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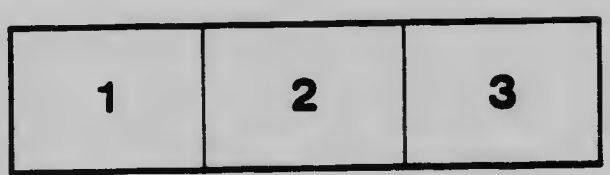

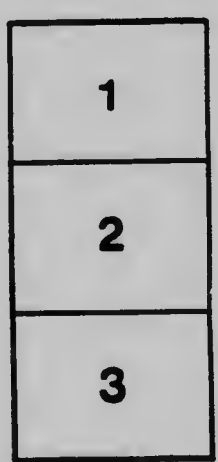

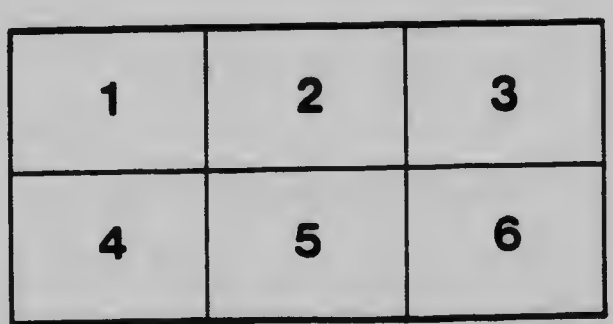

A TREATISE

ON

WILLS

BY

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THE SIXTH EDITION

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THE LAW

WITH RESPECT TO

WILLS.

CHAPTER XXIX.

OPERATION OF A GENERAL OR RESIDUARY BEQUEST (*a*).

	PAGE
I. *General and Residuary Bequests*	1041
II. *Operation of a General Residuary Bequest*	1045
III. *Limited Residuary Bequests*	1049
IV. *Particular Residuary Bequest*	1050
V. *Partial Failure of General Residuary Bequest*	1056
VI. *Powers of Appointment*	1059

I.—General and Residuary Bequests.—A general bequest is a gift of the testator's personal property described in general terms, as of "all my personal estate" (*b*). If a testator bequeaths his property by specific description (e.g., "my leaseholds, stocks, funds and securities, money in my house or at my banker's, and debts owing to me"), and it happens that this description includes all his personal property, nevertheless this is a specific and not a general bequest (*c*). The question what expressions will comprise the general personal estate, has been considered in Chapter XXVIII.

What is a general bequest.

In *Robertson* v. *Broadbent* (*d*), the testator, after directing his executors to pay all his just debts and funeral and testamentary expenses and giving pecuniary legacies, gave all his personal estate and effects of which he should die possessed, and which should not consist of money or securities for money, to R. absolutely.

(*a*) This chapter is new, except so far as it incorporates those parts of Chap. XXIII. in the preceding editions, dealing with the effect of a residuary bequest, which were added by Mr. Jarman's editors.

(*b*) Roper on Legacies, 242. As to general or residuary bequests by informal expressions, see Chap. XXVIII., ante, p. 1033.

(*c*) *Roffey* v. *Early*, 42 L. J. Ch. 472. Compare *Richards* v. *Richards*, 9 Price, 219, a case which seems to be not well reported. *Powell* v. *Riley*, L. R., 12 Eq. 175, may be treated as overruled: *Re Ovey*, 51 L. J. Ch. 665. See Chaps. XXX. and LIV.

(*d*) 8 A. C. 812, affirming C. A. in *Re Ovey*, 20 Ch. D. 676.

And he gave and devised all the rest, residue, and remainder of his estate both real and personal to his executors upon certain trusts. It was held that neither the exception of money and securities for money from the gift to R., nor the gift of all the rest, residue, and remainder of the testator's estate both real and personal, was enough to make the bequest to R. specific.

Bequest in general terms may be specific.

It is noticed elsewhere that a bequest of part of the testator's personal property may be specific, although described in general terms: as a gift of "all my personal estate at B." (*e*).

Distinction between a specific and general bequest.

The distinction between specific and general bequests is important, because the general personal estate of a testator is, unless a contrary intention appears, the fund out of which his funeral and testamentary expenses, debts and pecuniary legacies are payable (*f*); if he bequeaths pecuniary legacies and disposes specifically of all his personal estate, there is no fund out of which the legacies can be paid, and they consequently fail (*g*).

But a testator may indicate an intention that part of his general personal estate is to be primarily liable in exoneration of the rest (*h*).

Residuary bequest.

General bequest.

In most cases a testator, in disposing of his personal property, gives part of it to particular legatees and the rest of it by a general description, and the latter bequest is then called a residuary bequest (*i*). And it is immaterial whether he gives the particular legacies first, or gives them by way of exception: as "I give all my personal estate to A., except my furniture, which I give to B." In the latter case, the bequest to A. would be more properly called a general bequest (*j*).

When some specific things are enumerated.

A case which sometimes presents difficulty is where the testator enumerates some of the things in the residuary bequest. Apart from other indications of the testator's intention, the following rules appear correct:

(1) A gift of residue, including certain property (as "the residue

(*e*) Roper, 242; *Sayer* v. *Sayer*, 2 Vern. 688, and other cases cited in Chap. XXX.

(*f*) *Robertson* v. *Broadbent*, 8 A. C. 812.

(*g*) *Roffey* v. *Early*, 42 L. J. Ch. 472. The debts, &c., are payable out of the property specifically bequeathed in proportion to the value of the various bequests: *Re Hamilton*, [1892] W. N. 74.

(*h*) *Robertson* v. *Broadbent*, supra; and see infra, p. 1044, n. (*r*).

(*i*) The use of the word "residue" is, of course, not required. As to the technical meaning of the word "residue," see *Re Brook's Will*, 2 Dr. & Sm. 362; *Trethewy* v. *Helyar*, 4 Ch. D. 53. It will be remembered that as between tenant for life and remainder-man "residue" has a special meaning: *Allhusen* v. *Whittell*, L. R., 4 Eq. 295. As to the time when the executor becomes a trustee of the net residue, see *Re Smith*, 42 Ch. D. 302; *Re Timmis*, [1902] 1 Ch. 176.

(*j*) *Lysaght* v. *Edwards*, 2 Ch. D. 513, ante, p. 980. *Re Spencer*, 34 W. R. 527; *Blight* v. *Hartnoll*, 23 Ch. D. 218.

of my estate, including a certain fund"), does not make the gift of that property specific (*k*).

(2) The mere fact that the testator enumerates some specific things in the gift of residue (as "all my furniture, cattle, sheep and all my other personal estate") does not make the gift of those things specific (*l*).

(3) If the testator disposes specifically of the bulk of his property (as by giving his Consols to A., his mining shares to B., his leaseholds to C., and so on), and adds to one of these gifts all the residue of his personal estate, that gift is specific so far as regards the property specifically described (*m*). There are also cases in which a gift of residue, followed by an enumeration of specific things, has been held to be specific with regard to them (*n*), but it may perhaps be doubted whether they would be followed at the present day.

It may be noticed that in *Bethune* v. *Kennedy*, in which the doctrine in question appears to have been first laid down, the question was whether the legatees for life were entitled to the income of the funded property in specie (*o*).

In *Re Kendall's Trust* (*p*), the testator bequeathed to his mother "everything I die possessed of, namely," certain money and chattels, and added: "And lest there be any dispute I declare again that I leave everything I die possessed of to my dearest mother for her entire and sole use and benefit as stated above:" it was held that the whole residue passed.

Distinction between general and residuary bequests.

It rarely happens that it is necessary to consider the distinction between general and residuary bequests, for almost every will contains one general residuary bequest, but the question sometimes arises. Thus in *Re Orey* (*q*), a testator bequeathed pecuniary legacies, and gave all his personal estate, except money and securities

(*k*) *Re Tootal's Estate*, 2 Ch. D. 628; *Macdonald* v. *Irvine*, 8 Ch. D. 101; *Re Lyne's Estate*, L. R., 8 Eq. 482 (fund directed to become part of residuary estate). But if the testator after a gift of "my property" explains that it consists of certain investments, this appears to make it specific: *Hubbard* v. *Young*, 10 Bea. 203, sed qu.; this may be one of those cases where the Courts have overlooked the distinction between a specific bequest and the enjoyment in specie of a residuary bequest. See Chap. XXXIV.

(*l*) *Re Green*, 40 Ch. D. 610; *Taylor* v. *Taylor*, 6 Sim. 246; *Sargent* v. *Roberts*, 12 Jur. 429; *Sutherland* v. *Cooke*, 1 Coll. 498; *Fielding* v. *Preston*, 1 De G. & J. 438; *Fairer* v. *Park*, 3 Ch. D. 309; *Tighe* v. *Featherstonhaugh*, 13 L. R. Ir. 401; *Bridges* v. *Bridges*, 8 Vin. Abr. Devise, 295 F, pl. 13.

(*m*) *Hill* v. *Hill*, 11 Jur. N. S. 806; *Langdale* v. *Esmonde*, Ir. R., 4 Eq. 576; *Clarke* v. *Butler*, 1 Mer. 304 (revocation of bequest of "residue" held not to apply to specific things bequeathed with it).

(*n*) *Bethune* v. *Kennedy*, 1 My. & C., 114; *Mills* v. *Brown*, 21 Bea. 1.

(*o*) As to this, see Chap. XXXIV.

(*p*) 14 Bea. 608.

(*q*) 20 Ch. D. 676.

for money, to A. absolutely, and gave and devised all the residue of his estate, both real and personal, to his executors upon certain trusts: Lindley, L.J., said that the pecuniary legacies were to be paid primarily out of the money and securities for money, being the residue of the personal estate, and if that was insufficient they would come out of the personal estate generally, namely, that bequeathed to A. (*r*).

In *Atkinson* v. *Jones* (*rr*), a testator gave a moiety of his residue to each of his two daughters, followed, in the events which happened by an absolute power of appointment over one half of each moiety, and cross-limitations of the other half between the two daughters; the result was that an infinitely small part of one half of each moiety could not be appointed, but it was held by Wood, V.-C., that this might be disregarded, and that the whole residue was well appointed by the daughters.

Two gifts of residue in same testamentary instrument.

Where a testator, after bequeathing legacies, gives the remainder of his personal property to A., and then appoints B. his residuary legatee, the bequest to B. does not revoke the bequest to A. (*s*), and if the gift to A. fails, B. takes the benefit. It seems to have been formerly supposed that in such a case any legacies which might lapse would go to B. and not to A. Thus in *Re Jessop* (*s*), where the gift of residue was to S., and S. and O. were appointed residuary legatees, it was held that S. and O. were entitled to lapsed legacies. And in *Davis* v. *Bennett* (*s*), where the testator gave the residue to A. and B., and appointed C. residuary legatee, it was suggested by Romilly, M.R., that the second gift might operate on lapsed legacies (*t*). But in *Johns* v. *Wilson* (*u*), where a testator gave all the rest of his estate and effects "not hereinbefore otherwise disposed of, and all securities, bonds, coupons, cash in bank or elsewhere" to A. and B., and at the end of his will appointed C. S. his residuary legatee, it was held that lapsed legacies passed to A. and B. And in *Re Isaac* (*v*), where the testator gave the remainder of his property to A., and appointed B. his residuary legatee, it was held by Buckley, J., that A. took the benefit of lapsed legacies: the learned judge explained the decision in *Re*

(*r*) It is clear that the funeral and testamentary expenses and debts were payable in like manner: per Lord Selborne, L.C., *Roberts on* v. *Broadbent*, 8 App. Ca. 817.

(*rr*) Johns. 246.

(*s*) *Kilvington* v. *Parker*, 21 W. R. 191; *Re Jessop*, 14 Ir. Ch. 424; *Bristow* v. *Mansfield*, 31 W. R. 88; *Davis* v. *Bennet*, 30 Bea. 226; *Re Spencer*, 34 W. R. 527, stated ante, Chap. XVII.

(*t*) A similar opinion was expressed by the same judge in *Re Spencer*, 34 W. R. 527.

(*u*) [1900] 1 Ir. R. 342.

(*v*) [1905] 1 Ch. 427.

Jessop (*s*) based on the improbability of the testator having intended S. and O. to take no benefit under the will except in the case of the gift to S. failing.

In *Ludlow* v. *Stevenson* (*ss*), the testator gave to his daughter all his books, plate, linen, china, wearing apparel, watches, jewels, and money (except money at the banker's, or in the funds, or placed on security), and all other property not otherwise disposed of. And he directed that unless indispensably necessary his funded and other property should remain as it was until the decease of certain annuitants under the will, and on the decease of the annuitants he directed the whole of his personal estate to be invested in Government securities, and one-fourth part to be transferred to the Royal Society, and the other three parts to other specified public institutions. Lord Cranworth held that the daughter was not entitled to railway shares, foreign securities, or other investments forming part of the testator's personal estate, but that these descriptions of property passed under the bequest to the public institutions named in the will.

In *Barrett* v. *White* (*w*), a testatrix after bequeathing pecuniary legacies, &c., gave "whatever money remains" to A. and B., and then after making various specific bequests concluded her will with the words: "If I have omitted naming anything, I leave it to X. and Y." It was held by Kindersley, V.-C., that the gift to A. and B. passed the general personal estate, and that the gift to X. and Y. was not a true residuary clause.

Where there are two residuary bequests in the same will, it may appear that the latter was inserted, or allowed to remain, in error (*ww*).

One residuary gift in will and another in codicil.

A residuary gift in a codicil seems, as a general rule, to operate as a revocation of a residuary gift contained in the will (*x*).

Unlimited gift of income may pass capital.

In accordance with the general principle of construction, referred to in another chapter, an unlimited gift of the income of a testator's residuary estate will pass the capital, unless a contrary intention appears (*xx*).

General residuary bequest.

II. Operation of a General Residuary Bequest.—A general residuary bequest is a gift of all the personal property (*y*) of the

(*s*) 1 De G. & J. 496.

(*w*) 24 L. J. Ch. 724.

(*ww*) *Re Spencer*, 34 L. T. 597, stated in Chap. XVII.

(*x*) *Hardwicke* v. *Douglas*, 7 Cl. & F. 795.

(*xx*) *Coward* v. *Larkman*, 60 L. T. 1, and other cases cited in Chap. XXXIII., post.

(*y*) Including, of course, real estate constructively converted into personalty, but not money constructively

CHAP. XXIX.

testator not otherwise disposed of by the will. The testator may begin by making bequests to A., B., and C., and then give the residue to D., or he may say: "I give to D. all my personal estate, except my gold watch, which I give to A., and my leasehold house which I give to B., and a legacy of £100 which I give to C." (*a*). So if a testator gives legacies, &c., and then says "I appoint D. my residuary legatee," this operates as a bequest of the residue to D. (*b*). A residuary bequest may also be implied from more ambiguous expressions: thus, an appointment of A. and B. as executors may operate as a gift of the residue to them beneficially, if an intention to that effect appears from the will (*c*).

Gift of "small remainder."

In *Att.-Gen.* v. *Johnstone* (*cc*) it was held that a gift which was in terms a general residuary bequest did not take effect in that way. But the case is very exceptional.

Residuary bequest includes after-acquired property.

The presumption is that if a testator professes to dispose of all his property in general terms, he does not mean to die intestate as to any part of it: consequently a residuary bequest, even under the old law, would, in the absence of words shewing a contrary intention, pass not only the personal estate which the testator had at the time of making his will, but what he afterwards acquired and died possessed of (*d*). A residuary bequest has the same effect under the present law (*e*). And if a testator makes a future or contingent specific bequest in such a way as not to entitle the legatee to the intermediate income of and accretions to the property, they pass under the residuary bequest (*f*).

Interim income of residue.

A residuary bequest which is deferred or contingent in its terms, carries the income which accrues before it vests in possession (*g*).

converted into realty. Arrears of rent of real estate and an apportioned part of the current quarter's rent up to the testator's death, are also personalty (Williams, Ex. 10th ed., pp. 631 seq., Apportionment Act, 1870) and therefore pass under a residuary bequest (*Constable* v. *Constable*, 11 Ch. D. 681) unless specifically bequeathed, post, Chap. XXX. See Chap. XXV., ante, p. 941.

(*a*) See per Jessel, M.R., in *Blight* v. *Hartnoll*, 23 Ch. D. at p. 222.

(*b*) *Doe* d. *Roberts* v. *Roberts*, 7 M. & Wels. 382; *Re Methuen and Blore's Contract*, 16 Ch. D. 696, and cases there cited. See ante, p. 1016.

(*c*) *Harrison* v. *Harrison*, 2 H. & M. 237; *Fuge* v. *Fuge*, 27 L. R. Ir. 59, ante, p. 715.

(*cc*) Amb. 577, stated post, p. 1049.

(*d*) *Bland* v. *Lamb*, 2 Jac. & W. 399, post, p. 1051, n (*h*).

(*e*) Wills Act, s. 24.

(*f*) *Wyndham* v. *Wyndham*, 3 Bro. C. C. 58; *Shawe* v. *Cunliffe*, 4 Bro. C. C. 144; *Guthrie* v. *Walrond*, 22 Ch. D. 573; *Re Judkin's Trusts*, 25 Ch. D. 743. For the rules as to future and contingent bequests carrying intermediate income, see Chap. XXX.

(*g*) *Green* v. *Ekins*, 2 Atk. 473; *Trevanion* v. *Vivian*, 2 Ves. sen. 430; *Re Drakeley's Estate*, 19 Bea. 395; *Re Sanderson's Trust*, 3 K. & J. 497; *Re Lindo*, 59 L. T. 462. The income is accumulated in the meantime until it is stopped by the law; thenceforth it goes to the next of kin: *Bective* v. *Hodgson*, 10 H. L. C. 656; *Talbot* v. *Jevers*, L. R., 20 Eq. 255; *Wade-Gery* v. *Handley*, 1 Ch. D. 653, 3 ib. 374; *Re Taylor*, [1901] 2 Ch. 134, not following *Re Love* (*Green* v. *Tribe*), 47 L. J. Ch. 783.

And it makes no difference that the personalty is to be laid out in realty (*h*). So if the interim income is directed to be accumulated, and no disposition is made of the accumulations, made during the period allowed by law, they go with the residue (*i*).

General bequest of leasehol ls.

If a testator gives all his real estate and all his chattels real upon the same contingent trusts, the interim rents of the real estate go to the heir at law, and those of the chattels real go to the person in whom the property eventually vests (*j*).

Lapsed legacies.

In addition to carrying everything not in terms disposed of, a general residuary gift of personal estate carries all personal property which the testator has attempted to dispose of, but which in the event, turns out to be not well disposed of. A presumption arises for the residuary legatee against every one except the particular legatee; for a testator is supposed to give his personalty away from the former only for the sake of the latter (*l*). It has been said, that, to prevent a bequest of the residue from having this sweeping effect, very special words are required (*m*), and accordingly a residuary bequest of property "not specifically given," following various specific and general legacies, will include lapsed specific legacies (*n*).

Property excepted from general bequest.

On the same principle, a gift of all a testator's personal estate, except certain specific sums of stock and money, followed by a bequest of those particulars, was held, in *Evans* v. *Jones* (*o*), to include some of the specific legacies which had failed. And in *James* v. *Irving* (*p*), where the bequest was of "everything real and personal, &c., except the S. shares, which were not to be sold until after the death of A.," Lord Langdale, M.R., held, that the exception of the shares was only for the purpose of postponing the sale, and that they passed by the bequest. So,

(*h*) *Bective* v. *Hodgson*, supra.

(*i*) *Re Travis*, [1900] 2 Ch. 541.

(*j*) *Hodgson* v. *Bective*, 1 H. & M. 376.

(*l*) Per Sir W. Grant, *Cambridge* v. *Rous*, 8 Ves. at p. 25. See also *Leake* v. *Robinson*, 2 Mer. at p. 393; *Reynolds* v. *Kortright*, 18 Bea. at p. 427. Where a testator gives his residuary personal estate in trust for a tenant for life and remainder-man, questions sometimes arise from the fact that the residue varies from time to time: see *Re Drakeley's Estate*, 19 Bea. 395; *Bevan* v. *Waterhouse*, 3 Ch. D. 752. The rule in *Allhusen* v. *Whittell* (L. R., 4 Eq. 295), which makes "residue" mean something different from what the testator meant, also has to be borne in mind: see Chap. LIV.

(*m*) Per Lord Eldon, *Bland* v. *Lamb*, 2 J. & W. 406; post, p. 1051, n. (*h*). See also *Cunningham* v. *Murray*, 1 De G. & S. 366, rev. on app. 12 Jur. 547.

(*n*) *Roberts* v. *Cooke*, 16 Ves. 451. See also *Clowes* v. *Clowes*, 9 Sim. 403; *Re Spooner's Trust*, 2 Sim. N. S. 129 (lapsed appointed share).

(*o*) 2 Coll. 516. See also *Torrens* v. *Millington*, 26 W. R. 753; *Wingfield* v. *Newton*, 2 Coll. 520, n.; *Blight* v. *Hartnoll*, 23 Ch. D. 218 (stated post), and *Re Powell*, 83 L. T. 24.

(*p*) 10 Bea. 276. See also *Dobson* v. *Banks*, 32 Bea. 259; *Read* v. *Hodgens*, 7 Ir. Eq. Rep. 17; *Sheffield* v. *Lord Orrery*, 3 Atk. at p. 286; *Thompson* v. *Whitelock*, 4 De G. & J. 490; *Re Jupp*, 87 L. T. 739.

CHAP. XXIX.

in *Markham* v. *Ivatt* (*q*), a testatrix bequeathed certain leaseholds to A. for life, and directed that after her decease they should form the residue of her leasehold estates thereinafter bequeathed. She then bequeathed all the residue of her leaseholds whatsoever and wheresoever upon certain trusts: it was held that other leaseholds, not comprised in the bequest to A., passed by the residuary bequest. The question in such a case is whether the property is excepted in order to take it away under all circumstances and for all purposes from the persons to whom the residue is given (*r*), or whether it is excepted merely for the purpose of giving it to some one else; in the latter case, if the specific gift fails, the property passes to the residuary legatee (*s*).

Where a testator bequeathed all his property not included in his marriage settlement, this bequest was held to include a moiety of the settled funds, which under the ultimate trust eventually became his absolute property (*ss*).

Effect of disclaimer.

It is clear, on principle, that if a legatee disclaims a bequest it falls into residue: the effect of disclaimer is that the bequest does not take effect (*sss*).

Erroneous recital.

An erroneous statement or recital in a will that certain property of the testator has been settled or disposed of by him, will not exclude it from the residuary bequest (*t*).

"Due course of administration."

In *Scott* v. *Moore* (*u*), a testator gave a fund upon certain trusts for E. B. and her children, and in the event of her dying without leaving a child, he directed that the fund should be considered as part of his personal estate, and be disposed of in a due course of administration, and he gave his residue to E. B.: it was contended, that on the death of E. B. without leaving a child, the fund was to be disposed of according to the Statute of Distribution, because, otherwise, the will would be senseless (*v*); however, Shadwell, V.-C., held that it fell into residue, and belonged to E. B.'s estate.

(*q*) 20 Bea. 579.

(*r*) Instances of this kind are referred to supra.

(*s*) Per Wood, V.-C., in *Bernard* v. *Minshull*, Johns. at p. 299.

(*ss*) *Re Green* (*Walsh* v. *Green*), 31 L. R. Ir. 338. Compare the cases on reversions, &c., ante, p. 955, Chap. XXV.

(*sss*) Ante, p. 556.

(*t*) *Re Bagot*, [1893] 3 Ch. 348, overruling *Green* v. *Perry*, 23 Bea. 275; *Harris* v. *Harris*, Ir. R., 3 Eq. 610; *Hawks* v. *Longridge*, 29 L. T. 449; *Clibborn* v. *Clibborn*, 9 Ir. Jur. 381, as far as contra.

(*u*) 14 Sim. 35. The V.-C. thought that *Masters* v. *Hooper*, 4 Bro. C. C. 207, was wrongly decided.

(*v*) In *Jennings* v. *Gallimore*, 3 Ves. 146, the wording was different, but the argument was similar, and it prevailed. As to the meaning of the words "in due course of administration," see also *Briggs* v. *Upton*, L. R., 7 Ch. 376.

What will suffice to exclude any portion of the personalty from a residuary gift.

III.—Limited Residuary Bequest.—If the words of the will shew that the testator intended the residuary bequest to have a limited effect, the presumption in favour of the residuary legatee will, of course, be effectually rebutted (*w*); the difficulty in these, as in most other cases, being not in discovering the principle but in applying it to particular wills.

In *Davers* v. *Dewes* (*x*), a testator gave part of his plate to A., and declared that he intended to dispose of the residue thereof, and of the goods and furniture in C. house, by a codicil; he then bequeathed the residue of his personal estate whatsoever not before disposed of, or reserved to be disposed of by his codicil, to A. He made two codicils without disposing of the reserved articles; but Lord King held that, being expressly reserved to be disposed of by a codicil, those articles could not pass by the devise of the residuum by the will.

Again, in *Att.-Gen.* v. *Johnstone* (*y*), where, after giving legacies to a considerable amount, the testator gave to a hospital 100*l.*, "that is, if there remains enough of my personal estate to satisfy it; but if not, or in case there remains but little, then the 100*l.* to the hospital shall not be paid; and the small remainder of my personal estate shall be left to my executor," in trust for charity schools; "so as it is likewise my will that if my personal estate shall sufficiently reach towards satisfying all the legacies by me bequeathed and above mentioned, that my said executor shall also dispose of the remainder in favour of" the charity schools. Lord Camden held that legacies to a large amount which had lapsed did not pass by the residuary bequest. "I look upon the bequest to be specific, contingent, and conditional; that is, 'In case my estate turns out to pay all my other legacies, (which it has not) and there should be a little more, then I give that little.'"

Green v. *Pertwee* (*yy*) was decided on the same principle.

And in *Wainman* v. *Field* (*a*), a testator bequeathed to trustees all his personal estate (except such parts as were particularly disposed of, "and also except such leasehold estates as he should be entitled to at his decease; which leasehold estates he declared

(*w*) In such a case there is no true residuary gift, per Jessel, M.R.; *Blight* v. *Hartnoll*, 23 Ch. D. 222.

(*x*) 3 P. W. 40. The case of *Simmons* v. *Rudall*, 1 Sim N. S. 115, stated ante, p. 635, n. (*y*), illustrates the same principle.

(*y*) Ambler, 577. As to this case, see ante, p. 1046; and as to the word "small," see *Page* v. *Young*, L. R., 19 Eq. 501, stated, post, p. 1052.

(*yy*) 5 Ha. 249.

(*a*) Kay, 507. See also *Russell* v. *Clowes*, 2 Coll. 648. But see *Blight* v. *Hartnoll*, 23 Ch. D. 218, 223, where Jessel, M.R., intimated that he did not agree with the construction placed by Wood, V.-C., on the will in *Wainman* v. *Field*.

it to be his intention to exonerate from the payment of his debts and legacies") upon trust to pay debts, funeral expenses, and legacies; "and in case there should be any residue of his said personal estate (except as aforesaid) beyond what should be sufficient for the payment of his said debts and legacies," he gave the same to A. The will then contained a devise of the testator's freehold estates, and a bequest of his leaseholds which was void for remoteness: and the question being whether the leaseholds passed by the residuary bequest, Sir W. P. Wood, V.-C., held that they did not.

In *Blight* v. *Hartnoll* (*b*), a testatrix gave to A. all her personal property, except a leasehold wharf, which she bequeathed upon trusts which failed for remoteness: it was held by Fry, J., and by the Court of Appeal, that the wharf passed by the residuary bequest to A.

The rule in all these cases, as already stated (*c*), is that if the testator excepts a particular part of his property from a general bequest for all purposes, and does not dispose of it by the will, there is an intestacy as regards it. In *Re Fraser* (*d*), a testator bequeathed all his personal estate, except chattels real, upon certain trusts, and bequeathed his chattels real to his brother; the brother predeceased him; after his brother's death the testator made a codicil by which he confirmed his will, and in which he referred to his brother's death, but did not revoke the bequest of the leaseholds to him: it was held that, reading the will and codicil together, it could not be taken that the testator had excepted chattels real from the general bequest merely for the purpose of giving them to his brother, but that they were excepted for all purposes, and that they consequently did not pass under the general bequest (*e*).

In *Walsh* v. *Green* (*ee*), the testator confirmed a personalty settlement and bequeathed all his property not included in the settlement; this was held to pass a reversion reverting to the testator under the settlement.

Construction of "residue," "remainder," &c.

IV. Particular Residuary Bequest. When a testator, after disposing of part of his personal property, makes a gift of the "residue," or "remainder," or "what remains," &c., the question may arise whether he refers to his general personal estate, or

(*b*) 23 Ch. D. 218.
(*c*) Ante, p. 1047.
(*d*) [1904] 1 Ch. 726.
(*e*) Compare *Re Sinclair*, [1903] W. N. 113; *Re Taylor*, [1909] W. N. 59.
(*ee*) 31 L. R. Ir. 338.

to the undisposed-of portion of a certain property or fund which he had just before made applicable to specific and partial purposes. There is no rule of construction on this point. In *Crooke* v. *De Vandes* (*g*), the words "what remains to go to my grandson" at the end of a clause dealing with certain cash, stock, and securities, were held to be a bequest of the general residue. Another case of this nature is *Boys* v. *Morgan* (*h*). On the other hand, in *Ommanney* v. *Butcher* (*hh*), the testator, after making various specific dispositions of parts of his property, and directing his books and furniture, &c. to be sold, gave some small legacies, and concluded his will thus: "In case there is any money remaining, I should wish it to be given in private charity:" it was held that this referred to the money arising from the sale of the books, &c. And in *Say* v. *Creed* (*i*), "residue" was held to pass only the proceeds of sale of real estate. So in *Wilde* v. *Holtzmeyer* (*j*), where the will was inconsistent and inaccurate, the words "all I am possessed of" were construed to refer only to a particular fund of bank annuities; in *Wilson* v. *Wilson* (*k*), the word "remainder" following a gift of furniture and linen was held to refer only to furniture and linen, and not to a general residuary gift; in *Holford* v. *Wood* (*l*), the words "personal estate" received a restricted construction; in *Attorney-General* v. *Goulding* (*m*), the words "what is left" were held not to carry the general residue; and a gift of "such money, stocks, funds, or other securities not hereafter specifically devised as I may die possessed of" has been held by the Court of Probate not to constitute a gift of residue (*n*).

(*g*) 9 Ves. 197, 11 Ves. 330.

(*h*) 3 Myl. & Cr. 661. See also *Newman* v. *Newman*, 26 Bea. 218, where "surplus money" was held to mean the residue of two sums of stock: ante, p. 1030. In *Bland* v. *Lamb*, the testator began his will by expressing his intention of disposing of his "small property," and proceeded to enumerate investments amounting to over 60,000*l*., and to dispose of them; he also made various specific bequests, and concluded: "Anything I have forgot I leave at the disposal of Mrs. B." By a codicil he directed that if he had forgotten anything, he wished it "thrown into the lump for the benefit of the legatees." Mrs. B. died a few hours before the testator, having by her will left him over 20,000*l*. The main question was whether the testator intended to make a residuary gift, or whether the gift was in the nature of a specific bequest of the actual items that formed the personal estate of the testator at the time he made his will and codicil, or whether it was confined to such personal estate as the testator referred to in his will. Leach, V.-C., decided that the gift was a true residuary bequest (5 Madd. 412). Lord Eldon inclined to the same view (2 Jac. & W. 399), but the case was compromised before judgment was given. Compare [illegible] v. *Moore*, 14 Sim. 35, stated ante, [illegible]8.

(*hh*) T. & R. 280.

(*i*) 5 Hare, 580.

(*j*) 5 Ves. 811.

(*k*) 11 Jur. 793.

(*l*) 4 Ves. 76.

(*m*) 2 B. C. C. 428.

(*n*) *In bonis Aston*, 6 P. D. 203 (in this case the testator went on to refer to the stocks, &c., as a "portion of my capital"; it does not appear whether this influenced the construction; see ante, p. 1024); *Legge* v. *Asgill*, T. & R. 265, n.; *Wrench* v. *Jutting*, 3 Bea. 521:

Where in a will divided into paragraphs, each dealing with particular items, one paragraph directed debts and funeral expenses to be paid out of specified funds, "the remainder to be equally divided to my children," it was held by Malins, V.-C., that, as a general rule, where a will disposes of a variety of property, and winds up with a gift of the remainder or residue, it is a gift of the general residue, but that here the form of the will shewed that the testator meant to give only the remainder of the particular funds with which he was dealing in that paragraph (*o*).

In *Gibson* v. *Hale* (*p*). a testator gave the whole of his personal property to his son, and if his son should die under twenty-one, "then it is my wish to bequeath the sum of 500*l*. each to my brothers and sister, and any further surplus to be equally divided between these"; the son died under twenty-one; one of the testator's two brothers predeceased him, and it was held by Shadwell, V.-C., that "further surplus" meant what remained after the subtraction of the three sums of 500*l*., and that there was consequently an intestacy as to the 500*l*. bequeathed to the deceased brother. No reasons are given for the decision.

Operation of particular residuary bequest.

It is clear that a general bequest of chattels of a particular species carries all the chattels of that kind which the testator is possessed of at the time of his death; as, mortgages, stocks or furniture (*r*). Thus, a gift of "any small sum remaining in the bank after my funeral expenses have been paid," was held to carry the testatrix's balance at her banker's at the time of her death, although, in the meantime, it had increased from 480*l*. to 1370*l*., and notwithstanding the word "small" (*s*). In the fluctuating character of the property comprised in it, such a bequest resembles a general bequest of all the personal estate, but the analogy of such bequests to general residuary gifts is imperfect, since the universality, upon which the sweeping character of the latter mainly depends, is wanting in the former; and it would be unsafe to attribute a corresponding character to a gift of a particular residue.

Gift of particular residue, when specific.

For example, if a testator bequeaths a particular piece of furniture to A., and the "rest" or "residue" of his furniture to B., or his consols to A., and the "rest" or "residue" of his government

Jull v. *Jacobs*, 3 Ch. D. 703: some of them are stated ante, p. 1024.

(*o*) *Jull* v. *Jacobs*, 3 Ch. D. 703. See also *Clifford* v. *Arundell*, 1 D. F. & J. 307, where in a deed "other moneys in the hands of the trustees" was upon the context confined to income exclusive of principal moneys.

(*p*) 17 Sim. 129.

(*r*) See *Bothamley* v. *Sherson*, L. R., 20 Eq. 304, and the other cases referred to in Chap. XXX., as to specific bequests of chattels, &c.

(*s*) *Page* v. *Young*, L. R., 19 Eq. 501. See also *Re Douglas*, [1905], 1 Ch. 279 ("any little money left").

stocks to B., and A. dies before the testator, the property bequeathed to A. will not go to B., but fall into the general residue (*t*).

Effect of gift of residue of a sum treated as definite.

Again, when a testator is dealing with a particular fund, he sometimes uses the word "residue" to refer to a definite portion of the fund, and does not mean true residue. Thus, if a testator dealing with 300*l.* consols, says: "I give 100*l.* to A., 100*l.* to B., and the residue to C.," it is just as if he had said: "I give 100*l.* to A., 100*l.* to B., and 100*l.* to C.," and consequently if A. predeceases the testator the 100*l.* does not go to C., but is either undisposed of or passes by the general residuary bequest (*u*). The point in all such cases is to see whether the testator treated the particular fund as being a definite ascertained amount, or an indefinite amount. The leading instance of this type of cases is *Page* v. *Leapingwell* (*v*), where the testator devised some real property upon trust to sell, but not for less than 10,000*l.*, and to pay several sums amounting to 7800*l.* out of it, and then provided, "and after payment of the legacies above mentioned, I hereby order and direct my trustees to lay out and invest all the overplus monies arising from the sale of the said messuage, lands, and tenements in the public funds, and do, and shall pay, and apply the interest and dividends arising from the same to A. and B." Sir W. Grant, M.R., said that the question was whether the testator did not assume that he had 10,000*l.* to distribute, and conceived the true intention of the testator to have been that these persons should take as specific legatees. The property produced less than 7000*l.*, and consequently the legacies abated, and two void charitable legacies sank in the general residue and did not pass to A. and B. (*w*). This is a very strong case, because it assumes that the testator expected the property to fetch exactly 10,000*l.*, and not more, although he said not less than 10,000*l.*, and if it had fetched 20,000*l.* all the legacies would, on Sir W. Grant's construction, have been doubled (*x*). Such cases very frequently arise when a testator

Page v. *Leapingwell.*

(*t*) *Patching* v. *Barnett*, 28 W. R. 886, where the difference in their operation between the particular residuary gift and the general residuary gift was emphasised by the fact that they were in almost identical words. See *Springett* v. *Jenings*, L. R., 6 Ch. 333; per Rigby, L.J., in *Re Mason*, [1901] 1 Ch. at p. 627.

(*u*) See *Easum* v. *Appleford*, 5 My. & Cr. at p. 61; *Lakin* v. *Lakin*, 13 W. R. 704; *Fee* v. *McManus*, 15 L. R. Ir. 21. Compare *Hill* v. *Hill*, 11 Jur. N. S. 966, and other cases on specific bequests, Chap. XXX.

(*v*) 18 Ves. 463.

(*w*) Had the fund been given under a power of appointment, these void charitable legacies would have gone to prevent abatement: *Eales* v. *Drake*, 1 Ch. D. 217.

(*x*) Cases in which *Page* v. *Leapingwell* has been applied are, *Wright* v. *Weston*, 26 Bea. 429; *Haslewood* v. *Green*, 28 Bea. 1; *Elwes* v. *Causton*, 30 Bea. 554; *Walpole* v. *Apthorp*, L. R., 4 Eq. 37; *Re Margetts*, [1906] W. N. 44.

is distributing a fund over which he has a power of appointment (*y*).

True residue.

But the testator may by the context shew that he uses the word "residue" to denote a residue in the full sense of the word, and then it is held to include all of the particular kind which in the event is not otherwise disposed of (*z*). Thus, in *De Trafford* v. *Tempest* (*a*), where a testator gave to his widow certain chattels which, at his decease, might be in or about his house at T., and bequeathed to his son all his household and other furniture, plate, and chattels, not thereinbefore otherwise disposed of, which at his decease might be in or about his said house; and afterwards bequeathed his residuary estate to other persons: the widow died before the testator, and it was held by Sir J. Romilly, M.R., that the chattels, whereof the bequest to the widow had lapsed, fell into the particular residue, and passed to the son.

So in *Cook* v. *Oakley* (*b*), where the testator (a sailor) bequeathed certain specified articles to his mother, who died before him, it was held that a bequest of "all things not before bequeathed," which on the construction of the will was confined to things on board ship, included the articles comprised in the lapsed gift.

In these cases the expression "not otherwise bequeathed," or "not otherwise disposed of," is taken to mean "not effectually bequeathed or disposed of" (*c*).

Bequest of residue "subject to" prior bequests.

On the same principle, if a testator makes various bequests out of a fund, and bequeaths the residue of the fund to A., "subject to" or "after payment of," or "after deducting" the previous bequests, any of these bequests which fail pass under the gift of the residue to A. (*d*).

Uncertain amount.

Again, if a testator is disposing of a fund of unascertained amount, and gives a fixed sum of money out of it to A. and the residue to B., or if he is disposing of a fund of ascertained amount, and gives an unascertained part of it to A. and the residue to B., in either of these cases the general rule is that the gift to B. is a true residue:

(*y*) See Chap. XXIII., and *Re Jeaffreson's Trust*, L. R., 2 Eq. 276; *Falkner* v. *Butler*, Amb. 514; *Petre* v. *Petre*, 14 Bea. 197; *Miller* v. *Huddlestone*, L. R., 6 Eq. 65; *Re Cruddas*, [1900] 1 Ch. 730.

(*z*) As to the payment of estate duty out of a particular residue where the general residue is insufficient, see *De Quetteville* v. *De Quetteville*, 93 L. T. 579.

(*a*) 21 Bea. 564; and see *Hunt* v. *Berkley*, Mos. 47; *Champney* v. *Davy*, 11 Ch. D. 949; *M'Kay* v. *M'Kay*, [1900] 1 Ir. 213. post, p. 1055.

(*b*) 1 P. W. 302, ante, p. 1023.

(*c*) Per Rigby, L.J., in *Re Mason*, [1901] 1 Ch. at p. 626.

(*d*) *Malcolm* v. *Taylor*, 2 R. & Myl. 416; *Aston* v. *Wood*, 43 L. J. Ch. 715; *Re Larking*, 37 Ch. D. 310. See also *Carter* v. *Taggart*, 16 Sim. 423, and *Re Harries' Trusts*, Johns. 199, which are authorities for the proposition stated in the text; *Champney* v. *Davy*, 11 Ch. D. 949.

in other words, B. takes the fund subject to what is given to A. (*e*). Consequently, if the gift to A. fails, B. takes the whole fund, and if the fund is not sufficient to satisfy the gift to A., then B. gets nothing (*f*).

Legacies out of invested fund.

Hence it would seem that whenever there is a gift of money legacies out of a specified sum of stock, followed by a gift of the "residue," this will be a true residue, the amount of it being necessarily uncertain until the stock is actually sold (*g*). So if the amount of the fund is rendered uncertain by the fact that it is subject to a charge of debts (*h*).

Charge of debts.

Other examples of particular residues.

If a testator gives "all the residue and remainder" of a certain fund, after payment thereout of his debts and funeral and testamentary expenses, this, it is hardly necessary to say, is a true residue (*i*). And if a testator erroneously states that he has disposed of part of a fund, and gives the residue to A., A. takes the whole (*j*).

Powers of appointment.

"I do not think there is any sound distinction between cases of lapsed and cases of invalid disposition, whether the disposition be under a power of appointment, special or general, or in exercise of ownership; nor do I think that the construction of a particular residuary gift is affected by the presence or absence of a general residuary gift" (*k*).

Charitable gifts.

The effect of the gift of the residue of a particular fund often becomes important with reference to charitable gifts, where a fund (or the income of it) is given primarily for some object which is illegal, or is void for uncertainty, and the residue is given for some charitable purpose: the question then arises whether the charity takes the whole, or whether the gift fails altogether (*l*).

Gift to a class: revocation as to one member.

In *M'Kay* v. *M'Kay* (*ll*) the testator disposed of a particular

(*e*) In *Corballis* v. *Corballis*, 9 L. R. Ir. 309, the testator, after reciting that he was entitled to a policy for 2000*l*., bequeathed various sums, "parts thereof" to different people, and "the residue" to A.; considerable sums by way of bonus were added to the policy: it was held that A. took the net residue of the whole proceeds of the policy.

(*f*) *Champney* v. *Davy*, 11 Ch. D. 949; *Re Tunno*, 45 Ch. D. 66. See *Mitchell* v. *M'Isaac*, 18 Jur. 672. Most of the authorities are cases arising on appointments under powers: see *Falkner* v. *Butler*, *Petre* v. *Petre*, *Harley* v. *Moon*, and the other cases cited supra, p. 1054. In *Champney* v. *Davy*, Hall, V.-C., said that there was no distinction between appointments and bequests.

(*g*) See *Vivian* v. *Mortlock*, 21 Bea. 252; *De Lisle* v. *Hodges*, L. R., 17 Eq. 440 (appointment by deed, where stress was laid on repeated references to the investments).

(*h*) *Baker* v. *Farmer*, L. R., 3 Ch. 537. See the cases on appointments under powers, ante, p. 1054, n. (*y*).

(*i*) *Higgins* v. *Dawson*, [1902] A. C. 1, reversing the decision of the C. A. in *Re Grainger*, [1900] 2 Ch. 756, post, p. 1071.

(*j*) *Langan* v. *Bergin*, [1896] 1 Ir. R. 331.

(*k*) Per Hall, V.-C., in *Champney* v. *Davy*, 11 Ch. D. at p. 958.

(*l*) Ante, p. 228.

(*ll*) [1900] 1 Ir. 213. Compare *Re Dunster*, [1909] 1 Ch. 103, post, p. 1059.

class of property, partly by way of specific bequests, and partly by a residuary bequest, in favour of a class; by a codicil he revoked the gift of the residue as to a particular member of the class; another member of the class, and all the specific legatees, died in the testator's lifetime: it was held (first) that the specific bequests fell into the particular residue, and (secondly) that the share of that residue which failed by lapse, and the share the gift of which was revoked, both went to the other members of the class.

Failure of a share of residue.

V.—Partial Failure of General Residuary Bequest.—Where a testator makes a residuary bequest of all his personal estate, the general rule is that if a gift of a share of the residue fails, it does not accrue to the other shares, but goes to the next of kin. Thus, where a residue is bequeathed to four persons as tenants in common, and one of them predeceases the testator, there is an intestacy as to his fourth share (*m*). So if the bequest to one of them is revoked by a codicil (*n*).

In a simple case of this kind, the rule carries out the intention of the testator, for where there is a gift of one half of the residue to A., and of the other half to B., the fact that A. dies in the testator's lifetime, or that the gift to A. is revoked, cannot, without more, be taken to alter the testator's intention that B. is only to have half the residue. It is not an implied gift of A.'s half to B. (*o*). But several of the older cases treated the rule as an artificial one, with the application of which the intention of the testator had little or nothing to do. Thus, in *Skrymsher* v. *Northcote* (*p*), the rule was applied to a pecuniary legacy, which the testator directed to be paid out of a particular share of residue, instead of allowing it to be paid out of the general personal estate. In that case the testator gave his residuary estate equally between his two daughters: but in the event (which happened) of either of them dying and leaving no children, then out of the moiety of the one so dying he gave 500*l.* to H., and "the remainder of that moiety" to the other sister. The testator revoked the gift of 500*l.* without making any fresh disposition of it, and Sir T. Plumer, M.R., held that it

Skrymsher v. *Northcote*.

(*m*) *Bagwell* v. *Dry*, 1 P. W. 700; *Page* v. *Page*, 2 P. W. 489. The testator's debts and funeral and testamentary expenses, &c., are payable out of the residue generally, and not primarily out of the lapsed share: *Trethewy* v. *Helyar*, 4 Ch. D. 53, overruling dictum in *Gowan* v. *Broughton*, L. R., 19 Eq. 77.

(*n*) *Cresswell* v. *Cheslyn*, 2 Ed. 123; *Sykes* v. *Sykes*, L. R., 3 Ch. 301, post, p. 1059.

(*o*) See per Plumer, M.R., in *Skrymsher* v. *Northcote*, 1 Sw. at p. 571.

(*p*) 1 Sw. 566. See also *Lloyd* v. *Lloyd*, 4 Bea. 231; *Green* v. *Pertwee*, 5 Hare, 249; *Gibson* v. *Hale*, 17 Sim. 129; *Simmons* v. *Rudall*, 1 Sim. N. S. 115.

went to the next of kin. "Residue," he said, "means all of which no effectual disposition is made by the will, other than the residuary clause, but when the disposition of the residue itself fails, to the extent to which it fails, the will is inoperative." It is obvious that the intention of the testator was that the surviving daughter should take the whole residue subject to the payment of the 500*l.* to H., and that by revoking the gift of the 500*l.* he meant to make the gift of the residue absolute. In *Humble* v. *Shore* (*q*), the testator's intention was equally obvious. In that case there was a gift of one-sixth of the residue to S. W.: by a codicil the testatrix directed her trustees to hold the same one-sixth upon trust for S. W. for life, and after her death upon trust as to a sum of 2000*l.* for S. W.'s son, and that the remainder of the one-sixth should sink into the residue and be disposed of accordingly. Wigram, V.-C., said that he was unable to find any gift to the residuary legatees in these words, and held that subject to the express provisions of the codicil, the one-sixth share was undisposed of. This decision was upheld by Lord Cottenham, and was for some time followed in all cases which were indistinguishable from it (*r*). On the other hand, in *Evans* v. *Field* (*s*), a testatrix directed her executors to stand possessed of her residuary personal estate after satisfying legacies, and also of so much of her personal estate the trusts whereof should fail, upon trust for division in elevenths, one share being separately given to each one of eleven named persons. One of these died before the testatrix, and it was held by Shadwell, V.-C., that the whole residue went to the other ten. He said the gift of the residue was in the first place among the eleven; but then the testatrix directed that so much of her personal estate, the trusts whereof should fail, should be disposed of according to the same trusts: and one share having lapsed, he thought the necessary effect of that direction was to make the residue divisible into ten parts instead of eleven (*t*).

Humble v. Shore.

In *Crawshaw* v. *Crawshaw* (*u*), Jessel, M.R., pointed out the fallacy underlying the decision in *Humble* v. *Shore*, and declined to follow it on the ground that the words in the case before him were not precisely similar. Bacon, V.-C. (*v*), Kay, J. (*w*), and

(*q*) 7 Hare, 247; 1 H. & M. 550, n.

(*r*) *Light* v. *Light* v. *Burstall*, 1 H. & M. 546; *Re Barker's Estate*, 15 Ch. D. 635; *Re Savage's Trusts*, 50 L. J. Ch. 131; *Re Bevis's Trusts*, 20 W. R. 359; *Homfray* v. *Darby*, referred to in 15 Ch. D. at p. 637.

(*s*) 8 L. J. Ch. 264.

(*t*) Compare *Atkinson* v. *Jones*, Johns. 246. ante, p. 1044.

(*u*) 14 Ch. D. 817.

(*v*) In *Re Rhoades*, 29 Ch. D. 142.

(*w*) In *Re Ballance*, 42 Ch. D. 62.

CHAP. XXIX.

Re Palmer.

Chitty, J. (*x*), also took advantage of minute differences to avoid the necessity of following *Humble* v. *Shore*, and finally in *Re Palmer* (*y*), the Court of Appeal overruled it, and held that a direction in a codicil that upon the death of a person to shew a share of the residue had been given by the will, that share shall fall into and form part of the testator's residuary estate, operated as a gift of it to the other residuary legatees. The same rule applies where the will itself contains an accruer clause in the shape of a direction that, in the event of the trusts concerning any particular share failing, it shall fall into residue (*z*).

Subdivision of residue.

In *Re Wand* (*a*), a testator gave his residue as to $\frac{3}{7}$th parts in trust for a class of persons (class A) as tenants in common, and as to $\frac{1}{7}$th parts in trust for another class of persons (class B) as tenants in common; he provided that if a certain event should happen in his lifetime (as it did), the share of X., a member of class A, "shall lapse and form part of my residuary personal estate." Class A comprised three members (including X.), and class B four members. It was held that $\frac{1}{7}$th part was divisible in the proportion of $\frac{3}{7}$ths to class A, and $\frac{1}{7}$ths to class B, so that the two members of class A took $\frac{12}{28}$ths between them, and the four members of class B took $\frac{16}{28}$ths.

Skrymsher v. *Northcote* no longer law in cases where there is a gift over.

The downfall of *Humble* v. *Shore* seems necessarily to involve that of *Skrymsher* v. *Northcote* (*b*), and accordingly in *Re Parker* (*c*), where a testator gave one-third of his residuary estate upon trust as to 2250*l.* for A. if he should attain twenty-one, as to 2250*l.* for B. if he should attain twenty-one, and as to the remaining part of the one-third share upon trust for such of A., B., C., and D. as should attain twenty-one, with a gift over of the said one-third share in default, it was held by Farwell, J., that A. having died under twenty-one, his 2250*l.* went to B., C., and D., all of whom attained twenty-one. Farwell, J., remarked that in *Skrymsher* v. *Northcote* there was also a gift over, and that although that case might have been well decided "as the law then stood, I am nevertheless bound by the modern course of authority to attach great weight to the gift over, which shews that the testator intended that no part of the principal gift should fail unless all the children [A., B., C., and D.] died without attaining vested interests."

(*x*) In *Re Owen*, 36 Sol. J. 539; *Holgate* v. *Jennings*, 37 Sol. J. 303.
(*y*) [1893] 3 Ch. 369.
(*z*) *Re Allan*, [1903] 1 Ch. 276.
(*a*) [1907] 1 Ch. 391.
(*b*) Supra, p. 1056.
(*c*) [1901] 1 Ch. 408.

What words will carry share to other legatees.

In some cases the Court has seized upon other expressions shewing an intention that in the event of the trusts concerning a particular share of residue failing, it shall go to the other residuary legatees (*d*). Thus in *Vaudrey* v. *Howard* (*e*) a testator gave $\frac{6}{7}$ths of his residuary estate in equal shares to six persons, but in a certain event, in order to secure to all an equal participation in the property, A. and B. (two of the six) were not to receive any share: it was held that upon the happening of the event the $\frac{6}{7}$ths became divisible among the other four. So in *Re Radcliffe* (*f*) there was a gift of residue to A., B., C., and D. as tenants in common, "and if only one of them shall survive me, then to such one absolutely;" D. died in the testatrix's lifetime, and by a codicil referring to the death of D. she revoked "whatever interest" D. had in her will: it was held that A., B., and C. took the whole.

Legacy in lieu of share of residue.

If a testator gives his residue to A., B., and C. in shares as tenants in common, and by a codicil revokes the gift to A. and in lieu thereof bequeaths a legacy, this legacy is payable out of the whole residuary estate, and not out of the share originally bequeathed to A. (*g*), unless there is an express direction to that effect (*h*).

Residuary bequest to class: revocation as to one share.

Where the residue is given to a class, and by a codicil the testator revokes the gift so far as concerns a particular member of the class, this enures for the benefit of the other members (*hh*).

Doctrine of *Lassence* v. *Tierney*.

It is hardly necessary to say that the doctrine of *Lassence* v. *Tierney* (*i*) applies to gifts of residue (*j*).

VI.—Powers of Appointment.—The cases in which a general bequest operates as an exercise of a power of appointment, have been already discussed (*k*).

(*d*) See *Evans* v. *Field*, supra, p. 1057.

(*e*) 2 W. R. 32. Compare *Harris* v. *Davis*, 1 Coll. 416, where there was a complete gift of residue in shares, followed by a gift of part one of the shares to another person (apparently an afterthought); this latter gift was revoked by codicil, and it was held that the will was to be read as if the gift had never been contained in it.

(*f*) 51 W. R. 409.

(*g*) *Sykes* v. *Sykes*, L. R., 3 Ch. 301.

(*h*) *Re Wood's Will*, 29 Bea. 236. In *Walsh* v. *Walsh*, Ir. R., 4 Eq. 396, the testator revoked the gift of one share of the residue and gave pecuniary legacies to the legatees of the other shares: it was held that these legacies were payable out of the share the gift of which was revoked.

(*hh*) *Re Dunster*, [1909] 1 Ch. 103 (not following *Ramsay* v. *Shelmerdine*, L. R., 1 Eq. 129). Compare *M'Kay* v. *M'Kay*, [1900] 1 Ir. 213, ante, p. 1055.

(*i*) 1 Mac. & G. 551.

(*j*) *Hancock* v. *Watson*, [1902] A. C. 14.

(*k*) As to general powers, ante, p. 805 seq.; as to special powers, p. 827 seq.

CHAPTER XXX.

LEGACIES.

PAGE

I. *Definition* 1060
II. *General, Specific and Demonstrative Legacies*..... 1063
III. *Legacies of*—
(1) *Money*..... 1072
(2) *Chattels* 1075
(3) *Stocks and Shares*.... 1076
(4) *Debts* 1081
(5) *Interests in Land* 1082
(6) *Personally in a Particular Place* 1083
(7) *Personally described with Reference to its Source* 1088
IV. *Failure of Legacies; Lapse, &c.; Ademption of Specific Bequests*..... 1088

PAGE

V. *Interest and Income*:—
(1) *Specific Legacies*..... 1105
(2) *General and Demonstrative Legacies*..... 1106
(3) *Contingent Legacies*.... 1111
VI. *Legacies to*—
(1) *Infants* 1113
(2) *Testator's Wife*..... 1117
(3) *Executors*..... 1118
(4) *Creditors* 1118
(5) *Debtors* 1119
(6) *Servants* 1119
VII. *Additional and Substituted Legacies*..... 1120
VIII. *Exoneration from Death Duties, Income Tax, &c.* 1131

Definition of legacy—is a gift of personalty;

I.—Definition.—A legacy is a gift of personalty by will or other testamentary instrument (*a*). In *Windus* v. *Windus* (*b*) Lord Cranworth said: "In the first place, the words 'legacy' and 'residuary legatee' primâ facie have reference to personal estate only. There is, indeed, no magic in the words themselves, and if they are so used by a testator they may no doubt be construed as referring to real estate. Any man may use his own nomenclature if he only expresses what he means. I have not, however, been able to discover any case which satisfies my mind that independently of context you can understand 'legacy' or 'legatee' or 'residuary legatee' as applying to anything but personal estate."

Therefore "legacy" would primâ facie not include a bequest of

(*a*) It is hardly necessary to point out that this definition involves an intention of bounty on the part of the testator. In *Wilson* v. *Morley* (5 Ch. D. 776) a testator directed his debts to be paid, "including a debt of 300*l.* owing from me to my daughter"; in fact he owed his daughter 150*l.* only, and it was held that the direction did not amount to a legacy of 150*l.* in addition to the debt. But a direction to pay a supposed debt may amount to a legacy by implication: *Re Rowe*, [1898] 1 Ch. 153, and other cases cited ante, p. 624. So the "forgiveness" of a debt which is extinguished may be an implied legacy: see post, p. 1119.

(*b*) 6 De G. M. & G. 549; *Re Gibbs*, [1907] 1 Ch. 465.

the proceeds of land devised upon trust for sale (*c*). But if real estate is directed to be sold, and a sum of money is bequeathed out of the proceeds, that is a demonstrative legacy (*d*).

but may extend to realty.

Moreover, as explained in another chapter (*dd*), there are many cases in which by force of the context words properly descriptive of personalty only are held to pass real estate, and in that place instances have been given of the words "legacy" and "residuary legatee" being used in reference to real estate (*e*).

A gift of residue is not a legacy, apart from other indications of the testator's intention.

A gift of residue is not a legacy in the ordinary sense of the term (*f*), though the person taking it is called a residuary legatee, and a direction by the testator as to his legacies primâ facie applies only to legacies in the strict sense of the term, and not to shares of residue (*g*). But from other parts of the will the testator's intention may be gathered that he used the word "legatee" to include the residuary legatee, and "legacy" to include the residuary gift. Thus in *Ward* v. *Grey* (*h*) the testator's fourth codicil was as follows: "Whereas the last legacy of Nelson to his country has been so ungratefully ignored, and whereas I have done my humble best to carry it out in my lifetime, I hereby desire that every legatee under this my last will and codicils shall also contribute 1*l*. per cent. out of their legacies to Mrs. Horatia Ward and her children, nor will they grudge it, if they read the life and deeds of Nelson, without whom they would never have the other ninety-nine parts to enjoy"; it was held by Romilly, M.R., that the residuary legatee was bound to contribute.

Annuities are legacies,

Gifts of annuities are legacies, and annuitants are legatees. If, therefore, a testator gives legacies and annuities, and then makes further provision as to his "legacies" or "legatees," the provision will primâ facie apply to the annuities as well as to the legacies (*i*). But not if the testator himself distinguished between them (*j*). For instance, when the testator uses the words "legacies and annuities" and "legatees and annuitants" in various clauses in his will, and then directs certain moneys to be divided amongst the legatees in

unless the testator makes a distinction.

(*c*) *White* v. *Lake*, L. R., 6 Eq. 188.

(*d*) *Hodges* v. *Grant*, L. R., 4 Eq. 140, post, p. 1071 n. (*m*).

(*dd*) Chap. XXVII.

(*e*) The word "bequest" may similarly be held to mean "devise," as in *Jackson* v. *Hosie*, 27 L. R. Ir. 450, although in that case the testator had used "devise" in its technical sense.

(*f*) A gift of residue is a legacy within the Real Property Limitation Act, 1874: *Re Davis*, [1891] 3 Ch. 119. If the testator creates a secret trust of a specific part of his residue, that is equivalent to a specific bequest: *Re Maddock*, [1902] 2 Ch. 220.

(*g*) *Re Aiken*, [1898] 1 Ir. R. 335; *Re Elcom*, [1894] 1 Ch. 303 ("pecuniary legacies").

(*h*) 26 Bea. 485.

(*i*) *Sibley* v. *Perry*, 7 Ves. 522; *Bromley* v. *Wright*, 7 Ha. 334; *Heath* v. *Weston*, 3 D. M. & G. 601.

(*j*) *Gaskin* v. *Rogers*, L. R., 2 Eq. 284.

proportion to their several legacies, annuitants will not take under the latter bequest (*k*).

Annuities primarily payable out of personal estate.

The rule that legacies are payable primarily out of the general personal estate unless a contrary intention appears from the will, applies also to annuities (*l*). And the same general principles as to the construction of words shewing such a contrary intention, and as to contribution by several distinct properties, or out of a mixed fund, which apply to legacies apply to annuities (*m*). But in some respects annuities are subject to special rules (*n*).

Annuities charged on or payable out of land.

In *Creed* v. *Creed* (*o*) the annuities bequeathed by the will were held to have priority over the legacies as regards the real estate on the ground that the annuities were specific gifts out of the real estate, and that the legacies were merely charged on it. The same result would have followed if the annuities had been in the nature of demonstrative legacies payable primarily out of the real estate (*p*).

Demonstrative annuity.

Another example of a demonstrative annuity is where it is made payable primarily out of the income of a particular fund of stock or other personalty (*q*).

Meaning of legacy in the County Court Acts.

Under section 58 of the County Court Act, 1888 (*r*), the amount or part of the amount of a distributive share under an intestacy or of any legacy under a will not exceeding 50*l.* can be recovered in the County Court, and questions have arisen as to the meaning of the word "legacy" within this section and the corresponding section of the County Court Act, 1846 (*s*). It seems that a legacy given in trust is not within the section (*t*). And an annuity or periodical sum to be paid by a devisee is apparently not a legacy for this purpose (*u*). And a legacy settled on A. for life, with remainder to B., does not, it would seem, even after A.'s death, fall within the section (*v*).

Technical words not required.

It is hardly necessary to say that no particular form of words is required for the gift of a legacy (*w*). A bequest of money in the

(*k*) *Nannock* v. *Horton*, 7 Ves. 391.

(*l*) *Boughton* v. *Boughton*, 1 H. L. C. 406; see Chap. LIV.

(*m*) Ib. As to the manner in which the values of the contributory properties are ascertained, see *Fielding* v. *Preston*, 1 De G. & J. 438; *Ley* v. *Ley*, L. R., 6 Eq. 174 (deed).

(*n*) *Falkner* v. *Grace*, 9 Ha. 281; *Howard* v. *Dryland*, 38 L. T. 24. See Chap. XXXI.

(*o*) 11 Cl. & F. 491.

(*p*) *Re Briggs*, 45 L. T. 249.

(*q*) *Attwater* v. *Attwater*, 18 Ben. 330; *Smith* v. *Pybus*, 9 Ves. 566; *Vickers* v. *Pount*, 6 H. L. C. 885; *Creed* v. *Creed*, 11 Cl. & F. 491, cited post.

(*r*) 51 & 52 Vict. c. 43.

(*s*) 9 & 10 Vict. c. 61, s. 1, extended by 13 & 14 Vict. c. 61, s. 1.

(*t*) *Pears* v. *Wilson*, 6 Ex. 833; *Hewston* v. *Phillips*, 11 Ex. 699.

(*u*) *Longbottom* v. *Longbottom*, 8 Ex. 203. As to a conditional legacy, see *Fuller* v. *Mackey*, 2 E. & B. 573.

(*v*) *Beard* v. *Hine*, 10 W. R. 45.

(*w*) As to bequests by implication, see *Smith* v. *Fitzgerald*, 3 V. & B. 2,

form of a legacy may take effect as an appointment under a power, and vice versâ (*ww*).

II.—General, Specific and Demonstrative Legacies.—Legacies are of three kinds: (1) general or pecuniary (*x*), (2) specific, (3) demonstrative. It is not always easy to determine to which of these classes a given legacy belongs, but the distinction between them is of great importance, because of the different properties of the different kinds of legacies. Three kinds of legacies.

A general legacy is a gift of something to be furnished out of the testator's general personal estate; it need not form part of the testator's property at the time of his death. Thus, if I bequeath to A. "the sum of 100*l.*" or "100*l.* 2½ per cent. Consols," or "a gold watch," these are general legacies. General legacy.

A specific legacy is a gift of a particular part of the testator's personal property belonging to him at his death. Usually the subject matter of a specific legacy belongs to the testator at the date of the will, as where he gives to A. "my gold watch" or "the Consols now standing in my name." But the subject matter of a specific legacy may fluctuate between the date of the will and the death: as where a testator gives to A. "all the furniture which shall be in my house at the time of my death" (*y*) or "my stock in the L. W. Company" (*z*). Specific legacy.

A demonstrative legacy is a legacy which is in its nature general, but which is directed to be satisfied out of a specified fund or part of the testator's property: thus "I give A. 100*l.* out of the Consols now standing in my name" is demonstrative (*a*). Demonstrative legacy.

cited in Chap. XIX. In *Medlicot* v. *Bowes*, 1 Ves. sen. 207, a testator by codicil desired his sister out of the money given her by his will to leave 500*l.* at her death to A., who survived the testator, but died before the sister; it was held that this amounted to a legacy from the testator, and that it consequently did not lapse.

(*ww*) See Chap. XXIII.

(*x*) The words "general" and "pecuniary" as applied to legacies are not infrequently used as synonymous terms. As will be seen later, all general legacies are not pecuniary, and all pecuniary legacies are not general, but as most general legacies are pecuniary and most pecuniary legacies are general, it is not often necessary to distinguish between them.

(*y*) *Re Ovey*, 51 L. J. Ch. 665: post, p. 1066.

(*z*) *Re Slater*, [1907] 1 Ch. 665. The doubt expressed in *Parrott* v. *Worsold*, 1 J. & W. 594, is unfounded. Bequests of stock are discussed more in detail in a later part of this chapter. In *Lady Langdale* v. *Briggs*, 8 D. M. & G. 391, the Court of Appeal seem to have felt some difficulty in deciding whether a bequest of "all my leasehold messuages, &c.," was specific or general: the reporter had no such difficulty (see headnote).

(*a*) See *Tempest* v. *Tempest*, 7 D. M. & G. 470, where Lord Cranworth said that a pecuniary legacy payable out of the pure personalty in priority to other legacies was "in the nature of a demonstrative legacy."

CHAP. XXX.

These rough definitions (*b*) will now be expanded and exemplified by a consideration of some of the leading cases on the subject.

First, as to general legacies.

Pecuniary legacy.

The commonest form of a general legacy is a gift of a sum of money: "I give A. 100*l*." This is sometimes called a pecuniary legacy.

General legacies payable out of personal estate.

The essence of a general legacy is that it is payable out of the general personal estate. Consequently, a pecuniary legacy payable exclusively out of real estate is not a general legacy (*c*). But a general legacy may be charged on the testator's real estate, and then the question arises whether the real estate or the personal estate is primarily liable (*d*).

General legacy operating as appointment.

The mere fact that a testator bequeaths a sum of money or stock to a person does not conclusively shew that it is a general legacy. It may appear from the context or the surrounding circumstances that the legacy was meant to take effect, either primarily or absolutely, out of property over which the testator had a power of appointment (*e*).

Legacy payable out of share of residue.

A legacy may be made payable out of a part of the general personal estate: as where a testator by codicil gives a legacy payable out of a share of residue the gift of which has lapsed or been revoked (*f*). But without such a direction a legacy given in lieu of a share of residue is payable out of the whole personal estate (*g*).

Personal liability of devisee.

Where land is devised subject to or charged with a legacy, this does not, as a general rule, impose any personal liability on the devisee, although, of course, if he sells the property before the legacy is paid, he can only sell subject to the charge (*h*). On the other hand, the testator may so express himself as to impose a personal liability on the devisee in the event of his accepting the devise (*i*).

General legacies of chattels, stock, &c.

It has already been mentioned that a gift of a particular chattel or other personal property, such as stock, may be a general legacy: as a gift of "a gold watch" or "500*l*. Consols" (*j*). In such a case, if the testator's estate at the time of his death does not include

(*b*) Other definitions are given by Pearson, J., in *Re Young*, 52 L.T. 754.

(*c*) *Hancox* v. *Abbey*, 11 Ves. 179; *Dickin* v. *Edwards*, 4 Ha. 273, and other cases cited in Chap. LIV.

(*d*) See Chap. LIV.

(*e*) *Walker* v. *Laxton*, 1 Y. & J. 557; *Re Young*, 52 L. T. 754: *Disney* v. *Crosse*, L. R., 2 Eq. 592; *Brennan* v. *Brennan*, Ir. R. 2 Eq. 321; *Davies* v. *Fowler*, L. R., 16 Eq. 308, and other cases cited in Chap. XXIII.

(*f*) *Re Wood's Will*, 29 B. .. 236.

(*g*) *Sykes* v. *Sykes*, L. R., 3 Ch. 301.

(*h*) *Jillard* v. *Edgar*, 3 De G. & S. 502, where the case of *Newman* v. *Kent*, 1 Mer. 240, is referred to.

(*i*) See *Messenger* v. *Andrews*, 4 Russ. 478, and other cases cited, Chap. XXXIX.

(*j*) A gift of "my gold watch" would be specific: Roper, 193.

a chattel or sum of stock answering the description, the value must be made good out of the testator's personal estate (*k*), provided the value can be ascertained. If the value cannot be ascertained, it seems that the gift fails (*l*).

Secondly, as to specific legacies.

Nature of a specific legacy.

In the earlier cases definitions of "specific legacy" have been given which in the light of some recent authorities are found to be incomplete or inaccurate (*m*). These definitions were criticised by Lord Cranworth in *Fielding* v. *Preston* (*n*), where he observed: "There have been attempts in various cases to determine the meaning of a specific legacy and what is the test whereby such legacies may be distinguished from general bequests. There are objections to most of the definitions, but I think we are quite safe in treating that as a specific bequest which the testator directs to

(*k*) See *Macdonald* v. *Irvine*, 8 Ch. D. 101.

(*l*) As to stock, see *Re Gray*, 30 Ch. D. 205, post, p. 1080. It is submitted that a general legacy of a chattel to be furnished out of the testator's estate must be of a thing which is of such a nature that its approximate value can be ascertained. There is very little authority on this subject, but in *Purse* v. *Snaplin*, 1 Atk. p. 414, the following passage from Domat (Vol. II. 159, s. 21) is quoted in a footnote: "When a testator bequeaths a certain thing, which he specifies as being his own, the legacy will not have its effect, unless that thing be found extant in the succession. For example, if he had said, 'I bequeath to such a one my watch, or my diamond ring,' and that there were not found in the succession either diamond ring or watch, the legacy would be null. But if he had said, 'I bequeath a diamond ring, or a watch,' the legacy would be due, and would have its effect."

There does not appear to be any case in the books in which a legacy of (say) a diamond ring without specifying either the kind or value of the diamond ring has been held to be good, and it is submitted that such a gift would fail for uncertainty: see *Re Gray*, supra. Swinburne (13th edition, Part III., s. v. p. 246) says that a legacy of a horse or yoke of oxen is a good general legacy though the testator have neither horse nor ox of his own, and that it must be determined from the terms of the will whether the legatee or the executor is to choose it: he adds that the person who has the selection must not be unreasonable, "otherwise the legatory might make choice of the best horse, and the executor of the worst in the country, contrary to the meaning of the deceased." Sed quære, whether these refinements would now be regarded.

It is noticeable that Roper (4th edition, p. 193) in discussing when legacies of individual personal chattels are or are not specific, after giving illustrations of specific legacies of a horse or a brooch, says: "But if it be uncertain from the description whether any particular horse or brooch was intended, so that the bequest may be satisfied by delivery of something of the same species as that mentioned, the legacy will not be specific. Thus if A. having many horses or brooches bequeath 'a brooch' or 'a horse' to B., in these and in such cases the legacies will not be specific but general." It is evident that if the legacy is to be general it is not necessary that A. should have a brooch or a horse amongst his assets, but possibly Mr. Roper means to imply that having the brooches or horses makes a sufficiently definite class of horses or brooches to prevent the legacy failing on the ground of uncertainty, and that a mere gift of a brooch or a horse or a diamond ring would probably fail for uncertainty. It is difficult to state exactly what degree of particularity in the description is essential; it is assumed that a gift to a servant of a mourning suit, or to a friend of a mourning ring, would probably be sufficiently definite.

(*m*) E.g. *Hinton* v. *Pinke*, (1719) 1 P. W. 539, per Lord Chancellor Parker. *Purse* v. *Snaplin*, (1738) 1 Atk. at p. 417, per Lord Hardwicke.

(*n*) 1 De G. & J. 438.

be enjoyed in specie." But this is not the test: a testator may give his residuary personalty to be enjoyed in specie, but that does not make the bequest specific (*nn*).

Sir G. Jessel's definition, *Bothamley* v. *Sherson*.

In 1875, in the case of *Bothamley* v. *Sherson* (*o*), Jessel, M.R., delivered a most valuable judgment, in which, after referring to Lord Cranworth's observations, he applied himself to determine what a specific bequest is in the following words: "In the first place, it is a part of the testator's property. A general bequest may or may not be a part of the testator's property. A man who gives 100*l*. money or 100*l*. stock may not have either the money or the stock, in which case the testator's executors must raise the money or buy the stock; or he may have money or stock sufficient to discharge the legacy, in which case the executor would probably discharge it out of the actual money or stock. But in the case of a general legacy it has no reference to the actual state of the testator's property, it being only supposed that the testator has sufficient property which on being realised will procure for the legatee that which is given to him, while in the case of a specific bequest it must be of a part of the testator's property itself. That is the first thing. In the next place it must be a part emphatically, as distinguished from the whole. It must be what has been sometimes called a severed or distinguished part. It must not be the whole, in the meaning of being the totality of the testator's property or the totality of the general residue of his property after having given legacies out of it. But if it satisfy both conditions, that it is a part of the testator's property itself and is a part as distinguished, as I said before, from the whole or from the whole of the residue, then it appears to me to satisfy everything that is required to treat it as a specific legacy."

But even this definition proved to be capable of misapprehension, and the M.R. explained it in *Re Ovey* (*p*), a case in which the Court of Appeal overruled Fry, J., and the House of Lords approved the decision of the Court of Appeal (*q*). In that case the testator, after directing his executors to pay all his just debts and funeral and testamentary expenses, and giving pecuniary legacies to individuals and to charities, gave all his personal estate and effects of which he should die possessed and which should not consist of money or securities for money to A. absolutely; and he gave and devised all

(*nn*) See Chap. XXXIV., where the rule in *Howe* v. *Lord Dartmouth* is discussed.

(*o*) L. R., 20 Eq. 304.

(*p*) 20 Ch. D. 676, better reported in 51 L. J. Ch. 665.

(*q*) Sub nom. *Robertson* v. *Broadbent*, 8 A. C. 813.

the rest, residue and remainder of his estate, both real and personal, to his executors upon certain trusts, all the legacies to be free of legacy duty; the legacies for charitable purposes to be paid exclusively out of such part of his personal estate as might lawfully be appropriated to such purposes, and preferably to any other payment thereout. It was held that A.'s legacy was not specific. Lord Blackburn said the bequests to A. and the executors together constituted one residuary bequest. Lord Fitzgerald thought that the will was to be read as a bequest to the executors of the testator's money and securities for money, and of all the residue of his personal estate to A. Lord Selborne in his speech defined a specific legacy as something "which a testator, identifying it by a sufficient description and manifesting an intention that it should be enjoyed or taken in the state and condition indicated by that description, separates in favour of a particular legatee, from the general mass of his personal estate" (*r*).

Definition in *Robertson* v. *Broadbent*.

This definition and that of Sir G. Jessel may be taken as authoritative, but they are not very easy to apply to the facts in some cases (*s*), and it must never be forgotten that it is unsafe to trust to decisions on the effect of gifts in certain words without carefully considering the context and any indications of the testator's intention on a perusal of the whole will. For this reason a minute consideration of the cases, which are very numerous, has not been inserted here. The reader who wishes to acquaint himself with the earlier cases on specific legacies may be referred to Mr. Cox's notes to *Hinton* v. *Pinke* (1 P. W. 539) and *Rider* v. *Wager* (2 P. W. 328), Mr. Raithby's note to *Brown* v. *Allen* (1 Vernon, 31), Mr. Sanders' notes to *Purse* v. *Snaplin* (1 Atk. 414), and Mr. Fonblanque's note, Treat. Eq. 369 (*t*).

The Court leans against specific legacies.

But in construing wills the Court leans very strongly against specific legacies, so that in a case of doubt the more probable view is that the legacy is not specific (*u*).

(*r*) See also per Kekewich, J., in *De Quetteville* v. *De Quetteville*, 92 L. T. at p. 762.

(*s*) A curious question arose in *Shepheard* v. *Beetham* (6 Ch. D. 597), where a testatrix bequeathed to a hospital all her household furniture and other things in her dwelling-house, and also all her ready money, money at the banker's, and money in the public stocks or funds of Great Britain, and also all other of her personal estate and effects which she could by law bequeath to such an institution, and she appointed executors, but made no further disposition of her property; it was held by Malins, V.-C., that the charitable bequest was specific. The decision seems erroneous. The decision of the same judge in *Powell* v. *Riley*, L. R., 12 Eq. 175, is also bad law (per Jessel, M.R., in *Re Orey*, 51 L. J. Ch. at p. 667).

(*t*) See *Apreece* v. *Apreece*, 1 V. & B. 361; *Gillaume* v. *Adderley*, 15 Ves. 384.

(*u*) *Kirby* v. *Potter*, 4 Ves. at p. 752; *Innes* v. *Johnson*, 4 Ves. 568; *Webster* v. *Hale*, 8 Ves. 413; *Ellis* v. *Walker*, Amb. 309; *Sayer* v. *Sayer*, 7 Ha. 377 (see 3

CHAP. XXX.

Bequest may be general or specific according to the event.

In *Fielding* v. *Preston* (*v*) a testator gave all his real and personal property upon trust for his son for life, and after his death (in the events which happened) he gave his leaseholds to one daughter and all his funded property and other personal estate to another daughter: it was held that on the death of the son the gift of the leaseholds to the one daughter was specific, but that the gift of the funded property to the other was not.

Bequest of part of a specific fund is specific.

If a testator directs a specific chattel to be divided, part to go to A. and part to B., the gifts are clearly specific, and similarly bequests of parts of a specific fund are specific (*w*). And where a testator devised his property in trust for sale, but not for less than 10,000*l.*, and to pay several sums amounting to 7800*l.* and the overplus moneys to A., and on a sale the produce was less than 7000*l.*, Sir W. Grant, M.R., considered the true intention to have been that the different persons should take as specific legatees, and therefore must abate among themselves (*x*).

In another case the bequest was: "The pink coupons in the pigeon-hole are for 3666*l.*: send those to Irving & Slade, of 1 Copthall Court, and he is to pay to Ellen Tomkins 2500*l.*, the rest for Archdeacon Giles for Bess and Edie." The gift of 2500*l.* was held to be specific (*y*).

Bequests of stock.

Specific bequests of money or stock are considered in a later part of this chapter under those headings.

Accessories, &c.

The question what accessories pass by the bequest of a specific chattel, real or personal, is referred to post, p. 1076 and p. 1083.

Specific bequest may fluctuate.

It has been already pointed out that a bequest may be specific although the property comprised in it is described in general terms, so that the subject matter of the bequest may fluctuate between the date of the will and the death of the testator. Thus a bequest of "all my stock in trade of wines and spirituous liquors which I shall be possessed of at the time of my death" is specific (*z*). So a gift of property of a certain kind in a particular locality is specific (*a*). But a bequest of personal property is not made specific merely because it is followed by a partial enumeration of specified things included in it (*b*).

M. & G. 606); *Williams* v. *Hughes*, 24 Bea. 474; *Chaworth* v. *Beech*, 4 Ves. 555.

(*v*) 1 De G. & J. 438.

(*w*) *Nelson* v. *Carter*, 5 Sim. 530; *Ford* v. *Fleming*, 2 P. W. 469; *Oliver* v. *Oliver*, L. R., 11 Eq. 506; *Re Sayer*, 53 L. J. Ch. 832. As to appointments under powers, see Chap. XXIII.

(*x*) *Page* v. *Leapingwell*, 18 Ves. 463.

(*y*) *Re Jeffery's Trusts*, L. R., 2 Eq. 68.

(*z*) *Stewart* v. *Denton*, 4 Doug. 219, post, p. 1075.

(*a*) *Sayer* v. *Sayer*, 2 Vern. 688; *Nisbett* v. *Murray*, 5 Ves. 150; *Green* v. *Symonds*, 1 Bro. C. C. 129, n.; *Moore* v. *Moore*, ib. 127; *Gayre* v. *Gayre*, 2 Vern. 538, and other cases cited Roper, 243.

(*b*) *Fairer* v. *Park*, 3 Ch. D. 309. See Chap. XXIX.

Where a testator makes his real estate liable for debts, legacies, &c., in exoneration of his general personal estate, and gives all his personal estate to A., the result is practically the same as if the bequest to A. were specific, and this appears to be the reason why in some of the cases such a bequest is treated as specific (*c*). These cases are considered in a subsequent chapter (*d*). That such a bequest is really general is shewn by the test suggested by Lord Selborne in *Robertson* v. *Broadbent* (*e*), namely, that it is subject to the rule in *Howe* v. *Lord Dartmouth*.

Where personalty is exonerated from debts and legacies.

In *Mullins* v. *Smith* (*f*) a testator bequeathed specific legacies of Consols to various persons, and if he should not at his death be possessed of the stock he bequeathed to each legatee a money legacy of equivalent amount: Kindersley, V.-C., said that as the testator had stock to answer the bequests the legacies were specific, but that if he had not had the stock they would have been general legacies.

Alternative legacies.

Thirdly, as to demonstrative legacies.

Although it is usual to classify legacies into the three classes of general, specific and demonstrative, it must be remembered that a demonstrative legacy is from most points of view a general legacy, and that the more logical classification is to divide legacies into specific and general, and then to sub-divide general legacies into the two sub-classes of demonstrative and non-demonstrative. In many of the cases the only question is whether the legacy is specific or not; such cases are, for instance, those where the problem is to determine whether or no a legacy has been adeemed. The cases where it is necessary to determine whether a legacy is demonstrative or not depend on the question of priority and not of ademption (*g*). But nevertheless many of the cases above referred to in the discussion of specific legacies are also in fact decisions on the nature of demonstrative legacies, so that we cannot separate off two classes of decisions (1) on specific legacies, (2) on demonstrative legacies; and the reason for this is clear when we consider the nature of the three kinds of legacies, for the problem is not to distinguish the two classes, specific on the one hand and demonstrative and general on the other, but rather in the first place to determine whether the legacy is or is not specific, and if not specific then whether a

Demonstrative legacies.

(*c*) See *Tower* v. *Rous*, 18 Ves. 132; *Ouseley* v. *Anstruther*, 10 Bea. 453; *Jones* v. *Bruce*, 11 Sim. 221; *Gilbertson* v. *Gilbertson*, 34 Bea. 354; *Powell* v. *Riley*, L. R., 12 Eq. 175.

(*d*) Chap. LIV.

(*e*) 8 A. C. at p. 816. See also the comment of Jessel, M.R., on *Powell* v. *Riley*, in *Re Ovey*, 51 L. J. Ch. at p. 667.

(*f*) 1 Dr. & Sm. 204.

(*g*) As to the abatement of demonstrative legacies, see Chap. LIV.

CHAP. XXX.

particular fund or estate is pointed out as that which is to be primarily liable. But unless there is a particular fund there is generally no reason for supposing that a legacy is specific, consequently in fact most of the decisions on specific legacies determine that a certain legacy is specific or is demonstrative, although very often the word demonstrative is not used, and the point decided is that a certain legacy fell into the class of specific legacies or of general legacies as the case may be; the word "general" being used to include both the demonstrative and non-demonstrative sub-classes.

Definition of Wood, V.-C.

The cases on demonstrative legacies were considered by Lord Cottenham in *Creed* v. *Creed* (*h*) and by Sir W. Page Wood, V.-C., in *Paget* v. *Huish* (*i*). The Vice-Chancellor stated the law as follows: "The question on this special case is one which very frequently arises, whether certain annuities are given only out of particular property, or whether, though they be charged primarily on that, the personal estate of the testator is liable to make good any deficiency. There is also a further question whether the annuities are payable out of corpus or only out of income. As to the first point, the authorities may be ranged under three heads, the distinctions being perfectly clear, though there is often much difficulty in applying them to a particular will. The first class is where you have a simple gift of a legacy or annuity, with a mere charge upon real estate; and there the personal estate is not only not exonerated, but remains primarily liable; just as in the case of a charge of debts. Another class is where the legacy or annuity is a specific gift out of real estate, which is assumed to be sufficient to cover the amount. There the personal estate is in no way liable, and if the specific fund fails, the gift must fail with it (*j*). The third class is intermediate to these, where a legacy or annuity is, as it is termed, demonstrative, there being a clear general gift, but a particular fund pointed out as that which is to be primarily liable, on failure of which the general personal estate remains liable (*k*). . . . The point in all these cases is, to ascertain whether the testator has merely pointed out a particular fund which he desires to have applied in paying the legacy, or whether the legacy itself is given only as a portion of the specified fund" (*l*).

(*h*) 11 Cl. & F. 491.

(*i*) 1 H. & M. 663.

(*j*) *Patching* v. *Barnett*, 51 L. J. Ch. 74, was a case of this kind.

(*k*) *Lamphier* v. *Despard*, 2 Dr. & W. 59 (stated post, Chap. LIV), appears to have been a case of this kind, although Sugden, C., said it was not a question of demonstrative legacies.

(*l*) As in *Re Sayer*, 53 L. J. Ch. 832. See also the remarks of Lord Hardwicke in *Ellis* v. *Walker*, Amb. 309, which do not seem quite accurate, on the question of construction: the bequest was not one of a doubtful or contingent debt.

Other cases on demonstrative legacies are collected in the footnote (*m*).

Where a testator has property of his own, and also a power of appointment over a settled fund, and bequeaths legacies in general terms, the question may arise whether those bequests are general, specific or demonstrative. This question is discussed elsewhere (*n*).

The distinction between specific and demonstrative legacies was discussed in *Re Grainger* (*o*); the testator bequeathed a number of pecuniary legacies, and then gave "all the residue and remainder" of a certain fund, after payment of his debts and funeral and testamentary expenses, to A.; there was no general residuary gift. It was held by the Court of Appeal that the words "all the residue and remainder" in the gift to A. meant that the pecuniary legacies were to be paid out of the fund before A. took anything; it followed that the legacies were specific. The decision of the Court of Appeal on the first point was, however, reversed by the House of Lords (*p*), and the second point therefore did not arise.

Priority of specific legacies in administration.

Property given by way of specific bequest is assets for the payment of debts, but specific legacies and real estate devised, whether in terms specific or residuary, are liable to contribute only after all the other assets of the testator (with the exception of property over which the testator has a general power of appointment which he exercises by his will) are exhausted (*q*).

General legacies not liable to ademption,

General legacies, on the other hand, are not liable to ademption (except in the cases mentioned before), but are liable for the payment of debts not only before specific legacies but also before residuary devises (*r*).

nor are demonstrative legacies.

Demonstrative legacies are in their nature general and are not liable to ademption if the specific fund on which they are charged is adeemed or non-existent (*s*), and on the other hand, being payable

(*m*) *Acton* v. *Acton*, 1 Mer. 178; *Fowler* v. *Willoughby*, 2 S. & St. 354; *Willox* v. *Rhodes*, 2 Russ. 452; *Bevan* v. *Att.-Gen.*, 4 Giff. 361; *Roberts* v. *Pocock*, 4 Ves. 150; *Smith* v. *Fitzgerald*, 3 V. & B. 2; *Mann* v. *Copland*, 2 Madd. 223; *Dean* v. *Test*, 9 Ves. 146; *Colvile* v. *Middleton*, 3 Bea. 570; *Sparrow* v. *Josselyn*, 16 Bea. 135 (a decision of doubtful accuracy); *Vickers* v. *Pound*, 6 H. L. C. 885; *Sellon* v. *Watts*, 9 W. R. 847; *Fream* v. *Dowling*, 20 Bea. 624; *Hodges* v. *Grant*, L. R., 4 Eq. 140; *Sidebotham* v. *Watson*, 11 Ha. 170. As to *Barker* v. *Rayner*, 2 Russ. 122, and *Le Grice* v. *Finch*, 3 Mer. 50, see post, p. 1096.

(*n*) Chap. XXIII.

(*o*) [1900] 2 Ch. 756.

(*p*) *Higgins* v. *Dawson*, [1902] A. C. 1.

(*q*) See Chap. LIV.

(*r*) Strictly it is incorrect to say that debts are to be paid out of legacies. Debts are paid out of the testator's assets; but custom to some extent justifies this inaccurate language. *Re Bate*, 43 Ch. D. 600, must be considered overruled: Seton, p. 1673, and the cases there contained. See Chap. LIV.

(*s*) *Savile* v. *Blacket*, 1 P. W. 777; *Cartwright* v. *Cartwright*, 2 Br. C. C. 114; *Colvile* v. *Middleton*, 3 Bea. 570, and the cases cited above, n. (*m*).

out of a specific fund, they are not liable for debts until after the general legacies have been exhausted (*t*). If, however, the fund out of which a demonstrative legacy is primarily payable fails, so that it becomes a general legacy, it is liable to abatement with the other general legacies (*u*).

III.—Legacies of Money, Chattels, Stocks and Shares, Debts, Interests in Land, &c.—The most common subjects of bequests are (1) money, (2) chattels, (3) stocks and shares, (4) debts and choses in action, and (5) leaseholds and interests in land. Some observations may conveniently be made here on bequests of these natures, especially with reference to the question whether a bequest is specific or general. Two other subjects which may usefully be noticed are bequests of (6) property in a particular place and (7) property described with reference to its source.

The question what property passes by a specific bequest in any particular case is treated of elsewhere (*v*).

Bequests of money.

(1) *Legacies of Money.*—A bequest of money is ordinarily a general legacy, and the fact that the money is given that a particular chattel may be purchased by the legatee, or to buy an annuity, or a sum of stock, makes no difference. The legacy is a general and not a specific legacy (*w*).

When specific.

But a legacy of money may be specific, as a bequest of the money in a certain chest (*x*), or in such a hand (*y*), or secured by certain documents (*z*). And a legacy of money out of specific money for instance, a legacy of money out of the dividends of specific stock (*a*), or out of a mortgage or other debt (*b*)—is specific. So a gift of money payable out of land may be specific; thus, if a testator directs land to be sold and 400*l.* to be paid out of the proceeds to A., this is a specific bequest (*c*). But if there is first a bequest of a

(*t*) See Chap. LIV.

(*u*) *Mullins* v. *Smith*, 1 Dr. & S. 204.

(*v*) Chap. XXXV.

(*w*) *Apreece* v. *Apreece*, 1 V. & B. 364; *Gibbons* v. *Hills*, 1 Dick. 324; *Edwards* v. *Hall*, 11 Ha. at p. 23; *Hinton* v. *Pinke*, 1 P. W. 539; *Hume* v. *Edwards*, 3 Atk. 693.

(*x*) *Lawson* v. *Stitch*, 1 Atk. 507.

(*y*) *Hinton* v. *Pinke*, 1 P. W. 539; *Crockat* v. *Crockat*, 2 P. W. 165.

(*z*) *Gillaume* v. *Adderley*, 15 Ves. 384.

(*a*) *Drinkwater* v. *Falconer*, 2 Ves. sen. 623.

(*b*) *Ford* v. *Fleming*, 2 P. W. 469; *Nelson* v. *Carter*, 5 Sim. 530; *Badrick* v. *Stevens*, 3 Br. C. C. 431; *Re Grainger*, [1900] 2 Ch. 756, stated ante, p. 1071; per Lord Davey, s. c. *Higgins* v. *Dawson*, [1902] A. C. p. 12. As to bequests of debts, see post, p. 1081. In *Ellis* v. *Walker*, Amb. 309, the law does not seem to be accurately stated.

(*c*) *Spurway* v. *Glynn*, 9 Ves. 483; *Rickets* v. *Ladley*, 3 Russ. 418; *Newbold* v. *Roadknight*, 1 R. & My. 677; *Dickin* v. *Edwards*, 4 Ha. 273; *Fream* v. *Dowling*, 20 Bea. 624; *Patching* v. *Barnett*, 51 L. J. Ch. 74. See also *Page* v. *Leapingwell*, 18 Ves. 463, ante, p. 1068. As to *Long* v. *Short*, 1 P. W. 403, and *Davenhill* v. *Fletcher*, Amb. 244, see *Creed* v. *Creed*, 11 Cl. & F. 491.

legacy, and then a particular fund or property is pointed out as that which is to be primarily liable for its payment, the legacy is demonstrative (*d*). These cases must of course be distinguished from those in which there is a mere charge of legacies on real estate: there the personal estate is primarily liable (*e*).

Money described as invested in a certain way.

Where a testator bequeaths a sum of money which is described as "invested" in a particular stock or the like, such as a bequest of "5000*l*. in the Funds," or "5000*l*. invested in Consols," the question arises: does the testator mean the legatee to have 5000*l*. in any case, or has he a particular investment in his mind, so that if he realises it and invests the money differently the legacy is adeemed? In most cases the answer probably is that at the time the testator makes his will he wishes the legatee to have the particular investment, and does not contemplate the possibility of his afterwards realising it, or of the investment being changed by act of parliament or other paramount authority; if this possibility were in his mind, he would probably alter the form of the bequest so as to prevent its failing (*f*). "If I were allowed to guess what was the intention of the testator in this case and in other cases where specific bequests have been held to be adeemed, I should say that the doctrine of ademption very often defeats that intention" (*g*). It is probably this feeling which accounts for some conflicting decisions on the class of gifts above referred to. Thus in *Mytton* v. *Mytton* (*h*) the testatrix gave "the sum of 3000*l*. invested in Indian security": at the time of her will she had 3000*l*. invested in Indian securities, which were paid off before her death: Malins, V.-C., held that the gift was demonstrative, and therefore did not fail, adding: "I am perfectly satisfied that this decision will be in accordance with her real intention." The learned judge was no doubt influenced by the hardship which would have been caused by a contrary decision, for in the case of a similar gift, which came before him a few months later, and in which the question of ademption did not arise, he held that the gift was specific (*hh*). In *Re Pratt* (*i*) a gift of "800 pounds invested in 2½ Consols" was held by North, J., to be specific.

(*d*) *Gillaume* v. *Adderley*, 15 Ves. 384; *Mann* v. *Copland*, 2 Mad. 223; *Fowler* v. *Willoughby*, 2 S. & St. 354; *Colvile* v. *Middleton*, 3 Bea. 570. See *Poole* v. *Heron*, 42 L. J. Ch. 348; *Willox* v. *Rhodes*, 2 Russ. 452; *Paget* v. *Huish*, 1 H. & M. 663. For an instance of specific legacies given by a will being made demonstrative by a codicil, see *Williams* v. *Hughes*, 24 Bea. 474.

(*e*) *Davies* v. *Ashford*, 15 Sim. 42, and cases cited in Chap. LIV.

(*f*) As in *Mullins* v. *Smith*, 1 Dr. & Sm. 204.

(*g*) Per Jessel, M.R., 7 Ch. D. p. 341.

(*h*) L. R. 19 Eq. 30.

(*hh*) *Paye* v. *Young*, L. R. 19 Eq. 501.

(*i*) [1894] 1 Ch. 491. See also *Kermode* v. *Macdonald*, L. R., 3 Ch. 584; *Re Sayer*, 53 L. J. Ch. 832; *Brennan* v.

CHAP. XXX.

Division of fund.

Where a testator is entitled to a fund which he estimates at a certain amount, and bequeaths particular sums out of it to different people, the total of which is equivalent to the stated amount of the fund, the question arises whether the legatees take merely the sums given them, or whether the testator intended to divide the fund, whatever it might be, among the legatees in proportion to the sums bequeathed to them. The notion appears formerly to have prevailed that such an intention can be implied from the fact that the sums bequeathed exhaust the estimated amount of the fund, but this doctrine has been exploded. If in such a case the fund realises more than the estimated amount, the surplus is undisposed of (*j*).

Power of appointment.

Appointments under powers are subject to special rules (*k*).

Legacy of profit costs.

When an executor is empowered by a testator to act as solicitor to the estate and to charge for work so done, this is a legacy to him of his profit costs (*l*).

Foreign currency.

As to legacies in foreign currency, see *Cockerell* v. *Barber* (*m*) and *Saunders* v. *Drake* (*n*).

Gift of unascertained sum.

A legacy may consist of a sum not ascertained at the date of the will. Thus a direction to purchase an annuity of a certain amount for A. B. is a legacy to A. B. of the amount of the purchase-money required (*o*). So a testator may give a legacy equal to a sum of fluctuating amount: such as the amount of a servant's yearly wages (*p*); or a legacy of a certain amount subject to deduction: as where a testator bequeaths to A. B. a legacy of 5000*l*., and directs that if he makes advances to A. B., or if A. B. is indebted to him at the time of his death, the amount of the advances or indebtedness shall be deducted from the legacy (*q*).

Statement by testator as to amount paid to legatee.

Sometimes a testator states or recites in his will that he has paid or advanced a certain sum, and directs that it is to be deducted from a legacy bequeathed by him; in such a case evidence is not admissible to shew that the sum paid or advanced was in fact of greater or less amount than that stated in the will (*r*). But a statement or entry made by the testator after the

Brennan, Ir. R. 2 Eq. 321. Other cases are referred to post, p. 1079.

(*j*) *Smith* v. *Fitzgerald*, 3 V. & B. 2, where *Cordell* v. *Noden*, 2 Vern. 148, is referred to as erroneous.

(*k*) See Chap. XXIII.

(*l*) *Re White*, [1898] 2 Ch. 217. See also *Re Pooley*, 40 Ch. D. 1.

(*m*) 16 Ves. 461.

(*n*) 2 Atk. 465. Other cases are, *Pierson* v. *Garnet*, 2 Br. C. C. 39, 47; *Malcolm* v. *Martin*, 3 Br. C. C. 50. The case of *Manners* v. *Pearson*, [1898] 1 Ch. 581, was one of contract.

(*o*) *Ford* v. *Batley*, 17 Bea. 303; *Re Mabbett*, [1891] 1 Ch. 707, and the cases there cited.

(*p*) See p. 1120.

(*q*) *Re Taylor's Estate*, 22 Ch. D. 495.

(*r*) *Re Aird's Estate*, 12 Ch. D. 291; *Burrowes* v. *Lord Clonbrock*, 27 L. R. Ir. 538. In *Quihampton* v. *Going*, 24 W. R. 917, and *Re Wood*, 32 Ch. D. 517, the gifts were of shares of residue.

execution of the will, although admissible as primâ facie evidence of the amount of the advances made by him, is not conclusive (*s*). In *Re Coyte* (*t*) the testator directed that all advances entered by him in a certain book should be brought into account by his legatees; he subsequently destroyed the leaves in this book which contained entries of the advances made by him, and it was held that this operated as a revocation of the direction contained in the will.

The cases on erroneous recitals as to the amount of advances are divided by Swinfen Eady, J., in his judgment in *Re Kelsey* (*u*), into two classes: "In class 1, the testator by apt words directs a legatee to bring a particular sum into hotchpot. He may recite erroneously that a particular sum has been advanced, and direct the legatee to bring that sum, or the sum 'hereinbefore recited to have been advanced' into hotchpot, or he may by other appropriate language shew an intention that the legatee shall absolutely and in any event bring the sum mentioned into hotchpot; in other words, that the legatee shall only take upon the footing of bringing that particular sum into account, and only receiving the balance payable to him on that footing. In class 2 the testator recites the debt owing from the legatee—again he may recite it erroneously—and then directs the debt, 'or so much thereof as shall remain unpaid' at the testator's death or time of distribution, to be deducted and brought into account. In cases of this class the testator really intends that there shall be brought into account the debt or balance thereof which is actually owing at the time of death or distribution"

Bequest of chattels.

(2) *Legacies of Chattels.*—Legacies of chattels may be general or specific. They are the former when there is nothing to shew that a particular chattel is intended, the latter when the particular chattel is pointed out. There is an important distinction between chattels which are specified at the date of the will—as "the furniture now in my house"—and those which are specified at the death of the testator—as "the furniture I shall be possessed of at the date of my death." At one time it was considered that the latter type of bequest was not specific, but the contrary is now clearly settled (*v*). The importance of this distinction will appear when the subject of ademption is discussed (*w*).

(*s*) *Whateley* v. *Spooner*, 3 K. & J. 542. See *Smith* v. *Conder*, 9 Ch. D. 170, referred to ante, p. 500.

(*t*) 56 L. T. 510.

(*u*) [1905] 2 Ch. 465 at p. 469. Cf. *Re Segelcke*, [1906] 2 Ch. 301.

(*v*) See *Stewart* v. *Denton*, 4 Dougl. 219, and the observations on that case by Jessel, M.R., in *Bothamley* v. *Sherson*, L. R., 20 Eq. 309.

(*w*) Post, p. 1098 et seq.

Chattels in a house.

The question what passes by a bequest of "goods" or "chattels" in a particular house is considered later (*x*).

What accessories pass by bequest of specific chattel.

As a general rule, a gift of a specific chattel passes everything which is properly accessory to it; thus a bequest of a mirror will pass a miniature belonging to it, although there may be a bequest of pictures (which includes ordinary miniatures) to another person (*xx*); and a bequest of a box will of course pass the key belonging to it; but not converso (*xxx*). So a bequest of "my tin dispatch-box, at present at the W. Bank," will not pass valuable securities therein contained (*yy*).

Legacies of stocks and shares.

(3) *Legacies of Stocks and Shares.*—Whether a legacy of stock is specific or general is a question which frequently arises; in the course of the many decisions on such a point, various rules have been evolved which are of great assistance in construing bequests of this nature. The rules are not rules of law, but only supply primâ facie indications of the testator's intention, and they yield to other indications of that intention as expressed in the will.

Legacy of stock, shares, &c., primâ facie, general.

A legacy of stock (*y*) or of money in stock (*z*), or of bonds (*a*), or of shares (*b*) is primâ facie a general legacy, and it makes no difference that at the date of the will the testator had the precise amount of stock. A good illustration is the case of *Robinson* v. *Addison* (*c*), where the testator had fifteen and a half Leeds and Liverpool Canal shares; he bequeathed five and a half shares to A., five to B., and five to C. At his death he possessed no shares. It was argued that the testator, in giving the precise number of shares which he possessed, must have had those shares in his contemplation, and no other, and consequently must have meant specific gifts of them. It was also argued that the shares of this canal were so rarely brought to market, that they could not be considered as transferable or purchasable for money, and could not be considered as gifts of particular

(*x*) Post, p. 1098.

(*xx*) *Re Craven*, 99 L. T. 390; 100 L. T. 284.

(*xxx*) *Re Robson*, [1891] 2 Ch. 559.

(*yy*) *Re Hunter*, 25 T. L. R. 19.

(*y*) *Partridge* v. *Partridge*, 9 Mod. 269; *Simmons* v. *Vallance*, 4 Br. C. C. 345; *Wilson* v. *Brownsmith*, 9 Ves. 180.

(*z*) *Peterborough* v. *Mortlock*, 1 Br. C. C. 565; *Bronsdon* v. *Winter*, 1 Amb. 57; *Webster* v. *Hale*, 8 Ves. 410; *Purse* v. *Snaplin*, 1 Atk. 414. But if the gift is of a certain sum of money "invested" in a certain stock, this, it is submitted, clearly points to an existing investment, and is specific. The decisions of Malins, V.-C., in *Mytton* v. *Mytton*, supra, p. 1073, and *Page* v. *Young*, L. R., 19 Eq. 501, seem to be inconsistent and both wrong. In *Brennan* v. *Brennan*, Ir. R., 2 Eq. 321, a bequest of "500*l.* of my money in the Bank of Ireland" was held to be a specific bequest of 500*l.* Bank stock.

(*a*) *Macdonald* v. *Irvine*, 8 Ch. D. 101.

(*b*) *Re Gray*, 36 Ch. D. 205 (where the bequest failed: post, p. 1080); *Re Gillins*, [1909] 1 Ch. 345; *Barr's Trustees* v. *Ardrossan Club*, 3 Court of Sess. Ca. (Fraser, &c.) 903.

(*c*) 2 Bea. 515.

things which the executors could purchase out of the assets. But it was held that the legacies were general. There is an early case of *Jeffreys* v. *Jeffreys* (*d*), in which a bequest of 2702*l.* 3*s.* 0*d.* capital stock in the Bank of England was held to be specific, the testator having that precise amount of stock at the time of making his will, but the decision stands alone (*e*) and seems opposed to all the more recent decisions.

Contrary intention.

But the fact that the testator had at the time of making his will shares or stocks of a particular description may, coupled with other indications, make a bequest of those shares or stocks specific. Thus in *Re Nottage* (*f*) the testator gave certain stocks and shares to trustees "upon trust to continue the same in their present state of investment," which made these bequests specific (*g*), and bequeathed other stocks and shares in the same companies to various legatees: it was held on the construction of the whole will, regard being had to the state of the testator's investments at the date of the will, that he meant to dispose of specific stocks and shares which he owned at the time, and that all the bequests were specific (*h*).

Power of appointment.

The fact that the testator has a power of appointment over certain stocks may make bequests of those stocks, though in general terms, take effect as appointments under the power, so as to be specific (*i*).

Gift of "my stock," &c., is specific.

Again, if the testator describes the subject matter of the bequest as "my stock," the legacy is specific (*j*). Thus in the leading case of *Ashburner* v. *Macguire* (*k*) the bequest was of "my capital stock of 1000*l.* in the India Company's stock": Lord Thurlow said "the pronoun *my* has been relied on in many cases in deciding the legacy to be specific."

And a bequest of stock may be specific even if no amount is mentioned and the stock is not described as "my stock" or as

(*d*) 3 Atk. 120.

(*e*) "It is presumed therefore that the case of *Jeffreys* v. *Jeffreys* cannot be considered of any authority."—Roper on Legacies, 4th edition, p. 262.

(*f*) [1895] 2 Ch. 657.

(*g*) Post, p. 1079.

(*h*) *Re Pratt*, [1894] 1 Ch. 491, where the earlier cases of *Gillaume* v. *Adderley*, 15 Ves. 384; *Page* v. *Young*, L. R., 19 Eq. 501; *Hosking* v. *Nicholls*, 1 Y. & C. C. C. 478; *Morley* v. *Bird*, 3 Ves. 628; *Gordon* v. *Duff*, 3 D. F. & J. 662; *McClellan* v. *Clark*, 50 L. T. 616 (reported s. n. *Re Sayer*, 53 L. J. Ch. 832); and *Mytton* v. *Mytton*, L. R., 19 Eq. 30, are referred to in the judgment.

(*i*) See Chap. XXIII.

(*j*) *Shuttleworth* v. *Greaves*, 4 Myl. & C. 35; *Kamp* v. *Jones*, 2 Keen, 756; *Hayes* v. *Hayes*, 1 Keen, 97; *Dummer* v. *Pitcher*, 5 Sim. 35, 2 M. & K. 262; *Miller* v. *Little*, 2 Bea. 259; and see *Measure* v. *Carleton* (a curious case), 30 Bea. 538; *Kermode* v. *Macdonald*, L. R., 1 Eq. 457, 3 Ch. 584; *Dobson* v. *Waterman*, 3 Ves. 308, n., where the stock was wrongly described. It will be remembered that a simple gift of "my Consols," although specific, is a fluctuating bequest: see p. 1068.

(*k*) 2 Br. C. C. 108.

"standing in my name." Thus in *Re Slater* (*l*) a testator bequeathed "the interest arising from money invested in the L. W. Company," and the bequest was held to be specific (*m*).

After-acquired stock or shares.

There are cases, decided on sec. 24 of the Wills Act, according to which words literally referring to the date of the will have the same effect as if the will had been made immediately before the testator's death. As in *Hepburn* v. *Skirving* (*n*), where a gift of "the shares I am possessed of in the A. Bank" was held to pass shares acquired after the date of the will. This is a specific bequest, being equivalent to a gift of "all the shares which I shall be possessed of at the time of my death" (*o*).

Direction to sell makes stock legacy specific.

A legacy of so much stock directed to be sold is specific, for the testator cannot intend his executors to buy the stock merely for the purpose of re-selling it. This seems to be the correct explanation of *Ashton* v. *Ashton* (*p*), a case which has caused some difficulty. On the other hand, a mere direction to transfer the stock will not make the legacy specific (*q*).

Gift of "stock now standing in my name" specific.

The testator's intention that the legacy shall be specific may also be shewn by a reference to the stock as "now standing in my name," "which I now possess," &c., or by a reference to stock "of which I may at the time of my death be possessed," or other words referring to a particular investment (*r*).

Gift of stock out of specific stock.

It should be noticed that a gift of stock out of specific stock is specific (*rr*).

Bequests of stock to different persons.

If a testator gives legacies of stock or shares, and then gives the remainder standing in his name, the intention that the previous

(*l*) [1906] 2 Ch. 480; [1907] 1 Ch. 665. See *D'Aglie* v. *Fryer*, 12 Sim. 1.

(*m*) It was admitted by both parties that the bequest was specific: the question argued was whether the legacy was adeemed by the conversion of the stock after the date of the will: see post.

(*n*) 4 Jur. N. S. 651. and other cases cited in Chap. XII.

(*o*) *Re Slater*, [1906] 2 Ch. 480; [1907] 1 Ch. 665; *Trinder* v. *Trinder*, L. R. 1 Eq. 695. See *Smallman* v. *Goolden*, 1 Cox 329 (before the Wills Act).

(*p*) 3 P. W. 384; see *Purse* v. *Snaplin*, 1 Atk. 414.

(*q*) *Sibley* v. *Perry*, 7 Ves. 522; *Webster* v. *Hale*, 8 Ves. 410; and see *Lambert* v. *Lambert*, 11 Ves. 607.

(*r*) *Barton* v. *Cooke*, 5 Ves. 461; *Hosking* v. *Nicholls*, 1 Y. & C. C. C. 478; *Norris* v. *Harrison*, 2 Mad. 268; *Fontaine* v. *Tyler*, 3 Pr. 94; *Queen's College* v. *Sutton*, 12 Sim. 521; *Stephenson* v. *Dowson*, 3 Bea. 342; *Hosking* v. *Nicholls*, 1 Y. & C. C. C. 478; *Gordon* v. *Duff*, 28 Bea. 519; 3 D. F. & J. 662; *Kermode* v. *Macdonald*, L. R., 3 Ch. 584, *Flood* v. *Flood*, 1902, 1 Ir. R. 538; *Re Slater*, supra; *Horrison* v. *Jackson*, 7 Ch. D 339 ("standing in the names of trustees"). But where the testator directed his brokers to buy stock, and died before it was purchased, it was held that the stock did not pass to the specific legatee: *Thomas* v. *Thomas*, 27 Bea. 537. The decision in *Parrott* v. *Worsold*, 1 J. & W. 594, is, it is submitted, obviously wrong. As to *Mytton* v. *Mytton*, L. R., 19 Eq. 30, see ante, p. 1073, and infra.

(*rr*) *Morley* v. *Bird*, 3 Ves. 628; *Oliver* v. *Oliver*, L. R., 11 Eq. 506; *Re Sayer*, 53 L. J. Ch. 832; *Davies* v. *Fowler*, L. R., 16 Eq. 308; *Hosking* v. *Nicholls*, 1 Y. & C. C. C. 478.

bequests were specific seems clear, and the cases of *Sleech* v. *Thorington* (*s*) and *Millard* v. *Bailey* (*t*) are sometimes referred to as illustrations of this proposition. But on closer examination they do not appear expressly to decide the point. In the former the testatrix gave 2413*l.* 13*s.* 0*d.* to several persons in several parcels and different proportions by the name of South Sea annuity stock or South Sea annuities, giving to her coachman the "remaining 13*l.* 13*s.* 0*d.* standing in my name." The gifts were held specific, but Sir Thomas Clarke, M.R., in giving judgment, considered it material that there was a direction to sell and convert part into money, and he referred to *Ashton* v. *Ashton*. In *Millard* v. *Bailey* a bequest of shares in the E. Gas Company to various persons was followed by a bequest of the remaining shares to A. B. But it is material that the bequest was in the following form: "I leave and bequeath *the* shares in the E. Company as follows," and the specific nature of the bequests seems to have been assumed without argument. But even if these decisions do not conclude the point, a reference to the "remaining shares" as standing in the testatrix's name must imply that the former shares are also those standing in her name.

"Present state of investment."

Other instances are where a testator gives stock or shares upon trust to continue the same in their present state of investment (*u*), or otherwise refers to an existing investment in stock or shares (*v*).

Demonstrative bequest of money out of stock.

A bequest of a sum of 2000*l.* "to be paid out of the 4 per cent. consolidated annuities" was held in *Deane* v. *Test* (*w*) to be a pecuniary (or rather a demonstrative) legacy. In his judgment, Lord Eldon seems to cast some doubt on the accuracy of the decision of Arden, M.R., in *Kirby* v. *Potter* (*x*), in which it was held that a legacy of "1000*l.* out of my Reduced Bank annuities" was pecuniary (or demonstrative). In *Mytton* v. *Mytton* (*y*) the bequest was of "the sum of 3000*l.* invested in Indian security," and it was held by Malins, V.-C., to be a demonstrative legacy. According to North, J. (*z*), the decision might have been different if the words "the sum of" had been wanting, but this distinction was not present to the mind of the V.-C., as appears from the judgment.

"Invested in" a company may mean shares.

A gift of 400*l.* invested in the B. Company means 400 1*l.* shares in that company (*a*). As to what passes by a gift of

(*s*) 2 Ves. sen. 560.
(*t*) L. R., 1 Eq. 378.
(*u*) *Re Nottage*, [1895] 2 Ch. 657.
(*v*) *Mullins* v. *Smith*, 1 Dr. & S. 204; *Hosking* v. *Nicholls*, 1 Y. & C. C. C. 478.
(*w*) 9 Ves. 146.
(*x*) 4 Ves. 748. Compare *Selwood* v. *Mildmay*, 3 Ves. 306, commented on post, p. 1102 and infra.
(*y*) L. R., 19 Eq. 30.
(*z*) *Re Pratt*, 1894, 1 Ch. p. 497.
(*a*) *Re Buller*, 74 L. T. 406.

CHAP. XXX.

shares, see Lord Cranworth's judgment in *The Carron Company* v. *Hunter* (*b*).

Direction to make up amount of bequest.

In *Townsend* v. *Martin* (*c*) the testatrix bequeathed 5000*l*. Consols, with a direction that if she should not have sufficient stock to answer the legacy, her executors should out of her residuary estate purchase enough to make up the deficiency. The legacy was held to be specific.

Where stock insufficient.

It is hardly necessary to say that if a gift of a particular sum of stock is specific, and the testator at his death has only a smaller sum of that stock, only the latter passes by the bequest (*d*).

Gift of shares where none in the market or none in existence.

The rule that a stock legacy is primâ facie general has probably arisen from the leaning of the Court against specific legacies, but no doubt in some cases the rule defeats the testator's intention, and a case might arise where great difficulty would occur. Suppose that a testator bequeaths ten shares in the A. Company and has none at his death, and that the company is a small private company and none of the shareholders will part with their shares, is the gift to fail? There is no principle upon which it would; on the other hand, if it is to be supposed that there must be some price at which shares are obtainable, such a bequest might amount to a bequest of all the testator's personalty not specifically bequeathed, for it would be a general legacy of nearly infinite value. Such a case has never arisen, but it is possible that it should, and if it did, in spite of *Robinson* v. *Addison* the Court might struggle against the rule. Another case is where the company or stock has ceased to exist. In such a case the gift fails because it is impossible to determine its value (*e*); but this ground is not altogether satisfactory, and it may be suggested that the true ground for the decision in *Re Gray* is that it is a legacy of something non-existent and which cannot be obtained. On this ground it may be that whereas a legacy of a black horse may be good (*f*), a legacy of a unicorn or a great auk would be bad.

Gifts of shares in a non-existent company.

The case where a testator makes a bequest of shares in a company and the company is in existence at the testator's death, but has ceased to exist within a year of his death, does not seem to have arisen. If the executor need not purchase the shares and transfer

(*b*) L. R., 1 H. L. Sc. & D. 362; and see *Maclaren* v. *Stainton*, 3 D. F. & J. 202.

(*c*) 7 Hare, 471. See also *Queen's College* v. *Sutton*, 12 Sim. 521; *Fontaine* v. *Tyler*, 9 Pr. 94.

(*d*) *Gordon* v. *Duff*, 3 D. F. & J. 662. As to *Ashton* v. *Ashton*, 3 P. W. 384, see ante, p. 1078

(*e*) *Re Gray*, 36 Ch. D. 205.

(*f*) See footnote, p. 1065.

them to the legatee until the expiration of the year, it looks as though the legacy would fail on the principle of *Re Gray;* but on the other hand it might be argued that the legatee was entitled to the value of the shares, as at the testator's death, though the legacy was not payable until the expiration of the executor's year. It seems probable that the Court would hesitate to adopt a construction which would make a general legacy of shares fail because after the testator's death the company had been wound up and reconstructed, but the point is not without difficulty.

Effect of sec. 24 of Wills Act.

Where a testator makes a general bequest of a certain number of shares in a company, and the nominal amount of the shares is altered after the date of the will, the effect of sec. 24 of the Wills Act is to give the legatee the same number of shares of the altered nominal amount (*g*).

A gift of a sum of money to be purchased in the stock of the Bank of England is a gift of money of that amount, and not stock of that nominal amount (*h*).

Long annuities.

There are many old decisions on bequests of long annuities, but as this kind of investment is now practically obsolete, it is not thought necessary to examine them. Some of them are of doubtful accuracy (*i*).

Bequests of debts, &c.

(4) *Legacies of Debts.*—Legacies of debts, whether by simple contract or secured upon mortgages and bonds, frequently give rise to difficulties, for the distinction between giving the actual debt and a sum of money with reference to a debt is a fine one. Mr. Roper states the rule thus (*j*): "When the gift of the legacy is so connected with the debt or security as that the gift of the legacy and of the debt or security are the same, the intention to give nothing more than the identical debt or money due on the security is apparent, and consequently the legacy will be specific." *Ashburner* v. *Macguire* (*k*) is a good instance of a specific bequest of a debt; in that case Lord Thurlow said: "Whenever a debt or a part of a debt is the subject bequeathed, it is a *legatum nominis* or a *legatum debiti*."

(*g*) *Re Gillins*, [1909] 1 Ch. 345, cited in Chap. XII; *Re M'Afee*, [1909] 1 Ir. R. 124.

(*h*) *Allan* v. *Kelly*, 7 W. R. 139.

(*i*) *Fonnereau* v. *Poyntz*, 1 Br. C. C. 472; *Colpoys* v. *Colpoys*, Jac. 451; *Boys* v. *Williams*, 2 R. & My. 689; *Att.-Gen.* v. *Grote*, 2 R. & M. 699; *Gordon* v. *Duff*, 3 D. F. & J. 662. Some of them are referred to in Chap. XXXI.

(*j*) Legacies, 4th edition, p. 227.

(*k*) 2 Br. C. C. 108. See also *Innes* v. *Johnson*, 4 Ves. 568 ("300*l.* upon bond"); *Chaworth* v. *Beech*, 4 Ves. 555; *Nelson* v. *Carter*, 5 Sim. 530; *Gardner* v. *Hatton*, 6 Sim. 93; *Davies* v. *Morgan*, 1 Beav. 405; *Sidebotham* v. *Watson*, 11 Ha. 170; *Re Wedmore*, [1907] 2 Ch. 277.

On the other hand, if the security is merely described as not of the essence of the gift, the legacy is general, as a bequest of 400*l.* East India bonds (*l*), and in *Gillaume* v. *Adderley* (*m*) a bequest of 5000*l.* sterling or 50,000 current rupees, afterwards described as now vested in the East India Company's bonds, and sometimes mentioned as the said sum of 5000*l.* sterling, was held under all the circumstances of the case to be a demonstrative legacy. Legacies in their nature general given out of a debt are demonstrative, but a legacy of a part of a debt is specific.

Partnership debt.

A bequest of debts due from B. does not include debts due from a firm in which B. is a partner, if there is a debt due from B. alone (*n*).

Interest.

A legacy of the amount of a bond for 1000*l.* seems to carry interest accrued during the lifetime of the testator (*o*).

Rents of land.

Rent owing to a testator, in respect of either freeholds or leaseholds, may of course be specifically bequeathed (*oo*).

What words include debts and other choses in action.

The questions whether debts and other choses in action pass by general words of description, such as "property," "articles and effects," or the like, and to what extent choses in action can be said to have a locality, are discussed elsewhere (*p*).

Legacies to debtors and creditors.

Legacies to debtors and creditors are considered in a subsequent part of this chapter (*q*).

Bequests of interests in land.

(5) *Legacies of Interests in Land, &c.*—A bequest of leaseholds is specific (*r*), even if the bequest is in form general or residuary: as if I bequeath "all my leasehold property," for the testator's intention clearly is to sever the property from the rest of the personal estate (*s*). Similarly a gift of a rent charge, or an annuity issuing out of land, is an interest in the land itself and necessarily specific. And a gift of tithes is specific (*t*). But a legacy or annuity charged on land is demonstrative. "General legacies do not become specific because they are payable out of the proceeds of real estate; but the gift of the proceeds of the

(*l*) *Sleech* v. *Thorington*, 2 Ves. sen. 560. See *Macdonald* v. *Irvine*, 8 Ch. D. 101, cited ante, p. 1065.

(*m*) 15 Ves. 384.

(*n*) *Ex parte Kirk*, *Re Bennett*, 5 Ch. D. 809.

(*o*) *Harcourt* v. *Morgan*, 2 Keen, 274; *Gibbon* v. *Gibbon*, 13 C. B. 205; but see *Hawley* v. *Cutts*, 2 Free. 24, where a gift to a debtor of 300*l.* "which he owes to me upon bond" did not carry the interest.

(*oo*) As to the application of the Apportionment Act, 1870, in such a case, see *Re Lucas*, 55 L. J. Ch. 101, post, p. 1119. As to deducting outgoings, &c. see *Lindsay* v. *Earl of Wicklow*, Ir. R. 6 Eq. 72; *Re Duke of Cleveland's Estate*, [1894] 1 Ch. 164.

(*p*) Chap. XXXV. and post, p. 1085.

(*q*) Post, pp. 1118, 1119.

(*r*) *Long* v. *Short*, 1 P. W. 403.

(*s*) Roper on Legacies, 194. See *Lady Langdale* v. *Briggs*, 8 D. M. & G. 391.

(*t*) *Creed* v. *Creed*, 11 Cl. & F. at p. 508; *Rudstone* v. *Anderson*, 2 Ves. sen. 418.

sale of a real estate may be specific, as in *Page* v. *Leapingwell* (*u*). So the charge of the legacies upon the real estate does not make them specific, although the annuities payable and issuing out of them are so" (*v*).

Collateral benefits.

A bequest of property held under a lease does not necessarily carry the benefit of a collateral agreement or deed of covenant with the lessor (*w*). But it carries the right to compensation under a clause in the lease providing for its determination (*x*).

Renewed leases, &c.

The question whether a bequest of a leasehold property carries a new lease of the property, granted since the date of the will, is discussed elsewhere, as is also the question whether a term of years passes under a bequest of personal property if the testator afterwards acquires the reversion (*y*); and also the effect of sec. 24 of the Wills Act in making a bequest of "my leaseholds" or "the leaseholds of which I am possessed" include leaseholds acquired after the date of the will, and renewed leaseholds (*z*).

Liabilities under lease.

Where there is a specific bequest of leaseholds, the question arises as to who is liable to pay the rent and perform the covenants in the lease. This question arises either between the legatee and the testator's estate, or if the leaseholds are given in succession, between the persons successively entitled. The latter question is discussed in Chapter XXXIV. The question how far a specific legatee of leaseholds is entitled to exoneration in respect of them out of the testator's estate is discussed in Chapter LIV. As a general rule the legatee is subject to all liabilities arising after the testator's death, and the executors are entitled to be indemnified by him against these liabilities (*a*).

Money payable out of land.

A bequest of an annuity or legacy payable out of the rents of land, or out of the corpus or proceeds of the sale of land, may be specific or demonstrative, according as the testator does or does not express an intention that the legatee shall have the money, whether the estate is available and sufficient for its payment or not (*b*).

Bequests of personal property in a particular place.

(6) *Bequests of Personalty in a Particular Place.*—It frequently happens that a testator makes a bequest of personal property

(*u*) 18 Ves. 463.
(*v*) Per Lord Cottenham in *Creed* v. *Creed*.
(*w*) *Ledger* v. *Stanton*, 2 J. & H. 687.
(*x*) *Coyne* v. *Coyne*, Ir. R., 10 Eq. 496, stated in Chap. XXII. p. 739.
(*y*) Post, p. 1094.
(*z*) See Chap. XII.
(*a*) *Garratt* v. *Lancefield*, 2 Jur. N. S. 177; *Hickling* v. *Boyer*, 3 M. & G. 635; *Re Smith*, 84 L. T. 835.
(*b*) Roper, 195 seq., citing *Long* v. *Short*, 1 P. W. 403; *Creed* v. *Creed*, 11 Cl. & F. 491; *Mann* v. *Copland*, 2 Madd. 223; *Dickin* v. *Edwards*, 4 Ha. 273; *Savile* v. *Blacket*, 1 P. W. 777; *Fowler* v. *Willoughby*, 2 S. & St. 354; *Page* v. *Leapingwell*, 18 Ves. 463.

CHAP. XXX.

which he describes with reference to its locality: for example, "the furniture in my house," or "my house, with all that shall be in it at my death," or "my property in England," or "not in England" (*bb*). In construing bequests of this kind the following general rules should be borne in mind:

Effect of removal, &c.

(A) Although a bequest of "the furniture in my house," or the like, is specific, the testator generally contemplates the possibility of the subject matter fluctuating from time to time (*c*). The effect of such a gift with reference to changes and removals is discussed in a subsequent part of this chapter (*d*).

Things constructively in a house.

(B) It is not always essential that the chattels should be actually in the house at the time of the testator's death, assuming that to be the crucial time. Thus chattels which are temporarily removed from the house, or have even never been in it, may pass by such a bequest (*e*).

Ejusdem generis construction.

(C) "Goods and chattels," "effects" and "things," being words of generic description, it seems that a gift of "goods and chattels," "effects" or "things" in a house, will pass all choses in possession therein, including money and bank-notes (*f*). So a bequest of goods and chattels in and about the testator's dwelling-house and outhouses at T. will pass running horses (*g*). But where the testator commences by specifying a number of different kinds of household goods, as where he bequeaths his furniture, plate, pictures and other things (or effects) in a house, the ejusdem generis construction is frequently applied (*h*), and consequently such a gift only passes things falling within the description of furniture and household goods: it therefore does not include money (*i*), or securities, or

(*bb*) *Arnold* v. *Arnold*, infra; *Drake* v. *Mart n*, 23 Bea. 89; as to the latter case, see Chap. XXVIII.

(*c*) Per Jessel, M.R., L. R. 20 Eq. at p. 312.

(*d*) Post, p. 1110.

(*e*) *Brooke* v. *Warwick*, 2 De G. & S. 425: *Rawlinson* v. *Rawlinson*, 3 Ch. D. 302, and other cases cited infra, p. 1099. As to plate, see *Wilkins* v. *Jodrell*, 11 W. R. 588; *Re Stamford*, 22 T. L. R. 632, cited in Chap. XXXV. In *Lane* v. *Sewell* (43 L. J. Ch. 378) there was a gift of all corn and other articles in or about a mill: this was held not to pass corn in transitu.

(*f*) *Chapman* v. *Hart*, 1 Ves. sen. 271; unless the money is "an extraordinary sum, and just received," ib.; *Popham* v. *Lady Aylesbury*, Amb. 68. So a gift of "the contents" of a house will pass everything in it except title deeds, bonds, and securities for money: *Re Craven*, 99 L. T. 390: 100 L. T. 284; compare *Re McCalmont*, 19 T. L. R. 490.

(*g*) *Gower* v. *Gower*, Amb. 612.

(*h*) The cases in which the word "effects" passes the residuary personal estate, although preceded by words of specific description, as in *Hodgson* v. *Jex*, 2 Ch. D. 122, are considered in Chap. XXVIII.

(*i*) *Trafford* v. *Berrige*, 1 Eq. Ca. Abr. 201, pl. 14, and other cases cited ante, p. 1025; *Gibbs* v. *Lawrence*, 7 Jur.

jewellery (*j*), unless the intention appears to have been to give the legatee the whole contents of the house (*k*). The addition of the words "et cætera" to a gift of this description does not seem to enlarge its scope (*l*).

Where pecuniary legacy is also given.

It is said that a gift of goods and chattels, plate, jewels and household stuff in a house will not pass money found in the house, if a pecuniary legacy is also given to the legatee, but whether this doctrine is of much force except where the money found in the house is of considerable amount, may perhaps be doubted (*m*).

Heirlooms, or quasi-heirlooms.

A direction that the chattels or things are to go with the house, or be considered as heirlooms, necessarily restricts the bequest to such articles as are of household or domestic use or ornament, and are of a permanent character (*n*).

Fixtures.

Where chattels, such as pictures or tapestries, are fitted or fixed to a house, it is sometimes difficult to say whether they pass by a gift of "chattels in the house"; circumstances may shew that they were considered by the testator as part of the house and were not intended to be given with the ordinary movable furniture (*o*).

"Wines and property in England."

Where the gift is of things in a particular country, or the like, the ejusdem generis construction is less applicable. Thus in *Arnold* v. *Arnold* (*oo*), the testator gave to his wife "My wines and property in England"; in addition to wines the testator was entitled to property in the English funds, money at his bankers, &c., and it was held that they all passed under the bequest.

Choses in action.

(D) Where a testator makes a bequest of all his property or effects in a particular country or other locality, it is necessary, in order to construe such a gift correctly, to bear in mind that certain kinds of personalty, strictly speaking, have no locality, so that words which would in general be sufficient to pass personalty of those descriptions, may be insufficient when the personalty is described by

N. S. 137; *Campbell* v. *McGrain*, Ir. R., 9 Eq. 397; *Watson* v. *Arundel*, Ir. R., 10 Eq. 299; *Dutton* v. *Hockenhull*, 22 W. R. 701 (gift of "coins, curiosities and other articles" in a desk). In *Stone* v. *Parker*, 29 L. J. Ch. 874, and *Bradish* v. *Ellames*, 10 Jur. N. S. 1170, where the same construction prevailed, the gift was of things "in or about" a dwelling-house.

(*j*) *Re Miller*, 61 L. T. 365; *Re Hammersley*, 81 L. T. 150.

(*k*) See *Mahony* v. *Donovan*, 14 Ir. Ch. 262, 388. As to *Swinfen* v. *Swinfen*, 29 Bea. 207, see Chap. XXXV. The decision was discussed in *Campbell* v. *McGrain*, supra, and *Northey* v. *Paxton*, 60 L. T. 30.

(*l*) *Steignes* v. *Steignes*, Mos. 296, cited Chap. XXVIII; *Hertford* v. *Lowther*, 7 Bea. 1.

(*m*) *Anon.*, Finch Pr. Ch. 8. The case of *Roberts* v. *Kuffin*, 2 Atk. 113, is of questionable authority: see *Re Robson*, [1891] 2 Ch. 559, and compare *Chapman* v. *Hart*, ante, n. (*f*).

(*n*) *Fitzgerald* v. *Field*, 1 Russ. at p. 427; *Hare* v. *Pryce*, 11 L. T. 101; *Re Moir's Estate*, [1882] W. N. 139. Compare *Manton* v. *Tabois*, 30 Ch. D. 92.

(*o*) *Re Whaley*, [1908] 1 Ch. 615.

(*oo*) 2 My. and K. 365.

CHAP. XXX

reference to locality (*ooo*). Thus the term "money," used generally, will pass many choses in action which would not pass by the description of money in a particular place. At one time the Courts seem to have held that choses in action (except Bank of England notes) had no locality, and consequently did not pass by any description referring to locality; but this is no longer an invariable rule, and choses of action are held to pass by reference to locality or position in space in certain cases. The cases in which choses in action are held to have locality are (i) Bank of England notes, (ii) debts, (iii) where the documents representing the choses in action are described by reference to a place where they are ordinarily kept for security. These will be considered in turn.

Bank of England notes.

(i) It is not known why Bank of England notes have locality; they acquired this position at a time when they were not legal tender (*p*); Lord Eldon did not know the origin of this anomaly (*q*), but possibly the Court thought that testators could not distinguish between them and actual coin (*r*). Country bank notes are not within the exception (*s*).

Debts due from persons in a particular place.

(ii) Debts due from persons resident in a particular locality will pass under a gift of property in that locality (*t*). In *Nisbett* v. *Murray* (*u*) a testator, who at the time of his death resided in Jamaica, gave the residue of his estate in the island of Jamaica, except furniture and wearing apparel, to trustees. A debt had been due to the testator from persons resident in the island of Jamaica, but a person resident in England had become solely responsible for this debt; it was held that the debt had become property in England. With reference to these cases, Cotton, L.J., observed: "No doubt there are a great many cases which lay down that choses in action cannot be referred to as of any particular locality. Again, there are cases where a gift of property in a particular locality has been held to include debts due from persons in that locality. I think these latter cases go upon this—that there was in the will a sufficient indication of intention to include under the description of property in a particular place that which really cannot have any locality" (*v*).

(*ooo*) *Hertford* v. *Louther*, 7 Bea. 1, and cases cited in the notes infra.

(*p*) *Popham* v. *Lady Aylesbury*, Amb. 68 (gift of "my house and all that shall be in it at my death": held cash and bank notes passed; promissory note and securities did not). See 11 Ves. at p. 662.

(*q*) *Stuart* v. *Marquis of Bute*, 11 Ves. at p. 662.

(*r*) *Hertford* v. *Louther*, 7 Bea. at p. 9; *Fleming* v. *Brook*, 1 Sch. & Lef. 318; *Chapman* v. *Hart*, 1 Ves. sen. 271.

(*s*) *Brooke* v. *Turner*, 7 Sim. 671.

(*t*) *Tyrone* v. *Waterford*, 1 D. F. & J. 613; *Guthrie* v. *Walrond*, 22 Ch. D. 573 ("all my estate and effects in the island of Mauritius"); *Arnold* v. *Arnold*, 2 My. & K. 365; *Re Clark*, [1904] 1 Ch. 294.

(*u*) 5 Ves. 149.

(*v*) *In re Prater*, 37 Ch. D. at p. 486.

Yet it is not easy to point out what is a sufficient indication of intention; as the cases now stand, a simple gift of "all my property in Suffolk" would pass debts due to the testator by persons resident in Suffolk, but not shares in a company carrying on business in Suffolk (*w*).

Bonds of a corporation stand on the same footing as simple contract debts (*x*).

Choses in action in a particular place.

(iii) As a general rule, a gift in a will of goods and chattels, or money, or property, in a house, does not pass choses in action (*y*). But if a testator gives "my property in England," this includes stocks in the English funds (*yy*). Or if he gives "my property at R.'s bank" (*z*), such a gift passes not only the cash balance at the bank, but shares of which the certificates, whether payable to bearer or not, are deposited with the bank for safe custody. So a gift of a "desk with the contents thereof" (*a*), being a desk in which testator keeps securities, passes the securities in the desk. The ratio decidendi is that by such a gift the intention of the testator must be to give the choses in action usually kept in the place for safe custody. Chitty, J., states the distinction in the following way: "If the security box had been given with the contents thereof, it would have been absurd, to my mind, to take out all the valuable things which were found therein, and to say in substance that an empty box with any chattel put there by the testator, a lead pencil or the like, was all that was intended to pass. I think that 'with the contents thereof' does not mean the pens and ink and paper, and is not confined to mere chattels within the chattel. There is a distinction between a gift of chattels in a house and a gift of the contents of a desk; a desk being the kind of thing in which men do usually keep valuable things" (*b*).

But the title deeds to real property (or a key of a box) do not pass by such a gift, because they pass as part of the real property (or the box) to the persons entitled thereto (*c*).

And the gift of a particular tin box, without more, does not include its contents (*cc*).

(*w*) *Re Clark*, [1904] 1 Ch. 294, stated infra, p. 1088.

(*x*) *Re Clark*, infra, p. 1088.

(*y*) *Moore* v. *Moore*, 1 Br. C. C. 127; *Green* v. *Symonds*, ib. 129, n.; *Fleming* v. *Brook*, 1 Sch. & L. 318; *Hertford* v. *Lowther*, 7 Bea. 1.

(*yy*) *Arnold* v. *Arnold*, 2 My. & K. 365, where *Fleming* v. *Brook*, 1 Sch. & L. 318, is commented on. See *Drake* v. *Martin*, 23 Bea. 89. The decision in *Fleming* v. *Brook* seems erroneous.

(*z*) *Re Prater*, 37 Ch. D. 481.

(*a*) *Re Robson*, [1891] 2 Ch. 550.

(*b*) [1891] 2 Ch. at p. 562. But the testator may indicate that he does not intend money in the desk to pass: *Dutton* v. *Hockenhull*, 22 W. R. 701.

(*c*) *Re Robson*, supra, at p. 565. Compare *Re Craven*, 99 L. T. 390, 100 L. T. 284 (title deeds and share certificates).

(*cc*) *Re Hunter*, 25 T. L. R. 19.

CHAP. XXX.

In *Re Clark* (*d*), where the testator bequeathed all his personal estate in the United Kingdom to one set of trustees, and all his personal estate in South Africa to another set of trustees, it was held that shares held by him in mining companies in South Africa passed by the former bequest: it was possible to transfer the shares in London, and the share certificates were at the testator's bankers in London; but bonds payable to bearer of a corporation carrying on business in South Africa were held to pass under the latter bequest, although the bonds were also at the testator's bankers in London.

Personalty described with reference to its source.

(7) *Legacies of Personalty described with Reference to its Source.*—Sometimes a testator describes personal property with reference to the source from which he derives it: as where he gives to A. "all the property to which I am or may be entitled under the will of X." or "as next of kin of X." or the like (*e*). The general principle seems to be that so long as the property in question continues to exist in specie, or can clearly be traced into investments made by the testator and retained by him at his death, it will pass by the gift, but if it is sold and the proceeds are spent by the testator or mixed with his other property, the gift fails (*f*). The principle of these cases does not apply to a bequest of a specific sum of stock (*g*).

Negative description.

A bequest of all property "not included in" a particular settlement, will pass property which under that settlement belongs to the testator absolutely (*h*).

Failure of legacies.

IV.—Failure of Legacies—Ademption of Specific Bequests.

Legacies may fail in many ways; some of these are common to all legacies, others only to particular kinds of legacies.

Lapse.

Lapse has already been treated of in Chap. XIII., and failure on account of uncertainty in Chap. XIV., but a few observations may not be out of place here. Failure by lapse does not occur on account

(*d*) [1904] 1 Ch. 294.

(*e*) With regard to the question what will pass by such a gift, see *Askew* v. *Rooth*, L. R., 17 Eq. 426 (gift by a married woman of "all funds and property" purchased out of the savings of her separate estate); *Re Armstrong*, 49 L. J. Ch. 53 ("any property bequeathed to me"); *Green* v. *Giles*, 5 Ir. Ch. 25 ("patrimony"); *Scott* v. *Best*, 6 L. R. Ir. 1 ("all my interest in the property left to me by S." held not to include arrears of rent); *Re Trimmer*, 91 L. T. 26 (real estate derived under will and not partitioned).

(*f*) *Lee* v. *Lee*, 27 L. J. Ch. 824; *Moore* v. *Moore*, 29 Bea. 496; *Morgan* v. *Thomas*, 6 Ch. D. 176; post, p. 1096; *Manton* v. *Tabois*, 30 Ch. D. 92; *Re Borrer's Trusts*, 54 Sol. J. 32.

(*g*) *Harrison* v. *Jackson*, 7 Ch. D. 339. See post, p. 1096, where the cases of *Le Grice* v. *Finch*, 3 Mer 50, and *Clark* v. *Browne*, 2 Sm. & G. 524, are discussed.

(*h*) *Re Green*, 31 L. R. Ir. 338.

of anything connected with the subject of the gift (*i*) but on account of something connected with the object of the gift. The most common case is where the legatee has died in the testator's lifetime.

Uncertainty.

Failure from uncertainty may arise either from the subject or the object of the gift being uncertain.

Void from illegality.

Further, legacies may fail because the law makes them void, as, for instance, by infringing the Rule against Perpetuities or (under the old law) by being given to a charity out of property which savours of realty.

Mistaken motive is immaterial.

It may here be mentioned that if a bequest is absolute, the motive for making it is, as a rule, immaterial; if, therefore, a testator makes a bequest under a mistaken belief that he was subject to a legal obligation to do so, the bequest nevertheless takes effect (*j*). On the other hand, a testator may so express himself that a bequest which is apparently made under a mistaken belief as to a certain state of facts, is in reality conditional on that state of facts existing (*k*).

Legacy given for a purpose.

Again, a legacy which is given for a particular purpose does not necessarily fail if that purpose is not carried into effect (*l*), unless the testator has taken the precaution of making his intention effectual by means of a trust, condition, gift over, or the like. This subject has been already discussed (*m*).

Insufficiency of assets.

Any kind of legacy may fail owing to the insufficiency of the testator's assets. The order in which legacies are applied in payment of debts, and the way in which they may abate rateably inter se, are considered under administration of assets (*n*).

Non-existence of subject matter.

Specific or general (but not pecuniary) legacies may fail from non-existence of subject matter. Thus a bequest of "my gold watch" fails if I never at any time had one (*o*); and a bequest of jewels in a box deposited in a certain place fails if no such box can be found (*p*). If I had a gold watch at the date of the will, and afterwards sold

(*i*) As to misdescription of object, see Chap. XXXV.

(*j*) *Re Dyke*, 44 L. T. 568. Compare *Westcott* v. *Cullford*, 3 Ha. 265; *Att.-Gen.* v. *Ward*, 3 Ves. 327, stated ante, p. 189. Where the testator makes a mistake in the subject matter of the bequest (e.g. in bequeathing to a creditor a larger amount than is actually due to him) this is regarded as falsa demonstratio; see ante, p. 1074, and Chap. XXXV.

(*k*) *Doe* v. *Evans*, 10 Ad. & E. 228; *Thomas* v. *Howell*, L. R., 18 Eq. 198; ante, p. 189.

(*l*) Thus in *Parsons* v. *Coke*, 27 L. J. Ch. 828, a testator gave to his brother certain collieries, and for the better enabling him to carry on the collieries the testator bequeathed to him 10,000*l*. Before his death the testator sold the collieries to his brother, but it was held that the legacy was not adeemed. See also *Att.-Gen.* v. *Haberdashers' Co.*, 1 My. & K. 420; *Lockhart* v. *Hardy*, 9 Beav. 379; *Mexborough* v. *Savile*, 88 L. T. 131; *Palmer* v. *Flower*, L. R., 13 Eq. 250; *Earl of Lons* v. *Berchtoldt*, 3 K. & J. 185, and other cases cited ante. p. 882.

(*m*) Chap. XXIV.

(*n*) Chap. LIV.

(*o*) See *Evans* v. *Tripp*, 6 Mad. 91.

(*p*) *Jerningham* v. *Herbert*, 4 Russ. 388.

CHAP. XXX.

it, the legacy has been adeemed, unless I possess a gold watch at the time of my death, so that the bequest takes effect by virtue of sec. 24 of the Wills Act (*q*). Similarly, a general bequest of shares in a non-existent company will fail, as has already been pointed out, on account of the non-existence of the subject matter (*r*). General pecuniary legacies may also in certain cases be adeemed; this subject is dealt with in another chapter (*rr*), but it seems more convenient to consider the ademption of specific legacies in the present place.

Ademption of specific legacy.

A specific legacy is adeemed (*s*) if the subject of it has ceased to exist as part of the testator's property in his lifetime. Thus a specific bequest is adeemed, in the case of chattels if they are lost (*t*), destroyed, sold or given away; in the case of a debt if the debt is paid off; or in the case of stock if the stock is sold in the testator's lifetime (*u*); and if part of the debt is paid or part of the stock is sold, there is ademption pro tanto (*v*). For this purpose a binding contract of sale has the same effect as an actual sale (*w*). At one time it seems to have been considered that the testator's intention must be looked at to see whether there was an intention to adeem. Thus if the testator specifically bequeathed a mortgage debt and afterwards called it in, it might be supposed that there was an ademption, but if he was paid off against his will that there was none (*x*). This distinction has, however, long since been swept away, and was treated as exploded by Lord Thurlow in *Ashburner* v. *Macguire* (*y*).

Intention not considered.

Republication of will.

An adeemed legacy is not revived by a republication of the will, so as to give the legatee the property representing the adeemed legacy (*z*).

(*q*) See Chap. XII.

(*r*) See *Re Gray*, 36 Ch. D. 205.

(*rr*) See Chap. XXXII.

(*s*) As to translation, see Swinburne, 522. At one time a revoked legacy was considered to be adeemed.

(*t*) *Durrant* v. *Friend*, 5 De G. & S. 343, where insured chattels were lost at sea, and it was held that the specific legatee was not entitled to the insurance moneys.

(*u*) *Ashburner* v. *Macguire*, 2 Br. C. C. 108; *Badrick* v. *Stevens*, 3 B. C. C. 431; *In re Bridle*, 4 C. P. D. 236; *Harrison* v. *Jackson*, 7 Ch. D. 339; *Gardner* v. *Hatton*, 6 Sim. 93; *Re Robe*, 61 L. T. 497; *Makcown* v. *Ardagh*, Ir. R., 10 Eq. 445; *Manton* v. *Tabois*, 30 Ch. D. 92; *Maclean* v. *Maclean's Executors*, [1908] Ct. of Sess. Ca. 838; *Sidney* v. *Sidney*, L. R., 17 Eq. 65 (release of interest on specific debt).

(*v*) *Humphreys* v. *Humphreys*, 2 Cox, 184 (stock); *Aston* v. [illegible] J. Ch. 715 (partnership debt); *Hamilton*, [1901] 1 Ir. 383 (bank).

(*w*) *Watts* v. *Watts*, [illegible] Eq. 217 (notice to treat for lands under Lands Clauses Act). But an offer by an agent to sell the subject matter of a legacy made before, but accepted after, the testator's death does not cause ademption, because there was no binding contract: *Re Pearce*, 8 R. 805. As to conversion generally, see Chap. XXII.

(*x*) See *Crockat* v. *Crockat*, 2 P. W. 164; *Ford* v. *Fleming*, 2 P. W. 469; *Att.-Gen.* v. *Parkin*, Amb. 566.

(*y*) 2 Br. C. C. 108; *Stanley* v. *Potter*, 2 Cox, 180.

(*z*) Ante, p. 202; and compare *Cowper* v. *Mantell*, post, p. 1092.

No implied substitution of other property.

And if a legacy has been adeemed by being used by the testator for purposes for which he had provided by his will, the legatee has no equity to have the benefit of that provision (*a*). Nor does the fact that the proceeds of property comprised in a specific bequest have been set apart or re-invested by the testator so that they can be traced, entitle the legatee to them (*b*), unless the bequest is so expressed as to include the investments for the time being of a particular fund (*c*).

Where conversion is before the will.

It is of course necessary to distinguish between cases of ademption and misdescription. If a testator owns a certain investment and converts it into an investment of a similar kind, and subsequently makes a will by which he bequeaths the original investment, the legatee may be entitled to the equivalent in value of the original investment, on a principle somewhat similar to that of *falsa demonstratio* (*d*). It is obvious that in such a case no question of ademption arises. Thus in *Re Jameson* (*e*) the testatrix had at one time held shares in the S. and W. Bank; this bank afterwards amalgamated with the B. Bank, and the testatrix's shares were converted into shares of the B. Bank; the testatrix subsequently made her will, by which she bequeathed "all my shares in the W. and S. Bank": it was held that the shares in the B. Bank passed by this bequest.

Slight changes.

A mere nominal change in the subject of a specific gift does not cause ademption, and it was held in *Oakes* v. *Oakes* (*f*), by Turner, V.-C., that a bequest of Great Western Railway shares was not adeemed by the shares having been converted into consolidated stock by a resolution of the company under the authority of an Act of Parliament. This seems correct in principle, as the only difference between a 100*l.* share (if fully paid) and 100*l.* stock is that the latter can be sub-divided by the holder, while the former can not.

So in *Partridge* v. *Partridge* (*g*) a conversion of South Sea stock into South Sea annuities was held not to adeem a bequest of the stock.

Substantial change.

But if there is a substantial change in the subject of the bequest,

(*a*) *Humphreys* v. *Humphreys*, 2 Cox, 184.

(*b*) *Fryer* v. *Morris*, 9 Ves. 360; *Gardner* v. *Hatton*, 6 Sim. 93; *Re Bridle*, 4 C. P. D. 336 (with which compare *Makeown* v. *Ardagh*, Ir. R., 10 Eq. 445); *Harrison* v. *Jackson*, 7 Ch. D. 339; *Manton* v. *Tabois*, 30 Ch. D. 92; and cases cited supra, p. 1090.

(*c*) As to this, see *Lee* v. *Lee*, and other cases cited infra, p. 1088.

(*d*) *Selwood* v. *Mildmay*, 3 Ves. 306, and cases cited in notes. As to *Selwood* v. *Mildmay*, see infra, p. 1102. *Findlater* v. *Lowe*, [1904] 1 Ir. 519, was the case of a debt being converted into stock of a company: see post, p. 1119.

(*e*) [1908] 2 Ch. 111.

(*f*) 9 Ha. 666, and see *Morrice* v. *Aylmer*, L. R., 7 H. L. 717, overruling *Oakes* v. *Oakes* on one point. See *Re Slater*, [1907] 1 Ch. 665; *Re Pilkington's Trusts*, 13 L. T. 35 (where the words of the will were special).

(*g*) 9 Mod. 269.

it is adeemed. Thus in *Re Lane* (*h*), where a testator gave all his debentures in the S. Railway Company, and after the date of the will, when the debentures became payable, arranged with the company to exchange them for a smaller amount of permanent debenture stock bearing a higher rate of interest, it was held that the legacy was adeemed; the case was the same as if the testator had sold the debentures and bought debenture stock with the proceeds (*i*).

Ademption of charge on land.

In *Cowper* v. *Mantell* (*j*) a testator bequeathed certain leaseholds to A. and B. subject to the payment out of the rents of an annuity of 60*l.* to X.; he afterwards assigned the property to trustees upon other trusts, reserving a power by deed or will to appoint an annuity of 60*l.* to X.; subsequently he confirmed his will, but did not in terms exercise the power: it was held that the annuity failed. On the other hand, in *Longfield* v. *Bantry* (*k*) a testator was entitled to a charge on certain estates and bequeathed it to A.; afterwards the estates were re-settled with the concurrence of the testator, so as to give him a fresh charge for the same amount: it was held that there had been no substantial change, and that the bequest was not adeemed.

Declaration as to substituted investments.

In *Townsend* v. *Townsend* (*l*) a testatrix made specific bequests of various investments, and directed that if any of her investments should be changed, the substituted investment should be "considered legally the same" as that described in the will "on the production of sufficient memoranda to shew the particulars of such change": some of the investments were changed after the date of the will: it was held that memoranda in the testatrix's handwriting were admissible to identify the new investments, and that they passed accordingly. The decision seems contrary to the provisions of the Wills Act requiring every will to be in writing (*m*).

Conversion of property belonging to a lunatic.

A wrongful conversion will not in general operate as an ademption (*n*). On this principle, if a person becomes insane after making

(*h*) 14 Ch. D. 856, and see *Pattison* v. *Pattison*, 1 M. & K. 12 (exchange of "Long Annuities" for short annuities); *Re Gibeon*, L. R., 2 Eq. 669; *Macdonald* v. *Irvine*, L. R., 8 Ch. D. 101 (sale of Egyptian bonds and purchase of Egyptian bonds of a different kind); *Re Grey*, 36 Ch. D. 205; *Re Slater*, [1906] 2 Ch. 480; [1907] 1 Ch. 665 (conversion of stock in a water company).

(*i*) In *Re Herring*, [1908] 2 Ch. 493, Joyce, J., seemed to think that *Re Lane* ought to have been treated as coming under s. 24 of the Wills Act. See Chap. XII.

(*j*) 22 Bea. 223.

(*k*) 15 L. R. Ir. 101.

(*l*) 1 L. R. Ir. 180.

(*m*) See the remarks of Chitty, J., in *Re Freer*, 22 Ch. D. at p. 627.

(*n*) *Busan* v. *Brandon*, 8 Sim. 171; *Taylor* v. *Taylor*, 10 Hare, 475; *Jenkins* v. *Jones*, L. R., 2 Eq. 323; *Harrison* v. *Asher*, 2 De G. & Sm. 436 (conversion by agent without knowledge of testator's death). *Browne* v. *Groombridge*, 4 Madd. 495, seems contrary to principle.

his will, a conversion by his committee, without the sanction of the Judge in Lunacy, will not cause ademption (*o*). But under the Lunacy Regulation Act, 1853, it seems to have been considered that if a conversion was made under an order of the Judge, this was equivalent to a conversion by the testator himself, and therefore caused ademption (*p*). On the other hand, a transfer under an Order in Lunacy of stock into the name of the Paymaster-General out of the name of a testator who had become of unsound mind, was held not to adeem a bequest of "all stock standing in my name and belonging to me at the time of my decease" (*q*). And in cases governed by the Lunacy Act, 1890, sales and other dispositions of the property of a testator under the powers of the act do not affect the interests of his legatees except so far as the money thereby produced is actually expended under the act (*r*), and the Court will as far as possible administer the estate of a lunatic testator so as to preserve the rights of legatees (*s*).

Compulsory conversion.

So far as the question of ademption is concerned, it seems to be immaterial whether conversion is effected by the act of the testator or by a paramount authority, such as an act of parliament. Thus in *Re Slater* (*t*) a testator bequeathed "money invested in the L. Company"; at the date of his will the testator held stock in the L. Company which under the provisions of an act of parliament was converted into the stock of another corporation: it was held by Joyce, J., that the latter stock did not pass by the bequest.

Sec. 24 of Wills Act.

The effect of sec. 24 of the Wills Act with reference to the question of ademption is discussed elsewhere (*u*).

National Debt Conversion Act.

The effect of the National Debt (Conversion) Act, 1888, upon general and specific bequests of Consols is rather curious. By sec. 25 (2) it is enacted that "In any instrument executed before the passing of this Act references to any stock liable to be converted or enlarged in pursuance of this Act may, if the stock is so converted or enlarged, be construed as references to new stock, and in the case of any testamentary instrument executed before the passing of this Act, any disposition which but for the passing of this Act would have operated as a specific bequest of any such stock, shall, if the same is so converted or exchanged, be construed as a specific bequest of such new stock, and if the same is not so converted but is paid off or redeemed, shall be construed as a pecuniary legacy of a sum of money

(*o*) *Re Larking*, 37 Ch. D. 310.
(*p*) *Re Freer*, 22 Ch. D. 622; *Jones* v. *Green*, L. R., 5 Eq. 555.
(*q*) *Re Wood*, [1894] 2 Ch. 577.
(*r*) S. 123.
(*s*) *Re Wood*, supra.
(*t*) [1906] 2 Ch. 480; [1907] 1 Ch. 665.
(*u*) See Chap. XII.

CHAP. XXX.

equal to the nominal amount of the stock so paid off or redeemed." In the first part of this sub-section the word instrument includes a will (*v*), so that a general bequest of 100*l.* 3 per cent. Consols in a will executed before the act is now construed as a general bequest of 100*l.* 2½ per cent. Consols; and the same is the case with a specific bequest where the testator accepted the terms of conversion, but if the Consols are paid off and redeemed, the legatee, though he gets a legacy equal to the nominal amount of the stock, loses the benefit of the priority to which he would have been entitled as specific legatee, but gains the advantage that his legacy is not liable to ademption.

Change in nature of testator's interest.

The testator's interest in certain property may change between the date of the will and the death, and if he bequeaths his interest in the property, or the property, the question is whether he intends to describe the property or to limit the bequest to the interest he has at the date of the will. This question has been already referred to in connection with secs. 23 (*w*) and 24 (*x*) of the Wills Act, the former of which abolished the old rule that where a testator bequeathed property in which he had an interest, and afterwards disposed of that interest and acquired a new interest (as where he surrendered a lease and took a new lease of the same property), the latter did not generally pass by the bequest (*y*). Under the present law the question is purely one of intention. Such a case occurs when a testator bequeaths his share and interest in a business and subsequently acquires the whole business (*z*), or when he bequeaths his leasehold house and afterwards takes a new lease by way of renewal (*a*), or purchases the fee simple. In the latter case, if the testator intends that his interest in the house, whatever it may be, shall belong to the legatee, the fee simple will pass by the gift. Thus in *Saxton* v. *Saxton* (*b*) the testator gave to his wife all his term and interest in the leasehold house No. 1 B. Gardens, in which he then resided, for her absolute use and benefit, subject to the payment of the ground rent and performance of the covenants affecting the same. He afterwards purchased the freehold of the house, which

(*v*) *Re Howell-Shepherd*, [1894] 3 Ch. 649. See *Duke of Northumberland* v. *Percy*, [1893] 1 Ch. 298.

(*w*) Chap. VII., ante, p. 164.

(*x*) Chap. XII.

(*y*) See *Abney* v. *Miller*, 2 Atk. 593, and other cases cited in Chap. XII.

(*z*) *Re Russell*, 19 Ch. D. 432.

(*a*) This question is discussed in Chap. XII., ante, p. 405. See *Leckey* v. *Watson*, Ir. R., 7 C. L. 157; *Wedgwood* v. *Denton*, L. R., 12 Eq. 290.

(*b*) 13 Ch. D. 359; *Leckey* v. *Watson*, Ir. R., 7 C. L. 157. See *Struthers* v. *Struthers*, 5 W. R. 809; *Miles* v. *Miles*, L. R., 1 Eq. 462; *Cox* v. *Bennett*, L. R., 6 Eq. 422, cited ante, p. 408, where *Emuss* v. *Smith*, 2 De G. & S. 722, is also referred to.

was conveyed to him in fee simple. Malins, V.-C., held that the house passed to the widow for an estate in fee simple.

Where property is ascertained at death.

Where the will refers to the property as existing at the testator's decease, the cases do not turn on the question of ademption, which cannot strictly arise, but on whether the description in the will is sufficient to pass the property as it exists at the death (*c*). This has already been discussed with reference to the effect of sec. 24 of the Wills Act on specific bequests (*d*): such as the bequest of "my Government stock," which clearly passes all the Government stock held by the testator at the time of his death (*e*).

Effect of sec. 24 of Wills Act.

Merger of term.

If a testator, being possessed of a term of years, bequeaths his personal estate, and afterwards purchases the reversion, the term will merge, and therefore will not pass by the bequest (*f*), unless he keeps the term alive by having the reversion conveyed to a trustee (*g*).

Gift of settled property.

When a testator has a general power of appointment by will over funds in a settlement, a bequest of the funds is not necessarily adeemed by a change of investment under the powers of the settlement (*h*). But the question depends on the words of the appointment, and it seems that no distinction is drawn between general and special powers (*i*).

Where testator bequeaths his share or interest in an estate or fund.

Sometimes a testator makes a specific bequest of his share or interest in a trust fund, or in the estate of a deceased person, which has not been received by him at the date of the will. In such a case it seems clear that no sale or change of investment by the personal representatives or trustees who have control of the property will effect an ademption of the bequest, unless the testator so describes the property with reference to its condition at the date of the will that the words of the gift are inapplicable to the proceeds of sale or

(*c*) *Re Knight*, 34 Ch. D. 518.

(*d*) The effect of s. 23 of the Act is discussed in *Blake* v. *Blake*, 15 Ch. D. at p. 487.

(*e*) *Goodlad* v. *Burnett*, 1 K. & J. 341; *Everett* v. *Everett*, 7 Ch. D. 428, and other cases cited in Chap. XII. But a bequest in general terms may be so expressed as to shew that the testator had in his mind specific property belonging to him at the date of his will: this is the construction which most people would have put on the two bequests in *Drake* v. *Martin*, 23 Bea. 89: the construction which the M.R. put upon them does not seem to be in accordance with the authorities: see ante, p. 410.

(*f*) *Capel* v. *Girdler*, 9 Ves. 509. The actual decision seems to be erroneous, and to have proceeded on a misapprehension of *Whitchurch* v. *Whitchurch*, 2 P. W. 236; *Goodright* v. *Sales*, 2 Wils. 329, and similar cases. There is nothing in *Capel* v. *Girdler* to shew that the term was an attendant term.

(*g*) *Scott* v. *Fenhoullet*, 1 Br. C. C. 69. *Belaney* v. *Belaney*, L. R., 2 Ch. 138.

(*h*) *Re Johnstone's Settlement*, 14 Ch. D. 162; *Willett* v. *Finlay*, 29 L. R. Ir. 153, 497.

(*i*) *Re Dowsett*, [1901] 1 Ch. 398; *Beddington* v. *Baumann*, [1903] A. C. 13, affirming decision of C. A. in *Re Moses*, [1902] 1 Ch. 100.

CHAP. XXX.

new investment (*j*). But if the property is actually made over to the testator during his lifetime, the question is more difficult. If it were converted into money and mixed by him with his own property, the bequest would fail (*k*), but this result does not necessarily follow if the property is preserved by him in specie (*l*), or can otherwise be traced and distinguished from his other property. Thus in *Lee* v. *Lee* (*m*) a testator bequeathed the share to which he was or might become entitled in the personal estate of X. to A. and B. upon certain trusts for investment, &c.; after the date of the will, two separate sums of stock, representing his share in X.'s estate, were transferred to him; one of them he sold, but the other remained standing in his name until his death: it was held by Kindersley, V.-C., that the bequest of the latter sum was not adeemed. And the same principle applies if in such a case the stock is sold and the proceeds re-invested by the testator, provided the property can be followed and distinguished (*n*).

Where bequest is demonstrative.

In *Barker* v. *Rayner* (*o*) Lord Eldon said: "If there be a gift of a sum of money, and the testator points to a fund, not for the purpose of giving that fund, but for the purpose of shewing that the money to arise from that fund is to go to the legatee as money, the cases would authorise me to say that, the intention being to give the money, the legatee is not to lose the benefit intended for him, even if the money should not remain in that fund: and its ceasing to remain in that fund would not amount to an ademption." Such a bequest is in fact demonstrative, and takes effect whether the investment is in existence at the testator's death or not. The decision in *Le Grice* v. *Finch* (*p*) seems to have been a mistaken application of this principle. There the bequest was of a sum of "500*l.* now out upon mortgage"; it was called in by the testatrix, part applied by her to her own purposes, and the remainder invested in stock; Sir W. Grant, M.R., said: "The thing given is not the mortgage, but the money," and he decreed payment: in other words, he held that the legacy was demonstrative. The

(*j*) As in *Re Dowsett*, [1901] 1 Ch. 398: approved in *Beddington* v. *Baumann*, [1903] A. C. 13.

(*k*) *Jones* v. *Southall*, 32 Bea. 31; *Manton* v. *Tabois*, 30 Ch. D. 92.

(*l*) As in *Dingwell* v. *Askew*, 1 Cox. 427; *Clough* v. *Clough*, 3 My. & K. 296.

(*m*) 27 L. J. Ch. 824.

(*n*) *Power* v. *Moore*, 29 Bea. 496; *Margan* v. *Thomas*, 6 Ch. D. 176; *Re Kenyon's Estate*, 56 L. T. 626; *Re Vickers*, 81 L. T. 719 (deposit in a bank); *Toole* v. *Hamilton*, [1901] 1 Ir. 383 (similar case); *Longfield* v. *Bantry*, 15 L. R. Ir. 101. The case of *Clark* v. *Browne* (2 Sm. & G. 524) may possibly be supported on this principle, but the reasons given by V.-C. Stuart for his decision are unsatisfactory. The decision was criticised by Jessel, M.R., in *Harrison* v. *Jackson*, 7 Ch. D. 339, and by Bacon, V.-C., in *Manton* v. *Tabois*, 30 Ch. D. 92.

(*o*) 2 Russ. 122.

(*p*) 3 Mer. 50, commented on in *Sidebotham* v. *Watson*, 11 Ha. 170.

decision is therefore not open to the criticism which Jessel, M.R., made on it in *Harrison* v. *Jackson* (*q*), for Sir W. Grant did not hold that the property which represented the 500*l.* at the death of the testatrix passed to the legatees: he held that they were entitled to the 500*l.* Nevertheless, the decision cannot now be looked upon as good law, for the bequest was specific (*r*); a bequest of a mortgage debt is adeemed if the debt is paid off (*s*) and the legatee cannot follow the money (*t*).

The effect of sec. 24 of the Wills Act, on bequests of personalty.

The subject of a specific bequest may either be some particular thing, or it may consist of a number of things answering a certain description, so that the subject of the bequest may possibly fluctuate from time to time. The distinction between the two kinds of bequests has already been adverted to, but it is not always easy to determine from the words of the will which kind is intended to be given, and the Wills Act has made some alteration in the law in this respect. A consideration of sec. 24 of that act will make the difficulty manifest. The section enacts 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 appear in the will." The effect of this section on a devise of real estate has been already dealt with. Before the Wills Act, as regards general devises, the will spoke from the date of execution, but as regards general bequests from the date of the death. The effect of the act is not therefore in general to alter the law as regards general bequests, but it alters the law as regards an important class of specific bequests. The rule is thus stated by Jessel, M.R., in *Bothamley* v. *Sherson* (*u*): "No doubt one class of specific bequests is affected by the Act, namely, the class of specific bequests described as generic, that is, a specific bequest which points to a class of objects given by the testator, and which from the nature would not naturally be referable to the date of the instrument. A good illustration of this class of bequests is a gift 'of my household furniture.' There are very few persons not *in articulo mortis* who would not expect that some articles of household furniture would wear out, or be broken, or otherwise be parted with, and be replaced by other articles

Bothamley v. *Sherson.*

(*q*) 7 Ch. D. 339.

(*r*) It is submitted that *Selwood* v. *Mildmay*, 3 Ves. 306 (as to which see post, p. 1102), is open to the same objection: the decisions in that case and in *Le Grice* v. *Finch* appear, in fact, to have been due to a desire to avoid the operation of the doctrine of ademption, which, as Jessel, M.R., remarked in *Harrison* v. *Jackson*, often defeats the intention of testators.

(*s*) *Re Bridle*, 4 C. P. D. 336.

(*t*) *Sidebotham* v. *Watson*, 11 Ha. 170.

(*u*) L. R., 20 Eq. 304, at p. 312.

CHAP. XXX.

of a similar kind. It would not be natural to assume that a man giving that kind of legacy intended to restrict it to the property of that description which he had at the date of the will. It has been held in *Goodlad* v. *Burnett* (*v*) and in some other cases to which reference has been made, that in cases of that description the new law brings down the specific bequest to the date of the death; in other words, the new law makes a specific bequest of 'my furniture' to mean not 'the furniture which belongs to me at the time of making this my will,' but 'the furniture which shall belong to me at the time of my death.' Legacies expressed in both ways were specific before the Wills Act, and they equally remain specific now."

Description of chattels by reference to position.

The difference, however, which exists between moveable and immoveable property has given rise to a class of cases where the testator has defined the property by reference to its position in space. If the property is immoveable, this is clearly the most adequate definition, but with regard to moveable property many questions have arisen as to whether a removal was temporary or not, so that the reference to position in space does not always determine the matter. The cases on the subject are not altogether easy to understand, and it may assist the reader to make a general statement of the problems that arise. A testator may bequeath (1) the furniture in his house at A. at the date of his will, or (2) the furniture in his house at A. at the date of his death.

Gift of "furniture now in my house at A"

Consider now the first case; if he has furniture in his house at A., it is clearly marked out; the bequest may be adeemed by the furniture being destroyed or sold, but it is clear that subsequent removal cannot affect the gift (*w*). The subject of the gift is defined by its position in space at a given time; how, then, can its position in space at another time affect the matter? But what if he has no furniture in his house at A. at the date of the will? Primâ facie there is no legacy, but if the furniture had been removed for a temporary purpose and the testator was ignorant of or might reasonably have forgotten the fact, it would seem to be a case of falsa demonstratio. Thus a bequest of "all the furniture now in my study in my house at A." would clearly carry the study furniture, although on the actual day the will was made it had been removed into another room because the study was being cleaned (*x*).

(*v*) 1 K. & J. 341.

(*w*) *Cunningham* v. *Ross*, 2 Lee Eccl. R. 272, appears to be a case of this kind: post, p. 1100, n. (*f*).

(*x*) See *Norreys* v. *Franks*, Ir. R., 9 Eq. 18 (gift of contents of a box held to carry contents placed for safe custody in a safe).

Gift of "furniture in my house at A. at the date of my death"

Consider the second case. Obviously no case of ademption can arise, because the date of the death is the period when the gift is ascertained. If the testator has no longer his house at A., and consequently no furniture in it, there is nothing to fit the subject matter of the gift: the legacy fails, it is not adeemed (*y*). But again, the same question of falsa demonstratio arising from temporary removal may arise. Thus, if the day before the testator's death the house was burnt down, but the furniture saved and removed, the furniture would clearly pass (*z*), or if the testator intended to put the furniture in the house but was prevented by the tenant from doing so, the furniture will pass (*a*), but a picture purchased and not sent home will not pass (*b*). And jewels removed to a banker's for safe custody have been held to pass (*c*).

The topic thus stated does not appear to present any serious difficulty, and the rules seem to follow from well-ascertained principles of law applied to the particular properties of moveable chattels; but it must be admitted that the cases on the subject cause difficulties.

Difficulties of construction.

One difficulty lies in ascertaining to what chattels the description with reference to locality applies. Thus in *Domvile* v. *Taylor* (*d*) the testator gave to his wife "all my household furniture, plate . . . and other effects of the like nature, and all wines . . . and other consumable stores which shall at my decease be in or about my dwelling-house": it was held that the qualification as to locality only applied to the wines, &c. A somewhat similar case was *Norris* v. *Norris* (*e*), where the words "To my beloved wife I give all my interest in my house at Lavender Hill, the furniture, books, pictures, wines, &c.," were held to pass all the furniture, books, &c., which the testator had at the time of his death in another house to which he had removed from Lavender Hill: the description of the furniture, &c., was held to be used generally, and not with reference to any particular place or time.

Whether locality is essential.

Another difficulty is that the testator frequently leaves it in doubt

(*y*) *Shaftesbury* v. *Shaftesbury*, 2 Vern. 747; *Green* v. *Symonds*, 1 B. C. C. 129, n.; *Heseltine* v. *Heseltine*, 3 Mad. 276; *Spencer* v. *Spencer*, 21 Bea. 548, are cases of this nature. See also *Cunningham* v. *Ross*, 2 Lee Eccl. R. 272, post, p. 1100, n. (*f*).

(*z*) *Chapman* v. *Hart*, 1 Ves. sen. 271; *Land* v. *Devaynes*, post, p. 1100; *Norreys* v. *Franks*, Ir. R., 9 Eq. 18.

(*a*) *Rawlinson* v. *Rawlinson*, 3 Ch. D. 302. The decision seems correct on principle, although it is contrary to *Duke of Beaufort* v. *Dundonald*, 2 Vern. 739, and other old cases.

(*b*) *Brooke* v. *Warwick*, 2 De G. & S. 425.

(*c*) *Re Johnston*, 26 Ch. D. 538; *Norreys* v. *Franks*, supra. See *Wilkins* v. *Jodrell*, 11 W. R. 583.

(*d*) 32 Bea. 604. A different construction was arrived at in *Heseltine* v. *Heseltine*, 3 Madd. 276.

(*e*) 2 Coll. 719.

whether the place is an essential part of the description: in other words, whether he means the bequest to operate only on those chattels which at the date of his death are in the place referred to. If so, it is obvious that a permanent removal causes the gift to fail, wholly or in part. Thus, if a testator bequeaths the lease of his residence and the furniture in it to A., this may shew an intention that the furniture is to go with the house: and if before his death the lease expires, and he moves the furniture to another residence, the gift of the furniture fails (*f*).

Where locality is not constituting part of description.

On the other hand, the testator may use the reference to locality as a means of identifying certain chattels, and in that case it is not a continuing part of the description. Thus in *Blagrave* v. *Coore* (*g*) the testator directed his executors to sell the house, furniture, fixtures, &c., situate in G., and out of the proceeds to pay his debts, and bequeathed to his sisters all his furniture in England: after the date of the will the testator sold the house and part of the furniture in G., and removed the remainder to another house: it was held that it was included in the bequest to the executors and did not pass to the sisters.

Can removal ever cause ademption?

The proposition that a permanent removal of goods may cause an ademption is not only to be found in the arguments of counsel and in the works of learned writers, but is also supported by some judicial authority, and it is therefore not without great diffidence that it is suggested that removal can never be a cause of ademption strictly so called. The cases which are against this view will now be considered. In *Land* v. *Devaynes* (*h*) there was a bequest of all the testator's plate, linen and furniture in his house at Savile Street, together with the lease of the said house. At his death the plate

Land v. *Devaynes.*

(*f*) *Colleton* v. *Garth*, 6 Sim. 19. According to some of the old cases, the intention of the testator has nothing to do with the matter, the general rule being that where there is a gift of all goods in the house, that description relates to the death of the testator, and if they are removed they do not pass unless the removal is merely temporary: per Lord Hardwicke in *Chapman* v. *Hart*, 1 Ves. sen. 271. The case of *Green* v. *Symonds*, 1 Br. C. C. 129, n., was decided on this principle. In that case the testator gave to C. all his books at his chambers in the Temple; he there his death he removed the books into the country; it was held that this annulled the legacy, because a will of personalty shall only be construed from the death of the testator. Under s. 24 of this Act, a will is only construed from death of the testator where no contrary intention appears (see chap. 31): if [illegible] the testator had chambers in the Temple at the time of his death, it is clear that the bequest would convey intention within the meaning of s. 24. The case is similar to *Bingham* v. *Bingham*, 1 Lee Eccl. R. 477, 478, where the bequest was of "all goods lying in the chambers I possess at X.," and it was held that the bequest took effect notwithstanding the removal of the goods.

(*g*) 27 Bea. 178. Compare *Re Dennis*, 24 T. L. R. 499 motor car in Cornwall held to pass as "carriage in or belonging to" house in Denbigh.

(*h*) 4 Br. [illegible] 537.

was at B. It was argued by the Solicitor-General that any alteration of a specific legacy is an ademption. The Lord Chancellor, in his judgment, does not mention ademption, but said that "the testator had only one set of plate and linen. It is therefore like a general devise of all his plate and linen." That is, the Court decided that local position was not part of the description; and did not decide more than this. In *Moore* v. *Moore* (*i*) Lord Thurlow said that a removal of goods for a necessary purpose is not an ademption of a specific legacy. It would seem that he had in his mind the case where goods in a house at the testator's death were bequeathed, and also *Ashhamley* v. *Sherson* is an authority for saying that the doctrine of ademption is not applicable to such a case. In *Spencer* v. *Spencer* (*j*) the bequest was of household goods, &c., which at the time of the testator's death should be in the house he then occupied as a residence. The testator did not occupy a house in Buck Road at the time of his death. Sir John Romilly gave judgment as follows: "I am of opinion that this is a specific gift which has been adeemed by giving up the house and taking away property. If a testator gave all the property in a particular spot, by taking away the property the gift is adeemed. If taken away for temporary purposes, it would still be held to be given because intended to be returned. But here the taking away is permanent, and there is no description of the gift except as connected in the house. *Land* v. *Devaynes* does not apply. I must hold that the gift fails." It will be noticed that Sir J. Romilly says that the gift fails, though he begins by saying it is adeemed. As the bequest was a case of property defined at the date of the testator's death by reference and not ademption is the correct expression. The remaining case, and by far the most difficult of the cases is *Colleton* v. *Garth* (*k*). The testator bequeathed to his wife the lease of his house in Baker Street, and the household furniture, plate, pictures and certain other articles therein. The lease having expired in the testator's lifetime, part of the furniture was sold, and the remainder, together with the plate, pictures and other articles was removed to a house which the testator took in Edward Street. Sir L. Shadwell, V.-C., held that the testator made the bequest of the furniture, &c., with reference to giving the lease, and that he had in contemplation an enjoyment of the house with the furniture, &c., and consequently the bequest totally failed by the change of circumstances. He makes no reference to ademption, but Sir E. Sugden had mentioned it in argument, and the headnote

Moore v. *Moore*.

Spencer v. *Spencer*.

Colleton v. *Garth*.

(*i*) 1 B. C. C. 127.
(*j*) 21 Bea. 548.
(*k*) 6 Sim. 19.

CHAP. XXX.

says, "held that the legacy was adeemed." The decision proceeds upon a principle that the furniture went with the house, and that the bequest of the house having failed, that of the furniture did also. The limits of the principle applied in this case are not easy to ascertain, and it may be doubted whether at the present time the Court would be likely to extend it. A recent case in which ademption by removal is referred to is *Re Johnston* (*l*), where Chitty, J., in deciding that a box of jewellery deposited at the testator's banker's, passed under a bequest of "all the household furniture, paintings, pictures, books, china, and the whole contents of my said house," said: "No ademption by removal, it would seem, will take place when the goods are removed for their preservation," and he decided the case on the ground that the house was the usual locality. It may be that the theory of ademption by removal is by this time so completely established that it is idle to object to the use of the term, but it must be remembered that whereas the doctrine of ademption (in the case of specific legacies) in the usual sense only applies where at the date of the will the testator possessed the specific object, and at the date of his death did not, in the case of ademption by removal the object forms part of the testator's assets at the time of his death, but not necessarily (it would seem) at the date of his will. The inconvenience of the use of the word ademption to cover these different cases is not very great, but if the decision in *Re Johnston* is in fact an application of the rule falsa demonstratio non nocet, it seems more logical expressly to treat it as such (*m*).

Bequest of non-existent thing.

There is one very exceptional case in which a specific legacy does not fail on account of the non-existence of the subject matter. Where a testator gives a specific legacy and he is not entitled to the subject of the specific bequest, either at the date of his will or subsequently, it would naturally be supposed that the bequest would fail. But this is not always held to be so. In *Selwood* v. *Mildmay* (*n*) the testator gave to his wife 1250*l*., "part of my stock in the 4 per cent. annuities in the Bank of England." About four years before the date of his will he had sold out this stock and purchased (in several parcels) long annuities. Evidence was admitted to shew how the error in the will arose; namely, from the will having been partly copied from a previous will made before he sold the 4 per cent. annuities, and Lord Alvanley, M.R., said: "It

(*l*) 26 Ch. D. 538.
(*m*) See *Norreys* v. *Franks*, Ir. R., 9 Eq. 18.
(*n*) 3 Ves. 306

is clear the testator meant to give a legacy, but mistook the fund. He acted upon the idea that he had such stock. This distinction is, then: if he had had the stock at the time, it would have been considered specific, and that he meant that identical stock; and any act of his destroying that subject would be a proof of animus revocandi: but if it is a denomination, not the identical corpus in that case, if the thing itself cannot be found and there is a mistake as to the subject out of which it is to arise, that will be rectified. Mr. Cooke puts the case of a testator giving his black horse when he had only a white one: perhaps it would be said he mistook the colour: but suppose he had more white horses: I would rather put the case of a ring or a picture. The Court would not rectify that, if the subject could not be found, but here the Court will rectify it." From this it looks as if the M.R. has treated the question as one of falsa demonstratio, and in *Miller* v. *Travers* (*o*) the Court said, speaking of *Selwood* v. *Mildmay*: "This case is certainly a very strong one; but the decision appears to us to range itself under the head that '*falsa demonstratio non nocet*,' where enough appears upon the will itself to shew the intention, after the false description is rejected." The suggested distinction between stock and chattels (like a ring) appears to rest on the notion that a man would value a ring or a horse for its individual qualities or associations, and would therefore not be likely to make a mistake in describing it, while stock is a mere mode of investing money. But in *Selwood* v. *Mildmay* it would appear that the legatee did not take the long annuities in place of the 4 per cent. annuities, as would have been done if the case had been one of falsa demonstratio; the legacy was satisfied out of the personal estate: consequently the legacy was treated as demonstrative (*p*). Such a legacy would not be held to be demonstrative at the present day (*q*).

V.—Interest and Income.—(1) *Specific Legacies.*—A specific bequest, if vested in possession, and if the subject matter is income-bearing, entitles the legatee to the income from the testator's death (*r*), and also to all accretions which arise after the death (*s*).

Immediate specific legacy carries income.

(*o*) 1 Moo. & Scott, 342.

(*p*) This appears to have been the view taken by Lord Langdale in *Lindgren* v. *Lindgren*, 9 Bea. 358, ante, p. 504, n. (*w*). But see *Gordon* v. *Duff*, 3 D. F. & J. 662.

(*q*) See ante, p. 1078.

(*r*) *Barrington* v. *Tristram*, 6 Ves. 345. A direction to transfer a sum of stock to the legatee within a year from the testator's death does not exclude the rule: *Bristow* v. *Bristow*, 5 Bea. 289: even if the executors have an option of transferring one or other of two different stocks: *Chester* v. *Urwick*, 23 Bea. 402. As to appointments under powers, see *Re Marten*, [1901] 1 Ch. 370, cited in Chap. XXIII.

(*s*) *Jacques* v. *Chambers*, 2 Coll. 435.

CHAP. XXX.

In the case of shares and stocks, the legatee is entitled (subject to apportionment, if necessary) to dividends declared after the testator's death, although derived from profits made during his lifetime, and to all bonuses and other benefits arising after the testator's death, whether in the nature of capital or income, including bonuses having their origin in events which took place during the testator's lifetime (*t*). Income and bonuses ascertained and made payable, but not actually paid, during the testator's lifetime, belong to his estate, as capital (*u*). A similar principle seems to apply to private partnerships (*v*), except that profits derived from them are not liable to apportionment (*w*).

Apportionment.

Dividends and other periodical payments in the nature of income are apportionable under the Apportionment Act, 1870 (*x*). Consequently, if a testator bequeaths a specific sum of Consols to A., and dies between the dividend days, the dividend received after his death is apportioned between his estate and A. (*y*). But a testator may exclude the operation of the act: as if he bequeaths "all the dividends" or "the whole of the income" of certain shares to A. for life (*z*), or declares that the shares shall carry the dividend accruing thereon at his death (*a*).

Application of act.

The act does not apply to all kinds of income (*b*), and it has been suggested that it does not apply to a will made before the passing of the act (*c*), but on principle there seems to be no foundation for the suggestion (*d*). It clearly applies to a will republished by a codicil executed after the passing of the act (*e*). As regards the

(*t*) *Clive* v. *Clive*, Kay, 600; *Maclaren* v. *Stainton*, 3 D. F. & J. 202; *Bates* v. *Mackinley*, 31 Bea. 280; *Corron Company* v. *Hunter*, L. R., 1 Sc. & D. 362; *Re Hopkins' Trust*, L. R., 18 Eq. 696.

(*u*) *Shore* v. *Weekly*, 3 De G. & S. 467; *Clive* v. *Clive*, supra (as explained in *Wright* v. *Tuckett*, 1 J. & H. 266, and *Browne* v. *Collins*, infra); *Lock* v. *Venables*, 27 Bea. 598; *De Gendre* v. *Kent*, L. R., 4 Eq. 283.

(*v*) *Browne* v. *Collins*, L. R., 12 Eq. 586, where *Johnston* v. *Moore*, 27 L. J. Ch. 453; *Ibbetson* v. *Elam*, L. R., 1 Eq. 188, and *Re Barton's Trust*, L. R., 5 Eq. 238, are referred to.

(*w*) *Jones* v. *Ogle*, post, n. (*c*).

(*x*) A bonus paid by a trading company at irregular intervals out of revenue is within the act: *Re Griffith*, 12 Ch. D. 655. As to the capitalisation of profits, see *Bouch* v. *Sproule*, 12 App. Ca. 385, commented on in Chap. XXXIV.

(*y*) *Re Beaven*, 53 L. T. 245.

(*z*) *Jones* v. *Ogle*, L. R., 8 Ch. 192; *Re Meredith*, 67 L. J. Ch. 400.

(*a*) *Re Lysaght*, [1898] 1 Ch. 115.

(*b*) *Jones* v. *Ogle*, L. R., 8 Ch. 192 (partnership); *Re Cox's Trusts*, 9 Ch. D. 159 (newspaper).

(*c*) By counsel, arguendo, in *Hasluck* v. *Pedley*, L. R., 19 Eq. 271, citing *Jones* v. *Ogle*, supra. But in *Jones* v. *Ogle* the question did not arise, because the will contained an express gift of "dividends": the C. A. said that the act could not affect the construction of the will, which is obviously true.

(*d*) See the remarks of Jessel, M.R., in *Hasluck* v. *Pedley*, supra, and of Bowen, L.J., in *Constable* v. *Constable*, 32 Ch. D. 681, acted on by North, J., in *Re Bridger*, [1893] 1 Ch. 44, where *Re March*, 27 Ch. D. 166, is also referred to.

(*e*) *Constable* v. *Constable*, supra.

will of a testator who died before the passing of the act, some difficulty is caused by sec. 7, providing the act shall not apply if its application is expressly excluded, but it has been held that this does not prevent the act from applying to such a case (*f*). The question whether the regulations of a company against apportionment of dividends on its shares can operate as an "express stipulation that no apportionment shall take place" within the meaning of the act as between the beneficiaries under a will, was discussed but not decided in *Re Oppenheimer* (*g*). It would seem that such a stipulation, to be effective, must be contained in the will.

Arrears of interest.

A bequest of money secured by a particular bond or mortgage may be so worded to carry arrears of interest accrued during the testator's lifetime, but the authorities do not lay down any satisfactory principle (*h*).

Future specific legacy.

A specific bequest which is vested in interest, but the enjoyment of which is postponed, carries the interim income and accretions from the testator's death (*i*).

Contingent specific bequest does not carry income, unless segregated.

A specific bequest which is contingent (such as a bequest to an unborn person, or to a person in esse on the happening of a contingency) does not, as a general rule, carry the intermediate income, which falls into residue (*j*). But if the effect of the bequest is to separate the property from the general estate of the testator (as where leaseholds are bequeathed to trustees upon trust for A. for life, with remainder to his children who attain twenty-one, and A. dies leaving children who are all infants), then it carries the intermediate income from the death of the tenant for life, or if there is no preceding interest, from the testator's death (*k*). In *Harris* v. *Lloyd* (*l*) a testator directed a fund to be invested and held upon trust for the children of A., to be vested at twenty-one or marriage,

(*f*) *Lawrence* v. *Lawrence*, 26 Ch. D. 795 (where *Re Cline's Estate*, L. R., 18 Eq. 213, is referred to).

(*g*) [1907] 1 Ch. 399.

(*h*) *Roberts* v. *Kuffin*, 2 Atk. 112; *Hawley* v. *Cutts*, 2 Freem. 24; *Harcourt* v. *Morgan*, 2 Kee. 274.

(*i*) Per Jessel, M.R., in *Long* v. *Ocenden*, 16 Ch. D. 691; per Fry, J., in *Guthrie* v. *Walrond*, 22 Ch. D. 573.

(*j*) Per Lord Thurlow in *Wyndham* v. *Wyndham*, 3 Br. C. C. 58; *Holmes* v. *Prescott*, 33 L. J. Ch. 264; *Donohoe* v. *Mooney*, 27 L. R. Ir. 26. In *Wright* v. *Warren*, 4 De G. & S. 367, the bequest appears to have been vested. Compare the authorities on contingent pecuniary legacies, post, p. 1111.

(*k*) *Re Woodin*, [1895] 2 Ch. 309 (commenting on *Furneaux* v. *Rucker*, [1879] W. N. 135). This case is referred to in Chap. XLII, in connection with gifts to children as a class. Other cases are, *Boddy* v. *Dawes*, 1 Kee. 362, and *Re Clements*, [1894] 1 Ch. 665. The difference between these cases and the cases where a contingent pecuniary legacy is segregated, is that the latter only carries the income from a year after the testator's death: post, p. 1107.

Possibly a direct bequest of leaseholds without the intervention of trustees may be treated as a segregation: *Kiersey* v. *Flahavan*, [1905] 1 Ir. R. 45.

(*l*) T. & R. 310. The fund formed part of a mortgage debt, and therefore the bequest was specific: ante, p. 1082.

with provision for their maintenance; at the death of the testator, A. had no children: it was held that until the birth of a child the interest fell into residue. The decision seems contrary to the principle above stated.

Appointment. The question of interest on an appointed fund is considered elsewhere (*m*).

Where bequest adeemed. If a testator bequeaths property specifically to A., and afterwards enters into a contract of sale which is not completed until after his death, A. is entitled to the income until the sale is completed (*n*).

Rule in *Howe* v. *Earl of Dartmouth*. It is hardly necessary to say that the rule in *Howe* v. *Earl of Dartmouth* does not apply to specific bequests (*o*).

Revocation of probate: mesne income. In *Re West* (*oo*), specific shares were bequeathed to A. by will duly proved; the bequest was assented to by the executors and the shares transferred to A.; some years later a codicil was discovered revoking the bequest to A. and giving the shares to B.; the probate was revoked and a fresh probate, including the codicil, was granted to the same executors: it was held that B. was entitled to the mesne income of the shares.

Where time of payment is fixed by the testator. (2) *General and Demonstrative Legacies.*—The general rule is that interest on legacies runs from the time when they are payable (*p*). Consequently, legacies payable at a time fixed by the testator generally carry interest from that time (*q*). The time may depend on an uncertain event (*r*), or on an event which may or may not happen during the testator's lifetime. If the event happens during the testator's lifetime, it seems to be generally considered that interest runs from the testator's death (*s*).

(*m*) Chap. XXIII.

(*n*) *Watts* v. *Watts*, L. R., 17 Eq. 217. See *Townley* v. *Bedwell*, 14 Ves. 591.

(*o*) *Vincent* v. *Newcombe*, You. 599; *Cockran* v. *Cockran*, 14 Sim. 248; *Hubbard* v. *Young*, 10 Bea. 203.

(*oo*) [1909] 2 Ch. 180.

(*p*) Legacies in foreign currency do not carry the foreign rate of interest: *Bourke* v. *Ricketts*, 10 Ves. 330; *Hamilton* v. *Dallas*, 38 L. T. 215. As to interest in the case of legacies to infants, wives, &c., see post, p. 1113; and as to interest on a sum or fund appointed under a power, see Chap. XXIII. As to a sum forming part of a particular residue, see *Re White*, 101 L. T. 780.

(*q*) *Lloyd* v. *Williams*, 2 Atk. 108. In *Heath* v. *Perry*, 3 Atk. 101; *Crickett* v. *Dolby*, 3 Ves. 10, and *Tyrrell* v. *Tyrrell*, 4 Ves. 1, the legacies were payable on the legatees attaining twenty-one. So in *Chester* v. *Painter*, 2 P. W. 335, where the legatee died under twenty-one, it was held that his executors were not entitled to payment until the time when the legacy would have been payable if the legatee had lived. *Roden* v. *Smith*, Amb. 588, and *Maher* v. *Maher*, 1 L. R. Ir. 22, are to the same effect.

(*r*) *Holmes* v. *Crispe*, 18 L. J. Ch. 439; *Lord* v. *Lord*, L. R., 2 Ch. 782; *Gibbon* v. *Chaytor* (*Re Gyles*), [1907] 1 Ir. 65. In *Re White*, 101 L. T. 780, the testator gave his residue to A. for life, and after her death bequeathed out of it a legacy of £1000 to B.; A. died within a year after the testator: it was held that the interest on B.'s legacy ran from A.'s death, and not from the expiration of a year from the death of the testator.

(*s*) Post, p. 1110, where the accuracy of this view is questioned.

Rate.

The rate of interest payable on legacies, in the absence of an express direction by the testator, is 4 per cent. per annum (*t*).

Whether "per cent." implies "per annum."

A direction to pay interest on a legacy half-yearly obviously refers to the intervals at which the interest is to be paid, and has no reference to the rate. Nevertheless, in *Re Booker* (*u*), where the testator directed interest to be paid at the rate of 3 per cent. half-yearly, it was held that interest was payable at 6 per cent. per annum.

Where vested legacy payable in futuro is severed.

The general rule that a vested legacy, payable at a future time, only carries interest from that time, does not apply if the legacy is severed from the testator's estate: in such a case the legatee is entitled to the intermediate income from a year after the testator's death (*v*). The severance must be for some reason connected with the legacy itself, and not for mere reasons of administration (*w*). The rule also does not apply if the legacy is given to an infant, and the testator shews an intention that the legacy shall carry interest for maintenance (*ww*).

Security for legacy payable in futuro.

A person to whom a vested legacy, payable in futuro, is given, may require the executor to set aside a sufficient sum to meet it: and conversely it seems that the executor may, without the consent of the legatee, appropriate proper investments for that purpose, so as to free the residue (*x*).

Where no time fixed.

A general legacy out of personal estate, if no time for its payment is fixed by the will, is payable at the expiration of one year from the testator's death (*y*), and carries interest from that date (*z*). A legacy under the will of a married woman made in exercise of a power of appointment is in the same position (*a*).

(*t*) R. S. C. Order 55, r. 64. See *Re Davy*, [1908] 1 Ch. 61. As to legacies bequeathed by a person domiciled abroad, see *Hamilton* v. *Dallas*, 38 L. T. 215.

(*u*) 54 L. T. 239. "Per cent." is frequently used as an abbreviation of "per cent. per annum," even in acts of parliament and other public documents: see for example the National Debt Conversion Act, 1888, passim.

(*v*) *Dundas* v. *Wolfe Murray*, 1 H. & M. 425. In that case the fund carried interest from the testator's death, because in the special circumstances of the case it was severed immediately on that event. See *Boddy* v. *Dawes*, 1 Kee. 362, where the legacy was contingent.

(*w*) *Festing* v. *Allen*, 5 Hare, 573. See *Re Judkins's Trusts*, 25 Ch. D. 743, where the legacy was contingent, post, p. 1112.

(*ww*) *Leslie* v. *Leslie*, Ll. & Go. 1, citing *Pett* v. *Fellows*, 1 Sw. 561 n.; followed in *Re Churchill*, [1909] 2 Ch. 431.

(*x*) See *Re Hall*, [1903] 2 Ch. 226. As to contingent legacies, see post, p. 1111.

(*y*) *Benson* v. *Maude*, 6 Mad. 15. As to what amounts to a direction to pay legacies at a special time, see *Re Yates*, 96 L. T. 758; *Gibbon* v. *Chaytor*, [1907] 1 Ir. R. 65: *Re Whiteley*, 100 L. T. 920, 101 L. T. 508.

(*z*) *Maxwell* v. *Wettenhall*, 2 P. W. 26, and the cases there referred to; *Raven* v. *Waite*, 1 Sw. 553; *Freeman* v. *Simpson*, 6 Sim. 75.

(*a*) *Tatham* v. *Drummond*, 2 H. & M. 262. As to interest on appointed funds, see Chap. XXIII.

Demonstrative legacy.

In like manner a demonstrative legacy carries interest only from the expiration of the executor's year (*b*).

Rule stated by Sir W. Grant.

The general rule has thus been stated: "Wherever legacies are given out of personal estate, consisting of outstanding securities, those legacies cannot be actually paid until the money due upon such securities is actually got in; but by a rule that has been adopted for the sake of general convenience, this Court holds the personal estate to be reduced into possession within a year after the death of the testator. Upon that ground interest is payable upon legacies from that time, unless some other period is fixed by the will. Actual payment may in many instances be impracticable within that time: yet in legal contemplation the right to payment exists, and carries with it the right to interest until actual payment" (*c*).

Legacy to infant.

The most important exception to the general rule is where a testator gives a legacy to his infant child, without providing for its maintenance: in such a case interest, as a general rule, runs from the testator's death (*d*).

Where testator's property is reversionary,

The general rule is not affected by the circumstance that the testator's estate consists mainly of a reversionary interest which cannot be sold to advantage (*e*). But it is, of course, otherwise if

or legacy payable when specified property has been realised.

the legacy is made payable out of the moneys to arise from a reversionary interest (*f*), or if payment of the legacy is expressly deferred until certain property falls into possession or is realized (*g*), or until the testator's estate is sufficient to pay it (*h*).

Legacy vested subject to be divested.

The fact that a legacy is liable to be divested in a certain event (as where it is given to an infant, with a gift over in the event of his dying under twenty-one) does not prevent interest running from the expiration of a year from the testator's death (*i*).

Rule applies to legacy given for life.

"If an annuity is given, the first payment is paid at the end of a year from the death: but if a legacy is given for life, with remainder over, no interest is due till the end of two years. It is only interest

(*b*) *Mullins* v. *Smith*, 1 Dr. & Sm. at p. 210.

(*c*) Per Grant, M.R., in *Wood* v. *Penoyre*, 13 Ves. 325; *Re Yates*, 96 L. T. 758. See also *Kirkpatrick* v. *Bedford*, 4 A. C. at p. 100. The grounds for the actual decision in *Wood* v. *Penoyre* do not appear from the report. Possibly the report is erroneous.

(*d*) Post, p. 1114.

(*e*) *Re Blackford*, 27 Ch. D. 676.

(*f*) *Earle* v. *Bellingham*, 24 Bea. 448. So a legacy which is given by way of appointment under a power over a reversionary fund is not payable until the fund falls into possession: *Re Ludlam*, 63 L. T. 330. See Chap. XXIII.

(*g*) *Lord* v. *Lord*, L. R., 2 Ch. 782, where *Wood* v. *Penoyre*, supra, is distinguished.

(*h*) *Holmes* v. *Crispe*, 18 L. J. Ch 439.

(*i*) *Taylor* v. *Johnson*, 2 P. W. 504.

of the legacy; and till the legacy is payable, there is no fund to produce interest" (*j*).

Direction to pay as soon as possible.

A direction to pay a general legacy as soon as possible does not make it carry interest before a year has elapsed from the testator's death (*k*).

Legacies charged on land.

In the case of legacies charged upon land, where no day of payment is fixed, interest begins to run from the death of the testator (*l*). But where there is an immediate devise of land upon trust to sell, and out of the proceeds to pay legacies, interest does not commence to run until a year from the testator's death (*m*), unless the testator otherwise directs, and if legacies are merely charged upon land in aid of the personalty, they do not carry interest until a year after the testator's death (*o*).

Rule not affected by nature of testator's property.

At one time it was thought that if a legacy were given out of personal estate consisting of mortgages carrying interest or of stocks yielding profits half-yearly, the legacy carried interest from the death of the testator (*p*), but this is no longer the rule (*q*).

Rate of interest fixed by will.

If a testator directs that a legacy shall bear interest at a certain rate (say 4 per cent. per annum) until payment, the executors cannot free the residue by setting aside Consols to meet the legacy and thus avoid payment of interest at 4 per cent. If, however, the legacy is to an infant, they can pay the money into Court under the Trustee Act (*r*).

Legacy directed to be paid within the year.

A testator may expressly direct that a legacy be paid before the expiration of a year from his death, in which case it seems that interest is payable from the date fixed for payment. Thus if a testator gives a legacy to be paid three months after his death, it carries interest from the expiration of the three months (*s*). A

(*j*) Per Lord Eldon in *Gibson* v. *Bott*, 7 Ves. at p. 96; *Re Whittaker*, 21 Ch. D. 657.

(*k*) *Webster* v. *Hale*, 8 Ves. 410. See also *Benson* v. *Maude*, 6 Mad. 15.

(*l*) *Pearson* v. *Pearson*, 1 Sch. & Lef. 10; *Spurway* v. *Glynn*, 9 Ves. 483; *Shirt* v. *Westby*, 16 Ves. 393; *Maxwell* v. *Wettenhall*, 2 P. W. 26. In *Stonehouse* v. *Evelyn* (3 P. W. 252) a testatrix devised real estate upon trust to pay certain annuities, and after the death of the annuitants upon trust to sell and pay certain legacies out of the proceeds: it was held that the legacies carried interest from the death of the surviving annuitant. *Re Waters*, 42 Ch. D. 517.

(*m*) *Turner* v. *Buck*, L. R., 18 Eq. 301. But see the remarks of Kay, J., in *Re Waters*, supra.

(*o*) *Freeman* v. *Simpson*, 6 Sim. 75. In *Milltown* v. *Trench*, 4 Cl. & F. 276, the personalty was insufficient, and as the legacies were directed not to be raised out of the land until the death of the tenant for life, the interest was held to be payable out of the rents and profits in the meantime.

(*p*) *Maxwell* v. *Wettenhall*, 2 P. W. 26.

(*q*) *Gibson* v. *Bott*, 7 Ves. 89; *Pearson* v. *Pearson*, 1 Sch. & L. 10.

(*r*) *Re Salaman*, [1907] 2 Ch. 46.

(*s*) This is assumed in *Coventry* v. *Higgins*, 14 Sim. 30. A negative direction (as that no legacy shall be "legally payable" until six months after the testator's death) is not sufficient to alter the general rule: *Jauncey* v. *Att.-Gen.*, 3 Giff. 308, headnote.

CHAP. XXV.

legacy to children, with interest from the testator's death, does not, in the case of a child en ventre, carry interest before its birth (*t*).

Legacy payable on event which happens in testator's lifetime.

It sometimes happens that a legacy is made payable on an event which happens after the date of the will but during the testator's lifetime; for example, if a legacy is given to A. to be paid when he attains twenty-one, or a legacy is given to A. immediately upon the death of B., and A. attains twenty-one, or B. dies (as the case may be) in the testator's lifetime. It is obvious that in such a case the intention of the testator was to postpone payment of the legacy until the event happened, and not to expedite it, and that the result of the event happening in his lifetime is merely that the legacy becomes an immediate legacy, like any other legacy. In *Pickwick* v. *Gibbes* (*u*), where the legacy was payable on the death of a tenant for life, who predeceased the testator, Lord Langdale, M.R., thought the case doubtful, but he held the legatee to be entitled to interest from the testator's death, because the testator intended him to have maintenance from the death of the tenant for life. This is an intelligible reason. In *Coventry* v. *Higgins* (*v*), however, where the legacy was payable at twenty-one, Shadwell, V.-C., said that the effect of the legatee attaining twenty-one in the testator's lifetime, was that the legacy became payable on the testator's death, and carried interest from that time. If this reasoning is correct, the result may be curious; for instance, if a testator gives a legacy of 10,000*l.* to each of A. and B., and, A. being an infant at the date of the will, directs that A.'s legacy shall be paid when A. attains twenty-one, the result is that if A. attains twenty-one in the testator's lifetime he gets a year's interest (400*l.*) more than B. The same remarks apply to the case of a legatee attaining twenty-one (or the tenant for life dying) shortly after the testator's death. Here, again, there is on principle no reason why a deferred legacy should begin to carry interest before an ordinary immediate legacy.

Legacy to be paid within a certain period.

Sometimes a testator expressly directs a legacy to be paid within a certain period after his death exceeding a year; in such a case, if there is no reason why the legacy should not be paid at the expiration of a year from the testator's death, it carries interest from that time (*w*). But if it is impracticable to realise the assets within that time, it seems that the testator may be taken to have intended that the legacies should not carry interest until sufficient assets were got in. Thus in *Varley* v. *Winn* (*x*) there was a bequest

(*t*) *Rawlins* v. *Rawlins*, 2 Cox, 425.
(*u*) 1 Bea. 271.
(*v*) 14 Sim. 30.
(*w*) *Re Olive*, 53 L. J. Ch. 525.
(*x*) 2 K. & J. 700.

to the testator's daughters of 6000*l.* each, to be invested by the executors within seven years from the testator's death: Wood, V.-C., said: "The testator does not give interest if his estate will not allow his executors to invest these sums within seven years. It seems to be their duty to invest them within seven years if they can. The testator saw very possibly that there might be a difficulty in that; I do not conceive that they are bound. Of course they would not be bound to pay them if they had not the money, and there may be reversionary interests on other portions of the testator's property not bearing interest. The point must depend on whether or not the executors are in a condition to make an immediate payment; if they are, I think it ought to be done. The interest must be at 4*l.* per cent. from a year after the testator's death."

Power to postpone payment.

Where an executor has express power to postpone the payment of legacies for a certain period, this is primâ facie considered to be intended for the convenience and benefit of the estate, and not for the benefit of the residuary legatee; consequently the legacies, though not payable at the end of a year from the testator's death, carry interest from that period if the estate is then sufficient to pay them (*y*); but if the executor is residuary legatee, it may be that the power to postpone is intended for his benefit, and then the interest only runs from the expiration of the period given by the will (*z*). So where a legacy is given for a specific purpose, and directed to be paid as soon as required, without interest in the meantime: if delay in carrying the purpose into effect is caused by litigation, the legacy bears interest from the end of a year from the testator's death (*a*).

Legacy payable "when required."

(3) *Contingent Legacies.*—A contingent legacy does not in general carry interest while it is in suspense (*b*). Thus a legacy to an unborn child does not carry interest until his birth (*c*), and a legacy to a person on attaining twenty-one does not carry interest during his minority (*d*). This rule, however, is subject to an important exception (in the case of a legacy to the testator's child),

Interest on contingent legacies.

(*y*) Per *Wood*, V.-C., in *Varley* v. *Winn*, supra.

(*z*) *Thomas* v. *Att.-Gen.*, 2 Y. & C. Ex. 525.

(*a*) *Fisher* v. *Brierley*, 30 Bea. 268.

(*b*) *Wyndham* v. *Wyndham*, 3 Br. C. C. 58.

(*c*) *Rawlins* v. *Rawlins*, 2 Cox, 425. In *Harris* v. *Lloyd*, T. & R. 310, the bequest was specific: ante, p. 1105.

(*d*) *Re George*, 5 Ch. D. 837; *Re Dickson*, 29 Ch. D. 331; *Re Inman*, [1893] 3 Ch. 518. But interest may be expressly given for maintenance, in which case any unapplied balance of income will, in the event of the legatee dying under twenty-one, belong to his personal representative: *Harris* v. *Finch*, McClel. 141; the effect may be to make the legacy vested: *Re Peek's Trust*, L. R., 16 Eq. 221. But if a legacy, with interest, is given contingently on the legatee attaining twenty-one, no interest is payable until the legatee attains that age: *Knight* v. *Knight*, 2 S. & St. 490.

CHAP. XXX.

which is considered in a later part of this chapter (*e*). And, of course, an intention to give interest for maintenance during minority may be shewn in the case of a legacy to an infant who is not a child of the testator (*ee*).

Gift to a class.

The fact that the legacy is to be divided among a class of persons (such as the children of A.) who shall be living at a future time, or shall attain a certain age or the like, does not take it out of the general rule (*f*).

Severed legacy.

But if a legacy is severed from the testator's general estate (as by being directed to be invested and held in trust for the children of A. who attain twenty-one, and any of A.'s children are under age at the testator's death) then the legacy carries the intermediate income from one year after the testator's death (*g*). If the interests of the children are preceded by a life interest, the children are of course only entitled to the income from the death of the tenant for life (*h*). The severance must be for some reason connected with the legacy itself, and not for mere convenience of administration, or the like (*i*).

Contingent class.

The rules applicable to legacies to a contingent class of children are stated elsewhere (*j*).

Income of settled legacy.

Legacies are not subject to the rule in *Howe* v. *Earl of Dartmouth* (*k*). Consequently if trustees, in exercise of a power to that effect given to them, retain and appropriate speculative investments in satisfaction of a settled legacy, the tenant for life is entitled to the whole income (*l*).

Exceptions to general rules.

VI.—Special Classes of Legatees.—The properties of legacies do not merely depend on the nature of the subject of the gift, but also to some extent upon the legatee, and the general rules above stated are subject to certain exceptions depending on the character of the legatee. Bequests to charities are considered elsewhere (*m*), and need not be further mentioned here, but legacies to infants, to

(*e*) Post, p. 1113.

(*ee*) *Re Churchill's Estate*, [1909] 2 Ch. 431, following *Pett* v. *Fellows*, 1 Sw. 561 n.

(*f*) *Shawe* v. *Cunliffe*, 4 Br. C. C. 144. The decision in *Gotch* v. *Foster*, L. R., 5 Eq. 311, is referred to in Chap. XXXVII.

(*g*) *Re Medlock*, 55 L. J. Ch. 738; *Johnston* v. *O'Neill*, 3 L. R. Ir. 476; *Re Snaith*, [1894] W. N. 115, 42 W. R. 568 (the report of this case in 71 L. T. 318, says that interest was given from the testator's death, but this is obviously a mistake); *Re Couturier*, [1907] 1 Ch. 470. Compare the rule as to contingent specific bequests, ante, p. 1105.

(*h*) *Kidman* v. *Kidman*, 40 L. J. Ch. 359.

(*i*) *Festing* v. *Allen*, 5 Ha. 573; *Re Judkin's Trusts*, 25 Ch. D. 743; *Re Inman*, 1893, 3 Ch. 518. If the legacy is given for life, with remainder over, it is necessary to sever the legacy from the residue, for the sake of the tenant for life: *Kidman* v. *Kidman*, supra.

(*j*) Chap. XLII.

(*k*) As to which, see Chap. XXXIV.

(*l*) *Re Wilson*, [1907] 1 Ch. 394.

(*m*) Chap. IX.

wives, to executors, to debtors, to creditors, and to servants all present certain special features.

Infant's legacy may be paid into Court.

(1) *Legacies to Infants.*—Where a simple legacy is given to a person who is an infant at the testator's death, the executors can pay the money into Court under sec. 42 of the Trustee Act, 1893 (replacing sec. 32 of the Legacy Duty Act, 1796). The money is invested and the legatee is entitled to the income, and this takes the place of the interest, if any, directed to be paid by the will, although at a higher rate (*n*). The executors cannot free the residue by setting apart investments to meet the legacy (*o*).

Payment of legacy to infant or parent.

It seems that the Court has jurisdiction to allow a legacy given to an infant to be paid to its parent or guardian, on an undertaking that the money shall be applied for its benefit (*p*), but apparently this will only be done in the case of legacies of trifling amount. An executor must not do this (*q*), unless he is authorised by the will or by the Court. It sometimes happens that a testator directs a legacy to be paid to an infant, and that his or her receipt shall be a good discharge, and it is generally assumed that an executor would be justified in complying with such a direction (*r*), although the point does not seem to have been decided. It is clear that the Court can give effect to such a direction (*s*).

Interest by way of maintenance.

Where a testator leaves a legacy to his infant child, the legacy carries interest from the testator's death, unless maintenance is provided by the will in some other way. This is a very old rule. In *Hearle* v. *Greenbank* (*t*) Lord Hardwicke, C., said: "The general rule is where legacies are given, payable at a certain time, they carry no interest, for interest is for delay of payment, and consequently till the day of payment comes no interest is demandable. But I do admit at the same time, where a legacy is given by a father to a child, though the legacy is not payable but at a certain time, yet the Court allows interest. But in all these cases the ground the Court goes on is giving interest by way of maintenance." And in *Wynch* v. *Wynch* (*u*), Lord Kenyon, M.R., said: "It is very clear that when a father gives a legacy to a child, whether it be a vested legacy or not (*v*), it will carry interest from the death of the testator as a maintenance for the child; but this will only be where no other

(*n*) *Abraham* v. *Holderness*, 6 Jur. 290; *Re Salaman*, [1907] 2 Ch. 46.
(*o*) *Re Salaman*, supra; *Rimell* v. *Simpson*, 18 L. J. Ch. 55.
(*p*) *Walsh* v. *Walsh*, 1 Dr. 64.
(*q*) *Dagley* v. *Tolferry*, 1 P. W. 285.
(*r*) Key and Elphinstone, Conv. 9th Ed. vol. ii. 732.
(*s*) *Re Denekin*, 72 L. T. 220.
(*t*) 3 Atk. 695 at p. 716.
(*u*) 1 Cox, 433.
(*v*) See *Mills* v. *Roberts*, 1 R. & M. 555.

fund is provided for such maintenance; for it is equally clear that where other funds are provided for the maintenance, then if the legacy [illegible] payable at a future day it shall not carry interest till the day of payment comes, as in the case of a legacy to a perfect stranger" (*w*).

Testator in loco parentis. Natural child.

And the rule is the same where the testator has placed himself in loco parentis to the infant legatee (*x*); but a natural child is not entitled to interest from the death unless the testator has put himself in loco parentis (*y*), or unless he expressly directs that interest on the legacy shall be applied in the maintenance of the child (*z*).

Child en ventre.

Where a testator bequeaths a legacy to a child of his which is en ventre sa mère at the testator's death, the child is only entitled to interest from its birth (*a*). This would seem to follow from the fact that interest is given for maintenance.

Legacy to adult subject to obligation to maintain infants.

Where a testator bequeaths a legacy to an adult, subject to the obligation of maintaining the testator's children, or children towards whom he stands in loco parentis, it does not carry interest until after a year from the testator's death (*b*).

General rule that legacies given for maintenance carry interest from death.

If a legacy is bequeathed to an infant by a testator who is not its parent or in loco parentis to it, and the will expressly (*c*) or impliedly (*d*) shews an intention to provide for its maintenance, interest is allowed from the death of the testator, unless maintenance is available from some other source. In *Festing* v. *Allen* (*e*), Wigram V.-C., refused to infer such a general intention from an express trust for maintenance which failed. And if a legacy, with interest, is given contingently on the legatee attaining twenty-one, interest does not run until a year from the testator's death, and the legatee is not entitled to it unless he attains twenty-one (*f*).

Maintenance during part of minority.

The fact that the testator expressly provides for the maintenance of the infant legatee during a part of his minority does not necessarily exclude the general rule; and in such a case maintenance (*g*)

(*w*) See also *Heath* v. *Perry*, 3 Atk. 101; *In ledon* v. *Northcote*, 3 Atk. 430 (at p. 438); *Harvey* v. *Harvey*, 2 P. W. 21.

(*x*) *Wilson* v. *Maddison*, 2 Y. & C. C. C. 372; *Raven* v. *Waite*, 1 Sw. 553; *Acherley* v. *Wheeler* (or *Vernon*), 1 P. W. 783, may have been decided on this ground: see *Heath* v. *Perry*, 3 Atk. 102; *Cricket* v. *Dolby*, 3 Ves. 10.

(*y*) *Lowndes* v. *Lowndes*, 15 Ves. 301.

(*z*) *Newman* v. *Bateson*, 3 Sw. 689.

(*a*) *Rawlins* v. *Rawlins*, 2 Cox, 425.

(*b*) *Raven* v. *Waite*, 1 Sw. 553; *Re Crane*, [1908] 1 Ch. 379.

(*c*) As in *Re Richards*, L. R., 8 Eq. 119; *Chidgey* v. *Whitby*, 41 L. J. Ch. 699; *Beckford* v. *Tobin*, 1 Ves. sen. 308; *Newman* v. *Bateson*, 3 Sw. 689; *Dowling* v. *Tyrell*, 2 Russ. & My. 343; *Lowndes* v. *Lowndes*, 15 Ves. 301; *Pett* v. *Fellows*, 1 Sw. 561.

(*d*) *Lambert* v. *Parker*, Coop. t. Eldon, 143; *Leslie* v. *Leslie*, Ll. & G. t. Sugden, 1; *Pett* v. *Fellows*, 1 Sw. 561 n.; *Re Churchill*, [1909] 2 Ch. 431. The rule does not apply to a legacy to an adult: *Raven* v. *Waite*, 1 Sw. 553.

(*e*) 5 Hare, 573.

(*f*) *Knight* v. *Knight*, 2 S. & St. 490.

(*g*) *Chambers* v. *Goldwin*, 11 Ves. 1.

or interest by way of maintenance (*h*) may be allowed during the portion of the minority during which no express maintenance is given by the will.

Gift of residue. Accumulations of surplus income of contingent legacies.

The general principles above stated apply to a gift of residue (*i*).

If a vested legacy is given to an infant, payable on attaining twenty-one, with interest in the meantime, it is clear that any accumulations of interest, after allowing for maintenance, if necessary, belong to the infant, whether he attains twenty-one or not (*j*). But if the legacy is bequeathed to the infant contingently on his attaining twenty-one, under such circumstances that it carries interest for maintenance during minority, the infant does not acquire a vested interest in the income except so far as it is required for his maintenance; the surplus is an accretion to the capital, and the infant does not become entitled to it unless he attains twenty-one, and thus acquires an absolute vested interest. If he only acquires a life interest in the legacy on attaining twenty-one he does not become entitled to the accumulations of the surplus income; they are added to the capital of the legacy, and he is entitled to the resulting income (*k*).

Rate allowed.

The full rate of interest allowed for maintenance is 4 per cent., but this is only allowed when it is required. The Court may allow a fixed annual sum, not exceeding 4 per cent. If the testator directs the legacy to be invested and set apart, what is required for maintenance is taken out of the income and the surplus accumulated (*l*).

Where express provision for maintenance is made.

In *Hewitt* v. *Greenbank* (*m*) the testatrix made express provision out of her residuary estate for the maintenance of her infant daughter and bequeathed to her a legacy of 8000*l*., payable on her attaining twenty-one; it was held that she was not entitled to interest on the legacy. So if a testator bequeaths his residue to an infant child, and directs that out of the income a sum not exceeding 200*l*. shall be applied for maintenance, this excludes the general rule (*n*).

Effect of statutory power of maintenance.

If a testator bequeaths a legacy to his infant child, payable at twenty-one, and also bequeaths a share of residue to the child

(*h*) *Martin* v. *Martin*, L. R., 1 Eq. 369. The decision in *Kime* v. *Welfitt*, 3 Sim. 533, if it can be supported at all, turned on the special language of the will.

(*i*) *Mole* v. *Mole*, 1 Dick. 310; *May* v. *Potter*, 25 W. R. 507.

(*j*) See *Re Buckley's Trusts*, 22 Ch. D. 583.

(*k*) *Re Bowlby*, [1904] 2 Ch. 685. Disapproving *Re Scott*, [1902] 1 Ch. 918. See Chap. XXXIV, where the subject is considered more in detail.

(*l*) *Re Bowlby*, [1904] 2 Ch. at pp. 693, 707 et seq.

(*m*) Supra, p. 1113. *Wynch* v. *Wynch*, 1 Cox, 433; *Donovan* v. *Needham*, 9 Bea. 164; *Maher* v. *Maher*, 1 L. R. Ir. 22, and *Re George*, 5 Ch. D. 837, were similar cases.

(*n*) *May* v. *Potter*, 25 W. R. 507; *Re Rouse's Estate*, 9 Hare, 649.

CHAP. XXX.

contingently on its attaining twenty-one, and the will is made at such a date that it is subject to the provisions as to maintenance contained in Lord Cranworth's Act (*o*) or the Conveyancing Act, 1881, the question arises whether the power of maintenance out of the income of the share of residue conferred by the statute on the trustees of the will, excludes the general rule as to interest on the legacy; in other words, has the statutory provision for maintenance the same effect as an express provision? It is clear that the act was not intended to affect the construction of wills, because it applies to the wills of the testators who died before it came into operation (*p*), and it seems to follow that the question above stated should be answered in the negative. The question arose in *Re Moody* (*q*), and Kekewich, J., held that the infant legatees were entitled to interest on their legacies from the death of the testator, not on the ground above suggested, but on the ground that even if the will had contained an express power of maintenance out of the income of the infants' shares of residue, this would not have deprived them of the interest on their legacies (*r*).

Effect of advancement clause.

It was held in the same case that a discretionary power to expend part of the capital of the expectant share of a child for its advancement or betterment or benefit is not a provision for its maintenance within the meaning of the rule.

Several sources available for maintenance.

It sometimes happens that two or more sources of income are available for maintenance under the same will. In such a case, if it is for the benefit of the infant that maintenance should be provided out of the income of one fund in preference to the other, that course will be adopted (*s*).

Statutory power does not make contingent legacy bear interest.

The statutory power of maintenance conferred by Lord Cranworth's Act and the Conveyancing Act, 1881, has not altered the rule that a contingent legacy does not, in ordinary cases, carry interest (*t*).

Vested liable to be divested.

If a vested legacy is given to an infant, with a gift over in the event of his dying under twenty-one, the infant is entitled to interest unless and until the gift over takes effect (*u*). And

(*o*) 23 & 24 Vict. c. 145, s. 26.

(*p*) See *Re Dickson*, 29 Ch. D. 331.

(*q*) [1895] 1 Ch. 101.

(*r*) But is not an express power of maintenance equivalent for this purpose to a trust for maintenance? See the cases cited above, p. 1115.

(*s*) *Martin* v. *Martin*, L. R., 1 Eq. 369; *Re Wells*, 43 Ch. D. 281. In *Lucas* v. *King*, 11 W. R. 818, two funds were settled by the same settlor, one by deed and the other by will. Compare *Bruin* v. *Knott*, 1 Ph. 572, and other cases cited in Chap. XXIV. p. 928.

(*t*) *Re Cotton*, 1 Ch. D. 232; *Re George*, 5 Ch. D. 837; *Re Judkin's Trusts*, 25 Ch. D. 743; *Re Dickson*, 28 Ch. D. 291, 29 Ch. D. 331.

(*u*) *Barber* v. *Barber*, 3 My. & C. 688; *Mills* v. *Roberts*, 1 R. & My. 555. In *Taylor* v. *Johnson*, 2 P. W. 504, the interest did not run until a year from

the power of maintenance conferred by statute has not altered this rule (*v*).

When payment of deferred legacy accelerated.

If a legacy is given to A., to be paid at twenty-one, and the intermediate interest is not given, and A. dies before that period, his representatives must wait for the money until the time when A., if living, would have attained twenty-one (*w*): but if the legacy is given over to B. in the event of A. dying under age, B. will be entitled to call for it immediately upon the death of A. (*x*). And if the legacy is given to A. payable at twenty-one, with interest in the meantime, and A. dies under age, his executor can claim the legacy immediately (*y*).

Gift to a class of children, born and unborn.

The rules as to the destination of income where a legacy is given to a class of children, born and unborn, are stated elsewhere (*z*).

Legacy to testator's wife.

(2) *Legacies to Testator's Wife.*—There is a dictum of Lord Alvanley's in *Crickett* v. *Dolby* (*a*) to the effect that a legacy to a wife is within the same exception as a legacy to a child in the matter of interest, but in *Stent* v. *Robinson* (*b*), Sir W. Grant, M.R., said that there was no authority to support that dictum, and it is now clearly settled that a legacy to a wife (*c*), even if in lieu of dower and freebench (*d*) or of jointure (*e*), is in the same position as any other legacy.

A legacy given to a wife in satisfaction of dower is entitled to priority, and does not abate with other general legacies (*f*).

A legacy to the testator's wife for her immediate requirements, even though directed to be paid three months after the testator's death is not entitled to priority (*ff*).

the testator's death, he being apparently not in loco parentis.

(*v*) *Re Buckley's Trusts*, 22 Ch. D. 583. Compare the cases on life interests and contingent gifts, ante.

(*w*) *Chester* v. *Painter*, 2 P. W. 335; *Roden* v. *Smith*, Amb. 588; Roper on Legacies, 868.

(*x*) *Laundy* v. *Williams*, 2 P. W. 478. See *Maher* v. *Maher*, 1 L. R. Ir. 22, where maintenance was given out of the income of part of the estate, but no interest; and *Cusack* v. *Jellico*, 22 W. R. 344 (deed), where maintenance was given out of capital.

(*y*) Roper, 871, citing *Cloberry* v. *Lampen*, 2 Freem. 24; *Green* v. *Pigot*, 1 Br. C. C. 103; *Crickett* v. *Dolby*, 3 Ves. 13.

(*z*) Chap. XLIV.

(*a*) 3 Ves. 10.

(*b*) 12 Ves. 461.

(*c*) See *Lowndes* v. *Lowndes*, 15 Ves. 301; *Re Percy*, 34 Ch. D. 616; *Re Whittaker*, 21 Ch. D. 657.

(*d*) *Re Bignold*, 45 Ch. D. 496.

(*e*) *Elton* v. *Montague*, 1 L. J. Ch. (O. S.) 212.

(*f*) *Davenhill* v. *Fletcher*, Amb. 244; *Blower* v. *Morret*, 2 Ves. sen. 420; *Burridge* v. *Bradyl*, 1 P. Wms. 127; *Heath* v. *Dendy*, 1 Russ. 543; *Acey* v. *Simpson*, 5 B. 35; *Norcott* v. *Gordon*, 14 Sim. 258; *Stahlschmidt* v. *Lett*, 1 Sm. & Giff. 421; *In re Saunders-Davies*, 34 Ch. D. 482; *In re Greenwood*, [1892] 2 Ch. 295. And see *In re Wedmore*, [1907] 2 Ch. 277; and s. 12 of 3 & 4 Will. IV. c. 105.

(*ff*) *Re Schweder's Estate*, [1891] 3 Ch. 44; *Blower* v. *Morret*, 2 Ves. sen. 420; *Cazanove* v. *Cazanove*, 61 L. T. 115. *Re Hardy*, 17 Ch. D. 798 (a decision of Malins, V.-C.), is not followed.

Legacies to executors.

(3) *Legacies to Executors.*—Where a testator gives his residuary estate to persons whom he appoints executors, the question whether they take beneficially or as trustees for the next of kin is often a difficult one (*g*). Where the gift is a simple bequest, the presumption seems to be that the executors take beneficially. Thus in *Caruth* v. *Parker* (*h*) a testator gave to "my executors" a sum charged on land and a policy of insurance, and it was held that they took beneficially.

The question whether a legacy by a testator to his executor is given to him in that capacity or independently of his acting as executor, is discussed elsewhere (*i*).

A legacy to an executor as such does not, as a general rule, carry interest before he proves the will (*j*) or (to be quite accurate) before the time when he assumes the office and duties of an executor (*k*). From the fact that an infant cannot act as an executor, a legacy to an infant executor does not carry interest during his minority (*l*).

Legacies to executors for their trouble have no priority (*m*).

Legacies to creditors.

(4) *Legacies to Creditors.*—A legacy which operates as a satisfaction (as a legacy to a creditor in satisfaction of his debt) must in general take effect at the time of the testator's death (*n*), and therefore carries interest from the death. It will be remembered that contingent legacies and legacies to take place at a future day would not in general be considered to be in satisfaction of a debt (*o*).

Debts of another person.

A legacy in satisfaction of somebody else's debts does not carry interest until a year after the testator's death (*p*), unless the bequest is so worded as to comprise arrears of interest on the debts (*q*).

Where debt is barred

The doctrine that a legacy to a former creditor of the amount of a debt which has been barred by lapse of time or by the law of bankruptcy, is not subject to failure by lapse, has been already referred to (*r*). Such a legacy, it seems, is mere bounty in all other respects (*s*).

(*g*) See Chaps. XXI., XXII.

(*h*) 11 L. R. Ir. 18.

(*i*) Chap. XLI.

(*j*) *Angermann* v. *Ford*, 29 B. 349; *Hollingsworth* v. *Grascll*, 15 Sim. 52.

(*k*) *Lewis* v. *Mathews*, L. R., 8 Eq. 277. It seems that if a bequest to an executor is intended to be received by him immediately on the testator's death, he is entitled to it although he eventually refuses to act: *Humberston* v. *Humberston*, 1 P. W. 332 (bequest of mourning, &c.). In *Brydges* v. *Wotton*, 1 V. & B. 134, the legacy was to a trustee, not an executor.

(*l*) *Re Gardner*, 67 L. T. N. S. 552.

(*m*) *Duncan* v. *Watts*, 16 Bea. 204; *Heron* v. *Heron*, 2 Atk. 171; *Att.-Gen.* v. *Robins*, 2 P. Wm. 23.

(*n*) *Clark* v. *Sewell*, 3 Atk. 96.

(*o*) See Chap. XXXII., where the doctrine of satisfaction is considered.

(*p*) *Askew* v. *Thompson*, 4 K. & J. 620.

(*q*) *Aston* v. *Gregory*, 6 Ves. 151.

(*r*) Ante, Chap. XIII.

(*s*) *Turner* v. *Martin*, 7 D. M. & G. 429, citing *Coppin* v. *Coppin*, 2 P. W. 291; *Williamson* v. *Naylor*, 3 Y. & C. 208.

(5) *Legacies to Debtors.*—Sometimes a testator releases a person who is indebted to him by forgiving (or giving) him the debt. Such a bequest is liable to lapse (*t*). Legacy of a debt.

If the debt has been extinguished before the date of the will, a "forgiveness" of it may amount to a legacy of the same amount: as in *Findlater* v. *Lowe* (*u*), where the testatrix before the date of the will had accepted debenture stock and shares in satisfaction of a debt.

If a testator appoints his de' or to be his executor, this extinguishes the debt at law, and, although it does not extinguish the debt in equity (*v*), evidence is admissible to prove that the testator intended to forgive or release it (*w*). Appointment of debtor executor.

A debt may also be released by a verbal direction given by the testator to his residuary legatee (*x*). Verbal release.

In *Re Lucas* (*xx*) the testator directed his executors to forgive his tenant all rent owing at the time of his decease: it was held that the Apportionment Act, 1870, did not entitle the tenant to be forgiven any part of the rent since the last quarter day.

(6) *Legacies to Servants.*—A gift by a testator to his servants without more takes effect in favour of the servants at the date of the will (though they subsequently quit the testator's service) to the exclusion of those who subsequently enter his service (*y*), but a gift to servants w' shall have been in his employ for a certain time will include a servant who had left the testator's employment before the date of the will (*z*), and the testator may, of course, indicate that he means those in his service at the date of his death (*a*) or the date of his will and his death (*b*). Legacies to servants.

If the testator adds a condition, "who shall be in my service at my decease," such a condition must be strictly complied with.

(*t*) Ante, Chap. XIII.
(*u*) [1904] 1 Ir. R. 519.
(*v*) *Re Bourne*, [1906] 1 Ch. 697.
(*w*) *Strong* v. *Bird*, L. R., 18 Eq. 315.
(*x*) *Re Applebee*, [1891] 3 Ch. 422, and other cases cited at p. 912. The debt may be extinguished in other ways: *Re Price*, 11 Ch. D. 163. In *Eden* v. *Smyth*, 5 Ves. 341, accounts and other documents in the testator's handwriting were admitted as evidence that the debt had been released; but the practice is not a convenient one: *Chester* v. *Urwick* (No. 2), 23 Bea. 404. It would seem quite unnecessary to say that where a creditor bequeaths a legacy to his debtor, this, without more, is not primâ facie a release of the debt, were it not that in some of the older cases it seems to have been contended that a mere legacy might have this effect: see *Wilmot* v. *Woodhouse*, 4 Br. C. C. 227. See *Quin* v. *Seft*, 1 T. L. R. 49. But ambiguous words in a bequest of a legacy to a debtor may operate as a release of the debt, as in *Hyde* v. *Neale*, 15 Sim. 554. The subject is discussed in Roper on Leg. 1063, seq.
(*xx*) 55 L. J. Ch. 101.
(*y*) *Parker* v. *Marchant*, 1 Y. & C. C. C. 290.
(*z*) *Re Sharland*, [1896] 1 Ch. 517.
(*a*) *Re Marcus*, 56 L. J. Ch. 830.
(*b*) *Jones* v. *Henley*, 2 Ch. Rep. 162.

Previous dismissal, though wrongful, or even voluntary retirement intercepts the gift (*c*). But a temporary absence from actual service at the time of the testator's death will not deprive the servant of the benefit of the legacy (*d*). It has been held that under a gift to the testator's two servants living with him at his death, a third servant engaged after the date of the will was entitled (*e*). A legacy to servants applies to such only as spend their whole time in the testator's service, and not to one who is occasionally employed only, such as a steward of courts (*f*). But a farm bailiff is a servant within the meaning of such a gift (*g*). It has been held not to extend to a coachman supplied by a jobmaster, for he is not the testator's servant (*h*); or a boy occasionally employed to clean boots and knives (*i*). The expression "domestic servants" will not include outdoor servants not boarded by the testator, as gardeners, gamekeepers, stable servants (*j*).

Year's wages.

A legacy of a year's wages to servants implies that only those who are hired at yearly wages are to take (*k*); thus a domestic servant hired at 20*l*. a year, though paid monthly and dismissible at a month's notice, would be included, but a gardener hired at twenty shillings a week would not. But there is authority for limiting such a bequest to family servants usually hired by the year (*l*). In Ireland it has been held that under a bequest of one year's standing wages to servants, only those who are hired by the year can take (*m*). The earlier cases date from a time when yearly hirings of servants were common, and if they were strictly followed at the present day the testator's intention would be defeated. A construction based upon the fact that domestic servants were usually hired by the year should not be applied to a state of society where domestic servants are engaged by the month on the basis of an annual wage.

Double legacies.

VII.—Additional and Substituted Legacies.—It not infrequently occurs that more than one legacy is given to a legatee,

(*c*) *Darlow* v. *Edwards*, 1 H. & C. 547; *Re Serre's Estate*, 31 L. J. Ch. 519; *Re Hartley's Trusts*, 47 L. J. 610; *Re Benyon*, 51 L. T. 116.

(*d*) *Herbert* v. *Reid*, 16 Ves. 481.

(*e*) *Slecch* v. *Torrington*, 2 Ves. sen. 560.

(*f*) *Townshend* v. *Windham*, 2 Vern. 546.

(*g*) *Bulling* v. *Ellice*, 9 Jur. 936; *Armstrong* v. *Clavering*, 27 Bea. 226.

(*h*) *Chilcot* v. *Bromley*, 12 Ves. 114.

(*i*) *Thrupp* v. *Collett*, 26 Bea. 147.

(*j*) *Ogle* v. *Morgan*, 1 D. M. & G. 359; *Vaughan* v. *Booth*, 16 Jur. 808; *Howard* v. *Wilson*, 4 Hagg. 107; *Re Drax*, 57 L. T. 475; *Re Ogilby*, [1903] 1 Ir. R. 525.

(*k*) *Blackwell* v. *Pennant*, 9 Hare, 551; *Re Ravensworth*, [1905] 2 Ch. 1. In this case some of the judges intimated that in the absence of authority they might possibly have decided the case the other way.

(*l*) *Booth* v. *Dean*, 1 My. & K. 560, and the cases there referred to.

(*m*) *Breslin* v. *Waldron*, 4 Ir. Ch. 334.

either in the same or in different testamentary instruments. In such cases the question may arise whether the legacy last given is to be in addition to or in substitution for the previous legacies. The testator may indicate clearly his intention that the second legacy is additional or substitutional as the case may be. Thus (*n*) where the testator directed his trustees to convert his personal estate and to stand possessed of the proceeds upon certain trusts, among others on trust to pay 2000*l.* to each of his sons who should attain twenty-one, and upon further trust to set apart and pay over the sum of 2000*l.* to each of his sons on their respectively attaining twenty-one, the words "upon further trust" are sufficient to indicate that the second legacies were additional. A clear gift of an additional legacy will not be cut down by an ambiguous context, or for the reason that it appears to have been bequeathed under a misapprehension (*o*).

Hooley v. *Hatton.* Four cases of double legacies.

In the leading case of *Hooley* v. *Hatton* (*p*), Mr. Justice Ashton distinguished four cases of double legacies. First, where the same specific thing is given twice; secondly, where the like quantity is given twice; thirdly, where a less sum is given in a later instrument: as 100*l.* by will and 50*l.* by the codicil; fourthly, where a larger sum is given after a less. "The law seems to be, and the authorities only go to prove the legacy not to be double where it is given for the same cause in the same act and totidem verbis, or only with small difference; but where in different writings there is a bequest of equal, greater, or less sums, it is an augmentation."

Double gift of a specific object.

Evidently a gift of the same specific thing twice over to a legatee can only be one gift of that thing, and the second gift is mere repetition. Thus if a testator gives "my gold watch to A." and then in the same or another instrument gives "my gold watch to A.," and he has in fact only one gold watch, it is evident that the gift is merely repeated (*q*). Leaving this case aside, we have to consider the cases where the legacies are or are not given by the same instrument.

Whether testamentary writings form one instrument or not is decided by Court of Probate.

Whether different testamentary writings form one or several instruments is decided by the Court of Probate, and a Court of Construction is bound by the decision of the Court of Probate. Thus, where probate of a will and testamentary papers as containing together the testator's will was granted to his widow, Shadwell,

(*n*) *Burkinshaw* v. *Hodge*, 22 W. R. 484.

(*o*) *Re Segelcke*, [1906] 2 Ch. 301; *Gordon* v. *Hoffmann*, 7 Sim. 29; *Mann* v. *Fuller*, Kay, 624.

(*p*) 1 Br. C. C. C. 390, n.; White & Tudor, Vol. i. p. 865.

(*q*) See *Duke of St. Albans* v. *Beauclerk*, 2 Atk. 636.

CHAP. XXX.

V.-C., said that as all the papers had been proved as one instrument, they must all be construed together (*r*). And conversely, if probate is granted of a will and codicil, this shews that the writings are distinct instruments (*s*).

Legacies given by the same instrument.

We will first consider the case where legacies are given by the same instrument. In this case the rule (subject to any indications of a contrary intention) is that if the legacies are of the same amount, one only is good, but if of different amounts they are cumulative. The rule has no application to the case of a residue given to a person to whom previously a specific or pecuniary gift has been made. This seems obvious, but the point has been suggested in argument; Lord Cairns's dictum in *Kirkpatrick* v. *Bedford* (*t*) (where the point was raised) is conclusive: "No case could be cited, no case has ever occurred, where anyone ever thought of arguing that the cases about double gifts had any application to a case which, *ex specie*, is entirely distinguishable and different from them, the case of a gift of residue following a specific gift" (*u*).

Legacies of the same amount.

With regard to legacies of the same amount given by the same instrument, slight differences in the way in which the gifts are conferred—as for instance, that they may be payable at different times—are not sufficient to rebut the presumption afforded by the rule (*v*). The rule appears to be the same where the first gift is to a named person, and the second to a person coming within a given class. Thus in *Early* v. *Benbow* (*w*) the testator by a codicil gave legacies of 500*l.* each to A., B., C. and D., who were (as appeared from other parts of the will and codicil) grandchildren of his brother Henry. He added: "I direct my executors to pay out of my personal estate the sum of 500*l.* apiece to each child that may be born to either of the children of either of my brothers lawfully begotten to be paid to them on his or her attaining the age of twenty-one." A., B., C. and D. were held not to be entitled to double legacies (*x*).

(*r*) *Brine* v. *Ferrier*, 7 Sim. 549; *Heming* v. *Clutterbuck*, 1 Bligh. (N. S.) at p. 490; *Fraser* v. *Byng*, 1 R. & M. 9 (which has a valuable note).

(*s*) *Baillie* v. *Butterfield*, 1 Cox, 392; *Campbell* v. *Lord Radnor*, 1 Bro. C. C. 271; and see *Walsh* v. *Gladstone*, 1 Ph. 294; *Martin* v. *Drinkwater*, 2 Bea. 215.

(*t*) 4 App. Cas. 96.

(*u*) *Gordon* v. *Anderson*, 4 Jur. N. S. 1097 (a legacy in a second codicil followed a gift of residue in the first codicil).

(*v*) *Manning* v. *Thesiger*, 3 M. & K. 29; *Brine* v. *Ferrier*, 7 Sim. 549; *Garth* v. *Meyrick*, 1 Br. C. C. 30; *Greenwood* v. *Greenwood*, 1 Br. C. C. 31, n.

(*w*) 2 Coll. 342. But see *Re Dyke*, 44 L. T. 568, where two legacies of 4000*l.* each were held to be cumulative, although the beneficiaries were the same.

(*x*) See also *Early* v. *Middleton*, 14 Bea. 453, a case on the same codicil.

Annuities are in the same position as legacies. The contrary was considered barely arguable in *Holford* v. *Wood* (*y*). Annuities are within the rule.

The other part of the rule, that if the legacies given by the same instrument are of unequal amount (whether the latter is greater or less than the former), they are cumulative, is also clearly established by authority. Legacies of different amounts.

Where the second legacy is the greater the rule, as laid down in *Hooley* v. *Hatton* (quoted above), is that the legacies are cumulative, and this was followed in *Curry* v. *Pile* (*z*). The same rule applies to annuities (*a*). The rule yields to indications of the testator's intention. Thus in *Yockney* v. *Hansard* (*b*), Wigram, V.-C., said: "In this case I assume for the purpose of the argument that the rule of law, where there are two distinct gifts of different amounts given by the same instrument, with nothing more to explain them, is in favour of both gifts taking effect. The only doubt I have had in this case is, whether there are in fact two distinct gifts, or whether the second does not, in point of grammatical construction, include the first; in other words, whether this part of the will is not a statement of the amount of the income to be derived from a specific fund, which the testator's daughters are to have at different times and under different circumstances" (*c*).

Where the legacies are given by different instruments they are primâ facie cumulative. The rule was thus stated by Sir J. Leach in *Hurst* v. *Beach* (*d*): "I think the true result of the decisions is to be stated thus: where a testator leaves two testamentary instruments and in both has given a legacy simpliciter to the same person, the Court, considering that he who has twice given must primâ facie intended to mean two gifts, awards to the legatee both gifts, and it is indifferent whether the second legacy is of the Legacies given by different instruments are primâ facie cumulative. *Hurst* v. *Beach*.

(*y*) 4 Ves. 76. See also the cases last referred to, and the cases cited in Chap. XXXI.

(*z*) 2 Br. C. C. 225.

(*a*) *Hartley* v. *Ostler*, 22 Bea. 449.

(*b*) 3 Hare, 620.

(*c*) At p. 622.

(*d*) 5 Madd. at p. 358. See also *Hooley* v. *Hatton*, supra; *Wallop* v. *Hewett*, 2 Ch. Rep. 70; *Newport* v. *Kynaston*, Rep. t. Finch. 294; *Baillie* v. *Butterfield*, 1 Cox, 392; *Forbes* v. *Lawrence*, 1 Coll. 495; *Radburn* v. *Jervis*, 3 Bea. 450 (annuities); *Lee* v. *Pain*, 4 Ha. 201; *Roch* v. *Callen*, 6 Ha. 531; *Pit* v. *Pidgeon*, 1 Ch. Ca. 301; *Mackenzie* v. *Mackenzie*, 2 Russ. 262; *Guy* v. *Sharp*, 1 My. & K. 589; *Townshend* v. *Mostyn*, 26 Bea. 72; *Wilson* v. *O'Leary*, L. R., 12 Eq. 525, 7 Ch. 448; *Walsh* v. *Walsh*, Ir. R., 4 Eq. 396; *Suisse* v. *Lowther*, 2 Ha. 424; *Hertford* v. *Lowther*, 7 Bea. 107; *Lyon* v. *Colville*, 1 Coll. 449; *Brennan* v. *Moran*, 6 Ir. Ch. R. 26; *Cresswell* v. *Cresswell*, L. R., 6 Eq. 69; *Re Armstrong*, 31 L. R. Ir. 154; *Wray* v. *Field*, 2 Russ. 257, 6 Madd. 300; *Hodges* v. *Peacock*, 3 Ves. 735; *Strong* v. *Ingram*, 6 Sim. 197; *Watson* v. *Reed*, 5 Sim. 431; *Spire* v. *Smith*, 1 Bea. 419; *Leager* v. *Hooker*, 18 Jur. 481.

CHAP. XXX.

same amount, or less or larger than the first; but if in such two instruments the legacies are not given simpliciter, but the motive of the gift is expressed, and in both instruments the same motive is expressed, and the same sum is given, the Court considers these two coincidences as raising a presumption that the testator did not, by the second instrument, mean a second gift; but meant only a repetition of the former gift. The Court raises this presumption only when the double coincidence occurs of the same motive, and the same sum, in both instruments. It will not raise it if in either instrument there be no motive or a different motive expressed, although the sums may be the same; nor will it raise it if the same motive be expressed in both instruments and the sums be different." And in *Russell* v. *Dickson* (*e*) Lord Cranworth, L.C., laid it down as a general principle "that where a legacy is given to the same party in each of two different instruments, a will and codicil, or two codicils, primâ facie you must treat them as two gifts. That is an obvious proposition. If the party has twice said he gives, he must be understood to mean to give twice; but of course there may be circumstances to shew that the primâ facie construction is not, in the particular case, the construction to be adopted." In that case the presumption was rebutted by the fact that the testator stated in his last codicil that he had not time to alter his will (*f*).

Exception where the same motive for the gift is expressed.

From *Hurst* v. *Beach* it appears that there is an exception to the general rule, namely, where the same gift is given and for the same expressed motive. *Benyon* v. *Benyon* (*g*) is frequently referred to as an illustration of this exception, but in that case (where provision was made for the testator's natural son and his maintenance during minority) the main grounds of the decision seem to have been, first, that as the second codicil made some alteration in the provision for maintenance, the testator thought it necessary to repeat the bequest of capital contained in the previous codicil (*h*), and, secondly, the improbability of the testator creating two separate trusts of two sums of the same amount for the benefit of the same person. Grant, M.R., said with reference to the second legacy, that there was no probability that at so early a period of his (the son's) life, he was intended to have so very considerable an addition to his portion. And he regarded it as not settled whether the mere circumstance of the legacies being of the same amount did not

(*e*) 4 H. L. C. 293.

(*f*) See also *Osborne* v. *Duke of Leeds*, 5 Ves. 369.

(*g*) 17 Ves. 31.

(*h*) The decision in *Hinchcliffe* v. *Hinchcliffe*, 2 Dr. & S. 96 (weekly sums payable to testator's sons), seems to rest on this principle.

raise a presumption against their duplication. But the rule seems now to be clearly established in the terms stated in *Hurst* v. *Beach* (*i*). Thus in *Suisse* v. *Lowther* (*j*), Wigram, V.-C., said: "It is clearly decided, however, that the mere fact that the amount is the same is not such an identification of the second with the first as would prevent both from taking effect as cumulative; but if in addition to the amounts being the same the testator connects a motive with both, and the express motive is also the same, the double coincidence induces the Court to believe that repetition and not accumulation was intended."

Different amounts.

If the amounts of the legacies are different, though the motive be the same, they are primâ facie cumulative (*k*).

Difficulty in saying what is the motive of a legacy.

The mere fact that the legatee is in each case described as "my servant" is not expressive of motive; the words are words of description only (*l*). It is, indeed, not easy to see what is the true meaning of the rule as to motive. Thus in *Wilson* v. *O'Leary* (*m*), Sir W. M. James, referring to some legacies to servants, said: "It is contended on one side that they come within the general rule that gifts of the same sum to the same person for the same cause are to be construed as substitutionary and not accumulative, and on the other side that they are an exception from that rule. I do not know exactly what is meant by the expression 'the same cause,' as used in the rule. When a man leaves a legacy to a child it is because he is a child; if he leaves a legacy to a friend it is because he is a friend that he gives it. Perhaps the same might be said of every case of testamentary bounty, except the giving a certain sum to an executor for his trouble as executor" (*n*).

Indications of the testator's intention.

There are no limitations to the way in which the testator may shew his intention that the legacies are to be substitutional, and slight indications are often taken hold of to shew an intention against double legacies (*o*). Thus if each bequest is of 1000*l.* and a particular picture (*p*), or if the original bequest is imperfectly

(*i*) See *Ridges* v. *Morrison*, 1 Br. C. C. 389; *Moggridge* v. *Thackwell*, 3 Br. C. C. 517; *Fraser* v. *Byng*, 1 R. & M. 90.

(*j*) 2 Ha. 424, at p. 432.

(*k*) *Hurst* v. *Beach*, 5 Madd. 351.

(*l*) *Rock* v. *Callen*, 6 Ha. 531.

(*m*) 7 Ch. 448.

(*n*) See the curious case of *Re Armstrong*, 31 L. R. Ir. 154, where the testatrix made two codicils, in each of which she gave B. 500*l.* in substitution for a legacy of 1000*l.* bequeathed by the will: it was held that the two legacies of 500*l.* were not cumulative.

(*o*) *Robley* v. *Robley*, 2 Bea. 95, was a case where the presumption in favour of legacies being cumulative was rebutted by words shewing that the testator intended to make a similar provision for all his daughters. See *Mayor of London* v. *Russell*, Finch, 290 (see 6 Ir. Ch. 131). In *Allen* v. *Callow*, 3 Ves. 289, circumstances had changed since the date of the will. In *Watson* v. *Reed*, 5 Sim. 431, and *Saurey* v. *Rumney*, 5 De G. & S. 698, the legacies were held to be cumulative notwithstanding indications of a contrary intention.

(*p*) *Currie* v. *Pye*, 17 Ves. 462; *Roxburgh* v. *Fuller*, post.

One instrument held to be in substitution for another.

expressed and the second bequest appears to be explanatory (*q*), the second bequest will be taken to be substitutional. There are also several cases in which the whole of a later codicil has been held to be merely in substitution for a former codicil (*r*), even if there are differences between the manner in which the original and the substitutional legacies are given (*s*). As a general rule a difference in the manner in which two legacies are given indicates an intention that they are to be cumulative (*t*). But the distinction between legacies being substitutional and codicils being substitutional is not always very clearly observed. Thus in *Roxburgh* v. *Fuller* (*u*), the Master of the Rolls said that the question was similar to that decided in *Tuckey* v. *Henderson* (*v*)—not whether one *legacy* was substitutional for another, but whether the later *codicils* were substitutional for the earlier ones. In this case all the codicils referred to the will, but the later codicils did not allude to the earlier ones; the repeated gifts of horses, furniture, &c., could not be cumulative, and it was clear that the testator thought he had made only one codicil to his will: it was held that the dispositions made by the third codicil were substitutional, and that the legacies given by it only were payable. On the whole, however, the tendency of judicial opinion is to act on the general rule that gifts by different instruments are primâ facie cumulative, and to discourage attempts to fritter it away by a mere balance of probabilities (*w*).

Evidence of intention.

In *Hubbard* v. *Alexander* (*x*), Bacon, V.-C., admitted evidence to shew that two codicils of different dates, attested by different witnesses, were not intended by the testator to be two distinct instruments, but one. The decision, however, seems contrary to principle (*y*).

Probate.

In strictness, an instrument for which another has been substituted should not be admitted to probate. Thus in the case of *Chichester* v. *Quatre ages* (*z*), Jenne, P., held that a second codicil

(*q*) *Moggridge* v. *Thackwell*, 3 Br. C. C. 517; *Fraser* v. *Byng*, 1 R. & M. 90. Possibly this may be the reason why the testator in *Whyte* v. *Whyte*, L. R., 17 Eq. 50, executed two codicils.

(*r*) *Campbell* v. *Radnor*, 1 Br. C. C. 271; *Barclay* v. *Wainwright*, 3 Ves. 462; *Coole* v. *Boyd*, 2 Br. C. C. 521; *Tuckey* v. *Henderson*, 33 Bea. 174.

(*s*) *Att.-Gen.* v. *Hurley*, 4 Madd. 263 In *Gillespie* v. *Alexander*, 2 Sim. & St. 145, and *Hemming* v. *Gurrey*, 2 Sim. & St. 311, the substitution was only partial.

(*t*) *Hodges* v. *Peacock*, 3 Ves. 735; *Lee* v. *Pain*, 4 Ha. 201.

(*u*) 13 W. R. 39. Compare *Duke of St. Albans* v. *Beauclerk*, 2 Atk. 636, and the comments on that case in *Lee* v. *Pain*, 4 Ha. 201, and *Wilson* v. *O'Leary*, L. R., 7 Ch. 448.

(*v*) 33 Bea. 171.

(*w*) *Wilson* v. *O'Leary*, L. R., 7 Ch. 448.

(*x*) 3 Ch. D. 738.

(*y*) See Chap. XV.

(*z*) [1895] P. 186.

was in substitution for the first, and refused to admit the first to probate. The result of holding the legacies substitutional when the two codicils are identical is no doubt the same as holding the codicils substitutional. Thus in *Whyte* v. *Whyte* (*a*), a testator gave two legacies of 5000*l*., to the same person by two codicils executed at the same time and in nearly the same words, neither codicil comprising any other legacy, and it was held that the legacies were substitutional. Of course, the result is the same as holding that the codicils were substitutional, but it is suggested that the form of the decision is the right one, and that in *Hubbard* v. *Alexander*, Bacon, V.-C., wrongly assumed the jurisdiction of the Court of Probate in holding that two instruments were one when they had been proved as two. In *Jackson* v. *Jackson* (*b*), where two instruments had been proved in the Ecclesiastical Court, Mr. Justice Buller found from the whole of the second instrument an intention to make a new and distinct will in substitution for the earlier instrument, but the learned judge held the legacies (and not the instrument) to be substitutional. The fact that an instrument is described as a last will affords a presumption that so far as it goes it is intended to be substitutional (*c*). If the testator intends completely to revoke one instrument by a second, the former should not be admitted to probate; if he only intends to revoke it partially, the Court admits both to probate, and then it is a question of construction how far the revocation extends. This perhaps explains the language in the cases. And sometimes it is not easy to distinguish between questions of revocation and of substitution, for every substituted gift is a revocation of the former gift.

Substitution and revocation.

The fact that some legacies given by a later instrument are expressly stated to be additional to those given by an earlier instrument is not, of itself, sufficient to shew that others, given simpliciter, are intended to be substitutional (*d*). Nor does the fact that some legacies given by a later instrument are expressly stated to be substitutional shew that other legacies given simpliciter are also intended to be substitutional (*e*).

Inference from express statement as to other legacies.

The question whether extrinsic evidence is admissible to prove that two legacies are or are not intended to be cumulative, is discussed elsewhere (*f*).

(*a*) L. R., 17 Eq. 50.
(*b*) 2 Cox, 35.
(*c*) *Jackson* v. *Jackson*, supra; *Kidd* v. *North*, 2 Ph. 91; *Tuckey* v. *Henderson*, 33 Bea. 174; *In bonis Bryan*, [1907] P. 125.
(*d*) *Lee* v. *Pain*, 4 Ha. 201.
(*e*) *Re Armstrong*, 31 L. R. Ir. 154.
(*f*) Chap. XV.

CHAP. XXX.

Whether legacies by codicil are on the same terms as those given by will.

It is often a question whether a legacy bequeathed by a codicil is payable out of the same fund, or is subject to the same restrictions, as a legacy bequeathed to the same person by the will. If the second legacy is expressly given on the same conditions, &c., of course the affirmative does not admit of doubt (*h*); and the same construction prevails where the legacy by codicil is expressed to be in addition to (*i*), or in substitution for (*j*), the legacy given by the will. But it seems that where a legacy is given to A. for life, with remainder over, another legacy given to A. in addition to the legacy before mentioned, will be construed an absolute gift to him; and it is only where the original legacy is absolute or defeasible on certain terms in the party to whom the additional legacy is given, that the second gift is held to be on similar terms. In no case has it been held that the latter gift is to go to parties entitled under the subsequent limitations of the former gift (*k*). So if the original legacy is revoked, and "in lieu thereof" the testator bequeaths to A. a share of his residuary estate, A. takes the bequest absolutely (*l*). But the tenour of the will and codicil may shew an intention that the substituted gift is to be subject to the same limitations as the original gift (*m*).

(*h*) *Lloyd* v. *Branton*, 3 Mer. 108; see also *Cooper* v. *Day*, ib. 154; *Corporation of Gloucester* v. *Wood*, 3 Hare, 131, 1 H. L. Ca. 272.

(*i*) *Crowder* v. *Clowes*, 2 Ves. jun. 449; *Russell* v. *Dickson*, 2 D. & War. 133; *Day* v. *Croft*, 4 Bea. 561; *Burrell* v. *Earl of Egremont*, 7 Bea. 205; *Calor* v. *Calor*, 14 Bea. 463; *Warwick* v. *Hawkins*, 5 De G. & S. 481; *Duffield* v. *Currie*, 29 Bea. 284; *Re Benyon*, 51 L. T. 116; *Re Lawrenson*, [1891] W. N. 28; but the context may prevent an additional legacy from being paid precisely in the same manner as the original, *Overend* v. *Gurney*, 7 Sim. 128; *King* v. *Tootel*, 25 Bea. 23.

(*j*) *Cooper* v. *Day*, 3 Mer. 154; *Russell* v. *Dickson*, 2 D. & War. 133; *Martin* v. *Drinkwater*, 2 Bea. 215; *Bristow* v. *Bristow*, 5 Bea. 289; *Earl of Shaftesbury* v. *Duke of Marlborough*, 7 Sim. 237; *Fenton* v. *Farington*, 2 Jur. N. S. 1120; *Giesler* v. *Jones*, 25 Bea. 418; *Duncan* v. *Duncan*, 27 Bea. 392; *Johnstone* v. *Earl of Harrowby*, 1 D. F. & J. 183; *Re Wright, Knowles* v. *Sadler*, [1879] W. N. 20; *Re Boddington*, 25 Ch. D. 685; *Re Colyer*, 55 L. T. 344; *Re Joseph*, [1908] 1 Ch. 599, 2 Ch. 507. See also *Re Boden*, [1907] 1 Ch. 132, and other cases cited in Chap. XXXVI. In *Re Courtauld's Estate*, W. N. [1882] 185, a testator by his will gave several legacies and gave the residue among the legatees pro ratâ in proportion to the legacies; by a codicil he revoked the legacies given by the will and gave in substitution therefor other legacies of larger amounts: it was held by Kay, J., that the alteration in the amount of the legacies involved an alteration in the proportions of the residue. But express terms, annexed to a legacy given by codicil "instead of" one given by will, excluded the substitutional construction in *Haley* v. *Bannister*, 23 Bea. 336.

(*k*) *Re Mores' Trust*, 10 Hare, 171; *Mann* v. *Fuller*, Kay, 624. See also *Hill* v. *Jones*, 37 L. J. Ch. 465; and see *Cookson* v. *Hancock*, 1 Keen, 817, 2 My. & C. 606; and *Re Joseph*, [1908] 2 Ch. 507, the converse case, post, p. 1030.

(*l*) *Hargreaves* v. *Pennington*, 34 L. J. Ch. 180. *Alexander* v. *Alexander*, 5 Bea. 518, was the converse case.

(*m*) *Cookson* v. *Hancock*, 2 My. & C. 606, followed in *Donnellan* v. *O'Neill*, Ir. R., 5 Eq. 523, where it seems to be suggested that this construction is more easily adopted where the gifts are residuary. See also *Prescott* v. *Edmunds*, 4 L. J. O. S. Ch. 111.

When legacies by codicil are payable out of same fund as legacies by will.

The intention to assimilate the respective legacies or classes of legacies has in some instances been traced, though less distinctly indicated than in the cases mentioned above. As in *Leacroft* v. *Maynard* (*n*), where a testator devised his real estate in trust to sell and apply the produce in paying (among other legacies) 50*l.* to each trustee, to the Foundling Hospital 2000*l.*, and to the hospitals of L. and S. 1000*l.* each. Afterwards, by a codicil he revoked the devise and legacy to one of the trustees, and substituted another trustee, to whom he gave a legacy of 50*l.* He also revoked the legacies to the three hospitals, and gave 1500*l.* to the Foundling, 500*l.* to the Infirmary of N., and a sum to be distributed among the poor of S. It was unsuccessfully contended for the charities, that the legacies given by the codicil were not, like those of the will, charged on the land, and were therefore valid. Lord Thurlow seems to have thought, that the necessity which this would have occasioned of holding that the legacy to the new trustee must also come out of the personalty, formed a conclusive argument against the construction. But it seems that even without this ground the decision must have been the same (*o*).

So, in *Fitzgerald* v. *Field* (*p*), where a testator gave his personal and freehold estates to trustees, upon trust, with the money arising from his personal estate, and in aid thereof, by sale or mortgage of part of the freeholds, to pay certain annuities and legacies. By a codicil he revoked this bequest and devise, and gave the real and personal estate to other trustees upon the trusts in his will and codicil mentioned. He then bequeathed an annuity to A. for life, with the payment of which he charged the residue of his said lands, and with a power of distress. Lord Gifford, M.R., held that, whatever might be the construction if the codicil stood alone, it was evident, looking at the will and codicil together, the intention of the testator was, that all his personal estate should be applied in the first instance to the payment of annuities and legacies. But this does not apply where the residue is by the will given to the legatees in proportion to the legacies "herein," or "by the will" bequeathed to them, and by codicil additional legacies are given to some of the legatees; the proportion in which the residue is to be divided here remains unaltered (*q*).

(*n*) 1 Ves. jun. 279; see also *Brudnell* v. *Boughton*, 2 Atk. 268; *Bonner* v. *Bonner*, 13 Ves. 379; *Williams* v. *Hughes*, 24 Bea. 474; *Strong* v. *Ingram*, 6 Sim. 197.

(*o*) *Johnstone* v. *Earl of Harrowby*, 1 D. F. & J. 183; *Re Smith*, 2 J. & H. 594.

(*p*) 1 Russ. 416.

(*q*) *Hall* v. *Severne*, 9 Sim. 515; see *Sherer* v. *Bishop*, 4 B. C. C. 55.

CHAP. XXX.

Whether legacy given by codicil is exempt from duty like those of will.

Whether a legacy bequeathed by a codicil is to participate in an exemption from duty created by the will in favour of the legacies in general given by the will (*r*), or of some particular legacy for which the legacy in the codicil is substituted, has often been a point of dispute. Even in the latter case, it seems the intention to exempt the substituted legacy must be distinctly indicated, there being no necessary inference that the legacy bequeathed by the codicil is to stand pari passu in all respects with the legacy for which it is substituted. Thus, where a testator by his will gave to A. and B. an annuity of 300*l.* equally to be divided between them, during their joint lives, free from all taxes and stamp duties, and after the death of one of them, to the survivor during her life, and after the death of the survivor, over to C. for life. By a codicil the testator revoked the annuity of 300*l.*, and gave A. and B. a clear annuity of 100*l.* each, with benefit of survivorship. It was held, that the gift by the codicil was independent of the gift in the will, and, therefore, the annuities were not exempt from the duty (*s*).

Option to take substitutional legacy.

If an annuity is given to A., subject to an express or implied condition, with an option to take "in lieu and in substitution thereof" a legacy, and A. never becomes entitled to the annuity, he cannot claim the legacy (*t*).

Where substituted legacy is settled.

The general principle that an additional or substituted bequest is subject to the same provisions as the original bequest, obviously does not apply where the bequests are not to the same person. Accordingly, if a legacy is given by will to A. absolutely, subject to a clause of forfeiture, and by a codicil the testator revokes the legacy, and in lieu thereof gives a legacy upon trust for A. for life, with remainder to his children, the settled legacy is not subject to the original clause of forfeiture (*u*). A fortiori, a legacy given by codicil to B. in lieu of a legacy given by the will to A., who has died since the date of the will, is not subject to the same conditions or entitled to the same privileges as those attaching to the legacy to A (*v*).

Different legatees.

It is clear, however, that if a testator by his will gives a legacy free from duty, and by a codicil, after reciting his intention of increasing the legacy, revokes it, bequeathing in lieu thereof a

(*r*) As to the exemption of legacies, see post, p. 1030.

(*s*) *Burrowes* v. *Cottrell*, 3 Sim. 375.

(*t*) *Re Boddington*, 25 Ch. D. 685.

(*u*) The general principle and its limitations were stated by the Court of Appeal in *Re Joseph*, [1908] 2 Ch. 507 (reversing Eve, J., [1908] 1 Ch. 599), although it seems that on other grounds there was no forfeiture.

(*v*) *Chatteris* v. *Young*, 2 Russ. 183; *Re Gibson*, 2 J. & H. 656.

larger sum to the same legatees upon the same trusts, &c., the latter is also exempt (*w*).

Exoneration from duties.

VIII.—Exoneration from Death Duties, Income Tax, &c.—The subject of death duties does not fall within the scope of this work: but it is necessary to consider what expressions will throw the legacy duty (or other duty) on the residuary personal estate by exonerating the legatees. If a legacy or annuity is given free of duty, the duty is a pecuniary legacy, and hence this bequest of duty will abate pari passu with the general legacies in case of there being a deficiency of assets (*x*). Under sec. 21 of the Legacy Duty Act (*y*), legacy duty is not payable upon the bequest of the duty.

Legacy duty.

The following expressions have been held to exempt the legatees from the payment of legacy duty. A direction to executors to pay the duty on legacies out of the general estate (*yy*); to make payment of all the legacies without any deduction (*z*); or to pay the annuities and legacies clear of property tax and all expenses whatever attending the same (*a*); or free from any charge or liability in respect thereof, although in the same will there was a bequest free from any duty (*b*); or where the legacies were to be paid clear of all taxes and outgoings (*c*), free of all expense (*d*), or "free from duty" (*e*). Where a testatrix gave her real and personal estate upon trust to pay off the debts of her late husband, it was held that the legacy duty was to be borne by the legatee creditors, though it was contended that the testatrix's object would not be completely effected without paying the duty out of the general estate: but Tindal, C.J., observed that the debt had in effect been paid, for at the moment of payment the law casts on the legatee the liability to settle the duty (*f*).

Proceeds of realty.

A direction to pay legacies free of duty will not generally include the proceeds of realty directed to be sold (*g*); but probably would include legacies payable out of such proceeds. "Legacy" and

(*w*) *Cooper* v. *Day*, 3 Mer. 154. See also *Fisher* v. *Brierley*, 30 Bea. 267.

(*x*) *Farrer* v. *St. Catharine's College*, L. R., 16 Eq. 19. See *Wilson* v. *O'Leary*, L. R., 17 Eq. 419; *Re Turnbull*, [1905] 1 Ch. 726. In *Re Wilkins*, 27 Ch. D. 703, one of two annuities was given free of duty. See also *Lord Advocate* v. *Miller's Trustees*, 21 Sco. L. R. 709, and *Re Hadley*, [1909] 1 Ch. 20, at p. 25 (estate duty).

(*y*) 36 Geo. III. c. 52.

(*yy*) *Re Wheteley*, 100 L. T. 920; 101 L. T. 508.

(*z*) *Barksdale* v. *Gilliat*, 1 Sw. 562.

(*a*) *Courtoy* v. *Vincent*, T. & R. 433.

(*b*) *Warbrick* v. *Varley*, 30 Bea. 241.

(*c*) *Louch* v. *Peters*, 1 My. & K. 489.

(*d*) *Gosden* v. *Dotterill*, 1 My. & K. 56.

(*e*) *Re Turnbull*, [1905] 1 Ch. 726; these words also covered the settlement estate duty on a settled legacy.

(*f*) *Foster* v. *Ley*, 2 Scott, 438.

(*g*) *White* v. *Lake*, L. R., 6 Eq. 188; *Re King's Trusts*, 29 L. R. Ir. 401.

CHAP. XXX.

"legatee" may, however, be explained by the context to refer to realty (see ante, Chapter XXVII).

Specific bequests.

Where the testatrix directed all the legacies to be paid free of legacy duty, it was held that specific legacies of chattels were included in spite of the inaptness of the words "to be paid" (*h*), and the duty payable on the release of a debt (which is a specific legacy) was held to be payable out of the general personal estate under a direction to pay all "pecuniary" legacies free and clear of legacy duty (*i*).

"Clear."

And generally it would seem that, in spite of the cases in the footnote (*j*), a gift of a "clear" sum or annuity involves an exemption from duty (*k*). But a legacy of a "full" amount does not carry exemption from duty if the word "full" refers to other possible deductions (*l*).

"Full."

Legacies given by codicil.

A direction in a will that the legacy duty on the legacies "herein" given shall be paid out of the testator's estate does not extend to legacies given by a codicil, even though the codicil is directed to be taken as part of the will (*m*); it is otherwise where legacies generally are given duty free (*n*).

In *Re Dalrymple* (*o*) the testatrix, after giving certain legacies to males and females, declared that all legacies, devises and bequests thereinbefore or thereinafter given or made to or in favour of females should be free of legacy duty, and gave the residue to three males and three females as tenants in common. Kekewich, J., held that the legacy duty in respect of the shares of the females in the residue was to be paid out of their respective shares.

Similarly, the following expressions have been held to exempt annuitants from the payment of legacy duty: "clear of all

(*h*) *Re Johnston*, 26 Ch. D. 538.

(*i*) *Morris* v. *Livie*, 11 L. J. Ch. 172.

(*j*) *Hales* v. *Freeman*, 4 J. B. Moo. 21, 1 Br. & B. 391 (question not raised); *Barrows* v. *Cottrell*, 3 Sim. 375 (question not raised); *Sanders* v. *Kiddell*, 7 Sim. 536.

(*k*) *Harper* v. *Morley*, 2 Jur. 653; *Ford* v. *Ruxton*, 1 Coll. 403; *Baily* v. *Boult*, 14 Bea. 595; *Haynes* v. *Haynes*, 3 D. M. & G. 590; *Re Coles' Will*, L. R., 8 Eq. 271; *Marris* v. *Burton*, 11 Sim. 161; *Louch* v. *Peters*, 1 My. & K. 489; *Gude* v. *Mumford*, 2 Y. & C. 445; and see *Hodgworth* v. *Crawley*, 2 Atk. 376; *Re Robins*, 58 L. T. 382 (where another legacy was given "free of legacy duty"); *Re Currie*, 57 L. J. Ch. 743; *Re Saunders*, [1898] 1 Ch. 17 (settlement: succession duty; it is not clear from the report why the question arose as to succession duty and not estate duty); *Re Dyet*, 87 L. T. 744; *Re Coxwell's Trusts*, [1910] 1 Ch. 65.

(*l*) *Re Marcus*, 56 L. J. Ch. 830.

(*m*) *Early* v. *Benbow*, 2 Coll. 342; and see (as to "herein") *Radburn* v. *Jervis*, 3 Bea. 450; *Fuller* v. *Hooper*, 2 Ves. sen. 242; *Jauncey* v. *Att.-Gen.*, 3 Giff. 308; *Gillooly* v. *Plunkett*, 9 L. R. Ir. 324.

(*n*) *Byne* v. *Currey*, 2 Cr. & Mee. 603. See also *Williams* v. *Hughes*, 24 Bea. 474; *Ansley* v. *Cotton*, 16 L. J. Ch. 55, where the question was whether a legacy of stock was free of duty; and *Re Sealy*, 85 L. T. 451 (where *Early* v. *Benbow* and *Byne* v. *Currey* are discussed).

(*o*) 49 W. R. 626.

deductions whatsoever" (*p*); "without any deduction or abatement out of the same on any account or pretence whatsoever" (*q*); "clear of all taxes and deductions whatsoever" (*r*).

Fund to meet annuities.

A distinction has, indeed, been taken between the simple case of a gift of a clear yearly sum and the case of a direction to trustees to set apart a sum of money sufficient to produce a clear yearly sum where the trust of corpus is for persons in succession (*s*); and it was actually decided in *Pridie* v. *Field* (*t*) that in such a case the word "clear" did not mean free of duty. But this distinction does not seem to be tenable on principle (*u*).

Duty wrongly described.

In *Re Rayer* (*v*), a testator gave certain annuities charged on real estate, and directed that they should be paid "without any deduction except for legacy duty and income tax;" in fact, succession duty and not legacy duty was payable (*w*): Farwell, J., held that the case was one of falsa demonstratio, and that the annuitants had to bear the succession duty (*x*).

Settlement estate duty.

Under sec. 19 of the Finance Act, 1896 (*y*), "the settlement estate duty leviable in respect of a legacy or other personal property settled by the will of the deceased shall (unless the will contains an express provision to the contrary) be payable out of the settled legacy or property, in exoneration of the deceased's estate." A direction to pay "testamentary expenses" out of residue is not a provision to the contrary, because settlement estate duty on personalty is not a testamentary expense (*z*). In *Re Lewis* (*a*) Kekewich, J., held a direction to pay out of another fund "all duties payable by law out of my estate" was not an express provision to the contrary, but where the direction was to pay "the death duties payable out of my estate" out of a specific fund, Swinfen Eady, J. (distinguishing *Re Lewis*), held that the settlement estate duty on chattels settled by the will was payable out of the specific fund (*b*).

(*p*) *Dawkins* v. *Tatham*, 2 Sim. 492 (it was contended that the words excluding deduction referred to the payment of land tax).

(*q*) *Smith* v. *Anderson*, 4 Russ. 352.

(*r*) *Stow* v. *Davenport*, 5 B. & Ad. 359.

(*s*) *Sanders* v. *Kiddell*, supra; *Marris* v. *Burton*, supra; *Baily* v. *Boult*, 14 Bea. 595.

(*t*) 19 Bea. 497; see also *Banks* v. *Braithwaite*, 32 L. J. Ch. 35, which was questioned in *Re Saunders*, [1898] 1 Ch. 17.

(*u*) *Wilks* v. *Groom*, 2 Jur. N. S. 798; *Harper* v. *Morley*, 2 Jur. 653, which was not cited in *Banks* v. *Braithwaite*.

(*v*) [1903] 1 Ch. 685 (will made before but republished after the Customs and Inland Revenue Act, 1888).

(*w*) See s. 21 of the Customs and Inland Revenue Act, 1888.

(*x*) As to a covenant to pay "free of all deductions," see *Re Higgins*, 31 Ch. D. 142.

(*y*) 59 & 60 Vict. c. 28.

(*z*) *Re King*, [1904] 1 Ch. 363.

(*a*) [1900] 2 Ch. 176.

(*b*) *Re Cayley*, [1904] 2 Ch. 781. See *Re Pimm*, [1904] 2 Ch. 345, where a direction to pay "duties" was held to exonerate specifically devised realty, and *Re Leveridge*, [1901] 2 Ch. 830 ("estate duty" held to include settlement estate duty).

CHAP. XXX.

If a jointure is to be paid "without any deduction whatsoever, except in respect of income tax," this is an express provision to the contrary within sec. 14 (1) of the Finance Act, 1894 (*c*); a sum to be paid "without any deduction" is to be paid free of settlement estate duty (*d*).

Income tax.

When an annuity is given without words shewing that it is to be paid free of income tax, the annuitant must bear the tax (*e*), for the tax is a charge on the person, and such expressions as "to be paid without any deduction" (*f*), or "free from legacy duty and other deductions" (*g*), are not sufficient to exempt the annuitant from the tax unless the testator has shewn elsewhere that he considers income tax to be a deduction (*h*).

But where the annuity is given free from all deductions in respect of any taxes, the word deduction is construed by the word "taxes" associated with it, and the annuity is to be paid free of income tax (*i*).

(*c*) *Re Parker-Jervis*, [1898] 2 Ch. 643 (settlement).

(*d*) *Re Maryon-Wilson*, [1900] 1 Ch. 565 (settlement).

(*e*) *Re Sharp*, [1906] 1 Ch. 793.

(*f*) *Abadam* v. *Abadam*, 33 Beav. 475.

(*g*) *Lethbridge* v. *Thurlow*, 15 Bea. 334; *Sadler* v. *Rickards*, 4 K. & J. 302; *Pearetli* v. *Marriott*, 22 Ch. D. 182; *Gleadow* v. *Leatham*, 22 Ch. D. 269.

(*h*) *Turner* v. *Mullineux*, 1 J. & H. 334; *Re Buckle*, [1894] 1 Ch. 286.

(*i*) *Gleadow* v. *Leatham*, supra; *Festing* v. *Taylor*, 3 B. & S. 217 ("without any deduction on account of any taxes"); *Lord Lovat* v. *Duchess of Leeds*, 2 Dr. and Sm. 62 (direction to pay all taxes affecting the hereditament given to the devisee); *Re Bannerman's Estate*, 21 Ch. D. 105; *Wall* v. *Wall*, 15 Sim. 513, appears to be overruled.

CHAPTER XXXI.

ANNUITIES AND RENT-CHARGES.

PAGE

I. *Annuities*:—
(i.) *How far Annuities are governed by same Rules as Legacies*..1136
(ii.) *Life Annuities* 1138
(iii.) *Annuities for Special Purposes or Periods*1140
(iv.) *Perpetual Annuities* 1142
(v.) *From what Date an Annuity commences* 1143
(vi.) *Interest*..... 1144
(vii.) *Sum given to buy Annuity*..... 1145
(viii.) *Whether charged on Corpus or Income* 1147
II. *Rent-charges* 1152

I.—Annuities.—"An annuity is a right to receive de anno in annum a certain sum; that may be given for life, or for a series of years (*a*); it may be given during any particular period, or in perpetuity; and there is also this singularity about annuities, that, although payable out of the personal assets, they are capable of being given for the purpose of devolution, as real estate; they may be given to a man and his heirs, and may go to the heir as real estate" (*b*). Definition.

No special form of words is required for the bequest of an annuity. Thus if a testator directs his executors to invest a sufficient part of his estate to produce 100*l.* a year for the benefit of A., that is primâ facie a gift to A. of an annuity of 100*l.*, and not merely the annual income of the fund. The question is of importance with reference to the annuitant's rights as against the residue (*bb*). Indirect bequest of annuity.

Trustees are bound to deduct income tax in paying annuities, unless they are given free of tax (*c*). Income tax.

(*a*) As in *Scholefield* v. *Redfern*, 2 Dr. & Sm. 173.

(*b*) Per Kindersley, V.-C., in *Bignold* v. *Giles*, 4 Drew. 343. In saying that an annuity to a man and his heirs goes to the heir "as real estate," the V.-C. means that it goes "in the same way as real estate"; such an annuity is personal estate, and passes by a residuary bequest, although it does not pass to the executors virtute officii; *Stafford* v. *Buckley*, 2 Ves. sen. 170, and other authorities cited in *Aubin* v. *Daly*, 4 B. & Al. 59. As to annuities given to a man and his heirs, see post, p. 1142.

(*bb*) *May* v. *Bennett*, 1 Russ. 370; *Baker* v. *Baker*, 6 H. L. C. 616, and other cases cited post, pp. 1148.

(*c*) *Re Sharp*, [1906], 1 Ch. 793. As to

CHAP. XXXI.

Annuities, how far legacies.

(i.) *How far Annuities are governed by same Rules as Legacies.*—For most purposes, annuities given by will are legacies (*cc*); but many questions arise on gifts of annuities which, from the nature of the case, do not arise upon pecuniary legacies of lump sums, and there are some points of difference between the gift of an annuity and the gift of a pecuniary legacy.

Under a charge of legacies, annuities will generally be included, unless the testator manifest an intention to distinguish them (*d*), as by sometimes using both words (*e*).

Tenant for life and remainderman.

Where a testator gives his residuary estate upon trust for persons in succession, there is a practical difference between legacies and annuities, for the former, as between the tenant for life and the remainderman, are payable out of capital, and the latter out of income (*f*).

Whether cumulative or substitutional.

Where a testator gives two annuities to the same person, the question whether they are cumulative, or whether the second is in substitution for the first, depends on rules similar to those which apply to legacies (*g*). Thus, two annuities of equal amount in the same will to the same person are primâ facie not cumulative (*h*). But two annuities of equal amount to the same person, one given by will, the other by codicil, are primâ facie cumulative (*i*). And where several annuities of different amounts are given to the same person by the same will, they are primâ facie cumulative (*j*).

The question is, of course, one of intention, and depends on the wording of the will in each case (*k*).

Additional annuity.

If a testator bequeaths an annuity, and directs that in certain events the annuitant shall receive an additional annual sum to increase the amount, as a general rule the increased annuity is subject to the same provisions as the original annuity (*l*).

what words will exempt an annuity from income tax, see the chapter on Legacies.

(*cc*) *Sibley* v. *Perry*, 7 Ves. 522; *Bromley* v. *Wright*, 7 Hare, 334; *Ward* v. *Grey*, 26 Bea. 485; *Mullins* v. *Smith*, 1 Dr. & Sm. 204; *Nicholson* v. *Patrickson*, 3 Gif. 209; *Gaskin* v. *Rogers*, L. R., 2 Eq. 284.

(*d*) *Shipperdeon* v. *Tower*, 1 Y. & C. C. C. 441. See *Cunningham* v. *Foot*, 3 App. Ca. 974.

(*e*) See *Nannock* v. *Horton*, 7 Ves. 391; *Woodhead* v. *Turner*, 4 De G. & S. 429; *Gaskin* v. *Rogers*, L. R., 2 Eq. 284 ("pecuniary legacies"); *Heath* v. *Weston*, 3 D. M. & G. 601; *Weldon* v. *Bradshaw*, Ir. R., 7 Eq. 168.

(*f*) *Schelefield* v. *Redgrave*, 2 Dr. & S. 173. As to the mode of apportionment as between tenant for life and remainderman, see *Re Perkins*, [1907] 2 Ch. 596; *Re Thompson*, [1908] W. N. 195, cited in Chap. XXXIV.

(*g*) Chap. XXX.

(*h*) *Holford* v. *Wood*, 4 Ves. 76; *Baylee* v. *Quin*, 2 Dr. & W. 116.

(*i*) *Spire* v. *Smith*, 1 Bea. 419; *Radburn* v. *Jervis*, 3 Bea. 450.

(*j*) *Hartley* v. *Ostler*, 22 Bea. 449. See the somewhat similar case of *Adnam* v. *Cole*, 6 Bea. 353, where one annuity was held to be for a shorter period than the life of the annuitant, and the other to be in substitution for it.

(*k*) See the cases on cumulative and substitutional legacies in Chap. XXX.

(*l*) *Re Boden*, [1907] 1 Ch. 132 (annuity payable out of income, see post, p. 1150). Compare the cases on

The distinction between general, specific, and demonstrative annuities is considered in connection with the similar distinction between legacies (*m*). General, specific, or demonstrative.

A specific annuity is, of course, liable to ademption (*n*). Ademption of specific annuity.

In the case of a deficiency of assets, annuities and legacies abate rateably; the testator may, of course, indicate that he intends some annuities or legacies to be paid in priority to others, but the onus lies on the party seeking priority to make out that such priority was intended by the testator, and the proof of this must be clear and conclusive (*o*). Rateable abatement of annuities and legacies.

Where there is such a deficiency the annuitant is entitled to have the annuity valued, and the amount of the valuation, subject to an abatement in proportion to the abatement of the pecuniary legacies, paid to him (*p*), and if the annuitant dies before the payment of the annuity in full would have equalled the abated amount of the valuation, the other legatees have no claim to the surplus; but the amount of the valuation after abatement is, if the annuitant be dead, paid to the annuitant's personal representatives (*q*).

Sometimes an annuity is given subject to a restraint on anticipation, or to a provision for cesser or forfeiture in certain contingencies. Such a clause makes it difficult to apply the rule above stated. One solution of the difficulty is to disregard the clause and pay the amount of the valuation to the annuitant (*r*). But this seems contrary to principle, and is certainly contrary to precedent (*s*). Where annuity determinable.

Where annuities are given out of and charged on a fund which is insufficient, and in consequence of the deficiency the annuities How value of an annuity is calculated.

additional legacies in Chap. XXX. *Re Lawrenson*, [1891] Week. N. 4, annuities were bequeathed to A. and [illegible], and after their deaths to C. and D., and subject to these and other annuities the income of the residue was bequeathed to C. and D. in equal moieties for respective lives; the testator directed that "the several annuities hereinbefore bequeathed" should for the respective separate use of the annuitants without power of anticipation: it was held by the C. A., without some doubt, that the restraint on anticipation applied to the income of the residue as well as to the annuities.

(*m*) Chap. XXX. The question whether an annuity is specific, demonstrative, or general does not often arise except in the case of annuities charged on (or payable out of) land: see ante, p. 1062.

(*n*) *Cowper* v. *Montell*, 22 Bea. 223, stated p. 1092.

(*o*) *Miller* v. *Huddlestone*, 3 Mac. & G. 513, in which *Brown* v. *Brown* (1 Keen, 275) and *Lewin* v. *Lewin* (2 Ves. sen. 415) are discussed; *Roper* v. *Roper*, 3 Ch. D. 714, and other cases cited in Chap. LIV.

(*p*) *Wroughton* v. *Colquhoun*, 1 De G. & Sm. 357. The rule is merely one of administration: *Re Nicholson's Estate*, fr. R., 11 Eq. 177.

(*q*) *Long* v. *Hughes*, 1 De G. & Sm. 364; *Wroughton* v. *Colquhoun*, 1 De G. & Sm. 357; *Re Ross*, [1900] 1 Ch. 162.

(*r*) This method was adopted by Kekewich, J., in *Re Sinclair*, [1897] 1 [illegible] 921.

(*s*) *Gratrix* v. *Chambers*, 2 Giff. 321; [illegible] 1 De G. & Sm. 362; [illegible] [1900] 1 Ch. 162.

CHAP. XXXI.

have to abate, the question arises how the values of the annuities are to be calculated. The rules are laid down by Sir John Romilly, M.R., in *Todd* v. *Bielby* (*u*), as follows: (1) If all the annuitants are alive, the fund is divided in proportion to the actuarial or market values of the annuities (*v*). (2) If all the annuitants are dead, the fund is divided in the proportion of the arrears of the several annuities. (3) If some of the annuitants are alive and some are dead, the values of the annuities which have expired must be fixed at what the annuitants would have actually received had the fund not been deficient; the values of those which are still subsisting must be ascertained by adding the amount of the arrears actually accrued to the present value of the annuity. These rules appear to be well established (*w*).

The question what words will exonerate annuities from death duties, and income tax is discussed in the chapter on Legacies.

Primâ facie for life.

(ii.) *Life Annuities.*—A gift of 100*l.* to A. is unambiguous, but a gift of an annuity of 10*l.* to A. is primâ facie capable of two constructions: (1) that the annuity only endures during the life of A.; (2) that it is perpetual. The rules of construction are thus stated by Fry, J., in *Blight* v. *Hartnoll* (*x*): "As a general rule there can be no doubt that the gift of an annuity to A. is a gift of the annuity during the life of A. and nothing more (*y*). It is equally free from doubt that where the testator indicates the existence of the annuity without limit after the death of the person named, and therefore implies that it is to exist beyond the life of the annuitant, there the annuity is presumed to be a perpetual annuity (*z*). It is equally without doubt that there are cases in which the Court has come to the conclusion that the gift is not really that of an annuity, but the gift to a person of the income arising from a particular fund without limit, and there the Court holds that the unlimited gift of the income is a gift of the corpus from which the income arises."

But if the gift is expressly one of an annuity, the fact that it

(*u*) 27 Bea. 353.

(*v*) *Wroughton* v. *Colquhoun*, 1 De G. & S. 357.

(*w*) *Heath* v. *Nugent*, 20 Bea. 220; *In re Wilkins*, 27 Ch. D. 703; *Potts* v. *Smith*, L. R., 8 Eq. 683 (in the declaration as opposed to the order); *Re Metcalf*, [1903] 2 Ch. 424, where *Potts* v. *Smith* is considered.

(*x*) 19 Ch. D. 294.

(*y*) *Savery* v. *Dyer*, Amb. 139; *Nichols* v. *Hawkes*, 10 Hare, 342; *Re Forster's Estate*, 23 L. R. Ir. 269; *Re Grove's Trusts*, 1 Giff. 74; *Whitten* v. *Hanlon*, 16 L. R. Ir. 298; *Re Taber*, 46 L. T. 805.

(*z*) See *Barden* v. *Meagher*, Ir. R., 1 Eq. 246; *Hedges* v. *Harpur*, 3 De G. & J. 129; *Courtenay* v. *Gallagher*, 5 Ir. Ch. 154, 356; *Mansergh* v. *Campbell*, 3 De G. & J. 232.

is secured by a fund, or payable out of the income of a fund or the rentals of land, does not make it perpetual (*zz*), unless the testator shews an intention to dispose of the whole fund, as in the cases mentioned below (*zzz*).

The general rule applies even where the testator, in bequeathing annuities to persons in succession, uses the words "for life" in one part of the bequest, and omits them in another. Thus if an annuity is given to A. for life, and after his death to B., B. will take the annuity for life only (*a*), in the absence of any indications that he is to take a different interest (*b*). So the bequest of an annuity to several persons and the survivors of them, or to a person for his life, and then to his children, does not create a perpetual annuity (*c*). And an annuity of 150*l.* a year "to be secured to" A. is an annuity to A. for life (*d*). A gift of 250*l.* per annum to "A. or his descendants" is a gift of an annuity for life only (*e*).

Where an annuity is given equally amongst children who attain twenty-one, those who have attained twenty-one are only entitled to a proportionate part of the annuity if some of the other children are minors (*f*).

Survivorship.

It has been held (following apparently the analogy of gifts of life interests in personalty (*ff*)) that the gift of an annuity to A. and B. during their lives is a gift to them and the survivor of them (*g*); but if the annuity is given "unto and equally between and amongst" the annuitants, without words of survivorship, they take as tenants in common, and on the death of one of them his share ceases to be payable (*gg*). And a gift of 30*l.* each, yearly, so long as A. and B. should live, is a gift of separate annuities of 30*l.* to each of A. and B. for their lives (*h*).

Where an annuity is given to a number of persons in equal shares

(*zz*) *Wilson* v. *Maddison*, 2 Y. & C. C. C. 372; *Re Morgan*, [1893] 3 Ch. 222, where *Bent* v. *Cullen*, L. R., 6 Ch. 235, is observed upon; *Re Forster's Estate*, 23 L. R. Ir. 269; *Re Grove's Trusts*, 1 Giff. 74; *Re Taber*, 46 L. T. 805; *Banks* v. *Braithwaite*, 32 L. J. Ch. 198.

(*zzz*) Page 1143.

(*a*) *Yates* v. *Maddan*, 3 Mac. & G. at p. 540; *Lett* v. *Randall*, 3 Sm. & G. at p. 91; *Blight* v. *Hartnoll*, 19 Ch. D. 294.

(*b*) As in *Potter* v. *Baker*, 15 Bea. 489, and other cases cited ante, n. (*z*).

(*c*) *Blewitt* v. *Roberts*, 10 Sim. 491 (which apparently involves the reversal of *Tweedale* v. *Tweedale*, 10 Sim. 453); *Yates* v. *Maddan*, 3 Mac. & G. 532; *Blight* v. *Hartnoll*, 19 Ch. D. 294 (dissenting from *Evans* v. *Walker*, 3 Ch. D. 211); *Ward* v. *Ward*, [1903] 1 Ir. 211; *Re Smith's Estate*, [1905] 1 Ir. 453; *Sullivan* v. *Galbraith*, Ir. R., 4 Eq. 582.

(*d*) *Re Lord Southeden and Campbell*, [1893] W. N. 90.

(*e*) *Re Morgan*, [1893] 3 Ch. 222. As to the effect of the word "or" in creating a substitutional gift, see Chap. XXXVI.

(*f*) *Re Latham*, [1901] W. N. 243.

(*ff*) *Townley* v. *Bolton*, and other cases cited in Chap. XIX., ante, p. 642.

(*g*) *Alder* v. *Lawless*, 32 Bea. 72.

(*gg*) *Re Evans*, 99 L. T. 271.

(*h*) *Lill* v. *Lill*, 23 Bea. 446.

CHAP. XXXI.

during their lives and the life of the survivor of them, on the death of one of them his share of the annuity goes to his personal representatives (*i*).

Annuities for maintenance.

(iii.) *Annuities for Special Purposes or Periods.*—If an annuity is given to several persons for their maintenance and education, it clearly will not extend beyond their lives (*j*); but as maintenance and education are not necessarily confined to minority (*k*), an annuity given for such purposes is for life, and not limited to minority (*l*).

In *Re Yates* (*m*), the testator gave an annuity to his widow for the maintenance and education of his infant daughter: it was held that the widow was only a trustee for the daughter, and, consequently, that the annuity did not cease by reason of the death of the widow during the minority of the daughter.

In *Wilson* v. *Maddison* (*n*), a bequest of 30*l.* a year to A., together with her children B., C., and D., and for their joint maintenance, was held to be a bequest of that annual sum to A., B., C., and D. for their joint lives and the life of the survivor.

Conditional annuity for maintenance.

In *Re Greenwood* (*o*), a testator gave his residue upon trust for his children for life, with remainder over, and directed that while any unmarried child resided with M., a sum of 50*l.* a year should be deducted from that child's share of income and paid to M. An unmarried son ceased to reside with M., and assigned all his interest under the will for valuable consideration; he afterwards returned to reside with M.: it was held that, notwithstanding the assignment, M. was entitled to be paid the 50*l.* a year.

Animals.

If a testator bequeaths an annuity to a person for his life so long as certain animals belonging to the testator are living, this is clearly good. If the annuity is expressly given for the maintenance of the animals, it, of course, comes to an end on their death (*p*), and it would

(*i*) See *Jones* v. *Randall*, 1 J. & W. 100; *Bryan* v. *Twigg*, L. R., 3 Ch. 183, and other cases cited in Chap. XIX.

(*j*) *Knapp* v. *Noyes*, Amb. 662, was misunderstood. See 13 Ch. D. at p. 571. In some cases, however, it has been held that an annuity given for the maintenance of a person can continue after his death: see *Lewes* v. *Lewes*, 16 Sim. 266, commented on in Chap. XXIV.

(*k*) *Re Booth*, [1894] 2 Ch. 282; and see Chap. XXIV., pp. 924–925.

(*l*) *Soames* v. *Martin*, 10 Sim. 287; *Wilkins* v. *Jodrell*, 13 Ch. D. 564; *Williams* v. *Papworth*, [1900] A. C. 563; and see *Kilvington* v. *Gray*, 10 Sim. 293. As to *Foley* v. *Parry*, 2 My. & K. 138; *Gardner* v. *Barber*, 18 Jur. 508, and *Ryan* v. *Keogh*, Ir. R., 4 Eq. 357, see Chap. XXIV.

(*m*) [1901] 2 Ch. 438. Compare *Smith* v. *Havens*, Cro. Eliz. 252.

(*n*) 2 Y. & C. C. C. 372.

(*o*) 66 L. T. 101.

(*p*) *Re Howard*, Times, October 30, 1908. In *Hicks* v. *Ross*, L. R., 14 Eq. 141, annuities were bequeathed by the testator to his dogs without the intervention of trustees.

seem, on principle, that unless it were expended for that purpose, there would be a resulting trust for the testator's estate (*q*). It would also seem that a perpetual annuity may be given to a person and his representatives so long as certain animals are living. But it is submitted that a perpetual annuity cannot be given upon trust for the maintenance of certain animals, because if the annuity were not so applied in any year, there would be a resulting trust, and there does not appear to be any case (except that of a charitable trust) in which the rights of persons in personal property can be made to depend on an event which may not happen within the period allowed by the Rule against Perpetuities (*r*).

Annuity for a term, or pur auter vie,

The general rule that an annuity bequeathed to a person is primâ facie a life annuity does not apply to an annuity bequeathed for a term, or pur auter vie. "It has never been doubted that the gift of an annuity for a term, or pur auter vie, is a gift to the annuitant and his personal representatives during the term or the life of the cestui que vie" (*s*). And it only applies to annuities created de novo (*ss*).

or created de novo.

The question whether an annuity given expressly for the maintenance of A., during the life of B., is payable to A.'s representatives in the event of his predeceasing B., is discussed elsewhere (*t*).

Jointure.

As to a rent-charge by way of jointure, see post, p. 1153.

In *Adnam* v. *Cole* (*u*), the testator gave the income of his residuary estate to his widow for life, subject to the payment thereout of an annuity of 10*l.* to A. for his life. After the death of his widow, the testator gave his property to various persons, and, among other gifts, bequeathed the dividends of 1000*l.* stock to A. for life: it was held that the annuity of 10*l.* ceased on the death of the widow.

Determinable annuity.

An annuity may be determinable, as where it is given to a person for life until alienation, followed by a gift over (*v*); or to a person so long as he has not an income exceeding a certain sum (*w*); or

(*q*) A trust for the maintenance of animals could not, it seems, be enforced. See Chap. XXIV.

(*r*) The decision in *Re Dean*, 41 Ch. D. 552, is contra, but that decision is, it is submitted, erroneous. See ante, p. 297, n. (*d*), and Chap. XXIV. p. 901.

(*s*) Per James, L.J., in *Re Ord*, 12 Ch. D. 22; *Savery* v. *Dyer*, Dick. 162. Amb. 139; *Hill* v. *Ratley*, 2 J. & H. 634.

(*ss*) *Savery* v. *Dyer*, supra; *Nichols* v. *Hawkes*, 10 Ha. 342.

(*t*) Chap. XXIV.

(*u*) 6 Bea. 353.

(*v*) *Power* v. *Hayne*, L. R., 8 Eq. 262; *Hatton* v. *May*, 3 Ch. D. 148; *Re Draper's Trust*, 57 L. J. Ch. 942. As to the effect where the annuity is reversionary, and the annuitant dies before it becomes payable, see *Day* v. *Day*, and other cases cited post, p. 1146.

(*w*) As to the manner in which the income in such a case is to be ascertained, see *Re Hedges' Trust Estate*, L. R., 18 Eq. 419 (commented on elsewhere); *Bateman* v. *Faber*, 48 W. R. 151 (settlement).

to a woman while unmarried (*x*) or during widowhood (*y*), or so long as she and her son live together (*z*). So an annuity given out of the yearly rents of leaseholds comes to an end when the lease expires (*a*).

An annuity to a trustee so long as he should continue to execute the office of trustee, determines on the cesser of the active trusts, and does not continue until the trustee has retired from the trust (*b*); in fact, such a gift seems equivalent to an annuity to trustees for their trouble (*c*), and the trustees do not lose their annuity in such a case by employing a person to collect the rents (*d*), and the annuity does not necessarily cease by reason of a suit for administration (*e*).

Annuity may be perpetual.

(iv.) *Perpetual Annuities.*—The testator's intention that an annuity should be perpetual may be shewn in many ways.

Express words.

The proper way of bequeathing a perpetual annuity is to give it to A. for ever, or to A. and his executors, administrators and assigns, or (if the testator wishes to make it descendible to heirs) to A. and his heirs. Apparently the bequest of an annuity to A. and his descendants would create a perpetual annuity by way of fee simple conditional (*ee*).

Annuity to A. and his heirs.

An annuity given to A. and his heirs is personal property (*l*), though it descends to the heir. And a personal annuity cannot be entailed, for it is not within the statute *De Donis*, so that a devise of a personal annuity to A. and the heirs of his body will give A. a fee simple conditional (*m*).

An annuity to A. for ever passes to A.'s personal representative, and not to his heir (*n*).

There are two general rules applicable to cases in which the question arises, whether an annuity given indefinitely is for life or perpetual. "The one is, that the gift of the produce of a fund,

(*x*) *Heath* v. *Lewis*, 22 L. J. Ch. 721.

(*y*) *Re Howard*, [1901] 1 Ch. 412.

(*z*) *Sutcliffe* v. *Richardson*, L. R., 13 Eq. 606 (not determined by the death of the son).

(*a*) *Darbon* v. *Rickards*, 14 Sim. 537; *Courtenay* v. *Gallagher*, 5 Ir. Ch. 356.

(*b*) *Hull* v. *Christian*, L. R., 17 Eq. 546.

(*c*) As in *Clay* v. *Coles*, W. N. [1880] 145; *Henrion* v. *Botham*, Dru. t. Sug. 476; *McDermot* v. *O'Conor*, Ir. R., 10 Eq. 352.

(*d*) *Wilkinson* v. *Wilkinson*, 2 S. & St. 237; unless the annuity is for "collecting of rents," &c.; *Re Muffett*, 56 L. T. 685.

(*e*) *Baker* v. *Martin*, 8 Sim. 25.

(*ee*) *Re Morgan*, [1893] 3 Ch. 222; *Young* v. *Davies*, 2 Dr. & S. 167.

(*l*) Co. Litt. 20a; *Aubin* v. *Daly*, 4 B. & Ald. 59; *Radburn* v. *Jervis*, 3 Bea. 450; *Lady Holderness* v. *Lord Carmarthen*, 1 Br. C. C. 377; ante, p. 1135, n. (*b*).

(*m*) *Stafford* v. *Buckley*, 2 Ves. sen. 179; and see *Turner* v. *Turner*, 1 Br. C. C. 316.

(*n*) *Taylor* v. *Martindale*, 12 Sim. 158; *Joynt* v. *Richards*, 11 L. R. Ir. 278; *Parsons* v. *Parsons*, L. R., 8 Eq. 260.

whether particular or residuary, without limit as to time, is a gift of the fund itself; the other is, that where a testator speaks of an annuity which he gives to a person for life, as if it were in existence after the death of such person, irrespective of any words added for the purpose of continuing its existence for the benefit of any other person, there the annuity given indefinitely to such other person is a perpetual annuity" (*f*).

Thus if a testator dedicates the whole of his property, or the whole of a fund, to the payment of annuities, in such a way as to shew that he treats the annuities as a mode of calculating the shares which the annuitants are to take in the property or fund, then the annuities are perpetual (*g*).

Some of the cases in which testators have shewn an intention to give a perpetual annuity, by referring to it as continuing after the death of the first annuitant, have been already cited (*h*).

But the above are not the only methods by which a testator may indicate his intention to give a perpetual annuity. Thus, in *Engelhardt* v. *Engelhardt* (*i*), a testator directed the income of the shares settled on his married daughters to be increased out of his general dividends to 400*l.* annually to each of them: Hall, V.-C., held that the trustees of the respective settlements were entitled to receive as corpus out of the testator's estate sums sufficient in each instance to produce the supplementary income. A gift to A. of "200*l.* a year, being part of the moneys I now have in Bank security entirely for her own use and disposal," was held to give to A. so much Bank stock as would produce 200*l.* per annum (*j*).

Direction to purchase fund.

It has been held that a direction to the executor to purchase an annuity in Government securities to the amount of 50*l.* a year for A. creates a perpetual annuity to be provided for by an investment in Government securities sufficient to produce 50*l.* per annum (*k*).

At what date annuities begin to be payable.

(v.) *From what Date an Annuity commences.*—The general rule is that an annuity given by will is to commence from the testator's

(*f*) Per Lord Truro, C., in *Yates* v. *Maddan*, 3 Mac. & G. 532, based on Lord Cottenham's judgment in *Stokes* v. *Heron*, 12 Cl. & Fin. 161.

(*g*) *Stokes* v. *Heron*, supra, as explained in *Yates* v. *Maddan*, supra; *Robinson* v. *Hunt*, 4 Bea. 450; *Potter* v. *Baker*, 15 Bea. 489; *Hill* v. *Rattey*, 2 J. & H. 634; *Hicks* v. *Ross*, 14 Eq. 141. See *Courtenay* v. *Gallagher*, 5 Ir. Ch. 154, 356, where the annuities were payable out of the profit rentals of renewable leaseholds.

(*h*) *Hedges* v. *Harpur*, 3 De G. & J. 129; *Mansergh* v. *Campbell*, 3 De G. & J. 232, and other cases cited ante, p. 1138, n. (*z*); *Pawson* v. *Pawson*, 19 Bea. 146; *Warren* v. *Wright*, 12 Ir. Ch. 401.

(*i*) 26 W. R. 853.

(*j*) *Rawlings* v. *Jennings*, 13 Ves. 39.

(*k*) *Ross* v. *Borer*, 2 J. & H. 469; *Kerr* v. *Middlesex Hospital*, 2 D. M. & G. 576 ("the annuities to be purchased in the British funds"); and see *Aspland* v. *Watts*, 20 Bea. 474.

CHAP. XXXI.

death (*o*); that is to say, if no time for payment is fixed, the first payment is to be made at the expiration of one year from the testator's death, but if the testator directs that the annuity shall be paid, say, monthly, the first payment is to be made at the end of a month after the testator's death (*p*).

The arrears of an annuity charged on the testator's estate are computed from the testator's death (*q*).

It makes no difference that the annuity is charged on a reversion (*r*).

If the annuity is to be paid quarterly, on the usual quarter days, only a proportional part is payable on the first quarter day after the testator's decease (*s*).

Where a testatrix gave certain annuities, but not to commence till all her debts and legacies should be paid, it was held that the annuities commenced from the time when the legacies ought to have been paid (*t*).

If an annuity is in clear language made to commence at a time subsequent to the testator's death, with a later clause directing it to be paid by half-yearly payments, the first of such payments to be made at the expiration of six months from the testator's death, the later clause will not make the annuity commence from the testator's death, but will be rejected as inconsistent (*u*).

Interest on a legacy of money to buy an annuity.

(vi.) *Interest.*—Where a sum of money was bequeathed to executors, to be laid out in purchasing an annuity for the testator's daughter, it was held that interest on the sum of money only commenced to run one year after the testator's death (*v*). The daughter appears to have been of full age.

(*o*) See the general rule stated by Lord Eldon in *Gibson* v. *Bott*, 7 Ves. at pp. 96–7; *Re Robbins*, [1907] 2 Ch. 8.

(*p*) *Houghton* v. *Franklin*, 1 S. & St. 390.

(*q*) *Stamper* v. *Pickering*, 9 Sim. 176.

(*r*) *Pettinger* v. *Ambler*, 34 Bea. 542; *Re Williams*, 64 L. J. Ch. 349; unless an intention appears that the annuity is not to commence until the reversion falls in: *Jackson* v. *Hamilton*, 3 Jo. & Lat. 702, 9 Ir. Eq. 430.

(*s*) *Williams* v. *Wilson*, 5 N. R. 267. See *Irvin* v. *Ironmonger*, 2 R. & M. 531 (first payment to be made within eighteen months).

(*t*) *Inchaw* v. *Daly*, 9 L. R. Ir. 484. Compare *Re Robbins*, [1907] 2 Ch. 8 (where the annuity was to be purchased after realisation of the estate and payment of debts, &c.); *Astley* v. *Earl of Essex*, L. R., 6 Ch. 898 (annuity to commence after incumbrances paid off); *Rawson* v. *M'Causland*, Ir. R., 7 Eq. 277 (annuity to commence after payment of debts out of rents); *Roebuck* v. *Habershon*, 10 Jur. 279 (annuity to commence after death of another annuitant); *Bedborough* v. *Bedborough*, 34 Bea. 286 (annuity to married woman in the event of her separation from her husband).

(*u*) *Re Bywater*, 18 Ch. D. 17. See Chap. XVII., and compare *Re Williams*, supra, where the effect of a similar direction was to make the annuity commence from the testator's death, no other time having been previously specified.

(*v*) *Re Friend*, 78 L. T. 222. The point was considered doubtful in Lord Eldon's day: *Gibson* v. *Bott*, 7 Ves. at p. 97.

There is a curious distinction between pecuniary legacies and annuities as to the payment of interest. "The general rule of the Court is that arrears of an annuity do not carry interest. In the older cases, an exception was sometimes made in favour of the annuitant where the annuity was a provision for a wife or a child. Lord Hardwicke acted on this principle in *Newman* v. *Auling* (*w*). But in *Tew* v. *Lord Winterton* (*x*), Lord Thurlow repudiated this as a ground of decision, and his view of the law has, as I conceive, ever since been treated as sound and satisfactory. The cases in which in later times the Court, in the absence of express contract, has allowed interest, have been confined to those where the annuitant has held some legal security which, but for the interference of the Court, he might have made available for the obtaining of interest; or where the accumulation of arrears has been occasioned by the misconduct of the party bound to pay" (*y*).

No interest is payable on the arrears of an annuity.

And in a recent case (*z*), Kekewich, J., after stating that he was unable to see, on principle, why interest should not be payable, held, on a consideration of the cases, that the practice of not paying interest on annuities was established (*a*).

(vii.) *Sum given to buy Annuity.*—Where there is a bequest of a sum of money to buy an annuity, the annuitant is entitled to have the money, because the annuity might at once be sold, and it would be idle to compel the annuitant to have an annuity which he could resell (*b*); this is the case even where the testator shews clearly that he means the annuity to be held by trustees as a personal provision for the annuitant (*c*), or even where he expressly declares that the annuitant shall not be allowed to accept the value of the annuity in lieu thereof, or that it shall cease on alienation, unless such a condition is made effective by a gift over (*d*).

Annuitant entitled to lump sum in lieu of annuity.

If the annuitant dies before the money is laid out in the purchase

(*w*) 3 Atk. 579.

(*x*) 1 Ves. jun. 451.

(*y*) Per Lord Cranworth, C., in *Torre* v. *Brown*, 5 H. L. C. 555.

(*z*) *Re Hiscoe*, [1902] W. N. 49, 71 L. J. Ch. 347.

(*a*) *Batten* v. *Earnley*, 2 P. Wms. 163; *Anderson* v. *Dwyer*, 1 Sc. & L. 301; *Martyn* v. *Blake*, 3 Dr. & W. 125; *Taylor* v. *Taylor*, 8 Hare, 120; *Wheatley* v. *Davies*, 24 W. R. 818 (in which Malins, V.-C., refused to follow *Playfair* v. *Cooper*, 17 Bea. 187).

(*b*) *Ford* v. *Batley*, 17 Bea. 303; *Re Browne's Will*, 27 Bea. 324; *Yates* v. *Yates*, 28 Bea. 637. A direction to set aside a fund to secure an annuity does not give the annuitant the right to have the value of the annuity paid to him: *Wright* v. *Callender*, 2 D. M. & G. 652. But a discretionary power to invest a sum in the purchase of an annuity authorises the trustees to pay the sum to the annuitant: *Messeena* v. *Carr*, L. R., 9 Eq. 260.

(*c*) *Woodmeston* v. *Walker*, 2 R. & M. 197; *Re Browne's Will*, 27 Bea. 324.

(*d*) *In re Mabbett*, [1891] 1 Ch. 707; *Hunt-Foulston* v. *Furber*, 3 Ch. D. 285; *Stokes* v. *Cheek*, 28 Bea. 620; *Hatton* v. *May*, 3 Ch. D. 148; *Roper* v. *Roper*, 3 Ch. D. 714.

CHAP. XXXI.

of the annuity, his representatives will be entitled to payment of the money, even if the annuity is directed to be purchased after the death of a tenant for life, such a gift being primâ facie vested (*e*), or even if the annuity was given to a married woman for her separate use, with a restraint on anticipation (*f*). And there is no difference in this respect between a gift of a certain sum to be laid out in the purchase of an annuity, and a direction to purchase an annuity of a certain amount (*g*). In the former case, however, interest on the bequest does not run until after a year from the testator's death (*h*), while in the latter case the value of the annuity is calculated at the date of the testator's death (*i*).

The same rule applies where a sum of money is set aside for the payment of an annuity, and the principal, as well as the income, is dedicated to that purpose (*j*).

Where the testator directed his executor to set aside 200*l*., and thereout to pay his wife 3*l*. monthly, so long as she remained unmarried, it was held that on the death of the wife, unmarried, her executrix was entitled to the balance (*k*).

Reversionary annuity determinable on alienation.

In *Day* v. *Day* (*l*), a testator gave his residue upon trust for his wife for life, and after her decease, as to one-seventh part, in trust to invest the same in a Government annuity for the life of his son, and to pay the same, not by way of anticipation, to the son, but if the son should become bankrupt or encumber the annuity, then it was to go over to other persons; the son died during the lifetime of the widow without having committed a forfeiture, and it was held by Kindersley, V.-C., that the event upon which it was given over not having happened, the fund belonged to the son's representatives. But in *Power* v. *Hayne* (*m*), an exactly similar case, Malins, V.-C., refused to follow *Day* v. *Day*, and decided that the direction to purchase the annuity had failed, and that the fund was undisposed of, on the ground that the testator's obvious intention was that the annuity should be personally enjoyed by the annuitant; the V.-C. seems to have assumed that if in *Day* v. *Day* the son had survived the widow, Kindersley, V.-C., would have held him to be absolutely

(*e*) *Bayley* v. *Bishop*, 9 Ves. 6; *Yates* v. *Compton*, 2 P. W. 308; *Barnes* v. *Rowley*, 3 Ves. 305; *Palmer* v. *Craufurd*, 3 Sw. 482; *Wakeham* v. *Merrick*, 37 L. J. Ch. 45.

(*f*) As in *Re Ross*, [1900] 1 Ch. 162.

(*g*) *Dawson* v. *Heorn*, 1 R. & M. 606; *Re Robbins*, [1906] 2 Ch. 648, [1907] 2 Ch. 8; *Re Brunning*, [1909] 1 Ch. 276.

(*h*) *Re Friend*, supra.

(*i*) *Re Robbins*, supra. In *Ford* v. *Batley*, 17 Bea. 303, the executors had a discretion as to the kind of annuity to be purchased, but the M.R. refused to allow them to exercise it: ideo quære.

(*j*) *Wakeham* v. *Merrick*, supra.

(*k*) *Re Howard*, [1901] 1 Ch. 412, following *Rishton* v. *Cobb*, 5 My. & Cr. 145.

(*l*) 22 L. J. Ch. 870.

(*m*) L. R., 8 Eq. 262. See *Hatton* v. *May*, 3 Ch. D. 148

entitled to the fund (*n*). The decision of Malins, V.-C., was followed by Kekewich, J., in *Re Draper* (*o*).

Contingent purchase of annuity.

Where a testatrix charged annuities on land and, subject thereto, devised the land to trustees on trust for sale, and empowered the trustees to purchase Government annuities in place of the annuities charged on the land, and the trustees sold the land and deposited a sum of money in a bank sufficient to purchase the Government annuities, and an annuitant died before completion or payment of the purchase money, it was held that her personal representative was not entitled to receive the value of her annuity, but that the personal representative of an annuitant who died after completion was so entitled (*p*).

Whether charged on corpus or income.

(viii.) *Whether charged on Corpus or Income.*—Questions often arise whether an annuity is charged upon the corpus or only upon the income of property. Such questions arise between an annuitant and a residuary legatee, and also between an annuitant and the remainder-man of a particular fund out of which, or the income of which, the annuity is payable; in the latter case the question is whether the bequest is a bequest of an annuity for which the capital and income of the fund are liable, or whether it is a bequest of the income, or part of the income, of the fund which is directed to be set apart (*q*).

Direct gift of annuity.

Where there is a direct gift of an annuity, the annuity is payable out of the general estate before the residuary legatee is entitled to anything, and it makes no difference that the testator directs his executors or trustees to pay the annuity out of the income of his residuary estate (*r*), or to set aside a fund to produce the annuity (*s*). Sometimes the gift of residue is made subject to the payment of the annuity (*t*), which puts the matter beyond all doubt (*u*).

Intention to charge on corpus.

Even if there is no direct gift of the annuity, the testator may,

(*n*) It is only fair to point out that Malins, V.-C., appears to have had before him only the report of *Day* v. *Day*, in 1 Dr. 569, which is inaccurate.

(*o*) 57 L. J. Ch. 942.

(*p*) *Re Mabbett*, [1891] 1 Ch. 707

(*q*) *May* v. *Bennett*, 1 Russ. 370.

(*r*) *Re Mason*, 8 Ch. D. 411.

(*s*) *Carmichael* v. *Gee* (*Gee* v. *Mahood*), 5 App. Ca. 588 (where the gift of the annuity followed the direction to set aside a fund to secure it); *Bright* v. *Larcher*, 3 De G. & J. 148 (proceeds of real estate); *Park* v. *Darby*, [1895] W. N. 123; *Davies* v. *Wattier*, 1 S. & St. 463; *Upton* v. *Vanner*, 1 Dr. & Sm. 594; *Miner* v. *Baldwin*, 1 Sm. & G. 522; *Re Taylor*, 50 L. T. 717.

(*t*) As in *Miner* v. *Baldwin*, supra; *Birch* v. *Sherratt*, L. R., 2 Ch. 644; *Picard* v. *Mitchell*, 14 Bea. 103; *Haynes* v. *Haynes*, 3 D. M. & G. 590; *Perkins* v. *Cooke*, 2 J. & H. 393.

(*u*) As to the effect of the words "subject thereto" or the like in creating a continuing charge on the income, see *Re Mason*, 8 Ch. D. 411. post, p. 1149.

CHAP. XXXI.

by the provisions of his will, shew that he intends it to be provided out of residue, that is, to be charged on the corpus of his property (*v*).

Where an annuity is given indefinitely out of rents, and the property is given over subject to the annuity, this primâ facie amounts to charging the corpus with the annuity (*w*). And a direction to raise an annual sum out of land devised to trustees makes it a charge on the corpus (*x*).

In *Pearson* v. *Helliwell* (*y*), the testator charged annuities in favour of his wife and his mother on the corpus of the estate, and directed that if the rents and profits should prove insufficient, then the annuity bequeathed to his wife should abate in favour of that bequeathed to his mother. This direction was held not to deprive the wife of her right to have the corpus applied to make good her annuity.

Gift of annual income of fund.

A testator may, of course, shew that he intends an annuity which he has bequeathed to be payable out of income only, as where he directs a fund to be set aside to produce an income of 200*l.* a year, and to pay the dividends to A. for life, with remainder to B.; here B. is not entitled to come upon the corpus of the fund if the income falls below 200*l.* a year (*z*). This is not, strictly speaking, the gift of an annuity, and the question is not one between an annuitant and a residuary legatee, but between tenant for life and remainder-man. In this class of case the gift is "not a gift to an annuitant of a sum of money specifically mentioned, but it is a direction to set apart a capital sum, and what is given, and what the person to whom the income is to be paid takes, is the income of that capital sum which accrues due during his life, and nothing else" (*a*).

Annuity payable out of income of fund—

So if a fund is given to trustees upon trust to pay an annuity out of the "annual produce, dividends, or income" of the fund, there being no prior direct gift of the annuity, it will be charged only on

(*v*) *May* v. *Bennett*, 1 Russ. 370; *Wright* v. *Callender*, 2 D. M. & G. 652; *Mills* v. *Drewitt*, 20 Bea. 632; *Ingleman* v. *Worthington*, 1 Jur. N. S. 1062; *Anderson* v. *Anderson*, 33 Bea. 223; *Percy* v. *Percy*, 35 Bea. 295; *Croly* v. *Weld*, 3 D. M. & G. 993; *Perkins* v. *Cooke*, 2 J. & H. 393.

(*w*) *Phillips* v. *Gutteridge*, 3 D. J. & S. 332; *Bell* v. *Bell*, Ir. R., 6 Eq. 239. It is a question of intention on the whole will: see per Wood, V.-C., in *Salvin* v. *Weston*, 12 Jur. N. S. 700.

(*x*) *Torre* v. *Browne*, 5 H. L. C. 555.

(*y*) L. R., 18 Eq. 411.

(*z*) *Baker* v. *Baker*, 6 H. L. C. 616; *Tarbottom* v. *Earle*, 11 W. R. 680. In *Carmichael* v. *Gee*, 5 A. C. 588, the language of the will was ambiguous, but it was held (affirming C. A. in *Gee* v. *Mahood*, 11 Ch. D. 891) that the gift was one of an annuity and not of the income of the fund which the testator directed to be set aside.

(*a*) Per Jessel, M.R., in *Re Mason*, 8 Ch. D. 411; *Michell* v. *Wilton*, 20 Eq. 269; *A.-G.* v. *Poulden*, 3 Hare, 555.

income and not on corpus (*b*), unless the fund as well as the income is given in trust to pay the annuity (*c*). A gift over of the surplus income of a fund after payment of the annuity, goes to shew that the annuity is only charged on income and not on corpus (*d*). If the surplus income is directed to be accumulated for the benefit of other persons, the annuitant has no claim on the accumulated fund (*e*). A note to the case of *Howarth* v. *Rothwell* (*f*) gives a useful list of the earlier cases in which annuities were held payable out of corpus or income, as the case may be (*g*). Similarly, a testator may give his residuary estate to trustees upon trust out of the income to pay an annuity, without having made any direct bequest of the annuity: in such a case the annuity is payable only out of income, and, if it is insufficient, the annuity fails pro tanto (*h*).

—or residue.

But even where an annuity is made payable out of income, the testator may indicate an intention that it is to be charged on the corpus of the fund or residue. "If an annuity is given out of rents and profits, or dividends and interest, and the capital or corpus is given intact, from and after the annuitant's death, to another (*i*), the case is equivalent to the case of a life interest with remainder over. But if the capital is given over, not 'from and after the annuitant's death,' but 'from and after the satisfaction of the annuity and subject to the annuity,' then I think the case is equivalent to the case of a legacy and a residuary bequest, especially if the gift of the annuity itself admits of a construction charging it on the capital of the estate or of the trust fund" (*j*). Thus in *Re Mason* (*k*), a testator bequeathed life annuities to various persons, and bequeathed his residuary personalty to trustees upon trust out of the income thereof to pay and keep down the annuities, and

Gift over subject to annuity.

(*b*) *Hindle* v. *Taylor*, 20 Bea. 109; *Miller* v. *Huddlestone*, 3 Mac. & G. 513; *Heneage* v. *Andover*, 3 Y. & J. 360 (annuity secured by term of years); *Forbes* v. *Richardson*, 11 Ha. 354.

(*c*) *Hickman* v. *Upsall*, 2 Giff. 124.

(*d*) *Stelfox* v. *Sugden*, John. 234; *Taylor* v. *Taylor*, L. R., 17 Eq. 324; *Salvin* v. *Weston*, 12 Jur. N. S. 700; *Wormald* v. *Muzeen*, 29 W. R. 795, reversing 17 Ch. D. 167. See *Bell* v. *Bell*, Ir. R., 6 Eq. 239. In *Carter* v. *Salt*, Ir. R., 1 Eq. 97; *Re Matthew's Estate*, 7 L. R. Ir. 269, and *Re Pepper's Trusts*, 13 L. R. Ir. 108, the annuities were created by deed.

(*e*) *Darbon* v. *Rickards*, 14 Sim. 537.

(*f*) 30 Bea. 516.

(*g*) *Addecott* v. *Addecott*, 29 Bea. 460, is very shortly reported, and seems inconsistent with the general current of authority.

(*h*) *Re Boden*, [1907] 1 Ch. 132; and see *Sheppard* v. *Sheppard*, 32 Bea. 194.

(*i*) *Foster* v. *Smith*, 1 Ph. 629; *Michell* v. *Wilton*, 23 W. R. 789; *Earle* v. *Bellingham*, 24 Bea. 445.

(*j*) Per Rolt, L.J., in *Birch* v. *Sherratt*, L. R., 2 Ch. 644; *Playfair* v. *Cooper*, 17 Bea. 187; *Ex parte Wilkinson*, 3 De G. & S. 633; *Magill* v. *Murphy*, 1 L. R. Ir. 496; *Re Moore's Estate*, 19 L. R. Ir. 365.

(*k*) 8 Ch. D. 411.

subject thereto upon trusts for his children: it was held by Jessel, M.R., that the annuities were charged on corpus.

Effect of gift over "subject to" annuity.

The difficulty in these cases is to know whether the testator, in directing that the ultimate gift of the property is to be subject to the annuity, means anything more than to refer to the previous trust for payment of the annuity. If the gift over is clearly made subject to the complete performance of the trust for payment of the annuity, then the annuity is charged on corpus (*l*). If, on the other hand, the intention of the testator is merely to refer to the previous trust (as where the gift over is "subject to the trusts aforesaid"), this does not make the annuity a charge on the corpus (*m*).

Continuing charge on income.

There is, however, an intermediate class of cases. Where an annuity is made payable out of income without being charged on the corpus, the intention of the testator generally is that if the income is insufficient the annuity shall to that extent not be payable. But the testator may intend that the annuity shall be a continuing charge on the income, so that after the annuitant's death the income shall, in the first place, be applied in paying off the arrears of the annuity. Thus, in *Booth* v. *Coulton* (*n*), the residue was to be held upon trust out of the annual profits to pay three annuities, and "subject as aforesaid" upon trust to apply the annual profits for the benefit of A. for life; after the death of A. the testator gave the residue to B. absolutely: it was held that the annuities were a continuing charge on the income. But this construction is an inconvenient one (*o*), and will not be adopted if the will is so framed that on the death of the annuitant the trustees are no longer in receipt of the income: as where the property is expressly given over on the death of the annuitant (*p*), or is taken out of the hands of the trustees by being given absolutely to a beneficiary (*q*).

Re Boden.

In *Re Boden* (*r*), the testator directed that his trustees should pay an annuity of 8000*l.* to his wife out of the income of his residuary estate, and that in certain events they should pay her "such further sum" as should make up the annual sum of 10,000*l.*, and he disposed of the residue "subject to the trusts aforesaid": it was held

(*l*) *Phillips* v. *Gutteridge*, 3 D. J. & S. 332; *Birch* v. *Sherratt*, L. R., 2 Ch. 644; *Re Grant*, 31 W. R. 702.

(*m*) *Re Boden*, [1907] 1 Ch. 132, post; *Re Bigge*, [1907] 1 Ch. 714.

(*n*) L. R., 5 Ch. 684. See also *Re Mason*, 8 Ch. D. 411; *Ex parte Wilkinson*, 3 De G. & S. 633; and *Forbes* v. *Richardson*, 11 Hare, 354.

(*o*) Per Jessel, M.R., in *Re Mason*, 8 Ch. D. 411.

(*p*) *Foster* v. *Smith*, 1 Ph. 629.

(*q*) *Re Boden*, [1907] 1 Ch. 132; *Re Bigge*, [1907] 1 Ch. 714.

(*r*) [1907] 1 Ch. 132.

(first) that the direction to pay out of income applied to the annuity of 10,000*l.*, and not only to the annuity of 8000*l.*, and (secondly) that the words "subject to the trusts aforesaid" meant "subject to the trusts for payment of the annuity of 8000*l.* or 10,000*l.* (as the case might be) out of the income of the residuary estate," and did not create either a charge on the corpus or a continuing charge on the income (*s*). But in *Re Howarth* (*ss*) where the gift was "subject to the aforesaid annuities," Joyce, J., adopted the principle of *Booth* v. *Coulton*, while the Court of Appeal came to the conclusion that the annuities were a charge on the corpus.

Remedies of annuitants.

If an annuity is charged on the corpus of pe estate, the arrears are, of course, payable out of capital (*t*); the fund is in Court, and the income is insufficient to meet th ty, a prospective order will be made for the sale from tim of pa of the fund to make up the annuity (*u*). If the a s charged upon the corpus of settled real estate, the Court er to order the arrears of the annuity to be raised by sale ortgage of the estate (*v*).

If the testator charges all his property wi anni the executors do not release the property by setti aside an invested fund to meet the annuity (*w*), but the Court h jurisdiction to set aside a sufficient sum to answer the annuity and pay the remainder of the residue to the residuary legatees (*x*) If, however, the income of the estate is insufficient, the Court will ro the purchase of Government annuities, so as to set fre der of the residue for the benefit of the tenant for life (*y*

If an annuity is given by a testator, and there is a direction that it is to be charged on land or paid out of a particular superadded direction does not of itself exonerate the p

(*s*) See the curious case of *Re Hedges' Trust Estate*, L. R., 18 Eq. 419, where the question whether an annuitant was entitled to have recourse to corpus was held to depend on the intention expressed (or supposed to be expressed) by another testator. Such decisions should not be reported.

(*ss*) [1909] 1 Ch. 485; 2 Ch. 19.

(*t*) *Stamper* v. *Pickering*, 9 Sim. 176.

(*u*) *Hodge* v. *Lewin*, 1 Bea. 431; *Swallow* v. *Swallow*, 1 Bea. 432.

(*v*) *Re Tucker*, [1893] 2 Ch. 323, referred to in *Hambro* v. *Hambro*, [1894] 2 Ch. at p. 572. In *Philipps* v. *Philipps*, 8 Bea. 193, it was held that annuitants whose annuities were charged on settled estates were not entitled to ar out of corpus; it is difficult t this case with *Re Tucker*, wh er, it was not cited. Se v. *Mitchell*, 14 Bea. 103; *Byam* 19 Bea. 556.

(*w*) *Gordon* v. *Bowden*, 6 Mad. 34

(*x*) *Harbin* v. *Masterman*, [1896] 1 Ch. 351. Compare the cases on contingent legacies at p. 1111. The annuitant is entitled to the best security in Government stocks which can be obtained: *Hill* v. *Rattey*, 2 J. & H. 634; *Hicks* v. *Ross*, [1891] 3 Ch. 499.

(*y*) *Re Grant*, 31 W. R. 703 (the headnote erroneously states that the annuities were charged on real estate).

CHAP. XXXI.

of the testator (*z*). But the testator may charge a particular part of his property in exoneration of the rest (*a*).

Where an annuity is charged on land which is amply sufficient to answer the annuity, and the annuity falls in arrear, it seems that the Court will not appoint a receiver if the annuitant could have recovered the arrears by distress (*b*). But the annuitant is entitled to a decree for administration if the annuity is charged on the general residue as well as on land (*c*). Where leasehold property is given subject to an annuity, the annuitant is not entitled to have the property sold and the annuity secured while the annuity is regularly paid (*d*).

An annuity may be charged on personalty as well as realty, in which case the annuitant is entitled to cumulative remedies for its recovery (*e*).

General rules.

II.—Rent-charges (*ee*).—The general rules above stated with regard to annuities apply to rent-charges. Thus, where a rent-charge is devised by will by way of creation de novo, without words of limitation, the devisee is primâ facie entitled only to a rent-charge during his life, and not to a perpetual rent-charge. But this is a question of intention, depending on the language of the will (*f*). So if a rent-charge is given to three persons in equal shares, during their lives and the life of the survivor, the share of each of them (except the last survivor) passes on his death to his personal representatives (*g*).

Rent-charge in fee, in tail, &c.

An existing rent-charge in fee, being an incorporeal hereditament, may be disposed of by will, like any other hereditament (*h*) and

(*z*) *Re Trenchard*, [1905] 1 Ch. 82.

(*a*) *Greer* v. *Waring*, [1896] 1 Ir. R. 427. See Chap. LIII.; and see *Paget* v. *Huish*, 1 H. & M. 663.

(*b*) *Sollory* v. *Leaver*, L. R., 9 Eq. 22; *Kelsey* v. *Kelsey*, L. R., 17 Eq. 495. But there seems no doubt that in a proper case the Court will appoint a receiver: *Garfitt* v. *Allen*, 37 Ch. D. 48. See also post.

(*c*) *Wollaston* v. *Wollaston*, 7 Ch. D. 58.

(*d*) *Re Potter*, 50 L. T. 8; *Re Parry*, 42 Ch. D. 570.

(*e*) *Wollaston* v. *Wollaston*, 7 Ch. D. 58, and cases there cited. As to rent-charges created by deed, see *Butt's Case*, 7 Rep. 23a, and *Richardson* v. *Nixon*, 2 Jo. & Lat. 250.

(*ee*) Mr. Burton and Mr. Challis think that the correct plural of rent-charge is rents-charge, but the more usual spelling is so convenient that no apology is made for adopting it.

(*f*) *Mansergh* v. *Campbell*, 3 De G. & J. 232; *Sullivan* v. *Galbraith*, Ir. R., 4 Eq. 582; *Blight* v. *Hartnoll*, 19 Ch. D. 294, and other cases ante, p. 1139.

(*g*) *Chatfield* v. *Berchtoldt*, 18 W. R. 887, and other cases cited in Chap. XXXIV.

(*h*) Wills Act, sec. 3. A rent-charge for years is a chattel interest, and so is a rent-charge issuing out of a term of years; *Butt's Case*, 7 Rep. 23a; Coppinger on Rents, 112; *Re Fraser*, [1904] 1 Ch. 726. As to a rent-charge issuing out of land held pur auter vie, see *Hassell* d. *Hodgson* v. *Gowthwaite*, Willes, 500; *Plunket* v. *Reilly*, 2 Ir. Ch. 585. The dictum of Sugden, L.C., in *Richardson* v. *Nixon*, 2 Jo. & L. 250, seems to be contrary to the doctrine laid down in Co. Litt. 148a.

as it savours of the realty it may be entailed (*i*). But there is this difference between a rent-charge created de novo by devise to A. and the heirs of his body, and an existing rent-charge in fee devised to A. and the heirs of his body, that in the former case, if A. bars the entail, he only acquires a base fee, determinable upon his decease and the failure of his issue in tail, while in the latter case he acquires the fee simple. So if a rent-charge is devised de novo to A. and the heirs of his body, with remainder to B. and his heirs, A. can by barring the entail acquire the fee simple (*j*).

A rent-charge may be limited pur auter vie (*k*).

A rent-charge may be limited by way of a use upon a use (*l*).

Power to appoint rent-charge.

A testator may give a person power to appoint a rent-charge (*m*). If the power a[illegible]es the appointment of a rent-charge to a married wo[illegible] way of jointure, it is primâ facie intended not to take ef[illegible] at the death of her husband (*n*).

What words will create a rent-charge.

An annu[illegible] or yearly sum bequeathed by will may be made a rent-charge by words expressive of that intention. As where a testator devises land to A., " subject to and charged and chargeable with the payment of " a yearly sum to B. (*o*). And where a testator bequeaths an annuity, it is converted into a rent-charge if the testator goes on to charge it on land with a power of distress in such a way as to shew that the personal estate is not to be liable (*p*).

But if the annuity is payable out of the personal estate, the fact that it is also charged on real estate does not prevent it from being an ordinary personal annuity (*q*).

Charge on real and personal estate.

In *Taylor* v. *Martindale* (*r*), the testator gave his real and personal estate to his wife, subject to an annuity to his brother of " 50*l*. a year for ever " : it appears to have been held that it was merely a personal annuity. This decision was followed by Malins, V.-C., in

(*i*) Co. Litt. 19b.

(*j*) Co. Litt. 298a, Butler's note, citing *Chaplin* v. *Chaplin*, 3 P. W. 229, and other cases.

(*k*) *Bearpark* v. *Hutchinson*, 7 Bing. 178.

(*l*) *Gilbertson* v. *Richards*, 4 H. & N. 277; *Hanly* v. *Carroll*, [1907] 1 Ir. 166.

(*m*) See *Mountcashell* v. *Smyth*, [1895] 1 Ir. R. [illegible], where the amount of rent-charge [illegible] reference.

(*n*) [illegible] [1896] 2 Ch. 385, [illegible] *Jamies*[illegible] *Trevelyan*. 10 Ed. 269 [illegible] explained.

(*o*) [illegible] v. *Robinson*, 3 Bing. 392; *Ramsa*[illegible] 16 Sim. 5[illegible]5; *Ex parte* [illegible] *Creed* v. *Creed*, 11 Cl. & F. 491.

(*p*) *Patching* v. *Barnett*, 51 L. J. Ch. 74; *Ion* v. *Ashton*, 28 Bea. 379. See *Buckley* v. *Buckley*, 19 L. R. Ir. 544, and *Sinnett* v. *Herbert*, L. R., 12 Eq. 201 at p. 206.

(*q*) *Re Trenchard*, [1905] 1 Ch. 82, where *Lomax* v. *Lomax*, 12 Bea. 285; *Shipperdson* v. *Tower*, 1 Y. & C. C. C. 441; *Buckley* v. *Buckley*, 19 L. R. Ir. 544; *Re Waring*, [1896] 1 Ir. R. 427, are examined. The decision in *Re Trenchard* is examined in *Re Spencer Cooper*, [1908] 1 Ch. 130. As to cumulative remedies, see the cases referred to, supra p. 1152, n. (*e*).

(*r*) 12 Sim. 158.

CHAP. XXXI.

Parsons v. *Parsons* (*s*). But in two Irish cases it seems to have been assumed that the annuity in *Taylor* v. *Martindale* was charged on the real and personal estate of the testator (*t*). And in *Sollory* v. *Leaver* (*u*), where the testator gave an annuity to A., and devised and bequeathed all his real and personal property to B., subject and charged with the payment of the annuity, Malins, V.-C., held that the annuity was charged on the land, and that A. could recover it by distress. Such an annuitant can also obtain the appointment of a receiver (*v*).

Whether trust to pay annuity out of rents creates rent-charge.

In *Adams* v. *Adams* (*w*), lands were devised to trustees and their heirs "upon trust for such persons and for such uses here mentioned," namely, upon trust to permit and suffer A. to take the rents and profits during his life, "subject with this proviso, to pay my wife, or her assigns, one annuity or yearly rent of four guineas, issuing out of the same, during her life": it seems to have been assumed by the Court that the annuity was to be paid by the trustees, and that they took the legal estate during the widow's lifetime, so that no rent-charge was created in her favour; but the point did not require decision.

But if the annuity is expressed to be payable out of the land, and not merely out of the rents and profits, this creates a charge on the land (*x*).

Abatement.

If a testator gives a rent-charge, payable out of land devised by his will, and it is found that he was only entitled to an undivided share of the land, the rent-charge does not abate, but is payable in full out of the share belonging to the testator (*y*).

Priority of rent-charges.

Where several rent-charges are limited by the same will, they primâ facie rank pari passu, in accordance with the general rule relating to annuities and rent-charges, and if the property is insufficient to pay them all in full, they abate rateably (*z*).

Remedies.

The Landlord and Tenant Act, 1730 (s. 5), gave a power of distress to recover rents seek, and now sec. 44 of the Conveyancing and Law of Property Act, 1881, gives powers of distress and entry

(*s*) L. R., 8 Eq. 260.

(*t*) *Joynt* v. *Richards*, 11 L. R. Ir. 278; *Martin* v. *Haynes*, 29 L. R. Ir. 416 (leaseholds).

(*u*) L. R., 9 Eq. 22. See the decision of the same judge in *Kelsey* v. *Kelsey*, L. R., 17 Eq. 495 (leasehold). In *Re Parry*, 42 Ch. D. 570, it seems to have been assumed that the annuities were charged on the whole real and personal estate: these were life annuities.

(*v*) *Garfitt* v. *Allen*, 37 Ch. D. 48. As to arrears, see that case, and also *Re Anglesey*, L. R., 17 Eq. 283, and post, note (*a*).

(*w*) 6 Q. B. 860.

(*x*) *Jenkins* v. *Jenkins*, Willes, 650; *Doe* d. *White* v. *Simpson*, 5 East, 162; *Fenwick* v. *Potts*, 8 D. M. & G. 506; *Whittemore* v. *Whittemore*, 38 L. J. Ch. 17.

(*y*) *Roche* v. *Jordan*, [1896] 1 Ir. R. 494. See *Jackson* v. *Hamilton*, supra.

(*z*) See Chap. LIV.

to persons entitled to any annual sum charged on land, and also power to demise the land charged upon trust to raise the annual sum and arrears, provided these remedies could have been conferred by the will or other instrument by which the rent-charge is created (*a*).

(*a*) As to the power of the Court to appoint a receiver, see *Garfitt* v. *Allen*, 37 Ch. D. 48, and other cases cited ante, p. 1154. As to the power of the Court to raise arrears of a rent-charge, see *Cupit* v. *Jackson*, 13 Pr. 721; *White* v. *James*, 26 Bea. 191; *Hall* v. *Hurt*, 2 J. & H. 76; *Scottish Widows' Fund* v. *Craig*, 20 Ch. D. 208; *Graves* v. *Hicks*, 11 Sim. 536; *Philipps* v. *Philipps*, 8 Bea. 193; and *Horton* v. *Hall*, L. R., 17 Eq. 437 (explaining *Taylor* v. *Taylor*, L. R., 17 Eq. 324), most of which are considered in *Re Tucker*, [1893] 2 Ch. 323, and *Hambro* v. *Hambro*, [1894] 2 Ch. 564. Where the rent-charge is secured by a term, the owner's remedies are confined to that: *Blackburne* v. *Hope-Edwardes*, [1901] 1 Ch. 419.

CHAPTER XXXII.

SATISFACTION—ADEMPTION—HOTCHPOT.

	PAGE		PAGE
I. *Satisfaction and Ademption*	1156	IV. *Satisfaction of Portions by Legacies*	1166
II. *Ademption of Legacies by Portions*	1158	V. *Satisfaction of Debts by Legacies*	1172
III. *Ademption of Legacies given for a Purpose*	1164	VI. *Hotchpot*	1175

Definition of satisfaction.

I.—Satisfaction and Ademption.—"Satisfaction is the donation of a thing, with the intention that it is to be taken, either wholly or in part, in extinguishment of some prior claim of the donee" (*a*).

From this definition it follows that satisfaction is a doctrine which does not arise only in cases of wills, but, as will appear later, it so frequently arises in connection with legacies, that it is convenient to treat of the doctrine under the law of wills.

Intention is at the root of the doctrine of satisfaction, but the presumption of Courts of Equity against double portions, although it is not a rule of construction, has gone far in the direction of inferring intention (in the case of personal estate) from the mere relation of father and child (*b*). The existence of this presumption not infrequently makes the application of the general rule to particular cases a very difficult one, but when once the true intention has been discovered, the doctrine of satisfaction in itself causes no difficulty.

Satisfaction of debts by portions.

Thus, where a debt exists from a parent or other person in loco parentis, an advancement upon the marriage of the child is presumed to be a satisfaction, or satisfaction pro tanto, of the debt. This kind of satisfaction—of debts by portions—is outside the scope of this treatise, but the two cases of satisfaction of debts by legacies, and satisfaction of portions by legacies, will be considered and discussed.

(*a*) White and Tudor, L. C., note to *Chancey's Case*, 1 P. W. 408, cited with approval in *Chichester* v. *Coventry*, L. R., 2 H. L. at p. 95. As to the effect of an express provision for satisfaction see *Hoare* v. *Barnes*, 3 Br. C. C. 316; *Nottley* v. *Palmer*, 2 Dr. 93, and other cases cited in Chap. XVI.; and see post, p. 1170.

(*b*) *Chichester* v. *Coventry*, L. R., 2 H. L. at p. 86.

Ademption of legacies by portions.

If, on the other hand, a testator, after making a will giving a legacy to a child, advances a portion on the marriage of the child, a similar question arises, namely, whether the child is intended to have both the legacy and the portion, but it will be seen that this case is not within the definition of satisfaction given above, because the donee had no prior claim; and if the portion is intended to be in substitution for the legacy the latter is said to be adeemed.

The words satisfaction and ademption have sometimes been confused: both cases may perhaps be included in the neutral word substitution; but there are several most important distinctions to be drawn between them which will now be pointed out, after a few observations on the meaning of the word ademption.

Different meanings of the word ademption.

The word ademption (from the Latin *adimere*) implies that the legacy has been taken away. Thus there are two kinds of ademption: the one where the testator gives a specific chattel or fund, and the legacy fails because the chattel or fund has ceased to be part of the testator's assets; the other, where the testator gives a general legacy, and the legacy is held not to be payable because the intended bounty has already been satisfied by the testator: that is, there is an implied revocation of the gift of the legacy. The former of these kinds of ademption has been treated of in the chapter on legacies, and some observations are there made upon what may be considered to be a third kind of ademption, namely, ademption by removal (*e*). It is the other kind which we treat of here, and it will be convenient to state, in the first place, the distinctions between it and the former kind of ademption, and between it and satisfaction.

Distinction between the two kinds of ademption.

Ademption by the taking away of the subject of the gift from the testator's assets only occurs in the case of specific legacies; further, the testator's intention has nothing to do with the matter: ademption by the previous satisfaction of the gift only occurs in the case of general legacies; further, the testator's intention has everything to do with the matter.

Distinction between ademption and satisfaction.

Lord Romilly, in *Lord Chichester* v. *Coventry* (*d*), has thus explained the distinction between ademption and satisfaction: "In ademption the former benefit is given by a will which is a revocable instrument, and which the testator can alter as he pleases, and consequently, when he gives benefits by deed subsequently to the will, he may, either by express words or by implication of law, substitute a second

(*e*) A specific devise of land may be adeemed by the property being sold or conveyed after the date of the will. Mr. Jarman treats this as an instance of "revocation by alteration of estate": ante, p. 161.

(*d*) L. R., 2 H. L. at p. 90.

CHAP. XXXII.

gift for the former, which he has the power of altering at his pleasure. Consequently, in this case the law uses the word ademption because the bequest or devise contained in the will is thereby adeemed; that is, taken out of the will. But when a father, on the marriage of a child, enters into a covenant to settle either land or money, he is unable to adeem or alter that covenant, and if he give benefits by his will to the same objects, and states that this is to be in satisfaction of the covenant, he necessarily gives the objects of the covenant the right to elect whether they will take under the covenant, or whether they will take under the will. Therefore, this distinction is manifest. In cases of satisfaction, the persons intended to be benefited by the covenant, who, for shortness, may be called the objects of the covenant, and the persons intended to be benefited by the bequest or devise, in other words, the objects of the bequest, must be the same. In cases of ademption they may be, and frequently are, different."

Election.

Thus in cases of satisfaction the will is subsequent to the settlement or debt; the intention to satisfy is to be found in, or presumed to be found in, the will; a case of election must arise; and the objects of the covenant or creditors must be the legatees (*e*). In cases of ademption, on the other hand, the will is prior to the settlement; the intention to revoke the gift cannot be found in the will, but must be found in some act subsequent to the will; election cannot arise; and the objects of the covenant and of the bequest need not be the same. There is no great difficulty in keeping these distinctions in mind, if we recollect that ademption is in the nature of a revocation of a legacy, satisfaction the discharge of an obligation by means of a legacy; why then have ademption and satisfaction been so often confused? The reason is that in both classes of cases we are, speaking generally, applying the general rule of equity, which presumes against double portions to children.

Ademption of legacies by portions.

II.—Ademption of Legacies by Portions.—In the leading case of *Ex parte Pye* (*f*), Lord Eldon, C., stated the general rule of ademption of legacies by portions in the following terms: "When a father gives a legacy to a child, the legacy coming from a father to a child must be understood as a portion, though it is not so described in the will; and afterwards advancing a portion for that child, though there might be slight circumstances of difference between

(*e*) *Cooper* v. *Macdonald*, L. R., 16 Eq. 258.

(*f*) 18 Ves. 140. White and Tudor, L. C. vol. ii. p. 366.

that advance and the portion and a difference in amount, yet the father will be intended to have the same purpose in each instance; and the advance is therefore an adempti on of the legacy" (*g*).

The doctrine, then, which is fully established, although some modern judges dislike it (*h*), depends upon two assumptions: (1) that a legacy to a child is intended to be a portion; (2) that a subsequent portion is intended to be in substitution for the legacy. It is not very easy to ascertain the precise import of the first of these propositions, for the word portion is not a term of art. But it seems to be something which is given by the parent to establish the child in life or to make what is called provision for him (*i*). The second proposition is merely a special case of the general rule of equity which presumes that a testator does not intend a child to have a double portion. This presumption is not a rule of law, and may be rebutted (*j*). The circumstances may shew that a gift given during the lifetime is not intended as an ademption of the bequest. Thus, if a father gives a large sum to a daughter and expressly declares that it is not a portion, and subsequently gives a similar sum to a son, these circumstances may be sufficient to shew that the payment to the son was not intended as a portion (*k*). From the fact that the object of a portion is to make provision for a child, it is clear that small gifts, or even a series of small gifts, do not constitute a portion (*l*); thus, a gift for a wedding outfit or trip (*m*), or to enable the donee to pay off a debt (*n*), is not a portion, and the rule that a legacy to a child is a portion, of course does not mean that a small specific legacy is a portion, but that a gift of a substantial sum or a share of residue is intended to be a provision for the child. On the other hand, the purchase of a business for a son is clearly intended to be a provision for him, and may be a portion (*o*). It is

What is a portion?

(*g*) Early cases on this subject are, *Elkenhead's Case*, cited 2 Vern. 257 (see *Farnham* v. *Phillips*, 2 Atk. 215); *Ward* v. *Lant*, Prec. Ch. 182; *Scotton* v. *Scotton*, 1 Stra. 235; *Tapper* v. *Chalcroft*, cited 2 Atk. 492; *Watson* v. *Earl Lincoln*, Amb. 325; *Grave* v. *Salisbury*, 1 B. C. C. 425; *Jenkins* v. *Powell*, 2 Vern. 115; *Platt* v. *Platt*, 3 Sim. 503. The effect of most of these is stated in Roper, p. 367 et seq. See *Montefiore* v. *Guedalla*, 1 D. F. & J. 93.

(*h*) *Montagu* v. *Sandwich*, 32 Ch. D. at p. 544.

(*i*) *Taylor* v. *Taylor*, 20 Eq. 155.

(*j*) *Re Lacon*, [1891] 2 Ch. 482 at p. 498.

(*k*) *Re Scott*, [1903] 1 Ch. 1. In this case the Court of Appeal adopted the view of Jessel, M. R., in *Taylor* v. *Taylor*, supra, in preference to that of Wood, V.-C., in *Boyd* v. *Boyd*, L. R., 4 Eq. 305, and of Pearson, J., in *Re Blockley*, 29 Ch. D. 250.

(*l*) *Suisse* v. *Lowther*, 2 Ha. 424; *Schofield* v. *Heap*, 27 Bea. 93; *Nevin* v. *Drysdale*, 4 Eq. 517; *Re Pollock*, 28 Ch. D. 552; *Re Lacon*, [1891] 2 Ch. 482; *Taylor* v. *Taylor*, 20 Eq. 155; *Ravenscroft* v. *Jones*, 32 Bea. 669, 4 D. J. & S. 224.

(*m*) *Watson* v. *Watson*, 33 Bea. 574; *Re Peacock's Estates*, 14 Eq. 236; *Ferris* v. *Goodburn*, 27 L. J. Ch. 574.

(*n*) *Taylor* v. *Taylor*, L. R., 20 Eq. 155; *Re Scott*, [1903] 1 Ch. 1, disapproving *Re Blockley*, supra.

(*o*) *Stevenson* v. *Masson*, 17 Eq. 78.

hardly necessary to point out that the most ordinary case of a portion is a gift upon marriage, for the purpose of making provision for the child and his or her family (*p*). An annuity may be a portion (*q*).

In loco parentis.

The rule extends to all cases in which the testator is in loco parentis to the legatee, and is not confined to the case of father and lawful child (*r*). The meaning of a person being in loco parentis is carefully discussed by Lord Cottenham, C., in *Powys* v. *Mansfield*, from which it appears that a person in loco parentis to a child is a person who means to put himself in the situation of the lawful father of the child, with reference to the father's office and duty of making a provision for the child. But unless the testator has put himself in loco parentis, or unless the purpose for which the legacy was given appears on the face of the will (*s*), the rule does not extend to natural children, or to grandchildren, brothers, nephews, or other relatives (*t*).

Evidence is admissible to prove that a person means to put himself in loco parentis (*u*).

Ademption pro tanto.

At one time it was thought that the ademption was complete, although the sum advanced was less than the legacy (*v*), but in *Pym* v. *Lockyer* (*w*), Lord Cottenham, C., decided that there was not sufficient authority to support this view, and that where the advance is less than the legacy there is an ademption pro tanto. The portion, in fact, is to be brought into hotchpot, and its value is taken at the time the portion was advanced (*a*).

Advance before will no ademption.

Where the advance is made before the date of the will, it is clear that, apart from any agreement between the father and the child (*b*), the advance cannot cause a legacy to be adeemed, for, in fact, there

(*p*) *Leighton* v. *Leighton*, 18 Eq. 458.

(*q*) *Watson* v. *Watson*, 33 Bea. 574; *Hatfeild* v. *Minet*, 8 Ch. D. 136.

(*r*) *Booker* v. *Allen*, 2 Russ. & M. 270; *Powys* v. *Mansfield*, 3 My. & C. 359; *Rogers* v. *Soutten*, 2 Keen. 598.

(*s*) *Re Smythies*, [1903] 1 Ch. 259.

(*t*) *Grave* v. *Lord Salisbury*, 1 Br. C. C. 425, Roper, 382; *Shudal* v. *Jekyll*, 2 Atk. 516; *Powel* v. *Cleaver*, 2 Br. C. C. 499; *Wetherby* v. *Dixon*, Coop. C. C. 279; *Roome* v. *Roome*, 3 Atk. 181; *Perry* v. *Whitehead*, 6 Ves. 544; *Ellis* v. *Ellis*, 1 Sch. & L. 1; *Twining* v. *Powell*, 2 Coll. 262; *Lyddon* v. *Ellison*, 19 Bea. 565; *Curtin* v. *Evans*, 9 Ir. R. Eq. 553; *Fowkes* v. *Pascoe*, L. R., 10 Ch. 343.

(*u*) *Powys* v. *Mansfield*, 3 My. & C. 359; *Fowkes* v. *Pascoe*, L. R., 10 Ch. 343.

(*v*) Roper on Legacies, 4th edition, p. 366; *Harlop* v. *Whitmore*, 1 P. W. 681; *Clarke* v. *Burgoine*, 1 Dick. 353; *Ex parte Pye*, 18 Ves. at p. 151.

(*w*) 5 My. & Cr. 29; and see *Hopwood* v. *Hopwood*, 7 H. L. C. 728; *Kirk* v. *Eddowes*, 3 Ha. 509. In *Hoskins* v. *Hoskins*, Pre. Ch. 263, there was evidence of intention that the ademption should be partial. *Montague* v. *Montague*, 15 Bea. 565; *Re Pollock*, 28 Ch. D. 552. *Watson* v. *Watson*, 33 Bea. 576. *Kircudbright* v. *Kircudbright*, 8 Ves. 51; *Hatfeild* v. *Minet*, 8 Ch. D. 136; *Re Beddington*, [1900] 1 Ch. 771; *Re Furness*, [1901] 2 Ch. 346.

(*a*) As to hotchpot and valuation for purposes of hotchpot, see below.

(*b*) *Upton* v. *Prince*, 1 Cas. t. Tal. 71; *Taylor* v. *Cartwright*, L. R., 14 Eq. 167.

is no legacy to adeem at the date of the advance, and it has accordingly been laid down that "There is no presumption of law that the payment of a sum of money to a child even by a father before the date of the will is to go against a legacy to that child" (*c*). On the other hand, a legacy which has been adeemed will not be revived by a codicil republishing the will. The reason is that "the codicil can only act upon the will as it existed at the time; and, at the time, the legacy revoked, adeemed, or satisfied, formed no part of it" (*d*). And since 1 Vict. c. 26, a bequest of personalty once adeemed cannot be revived by parol, and the "continuing operation" of a will under sec. 24 extends only to uninterrupted gifts.

Adeemed legacy not revived by republication.

At one time it was doubted whether the rule applied to gifts of shares of residue (*e*), but it was settled in *Montefiore* v. *Guedalla* (*f*) that it does so. But though, where a legacy which is not a share of residue is adeemed, the residuary legatees get the benefit though they are strangers, yet the doctrine is not applied for the benefit of strangers where the legacy is a share of residue. The reason for this is explained by Mellish, L.J., in *Meinertzagen* v. *Walters* (*g*): "Now in the ordinary case of a legacy, where a legacy has been left to a child, and then a gift has been made which amounts to an ademption of that legacy, there certainly appears to be no possible way of holding it to be an ademption, so as to carry out the general rule against double portions, except by holding that whoever has the residue benefits by it; because by the necessity of the case the persons who have the residue must benefit by the fact of the previous legacy not being paid from any cause whatever. But, when we come to apply the rule as to a share of residue, it appears to me that it is perfectly easy to carry out what I consider the real principle of the rule, namely, equality between the children without allowing the stranger to take any benefit. It appears to me, therefore, that if the rule is to be applied to a share of residue it is to be applied simply to such an extent as may be necessary to carry out the principle that a testator who has divided his residue

Rule applies to share of residue.

—but not for the benefit of strangers.

(*c*) *Taylor* v. *Cartwright*, L. R., 14 Eq. at p. 176. See also *Re Peacock's Estate*, L. R., 14 Eq. 236.

(*d*) *Powys* v. *Mansfield*, 3 M. & Cr. at p. 376. See also *Drinkwater* v. *Falconer*, 2 Ves. sen. 623; *Izard* v. *Hurst*, Free. Ch. 224; *Monck* v. *Lord Monck*, 1 Ba. & Be. 298; *Booker* v. *Allen*, 2 Russ. & M. 270; *Montague* v. *Montague*, 15 Bea. 565, and the cases quoted on p. 203.

(*e*) Roper, 4th edition, p. 377; *Farnham* v. *Phillips*, 2 Atk. 215; *Watson* v. *Earl Lincoln*, Amb. 325; *Smith* v. *Strong*, 4 B. C. C. 493; *Freemantle* v. *Banks*, 5 Ves. 79; *Devese* v. *Pontet*, 1 Cox 188; but on the other hand see *Bengough* v. *Walker*, 15 Ves. 507.

(*f*) 1 D. F. & J. 93.

(*g*) L. R., 7 Ch. 670; *Re Heather*, [1906] 2 Ch. 230; *Schofield* v. *Heap*, 27 Bea. 93; *Beckton* v. *Barton*, 27 Bea. 99; *Thynne* v. *Glengall*, 2 H. L. C. 131; *Keays* v. *Gilmore*, 8 Ir. R. Eq. 290.

among his children, either equally or in any other proportion, does not intend to alter that equality or proportion by making a subsequent gift to a particular child."

According to this principle, if a testator bequeaths his residuary estate, the value of which is 20,000*l.*, to his three sons, A., B., and C., and a stranger, X., in equal shares, and after the execution of the will makes an advance of 2000*l.* to A., the estate is divisable thus: 3666*l.* 13*s.* 4*d.* to A., 5666*l.* 13*s.* 4*d.* to each of B. and C., and 5000*l.* to X. The exact point did not arise in *Meinertzagen* v. *Walters*, but the principle seems to be settled (*h*).

And where a legacy is given to a child, as well as a share of residue, the other residuary legatee being a stranger, neither the legacy nor the share of residue is adeemed in favour of the stranger (*i*).

Where legacy is absolute and share of residue settled.

If a testator bequeaths a legacy to a son absolutely, and also bequeaths a share of residue for the benefit of that son and his family by way of settlement, and afterwards makes an advance for the benefit of his son and his family by way of settlement, the advance will, as a general rule, operate pro tanto as an ademption of the share of residue rather than as an ademption of the absolute pecuniary legacy to the son (*j*).

Children taking by substitutional gift.

It seems that if a testator bequeaths a share of residue to a son, with a substitutional gift to the son's children in the event of his dying in the testator's lifetime, and afterwards makes an advance by way of portion to the son, and the son predeceases him, leaving children, they must bring the advance into account (*k*).

The presumption may be rebutted—by evidence.

The will, since it is prior to the advance, cannot throw any light upon the question whether the subsequent advance is intended as a portion and in substitution for the legacy. The rule is founded on a presumption which can be rebutted by evidence, for this evidence is not directed towards the construction of a written document—the will—but to shew what are the circumstances of the subsequent act (*l*). Apart from extrinsic evidence, the presumption may be rebutted by differences between the advance and the portion: but, as will be seen later, the differences which

—by difference between the advance and the portion.

(*h*) See *Stewart* v. *Stewart*, 15 Ch. D. 539. It would appear from this case that if a testator dies intestate as to part of his property, and his children take as his next of kin under the Statute of Distribution, the doctrine of ademption applies to the share of any child who has been advanced since the date of the will.

(*i*) *Re Heather*, [1906] 2 Ch. 230.

(*j*) *Montefiore* v. *Guedalla*, 1 D. F. & J. 93.

(*k*) *Re Scott*, [1903] 1 Ch. 1. The point did not really arise, because the advance in that case was not a portion. In *Rose* v. *Rogers*, 39 L. J. Ch. 791, the advance was made by way of loan.

(*l*) *Kirk* v. *Eddowes*, 3 Ha. 509; *Re Lacon*, [1891] 2 Ch. 482; *Hinchcliffe* v. *Hinchcliffe*, 3 Ves. 516.

may be sufficient to rebut the presumption in cases of satisfaction are not always sufficient to rebut it in cases of ademption. In fact, where both the gifts are established to be portions, that is, provisions for the child, considerable differences are not sufficient to rebut the presumption, and the principle is applied although it results in depriving persons entitled in remainder to the legacy. Thus, if the father gives a settled legacy to a child, and afterwards makes a settlement on that child, the principle applies, in spite of the fact that the limitations under the will and settlement are not the same (*m*). And in *Twining* v. *Powell* (*n*), a legacy to M., with a contingent limitation over to charity, which was adeemed by an advance to M. in the testatrix's lifetime, was held to be extinguished, as to the charity.

Different limitations are not sufficient to rebut the presumption

Again, the fact that the legacy and the portion, where it is provided for by a settlement, subsequent to the will, are payable at different times, is not of itself sufficient to rebut the presumption (*o*).

—nor are different times of payment.

How far the different motives of the property given by the will and that given subsequently is sufficient to rebut the presumption is a difficult question. The general rule is that the presumption against double portions will not prevail where the testamentary portion and the subsequent advancement are not ejusdem generis (*p*). Several of the cases refer to gifts of a share of a business, and it seems that for the purposes of considering the difference of the gifts the cases upon the subject of satisfaction are applicable to those of ademption. So far as any general principle can be laid down, it seems to be that "where a testator gives to a child a beneficial lease or share of works or any other thing, and says nothing about the value, he is not to be taken to be giving it in satisfaction of a pecuniary bequest; but where he does refer to the value the presumption of satisfaction may arise" (*q*). Other cases on this point are given in the footnote (*r*).

Where the nature of the property is different.

(*m*) *Stevenson* v. *Masson*, L. R., 17 Eq. 78; *Edgeworth* v. *Johnston*, I. R., 11 Eq. 326; *Durham* v. *Wharton*, 3 Cl. & Fin. 146; *Trimmer* v. *Bayne*, 7 Ves. 508; *Baugh* v. *Reed*, 3 Br. C. C. 192; *Monck* v. *Lord Monck*, 1 Ba. & Be. 298; *Platt* v. *Platt*, 3 Sim. 503; *Carver* v. *Bowles*, 2 Russ. & Myl. 301; *Lloyd* v. *Harvey*, 2 Russ. & Myl. 310; *Barry* v. *Harding*, 1 Jones & L. 475; *Sheffield* v. *Coventry*, 2 Russ. & M. 317; *Delacour* v. *Freeman*, 2 Ir. Ch. R. 633.

(*n*) 2 Coll. 262.

(*o*) *Hartopp* v. *Hartopp*, 17 Ves. 184; *Stevenson* v. *Masson*, L. R., 17 Eq. 78.

(*p*) *Re Jaques*, [1903] 1 Ch. 267, following *Holmes* v. *Holmes*, 1 Br. C. C. 555, and disapproving the observations of North, J., in *Re Vickers*, infra. See also *Saville v. Saville*, 2 Atk. 458.

(*q*) Per Jessel, M. R., in *Re Lawes*, 20 C[illegible] at p. 88.

(*r*) [illegible]*mes* v. *Holmes*, 1 B. C. C. 555; *Re Pollock*, 28 Ch. D. 552; *Re Lacon*, [1891] 2 Ch. 482; *Re Vickers*, 37 Ch. D. 525; and as to Consols and stock, see *Watson* v. *Watson*, 33 Bea. 574; *Leighton* v. *Leighton*, L. R., 18 Eq. 458.

Annuity may be a portion.

An annuity may, or may not, be a portion. The question is whether it is a permanent provision for the child or not (*s*).

The presumption may be rebutted if the portion is contingent

On the other hand, the following differences appear to be sufficient to rebut the presumption. If the portion is contingent it will not adeem a legacy (*t*), unless the contingency which would defeat is very remote (*u*), though, as has been mentioned above, a legacy limited over upon a contingency may be adeemed by a portion so as to defeat the limitation over.

—or if the beneficiaries are different.

Again, if the beneficiaries are different, the presumption of ademption does not often arise; as a general rule, there must be direct evidence of an intention to adeem. The question has chiefly arisen in the case of legacies to married daughters. Thus, in *Kirk* v. *Eddowes* (*v*), the testator by his will settled 3000*l.* on a married daughter and her children; after the date of the will, the testator, at his daughter's request, gave her husband 500*l.*, declaring it to be a payment on account of the settled legacy: it was held that the settled legacy was adeemed to the extent of 500*l.* Whether a gift of money to the husband of a daughter can operate as a substitution for a legacy to the daughter in the absence of any indication of intention is doubtful (*w*). A substitutional gift to issue of a child is not adeemed by a portion to the child (*ww*).

The rule does not apply to a devise of land: a devise of land is not a legacy, and it could not ordinarily be termed a portion (*x*).

Mr. Roper (*y*) considers the case where the advancement or legacy is given in lieu of a right to be another exception to the general rule, and he quotes *Baugh* v. *Read* (*z*) in support of this. But it hardly seems to be an exception to the rule, since an advancement or legacy in lieu of a right is not mere bounty on the part of the testator, and is, therefore, not merely a portion. The legatee, in fact, is in the position of a purchaser.

Ademption of legacies given for a purpose.

III.—Ademption of Legacies given for a Purpose.—There is another case in which general legacies may be adeemed which may fitly be mentioned here. If a testator, not being a parent

(*s*) *Kircudbright* v. *Kircudbright*, 8 Ves. 51; *Dawson* v. *Dawson*, L. R., 4 Eq. 504; *Edwards* v. *Freeman*, 2 P. W. 435; *Watson* v. *Watson*, 33 Bea. 574; *Hatfeild* v. *Minet*, 8 Ch. D. 136.

(*t*) *Spinks* v. *Robins*, 2 Atk. 491; *Crompton* v. *Sale*, 2 P. W. 553.

(*u*) *Powys* v. *Mansfield*, 3 My. & C. 359.

(*v*) 3 Hare, 509.

(*w*) *Ravenscroft* v. *Jones*, 32 Bea. 669. 4 D. J. & S. 224; *Cooper* v. *Macdonald*, L. R., 16 Eq. 258; *Earl of Durham* v. *Wharton*, 3 Cl. & F. 146; *Nevin* v. *Drysdale*, L. R., 4 Eq. 517.

(*ww*) *Rose* v. *Rogers*, 39 L. J. Ch. 791; *Hewitt* v. *Jardine*, L. R., 14 Eq. 58.

(*x*) *Davys* v. *Boucher*, 3 Yo. & Coll. 397.

(*y*) p. 376.

(*z*) 1 Ves. jun. 257.

or in loco parentis to a legatee, gives him a legacy for a particular purpose, and afterwards advances money for the same purpose, the legacy is adeemed. The rule is thus stated by Lord Selborne, C., in *Re Pollock* (*a*): "The presumptions arising out of the parental relation do not, of course, extend to any case in which the legatee is a stranger to that relation. But numerous authorities have determined that if a legacy appears on the face of the will to be bequeathed (though to a stranger) for a particular purpose, and a subsequent gift appears by proper evidence to have been made for the same purpose, a similar presumption is raised primâ facie in favour of ademption. And it is clear from the authorities that evidence of the circumstances under which the subsequent gift was made, including contemporaneous or substantially contemporaneous declarations of the donor (whether communicated to the donee or not) may be admissible in such a case. To constitute a particular purpose within the meaning of that doctrine, it is not, in my opinion, necessary that some special use or application of the money by, or on behalf of the legatee (e.g. for binding him an apprentice, purchasing for him a house, advancing him upon marriage or the like) should be in the testator's view. It is not less a purpose, as distinguished from a mere motive of spontaneous bounty, if the bequest is expressed to be made in fulfilment of some moral obligation recognised by the testator, and originating in a definite external cause, though not of a kind which (unless expressed) the law would have recognised or would have presumed to exist. And it appears to me that a case of this kind comes very near in principle to the first class of cases, in which ademption by a subsequent gift is inferred from the parental relation. The reasonable presumption is the same, namely, that as the purpose of both gifts was to fulfil one and the same antecedent obligation, or duty, a double fulfilment was presumably not intended" (*b*).

The purpose has to be specific, as for instance, a legacy given to purchase an advowson for the testator's son, which is adeemed by the testator afterwards purchasing an advowson for him (*c*).

The law presumes a legacy to a creditor to be in satisfaction of a debt (*d*).

(*a*) 28 Ch. D. 552

(*b*) *Robinson* v. *Whitley*, 9 Ves. 577; *Roome* v. *Roome*, 3 Atk. 181. See also *Debeze* v. *Mann*, 2 B. C. C. 519; *Monck* v. *Monck*, 1 Ba. & Be. 298; *Powys* v. *Mansfield*, 3 M. & Cr. 359; *Griffith* v. *Bourke*, 21 L. R. Ir. 92; *Rosewell* v. *Bennett*, 3 Atk. 77; *Trimmer* v. *Bayne*, 7 Ves. 508. *Re Smythies*, [1903] 1 Ch. 259 (infant—testator not in loco parentis—no ademption); *Re Corbett*, [1903] 2 Ch. 326 (charity—ademption).

(*c*) See *Pankhurst* v. *Howell*, L. R., 6 Ch. at p. 136.

(*d*) *Re Fletcher*, 38 Ch. D. 373.

CHAP. XXXII.

Satisfaction of portions by legacies.

IV.—Satisfaction of Portions by Legacies.—The doctrine of the satisfaction of portions by legacies is another illustration of the general leaning of Courts of Equity against double portions; and in this respect it bears some resemblance to the doctrine of the ademption of legacies by portions, and for the same reason it differs markedly from the doctrine of the satisfaction of debts by legacies (*e*). There need be no personal liability to pay the portions (*f*).

The rule is thus stated by Mr. Roper (*g*): "Where a parent is under obligation by articles or settlement to provide portions for his children, and he afterwards by will or codicil makes a provision for these children, it is a well-established rule of equity that such subsequent testamentary provision should be considered a satisfaction or performance of the obligation." There are numerous cases illustrating the general rule, which are referred to in the footnote (*h*).

Criticism of Mr. Roper's statement of the rule.

Mr. Roper's statement appears to be a little too wide, for the rule probably does not extend to the case of a mother. In *Re Ashton* (*i*) Stirling, J., said: "The rule against double portions is generally stated to apply to provision made by a parent or person in loco parentis: but in all the cases so far as they have been brought to my attention the parent referred to is the father. . . . Primâ facie the duty of making a provision for a child falls on the father, but may fall on or be assumed by some other person. I do not say that in no case and under no circumstance can the duty fall on or be assumed by the mother of the child; but it appears to me that the burden of proving such to be the case lies on those who assert the fact so to be." The meaning of "in loco parentis" has already been dealt with in considering ademption. Mr. Roper's statement appears to be not quite accurate in another respect, for the satisfaction is only pro tanto if the legacy is less than the portion (*k*).

It is easier to presume an intention to adeem than an intention

(*e*) Portions can also be satisfied by subsequent portions, though in this case the presumption is not so strong. See *Jesson* v. *Jesson*, 2 Vern. 255; *Davis* v. *Chambers*, 7 De. G. M. & G. 386; *Palmer* v. *Newell*, 8 De G. M. & G. 74.

(*f*) *Dawson* v. *Cleveland*, West. t. Hard. 106; *Re Battersby*, 19 L. R. Ir. 359.

(*g*) Roper, p. 1071.

(*h*) *Bruen* v. *Bruen*, 2 Vern. 439; *Blois* v. *Blois*, 2 Chan. Rep. 163; *Moulson* v. *Moulson*, 1 B. C. C. 82; *Warren* v. *Warren*, 1 B. C. C. 305; *Ackworth* v. *Ackworth*; *Byde* v. *Byde*; and *Somerset* v. *Somerset* (all in the notes to *Warren* v. *Warren*); *Copley* v. *Copley*, 1 P. W. 147; *Finch* v. *Finch*, 1 Ves. 534; *Hinchcliffe* v. *Hinchcliffe*, 3 Ves. 516; *Sparkes* v. *Cator*, 3 Ves. 530; *Pole* v. *Lord Somers*, 6 Ves. 309; *Bengough* v. *Walker*, 15 V. 507.

(*i*) [1897] 2 Ch. 574, reversed on another point, [1898] 1 Ch. 142. There is, of course, no satisfaction if the portions come from different persons. *Walpole* v. *Conway*, Barn. Ch. 153. See also *Bannatyne* v. *Ferguson*, [1896] 1 Ir. R. 149.

(*k*) *Warren* v. *Warren*, 1 B. C. C. 305, 1 Cox, 41; unless accepted as a complete satisfaction; *Byde* v. *Byde*, 2 Ed. 19.

to give a legacy in lieu or in satisfaction of an existing obligation (*l*), and there are very few cases in which a gift by will has been held a satisfaction of a previous liability, in which the persons interested under the will have not included all the persons interested under the settlement. But there are such cases (*m*); in them, however, as is obvious, the satisfaction only extends to those objects who are beneficiaries under the will. In *Lord Chichester* v. *Coventry*, Lord Romilly put the matter thus: "In cases of satisfaction, where the testator has first entered into a covenant to settle a sum of money upon his child for life, with remainder to the issue of the marriage, that covenant is not satisfied by a bequest of a like sum of money to that child absolutely; it is only satisfied pro tanto, that is, so far as the child is concerned. So if the bequest be to the children of the marriage, omitting the parent, that may be a satisfaction of so much of the covenant as relates to them, but is no satisfaction of the covenant to the parent. Accordingly, in these cases, if the bequest be to the parent, the parent may elect, or if the bequest be to the children of the marriage also the children may elect, to take under the will, instead of taking under the covenant; but this cannot affect the right of the other covenantees, who take no interest under the will" (*n*).

Persons taking derivatively not put to election.

The obligation to elect only extends to persons taking directly under the will: it does not extend to persons taking derivatively under a disposition made by a legatee. In *Re Blundell* (*o*) the testator on the marriage of his daughter covenanted to settle a sum (say 5000*l.*) on certain trusts for her and her husband and children; the settlement contained the usual after-acquired property clause: by his will the testator gave a share of his personal estate to the daughter absolutely: this share was caught by the after-acquired property clause, so that the husband and children took interests in it: it was held that the wife was the only person put to election.

The presumption of satisfaction can be rebutted by extrinsic evidence (*p*), for the rule of presumption may be rebutted or

(*l*) *Re Tussaud*, 9 Ch. D. 363; *Chichester* v. *Coventry*, L. R., 2 H. L. 71; *Montagu* v. *Sandwich*, 32 Ch. D. 525; *Dawson* v. *Dawson*, L. R., 4 Eq. 504.

(*m*) See *McCarogher* v. *Whieldon*, L. R., 3 Eq. 236; *Campbell* v. *Campbell*, L. R., 1 Eq. 383; *Bennett* v. *Houldsworth*, 6 Ch. D. 671; *Bethell* v. *Abraham*, 3 Ch. D. 590, n. *Thynne* v. *Glengall*, 2 H. L. C. 131; *Mayd* v. *Field*, 3 Ch. D. 587; *Re Vernon*, 95 L. T. 48.

(*n*) Cited with approval by Swinfen Eady, J., in *Re Blundell*, [1906] 2 Ch. at p. 229.

(*o*) [1906] 2 Ch. 222.

(*p*) *Re Tussaud*, 9 Ch. D. 363. As to the admission of evidence, see *Jeacock* v. *Falkener*, 1 Br. C. C. 295; *Haynes* v. *Mico*, 1 Br. C. C. 129; *Hinchcliffe* v. *Hinchcliffe* 3 Ves. 516; *Pole* v. *Lord*

CHAP. XXXII.

confirmed by parol evidence; and also by intrinsic evidence. That is, where the two provisions are so inconsistent in their nature as to lead the Court to the conclusion that the gifts were intended to be cumulative.

The presumption may be rebutted by—

We have now to consider what differences between the portion and the legacy are sufficient to rebut the presumption. In the case of satisfaction, the presumption is more easily rebutted than in the case of a [illegible]. Hence, although the cases on ademption are not, for this purpose, authorities on cases of satisfaction, yet cases on satisfaction apply à fortiori to cases of ademption. These observations apply only where there is no extrinsic evidence and where, apart from the differences, there is no intention manifested in the will; for in cases of satisfaction the will is subsequent to the settlement, and the intention is to be found in the will and not in the settlement. As in the case of ademption, the rule applies to gifts of residue, though, as will be seen later, a gift of residue is not considered to be in satisfaction of a debt other than a portion (*q*).

difference in the nature of the property.

Differences in the nature of the property may be sufficient to rebut the presumption (*r*). Thus, land will not be presumed to be in satisfaction for money, or money for land (*s*). But if the testator considers the pecuniary value of the gift there may be a satisfaction; thus, in *Bengough* v. *Walker* (*t*) a share in a powder works to be made up in value to 10,000*l*., charged with an annuity of 30*l*. per annum, was held to be in satisfaction of a portion of 2000*l*., and a gift of a rent-charge may be a satisfaction of a gross sum charged on land (*u*).

The fact that the portion is vested, and the legacy contingent, is sufficient to rebut the presumption (*v*); or that the legacy is in reversion (*w*).

Differences which are not sufficient to rebut the presumption.

But on the other hand, slight differences, as in the time of payment,

Somers, 6 Ves. 309; *Weall* v. *Rice*, 2 R. & M. 251; *Kirk* v. *Eddowes*, 3 Ha. 509; *Hall* v. *Hill*, 1 Dr. & W. 94.

(*q*) *Thynne* v. *Glengall*, 2 H. L. C. 131; *Rickman* v. *Morgan*, 1 B. C. C. 63; *Re Blundell*, [1906] 2 Ch. 222; but not to a life interest in residue: *Alleyn* v. *Alleyn*, 2 Ves. sen. 37.

(*r*) *Bellasis* v. *Uthwatt*, 1 Atk. 426; *Goodfellow* v. *Burchett*, 2 Vern. 298; *Ray* v. *Stanhope*, 2 Ch. R. 159; *Saville* v. *Saville*, 2 Atk. 458; *Grave* v. *Lord Salisbury*, 1 B. C. C. 425; *Pierce* v. *Locke*, 2 Ir. Ch. R. 205; *Chaplin* v. *Chaplin*, 3 P. W. 245.

(*s*) See *Lewis* v. *Lewis*, Ir. R., 11 Eq. 340.

(*t*) 15 Ves. 507.

(*u*) *Williams* v. *Duke of Bolton*, 1 Dick. 405, 4 Dr. & W. 225 n.; in *Re Jaques*, [1903] 1 Ch. 267, dissenting from *Re Vickers*, 37 Ch. D. 525, and *Re Lawes*, 20 Ch. D. 81, and approving *Holmes* v. *Holmes*, 1 B. C. C. 555.

(*v*) *Bellasis* v. *Uthwatt*, 1 Atk. 426; *Hanbury* v. *Hanbury*, 2 B. C. C. 352; *Pierce* v. *Locke*, 2 Ir. Ch. 205.

(*w*) *Sir W. Davies' Case*, 5 Vin. Ab. 292, pl. 38.

or in the limitations, are not sufficient to rebut the presumption. Thus the circumstance that by the will the legacy is to be paid three months after the wife's death instead of at her death, is not sufficient to rebut the presumption (*x*); in *Thynn* v. *Glengall* (*y*), by the settlement the husband and wife had a joint power of appointment amongst the children; by the will the wife alone had the power. This difference was not considered sufficient to rebut the presumption; and in the same case the power under the settlement extended only to the children of the marriage, and the power under the will to all the wife's children.

In *Weall* v. *Rice* (*z*), Sir J. Leach, M.R., stated the difference as follows: "In the present case the two provisions appear to me substantially of the same nature: and I consider that the wife taking in both instruments to her separate use, it is but a slight difference that in the will she is restrained from anticipation and alienation—that, the husband taking in both instruments an estate for life in remainder, it is but a slight difference that in the will it is expressed that he is to maintain and educate his children—that it is but a slight difference that by the settlement the children take as tenants in common in tail with cross remainders, and that by the will they take as tenants in common in fee, and that the testator has expressed an intention to give them cross remainders by a void executory devise, if any of them die under twenty-five. These differences, as I have before observed, appear to me to leave the two provisions substantially of the same nature."

In *Russell* v. *St. Aubyn* (*a*), Sir J. Bacon, V.-C., thus described the difference: "Now what is the difference between the obligation which the testator assumed in the present case, and the provision which he has made by way of portion for his daughter by the will? By the settlement the husband would take an interest for life; by the will the wife takes the first life interest to her separate use, and the subsequent life interest is given to the husband determinable upon his bankruptcy or alienation. By the settlement there is a joint power of appointment by the husband and wife or the survivor of them, among the children of the marriage; by the will a power of appointment is given to the wife among her children generally, or more remote issue, with an ultimate limitation in default of such issue upon the trusts declared of the other moiety of the testator's

(*x*) *Sparkes* v. *Cator*, 3 Ves. 530; *Copley* v. *Copley*, 1 P. W. 146; *Bethell* v. *Abraham*, 22 W. R. 745.

(*y*) 2 H. L. C. 131. See also *Russell* v. *St. Aubyn*, stated post; *Romaine* v. *Onslow*, 24 W. R. 899.

(*z*) 2 R. & M. 251, at p. 268.

(*a*) 2 Ch. D. 398, at p. 406. See also *Romaine* v. *Onslow*, 24 W. R. 899.

estate in favour of his daughter Mrs. M.," and held that a case of satisfaction arose.

In *Mayd* v. *Field* (*b*), Sir G. Jessell, M.R., said: "Here the difference is slight; but there is a life estate given to the husband in the settlement, and there is no such gift in the testamentary appointment. Then what is to be done as to the testamentary appointment? It is impossible to deprive the trustees of their right as creditors under the covenant; and consequently the question is, how far is the testamentary appointment satisfied by the provisions of the settlement? The answer is, to the extent to which the daughter and her children take under the settlement. The result is, that there will be nothing coming to the daughter nor anything to her children under the provisions of the will, unless the daughter's husband survive her. To that extent, therefore, the gift by the will is not duplicated in favour of the daughter and her children."

Instances where the differences have been sufficient to rebut the presumption are *Chichester* v. *Coventry* (*c*), *Lewis* v. *Lewis* (*d*), *Re Tussaud* (*e*), and *Re Vernon* (*ee*).

Indications of intention in will—

If the testator in his will states that he intends the legacy to be in satisfaction of the portion, or that it is not to be in satisfaction, but to be in addition, no question can arise; but it is sometimes difficult to ascertain whether certain expressions of the testator shew this intention (*f*). Thus, in *Montagu* v. *Earl of Sandwich* (*g*), a case which gave rise to considerable differences of judicial opinion, the testator by a settlement covenanted to pay his second son an annuity of 1000*l.* a year for life, and to charge the annuity on a sufficient part of the real estate he might be seised of. By his will he devised his real estate (subject to the charges and incumbrances thereon) in strict settlement, and gave legacies to his second son, the income of which would exceed 1000*l.* per annum. It was held that the words subject to the charges and incumbrances thereon were too general to rebut the presumption.

subject to charges.

Direction to pay debts.

And a direction in the will to pay debts is not alone sufficient to rebut the presumption (*h*).

Although the testator's intention must be found in the will, or

(*b*) 3 Ch. D. 587.
(*c*) L. R., 2 H. L. 71.
(*d*) I. R., 11 Eq. 310. 340.
(*e*) 9 Ch. D. 363.
(*ee*) 95 L. T. 48.
(*f*) *Burges* v. *Mawbey*, 10 Ves. 319; *Douce* v. *Torrington*, 2 M. & K. 600. See *Foster* v. *Evans*, 6 Sim. 15.
(*g*) 32 Ch. D. 525. See *Lethbridge* v. *Thurlow*, 15 Bea. 334.
(*h*) *Lord Chichester* v. *Coventry*, L. R., 2 H. L. 71; *Paget* v. *Grenfell*, 6 Eq. 7; *Bennett* v. *Houldsworth*, 6 Ch. D. 671.

presumed by law, and cannot be found in the settlement, yet questions may arise where the settlement declares that advances shall be in part satisfaction of the portion, for it becomes necessary to decide whether a bequest is an advancement within the meaning of the clause. If the declaration is that an advancement in the testator's lifetime is to go in part satisfaction of the portion, a legacy (*i*) or a share under an intestacy (*j*) will not be held to be an advancement within the meaning of the clause; but if the words "or at the time of my death," or "or otherwise" are added, the bequest may be held to be an advancement (*l*).

Construction of declaration in the settlement.

The cases where a distributive share of personal or real estate, which devolves upon a child, is held to be a performance or satisfaction of the obligation are not within the scope of this treatise. They are discussed by Mr. Roper at pp. 1109, et seq. of his work on Legacies.

There is a presumption that the satisfaction ensues for the benefit of the other children entitled under the settlement, but circumstances may shew that this is not intended to be the case (*m*).

In *Chichester* v. *Coventry* (*n*), the testator on the marriage of his daughter A. covenanted to pay to the trustees of her settlement 10,000*l*., with interest until payment: the 10,000*l*. was not paid during his lifetime: by his will he directed payment of his debts, and gave his residue in equal moieties upon trusts for the benefit of his daughters A. and B. for life, with limitations over: it was held that the gift by the will was not a satisfaction of the covenant, and that the 10,000*l*. must be deducted before the residue was divided.

Mode of ascertaining residue.

But a covenant by a settlor that on his death an aliquot share of his estate shall be settled for the benefit of his daughter and her family does not constitute a debt, and if by his will the settlor gives benefits to the persons who are absolutely entitled under the settlement, they are bound to elect between the benefits under the settlement and under the will (*o*).

(*i*) *Cooper* v. *Cooper*, L. R., 8 Ch. 813; *Douglas* v. *Willes*, 7 Ha. 318.

(*j*) *Twisden* v. *Twisden*, 9 V. 413.

(*l*) *Rickman* v. *Morgan*, 1 B. C. C. 63, 2 B. C. C. 394; *Leake* v. *Leake*, 10 Ves. 477; *Onslow* v. *Michell*, 18 Ves. 490; *Golding* v. *Haverfield*, 13 Price, 593; *Fazakerley* v. *Gillibrand*, 6 Sim. 591; *Noel* v. *Lord Walsingham*, 2 Sim. & St. 99; *Papillon* v. *Papillon*, 11 Sim. 642. In *Re Vernon*, 95 L. T. 48, the settlement (made on the marriage of the testator's daughter) contained a provision that any share passing to the daughter under her father's will should, if she elected to claim under the will, be a satisfaction of the father's covenant.

(*m*) *Folkes* v. *Western*, 9 Ves. 456; *Brownlow* v. *Meath*, 2 D. & Wa. 674; *Lee* v. *Head*, 1 K. & J. 620; *Bradford* v. *Romney*, 31 L. J. Ch. 497; *Noel* v. *Walsingham*, 2 S. & St. 99; *Ford* v. *Tynte*, 2 H. & M. 324; *Noblett* v. *Lichfield*, 7 Ir. Ch. R. 575.

(*n*) L. R., 2 H. L. 71.

(*o*) *Bennett* v. *Houldsworth*, 6 Ch. D. 671; *Re Vernon*, 95 L. T. 48. See also *Att.-Gen.* v. *Murray*, 20 L. R. Ir. 124.

Portion may be a "debt" for certain purposes.

V.—Satisfaction of Debts by Legacies.—Although, as above mentioned, a covenant to settle a sum of money on the marriage of a child constitutes a debt, yet with reference to the question of satisfaction, it is regarded as a portion (*oo*).

Satisfaction of debts by legacies.

With regard to ordinary debts, the rule as to their satisfaction by legacies is stated in the leading case of *Talbot* v. *Shrewsbury* (*p*), as follows: "If one being indebted to another in a sum of money does, by his will, give him a sum of money as great as or greater than the debt without taking any notice at all of the debt that this shall nevertheless be in satisfaction of the debt so as that he shall not have both the debt and the legacy."

This rule is, however, not favoured, and it has been said, rather paradoxically (*q*), that equity leans against legacies being taken in satisfaction of debts. It is probably more accurate to say that though Courts of Equity raise the presumption, yet it is a presumption which can very easily be rebutted (*r*).

The debt must be contracted before the will.

If the debt was contracted subsequently to the will, no presumption can arise, for the testator could not have intended that a legacy should go in satisfaction of a non-existent debt; and sec. 24 of the Wills Act cannot have the effect of altering the testator's intention at the time when he is making his will (*s*).

Effect of payment.

If the testator pays off the debt in his lifetime, the legacy is adeemed (*t*).

The presumption may be rebutted

The presumption may be rebutted by extrinsic evidence, by expressions of intention in the will, and by differences between the debt and the legacy.

by extrinsic evidence

On the admissibility of extrinsic evidence, the reader is referred to the cases mentioned in the previous section, which shew that a presumption may be rebutted in this way.

—by a direction to pay debts and legacies

In *Chancey's Case* (*u*), it was decided that a direction that all the testator's debts and legacies should be paid was sufficient to rebut the presumption. In that case, the testator was indebted to his

(*oo*) Ante, p. 1159.

(*p*) Pr. Ch. 394, White & Tudor, L. C. vol. II. 375; and see *Fowler* v. *Fowler*, 3 P. W. 353; *Atkinson* v. *Littlewood*, 18 Eq. 595; *Brown* v. *Dawson*, Pr. Ch. 240; *Benusan* v. *Nehemias*, 4 De G. & Sm. 381; *Wood* v. *Wood*, 7 Bea. 183.

(*q*) By Lord Cottenham, C., 2 H. L. C. at p. 153.

(*r*) See also *Carr* v. *Eastabrooke*, 3 Ves. 561, which decides that a negotiable bill of exchange is not satisfied by a legacy.

(*s*) *Cranmer's Case*, 2 Salk. 508; *Thomas* v. *Bennet*, 2 P. W. 341; *Plunkett* v. *Lewis*, 3 Ha. 316; *Minuel* v. *Sarazine*, Mos. 295; *Graham* v. *Graham*, 1 Ves. sen. 262.

(*t*) *Re Fletcher*, 38 Ch. D. 373.

(*u*) 1 P. W. 408, White & Tudor, L. C. vol. II. 376. See *Lethbridge* v. *Thurlow*, 15 Bea. 334; *Richardson* v. *Greese*, 3 Atk. 65; *Field* v. *Mostin*, 2 Dick. 543; *Jefferies* v. *Michell*, 20 B. 15; *Hassell* v. *Hawkins*, 4 Dr. 469; *Hales* v. *Darell*, 3 Bea. 324.

servant for wages in 100*l.*, and gave her a bond for that sum, and afterwards by will gave her 500*l.*, and directed that all his debts and legacies should be paid; Lord Chancellor King said: "This 100*l.* bond being then a debt, and the 500*l.* being a legacy, it was as strong as if he had directed that both the bond and the legacy should be paid."

But if the direction is contained in the will, the debt is incurred subsequently, and the legacy then given by a codicil, the presumption is not rebutted (*v*).

—or debts alone

Whether a direction to pay debts alone is sufficient to rebut the presumption has given rise to some difference of opinion. In *Edmunds* v. *Low* (*w*), it was held that this was not sufficient to rebut the presumption, but in *Re Huish* (*x*), Kay, J., said: "Now what difference is there between a direction to pay debts and legacies, and a direction to pay debts only? There is none, because the gift of a legacy is in itself a direction that the legacy shall be paid. Therefore, all that is material is, that there should be a direction that all debts should be paid. If, after giving a legacy to his creditor, a testator says: 'I direct my debt to be paid,' that means, 'although I have given a legacy to my creditor, I direct my debt to him be paid also.' It seems to me to make no difference where the testator directs that his legacies shall be paid. Accordingly I think that the case of *Edmunds* v. *Low*, which appears to have drawn a distinction between a direction to pay debts and legacies, and a direction to pay debts only, was not sufficiently considered, and I find that the balance of authority is against it" (*y*).

In *Wathen* v. *Smith* (*z*), Sir John Leach, V.-C., considered that a direction to pay debts did not refer to the testator's liability on bond, or covenant made on his marriage, but this view was disapproved by Sir J. Romilly, M.R., in *Cole* v. *Willard* (*a*).

If the documents are contemporaneous, it is a circumstance to be considered, for the presumption arises not in the will but in the circumstances of the case, and in such a case it is easier to rebut the presumption (*b*).

—by assigning a motive for the legacy.

The testator rebuts the presumption by assigning a motive

(*v*) *Gaynor* v. *Wood*, 1 P. W. 409, n.
(*w*) 3 K. & J. 318.
(*x*) 43 Ch. D. 260.
(*y*) See *Dawson* v. *Dawson*, 4 Eq. 504; *Horlock* v. *Wiggins*, 39 Ch. D. 142; *Hales* v. *Darell*, 3 Bea. 324; *Jefferies* v. *Michell*, 20 Bea. 15; *Cole* v. *Willard*, 25 Bea. 568; *Pinchin* v. *Simms*, 30 Bea. 119; *Charlton* v. *West*, 30 B. 124; *Atkinson* v. *Littlewood*, L. R., 18 Eq. 595.
(*z*) 4 Mad. 325.
(*a*) 25 Bea. 568. In *Glover* v. *Hartcup*, 34 Bea. 74, a direction to pay debts was one of the indications that an annuity was additional.
(*b*) *Horlock* v. *Wiggins*, 39 Ch. D. 142.

for the gift, or by giving it in satisfaction of some right, e.g., dower (c).

The rule only applies where the debt is certain. That is, that the testator should know that a certain amount, not a fluctuating liability, is due, and to whom it is due.

The legacy must be at least equal to the debt—

From the statement of the rule in *Chancey's Case*, we see that the legacy must be at least equal to the debt (*d*): there is no satisfaction pro tanto, as in the case of satisfaction of portions by legacies, unless there is a special arrangement with the creditor (*e*).

by difference between the debt and the legacy

The Courts will take hold of almost any difference between the debt and the legacy in order to rebut the presumption.

if the legacy is contingent or uncertain,

If the legacy is contingent, there will be no satisfaction (*f*), and the rule does not extend to a gift of the whole or part of a residue, because, the amount being uncertain, it may prove to be less than the debt (*g*).

or payable at a different time to the debt—

Almost any difference between the legacy and the debt, except that the legacy is greater in amount, is sufficient to rebut the presumption (*h*). Thus, if the debt is payable before the legacy, as where the debt is payable within three months of the testator's death, and no time is fixed for payment of the legacy, or where the debt is payable at once, and the legacy is by the will itself payable at a future time (*i*). And similarly an annuity payable by half-yearly payments under a covenant is not satisfied by an annuity given by will. Or if in any other way the legacy is less advantageous than the debt, as where the debt is secured and the legacy is not (*j*),

(*c*) *Mathews* v. *Mathews*, 2 Ves. sen. 635; *Charlton* v. *West*, 30 Bea. 124; *Pinchin* v. *Simms*, 30 Bea. 119; *Glover* v. *Hartcup*, 34 Bea. 74; *Drewe* v. *Bidgood*, 2 Sim. & Stu. 424; *Rawlins* v. *Powel*, 1 P. W. 297; *Carr* v. *Eastabrooke*, 3 Ves. 561; *Buckley* v. *Buckley*, 19 L. R. Ir. 544; *Smith* v. *Smith*, 3 Giff. 263; but see *Edmunds* v. *Low*, 3 K. & J. 318.

(*d*) *Cranmer's Case*, 2 Salk. 508; *Atkinson* v. *Webb*, 2 Vern. 478; *Eastwood* v. *Vinke*, 2 P. W. 614; *Gee* v. *Liddell*, 35 Bea. 621; *Minuel* v. *Sarazine*, Mos. 295; *Graham* v. *Graham*, 1 Ves. sen. 263; *Richardson* v. *Elphinstone*, 2 Ves. jun. 463; *Reade* v. *Reade*, 9 L. R. Ir. 409; *Coates* v. *Coates*, [1898] 1 Ir. 258.

(*e*) *Hammond* v. *Smith*, 33 Bea. 452.

(*f*) *Tolson* v. *Collins*, 4 Ves. 482; *Mathews* v. *Mathews*, 2 Ves. sen. 635; *Crompton* v. *Sale*, 2 P. W. 553; *Hanbury* v. *Hanbury*, 2 Br. C. C. 352; *Nicholls* v. *Judson*, 2 Atk. 300.

(*g*) *Barret* v. *Beckford*, 1 Ves. sen. 519; *Re Keogh's Estate*, 23 L. R. Ir. 257; *Devese* v. *Pontet*, 1 Cox, 188; *Thynne* v. *Glengall*, 2 H. L. C. 154.

(*h*) *Atkinson* v. *Webb*, 2 Vern. 478, Pr. Ch. 236; *Nicholls* v. *Judson*, 2 Atk. 300; *Hales* v. *Darell*, 3 Bea. 324; *Charlton* v. *West*, 30 Bea. 124; *Fairer* v. *Park*, 3 Ch. D. 309; *Haynes* v. *Mico*, 1 B. C. C. 129; *Devese* v. *Pontet*, 1 Cox. 188; *Adams* v. *Lavender*, 1 M'C. & Y. 41; *Re Horlock*, [1895] 1 Ch. 516; *Clark* v. *Sewell*, 3 Atk. 96; *Jeacock* v. *Falkener*, 1 B. C. C 295; *Re Dowse*, 50 L. J. Ch. 285; *Re Roberts*, 50 W. R. 469.

(*i*) But the fact that by the rules of administration a legacy is not payable until a year after the testator's death does not prevent satisfaction: *Re Rattenberry*, [1906] 1 Ch. 667, where the authorities were examined. It was also held in that case that the fact of the creditor being appointed executrix made no difference.

(*j*) *Hales* v. *Darell*, 3 Bea. 324.

or the debt is to separate use and the legacy is not (*k*): or where the testator is trustee of a sum of 1000*l.* for A. for life, with remainder to his children, and by his will bequeaths 1000*l.* to A. absolutely (*l*).

by the nature of the legacy being different from the debt.

A devise of land cannot be taken in satisfaction of a debt, because money and land are different things (*m*); nor can a specific chattel be in satisfaction of a debt. Nor can there be a satisfaction where the interest is of a different nature, as where the legacy is an interest for life (*mm*).

A covenant may be satisfied by an intestacy (*n*).

If the debt or legacy is payable to trustees.

Further cases of difference arise where trustees are interposed. Thus the fact that the debt is due to one set of trustees, and the legacy is given to another set, is an important circumstance, but it is not conclusive. Thus, in *Atkinson* v. *Littlewood* (*o*), the testator, by a deed of separation, covenanted with the trustee of the deed to pay him an annual sum of 52*l.* during the life of the testator's wife, to be paid on four special quarterly days for her separate use. By his will the testator gave certain property to trustees to pay out of the rent an annuity of 52*l.* to his wife generally, on the same quarter days. Sir R. Malins, V.-C., held that the second annuity was given in satisfaction of the first.

The fact that the creditor is the testator's child makes no difference to the application of the rule (*p*), unless the debt is a portion; in like manner it makes no difference that the debtor is the testator's wife or relation (*r*).

Hotchpot.

VI.—Hotchpot.—In many cases the testator does not rely upon the presumption of law against double portions, but directs that any advances made by him to his children shall, on the distribution of his estate, be brought into hotchpot and accounted for accordingly (*s*); or he may direct that sums covenanted to be paid

(*k*) *Bartlett* v. *Gillard*, 3 Russ. 149; *Rowe* v. *Rowe*, 2 De. G. & Sm. 294; *Fourdrin* v. *Gowdey*, 3 My. & K. 383; *Atkinson* v. *Littlewood*, L.R., 18 Eq. 595.

(*l*) *Fairer* v. *Park*, 3 Ch. D. 309.

(*m*) *Eastwood* v. *Vinke*, 2 P. W. 614; *Richardson* v. *Elphinstone*, 2 Ves. jun. 463; *Coates* v. *Coates*, [1898] 1 Ir. 258; *Forsight* v. *Grant*, 1 Ves. jun. 298; *Byde* v. *Byde*, 1 Cox, 44. In *Goodfellow* v. *Burchett*, 2 Vern. 297, a devise of lands was held not to be a satisfaction of a bond debt.

(*mm*) *Forsight* v. *Grant*, 1 Ves. 298; *Cole* v. *Willard*, 25 Bea. 568; *Alleyn* v. *Alleyn*, 2 Ves. sen. 37; *Barret* v. *Beckford*, 1 Ves. sen. 571.

(*n*) *Garthshore* v. *Chalie*, 10 Ves. 1.

(*o*) L. R., 18 Eq. 595. *Pinchin* v. *Simms*, 30 Bea. 119; *Smith* v. *Smith*, 3 Giff. 263.

(*p*) *Tolson* v. *Collins*, 4 Ves. 483; *Stocken* v. *Stocken*, 4 Sim. 152; but see *Plume* v. *Plume*, 7 Ves. 258.

(*r*) *Shadbolt* v. *Vanderplank*, 29 Bea. 405; *Atkinson* v. *Littlewood*, L. R., 18 Eq. 595; *Brown* v. *Dawson*, Pr. Ch. 240; *Fowler* v. *Fowler*, 3 P. W. 353.

(*s*) See *Nugee* v. *Chapman*, 29 Bea. 288, where a testator directed 10,000*l.* to be deducted from a son's share of residue as an equivalent for an estate

shall be brought into hotchpot instead of trusting to the law of satisfaction (*t*). The object of such provisions is to equalize the children's shares. With the same object an express clause of hotchpot is generally inserted where there is a power of appointment among children, or the like (*u*). Sometimes, also, where a child is entitled in its own right to property, the testator requires it to be brought into hotchpot in the division of his residuary estate (*v*).

In *Stewart* v. *Stewart* (*w*), the testator had made an advance of 500*l.* to his son J.; by his will he gave a share of his residue to J., which he afterwards revoked by a codicil, so that he died intestate as to that share, and J. became entitled to part of it as one of the testator's statutory next of kin: the will contained a direction that none of his children who had received from him any sum by way of advancement should be entitled to any part of his residuary estate, without bringing the advance into hotchpot. It was held that this clause applied to J.'s part of the undisposed-of share of residue, and that he must bring the 500*l.* into hotchpot.

In *Brocklehurst* v. *Flint* (*x*) a testator gave a fund to four persons in such shares as A. B. should appoint, and in default equally, and directed that advances made by him to any of them should be brought into hotchpot. Sir J. Romilly, M.R., held that the hotchpot clause only applied to the unappointed part of the fund, since to hold otherwise would fetter A. B.'s power of appointment.

Advances in testator's lifetime.

Frequently the hotchpot clause refers to advances, gifts or payments made by B. in his lifetime, and at one time it was thought that a gift by B.'s will, or a share under his intestacy, was a gift in his lifetime (*y*), but this view was strongly disapproved of in *Cooper* v.

devised to him, which the testator did not eventually acquire; and *Stares* v. *Penton*, L. R., 4 Eq. 40, where the Court refused to give effect to the testator's direction. See also *Smith* v. *Crabtree*, 6 Ch. D. 591, where advances were decided to be set off against shares of residue, and it was held that there was no satisfaction of a general legacy.

(*t*) As in *Fox* v. *Fox*, L. R., 11 Eq. 142. As to the effect of a proviso for satisfaction in a settlement, see *Watson* v. *Lincoln*, Amb. 325. In *Limpus* v. *Arnold*, 15 Q. B. D. 300, a testator gave his residue to his wife for life, and after her death to his children, and declared that any advances made by him to any child should be taken in part satisfaction of that child's share; he had advanced 2000*l.* by way of loan (bearing interest) to one of his sons: it was held the widow was entitled to receive interest on that sum during her life. The trusts for conversion, investment, &c., were extremely obscure.

(*u*) Ante, p. 853.

(*v*) *Middleton* v. *Windross*, L. R., 16 Eq. 212.

(*w*) 15 Ch. D. 539. As to hotchpot in cases of intestacy or partial intestacy, see the end of this chapter.

(*x*) 16 Bea. 100.

(*y*) *Rickman* v. *Morgan*, 1 B. C. C. 63, 2 B. C. C. 394; *Twisden* v. *Twisden*, 9 Ves. 413; *Leake* v. *Leake*, 10 Ves. 477; *Golding* v. *Haverfield*, 13 Price, 393; McCl. 345; *Onslow* v. *Michell*, 18 V. 490; *Fazakerly* v. *Gillibrand*, 6 Sim. 591; *Papillon* v. *Papillon*, 11 Sim 642; Roper, 4th edition, p. 1098.

Cooper (*z*), and cannot any longer be considered law. In that case Lord Selborne, C., said: "When examined, these cases are found to present a most remarkable example of the extraordinary manner in which the use of precedents has sometimes caused the courts of this country, first to slide into manifest error, and afterwards to follow that error under the notion that they are bound to do so."

What are advances.

The chief difficulty is to determine what are advances within the meaning of the instrument (*a*). In *Douglas* v. *Willes* (*b*), a case arising on a post-nuptial settlement, it was decided on the words of the hotchpot clause that the assignment of a leasehold house to a child, and the advance of a sum of money to a daughter for the purpose of apprenticing her son, were not advances and need not be brought into account. In *Re Whitehouse* (*c*) a son of a testator agreed to purchase a business for 1500*l*., of which 300*l*. was to be paid at once, and the residue by instalments, secured by the promissory notes of the testator and his son. The sum of 300*l*. was paid by the testator, and the first promissory note was paid by him, and others by his executors after his death. The 300*l*., and the sum paid on the first promissory note, were held to be advances, but the sums paid by the executors not to be advances made in the testator's lifetime (*d*).

Where debts are due, and are to be brought into account, the whole debt (even if it, or part of it, is statute barred) must be considered an advance (*e*).

If a testator gives a share of his residue to his son A. for life, with limitations over for A.'s wife and children, and directs any debts owing to him by A. to be brought into hotchpot, it may be a question whether A.'s debt is to be brought in account as against A.'s life interest, or as against the share settled on A. and his wife and children. The question turns on the precise wording of the will. *Silverside* v. *Silverside* (*f*) is an illustration of the former, *White* v. *Turner* (*g*) of the latter construction.

Settled property.

Sometimes settled property is to be brought into hotchpot, and a clause directing that any sum which the testator had given to

(*z*) L. R., 8 Ch. 813.

(*a*) See *M'Clure* v. *Evans*, 29 Bea. 422.

(*b*) 7 Hare, 318; *Re Jaques*, [1903] 1 Ch. 267.

(*c*) 37 Ch. D. 683.

(*d*) As to the effect of bankruptcy, see *Ansler* v. *Powell*, 1 D. J. & S. 99.

(*e*) *Poole* v. *Poole*, L. R., 7 Ch. 17; *Mathews* v. *Keble*, L. R., 4 Eq. 467, L. R., 3 Ch. 691. As to a debt released by a composition, see *Golds* v. *Greenfield*, 2 Sm. & G. 476. As to arrears of rent owing by a legatee, where the testator's title has been barred by lapse of time, see *Re Jolly*, [1900] 2 Ch. 616, reversing [1900], 1 Ch. 292.

(*f*) 25 Bea. 340. See also *Hewitt* v. *Jardine*, L. R., 14 Eq. 58; *Re Gist*, [1906] 2 Ch. 280 (order in lunacy).

(*g*) 25 Bea. 505.

CHAP. XXXII.

or with any child on his or her marriage, should be brought into hotchpot, caused considerable difficulty in the case of *Wheeler* v. *Humphreys* (*h*). In that case, the testator, on the marriage of his son, covenanted that his executors should pay the trustees of the son's marriage settlement a sum of 10,000*l*., to be held in trust for the son for life, with an ultimate reversion (in the events which happened) to the testator himself. It was finally decided that the testator did not give this reversion either to or with the son. The House of Lords held that what a donor keeps back is no gift, and in doing so prevented the hotchpot clause from operating to produce an inequality. The result of the decision was, therefore, highly satisfactory, and probably in accordance with the testator's intention, although it may be doubted whether the testator would not have considered that he had given 10,000*l*. with his son, and not merely some interest in the 10,000*l*. The difficulty seems to have been caused by considering whether, when on a division of the estate 10,000*l*. had been brought into hotchpot, the hotchpot clause did not have a second operation on the reversionary interest (which was then in possession) in the 10,000*l*.

Several funds.

Where more than one fund is settled, the question arises whether a separate hotchpot clause is to be applied to each, or whether the funds are for the purpose of hotchpot to be treated as one fund. If all the funds are settled by one will upon the same trusts, primâ facie there is one hotchpot clause for all the funds together (*i*). But if there are two instruments, and one fund is settled with reference to the trusts declared in the other instrument, the funds are separate, with a separate hotchpot clause for each (*j*).

If the testator himself recites what the amounts advanced are, the legatees will be bound by the recital (*k*); the case of *Re Taylor's Estate* (*l*) was based on the very special words of the will and codicil. Sometimes the testator refers to entries in ledgers to shew the amount of the advances, but entries or letters subsequent to the will cannot be admitted to vary any declaration in the will (*m*).

In setting off advances against legacies, any necessary abatement must be calculated on the whole legacy, and not on the difference between the legacy and the advance (*n*).

(*h*) [1898] A. C. 506.
(*i*) *Re Perkins*, 67 L. T. 743.
(*j*) *Montague* v. *Montague*, 15 Bea. 565; *Re North*, 76 L. T. 186; and for different funds in one settlement, see *Re Marquess of Bristol*, [1897] 1 Ch. 946; *Hutchinson* v. *Tottenham*, [1898] 1 Ir. R. 403.
(*k*) *Re Aird's Estate*, 12 Ch. D. 291; *Re Wood*, 32 Ch. D. 517.
(*l*) 22 Ch. D. 495.
(*m*) *Smith* v. *Conder*, 9 Ch. D. 170; *Whateley* v. *Spooner*, 3 K. & J. 542; *Re Coyte*, 56 L. T. 510
(*n*) *Re Schweder*, [1893] W. N. 12.

In *Fox* v. *Fox* (*o*) the testator gave his residuary estate to his children in shares, which depended on whether it did or did not exceed 40,000*l*., and he directed that a sum which he had covenanted to settle on his daughter should be taken towards satisfaction of her share under the will: it was held by Malins, V.-C., that by reason of this direction the estate available for distribution "virtually included" the amount payable under the covenant, the result being that it exceeded 40,000*l*. It is submitted that the decision is erroneous. The object of the direction was to produce equality.

Interest on advances.

In the absence of any directions by the testator to the contrary, advances to his children on account of their portions bear no interest up to his death, but from his death they bear interest at 4 per cent. (*p*); if the period of distribution is not the testator's death, interest is charged only from the period of distribution (*q*).

Where the residue is settled, so that the interest on outstanding advances has to be brought into account, the general rule is that interest at 4 per cent. per annum on the advances is added to the actual income of the estate, for the purpose of computation, and when the aggregate income so arrived at has been divided into the proper number of shares, the amount of the interest on each advance is deducted from the respective beneficiary's share of the aggregate income (*r*). If the testator directs the capital value of the residue to be ascertained at a particular time, the advances are brought into account in the usual way, and the income is divided in accordance with the shares thus ascertained (*s*).

Annuities: how valued.

An annuity may be an advance which is to be brought into hotchpot (*t*). How the annuity is to be valued for this purpose is a difficult question. Probably the correct method is to value it as an advance of a capital sum equal to the actuarial value of the annuity at the time when the annuity was granted (*u*), but there is authority for the proposition that if the annuity has ceased the

(*o*) L. R., 11 Eq. 142.

(*p*) *Stewart* v. *Stewart*, 15 Ch. D. 539 (5 per cent. per annum up to the testator's death, and 4 per cent. per annum afterwards); *Andrewes* v. *George*, 3 Sim. 393; *Hilton* v. *Hilton*, L. R., 14 Eq. 468 (the report is corrected in *Re Whiteford*, infra); *Field* v. *Seward*, 5 Ch. D. 538; *Re Hargreaves*, 86 L. T. 43; *Re Davy*, [1908] 1 Ch. 61, overruling some previous decisions or dicta to the contrary to the cases cited in the next note. As to interest on advances made by strangers, see *Poole* v. *Poole*, L. R., 7 Ch. 17.

(*q*) *Re Lambert*, [1897] 2 Ch. 169; *Re Dallmeyer*, [1896] 1 Ch. 372; *Re Rees*, 17 Ch. D. 98; *Re Whiteford*, [1903] 1 Ch. 889.

(*r*) *Re Poyser*, [1908] 1 Ch. 828.

(*s*) *Re Hargreaves*, 88 L. T. 100; followed in *Re Gilbert*, [1908] W. N. 63.

(*t*) *Kircudbright* v. *Kircudbright*, 8 V. 51.

(*u*) See per Thesiger, L.J., in *Hatfeild* v. *Minet*, 8 Ch. D. 136, and *Kircudbright* v. *Kircudbright*, supra.

annuitant has the option of claiming that the value of the payment received is the amount to be brought into hotchpot (*v*).

Life and reversionary interests: how valued.

When life and reversionary interests have to be brought into hotchpot, as is not infrequently the case, it is difficult to say how they should be valued. In *Eales* v. *Drake* (*w*), Jessel, M.R., said that their value "must be ascertained in the best way you can." In *Re Heathcote* (*x*) a case on a settlement, Kekewich, J., held that the value of certain life interests, which were to be brought into hotchpot, must be calculated not by reference to the duration of the interests, but by an actuarial valuation of them at the time when they first took effect. In *Wheeler* v. *Humphreys* (*y*), the House of Lords do not seem to have considered the point, but their decision appears to involve the view that actual, and not actuarial values are to be taken. With great diffidence it is submitted that the correct method is that stated above in the case of annuities, namely, that you consider the state of facts and contingencies at the time when the life interest or reversion is to be brought into hotchpot. If you know the actual value, because the life interest has ceased, you take that; if you do not, you take the actuarial value. This method seems fair, and does not involve the difficulty that the right of parties may be seriously altered owing to the chance that there has been a delay in bringing the amounts into hotchpot. But in the light of *Wheeler* v. *Humphreys* (*y*), it is impossible to state with any confidence that this view is correct (*z*).

Powers of appointment.

Questions of hotchpot sometimes arise in the case of appointments under powers—these are considered elsewhere (*a*).

Hotchpot under the Statute of Distributions.

In the case of intestacy as to personal estate, sec. 5 of the Statute of Distributions (22 & 23 Car. 2, c. 10) makes provision for bringing advances into hotchpot by providing for the distribution as follows: one third part to the wife of the intestate, "and all the residue by equal portions to and amongst the children of such persons dying intestate, and such persons as legally represent such children in case any of the said children be then dead, other than such child or children (not being heir-at-law) who shall have any estate by the settlement of the intestate, or shall be advanced

(*v*) *Kircudbright* v. *Kircudbright*, supra.

(*w*) 1 Ch. D. 217, where *Rucker* v. *Scholefield*, 1 H. & M. 36, was cited.

(*x*) [1891] W. N. 10.

(*y*) [1898] A. C. 506.

(*z*) As to valuation of reversionary annuities where there is abatement, see *Re Metcalf*, [1903] 2 Ch. 424. In *Re Kelly's Settlement Trusts*, [1910] 1 Ch. 78, the fact that the tenant for life surrendered her life interest was held not to accelerate the period of valuation.

(*a*) Ante, p. 853.

by the intestate in his lifetime by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made; and in case any child, other than the heir-at-law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share which will be due to the other children by such distribution as aforesaid, then so much of the surplusage of the estate of such intestate to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal as near as can be estimated; but the heir-at-law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent or otherwise from the intestate."

When the Statute of Distributions is applied by analogy to the case of partial intestacy of the beneficial interest in undisposed of residue, advancees need not be brought into hotchpot (*a*). On the other hand, the provisions of sec. 5 as to hotchpot apply to an intestacy occasioned by a will becoming wholly inoperative in consequence of the death of the sole executive and legatee in the lifetime of the testator (*b*). It will be noticed that land given to an heir does not have to be brought into hotchpot (*c*); and that advancees to brothers and sisters are not within the provisions of the section (*d*).

(*a*) *Re Roby*, [1907] 2 Ch. 84; [1908] 1 Ch. 71.

(*b*) *Re Ford*, [1902] 1 Ch. 218; [1902] 2 Ch. 605, following *Harte* v. *Meredith*, 13 L. R. Ir. 341. And see *Stewart* v. *Stewart*, stated supra, p. 1176.

(*c*) *Edwards* v. *Freeman*, 2 P. W. 435. *Chantrell* v. *Chantrell*, 37 L. T. 220 (annuity charged on land). *Re Lyons*, [1903] 1 Ir. 156 (lease pur auter vie).

(*d*) *Re Gist*, [1906] 2 Ch. 280.

CHAPTER XXXIII.

ABSOLUTE INTERESTS IN PERSONALTY.

PAGE

1. *What Words will give an Absolute Interest* 1182
   (i.) *Absolute Gift may be cut down* 1184
   (ii.) *Indefinite Gift of Income* 1185

II. *Express Gift for Life enlarged into Absolute Interest* :—
   (i.) *General Rule* 1187
   (ii.) *Gift for Life followed by Gift to Executors, &c.* 1187
   (iii.) *Gift for Life followed by General Power of Appointment* 1188

III. *Where Words which create an Estate Tail in Real Estate confer the Absolute Interest in Personalty* :— PAGE
   (i.) *Where the Words would create an Estate Tail in Realty expressly or by Implication* 1193
   (ii.) *Where Words of Distribution are superadded* 1194
   (iii.) *Where the Bequest is to a Person and his Issue simply* 1198
   (iv.) *Where the Bequest is to A. for Life, and after his Death to his Issue* 1199
   (v.) *Ulterior Bequests* 1202

What words will create an absolute interest.

I.—What Words will give an Absolute Interest.—Express words of gift are not necessary to create an absolute interest. Almost any words which profess to give the legatee complete control over the property are sufficient to create an absolute interest, unless the testator draws a distinction between ownership and a power of disposition. Thus a direction that A. shall have certain property "at his disposal" (*a*) or a bequest of property to A. "to be disposed of by him by his will as he sees fit," gives an absolute interest to A. (*b*), unless the property is expressly given to A. for life, with a power of appointment, either general or special (*c*), or unless the context shews that A. is only intended to

(*a*) *Kellett* v. *Kellett*, L. R., 3 H. L. 160.

(*b*) *Robinson* v. *Dusgate*, 2 Vern. 181; *Maskelyne* v. *Maskelyne*, Amb. 750; *Hixon* v. *Oliver*, 13 Ves. 108 ("to be disposed of as she thinks proper to be paid after her death"); *Bull* v. *Kingston*, 1 Mer. 314 (right of disposing of by will "excepting to E. P."). The first three cases are cited by Mr. Roper (Legacies, 642) without disapprobation, but it seems difficult to justify them, and equally difficult to say what the respective testators meant.

(*c*) *Birch* v. *Wade*, 3 V. & B. 198. *Nannock* v. *Horton*, 7 Ves. 391. If the testator goes on to give the property in default of appointment to A.'s executors or administrators, this is generally tantamount to an absolute interest, post, p. 1189.

have a power of appointment or disposition, with or without a life interest (*d*). The cases in which an express gift for life may be enlarged by the context into an absolute interest are considered in the next section.

Gift conditional in form.

And a gift may operate to confer an absolute interest, although it is expressed in qualified or conditional terms. Thus a bequest of pictures to A., "to go to him when he is married and has a house of his own," was held to give A. an absolute interest (*e*).

Qualification void for repugnancy.

Sometimes the expressed intention of a testator to give only a limited interest is defeated by a rule of law. Thus if a gift is accompanied by a direction or provision which is inconsistent with ownership, the direction or provision is rejected, and the gift becomes absolute (*f*). So the general rule is that if consumable articles (res quæ ipso usu consumuntur), such as wines and provisions, are bequeathed to A. for life, with a gift over, they belong absolutely to A. (*g*). A gift of ordinary chattels to A. for life, and after his death to B., in theory vests the absolute ownership in A. (*h*), but the rights of B. are enforced in equity (*i*). And executory bequests of terms of years are recognized at law (*j*). But it will of course be remembered that personal property cannot be entailed, or settled on a number of persons in succession, beyond the limits allowed by law (*k*).

Things incapable of limited ownership.

Doctrine of *Lassence* v. *Tierney*.

It sometimes happens that a gift becomes absolute ex postfacto, for there is a general principle (sometimes called the doctrine in *Lassence* v. *Tierney*) that "if a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails" (*l*). And the doctrine is not confined to cases where the restrictions are for the benefit of the legatee personally; the general rule is that whenever there is an absolute gift to a legatee in the first instance, followed by a gift over which fails, either because there is no one in existence to take under it, or from lapse or invalidity or any other reason, then the absolute gift takes effect, to the exclusion of the testator's residuary legatee or next-of-kin, as the case may be (*m*).

(*d*) *Blakeney* v. *Blakeney*, 6 Sim. 52. See *Espinasse* v. *Luffingham*, 3 Jo. & Lat. 186, post, p. 1189 and Chap. XXIII.

(*e*) *Re Panter*, 22 T. L. R. 431.

(*f*) Ante, Chap. XVII.

(*g*) See Chap. XXXVIII., where the exceptions are stated.

(*h*) Williams, Pers. Pr. 356.

(*i*) Chap. XXXVIII.

(*j*) Ibid.

(*k*) *Byng* v. *Lord Strafford*, 5 Bea. 558, and other cases cited in Chap. XVII.

(*l*) Per Lord Cottenham in *Lassence* v. *Tierney*, 1 Mac. & G. 551, cited with approval by Lord Cairns, in *Kellett* v. *Kellett*, L. R., 3 H. L. 160.

(*m*) *Hancock* v. *Watson*, [1902] A. C. 14, affirming C. A. in *Re Hancock*, [1901] 1 Ch. 482, and see *Re Wilcock*, [1898]

CHAP. XXXIII.

The difficulty in many cases is to say whether an absolute interest is given or not (*n*). With reference to this the following rules may be mentioned:

Absolute interest may be cut down by clear words.

(i.) *Absolute Gift may be cut down.*—A bequest of personal property to A. without more (*o*), gives him an absolute interest. But it may appear from the context, or from other provisions in the will, that the testator intended to give A. a limited interest, such as a life interest, with or without a power of appointment (*p*). As a general rule, an absolute interest cannot be cut down except by clear words (*q*). And even clear words will not cut down an absolute gift if the intended restriction or gift over is repugnant, or mere surplusage. As where there is a gift to A. absolutely, with a direction to apply the income in a certain way for his benefit during life (*r*); or a gift to A. with a superadded power to dispose of the property (*s*), or where property is given to A. absolutely, with a gift over in the event of his not disposing of it (*t*). So

1 Ch. 95. The older cases are *Whittell* v. *Dudin*, 2 J. & W. 279; *Arnold* v. *Congreve*, 1 Russ. & M. 209; *Hulme* v. *Hulme*, 9 Sim. 644; *Campbell* v. *Brownrigg*, 1 Ph. 301; *Mayer* v. *Townsend*, 3 Bea. 443; *Ridgway* v. *Woodhouse*, 7 Bea. 437; *Winckworth* v. *Winckworth*, 8 Bea. 576; *Dawson* v. *Bourne*, 16 Bea. 29; *Gompertz* v. *Gompertz*, 2 Ph. 107; *Watkins* v. *Weston*, 3 D. J. & S. 434; *Re Corbett's Trust*, Johns. 591. As to *Stephens* v. *Gadsden*, 20 Bea. 463; *Gerrard* v. *Butler*, ib. 541; *Churchill* v. *Churchill*, L. R., 5 Eq. 44, see Chap. XXIII., where other cases on the subject are referred to. See also *Lyddon* v. *Ellison*, 19 Bea. 565, and other cases referred to in Chap. XXXVIII. The cases of *Carver* v. *Bowles*, 2 R. & My. 301; *Kampf* v. *Jones*, 2 Keen, 756; and *Ring* v. *Hardwick*, 2 Bea. 352, are referred to in connection with the Rule against Perpetuities (Chap. X.).

(*n*) *Lambe* v. *Eames*, L. R., 6 Ch. 597.

(*o*) Or to A. and his personal representatives: *Taylor* v. *Beverley*, 1 Coll. 108. See *Lugar* v. *Harman*, 1 Cox, 250 ("lawful representatives"), and *Appleton* v. *Rowley*, L. R., 8 Eq. 139 ("heirs or representatives"), and Chap. XLI. as to the use of the words executors or representatives as words of limitation. A bequest to A. and to her heirs after her is an absolute bequest to A.: *Atkinson* v. *L'Estrange*, 15 L. R. Ir. 340.

(*p*) Ante, pp. 791 seq. As to gifts upon condition, see Chap. XXXIX.

(*q*) Ante, p. 566. An absolute gift in a will may of course be cut down to a life interest by a codicil, if the intention is clear, as in *Re Margitson*, 31 W. R. 257, see Chap. VII., ante, p. 188.

(*r*) Chap. XXXIV. The decision in *Billing* v. *Billing*, 5 Sim. 232, is generally referred to this ground. There the testator gave his property to trustees upon trust to invest for the use and benefit of A., to be paid at such time and in such manner as they should think proper, and that when A. attained twenty-one they should pay the income as they might think most for his advantage, in weekly or quarterly payments, during his life. The testator's intention obviously was to provide for A.'s personal maintenance, and this construction is confirmed by the fact that A. was deaf and dumb. However, Shadwell, V.-C., held that he took an absolute interest. In *Gurney* v. *Goggs*, 25 Bea. 334, there was more difficulty in giving effect to the testator's intention, see ante, p. 561.

(*s*) *Hales* v. *Margerum*, 3 Ves. 299; *Comber* v. *Graham*, 1 R. & M. 450; *Howorth* v. *Dewell*, 29 Bea. 18 (where the power was in favour of the testator's children); and see Chap. XIV.

(*t*) *Bull* v. *Kingston*, 1 Mer. 314 (gift over of "what may remain at her decease"). See *Re Yalden*, 1 D. M. & G. 53; *Re Mortlock's Trust*, 3 K. & J. 456, and other cases cited in Chap. XIV.

if a restriction or gift over is void for remoteness, or otherwise fails, the result may be that the original gift becomes absolute (*u*).

Power of appointment.

It is hardly necessary to say that where there is no absolute gift, a power of appointment or disposition among a certain class of persons does not give any interest to the donee of the power (*v*), although the objects of the power may take an interest by implication (*w*), or by way of trust (*x*).

Where no trust created.

It often happens that a testator gives property to a person, for example, his widow, "to be at her disposal in any way she may think best for the benefit of herself or family" (*y*) or "with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do" (*z*): the additional words not being sufficiently strong to create a trust in favour of the "family," the gift to the widow is absolute. If, however, the attempt to create a trust fails by reason of its uncertainty or illegality, a different rule prevails. This subject is discussed in detail elsewhere (*a*).

Absolute interest subject to executory gift over.

In *Re Hanbury* (*b*) a testator gave all his property to his wife absolutely, in full confidence that at her death she would devise it to such one or more of his nieces as she thought fit, and in default of any disposition by her by will, he directed his property to be equally divided among his surviving nieces: it was held that this was a gift to the wife for life, with a power of appointment among the nieces, and a gift to the surviving nieces in default of appointment, and if no niece survived the wife, she took absolutely. The rule in *Allhusen* v. *Whittell* (*c*) does not apply to such a case (*d*).

Indefinite gift of income.

(ii.) *Indefinite Gift of Income.*—Numerous cases decide that an indefinite gift of the income of a fund to a person is a gift of the corpus; and this may be so even where legacies are given payable on the death of the legatee of the income. Thus in *Jennings* v. *Baily* (*e*)

(*u*) See Chap. XXIII. As to the cases where property is given upon a trust which fails, see Chap. XXIV.

(*v*) *Blakeney* v. *Blakeney*, 6 Sim. 52.

(*w*) *Birch* v. *Wade*, 3 V. & B. 198, and other cases cited in Chap. XIX.

(*x*) *Blakeney* v. *Blakeney*, supra, and other cases cited in Chap. XXIV.

(*y*) See this question discussed in Chap. XXIV.

(*z*) *Re Hutchinson and Tenant*, 8 Ch. D. 540. Compare *Morrin* v. *Morrin*, 19 L. R. Ir. 37. See the cases on precatory trusts, Chap. XXIV.

(*a*) Chap. XIV.

(*b*) [1904] 1 Ch. 415; s. c. sub nom. *Comiskey* v. *Bowring-Hanbury*, [1905] A. C. 84. Compare *Bradshaw* v. *Bradshaw*, [1908] 1 Ir. R. 288.

(*c*) L. R., 4 Eq. 295.

(*d*) *Re Hanbury*, [1909] W. N. 157.

(*e*) 17 Bea. 118. See also *Re Morgan*, [1893] 3 Ch. 222; *Philippo* v. *Chamberlaine*, 4 Ves. 51; *Rawlings* v. *Jennings*, 13 Ves. 39; *Boosey* v. *Gardner*, 18 Bea. 471; *Clough* v. *Wynne*, 2 Mad. 188; *Penny* v. *Pippin*, 15 W. R. 306; *Re Tandy*, 34 W. R. 748; *Davidson* v. *Kimpton*, 18 Ch. D. 213; *Humphrey* v.

CHAP. XXXIII.

the testatrix directed her executors to pay to A. or her assigns the interest, dividends, and annual profit and produce of her personal estate (after payment of debts and funeral expenses); she then gave certain legacies after the death of A.; Sir J. Romilly, M.R., said it was quite clear that the gift of income of the personal estate standing alone would have been an absolute gift, and he declared that the whole of the residuary estate passed to A. subject to the legacies. It has even been held that if the gift of income is followed by a power to dispose of the corpus by will, with a gift over in default, this does not prevent the legatee from taking an absolute interest (*f*).

Form of gift immaterial.

It makes no difference that the income is given to the legatee directly or through the intervention of trustees, or that it is given to the separate use of a married woman (*g*).

Rents of leaseholds.

So a gift of the rents of leaseholds will generally pass an absolute interest in them (*h*).

Alternate gift of income to two persons.

In *Tredennick* v. *Tredennick* (*i*) a testator bequeathed to A. all the dividends due from January to July on certain specified stocks and shares, and to B. the corresponding dividends payable from July to December: it was held that A. and B. took the capital of the stocks and shares in equal moieties.

Power of appointment.

A power of appointing the income of a fund for an indefinite time is equivalent to a power over the capital (*j*).

Contrary intention.

If the income of property is given indefinitely, but it appears from the scheme of the will that the corpus is to be disposed of when all the legatees of the income are dead, they take only life interests (*k*). The intention that a legatee of income shall only take for his life may be shewn in various ways (*kk*). Thus unless a gift of income to B. and C. and the survivor of them, the survivor takes only a life interest (*kkk*).

Gift during spinsterhood or widowhood.

It has been held that a gift of income so long as the legatee shall remain single and unmarried must be considered as requiring the act of marriage to determine the interest, and that the gift is therefore one of the dividends of stock without limitation as to time (if the legatee do not marry), and therefore carries the absolute interest.

Humphrey, 1 Sim. N. S. 536; *Re Andrew's Will*, 27 Bea. 608; *Re Coward*, 57 L. T. 285; s. c., *Coward* v. *Larkman*, 60 L. T. 1; *Wiley* v. *Chanteperdrix*, [1894] 1 Ir. R. 209.

(*f*) *Weale* v. *Ollive*, 32 Bea. 421. See *Southouse* v. *Bate*, 16 Bea. 132.

(*g*) *Haig* v. *Swiney*, 1 Sim. & St. 487; *Elton* v. *Shepard*, 1 Br. C. C. 532. *Coward* v. *Larkman*, supra.

(*h*) *Bignall* v. *Rose*, 24 L. J. Ch. 27; *Watkins* v. *Weston*, 3 D. J. & S. 434.

(*i*) [1900] 1 Ir. 354.

(*j*) *Re L'Herminier*, [1894] 1 Ch. 675.

(*k*) *Buchanan* v. *Harrison*, 8 Jur. N. S. 965. Compare *Re Morgan*, [1893] 3 Ch. 222.

(*kk*) See *Coward* v. *Larkman*, supra.

(*kkk*) *Blann* v. *Bell*, 2 D. M. & G. 775. Compare *Re Tandy*, supra.

In *Rishton* v. *Cobb* (*l*), where this opinion is given, Lord Cottenham decided that the legatee took an absolute interest although she was married at the testator's death. The decision is not altogether satisfactory; a gift of income to the testator's widow "so long as she shall continue my widow and unmarried" only carries the income during widowhood or life, and is not a gift of the corpus, and it is difficult to see why a gift of income to A., so long as she remains unmarried, should give an absolute interest if A. die unmarried. Lord Selborne in *Re Boddington* (*m*) criticized *Rishton* v. *Cobb*, but the latter case has been followed by Farwell, J., in *Re Howard* (*n*).

II.—Express Gift for Life enlarged into Absolute Interest. The question whether a gift of personal property to A. for life, followed by words which, if the property were real, would give him an estate tail, gives him an absolute interest, is discussed later (*o*). In other cases, the principal rules are as follows:

Express gift for life or in tail may confer an absolute interest.

(i.) *General Rule.*—An express gift for life will not, as a general rule, be enlarged into an absolute interest by implication (*p*), but it sometimes happens that a testator gives a life interest in express words, while the will, taken as a whole, shews an intention to confer an absolute interest: as where a testator gives his property to his wife for life, and after her death bequeaths certain legacies, and leaves the remainder at her disposal (*q*).

Gift for life when enlarged.

In some cases this result follows from the fact that the nature of the property makes it impossible to give full effect to the testator's intention. Thus a gift of things quæ ipso usu consumuntur to A. for life, with remainder to B., generally gives A. an absolute interest (*r*).

Things quæ ipso usu consumuntur.

(ii.) *Gift for Life followed by Gift to Executors, &c.*—A bequest to A. for life, with remainder to his executors and

A. for life, remainder to executors.

(*l*) 5 My. & Cr. 145.

(*m*) 25 Ch. D. at p. 689.

(*n*) [1901] 1 Ch. 412. See also *Re Rowland*, 86 L. T. 78.

(*o*) Post, p. 1193.

(*p*) *Scawin* v. *Watson*, 10 Bea. 200, and cases there cited; *Kay* v. *Winder*, 12 Bea. 610; *Savage* v. *Tyers*, L. R., 7 Ch. 356; *Re Richards*, 50 L. T. 22; *Allen* v. *Allen*, 21 W. R. 747. See further on this subject Chap. XXXIV.

(*q*) *Nowlan* v. *Walsh*, 4 De G. & S. 584; *Re Maxwell's Will*, 24 Bea. 246; *Re Davids' Trusts*, John. 495; *Reid* v. *Carleton*, [1905] 1 Ir. R. 147. See *Buil* v. *Kingston*, 1 Mer. 314.

(*r*) Chap. XXXVIII. As to farming stock, see *Myers* v. *Washbrook*, [1901] 1 K. B. 360. In *Terry* v. *Terry* (33 Bea. 232) A. and B. were directed to carry on the testator's business during A.'s life-time, and for that purpose they were to have the use of the testator's book debts or capital; it was held that this gave them an absolute interest in "the book debts or capital."

CHAP. XXXIII.

administrators (*s*) or to his personal representatives (*t*), is a gift of an absolute interest.

Whether next-of-kin are meant.

The question sometimes arises whether the words "executors and administrators" or "personal representatives" are used not as words of limitation, but in the sense of next-of-kin. This topic is discussed in Chap. XLI. (Gifts to Personal Representatives, Executors, &c.)

In *Re Bogle* (*u*), a testator bequeathed a legacy upon trust to pay the income to A. for life, and after his death, if he should have two children who should attain twenty-one, upon trust as to one moiety for his executors or administrators; A. had two children who attained twenty-one, and he was held to be absolutely entitled to one moiety of the fund.

Life interest and power of appointment or disposition.

(iii.) *Gift for Life followed by General Power of Appointment.*—There are some cases in which a combination of a life interest in personalty, with a power of appointment or disposition over the corpus, may in effect be an absolute gift, without any necessity for the donee of the power either to exercise or release it.

If personalty is given to A. for life, with a general power of appointment by deed or will, and a gift over in default of appointment to some persons other than A. or his legal personal representatives, it is clear that on the one hand A. can appoint the property to himself, and so become absolute owner of it, and on the other hand, that in case he dies without having effectually exercised his power of appointment, the gift over will take effect.

So if the power is one of disposition. Thus in *Pennock* v. *Pennock* (*v*) the gift was to a person for life with power to take and apply the whole or any part of the capital for his own benefit, with a gift over on his death: it was held that on his death without having exercised the power, the gift over took effect. And if the power of disposition is only given to afford the tenant for life an additional fund for maintenance, then he can only dispose of such part of the capital as is required for that purpose (*vv*).

In the event, however, of there being no gift over, or none except to A. or his legal personal representatives, different considerations

(*s*) *Long* v. *Watkinson*, 17 Bea. 471; explained in *Webb* v. *Sadler*, L. R., 8 Ch. 419; *Re Bogle*, infra. As to *Avern* v. *Lloyd*, L. R., 5 Eq. 383, see *Re Hargreaves*, 43 Ch. 401; Gray, Perp., § 277 (second ed.).

(*t*) *Alger* v. *Parrott*, L. R., 3 Eq. 328; *Saberton* v. *Skeels*, 1 R. & M. 587; *Wing* v. *Wing*, 24 W. R. 878.

(*u*) 78 L. T. 457.

(*v*) L. R., 13 Eq. 144 (considered in *Parnell* v. *Boyd*, [1896] 2 Ir. 571); *Re Richards*, [1902] 1 Ch. 76.

(*vv*) *Re Pedrotti's Will*, 27 Bea. 583; *Re Fox*, 62 L. T. 762; see *Re Richards*, supra.

may arise, and it is a matter of some nicety to determine whether A. is in effect the absolute owner of the property.

Question of intention.

If the testator draws a clear distinction between power and property (*w*), a gift to A. for life with a power of appointment by will, gives A. nothing more than what is expressed; as where the gift is to A. for life, and after his death to such person as he shall by will appoint (*x*). But where the wording is ambiguous, the question is more difficult. In *Reith* v. *Seymour* (*y*) the gift was to A. for life, and after her death to be at her entire disposal, either by will or otherwise, and it was held to give her only a life estate with a power of appointment. Again, in *Espinasse* v. *Luffingham* (*z*) a testator gave various chattels to his wife absolutely, and bequeathed to her "the use of my plate, with power to dispose of such portion thereof as she shall think proper"; the difference between the two gifts was held to shew that in the case of the plate she was only intended to take a life interest with a power of disposition. On the other hand, in *Nowlan* v. *Walsh* (*a*), where the testator bequeathed to his wife the income of all his property, and after her death bequeathed some legacies and left the remainder of his property at the disposal of his wife if she remained a widow, with a gift-over in the event of her marrying, it was held by Knight-Bruce, V.-C., that the widow, who did not marry again, took the residue absolutely, subject to the legacies. He said: "There is nothing in the word 'disposal' essentially indicating power rather than property, independently of the context. There are several reasons here for referring it to property, more than for referring it merely to power." The decisions in *Hoy* v. *Master* (*b*), *Re Maxwell's Will* (*c*), *Hole* v. *Davies* (*cc*), *Re Davids' Trusts* (*d*), and *Reid* v. *Carleton* (*dd*), seem to rest on the same principle

Effect of gift over to executors and administrators.

There is the highest authority for the proposition that a gift to A. for life, with remainder as he shall by deed or will appoint, with remainder to his executors or administrators, vests in equity the entire corpus in A. A. can be a married woman with the gift to her separate use. This is asserted in *London Chartered Bank of Australia* v. *Lemprière* (*e*) in the following words: "In the present case it is to

(*w*) The difference between the two ideas is explained by Fry, L.J., in *Ex parte Gilchrist*, 17 Q. B. D. 521.

(*x*) Per Sir W. Grant, *Bradly* v. *Westcott*, 13 Ves. at p. 453; *Nannock* v. *Horton*, 7 Ves. 391. See *Scott* v. *Josselyn*, 26 Bea. 174, where the legatee had (i.) a life interest; (ii.) a power of disposition over the capital during her life, and (iii.) a power of appointment by will over the balance.

(*y*) 4 Russ. 263; *Archibald* v. *Wright*, 9 Sim. 161.

(*z*) 3 Jo. & Lat. 186.

(*a*) 4 De G. & S. 584.

(*b*) 6 Sim. 568.

(*c*) 24 Bea. 246.

(*cc*) 34 Bea. 345.

(*d*) Johns. 495. The reasoning in this case, however, is not quite satisfactory.

(*dd*) [1905] 1 Ir. 147.

(*e*) L. R., 4 P. C. at p. 595.

CHAP. XXXIII.

be noted that the gift is to the married woman for her separate use for life, with remainder as she should, notwithstanding her coverture, by deed or will appoint, with remainder to her executors or administrators. Their Lordships are satisfied that on the weight of authority and on principle they ought to treat this as what in common sense and to common apprehension it would be, an absolute gift to the sole and separate use of the lady. The words are an expansion and expression of what would be implied in the word 'sole and separate use,' and they conceive themselves at liberty to hold that such a form of gift to a married woman, without any restraint on anticipation, vests, in equity, the entire corpus in her for all purposes as fully as a similar gift to a man would vest it in him." From these words it looks as if in the case of a bequest to A. for life, with remainder as he shall by deed or will (or by will only) appoint, and in default of appointment to A.'s executors and administrators, the fund could (subject to any question of duty (*f*)) be safely handed over by the executors or trustees to A., and that A. could give a valid receipt for it without there being any necessity for A. to exercise or release his power (*ff*). But this is not necessarily the case.

In the first place, it seems clear that if the power of appointment is by will only, a formal release of the power, or something equivalent, is required. Thus in *Re Davenport* (*g*) the testator directed that after the death of his wife the trustees should hold certain trust funds upon trust to pay the income thereof equally for the benefit and maintenance of his two daughters during their minorities, and when they should respectively attain the age of twenty-one years to pay the same income to them in equal moieties during their lives for their separate use; and as to the capital of such trust funds the testator declared that the same being divided into equal parts should as to each moiety thereof be subject to the appointment by will of his said daughters respectively, and be assigned and paid over by his trustees according to such appointment or appointments, and in default thereof to their executors, administrators or assigns respectively. The widow died in 1878, the daughters married in 1889 and 1890. Kekewich, J., held that by virtue of the Married Women's Property Act, 1882, the life interest and the interest in reversion were alike limited to the separate use of the married women, and that on releasing their powers they would be absolutely entitled to the fund, adding, "I have said that the married women must release their

(*f*) See *Jackson* v. *Commissioners of Stamps*, [1903] A. C. 350.

(*ff*) As to the release of general and special powers, see ante, pp. 836 seq.

(*g*) [1895] 1 Ch. 361.

powers because I am now only making a declaration. If I went on at their request to order payment I should not require any release of the power, because the order for payment would operate as a release. But as the order is not in that form I think there must be releases of the powers" (*h*). The rule appears to be that since the order of the Court will bind equitable interests, the Court will not insist on the formality of a release or an appointment if the desire or intention of the donee of the power of appointment to take the whole fund is manifest. In *Irwin* v. *Farrer* (*i*) the testator directed a legacy to be laid out in stock, and the dividends as they came due to be paid to A. for life, and after her decease to pay the principal according to her appointment by will or otherwise; A. filed a bill praying for payment of the legacy, and the Court of Exchequer made a decree in her favour without a formal appointment being executed, holding that the demand by the Bill was a sufficient indication of her intention to take the whole for her own benefit. It does not appear from the report whether or not there was a gift over in default of appointment. Similarly in *Holloway* v. *Clarkson* (*j*) there were bequests to females, some married and some single, for their separate use for their respective lives and after their decease to such persons as they should respectively appoint, and in default of appointment to their respective executors, administrators and assigns; several of the legatees presented petitions for transfers of their shares in the fund; Sir J. Wigram, V.-C., said that it being clear the executors of the several female legatees could only take the fund as part of the estates of such legatees, that the legatees were authorized to make an immediate disposition of their legacies either by a revocable or an irrevocable act; and that their executors could not dispute, or claim in opposition to the act of such legatees, he was of opinion that the petition was in such case equivalent to an appointment, and that therefore the order ought to be made as sought by the petitioners.

In *Devall* v. *Dickens* (*k*) the limitations were similar, except that the power was by will only. Sir J. Wigram said that he had in previous cases of a similar description to the present always held that the effect of such a limitation was substantially to give the entire interest in the property to the legatee, and he ordered a transfer of the fund.

In *Page* v. *Soper* (*l*) the limitations (contained in a settlement) resembled those in *Devall* v. *Dickens*, but there was a restraint on

(*h*) [1895] 1 Ch. at p. 367.
(*i*) 19 Ves. 86.
(*j*) 2 Ha. 521; *Cambridge* v. *Rous*. 25 Bea. 574.
(*k*) 9 Jur. 550.
(*l*) 11 Ha. 321. See also *Re Onslow*, 39 Ch. D. 622, a case of a settlement.

CHAP. XXXIII.

anticipation attached to the life estate. The donee of the power having become a widow, applied to the Court for a transfer of the funds offering to release her power; and an order was made accordingly.

In *Cambridge* v. *Rous* (No. 2) (*m*) there was no gift over, but the order was made without requiring the power of appointment to be exercised.

The result of these authorities would appear to be as follows:

(1) A gift to A. for life, with a power of appointment by deed or will, with a gift over away from A. or his estate, or with no gift over, gives A. entire dominion over the fund, and therefore if he applies to the Court for it the Court need not require a formal appointment of the fund, as his application to the Court is a sufficient intention to take the fund (*n*).

(2) If the power of appointment in the last case had been by will only, the Court would not decree payment because an appointment by will must be executed in accordance with the Wills Act.

(3) If there is a gift over to A.'s executors and administrators, then, whether the power is by deed or will, or by will alone, there is substantially an absolute gift to A., and consequently the Court will make an order for transfer without requiring an appointment or a release of the power.

Whether trustees can dispense with appointment or release.

It now remains to be considered whether the executors or trustees can safely pay over the fund to A. in any of the above cases. As regards (1) and (2) it is clear that they cannot. As regards (3) it is submitted that they cannot because although A. is substantially absolute owner of the fund, and some of the cases treat him as if he were owner, yet a trustee would not be safe in handing over the fund until A. had taken the requisite legal steps to have the entire beneficial interest vested in him, and so that no power of divesting that beneficial interest remains. A further question arises, namely, whether if in such a case A. either appoints to himself or releases his power there may not be a liability to estate duty under section 11 of the Finance Act 1910. This is not an easy question to answer. The section appears to refer to dealings with the life interest, and in the case supposed A. would only deal with a power of disposition to take effect after the life interest, but executors and trustees would do well to make proper provision for the possibility of estate duty becoming payable before they hand over the fund.

What is an exercise of a general power.

An actual dealing with the fund by the tenant for life, for

(*m*) 25 Bea. 574.

(*n*) See *Irwin* v. *Farrer*, supra.

instance, by selling out Consols and investing in Long Annuities, is not an exercise of a power of appointment "by will or otherwise" (*o*).

III.—Where Words which create an Estate Tail in Real Estate confer the Absolute Interest in Personalty.—The principal rules are as follows:—

Words which create an estate tail in realty confer the absolute interest in personalty.

(i.) *Where the Words would create an Estate Tail in Realty expressly or by Implication* (*p*).—"It has been established by a long series of cases (*q*) that where personal estate (including of course terms of years of whatever duration (*r*)) 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 (*s*).

Rule applies to estates tail by implication.

"This rule is not confined, as has been sometimes affirmed (*t*), to cases in which the words, if used in reference to realty, would create an *express* estate tail; for it applies also to those in which an estate tail would arise *by implication*, except in the particular case in which words expressive of a failure of issue receive a different construction in reference to real and personal estate (*u*). Thus, where by a will which is regulated by the old law personalty is bequeathed to A., or to A. and his heirs, and if he shall die without issue to B. (which would clearly make A. tenant in tail of real estate), he will take the absolute interest (*v*).

(*o*) *Reith* v. *Seymour*, 4 Russ. 263.

(*p*) This section is in the words of Mr. Jarman in the first edition, vol. II. pp. 489 seq.; a few cases have been added to the footnotes.

(*q*) *Leventhorpe* v. *Ashbie*, Rolle's Abr. 831, pl. 1; *Bennet* v. *Lewknor*, Roll. Rep. 356; *Fereyes* v. *Robertson*, Bunb. 301, 8 Vin. Abr. 451, pl. 25, 26; *Richards* v. *Bergavenny*, 2 Vern. 324; *Seale* v. *Seale*, 1 P. Wms. 290; *Stratton* v. *Payne*, 3 Br. P. C. Toml. 99; *Pelham* v. *Gregory*, 3 Br. P. C. Toml. 204; *Montagu* v. *Beaulieu*, 3 Br. P. C. Toml. 277; *Donn* v. *Penny*, 1 Mer. 20; *Chatham* v. *Tothill*, 7 Br. P. C. Toml. 453, 1 Mad. 488 (sub nom. *Tothill* v. *Pitt*); *Butterfield* v. *Butterfield*, 1 Ves. sen. 133, 154; *Robinson* v. *Fitzherbert*, 2 B. C. C. 127; *Elton* v. *Eason*, 19 Ves. 73; *Britton* v. *Twining*, 3 Mer. 176; *Crawford* v. *Trotter*, 4 Mad. 360; *Simmons* v. *Simmons*, 8 Sim. 22; *Williams* v. *Lewis*, 6 H. L. C. 1013 (affirming 3 Drew. 668); *Re Walker*, [1908] 2 Ch. 705: *Re Cleary's Trusts*, 16 Ir. Ch. 438.

(*r*) 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.

(*s*) It will of course be remembered that if personal property is bequeathed to A. in tail, with remainder to B. in tail, and A. dies in the testator's life without issue, the bequest to B. takes effect: *Re Lowman*, [1895] 2 Ch. 348, and other cases cited, ante, p. 452.

(*t*) *Atkinson* v. *Hutchinson*, 3 P. W. 259; *Doe* v. *Lyde*, 1 T. R. 593.

(*u*) See Chap. LII.

(*v*) *Love* v. *Windham*, 2 Ch. Rep. 14, 1 Lev. 290; *Chandless* v. *Price*, 3 Ves. 99; *Campbell* v. *Harding*, 2 R. & My.

CHAP. XXVIII.

Rule applies to cases falling within the rule in *Shelley's case.*

"The rule also applies to those cases in which, by the operation of the rule in *Shelley's Case* (*w*), the terms of the bequest would, in reference to real estate, create an estate tail. Thus in *Garth* v. *Baldwin* (*x*) where a testator devised real and personal estate to X., 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.

Though the interest be referential to the devise.

"And in such a case whether the bequest itself contains the words of limitation, or refer to a devise of realty creating the estate tail. As in *Brouncker* v. *Bayot* (*y*), 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 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 same interest in personalty."

Words of distribution, &c., annexed to the limitation to the heirs of the body, &c.

(u.) *Where Words of Distribution are superadded.*—"The next question," says Mr. Jarman (*z*), "is, whether words of distribution or other expressions marking a course of enjoyment inconsistent

390; *Dunk* v. *Fenner*, 2 R. & My. 557; *Simmons* v. *Simmons*, 8 Sim. 22; *Cauldfield* v. *Maguire*, 2 J. & Lat. at p. 176; *Hale* v. *Goble*, 13 C. B. 445; *Webster* v. [illegible] Bea. 236.

[illegible] which, see Chap. XLVIII.

2 Ves. sen. 646; see also *Webb* v. [illegible], 1 P. W. 132, 2 Vern. 668; *Butterfield* v. *Butterfield*, 1 Ves. sen. 133, 154; *Tothill* v. *Earl of Chatham*, 7 Br. 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. sen. 133, 154; *Glover* v. *Strothoff*, 2 B. C. C. 33; *Re Andrew's Will*, 27 Bea. 608; and the other cases overruling *Smith* v. *Clever*, 2 Vern. 38; and (on this point) *Fonnereau* v. *Fonnereau*, 3 Atk. 315.

(*y*) 1 Mer. 271, 19 Ves. 574; see also *Douglas* v. *Congreve*, 1 Bea. 59; and the cases referred to ante, pp. 692 seq., on gifts of chattels by reference to the limitations of real estate.

(*z*) First edition, vol. II. p. 491.

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 (*a*). 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* (*b*), where personalty was bequeathed to A. for life, and after her decease unto the heirs of her body lawfully begotten, *equally to be divided between them share and share alike*; and in default of such issue over; and it was held by Lord Thurlow (*c*), 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., as Lord Loughborough pointed out, must expunge the words "for life," and the words which directed 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. *Doe* v. *Applin* (*d*) does not apply . . . to preserve it from the Crown, or the husband . . . *King* v. *Burchell* (*e*) applies still less."

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 (*f*): and to use "heirs of the body" regarding personalty is a misapplication of those words, which has always (*g*) 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* (*h*), where by post-nuptial settlement a term was limited in trust 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

(*a*) See post, Chap. X
(*b*) 4 Br. C. C. 54
ment, 13 Ves. 479,
(*c*) This is a mi
borough was Chance
(*d*) 4 T. R. 82, post
(*e*) Amb. 379,
Chap. LI.

& G.
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CHAP. XXXIII.

Words of distribution, &c., annexed to the limitation to the heirs of the body, &c.

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 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." (*i*).

So in *Wilson* v. *Vansittart* (*j*), 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 (*k*).

In *Kinch* v. *Ward* (*l*), 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 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* (*m*), Sir W. P. Wood, V.-C.,

(*i*) 2 Ves. sen. 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.

(*j*) Amb. 562.

(*k*) See *Chamberlayne* v. *Chamberlayne*, 6 Ell. & Bl. 625. 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"; and see *Re Barker's Trusts*, post.

(*l*) 2 S. & St. 409

(*m*) L. R., 2 Eq. 276. See also *Symers* v. *Jobson*, 16 Sim. 267.

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 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* (*n*). 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* (*o*), 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 *successivé*, 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 from *Hodgeson* v. *Bussey* and *Sands* v. *Dixwell*" (*p*). He therefore held that A. did not take an absolute interest.

In *Re Barker's Trusts* (*q*), the testator bequeathed his residuary estate to W. and the heirs of his body in equal proportions, and in the event of W. dying during the life of S. without leaving heirs of his body, he bequeathed it to S. for life, and "at the decease of S., W., and the heirs of his body," over. S. died; W. had six children: the personalty was held to have vested in W. absolutely, and a fund in Court was paid out to him on this footing.

(*n*) 1 P. W. 663.

(*o*) See Chap. XLIX.

(*p*) 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 post, Chap. XLVIII.

(*q*) 48 L. T. N. S. 573, 52 L. J. Ch. 565. The principle of the decision was that the testator desired to give *successivé*.

(iii.) *Where the Bequest is to a Person and his Issue simply* (*r*).—"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 (*s*), confers on him the absolute ownership in personalty.

Whether "issue" explained to mean issue *at the death.*

"Lord Hardwicke in *Lampley* v. *Blower* (*t*) admitted this proposition, 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* (*u*) issue living *at the death*), explained 'issue' in the body of the devise to be used in the same sense.

To four persons and the issue of their respective bodies, if any die without issue at death over.

"This seems to be rather a strained construction, and is inconsistent with *Lyon* v. *Mitchell* (*v*), which is a direct authority as to the effect of a bequest simply to A. and his issue. A testator bequeathed personalty to his four sons, share and share alike, as tenants in common, *and to the issue of their several and respective bodies lawfully begotten;* but in case of the death of any or either of them without issue lawfully begotten *living at the time of his or their respective deaths*, then the part or share of him or them so dying should go to the survivors or survivor equally, and to the issue of their several and respective bodies lawfully begotten. Sir T. Plumer, 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" (*w*).

Extent of doctrine.

In simple cases like those cited above, this principle of construction is almost inevitable, because if the word "issue" were treated as a word of purchase, the issue would take concurrently with their parent, and the result, especially in such a case as *Lyon* v. *Mitchell* (*x*), would, as Sir T. Plumer pointed out, be so inconvenient as to trench on absurdity. It was remarked by Lord Cranworth

(*r*) This section follows Mr. Jarman's words in the first edition, vol. II. p. 493.
(*s*) See Chap. LI.
(*t*) 3 Atk. 397. See Chap. LI.
(*u*) See Chap. LII.
(*v*) 1 Mad. 467.
(*w*) See also *Doan* v. *Penny*, 19 Ves. 545; *Beaver* v. *Nowell*, 25 Bea. 551. As to *Young* v. *Davies*, 2 Dr. & Sm. 167 (offspring), see Chap. XXXVI. The construction has been extended to a case where money was directed to be settled on A. and his issue: *Samuel* v. *Samuel*, 1 [illegible] J. Ch. 222, but the decision seems contrary to principle: Chap. XLVIII.
(*x*) Supra. See also per Kindersley, V.-C., 2 Dr. & S. at p. 171.

and Turner, L.J. (*y*), that the construction by which a devise of real estate to A. and his issue is held to give A. an estate tail effectuates the intention as far as possible, while to hold that a bequest of personal property to A. and his issue gives A. an absolute interest defeats the intention, because the issue take nothing. And it is now settled that there is no absolute rule that a gift to a person and his issue gives him an absolute interest: it is a question of construction on the whole will. Thus if personal property is given to several persons (whether nominatim or as a class) and their issue, the words "and their issue" may be construed as words of substitution, so that if one of the primary legatees dies in the testator's lifetime, or before the period of distribution, as the case may be, his issue take his share (*z*).

Blended gift of realty and personalty.

The view seems formerly to have been held that where real and personal estate are both disposed of by the same words, which give an estate tail in the realty, then the personalty vests absolutely in the first taker, and *Parkin* v. *Knight* (*a*) and *Tate* v. *Clarke* (*b*) are cited as supporting the doctrine. But in recent years this view, which is not based on any reasonable principle of construction, has been dissented from (*c*). If it is to be treated as obsolete, the result appears to be that, in a modern will, under a gift of real and personal property to A. and his issue, A. would take an estate tail in the realty and an absolute interest in the personalty, while if the gift were to a number of persons and their issue, the words "and their issue" would be construed as words of limitation in the case of the realty, and as words of substitution in the case of the personalty, if that construction were consistent with the scheme of the will (*d*).

Ancestor and issue may take concurrently.

In some cases a gift to a class and their issue has been held to include all persons falling within the literal meaning of the words, the issue taking concurrently with their ancestors (*e*).

To A. for life and after his death to his issue.

(iv.) *Bequest to A. for Life, and after his Death to his Issue.*—Mr. Jarman continues (*f*): "Our next inquiry is, whether a bequest

(*y*) In *Ex parte Wynch*, 5 D. M. & G. at pp. 204, 225. The remarks must be read in connection with the doctrine discussed in that case: post, p. 1201.

(*z*) Post, Chap. XXXVI. It does not seem to have been decided whether in a gift to A. "and his issue," those words can ever be construed as substituting the issue for A. in the event of his predeceasing the testator.

(*a*) 15 Sim. 83. As to this case see post, Chap. XXXVI.

(*b*) 1 Bea. 100. As to this case, see post, p. 1201, n. (*r*).

(*c*) See *Jackson* v. *Culvert*, 1 J. & H. 235, post, p. 1201; *Herrick* v. *Franklin*, L. R., 6 Eq. 593, post, p. 1201, n. (*r*).

(*d*) As to this, see *Tate* v. *Clarke*, Chap. XXXVI.

(*e*) *Law* v. *Thorp*, 27 L. J. Ch. 649, cited in Chap. XXXVI.

(*f*) First edition, vol. II. p. 494.

CHAP. XXXIII.

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 shewn 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* (*g*), 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 (*h*) (the issue being to take *concurrently with* and not by way of remainder *after* the ancestor); the inevitable conclusion would seem to be that in the case suggested A. would be absolutely entitled."

It seems, however, now to be settled by a series of cases, beginning with *Knight* v. *Ellis* (*i*), that in such a case A. will take for life only. The rule 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 in, like a corresponding gift to children, all the objects who are living at the testator's death, and all who come in esse during the life interest (*j*).

Distinction between gift to one at a time and gift to all the issue together.

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" (*k*). By means of this distinction, perhaps, the decision in *Jordan* v. *Lowe* (*l*) 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

(*g*) That the rule in *Shelley's Case* applies, whatever be the word of limitation used, see Chap. XLVIII.

(*h*) As to such cases of devises, see Chap. LI.

(*i*) 2 Br. C. C. 570; *Heather* v. *Winder*, 5 L. J. Ch. N. S. 41; *Ex parte Wynch*, 1 Sm. & G. 427, 5 D. M. & G. 188; *Foster* v. *Wybrants*, Ir. R., 11 Eq. 40; *Re Cullen's Estate*, [1907] 1 Ir. 73. See also *Goldney* v. *Crabb*, 19 Bea. 338; *Waldron* v. *Boulter*, 22 Bea. 284. *McKenna* v. *Eager*, Ir. R., 9 C. L. 79 (bequest of leaseholds), is referable to this principle, and not to the rule followed in *Roddy* v. *Fitzgerald*, 6 H. L. Ca. 823, and *Montgomery* v. *Montgomery*, 3 Jo. & Lat. 47, Chap. XLIX. *A.-G.* v. *Bright*, 2 Keen, 57, is overruled.

(*j*) *Jackson* v. *Calvert*, 1 J. & H. 235. See similar construction where the words "heirs of the body" are used, *Jacobs* v. *Amyatt*, ante, p. 1195.

(*k*) 2 B. C. C. 570.

(*l*) 6 Bea. 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 for ever; *Prentice* v. *Brooke*, 5 L. R. Ir. 435.

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 in *Ex parte Wynch* (*m*), "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 for ever 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*."

To A. for life, and in default of issue over.

Lord Thurlow (*n*) 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* (*o*), 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* (*p*), where personalty was given to be invested for 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 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 (*q*). 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" (*r*): and if the personal is clearly a mere

(*m*) 5 D. M. & G. 188, at p. 212.

(*n*) 2 B. C. C. at p. 578. See also his dictum, *Att.-Gen.* v. *Bayley*, 2 B. C. C. 553.

(*o*) 2 My. & K. 441,; Chap. LII.

(*p*) 5 D. M. & G. 199, n. See also *Re Banks' Trust*, 2 K. & J. 387.

(*q*) *Jackson* v. *Calvert*, 1 J. & H. 235. See also *Re Banks' Trust*, 2 K. & J. 387.

(*r*) See *Tate* v. *Clarke*, 1 Bea. 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 shewing 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

CHAP. XXXIII.

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 (*s*).

General conclusion.

Upon the whole, the result is that the rule 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" cannot be asserted without qualification. In many decisions 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 (*t*); 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 (*u*)), 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 (*v*). Hence, too, it has been finally decided that the rule in *Wild's Case* does not apply to bequests of personalty (*w*).

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 favour of the children (*x*),—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.

Bequests over after gifts in question, when void.

(v.) *Ulterior Bequests.*—Mr. Jarman continues (*y*): "A necessary consequence of the rule, that words which create an estate tail in realty confer the absolute interest in personalty, is, that all bequests ulterior to such a gift are void (*z*); 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

* Bequest to A. for life, and after his death to his *heirs*; A. takes for life only.

to such a gift. *Powell* v. *Boggis*, 35 Bea. 535, and *Comfort* v. *Brown*, 10 Ch. D. 146, must rest on the special terms of the wills. See as to the former, Chap. XL.

(*s*) Per Wood, V.-C., *Jackson* v. *Calvert*, 1 J. & H. 238. See also *Douglas* v. *Congreve*, 1 Bea. 59.

(*t*) Chap. LI.

(*u*) Chap. L.

(*v*) 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.

(*w*) Chap. L.

(*x*) Chap. L.

(*y*) First edition, vol. II. p. 504. * The remarks on the effect of a bequest of personalty to a man and his issue, in raising a substitutional gift in favour of the issue, which preceded this section in Mr. Jarman's text, have been transferred to the new chapter on Substitutional Gifts (Chap. XXXVI. in this edition).

(*z*) *Hoare* v. *Byng*, 10 Cl. & Fin. 508; *Re Percy*, 24 Ch. D. 616.

simply as substitutional or *alternative* bequests, each gift in the series being dependent upon the event of the preceding gift or gifts not taking effect.

"Thus, where a term of years is limited to A. for life, with remainder to his first and other sons successively in tail male with 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 labour, were it not that at one period the authorities (including a decision of the supreme Court of Judicature (*a*)) sanctioned a contrary doctrine.

"In *Brett* v. *Sawbridge* (*b*), a testator who was a mortgagee in possession of a term of years, devised it (supposing himself to be seised of an estate of inheritance) to J., son of H., for life, remainder to his first and other sons in tail male, remainder to two other sons of H., and their sons successively in tail in like manner, remainder to all other the sons of J. successively in tail, with remainder to the right heirs of B. and W. Though it appeared that none of the tenants in tail had come in esse, Sir J. Jekyll, M.R., held that the limitation over was void; and his decree was affirmed in the House of Lords. The reasons urged in its support were, first, that as the testator intended to dispose of the inheritance, the term did not pass; and secondly, that the limitation over being after an indefinite failure of issue, was void for remoteness. It is not stated upon which ground the House proceeded, but, most probably, as the reporter assumes, upon the latter, as the objection that the testator intended to dispose of the inheritance could not be sustained for an instant as a reason against the devise operating upon the term.

"In regard to the alleged remoteness of the limitation to the heirs of B. and W., however, the case is completely overruled by

Brett v. *Sawbridge* overruled by *Pelham* v. *Gregory*.

(*a*) By which term Mr. Jarman means, of course, the House of Lords; he wrote in 1844.

(*b*) 3 Br. 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.

CHAP. XXXIII.

the determination of the House of Lords in *Pelham* v. *Gregory* (c), which arose on the will of the Duke of Newcastle, who devised all his freehold and leasehold estates to T. for life, with remainder to his first and other sons in tail male, with remainder to H. for life, with remainder to *his* first and other sons in tail male, with remainders over: T. was living, but had no son; H. had a son, who during the life of T. died, and it was held that the administrator of such son was absolutely entitled to the leasehold estates, subject only to be defeated by the birth of a son of T., the prior tenant for life.

Such gifts may be made defeasible on a collateral event.

"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. (*d*).

Effect of Act 1 Vict. c. 26, s. 29, on this rule of construction.

"And here it occurs to remark, that the enactment (*e*) restricting words denoting a failure of issue to a failure at the death (which we have seen prevents them having the effect of creating an estate tail by implication) will, when applied to personalty, operate to restrain such words from passing the absolute interest, and also to bring within the compass of the rule against perpetuities the ulterior bequest depending on such contingency. If, therefore, a testator by a will made or republished since 1837, 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 favour of B. on his (A.'s) leaving no issue at his death.

"Where the bequest is to A. expressly for life, and in case of his dying without issue to B., the construction seems also free from doubt. A. will, according to the newly enacted doctrine, take a life interest in *any* event, and B. will take the ulterior interest, only in the event of A.'s leaving no issue; in the converse event of A. leaving issue, the ulterior interest will be undisposed of."

(c) 3 Br. 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 *Tothill* v. *Pitt*, stated 1 Mad. at p. 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*).

(d) *Lamb* v. *Archer*, 1 Salk. 225; see Chap. LII.

(e) Wills Act, s. 29.

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 (*f*), and A. will, it should seem, be absolutely entitled as before (*g*).

(*f*) See Chap. LI.

(*g*) Ante, p. 1201, as in *Bodens* v. *Watson* (or *Lord Galway*), Amb. 398, 478, 2 Ed. 297; *Re Sallery*, 11 Ir. Ch. 236 (bequest of leaseholds to illegitimate child A., and if A. should die without "heirs or issue," over).

CHAPTER XXXIV.

LIFE ESTATES AND INTERESTS.

PAGE

I. *How created* 1206
II. *Estates pur autre Vie* 1211
III. *Tenant for Life and Remainder-man:—*
(1) *Charges and Outgoings*.1214
(2) *Leaseholds* 1216
(3) *Copyholds and Renewable Leaseholds* 1217
(4) *Reversions and Remainders* 1218
(5) *Income — Apportionment—Accumulations*1219
(6) *Casual Profits* 1220
(7) *Profits of Trading Companies* 1222
(8) *Profits of Private Partnerships*.....1227
(9) *Residue given to Persons in Succession, subject to a Trust for Conversion*1229
(10) (i.) *The Rule in Howe* v. *Lord Dartmouth*...1242
(ii.) *What Expressions exclude the Rule*...1245

Life interests created by implication.

I.—How created.—An intention to give a person an estate for life in real property, or a life interest in personal property, is sometimes inferred from the terms of a will, although it contains no direct gift to that person. The creation of estates or interests by implication in this manner has already been considered (*a*). In this chapter it is proposed to consider what words of direct gift will confer a life interest.

Life interest in personal property.

A gift of chattels or other personal property to A., without more, gives A. an absolute interest in the subject matter of the gift, and it is necessary to use the words "for life" (*b*), or similar words, in order to cut down his enjoyment to a life interest, unless that intention appears from other parts of the will, as in the cases mentioned in the next paragraph. The proper way of creating a life interest in chattels personal is through the medium of a trust, as they are in theory essentially the subject of absolute ownership. Courts of Equity, however, protect the rights of executory legatees

(*a*) Chap. XIX.

(*b*) In *Cooney* v. *Nicholls*, 7 L. R. Ir. 107, the testator gave to his wife "my house during her life, also the interest of my money in the Government funds, also my furniture": it was held that the restriction of a life interest did not extend to the funds or the furniture. In *Mannox* v. *Greener*, L. R., 14 Eq. 456, a gift of furniture conferred only a life interest, as it was followed by words ("to revert back to the estate") which could only have that effect.

in remainder (*c*). Terms of years can be the subject of executory bequests (*d*).

Express words not required.

Although a gift of personal property to A., without more, primâ facie confers an absolute interest, it may appear from the subsequent provisions of the will that the testator intended A. to take only a life interest, if the words cannot otherwise have effect given them (*e*). For although a gift to A., followed by a gift to B. contingently on A.'s death, is, in the absence of any controlling context, construed as an absolute gift to A. if he survives the testator, so that the gift to B. only takes effect in the event of A.'s death in the lifetime of the testator (*f*), yet if the gift is to A., and "after" or "on" or "at" his death to B., the primâ facie construction is that the testator intends to give a life interest to A., with remainder to B. (*g*). In such a case, if the intention is clear that A. is only to have a life interest in any event, his interest is not re-converted into an absolute one by the failure of the gift to B. (*h*), while if the intention is that A.'s absolute interest is not to be cut down unless the gift to B. takes effect, then the failure of the gift to B. gives A. an absolute interest (*i*).

Such an expression as "in the event of A.'s death" is frequently used by laymen to mean "when A. dies," and the result is that the technical rule of construction above stated—namely, that a gift to A., and "in the event" of his death to some one else, is only intended to provide for the case of A. dying in the lifetime of the testator—often defeats the testator's intention, especially where the objects of the gift over are A.'s children. Thus in *Re Bourke's Trusts* (*j*) the testator gave his brother J. B. the sum of 2500*l*., to be invested by the executors, and the interest to be paid from time to time to J. B., without power of anticipation, and "in the event of

(*c*) Chap. XXXVIII.

(*d*) See *Manning's Case*, 8 Rep. 94b, and other cases cited in Chap. XXXVIII. This question is discussed in Gray on Perp., 2nd edition, pp. 119 seq., 564 seq.

(*e*) See *Mannox* v. *Greener*, L. R., 14 Eq. 456.

(*f*) Chap. LVI. The exceptional cases of *Billings* v. *Sandom*, 1 Br. C. C. 393; *Nowlan* v. *Nelligan*, 1 Br. C. C. 489; and *Lord Douglas* v. *Chalmer*, 2 Ves. jun. 501, in each of which a gift to A., and in case of his death to B., was held to give A. only a life interest, are there discussed.

(*g*) *Re Adams' Trusts*, 14 W. R. 18; *Waters* v. *Waters*, 26 L. J. Ch. 624; *Sherratt* v. *Bentley*, 2 My. & K. 149; *Re Russell*, 52 L. T. 559; *Harris* v. *Newton*, 46 L. J. Ch. 268; *Re Houghton*, 53 L. J. Ch. 1018; *Re Ibbetson*, 88 L. T. 461; *In bonis Lupton*, [1905] P. 321. Many of these cases are discussed in Chap. XVII. Compare *Re Percy*, 24 Ch. D. 616, where there was a gift to A. "afterwards to go to" B., and it was held that A. took absolutely: sed quære: the decision clearly defeated the intention of the testator.

(*h*) *Joslin* v. *Hammond*, 3 My. & K. 110, stated in Chap. XXXVIII.

(*i*) *Crozier* v. *Crozier*, L. R., 15 Eq. 282.

(*j*) 27 L. R. Ir. 573.

CHAP. XXXIV.

the death of J. B." the interest was directed to be paid for the support of his children until they attained twenty-five, when each was to receive an equal part of the 2500*l.*; there was a gift over in the event of J. B. dying "without heirs" or of the children dying "without heirs" before the age of twenty-five. Nevertheless, it was held that J. B. took absolutely.

Gift to parent and children.

A gift for the benefit of A. and his children may be so expressed as to give A. an estate for life with a power of appointment among the children, and an implied gift to them in default of appointment (*jj*).

Gift of "what remains," &c.

In several cases a gift to A., with a direction that at A.'s death "the residue" or "whatever remains" of the property shall go to B., has been held to give A. a life interest only (*k*), while in other cases somewhat similar words have been held to give A. an absolute interest (*l*), or a life interest with a power of appointment or disposition (*m*). In one case, where a testator gave his personal estate to his wife, and "the residue" of his personal estate in trust for his children, it was held upon a consideration of the whole will (under which the wife took an estate for life in real property) that the wife only took a life interest in the personalty (*n*). In *Re Russell* (*o*), there was a bequest of 1000*l.* to A., "the same to become the property (at her death) of her heirs": it was held that A. took a life interest only.

Life interest, where enlarged.

An express gift of personalty for life will not easily be enlarged by the context into an absolute interest (*p*), but instances of this sometimes occur (*q*). It is hardly necessary to say that as the rule in *Shelley's Case* (infra) does not apply to personal estate, a

(*jj*) See *Bradshaw* v. *Bradshaw*, [1908] 1 Ir. 288, and other cases cited in Chap. XXIV.

(*k*) *Constable* v. *Bull*, 3 De G. & S. 411; *Re Brook's Will*, 2 Dr. & Sm. 362, 13 W. R. 573; *Re Adams' Trust*, 14 W. R. 18; *Gibbens* v. *Potter*, 10 Ch. D. 733; *Re Sheldon and Kemble*, 53 L. T. 527; *In b. Lupton*, [1905] P. 321. The cases in which a gift over of "what remains" has been held void for uncertainty are considered in Chap. XIV.

(*l*) See *Perry* v. *Merritt*, L. R., 18 Eq. 152; *Parnell* v. *Boyd*, [1896] 2 Ir. R. 571; *Re Jones*, [1898] 1 Ch. 438, and the cases cited in Chaps. XIV. and XVII. A direction that a legacy bequeathed to A. shall be invested, and that he be paid only the dividends arising therefrom, does not prevent A. from taking the legacy absolutely: *Richards* v. *Richards*, 9 Price, 219.

(*m*) See *Re Stringer*, 6 Ch. D. 1; *Re Sanford*, [1901] 1 Ch. 939; and other cases considered in Chap. XXIII.

(*n*) *Re Bagshaw's Trusts*, 46 L. J. Ch. 467. Compare *Hare* v. *Westropp*, 9 W. R. 689.

(*o*) 52 L. T. 559.

(*p*) *Scawin* v. *Watson*, 10 Bea. 200; *Re Graham's Will*, 33 Bea. 479; *Re Holden*, 59 L. T. 358. In *M'Culloch* v. *M'Culloch*, 3 Giff. 606, however, words which were apparently intended to give an interest less than a life interest, namely, an interest durante viduitate, were held to confer an absolute interest, subject to a gift over in the event of the legatee marrying again.

(*q*) *Nowlan* v. *Walsh*, 4 De G. & S. 584; and the cases cited in Chap. XXXIII.

bequest to A. for life and after his death to his heirs does not give A. the absolute interest, even if it is combined with a devise of realty, in which, of course, A. takes the fee (*r*).

Consumable things.

The rule that a gift of consumable things to A. for life, with remainder to B., primâ facie vests the absolute interest in A., is discussed in Chapter XXXVIII.

Effect of codicil.

Where an absolute interest (or an interest greater than a life estate) is given to a person by a will, it can of course be cut down to a life interest (or other interest) by a codicil, if the intention is clear (*s*).

Life estate in land.

Before the Wills Act, a devise of land to A. gave A. an estate for life, in the absence of any contrary indications in the will. What expressions were, under the old law, considered sufficient indications that the testator intended A. to take a larger estate than an estate for life, are stated in Chapter XLV. Since the Wills Act the presumption is the other way, and primâ facie a devise to A. gives A. an estate in fee simple, or other the whole estate or interest of the testator; but the effect of sec. 28 of the act is only to raise a presumption, and the intention that A. should take only a life estate may be shewn in various ways (*ss*). Thus a devise to A., followed by a direction that "at" or "on" or "after" A.'s death the property shall go to B., will as a general rule give A. a life estate only (*t*). In *Quarm* v. *Quarm* (*u*), the testator devised a freehold estate to seven persons as joint tenants and not as tenants in common, and to the survivor of them, his or her heirs and assigns for ever, it was held that the devisees did not take a joint estate in fee simple, but that they were joint tenants for life with a contingent remainder in fee simple to the survivor, because the former contention would render the words "to the survivor, &c.," useless.

Life estate, when enlarged.

The general principle that an express gift for life of personal property is not easily enlarged into an absolute interest, seems also to apply to real estate (*v*), but its operation is interfered with by some special rules applying to gifts of real estate. Thus the effect

(*r*) *Herrick* v. *Franklin*, L. R., 6 Eq. 593.

(*s*) See Chap. VII.

(*ss*) As to the construction of an express "cutting down clause" in a will devising land in strict settlement, see *Villar* v. *Gilbey*, [1906] 1 Ch. 583, [1907] A. C. 139.

(*t*) *Sherratt* v. *Bentley*, 2 My. & K. 149; *Gravenor* v. *Watkins*, L. R., 6 C. P. 500.

(*u*) [1892] 1 Q. B. 184.

(*v*) See *Moore* v. *Ffolliott*, 11 L. R. Ir. 206; 19 L. R. Ir. 499, where the testator devised land to three persons expressly for life and then referred to his having left it to them as his "co-heirs."

CHAP. XXXIV.

of the rule in *Shelley's Case* may be to enlarge an express gift for life into an estate of inheritance (*vv*), and under the doctrine of cy-près an estate for life may be enlarged into an estate tail (*w*). So an express gift for life may be enlarged into an estate tail by subsequent words, if that construction appears best to effectuate the intention of the testator (*x*). But if the intention of the testator to give an estate for life only is clear and can be carried into effect, the estate will not be enlarged in order to carry out a supposed "general intention" of the testator (*y*).

In *Foster* v. *Lord Romney* (*z*), where the will was before the Wills Act, a testator devised to A. for life, and after the decease of A. to all and every the son and sons of A. severally and successively one after another in priority of birth, and for default of such issue over. It was held that the sons took life estates. This decision has been twice followed in Ireland (*a*), but no similar case appears to be reported where the will was made after the Wills Act came into operation.

A gift of the "use and occupation" of property has never been held to mean an unlimited gift (*b*).

Interests created de novo.

The rule that a devise without words of limitation (since the Wills Act) passes the fee, does not apply to interests created de novo (*c*).

Gift to several persons during their lives.

Whether the property is real or personal, a gift of income "for the life of A. and B. to be equally divided between them," continues only during their joint lives (*d*). But a gift to A. and B. during their natural lives is a gift to A. and B., and the survivor of them during their lives, and if A. dies in the testator's lifetime, the gift to B. does not lapse (*e*).

If property is given to A., B., and C. "during their respective

(*vv*) Chap. XLVIII.

(*w*) Ante, p. 288.

(*x*) *Roe* v. *Grew*, 2 Wils. 322, and other cases referred to in Chap. XLVII. The rule that a gift over in default of issue of A. following a gift to A. for life, had the effect of enlarging A.'s estate for life to an estate tail, does not apply to wills governed by the Wills Act. See Chap. XIX.

(*y*) *Kershaw* v. *Kershaw*, 3 Ell. & B. 845; *Forsbrook* v. *Forsbrook*, L. R., 1 Ch. 93; *Hampton* v. *Holman*, 5 Ch. D. 183.

(*z*) 11 East, 594.

(*a*) *Bevan* v. *White*, 11 Ir. Eq. 473 (the date of the will is not given, but it seems to have been before the Wills Act); *Palmer* v. *Palmer*, 18 L. R. Ir. 192 (will before Wills Act). Compare *Re Buckton*, [1907] 2 Ch. 407.

(*b*) *Re Coward*, 60 L. T. 1. See per Lord Watson, at p. 3.

(*c*) See Chap. XLV., and Chap. XXXI., ante, p. 1152.

(*d*) *Grant* v. *Winbolt*, 23 L. J. Ch. 282; and see *Re Drakeley's Estate*, 19 B. 395.

(*e*) *Alder* v. *Lawless*, 32 Bea. 72; and see *Neighbour* v. *Thurlow*, 28 Bea. 33. So a gift to A. and B. "during their joint and natural lives" means during their joint lives and the life of each of them: *Smith* v. *Oakes*, 14 Sim. 122. This is the construction even where A. and B. are husband and wife: *Moffatt* v. *Burnie*, 18 Bea. 211.

lives, and subject thereto in trust for the respective children of the said A., B., and C. as tenants in common," A., B., and C. are tenants in common, and the children take per stirpes (*ee*).

A gift to A. and B. during their joint lives, followed by a gift over on the death of both, may operate as a gift by implication to the survivor for his life (*f*).

Gift to A. during life of B. and C.

A limitation of real estate to A. during the life of B. and C. gives A. an estate during the lives of B. and C. and the survivor; but a limitation for 100 years if A. and B. shall so long live is determined by the death of either, because this is a collateral condition; probably these rules also apply to personal estate (*ff*).

A devise to A. for his life and the life of his heir gives A. an estate during his life and that of the person who at his death shall be his heir (*g*).

As to gifts of annuities to several persons for their lives, see Chapter XXXI.

Estates pur auter vie.

II.—Estates pur auter Vie.—An estate pur auter vie may be created by a devise of lands or tenements to A. during the life of some other person or persons (*gg*).

In *Re Ashforth* (*h*) the testatrix devised real estate to trustees and their heirs upon trust to pay the rents to A., B., and C., and the survivors and survivor of them during their lives and the life of the survivor, and after the decease of such survivor to pay and divide the rents equally amongst all such of the children (born in her lifetime or within 21 years of her death) of A., B., and C. as should be living at the date of the division, and after the death of all such children except one the testatrix devised the real estate to such surviving child in tail: Farwell, J., held that the trustees took an estate pur auter vie. But there does not seem to be any authority for this decision. It is assumed by all text writers

(*ee*) *Sutcliffe* v. *Howard*, 38 L. J. Ch. 472.

(*f*) See *Townley* v. *Bolton*, 1 My. & K. 148; *Moffatt* v. *Burnie*, 18 Bea. 211; *Re Buller*, 74 L. T. 400, and the other cases cited above, p. 642.

(*ff*) *Day* v. *Day*, Kay, 703; *Brudnel's Case*, 5 Rep. 9.

(*g*) *Re Amos*, [1891] 3 Ch. 159.

(*gg*) Litt. sec. 56. The old doctrine was that if a rent-charge was limited to A. during the life of B., and A. died during B.'s lifetime, the rent-charge determined: *Smartle* v. *Penhallow*, Salk. 188; *Holden* v. *Smallbrooke*, Vaughan, at p. 199. By a strained interpretation of the Statute of Frauds, it was held that the 15th section altered the law in this respect; such a rent-charge, therefore, does not determine by the death of the grantee, but passes to his personal representative under s. 6 of the Wills Act. See *Bearpark* v. *Hutchinson*, 7 Bing. 178.

(*h*) [1905] 1 Ch. 535. The decision itself is correct, for the ultimate limitation was an executory devise, and therefore void for remoteness. But both the grounds given for the decision are, it is submitted, erroneous. See supra, p. 372.

CHAP. XXXIV.

of weight that in creating an estate pur auter vie, the lives during which the estate is to have continuance must be in existence when the limitation is made (*hh*).

An estate pur auter vie is realty (*i*).

Deposition and devolution of estates pur auter vie.

The provisions of the Wills Act with regard to the devisability of existing estates pur auter vie, and their devolution on intestacy, have been already referred to (*j*).

It seems that where a tenant pur auter vie dies intestate, a case of general occupancy may still occur, during t' interval before administration is granted. But the view generally held is that no practical difficulty is likely to arise in such a case, because the title of the administrator relates back to the death, and the general occupant would therefore not profit by his intrusion (*k*).

Equitable estates p. a. v.

It has been held that the 6th section of the Wills Act applies to equitable estates pur auter vie; consequently if there is no special occupant in equity of such an estate, and the tenant dies intestate, it passes to his personal representatives (*l*); and there can be no general occupancy during the interval before administration is granted (*m*).

The same rules also apply to the case of a legal estate pur auter vie being devised to trustees upon trust for one or more persons (*n*).

Special occupant.

It has been already mentioned that the question whether there is a special occupant, in the event of a tenant pur auter vie dying intestate, is regulated by the terms of the last instrument under which he claims, each tenant having the right of altering the mode in which the estate shall devolve (*o*). But a power of appointment over an estate pur auter vie may be so restricted as not to enable the donee to alter the devolution of the estate (*p*). If no special occupant is designated (*q*), and the tenant dies intestate, the estate

(*hh*) See an article in the Solicitor's Journal, vol. 49, p. 793, referred to in Gray on Perpetuities, addenda.

(*i*) Ante, p. 3.

(*j*) Ante, p. 72. Before the Wills Act it was held that if an estate pur auter vie, limited to the heirs of the tenant, was devised by him without words of limitation, the devisee took only a life-estate: *Doe* d. *Jeff* v. *Robinson*, 8 B. & Cr. 296. Mr. Hayes has commented on the "singular inaccuracy, as well as inconsistency," with which this decision "strained" the rule requiring words of inheritance, or their equivalent, in the case of a devise of the fee in lands (Conv. i. 352, ii. 83). The decision was, however, approved by Lord St. Leonards: *Allen* v. *Allen*, 2 Dr. & W. p. 327; *Crozier* v. *Crozier*, 3 Dr. & W. p. 382.

(*k*) See 1 Preston, Conv. 44: *Re Inman*, infra note (*m*): per Stirling, L.J., in *In bonis Pryse*, [1904] P. at p. 305.

(*l*) *Re Michell*, [1892] 2 Ch. 87: *Mountcashell* v. *More-Smyth*, [1896] A. C. 158: *Re Sheppard*, [1897] 2 Ch. 67.

(*m*) *Re Inman*, [1903] 1 Ch. 241.

(*n*) *Reynolds* v. *Wright*, 2 D. F. & J. 590; *Croker* v. *Brady*, 4 L. R. Ir. 653.

(*o*) Ante, p. 72, and the cases cited supra, n. (*l*).

(*p*) *Whitehead* v. *Morton*, 19 L. R. Ir. 435.

(*q*) It seems that the heir can be made a special occupant by untechnical

passes to his personal representative under sec. 6 of the Wills Act; the same result follows if the estate is given to A. and his heirs, and A. dies intestate without an heir (*r*).

If an estate pur auter vie is given to A. and his heirs, and A. devises it to B. without words of limitation, and A. dies intestate, the estate passes to his personal representative (*s*).

Incorporeal hereditaments.

There may be a special occupant of an incorporeal hereditament (*t*).

Copyholds.

There can also be a special occupant of copyholds (*u*).

Quasi entail.

A testator entitled to an estate pur auter vie can devise it in quasi-entail, by any words which would create an estate tail in lands belonging to him in fee simple (*v*). A quasi-entail can be barred by the quasi tenant in tail in possession by act inter vivos (*w*), but, according to the opinion of Mr. Jarman (*x*) and Mr. Hayes (*y*), not by testamentary disposition.

Remainders and executory interests.

An existing estate pur auter vie can also be devised to A. for life, with remainder to B., or it can be devised to A. absolutely, subject to an executory gift over. Such a remainder or executory interest is a mere expectancy, and not an estate, but it cannot be destroyed by A. (*z*). So a contingent remainder in an estate pur auter vie is not liable to be destroyed by the determination of the particular estate (*a*).

words in a devise; see *Philpotts* v. *Jarvis*, 3 Doug. 425, as explained in *Re Sheppard*, [1897] 2 Ch. at p. 70, and *Re Inman*, [1903] 1 Ch. at p. 247: and quære; and see per Lord Davey, [1896] A. C. at p. 165. If land is devised to A., his heirs, executors, administrators and assigns during the life of B., and A. dies intestate, his heir is entitled as special occupant: *Carpenter* v. *Dunsmore*, 3 E. & B. 918.

(*r*) Ante, p. 73 n. (*d*); *Plunket* v. *Reilly*, 2 Ir. Ch. 585.

(*s*) *Re Michell*, [1892] 2 Ch. 87, where the earlier authorities are referred to; *Mountcashell* v. *More-Smyth*, [1896] A. C. 158; *Re Inman*, [1903] 1 Ch. 241, following *Doe* v. *Lewis*, 9 M. & W. 662, and dissenting from *Blake* v. *Jones*, 1 Hud. & Br. 227, n.; *Wall* v. *Byrne*, 2 Jo. & L. 118, and *Re King*, [1899] 1 Ir. R. 30.

(*t*) *Northen* v. *Carnegie*, 4 Dr. 587. See *Plunket* v. *Reilly*, 2 Ir. Ch. 585. There cannot be a general occupant of an incorporeal hereditament. See *Hassell* v. *Douthwaite*, Willes, 500, and the authorities cited in *Bearpark* v. *Hutchinson*, 7 Bing. 178.

(*u*) *Doe* v. *Martin*, 2 W. Bl. 1148. There cannot be a general occupancy of copyholds (*Zouch* d. *Forse* v. *Forse*, 7 East, 186) without a custom to that effect (*Doe* v. *Goddard*, 1 B. & Cr. 522; Scriven, 24).

(*v*) *Re M'Neale*, 7 Ir. Ch. 388. As to quasi-entails, see Hargrave's note to Co. Litt. 20 a; Hayes, Conv. i. 197. See *Re Mahon's Estate*, 1 Ir. C. L. 567; *Re Whitsett's Estate*, ib. 632; *Allen* v. *Allen*, 2 Dr. & W. 307; *Betty* v. *Humphreys*, Ir. R., 9 Eq. 332.

(*w*) See authorities cited in notes (*v*) and (*z*). A quasi tenant in tail in remainder cannot bar the entail without the concurrence of the tenant for life: ante, p. 74, n. (*f*).

(*x*) Ante, p. 74. But see Theobald on Wills, 523. The analogy between an estate tail and a quasi-entail seems to support the view held by Mr. Jarman and Mr. Hayes.

(*y*) Conv. i. 198.

(*z*) The principal authorities are cited in *Pickersgill* v. *Grey*, 30 Bea. 352; *Re Barker's Settled Estates*, 18 Ch. D. 624.

(*a*) *Ferguson* v. *Ferguson*, 17 L. R. Ir. 552.

CHAP. XXXIV.

Tenant for life must pay outgoings.

III. Tenant for Life and Remainder-man. The general law of tenant for life and remainder-man is outside the scope of this treatise, and the reader is referred to recognised text books for the discussion of the law relating to waste, timber (*j*), mines (*jj*), emblements, fixtures, improvements, and the incidence of estate duty. In the following pages, however, the law is stated in relation to certain matters which not infrequently arise where life estates or interests are given by will.

(1) CHARGES AND OUTGOINGS.—In the absence of specific directions by the testator, the tenant for life must pay the usual outgoings, such as land tax, tithe rent charge or any other rent charges, and the ground rent (if the property is leasehold) and must (to the extent of the rents and profits but not further) pay the interest on mortgages or incumbrances subject to which the estate has been devised to him (*k*). The cost of surveys and notices requiring tenants to repair have been held not to be "outgoings," and directed to be raised by mortgage upon which the tenant for life would keep down the interest (*l*). Deductions under the provisions of the Licensing Act, 1904, are borne by the tenant for life (*m*).

Annuities.

The question how annuities are apportionable as between tenant for life and remainder-man is discussed in sub-section (9), post, p. 1231.

Cost of improvements.

A tenant for life cannot charge the expenses of improvements upon the property (*n*), except under the Settled Land Acts (*o*), but the Court has a jurisdiction to permit him to charge moneys expended for salvage (*p*), or in some cases for the benefit of the trust estate (*q*).

Salvage.

(*j*) See *Dashwood* v. *Magniac*, [1891] 3 Ch. 306.

(*jj*) Some of the rules of law with regard to the profits of mines are referred to, post, p. 1211.

(*k*) But this only extends to the interest on charges accrued due during his life estate: *Kirwan* v. *Kennedy*, I. R., 4 Eq. 499; and if a tenant for life pays off charges, the amount so paid may be set off against arrears of interest or an incumbrance left unpaid by the tenant for life: *Howlin* v. *Sheppard*, I. R., 6 Eq. 497; but a tenant for life, buying up an incumbrance, can, it seems, only have credit against the estate for the amount he actually paid: *Hall* v. *Browne*, Dru. t. Sug. 426.

(*l*) *Re McClure*, 95 L. T. 701.

(*m*) *Re Smith*, [1906] 1 Ch. 799.

(*n*) *Nairn* v. *Marjoribanks*, 3 Russ. 582; *Re Leigh's Estate*, L. R., 6 Ch. 887; *Bostock* v. *Blakeney*, 2 B. C. C. 653.

(*o*) For instances, where this can and cannot be done, see *Clarke* v. *Thornton*, 35 Ch. D. 307; *Re Lord Stamford's S. E.*, 43 Ch. D. 84; *Re Thomas*, [1900] 1 Ch. 319; *Re Partington*, [1902] 1 Ch. 711.

(*p*) *Hibbert* v. *Cooke*, 1 S. & St. 552; *Dent* v. *Dent*, 30 Bea. 363; *Dixon* v. *Peacock*, 3 Dr. 288; *Ferguson* v. *Ferguson*, 17 L. R. Ir. 552; or to pay them out of capital moneys, *Re Hawker's Settled Estate*, 76 L. T. 286.

(*q*) *Conway* v. *Fenton*, 40 Ch. D. 512 (settlement). In *Lord De Tabley*, 75 L. T. 328, North, J., said that this case did not establish any rule. See *Gilliland* v. *Crawford*, Ir. R., 4 Eq. 35.

Statutory charges.

Expenses which by statute are made a charge upon the property, such as road-making expenses under the Public Health Act, 1875, are, in the absence of special directions in the will, borne by capital (*r*).

Miscellaneous liabilities.

But where property, consisting of houses or other buildings, is given to A. and his assigns for life, he or they committing no manner of waste, and keeping the property in good and tenantable repair, it seems that the tenant for life must rebuild the houses if they are accidentally destroyed by fire (*s*).

The tenant for life has to pay any moneys due to an outgoing tenant by the terms of the tenant's lease (*t*).

Where a testator gives successive interests, and adds to them a direction that the person who takes shall do a particular thing, such as repairing buildings, discharging debts, or paying an annuity, and the devisee accepts the estate, there is a personal liability, capable of being enforced in equity, to perform the directions imposed by the testator (*u*).

Income applied as capital.

In *Re Marquess of Bute* (*v*), the testator devised his estates to trustees for 1500 years upon trust, "by mortgaging or otherwise disposing of the term . . . or by with and out of the rents, issues and profits," or by one or all of those ways, to raise moneys sufficient for the purposes mentioned in the will, which involved capital expenditure. The trustees expended large sums, chiefly out of income. It was held that this was a charge on the corpus of the estates comprised in the term, and that the tenant for life was only liable for the interest. Bacon, V.-C., followed the general principle laid down in *Playters* v. *Abbott* (*w*), *Jones* v. *Jones* (*x*) and *Marker* v. *Kekewich* (*y*).

Moneys raisable out of leaseholds.

On the same principle, if settled freeholds and leaseholds are vested in trustees upon trust to raise moneys in such way as the trustees think fit, and they postpone the raising for a considerable period, so that the value of the leaseholds is diminished, the Court has power to adjust the burden of the charge between the tenant for life and the remainder-man (*z*).

Charges directed to be paid out of income.

A testator may, of course, direct the income of property to be

(*r*) *Re Smith's S. E.*, [1901] 1 Ch. 689; *Re Pizzi*, [1907] 1 Ch. 67 (Private Street Works Act, 1891); *Re Barney*, [1894] 3 Ch. 562 (Drainage: Public Health Act, 1848); *Re Farnham's Settlement*, [1904] 2 Ch. 561 (Public Health (London) Act, 1891).

(*s*) *Re Skingley*, 3 Mac. & G. 221.

(*t*) *Mansel* v. *Norton*, 22 Ch. D. 769.

(*u*) *Re Williams*, 54 L. T. 105; *Re Bradbrook*, 56 L. T. 103 ("good and tenantable repair").

(*v*) 27 Ch. D. 196.

(*w*) 2 My. & K. 97, cited post, Chap. LIII.

(*x*) 5 Ha. 440, cited post, 1217, n. (*l*).

(*y*) 8 Ha. 291.

(*z*) *Blake* v. *O'Reilly*, [1895] 1 Ir. 479.

CHAP. XXXIV.

employed in paying off incumbrances, so that, until they are discharged, the tenant for life does not receive the income. But such a scheme is necessarily subservient to the right of the incumbrancers to get paid in a different way, and if they are paid in a different way (e.g., out of the proceeds of the sale of part of the property), there is then nothing to prevent the tenant for life from receiving the income; the remainder-man has no equity to have the expenditure recouped out of the future income (*a*).

Leaseholds.

(2) LEASEHOLDS.—Where leaseholds are bequeathed, questions may arise between the specific legatees of the leaseholds and the testator's general estate; these are discussed in Chapter LIV.; if leaseholds are bequeathed in succession a different set of questions arise between the tenant for life and the persons entitled in remainder. These questions will now be briefly considered.

Where leaseholds are bequeathed in succession, the question arises who is to pay for the rent due at the testator's death, and for any existing dilapidations or repairs which must be done under the covenants in the lease. These are debts of the testator's estate (*b*), and should therefore be paid by the executors and paid for out of corpus, and under special circumstances rent accrued due after the testator's death may be payable out of corpus (*c*).

Where leaseholds are vested in trustees for a tenant for life and remainder-man, it is their duty to perform the covenants of the lease, and they are entitled to have the rents applied in keeping the houses in a proper state of repair (*d*).

On the other hand, an equitable tenant for life of leasehold is bound during the continuance of his interest as between himself and his testator's estate, to perform the continuing obligations under the lease, on the principle that a tenant for life, whether legal or equitable, is within the maxim "qui sentit commodum sentire debit et onus" (*e*). Where expenses are incurred to meet the requirements of a local

(*a*) *Tewart* v. *Lawson*, L. R., 18 Eq. 490; *Norton* v. *Johnstone*, 30 Ch. D. 649; *Re Green*, 40 Ch. D. 610; where the debts were paid out of corpus by the executrix, who was also the tenant for life. See *Biggar* v. *Eastwood*, 19 L. R. Ir. 49, where the terms of the will were special, and the income was held to be applicable for purposes of recoupment.

(*b*) *Re Betty*, [1899] 1 Ch. 821; *Re Courtier*, 34 Ch. D. 136; *Pinfold* v. *Shillingford*, 46 L. J. N. S. (Ch.) 491; *Brereton* v. *Day*, [1895] 1 Ir. 519; *Re Smith*, 84 L. T. 835. See *Re Hanbury*, 101 L. T. 32.

(*c*) As in *Allen* v. *Embleton*, 4 Dr. 226, where the testator was not at the time of his death the owner of the leasehold.

(*d*) *Re Fowler*, 16 Ch. D. 723.

(*e*) *Re Betty*, supra; *Re Baring*, [1893] 1 Ch. 61; *Kingham* v. *Kingham*, [1897] 1 Ir. R. 170; *Re Redding*, [1897] 1 Ch. 876; *Re Gjers*, [1899] 2 Ch. 54; *Re Waldron and Bogue's Contract*, [1904] 1 Ir. R. 240. See also *Marsh* v. *Wells*, 2 S. & St. 87. *Re Tomlinson*, [1898] 1 Ch. 232, was based on a mistaken view of the decision of the Court of Appeal in *Re Courtier*, 34 Ch. D. 136.

authority, it is necessary to consider the terms of the statute and the terms of the lease (*f*).

Sale of leaseholds under statutory power, &c.

If leaseholds, specifically bequeathed, are sold compulsorily, or under the Settled Land Acts, or by order of the Court, the proceeds ought, as a general principle, to be invested and applied in such a manner as to give the tenant for life and remainder-man the same benefit as they would have derived from the lease, or as near thereto as may be (*g*). This means that the tenant for life is entitled to have his income made up out of corpus (*h*). In *Askew* v. *Woodhead* (*i*), the purchase money was sufficient to provide an annuity for the unexpired term of the lease of much larger amount than the rent, and it was held by the Court of Appeal that the tenant for life was entitled to receive this annuity.

If wasting property (as leaseholds) bequeathed in specie is converted into a permanent fund, with the consent of the tenant for life, and he survives the period when the leaseholds would have expired, the capital of the permanent fund will become the absolute property of the tenant for life (*j*). But a lease in which the tenant for life is cestui que vie, would practically not become his absolute property immediately, at least not so as to enable him to assign or surrender it; for the chance of renewal for the benefit of the remainder-man would be thereby lost, and it seems that on this account a sale or surrender by him would be set aside (*k*).

Renewal of leaseholds.

(3) COPYHOLDS AND RENEWABLE LEASEHOLDS.—Where copyholds or renewable leaseholds are settled, the costs of fines are apportioned between the tenant for life and remainder-man, on the principle of *Nightingale* v. *Lawson* (*l*), that is, in proportion to their actual enjoyment. In the case of leaseholds, a tenant for life is not bound to renew, unless from the terms of the will or the nature and formation of the gift to him, an intention that he should be bound

(*f*) *Re Lever*, [1897] 1 Ch. 32; *Re Crawley*, 28 Ch. D. 431. See also *Re Copland's Settlement*, [1900] 1 Ch. 326 (cost of complying with sanitary notice and dangerous structure notice).

(*g*) Lands Clauses Act, 1845, s. 74; Settled Land Act, 1882, s. 34.

(*h*) *Jeffreys* v. *Conner*, 28 Bea. 328; *Re Phillips' Trusts*, L. R., 6 Eq. 250; *Re Pfleger*, ib. 426, and cases there cited.

(*i*) 14 Ch. D. 27; followed in *Re Lingard*, [1908] W. N. 107.

(*j*) *Phillips* v. *Sarjent*, 7 Hare, 33; *Re Beaufoy's Estate*, 1 Sm. & Gif. 20.

(*k*) *Harvey* v. *Harvey*, 5 Bea. 134, where, however, under the peculiar circumstances, the sale was not held bad.

(*l*) 1 B. C. C. 440. See *Re Bullock's Estate*, 91 L. T. 650; *Carter* v. *Sebright*, 26 Bea. 374; *Buckeridge* v. *Ingram*, 2 Ves. jun. 652; *Playters* v. *Abbott*, 2 My. & K. 97; *Jones* v. *Jones*, 5 Ha. 440; *Giddings* v. *Giddings*, 3 Russ. 241; *Bradford* v. *Brownjohn*, L. R., 3 Ch. 711; *Isaac* v. *Wall*, 6 Ch. D. 706; *Reeves* v. *Creswick*, 3 Y. & C. Ex. 715. See generally as to the rights of tenant for life and remainder-man with respect to renewable leaseholds, Vaizey on Settlements, 1313 et seq.

to renew can be implied (*m*); if he does renew he renews for the benefit of the estate (*n*), and this doctrine applies also to the purchase of the reversion by the tenant for life (*o*), if the lease is renewable by contract or custom (*p*). The testator may, of course, throw the cost of renewal on the tenant for life or the estate (*q*).

A direction to raise and pay the fines out of the rents and profits is not enough to make the fines payable by the tenant for life (*r*); but where the first trust is to pay the fines out of the rents and profits this appears to be a sufficient direction to make the fines payable solely by the tenant for life (*s*).

Sale of renewable leaseholds.

Where leaseholds are renewable by usage, but not by law (as sometimes happens in the case of church lands), a testator may, in specifically bequeathing them upon trust for persons in succession, make provision for creating a renewal fund out of the rents, and thus shew an intention to treat the property as permanent; in such a case, if the property is compulsorily sold under the provisions of the Lands Clauses Acts, the general rule above stated (*t*) does not apply, and the tenant for life is not entitled to have his income made up out of capital (*u*). So if renewal is refused by the lessor, the unexpired leasehold ought to be converted into a permanent fund; this, together with the renewal fund, if any, is corpus, to the income of which the tenant for life is entitled (*v*).

(4) REVERSIONS AND REMAINDERS.—Where land subject to a beneficial lease is sold under the Lands Clauses Acts or the Settled Land Acts, the tenant for life is, during the unexpired term of the lease, entitled to so much only of the income of the invested purchase

(*m*) *White* v. *White*, 9 Ves. 554; *Capel* v. *Wood*, 4 Russ. 500; *Jones* v. *Jones*, 5 Hare, 440; *O'Ferrall* v. *O'Ferrall*, Ll. & G. t. P. 79. In *Pinfold* v. *Shillingford*, 25 W. R. 425, renewal was impossible by the act of the testator.

(*n*) *Bowles* v. *Stewart*, 1 Sch. & L. 209; *Owen* v. *Williams*, Ambler, 734.

(*o*) *Phillips* v. *Phillips*, 29 Ch. D. 673.

(*p*) *Longton* v. *Wilsby*, 76 L. T. 770. See the note to *Keech* v. *Sandford* in White and Tudor, L. C. 7th ed. vol. ii. p. 693.

(*q*) *Stone* v. *Theed*, 2 B. C. C. 243; *Trench* v. *St. George*, 1 Dr. & Wal. 417.

(*r*) *Allan* v. *Backhouse*, 2 V. & B. 65; and see *Greenwood* v. *Evans*, 4 Bea. 44 (or by mortgage); *Ainslie* v. *Harcourt*, 28 Bea. 313.

(*s*) *Shaftesbury* v. *Marlborough*, 2 M. & K. 111. See also *Blake* v. *Peters*, 1 D. J. & S. 345; *Solley* v. *Wood*, 29 Bea. 482 (settlement); *Mondford* v. *Cadogan*, 17 Ves. 485, 19 Ves. 635 (settlement).

(*t*) Ante, p. 1217.

(*u*) *Re Wood's Estate*, L. R., 10 Eq. 572.

(*v*) *Hollier* v. *Burne*, L. R., 16 Eq. 163; *Maddy* v. *Hale*, 3 Ch. D. 327; distinguishing *Tardiff* v. *Robinson*, 27 Bea. 629, n.; *Morres* v. *Hodges*, ib. 625; and *Hayward* v. *Pile*, L. R., 5 Ch. 214. See also *Re Barber's S. E.*, 18 Ch. D. 624 (leases for lives). In *Hollier* v. *Burne*, Lord Selborne's statement of "the general law of the Court" appears to have been made per incuriam, as the rule in question does not apply to specific bequests. See also *Re Lord Rancliffe's Will*, 26 Ch. D. 590 (where a beneficiary purchased the reversion, and the property was afterwards taken compulsorily), and *Gould* v. *Tripp*, [1883] W. N. 72 (settlement).

moneys as is equal to the rent under the lease: the rest of the income is accumulated and added to corpus (*w*).

Apportionment Act, 1870.

(5) INCOME—APPORTIONMENT—ACCUMULATIONS.—By sec. 2 of the Apportionment Act, 1870 (*x*), rents, annuities, dividends, and other periodical payments in the nature of income (*y*) shall be considered as accruing from day to day, and shall be apportionable in respect of time accordingly, and by sec. 5 dividends include all payments made by the name of dividend, bonus, or otherwise out of revenue of trading or other public companies divisible between all or any of the members of such respective companies, whether such payment shall be usually made or declared at any fixed time or otherwise, but dividend does not include payment in the nature of a return or reimbursement of capital. The act applies to specific legacies and devises (*z*), but not to all kinds of property yielding income (*a*), and the testator may indicate that the Apportionment Act is not to apply (*b*). Thus, in *Re Lysaght* (*c*), a declaration that "every share in the said company of L. Ltd., hereby bequeathed, shall carry with it dividend accruing thereon at my death," was held to exclude the act, but not to capitalize these dividends, which were payable to the tenants for life as income.

And in *Re Clarke* (*d*), the testator bequeathed 15,000*l.* to trustees, such sum to carry interest at 4½ per cent. until the same should be paid or appropriated upon trust to invest the same and to pay the annual income of the legacy and the investment thereof, including in such income the interest payable in respect of such legacy to his wife for life, with remainder over. Interest was paid to the widow till the legacy was invested in stocks, in some of which five

(*w*) *Cottrell* v. *Cottrell*, 28 Ch. D. 628, following *Re Mette's Estate*, L. R., 7 Eq. 72; *Re Wootton's Estate*, L. R., 1 Eq. 589; *Re Wilkes' Estate*, 16 Ch. D. 597. As to the right of a tenant for life, unimpeachable for waste, to the purchase moneys paid for leased minerals taken compulsorily, see *Re Barrington*, 33 Ch. D. 523.

(*x*) 33 & 34 Vict. c. 35. The act applies to instruments coming into operation before the passing of the act: *Re Cline's Estate*, L. R., 18 Eq. 213; *Roseingrave* v. *Burke*, Ir. R., 7 Eq. 187; *Patching* v. *Barnett*, 28 W. R. 886; *Lawrence* v. *Lawrence*, 26 Ch. D. 795 (see this question discussed in Chap. XXX.)

(*y*) As to business profits, see *Re Cox's Trusts*, 9 Ch. D. 159; *Jones* v. *Ogle*, 8 Ch. 192. An insurance company not incorporated has been held to be a public company within the act: *Re Griffith*, 12 Ch. D. 655.

(*z*) *Hasluck* v. *Pedley*, L. R., 19 Eq. 271; *Pollock* v. *Pollock*, 18 Eq. 329; *Capron* v. *Capron*, 17 Eq. 288; *Att.-Gen.* v. *Daly*, L. R., 8 Eq. 595. *Whitehead* v. *Whitehead*, 16 Eq. 528, is erroneous.

(*a*) See Chap. XXX.

(*b*) See s. 7; *Roseingrave* v. *Burke*, supra.

(*c*) [1898] 1 Ch. 115; *Macpherson's Trustees* v. *Macpherson*, [1907] Sess. Cas. 1067 (direction to pay dividends "as received"). It seems that the stipulation referred to in s. 7 should be in the will: *Re Oppenheimer*, [1907] 1 Ch. 399.

(*d*) 18 Ch. D. 160.

CHAP. XXXIV.

months' dividend had accrued: Sir J. Bacon, V.-C., held that the Apportionment Act did not apply, and that the widow was entitled to the whole of the dividends. It is hardly necessary to say that the act does not apply to any sum duly and properly paid or accrued due before the happening of the incident which is said to necessitate or require the apportionment (*e*).

The question of apportionment is discussed elsewhere in connection with the rights of devisees (*f*) and legatees (*g*) as against the testator's estate. *Clive* v. *Clive* (*h*) is an instance of apportionment as between tenant for life and remainder-man.

Accumulations of income given for maintenance.

If a vested legacy is given to an infant for life, the accumulations of income during minority belong to the legatee (*i*), but if the life interest is contingent, they belong to capital, and the legatee, on attaining majority, is only entitled to the income of the investments representing them (*j*).

Wasting and hazardous property.

If personal property of a wasting or hazardous character is specifically bequeathed upon trust for A. for life, with remainder over, A. is primâ facie entitled to the whole income, although a different rule prevails if the property forms part of a residuary bequest (*jj*). Some of the rules relating to mining properties, &c., are referred to post, p 1244.

Casual profits in the case of realty.

(6) CASUAL PROFITS.—With regard to casual profits, the question as between tenant for life and remainder-man of real estate may to some extent depend upon whether or no the tenant for life is impeachable for waste. In *Re Medows* (*k*), by the custom of a manor, copyholds were granted on leases for lives at small quit rents and subject to heriots, on payment of arbitrary fines to the lord. There was no obligation on the lord to renew the leases. A tenant for life of the manor, unimpeachable for waste, and having only an ordinary power of leasing for twenty-one years, granted leases for lives and received fines. Kekewich, J., held that the fines were income, and belonged to the tenant for life.

In an earlier case (*l*), where it is not stated whether the tenant for life was or was not impeachable for waste, Jessel, M.R., said that the tenant for life of a settled estate takes all casual profits which accrue during the time of his tenancy for life. Thus, the tenant for

(*e*) *Ellis* v. *Rowbotham*, [1900] 1 Q. B. 749 (rent payable in advance).
(*f*) Chap. XXV.
(*g*) Chap. XXX.
(*h*) L. R., 7 Ch. 433.
(*i*) *Re Wells*, 43 Ch. D. 281.
(*j*) *Re Bowlby*, [1894] 2 Ch. 685, overruling *Re Scott*, [1902] 1 Ch. 918.
(*jj*) Post, p. 1242.
(*k*) [1898] 1 Ch. 300.
(*l*) *Brigstocke* v. *Brigstocke*, 8 Ch. D. 357. See also *Noble* v. *Cass*, 2 Sim. 343 (damages for breach of covenant in a lease granted by the testatrix).

life of a manor takes the fines arising from copyholds because they become payable under an obligation arising from the custom (*m*).

And in the absence of mala fides, money paid to a legal life tenant as the consideration for accepting the surrender of a lease granted without recourse to the power of the Settled Land Acts, belongs to him as a casual profit (*n*).

Accretions to personalty caused by investing between dividend days.

With regard to personalty settled by will, extraordinary profits, or accretions in the case of trading companies or business partnerships, are dealt with later, but in the case of ordinary securities, unless they are bought or sold upon the days when dividends are payable, or unless the proceeds of sale of one investment are employed in the purchase of another investment, the income of which is payable on the same days, it is evident that on every change of investment either some dividend is purchased out of capital or some dividend is sold and invested as capital. Thus, the trustees of a will who had power to vary investments by always selling the securities cum dividend just before the dividends were declared, and investing in other securities in which dividends had just been declared, could succeed, in effect, in capitalizing the whole of the dividends for as long a period as they should so act, or, by reversing the process, could in effect succeed in paying income out of capital. But apart from special circumstances, and, of course, in the absence of any mala fides on the part of the trustees, it has been settled that the tenant for life takes the dividends, even though in this way purchased out of capital, or loses the income invested in capital. The matter was put very clearly by Kindersley, V.-C., in *Scholefield* v. *Redfern*, as follows (*o*): "There is another question of a peculiar kind, and one which is novel to me. The point will be best explained by putting an example. Suppose part of the testator's property to consist of a certain American stock bearing interest or dividends payable at half-yearly periods, say January and July, and the trustees sell it in order to invest the proceeds in Consols: if they sell it at any other time than precisely the period at which a dividend has just accrued, the money realized by the sale is so much more in proportion to the time which has elapsed since the last dividend day. Therefore, the amount realized by the sale is compounded, partly of the value of the stock itself, and partly of the value of that proportionate part of the current half-year's dividend which may be considered to have accrued since the last dividend day. It is

(*m*) And see *Earl Cowley* v. *Wellesley*, L. R., 1 Eq. 656, 35 Bea. 635.

(*n*) *Re Hunloke's S. E.*, [1902] 1 Ch. 941.

(*o*) 2 Dr. & Sm. 173, quoted with approval by Stirling, J., [1896] 2 Ch., at p. 246.

CHAP. XXXIV.

contended that the tenant for life ought to have this latter portion as income. Now it is certain that in the multitude of cases of administration of estates in modern times, where similar directions have been given by testators, the Court has never been in the habit of administering any such equity. When we consider a little further, it is obvious that if the tenant for life is to have something out of the sale money as representing income, then when the trustees invest the money, unless they invest it on the very day on which the dividend has just accrued due, the same equity ought to be administered the other way, and we ought to take from the tenant for life something of his next dividend on the Consols and add that to the capital, in order to make things equal as between him and the remainder-man. It is clear that if there is an equity one way there is an equity the other way. It is obvious that the reason why such equity on either side has never been administered habitually by this Court is that by attempting it a grievous burden would be imposed upon the estates of testators by reason of the complex investigation it would lead to. The gain to either party would be far more than compensated by the expense which might be incurred in a complicated case, and for that reason, no doubt, the thing has never been done. I will not be the first to introduce the practice." The same learned judge discussed the matter very fully in *Freman* v. *Whitbread* (*p*). But in exceptional cases the general rule has been departed from (*q*). And it has been held not to apply where the investment is made after the dividend has been earned and declared, but before it is payable (*qq*).

Shares in trading companies.

(7) PROFITS OF TRADING COMPANIES.—Where a trust estate includes shares in a trading company which the trustees are authorized to hold, they are, of course, bound by the constitution and regulations of the company in the same way as the other shareholders, and consequently in the case of dividends paid out of current profits in the ordinary way there can rarely be any question as to the rights of the tenant for life and remainder-man, because it may generally be assumed that the dividends are properly declared, although it is conceivable that if a company paid dividends out of capital, or otherwise misapplied its funds, and the trustees had notice of this, it might be their duty to raise the question before paying over the dividend (or the whole of it) to the tenant for life,

(*p*) L. R., 1 Eq. 266.

(*q*) For example, *Lord Londesborough* v. *Somerville*, 19 Bea. 295; *Bulkeley* v. *Stephens*, 3 N. R. 105; *Bulkeley* v. *Stephens*, [1896] 2 Ch. 241.

(*qq*) *Re Sir R. Peel's Settled Estate*, 54 Sol. J. 214.

or (if he die after the dividend is declared, and before it is paid) to his personal representative (*r*). The question how the profits of a trading company ought to be ascertained is one of considerable difficulty, and has given cause to a large number of judicial decisions. But the question is still completely unsettled, and the recent tendency of the Courts is in the direction of giving a large measure of discretion to the business men who are actually conducting the business, and in a recent case (*s*) in the House of Lords, Lord Davey disapproved of some of the propositions which had been laid down by the Court of Appeal, and Lord Halsbury, C., said: "But what are profits and what is capital may be a difficult and sometimes an almost impossible problem to solve. When the time comes that these questions come before us in a concrete case we must deal with them, but until they do I, for one, decline to express an opinion not called for by the particular facts before us, and I am the more averse to doing so because I foresee that many matters will have to be considered by men of business which are not altogether familiar to a court of law."

Rules deduced from the authorities.

In the absence, however, of any improper payment of dividends on the part of the company, the following propositions appear to be established:

Rule (A).

(A) The decision of the company as to what is capital and what is income is binding on the tenant for life and remainderman.

"When a testator or settlor directs or permits the subject of his disposition to remain as shares or stock in a company which has the power either of distributing its profits as dividend, or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under him the testator or settlor, in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern enures to the benefit of all who are interested in the capital" (*t*).

But it is not always easy to determine what the company's

(*r*) *Price* v. *Anderson*, 15 Sim. 473; *Re Hopkins' Trusts*, L. R., 18 Eq. 696; *Wright* v. *Tuckett*, 1 J. & H. 266 (settlement).

(*s*) *Dovey* v. *Cory*, [1901] A. C. 477.

(*t*) Per the C. A. in *Re Bouch*, 29 Ch. D. at p. 653, and approved by Lord Herschell in *Bouch* v. *Sproule*, 12 A. C. at p. 397. See *Hollis* v. *Allan*, 14 W. R. 980 (settlement). In *Bouch* v. *Sproule* Lord Herschell seems to have assumed that a company formed under the Companies Acts can capitalize its profits by issuing fully paid shares to the members without giving them the option of taking the profits in cash; in an article in the "Juridical Review" for March 1903 the present editors ventured to contend that a company has no such power.

CHAP. XXXIV.

decision has been, and the following rules offer guidance on this point:

Rule (B).

(B) If a company has power to increase its capital, it cannot be considered as having converted its profits into capital when it has not taken the proper steps to increase its capital, and consequently any bonus or dividend distributed is not capital.

"Where a company has power to increase its capital and to appropriate its profits to such increase, it cannot be considered as having intended to convert or having converted any part of its profits into capital when it has made no such increase" (*u*). Thus, in *Re Hopkins' Trusts* (*v*), an extraordinary or special dividend paid out of accumulated profits was held to be income.

Rule (C).

(C) But, conversely, if a company applies part of its earnings in increasing its capital, and issues new shares to represent the money so applied, the new shares are capital. *Re Barton's Trust* (*w*) is a case of this kind.

Rule (D).

(D) If a company has no power to increase its capital, it may be that a bonus out of accumulated profits is capital if the company has, in fact, used them for capital purposes.

This remarkable rule has arisen out of a series of cases dealing with the stock of the Bank of England (*x*), the Bank of Scotland (*y*), and the Bank of Ireland (*a*), where payments by way of bonus arising from accumulated profits had been made to the shareholders: it was held that they were in the nature of capital and did not go to the tenant for life; and in *Bouch* v. *Sproule*, Lord Herschell considered that the inability of the Banks of England and Scotland to increase their capital was the reason why the payments to the shareholders by way of bonus were in these cases treated as payments in respect of capital. He said: "I think, therefore, that *Irving* v. *Houstoun* must still be regarded as good law, unaffected by any counter current of authority. But it is, in my opinion, an authority governing only a case similar in its facts: that is to say, a case where the company has no power to increase its capital, but has accumulated profits, and used them in fact for capital purposes, and afterwards distributes these profits amongst the proprietors" (*b*).

(*u*) Per Lord Herschell, *Bouch* v. *Sproule*, 12 A. C. at p. 398. See *Blyth's Trustees* v. *Milne*, 7 F. 799.

(*v*) L. R., 12 Eq. 606. *Re Aubury*, 45 Ch. D. 237, is another instance.

(*w*) L. R., 5 Eq. 238 (settlement).

(*x*) *Brander* v. *Brander*, 4 Ves. 800; *Paris* v. *Paris*, 10 Ves. 185; *Clayton* v. *Gresham*, 10 Ves. 288; *Witts* v. *Steere*, 13 Ves. 363. See also *Plumbe* v. *Neild*, 29 L. J. Ch. 618 (which is commented on in *Dale* v. *Hayes*, 19 W. R. 299); *Barclay* v. *Wainewright*, 14 Ves. 66; and compare *Ward* v. *Combe*, 7 Sim. 634 (settlement).

(*y*) *Irving* v. *Houston*, 4 Paton Sc. App. 521.

(*a*) *Ex parte Hodgens*, 11 Ir. Eq. 99.

(*b*) 12 A. C. at p. 397.

As a matter of fact, the inability of the Bank of England to increase its capital was put forward in *Brander* v. *Brander* and *Paris* v. *Paris* as an argument on behalf of the tenant for life, and the real reason why the House of Lords decided in favour of the remainder-man in *Irving* v. *Houstoun* was (as Lord Eldon remarked) that the bank's practice of setting aside reserve funds was well known to the stockholders, and that if a testator gave the dividends of bank stock to a tenant for life he did not mean him "to run away with a bonus that may have been accumulating on the capital for half a century." In the later case of *Paris* v. *Paris*, Lord Eldon added that the House of Lords, in deciding *Irving* v. *Houstoun*, did not like to disturb previous decisions on the point which had gone to great length, and in *Barclay* v. *Wainewright* (c) he gave yet a third reason, namely, that it was impracticable to ascertain at what time the profits had been earned, and that "the Court cut short the difficulty by saying it (the bonus) should be considered as a gift of capital to those having capital according to the charter."

The distinction, however, must be considered as established, with the curious result stated above.

Rule (E).

(E) Where a company is wound up, and there is a surplus after payment of debts and repaying to the shareholders the capital paid upon their shares, such surplus is capital (*d*), but whether a reserve fund of undivided profits is to be treated as income seems to depend upon the regulations of the company (*e*). The question in this form does not appear to have arisen between tenant for life and remainder-man, but it seems clear that the same principle would be applicable in that case, as in the case where the dispute is between preference and ordinary shareholders.

Not infrequently the company gives the individual shareholders the option whether they will receive a bonus dividend in cash or will capitalize it. In such a case the rule is:

Rule (F).

(F) If a company declares a dividend, and at the same time gives the shareholders an option to take up new shares with the amount

(c) 14 Ves. at p. 78; but in *Preston* v. *Melville*, 16 Sim. 163, a bonus of 1 per cent. was given to the tenant for life.

(*d*) *Birch* v. *Cropper*, 14 A. C. 525; *Re Weymouth Steam Packet Co.*, [1891] 1 Ch. 66; *Re Armitage*, [1893] 3 Ch. 337.

(*e*) *Re Bridgewater Navigation Co.*, [1891] 2 Ch. 317; *Bishop* v. *Smyrna and Cassaba Railway*, [1895] 2 Ch. 596, where it was also held that earnings made by a company after it has gone into liquidation are capital and not income; *Re Crichton's Oil Company*, [1902] 2 Ch. 86; subject to the rights of the preference shareholders: *Re W. J. Hall & Co., Ltd.*, [1909] 1 Ch. 521; and compare *Nicholson* v. *Nicholson*, 30 L. J. Ch. 617, which turned upon the provisions of the deed of settlement of an insurance company.

CHAP. XXXIV.

of the dividend, the value of the dividend is income and the value of the option is capital.

Re Northage (*f*) is a good illustration of this. There the directors of a company allotted to the trustees, as holders of 150 fully paid shares, 75 new shares of 10*l.* each, being their proportion of the new issue. At the same time they enclosed a bonus dividend warrant for 750*l.*, the amount due in respect of the new shares. The trustees applied this bonus dividend in taking up the 75 shares, and then sold the shares for 1363*l.* North, J., held that 750*l.* the amount of the bonus dividend, belonged to the tenant for life, and that the residue of the 1363*l.* was capital (*g*).

Bouch v. *Sproule* (*gg*) differs from *Re Northage* in the fact that there there was in substance no option, the effect of the whole operation being that the company capitalized the profits.

Windfall to a company.

Lastly, the distributed fund may not arise from accumulated profits in the strict sense of the word, but from the payment of some outstanding claim, or in some other way. In such a case the fund cannot be properly distributed (except in a winding up) unless it can either properly be considered as income or unless it represents a surplus or profit on capital account, and this raises many of the difficult questions about the manner in which the accounts of trading companies should be kept, which are at present unsolved by authority (*h*). But if money arising from a windfall or a profit on capital account is properly distributable among the shareholders, it would no doubt be treated as income for all purposes. Thus, in *Maclaren* v. *Stainton* (*i*), a company had claims against its manager in respect of moneys not accounted for by him; many years afterwards these claims were compromised, and a large sum was paid to the company and divided among the shareholders by way of bonus; one of the shareholders died before the compromise, having bequeathed his shares by way of settlement: it was held that the bonus was income and belonged to the tenant for life under the will, although the company's claim had accrued during the life of the testator (*j*).

Return of capital under Companies Act, 1880.

Where a company has accumulated undivided profits and decides

(*f*) 64 L. T. 625.

(*g*) Other cases are, *Re Bromley*, 55 L. T. 145; *Re Malam*, [1894] 3 Ch. 578; and see *Rowley* v. *Unwin*, 2 K. & J. 138 (a case of a marriage settlement).

(*gg*) Ante, p. 1223.

(*h*) See *Lubbock* v. *British Bank of South America*, [1892] 2 Ch. 198; *Verner* v. *General, &c., Trust*, [1894] 2 Ch. 239; *Foster* v. *New Trinidad Lake Asphalt Co., Ltd.*, [1901] 1 Ch. 208; *Re Armitage*, [1893] 3 Ch. 337.

(*i*) 3 D. F. & J. 202.

(*j*) See *The Carron Company* v. *Hunter*, L. R., 1 Sc. & D. 362, a case arising in the same company between specific and residuary legatees. *Edmondson* v. *Crosthwaite*, 34 Bea. 30, is another case on the Carron Company.

to "return" them to the shareholders in reduction of the paid-up capital, under the Companies Act, 1880, the amount received by each shareholder is capital and not income, provided, of course, the requirements of the act are complied with: if not, the amount is income (*k*).

Profits of a private partnership.

(8) PROFITS OF PRIVATE PARTNERSHIPS.—Questions as to the difference between capital and profits do not often arise in the case of an ordinary partnership, because the partners can settle the matter by agreement between themselves. But where trustees are authorized to carry on a private trade or business, either alone or in conjunction with other persons, as part of a trust estate, the rights of the beneficiaries have to be considered. In such a case the mode of ascertaining the profits depends partly on the general principle that the tenant for life is not entitled to have the corpus of the trust estate diminished at the expense of the remainder-man, and partly on the intention of the settlor. This intention may be expressed, or it may be implied from the stipulations of the deed of partnership (if the settlor had partners), or from the system of ascertaining profits previously adopted by the settlor. Thus in *Straker* v. *Wilson* (*l*), a testator bequeathed to trustees his share of a colliery in which he was a partner upon trust for his wife for life with remainders over; by the deed of partnership the majority in value of the partners had power to dispose of the profits by adding them to the capital or dividing them between the partners; the trustees (of whom the wife herself was one) continued to be partners in the colliery, but the profits were not divided for many years, the amount being carried to the credit of the profit and loss account and employed in improving and developing the property and in paying off debts: it was held that the profits so applied had been capitalized, and that the share of them belonging to the testator's estate did not go to the tenant for life as income, but formed part of the corpus. Again, in *Gow* v. *Forster* (*m*), the testator bequeathed his residuary property (including his share in a business) to trustees upon trust to pay one half of the income (including the net profits of the business) to his daughter for life; it had been the practice of the firm in prosperous years to divide the whole profit among the partners, in bad years to write off each partner's proportion of the profit from his share of the capital: after the death of the testator his trustees carried on the

(*k*) *Re Piercy*, [1907] 1 Ch. 289.
(*l*) L. R., 3 Ch. 503.
(*m*) 26 Ch. D. 672.

business in conjunction with the other partners: in one year there was a loss, which was written off in the books of the firm from the shares of the capital of each partner, including the testator's estate: in the next year there was a profit, and it was held that the daughter was entitled to one half of so much of that profit as belonged to the testator's estate, without any deduction for the purpose of making good the loss of the previous year. Where there is no stipulation or practice in this respect, the general rule is that losses must be made good out of the profits of subsequent years, and not out of capital. Thus in *Upton* v. *Brown* (*n*) a settled business was carried on at a loss during the life of the first tenant for life, and at a profit during the life of the second tenant for life: it was held that the losses must be made good out of the profits and not out of capital. If, however, the will contains any provisions for ascertaining profits, they must, of course, be observed, even if they are inconsistent with the ordinary practice of persons engaged in similar trades. Thus in *Re Millechamp* (*o*) the testator in effect directed that the income arising from his business should be applicable as income under the trusts of his will, and that no part should be retained as corpus or capital, and that any losses should be defrayed out of his estate: it was held that the tenant for life was entitled to the profits made in any year, and that if there was a loss it must be paid out of the capital employed in the business. Where the business belongs entirely to the trust estate, no deduction is made in calculating the profits for interest, or the capital employed in the business (*p*); but if freehold land belonging to the trust estate is occupied for the purposes of a business a question may arise as to rent being allowed in respect of it (*q*).

A tenant for life in specie of a share in a partnership has been held not entitled to the increase of capital made during his life (*r*).

The expenses incurred by a trustee (to whom the testator's capital left in a business by him on retiring had been bequeathed in trust for persons in succession) in employing accountants and auditors to examine the books of the partnership periodically, in order to see whether the business is in a sound condition, are not outgoings to be borne by the tenant for life, but expenses incurred for the benefit of the whole, and therefore are payable out of capital (*s*). It is submitted that the expense of auditing the

(*n*) 26 Ch. D. 588.
(*o*) 52 L. T. 758.
(*p*) *Gee* v. *Liddell*, 35 Bea. 631
(*q*) See *Re Millechamp*, 52 L. T. 758.
(*r*) *Mousley* v *Carr*, 4 Bea. 49.
(*s*) *Re Bennett*, [1896] 1 Ch. 778.

accounts to ascertain the amount of profits in any year would be an outgoing payable out of income.

Where the trustees are not authorized to carry on the business.

The above rules only apply in the case where the testator has authorized his executor or trustees to carry on the business. Without such authorization they may not carry on the business or employ trust moneys in carrying it on, except so far as is necessary for winding up or disposing of the business (*t*). In any case where a business is carried on without authority, the tenant for life is only entitled to the income of the business up to 4 per cent. per annum on the capital employed, the surplus profits being treated as accretions to capital (*u*).

In *Stroud* v. *Gwyer* (*v*), the testator authorized his executors to enter into partnership with his brother and sons on such terms as they should think fit, and to leave his capital therein for a certain period. The executors accordingly entered into partnership with the brothers and sons on the terms that interest at 5 per cent. per annum should be allowed on the testator's capital, and that the executors should only draw out 2 per cent. on that capital for their share of profits, and that the remainder of their share of profits should remain in the partnership as additional capital; after the specified period had elapsed a new partnership was formed, and the executors, in breach of trust, allowed the capital to remain in the business at interest at 5 per cent. per annum: it was held that the tenant for life was entitled to the whole of the interest at 5 per cent. per annum payable under the first partnership: that the rest of the executors' share of the profits was capital and not income: and that the tenant for life was entitled to the whole of the interest at 5 per cent. per annum payable under the second partnership. The decision on the third point may not be good law (*w*).

A power to postpone the conversion of a business authorizes the trustees to carry on the business. In *Re Crowther* (*x*), the trustees carried on the business for 22 years, not with a view to a sale, but for the benefit of the tenant for life: it was held that the whole of the profits of the business had been properly paid to the tenant for life.

Effect of a trust for conversion.

(9) RESIDUE GIVEN TO PERSONS IN SUCCESSION, SUBJECT TO A TRUST FOR CONVERSION.—The rights of a legatee for life and

(*t*) *Kirkman* v. *Booth*, 11 Bea. 273; *Collinson* v. *Lister*, 20 Bea. 356; *Re Chancellor*, 26 Ch. D. 42. As to what capital may be employed, see *M'Neillie* v. *Acton*, 4 D. M. & G. 744. In carrying on a business trustees may not make any personal profit unless authorized to do so: *Re Sykes*, [1909] 2 Ch. 241, doubting *Smith* v. *Langford*, 2 Bea. 362.

(*u*) *Re Hill*, 50 L. J. Ch. 551 (settlement).

(*v*) 28 Bea. 130.

(*w*) *Re Hill*, 50 L. J. Ch. 551.

(*x*) [1895] 2 Ch. 56.

CHAP. XXXIV.

remainder-man, in property subject to a trust for conversion, remain to be considered. It will be remembered that the non-execution of a trust for conversion does not operate to affect the rights of the beneficiaries (*y*).

"But though," says Mr. Jarman (*z*), "the general principle is well settled, yet many questions have arisen in the course of its application, especially respecting the precise point of time at which the enjoyment of the legatee for life commences; the effect of an express direction to accumulate the income until conversion; and, above all, as to whether the legatee for life of the proceeds is, until the conversion of the property, to take the actual income, or the assumed income; in other words, whether he is entitled to the income accruing from the property in its actual condition, or the income which, if duly converted and invested, it would have yielded.

"Points of this nature have most commonly occurred under general residuary clauses containing trusts for sale and conversion, in which the principle has to be applied to the various species of property of which a residue is composed."

The following will be found to embody the chief doctrines to be deduced from the authorities:—

As to income of property duly invested.

(i) The ordinary case is that of residuary personal estate being directed to be sold or otherwise converted into money, and the produce (either with or without a prior express trust for payment of debts and legacies) laid out in Government or real securities, or other specified investments, for the benefit of a person for life, at whose decease the capital is given over, without any express appropriation of the income accruing before conversion: here the income arising from such part of the residue as, at the testator's decease, was actually invested in Government or real securities, or other securities of the nature contemplated by the investment trust, belongs to the residuary legatee for life from the period of the testator's decease (*a*).

Rule in *Allhusen* v. *Whittell.*

But income arising within the first year from so much of the testator's estate as is required for payment of debts and legacies, is not income arising from residue (*b*). In other words, there is no residue till these payments have been made, and the tenant

(*y*) *Waddington* v. *Yates*, 15 L. J. Ch. 223. See Chap. XXII.

(*z*) First edition, p. 540.

(*a*) *Hewitt* v. *Morris*, T. & R. 241; *Angerstein* v. *Martin*, ib. 232; *Taylor* v. *Clark*, 1 Hare, 161; *Macpherson* v. *Macpherson*, 16 Jur. 847, 1 Macq. H. L. 243; *Hume* v. *Richardson*, 4 D. F. & J. 29; *Brown* v. *Gellatly*, L. R., 2 Ch. 751.

(*b*) *Holgate* v. *Jennings*, 24 Bea. 623.

for life must keep down the interest on debts as well during the first as during subsequent years (*c*).

Fund set aside for legacies.

Where a fund is set aside to answer contingent legacies, the income arising from the fund, until the legacies become payable, forms part of the income of the residue (*d*); but the income of a fund set aside to answer legacies vested but not yet payable, is to be treated as capital and invested, and the income of the investment will be paid to the tenant for life of the residue (*e*); but the surplus dividends of a fund set aside to answer a conditional annuity after paying the annuity are income (*f*).

Annuities.

Where a testator who has charged his estate with or covenanted to pay an annuity, gives his residue to A. for life, with remainder over, there has been a difference of judicial opinion as to the correct course to pursue. Probably the correct rule is to deal with each payment as it occurs, and to ascertain what sum set aside at the death of the testator and accumulated at 3 per cent. simple interest would have met the particular payment, and attribute that part of the payment to capital, and the remaining part to income (*g*).

In *Re Dawson* (*h*), it was held by Swinfen Eady, J., that the successive instalments of the annuities should be borne by income and capital in proportion to the actuarial values of the life estate and reversion at the testator's death. This method seems less accurate, but is simpler, since the proportion is calculated once for all.

As to income of property not duly invested.

(ii) In the case already described, namely, that of a residuary bequest containing a trust for sale and conversion, without any express appropriation of the annual income until conversion, the destination of such income arising within the first year from the unconverted property (comprising all which does not consist of

(*c*) *Allhusen* v. *Whittell*, L. R., 4 Eq. 295; *Marshall* v. *Crowther*, 2 Ch. D. 199 (real estate, where *Greisley* v. *Earl of Chesterfield*, 13 Bea. 288, was not followed); *Lambert* v. *Lambert*, 16 Eq. 320; *Aikin* v. *Butler*, Seton on Decrees, p. 1680. The rule in *Allhusen* v. *Whittell* does not apply where a person is entitled to the residue absolutely, subject to an executory gift over: *Re Hanbury*, 101 L. T. 32.

(*d*) *Allhusen* v. *Whittell*, 4 Eq. 295; *Crawley* v. *Crawley*, 7 Sim. 427; *Fullerton* v. *Martin*, 1 Dr. & Sm. 31.

(*e*) *Re Whitehead*, [1894] 1 Ch. 678; *Crawley* v. *Crawley*, 7 Sim. 427.

(*f*) *Re Whitehead*, supra; *Cranley* v. *Dixon*, 23 Bea. 512. But see *Tucker* v. *Boswell*, 5 Bea. 607, which does not seem to be consistent with the later cases.

(*g*) *Re Perkins*, [1907] 2 Ch. 590 (where Swinfen Eady, J., declined to follow *Re Bacon*, 62 L. J. Ch. 445, and *Re Henry*, [1907] 1 Ch. 30, and followed *Allhusen* v. *Whittell*, 4 Eq. 295, and *Re Harrison*, 43 Ch. D. 55). See also *Re Thompson*, [1908] W. N. 195. But on principle it is difficult to see why compound interest is not calculated.

(*h*) [1906] 2 Ch. 211, following *Yates* v. *Yates*, 28 Bea. 637. But see *Re Perkins*, supra, where it seems that this rule would have worked unfairly. See also *Bulwer* v. *Astley*, 1 Ph. 422; *Yonge* v. *Furse*, 20 Bea. 380; *Re Muffett*, 39 Ch. D. 534.

CHAP. XXXIV.

such investments as the proceeds are directed to be converted into) was long doubtful. In *La Terriere* v. *Bulmer* (*i*), Sir A. Hart, V.-C., decided that the first year's income formed part of the capital. In *Dimes* v. *Scott* (*j*), Lord Lyndhurst held the legatee for life to be entitled during the year, in lieu of the actual income, to dividends on so much Three per Cent. stock as the proceeds of the property, if converted, would have purchased at the end of the year. In *Douglas* v. *Congreve* (*k*), Lord Langdale, M.R. (after noticing these conflicting opinions), gave the legatee for life the actual income arising from unconverted funds, from the testator's death until the end of the year, or until conversion, which should first happen (*l*); a rule which certainly seems to be more just than the first, and more convenient than the second, of the others which have been referred to, and was apparently adhered to by the same Judge in *Mehrtens* v. *Andrews* (*m*). However, the rule laid down in *Dimes* v. *Scott* has since been repeatedly followed, and must be considered as now settled (*n*). The 2½ per cent. Consols will take the place of the 3 per cent.

Effect of direction to accumulate until conversion.

(iii) The rule that conversion is to be deemed as having been made within a year from the testator's death, is applied in favour of, as well as against, the tenant for life. Thus, where trustees are directed to convert the property (whether it be land into money, or money into land), and until conversion the income is directed to be accumulated and added to the capital; and it happens that the conversion is deferred beyond the period of a year from the testator's decease, the process of accumulation ceases, and the title of the legatee for life to the income commences, at the end of such year; this being considered to afford a reasonable time for the conversion of the property (*o*); and it is immaterial, in such case, that the clause directing the accumulation of the income goes on

(*i*) 2 Sim. 18.

(*j*) 4 Russ. 195.

(*k*) 1 Kee. 410.

(*l*) See *Angerstein* v. *Martin*, T. & R. 232, acc. But Lord St. Leonards has said (16 Jur. 847, 1 Macq. H. L. Ca. 243) that when Lord Eldon there decreed the dividends on Russian stock to the tenant for life his attention could not have been called to the point. See also per K. Bruce, V.-C., 1 Y. & C. C. C. at p. 318.

(*m*) 3 Bea. 72.

(*n*) *Taylor* v. *Clark*, 1 Hare, 161; *Morgan* v. *Morgan*, 14 Bea. 72; *Brown* v. *Gellatly*, L. R., 2 Ch. 751; *Allhusen* v. *Whittell*, L. R., 4 Eq. 295.

(*o*) *Sitwell* v. *Bernard*, 6 Ves. 520, and cases there cited; *Kilvington* v. *Gray*, 2 S. & St. 396; *Noel* v. *Henley*, 7 Pri. 241; *Stair* v. *Macgill*, 1 Bli. N. S. 662; *Vickers* v. *Scott*, 3 My. & K. 500; *Tucker* v. *Boswell*, 5 Bea. 607. See also *Vigor* v. *Harwood*, 12 Sim. 172, where an *implied* direction to accumulate was altogether disregarded, so that the tenant for life got the income from the testator's death. The decisions in *Taylor* v. *Hibbert*, 1 Jac. & W. 308, and *Stott* v. *Hollingworth*, 3 Madd. 161, appear to have been based on a misapprehension of *Sitwell* v. *Bernard*, and are erroneous.

to provide for its investment (*p*). And it is to be observed that where the purchase of land is to be made with a pecuniary legacy, which is to come out of the testator's general estate (and payment of which, therefore, may, under the general rule, be made at any time within a year), the twelve months at which the income becomes receivable by the tenant for life is computed from the time of the receipt of the legacy (*q*).

As to income of property converted within the year.

(iv) With respect to such portion of the property as is, in point of fact, converted before the end of the year following the testator's decease, the legatee for life takes the actual income of the fund constituted of the proceeds from the time of its actual investment; and that too, of course, without regard to the fact of there being an express direction to accumulate the profits until conversion or not (*r*).

As to income of property which can be but is not converted within the year.

(v) If the property can be, but is not, actually converted at the end of a year from the testator's decease, it must be computed what would have been the result if the conversion had taken place at such year's end, and the proceeds had been then invested in the public stocks (*s*); the dividends of which stocks will form the income to which the legatee for life will be entitled either from the testator's decease or from the end of the year, according to the fact whether there is not, or is, an intermediate trust for accumulation. And this rule applies as well where the unconverted fund or property is of a permanent nature as where it is limited in its duration, as leaseholds, &c. (*t*).

In *Dimes* v. *Scott* (*u*), a testator bequeathed the residue of his personal estate to trustees, upon trust to convert the same into

(*p*) *Entwistle* v. *Markland*, 6 Ves. 528, n.

(*q*) *Parry* v. *Warrington*, 6 Madd. 155.

(*r*) *La Terriere* v. *Bulmer*, 2 Sim. 18. See also *Dimes* v. *Scott*, 4 Russ. 195; *Gibson* v. *Bott*, 7 Ves. 89.

(*s*) Formerly the investment was deemed to have been made in Three per Cent. Consols. It would seem that, for the purpose in question, the investment should now be deemed to have been made in Two and One Half per Cent. Consols. Having regard, on the one hand, to the extended range of investments now authorized for cash under the control of the Court, and on the other hand, to the high price which is at the present day commanded by all high-class stocks and securities, and particularly the public funds and securities of the United Kingdom, it would seem that the rule laid down in the early cases will require judicial reconsideration. According to the price of Consols in 1802, when the rule in question was laid down in *Dimes* v. *Scott*, 4 Russ. at p. 209, the tenant for life got more than four per cent. by the plan which was adopted. See *Brown* v. *Gellatly*, arg., L. R., 2 Ch. at p. 756, and note, and p. 1237, later.

(*t*) See *Dimes* v. *Scott*, 4 Russ. 195; *Mills* v. *Mills*, 7 Sim. 501; *Mehrtens* v. *Andrews*, 3 Bea. 72; *Hume* v. *Richardson*, 4 D. F. & J. 29; *Brown* v. *Gellatly*, L. R., 2 Ch. 751.

(*u*) 4 Russ. 195.

CHAP. XXXIV.

money, and thereout to pay debts, and invest the surplus in government or real securities, for the benefit of A. for life; at whose decease the capital was given to other persons absolutely. When the testator died, part of his property was invested in an East India security, yielding 10*l.* per cent., on which the executors permitted it to remain for several years, and during this period paid over the whole interest to the legatee for life; Lord Lyndhurst decided that they could only be allowed, as a proper application of income, a sum equal to the dividend on so much 3 per cent. Consols as the proceeds of the security, if turned into money at the end of a year from the testator's decease, would have purchased; such dividends to be computed from the decease of the testator; and though it appeared that the fund had actually yielded more than it would have produced if sold at the end of a year, yet the trustees were held not to be entitled to the benefit of this gain, by way of set-off against the claim of the ulterior legatees for excess of income paid to the legatee for life; but were bound to account for both such excess, and also the entire sum actually received on the conversion of the security. In *Robinson* v. *Robinson* (*v*), where trustees had an option to invest in Government or real securities, and had neglected to convert improper investments and a loss had ensued, they were charged, not with so much Government stock (for they were not bound to choose that mode of investment), but with the money value of the fund at the year's end, and 4*l.* per cent. interest on such value; and it was held to follow that the income of the tenant for life who had acquiesced in the default must also be 4*l.* per cent. on the same value. But where the only question is what are the relative rights of tenant for life and remainder-man in an improper investment forming part of the testator's estate, the rule in *Dimes* v. *Scott* and *Taylor* v. *Clark* (*w*) applies, and whether the will does or does not give an option to invest in Government or other securities, the tenant for life is entitled only to dividends on so much Consols (*x*).

Neither the Rule of the Supreme Court of November 1888 (Ord. XXII. Rule 17), nor the Trustee Act, 1893, nor the Colonial Stocks Act, 1900, would appear to affect the rule in the case of improper securities left unconverted. But securities authorized by statute, or by the Rules of Court for the time being in force, are proper investments for a testator's estate, although not expressly authorized by

(*v*) 1 D. M. & G. 247.

(*w*) 1 Hare, 161.

(*x*) *Brown* v. *Gellatly*, L. R., 2 Ch. 751. *Anderson* v. *Read*, 22 W. R. 527 (cor. Hall, V.-C.), where the trust for investment is stated to have been "comprehensive," appears to be to the same effect.

the will, unless expressly forbidden thereby (*y*); and the tenant for life will be entitled as income to the annual proceeds of such investments, when actually found, or made, part of the testator's estate (*z*).

As to income of property which cannot be converted.

(vi) Where property ought to be, but from its nature cannot be, immediately converted, at least without great loss to the estate, the authorities are not quite uniform. Thus, in *Gibson* v. *Bott* (*a*), where leaseholds directed to be converted could not be sold for want of a good title, Lord Eldon gave the tenant for life 4 per cent. per annum from the testator's death on a sum to be ascertained as the value at the testator's death (*b*). Lord Langdale, in *Mehrtens* v. *Andrews* (*c*), after the leases had expired, directed a value to be put upon them having reference to the enjoyment had thereunder, and that the income of the tenant for life should be taken as the dividends of the sum of Consols which could have been purchased for that value. In *Meyer* v. *Simonsen* (*d*) there was no trust for conversion, but the trustees were bound to convert under the rule in *Howe* v. *Earl of Dartmouth* (referred to in the next section), and the principles laid down in the judgment are generally treated as applicable to cases where conversion is expressly directed. In *Meyer* v. *Simonsen* conversion could not, from the nature of the property, be immediately made, and Sir J. Parker, V.-C., decided that interest at 4 per cent. on the value should be allowed. He said there were three distinct classes of cases: "First, where the subject matter of the bequest is either invested in the funds or in some security of which the Court approves, there conversion is not necessary, and the tenant for life takes the interest of the fund as it is, and the corpus belongs to those in remainder. The second class is where part of the estate can be sold and converted so as not to sacrifice the interest of the tenant for life or of the remainder-man, such a case is one of partial conversion, and the proceeds of the part converted must be laid out on the permanent securities approved of by the Court, of which the tenant for life will take the interest, and the remainder-man the corpus. The third class is where the property is so laid out as to be secure and to produce a large annual income, but is not capable of immediate conversion

(*y*) For an example of an express prohibition, see *Ovey* v. *Ovey*, [1900] 2 Ch. 524 (it seems, however, that the decision in that case is wrong, since the attention of the judge was not called to s. 27 of the National Debt Conversion Act, 1888).

(*z*) *Hume* v. *Richardson*, 4 D. F. & J. 29.

(*a*) 7 Ves. 89.

(*b*) 1 Y. & C. C. C. 320, n. (*a*).

(*c*) 3 Bea. 72.

(*d*) 5 De G. & S. 723. See *Caulfield* v. *Maguire*, 2 J. & Lat. at p. 162; *Re Eaton*, 70 L. T. 761.

CHAP. XXXIV.

without loss and damage to the estate, as in *Gibson* v. *Bott*, and *Caldecott* v. *Caldecott* (*e*). There the rule is not to convert the property, but to set a value upon it, and give to the tenant for life 4 per cent. on such value, and the residue of the income must then be invested, and the income of the investment paid to the tenant for life, but the corpus must be secured for the remainder-man" (*f*).

Power to postpone conversion.

(vii) In carefully drawn wills, a trust for conversion is generally accompanied by a discretion given to the trustees to postpone conversion for a definite or indefinite period. Such a discretion, if exercised in good faith, exonerates them from liability for loss, even if some of the property consists of shares in an unlimited company (*h*).

Long annuities.

If the trustees have a power to retain investments in the public funds or government securities, they may retain long annuities forming part of the estate (*i*).

Business.

Where the property directed to be converted includes a business, it is not clear whether a power to postpone conversion, without more, authorizes the trustees to carry on the business for an indefinite time: they may certainly carry it on for any reasonable period (for example, two years), in order to enable them to dispose of it to advantage as a going concern (*j*). In *Re Crowther* (*k*), where the trustees carried on the testator's business for twenty-two years, not with a view to a sale, but for the benefit of the tenant for life, Chitty, J., held that they were justified in so doing. If, however, the will directs the business to be sold with all convenient speed, a general power to postpone conversion does not authorize the trustees to carry on the business for an indefinite period (*l*). In the case in which this was decided, North, J., seemed to think that *Re Crowther* went too far. The learned judge was no doubt influenced by the rule that trustees must not carry on a business unless they are expressly authorized to do so (*m*).

(*e*) 1 Y. & C. C. C. 312.

(*f*) This rule was approved in *Wentworth* v. *Wentworth*, [1900] A. C. at p. 171; and see *Fearns* v. *Young*, 9 Ves. 549; *Walker* v. *Shore*, 19 ib. 387, 1 Y. & C. C. C. 321, n.; *Caldecott* v. *Caldecott*, 1 Y. & C. C. C. 312, 737; *Arnold* v. *Ennis*, 2 Ir. Ch. Rep. 601; *Re Llewellyn's Trust*, 29 Bea. 171; *Brown* v. *Gellatly*, L. R., 2 Ch. 751 (as to the ships). But see *Crawley* v. *Crawley*, 7 Sim. 427, contra. See also *Arnold* v. *Ennis*, 2 Ir. Ch. Rep. 601 (racehorse).

(*h*) *Re Norrington*, 13 Ch. D. 654.

(*i*) *Howard* v. *Kay*, 27 L. J. Ch. 448; *Wilday* v. *Sandys*, L. R., 7 Eq. 455. In *Tickner* v. *Old*, L. R., 18 Eq. 422, Malins, V.-C., seems to have forgotten his own decision in *Wilday* v. *Sandys*. See post, p. 1247, n. (*z*). Compare *Preston* v. *Melville*, 15 Sim. 35, where there was a power to renew investments on "undoubted real or personal security."

(*j*) *Re Chancellor*, 26 Ch. D. 42.

(*k*) [1895] 2 Ch. 56. In *Kirkman* v. *Booth*, 11 Bea. 273, there was no trust for conversion: supra, p. 1229.

(*l*) *Re Smith*, [1896] 1 Ch. 171.

(*m*) See *Kirkman* v. *Booth*, 11 Bea. at p. 280.

If the testator is a partner in a business, and the articles of partnership require that his capital shall remain in the business for a fixed time, the effect of a power to postpone conversion may be to entitle the tenant for life to interest on the testator's capital at the rate fixed by the articles (*n*).

Income of retained investments.

There is a conflict of judicial opinion on the question whether rules (ii), (iii), (iv), (v), and (vi), stated above, apply where the will gives the trustees a discretionary power to postpone conversion, but says nothing as to the destination of the income pending conversion. It is obvious that if the will expressly directs that, pending conversion, the income of the retained investments is to be treated as if it were income arising from investments authorized by the will, the tenant for life is entitled to the whole income (*o*), and the same result follows if the will contains some implied direction to that effect; as where the testator directs the income of his residuary estate, or of the securities for the time being "constituting" his residuary personal estate, to be paid to the tenant for life, for this clearly includes the income of the retained investments (*p*). In *Re Sheldon* (*q*), North, J., expressed the opinion that this principle, though it applies to hazardous, does not apply to wasting, investments, and that in the case of wasting investments the tenant for life is only entitled to receive interest on the capital value. But it is not easy to see why there should be any distinction of this kind, for the effect of an implied direction to pay the whole income to the tenant for life ought to be the same as that of an express direction to that effect (*qq*).

If, however, the testator directs his residue to be converted and invested, and the income of his "residuary trust moneys and the investments representing the same" to be paid to A. for life, a mere power to postpone conversion does not, it seems, entitle A. to the whole income of unauthorized investments retained by the trustees (*r*).

Implied power to postpone conversion.

In *Brown* v. *Gellatly* (*rr*) the testator empowered his trustees to

(*n*) *Johnston* v. *Moore*, 27 L. J. Ch. 453.

(*o*) *Re Chancellor*, 26 Ch. D. 42; *Re Crowther*, [1895] 2 Ch. 56. As to these cases, see ante, p. 1229. *Morley* v. *Mendham*, 2 Jur. N. S. 998; *Lean* v. *Lean*, 32 L. T. 305 (ships). See also *Sparling* v. *Parker*, 9 Bea. 524; *Wrey* v. *Smith*, 14 Sim. 202; *Waters* v. *Waters*, 32 L. T. 306, n.

(*p*) *Re Thomas*, [1891] 3 Ch. 482; *Green* v. *Britten*, 1 D. J. & S. 649.

(*q*) 39 Ch. D. 50. In *Furley* v. *Hyder*, 42 L. J. Ch. 626, the tenant for life was not allowed the dividends on some water stock retained by the Court.

(*qq*) Compare the principle applicable where there is no express trust for conversion, infra, p. 1245.

(*r*) *Re Chaytor*, [1905] 1 Ch. 233 (disapproving the decision in *Bulkeley* v. *Stephens*, 3 N. R. 105); *Re Lynch Blosse*, [1899] W. N. 27; *Re Woods*, [1904] 2 Ch. 4; *Re Carter*, 41 W. R. 140 (leaseholds). In *Re Bates*, [1907] 1 Ch. 22, there was no trust for conversion.

(*rr*) L. R., 2 Ch. 751.

realize his property and to sail his ships for the benefit of his estate until they could be satisfactorily sold; this gave them a discretion to postpone conversion, and Lord Cairns held that the case fell within the third division pointed out by Sir James Parker in his judgment, already quoted, in *Meyer* v. *Simonsen*.

Reversionary and other interests not producing income.

(viii.) The rules already stated are primarily applicable to property producing income, but a residue subject to a trust or power to convert often includes property which, from its nature, or from other causes, does not produce income. A reversionary interest, or a policy of life insurance, is not income bearing, and the interest on a mortgage debt may be in arrear and unpaid for a considerable period of time. If the trust for sale is absolute, and there is no discretionary power to postpone conversion, the tenant for life can compel the trustees to convert the property (unless it is absolutely unsaleable) and invest the proceeds in authorized securities, the income of which is paid to the tenant for life (*s*); and this is so even in the case of a reversionary interest expectant on the death of the tenant for life (*t*). The tenant for life does not lose his right to claim interest on the value of the property while unconverted, merely by acquiescing in its retention by the trustees (*u*), but if he requests the trustees to delay conversion it would seem that he impliedly waives this right (*v*).

No power to postpone.

Power to postpone.

In most cases, however, the testator gives the trustees a discretionary power of sale, or power to postpone conversion, and then the tenant for life cannot compel a realization of the property so long as the trustees, in the proper exercise of their discretion, think fit to keep it unconverted; in such a case the tenant for life gets nothing until the property falls into possession or is sold; thenceforward he is entitled to the income produced by the property or the investments representing the proceeds of sale (*w*). If, however, the trustees exercise their discretion improperly, or do not exercise it at all, the property, when it does fall into possession, is treated as if no discretionary power of postponement had been given them, and it is apportionable between the tenant for life (or his representatives) and the remainder-man on that basis (*x*).

(*s*) In *Re Hobson*, 55 L. J. Ch. 422.

(*t*) *Johnson* v. *Routh*, 27 L. J. Ch. 306; *Countess of Harrington* v. *Atherton*, 2 D. J. & S. 352. But the testator, of course, may indicate that a reversionary interest shall not be considered to form part of his estate until it falls into possession: *Re Flower*, 63 L. T. 201 (reversing 62 L. T. 216).

(*u*) In *Re Hobson*, 55 L. J. Ch. 422.

(*v*) *Walker* v. *Shore*, 19 Ves. 387.

(*w*) *Mackie* v. *Mackie*, 5 Hare, 70; *Rowlls* v. *Bebb*, [1900] 2 Ch. 107.

(*x*) *Rowlls* v. *Bebb*, supra. That case seems to decide that the object of a power to postpone conversion is to

In such a case as that above referred to, where conversion ought to have taken place, either because there was no power to postpone, or because the power was not exercised or improperly exercised, it becomes necessary to determine what portion of the property belongs to the tenant for life or his representatives.

Apportionment of a reversion when it falls into possession.

The method by which the fund is apportioned has varied from time to time. In *Wilkinson* v. *Duncan* (*y*), the value which the reversion would have had at the expiration of one year from the testator's death, if the actual time of its falling into possession had then been known, was calculated, and the difference between the fund and this value was paid to the tenant for life; the residue of the fund was invested, and the dividends paid to the tenant for life. The report of his case does not state how the value was calculated, but from *Beavan* v. *Beavan* (*z*) it appears that the sum which, with simple interest at 4 per cent., calculated from one year from the testator's death till the date when the fund fell in, was to be the value required. This method was also adopted in *Wright* v. *Lambert* (*a*), a case in which the tenant for life died before the fund fell into possession, and the estate of the tenant for life was given simple interest at 4 per cent. on the sum so ascertained. In *Beavan* v. *Beavan* (*b*), Lord Romilly adopted a more rational plan, namely, to ascertain the sum which, if put out at interest at 4 per cent. per annum on the day of the testator's death, and accumulated at compound interest with yearly rests (deducting income tax) would have produced the amount actually recovered on the day when the property was realized; this sum is then treated as capital, and the residue as income. The same method was adopted in *Re Chesterfield's Trusts* (*c*).

In the course of time the fall in the rate of interest made the calculation on a 4 per cent. basis unduly favourable to the tenant for life, and Kekewich, J., in *Re Goodenough* (*d*), took the step of reducing the rate to 3 per cent., and his decision has been followed

enable the trustees to equalize matters as between the tenant for life and remainder-man, and that if, in fact, no part of the testator's estate consists of wasting or hazardous investments, it is the trustees' duty to convert a reversionary interest if it is saleable. The will in *Rowlls* v. *Bebb* does not seem to have contained the usual direction that reversionary property shall not be sold until it falls into possession. In *Glengall* v. *Barnard*, 5 Bea. 245, the Court permitted annuities and policies on the life of the annuitants to be retained in lieu of selling both the annuities and the policies.

(*y*) 23 Bea. 469.

(*z*) 24 Ch. D. 649, n.

(*a*) 6 Ch. D. 649.

(*b*) 24 Ch. D. 649, n.

(*c*) 24 Ch. D. 643. Compare also *Cox* v. *Cox*, L.R., 8 Eq. 343 (settlement, part of bond debt recovered); *Turner* v. *Newport*, 2 Ph. 14, and *Re Bird*, [1901] 1 Ch. 916, which are cases of unauthorized investments. See *Re Atkinson*, [1904] 2 Ch. at p. 167.

(*d*) [1895] 2 Ch. 537.

CHAP. XXXIV.

in other cases (*e*). The method of calculation used in *Beavan* v. *Beavan*, but with a 3 per cent. basis, is that at present adopted.

This method has also been applied to the case of a business carried on at a loss (*f*), and to a policy of life insurance (*g*), but with the rate at 4 per cent. (*h*). The same method is also applied in the case of a contingent reversion (*i*). In *Re Godden* (*j*), the same method was applied to sums received from some mortgaged property under peculiar circumstances; the property was a colliery, of which the testator was in possession as mortgagee, and interest was in arrear at his death; the trustees commenced a foreclosure action, in which a receiver was appointed, and he received various sums from the working of the colliery: an order for foreclosure absolute was made, and the mortgage debt ceased to exist, and the colliery became part of the testator's estate: the question therefore arose, what was to be done with the sums previously received from the working of the colliery. It was held that they ought to be divided between capital and income on the principle laid down in *Re Chesterfield's Trusts*. But where an investment is made by the trustees of a will on mortgage, under the powers contained in the will, and the sum realized by the security is insufficient to pay principal and arrears of interest, the amount is divided in proportion to the amount due for principal and the amount due for interest (*k*).

If the reversion is sold before it falls into possession, the same method of apportionment is applicable to the proceeds of sale. If the tenant for life has died before the reversion falls into possession, his estate would, on principle, be entitled to 3 per cent. compound interest during his life, from the date of the testator's death, on the value of the reversion ascertained on that date by the method of *Re Goodenough*.

Property not actually producing income.

Where a will gives the trustees a discretionary power to postpone conversion, it generally goes on to direct that the income of property retained unconverted shall be paid to the tenant for life, but that no property not actually producing income shall be treated as producing income, the object, of course, being to exclude the two rules

(*e*) *Re Duke of Cleveland's Estate*, [1895] 2 Ch. 542; *Rowlls* v. *Bebb*, [1900] 2 Ch. 107.
(*f*) *Re Hengler*, [1893] 1 Ch. 586.
(*g*) *Re Morley*, [1895] 2 Ch. 738.
(*h*) Ibid., at p. 743.
(*i*) *Re Hobson*, 55 L. J. N. S. 432.
(*j*) [1893] 1 Ch. 292.
(*k*) *Re Atkinson*, [1904] 2 Ch. 160 (following *Re Moore*, 54 L. J. Ch. 432, and *Re Alston*, [1901] 2 Ch. 584, and overruling *Re Foster*, 45 Ch. D. 629, and *Re Phillimore*, [1903] 1 Ch. 942); *Stewart* v. *Kingsale*, [1902] 1 Ir. 496 (settlement); *Re Anckettill's Estate*, 27 L. R. Ir. 331. See also *Re Broadwood's Settlements*, [1908] 1 Ch. 115, and *Ackroyd* v. *Ackroyd*, 18 Eq. 313 (part of personalty recovered after a time from absconding executor).

(v) and (viii) above stated. But the Courts seem inclined to put a narrow construction on the clause. Thus in *Re Godden* (*l*), it was held by North, J., that money received since the death of a testator from the working of a colliery of which he was in possession as mortgagee at his death, was not "income" within the meaning of the clause. And in *Re Hubbuck* (*m*), the Court of Appeal decided that the latter part of the clause above referred to did not have the operation which conveyancers had hitherto attributed to it. In that case the residue included a mortgage on which no interest was paid, and which produced, when realized, less than the principal. The Court of Appeal (reversing Stirling, J.) held in effect that the mortgage had actually produced income, and that the tenant for life was entitled to a proportionate part of the amount realized. It is difficult to understand the principle of this decision. When the testator referred to actual income he meant actual income, and not imaginary or notional income.

In *Re Lewis* (*mm*), the will contained a similar clause; in that case the question arose with reference to a mortgage under which the interest, although it went on accruing, was not payable until the death of the mortgagor, which took place five years after that of the testator: it was held that the tenant for life was entitled to the income that accrued during that period.

Real estate.

(ix.) The questions above discussed arise chiefly in relation to personalty, but it frequently happens that a testator gives his real and personal estate together upon trust for conversion and investment, and for payment of the resulting income to persons in succession. As ordinary land is not primâ facie a wasting or hazardous form of property, it would seem clear that the general principle stated above under rule (i.) applies to it, and that so long as the trustees, without impropriety, postpone the sale of it, the tenant for life is entitled to the rents and profits. And this may now be considered established (*n*).

But if the land is of such a nature that it is readily saleable and yet only produces a small rental, incommensurate to its real value,

(*l*) [1893] 1 Ch. 292.

(*m*) [1896] 1 Ch. 754.

(*mm*) [1907] 2 Ch. 296. See *Re Taylor's Trusts*, [1905] 1 Ch. 734 (settlement of 6 per cent. bonds; the interest fell into arrear and the bonds were sold; no part of the purchase money was paid to the estate of the tenant for life).

(*n*) *Casamajor* v. *Strode*, 19 Ves. 391, n.; *Vigor* v. *Harwood*, 12 Sim. 172; *Vickers* v. *Scott*, 3 My. & K. 500; *Fitzgerald* v. *Jervoise*, 5 Mad. 25; *Hope* v. *D'Hédouville*, [1893] 2 Ch. 361; *Re Scarle*, [1900] 2 Ch. 829; *Re Oliver*, [1908] 2 Ch. 74. The general principle is also stated in the chapter on Conversion, ante, p. 742.

CHAP. XXXIV.

the tenant for life is entitled to insist either that it shall be sold, or that he shall be put in the same position as if it had been sold at its true value: if he allows it to remain unsold without protest he has no claim (*nn*).

Conversely, if the land is let on such terms that it is in effect a wasting investment—as in the case of mines, brickfields, &c.—the tenant for life is only entitled to such an income as would have been produced if the property had been sold (*o*). This rule, however, does not seem to apply if the mines or brickfields were being worked at the testator's death, and if conversion has been postponed without impropriety (*oo*).

The rule in *Howe* v. *Lord Dartmouth.*

(10) (i.) THE RULE IN HOWE *v.* LORD DARTMOUTH.—It remains to be considered how far the preceding rules apply to cases in which the residuary clause contains no trust for conversion, express or implied, as where a testator simply bequeaths all the residue of his personal estate in trust for A. for life, and after his decease to B. absolutely (*p*). In such a case, if the residuary estate consisted of hazardous or wasting property (as, for instance, speculative investments, or leaseholds with a few years to run), the result of a specific enjoyment of the property might be that B. would obtain nothing. Acting on the assumption that the testator's intention was that B. should not suffer hardship, the Court, in order to give effect to this supposed intention of the testator, requires the wasting property to be converted and invested in trust investments. If the property had been not wasting, but reversionary, the converse result—that A. might get nothing—might occur, so that the rule for conversion is also applied, in the case of reversionary and other interests not producing income, in favour of the tenant for life (*q*).

This rule is called the rule in *Howe* v. *The Earl of Dartmouth* (*r*),

(*nn*) *Walker* v. *Shore*, 19 Ves. 387; *Yates* v. *Yates*, 28 Bea. 637.

(*o*) *Wentworth* v. *Wentworth*, [1900] A. C. 163 (following *Meyer* v. *Simonsen* and *Brown* v. *Gellatly*, ante, p. 1235); *Re Woods*, [1904] 2 Ch. 4. The general principles are stated by Lindley, L.J., in *Re Ridge*, 31 Ch. D. 504, where it is pointed out that in the case supposed the tenant for life cannot be said to be either impeachable or unimpeachable for waste: consequently the provisions of the Settled Land Acts are inapplicable.

(*oo*) The decisions in *Miller* v. *Miller*, L. R., 13 Eq. 263, and *Re Darnley*, [1907] 1 Ch. 159, can probably be supported on this ground. In *Re North*, [1909] 1 Ch. 625, there was no trust for sale until after the death of the tenants for life.

(*p*) In *Tickner* v. *Old* (L. R., 18 Eq. 422), where there was an express trust to convert, followed by a power to retain certain kinds of investments, Malins, V.-C., considered that the rule in *Howe* v. *Earl of Dartmouth* applied, but the remarks of the learned V.-C. on this point must have been made per incuriam.

(*q*) *Hinves* v. *Hinves*, 3 Hare, at p. 611.

(*r*) 7 Ves. 137.

from the case in which it was applied by Lord Eldon to a residuary bequest including Bank stock (not then considered a proper investment for trust funds) and terminable annuities. The rule applies to short leaseholds (*s*), foreign bonds (*t*), shares in trading companies (*u*), a business carried on by the testator (*v*), and generally to all investments not authorized by law. It also applies in favour of a person having a life annuity charged on a wasting fund or residue (*w*).

Where rule does not apply.

The reason of the rule is not generally applicable to an absolute gift subject to an executory limitation (*x*). Nor does it apply to a settled legacy (*y*).

Real estate.

The rule as formulated by Lord Eldon only applies to residuary gifts of personal estate, and it is generally assumed not to apply to real estate (*z*). Lord Eldon seems to have thought that the reason for the exclusion of the rule in the case of real estate was that a residuary devise of real estate was specific (*zz*), but it is submitted that the rule is really based on the presumed intention on the part of the testator that wasting property, whatever its nature, unless given by a specific description, ought to be converted for the benefit of the remainder-man. Real estate, as a rule, is not hazardous, but it may be wasting, as in the case of mines, brickfields, &c. Special rules, however, apply to devises of such properties, whether the devise is residuary or specific. For if the mines are leased (or agreed to be leased) at the death of the testator, the presumption is that the testator intended the tenant

Mines, brickfields, &c.

(*s*) *Morgan* v. *Morgan*, 14 Bea. 72; *Chambers* v. *Chambers*, 15 Sim. 183; *Lyons* v. *Harris*, [1907] 1 Ir. R. 32.

(*t*) *Blann* v. *Bell*, 2 De G. M. & G. 775 (Dutch bonds); *Re Shaw's Trusts*, L. R., 12 Eq. 124 (Colonial bonds).

(*u*) *Thornton* v. *Ellis*, 15 Bea. 193 (railway shares); *Re Shaw's Trusts*, supra (railway stock).

(*v*) *Kirkman* v. *Booth*, 11 Bea. 273; *Meyer* v. *Simonsen*, 5 De G. & S. 723, ante, p. 1235. For an instance where the rule was held to be excluded, see *Stainer* v. *Hodgkinson*, 73 L. J. Ch. 179, post.

(*w*) *Fryer* v. *Buttar*, 8 Sim. 442; *Wightwick* v. *Lord*, 6 H. L. C. 217.

(*x*) *Re Bland*, [1899] 2 Ch. 336.

(*y*) If, therefore, trustees in exercise of a power given them for that purpose retain existing investments and appropriate them in satisfaction of a settled legacy, the tenant for life is entitled to the whole income, provided the investments are of a permanent character: *Re Wilson*, [1907] 1 Ch. 394.

(*z*) In the case of *Yates* v. *Yates*, 28 Bea. 637, which is often cited as a decision on the point, the trustees had a discretionary power of sale, as to the effect of which see next section. The question does not seem to be affected by the fact that real and personal estate are included in the same residuary gift: *Re Oliver*, [1908] 2 Ch. 74.

(*zz*) For the purposes of the rule as to payment of a testator's debts a residuary devise is still specific, notwithstanding the provisions of the Wills Act: *Hensman* v. *Fryer*, L. R., 3 Ch. 420. Stuart, V.-C., refused to follow this in *Collins* v. *Lewis*, L. R., 8 Eq. 708, and Malins, V.-C., refused to follow it in *Dugdale* v. *Dugdale*, L. R., 14 Eq. 234, saying that the Court is not bound to follow a decision of the Court of Appeal if clearly erroneous. But *Hensman* v. *Fryer* is generally accepted as good law. See *Lancefield* v. *Iggulden*, L. R., 10 Ch. 136.

CHAP. XXXIV.

for life to have the whole income, and if they are leased after his death by the tenant for life under the powers of the Settled Land Acts, the rules laid down by those acts as to the capitalization of part of the rent are applicable (*a*). It does not seem to have been decided whether the tenant for life under a residuary devise has any equity to have the property converted, if it would be to his interest to do so, as in the case of building land let as agricultural land, but as the principle of *Howe* v. *Earl of Dartmouth* does not apply to mining properties and the like, it seems impossible to apply it to the converse case, although this may produce an unjust result, for if a testator devises and bequeaths all his residuary estate to A. for life, with remainder to B., and the residue consists of short leaseholds and freehold ground rents with a near reversion, the leaseholds will be converted for the benefit of B., but the freeholds will not be converted for the benefit of A. Where the will contains a discretionary trust for conversion, the question may arise whether it is the duty of the trustees to sell (*aa*).

Mines.

Foreign leaseholds.

The rule does not apply to leaseholds situate abroad (*b*).

Income of wasting property.

If wasting property is not actually converted, the fair course in such cases seems to be to carry to account, as capital, the income accruing from the time of the testator's decease; and, in lieu of such income, to pay to the legatee for life from that period, a sum equal to the dividends which the produce of the sale would have yielded, if invested in 2½ per cent. Consols; such investment, however, not being supposed to be made until the period of the actual sale (if within the year), though it regulates the income retrospectively from the testator's death. But if the sale does not take place within a year after the testator's decease, the amount must, it should seem, be regulated by the presumed proceeds, i.e., the value at the end of such year, together, in either case, with dividends on the interim income of the terminable unconverted property (*c*).

(*a*) *Re Ridge*, 31 Ch. D. 504; *Campbell* v. *Wardlow*, 8 A. C. 641; *Re Kemeys-Tynte*, [1892] 2 Ch. 211; *Re Chaytor*, [1900] 2 Ch. 804. As to what is a new mine see *Re Maynard's S. E.*, [1899] 2 Ch. 347; *Chaytor* v. *Trotter*, 87 L. T. 33. As to applying the rule in *Meyer* v. *Simonsen*, ante, p. 1235, to a residuary devise of a mining property where there is a trust for conversion, see *Wentworth* v. *Wentworth*, [1900] A. C. 163; *Re Woods*, [1904] 2 Ch. 4, ante, p. 1242.

(*aa*) See *Yates* v. *Yates*, 28 Bea. 637; *Miller* v. *Miller*, L. R., 13 Eq. 263. In *Re North*, [1909] 1 Ch. 625, there was a future trust for sale.

(*b*) *Re Moses*, [1908] 2 Ch. 235.

(*c*) *Fearns* v. *Young*, 9 Ves. 549; *Howe* v. *Earl of Dartmouth*, 7 Ves. 137; *Mills* v. *Mills*, 7 Sim. 501; *Morgan* v. *Morgan*, 14 Bea. 72; *Fryer* v. *Buttar*, 8 Sim. 442; *Benn* v. *Dixon*, 10 Sim. 636; *Chambers* v. *Chambers*, 15 Sim. 183; *Smith* v. *Pugh*, 6 Jur. 701; *Lichfield* v. *Baker*, 2 Bea. 481, 13 ib. 447. But

As to income of a fund precarious, but not wasting.

What would be the destination of income arising from a fund which, though not wasting or fluctuating, is precariously secured, is more doubtful. It would clearly be the duty of any executor or trustee to call in the money as soon as possible (*d*); but in the meantime, if the fund should happen to yield a larger amount of income than a proper investment (as in the case of a loan on personal security at 10 per cent.), the trustee or executor could not, it is conceived, with safety pay the legatee for life the actual income, though no loss of principal were eventually sustained, having regard to the severe lesson taught to trustees by the case of *Dimes* v. *Scott* (*e*), in which, however, it is to be remembered, there was an express trust for conversion.

Contrary Intention.

(ii.) *What Expressions exclude the Rule.*—The rule in *Howe* v. *The Earl of Dartmouth* "is purely an artificial rule, and is often calculated to defeat what the testator would have wished in order to give effect to his intentions, and slight circumstances will be sufficient to show that the rule is not to be put in force" (*f*). Nevertheless, it is difficult, if not impossible, to lay down any general principle to assist us in answering the question: What amounts to an indication of intention that the legatee for life shall, in exclusion of the general doctrine, enjoy in specie the property which is the subject of disposition? This is a question of construction, and some of the cases on it will be found to turn upon rather nice distinctions.

Intention to give enjoyment in specie.

Where part of residue is specified.

The rule only applies to residues, and not to specific bequests; sometimes a testator combines with the general words of a residuary clause, an enumeration of certain species of property, thus raising the question whether the enumeration is to be considered as taking

see *Sutherland* v. *Cooke*, 1 Coll. 498, and *Crawley* v. *Crawley*, 7 Sim. 427, where 4*l.* per cent. was allowed, and a remark on the last case, Hayes and Jarm. Con. Wills, 3rd edition, p. 227. The rule that the tenant for life is only entitled to so much for income as the property would have produced if sold and invested in Consols, does not apply where the testator dies, and his property, and the persons entitled under his will, are out of the jurisdiction of the Court of Chancery, but it attaches as soon as the persons entitled arrive in this country, *Holland* v. *Hughes*, 16 Ves. 111.

(*d*) *Thornton* v. *Ellis*, 15 Beav. 193. But see *Johnson* v. *Johnson*, 2 Coll. 441.

(*e*) See *Caldecott* v. *Caldecott*, 1 Y. & C. C. C. 737: but contra, *Douglas* v. *Congreve*, 1 Kee. 410; and *Mehrtens* v. *Andrews*, 3 Bea. 72, where the fund was both wasting and precarious. See also *Macdonald* v. *Irvine*, 8 Ch. D. 101, 112, 121.

(*f*) Per Kindersley, V.-C., in *Simpson* v. *Lester*, 4 Jur. N. S. 1269; and see the remarks of Baggallay, L.J., in *Macdonald* v. *Irvine*, 8 Ch. D., p. 113. Not only is the rule an artificial one, but it is based on a mistaken notion that enjoyment in specie depends on the bequest being specific, as may be seen from Lord Eldon's judgment, and that of Shadwell, V.C., in *Mills* v. *Mills*, 7 Sim. 501. The two questions are quite distinct. See per Lord Cottenham in *Pickering* v. *Pickering*, 4 Myl. & Cr. 289.

the specified property out of the rule. Whether in such a case the bequest of the particulars is specific is discussed in Chapters XXIX. and XXX.

If, however, the bequest of the particulars enumerated is not specific, then it seems that the mere enumeration of some particulars, without any other indication, is not sufficient to exclude the rule (*i*).

Vaughan v. Buck.

But Lord Lyndhurst, C., in *Vaughan* v. *Buck* (*j*), on a will of doubtful construction, which the L.C. said might for the purpose now in question be read thus: "I give the whole of my property, viz. my house, 21, North Street, 1000*l*. New 4*l*. per cents., 1500*l*. in the 3*l*. per cent. Consols, 645*l*. in the 3*l*. per cent. Reduced, and 20*l*. per annum long annuities, with the residue and interest, if there should be any, to my wife for life, and after to be divided equally between my surviving children:" held that the widow was entitled to enjoy the house, which was leasehold, and the long annuities, in specie. "With respect to the house," Lord Lyndhurst said, "the bequest is clearly specific, and as to the long annuities they constitute one of the items in the testator's property existing at the date of the will, and which by this description he bequeathed to his wife. . . . *Bethune* v. *Kennedy* (*k*) is similar in principle, and corresponds nearly in its circumstances with the present."

But, in fact, the M.R., in *Bethune* v. *Kennedy*, held that there was a specific gift of the funds: and *Vaughan* v. *Buck* was followed with some reluctance in *Oakes* v. *Strachey* (*l*) by the V.-C., whose decision had been overruled in the former case by Lord Lyndhurst (*m*).

What will exclude rule.

It has been said that the effect of the later cases is to allow small indications of intention to prevent the application of the rule (*n*); but it must be done by a fair construction of the will, the burden being always on those who would exclude the rule (*o*). In *Stanier* v. *Hodgkinson* (*oo*) the testator gave his wife all his real and personal estate during widowhood, and at her death to be divided among his children; "also my shares and interest" in two

(*i*) *Stirling* v. *Lydiard*, 3 Atk. 199; *Mills* v. *Mills*, 7 Sim. 501; *House* v. *Way*, 18 L. J. Ch. 22, 12 Jur. 939; *Cotton* v. *Cotton*, 14 Jur. 950; *James* v. *Gammon*, 15 L. J. Ch. 217; *Simpson* v. *Earles*, 11 Jur. 921; *Pickup* v. *Atkinson*, 4 Hare, 624; and see *Sutherland* v. *Cooke*, 1 Coll. 498; *Morgan* v. *Morgan*, 14 Bea. 72; *Craig* v. *Wheeler*, 29 L. J. Ch. 374; *Re Tootal's Estate*, 2 Ch. D. 628.

(*j*) 1 Phill. 75. See also *Hubbard* v. *Young*, 10 Bea. 203; *Mills* v. *Brown*, 21 Bea. 1.

(*k*) 1 My. & Cr. 114.

(*l*) 13 Sim. 414.

(*m*) In *Milne* v. *Parker*, 12 Jur. 171, the intention to give the residuary legatee the income in specie of part of the residue was clear.

(*n*) *Morgan* v. *Morgan*, 14 Bea. 72; and see 3 Hare, pp. 612, 613.

(*o*) *Macdonald* v. *Irvine*, 8 Ch. D. 101.

(*oo*) 73 L. J. Ch. 179.

colliery businesses: it was held that the wife was entitled to the income of the businesses in specie, partly because they were specifically mentioned, and partly by reason of the direction that the residue was to be divided at her death.

Expressions which imply enjoyment in specie.

A direction to renew or keep in repair (*p*), or to demise (*q*) or discharge incumbrances on (*r*) leaseholds, points to enjoyment in specie. And where after a bequest of a residue for life there is an express trust for conversion at a specified period, it will be inferred that no conversion is to take place previously to that period, and the tenant for life, therefore, takes the income in specie (*s*); so where there is a power to convert generally (*t*), and à fortiori where there is a direction not to convert without consent (*u*), or for a definite term of seven years (*v*), or a discretion is given either to convert or not (*w*).

In *Re Benthum* (*x*), a testator, who was entitled to freeholds, and also to leasehold houses held for an unexpired term of 39 years, and let to weekly tenants, after bequeathing legacies gave to his widow a life rent of all his property, with power to sell and reinvest the proceeds on good security. Kekewich, J., held that the power of sale was sufficient to exclude the rule in *Howe* v. *Lord Dartmouth*. And an express trust to convert all "except Government stock" entitles the tenant for life to specific enjoyment of long annuities (*y*). And this was so held, even though in the same will the trustees were directed to invest the proceeds of conversion in "Government stock," a direction which admittedly did not authorize them to invest in long annuities: the reason why it did not do so being not that long annuities did not come within the words of the direction as well as within the words of the exception, but because the Court would not permit the trustees to select perishable securities (*z*).

(*p*) *Crowe* v. *Crisford*, 17 Bea. 507.

(*q*) *Hind* v. *Selby*, 22 Bea. 373; *Thursby* v. *Thursby*, L. R., 19 Eq. 295.

(*r*) *Re Sewell's Estate*, L. R., 11 Eq. 80.

(*s*) *Alcock* v. *Sloper*, 2 My. & K. 699; *Hunt* v. *Scott*, 1 Do G. & S. 219; *Daniel* v. *Warren*, 2 Y. & C. C. C. 200; *Harvey* v. *Harvey*, 5 Bea. 134; *Rowe* v. *Rowe*, 29 Bea. 276; *Re Holden*, W. N., 1888, p. 33; *Stanier* v. *Hodgkinson*, supra, n. (*oo*). In *Mills* v. *Mills*, 7 Sim. 501, the direction to convert had reference to a conversion into actual money for the purpose of making loans, and did not therefore exclude by implication a previous conversion into other investments.

(*t*) *Bowden* v. *Bowden*, 17 Sim. 65; *Re Leonard*, 29 W. R. 234; *Skirving* v. *Williams*, 24 Bea. 275. But see *Jebb* v. *Tugwell*, 20 Bea. 84, and the cases referred to, p. 1249, below.

(*u*) *Hinves* v. *Hinves*, 3 Hare, 609; *Ellis* v. *Eden*, 23 Bea. 543.

(*v*) *Green* v. *Britten*, 1 D. J. & S. 649.

(*w*) *Simpson* v. *Lester*, 4 Jur. N. S. 1269.

(*x*) 94 L. T. 307; *Re Pilcairn*, [1896] 2 Ch. 199.

(*y*) *Howard* v. *Kay*, 27 L. J. Ch. 448; *Wilday* v. *Sandys*, L. R., 7 Eq. 455. See also *Grant* v. *Mussett*, 8 W. R. 330.

(*z*) Per Lord Romilly, L. R., 7 Eq. at p. 457. As to the decision in *Tickner* v. *Old*, L. R., 18 Eq. 422, which is sometimes cited as bearing on this matter, see ante, p. 1236, n. (*i*).

A power to retain investments of a specified nature entitles the tenant for life to the whole income of those investments, but not, of course, to the income of other unauthorized investments (*a*).

Distinction between hazardous and wasting investments.

In considering whether the rule in *Howe* v. *Earl of Dartmouth* applies in a particular case, there is, on principle, no distinction between investments which are wasting, and those which are merely speculative or hazardous, for if the testator shews an intention that the tenant for life should have the enjoyment of the residue in specie, he excludes the rule in *Howe* v. *Earl of Dartmouth* altogether, and not merely in respect of hazardous investments. But this principle has not been adhered to, and it was formerly regarded as settled that if a testator bequeathed his residue upon trust for A. for life, and gave the trustees a discretionary power to retain any of his investments, A. was entitled to the whole of the income arising from unauthorized investments of a permanent nature, so long as they were retained unconverted (*b*), but not to that arising from wasting investments: it was considered that these latter ought to be converted, or treated as having been converted (*c*). Wasting investments, it was held, could only be excluded from the rule if a clear intention appeared. Thus, in *Simpson* v. *Lester* (*d*), a testator gave all his residue, "including my mining property," in trust for his wife for life, and gave his trustees a discretionary power of conversion: it was held that the tenant for life was entitled to the enjoyment in specie of the testator's mining property. So in *Burton* v. *Mount* (*e*), where a testator gave all his real and personal estate upon trust to pay the rents, profits, dividends and interest to A. for life, and empowered his trustees, notwithstanding the devise and bequest of his freehold and leasehold estates, to sell the same, it was held that A. was entitled to the enjoyment in specie of leaseholds and long annuities forming part of the residue. However, the leaning of the courts is now in favour of the true principle, and where a testator gives his trustees a power to retain existing investments, this entitles the tenant for life to the income of wasting as well as of permanent investments (*ee*).

(*a*) *Brown* v. *Gellatly*, L. R., 2 Ch. 751.

(*b*) *Re Sheldon*, 39 Ch. D. 50; *Re Bates*, [1907] 1 Ch. 22; *Re Wilson*, [1907] 1 Ch. 394.

(*c*) *Porter* v. *Baddeley*, 5 Ch. D. 542. *Gray* v. *Siggers*, 15 Ch. D. 74, was, at the time it was decided, contrary to the current of authority.

(*d*) 4 Jur. N. S. 1269.

(*e*) 2 De G. & S. 383. The V.-C. (Knight Bruce) intimated that he would probably have decided otherwise as to the Long Annuities but for the decisions in *Alcock* v. *Sloper* (2 M. & K. 699), *Collins* v. *Collins* (2 M. & K. 703), *Bethune* v. *Kennedy* (1 My. & Cr. 114), and *Pickering* v. *Pickering* (4 My. & Cr. 289); and see *Waters* v. *Waters*, 32 L. T. N. S. 306, n.

(*ee*) *Re Nicholson*, [1909] 2 Ch. 111.

Reversionary interest.

Conversely, if the trustees have a discretionary power of conversion, and in the exercise of their discretion retain a reversionary interest unsold until after the death of the tenant for life, his representatives are not entitled to any part of the proceeds of sale (*f*).

Expressions insufficient to confer enjoyment in specie.

But a discretionary power of sale does not always entitle the tenant for life to enjoyment in specie. Thus, a power to sell the testator's ships for the benefit of his estate till they can be satisfactorily sold (*g*), or a direction to sell a horse if a stated sum should be offered, if not, to let him, and if a sale should be made, to invest the money (*h*)—a sale upon the first good opportunity being in each case evidently contemplated—shews no intention to alter equities between successive takers, but only to regulate the discretion of the trustees in conducting the sale, and does not give the tenant for life the actual profits made before sale (*i*). So a direction to convert certain specific parts of the personal estate does not imply that the residuary estate is not to be converted (*j*); neither does a direction to sell the residuary personal estate for payment of debts and legacies imply that it is to be sold for no other purpose; since a sale for the purpose of making those payments is no more than the law itself would order in the common course of administration without an express direction (*k*). A power to vary securities, though an insufficient ground for conversion in the case of a specific gift (*l*), yet affords a strong argument in favour of a sale when it has reference to a residuary bequest (*m*).

Where of several items in one gift some are clearly not subject to sale.

Where various items of property are dealt with together, the fact that some of them are clearly to be enjoyed in specie (and more especially if these be of a kind which, according to the general rule, ought to be converted), affords an argument in favour of the remaining items having been also intended to be so enjoyed (*n*); an

(*f*) *Re Pitcairn*, [1896] 2 Ch. 199.

(*g*) *Brown* v. *Gellatly*, L. R., 2 Ch. 751. Cf. *Thursby* v. *Thursby*, L. R., 19 Eq. 395.

(*h*) *Arnold* v. *Ennis*, 2 Ir. Ch. Rep. 601. See *Gibson* v. *Bott*, ante, p. 1235.

(*i*) Unless there is an express direction that interim profits shall go as income, see *Re Chancellor*, 26 Ch. D. 42.

(*j*) *Cafe* v. *Bent*, 5 Hare, 24; *Hood* v. *Clapham*, 19 Bea. 90, which is not consistent with *Morgan* v. *Morgan*, 14 Bea. 85, 86. Secus where all is directed to be sold except specific parts, see cases cited ante, p. 1247.

(*k*) *Caldecott* v. *Caldecott*, 1 Y. & C. C. C. 312; *Johnson* v. *Johnson*, 2 Coll. 441.

(*l*) *Lord* v. *Godfrey*, 4 Mad. 455.

(*m*) *Morgan* v. *Morgan*, 14 Bea. 72. Compare *Lyons* v. *Harris*, [1907] 1 Ir. 32.

(*n*) *Bethune* v. *Kennedy*, 1 My. & Cr. 114; *Burton* v. *Mount*, 2 De G. & S. 383; *Simpson* v. *Earles*, 11 Jur. 921, V.-C. Wigram; *House* v. *Way*, 12 Jur. 958, 18 L. J. Ch. 22, V.-C. Wigram; *Howe* v. *Howe*, 14 Jur. 359 (K. Brucc, V.-C.); *Cotton* v. *Cotton*, ib. 950; *Booth* v. *Coulton*, 7 Jur. N. S. 207 (freehold distillery with utensils, &c., let together at one rent); *Holgate* v. *Jennings*, 24 Bea. 623, where it was said that though investments were to be enjoyed in specie, debts, as turnpike bonds, must be got in.

CHAP. XXXIV.

argument, however, which requires other corroborative circumstances to render it conclusive (*o*).

Where the gift in remainder points to the very property.

An intention that the tenant for life shall enjoy the property in specie is sometimes collected from the circumstance that the terms of the gift in remainder point to the very property as it existed at the testator's death. Thus, in *Collins* v. *Collins* (*p*), where the words of the bequest were "I give to my wife, all and every part of my property, in every shape, and without any reserve, and in whatever manner it is situated, for her natural life; and at her death the property so left to be divided in the following manner." Part of the testator's property consisted of a leasehold messuage, held for a term of twenty-eight years; and Sir J. Leach, M.R., considered that the ulterior legatees were not entitled to have the lease sold, but that it was the intention of the testator that his widow should enjoy the leasehold property for her life.

Collins v. *Collins.*

Pickering v. *Pickering.*

Again, in *Pickering* v. *Pickering* (*q*), where a testator gave to his wife, subject to the payment of his debts and legacies, and such annuities and assurances as he was liable to pay, all the interests, rents, dividends, annual produce and profits, use and enjoyment, of his real and personal estate, for life; and at her decease, the testator gave all the rest and residue of his estate, real and personal, to his son-in-law; but, in case of his dying before the testator's wife, then he directed the residue to be divided in manner therein mentioned. Part of the testator's property consisted of a leasehold house and a life annuity; and the charges thereon also comprised annual payments. Lord Langdale, M.R., decided that in this case the testator had indicated an intention that the property should be specifically enjoyed by his wife during her life; and Lord Cottenham, on appeal (*r*), was of the same opinion, grounding his judgment especially on *Collins* v. *Collins*, to which he thought the direction to divide the property on a certain event precisely assimilated the case before him. He remarked that in *Collins* v. *Collins* there were expressions only applicable to the actual condition of the property.

Harris v. *Poyner.*

In *Harris* v. *Poyner* (*s*), the testator devised and bequeathed all the residue of his real and personal estate, "and all his estate, term and interest therein," to trustees in trust for his wife for life, and after her death, he devised "the same, and all his estate, term

(*o*) *Howe* v. *Earl of Dartmouth*, 7 Ves. 137*a*; *Blann* v. *Bell*, 5 De G. & S. 658, 2 D. M. & G. 775.

(*p*) 2 My. & K. 703.

(*q*) 2 Bea. 31.

(*r*) 4 My. & Cr. 289.

(*s*) 1 Drew. 174; but see *Lichfield* v. *Baker*, 2 Bea. 481, 13 ib. 447; *Thornton* v. *Ellis*, 15 Bea. 193; *Bowden* v. *Bowden*, 17 Sim. 65.

and interest therein" to his son: Sir R. Kindersley, V.-C., thought that the testator intended the son to take the identical property, and, therefore, that there was to be no conversion during the life of the widow.

Effect of gift of rents to tenant for life.

In *Pickup* v. *Atkinson* (*t*), the ground on which the conversion was opposed was, that there was a gift to the tenant for life of the rents, profits, dividends and interest of all the residue, &c., and that if leaseholds comprised in the residue were to be converted, the word "rents" would, in effect, be struck out of the will. In support of this, *Goodenough* v. *Tremamondo* (*u*) was cited, where Lord Langdale, M.R., relying on the use of that word in the gift for life, and gift over, held that there was to be no conversion; but Sir J. Wigram, V.-C., in deciding that there must be a conversion in the case before him, said that, according to that argument, the use of the words "dividends" (*v*), "interest," would prevent the conversion of any property yielding income denominated by those words. However, in *Cafe* v. *Bent* (*w*), where a testator directed a percentage on the receipt of the "rents" of the residue, after satisfying "all ground rents and other outgoings," to be paid to his son, and none of the property included in the residue except leaseholds produced "rents," the same judge held that the leaseholds were to be enjoyed in specie. This conclusion was probably fortified by a different percentage being given on the "dividends" arising from the residue.

In *Re Game* (*x*), a testator directed that the rents and profits of his residuary real and personal estate should be paid to his wife for life; and after her death he gave his residuary estate to others in succession, subject to certain annuities, and conferred on the annuitants a power of distress. Stirling, J., held that neither the direction to pay rents nor the power of distress was sufficient to exclude the operation of the rule in *Howe* v. *Lord Dartmouth*.

Gift of "income" of residue.

In *Boys* v. *Boys* (*y*), a testator gave to his wife for life the interest, dividends, or income of all moneys or stock, "and of all other property whatsoever yielding income at my decease": it was held

(*t*) 4 Hare, 624.

(*u*) 2 Bea. 512; and see *Marshall* v. *Bremner*, 2 Sm. & Gif. 237; *Crowe* v. *Crisford*, 17 Bea. 507; *Skirving* v. *Williams*, 24 Bea. 275.

(*v*) Some stress was laid upon this word by Sir J. Leach in *Alcock* v. *Sloper*; and see *Blann* v. *Bell*, 5 De G. & S. 658; *Bowden* v. *Bowden*, 17 Sim. 65; but see *Sutherland* v. *Cooke*, 1 Coll. 498.

(*w*) 5 Hare, 24; see *Neville* v. *Fortescue*, 16 Sim. 333.

(*x*) [1897] 1 Ch. 881, following *Craig* v. *Wheeler*, 29 L. J. Ch. 374, and *Harris* v. *Poyner*, 1 Dr. 174, and discussing *Crowe* v. *Crisford*, 17 Bea. 507; *Wearing* v. *Wearing*, 23 Bea. 99, and *Vachell* v. *Roberts*, 32 Bea. 140 (*Hood* v. *Clapham*, 19 Bea. 90 was not cited in *Re Game*).

(*y*) 28 Bea. 436.

CHAP. XXXIV.

by Romilly, M.R., that this shewed an intention to give the widow the income of the funds as they stood at the death of the testator. No doubt this was so, but that is so in all the cases to which the rule in *Howe* v. *Lord Dartmouth* applies. It is clear from the modern decisions that a gift of the income of "my estate" to a person for life, does not entitle him to the enjoyment of it in specie (*z*).

(*z*) *Macdonald* v. *Irvine*, 8 Ch. D. 101; *Lyons* v. *Harris*, [1907] 1 Ir. 32.

CHAPTER XXXV.

DESCRIPTION OF PERSONS AND THINGS.

	PAGE		PAGE
I. *General Principles*.....	1253	B. *Property*—	
II. *Falsa Demonstratio non nocet*.....	1265	(1) *Words descriptive of Land, Houses, &c.*	1287
III. *Property answering the Description alone passes*....	1276	(2) *Words descriptive of Personal Property*.....	1299
IV. *Words of Description*—			
A. *Persons*.....	1284		

I.—**General Principles.**—If a testator makes a disposition in such terms that the subject or object of gift cannot be identified, the gift necessarily fails: as where he devises his land in the parish of A. and has at the time of his death no land in the parish of A. (*a*), or makes a gift of property, and leaves the name of the devisee or legatee blank (*b*). But if the testator uses a description which, though inaccurate, affords some means of identifying the subject or object of the gift, the error may be explained by parol evidence: as where he devises his "Quendon Hall Estates in the county of Essex," having no estate so named, but having a house called Quendon Hall and lands in Essex (*c*); or where he gives his "shares in the X. Company," and it appears that although he has no shares he has stock in that company (*d*); or gives property to Charles Smith, and it appears that at the date of the will the testator knew no one of that name, but knew a person called Richard Smith (*e*).

Object or subject of gift not identified.

Parol evidence.

It will also be remembered that if a testator gives one of his chattels, or part of his land, without defining or identifying it, this may give the legatee or devisee a right of selection (*f*). Or if he bequeaths a chattel or sum of stock, &c., in a general way, the legatee may be entitled to require the executors to purchase it (*g*).

Right of selection or purchase.

(*a*) *Millers* v. *Travers*, 8 Bing. 244; *Barber* v. *Wood*, 4 Ch. D. 885, and other cases cited ante, Chap. XV.
(*b*) Ante, p. 514.
(*c*) *Webb* v. *Byng*, 1 K. & J. 580.
(*d*) *Morrice* v. *Aylmer*, L. R., 7 H. L. 717, post, p. 1306.
(*e*) *Pitcairne* v. *Brase*, Finch, 403, and other cases cited post, p. 1259.
(*f*) See Chap. XIV.
(*g*) See Chap. XXX.

CHAP. XXXV.

All particulars in description of subject-matter of disposition need not be correct.

The general rule is thus laid down by Mr. Jarman: (*h*) "It is clearly not essential to the validity of a devise that all the particulars which the testator has included in his description of the subject or object of gift should be accurate. There need only be enough of correspondence to afford the means of identifying both (*i*). Thus, the devise of a house or field, described by name, is not rendered uncertain by its being mentioned to be in the occupation of a person who is not the occupier; for as the property was adequately described in the first instance, this erroneous and unnecessary addition does not vitiate the devise (*j*). And even if it should turn out that part only of the house or field so named was in the occupation of the person designated by the testator as the occupant, the whole nevertheless would pass (*k*).

Mistake in locality of lands.

"A reference to occupancy often comes in aid of a defect or error in the locality, and vice versâ. Thus, a devise of 'my lands at Bramstead, in the county of *Surrey*, in the occupation of John Ashley,' has been held to pass lands in the occupation of John Ashley, at Bramstead, in the county of *Hants* (*l*). Even without the reference to the occupancy, however, in this instance the description would have been sufficient, for the misnomer of the county in which a parish is situate produces no uncertainty unless the testator should happen to have property answering to the description in a parish of that name in more than one county (*m*).

"It has even been held that a devise of houses and lands lying in the *parish* of Billing, and in a street called Brook Street, is a good devise of lands in Billing *Street*, the testator having no lands in the parish of Billing (*n*).

Leasehold will pass as "freehold."

"So it is clear that a leasehold estate will pass under the description of freehold, where the reference to its name or local situation, and the fact of the testator having no freehold estate answering thereto, leave no doubt of the identity (*o*); and vice versâ (*p*).

"It has been adjudged, too, that under a devise of buildings in a specified street, houses situate in a lane contiguous to, and opening

(*h*) First ed., p. 329, where these remarks form part of the chapter on "Gifts void for Uncertainty."

(*i*) See *Purchase* v. *Shallis*, 19 L. J. Ch. 518; *Howard* v. *Conway*, 1 Coll. 87; *Stephens* v. *Powys*, 1 De G. & J. 24.

(*j*) *Blague* v. *Gold*, Cro. Car. 447, 473; *Tomson* v. *Thornton*, And. 188, 2 Leon. 120.

(*k*) *Chamberlaine* v. *Turner*, Cro. Car. 129.

(*l*) *Hastead* v. *Searle*, 1 Ld. Raym. 728.

(*m*) See *Owens* v. *Bean*, Finch, 395; *Brown* v. *Longley*, 2 Eq. Ca. Ab. 416, pl. 14.

(*n*) Brownl. 131, 8 Vin. Ab. 277, pl. 7.

(*o*) *Denn* d. *Wilkins* v. *Kemeys*, 9 East, 366.

(*p*) *Day* v. *Trig*, 1 P. W. 286, post; *Doe* d. *Dunning* v. *Lord Cranstoun*, 7 M. & Wels. 1.

into, that street pass, for want of a subject more nearly answering to the description" (*q*).

Misdescription in case of personalty.

The same principle applies to gifts of personal property; thus a gift of debenture stock of a certain company may pass debentures of that company if the testator had no debenture stock (*r*); a gift of "shares" may pass common stock (*s*), or even debenture stock (*t*); and a bequest of Danish bonds for 3520*l.* may pass Danish bonds for 5600*l.* if the error is clear (*u*). A bequest of 700*l.* East India stock has even been held to pass 700*l.* Bank stock (*v*).

In *Re Jameson* (*w*) a testatrix bequeathed all her shares in "the Wensleydale and Swaledale Banking Company"; there was no such bank, either at the date of the will or at the testatrix's death, but she had formerly owned shares in the Swaledale and Wensleydale Banking Company, which before the date of the will had been converted into shares of Barclay & Company: it was held that these latter shares passed by the bequest. Numerous other examples of erroneous description may be cited (*x*).

Devise of certain land may pass share of proceeds of sale.

On the same principle, if a person is entitled, under a certain deed, to a moiety of the proceeds of sale of land at X. which is subject to an absolute trust for sale, and by his will devises all the lands, tenements and hereditaments of which he is seised or possessed under that deed, this will pass his moiety of the proceeds of sale (*xx*). So, if a person is in possession, as mortgagee, of leasehold property in X., having no other property there, and bequeaths his leasehold property in X. to A., his beneficial interest in the property will pass to A., and not merely the legal estate, although the will contains an express gift of all estates vested in the testator as mortgagee (*y*).

Gift of land may pass mortgage debt.

Distinction between misdescription and ademption.

It is hardly necessary to warn the reader against confusing the principle now under discussion with the doctrine of ademption; if a testator devises his land at X. to A., and afterwards sells it and invests part of the sale-money on mortgage of the same land, the

(*q*) *Doe* d. *Humphreys* v. *Roberts*, 5 B. & Ald. 407, post, p. 1280, where other cases relating to this point are cited.

(*r*) *Re Nottage* (No. 2), [1895] 2 Ch. 657.

(*s*) *Morrice* v. *Aylmer*, L. R., 7 H. L. 717, and other cases cited post, p. 1306.

(*t*) *Re Weeding*, [1896] 2 Ch. 364, post, p. 1273; *Re Bodman*, post, p. 1306.

(*u*) *Goodlad* v. *Burnett*, 1 K. & J. 341; *Lindgren* v. *Lindgren*, 9 Bea. 358.

(*v*) *Door* v. *Geary*, 1 Ves. sen. 255.

(*w*) [1908] 2 Ch. 111, referred to in Chap. XXX. See also *Re Weeding*, [1896] 2 Ch. 364; *Trinder* v. *Trinder*, L. R., 1 Eq. 695; *Flood* v. *Flood*, [1902] 1 Ir. 538; *Townsend* v. *Townsend*, 1 L. R. Ir. 180, all cited post.

(*x*) *D'Aglie* v. *Fryer*, 12 Sim. 1; *Gallini* v. *Noble*, 3 Mer. 691, and other cases cited post.

(*xx*) *Re Lowman*, [1895] 2 Ch. 348; *Re Glassington*, [1906] 2 Ch. 305.

(*y*) *Woodhouse* v. *Meredith*, 1 Mer. 450; *Re Carter*, [1900] 1 Ch. 801.

CHAP. XXXV.

devise to A. is adeemed (*z*). So if a testator gives his shares in a certain company, and after the date of the will the shares are converted into the shares of another company, they do not, as a general rule, pass by the bequest (*zz*). There are many other instances in which it is necessary to distinguish between cases where a testator misdescribes property belonging to him at the date of his will, and those in which he disposes of property by an accurate description, which afterwards becomes inaccurate or ambiguous through a change in the property itself. The law governing cases of the second class is unsatisfactory by reason of sec. 24 of the Wills Act, the effect of which has been already considered (*a*).

Where description of property is changed after date of will.

Ademption by removal, &c.

The question whether a gift of chattels in a particular place is adeemed by their temporary or permanent removal is discussed elsewhere (*b*).

In description of objects all particulars need not be correct.

Mr. Jarman continues (*bb*): "The same principles of construction of course apply to objects of gift. It is sufficient, therefore, that the devisee or legatee is so designated as to be distinguished from every other person, and the inaptitude of some of the particulars introduced into the testator's description is immaterial; and this whether the object of the gift be a corporation or an individual. Thus, a devise 'to the mayor, jurats, and town-council of the ancient town of Rye,' has been held to be good, though they were incorporated by the name of 'the mayor, jurats, and commonalty'" (*c*).

On the same principle, where money was bequeathed to the provost and fellows of Queen's College, Oxford, to purchase books to be added to the library, the proper name of the corporation being "the provost and scholars, &c.": the corporation was held to be entitled, because the evidence shewed that in common parlance the name of "Provost and Fellows" was used instead of the proper corporate name of the College, and also on the ground that the library belonged to the body corporate, who were, therefore, the proper persons to make additions to it (*d*). And where a bequest to

(*z*) *Re Clowes*, [1893] 1 Ch. 214. (The devisee would not now even take the legal estate: Conveyancing Act, 1881, s. 30.) Compare *Moor* v. *Raisbeck*, 12 Sim. 123, and other cases cited in Chap. VII.

(*zz*) See the section on Ademption in Chap. XXX.

(*a*) Chap. XII. (*b*) Chap. XXX.

(*bb*) First edition, p. 330.

(*c*) *Att.-Gen.* v. *Corporation of Rye*, 1 J. B. Moore, 267, 7 Taunt. 546. See also Fitz. Dev. 27, Dalison, 78, s. 8; 10 Rep. 57; *Foster* v. *Watter*, Cro. Eliz. 106, 2 Leon. 165. But as to gifts to corporations, vide ante, Chap. V.

(*d*) *Queen's College* v. *Sutton*, 12 Sim. 521. In *Att.-Gen.* v. *Sibthorp* (2 Russ. & My. 107) a bequest "to the fellows and demies of Magdalen College, Oxford," was held void, not on the ground that the description of the college was inaccurate, but on the ground that the whole bequest was "so extraordinary and irrational" that it was impossible to support it.

"the Westminster Hospital, Charing Cross," was claimed by the Westminster Hospital in Broad Sanctuary, and also by the Royal Ophthalmic Hospital, and by the Charing Cross Hospital, Agar Street, Strand, the latter was held entitled, as being nearest to the locality mentioned, and as being a general hospital (*e*): the testator, when he intended to give to a hospital of a special character, having so named it (*f*). And where a testatrix made a bequest to "the Church Pastoral Aid Society in England," and another bequest to "the Church Pastoral Aid Society in Ireland," there being no such Society in Ireland, it was held that the Spiritual Aid Society in Ireland, a society similar to the Church Pastoral Aid Society in England, was entitled to the bequest (*g*).

Parol evidence to explain ambiguity.

Where the description is equally applicable to two different objects, either of which would have been sufficiently designated if the other had not existed, evidence is admissible to remove the ambiguity, by shewing which of them was known to the testator (*h*), and (if a charitable institution) to which of them he subscribed (*i*). If this evidence fails to indicate which the testator meant, the bequest fails, unless, as already noticed, it is charitable and applicable cy-près (*j*).

General rule as to name.

As a general rule, *veritas nominis tollit errorem demonstrationis*; so that where there is a person to answer the name, it will be immaterial that any further description does not precisely apply. Thus a bequest to C. M. S. and C. E., legitimate son and daughter of C. S., was held to be a good bequest to persons of those names, though they turned out to be illegitimate, in consequence of an anterior marriage of their father being established (*k*). And the rule has prevailed, although besides a wrong or inaccurate description, one of the christian names of the legatee was omitted; a gift to "my niece Elizabeth" being held a sufficient description of Elizabeth Jane, a great grand-niece (*l*).

Gift to person described as "wife" or "husband," &c.

It is on this principle that a gift to A. B. by name, described as

(*e*) See *Re Alchin's Trusts*, L. R., 14 Eq. 230.

(*f*) *Bradshaw* v. *Thompson*, 2 Y. & C. C. C. 295; and see *Wilson* v. *Squire*, 1 Y. & C. C. C. 654; *Smith* v. *Ruger*, 5 Jur. N. S. 905; *Re Davies*, 21 W. R. 154.

(*g*) *Re Maguire*, L. R., 9 Eq. 632; but see as to this case, ante, p. 228. See *Coldwell* v. *Holme*, 2 Sm. & G. 31.

(*h*) *King's College Hospital* v. *Wheildon*, 18 Bea. 30.

(*i*) *Re Kilvert's Trusts*, L. R., 7 Ch. 170; *Re Fearn's Will*, 27 W. R. 392; *Re Briscoe's Trust*, 20 W. R. 355, and the other cases cited ante, p. 227.

(*j*) *Re Clergy Society*, 2 K. & J. 615, ante, p. 242.

(*k*) *Standen* v. *Standen*, 2 Ves. jun. 589, 6 B. P. C. Toml. 193; and see *Doe* d. *Gains* v. *Rouse*, 5 C. B. 422; *Giles* v. *Giles*, 1 Kee. 685; *Re Blackman*, 16 Bea. 377; *Ford* v. *Batley*, 23 L. J. Ch. 225; *Pratt* v. *Mathew*, 22 Bea. 328; *Farrer* v. *St. Catharine's College*, L. R., 16 Eq. 19. As to bequests to illegitimate children, see post, Chap. XLIII.

(*l*) *Stringer* v. *Gardiner*, 27 Bea. 35, 4 De G. & J. 468.

CHAP. XXXV.

the wife or husband or widow of the testator or another person, is not in general affected by the fact of the devisee or legatee not answering the description. Thus in *Giles* v. *Giles* (*m*) a bequest by the testator to his wife Ann Giles was held good, although their supposed marriage was illegal, her first husband being alive at the time; it seems that she and the testator both supposed that he was dead. The case is still clearer if the testator knows at the time of the supposed marriage that it is illegal (*n*). Where the testator goes through the form of marriage with a woman who represents herself to be a widow, her first husband being in fact living, the validity of a gift by the testator to her as "my wife" depends on whether she made the representation fraudulently (*o*): if she did the Court of Probate will refuse to allow her to take advantage of it (*p*).

The same rule applies where a testatrix makes a gift to A. B., describing him as "my husband" (*q*).

Even if no form of marriage is gone through, a bequest to a woman described as "my wife A. B." is good, if she has been recognized by the testator as his wife: and the fact that he has a lawful wife living makes no difference (*r*).

Where the gift is not to a person by name, but simply to "my wife" or "my husband," different considerations prevail. The cases have been already considered (*s*).

Divorced wife.

In *Re Boddington* (*t*) a testator bequeathed a legacy of 200*l.* "to my wife E. C.," and also bequeathed to "my said wife" an annuity "so long as she shall continue my widow and unmarried"; after the date of the will the marriage was annulled at the suit of the wife: it was held that she was entitled to the legacy, but not to the annuity, on the ground that she was not the testator's widow. If the annuity had been given to her so long as she continued unmarried the result would have been different. Thus in *Knox* v. *Wells* (*u*) the testator bequeathed an annuity to his son George Wells and Eliza his wife jointly, and directed that on the death of George, "leaving Eliza his wife surviving him," his trustees should pay to her an annuity "so long as she continues unmarried." After the

(*m*) 1 Kee. 685; s. c. sub nom. *Penfold* v. *Giles*, 6 L. J. Ch. 4.

(*n*) *Doe* d. *Gains* v. *Rouse*, 5 C. B. 422; *Dilley* v. *Matthews*, 2 N. R. 60; *Pratt* v. *Mathew*, 22 Bea. 328; *Re Wagstaff*, [1907] 2 Ch. 35; [1908] 1 Ch. 162.

(*o*) *Re Petts*, 27 Bea. 576, where the woman had heard nothing from her first husband for nineteen years.

(*p*) *Meluish* v. *Milton*, 3 Ch. D. 27. In the earlier cases of *Kennell* v. *Abbott*, 4 Ves. 802, *Wilkinson* v. *Joughin*, L. R., 2 Eq. 319, went on the theory that the Court of Chancery has jurisdiction in such cases, but the contrary is now settled; supra, pp. 42, 43.

(*q*) *Kennell* v. *Abbott*, supra.

(*r*) *Lepine* v. *Bean*, L. R., 10 Eq. 160.

(*s*) Supra, p. 400.

(*t*) 22 Ch. D. 597; 25 Ch. D. 685; *N.* v. *M.* 1 T. L. R. 523.

(*u*) 48 L. T. 655.

testat[illegible]ath George Wells obtained a divorce from his wife and died in her lifetime; she was held to be entitled to the annuity so long as she remained unmarried.

Reputed wife of third person.

In *Turner* v. *Brittain* (*v*) a testator made a bequest to H., the present wife of his son J. B. There was a woman named C. H. living with J. B., and they had falsely represented to the testator that they were married. It was held that C. H. was entitled to the legacy. The same principle was followed in *Anderson* v. *Berkley* (*w*). In many cases the use of the word "wife" to describe the reputed wife of a person has an important bearing on the construction of the word "children" as meaning his illegitimate children by her (*x*). Conversely, a reference to a person by name as the "child" of A. B. (he being the illegitimate child of A. B.) may have a bearing on the construction of a gift to "the wife" of A. B. (*y*).

Gift to "widow" of third person.

In *Rishton* v. *Cobb* (*z*) the testator gave 2000*l.* to trustees upon trust to invest and allow "Lady C., widow of the late Sir N. C., to receive the dividends so long as she shall continue single and unmarried"; he also bequeathed "to the said Lady C. the sum of 500*l.*" About five years before the date of the will, Lady C. had married H. R., who, a few months after the marriage, went abroad and never returned. The testator was not aware of these facts, and the lady continued to call herself Lady C. It was held by Lord Cottenham that in concealing her second marriage she acted with no improper motive, and that the testator's bounty was not induced by it, and that she was entitled, not only to the legacy of 500*l.*, but also to the 2000*l.* The propriety of the decision was doubted by Fry, J., and Lord Selborne in *Re Boddington* (*a*), so far as regards the 2000*l.*: it is submitted that so far as regards the 500*l.* the decision was clearly right.

Latent ambiguity.

The principles above stated do not, of course, apply where there is a latent ambiguity arising from the fact that the description given in the will applies to two persons; these cases are considered in another chapter (*aa*).

Misnomer of individuals.

Another maxim is, that *nihil facit error nominis cum de corpore constat* (*b*); and there are many cases in which the description is such as to lead to an irresistible inference that the person named was not the person in the testator's mind. Thus, where (*c*) the devise was to

(*v*) 3 N. R. 21.
(*w*) [1902] 1 Ch. 936.
(*x*) See *Re Horner*, 37 Ch. D. 695; *Re Harrison*, [1894] 1 Ch. 561, and the other cases cited post, Chap. XLIII.
(*y*) See *Re Lowe*, 61 L. J. Ch. 415, ante, p. 401.
(*z*) 5 Myl. & Cr. 145.
(*a*) Supra, p. 1258.
(*aa*) Chap. XV.
(*b*) 11 Rep. 21a.
(*c*) *Pitcairne* v. *Brase*, Finch, 403.

CHAP. XXXV.

"William Pitcairne, eldest son of Charles Pitcairne," it was insisted that the eldest son had no title, because his name was not William, but Andrew; nevertheless the Court was of opinion that the words were sufficient to point him out with certainty.

"James" entitled under gift to "John."

So (*d*) under a bequest to "John and Benedict, sons of John Sweet." a son named James (there being no John) was held to be entitled. It was proved, too, that the testator used to call him "Jacky"; but Lord Hardwicke appears to have thought this evidence unnecessary to establish his title. And in *Re Hooper* (*e*), under a bequest to "Percy," described as a son of C. A. H., who had no son named Percy, a son of C. A. H. named Herbert, generally called "Bertie," was held to be entitled.

"Edward," written by mistake for "Samuel."

Again, where (*f*) a testator gave an annuity to his brother "Edward Parsons" for life, and, after his decease, the same to go equally among his (E. P.'s) children, "by his present wife," and at the date of the will, the testator had no brother except one named Samuel, who had a wife and children; but four or five years before, he had a brother named Edward, who as well as his wife, was then dead, which fact was known to the testator, who by the same will, gave legacies to his children. The testator had been in the habit of calling his brother Samuel, "Edward" and "Ned." Lord Loughborough, without argument, held the children of Samuel to be entitled.

"Charles," by mistake for "Richard."

In another case (*g*), a bequest to "the Rev. Charles Smith, of Stapleton Tawney, clerk," was held to apply to one who answered the other parts of the description, but whose name was Richard; though it was suggested that the person intended was Charles Smith of Romford, an officer in the army; it appeared, however, that he was dead at the date of the will, and that the testator had been informed of the fact. If the other part of the description, as well as the name, had corresponded with those of the deceased Charles Smith, and the testator could have been ignorant of his death, it would have been difficult to sustain the claim of Richard.

Other instances of mistake in christian name.

So where (*h*) a testator bequeathed to his six grandchildren (*i*) by their christian names, but the name of Ann, one of them, was repeated, and that of Elizabeth, another, omitted, it was held that Elizabeth should take the share mistakenly given to Ann by the repetition of her name. Under the present practice the name

See also *Gynes* v. *Kemsley*, 1 Freem. 293; *Rivers' Case*, 1 Atk. 410.

(*d*) *Dorset* v. *Sweet*, Amb. 175.

(*e*) 88 L. T. 160. See also *Re Radcliffe*, 51 W. R. 409. See *Beaumont* v. *Fell*, 2 P. W. 141, referred to post, p. 1264.

(*f*) *Parsons* v. *Parsons*, 1 Ves. jun. 266.

(*g*) *Smith* v. *Coney*, 6 Ves. 42; see *Re Blackman*, supra.

(*h*) *Garth* v. *Meyrick*, 1 B. C. C. 30.

(*i*) As to gift to a specified number of children, vide post, Chap. XLII., s. III.

inserted by mistake in such a case may be omitted from the probate copy (*j*).

Again, where (*k*) a testator gave to "my namesake Thomas Stockdale, the second son of my brother John Stockdale," the second son, though not named Thomas, was held to be entitled, there being no son of that name. The error in the name here was remarkable, as the testator, in describing the legatee as his own namesake, had his attention particularly drawn to the name.

So, under a devise to "Mary Cook, wife of — Cook" (*l*), a married woman named Elizabeth Cook was held to be entitled, on evidence shewing that the testator had no other relative of the name of Cook, and that she was the person intended. In this case the additional description was very slight, it merely shewed the devisee to be a married woman. The principle has been recognized in several modern cases (*m*).

The decision in *Re Ely* (*n*) seems to be inconsistent with the principle now under discussion. In that case a testator bequeathed to his cousin A., son of his late uncle, unless he should immediately on the testator's death succeed to the title of Marquis of E., the sum of 2000*l.*; A. was dead at the date of the will, and at that date and at the testator's death G. was the only son of the testator's late uncle other than the son who succeeded to the title; Kekewich, J., held that there was no ambiguity; he therefore refused to admit parol evidence that the testator was aware of the death of A. and intended to benefit G., and that the name of the former was inserted by mistake.

Other examples of principle.

The principle is not confined to cases of description by relationship. So far has it been carried that a gift to "my god-child" described as "the daughter of A.," may take effect in favour of the testator's god-child who is the son of A. (*o*).

Distinction where there is more than one claimant.

Where the description of a legatee is inaccurate, it not unfrequently happens that part of the description applies to one person, and part to another. Here the maxims quoted above give but little help. The essence of the previous cases is that as to one term of the description it is applicable to no one: it is clearly erroneous. But in the cases now referred to each of the terms apply correctly,

(*j*) *In bonis Boehm*, [1891] P. 247: ante, pp. 30, 493.

(*k*) *Stockdale* v. *Bushby*, G. Coop. 229, 19 Ves. 381.

(*l*) *Doe* d. *Cook* v. *Danvers*, 7 East, 299.

(*m*) *Patching* v. *Barnett*, 45 L. T. 292 (where the bequest failed for other reasons); *Re Waller*, 68 L. J. Ch. 526; *Baxter* v. *Morgan*, 7 L. R. Ir. 501 (wrong name as well as wrong description).

(*n*) 65 L. T. 452.

(*o*) *Re Blayney*, Ir. R., 9 Eq. 413; *Re Blake's Trusts*, [1904] 1 Ir. 98; *Re Nunn's Trust*, L. R., 19 Eq. 331 (gift to "my housekeeper" by wrong name); *Re Fry*, 22 W. R. 813 (gift to "my servant" by wrong name).

CHAP. XXXV.

or with some degree of accuracy, to some one, and the question is, which is wrong? This can only be solved by considering the general context and the surrounding circumstances (*p*), and although it has been said that the description has generally prevailed over the name, yet numerous instances will be found on both sides.

Cases where the name prevailed.

Thus in *Garland* v. *Beverley* (*q*) where a testator devised land to his nephew for life, remainder to "William, the eldest son of my said nephew" for life, remainder to the issue of W. in tail; William was, in fact, the second son, but was nevertheless held to be entitled. Again, in *Gillett* v. *Gane* (*r*), where the testator devised to his son for life, remainder to "Robert the fourth son" of the son in fee, with an executory gift-over if Robert should die under twenty-one "to —— the fifth son," and so on to those born after the fifth; Robert Henry, in fact, was the third son, but having attained twenty-one was held to be absolutely entitled.

Cases where the description prevailed.

On the other hand, in *Doe* v. *Huthwaite* (*s*), where, after previous limitations, the devise was to "Stokeham H., second son of A." for life, remainder to his issue in strict settlement, remainder "to John H., third son of A." and his issue in like manner; in fact, Stokeham was the third son of A. and John was his second, and it was held that the mistake was in the name, and that John and his issue were entitled before Stokeham and his issue.

So, where there was a gift to "Clare Hannah, the wife of A.," whose wife was named "Hannah" only, but who had an infant daughter, named "Clare Hannah," it was held that the testator could not have had an infant in view when he gave a legacy to a wife, and that therefore the wife was entitled to the legacy (*t*). And where both the name and description are almost entirely inapplicable, the general purpose of the testator, collected from the circumstances, will sometimes point out the object: as where there was a gift for life to "Elizabeth A., a natural daughter of Elizabeth A., single woman, and who formerly lived in my service," with remainder to her children. The servant Elizabeth was a married woman, who had an illegitimate

(*p*) See Chap. XV.

(*q*) 9 Ch. D. 213. So in *Newbolt* v. *Pryce*, 14 Sim. 354, though the name was not fully given; as to which see also *Bernasconi* v. *Atkinson*, *Gillett* v. *Gane*, *Charter* v. *Charter*, all cited infra.

(*r*) L. R., 10 Eq. 29. Other cases where the name has prevailed over the description are, *Bernasconi* v. *Atkinson*, 10 Hare, 345; *Garner* v. *Garner*, 29 Bea. 114; *Farrer* v. *St. Catharine's College*, L. R., 16 Eq. 19; *Re Lyon's Trusts*, 48 L. J. Ch. 245; *Re Taylor*, 34 Ch. D. 255; *Dooley* v. *Mahon*, Ir. R., 11 Eq. 299.

(*s*) 2 Moore, 304. See also *Neeld* v. *Neeld*, [1878] W. N., p. 219. Other cases in which the description has prevailed over the name are, *Re Feltham's Trusts*, 1 K. & J. 528; *Hodgson* v. *Clarke*, 1 D. F. & J. 394.

(*t*) *Adams* v. *Jones*, 9 Hare 485; and see *Lee* v. *Pain*, 4 Hare, at p. 253; *Re Wolverton Estates*, 7 Ch. D. 197.

son John, who had died leaving children, and a legitimate daughter Margaret, and it was held that the children of John were entitled, and not Margaret, the circumstances being such as to lead to the inference, that the children of the illegitimate child of the servant Elizabeth, without reference to name or sex, were the objects of the testator's bounty (*u*).

Where there is a person who substantially answers both name and description.

But if there is a person whose name and description substantially correspond with those given in the will, the Court will not allow the gift to take effect in favour of a person who answers the description but is of a different name. As in *Mostyn* v. *Mostyn* (*uu*), where there was a gift to John Henry Mostyn, with a gift over in the event of his not marrying, to Samuel Mostyn, John Mostyn, and Mary Davies (formerly Mostyn), "all of them late of Calcott Hall," that having been the residence of the testatrix's deceased brother, who had five children, Robert John, John Henry, Samuel, Thomas, and Mary; the last four left Calcott Hall on the death of their father, and it was therefore clear that the testatrix meant the gift over to take effect in favour of Samuel, Thomas, and Mary, but it was held that as there was a son named John Henry, it was impossible to say that Thomas was meant. Mere conjecture is not admissible.

Ambiguous description of charity.

The same kind of question frequently arises in the case of gifts to charitable institutions: thus in a recent case (*v*) a testatrix by will bequeathed a legacy of 250*l*. to the British Home for Incurables, Streatham: by a codicil which recited twice incorrectly that she had, among other legacies, given by will 500*l*. to the British Home for Incurables, Streatham, she revoked all the legacies and "instead thereof" bequeathed 500*l*. each to the Royal Home for Incurables, Streatham, and another institution; this legacy was claimed by both the British Home and Hospital for Incurables and by the Royal Hospital for Incurables, and evidence was given as to the testatrix's subscriptions to both institutions; it was held that the Royal Hospital for Incurables was entitled to the legacy.

Appointment of executor by wrong name.

In *Charter* v. *Charter* (*w*) the question arose as to the appointment of an executor, and it was held that the nature of the duties imposed by the will on the executor, and the circumstances of the testator's family, shewed that the testator, in appointing his son "Forster

(*u*) *Ryall* v. *Hannam*, 10 Bea. 536; and see *Rickit's Trust*, 11 Hare, 299.

(*uu*) 5 H. L. C. 155.

(*v*) *British Home for Incurables* v. *Royal Hospital for I.*, 90 L. T. 601. See *Re Clergy Society*, 2 K. & J. 615; *Re Kilvert's Trusts*, L. R., 7 Ch. 170; *Re Alchin's Trusts*, L. R., 14 Eq. 230; *Coldwell* v. *Holme*, 2 Sm. & G. 31, and the other cases cited ante, p. 227.

(*w*) L. R., 7 H. L. 364. Followed in *In bonis Chappell*, [1894] P. 98. See also *In bonis Brake*, 6 P. D. 217; *In bonis Twohill*, 3 L. R. Ir. 21.

CHAP. XXXV.

Charter," really meant to appoint his son Charles Charter, although he had another son called William Forster Charter.

Ambiguity partially removed by context.

The claim of a person who might otherwise be entitled is sometimes excluded by the context. Thus in *Douglas* v. *Fellows* (*x*) a testatrix gave a legacy of 300*l*. to Commodore Peter Douglas and a like legacy "to the children of Peter Henry Douglas." The commodore's real name was Peter John Douglas; there was no such person as Peter Henry Douglas, but Peter John Douglas had a brother named Henry Osborn Douglas, who died before the date of the will, leaving three children, who claimed the second legacy; it was also claimed by the five children of Peter John Douglas, but Wood, V.-C., decided in favour of the children of Henry Osborn Douglas.

Where devisee or legatee is described but not named.

The same principles are applicable for the construction of wills where the devisee is not mentioned by name, but the description is composed wholly of "demonstration," as, where the gift is to the first or second son, or to the children, of some named person. Thus in *Camoys* v. *Blundell* (*y*), where the gift was to the "second son of Edward Weld, of Lulworth, for life," and there was among other subsequent remainders, a remainder to the first and other sons of each brother, except the eldest, of Edward Weld, and also a remainder to Lady S., one of the sisters of Edward Weld: the facts were, that there was no Edward Weld, of Lulworth, but there was a Joseph Weld of that place, who had three sons and an elder brother, and a sister, Lady S., and there was an Edward Joseph Weld, of the same place (son of Joseph Weld), who had no children or elder brother, and no sister named Lady S.; and it was decided that the second son of Joseph, as more perfectly answering the description, was the person designated to take the first estate for life under the description of the second son of Edward.

Complete misnomer.

So a legacy to "my wife" may take effect in favour of a person whom the testator intended to marry (*yy*).

Sometimes cases of complete misnomer occur. Thus a testator may give a legacy to "Mrs. Sawyer" when he means a person whose real name is Mrs. Swapper, or to "Catherine Earnley" when he means a person whose real name is Gertrude Yardley (*z*). These

(*x*) Kay, 114. For the application of the same rule to a gift to a charity, see *Lee* v. *Pain*, 4 Ha. at p. 254, ante, p. 1262.

(*y*) 1 H. L. C. 778. See also *Del. Mare* v. *Rebello*, 3 B. C. C. 447, 1 Ves. jun. 412; *Holmes* v. *Custance*, 12 Ves. 279; *Daubeny* v. *Coghlan*, 12 Sim. 507; *Re Ingle's Trust*, L. R., 11 Eq. 578; *Bristow* v. *Bristow*, 5 Bea. 289 (where both fathers bore the same name).

(*yy*) *Schloss* v. *Stiebel*, 6 Sim. 1; *Re Brown*, 54 Sol. J. 251.

(*z*) *Masters* v. *Masters*, 1 P. W. 421; *Beaumont* v. *Fell*, 2 P. W. 141.

and similar cases are referred to in connection with the admission of parol evidence (*a*).

Parol evidence.

The cases of *Doe* d. *Hiscocks* v. *Hiscocks* (*b*), *Doe* d. *Thomas* v. *Beynon* (*c*), *Grant* v. *Grant* (*d*), and other cases bearing on this subject are also discussed in connection with the question as to the admissibility of parol evidence (*e*).

Name and description evenly balanced.

If the ambiguity is not removed by the context and by parol evidence of the surrounding circumstances, the gift necessarily fails for uncertainty; for direct evidence of the testator's intention is inadmissible. Thus in *Drake* v. *Drake* (*f*), where a testator gave a legacy to "his sister Mary Frances T. D.," and the residue of his estate to "his niece Mary Frances T. D." and three other persons. The testator had a sister-in-law, but no niece of that name, though he had nieces, one of whom was named Frances Isabella T. D., another Mary Caroline T. D., and a third Mary Elizabeth T. D.; there was no circumstance shewing that one nicce was intended to take the share of residue rather than another, and nothing to take it from a niece and to give it to the sister-in-law, unless, without any evidence to prove error of demonstration, there was a rigid rule that the name should prevail. It was therefore held in the House of Lords that the gift of one-fourth of the residue failed.

Case of indefinite reference to locality.

Where the objects of gift are described by reference to locality, there must be some definite local limit. Thus, a gift to persons resident in the hospitals of or in the vicinity of C., has been held void for uncertainty as to what should be said to be in the vicinity of C. (*g*).

Falsa demonstratio non nocet.

II.—Falsa Demonstratio non nocet.—In determining what property is comprehended in the terms used to describe the subject of gift, frequent recourse is had to two rules of construction, one of which is expressed by the maxim "Falsa demonstratio non nocet eum de corpore constat," the other by the maxim "Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram."

Meaning of the rule.

The first rule means that where the description is made up of

(*a*) Chap. XV.
(*b*) 5 M. & Wels. 363.
(*c*) 12 Ad. & El. 431.
(*d*) L. R., 5 C. P. 380, 727.
(*e*) Chap. XV.
(*f*) 8 H. L. C. 172, affirming Romilly, M.R., 25 Bea. 642.
(*g*) *Flint* v. *Warren*, 15 Sim. 626. As to the extent of London in a gift to "the hospitals of London," see *Wallace* v. *Att.-Gen.*, 33 Bea. 384.

CHAP. XXXV.

more than one part, and one part is true, but the other false, there, if the part which is true describe the subject with sufficient legal certainty, the untrue part will be rejected and will not vitiate the devise. "The characteristic of cases within the rule is, that the description, so far as it is false, applies to no subject at all, and, so far as it is true, applies to one only" (*i*). Thus, in *Day* v. *Trig* (*j*), where one devised "all his freehold houses in Aldersgate Street, London," having in fact only leasehold houses there, it was held that the word "freehold" should rather be rejected than the will be wholly void, and that the leasehold houses should pass (*k*).

Devise of "freehold houses in A. street, London." The word "freehold" rejected.

So, in *Blague* v. *Gold* (*l*), where a testator, having two houses in A., one called "The Corner House," in the tenure of B. and N., the other adjoining thereto and in the tenure of H., devised "his house called 'The Corner House' in A., in the tenure of B. and H.": the testator having no house in the joint tenure of B. and H., it was held that the description by tenure was mere surplusage and might be rejected.

"House called 'the corner house' in A., in the tenure of B."

Conversely, freeholds may pass under a gift of "my leasehold estate at A., commonly called, &c.," if there is no leasehold property answering the description (*m*).

Freeholds misdescribed as leaseholds held to pass.

And even if the testator has freehold property as well as leaseholds, the latter may pass by the description of freehold; thus if he has a farm at A. which is partly freehold and partly leasehold, and devises "my freehold farm at A.," this may pass the leasehold portion as well as the freehold (*x*). So if the testator has a freehold and a leasehold interest in a messuage in A. and devises his freehold messuage in A., this may pass his leasehold interest (*y*).

(*i*) Per Alderson, B., *Morrell* v. *Fisher*, 4 Exch. 591; see also Wigram, Wills, pl. 67.

(*j*) 1 P. W. 286; *Doe* d. *Dunning* v. *Cranstoun*, 7 M. & Wels. 1; *Nelson* v. *Hopkins*, 21 L. J. Ch. 410. See also *Welby* v. *Welby*, 2 V. & B. 187. Compare the case of a testator who specifically bequeaths leaseholds and afterwards acquires the reversion in fee, ante, p. 408.

(*k*) This statement of the law (which is taken from the third edition of this work by Messrs. Wolstenholme and Vincent) has been frequently cited with approval by the Courts: see *Cowen* v. *Truefitt*, [1899] 2 Ch. 309; *Anderson* v. *Berkley*, [1902] 1 Ch. 936; ante, p. 401. In *Re Rayer*, [1903] 1 Ch. 685, it was held that a testator, in referring to "legacy duty" really meant "succession duty," and the headnote treats the case as one of falsa demonstratio, but this use of the expression is unusual. As to the application of the maxim to deeds, see *Doe* d. *Smith* v. *Galloway*, 5 B. & Ad. 43; *Cowen* v. *Truefitt*, supra; *Griffiths* v. *Penson*, 9 Jur. N. S. 385.

(*l*) Cro. Car. 447, 473.

(*m*) *Denn* d. *Wilkins* v. *Kemeys*, 9 East, 366.

(*x*) This seems to follow from the principle laid down by Chitty, J., in *Re Bright-Smith*, 31 Ch. D. 314, where *Stone* v. *Greening*, 13 Sim. 390, and *Hall* v. *Fisher*, 1 Coll. 47, which are contra, are discussed.

(*y*) *Mathews* v. *Mathews*, L. R., 4 Eq. 278, stated post, p. 1278.

Where principle does not apply.

But the principle does not apply where the circumstances shew that the testator had in mind some property to which the description strictly applied at the date of the will. Thus in *Re Knight* (*n*) a testator gave to his wife "the lease of" the house in which he should reside at the time of his decease; he resided at the date of the will in a house which he held on a short lease at a rack rent; he subsequently purchased a freehold house in which he resided at the time of his death: it was held that the gift did not pass the freehold house to the wife.

Extension of the rule.

In the application of the principle in question, the Courts have not confined themselves to cases which are strictly within its terms. It is often found, on a disclosure of the facts of the case, that of two particulars of which the description is composed, each separately finds some corresponding subject, but the one is applicable to a larger portion of the testator's property than the other, thereby raising the question whether the more limited term be restrictive of the other, or expressive only of a suggestion or affirmation. It is a mere question of construction; for it is clear that if the answer be that the more limited term is merely suggestive or affirmative, it will be disregarded in deciding upon the quantity to be considered as covered by the description.

Question where parts of the description are not co-extensive.

Limited term rejected where property is described as an entire subject.

Now if the testator describe the subject of the devise as an entire subject, and in terms of sufficient certainty as his "farm" called A., or his "house" in a particular place, or his "B. estate," or the like, then, although he adds a clause to the effect that the property is in the occupation of a particular tenant, or is situate in a particular county, street or other locality, and it turns out that such clause is true only of a part of the property, the entire subject may well pass, unrestricted by the additional clause, if such a construction be in accordance with the general intent of the testator (*o*).

Inaccuracy in statement of locality.

Thus where a testatrix devised all her messuages situate in Denmark Court, it was held that the devise passed not only five houses in the court, but also an adjacent house numbered 383 Strand, which practically formed part of the Denmark Court property (*p*). So a devise of "my freehold estate situate in Three Colt Street" may pass a house in Old Ford Road (*q*).

"Estate."

An example of the rejection of words as falsa demonstratio when used with reference to the word "estate," is presented by *Doe* d.

(*n*) 34 Ch. D. 518. Compare the cases of *Emuss* v. *Smith*, *Cave* v. *Harris*, and *Re Seal*, infra.

(*o*) See per Lord Ellenborough, *Roe* d. *Conolly* v. *Vernon*, 5 East, at p. 80.

(*p*) *Newton* v. *Lucas*, 1 My. & C. 391; *Gauntlett* v. *Carter*, 17 Bea. 586.

(*q*) *Harman* v. *Gurner*, 35 Bea. 478.

CHAP. XXXV.

Beach v. *Earl of Jersey* (*r*), where A. devised all that her "Briton Ferry estate, with all the manors, advowsons, messuages, buildings, lands, tenements and hereditaments thereunto belonging, and of which the same consists." In a subsequent part of the will, after describing another estate, she added, "which, as well as my Briton Ferry estate, is situate, lying and being in the county of Glamorgan." It turned out that part of the Briton Ferry estate was situate in the county of Brecon; but it was found by special verdict that the whole had been known by the name of the Briton Ferry estate for fifty years before the death of the testatrix; and it was held that the whole passed (*s*).

Inaccuracy in statement of occupancy.

There are numerous cases in which an inaccuracy with regard to the occupancy of lands has been rejected as immaterial. Thus in *Goodtitle* d. *Radford* v. *Southern* (*t*), where a testator devised all that his farm, called Trogues Farm, situate in the parish of D., now in the occupation of A. C. The question was, whether two closes, part of Trogues Farm, but not in the occupation of A. C., passed by this devise. It was held that the devise comprehended the whole of Trogues Farm, which was a plain and certain description, and was not affected by the defective description of the occupation.

So, in *Down* v. *Down* (*u*), where A. devised all his farm and lands called Colt's-foot Farm, situate in or near the parishes of D., W. and T., now on lease to Mary Field, at the yearly rent of 150*l*. It was held that a close of seven acres, called Williamspring, which was a part of Colt's-foot Farm, but was excepted out of Mary Field's lease, as well as out of a subsequent lease granted by the testator to another person, passed (*v*); the Court being of opinion that it was the intention of the testator to pass the whole of the farm, and not that only which was in the occupation of Mary Field.

And in *Re Champion* (*w*), North, J., thought th the words "now in my own occupation" following a description of the devised property, were not a vital part of the description.

Distinction where the reference to the occupancy precedes that to the name.

"But though," says Mr. Jarman (*x*), "a devise of 'my farm

(*r*) 1 B. & Ald. 550.

(*s*) Observe the agreement between the principle of these cases and that of those which are cited in connection with the subject of uncertainty, as illustrative of the rule that a false addition does not vitiate a devise, ante, p. 1254; see also *Doe* v. *Nickliss*, 4 Jur. 660.

(*t*) 1 M. & Sel. 299; see also *Paul* v. *Paul*, 2 Burr. 1089; *Whitfield* v. *Langdale*, 1 Ch. D. 61, as to "Hookland" and "Tickeridge." In the same case it was held that a devise of a "messuage and lands called Claggetts and Sievelands" carried the whole of Claggett's farm, upon evidence that this farm included Claggetts and Sievelands and a good deal more, sed qu. Qu. also as to the exclusion of the wood from Tickeridge.

(*u*) 1 J. B. Moo. 80.

(*v*) The farm consisted of about 172 acres.

(*w*) [1893] 1 Ch. 101. In the C. A. the decision turned on the question of republication: ante, p. 202.

(*x*) First edition, p. 716.

called A. in the occupation of B.' is not, under these circumstances limited to that part of the farm which is in the occupation of B., yet perhaps it does not follow that the same construction would be given to a devise of 'all my farm in the occupation of B. called A.' In this case, the reference to the occupancy forms the primary substantive part of the description, and the name is merely an addition. Thus, in the early case of *Woodden* v. *Osbourn* (*y*), where A., having lands called *Hayes* Lands, which extended into two vills, *Cokefield* and *Cranfield*, devised all his lands in *Cokefield* called *Hayes* Lands, to J. S., it seems to have been held that the part which was in *Cranfield* did not pass. Unless a reference to locality be more restrictive than a reference to occupation (*z*), this case seems to warrant the distinction suggested." It is to be observed, however, that Popham, C.J., and Gawdy and Yelverton, JJ., went on to say, that if the words had been "all his lands called Hayes Lands, in Cokefield" (thus reversing the order), nothing had passed but the land in Cokefield (*a*). And, on the other hand, a distinction for this purpose between a reference to locality and a reference to occupation is discountenanced by the case of *Doe* d. *Beach* v. *Earl of Jersey* (*b*).

Where subject of devise described as "a house," followed by terms applicable to a part only.

Next, with regard to the devise of a "house," it was decided in *Chamberlaine* v. *Turner* (*c*), where a testator devised "the house or tenement wherein W. N. dwelt, called the White Swan, in Old Street," and it appeared that W. N. occupied only the entry or alley of the said house and three upper rooms in the same, divers other persons occupying other parts, that the whole house passed (*d*).

On the other hand, in *Re Seal* (*e*) the testator at the time of making his will owned S. House and also an adjoining stable, and

(*y*) Cro. El. 674; s. c. nom. *Tuttesham* v. *Roberts*, Cro. Jac. 22; and Lord Ellenborough's judgment in *Roe* d. *Conolly* v. *Vernon*, 5 East, at p. 78. The principal point in the case in Croke seems to have been whether the Hayes Lands, being so restricted in the devise to J. S., was subject to the same restriction in a subsequent devise of it as Hayes Lands generally; and the decision, of course, was in the affirmative. As to words of description being narrowed by the effect of the general context, see *Doe* d. *Harris* v. *Greathed*, 8 East, 91.

(*z*) See *Doe* d. *Beach* v. *Earl of Jersey*, 1 B. & Ald. 550, stated infra.

(*a*) In *Stukeley* v. *Butler*, Hob. 171, it is said "it is vain to imagine one part before another: for though words can neither be spoken nor written at once, yet the mind of the author comprehends them at once, which gives vitam et modum to the sentence": see also *Doe* v. *Galloway*, 5 B. & Ad. at p. 50.

(*b*) 1 B. & Ald. 550, 3 B. & Cr. 870.

(*c*) Cro. Car. 129. The Court seems to have treated the case as if the words had been "in the occupation of W. N.," which might perhaps be restrictive, where the terms actually used would not; see per Lord Hardwicke, 3 Atk. at p. 9: see also *Doe* d. *Hubbard* v. *Hubbard*, 15 Q. B. 227, per Erle, J., and Lord Campbell, C. J.

(*d*) See also *Re Midland Rail. Co.*, 34 Bea. 525, stated ante, p. 418; *Hibon* v. *Hibon*, 32 L. J. Ch. 374, 9 Jur. N. S. 511 ("house and premises").

(*e*) [1894] 1 Ch. 316.

CHAP. XXXV.

other buildings; he occupied the house and a room on the first floor of the stable, to which the only access was through the house: he had let the rest of the stable, and also the other building belonging to the house, to his sons; by his will he devised "my residence called S. House and premises thereto as the same are now occupied by me": it was held that the devise included the room over the stable, but not the rest of the stable or the other buildings occupied by the sons.

"Messuages and lands called the D."

The same principle is illustrated by *Hardwick* v. *Hardwick* (*f*), where the devise was of "the messuages, lands and premises called "The Dyffrydd, situate in the parish of K., now in the occupation of E."; although part of "The Dyffrydd" was not in the parish of K., and other part was not in the occupation of E., yet the whole was held to pass: and by *Travers* v. *Blundell* (*g*), where a testator, having under his father's will power to appoint "all that part of R.'s estate purchased by me, situate at P., consisting of" six specified closes, appointed "all that part of the property comprised in my late father's will as is therein described as that part of R.'s estate purchased by my father, situate at P., consisting of," and then specifying four only of the six closes; it was held that all six were well appointed. The appointment was of a certain corpus or subject as described by the father's will, and representing that description to be in certain specified terms; one of the terms specified differed from the corresponding term of the description actually contained in the father's will, and, not being needed for the ascertainment of the subject, was rejected as falsa demonstratio.

"All that estate as described in the will of A."

Different construction in *Hall* v. *Fisher*.

A different construction, however, prevailed in *Hall* v. *Fisher* (*h*), where a testator, by will dated 1841, devised "all that freehold farm called the Wick Farm, in Headington, containing 200 acres or thereabouts, occupied by William Eeley as tenant thereof to me." It appeared that the person from whom the testator claimed the Wick Farm, which was all freehold, had sold a small portion of it, but had continued to occupy it as part of the Wick Farm, under a demise from the purchasers, and to treat it as such, and that the testator had let the whole to W. Eeley. There was therefore a sufficiently certain description, in accordance with the testator's undoubted intention, and corresponding in every particular but

(*f*) L. R., 16 Eq. 168, explaining *Pedley* v. *Dodds*, L. R., 2 Eq. 819; and see *Whitfield* v. *Langdale*, 1 Ch. D. 61, supra.

(*g*) 6 Ch. D. 436; *Armstrong* v. *Buckland*, 18 Bea. 204; *Cooch* v. *Walden*, 46 L. J. Ch. 639. See also *Cunningham* v. *Butler*, 3 Gif. 37. The decision was commented on and distinguished in *Re Seal*, [1894] 1 Ch. 316, supra, p. 1269.

(*h*) 1 Coll. 47. See also *Emuss* v. *Smith*, 2 De G. & S. 722, stated ante, p. 410.

the word freehold with the actual state of the property; but Sir J. K. Bruce, V.-C., said he could not view the case as one of falsa demonstratio; that if the word "freehold" had been omitted, the probability was, the leasehold in question would have been held to pass; but that there was a subject here which properly answered the description given in the will. But the case has been questioned (*i*), and in *Re Bright-Smith* (*j*), a gift of "my freehold farm and lands, situate at E, and now in the occupation of J. B.," was held to pass a farm of 76 acres of which 25 acres were freehold and 26 acres copyhold.

Subsequent reference to occupancy does not extend devise.

Mr. Jarman observes (*k*) that "As a subsequent reference to the occupancy does not limit a devise of a farm by name to the lands so occupied, it is clear that it would not, under such circumstances, enlarge a devise in which the occupancy extended to lands not included in the name. Consequently, under a devise of 'my *Trogues* Farm, in the occupation of A.,' lands of another farm in the occupation of A. would unquestionably *not* pass; and this hypothesis agrees with the principle of a class of decisions stated in the sequel" (*l*).

Erroneous reference to testator's title.

On the same general principle, an erroneous reference by the testator to the manner in which he acquired title to the devised property, may be rejected as falsa demonstratio (*ll*).

Words not rejected, if required to prevent the devise being contradictory to another.

Parts of a description which, if the will contained no other devise than that to which they belong, would be rejected as falsa demonstratio, sometimes derive a restrictive force from another devise in the same will, with which they would otherwise stand in contradiction. Thus, in *Higham* v. *Baker* (*m*), where a testator devised his farm called Whiteacre, and the lands to the same belonging, then in the tenure of W., to A., and devised his farm called Blackacre, and the lands to the same belonging, to B.; and it appeared that there were 100 acres of land belonging to Whiteacre, and no land belonging to Blackacre, but that the testator had let Whiteacre with 60 acres of the land belonging to it, and the remaining 40 acres with Blackacre: it was clear that only so much of the land belonging to Whiteacre as was in the tenure of W. was devised to A.

So, in *Press* v. *Parker* (*n*), where a testator devised to A. "my

(*i*) By Lord Selborne, L. R., 16 Eq. at p. 177, who also (ib.) questions *Stone* v. *Greening*, 13 Sim. 390. Both of these cases were also questioned by Chitty, J., in *Re Bright-Smith*.

(*j*) 31 Ch. D. 314. Compare *Re Steel*, [1903] 1 Ch. 135, which, however, does not rest on the principle now under discussion.

(*k*) First edition, p. 716.

(*l*) See *Doe* d. *Tyrrell* v. *Lyford*, 4 M. & Sel. 550; *Hall* v. *Fisher*, 1 Coll. 47; *Doe* d. *Renow* v. *Ashley*, 10 Q. B. 663.

(*ll*) *Welby* v. *Welby*, 2 V. & B. 187.

(*m*) Cro. El. 15.

(*n*) 10 J. B. Moo. 158, 2 Bing. 456.

freehold messuage, &c., in the parish of H., wherein he now lives, with the yard, back estate and premises thereunto belonging, part of which is now in my own occupation, and other part whereof is in the occupation of C. and M."; and he devised to B. his front messuage in K. street, in the parish of H. aforesaid, with the appurtenances, "now in the occupation of E.," with a right of way to the yard adjoining, and the use of the pump, &c., in the yard. The question was whether a coal-cellar passed to A. or B. It was within the range of the house devised to B., but was in the occupation of the testator, who had put up a partition between it and B.'s premises, the entrance being from his own house. It was held that the cellar, being in the testator's occupation, passed to A.; the intention, it was thought, being manifest to give to A. whatever was so occupied. But Best, C.J., said if the latter devise had stood alone, the words "in the occupation of E." might have been deemed mere words of description.

Whether devise passed all that was occupied by the person described.

In connection with the subject of the construction of words referring to occupancy, it may be here observed, that in *Doe* d. *Templeman* v. *Martin* (*o*), where a testator devised all his messuage, "the Ark Cottage, gardens and lands at S., rented to Mrs. S., and ...ers; and it was attempted to confine the devise to a particular property at S., forming a distinct purchase made by the testator, of which Mrs. S. was the principal occupant; the devise was held to comprise all the land situate at S., by whomsoever rented, including a considerable farm, in the occupation of a tenant, not Mrs. S.; the suggestion, that the testator could scarcely mean to describe a large property in such terms (omitting the name of the tenant), not being allowed to prevail against the clear import of the words of the will.

It is to be observed that in the foregoing cases where terms of occupancy or locality were not allowed by reason of their inapplicability to particular portions of the subject to exclude them from the devise, those portions bore but a small proportion to the whole. But in *Whitfield* v. *Langdale* (*p*), an erroneous statement of the acreage as being "by estimation 80 acres, more or less," was not permitted to exclude any portion of the "farm" devised, although the real quantity was 175 acres, and as to a small part of the disputed lands there was a mistake also made in the locality.

Limited term rejected though applicable to large proportion.

When property is devised by a general description, and this is followed by a specific description or enumeration of particulars, the

General, followed by specific, description.

(*o*) 4 B. & Ad. 770; conf. *Chester* v. *Chester*, 3 P. W. 55, where an attempt was made to limit the sense of "elsewhere" by reference to previously specified places.

(*p*) 1 Ch. D. 61, ante, p. 1268, n. (*t*).

latter will as a rule prevail (*q*). Thus in *Re Brocket* (*r*) a testatrix devised the real estate to which she became entitled under the will of A., namely, the residence known as O. House and lands in the parishes of O., S. M. and H.; it was held that the devise was confined to the property so described, and did not include some land in the City of London, to which the testatrix was also entitled under the will of A. Possibly if the property not specifically mentioned had formed part of the O. House estate, it would have passed by the devise (*s*).

Land subject to trust for sale.

If a testator is entitled to dispose of the proceeds of sale of an estate which is subject to a trust for sale, and by his will devises the estate itself, by name, the devise will, as a general rule, pass the proceeds of sale, the supposition being that the testator meant to give his interest in the land, whatever it might be, but mistook the nature of that interest (*t*). And even if the devise is of "all the real estate of or to which I shall be seised or entitled or over which I shall have any power of disposition or appointment by will at the time of my death," the interest of the testator in the proceeds of sale of certain lands to which he was entitled at the date of the will, may pass by the devise, if he was not beneficially entitled to any real estate (*u*). Otherwise it seems clear that the proceeds of sale would not pass by a general devise of real estate (*v*).

Personal property.

The doctrine of falsa demonstratio also applies to gifts of personal property (*w*). Thus in *Re Weeding* (*x*) a testatrix bequeathed all her shares in the Great Western Trunk Railway of Canada: there was no such company, but the testatrix formerly owned some debenture stock (not shares) of the Great Western Railway Company of Canada, which before the date of the will was converted into a debenture stock known as "Great Western Perpetual Debenture Stock" of the Grand Trunk Railway of Canada. It was held that this passed by the bequest. So in *Flood* v. *Flood* (*y*) stock owned by a testatrix in the Dublin and Kingstown Railway was held to pass

(*q*) *West* v. *Lawday*, 11 H. L. C. 375.

(*r*) [1908] 1 Ch. 185.

(*s*) See *Travers* v. *Blundell*, supra, p. 1270, and *Armstrong* v. *Buckland*, 18 Bea. 204.

(*t*) *Cooper* v. *Martin*, L. R., 3 Ch. 47; *Re Lowman*, [1895] 2 Ch. 348.

(*u*) *Re Glassington*, [1906] 2 Ch. 305. On the question of the admissibility of evidence in this case, see Chap. XV.

(*v*) See *Goold* v. *Teague*, 5 Jur. N. S. 116, where the gift was of "all my leasehold estates."

(*w*) Leaseholds are for present purposes treated as landed property.

(*x*) [1896] 2 Ch. 364; *Trinder* v. *Trinder*, L. R., 1 Eq. 695; *Re Jameson*, [1908] 2 Ch. 111 (shares in a bank which had ceased to exist): ante, p. 1091.

(*y*) [1902] 1 Ir. 538. Compare *Townsend* v. *Townsend*, 1 L. R. Ir. 180, where the testatrix displayed great ingenuity in misdescribing her investments.

CHAP. XXXV.

under a bequest of stock in the Dublin, Wicklow and Wexford Railway, it appearing that the former railway was leased to and worked by the latter, and that the two were commonly looked upon as one undertaking. Shares in a slate quarry company may pass under a bequest of "shares in mines" (*z*).

Shares, stock, debentures, &c.

The cases in which bequests of "shares" in a company have been held to pass capital stock or even debenture stock of that company, have been already referred to (*a*). So a bequest of "debenture stock or shares in the S. Company" may pass debentures of that company if it has no debenture stock (*b*).

In all these cases, however, it must be remembered that if the testator has property answering the description, that is primâ facie sufficient to satisfy the gift (*c*).

If a testator bequeaths shares in a company and he has shares of different classes, this may give the legatee a right of selection (*d*).

"Stock standing in my name," &c.

Where a testator erroneously describes stocks or other investments as standing in his name, or in the name of some other person, this does not, as a general rule, invalidate the gift (*e*).

A more detailed examination of the authorities on these subjects will be found in a subsequent section of this chapter (*f*).

Contract to purchase stock.

In *Collison* v. *Girling* (*g*) Lord Cottenham laid it down as a general principle that if a man has contracted to purchase a thing, such as stock, and then makes his will, by which he bequeaths "all my stock" of that description, the legatee is entitled to the benefit of the contract: "What a party is entitled to under a contract he considers as his own." The principle is perhaps laid down too widely. If the testator at the date of his will had stock of the particular description, it might be difficult to avoid the application of the rule considered in the next section. Of course, if the gift were of "all the stock which I may be entitled to at my death," stock which the testator had contracted to purchase would pass; and (equally of course) stock contracted to be purchased by the testator's brokers a few hours after his death would not pass (*h*).

Debts.

There are several cases in which an inaccuracy in the description of sums of money referred to in the will as debts, was not allowed

(*z*) *Crossland* v. *Meyrick*, 37 L. J. Ch. 125.

(*a*) Ante, p. 1255.

(*b*) *Re Nottage* (No. 2), [1895] 2 Ch. 657.

(*c*) See next section.

(*d*) Ante, p. 461.

(*e*) *Mackinley* v. *Sison*, 8 Sim. 561; *Sheffield* v. *Van Donop*, 7 Ha. 42; *Quennell* v. *Turner*, 13 Bea. 240; *Ellis* v. *Eden*, 25 Bea. 482.

(*f*) Post, pp. 1306 et seq.

(*g*) 4 M. & Cr. 63.

(*h*) *Thomas* v. *Thomas*, 27 Bea. 537.

to defeat the intention of the testator (*i*), there being no debt which answered the description (*j*).

Distinction between mistake and misdescription.

Where it is clear that the testator has made a mistake as to the nature of the property which he wishes to dispose of, no question of falsa demonstratio really arises: instead of misdescribing something which he has, he means to give something which he has not, and the gift therefore fails. Thus in *Waters* v. *Wood* (*k*), where the testator bequeathed "all the policies of life insurance which I have effected in the U. and L. I. offices" in such a way as to shew clearly that he supposed that he had effected policies in those offices, it was held that shares which he held in those offices did not pass by the bequest. So, in *Millar* v. *Woodside* (*l*), a testatrix had forty-one shares in a bank, and was entitled to a life interest in twelve other shares in the same bank standing in the name of B. as trustee of a deed by which she had settled those twelve shares; by her will she recited that she was entitled to twelve shares in the bank, which stood in the name of herself and B. as trustee for her, and bequeathed them to X.; it was held that the gift was inoperative, and could not be made good out of her own shares. But the natural tendency of the Courts is to disregard mistakes of this kind, if the identity of the property is clear, and the testator's mistake only relates to the nature of his interest in it. Such are the cases where a testator's interest in the proceeds of sale of land is held to pass by a devise of that land (*m*). And there are cases in which this tendency has led to a construction which puts a considerable strain on the words of the will. Thus, in *Findlater* v. *Lowe* (*n*), the testatrix had lent a firm a large sum of money; when the firm was turned into a company the testatrix accepted debenture stock and shares in respect of her debt. She afterwards made her will by which she "forgave" the debt: it was held that the debtors were entitled to a legacy of the same amount. The case of *Selwood* v. *Mildmay* (*o*) is supposed to have been decided on this principle, but whether it was or not, neither case has any connection with the doctrine of falsa demonstratio (*p*). Nor is it possible that any question of falsa

(*i*) *Maybery* v. *Brooking*, 7 D. M. & G. 673; *Re Rowe*, [1898] 1 Ch. 153; *Re Dyke*, 44 L. T. 568; *Re Hodgson*, [1899] 1 Ch. 666. As to bequests of debts where the amount is wrongly stated, see *Wilson* v. *Morley*, 5 Ch. D. 776; *Whitfield* v. *Clemment*, 1 Mer. 402, cited ante, p. 624.

(*j*) As was the case in *Ex parte Kirk*, 5 Ch. D. 809.

(*k*) 5 De G. & S. 717.

(*l*) Ir. R., 6 Eq. 546.

(*m*) Ante, p. 1273.

(*n*) [1904] 1 Ir. 519. The question in this case must be distinguished from that which arose in *Goodlad* v. *Burnett*, 1 K. & J. 341.

(*o*) 3 Ves. 306.

(*p*) See Chap. XXX.

demonstratio should arise where the testator specifically bequeaths a certain thing and never had anything which could pass by that description: in such a case the gift fails because there is nothing for it to take effect on (*q*).

Limits of the doctrine.

In *Slingsby* v. *Grainger* (*r*) an attempt was made to apply the doctrine of falsa demonstratio. There the testatrix possessed property in t[illegible]nds and in Bank Stock: she left to her brother "everything [illegible]y be possessed of at my decease, for his life. . . . Should he die a bachelor, I leave the whole of my fortune now standing in the Funds to E. S." The brother died a bachelor. It was held that the Bank Stock did not pass to E. S. "The distinction," said Lord Cranworth, "is between those cases in which there has been a complete description of the thing given, and a subsequent misdescription as to some particular connected with it, and cases in which that which is subsequently connected with the description is so connected as to form part of the description of the thing given." The case falls within the rule stated in the following section.

Devise of property not described as a whole is confined to what exactly answers it.

III.—Property answering the Description alone passes.—The second maxim above referred to is "non accipi debent verba in falsam demonstrationem quæ competunt in limitationem veram," and accordingly Mr. Jarman lays it down as a well-settled canon of construction (*s*) "that where a given subject is devised, and there are found two species of property, the one technically and precisely corresponding to the description in the devise, and the other not so completely answering thereto, the latter will be excluded; though, had there been no other property on which the devise could have operated, it might have been held to comprise the less appropriate subject.

"Entitled to on decease of X."

"As in *Roe* d. *Ryall* v. *Bell* (*t*), where a testator devised all his copyhold estates situate at G., *which he became entitled to on the decease of his father*. The fact was, that on the death of his father,

(*q*) *Evans* v. *Tripp*, 6 Mad. 91. The general principle is stated in Chap. XXX.

(*r*) 7 H. L. C. 273. See also *Waters* v. *Wood*, 5 De G. & S. 717, supra, p. 1275.

(*s*) First edition, p. 720. The rule has been frequently recognised in cases where, owing to the description not accurately fitting any particular property, the rule falsa demonstratio non nocet is applied; see *Hardwick* v. *Hardwick* and *Re Bright-Smith*, ante, pp. 1270, 1271.

(*t*) 8 T. R. 579; see also *Wills* v. *Sayers*, 4 Mad. 409; *Doe* d. *Gillard* v. *Gillard*, 5 B. & Ald. 785 and see the rule exemplified in cases treated of ante, p. 1271. But see *Doe* d. *Newton* v. *Taylor*, 7 B. & C. 384, where a devise by A., of her moiety of all her late father's messuages, &c., situate, &c., was held to extend as well to lands which had been the property of the father, and had been devised by him to a granddaughter, from whom they had descended to the testatrix, as to those which had descended to her immediately from him In this case, the terms used were equally applicable to both properties.

the testator had taken possession of two copyhold estates at G.; one which his father had in his lifetime surrendered to him in fee, but of which he (the father) had retained possession until his death, and another which descended to the testator as heir. It was held, that the latter estate being sufficient to satisfy the words, the former did not pass" (*u*).

"Purchased of S."

Again, it has been held (*v*), that a devise of lands at W., in the parish of C., "which I purchased of S.," did not include lands not at W., though purchased of S., in the parish of C. So in *Cave* v. *Harris* (*w*), a devise of property "which I have lately purchased," was held not to include a piece of land which did not strictly fall within those words. And in *Roe* d. *Conolly* v. *Vernon* (*x*), a surrender to the use of the testator's will of all the lands, &c., situate in certain specified places, which he held of the manor of W., being of the yearly rent to the lord in the whole of 4*l.* 10*s.* 8½*d.*, and compounded for, was held to be confined to copyholds compounded for, though the rent specified exceeded the amount of rent paid for the compounded copyholds, but did not correspond with the amount paid for the whole.

"In my occupation."

So, in *Doe* d. *Parkin* v. *Parkin* (*y*), where a testator, seised of a house and five acres of land in his own occupation, and of an inn and nine acres of land in the same place, not so occupied, devised all his messuages, tenements, lands, grounds, hereditaments and premises situate at or in the township of A., in the parish of B., and then in his own occupation, with the appurtenances, to certain uses, the Court held that these words were clearly restrictive, and consequently that the inn did not pass.

And in *Re Seal* (*z*), where there was a devise of a "residence and premises thereto, as the same are now occupied by me," full effect was given to the latter words as restrictive of the devise.

In *Pullin* v. *Pullin* (*a*), a testator, reciting that he was seised in fee of divers freehold lands in the parish of St. Mary, Islington, and of certain copyholds within and holden of the manor of the Prebendary of Islington, and *all* which lands, &c. were subject to

(*u*) See also *Wilkinson* v. *Bewicke*, 1 Eq. Rep. 12. But a devise of lands, which the testator had from time to time "purchased," has been held to apply to lands which he had received in exchange, and not (as contended) to be confined to those which he had bought with money; the word "purchase" admitting, it was considered, of application to what was purchased for money or lands, *Doe* d. *Meyrick* v. *Meyrick*, 1 Cr. & M. 820.

(*v*) *Doe* d. *Tyrrell* v. *Lyford*, 4 M. & Sel. 550.

(*w*) 57 L. J. Ch. 62.

(*x*) 5 East, 51.

(*y*) 5 Taunt. 321; doubted in *White* v. *Birch*, 36 L. J. Ch. 174, sed qu.

(*z*) [1894] 1 Ch. 316, ante, p. 1269.

(*a*) 10 J. B. Moo. 464, 3 Bing. 47, see also *Wilson* v. *Mount*, 3 Ves. 191.

CHAP. XXXV.

a mortgage thereof made by him to R. (minutely referring to the mortgage), gave and devised all his *said* freehold and copyhold lands and hereditaments; it was held that twenty-one acres of freehold land in Islington, not in mortgage to R., did not pass under his devise, but were included in a general devise in a subsequent part of the will of the residue of his freehold, copyhold and leasehold estate; the Court being of opinion that the testator intended to confine the former devise to the property in mortgage to R. It seems that a contrary construction would have left the residuary clause nothing to operate upon; but this circumstance was not relied on, and seems indeed entitled to little weight, as the clause embraced copyholds as well as freeholds, and the testator had no copyholds except those in mortgage. The testator's expressions certainly indicated that he considered the mortgage as extending over the whole subject devised.

And in *Morrell* v. *Fisher* (*b*), where a testator devised "all his leasehold farm-house, home-stead, lands and tenements at Headington, held under Magdalen College, Oxford, and then in the possession of T. B. as tenant to him," it was contended, that two pieces of land at Headington, containing together twelve acres and being leasehold, held of the College, but not in the possession of T. B., passed by this devise. But the Court of Exchequer were of a contrary opinion, there being other lands which fully answered the description.

This principle is applicable to descriptions of property with reference to its tenure, as freehold or copyhold, or with reference to the testator's estate and interest in it. So that if a testator devises his freehold hereditaments at X. to A. B., this will not, as a general rule, pass his copyholds at X. (*c*). And in the absence of special circumstances, a devise of freeholds at X. will not pass leasehold at X., nor will a gift of leaseholds at D. pass freeholds at D. (*d*). But where, besides a fee simple estate in one part and a leasehold interest in a second part of a block of buildings in A. Street and B. Court, a testator had in a third part of the same block a leasehold interest in possession, and (subject to an intermediate reversionary term) the ultimate reversion in fee, and devised his "freehold messuages in A. Street and B. Court"; it was held that everything passed in which he had the fee, and that as he had the fee in the third part,

(*b*) 4 Exch. 591; and see *Homer* v. *Homer*, 8 Ch. D. 758 (land at Stock Green).

(*c*) *Doe* v. *Brown*, 11 East, 441; *Quennell* v. *Turner*, 13 Bea. 240.

(*d*) *Corballis* v. *Corballis*, 9 L. R. Ir. 309.

although he had another sort of interest in it besides, yet the whole of his interest in it passed by the devise, the testator having sufficiently denoted the thing which he intended to pass. The portion in which he had only a leasehold interest of course did not pass by the devise (*e*). And it seems that the same construction would have been applied even if the testator had expressly bequeathed his leasehold interest to another person (*f*). But where the description of the property is specific, the word "freehold" may be rejected as falsa demonstratio (*g*).

The principle in question has most frequently been applied to terms of local description. Thus, if a testator have property in, and property contiguous to a particular place, it is clear that a devise of houses or buildings in that place will carry the former to the exclusion of the latter (*h*). The leading case in this doctrine is *Webber* v. *Stanley* (*i*), where a testatrix first charged her Welsh estates with a sum of money as "an addition to her Tedworth estates thereinafter devised," then gave her mansion house at Tedworth, in the county of Hants, and all her manors, farms, lands, &c., in the county of Hants, devised to her by her husband (subject to the annuities charged thereon by his will), and all other her hereditaments in the county of Hants, "all which hereditaments in the county of Hants were thereinafter described as her Tedworth estates," to uses in strict settlement, and she subsequently referred to "her said Tedworth estates": it appeared that the husband, being owner of property in Hants and Wilts, together known as "the Tedworth Estate," had devised to the testatrix all his estates at or near Tedworth, charged with certain annuities: it also appeared that there was only one manor in Hants, but several in Wilts, that some of the farms of "the Tedworth Estate" lay partly in one county and partly in another, and that the charges thrown on the devised property were or might become out of all proportion to the value of the Hants property. It was held in C. P. that the words "in the county of Hants" were not falsa demonstratio, but confined the

Webber v. *Stanley.*

(*e*) *Mathews* v. *Mathews*, L. R., 4 Eq. 278.

(*f*) *Re Guyton and Rosenberg*, [1961] 2 Ch. 591. As to the effect of sec. 26 of the Wills Act, see ante, p. 962.

(*g*) See *Re Bright-Smith*, 31 Ch. D. 314, ante, p. 1271.

(*h*) See *Doe* d. *Browne* v. *Greening*, 3 M. & Sel. 171; *Pogson* v. *Thomas*, 6 Bing. N. C. 337; *Smith* v. *Ridgway*, L. R., 1 Ex. 46, 331; *Evans* v. *Angell*, 26 Bea. 202; *Lister* v. *Pickford*, 34 Bea. 576. But where a house, with the appurtenances, is described to be in a certain place, lands quasi appurtenant to the house may pass, though not in that place: *Boocher* v. *Samford*, Cro. El. 113; and see *Moser* v. *Platt*, 14 Sim. 95.

(*i*) 16 C. B. (N. S.) 698, virtually overruling *Stanley* v. *Stanley*, 2 J. & H. 491, on same will. See *Re Brocket*, [1908] 1 Ch. 185.

CHAP. XXXV.

devise to lands in that county. Erle, C.J., delivered judgment and "laid down the law with a clearness and authority which cannot be strengthened or added to" (*j*): there was a property which every part of the description fitted, and on which every word of it had full effect: if the testatrix had devised "her Tedworth estates" simply, that would have sufficed; but that phrase was never used by her without referring to the definition (her "said" Tedworth estates), which confined it to property in Hants. As to the word "manors" (in the plural), it occurred only in a sweeping general clause; and as to the charges, a similar disproportion had been disregarded in *Doe* d. *Templeman* v. *Martin* (*k*); and such considerations could not outweigh the clear words of the devise. The correctness of the principle laid down in *Webber* v. *Stanley* is well established (*l*).

"At, in or near," how construed.

So, in *Doe* d. *Ashforth* v. *Bower* (*m*), where a testator devised all his messuages, tenements or dwelling-houses, and buildings situate at, in or near Snig Hill, in Sheffield, which he had lately purchased from the Duke of Norfolk. The testator had six houses at Sheffield all purchased from the Duke, and comprised in one conveyance, four of which houses were distant about twenty yards from Snig Hill, and the remaining two about four hundred yards therefrom. The testator had redeemed the land tax for all the houses by one contract. It was held, that the devise did not comprise the two latter houses, part only of the description applying to them, and there being other houses to which the whole of the description did apply.

Description applied to a subject not strictly falling within it, for want of a more appropriate one.

But if the testator had no property in the street named, a contiguous property may pass. Thus, in *Doe* d. *Humphreys* v. *Roberts* (*n*), where a testator devised all that his messuage or dwelling-house, with the appurtenances, situate in High Street, in the town of Holywell, wherein his mother inhabited, and nearly opposite to the White-horse inn, together with the shop adjoining the said messuage, and all and every his buildings and hereditaments in the same street, to .. It appeared that the testator had only one house in High Street, and that was occupied by his mother; but he had two cottages in a lane called Bakehouse Lane, behind the house, from which it was separated by a road wide enough to admit

(*j*) Per Willes, J., in *Smith* v. *Ridgway*, L. R., 1 Ex. 331.

(*k*) 4 B. & Ad. 771.

(*l*) See *Re Seal*, [1894] 1 Ch. 316, ante, p. 1269.

(*m*) 3 B. & Ad. 453. See also *Attwater* v. *Attwater*, 18 Bea. 330. The case of *Newton* v. *Lucas*, 6 Sim. 54, is generally cited in support of the same position; but the first decision was given, under the particular circumstances, in favour of the greater comprehensiveness of the devise, 1 My. & Cr. 391.

(*n*) 5 B. & Ald. 407; *Baddeley* v. *Gingell*, 1 Exch. 319; *Goodright* d. *Lamb* v. *Pears*, 11 East, 58; *Nightingall* v. *Smith*, 1 Exch. 879; *Doe* d. *Campton* v. *Carpenter*, 16 Q. B. 181.

carriages ; but there was no thoroughfare in the lane, and the only entrance to it was out of High Street under an arch a little below the testator's house. It was held that these cottages passed under the devise, the Court relying much on the fact that the testator had no other property which could answer to that part of the description ; and there being, it was thought, a clear intention to pass some property in the street in addition to the house ; and as there was no access to them but from the street, it was considered that the cottages might, without much impropriety, be described as situate in the street.

It is observable, that if the cottages in question had not passed under this devise, there was a general clause which would have comprised them, so that the construction was not induced by an anxiety to avoid intestacy.

Devise of lands in one county not applied to lands in another county.

" It is clear, however," as Mr. Jarman points out (*o*), " that where a testator having lands in a certain county, devises all his estates in another county, in which he has actually no property, the lands in the former county will not pass (*p*).

Local name used in peculiar sense.

" And though a testator may show by the context of his will, that he uses a local appellation in a peculiar and extraordinary sense, yet this hypothesis will not be adopted upon slight and equivocal grounds. Thus, where (*q*) the devise was of a testator's lands, ' in Leverington,' and it appeared that there was within the parish of this name a district called Leverington Parson's Drove, for which a chapel of ease had long ago been endowed, and that the testator had lands in the parish which were within the chapelry, and lands in the parish which were not ; it was contended that this devise was to be confined to the latter, on the ground that the testator had himself distinguished the parish and the chapelry by describing himself to be ' of Leverington,' and one of his devisees as being of ' Leverington Parson's Drove ' : but the Court held, that the lands in the parish, whether in the chapelry or not, passed by the devise ; Lord Denman observing, that though if the description of locality had been ' Leverington Parson's Drove,' that would have been exclusive of every other part of the parish ; yet the use of the larger term did not exclude the less."

But in a case (*r*) where a man was seised of land in a vill and in

(o) First edition, p. 723.

(p) *Miller* v. *Travers*, 8 Bing. 224 ; *Poyson* v. *Thomas*, 6 Bing. N. C. 337 ; *Moser* v. *Platt*, 14 Sim. 95 ; *Barber* v. *Wood*, 4 Ch. D. 885.

(q) *Doe* d. *Edwards* v. *Johnson*, 5 Nev. & M. 281.

(r) *Anon.*, 3 Dy. 261, pl. 27. In the parish of Street were two vills, viz. Street and Walton ; by fine levied of " all his lands in Street," land in Walton did not pass, *Stork* v. *Fox*, Cro. Jac. 120. But this is explained to have been because the law then took notice only of

two hamlets of the same vill, and devised all his lands being in the vill, and in one of the two hamlets by name, it was held that nothing of the land in the other hamlet should pass; for the naming of the one hamlet argued his intent fully.

"Estates in or near L., near M."

In regard to proximity, it has been decided that a devise of estates, situate "in or near Latchingdon, near Maldon," did not include a close which was situate four or six miles from Latchingdon, and in the town of Maldon (*s*).

"Lands at or within D."

Some minute but not unserviceable criticism was devoted to the words "at or within" in *Homer* v. *Homer* (*t*), where, among other devises of distinct properties, one "in the parish of" A., another "in the parish of" B., and a third "in the parish of" C., a testator devised his "manor of D., and all his messuages, tenements and lands at or within D. then in the occupation of J. S." The testator had two farms, the greater part of which was in the parish (which was co-extensive with the manor) of D., but a small part of each was in an adjoining parish, separated from the bulk, in the one case by a hedge (which was close to the church of D.), in the other by a high road. It was held by Fry, J., that the outlying portions did not pass by the devise. But his decision was reversed by the L.JJ., who held that D. meant the place so called, not the parish of D.

Whether gift of hereditaments "situate at A." will pass advowson.

It may here be observed that although an advowson in gross (*u*) is merely a right collateral to the land, and is therefore not properly described as being "in" or "situate at" a particular place (*uu*), yet a devise of "all my real estate in the county of A." will pass an advowson in gross in respect of a parish church situate in the county of A., if it appears from all the circumstances that the testator intended it to pass (*v*).

Effect where there is property of another answering to the description.

Mr. Jarman remarks (*w*) with reference to the general rule discussed above: "Sometimes the application of the principle in question is embarrassed by the circumstance, that the terms of description, though not applicable to any property of the testator, precisely answer to the property of some other person. For instance, a testator having a manor, called North Dale, in A., devises his manor, called South Dale, in A. Now, supposing that there was

civil, not (unless named) of ecclesiastical, divisions, 4 Crui. Dig. p. 265.

(*s*) *Doe* d. *Dell* v. *Pigott*, 1 J. B. Moo. 274, 7 Taunt. 552; see also *Doe* v. *Bower*, 3 B. & Ad. 453.

(*t*) 8 Ch. D. 758. See also *Att.-Gen.* v. *Horner*, 11 App. Ca. 66, which was a case of a grant by charter of a market "in sive juxta" a particular locality.

(*u*) See ante, p. 75.

(*uu*) *Crompton* v. *Jarratt*, 30 Ch. D. 298, where the earlier authorities are discussed.

(*v*) *Re Hodgson*, [1898] 2 Ch. 545. In *Anon.*, Dyer, 323b, an advowson was held to pass by a lease of "hereditaments situate, lying and being in T."

(*w*) First edition, p. 724.

in A. no manor of South Dale, the authorities would authorize the application of the devise to the manor of North Dale; but if it should turn out that there was in A. a manor called South Dale, belonging to some other person, it might be contended that the testator conceived himself to have some devisable interest in the manor of South Dale, and intended to devise that interest, or, in respect of wills operating under the present law, he might have contemplated the subsequent acquisition of a devisable interest in such manor."

Bequests of money in the funds, &c.

The rule above discussed is also applicable to gifts of personalty. Thus where a testator at the date of his will owned Government stock standing in his name in the Bank of Ireland, and also Government debentures payable to bearer, the accounts of which were kept at the Bank of Ireland, it was held that the latter did not pass under a bequest of "the whole of my Irish funded property standing in my name in the Bank of Ireland" (*x*). So a bequest of "shares in the A. company" will not pass debentures of that company if the testator has shares (*y*). Nor will a bequest of policies in a certain insurance company pass shares in that company, although the testator never had any policies in it, if it appears from the will that the testator drew a distinction between shares and policies (*z*).

Public funds "in my name."

If a testator is entitled to a beneficial interest in Government funds standing in the names of trustees, and has no such funds standing in his own name, a bequest of "all moneys standing in my name in the public funds" will pass his interest in the funds standing in the names of the trustees (*a*).

Securities, money on deposit, &c.

And a bequest of a particular investment may pass a different kind of investment, if there is nothing accurately answering the description (*b*). Thus a bequest of a sum described as invested on the deposit receipt of a bank may pass shares in that bank (*c*).

Stock.

If a testator bequeaths a sum of X. stock, and he has at the time of his death a smaller sum of X. stock, the bequest will pass only that stock, and not stock of a similar description into which some X. stock formerly belonging to the testator had been converted (*d*).

(*x*) *Ridge* v. *Newton*, 2 Dr. & W. 239; *Slingsby* v. *Grainger*, 7 H. L. C. 273 (stated ante, p. 1276); *Ex parte Kirk*, 5 Ch D. 800 (debt).

(*y*) *Re Bodman*, [1891] 3 Ch. 135; *Dillon* v. *Arkins*, 17 L. R. Ir. 636. Aliter if he has no shares: *Re Weeding*, ante, p. 1273.

(*z*) *Waters* v. *Wood*, 5 De G. & S. 717.

(*a*) *Quennell* v. *Turner*, 13 Bea. 240. *Mangin* v. *Mangin*, 16 Bea. 300, is not a valuable authority: see *Slingsby* v. *Grainger*, 7 H. L. C. 273, ante, p. 1276.

(*b*) *Richards* v. *Patteson*, 15 Sim. 501, ante, p. 461.

(*c*) *Mosse* v. *Cranfield*, [1895] 1 Ir. 80.

(*d*) *Gilliat* v. *Gilliat*, 28 Bea. 481.

CHAP. XXXV.

Effect of testator acquiring stock after date of will.

It has been already explained that if a testator bequeaths "my shares" in a certain company, and at the date of the will he holds debenture stock of the company and no shares, the debenture stock may pass under the bequest (*e*). But suppose the testator, after the date of the will, were to acquire shares in the company? According to Nor J. (*f*), this would prevent the debenture stock from passing by the bequest, but this seems an illogical result, which can only be justified by supposing that when the testator made his will he contemplated buying the shares—a somewhat improbable supposition.

Debts.

On the same principle, if a testator bequeaths "all debts which shall be due to me by B. at the time of my decease," and there is at the time of the testator's death a debt due to him by B., this satisfies the bequest, and it will not pass debts due to the testator by B. jointly with other persons. If, however, there is no debt accurately answering the description, the doctrine of falsa demonstratio may be applicable (*g*).

Account at bank.

A bequest of "money standing to my account at the X. Bank" will not necessarily pass money standing in the name of the testator at the Y. Bank (*h*).

Classes of relations, &c.

IV.—Words of Description.—(A) PERSONS.—The meaning to be given to many generic words of description is discussed in other chapters of this work, especially in connection with gifts to children (*i*), nephews and other classes of relations (*j*), and to heirs (*k*), issue, descendants, family, next-of-kin, representatives, executors, &c. (*l*).

Residence.

A testator sometimes gives property to such members of a class as live or reside in a certain county: as a general rule, persons who are absent from that county temporarily or as a matter of duty may nevertheless be considered as living there (*m*).

"Lessee."

"Lessee" may include an assignee of the lease (*n*).

Surnames.

Questions sometimes arise as to the effect of a gift to persons bearing a certain surname (*o*), or a gift to a person upon condition

(*e*) *Re Weeding*, [1896] 2 Ch. 364, ante, p. 1273.
(*f*) Ib.
(*g*) *Ex parte Kirk*, 5 Ch. D. 809; *Maybery* v. *Brooking*, 7 D. M. & G. 673.
(*h*) *Re Howes*, [1882] W. N. 102.
(*i*) Chap. XLII.
(*j*) Chap. XLI.
(*k*) Chap. XL.
(*l*) Chap. XLI.
(*m*) *Dale* v. *Atkinson*, 3 Jur. N. S. 41; *Woods* v. *Townley*, 11 Ha. 314. See *Re Arbib*, [1891] 1 Ch. 601. Compare the cases on conditions as to residence, post, Chap. XXXIX.
(*n*) *King* v. *Rymill*, 78 L. T. 696.
(*o*) *Pyot* v. *Pyot*, 1 Ves. sen. 335 ("my nearest relations of the name of Pyot"); *Leigh* v. *Leigh*, 15 Ves. 92 ("kindred of my name and blood"); *Bon* v. *Smith*, Cro. El. 532 ("the next of my name"); *Jobson's case*, ib. 576.

that he or she marries a person bearing a certain surname (*p*), but no general principle can be deduced from the cases. The subject of surnames is discussed in a later chapter (*q*).

"Unmarried."

"The word *unmarried* means either never having been married, or, not having a husband or wife at the time. The former is its ordinary signification" (*r*). But it is a word of flexible meaning, to be construed with reference to the context (*s*). In *Re Thistlethwayte* (*t*) a testator, after giving his daughter an annuity during the joint lives of herself and her mother, gave her a larger annuity if she should survive her mother "and be still unmarried"; and he gave her a sum of money at her mother's decease if she should be "then unmarried"; it was held that "unmarried" meant "a spinster." On the other hand, in *Re Sanders' Trusts* (*u*) there was a gift to A. for life, remainder to any wife he might thereafter marry for life, remainder to his children absolutely, and in case he died unmarried and without issue, to B., C., and D. absolutely. A. survived B., C., and D., and died a widower, without ever having had a child, and it was held that the representatives of B., C., and D. were entitled to the legacy. The same construction was adopted in *Re King* (*v*) and *Re Chant* (*w*).

Effect of divorce.

Upon the principle that the word "unmarried" is of flexible meaning, where a testatrix by her will gave a fund to trustees upon trust to pay the income to A. for life, and on his death to divide the fund into four parts, and as to one of the parts "upon trust to pay the same to J. H., spinster, if she be then sole and unmarried, but if she be then married" to hold the fund upon trusts for J. H. for her life, and after her death for her children; it was held by North, J. (*x*), that J. H., who had married after the date of the will, and whose marriage had previously to the death of A. been dissolved by decree absolute, was entitled absolutely to the one-fourth of the fund.

Class of unmarried persons.

Where there is a gift to a class of unmarried persons (as to "my unmarried sisters") the class is primâ facie to be ascertained at the testator's death (*y*).

(*p*) *Barlow* v. *Baleman*, 3 P. W. 65, post, Chap. XXXIX.

(*q*) Chap. XXXIX.

(*r*) Mr. Jarman, in the first edition of this work, p. 457; ante, p. 617. *Heywood* v. *Heywood*, 29 Bea. 9; *Radford* v. *Willis*, L. R., 7 Ch. 7; *Dalrymple* v. *Hall*, 16 Ch. D. 715; *Re Sergeant*, 26 Ch. D. 575; *Blundell* v. *De Falbe*, 57 L. J. Ch. 576 (marriage settlement).

(*s*) *Clarke* v. *Colls*, 9 H. L. C. 601, affirming decree of Wood, V.-C., in *Mitchell* v. *Colls*, John. 674.

(*t*) 24 L. J. Ch. 712.

(*u*) L. R., 1 Eq. 675.

(*v*) 62 L. T. 789.

(*w*) [1900] 2 Ch. 345.

(*x*) *Re Lesingham's Trusts*, 24 Ch. D. 703.

(*y*) *Blagrove* v. *Coore*, 27 Bea. 138. As to the rules for ascertaining classes, see Chap. XLII.

CHAP. XXXV.

Maintenance of unmarried children.

Where a testator gives the income of his property to his wife for life for the benefit of herself and his unmarried children, it might be supposed that he means his children for the time being unmarried; but in *Jubber* v. *Jubber* (*z*), Shadwell, V.-C., decided otherwise; he remarked: "The term 'unmarried' is *designatio personarum*; and, if once the child is entitled to participate in the fund by filling the character of an unmarried child, he will not lose that right if he subsequently marries."

Hypothetical death "unmarried."

The meaning of the word "unmarried" has been much discussed in connection with gifts to the persons who would have been the statutory next-of-kin of a woman "if she had died unmarried" (*a*).

"Sole."

The primary meaning of "sole," as applied to a married woman, is that she has no husband at the time; it therefore includes the case of a widow (*b*).

"Married."

The phrase "married," as applied to a woman, primâ facie means a woman who has a husband at the time (*c*).

Wife, husband, &c.

The question whether a gift to the wife (or husband) of A. without the name of the legatee being given, refers to the person who answers that description at the date of the will, or at some other period, has been already discussed (*d*), as has also the question whether a gift to a person whose name is given, and who is described in the will as the wife (or husband) of A., takes effect although the person is not lawfully married (*e*).

"Widow."

In *Re Wagstaff* (*f*) a testator gave his residuary estate to his "wife, Dorothy Josephine Wagstaff" and two other persons upon trust for sale and investment, and to pay the income to "my said wife during her life, if she shall so long continue my widow, for her own use and benefit, and upon or after her decease or second marriage" upon the trusts therein mentioned. Four years before the date of the will the testator went through the ceremony of marriage with Dorothy Josephine Jalland, knowing that she was then the wife of A. G. Jalland; they both survived the testator. It was held that Mrs. Jalland was entitled to a life interest in the residue unless and until she married after the testator's death.

Divorce.

A woman whose marriage has been dissolved is not the widow of her divorced husband if she survives him (*g*).

(*z*) 9 Sim. 503. See *Garratt* v. *Niblock*, 1 R. & My. 629; *Hall* v. *Robertson*, 4 D. M. & G. 781.

(*a*) Chap. XLI.

(*b*) *Re Lesingham's Trusts*, 24 Ch. D. 703; *Hardwick* v. *Thurston*, 4 Russ. 380.

(*c*) *Re Lesingham's Trusts*, supra; *Rudall* v. *Nichols*, [1900] W. N. 133.

(*d*) Ante, p. 397.

(*e*) Ante, p. 400.

(*f*) [1907] 2 Ch. 35; [1908] 1 Ch. 162.

(*g*) *Re Boddington*, 25 Ch. D. 485, *Re Kettlewell*, 98 L. T. 23.

(B) PROPERTY.—(1) *Words descriptive of Land, Houses, &c.* (*h*).—Mr. Jarman lays it down (*i*) that "The most comprehensive words of description applicable to real estate are *tenements* and *hereditaments*; as they include every species of realty, as well corporeal as incorporeal (*j*).

"Tenements and hereditaments," include what.

"The word 'lands' is not equally extensive; for though, generally, it includes as well the surface of the ground as every thing that is on and under it, as houses and other buildings (*k*), mines, &c., yet it seems that the term will not, proprio vigore, comprehend incorporeal hereditaments, as advowsons, tithes, &c. (*l*), unless there is no other real estate to satisfy the words of the devise: a circumstance, however, which in regard to wills made or republished since 1837, would be immaterial. Thus it seems that if a man devise all his lands in A., and he has no other real estate there than tithes, they will pass (*m*). So, if he devise a certain manor, and has only a fee farm rent issuing out of it, such rent will pass (*n*).

"Lands."

"But though a devise of *lands* will, unaided by the context, carry *houses* (*o*), or rather the land on which the houses are built; yet of course this does not hold where the testator evidently uses the term in contradistinction to *house*.

Whether it includes houses.

"As where (*p*) A. having a messuage at L. and a messuage and lands at W., devised his house at L., with all other his lands, meadows, pastures, with their appurtenances, lying in W., the house at W. was held not to pass.

"The observation is equally applicable to other words of description, any of which may be diverted from their ordinary signification, by being placed in contrast or opposition to others" (*q*).

(*h*) The questions discussed in this section are closely connected with those treated of in Chaps. XXV. and XXVII.

(*i*) First edition, p. 706. Mr. Jarman must here be understood as referring to technical words of description, for "estate" and "property" are words of equally wide import: see ante, p. 999. As to the meaning of "tenements" and "hereditaments," which are not co-extensive, see Co. Litt. 6a.

(*j*) Co. Litt. 6a, 19b, 20a, 154a. In *Wybrants* v. *Maude*, [1895] 1 Ir. 214, "lands and tenements" was held to mean an undivided share of land. As to the effect of "hereditaments" in passing money subject to a trust for re-investment in land, see *Basset* v. *St. Levan*, 43 W. R. 165; *Re Gosselin*, [1906] 1 Ch. 120, infra, p. 1289.

(*k*) *Ewer* v. *Heydon*, Moore, 359, pl. 491.

(*l*) See Com. Dig. Advowson, C. 1; *Anon.*, Dyer, 323b; *Bishop of London* v. *Chapter of Southwell*, Hob. 303. Mr. Jarman must be understood as speaking of advowsons in gross: an advowson appendant or appurtenant passes with the manor or land to which it is annexed. That a rent-charge or rent-seek will not generally pass by devise of "lands," see *West* v. *Lawday*, 11 H. L. Ca. 375, per cur.; and as to the effect of a devise of real estate "in" or "situate at" a particular locality in passing advowsons, see ante, p. 1282.

(*m*) See *Ritch* v. *Sanders*, Styles, 261.

(*n*) *Inchley* v. *Robinson*, 2 Leon. 165, c. 218.

(*o*) Co. Litt. 4a.

(*p*) *Heydon's Will*, 2 And. 123; Cro. El. 476, 658 (*Ewer* v. *Heydon*). See also *Re Portal* and *Lamb*, 30 Ch. D. 50.

(*q*) See *Hockley* v. *Mawbey*, 1 Ves.

Words of locality referred to immediate antecedent.

Where a testator devises two kinds of property by a general description, and adds words referring to locality, the question may arise whether these words apply to both kinds of property or only to the latter. Thus in *Doe* d. *Gillard* v. *Gillard* (*r*), where the devise was "of all my lands for ever, and leasehold property here or at Beeston," the main question was whether the restrictive words "here or at Beeston" applied to both freehold and leasehold, or to leasehold lands only; and it was held that they were confined to the latter, and that the devise of the freehold lands was general without any local restriction.

Locality, how described.

A term descriptive of locality is not necessarily taken in its strictly accurate sense (*s*).

Reference to testator's title.

Sometimes a testator describes land by referring to the mode in which he acquired it: as when he devises the land "which I became entitled to on the death of my father," or the land "which I purchased of A." (*a*). Here again strict accuracy is not required: thus, a devise of lands, "which I have from time to time purchased," may include lands acquired by exchange (*b*).

"Land" includes leaseholds.

With reference to the meaning of the word "land," an old rule of construction has been abolished by sec. 26 of the Wills Act, which enacts that a devise of the land of the testator, or of the land of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general way, shall be construed to include the leasehold estates of the testator, unless a contrary intention appears. This section is chiefly of importance with reference to residuary devises, and has accordingly been considered in Chapter XXV. (*t*). Some of the cases there cited relate to devises of "all my land" in a particular place.

Whether "freeholds" will pass leaseholds, and vice versâ.

As a general rule, a devise of "freehold" land does not pass leaseholds, but as already mentioned, where the devise is specific, and the testator has no freehold land answering the description, leasehold land may pass; and conversely, where the gift is of land described as leasehold (*u*). And it seems clear that where a testator devises "my freehold farm called Blackacre, now in the occupation of X.," and it appears that part of the farm is leasehold

jun. 143; and *Doe* d. *Ryall* v. *Bell*, 8 T. R. 579, stated ante, p. 1276.

(*r*) 5 B. & Ald. 785; also cited ante, p. 1004. Compare *Pomeroy* v. *Taylor*, 32 Bea. 604.

(*s*) *Wallace* v. *Att.-Gen.*, 33 Bea. 3[illegible] (gift to "the hospitals of London").

(*a*) *Doe* d. *Ryall* v. *Bell*, 8 T. R. 579; *Doe* d. *Tyrrell* v. [illegible]*ford*, 4 M. & Sel. 550, both cited ante, p. 1276, 1277; *Hounsell* v. *Dunning*, [1892] 1 Ch. 512 ante, p. [illegible].

(*b*) *Doe* d. *Meyrick* v. *Meyrick*, 1 Cr. & M. 820, ante, p. 1277, n. (*a*).

(*t*) Ante, p. 962.

(*u*) Ante, p. 1266.

(the whole being in the occupation of X.), the leasehold portion will pass (*u*).

Whether "real estate" will pass leaseholds.

The question whether a devise of "real estate" passes leaseholds is discussed elsewhere (*uu*).

Customary and copyhold land.

A devise of "freehold" land does not, as a general rule, pass customary freeholds or privileged copyholds; see post, p. 1298.

It will be remembered that under sec. 26 of the Wills Act, a devise of "lands" prima facie passes customary and copyhold land as well as freeholds (*v*).

Money to be laid out in lands.

Money impressed with a trust for investment in the purchase of land will pass under a devise of "lands" or "hereditaments"; but it may be impressed in land situate anywhere in England, it will not pass under a devise of "all my lands in the county of S." (*w*).

Land subject to a trust for conversion.

Where a testator has personal property which is constructively personalty, being land under a trust for sale but not sold, it will pass under a gift of the testator's "real estate" or of his "lands, tenements or hereditaments," if the property is sufficiently identified (e.g. by a reference to its locality or to the settlement in which it is comprised), or if the testator had no interest in any land or real estate in the proper sense of the term, so that it can fairly be inferred that he must have meant to refer to the property in question (*x*).

Mortgage debt.

It is noticed elsewhere that a devise of lands does not as a general rule pass the beneficial interest in a mortgage (*y*).

Merger of charge.

Where a testator is entitled to land which is subject to a charge, and is also entitled to the charge itself or a beneficial interest in it, the question may arise whether a merger has taken place or has, of course a devise of the land passes the benefit of the charge, but if no merger has taken place, the benefit of the charge will pass under any gift expressed in appropriate words (*z*), or the testator may direct it to merge (*a*).

"Premises."

The word "premises" properly denotes that which is before

(*u*) See *Re Bright-Smith*, 31 Ch. D. 314 (stated ante, p. 1271), where the question was as to copyholds, but the principle seems the same. *Hall* v. *Fisher*, 1 Cox, 47, and *Stone* v. *Greening*, 13 Ves. 390, are commented on by Chitty, J. The case of *Emuss* v. *Smith*, 2 De G. & Sm. 722 (stated ante, p. 410), seems to have turned on the special language of the will: sed qu. whether the doctrine of falsa demonstratio might not have been applied.

(*uu*) Ante, p. 963.

(*v*) Ante, p. 959.

(*w*) *Re Duke of Cleveland's S.E.*, [1893] 3 Ch. 244; *Basset* v. *St. Levan*, 71 L. T. 718; *Re Gosselin*, [1906] 1 Ch. 120.

(*x*) *Re Lowman*, [1895] 2 Ch. 348; *Re Glassington*, [1906] 2 Ch. 305.

(*y*) Ante, pp. 1235 et seq., where the exceptions to the general rule are stated.

(*z*) *Wilkes* v. *Collin*, L. R., 8 Eq. 338. As to the rule with regard to merger in these cases, see ante, p. 970.

(*a*) *Re Nunns' Estate*, 23 L. R. Ir. 286.

CHAP. XXXV.

mentioned, and in this view, its comprehensiveness is of course measured by that of the expression to which it refers (*b*). Thus (*c*), where a testator devised a certain messuage and the furniture in it to A. for life, and after A.'s decease gave the said messuage "and premises" to B., the latter devise was held to carry the furniture as well as the messuage to B., on the ground that the word "premises" included all that went before. But the word is constantly used, not only in popular language but also in modern acts of parliament, without reference to what is before mentioned, in the general sense of houses, land and the like; and it has often been so construed when used in wills (*d*). It is also frequently used to denote appurtenances, in the popular sense of that expression (*e*). Even a gift of "the leasehold premises No. 32 Princes Gate" will pass stables at 3 Princes Mews, held under a different lease (*f*).

Devise of "messuages" generally.

It sometimes happens that a testator, in making a residuary devise, or a specific devise of land in a particular locality, uses a number of general words, such as "messuages, lands, tenements, and hereditaments." Before the Wills Act, the use of the word "messuages" did not make the devise include leasehold messuages, unless an intention that it should do so appeared from the will or from the circumstances (*ff*). The Wills Act has not directly altered the rule, but as a devise of "land" now primâ facie includes leaseholds, the question as to the effect of the word "messuages" is not likely to be of importance. As to *Arkell* v. *Fletcher*, 10 Sim. 299, see post, p. 1297, n. (*uu*).

"Messuage" includes curtilage, garden and orchard;

As a word of particular description, "messuage" has been

(*b*) *Doe* d. *Biddulph* v. *Meakin*, 1 East, 456. This doctrine was advanced in the judgment, and is indeed unquestionable; but the case did not turn precisely on the question. A. devised a messuage or tenement, lands, buildings and premises, then in his own possession, and all other his real estate whatsoever, to his wife for life. And after her decease, he devised the said messuage, or tenements, buildings, lands, and premises, to his son W. in fee. The question was, whether the devise to W. included all that was given to the wife, or only the premises in his own occupation; and it was held, that it included all. The point, therefore, was not so much, whether the word "premises" included the whole antecedent subject, as whether the testator, having used precisely the same words as those by which he had described the property in his own occupation, was not to be understood to mean to confine the devise in question to that property. If the devise were not so restrained, there were other words sufficient to carry the reversion in dispute, without calling in aid the word premises.

(*c*) *Sanford* v. *Irby*, 4 L. J. Ch. O. S. 23, cor. Lord Gifford, M.R. See *Doe* d. *Bailey* v. *Sloggett*, 5 Exch. 107.

(*d*) *Doe* d. *Hemming* v. *Willetts*, 7 C. B. 709; and see *Ross* v. *Veal*, 1 Jur. N. S. 751; *Lethbridge* v. *Lethbridge*, 3 D. F. & J. 523, 4 D. F. & J. 35; *Hibon* v. *Hibon*, 32 L. J. Ch. 374 (detached piece of land held to pass with house).

(*e*) *Read* v. *Read*, 15 W. R. 165. See *Cave* v. *Harris* and *Re Seal*, supra, p. 1269.

(*f*) *Mocatta* v. *Mocatta*, 49 L. T. 629, following *Hibon* v. *Hibon*, supra.

(*ff*) *Thompson* v. *Lady Lawley*, 2 B. & P. 303; *Hobson* v. *Blackburn*, 1 My. & K. 571.

variously construed; sometimes a greater and sometimes a less degree of comprehensiveness having been attributed to it.

In an early case (*g*) it is laid down, that the grant of a messuage did not include a garden, but was confined to the house, "and the circuit thereof," and it was thought that the words "messuage or tenement" must receive the same construction, the word "tenement" being in such case used as synonymous with messuage; it was, said, however, that it would have been otherwise if the expression had been "messuage and tenement": indeed, one of the Judges (Weston) expressed an opinion, that a garden would pass by the name of a messuage or tenement, if they had been held together; and in *Carden* v. *Tuck* (*h*), a devise of a messuage was held to include the garden as well as the curtilage (*i*), the garden being, as was said, as well for necessity as pleasure. So, in *Smith* v. *Martin* (*j*), it was held that a garden might be said to be parcel of a house, and by that name would pass in a conveyance.

—but not meadow or arable land.

In *Hearn* v. *Allen* (*k*), two acres of land occupied with the messuage, but distant four miles from it, were held not to pass under a devise of a messuage "cum pertinentiis." On the other hand, in *Gulliver* d. *Jefferies* v. *Poyntz* (*l*), two closes of meadow and six acres of arable land were held to pass under a devise of "three messuages, with all houses, barns, stables, stalls, &c., that stands upon or belongs to the said messuages." Much reliance was placed by the Court on the fact that the property had been conveyed to the testator by the description of "a messuage or tenement with the appurtenances"; and Mr. Jarman remarks (*m*), with reference to this, that "it is clear, that intrinsic evidence of this nature was inadmissible to enlarge the established import of the words of the devise (*n*).

(*g*) Moore, 24, pl. 82, Dal. 29.

(*h*) Cro. El. 89, 3 Leon. 214, pl. 283 (*Chard* v. *Tuck*). Lord Coke was also of this opinion, post, n. (*p*).

(*i*) As to what is a curtilage, see *Marson* v. *London, Chatham and Dover Rail. Co.*, L. R., 6 Eq. 101. The unfortunate use of the word in the Public Health Act, 1875, has, as might have been expected, given rise to difficult questions: *Pilbrow* v. *St. Leonard, Shoreditch*, [1895] 1 Q. B. 433; *Harris* v. *Scurfield*, 91 L. T. 536.

(*j*) 2 Saund. 400; see also *Hill* v. *Grange*, Plowd. at p. 170a; *Bettisworth's Case*, 2 Rep. 32a. It has been held that "house" in s. 92 of the L. C. Act includes all that would pass by the grant of a "house"—includes therefore a garden, though partly used for trade purposes, *Salter* v. *Metropolitan Rail. Co.*, L. R., 9 Eq. 432 (nursery garden), but not if wholly so used, *Falkner* v. *Somerset and Dorset Rail. Co.*, L. R., 16 Eq. 458 (market garden). See also *Grosvenor* v. *Hampstead Junction Rail. Co.*, 1 De G. & J. 446; *Fergusson* v. *Brighton Rail. Co.*, 33 Bea. 103, aff. 33 L. J. Ch. 29; *Steele* v. *Midland Rail. Co.*, L. R., 1 Ch. 275; *Richards* v. *Swansea Improvement Com.*, 9 Ch. D. 425.

(*k*) Cro. Car. 57; s. c. Litt. Rep. 5, nom. *Kene* v. *Allen*. Compare *Hibon* v. *Hibon*, 32 L. J. Ch. 374. As to the proper meaning of "appurtenances," see infra.

(*l*) 2 W. Bl. 726, 3 Wils. 141.

(*m*) First edition, p. 708.

(*n*) *Doe* d. *Brown* v. *Brown*, 11 East, 441, ante, p. 489. But evidence of a similar character was admitted in *Ross* v. *Veal*, 1 Jur. N. S. 751.

CHAP. XXXV.

The influence which this circumstance appears to have had in the determination certainly weakens its authority, and it is probable that the same construction would not now be adopted. At this day, indeed, the distinction suggested in the early cases (*o*) between *messuage* and *house*, in regard to the greater comprehensiveness of the former, is not to be relied on (*p*); and it is clear, that even the word messuage would not now be held to carry land beyond a homestead or orchard, though contiguous to, or enjoyed with it (*q*).

"House."

"House I live in and garden."

"In *Doe* d. *Clements* v. *Collins* (*r*), it was held, that under a devise of 'the house I live in and garden,' stables and a yard, which were in a ring fence that inclosed the whole, and a coal-pen which was on the opposite side of the road near the house, and both which were in the testator's own occupation, were included. The coal-pen was used in his trade, as well as for the purposes of his family. It was admitted, that the question as to the coal-pen was doubtful; but considering that it was in the testator's own occupation, was used by him partly for domestic purposes, and was annexed to no other tenement, the Court thought it passed.

Case in which "house" was held to include land.

"There is indeed a case (*s*) in which a devise of the testator's house at C. was held to include land; on the ground, it should seem, that the devisee was directed to be at the charge of housekeeping, servants' wages and coach-horses, to the number that the testator had maintained; and it appearing that he had a small piece of land, which he had employed to raise hay and corn for the house, and which was ploughed with the coach-horses (*t*). The Court, therefore, thought that as everything was to be carried on as it was in his lifetime, and the same style of living observed, the lands, the profits whereof had been used to be applied to the maintenance of the house, should continue to be so applied.

"However strong these circumstances may be as affording

(*o*) *Thomas* v. *Lane*, 2 Ch. Ca. 26, Keilw. 57, where it is said that *messuage* extends to the curtilage, though not to the garden; but that *domus* comprises only buildings.

(*p*) See Mr. Justice Ashhurst's judgment in *Doe* d. *Clements* v. *Collins*, 2 T. R. at p. 502; and Co. Lit. 5b, where Lord Coke says, "By the grant of a messuage or house, *messuagium*, the orchard, garden and curtilage doe passe; and so an acre or more may pass by the name of a house." See also *King* v. *Wycombe Rail. Co.*, 28 Bea. 104.

(*q*) See *Roe* d. *Walker* v. *Walker*, 3 B. & P. 375; but in this case "lands" were expressly devised with the house in an earlier part of the will. See also Shepp. Touchst. 94.

(*r*) 2 T. R. 498; Ashhurst, J., seems to treat the case as if the word "appurtenances" had been in the will: ib. pl. 502. See observations on the case by Turner, L. J., L. R., 1 Ch. at p. 291. In *Heach* v. *Prichard*, [1882] W. N. p. 140, "cottage and garden" was held to include an adjoining orchard.

(*s*) *Blackborn* v. *Edgley*, 1 P. W. 600.

(*t*) The Court assumed that there was a direction that the horses should continue to plough the lands; but the will, as stated in the report, contains no such clause.

conjecture, they seem not to amount to that species of evidence on which to found a judicial exposition of the testator's intention" (*u*).

It has accordingly been laid down by an eminent modern judge (*v*) that "house" will include whatever is necessary for the convenient occupation of the house, but not all that the occupier finds it convenient to occupy with it.

Direction to erect mansion-house held to include formation of suitable grounds.

But where a testator directed his trustees to erect a mansion-house, and suitable offices fit for the residence of the owner of his estates (which were worth about 15,000*l.* per annum), on some convenient spot, Sir L. Shadwell, V.-C., held that the direction authorized the formation of a garden and pleasure-grounds (*w*).

It is hardly necessary to say that if the testator himself distinguishes between "house" and "land," this may restrict the operation of the former word (*x*).

"House," "cottage," what amounts to.

So much for the comprehensiveness of the word "house." The converse question is, what kind of tenement will satisfy this and other similar terms. In *Doe* d. *Hubbard* v. *Hubbard* (*y*), it was held that the word "cottage" (defined by Lord Coke (*z*) to be a little house without land to it) was satisfied by a tenement partitioned off from a larger cottage and having a separate entrance, though not including an upper room under the same roof.

Easements.

It is clear that a devise of a house or land carries with it all easements and similar rights belonging to it, and that the doctrine of the implied grant of easements of necessity applies to devises as well as to conveyances by deed (*a*).

"Appurtenances."

It has been sometimes a question what will pass under the denomination of "appurtenances" to a messuage or house. Strictly speaking, land cannot be appurtenant to a house (*b*) or to other land (*c*). The case of *Hearn* v. *Allen* (*d*) was decided on this ground.

(*u*) See 2 B. & P. at p. 308.

(*v*) Turner, L.J., in *Steele* v. *Midland Rail. Co.*, L. R., 1 Ch. 275. Knight-Bruce, L.J., was apparently disposed to give the word a wider meaning.

(*w*) *Lombe* v. *Stoughton*, 18 L. J. Ch. 400.

(*x*) *Roe* d. *Walker* v. *Walker*, 3 B. & P. 375. See also *Buck* d. *Whilley* v. *Burton*, 1 B. & P. 53, post.

(*y*) 15 Q. B. 227.

(*z*) Co. Lit. 56b. "A cottage is a small dwelling-house," *Doe* v. *Sotheron*, 2 B. & Ad. at p. 638.

(*a*) *Pearson* v. *Spencer*, 3 B. & S. 761; *Phillips* v. *Low*, [1892] 1 Ch. 47. See *Taws* v. *Knowles*, [1891] 2 Q. B. 564; *Corbett* v. *Jonas*, [1892] 3 Ch. 137. But the devise to A. of a house "as now in the occupation of T." does not give A. the right to use a way and pump on an adjoining property of the testatrix which had been used by T. with the knowledge and consent of the testatrix: *Polden* v. *Bastard*, L. R., 1 Q. B. 156. As to what is an easement of necessity, see *Union Lighterage Co.* v. *London Graving Dock Co.*, [1902] 2 Ch. 557. As to the creation of easements de novo by express words, see ante, p. 75, and post, Chap. XLV.

(*b*) Plowd. 169a, 170.

(*c*) Co. Lit. 121b: 8 B. & Cr. 141: 6 Bing. at p. 161.

(*d*) Cro. Car. 57, ante, p. 1291, and post, p. 1295.

But in *Boocher* v. *Samford* (*e*), where a testator devised "the tenement with the appurtenances in which H. B. dwelleth in Ebley," it was held that lands that had been held at one rent with the house for sixty years passed, though not strictly appurtenant. And in *Doe* d. *Lempriere* v. *Martin* (*f*), a devise of the testator's copyhold messuage, with all outhouses, gardens, and appurtenances to the same belonging, situate at F., and then in his own possession, was held to include a small piece of land, being the site of several cottages pulled down by the testator, who had laid the ground open to his court yard, and then occupied it with the house, though his estate in the two was different (*g*).

Gardens, &c., held to pass as appurtenances to a house.

But in a subsequent case (*h*), a direction by the testator that his steward should enjoy his mansion-house "with the appurtenances," for one year after his death, was held to extend to orchards, but not to fifty or sixty acres of land, which the testator had kept in his own hands with the house. And this construction was corroborated by the fact of there being, in another part of the same will, a devise of this property "with the lands and grounds," also "with the appurtenances," showing that the testator had the distinction in view. Eyre, C.J., said if this had not been so, and if they had found a house situated in a park, which had always been occupied with it, being, as it were, an integral part of the thing, it might have proved the intention of the testator to pass the whole together.

Mr. Jarman remarks (*i*) that "this would be carrying the construction of the word very far. At all events, it is not to be doubted that whatever is necessary to the commodious enjoyment of the house will in general pass under the word 'appurtenances' (*j*); à fortiori if then actually enjoyed with it by the person in whose occupation the house is described to be; though in some of the cases more weight has been given to this circumstance than it seems fairly entitled to. It is not likely that at this day the word would be carried beyond its ordinary acceptation." It has a definite meaning, and though

(*e*) Cro. El. 113.

(*f*) 2 W. Bl. 1148; *Re Midland Rail. Co.*, 34 Beav. 525, stated ante, p. 418.

(*g*) In *Yates* v. *Cincard*, Cro. El. 704, it was held that a piece of freehold land occupied with a copyhold house did not pass under the devise of the house with the appurtenances: sed quære.

(*h*) *Buck* d. *Whalley* v. *Nurton*, 1 B. & P. 53; see also *Harwood* v. *Higham*, Godb. 40.

(*i*) First edition, p. 711.

(*j*) See *Nicholas* v. *Chamberlain*, Cro. Jac. 121; *Hobson* v. *Blackburn*, 1 My. & K. 571; *Thomas* v. *Owen*, 20 Q. B. D. 225, where in a lease of a house a right of way over an accommodation road was held to pass by the words "appurtenances thereto belonging"; for this purpose, however, the word is generally unnecessary, *Steele* v. *Midland Rail. Co.*, L. R., 1 Ch. 275; *Phillips* v. *Low*, [1892] 1 Ch. 47, ante, p. 1293.

it may be enlarged by the context, the burden of proof lies on those who so contend (*k*).

"Lands appertaining to" a house, &c.

There is, however, a difference between the devise of a house and the "appurtenances," and of a house with the "lands appertaining thereto." It is clear that by the latter expression some lands are intended, and therefore the primary sense of the word "appertaining" is excluded. Thus in *Hill* v. *Grange* (*l*), it was held that the demise of a messuage, "with all lands appertaining thereto," comprised all lands usually occupied with or lying near to the messuage; for when "appertaining" was placed with the said other words, it could not be taken in any other sense, and therefore it should there be taken, not according to the true definition of it, because that did not stand with the matter, but in such sense as the party intended it. And in *Hearn* v. *Allen* (*m*), the Court, while holding that the lands there in dispute were not included by the term "cum pertinentiis," said it would have been otherwise if it had been "cum terris pertinentibus."

"Thereunto belonging."

The construction of the words "thereunto belonging," which are not words of art (*n*), has often come under discussion.

Thus, in *Ongley* v. *Chambers* (*o*), where a testator devised the rectory or parsonage of Minster, with the messuages, lands, tenements, tithes, hereditaments and all and singular other the premises "thereunto belonging," with the appurtenances; it was held that, by the effect of these words, the devise operated on certain lands which had been purchased by the owners of the rectory between the years 1607 and 1632, and had been since uninterruptedly occupied with it, and had been in various leases described as belonging to the rectory; for though not, strictly speaking, appurtenant to the rectory, they had become, by unity of title and concurrent occupation, joined to the rectory, and might be taken in popular acceptation as

(*k*) See acc. *Evans* v. *Angell*, 26 Bea. 202; *Lister* v. *Pickford*, 34 Bea. 576 (in both of which "appurtenances" was construed strictly); *Smith* v. *Ridgway*, L. R., 1 Ex. 46, 331; also per Parke, B., *Pheysey* v. *Vicary*, 16 M. & W. at p. 494. See also *Cuthbert* v. *Robinson*, 15 L. J. Ch. 238, where having regard to the context of the will and the circumstances of the case, Kay, J., held that land passed by the word "appurtenances."

(*l*) Plowd. at p. 170a.

(*m*) Cro. Car. 57, ante, p. 1293; see also *Cennings* v. *Lake*, Cro. Car. 168; *Higham* v. *Baker*, Cro. El. 15, per Anderson, C.J.

(*n*) Per Pollock, C.B., *Maitland* v. *Mackinnon*, 1 H. & C. 607.

(*o*) 8 J. B. Moo. 665, 1 Bing. 483; see also *Doe* v. *Hollon*, 5 Nev. & M. 391, 4 Ad. & Ell. 76; *Bodenham* v. *Pritchard*, 1 B. & Cr. 350 ("lands thereto belonging as now enjoyed by me"); with which cf. *Polden* v. *Bastard*, L. R., 1 Q. B. 156, ante, p. 1293, note (*a*). In *Marshall* v. *Hopkins*, 15 East, 309, a house and nineteen acres of land, all held by the testator under one title, and which at a former period of his ownership had been, but at the date of the will were not, in one and the same occupation, were held to pass by a devise of "all that my messuage, dwelling-house or tenement, with all lands, hereditaments and appurtenances thereto belonging."

CHAP. XXXV.

belonging thereto. Lord Gifford, C.J., referred to several old cases and text books in which it was laid down that lands, which had been occupied with a house for ten or twelve or even five or six years, might pass as parcel of or as belonging to such house.

The effect of the words "thereto belonging" was also considered in *Doe* d. *Gore* v. *Langton* (*p*), where they were used in connection with a manor, and in *Downe* v. *Sheffield* (*q*).

"Thereto adjoining."

In *Josh* v. *Josh* (*r*), the question was what passed by the description of "the piece of land adjoining" a house and premises previously described; whether it comprised several contiguous fields, each one situated beyond the other, and forming with the house and premises the whole of the testator's real property, or was limited to the single field next to the house and premises: and it was held to comprise the whole.

"Farm."

The word "farm" usually means a definite quantity of land with buildings on it, used for agricultural purposes or the like. The word has long since lost its original sense of land leases for life or years at a rent. In the sixteenth century it was used to mean a capital messuage with a considerable quantity of land belonging to it (*s*). At the present day "farm" primâ facie means land and buildings used for agriculture and the pasturage of beasts, but a farm may, and often does, include woodland (*ss*). The term implies "some entire subject matter," such as, if let, would be let to one tenant (*t*). It may include houses, lands and tenements (*tt*) of every tenure, and therefore a specific devise of a "freehold farm" will, it seems, primâ facie include copyholds and leaseholds (*u*). Even before the Wills Act, the use in a residuary devise of the word "farms" sometimes had the effect of making it include leaseholds (*uu*) Since the act the question is not likely to arise (*uuu*).

(*p*) 2 B. & Ad. 680. In *Kennedy* v. *Kelly*, 28 Bea. 223, a bequest of a lease of a house "with all buildings belonging to me" was held to pass stables occupied with the house by the testator though under a different title.

(*q*) 71 L. T. 292.

(*r*) 5 C. B. N. S. 454.

(*s*) Plowd. 191; Termes de la Ley: Jacob's Law Dict.

(*ss*) *Portman* v. *Mill*, 3 Jur. 356; Shepp. Touch. 93.

(*t*) See *Re Bright-Smith*, 31 Ch. D. 314; *Lane* v. *Stanhope*, infra. As to the effect of words describing a particular farm as being in the occupation of a certain person, see the next section of this chapter.

(*tt*) Co. Litt. 5a.

(*u*) *Re Bright-Smith*, supra.

(*uu*) *Lane* v. *Stanhope*, 6 T. R. 345 (where part of the farm was leasehold); *Doe* d. *Belasyse* v. *Lucan*, 9 East, 448; *O'Connor* v. *O'Connor*, Ir. R., 4 Eq. 483. In *Holmes* v. *Milward*, 47 L. J. Ch. 522, Fry, J., held that the use of the word "farms," in a residuary devise of real estate, did not make it include the leasehold part of a farm belonging to the testator, apparently on the ground that the residue was devised "in fee," and that the testator throughout his will distinguished between his real estate and his personal estate. But the case of *Lane* v. *Stanhope* was even stronger, for there the devise was in strict settlement, and yet it was held that the leasehold part of the farm passed.

Devise of "rents and profits" passes the land.

In the absence of a context indicating a contrary intention (*v*), a devise of the rents and profits (*vv*) or of the income (*w*) of land passes the land itself both at law and in equity; a rule, it is said, founded on the feudal law, according to which the whole beneficial interest in the land consisted in the right to take the rents and profits (*x*). And since the Wills Act, 1837, such a devise carries the fee simple (*y*); before that act it carried no more than an estate for life, unless words of inheritance were added (*z*). But

"Ground rent" held to include reversion.

under the old law, where a testator, seised or possessed of a reversion in fee or for years, to which rent was incident, devised or bequeathed his "ground rent," not only the rent, but the reversion would pass (*a*); as he was considered, when speaking of the ground rent, to mean by that term all the reversionary interest, of which the rent was the immediate fruit.

Rents of leaseholds.

So a gift of the rents of leaseholds may pass the absolute interest in them (*b*).

Arrears of rents.

A gift of arrears of rents may give rise to questions as to its effect (*c*).

Advowson will pass under "rents and profits."

A devise of "rents and profits" includes an advowson (*d*); and with it of course the right of presentation in case the living is vacant; unless the will devotes the "rents and profits" wholly to purposes which can be answered only by money or money's worth, as the

Whether the decision in *Holmes* v. *Milward* is right or wrong, exception must be taken to the learned judge's statement that the primary meaning of "farm" is land let out by the owner; no one uses the word in that sense at the present day. In *Arkell* v. *Fletcher*, 10 Sim. 299, the limitations were applicable to freeholds only, but the residuary devise included the words "messuages and farms," and the only messuages and farm buildings belonging to the testator were held by him for the remainder of a term of 4800 years; it was therefore clear that he intended them to be included in the residuary devise, as in *Hobson* v. *Blackburn*, 1 My. & K. 571.

(*uuu*) See Chap. XXV., ante, p. 962, where the effect of s. 26 is discussed.

(*v*) *Re Coward*, 57 L. T. 285; s. c. *Coward* v. *Larkman*, 60 L. T. 1. See *Blann* v. *Bell*, 2 D. M. & G. 775, and other cases cited in Chap. XXXIII.

(*vv*) Co. Lit. 4b; *Parker* v. *Plummer*, Cro. El. 199; *South* v. *Alleine*, 1 Salk. 228; *Doe* d. *Goldin* v. *Lakeman*, 2 B. & Ad. 30; *Re Martin*, [1892] W. N. 120. The word "profits" by itself is sufficient, *Johnson* v. *Arnold*, 1 Ves. sen. 170; *Baines* v. *Dixon*, ib. 42.

(*w*) *Mannox* v. *Greener*, L. R., 14 Eq. 456.

(*x*) Per Lord Cranworth, *Blann* v. *Bell*, 2 D. M. & G. at p. 781.

(*y*) *Plenty* v. *West*, 6 C. B. 201; *Mannox* v. *Greener*, L. R., 14 Eq. 456. As to the cases where an indefinite bequest of the income of personal estate passes the absolute interest, see Chap. XXXIII.

(*z*) *Hodson* v. *Ball*, 14 Sim. at p. 571, and see *Belt* v. *Mitchelson*, Belt's Suppl. to Vesey, sen. 227.

(*a*) *Kerry* v. *Derrick*, Moore, 771; *Maundy* v. *Maundy*, 2 Stra. 1020; *Kaye* v. *Laxon*, 1 Br. C. C. 76 (leasehold ground rents); and see *Ashton* v. *Adamson*, 1 Dr. & War. 198.

(*b*) *Watkins* v. *Weston*, 32 Bea. 238, 3 D. J. & S. 434.

(*c*) *Lindsay* v. *Earl of Wicklow*, Ir. R., 6 Eq. 72; *Re Lucas*, 55 L. J. Ch. 101; *Re Duke of Cleveland's Estate*, [1894] 1 Ch. 164; ante, p. 1289; *Wills* v. *Wills*, [1909] 1 Ir. 268.

(*d*) *Earl of Albemarle* v. *Rogers*, 2 Ves. jun. 477, 7 Br. P. C. Toml. 522; *Sherrard* v. *Lord Harborough*, Amb. at p. 167, per L. C.

CHAP. XXXV.

augmentation of poor livings (*e*), investment in lands (*f*), or the maintenance of children and accumulation of surplus (*g*); in which case the right of presentation, not being the subject of profit, will result to the heir. If the living is full the future right of presentation may be sold for the purposes of the will, like any other fruit of property (*h*), but see now the Benefices Act, 1898.

An advowson appendant or appurtenant passes, of course, under a devise of the land to which it is annexed.

What passes by devise of advowson.

The effect of the devise of an advowson has been already referred to (*i*).

The devise of a "living" may pass the advowson or the next presentation, according to the context (*j*).

Devise of "use and occupation."

A devise of the "free use" (*k*), or of the "use and occupation" (*l*) of land, passes an estate in the land, and consequently a right to let or assign it, and is not confined to the personal use or occupation of the property, unless the context clearly calls for the more limited construction, as where there is a gift over on cesser of occupation (*m*), or where the house is devised to trustees, with a direction that A. may reside in it rent free (*n*). Primâ facie, a devise of the use and occupation of a house or land is limited to the life of the devisee (*nn*).

Customary freeholds pass as copyholds,

It is clear that customary estates, held by copy of court roll, although not at the will of the lord as in the case of proper copyholds, will pass under the denomination of copyholds, and not, unless in special circumstances, under that of freeholds (*o*). Special

except in special circumstances.

circumstances were held to exist in *Re Steel* (*p*). In that case a testatrix had inherited four fields at M., two of which were of freehold tenure, but the other two were privileged copyholds, not held

(*e*) *Kensey* v. *Langham*, Ca. temp. Talb. 143.

(*f*) *Sherrard* v. *Lord Harborough*, Amb. 165.

(*g*) *Martin* v. *Martin*, 1 Sim. 579.

(*h*) *Cooke* v. *Cholmondeley*, 3 Drew. 1; *Cust* v. *Middleton*, 11 W. R. 456.

(*i*) Ante, p. 75.

(*j*) *Webb* v. *Pyng*, 2 K. & J. 669.

(*k*) *Cook* v. *Gerrard*, 1 Saund. 181, 186, c.

(*l*) *Manning's Case*, 8 Rep. 94b; *Whittome* v. *Lamb*, 12 M. & Wels. 813; *Rabbeth* v. *Squire*, 19 Bea. 70. 4 De G. & J. 406; *Mannox* v. *Greener*, L. R., 14 Eq. 456; *Re Coward*, 60 L. T. 1. "Occupation is not living and residing"; per Lord Eldon, in *Fillingham* v. *Bromley*, T. & R. 536, stated post, Chap. XXXIX.

(*m*) *Maclaren* v. *Stainton*, 27 L. J. Ch. 442; *Stone* v. *Parker*, 29 ib. 874. As to conditions requiring "residence" and the effect of the Settled Land Act, 1882, see Chap. XXXIX.

(*n*) *May* v. *May*, 44 L. T. 412.

(*nn*) *Re Coward*, 57 L. T. 285; s. c. *Coward* v. *Larkman*, 60 L. T. 1, where Lord Halsbury suggested that s. 28 of the Wills Act affects the question: but the section speaks of a devise of real estate, not of a devise of the use and occupation of real estate. Moreover, s. 28 does not apply to interests created de novo: see post, Chap. XLV.

(*o*) *Roe* d. *Conolly* v. *Vernon*, 5 East, at p. 83; *Doe* d. *Cook* v. *Danvers*, 7 East, 299.

(*p*) [1903] 1 Ch. 135.

at the will of the lord, and commonly known in the locality as "customary freeholds," or "freeholds": it was held that they passed by a devise of "my freehold land and hereditaments at M."

Manor.

The devise of a manor, even under the old law, included copyholds, parcel of the manor, acquired by the lord after the date of his will (*q*), and freeholds, held of the manor, coming to the lord by escheat after the date of his will (*r*); but such freeholds, if purchased by the lord, do not become parcel of the manor (*s*), except possibly in reputation (*t*).

"Moiety"

A testator may use "moiety" in the sense of a part or share (*u*).

Question whether one moiety or both moieties passed.

Where (*v*) a testator, having a fee simple in possession in one moiety of lands called H., and the reversion in fee in the other, devised "All that my part, purpart and portion of and in the tenement called H.," with other lands, "and the reversion and reversions, remainder and remainders, rents, issues and profits thereof," it was held that both moieties passed.

"Property, brewery, &c."

In *Waite* v. *Morland* (*w*) a disposition of "all my property, brewery &c." was held to mean "all my brewery property," and therefore to include a number of public houses belonging to the testatrix, the tenants of which were bound to buy their beer from her brewery.

Real estate "not partitioned."

In *Re Trimmer* (*x*) the question arose what passed under a devise of real estate held by the testator under the will of his father as tenant in common "and not partitioned."

Locality and source.

(2) *Words descriptive of Personal Property* (*y*).—The authorities on the effect of bequests of property described with reference to its locality, or the source from which it is derived, are referred to elsewhere (*z*).

"Estate" and "property."

It has already been pointed out that "estate" and "property" are words of wide meaning, and primâ facie include both real and personal property, although their meaning may be restricted by the context (*a*).

"Effects," "goods," "chattels," "money," &c.

It has also been pointed out that the entire personal estate of a

(*q*) *Roe* d. *Hale* v. *Wegg*, 6 T. R. 708; *Hicks* v. *Sallitt*, 3 D. M. & G. 782.

(*r*) *Delacherois* v. *Delacherois*, 11 H. L. C. 62.

(*s*) Ib.

(*t*) *Reg.* v. *Duchess of Buccleugh*, 6 Mod. 151. As to what is comprised in the expression "reputed manor," see *Doe* d. *Clayton* v. *Williams*, 11 M. & W. 803 (deed).

(*u*) *Morrow* v. *McConville*, 11 L. R. Ir. 236.

(*v*) *Doe* d. *Phillips* v. *Phillips*, 1 T. R. 105.

(*w*) 12 Jur. N. S. 763.

(*x*) 91 L. T. 26.

(*y*) Other than leaseholds, which for this purpose fall under the head of "lands, houses, &c.," supra.

(*z*) Chap. XXX.

(*a*) Ante, p. 999. See *Askew* v. *Rooth*, *Lee* v. *Lee*, and other cases cited post.

testator may pass by the word "effects," or "goods," or "chattels," and even by the word "money" and other informal words (*b*).

It is here proposed to discuss the meaning of words descriptive of personal property not comprised in a residuary bequest.

Gift of income.

The operation of a gift of the income of property in passing an absolute interest in it, has been discussed in Chapter XXXIII.

"Goods," "Chattels," "effects," &c.

The operation of a gift of "goods," "chattels," "effects," "things," "movables," or the like, may be restrained by a reference to a locality (*c*), or by being employed in conjunction with words of a narrower meaning, thus leading to the ejusdem generis construction (*d*).

"Movables"

The word "movables," it has been said, may, if not restrained by the context, pass the whole purely personal estate of the testator (*e*), by which appear to be meant choses in action as well as choses in possession, but not leaseholds.

"Money."

With regard to the word "money," Mr. Jarman says (*f*): "In its strict acceptation, 'money' will, it seems, extend to bank notes (*g*); and no doubt to Exchequer bills and other documents payable to bearer; probably also to bills of exchange indorsed in blank" (*h*). It will extend to money in the hands of an agent (*i*), or on deposit with a banker (*j*). But money in the hands of a stakeholder to abide an event which does not happen in the testator's lifetime will not pass by a bequest of his "money" (*k*). And in an Irish case of *Dillon* v. *M'Donnell* (*l*), it was held that a gift of "money" did not pass an unpaid fine for a grant of land in perpetuity which had not been completed at the time of the testator's death.

It was held in *Shelmer's Case* (*m*) that money lent on mortgage passed by a bequest of money belonging to the testatrix at her death; for "money," said Gilbert, C.B., "is a genus that comprehends two species, viz. ready money and money due, i.e. the money in the owner's own hands and his money in the hands of anybody else" (*n*). So a gift of "moneys of which I may at the time of my decease be absolutely possessed," was held to pass all moneys

(*b*) Chap. XXVIII.

(*c*) See post, p. 1307, as to furniture and household goods, &c., and Chap. XXX.

(*d*) Chap. XXVIII.

(*e*) *Steignes* v. *Steignes*, Mos. 296.

(*f*) First edition, p. 702, n.

(*g*) *Downing* v. *Townsend*, Ambler, 280.

(*h*) *Collins* v. *Martin*, 1 B. & P. 648 at p. 651; *Wookey* v. *Pole*, 4 B. & Ald. 1; *Scully* v. *Stawell*, Ir. R., 2 Eq. 326, and see 1 Roper on Legacies by White, 252.

(*i*) *Ogle* v. *Knipe*, L. R., 8 Eq. 434.

(*j*) *Manning* v. *Purcell*, 7 D. M. & G. 55.

(*k*) *Manning* v. *Purcell*, supra.

(*l*) 7 L. R. Ir. 335.

(*m*) Gilb. Eq. Rep. 200.

(*n*) In *Re Townley*, 32 W. R. 549, Pearson, J., said that in its strict sense "moneys" means cash.

owing to the testatrix on security or otherwise (*o*). On the other hand, in *Re Mason's Will* (*p*), a legacy due from another testator's estate was held not to pass by a bequest of "money and securities for money," because it was only a debt.

"Money due to me."

However, a bequest of "money due to me" will pass a legacy due from another testator's estate, if that estate has been got in by the executor so as to constitute the legacy a debt from him (*q*); otherwise if the estate has not been so got in (*r*). A gift of "moneys owing to me from A." will not pass the testator's interest in a sum of money due from A. to the estate of an intestate of which the testatrix is entitled to a distributive share (*s*). "Money due (or owing) to me" will also include money at a bank (*t*), money on deposit at a bank (*u*), moneys under a policy on the testator's own life (*v*), and damages to which he was entitled, though the amount was unascertained at his death (*w*). But not money to be paid for a service not completed at the testator's death (*x*).

Debt due by a firm.

If A. is indebted to the testator in 500*l*., and a firm of which A. is a member is indebted to the testator in 1000*l*., and the testator bequeaths "all debts due to me by A.," this bequest does not include the 1000*l*. (*y*).

Set off of moneys owing by legatee.

A bequest to a person of all moneys due by him to the testator carries only the balance remaining due, after deducting any debts owing by the legatee to the testator (*z*).

Whether "money" includes stock.

"Money" does not include money invested in the Funds, or in other stocks or shares, &c., unless there is something in the context or

(*o*) *Langdale* v. *Whitfield*, 4 K. & J. 426. The decision turned partly on the context.

(*p*) 34 Bea. 494. In *Collins* v. *Collins*, L. R., 12 Eq. 455, arrears of a Government allowance and a sum payable for funeral expenses by a friendly society were assumed to pass as "moneys," and in *Byrom* v. *Brandreth*, L. R., 16 Eq. 475, Selborne, L.C., thought that an acknowledged legacy or any money payable to the testator on application would pass by a bequest of "money of which I may die possessed," but not an apportioned part of an annuity or an unacknowledged legacy: see *Re Beaven*, 53 L. T. 245.

(*q*) *Bainbridge* v. *Bainbridge*, 9 Sim. 16.

(*r*) *Martin* v. *Hobson*, L. R., 8 Ch. 401.

(*s*) *Collins* v. *Doyle*, 1 Russ. 135. In *Brown* v. *Brown*, 6 W. R. 613, money raisable at A.'s request under the trusts of a term of years was held to pass by a gift in A.'s will of "all moneys due to me on mortgage and all debts owing to me on any account." It is not easy to justify the decision, as it does not appear that the testator had requested the sum to be raised: compare *Re Salvin*, [1906] 2 Ch. 459, cited in Chap. XXIII. and see *Earl Poulett* v. *Hood*, 35 Bea. 234, post, p. 1304.

(*t*) *Carr* v. *Carr*, 1 Mer. 541, n.

(*u*) *Re Derbyshire*, [1906] 1 Ch. 135.

(*v*) *Petty* v. *Willson*, L. R., 4 Ch. 574.

(*w*) *Bide* v. *Harrison*, L. R., 17 Eq. 76.

(*x*) *Stephenson* v. *Dowson*, 3 Bea. 342.

(*y*) *Ex parte Kirk*, 5 Ch. D. 800. But if there had never been any debt owing to the testator by A. individually, the doctrine of falsa demonstratio might perhaps have been applied, as in *Maybery* v. *Brooking*, 7 D. M. & G. 673, ante, p. 1275.

(*z*) *Ganly* v. *Dowling*, 5 L. R. Ir. 628; *Ekins* v. *Morris*, 8 W. R. 301. Compare *Chick* v. *Blackmore*, 2 Sm. & G. 274 (book debts), cited post, p. 1311.

the surrounding circumstances to give it this extended meaning (*a*). Thus "my money in the Bank of England" may mean stock in the Funds, if the testator never had any cash in the Bank (*b*). So "money deposited in the Post Office Savings Bank" may include money invested in consols through that bank (*bb*). And of course "moneys in the Funds" is equivalent to "moneys invested in English Government securities" (*c*).

What words will pass money at a banker's.

Although money at a banker's is, in fact, a debt due from the banker (*d*), and will pass under a bequest of a debt (*e*), yet the term "ready money" or "money in hand" does also sufficiently describe such money and generally will pass it (*f*). Money in a banker's hands on a deposit account which, at the testator's death, can be withdrawn without notice, will also pass by a bequest of "money" or "ready money" (*g*), but not if notice is required (*h*). Money on deposit at a bank, whether notice of withdrawal is required or not, will pass under a bequest of "moneys owing to me" (*i*), or "property at interest (*ii*). Stock is not "ready money" (*j*), nor are notes of hand (*k*), or money in the hands of an agent (*l*), or unreceived dividends on stock, the warrants for which have neither been received nor demanded (*m*); or rent or the interest on a mortgage (*n*); or apportioned parts of pensions or dividends (*o*).

What will not pass under a bequest of "ready money" or "money in hand."

"Cash."

"Cash" is a stricter term than "money." In *Beales* v. *Crisford* (*p*) it was held that a promissory note, payable to order, some Columbian bonds, and long annuities were not included in "cash or

(*a*) *Lowe* v. *Thomas*, Kay, 369, 5 D. M. & G. 315; *Waite* v. *Combes*, 5 De G. & S. 676; *Hotham* v. *Sutton*, 15 Ves. 319; *Gosden* v. *Dotterill*, 1 My. & K. 56; *Glendening* v. *Glendening*, 9 Bea. 324; *Whateley* v. *Spooner*, 3 K. & J. 542; *Newman* v. *Newman*, 26 Bea. 218; *Hart* v. *Hernandez*, 52 L. T. 217; *Stooke* v. *Stooke*, 35 Bea. 396 (stated ante, p. 1037); *Collins* v. *Collins*, L. R., 12 Eq. 455; and see the other cases stated ante, p. 1038. *Ommanney* v. *Butcher*, T. & R. 260, and other cases in which the question was whether the general residue passed by a bequest of "money," are considered in Chap. XXVIII.

(*b*) *Gallini* v. *Noble*, 3 Mer. 691; *Brennan* v. *Brennan*, Ir. R., 2 Eq. 321.

(*bb*) *Re Adkins*, 98 L. T. 567.

(*c*) *Burnie* v. *Getting*, 2 Coll. 324; *Slingsby* v. *Grainger*, 7 H. L. C. 273, and other cases cited post, p. 1035.

(*d*) *Foley* v. *Hill*, 2 H. L. C. 28.

(*e*) *Parker* v. *Marchant*, 1 Ph. 361; *Carr* v. *Carr*, 1 Mer. 541, n.; *Potts* v. *Gregg*, 16 M. & W. 321.

(*f*) *Parker* v. *Marchant*, 1 Ph. 356; 1 Y. & C. C. C. 290; *Vaisey* v. *Reynolds*, 5 Russ. 12; *Taylor* v. *Taylor*, 1 Jur. 401.

(*g*) *Re Powell's Trust*, Johns. 49; *Manning* v. *Purcell*, 7 D. M. & G. 55; *Stein* v. *Ritherdon*, 37 L. J. Ch. 369; *Re Boorer*, [1908] W. N. 189.

(*h*) *Mayne* v. *Mayne*, [1897] 1 Ir. 324; *Re Wheeler*, [1904 2 Ch. 66; *Re Price*, [1905] 2 Ch. 55.

(*i*) *Re Derbyshire*, ante, p. 1301.

(*ii*) *Sealy* v. *Stowell*, Ir. R., 2 Eq. 326.

(*j*) *Bevan* v. *Bevan*, 5 L. R. Ir. 57; *Enohin* v. *Wylie*, 10 H. L. C. 1.

(*k*) *Re Powell's Trust*, supra.

(*l*) *Parker* v. *Marchant*, supra; *Smith* v. *Butler*, 3 Jo. & Lat. 565; *Cooke* v. *Wagster*, 2 Sm. & G. 296, post, p. 1303, n. (*a*).

(*m*) *May* v. *Grave*, 3 De G. & S. 462.

(*n*) *Fryer* v. *Ranken*, 11 Sim. 55; *Stein* v. *Ritherdon*, 37 L. J. Ch. 369.

(*o*) *Stein* v. *Ritherdon*, supra.

(*p*) 13 Sim. 592.

moneys so called" (i.e. "cash or money commonly called cash"). The word "money," coupled with the word "cash," is confined to money strictly and properly so called (*q*).

"Cash at bankers."

A bequest of "the cash balances standing to the credit either of my current account or deposit account with any of my bankers" means what it says, and does not include money in the hands of an agent for sale (*r*). "Cash at my banker's" means money on current drawing account, and such money on deposit as is withdrawable without notice (*s*).

Securities.

The word "securities" has the primary meaning of money secured on property, and does not extend to a share of property or shares in the capital of a company (*t*), and consequently the expressions "securities for money" and "investment of money upon securities," and even the expression "investment of money in securities," would, in the absence of anything to negative that view, be held to apply only to securities in the sense above stated (*u*); but the context may shew that the testator used the word in the sense of "investments" (*v*). Thus "securities for money standing invested in my name" will pass mortgage bonds, India stock, debenture stocks, preference stocks and shares (*w*).

In *Re Maitland* (*x*) a gift of "securities in my name held for me by the L. Bank" was held not to pass shares, the certificates for which were held by the bank, nor some stock in respect of which the testator had given the bank a power of attorney authorizing it to receive the dividends and sell the stock.

Real securities.

It seems that turnpike bonds secured by a charge on tolls, are "real securities" (*y*), but not "mortgages on real securities" (*z*).

Securities for money.

The words "securities for money" will include stocks in the Funds even without the aid of the context (*a*), so also unpaid purchase money in respect of which the testator had a vendor's lien (*b*),

(*q*) *Nevinson* v. *Lady Lennard*, 34 Bea. 487.

(*r*) *De Roebeck* v. *Cloncurry*, Ir. R., 5 Eq. 1.

(*s*) *Re Boorer*, [1908] W. N. 189.

(*t*) *Murphy* v. *Doyle*, 29 L. R. Ir. 333.

(*u*) Per Romer, L.J., in *Re Rayner*, [1904] 1 Ch. 176 at p. 189. In *Cooke* v. *Wagster*, 2 Sm. & G. 296, money left in the hands of an agent for investment was held to pass under a gift of "ready money and securities for money, money in the Funds, and money in the bank or banks (if any), which may be due and owing to me." See also *Wilkes* v. *Collin*, L. R., 8 Eq. 338 ("money on real securities").

(*v*) *Re Rayner*, supra; *Re Gent and Eason's Contract*, [1905] 1 Ch. 386. As to the word "securities" changing in meaning according to circumstances, occasion and date, see the judgment of Vaughan Williams, L.J., in *Re Rayner*.

(*w*) *Re Johnson*, 89 L. T. 84, 520.

(*x*) 74 L. T. 274.

(*y*) *Robinson* v. *Robinson*, 1 D. M. & G. 247.

(*z*) *Cavendish* v. *Cavendish*, 30 Ch. D. 227.

(*a*) *Dawson* v. *Pack*, 1 S. & St. 500; *Re Beaven*, 7 L. T. 245; *Dicks* v. *Lambert*, 4 Ves. 725; *Rickman* v. *Ives*, 1 Jur. 234; *Turner* v. *Turner*, 21 L. J. Ch. 843.

(*b*) *Callow* v. *Callow*, 42 Ch. D. 550, doubting *Gould* v. *Teague*, 7 W. R. 84.

CHAP. XXXV.

but not bank stock (*c*), nor shares in an insurance (*d*) or canal (*e*) or banking (*f*) company; nor an I O U given for goods sold (*g*), nor a banker's deposit note (*h*), nor a balance at a bank bearing interest (*i*), nor a legacy due from another testator's estate (*j*). A mortgage is of course a "security for money," but whether a mortgage debt forming part of a trust estate in which a testator is beneficially interested will pass under a bequest of "my securities for money," depends on the nature of his interest (*k*). Without the aid of the context, a gift of "securities for money" does not include shares in a public company, but does include debenture stock (*l*). A bill of exchange or promissory note is a "security for money" in the legal and proper sense of the word (*m*), and so is a bond (*n*) and a judgment (*o*). A policy of assurance on the life of a debtor is a "security" (*p*), and money on deposit in the Post Office Savings Bank has been held, having regard to the provisions of the statute 24 & 25 Vict. c. 14, s. 5, to pass under a bequest of money invested in Consols or other securities (*q*).

Money due on mortgage.

The words "money due or owing to me on mortgage from any person" do not pass sums of money charged on a family estate and secured by a term of years (*r*). But a specific bequest of a mortgage debt for 10,000*l*. may pass a registered judgment against the mortgagor (*s*).

"Investment."

"Investment" is a vague term, and no general rule can be laid down as to its meaning. In *Re Price* (*t*) it was held that money on deposit at a bank did not pass by a bequest of "pecuniary investments."

"Money invested in" a company.

A bequest of "money invested in" a certain company will

(*c*) *Ogle* v. *Knipe*, L. R., 8 Eq. 434.

(*d*) *Turner* v. *Turner*, supra.

(*e*) *Ogle* v. *Knipe*, supra; *Hudleston* v. *Gouldsbury*, 10 Beav. 547.

(*f*) *Re Kavanagh*, 27 L. R. Ir. 495, aff. sub nom. *Murphy* v. *Doyle*, 29 L. R. Ir. 333.

(*g*) *Barry* v. *Harding*, 1 Jo. & Lat. 475; *Turney* v. *Dodwell*, 23 L. J. Q. B. 137 (promissory note).

(*h*) *Hopkins* v. *Abbott*, L. R., 19 Eq. 222.

(*i*) *Vaisey* v. *Reynolds*, 5 Russ. 12.

(*j*) *Re Mason's Will*, 34 Beav. 494.

(*k*) *Ogle* v. *Knipe*, supra.

(*l*) *M'Donnell* v. *Morrow*, 23 L. R. Ir. 591. See *Harris* v. *Harris*, 29 Beav. 107; *Re Beaven*, supra.

(*m*) *Barry* v. *Harding*, supra; *Re Beaven*, supra, where the decision in *Stokes* v. *Guy*, 4 Y. & C. Ex. 571, on an investment clause was not followed as to a gift in a will.

(*n*) *Bacchus* v. *Gilbee*, 3 De G. J. & S. 577.

(*o*) *West Ham Union* v. *Ovens*, L. R., 8 Ex. 37 ("valuable security" within 12 & 13 Vict. c. 103, s. 16).

(*p*) *Phillips* v. *Eastwood*, 1 Ll. & G. at p. 291, where it was suggested that policies might pass under a gift of "debentures," but the meaning of the word has changed since 1835, and no one would now think of describing a policy as a debenture.

(*q*) *Re Saxby*, [1890] W. N. 171.

(*r*) *Earl Poulett* v. *Hood*, 35 Beav. 234. See *Brown* v. *Brown*, 6 W. R. 613, ante, p. 1301, n. (*s*).

(*s*) *Purley* v. *Purley*, 1 N. R. 509.

(*t*) [1905] 2 Ch. 55.

apparently pass shares and stocks of every description in that company (*u*).

"All I hold" in a company.

A bequest of "all I hold" in a bank or other company may pass money on deposit, or stocks or shares in the company (*v*).

"Annuities."

Formerly many British Government securities and other investments were known as "annuities," and the differences between them were a frequent source of difficulty to testators (*w*). A bequest of "1000*l*. Long Annuities now standing in my name," has accordingly been held to pass 1000*l*. reduced annuities (*x*); and "Consolidated Bank Annuities" may mean South Sea annuities (*y*), unless the testator has annuities answering the description in the will (*z*).

Government stocks or funds.

"The Funds," or "the public funds," generally mean funded securities guaranteed by the British Government—as consols (*a*), reduced annuities, long annuities (*b*), &c. But "the Funds" will not include bank stock (*c*), nor East India stock under 3 & 4 W. 4, c. 85 (*d*); nor unfunded exchequer bills (*e*); nor Greek bonds guaranteed by this country (*f*).

Bank stock.

On the other hand, a gift of "Bank stock" may pass English Government stock if that construction is assisted by the context and the state of facts at the date of the will (*g*), and conversely a gift of "700*l*. East India stock in which I am now interested possessed of or entitled unto" will pass 700*l*. Bank stock standing in the testator's name at the date of the will, he having no East India stock (*h*). But a bequest of property "in the funds" will not pass

(*u*) See *Re Butler*, [1894] 3 Ch. 250 ("all my invested money"); *Mosse* v. *Cranfield*, [1895] 1 Ir. 80 (gift of "500*l*. invested in the Australian Bank on deposit receipt" held to pass shares in the Union Bank of Australia); and *Re Slater*, [1906] 2 Ch. 480, where the question was whether the bequest was adeemed by the conversion of the stock, &c., into stock of another undertaking. See Chap. XXX.

(*v*) *Townsend* v. *Townsend*, 1 L. R. Ir. 180.

(*w*) As to the cases on Long Annuities, see p. 1081.

(*x*) *Penticost* v. *Ley*, 2 J. & W. 207.

(*y*) *Dobson* v. *Waterman*, 3 Ves. 307, n.

(*z*) As to the case of *Selwood* v. *Mildmay*, 3 Ves. 306, see ante, p. 1102.

(*a*) For an inaccurate description of consols, see *Re Pratt*, [1894] 1 Ch. 491.

(*b*) *Howard* v. *Kay*, 27 L. J. Ch. 448.

(*c*) *Slingsby* v. *Grainger*, 7 H. L. C. 273 (unless perhaps where there is no property strictly answering the description, or where there is something in the context to give a more extended meaning to the term, per Lord Kingsdown, ib. at p. 287). *Mangin* v. *Mangin*, 16 Bea. 300, may be considered overruled on this point. As to the application of the doctrine of *falsa demonstratio* to such cases, see supra, p. 1273.

(*d*) *Brown* v. *Brown*, 4 K. & J. 704.

(*e*) *Johnson* v. *Digby*, 8 L. J. O. S. Ch. 38.

(*f*) *Burnie* v. *Getting*, 2 Coll. 324. See 3 & 4 W. IV. c. 121. A "funded debt" properly means a more or less permanent debt, as opposed to a temporary or floating debt secured by bills or the like. See *Ridge* v. *Newton*, 2 D. & War. 239 (gift of "my Irish funded property"); *Askew* v. *Booth*, L. R., 17 Eq. 426 ("funds and property purchased").

(*g*) *Drake* v. *Martin*, 23 Bea. 89. Compare *Gallini* v. *Noble*, 3 Mer. 691, ante, p. 1036, n. (*d*).

(*h*) *Door* v. *Geary*, 1 Ves. sen. 255.

CHAP. XXXV.

Bank stock if the testator has money in the "funds" properly so called (*i*).

Foreign and Colonial securities.

"Government stock or securities" does not include Indian or Colonial securities (*j*). "Foreign bonds" does not include Colonial bonds (*k*). "Stock in the foreign funds" may pass securities for which the faith of a foreign country is pledged (*l*). In *Palin* v. *Brookes* (*m*), United States Government bonds for 6800 dol. were held to pass by a gift of "my 7000 dol. or the produce thereof."

"Stock" may mean stock in trade, &c.

"Stock" is an ambiguous word, and may mean stock in trade (*n*), or farming stock (*o*), or stock in a company.

Stock in a company.

"Stock" in a company may be capital stock or debenture stock, and apparently a gift of "all my stock" in a certain company would include stock of either description (*p*).

Shares of different classes.

Where a testator bequeaths shares in a company, and it turns out that he has shares of different classes, the question may arise whether the gift is void for uncertainty or whether the legatee has a right of selection (*q*).

Shares and stock.

A bequest of a testator's shares in an incorporated company passes all the rights and benefits attached to the shares (*r*).

The term "shares" is sufficient to pass the testator's interest in the joint stock or capital of a company, whether such capital consists only of shares properly so called or of consolidated stock (*s*).

Debentures and debenture stock.

Under a gift of "all my debentures in the A. Company" debenture stock in that company may pass, even if the testator also had debentures in it (*t*). But debenture stock will not pass by a gift of shares (*u*), unless at the date of the will the testator had no shares,

(*i*) *Slingsby* v. *Grainger*, supra.

(*j*) *Re Hamilton*, 6 T. L. R. 173; *Brown* v. *Brown*, 6 W. R. 613 ("government or parliamentary stocks or funds").

(*k*) *Hull* v. *Hill*, 4 Ch. D. 97.

(*l*) *Ellis* v. *Eden*, 23 Bea. 543. As to the meaning of "stocks or funds of any foreign government" and "foreign securities" in an investment clause, see *Cadell* v. *Earle*, 46 L. J. Ch. 798; *Re Langdale's Settlement Trusts*, L. R., 10 Eq. 39.

(*m*) 26 W. R. 876.

(*n*) *Elliott* v. *Elliott*, 9 M. & W. 23.

(*o*) See *Creagh* v. *Creagh*, 13 Ir. Ch. 28, post, p. 1311; *Randall* v. *Russell*, 3 Mer. 190, where two kinds of "stock" were bequeathed.

(*p*) See *Re Bodman*, [1891] 3 Ch. 135, where the question turned on the difference between shares and debenture stock. As to the application of the ejusdem generis construction to the phrase "stock or shares," see *Sellar* v. *Bright*, [1904] 2 K. B. 446.

(*q*) Ante, p. 461.

(*r*) *Carron Co.* v. *Hunter*, L. R., 1 H. L. Sc. 362.

(*s*) Per Chitty, J., in *Re Bodman* [1891] 3 Ch. at p. 136. In *Re Gibson*, L. R., 2 Eq. 669, the bequest failed because it was adeemed. In *Brannigan* v. *Murphy*, [1896] 1 Ir. R. 418, a gift of "two ordinary shares" was held to pass 200*l.* stock. See *Morrice* v. *Aylmer*, L. R., 10 Ch. 148, 7 H. L. 717, overruling *Oakes* v. *Oakes*, 9 Hare, 666

(*t*) *Re Herring*, [1908] W. N. 153.

(*u*) *Re Bodman*, supra. Debentures are not "stock or shares" within Order XLVI. r. i. or the Judgments Act, 1838, s. 14; *Sellar* v. *Charles Bright & Co., Lim.*, [1904] 2 K. B. 446.

but only debenture stock (*v*). A fortiori, debentures will not pass by a gift of "shares" if the testator has any shares (*w*).

In *Re Nottage* (No. 2) (*x*) a bequest of 500*l.* debenture stock or shares of the S. Company was held to pass debentures of that company, which had no debenture stock or any shares except ordinary shares: the testator owned some ordinary shares in the company, but some of these he bequeathed by their proper designation.

In *Re Herring* (*y*) the testator bequeathed "... my debentures and preferred and deferred stock in the M. Company." At the date of his will and at the time of his death he held preferred and deferred stock, debentures and debenture stock: it was held that the debenture stock passed under the bequest.

False demonstratio in case of stock, &c.

The effect of misdescription in the name of a company in bequeathing shares or stock, has been already considered (*z*).

Ademption in case of stock, bonds, debentures, &c.

The question whether a bequest of the shares or stocks of a particular company is adeemed by their being converted during the lifetime of the testator into shares or stocks of another company is discussed elsewhere (*a*).

"Corporation," "company," &c.

The expression "corporation" or "company" is not necessarily confined to corporations or companies formed and carrying on their business or operations in the United Kingdom (*b*).

Use and enjoyment of personal property.

A gift of the "use" or "use and enjoyment" of chattels, such as furniture or plate, seems to imply a gift for life only (*c*), and this is clearly so if the gift is contrasted with an absolute gift of other chattels (*d*). But if the nature of the property requires, such a gift will pass the absolute interest (*e*).

"Household goods" or "furniture."

The words "household goods" or "furniture" will include pictures hung up, plate and house linen (*f*), unless these words are used elsewhere in the will in contradistinction thereto (*g*); they will also include prize medals, coins and trinkets if framed and

(*v*) *Re Weeding*, [1896] 2 Ch. 364; *Townsend* v. *Townsend*, 1 L. R. Ir. 180.

(*w*) *Dillon* v. *Arkins*, 17 L. R. Ir. 636.

(*x*) [1895] 2 Ch. 657.

(*y*) [1908] 2 Ch. 493.

(*z*) Supra, p. 1255.

(*a*) Chap. XXX.

(*b*) *Re Stanley*, [1906] 1 Ch. 131; see Chap. XXIV., ante, p. 920.

(*c*) See *Hyde* v. *Parrat*, 1 P. W. 1; per Lord Watson, in *Coward* v. *Larkman*, 60 L. T. 1, where the property was real estate.

(*d*) *Terry* v. *Terry*, 33 Bea. 232. As to things quæ ipso usu consumuntur, see Chap. XXXVII.

(*e*) *Espinasse* v. *Luffingham*, 3 Jo. & L. 186. As to the use authorized by such a gift, see *Marshall* v. *Blew*, 2 Atk. 217; *Re Williamson*, post, p. 1310.

(*f*) *Kelly* v. *Powlet*, Amb. 605; *Re Londesborough*, 50 L. J. Ch. 9; *Nicholls* v. *Osborne*, 2 P. W. 419; *Cremorne* v. *Antrobus*, 5 Russ. 312. But it has been held that plate not permanently used in a house will not pass by a bequest of furniture in that house: *Wilkins* v. *Jodrell*, 11 W. R. 588. See *Masters* v. *Masters*, 1 P. W. 424.

(*g*) *Franklyn* v. *Earl of Burlington*, Pre. Ch. 251.

CHAP. XXXV.

hung or otherwise disposed for ornament (*d*), but not books (*e*) (unless an intention to include them appears by the context (*ee*)), nor wines, or other consumable articles (*f*). A gift of "household furniture" will not pass goods belonging to the testator in the way of or used in carrying on trade (*g*), nor farming stock; nor, in general, tenants' fixtures, i.e. they will generally pass with the testator's interest in the house (*h*). And even pictures and tapestry may pass as part of the house, and not under a gift of "chattels in the house," if they form part of the decoration of the house (*i*). In *Paton* v. *Sheppard* (*j*) the house had been settled without the tenant's fixtures, and these were held to pass to the legatee of the furniture as against the residuary legatees (*k*).

A bequest of "furniture" will pass furniture used by the testator in his trade, if it is described as being in the place where he carries on business, the term being wider than "household furniture" (*l*).

"Household effects."

The words "household furniture and other household effects" (*m*) are very wide (*n*), and have been held to comprise pistols, lathes, pictures, organ, books, wines and a haystack if for use (but not if for sale), but not a pony or a cow or a fowling-piece (unless used for domestic defence) (*o*); nor watches, jewellery or other personal ornaments (*p*). Horses and carriages are household effects (*q*), and

(*d*) *Minton* v. *Minton*, 21 L. T. 40; *Cremorne* v. *Antrobus*, supra; *Field* v. *Peckett* (No. 2), 29 Bea. 573; and see *Field* v. *Peckett* (No. 2), 9 W. R. 526.

(*e*) *Kelly* v. *Powlet*, supra; *Bridgman* v. *Dove*, 3 Atk. 201; *Allen* v. *Allen*, Mos. 112; *Cremorne* v. *Antrobus*, supra.

(*ee*) Books have been held to pass under a gift of "household effects," although Lord Lyndhurst thought the point doubtful: *Cole* v. *Fitzgerald*, 3 Russ. 301, post, n. (*o*).

(*f*) *Porter* v. *Tournay*, 3 Ves. 311; *Sealy* v. *Stawell*, Ir. R., 2 Eq. 326. See *Re Moir's Estate*, [1882] W. N. 139, where the "household goods," &c., were bequeathed to go with the residence as heirlooms. As to whether wines are "household effects," see *Cole* v. *Fitzgerald*, post, n. (*o*).

(*g*) *Le Farrant* v. *Spencer*, 1 Ves. sen. 97; *Kelly* v. *Powlet*, supra; *Pratt* v. *Jackson*, 1 Br. P. C. 222; *Manning* v. *Purcell*, 7 D. M. & G. 55; *MacPhail* v. *Phillips*, [1904] 1 Ir. 155.

(*h*) *Finney* v. *Grice*, 10 Ch. D. 13; *Allen* v. *Allen*, Mos. 112; *Re Seton Smith*, supra.

(*i*) *Re Whaley*, [1908] 1 Ch. 615.

(*j*) 10 Sim. 186.

(*k*) For the distinction between fixtures, fixed fixtures, and furniture not fixed, see *Birch* v. *Dawson*, 2 A. & E. 37.

(*l*) *Re Seton-Smith*, [1902] 1 Ch. 717. As to the word "household," see ante, notes (*ee*) and (*f*).

(*m*) The expression "household furniture and effects" has the same meaning: *Northey* v. *Paxton*, 60 L. T. 30; *MacPhail* v. *Phillips*, [1904] 1 Ir. 155.

(*n*) In *Re Johnson*, 92 L. T. 357, a gift of "the remainder of my household property" was held on the context to pass the whole residuary personalty.

(*o*) *Cole* v. *Fitzgerald*, 1 S. & St. 189, aff. 3 Russ. 301. As to a parrot and cage there was a difference of opinion between the reporters: see n. 3 Russ. 301; *Re Labron*, 1 T. L. R. 248; *Stone* v. *Parker*, 29 L. J. Ch. 874; *Re Bourne*, 58 L. T. 537 (wines).

(*p*) *Tempest* v. *Tempest*, 2 K. & J. 635; *Northey* v. *Paxton*, 60 L. T. 30; *Re Hammersley*, 81 L. T. 150; *Boon* v. *Cornforth*, 2 Ves. sen. 277. See also *Re McCalmont*, 19 T. L. R. 490 (gift of a house "together with the furniture and contents therein and appertaining thereto").

(*q*) *Re Hammersley*, 81 L. T. 150. Compare *Re McCalmont*, supra.

"Effects" ejusdem generis.

so are motor cars, if the testator's intention is that the legatee shall have everything required for the enjoyment of a certain house (*r*). A gift of all "furniture, plate, linen, china, pictures, and other goods, chattels and effects" in a house will not include a sum of money found in the house (*s*), for although "effects" by itself is large enough to pass any kind of personal estate (*t*), its use in a gift of a particular part of the testator's property, shews that it is confined to effects ejusdem generis (*u*). But bank notes in a house have been held to pass under a bequest of "my dwelling-house and household furniture and all things now therein in my possession," because the context was supposed to shew an intention to make a sweeping disposition (*v*), and in *Swinfen* v. *Swinfen* (*w*), Romilly, M.R., held that money in a house passed under a gift of "all furniture and other movable goods here," but the decision seems contrary to principle.

When furniture, &c., goes with house.

If a testator gives a person the use and enjoyment during his life of a residence and of the testator's "furniture, goods and chattels," this means only such furniture and effects as would, if the house were let furnished, go with the occupation, and not such articles as jewellery, guns, pistols, tricycles and scientific instruments (*x*).

Heirlooms.

So a bequest of plate, furniture, china, goods, chattels and effects in a house to be annexed as heirlooms, does not include money or things quæ ipso usu consumuntur, or things of a perishable nature, such as carriages, horses, &c. (*y*).

Furniture in a house.

The effect of a bequest of furniture in a particular house, with reference to the question what passes by such a bequest, is discussed in Chap. XXX.

Two residences.

Sometimes a testator has two residences, and bequeaths the furniture, plate or the like in one of them to A., either with or without making a disposition of the articles of a similar description in the other house in favour of some other person: in such a case the

(*r*) *Re Howe*, [1908] W. N. 223; *Denholm's Trustees* v. *Denholm*, [1908] Ct. Sess. Ca. 43.

(*s*) *Gibbs* v. *Lawrence*, 7 Jur. N. S. 137; *Campbell* v. *McGrain*, Ir. R., 9 Eq. 397; *Re McCalmont*, 19 T. L. R 490 (debentures and other choses in action held not to pass as "appertaining to" a house); *Re Miller*, 61 L. T. 365; *Re O'Brien*, [1906] 1 Ir. 649 ("whatever is in the house").

(*t*) As to the operation of the word "effects" in passing the whole residuary personal estate where there is no residuary gift, see Chap. XXVII.

(*u*) *Trafford* v. *Berrige*, 1 Eq. Ca. Abr. 201 pl. 14, and other cases cited in Chap. XXXVIII.

(*v*) *Mahony* v. *Donovan*, 14 Ir. Ch. 262, 388. Compare *Anderson* v. *Anderson*, [1895] 1 Q. B. 749 (deed), where the ejusdem generis construction was rejected.

(*w*) 29 Bea. 207.

(*x*) *Manton* v. *Tabois*, 30 Ch. D. 92. Compare *Bradish* v. *Ellames*, 10 Jur. N. S. 1170, and other cases cited ante, p. 1084, in reference to gifts of chattels "in or about" a dwelling-house.

(*y*) *Hare* v. *Pryce*, 11 L. T. 101.

CHAP. XXXV.

principal test seems to be the actual state of things at the death, but other considerations may arise (*z*).

Miscellaneous articles of household use or ornament.

Under the term "household furniture, implements of household and articles of vertu," telescopes have been held to pass (*a*): but apparently a bust would not pass by a bequest of "household goods and furniture," or of "watches and personal ornaments" (*b*). An altar stone and relics are not passed by a bequest of "furniture" or "articles of household use or ornament" (*c*). And jewellery does not pass under a gift of furniture and effects in a house (*d*). But orchids used in a house for ornament from time to time have been held to pass as "articles of household or domestic use or ornament" (*e*).

Pictures.

Pictures primâ facie pass by a gift of furniture (*f*) but not by a gift of "plate, china and all objects of vertu and taste," the ejusdem generis construction being applicable to such a gift (*g*).

If a testator gives A. the use and enjoyment of his pictures during her life, this entitles A. to let the pictures as part of the contents of a furnished house (*h*).

Jewels, books, plate, &c.

A bequest of family diamonds and other jewels passes masonic orders and silver filagree ornaments (*i*).

Manuscript notes bound up in volumes will pass as books (*j*).

Plate and plated articles.

"Plate" does not include plated articles (*k*), nor does a bequest of "plate and plated articles" include articles mounted with silver (*kk*).

If a testator has two residences, and is in the habit of removing part of his plate temporarily from one residence to the other, the question what passes by a bequest of "the plate in my residence of A." seems to depend partly on the object of the removal (*l*).

Live and dead stock.

The words "live and dead stock" have been held to pass growing crops (*ll*). They have also been held to include books and wine when the bequest was of "furniture, linen, plate, pictures,

(*z*) See *Re Stamford*, 22 T. L. R. 632; *Bruce* v. *Howe*, 19 W. R. 116; *Land* v. *Devaynes*, 4 Br. C. C. 537; *Willis* v. *Courtois*, 1 Bea. 189.

(*a*) *Brooke* v. *Warwick*, 2 De G. & S. 425.

(*b*) *Willis* v. *Curtois*, 1 Bea. 189.

(*c*) *Petre* v. *Ferrers*, 65 L. T. N. S. 568.

(*d*) *Re Miller*, 61 L. T. 365; *Re Hammersley*, 81 L. T. 150.

(*e*) *Re Owen*, 78 L. T. 643.

(*f*) *Kelly* v. *Powell*, Amb. 605. But a picture may form part of the decoration of a house, so as to pass with it, and not under a gift of "chattels in the house": *Re Whaley*, [1908] 1 Ch. 615.

(*g*) *Re Londesborough*, 50 L. J. Ch. 9.

(*h*) *Re Williamson*, 94 L. T. 813.

(*i*) *Brooke* v. *Warwick*, 2 De G. & S. 425.

(*j*) *Willis* v. *Curtois*, 1 Bea. 189.

(*k*) *Holden* v. *Ramsbottom*, 4 Giff. 205.

(*kk*) *Re Lewis*, [1910] W. N. 6.

(*l*) *Re Stamford*, 22 T. L. R. 632. Compare *Wilkins* v. *Jodrell*, 11 W. R. 588.

(*ll*) *Blake* v. *Gibbs*, 5 Russ. 13 n.

carriages, horses, and other live and dead stock" (*m*); but the word "furniture" alone does not help to enlarge the words "live and dead stock," coupled with it, so as to include books and wine (*n*).

Live and dead stock may pass by a gift of "movable goods" (*o*).

Stock of a farm.

Growing crops, it seems, will pass under a bequest of stock of a farm (*p*) or stock upon a farm (*q*).

Business and goodwill, &c.

Under a gift of "plant and goodwill" the house of business held at a rack rent was decided to pass (*r*); but the question is one of intention, and a direction to transfer a "business" has been held not to pass the freehold shop in which the business was carried on (*s*). Whether a bequest of the testator's interest in a business or in the goodwill of a business passes capital, undrawn profits, stock in trade, &c., seems to depend to some extent on the nature of the business and on the other provisions of the will (*t*). Apparently it would not pass a debt due to the testator from the partnership (*u*). But it will pass a share in the business which the testator has contracted to purchase (*v*).

"Book debts."

"Book debts" appear to be the balance only of what, on the adjustment of the testator's accounts, is due to his estate from those persons with whom he dealt (*w*).

"Capital."

"Capital invested" in a business has been held to mean everything that the testator was entitled to receive out of the assets of the business, and to include a debt due to him by his partner (*x*).

Stock in trade.

The question what passes by a bequest of stock in trade necessarily depends on the nature of the testator's business and the manner in which it is usually carried on (*y*).

(*m*) *Hutchinson* v. *Smith*, 11 W. R. 417.

(*n*) *Porter* v. *Tournay*, 3 Ves. 311, where the bequest was for life, so that things quæ ipso usu consumuntur were considered to be excluded. As to gifts of live and dead stock, see *Randall* v. *Russell*, 3 Mer. 190; *Rudge* v. *Winnall*, 12 Bea. 357.

(*o*) *Swinfen* v. *Swinfen*, 29 Bea. 207. See *Randall* v. *Russell*, 3 Mer. 190.

(*p*) *Cox* v. *Godsalve*, 6 East, 604, n.

(*q*) *West* v. *Moore*, 8 East, 339; *Rudge* v. *Winnall*, 12 Bea. 357; *Re Roose*, 17 Ch. D. 696, overruling *Vaisey* v. *Reynolds*, 5 Russ. 12; and see 1 Roper on Legacies by White, 249. As to farming stock generally, see *Harvey* v. *Harvey*, 32 Bea. 441; *Burbidge* v. *Burbidge*, 16 W. R. 76 (live and dead farming stock); *Creagh* v. *Creagh*, 13 Ir. Ch. 28 (bequest of use of "furniture, stock, and house linen" for limited time).

(*r*) *Blake* v. *Shaw*, Johns. 732.

(*s*) *Re Henton*, 30 W. R. 702; *Devitt* v. *Kearney*, 13 L. R. Ir. 45.

(*t*) See *Re Barfield*, 84 L. T. 28, where *Re Delany*, 15 L. R. Ir. 55, is commented on.

(*u*) *Re Beard*, 57 L. J. Ch. 887.

(*v*) *Re Stevens*, [1888] W. N. 110.

(*w*) *Chick* v. *Blackmore*, 2 Sm. & G. 274. Compare *Ekins* v. *Morris*, 8 W. R. 301; *Ganly* v. *Dowling*, 5 L. R. Ir. 628, ante, p. 1301; *Terry* v. *Terry*, 33 Bea. 232. Bankers' balances, bonds, &c., are not book debts: *Re Stevens*, [1888] W. N. 110.

(*x*) *Bevan* v. *Att.-Gen.*, 4 Giff. 361: sed quære as to the debt; compare *Re Beard*, supra.

(*y*) *Elliott* v. *Elliott*, 9 M. & W. 23; *Re Richardson*, 50 L. J. Ch. 488.

CHAPTER XXXVI.

ALTERNATIVE AND SUBSTITUTIONAL GIFTS—GIFTS OVER.

	PAGE
I. *Distinction between Alternative and Substitutional Gifts*	1312
II. *What Words will create a Substitutional Gift*:—	1315
(i.) *Gift to a Person "or" his Issue, Children, Heirs, Executors, &c.*	1316
(ii.) *Gift to a Person "and" his Issue, Children, &c.*	1319
(iii.) *Other Cases of implied Substitutional Gifts*	1323
III. *Where Primary Gift is to a Class*:—	1323
(a) *Where Gift is Immediate*	1324
(b) *Where there is a prior Life Interest*	1325
IV. *Substitutional Gifts to Children or Issue*	1328
V. *Distinction between Substitutional and Original (or Substantive) Gifts*	1330
VI. *Whether Objects of Primary and Secondary Gifts take concurrently*	1334
VII. *Substitution in place of Person dead at Date of Will*	1336
VIII. *Gifts over*	1344

Difference between alternative and substitutional gifts.

I.—Distinction between Alternative and Substitutional Gifts.—The terms "alternative" and "substitutional" are sometimes used as synonymous, and sometimes as opposed to one another.

In simple gifts, "alternative" has the same meaning as "substitutional" (*a*). Thus where there is a gift to A., or in case of his death to his children, "both are not to take, but either the parent or the children in the alternative" (*b*); consequently if A. predeceases the testator he takes nothing, and if he survives the testator the children take nothing. Such a gift might be described either as an alternative or as a substitutional gift. So if 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 male and A. has no son, "the successive limitations, though having the form of remainders, operate simply

(*a*) As to alternative limitations of real estate, taking effect according to the state of facts at the death of the testator, see ante, p. 354.

(*b*) Per Sir W. Grant, M.R., in *Turner* v. *Moor*, 6 Ves. at p. 559; per Jessel, M.R., in *Re Sibley's Trusts*, 5 Ch. D. at p. 499.

as substitutional or *alternative* bequests, each gift in the series being dependent upon the event of the preceding gift or gifts not taking effect" (*c*). But in many cases there is a distinction between an alternative and a substitutional gift. Thus if the gift is "to A. or B." simply, this is an alternative gift, and is, it seems, void for uncertainty (*d*): while if the gift is "to A. and B. or C." it may be possible to construe it as intended to take effect in favour of C. in the event of its failing as to B., in which case it is a substitutional gift as regards him (*e*). So if the gift is to X. for life, and after his death to A. or his children, the primâ facie meaning is that if A. survives the testator he takes a vested interest, subject to be divested if he dies during X.'s lifetime. Such a gift is called substitutional and not alternative. If, however, the second gift is not intended to divest the primary gift, but only to take effect in the event of its failing, the second gift is called alternative. Thus in *Re Roberts* (*f*) a testator gave a share of his residuary estate to each of his two daughters, A. and B., for their respective lives, and after their deaths their respective shares were "to be equally divided between their respective children or legal representatives"; A. had several children, all of whom predeceased her: it was held that the words "or legal representatives" had not the effect of a substitutional clause, but operated as an alternative gift to take effect only in the event of there being no child that took a vested interest; consequently the vested interests of A.'s children were not divested by their death in her lifetime (*g*).

Original or substitutional.

Where the primary and secondary (or alternative) gifts are both to classes, the question arises whether the secondary (or alternative) gift is original or substitutional (*h*). This question is discussed later (*i*).

"Alternative" in the sense of "inclusive."

Yet another meaning was given to "alternative" in *Re Delmar Charitable Trust* (*j*). There a testator gave the income of certain property to the P. A. Society, "or some one or more kindred institutions" having similar objects: it was held by Stirling, J., that this was not a substitutional gift, to take effect in the event of

(*c*) Mr. Jarman, in the first edition of this work, Vol. II. p. 504, where he examines the cases of *Brett* v. *Sawbridge* and *Pelham* v. *Gregory*. His remarks are printed in extenso in Chap. XXXIII., ante, p. 1202.

(*d*) Ante, Vol. I. p. 475.

(*e*) *Carey* v. *Carey*, 6 Ir. Ch. R. 255, stated ante, Vol. I. p. 476.

(*f*) [1903] 2 Ch. 200.

(*g*) The decision in *McCormick* v. *Simpson*, [1907] A. C. 494, seems to rest on the same principle.

(*h*) See *Re Coulden*, [1908] 1 Ch. 320.

(*i*) Post, p. 1335.

(*j*) [1897] 2 Ch. 163. The decision was in substance that "or" was to be construed "and," the difficulty as to uncertainty being obviated by the fact that the gift was charitable.

CHAP. XXXVI.

the P. A. Society ceasing to exist, but what he called an "alternative" gift, and that it included, in addition to the P. A. Society, one or more kindred institutions to be designated by the Court. This use of the term seems hardly consistent with the proper meaning of "alternative," which, as pointed out by Sir W. Grant (*h*), implies mutual exclusion.

Imperfect substitutional gifts.

A complete substitutional gift, indicating the primary legatee, the substituted legatee, and the event in which substitution is to take place, seldom gives rise to questions. In most substitutional gifts, however, one or more of these details are omitted.

Uncertainty as to primary legatee.

Uncertainty as to the primary legatee frequently occurs where the gift is to a class of persons, with a direction that children of a deceased member of the class are to be substituted for their parent (*i*). Thus a gift to "my surviving brothers and sisters" is ambiguous (*j*).

Uncertainty as to substituted legatee.

Uncertainty as to the substituted legatee is often caused by the use of inappropriate expressions: thus in a gift of real and personal property to a person "or his heirs," "heirs" may mean next of kin (*k*), heir at law (*l*), or issue (*m*).

"Legal representatives" is also an ambiguous expression (*n*), and where the class of substituted legatees is directed to consist of persons "then living" difficult questions may arise (*o*).

Substituted class, how ascertained.

Where the substituted legatees take as a class, the class is ascertained, it seems, in accordance with the general rules applicable to gifts to classes (*p*). The question frequently arises where there is a prior life estate, as in the case of a gift to A. for life and after his death to B. or his issue: if B. dies in the testator's lifetime, the class is ascertained at the testator's death (*q*), while if he survives the testator and dies in A.'s lifetime, the class consists of all issue coming into existence before the death of the tenant for life (*r*). If there are no words of severance they take as joint tenants, so that the representatives of those dying before the tenant for life are excluded (*s*).

(*h*) Ante, p. 1312.

(*i*) See the remarks of Jessel, M. R., in *Re Sibley's Trusts*, 5 Ch. D. at p. 499, post.

(*j*) *Shailer* v. *Groves*, 11 Jur. 485.

(*k*) See *Re Porter's Trust*, 4 K. & J. 188, and other cases cited in Chap. XL.

(*l*) *Keay* v. *Boulton*, 25 Ch. D. 212.

(*m*) *Speakman* v. *Speakman*, 8 Ha. 187.

(*n*) As to gifts to A. "or his executors," or to A. "and in case of his death to his executors," see *Re Clay*, 51 L. J. Ch. 618, and other cases cited in Chap. XLI.

(*o*) As in *Hodgson* v. *Smithson*, 21 Bea. 354, 8 D. M. & G. 604; *Heasman* v. *Pearse*, L. R., 7 Ch. 275, 660.

(*p*) As to gifts to next of kin, relations, &c., see Chap. XLI.; as to gifts to children, see Chap. XLII.

(*q*) *Hobgen* v. *Neale*, L. R., 11 Eq. 48, following *Ive* v. *King*, 16 Bea. 46, where the gift was to children, not issue.

(*r*) *Re Jones's Estate*, 47 L. J. Ch. 775, following *Re Sibley's Trusts*, 5 Ch. D. 491, and dissenting from *Hobgen* v. *Neale*, L. R., 11 Eq. 48.

(*s*) *Re Jones's Estate*, supra.

The questions whether issue, descendants, &c., take per stirpes or per capita, and whether they take as joint tenants or as tenants in common, are discussed elsewhere (*t*).

Substitutional gifts to the children or issue of a prior legatee are further considered in a later section of this chapter.

Uncertainty as to event.

Uncertainty as to the event in which substitution is to take place is frequently caused by the use of ambiguous expressions. Thus if a testator bequeaths a legacy payable within six months after his decease, and directs that in the event of the legatee's death, "not having received" his legacy, his child or children shall be entitled to it, the question arises whether this refers to death in the lifetime of the testator, or after the testator's death (*u*).

Substitution on death before becoming entitled.

Where the gift was to A. for life and after her death the property was to be divided among the children of B., with a substitutional gift in the event of any child dying before becoming entitled, it was held that this meant becoming entitled in possession (*v*).

Whether contingency applies to both classes.

Where the original gift and the substituted gift are both to classes, uncertainty may arise from a doubt whether a contingency referred to by the testator applies to one or both of the classes. Thus in *Atkinson* v. *Bartrum* (*w*) there was a bequest to two persons for their lives, and after the death of the survivor to the testator's surviving brothers and sisters or their children equally. It was held that only those children who survived the tenant for life were entitled to take. As a general rule, a substitutional gift to the children of prior legatees who die before a certain time is not subject to the same condition of survivorship (*x*).

II.—What Words will create a Substitutional Gift.—An intention to create a substitutional gift may be inferred from ambiguous words. The two commonest examples of this construction occur where the gift is to a person "or" his issue, children, &c., or to a person "and" his issue, children, &c.

(*t*) Chap. XLI.

(*u*) *Smith* v. *Oliver*, 11 Bea. 494; *Re Green's Estate*, 1 Dr. & Sm. 63, and other cases referred to in Chap. LVII.

(*v*) *Re Maunder*, [1903] 1 Ch. 451.

(*w*) 28 Bea. 219; *Re Fox's Will*, 35 Bea. 163. See *Re Coulden*, [1908] 1 Ch. 320. From the decree in *Shailer* v. *Groves* (11 Jur. 485) it would seem that Wigram, V.-C., came to a similar decision in that case, but no indication of it is given in the judgment as reported, 6 Hare, 162. In *Congreve* v. *Palmer*, 16 Bea. 435, the gift was to A. for life, and after her death to her sisters or their children then living; the words "then living" were, of course, held to be applicable to the children, but the question whether they were applicable to the sisters did not really arise, because without them the gifts to the sisters would have been divested, as they all died before A., leaving children.

(*x*) Post, p. 1332.

"Or" read as introducing a substituted gift.

(i.) *Gift to a Person "or" his Issue, Children, Heirs, Executors, &c.*—In discussing the construction of the word "or" in such gifts as "to A. or his issue," Mr. Jarman says (*y*): "The strong tendency of the modern cases certainly is to consider the word 'or' as introducing a substituted gift in the event of the first legatee dying in the testator's lifetime: in other words, as inserted in prospect of, and with a view to guard against, the failure of the gift by lapse.

To A. or her issue.

"Thus, in *Davenport* v. *Hanbury* (*z*), where the bequest was to A. *or* her issue, it seems to have been taken for granted that the word *or* was intended to substitute the issue in case of the death of A. in the testator's lifetime; the question discussed being, not *whether* issue were entitled, but *how*, i.e. whether per stirpes or per capita. So, in *Montagu* v. *Nucella* (*a*), where legacies were bequeathed to the testator's nephews and nieces, '*or* to their respective child or children,' Lord *Gifford*, M. R., held the effect to be to vest the legacies absolutely in the children surviving the testator, and that the children were let in only as substitutes for their parent or parents dying in the testator's lifetime. . . . Lastly, in *Gittings* v. *M'Dermott* (*b*), where a testator bequeathed certain stock to the children of his sister, the late Elizabeth Wall, OR *to their heirs*, Sir J. *Leach*, M. R., considered it to be clear that the word 'or' implied a substitution, and that the next of kin (who in regard to personalty were considered to be designated by the word heirs) of such of the legatees as died in the testator's lifetime were entitled to their legacies; and Lord *Brougham* on appeal affirmed his Honor's decree.

To legatees, *or* to their respective child or children.

To the children of A., *or* to their heirs.

"These cases (*c*) seem to be inconsistent with, and therefore to have overruled, *Newman* v. *Nightingale* (*d*), where a sum of 500*l*. was bequeathed to the sole use of A. *or of her children* for ever; and Lord *Thurlow* held, that the true construction of the words was, to give A. an interest for life, and the children to take it amongst them at her death.

Whether words refer to contingency in lifetime of testator, or afterwards.

"Where, however, the words in question are applied to a bequest which may not take effect in possession on the testator's decease, another point presents itself, namely, whether the word 'or'

(*y*) First edition, Vol. I. p. 453. These remarks have been transferred from the chapter on "Supplying, Transposing and Changing Words" (now Chap. XVIII.), where they followed a discussion of the cases in which "or" is read "and."

(*z*) 3 Ves. 257; *Crooke* v. *De Vandes*, 9 Ves. 197.

(*a*) 1 Russ. 165.

(*b*) 2 My. & K. 69. The case of *Jones* v. *Torin*, 6 Sim. 255, cited by Mr. Jarman before *Gittings* v. *M'Dermott*, has been overruled.

(*c*) Later cases, decided on the same principle, are, *Whitcher* v. *Penley*, 9 Bea. 477; *Penley* v. *Penley*, 12 ib. 547; *Chipchase* v. *Simpson*, 16 Sim. 485; and see the cases on gifts to classes, infra, p. 1324 et seq.

(*d*) 1 Cox, 341.

(admitting it to be introductory of a substituted gift) is meant to provide against the contingency of the first-named legatee dying in the testator's lifetime, or that of his dying in the interval between the death of the testator and the vesting in possession. Such a question occurred in *Girdlestone* v. *Doe* (*e*), where a testator bequeathed 40*l*. per annum to A. for life, and after her decease to B. *or his heirs;* and it was held that B., who survived the testator, did not take the absolute interest, but that the latter words created a substitutional gift for his next of kin in the event of B. dying in the lifetime of A. (*f*)."

Death of original legatee at any time.

In certain cases, however, where the prior legatee is an individual (*g*), and there is a prior life estate, a substitutional gift will take effect on the death of the first legatee at any time, i.e. whether in the testator's lifetime or in that of the tenant for life. Thus in *Re Porter's Trust* (*h*), the testatrix gave her residue to A. for life, and at the death of A. bequeathed a legacy to B. "or his heirs"; B. died in the lifetime of the testatrix, and it was held that his statutory next of kin were entitled to the legacy.

Distinction between words of purchase and words of limitation.

Most of the cases in which the word "or" has been given the effect of a clause of substitution are cases in which the gift is to a person "or his children," or "issue" (*j*), or where personal property is given to a person "or his heirs" (*l*). But if an ambiguity is caused by the fact that the words introduced by the "or" may possibly have been intended as words of limitation, the construction is more difficult. Thus, before the Wills Act, a devise of real estate to "A. or his heirs" was construed to mean "A. and his heirs," in order to give him the fee (*m*). So it appears to be doubtful whether in a gift of personal property to "A. or his executors" or "personal representatives," the word "or" has a substitutional effect. Sir R. P. Arden seems to have taught that where there is an immediate gift to "A. or his representatives"

(*e*) 2 Sim. 225; see also *Corbyn* v. *French*, 4 Ves. 418; *Hervey* v. *M'Laughlin*, 1 Price, 264: post, Chap. LVII.

(*f*) The same principle was followed in *Price* v. *Lockley*, 6 Bea. 180; *Burrell* v. *Baskerfield*, 11 Bea. 525; *Doody* v. *Higgins*, 9 Hare, App. xxxii.; *Jacobs* v. *Jacobs*, 16 Bea. 557; *Re Craven*, 23 Bea. 333; *Timins* v. *Stackhouse*, 27 Bea. 434; *Blundell* v. *Chapman*, 33 Bea. 648; and apparently in *McCormick* v. *Simpson*, [1907] A. C. 494.

(*g*) As to the rule where the original gift is to a class, see post, p. 1325.

(*h*) 4 K. & J. 188; *Collins* v. *Johnson*, 8 Sim. 356, n.

(*j*) Supra.

(*l*) *Gillings* v. *M'Dermott*, 2 Myl. & K. 69; *Wingfield* v. *Wingfield*, 9 Ch. D. 658 (where *Lachlan* v. *Reynolds*, 9 Ha. 796, is explained); *Keay* v. *Boulton*, 25 Ch. D. 212 (gift of real and personal property): Chap. XL.

(*m*) See *Read* v. *Snell*, 2 Atk. 642, and other cases cited ante, p. 612, where the question whether this rule of construction has been altered by the Wills Act is referred to. As to a gift of realty and personalty to "A. or his issue" in a will before 1837, see *Parkin* v. *Knight*, 15 Sim. 83.

CHAP. XXXVI.

this is a substitutional gift to A.'s personal representatives in the event of his death in the testator's lifetime. He said (*n*): "A testator is never to be supposed to mean to give to any but those who shall survive him, unless the intention is perfectly clear. I will not determine now, because it is not necessary, that where a legacy is given to a person or to his representatives, it can mean anything but, in case of his death in the life of the testator, but it is perfectly clear, that where the fund is given to one for life and after the death of that person to several others, and in case of their deaths to their representatives, there is no reason to presume an intention that it shall not lapse by the death of the legatee in the life of the testator." But if the bequest is deferred, either for a fixed period of time, or by a preceding life interest, a gift to "A. or his representatives" may be meant to provide for the case of A. dying after the testator and before the bequest is payable. Accordingly, where there is a bequest to A. for life, and after his decease to B. "or his executors," or to B. "or his personal representatives," and B. dies before the testator, the bequest lapses; but if the words following "or" imply a beneficial gift (as where the gift is to B. "or his issue" or "next of kin"), the persons so designated will take by substitution whether B. dies in the lifetime of the testator or in that of the tenant for life (*o*). So if the gift is to A. for life and then to B. "or his personal representatives," and the context shews that by these words the testator meant "next of kin" (*p*), it seems clear that the bequest would not lapse by the death of B. in the testator's lifetime.

In case of A. dying, leaving issue.

The same rule of construction applies where the substitutional gift is in the form of a direction that in case of the death of the primary legatee leaving issue, they are to take the legacy (*q*).

Effect of gift to A. or his issue.

A gift to a person "or his issue," when preceded by a life interest, is in fact equivalent to an absolute gift to the prior legatee, followed by a gift over in the event of his dying before the period of distribution leaving issue, so that if he dies before that period without

(*n*) *Corbyn* v. *French*, 4 Ves. at p. 435.

(*o*) *Bone* v. *Cook*, McClel. 168, stated in Chap. LVII.; *Corbyn* v. *French*, 4 Ves. 418; *Tidwell* v. *Ariel*, 3 Madd. 403; *Re Porter's Trust*, 4 K. & J. 188. The case of *Leach* v. *Leach*, 35 Bea. 185, appears to have been decided on this principle. In *Tidwell* v. *Ariel* and in *Thompson* v. *Whitelock*, 4 De G. & J. 490, the legacies were payable at a certain time after the testator's death. In *Maxwell* v. *Maxwell*, Ir. R., 2 Eq. 478, where the gift was to "my younger sons or their executors," the executors of a younger son who was dead at the date of the will were held to be entitled, because the testator had by an earlier clause in the will shewn that he meant the gift to have that effect. See Chap. XIII.

(*p*) As in *King* v. *Cleaveland*, 4 De G. & J. 477.

(*q*) *Le Jeune* v. *Le Jeune*, 2 Kee. 701; *Ive* v. *King*, 16 Bea. 46; *Hobgen* v. *Neale*, L. R., 11 Eq. 48.

leaving issue, the gift to him is not divested and his representatives are entitled to it.

Thus in *Salisbury* v. *Petty* (*r*), immediate legacies of 2000*l.* each were bequeathed to B., C. and D. or their issue, and further legacies of 3000*l.* each were bequeathed, subject to a prior life interest in A., to B., C. and D. or their issue. B. died in the lifetime of A., without issue, and C. and D. died in the lifetime of A., leaving issue. Consequently B. took both his legacies absolutely; C. and D. took their two legacies of 2000*l.*, and the children of C. and D. took the two legacies of 3000*l.* by substitution for their parents.

Substitutional gift to survivors.

Where the gift is to A. for life, and after his death to B., C. and D. in equal shares, or to such of them as shall be living at A.'s death, his, her or their executors, administrators and assigns, this gives B., C. and D. vested interests liable to be divested: if they all die in A.'s lifetime, their representatives take in equal shares, but if B. and C. die in A.'s lifetime and D. survives, he takes the whole (*s*).

Gift by implication to objects of power.

The substitutional construction is not given to the word "or" when it occurs in a power of appointment or selection, and a gift by implication to the objects of the power arises by reason of its not having been exercised (*t*). Thus a gift to A., B. and C., "or their children" as X. shall appoint, operates as a gift in default of appointment to A., B. and C. and their children, because they are all objects of the power (*u*).

(ii.) *Gift to a Person "and" his Issue, Children, &c.*—In discussing the effect of a gift of personalty to "A. and his issue," Mr. Jarman points out that the primâ facie effect of such a bequest is to give A. the absolute interest, and continues (*v*): "The word 'issue,' under a joint gift to the ancestor and issue, has also been sometimes construed as introducing a substituted gift in favour of these objects, in the event of the failure of the original gift to the ancestor who, if such gift takes effect, becomes solely and absolutely entitled.

"Thus, in *Pearson* v. *Stephen* (*w*), where the testator, John

(*r*) 3 Ha. 86; *Burrell* v. *Baskerfield*, 11 Bea. 525, was a similar case.

(*s*) *Re Sanders' Trusts*, L. R., 1 Eq. 675. Compare *Sturgess* v. *Pearson*, 4 Madd. 411, cited p. 1307.

(*t*) As to the cases in which this implication arises, see p. 650.

(*u*) *Penny* v. *Turner*, 2 Ph. 493; *Re White's Trusts*, Johns. 656.

(*v*) First edition, Vol. II. p. 500, where this section formed part of Chap. XLIV. in the original work, which was entitled, "Rule that Words which create an Estate Tail in Real Estate confer the Absolute Interest in Personalty"; the rest of this chapter has been incorporated in Chap. XXXIII. in the present edition.

(*w*) 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.

CHAP. XXXVI.

To five persons and their respective issue per stirpes.

Pearson v. *Stephen.*

Pearson, bequeathed to trustees so much stock as should be sufficient to pay thereout the yearly sum of 1000*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 4000*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 attain such age. The question was, what interests the five sons (all of whom survived the testator) took under these bequests? Sir J. Leach, M. R., held that the sons took life interests only (subject, as to the 4000*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 4000*l.*, in the event of S. dying in the lifetime of G., the sons of the testator *living at such event* would be absolutely entitled to the stock in equal shares; but if any of the sons should die in the lifetime of S., leaving issue, such issue, if living at the death of S. (*x*), would be entitled to the share or shares of the fund which their parents would have been entitled to, if living, such issue to take the shares in question equally among them; and it was also adjudged that the sons, at the death of the testator, took an absolute interest in the residue. And an opinion was expressed by the Lord Chancellor (Brougham), that, if any of the sons had died in the lifetime of the testator, his children, living at his (the testator's) death, would have taken, by substitution, the share of the parent.

p. 453 [first edition]; also *Price* v. *Lockley*, 6 Bea. 180." Mr. Jarman's remarks on this point will be found ante, p. 1316.

(*x*) As to this, see ante, p. 1315.

Remarks on *Pearson* v. *Stephen*.

"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 600*l.* stock, in the further event of their dying during the subsistence 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.

To the daughters of T. and their issue, with benefit of survivorship.

"The case of *Pearson* v. *Stephen* was referred to in *Gibbs* v. *Tait* (*y*), 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*.

Remark on *Gibbs* v. *Tait*.

"This remark shews that the Vice-Chancellor considered the case before him to belong to the same class as the cited authority: perhaps the clauses of accruer (which are not stated) may have aided this interpretation."

Bequest to several and their descendants per stirpes.

The decision in *Pearson* v. *Stephen* was followed in *Dick* v. *Lacy* (*z*), 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 for ever; 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.

Of course the principle of *Pearson* v. *Stephen* does not apply

(*y*) 8 Sim. 132.

(*z*) 8 Bea. 214. See also *Hedges* v. *Harpur*, 9 Bea. 479 (issue to take only their parent's share); *Tucker* v. *Billing*, 2 Jur. N. S. 483; *Clay* v. *Pennington*, 7 Sim. 370; *Hurry* v. *Hurry*, L. R., 10 Eq. 346, were similar cases. In *Young* v. *Davies*, 2 Dr. and Sm. 167, Kindersley, V.-C., refused to treat a gift to "my surviving daughters and their lawful offspring" as substitutional gift. But see *Re Coulden*, [1908] 1 Ch. 320, referred to post, p. 1331. As to a gift to A., and in case of his death to his issue, see *Le Jeune* v. *Le Jeune*, ante, p. 1318. *Etches* v. *Etches*, 3 Dr. 447, seems to have been wrongly decided. In *Burrell* v. *Baskerfield*, 11 Bea. 525, the gift was to A. for life, and then to certain cousins of the testator "and their children": the substitutional construction was aided by the fact that in an earlier part of the will a legacy was given to each of the cousins and the children of a deceased cousin.

CHAP. XXXVI.

where the context shews that "issue" is used as a word of limitation (*zz*).

Mr. Jarman continues (*a*): "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.

Issue not entitled concurrently with ancestor.

"Thus, in *Butler* v. *Cumaney* (*b*) a testator bequeathed 2000*l.* to the children of his sister B. and their lawful issue, in case any of them should die leaving lawful issue. He also gave unto and among all and every the child and children of his late brother Jacob *and their issue* (except his nephew A.) the sum of 2000*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.

"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.

Issue held entitled concurrently with ancestor.

"An instance of the admission of such concurrent claims occurs in *Clay* v. *Pennington* (*c*), 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 descendants of B., who were living at the period in question, were entitled to

(*zz*) *Tate* v. *Clarke*, 1 Bea. 100.
(*a*) First edition, Vol. II. p. 502.
(*b*) 4 Russ. 70. See also *Dick* v. *Lacy*, 8 Bea. 214; *Re Stanhope's Trusts*, 27 Bea. 201.
(*c*) 5 Sim. 370. See also *Law* v. *Thorp*, 27 L. J. Ch. 649, 4 Jur. N. S. 447; and Prior on Issue, 37, 38.

participate, and which of course involved a denial of the proposition that 'issue' was here used as a word of limitation."

(iii.) *Other Cases of implied Substitutional Gifts.*—Reference is made elsewhere (*d*) to the doctrine that where personal estate is limited to several persons not in esse successively, in terms which, if the property were realty, would give them estates tail, the successive limitations operate as substitutional or alternative bequests.

In *Prentice* v. *Brooke* (*e*), chattels real were bequeathed to trustees for fifteen years upon certain trusts, and after that term upon trust for H., the trust being so expressed that H. took absolutely subject to a gift over in the event of his leaving no issue living at his death; there was a concluding declaration that "the above bequest" to H. was to go to his lawful issue should he leave such issue; it was held that this was a substitutional gift to his issue in the event of his dying within the fifteen years.

Contingent gift to children, &c.

In *Crozier* v. *Crozier* (*y*), a testator gave property to his wife, "and after her death to be equally divided to the children, should there be any." At the death of the testator there were no children. It was held that the widow took absolutely, but on what ground is not quite clear (*z*). The case is sometimes treated as having been decided on the question how an absolute interest can be cut down to a life interest (*a*).

In *Comiskey* v. *Bowring-Hanbury* (*b*), a gift of property to A. absolutely, "in full confidence" that at her death she would devise it to one or more of the testator's nieces, with a direction that in default of any disposition by her by will the property should be equally divided among the nieces, was held to give A. an absolute interest defeasible in the event of any niece surviving her.

General rule.

III.—Where Primary Gift is to a Class.—It is obvious "that where there is a bequest to a class, followed by a substitutional bequest in case of the death of any member of the class, there, to determine whether the substitutional bequest is to take effect upon the death of any particular individual, you must first inquire whether he was a member of the class at all. If he was not, it is impossible

(*d*) Chap. XXXIII., ante, pp. 1202, seq., where *Pelham* v. *Gregory*, 3 Br. P. C. 204, is stated.
(*e*) 5 L. R. Ir. 435.
(*y*) L. R., 15 Eq. 282.
(*z*) In *Re Hanbury*, [1904] 1 Ch. 415, Stirling, L. J., treated the case as an example of a defeasible interest which had become absolute owing to the failure of the gift over.
(*a*) *Monck* v. *Croker*, [1900] 1 Ir. 56.
(*b*) [1905] A. C. 84.

to predicate substitution with respect to him" (*c*). The difficulty in most of the cases is to ascertain what persons the original class is composed of (*d*).

Where will defines the class.

It will of course be remembered that where the class is defined by the will, the definition must, as a general rule, be strictly adhered to, although the result often defeats the obvious intention of the testator (*e*). Thus if the gift is to the children of S. living at the testator's death, and in case any of them should die, leaving issue, such issue should be entitled to their parent's share, the issue of a child who dies in the testator's lifetime are not entitled to share (*f*). But if there is an ambiguity on the face of the will, advantage may be taken of this to correct the testator's language. Thus in *Giles* v. *Giles* (*g*) a testator gave his residue to all his children living at the decease of his wife, and if any "such children" should be deceased before his wife, leaving issue, the children of such his son or daughter should be entitled to his or her portion; as it was impossible that any child who survived the wife should predecease her, the word "such" was disregarded.

Immediate gift to class with clause of substitution.

(a) *Where gift is immediate.*

In the case of an immediate gift to a class of persons, such as the children of A., with a substitutional gift to their issue or the like, it is clear that if any child of A. dies between the date of the will and the death of the testator, leaving issue, they take by substitution (*h*). The principle is stated (or rather assumed) in *Christopherson* v. *Naylor* (*i*), where the testator bequeathed a legacy to each of his nephews and nieces living at his death, and directed that in the event of any nephew or niece dying in his lifetime the legacy "intended for" the nephew or niece so dying should be for his or her issue: the question was whether the issue of nephews and nieces who died before the date of the testator's will were entitled to their legacies (*j*). Sir W. Grant said: "The nephews and nieces are here the primary legatees. Nothing whatever is given to their issue, except in the way of substitution. In order to claim, therefore,

(*c*) Per Wood, V.-C., in *Re Porter's Trust*, 4 K. & J. at p. 191, following *Christopherson* v. *Naylor*, 1 Mer. 320; *Ive* v. *King*, 16 Bea. 46.

(*d*) Per Jessel, M. R., in *Re Sibley's Trusts*, 5 Ch. D. at p. 499.

(*e*) See the cases on gifts to "children then living," followed by a clause of substitution, which are cited in Chap. XLII.

(*f*) *Shergold* v. *Boone*, 13 Ves. 370; *Smith* v. *Farr*, 3 Y. & C. 328. Compare *Re Kinnear*, 90 L. T. 537.

(*g*) 8 Sim. 360. Compare *Habergham* v. *Ridehalgh*, L. R., 9 Eq. 395; *Jeyes* v. *Savage*, L. R., 10 Ch. 555.

(*h*) *Cort* v. *Winder*, 1 Coll. 320.

(*i*) 1 Mer. 320. In *Christopherson* v. *Naylor* the gift to the issue of a deceased nephew was not strictly substitutional, because nothing was given to the parent: the case properly belongs infra, p. 1330, but it is cited here on account of the general principle laid down in it.

(*j*) This question is discussed post, p. 1324 et seq.

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 in *Re Webster's Estate* (*k*), where a similar question arose, Kay, J., said: "Where there is a gift to a class and then a substitutionary gift of the share of any one of the class who should die in the lifetime of the testator, no one can take under the substitutionary gift who is not able to predicate that his parent might have been one of the original class, and consequently if the parent was dead at the date of the will, and therefore by no possibility could have taken as one of the original class, his issue are not able to take under the substitutionary gift."

(b) *Where there is a prior life interest.*

Whether same rule applies where there is a prior life estate.

On principle, it would seem to follow that the same rule ought to apply where there is a prior life estate, so that if property is given to X. for life, and after his death to the nephews of the testator or their children, the children of any nephew who dies after the date of the will and before the death of X., would be entitled to the share intended for their parent, because every nephew of the testator who is living at the date of the will or is born before the period of distribution is what Sir W. Grant calls an original legatee, or as Kay, J., puts it, one of the original class. And Mr. Jarman evidently inclined to this opinion, for after citing the cases of *Christopherson* v. *Naylor* (*l*), *Butter* v. *Ommaney* (*m*), *Waugh* v. *Waugh* (*n*), *Peel* v. *Catlow* (*o*) and *Gray* v. *Garman* (*p*), he remarks (*q*):

Suggested distinction where decease is after will.

"It will be observed that, in the five preceding cases, the person whose children it was attempted to bring within the compass of the clause in question was dead at the date of the will, and could not possibly have been an object of the primary bequest; and it does not follow that the same 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* (*r*), where a testator directed that certain estate, which by his marriage settlement he had settled on his wife for life, and another estate, which he had devised to her

(*k*) 23 Ch. D. at p. 739.
(*l*) 1 Mer. 320.
(*m*) 4 Russ. 70.
(*n*) 2 Myl. & K. 41.
(*o*) 9 Sim. 372.
(*p*) 2 Ha. 268.
(*q*) First edition, Vol. II. p. 681.
(*r*) 4 Madd. 377. "Whether the nephews and nieces were in existence at the date of the will is not stated" (note by Mr. Jarman).

CHAP. XXXVI.

for her life, should be sold at her decease, and the money arising therefrom equally divided among his nephews and nieces, *the children of such of them* (*s*) *as should be then dead standing in the place of their father and mother deceased.* The question was, whether the children of such of the nephews and nieces as died in the testator's lifetime were entitled. Sir J. Leach, V.-C., decided in the negative; his Honor being of opinion that the latter clause applied to the children of such of the nephews and nieces only as died after the testator, and before the wife.

"The case of *Thornhill* v. *Thornhill*, however, has been much disapproved of, as applying a very harsh and rigid rule of construction to testamentary provisions for children; and its authority was unequivocally denied in *Smith* v. *Smith* (*t*), where . . . Sir L. Shadwell, V.-C., said: 'I think that the decision in *Thornhill* v. *Thornhill* is wrong.'"

It is certainly difficult to see, on principle, why the existence of a prior estate for life should prevent substitution in the case of a member of the original class dying in the lifetime of the testator, if substitution is allowed where the gift is immediate. In both cases the object of the testator is to benefit a class which includes persons living at the date of the will, and to provide for the issue of members of the class who die before the period of distribution.

Authorities supporting *Thornhill* v. *Thornhill*.

However, the authority of *Thornhill* v. *Thornhill* is supported by a dictum of Romilly, M. R., in *Ive* v. *King* (*u*), and by three modern decisions (*v*). The argument on which these decisions are based is that when a testator makes a deferred bequest to a class followed by a substitutional gift, as "to A. for life and after his death to my brothers or their heirs," the gift to the brothers only takes effect in favour of those who survive the testator, and that consequently the gift is in effect "to A. for life and after his death to my brothers who shall be living at my death or their heirs." But this is not what the testator says, and still less what he means, for a gift to "my brothers" primarily means "my brothers now living." That this is the proper construction of such a bequest, when considered

(*s*) In this quotation Mr. Jarman has followed the reporter's marginal note; in the text of the report the clause is thus stated: "the children of such as should be then dead standing in the place of their father and mother deceased."

(*t*) 8 Sim. 353. Mr. Jarman's marginal note to this paragraph is: "Case of *Thornhill* v. *Thornhill* overruled."

(*u*) 16 Bea. at p. 53. In support of his dictum the M. R. cites, not *Thornhill* v. *Thornhill*, but *Peel* v. *Catlow*, *Waugh* v. *Waugh*, and *Christopherson* v. *Naylor*, in all of which, as Mr. Jarman points out, the original legatee was dead at the date of the will. The dictum is therefore not of great weight.

(*v*) *Neilson* v. *Monro*, 27 W. R. 936; *Re Hannam*, [1897] 2 Ch. 39; *Re Ibbetson*, 88 L. T. 461.

with reference to a subsequent clause of substitution or gift over, is clear from Sir W. Grant's judgment in *Christopherson* v. *Naylor* (*w*), and in *Shergold* v. *Boone* (*x*), where there was a bequest to the children of A. who should be living at the testator's decease, equally, with clauses of survivorship and substitution: "The bequest is not to all the children generally, but to such only who shall be living at the testator's decease. Therefore the children, who died during his life, had nothing, either to lapse, or to descend to issue, or to survive to the other children. The children who shall be living at his death are the original and sole legatees." Without this qualification, therefore, all the children living at the date of the will would have been "original legatees" for the purpose of lapse, survivorship or substitution. In *Re Musther* (*y*), where the gift was to nephews and nieces, "but should any of them be dead before me, I then direct that his or her share shall be equally divided between his or her children," Cotton, L. J., said: "As I read that bequest, the gift is one to nephews and nieces of the testatrix who are capable of taking: *that is, to nephews and nieces who were living at the date of the will*, and those nephews and nieces were only intended to take provided they survived the testatrix, for the gift over provides for the event of any of them dying after the date of the will and before the death of the testatrix"; that is, the requirement of surviving the testatrix was not implied in the original gift, but imposed by the terms of the gift over. In *Re Hannam* (*z*), North, J., admitted that if the gift to brothers and sisters had been immediate, followed by a substitution of children of deceased brothers and sisters for their parents, "the reference to children could only be to children of brothers and sisters who had died in the lifetime of the testator"; that is, the gift to brothers and sisters in such a case would have included "my brothers and sisters now living." It is difficult to see why the interposition of a life estate should alter the obvious and natural meaning of the words. As James, V.-C., said (*a*): "I think 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

(*w*) Quoted supra, p. 1324.
(*x*) 13 Ves. 370.
(*y*) 43 Ch. D. 569.
(*z*) [1897] 2 Ch. 39.
(*a*) *Re Hotchkiss's Trusts*, L. R., 8 Eq. at p. 649. In that the gift was immediate. In *West* v. *Orr*, 8 Ch. D. 60, there was a gift to A. for life, and after her death to such of the children of the testator's sisters as should survive A., with a clause of substitution in the event of any of "such children" dying in the testator's lifetime: James, L. J., pointed out that, "ordinarily speaking, the gift to a class is a gift to a class of persons living," and that "any of such children" meant "any of the children now living."

contingency of such persons continuing to live up to the time of his death " (*b*). If a testator, in making a bequest " to my brothers and sisters," has in view living persons, and adds a clause of substitution, the obvious conclusion is that he wishes to provide for the contingency of some of them dying in his lifetime. The interposition of a prior life estate cannot narrow the construction of the original gift. However, the rule laid down in *Re Ibbetson* and the other cases cited above is clearly binding on all Courts of first instance.

Reference to "share."

In *Re Hannam* (*c*), the clause of substitution directed that the children of a deceased brother or sister should take their deceased parent's share, and one of the grounds on which North, J., based his decision was that a brother or sister who died in the testator's lifetime had no share. But if the gift to the brothers and sisters of the testator included the brothers and sisters living at the date of the will, it seems clear that " by deceased parent's share " the testator meant the share which the deceased parent would have taken if living (*d*). No reference to a share occurred in *Neilson* v. *Monro* or in *Re Ibbetson* (*e*).

It is clear that in the class of cases now under discussion substitution takes place as regards any brother or sister who survives the testator and dies in the lifetime of the tenant for life (*f*).

Original gift.

The rule in *Thornhill* v. *Thornhill* does not apply to original gifts (*g*).

IV.—Substitutional Gifts to Children or Issue.—Where there is a gift to persons, or a class of persons, followed by a substitutional gift to their children or issue in the event of their dying before a certain time or event—as to A. for life and after his death to his children in equal shares, with a direction that if any of them shall die during A.'s lifetime, the issue of such child shall take his share—the following rules should be borne in mind (*h*):

(*b*) See also the same learned judge's excellent criticism of the rule on which *Thornhill* v. *Thornhill* is supposed to be based, in *Habergham* v. *Ridehalgh*, L. R., 9 Eq. 395.

(*c*) Supra, p. 1327.

(*d*) The Court will put a reasonable construction on the word " share " if the technical construction would defeat the obvious intention of the testator: *Re Pinhorne*, [1894] 2 Ch. 276; *Re Powell*, [1900] 2 Ch. 525; *Re Whitmore*, [1902] 2 Ch. 66.

(*e*) Supra.

(*f*) *Finlason* v. *Tatlock*, L. R., 9 Eq. 258; *Neilson* v. *Monro*, 27 W. R. 936; *Re Ibbetson*, 88 L. T. 461; *Re Miles*, 61 L. T. 359; *Re Gilbert*, 54 L. T. 752; *Re Flower*, 62 L. T. 216. The decision in *Re Dawes' Trusts*, 4 Ch. D. 210, is erroneous.

(*g*) Infra, p. 1333.

(*h*) See the judgment of Kindersley, V.-C., in *Lanphier* v. *Buck*, 2 Dr. & S. 484.

(*a*) Every child who survives the testator takes a vested interest, subject to be divested if he dies during A.'s lifetime, leaving issue. Consequently, if a child dies during A.'s lifetime without leaving issue, his share is not divested (*i*). But if he dies during A.'s lifetime, leaving issue, they take his share by substitution (*j*).

(*b*) It follows from this rule that the issue of a child who dies in A.'s lifetime cannot take unless they survive their parent (*k*).

The two preceding rules do not apply to cases where the gift to the issue is original or substantive (*l*).

(*c*) It is not necessary that issue who take by substitution should survive the tenant for life. Consequently, if in the case above put a child survives the testator and dies in A.'s lifetime, leaving issue who survive him but die in A.'s lifetime, they take his share (*m*).

There was for many years a conflict of authority on this rule, chiefly with regard to its application to quasi-substitutional gifts; the conflict did not come to an end until the decision in *Martin* v. *Holgate* by the House of Lords in 1866 (*n*).

Express intention.

If a testator expresses an intention that the gift to the children is to be subject to the same contingency of survivorship as the gift to the primary object, effect will of course be given to it: as where the gift is to A. for life, and then to her sisters or their children, living at her decease (*o*).

Ascertaining class.

The manner in which the class to take under a substitutional gift to issue is ascertained has been already referred to (*p*).

Double share.

The effect of a clause of substitution to children may be to give the substituted class two shares: as in *Re Smith* (*q*), where a testator gave his residue to all his nephews and nieces, with a gift over to the children of nephews and nieces who should die in his lifetime, such children to take the share which their parent would have taken if he or she had survived the testator; one of the nephews married one

(*i*) *Salisbury* v. *Petty*, stated ante, p. 1319; *Re Bennett's Trust*, 3 K. & J. 280; *Re Wood*, 29 W. R. 171; *Bolitho* v. *Hillyar*, 34 Bea. 180. See *Strother* v. *Dutton*, 1 De G. & J. 675, stated post, p. 1369.

(*j*) See *Price* v. *Lockley*, 6 Bea. 180, and other cases cited ante, p. 1317.

(*k*) *Re Turner*, 2 Dr. & Sm. 501; *Re Bennett's Trust*, supra. As to *Re Merrick's Trusts*, see the remarks of Joyce, J., in *Re Woolley*, [1903] 2 Ch. at p. 210.

(*l*) See sec. V.

(*m*) *Re Turner*, 2 Dr. & Sm. 501; *Re Bennett's Trust*, 3 K. &. J. 280; *Re Flower*, 62 L. T. 677; *Re Battersby's Trusts*, [1896] 1 Ir. 600. As to *Pearson* v. *Stephen*, 5 Bli. N. S. 203, see per Kindersley, V.-C., 34 L. J. Ch. at p. 659; per Stirling, J., *Re Flower*, supra.

(*n*) Post, p. 1330.

(*o*) *Congreve* v. *Palmer*, 16 Bea. 435. The cases of *Bennett* v. *Merriman*, 6 Bea. 360, and *Re Kirkman's Trust*, 3 De G. & J. 558, are sometimes cited as illustrations of this construction, but neither case can be considered a strong authority: see *Martin* v. *Holgate*, L. R., 1 H. L. 175. They were both cases of quasi-substitution, but as regards the question under discussion there is no difference between strictly substitutional and quasi-substitutional gifts.

(*p*) Supra, p. 1314.

(*q*) [1892] W. N. 106.

CHAP. XXXVI.

of the nieces, and both died in the testator's lifetime: it was held that their children took two shares.

Whether gift is original or substitutional.

Lanphier v. *Buck.*

V.—Distinction between Substitutional and Original (or Substantive) Gifts.—In *Lanphier* v. *Buck* the gift was (in effect) to Mary Buck for life, and after her death to the testator's nephews and nieces then living, and the issue of such of them as might be then dead, such issue to be entitled to its parent's share only. Kindersley, V.-C., said (*r*) it was necessary to consider the question "whether there is any distinction, with regard to the question of who is to take, between what is called an original gift and a gift by substitution; and although I am bound to say that I do not think the distinction in language has been very accurately and carefully observed in some of the cases, it appears to me that the distinction is very plain, and very broad and clear. In the present case the gift is to two classes of objects, to such nephews and nieces as shall be living at a given time, and to the issue of such nephews and nieces as shall be dead at that time (*s*). Is that an original gift to the issue, or a gift by substitution? Clearly an original gift to them. It is true you may say in a sense they are substituted for their parents, because they take the share respectively among them which their parent would, if he had come into the first class, have himself taken, and in that sense (but that is not the accurate and proper sense) you may say that there is a substitution; but it is as much an original gift to the issue of such of the nephews and nieces as shall have died before the tenant for life, as it is an original gift to such of the nephews and nieces as shall be living at the death of the tenant for life. One is as much an original gift as the other; and I apprehend that the present case is a clear instance of an original gift. Then what is a gift by substitution? A gift by substitution is this, to take a simple case of it: Supposing it had run thus in the present case: to Mary Buck for life, and after her death without issue (an event which has happened) to all my nephews and nieces, but if any one of those nephews and nieces dies before the tenant for life, then to the issue of that one, the issue taking the parent's share; that is a gift by substitution" (*t*).

(*r*) 34 L. J. Ch. p. 656. "Issue" was construed to mean "children": post, Chap. XLI.

(*s*) It will be remembered that in considering whether a gift of this kind is open to objection on the score of remoteness, the objects are considered to form one class: *Smith* v. *Smith*, L. R., 5 Ch. 342: *Stuart* v. *Cockerell*, ib. 713; *Pearks* v. *Moseley*, 5 A. C. 714; ante, p. 333. It is now more usual to say that such a gift is to a "composite class": see per Chitty, J., in *Re Parsons*, 8 R. 430.

(*t*) The distinction is also explained in *Gray* v. *Garman*, 2 Ha. 268; *Martin* v. *Holgate*, L. R., 1 H. L. 175; and *Re Woolley*, [1903] 2 Ch. 206, and the cases

Where the language of the will is ambiguous, it may be interpreted by a gift over (*u*).

The gift in *Lanphier* v. *Buck* is probably the commonest form of an original gift to issue or children taking concurrently with another class of objects, but the same effect can be produced by informal words.

Inaccurate wording.

Thus if the testator makes a bequest to all his children living at the death of his wife, and directs that if any of "such" children should die before his wife and leave issue, then the children of such his son or daughter should be entitled to his or her portion, this is an original gift to the issue of deceased children, the word "such" being disregarded (*v*).

"Or" may introduce original gift.

Again, although the general rule, as already mentioned, is that the word "or," in gifts to a person "or his issue" or the like, operates as a clause of substitution, it sometimes operates as an original gift (*w*). Thus in a gift to such of a class of persons as shall be living at a certain time, "or their issue," the effect of "or" is to include in the gift the issue of such of the class as have previously died, whether before or after the date of the will (*x*). So if a testator gives his property to "all and every his brothers and sisters or their issue," and at the date of the will he has only sisters living, his brothers being all then dead, the issue of deceased brothers and sisters will take (*y*).

Issue to take "by way of substitution."

The fact that the testator says that the issue are to take "by way of substitution" the share which their deceased parent would have taken if living, does not affect the construction (*z*).

Effect of "and."

In *Re Coulden* (*a*) a testator directed that on the happening of a certain event his property should be equally divided amongst his then surviving children and their respective issue: it was held that this was an original gift to the issue of any children then dead, and that the issue of the children then living took nothing. The decision was a bold one, for the words of the will were clear and unambiguous,

there cited. See also *Re Gilbert*, 54 L. T. 752; *Re Miles*, 61 L. T. 359; *Re Flower*, 62 L. T. 216, 677; *Attwood* v. *Alford*, L. R., 2 Eq. 479, and other cases cited in Chap. LVII.

(*u*) *Stuart* v. *Cockerell*, L. R., 5 Ch. 713. In *Miller* v. *Chapman*, 24 L. J. Ch. 409, the language of the will was ambiguous, and no aid was afforded by the context.

(*v*) *Giles* v. *Giles*, 8 Sim. 360. *Jarvis* v. *Pond*, 9 Sim. 549, was a similar case.

(*w*) *Attwood* v. *Alford*, L. R., 2 Eq. 479.

(*x*) *Re Philps' Will*, L. R., 7 Eq. 151; *King* v. *Cleaveland*, 4 De G. & J. 477; *Burt* v. *Hellyar*, L. R., 14 Eq. 160; *Wingfield* v. *Wingfield*, 9 Ch. D. 658; *Keay* v. *Boulton*, 25 Ch. D. 212. The statement of the rule attributed to Wood, V.-C., in *Re Merrick's Trusts*, L. R., 1 Eq. 551, is inaccurate: see *Re Woolley*, [1903] 2 Ch. at p. 210.

(*y*) *Gowling* v. *Thompson*, L. R., 11 Eq. 366, n., and other cases cited post, p. 1337.

(*z*) *Re Parsons*, 8 R. 430.

(*a*) [1908] 1 Ch. 320.

CHAP. XXXVI.

but no doubt it gave effect to the testator's real (as distinguished from his expressed) intention.

Differences between original and substitutional gifts.

There are several important differences between the two kinds of gift. Where the gift (as in *Lanphier* v. *Buck*) is to A. for life, and after her death to the testator's nephews and nieces then living and the issue of such of them as may be then dead, the gift to the nephews and nieces is contingent; nothing vests in any nephew or niece until the death of A. (*b*). Where, however, the gift is substitutional—as "to A. for life and after her death to my nephews and nieces or their issue"—every nephew and niece who survives the testator takes a vested interest, subject to be divested if he or she dies in A.'s lifetime, leaving issue (*c*).

Effect of primary legatee dying with or without issue.

Whether the gift is original or substitutional, if a nephew dies in A.'s lifetime, leaving issue, they take the share intended for him, in the former case by way of original gift, in the latter case by substitution. But if he dies without leaving issue, it follows from the different natures of the two gifts that where the gift to the nephew is contingent on his surviving the tenant for life (as in *Lanphier* v. *Buck*) it fails altogether on his death without issue (*d*); on the other hand where the gift to the nephew is vested subject to be divested on his dying in A.'s lifetime, leaving issue (as in cases where the gift to the issue is substitutional), it is not divested if he dies without issue, and in that event his personal representatives are entitled to his share (*e*).

Issue not subject to contingency of survivorship.

Whether the gift is original or substitutional, it is not necessary, in such cases as those now under consideration, that the issue should survive the tenant for life, or as it is sometimes put, there is no implication that the gift to the issue is subject to the same contingency of survivorship as the gift to the parents. Consequently, if the gift is to A. for life, and after her death to the testator's nephews then living or their issue, and a nephew dies in A.'s lifetime, leaving issue, and they also die in A.'s lifetime, they nevertheless take their parent's share (*f*).

(*b*) If the gift is to A. for life, and after his death to B., C. and D. or such of them as shall be then living, and in case any of them shall be then dead, leaving children, his share to go to such children, this gives each of B., C. and D. a vested interest, subject to be divested in favour of his children (if any), and if none, in favour of the survivors (if any) living at the death of A. See *Sturgess* v. *Pearson*, 4 Mad. 411, ante, p. 1319.

(*c*) The rule is thus stated by Kindersley, V.-C., in *Lanphier* v. *Buck*, as reported in 2 Dr. & Sm. at p. 495.

(*d*) Per Kindersley, V.-C., 2 Dr. & Sm. at p. 495.

(*e*) See *Salisbury* v. *Petty*, stated ante, p. 1319.

(*f*) *Lanphier* v. *Buck*, 34 L. J. Ch. 650; *Martin* v. *Holgate*, L. R., 1 H. L. 175; *Re Orton's Trusts*, L. R., 3 Eq. 375; *Re Pell's Trust*, 3 D. F. & J. 291; *Re Woolley*, [1903] 2 Ch. 206; *Banks's Trustees* v. *Banks's Trustees*, [1907]

But the context of the will may shew that the contingency of survivorship was intended to apply to the issue (*g*).

Effect of context.

It has been already mentioned that where there is a substitutional gift in favour of the children of a primary legatee, it does not take effect in favour of children who die in their parent's lifetime (*h*). This rule does not apply where the gift in favour of the children or issue of a primary legatee is original; they take whether they survive their parent or not (*i*).

Where gift to issue is original they need not survive their parent.

If the gift is to such of a number of persons as shall be living at the death of the tenant for life, and the issue of such of them as shall be then dead leaving issue, the better opinion is that if one of the primary legatees dies in the lifetime of the tenant for life, leaving issue and having had other issue who predeceased him, the latter take as well as the former, because the expression "leaving issue" has reference to the parent, and the gift is to "issue" generally, not "surviving issue" (*j*).

"Leaving issue."

Whether *Thornhill* v. *Thornhill* (*k*) was rightly decided or not, the rule laid down in it clearly does not apply where the gift is original, and not by way of substitution. As in *King* v. *Cleaveland* (*l*), where there were two life estates, followed by a gift to the children of A. then living or their legal personal representatives; the next of kin of two children who died in the lifetime of the testator were held entitled.

Where primary legatee predeceases testator.

Where the gift is to a class of children living at the death of the

Sess. Ca. 125. Previous decisions were, *Stanley* v. *Wise*, 1 Cox, 432; *Lyon* v. *Coward*, 15 Sim. 287; *Masters* v. *Scales*, 13 Bea. 60; *Barker* v. *Barker*, 5 De G. & S. 753 (stated and commented on in the third edition of this work, Vol. II. pp. 174–5); *Bellamy* v. *Hill*, 2 Sm. & G. 328; *Re Bennett's Trust*, 3 K. & J. 280; *Crause* v. *Cooper*, 1 J. & H. 207; *Re Wildman's Trusts*, ib. 299; *Harcourt* v. *Harcourt*, 26 L. J., Ch. 536 (deed).

(*g*) As in *Re Fox's Will*, 35 Bea. 163; *Re Coulden*, [1908] 1 Ch. 320. See *Bennett* v. *Merriman* and *Re Kirkman's Trust*, cited ante, p. 1329, n. (o). The decision in *Eyre* v. *Marsden*, 2 Kee. 564, was justified by the fact that the gift to the children contained a reference to the anterior gift to the parent. See also *Macgregor* v. *Macgregor*, 2 Coll. 192; *Penny* v. *Clarke*, 1 D. F. & J. 425; *Re Corrie's Will*, 32 Bea. 426, all of which may be disregarded since the decision in *Martin* v. *Holgate*.

(*h*) "Primary legatee" is here used as a convenient expression to indicate a person who would have been entitled to a share if he had survived the tenant for life.

(*i*) *Lanphier* v. *Buck*, 2 Dr. & Sm. 484; *Re Smith's Trusts*, 7 Ch. D. 665; *Re Woolley*, [1903] 2 Ch. 206. The decision in *Humfrey* v. *Humfrey*, 2 Dr. & Sm. 49, has not been followed. As to *Crause* v. *Cooper*, 1 J. & H. 207, see *Re Merrick's Trusts*, L. R., 1 Eq. 551; and as to *Harcourt* v. *Harcourt*, 26 L. J. Ch. 536, see *Lanphier* v. *Buck*, 34 L. J. Ch. at p. 659.

(*j*) *Re Smith's Trusts*, 7 Ch. D. 665, dissenting from dictum of Kindersley, V.-C., in *Lanphier* v. *Buck*, 2 Dr. & Sm. at p. 490. See also *Thompson* v. *Clive*, 23 Bea. 282.

(*k*) Supra, p. 1326.

(*l*) 4 De G. & J. 477. *Smith* v. *Smith*, 8 Sim. 353, is to the same effect.

Gift to issue of legatee predeceasing tenant for life.

tenant for life, with a direction that if any of them shall die in his lifetime leaving issue, such issue shall take the share which the parent would have been entitled to if living, the issue of a child who dies before the testator in the lifetime of the tenant for life are entitled to their parent's share (*m*). But if a child survives the tenant for life and they both predecease the testator, the issue of the child cannot take (*n*).

Where there is a clause of survivorship.

It frequently happens that there is a gift to a person for life, and after his death to children (or other descendants) of the testator then living and the issue of any then dead, and a clause of survivorship in the case of any then dead without leaving issue. The result is that the children living at the death of the tenant for life and the issue then living of deceased children take the whole (*o*).

Whether objects of primary and secondary gifts can compete.

VI.—Whether objects of Primary and Secondary Gifts take concurrently.—It follows from the nature of a substitutional gift that the object of it takes nothing unless the primary gift fails: he cannot take in competition with the object of the primary gift (*p*).

The same rule applies where the secondary gift is original (*q*).

Where primary gift is to several individuals.

Where there is a gift to a number of individuals, A., B., C. and D., or their issue, and A. dies before the period of distribution, leaving issue, they take one-fourth, concurrently with B., C. and D., each of whom takes one-fourth (*r*).

Where primary and secondary gifts are both to classes.

Where there is a gift to a class, followed by a substitutional gift to another class (e.g. "to my nephews and nieces or their children") the question sometimes arises whether members of both classes take concurrently, or whether substitution only takes place as between the two classes themselves. If all the members of the original class are living at the time of distribution, or if they are all dead, the question does not arise, for in the former case the members of the original class take, to the exclusion of the second class, and in the latter case the members of the second class take (*s*).

(*m*) *Ashling* v. *Knowles*, 3 Dr. 593.

(*n*) *Re Kinnear*, 90 L. T. 537. Compare *Coulthurst* v. *Carter*, 15 Bea. 421.

(*o*) *Eyre* v. *Marsden*, 2 Kee. 564, 4 My. & Cr. 231; *Masters* v. *Scales*, 13 Bea. 60; *Buckle* v. *Fawcett*, 4 Ha. 536. Compare those cases where the gift is to a class of persons for life in equal shares, with remainder as to each share to the issue of each dying leaving issue, and a clause of survivorship as to the share of any dying without issue: *Goodman* v. *Goodman*, 1 De G. & Sm. 695; *Cross* v. *Maltby*, L. R., 20 Eq. 378, and other cases cited in Chap. LV.

(*p*) *Whitcher* v. *Penley*, 9 Bea. 477; *Penley* v. *Penley*, 12 Bea. 547; *Margitson* v. *Hall*, 10 Jur. N. S. 89, and other cases cited post, p. 1335, n. (*v*). See *Ralph* v. *Carrick*, 11 Ch. D. 873, stated in Chap. XLI.

(*q*) *Johnson* v. *Cope*, 17 Bea. 561; *Re Coulden*, [1908] 1 Ch. 320; *Re Rawlinson* [1909] 2 Ch. 36.

(*r*) *Price* v. *Lockley*, 6 Bea. 180, and other cases cited ante, p. 1317.

(*s*) *Sparks* v. *Restal*, 24 Bea. 218; *Margitson* v. *Hall*, 10 Jur. N. S. 89; *Timins* v. *Stackhouse*, 27 Bea. 434; and see per Byrne, J., in *Re Coley*, [1901] 1

If members of both classes are in existence at the period of distribution the following rules seem to express the result of the authorities :

(*a*) If the substitutional gift is to persons standing in a certain relation to the original class, and there are words of division, equality or the like, the members of both classes take concurrently ; thus where the gift is " to my nephews and nieces or their issue, in equal shares," the issue of a nephew or niece dying after the testator and before the period of distribution will take concurrently with the other nephews and nieces (*t*).

(*b*) Whether the same result would follow in the absence of words denoting division, equality, or the creation of a tenancy in common, does not seem to have been decided, but in some modern cases there are dicta implying that if the substitutional gift is to persons described as standing in the relation of issue, next of kin, or the like, to the members of the original class, the members of both classes can take concurrently (*u*).

(*c*) If the substitutional gift is to persons described without reference to the members of the original class, and there are no words importing a division into shares, members of the substituted class cannot take concurrently with members of the original class. Thus in *Re Coley* (*v*) there was a limitation (by deed) to the children or grandchildren of A. living at a certain time, and it was held that the sons and daughters of A. living at that time took as joint tenants to the exclusion of the children of deceased sons and daughters.

In *Re Roberts* (*w*) a testator gave a share of residue to each of his two daughters by name for their respective lives, and directed that after their deaths their respective shares should be equally divided " between their respective children or legal representatives " : it

Ch. at p. 43. This was a case on a settlement, as were also *Re Cleland's Trusts*, 7 L. R. Ir. 74, and *Re Lund's Settlement*, 89 L. T. 606. In *Willis* v. *Plaskett*, 4 Bea. 208, and *Johnson* v. *Cope*, 17 Bea. 561, the gift to the children was substantive, not substitutional. As to the question whether the members of the second class take per stirpes or per capita, see *Shailer* v. *Groves*, 11 Jur. 485, and the other cases cited in Chap. XLI. s. III. The rules as to gifts to " descendants," " next-of-kin," &c., are stated in Chap. XLI.

(*t*) *Armstrong* v. *Stockham*, 7 Jur. 230 ; *Shailer* v. *Groves*, 11 Jur. 485 ; *Re Gilbert*, 54 L. T. 752 ; *Re Miles*, 61 L. T. 359 ; *Finlason* v. *Tatlock*, L. R., 9 Eq. 258 ; *Neilson* v. *Monro*, 27 W. R. 936. The decision in *Re Sibley's Trusts*, 5 Ch. D. 494, where on the special language of the will the original class was held to include nephews dead at the date of the will, is referred to ante. p. 1324 and post, p. 1337.

(*u*) *Re Sibley's Trusts*, 5 Ch. D. 494 ; *Re Coley*, [1901] 1 Ch. 40 ; *Re Roberts*, [1903] 2 Ch. 200.

(*v*) [1901] 1 Ch. 40. A similar construction seems to have been adopted in *Amson* v. *Harris*, 19 Bea. 210 ; *Margitson* v. *Hall*, 10 Jur. N. S. 89 ; and *Holland* v. *Wood*, L. R., 11 Eq. 91 ; but in *Margitson* v. *Hall* the question did not arise, as all the children were living at the period of distribution. Compare *Re Cleland's Trust*, 7 L. R. Ir. 74 ; *Re Lund's Settlement*, 89 L. T. 606.

(*w*) [1903] 2 Ch. 200.

was held that the gift to the legal representatives was not intended to take effect as a substitutional gift in the event of any child of a daughter dying in her lifetime, but only in the event of her not having any child who survived the testator or was born after his death.

VII.—Substitution in place of Person dead at date of Will.—It is obvious that substitution, in the proper sense of the word, is impossible in the case of a person who is dead at the date of the will, because a gift to a dead person is of no effect. But where a testator is not certain whether a person is dead or not, or where he wishes to divide property among several persons then living, and the issue, next of kin, or the like, of a deceased person, and to provide by words of substitution for the death of any of the other legatees, he may make the clause of substitution serve both purposes by including the deceased person among the original legatees and making the words of substitution apply to him. In such a case the gift to his issue or next of kin is really a substantive gift by reference, but it is in form substitutional, and is commonly so called (*x*).

Gift to several persons nominatim.

(*a*) *Where prior gift is to individuals.*—An instance of this occurred in *Ive* v. *King* (*y*), where there was a gift to several persons nominatim, with a substitutional gift to their children in the event of their death: one of the prior legatees was dead at the date of the will, and it was held that her children took by substitution.

Rule in *Christopherson* v. *Naylor*.

(*b*) *Where prior gift is to a class.*—Where, however, the prior gift is to a class of persons, the principle laid down in *Christopherson* v. *Naylor* (*z*) applies, unless excluded by the context or the state of facts at the date of the will. Thus in *Re Webster's Estate* (*a*), where the gift was to "all the children of H., or in event of decease to their descendants share and share alike," it was held that the issue of a child of H. who was dead at the date of the will, were not entitled to share. This rule rests on the presumption that where a testator makes a bequest to persons described as a class, such as "my nephews and nieces," he means nephews and nieces living at the date of the will or thereafter to be born, and therefore if he adds a clause of substitution he does not intend it to apply to a nephew or niece who is dead at the date of the will (*b*).

(*x*) See the remarks of Chitty, J., in *Parsons*, 8 R. 430, stated post, p. 43.

(*y*) 16 Bea. 46; *Hobgen* v. *Neale*, L. R., 11 Eq. 48. See also *Hannam* v. *Sims*, 2 De G. & J. 151. *Barnes* v. *Jennings*, L. R., 2 Eq. 448, was the case of a deed.

(*z*) 1 Mer. 320: the judgment is cited ante, p. 1324.

(*a*) 23 Ch. D. 737. As to *Congreve* v. *Palmer*, 16 Bea. 435, see *Wingfield* v. *Wingfield*, 9 Ch. D. 658.

(*b*) *Gray* v. *Garman*, 2 Ha. 268; *Parker* v. *Tootal*, 11 H. L. C. 143; *Re Rotchkiss's Trusts*, L. R., 8 Eq. 643, ante, p. 1327; *Habergham* v. *Ridehalgh*, L. R., 9 Eq. 395; *Hunter* v. *Cheshire*,

Presumption rebutted by state of facts.

But this presumption is rebutted if the state of facts at the date of the will shews that the testator meant to include deceased persons in the original class. Thus in *Gowling* v. *Thompson* (*c*) the testator gave his residue to his "brothers and sisters or their issue"; at the date of the will all his brothers had been dead several years: it was held that he referred to his brothers and sisters as stirpes, in order to shew how the property was to be divided, and that the issue of such of them as were dead at the date of the will were entitled to share.

Presumption not rebutted by relationship to testator.

It is probable that in the majority of cases a testator who makes a bequest in favour of a class of his relations, with a clause of substitution in favour of their issue, has the same intention as the testator in *Gowling* v. *Thompson*, and refers to the original class in order to shew how he wishes his property to be divided. And in *Re Smith's Trusts* (*d*), where the testatrix directed her property to be equally divided amongst her brothers and sisters, and should any of them be dead, their share was to be equally divided amongst their children, Jessel, M.R., declined to attribute to the testatrix "the capricious intention" of including children of a brother who died after the will, and of excluding the children of one who died before the will. Again in *Re Sibley's Trusts* (*e*) the gift was to A. for life, and after her death to "all and every the children of F. or their issue in equal shares": F. had six children, four of whom were dead at the date of the will, and two survived the tenant for life, and Jessel, M.R., held that the issue of the four deceased children were entitled to share. The learned judge thought that it was improbable, having regard to the relationship between the parties, that the testator should favour the surviving children at the expense of the issue of the deceased children; he also thought that the expression "all and every the children" conveyed the idea of more than two. The decision, however, has not been approved, and cannot be considered as establishing an exception to the general rule (*f*).

In *Re Chinery* (*g*), Stirling, J., said: "I confess that, apart from the authorities, I should have had a strong inclination to follow the

L. R., 8 Ch. 751; *Re Chinery*, 39 Ch. D. 614; *Re Musther*, 43 Ch. D. 569. See also *West* v. *Orr*, 8 Ch. D. 60; *Re Offiler*, 83 L. T. 758; *Re Barker*, 47 L. T. 38; *Kelsey* v. *Ellis*, 38 L. T. 471; *Atkinson* v. *Atkinson*, Ir. R., 6 Eq. 184.

(*c*) L. R., 11 Eq. 366, n. Followed in *Barnaby* v. *Tassell*, L. R., 11 Eq. 363. The decision in *Re Sibley's Trusts*, infra, was partly based on the same ground. *Walsh* v. *Blayney*, 21 L. R. Ir. 140, in which these cases are discussed, was not a case of substitution, but of executory limitation. The principle was not applicable in *Crook* v. *Whilley*, 7 D. M. & G. 490, because the gift was to "the present nieces of A."

(*d*) 5 Ch. D. 497, n.

(*e*) 5 Ch. D. 494.

(*f*) See *Re Webster's Estate*, 23 Ch. D. 737.

(*g*) 39 Ch. D. 614. See *Re Musther*, 43 Ch. D. 569.

opinion of the late Master of the Rolls (*h*), which seems to me more likely to give effect to the testator's intention, but the weight of authority is against his view."

May be rebutted by context.

The presumption may of course be rebutted by the context, but the authorities do not afford much guidance as to the nature of the context required for this purpose. In *Phillips* v. *Phillips* (*i*) the testator gave a legacy to each and every of his cousins and directed that "if it shall happen that any of these my said cousins shall die in my lifetime and leave issue," the legacy which would have been payable to the deceased should be paid to his or her children; the testator authorised his executors to make inquiries as to the children of cousins who might have died in his lifetime; Stuart, V.-C., in deciding that the children of cousins who were dead at the date of the will were entitled to legacies, relied partly on the words referring to death in the testator's lifetime and partly on the direction to make inquiries.

Rule in *Loring* v. *Thomas*.

The most important class of cases in which the general rule is excluded by the context, is that governed by the decision in *Loring* v. *Thomas* (*j*), where a testatrix devised real estate in trust (after successive 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" (*k*), or "any *such* child," but generally "any child or children," and ("shall die"

(*h*) Sir George Jessel, as expressed in *Re Smith's Trusts*, supra.

(*i*) 10 Jur. N. S. 1173. The decision of the same judge in *Parsons* v. *Gulliford*, 10 Jur. N. S. 231, seems to have proceeded on a misapprehension of the decision in *Loring* v. *Thomas*, infra.

(*j*) 1 Dr. & Sm. 497.

(*k*) As to this, see *Re Thompson's Trusts*, 2 W. R. 218, 445, and other cases cited in Chap. LVII. 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, infra, n. (*m*).

being, on the authority of *Christopherson* v. *Naylor*, construed "shall have died" (*l*)) 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.

Explanation of rule.

The ratio decidendi of *Loring* v. *Thomas* was "that what the children were to have taken was not the share of their deceased parent, but the share which their deceased parent would have been entitled to on a certain hypothesis" (*m*). The rule as so explained is a definite rule of construction, and its authority has been recognised by the Court of Appeal and the House of Lords (*n*). The recent cases of *Re Lambert* (*o*) and *Re Metcalfe* (*oo*) were decided in accordance with it.

Inconsistent decisions.

It cannot be denied that the rule in *Loring* v. *Thomas* is an artificial rule, because in applying it the Court ignores the literal meaning of the will by inferring a different intention from provisions inserted alio intuitu. Inasmuch as it gives effect to the meaning of the testator, it is a beneficent rule, but it strains the conscience of judges who think that whenever the language of a will is clear it should be construed literally, however harsh or capricious the result may be.

Thus in *Re Offiler* (*p*) the gift was upon trust for "my brothers and sisters," followed by a direction for the settlement of "the share of my brother James" and a provision that "if any of my other brothers or sisters shall die in my lifetime, leaving issue, any of whom shall be living at my death, such issue so living shall take . . . the share which such other brother or sister would have taken if then living." Buckley, J., held that *Loring* v. *Thomas* did not

(*l*) The V.-C. also relied on the use by the testatrix of the expression "shall live to attain twenty-one," which was obviously not meant to exclude children who had attained twenty-one before the date of the will.

(*m*) Per Stirling, J., in *Re Chinery*, 30 Ch. D. p. 618. See also *Re Chapman's Will*, 32 Bea. 382. The decision in *Re Potter's Trust*, L. R., 8 Eq. 52, may possibly be sustained on this principle: see *Re Hotchkiss's Trusts*, L. R., 8 Eq. 643. The decision in *Adams* v. *Adams*, L. R., 14 Eq. 246, may be treated as overruled, at all events so far as it impugns the authority of *Christopherson* v. *Naylor*.

(*n*) *Barraclough* v. *Cooper* (decided in 1905), [1908] 2 Ch. 121, n., where Lord Macnaghten quoted with approval the principle laid down by Kindersley, V.-C., that if the testator uses language so wide and general as to be no less applicable to a predeceased child than to a child living at the date of the will, then a direction that the issue of a deceased child shall represent or be substituted for their parent and take the share which their parent would have taken if living, must be held to apply to a predeceased child as well as to a child living at the date of the will.

(*o*) [1908] 2 Ch. 117.

(*oo*) [1909] 1 Ch. 424. In this case, as in *Loring* v. *Thomas*, the gift was not to children of the testator, and Joyce, J., thought the distinction of importance. See also the remarks of Romer, L.J., in *Re Gorringe*, infra.

(*p*) 83 L. T. 758.

CHAP. XXXVI.

apply, and that the children of a sister who was dead at the date of the will were not entitled to share in the residue. The learned judge said that the expression "my brothers and sisters" must mean "my brothers and sisters living at my death," but this is a statement of the legal effect of the expression, rather than of the sense in which the testator used it (*q*). The primary meaning of "my brothers and sisters" is "my brothers and sisters now living" (*r*), and what *Loring* v. *Thomas* decided was that that meaning may be extended so as to include brothers and sisters dead at the date of the will if the testator uses a clause of substitution in a particular form. It is difficult to see any substantial difference between the will in *Loring* v. *Thomas* and that in *Re Offiler*.

Again, in *Re Cope* (*s*) the literal construction of words importing futurity was adopted. In that case the will contained (in addition to the quasi-substitutional clause) a proviso which obviously referred to children living at the date of the will, and this was supposed to indicate that the testator did not intend to benefit the children of any child who was dead at the date of the will. The proviso in question did no doubt create a difficulty which did not exist in *Loring* v. *Thomas*. The language of the learned judges, however, shews a strong disinclination to follow the decision in *Loring* v. *Thomas* in cases where the language of the substitutional gift can be satisfied by confining it to children living at the date of the will.

Re Gorringe.

It is hardly necessary to say that if the primary gift is confined to children living at the date of the will, or if the testator refers to the fact that one of his children is dead at the date of the will, and makes provision for his or her issue, this affords a strong presumption that whenever he refers to "my children" he means his children then living. Thus in *Gorringe* v. *Mahlstedt* (*t*), where the testator gave his residue to "all or any my children or child (other than R.) who shall be living at my death and attain twenty-one," and provided that "in case any of my children (other than R.) shall predecease me leaving any child or children living at my death, then such child or children of my deceased child (other than R.) shall take the share

(*q*) If this had been the sense in which the testator used the words, the quasi-substitutional gift would in effect have run thus: "If any of my other brothers and sisters living at my death shall die in my lifetime," &c.

(*r*) See the authorities cited ante, p. 1327, especially the remarks of James, V.-C., in *Re Hotchkiss's Trusts*.

(*s*) [1908] 2 Ch. 1 (C. A.).

(*t*) [1907] A. C. 225, reversing the decision of the Court of Appeal in *Re Gorringe*, [1906] 2 Ch. 341. In this case the gift was not strictly substitutional, as the original gift was confined to children living at the testator's death (infra, p. 1342), but this does not affect the point under discussion. See a note on the case in 51 Sol. Journal, 493.

which his, her or their parent would have taken if such parent were living and over the age of twenty-one years at my decease"; it was held by Joyce, J., Romer, L.J., and the House of Lords, against the opinion of Vaughan Williams and Fletcher Moulton, L.JJ., that the children of a son who was dead at the date of the will were not entitled to share. The most important points of difference between this case and *Loring* v. *Thomas* are that in *Gorringe* v. *Mahlstedt* the testator began by giving legacies to four children of his deceased son and an annuity and legacy to his son R.; that the gift of residue was to children "who shall be living at my death" (words obviously inappropriate to a deceased child), and that the words "in case" by which the clause of quasi-substitution began were too purely hypothetical to be construed as referring to the death of his deceased son. Romer, L.J., also laid stress on the fact that in *Loring* v. *Thomas* the gift was not to the children of the testatrix: in such a case the general nature of the testator's language might be due to his not being sure of the state of the families which he desired to benefit. But independently of this consideration, the meaning of the will in *Gorringe* v. *Mahlstedt* was sufficiently clear to exclude the rule in *Loring* v. *Thomas*.

Where secondary class take by independent gift.

(c) *Where secondary gift is original.*—The distinction between original and substitutional gifts has been already pointed out (*u*).

Concurrent gift to two classes of descendants.

The simplest case of original gift is where two classes take concurrently under the same clause. Thus if property is given to A. for life, and after his death to the children of A., who shall be living at his decease, and the issue of any child who shall be then dead, such issue to take the share which their parent would have been entitled to if then living, a child who dies in A.'s lifetime takes nothing, and his issue take under the substantive gift to them. In such a case the issue of a child who was dead at the date of the will are included in the gift (*v*).

(*u*) Ante, p. 1330.

(*v*) *Tytherleigh* v. *Harbin*, 6 Sim. 329; *Heasman* v. *Pearse*, L. R., 7 Ch. 275, and other cases cited in Chap. LVII. In *Re Thompson's Trusts* (2 W. R. 218, 445), the gift after the death of the tenant for life was to "my children then living and the child or children of such of my *said* children as shall then be dead," and it was held that the children of a child who was dead at the date of the will were not entitled. The decision is not very satisfactory, for the word "said" was obviously surplusage. The distinction drawn by Turner, L.J., between *Tytherleigh* v. *Harbin* and the case before him seems somewhat fine. As to *Etches* v. *Etches*, 3 Dr. 447, see ante, p. 1321. *Waugh* v. *Waugh*, 2 Myl. & K. 41, can only be supported (if at all) on the ground that the will contained a provision for the daughter of a person (dead at the date of the will) whose children would otherwise have been entitled under the rule in *Tytherleigh* v. *Harbin* (see per Kindersley, V.-C., 1 Dr. & Sm. at p. 521). As to this, see *Gorringe* v. *Mahlstedt*, ante.

Elliptic gift to two classes.

A gift "to my wife for life and after her death to my children then living or their heirs," has the same effect (*w*).

Reference to "share."

In *Tytherleigh* v. *Harbin* the direction was that the issue were to take the share which their parent would have been entitled to "if living," but it seems that a simple reference to the parent's share does not prevent the issue of a child who was dead at the date of the will from taking. Thus in *Bebb* v. *Beckwith* (*x*) the gift was to all the children of J. B. and the issue of such of them as should be deceased, such issue to be entitled to the share of their deceased parents, and it was held that the issue of a child who was dead at the date of the will were entitled to take, Lord Langdale being of opinion that the effect of the reference to the parents' share was to limit the amount of the share to which the issue were entitled, and not to make the issue take by way of substitution. This appears to be in accordance with the principle now acted on by the Court in construing the word "share" (*y*).

Quasi-substitutional gift.

Where the gift takes the form of a bequest to a class of persons living at a certain time, as "to my brothers living at my death," followed by a proviso that "if any of my brothers shall then be dead," his issue shall stand in his place, or be entitled to his share, or words to that effect, the question whether the proviso applies to a brother dead at the date of the will is often one of difficulty, but the general rule is the same as that established with respect to strictly substitutional gifts, namely, that a gift to a class of persons, such as brothers, primâ facie means brothers living at the date of the will and that no one can claim as a representative of, or substitute for, a brother then dead (*z*).

Thus in *West* v. *Orr* (*a*) a testator gave his property to his wife for life, and after her decease to such of the children of A. and B. (both deceased) as should survive his wife and attain twenty-one or marry, but in case any of such children should be dead at his decease leaving issue, such issue were to take the share of their

(*w*) *Re Philps' Will*, L. R., 7 Eq. 151, and other cases cited in Chap. LVII. The same principle would probably apply to a gift to "my surviving children or their families," following an estate for life (*Burt* v. *Hellyar*, L. R., 14 Eq. 160).

(*x*) 2 Bea. 308. See also *Coulthurst* v. *Carter*, 15 Bea. 421; *Re Faulding's Trust*, 26 Bea. 263, distinguishing *Butler* v. *Ommaney*, 4 Russ. 70.

(*y*) See *Re Pinhorne*, [1894] 2 Ch. 276, and other cases cited ante, p. 1328.

(*z*) *Christopherson* v. *Naylor*, 1 Mer. 320; *Butler* v. *Ommaney*, 4 Russ. 73; *Smith* v. *Pepper*, 27 Bea. 86; *Re Brown*, 58 L. J. Ch. 420, and cases cited ante, p. 1325. There is much to be said for the view expressed by Malins, V.-C., in *Re Potter's Trust*, L. R., 8 Eq. 52, and *Hall* v. *Woolley*, 39 L. J. Ch. 106, but the authority of *Christopherson* v. *Naylor* is firmly established. See the remarks on the application of the rule to strictly substitutional gifts, ante, p. 1324.

(*a*) 8 Ch. D. 60.

deceased parent. A child of A. died before the testator, leaving issue who survived him, but it was held that they did not take, because, on the principle laid down in *Christopherson* v. *Naylor*, "the children of A. and B." meant "the children now living of A. and B." (*b*).

Rule in *Loring* v. *Thomas*.

The rule in *Loring* v. *Thomas* (*c*) applies to a quasi-substitutional gift (*d*). Thus in *Re Parsons* (*e*) the gift was (in effect) to "such of my children as shall be living at the death of my said wife, and such issue then living of my child or children as [*sic*] shall have died previous to the death of my said wife who [*sic*] shall either before or after the death of my said wife attain twenty-one, 'in equal shares per stirpes,' and so that the issue of deceased children shall take as tenants in common by way of substitution the share or respective shares only which the parent or respective parents would if living have taken." One of the sons was dead at the date of the will, leaving children for whom maintenance was provided by the will. It was held by Chitty, J., that these children took by original gift as members of a composite class.

Effect of context.

If the testator by his will expressly refers to the fact that one of the original class is dead, and gives legacies to his children, this affords a strong presumption that the principle of construction in *Loring* v. *Thomas* is not applicable (*f*).

State of facts at date of will.

An intention to include the children of a person who was dead at the date of the will may appear from the state of facts at that time: as where a testator makes a gift to his "brothers," with a quasi-substitutional gift to their children, and it appears that at the date of the will he had only one brother living, two being then dead leaving children (*g*).

Legatee dead before birth of testator.

In *Wingfield* v. *Wingfield* (*gg*), it was held that the next of kin of a person who died before the testatrix was born were not entitled to share under a gift to the testatrix's "brothers and sisters then living or their heirs."

(*b*) The Court of Appeal held the gift to be substitutional, but it was not substitutional in the strict sense of the word, for nothing was given to any child who did not survive the tenant for life. The curious hiatus in the limitations of the will seems to have misled Baggallay, L.J.; the fact that a gift would produce an "extraordinary result" does not convert it from an original into a substitutional gift.

(*c*) Ante, p. 1338.

(*d*) *Re Chapman's Will*, 32 Bea. 382; *Re Woolrich*, 11 Ch. D. 663.

(*e*) 8 R. 430.

(*f*) *Gorringe* v. *Mahlstedt*, ante, p. 1340. As there noted, this was not the case of a substitutional gift in the strict sense of the term.

(*g*) *Re Jordan's Trusts*, 2 N. R. 57; *Giles* v. *Giles*, 8 Sim. 360; *Jarvis* v. *Pond*, 9 Sim. 549. Compare *Gowling* v. *Thompson*, and the other cases of strictly substitutional gifts cited ante, p. 1337.

(*gg*) 9 Ch. D. 658.

Meaning of "gift over."

VIII.—Gifts over. "Gift over" is not a term of art, but is a term of common use applied to certain kinds of executory devises and bequests. There is no authoritative definition, but the essential elements in a gift over are, first, that it is a gift to arise upon a future contingency, and secondly, that it operates by way of defeasance or shifting of a prior gift which would be absolute were the contingency not to occur. Thus a limitation in remainder, although it arises upon a future contingency, is not a gift over (*h*).

The effect of a gift over in divesting a prior vested interest is discussed in Chapter XXXVII. If the prior gift itself fails, the question arises whether its failure affects the gift over. This question is discussed in Chapter X., with reference to the Rule against Perpetuities, and in Chapter LVIII., with reference to the effect of the failure of a prior gift by reason of the object of it never coming into existence, or dying in the testator's lifetime.

Invalid gift over.

It is hardly necessary to say that a gift over is subject to the same rules of law as an original gift; it may therefore be void because it transgresses the Rule against Perpetuities (*i*) or because it is repugnant to the original gift (*j*), or because it is contrary to the provisions of the Settled Land Acts (*k*). In such a case the original gift takes effect absolutely, if it is in itself valid and effectual.

So if there is a gift over in the event of the legatee's marriage, and the gift over cannot take effect, being void, the property will devolve according to the other limitations of the will (*l*).

Acceleration of gift over.

Sometimes a gift over is, on the face of the will, void for repugnancy or some other cause, and yet takes effect by reason of subsequent events. Thus in *Re Lowman* (*ll*) a testator bequeathed property to H. for life, with remainder to his sons successively in tail male, with similar remainders to the sons of E., M., and F. As the property was personalty, it would have vested in the eldest

(*h*) The distinction between a gift over and a remainder is pointed out by Wood, V.-C., in *Re Banks' Trust* (2 K. & J. 387): "There is a gift of the funded property to Sarah for life, and then a gift over of the real estate [previously devised to her absolutely], which might well be construed to imply an estate tail in her as to that; and then there is a break, and then a gift of the funded property to Mrs. Walker absolutely, which I must hold to be a gift in remainder, for . . . the will is perfectly consistent if it is construed to give Sarah Banks a life interest in the funded property, and after her death to give the same property to Mrs. Walker absolutely."

(*i*) Chap. X.

(*j*) Chap. XVII.

(*k*) *Re Smith*, [1899] 1 Ch. 331.

(*l*) *Morley* v. *Rennoldson*, [1895] 1 Ch. 449.

(*ll*) [1895] 2 Ch. 348, dissenting from dictum of Knight Bruce, V.-C., in *Harris* v. *Davis*, 1 Coll. 416. As to the decision of the same judge in *Andrew* v. *Andrew*, 1 Coll. 686, see Chap. XIII.

son of H. absolutely, if there had been one, and the subsequent "remainders," or gifts over, would have been void. H., M., and E. survived the testator, but had no children; F. had two sons, the elder of whom predeceased the testator: it was held that the failure of the earlier gifts did not destroy, but accelerated, the gift to F.'s surviving son, and that he took absolutely.

Effect of gift over on construction.

The effect of a gift over upon the construction of prior limitations in a will illustrates the general principle that the whole will must be looked at to determine the construction of any particular clause; but it may be convenient to consider shortly the various ways in which a gift over may affect the construction of the other clauses in a will; these ways are in the main as follows:—

A gift over may:

(1) Imply a gift or enlarge a previous gift.

(2) Cut down or divest a vested gift.

(3) Determine vesting, and hence determine a class.

(4) Give validity to a condition.

These topics are treated of in their appropriate places in this work, and the following statement is only a summary.

Implication of estate tail.

(1) "Whether an estate be given in fee or for life, or generally without any particular limit as to its duration, if it be followed by a devise over in case of the devisee dying without issue (*m*) the devisee will take an estate tail" (*n*). This illustrates (2) or (1) according as the prior devise is in fee or for life.

Implication of absolute interest.

A devise to A. till twenty-one, with a gift over if he dies under twenty-one, gives A. an estate in fee by implication defeasible upon death under twenty-one (*o*). A similar implication occurs in the case of personal estate.

Implication of cross remainders.

Cross remainders will be implied where the testator gives over the whole of an estate upon the failure of issue of more than two tenants in common (*p*). But cross limitations are not implied so as to divest vested interests; *secus* as to contingent interests.

Duration of annuity.

The duration of an annuity may sometimes be inferred from a gift over (*q*); this is not always strictly a case of implication of

(*m*) That is, if these words import an indefinite failure of issue; in a will made since 1837 such words standing by themselves would not have this effect (see Chap. LII.).

(*n*) *Machell* v. *Weeding*, 8 Sim. 4. See p. 657 et seq. This subject is discussed in Chap. XIX.

(*o*) *Cropton* v. *Davies*, L. R., 4 C. P. 159. See p. 646.

(*p*) *Doe* d. *Gorges* v. *Webb*, 1 Taunt. 234. See p. 661 et seq.

(*q*) *Armstrong* v. *Eldridge*, 3 B. C. C. 215; ante, p. 643 et seq.

CHAP. XXXVI.

estates or interests, but may be an illustration of words creating a tenancy in common being rejected by force of the context (*r*).

Fee cut down to estate tail.

(2) As already mentioned, a gift over in default of issue, if the words imply an indefinite failure of issue, will cut down an estate in fee simple to an estate tail (*s*).

Similarly "heirs" will be held to mean heirs of the body if there is a limitation over in default of heirs to a collateral heir (*t*).

A devise to two in fee and if both die without issue then over, gives them joint estates for life with several inheritances in tail, with cross remainders between them in tail (*u*).

Estate tail not cut down.

But if there is a devise to A. and the heirs of his body or his issue or the like, with a gift over in the event of his dying without leaving issue living at his death, the gift over does not cut down the estate tail previously given to him (*uu*).

Fee cut down to life estate.

A devise to A. in fee, or an absolute bequest to A., may be cut down to a life estate or interest by a gift over on the death of A. (*v*), but the words which cut down the absolute estate must be clear (*w*), and if the gift over is a gift of a life estate only, A. will take the fee subject only to the life interest (*x*).

(3) There seems to be no case where a gift over enlarges or diminishes a class, except where it determines vesting.

A gift over of the shares of members of a class who die under a certain age to the other members of the class has the effect of vesting the shares, because the gift over would have no effect if the shares did not vest till that age (*a*).

Effect on vesting.

A gift in trust for A. should he survive B., but if A. does not survive B. or attain twenty-one, then to C., vests the gift to A. at twenty-one (*b*).

In *Bree* v. *Perfect* (*c*), the gift was in trust to pay the interest to A. for life, and at her death the principal to be equally divided "among such of her children as shall be living at the time of her death, as they respectively attain twenty-one," but if she should

(*r*) See post, Chap. XLIV.
(*s*) See ante, p. 657 et seq.
(*t*) See post, Chap. XLVII.
(*u*) *Forrest* v. *Whiteway*, 3 Ex. 367.
(*uu*) *Wright* v. *Pearson*, 1 Ed. 119; post, Chap. LI.
(*v*) Chap. XXXIV.
(*w*) *Re Jones*, [1898] 1 Ch. 438: *Re Cobbold*, [1903] 2 Ch. 299.
(*x*) *Gatenby* v. *Morgan*, 1 Q. B. D. 685. See post, p. 1436.
(*a*) See *Re Edmondson's Estate*, L. R., 5 Eq. 389, post, p. 1355. In *Re Turney*, [1899] 2 Ch. 739, the gift over was to a person not a member of the class; the case is stated below, p. 1365.
(*b*) *Re Thomson's Trusts*, L. R., 11 Eq. 146.
(*c*) 1 Coll. 128.

"die without leaving issue" over: it was held that the prineipal vested in the children living at the death of A. (*d*). But the authority of the decision seems doubtful (*e*).

Where a legacy is charged upon land, a gift over in one event favours vesting in all other events (*f*).

A gift over is an argument for the immediate vesting of a residuary bequest (*g*).

A gift over in the event of a devisee dying under twenty-one shews the meaning of the testator to have been that the first devisee should take whatever interest the party claiming under the devise over is not entitled to, which of course gives him the immediate interest, subject only to the chance of its being divested on a future contingency (*h*).

Where there is a gift to children after the death of their parent, and there is a gift over not in terms limited to the death before twenty-one of the children who survive that parent, the gift may be vested by the effect of the gift over (*i*).

Conditions in terrorem.

(4) Certain conditions annexed to gifts of personalty, though valid, are held to be ineffectual and in terrorem merely, unless there is a gift over (*j*). Conditions in partial restraint of marriage (*k*), or a condition not to contest the will (*l*) are instances; in the case of realty, however, they are effectual though there is no gift over (*m*).

Forfeiture on alienation or bankruptcy.

Restraints upon alienation, except where attached to the separate use of a married woman, are likewise bad (*n*), but absolute interests may be given over upon alienation before possession. A condition giving over an estate in fee on the bankruptcy of the devisee is void (*o*), but in the case of a life estate, a gift over upon bankruptcy or alienation is not necessary to make the condition effective (*p*).

If a condition subsequent is illegal or repugnant, a gift over will not make it effectual. In such a case the gift over as well as the condition is void (*q*).

Other effects of gift over.

A gift over may modify the original gift in other ways. Thus in *Hawkins* v. *Hamerton* (*y*) there was a gift to the testator's children

(*d*) See also *Ingram* v. *Suckling*, 7 W. R. 386; *Re Bevan's Trusts*, 34 Ch. D. 716. These cases are referred to in Chap. XXXVII.

(*e*) *Re Edwards*, [1906] 1 Ch. 570.

(*f*) See *Markin* v. *Phillipson*, 3 My. & K. 257, post, p. 1395, n. (*a*).

(*g*) See post, p. 1426 et seq.

(*h*) *Phipps* v. *Ackers*, 9 Cl. & Fin. 583. See *Finch* v. *Lane*, L. R., 10 Eq. 501.

(*i*) *Re Knowles*, 21 Ch. D. 806.

(*j*) Chap. XXXIX. sect. II.

(*k*) Ibid., sect. X.

(*l*) Ibid., sect. XIII.

(*m*) Ibid., sect. X.

(*n*) Ibid., sect. IX.

(*o*) Ibid., sect. VIII.

(*p*) Ibid., sect. VIII.

(*q*) Ibid., sect. II.

(*y*) 16 Sim. 410. See *Re Corbett's Trusts*, Johns. 591.

CHAP. XXXVI.

for life, and after their death to their children in equal shares, with a gift over of the share of any son or daughter dying without leaving issue, to the survivors and their issue in equal shares: it was held that the gift over shewed that the original gift was to the grandchildren per stirpes and not per capita.

So a gift over may shew that the testator, in framing the original gift, uses the word "vested" as meaning "payable" or "indefeasible" (*z*), or uses the word "issue" as meaning "children" (*a*).

Construction of gifts over.

Many of the rules as to the construction of contingent gifts have especial reference to gifts over; such, for example, are the rules as to the construction of gifts to take effect on the death of a prior legatee, whether the words refer to death simply (*q*), or to the event of the death of the prior legatee in some contingency (*r*): gifts to take effect in default of the issue of a certain person (*s*): gifts to survivors (*t*): these rules are discussed in other parts of this work, and it is here proposed to refer shortly to some miscellaneous questions arising on the construction of gifts over.

Literal construction.

If the language of a gift over is clear, it will be construed literally. Thus, suppose the gift is to A. and B. for life, and on their death to their children, and in the event of either one dying without children, his share to go to the other; in such a case, if both die without children, the survivor takes the whole (*u*). So if there is a gift to A., and in the event of his predeceasing the testator to to B., and A. and the testator die at the same instant, the gift over does not take effect (*v*). *Amherst* v. *Lytton* (*w*) was decided on this principle.

Wide construction.

But in *Avelyn* v. *Ward* (*x*) the testator devised land to A. and his heirs on condition of his executing a release, and if he should neglect to give such release, the testator devised the land to B.: A. died in the testator's lifetime, and it was held that the gift over took effect. Lord Hardwicke construed it as a conditional limitation, and said (in effect) that in the case of such a limitation it is not necessary that every particular fact shall take place, but the limita-

(*z*) *Re Baxter's Trusts*, 10 Jur. N. S. 845, and other cases cited p. 1356, see Chap. LVII.
(*a*) Chap. XLI.
(*q*) Discussed in Chap. LVI.
(*r*) Discussed in Chap. LVII.
(*s*) Discussed in Chap. LII.
(*t*) Discussed in Chap. LV.
(*u*) *Drennan* v. *Andrew*, 36 L. J. Ch. 1.
(*v*) *Elliott* v. *Smith* 22 Ch. D. 236. See *Wing* v. *Angrave*, 8 H. L. C. 183.
(*w*) 5 Br. P. C. 254; Fearne, C. R. 238, stated p. 1361, s. n. *Amherst* v. *Darnelly*.
(*x*) 1 Ves. sen. 420. Followed in *Re Sheppard's Trust*, 1 K. & J. 269.

tion is to be construed according to the sense and intention of the testator, which was, in substance, that if no release was executed, the estate should go over.

This liberal canon of construction is frequently applied (*y*).

Discrepancy between original gift and gift over.

Difficulty in construing gifts over arises where the original gift is subject to one contingency, and the gift over is to take effect on another contingency, or for some other reason the gift over does not "fit" the original gift.

In some cases the gift over is read strictly. Thus in *Re Edwards* (*z*) a testatrix gave property in trust for her children who attained twenty-one or married, with a gift over to other persons in the event of her death "without leaving any children surviving me": she only had one child, who survived her and died in infancy: it was held that the gift over did not take effect, and that there was an intestacy.

In some cases, however, the gift over will be modified. Thus if property is given to A. for life, and after his death to his children, with a gift over in the event of his dying "without leaving any child," and he has children who take vested interests and die before him, the gift over will be read as if it had been "without having any child," in order not to defeat the vested interests (*a*).

This principle of construction will not readily be applied where the subject-matter of gift is an annuity, which necessarily involves the notion of personal enjoyment (*b*).

Where a testator gives property to A. for life, and after his death to his children, "and if he shall die unmarried and without leaving a child," then over: here "unmarried" will, as a general rule, be read "not leaving a widow," because the word "unmarried" would be senseless (*bb*).

Another example of a gift over being modified occurred in *Home*

(*y*) See *Luxford* v. *Cheeke*, 3 Lev. 125, and other cases cited p. 1361 et seq: *Darrel* v. *Molesworth*, 2 Vern. 378, and other cases cited in Chap. LVII.; *Jones* v. *Westcomb*, Prec. Ch. 316; *Scatterwood* v. *Edge*, 1 Salk. 229, and other cases cited in Chap. LVIII.

(*z*) [1906] 1 Ch. 570. *Re Hamlet*, 39 Ch. D. 426, was the converse case. The decision of Malins, V.-C., to the contrary in *Kidman* v. *Kidman*, 40 L. J. Ch. 359, is founded on a misapprehension of the decision in *Re Wrangham's Trust*, 1 Dr. & Sm. 358: per Romer, L.J., in *Re Edwards*, supra.

(*a*) *Re Thompson's Trusts*, 5 De G. & S. 667; *Maitland* v. *Chalie*, 6 Madd. 243; *Casamajor* v. *Strode*, 8 Jur. 14; *Ex parte Hooper*, 1 Drew. 264; *Marshall* v. *Hill*, 2 Mau. & Sel. 608; *Kennedy* v. *Sedgwick*, 3 K. & J. 540; *Treharne* v. *Layton*, L. R., 10 Q. B. 459. *Re Cobbold*, [1903] 2 Ch. 299.

(*b*) *Re Hemingway*, 45 Ch. D. 453.

(*bb*) *Doe* d. *Everett* v. *Cooke*, 7 East, 269; *Re Sanders' Trust*, L. R. 1 Eq. 675; *Re King*, 62 L. T. 789; *Re Chant*, [1900] 2 Ch. 345. As to the meaning of "unmarried," see Chap. XXXV., ante, p. 1285.

CHAP. XXXVI.

v. *Pillans* (*c*), where a gift over in the event of the legatee's death, leaving children, was held to mean death under twenty-one, the original gift being contingent on the legatee (a female) attaining that age. But this construction is not, it seems, one generally applicable, and in *Re Schnadhorst* (*d*), where the gift was to A. for life and then to the testator's children who should attain twenty-one or (in the case of daughters) marry, with a gift over as to the share of any child dying leaving issue, it was held that this meant death at any time.

Alteration of "or" into "and"; and conversely.

Cases sometimes occur where the court goes so far as to change the wording of a gift over in order to give effect to the testator's intention. Thus, where property is given upon the happening of either of two events, such as the legatee attaining twenty-one or marrying, and there is a gift over on his death under twenty-one or unmarried, "or" in the gift over will be read "and," so as to make it consistent with the prior gift (*e*). So if property is given to A. absolutely with a gift over in the event of his "dying without children," this will be read as "dying without issue (*f*).

"Children" read "issue."

Double event.

In *Ormerod* v. *Riley* (*g*) the testator, who was entitled to certain freehold and copyhold estates for life, with remainder to his children, gave his residuary real and personal estate equally to his four children, and directed that each of his three younger children should sell and convey a certain part of the estates to which he was entitled for life to his eldest son; and in case any of the three should refuse so to do he directed that such child's share in his (the testator's) real and personal estate should go over to his said eldest son, and that the child so refusing should take no benefit under his will; and he declared that the share of his daughter A. (one of the three younger children) should be settled for her separate use for life, and after her death for her children equally; and he willed and desired that his said daughter and her husband should settle and assure the said property to which he himself was

(*c*) 2 Myl. & K. 15, stated and commented on in Chap. LVII. Other examples are *Grimshawe* v. *Pickup*, 9 Sim. 591; *Thackeray* v. *Hampson*, 2 S. & St. 214; *Desbody* v. *Boyville*, 2 P. W. 547. See also *Doe* d. *Everett* v. *Cooke*, 7 East, 269, and other cases cited in Chap. XVIII. p. 618.

(*d*) [1902] 2 Ch. 234, following the general principle laid down in *O'Mahoney* v. *Burdett*, L. R., 7 H. L. 388, stated and commented on in Chap. LVII.

(*e*) See *Grant* v. *Dyer*, 2 Dow, 73, and other cases cited ante Chap. XVIII. Where the question of changing "or" into "and" in a gift over on death under twenty-one or without issue, or the like, following an absolute gift (as in *Soulle* v. *Gerrard*, Cro. El. 525) is also discussed.

(*f*) *Parker* v. *Birks*, 1 K. & J. 156 (where the earlier cases are cited), *Re Synge's Trust*, 3 Ir. Ch. 379. As to *Doe* v. *Webber*, 1 B. & Ald. 713, and *Doe* v. *Simpson*, 5 Scott, 770, see Chap. L.

(*g*) 13 L. T. N. S. 571.

entitled for life upon trust corresponding with those already declared concerning her share of his own estate; and in case she and her husband should refuse to make such settlement then that the property given by his will should go over to his other three children in equal shares. A. and her husband refused to sell the share and refused to make the settlement directed. It was held that as the testator had not provided for the double refusal both gifts over were nugatory and void.

Similarly where the original gift is subject to two contingencies a gift over to take effect on one of them is inoperative (*h*).

And where the original gift is subject to a condition, with a gift over by way of defeasance which does not fit the condition, the effect sometimes is that the gift over is void and the original gift becomes absolute (*i*).

A gift over may also be inoperative where the original gift is absolute, although, read literally, the event on which the gift over is to take effect has happened. Thus in *McCormick* v. *Simpson* (*j*) the gift was to J. C. or his eldest son, "and in case of the death of the said J. C. without such issue male as aforesaid," then over; J. C. had a son, and they both survived the testator, but the son predeceased J. C.: it was held that the gift over did not take effect.

Gifts in default of appointment

Gifts in default of appointment under powers bear a superficial resemblance to gifts over, but they are essentially different in substance, a gift in default of appointment is primâ facie vested, subject to be divested by an exercise of the power (*k*). Therefore a gift in default of appointment may take effect, although the power itself is void for remoteness, or cannot be exercised, or fails by the death of the donee in the lifetime of the testator (*l*).

The question whether a gift in default of appointment is subject to a qualification applying to the objects of the power, is discussed elsewhere (*m*).

(*h*) See Chap. XXXVII.

(*i*) *Re Catt's Trusts*, 2 H. & M. 46; *Musgrave* v. *Brooke*, 26 Ch. D. 792, see Chap. XXXIX.

(*j*) [1907] A. C. 494.

(*k*) Ante, Vol. I., p. 788. As to the effect of the death, in the testator's lifetime, of one of several persons to whom the property is given in default of appointment, see post, Chap. XLIV.

(*l*) Ante, Vol. I., pp. 311, 848; *Nichols* v. *Haviland*, 1 K. & J. 504. If a gift over is expressed to take effect in an event which implies the existence of a certain person, and that person never comes into existence, or predeceases the testator, the court will, if possible, give effect to the gift over. But these cases rest on a different principle, namely, that of an implied intention. See Chap. LVIII.

(*m*) Ante, Vol. I., p. 849.

CHAPTER XXXVII.

DEVISES AND BEQUESTS, WHETHER VESTED OR CONTINGENT.

	PAGE
I. *Preliminary*	1352
(i) *Meaning of "vested" and "contingent"*	1352
(ii) *Contingent Interest, when transmissible*	1353
(iii) *Construction of an express Direction as to Vesting*	1354
II. *General Rule in regard to Vesting*	1357
III. *Interests vested subject to be divested*	1364
IV. *Devises construed to be vested, notwithstanding Expressions importing Contingency*	1371
V. *Devises contingent by express Terms, notwithstanding absurd Consequences*	1385
VI. *Implication of Contingency*	1388
VII. *Whether Contingency applies to one or all of several Limitations*	1390
VIII. *Vesting of Legacies charged on Land*	1393
IX. *Vesting of Bequests of Personalty*	1397
X. *Vesting of Residuary Bequests*	1420

I. Preliminary.—In this chapter Mr. Jarman deals with some general principles on which the court proceeds in deciding whether a devise or bequest is vested or contingent. There are numerous rules of construction applicable to certain limitations of frequent occurrence in practice, especially those referring to death simply, or to death coupled with some contingency, or to survivorship, etc. These are considered in later chapters (*a*).

Meaning of "vested" and "contingent."

(i) *Meaning of "vested" and "contingent."*—The word "vested" has several meanings which are liable to be confused (*b*). As applied to land, when a person has an actual estate it is said to be vested in him: thus if land is devised to A. for life and after his death to B., here A. has a vested estate in possession and B. has a vested estate in remainder (*c*): while if the devise is to A. for life and if C. shall be living at A.'s death then to B., here B. has no

(*a*) Chapters LVI, LVII, LV.

(*b*) See Hawkins on Wills, p. 221, where the division of legacies according to the rules of the civil law is shewn to be inapplicable to English law; Challis, R. P. 2nd ed. p. 64.

(*c*) As to the estate of trustees to preserve contingent remainders, see *Smith* d. *Dormer* v. *Parkhurst*, 18 Vin. Abr. 413, 6 Br. P. C. 351; Fearne, C. R. 220; Challis, R. P. 2nd ed. p. 133.

e, but a contingent remainder, which is merely the prospect or possibility of a future estate, and liable to be defeated by the death of C. in A.'s lifetime. So if land is devised to two persons for life, remainder to the survivor of them in fee, the remainder is contingent, for it is uncertain who will be the survivor (*d*).

Remainders are therefore divided into two classes, vested and contingent, and hence "vested" has come to have the meaning of certain, as opposed to something which is conditional or uncertain. Using the term in this sense, Mr. Fearne (*e*) divides vested estates into (i) estates vested in possession, where there exists a right of present enjoyment, and (ii) estates vested in interest, where there is a present fixed right of future enjoyment. This classification is also applicable to equitable interests in real and personal property.

Contingent interest when transmissible.

(ii.) *Contingent Interest, when transmissible.*—Mr. Jarman points out (*f*), that "a contingent interest will or will not be transmissible to the personal representatives of the legatee, according to the nature of the contingency on which it is dependent. If the gift is to children who shall live to attain a certain age, or shall survive a given period or event, the death of any child pending the contingency has obviously the effect of striking the name of such deceased child out of the class of presumptive objects; and, consequently, such an interest can never devolve to representatives, as it becomes vested and transmissible at the same instant of time (*g*). Where, however, the contingency on which the vesting depends is a collateral event, irrespective of attainment to a given age and surviving a given period, the death of any child pending the contingency works no such exclusion; but simply substitutes and lets in the legatee's representative for himself.

"Thus, where (*h*) a testator bequeathed his personal estate to A., and if he shall die without leaving issue, then over to B.; in the event of B. surviving the testator, and afterwards dying in the lifetime of A., testate or intestate, his contingent or executory interest will devolve to his executor or administrator (as the case may be)."

(*d*) Fearne, C. R. 9; *Whitby* v. *Von Luedecke*, [1906] 1 Ch. 783; and see ante, p. 1209.

(*e*) C. R. 1.

(*f*) First ed. p. 777.

(*g*) "As far as I can discover, the only case in which a contingent future interest is not transmissible is where the being in existence when the contingency happens is an essential part of the description of the person who is to take." Per Kay, J., in *Re Cresswell*, 24 Ch. D. at p. 107.

(*h*) *Pinbury* v. *Elkin*, 2 Vern. 758, 766; *King* v. *Withers*, Cas. t. Talb. 117, 3 B. C. P. Toml. 135; *Wilson* v. *Bayly*, ib. 195; *Barnes* v. *Allen*, 1 B. C. C. 181; *Taylor* v. *Graham*, 3 A. C. 1287; *Re Cresswell*, 24 Ch. D. 102.

Leeming v. *Sherratt*.

So, in *Leeming* v. *Sherratt* (*i*), where a testator gave his freehold and the residue of his personal property to trustees, upon trust to sell the freehold and get in the personal property, and to pay and divide the money arising therefrom, so soon as his youngest child should attain the age of twenty-one, unto and equally amongst his children, and in case of the death of any of the children leaving issue, such issue were to take the share which the parent so dying would have been entitled to have; Wigram, V.-C., held that a child who attained his majority, but died before the youngest attained twenty-one, was, nevertheless, entitled to a share of the fund. The trustees, he said, are trustees of the residue for all the testator's children upon the happening of an event, which in fact has happened, namely, the youngest child attaining twenty-one. He added, that if there was any case which decided, as an abstract proposition, that a gift of a residue to a testator's children, upon an event which afterwards happened, did not confer upon those children an interest transmissible to their representatives, merely because they died before the event happened, he was satisfied that case must be at variance with other authorities.

On the same principle, where property is given to the children of A. in the event of his leaving a child or children surviving him, and he has several children, some of whom die in his lifetime, and others survive him, the interests of all the children become vested on his death, so that the representatives of the deceased children take their shares (*j*). But of course, the principle does not apply where the contingency of survivorship is expressly attached to the class who are to take (*k*).

Effect of an express direction when gift is to "vest."

(iii.) *Construction of an express Direction as to Vesting.*—The strict and ordinary meaning of "vested" is "vested in interest" (*l*), and consequently if in a devise or bequest the testator has himself subjoined to the gift a declaration that it shall vest at a stated period, and if there be nothing in the context to show that the word "vest" is to be taken otherwise than in its strictly legal sense, all discussion is of course precluded; for a gift cannot vest

(*i*) 2 Hare, 14. See also *Stanley* v. *Wise*, 1 Cox, 432; *Brocklebank* v. *Johnson*, 20 Bea. 205; *Re Smith's Will*, ib. 197.

(*j*) *Boulton* v. *Beard*, 3 D. M. & G. 608; *Blythesea* v. *Blythesea*, 23 L. J. Ch. 1004, and other cases cited post, Chapter XLII.

(*k*) *Sheffield* v. *Kennett*, 4 De G. & J. 593, and other cases cited post, Chapter LVII.

(*l*) Per Wood, V.-C. in *Re Baxter's Trusts*, 10 Jur. N. S. at p. 847. The dicta to the contrary in *Young* v. *Robertson*, 8 Jur. N. S. 825 are erroneous. See *Richardson* v. *Power*, 19 C. B. N. S. 780, and other cases cited, post, Chapter LVII.

at two different periods (*m*). But a question generally arises in these cases as to the real meaning to be attributed to the word. If the testator has in other parts of the will treated the property devised or bequeathed as belonging to the devisee or legatee, and spoken of his share therein before the specified period (*n*), or if he has given over the property in case the devisee or legatee dies before the time named without issue, from which it is to be inferred that he is to retain it in every other case (*o*), the natural conclusion is, that the word is to be read as meaning "vested in possession," or "indefeasibly vested," and that the gift is vested, liable only to be divested on a particular contingency (*p*). An accruer clause, (*q*) or gift over, to take effect in the event of death before the time named, or before attaining "a vested interest," simpliciter, although indecisive perhaps by itself (*r*), tends strongly to the same conclusion (*s*). The possibility of the devisee or legatee so dying, and of his leaving issue, who, if the gift is strictly contingent and does not devolve to them from their parent, are otherwise altogether (*t*) or in some probable event (*u*) unprovided for by the will, has in these, as in many other cases, furnished a powerful motive for adopting a more liberal interpretation. Where, upon the parent so dying, the property is expressly given to his issue, this motive is wanting, and the Court will be slow to depart from the primary meaning of the word "vest," and of associated expressions the natural import of which is contingency (*v*). So, if the will gives the issue the chance of taking through their parent, as if the property is directed to vest

In what cases "vested" means "indefeasible."

In what cases literally construed.

(*m*) The cases of *Russel* v. *Buchanan*, 7 Sim. 628, and *Glanvill* v. *Glanvill*, 2 Mer. 38, are referred to post, p. 1379. See also *Comport* v. *Austen*, 12 Sim. 218; *Wakefield* v. *Dyott*, 4 Jur. N. S. 1098; *Selby* v. *Whittaker*, 6 Ch. D. 239, post, p. 1390; *Creeth* v. *Wilson*, 9 L. R. Ir. 216; *Armytage* v. *Wilkinson*, 3 A. C. 355, post, p. 1366.

(*n*) *Berkeley* v. *Swinburne*, 16 Sim. 275 (residue); *Poole* v. *Bott*, 11 Hare, 33 (separate gifts of real and personal estate); *Walker* v. *Simpson*, 1 K. & J. 713; *Barnet* v. *Barnet*, 29 Bea. 239.

(*o*) *Taylor* v. *Frobisher*, 5 De G. & S. 191. Lord Hardwicke seems to have used the word in this sense in *Haughton* v. *Harrison*, 2 Atk. 329.

(*p*) See *Young* v. *Robertson*, supra. As to interests vested subject to be divested, see post, sect. III.

(*q*) *Re Edmondson's Estate*, L. R., 5 Eq. 389.

(*r*) *Glanvill* v. *Glanvill*, 2 Mer. 38; *Re Blakemore's Settlement*, 20 Bea. 214; *Re Morse's Settlement*, 21 Bea. 174. The last two cases were upon deeds, and moreover proceeded upon the questionable distinction drawn by Leach, M.R., 3 My. & K. 411, between a gift over under age, and a gift over under age and without issue. See post, p. 1395, n. (*a*).

(*s*) *Re Baxter's Trusts*, 10 Jur. N. S. 845; *Re Morris*, 26 L. J. Ch. 688; *Best* v. *Williams*, [1890] W. N. 189. Cf. *Pickford* v. *Brown*, 2 K. & J. 426, where the gift over itself contained expressions favouring the suspension of vesting, as in *Russel* v. *Buchanan*, post, p. 1379. See also *Re Wrightson*, [1904] 2 Ch. 95, post, Chap. XXXVIII.

(*t*) *Taylor* v. *Frobisher*, 5 De G. & S. 191.

(*u*) *Re Edmondson's Estate*, L. R. 5 Eq. 389.

(*v*) *Rowland* v. *Tawney*, 26 Bea. 67; and see *Comport* v. *Austen*, 12 Sim. 218; *Selby* v. *Whittaker*, 6 Ch. D. 239.

in the devisee or legatee on his attaining a specified age, or dying leaving issue (*w*). A gift of the interest until the arrival of the time named, also favours the less strict construction, upon principles already explained (*x*). But if the interest is to be accumulated and paid at the same time as the principal fund (*y*); or if by the context a distinction is drawn between the terms "vested" and "payable" (*z*), the word "vest" must have its proper meaning (*a*).

Class may be enlarged by direction as to vesting.

Where the gift is in the first instance to a restricted class, as to children who shall survive A., a direction that the property shall vest, say, at the age of twenty-one, will not generally enlarge the class, but only impose a further condition of enjoyment on the class already defined (*b*). But where the direction was that the property should vest in "the children," thus giving a new description without the previous restriction, the restriction was held to be neutralised (*c*). So, where the gift was to such of the children as should attain twenty-five, and it was declared that if any child attained twenty-one and died before twenty-five his share should vest at his death, the shares were held to vest at twenty-one (*d*). In *Williams* v. *Russell* (*e*), a testator gave property in trust for A. for life with remainder to her children who should be living at her death and attain twenty-one; by a subsequent proviso he declared that the children of A. who had attained or should attain twenty-one or die before that age leaving issue, should be deemed to have attained a vested interest: it was held that this proviso operated as a new and additional gift,

(*w*) *Re Thatcher's Trusts*, 26 Bea. 365.

(*x*) *Simpson* v. *Peach*, L. R., 16 Eq. 208 ("payable" and "vested" exchanged meanings).

(*y*) *Re Thruston*, 17 Sim. 21; see also *Griffith* v. *Blunt*, 4 Bea. 248.

(*z*) *Ellis* v. *Maxwell*, 12 Bea. 104; see also *Parkin* v. *Hodgkinson*, 15 Sim. 293; *Re Thatcher's Trusts*, 26 Bea. 365; *Re Colley's Trusts*, L. R. 1 Eq. 496, where the strict construction was assumed. In *Sillick* v. *Booth*, 1 Y. & C. C. C. 121, and *King* v. *Cullen*, 2 De G. & S. 252, the context gave to the word "vested" in a gift over upon death before vesting a sense corresponding to the word "payable" used in the primary gift. "Paid" was held to mean "vested" in *Martineau* v. *Rogers*, 8 D. M. & G. 328. And sometimes where both words occur, they are held to be used indiscriminately, *Re Baxter's Trusts*, 10 Jur. N. S. 845; *Darley* v. *Percival* [1900], 1 Ir. 129 (deed). See further on the meaning of "vested" in gifts over in case of the legatee dying before attaining a "vested" interest, Chapter LVII.

(*a*) In *Bythesea* v. *Bythesea*, 23 L. J. Ch. 1004, the will contained a declaration as to vesting which appears to have had little or no influence on the construction, post, Chapter XLII.

(*b*) *Re Payne*, 25 Bea. 556; *Re Parr's Trusts*, 41 L. J. Ch. 170; *Bickford* v. *Chalker*, 2 Drew. 327; *Draycott* v. *Wood*, 5 W. R. 158; *Williams* v. *Haythorne*, L. R. 6 Ch. 782 (though it was residue and another clause became surplusage).

(*c*) *Jackson* v. *Dower*, 2 H. & M. 209 (residue).

(*d*) *Mappin* v. *Mappin*, [1877] W. N. p. 207 (residue). See also *Dalton* v. *Hill*, 10 W. R. 396.

(*e*) 10 Jur. N. S. 168.

and that children of A. who attained twenty-one and predeceased her, were entitled to share.

Reference to possession.

A direction that members of a class shall become "beneficially interested" at a certain time does not prevent them from taking vested interests at an earlier period (*f*). But a direction deferring possession may throw light on the meaning of the word "vested" (*g*).

Fluctuating class.

It may here be noted that where property is given to a class, the members of which may be increased between the time of creating the remainder and the termination of the particular estate, although the interest of each member as he comes into existence is treated as vested, yet in some respects it is contingent, for until the particular estate comes to an end, the share of each member is liable to be diminished by the addition of new members. This is why such gifts are liable to fail for contravening the Rule against Perpetuities, although interests which are vested in the proper sense of the word are not within the Rule (*h*).

General rule as to vesting.

II.—General Rule in regard to Vesting.—"The law," says Mr. Jarman (*i*), "is said to favour the vesting of estates (*j*); the effect of which principle seems to be, that property which is the subject of any disposition, whether testamentary or otherwise, will belong to the object of gift immediately on the instrument taking effect, or so soon afterwards as such object comes into existence, or the terms thereof will permit. As, therefore, a will takes effect at the death of the testator, it follows that any devise or bequest in favour of a person in esse simply (i.e. without any intimation of a desire to suspend or postpone its operation), confers an immediately vested interest.

"If words of futurity are introduced into the gift, the question arises whether the expressions are inserted for the purpose of

(*f*) *M'Lachlan* v. *Taitt*, 28 Bea. 407; 2 D. F. & J. 449.

(*g*) *Re Wrightson*, [1904] 2 Ch. 95.

(*h*) Gray on Perpetuities, §§ 110, 110a.

(*i*) First ed. p. 726. See *Duffield* v. *Duffield*, 3 Bli. N. S. 260; *Re Wrightson*, [1904] 2 Ch. 95. The general principle is also referred to infra, p. 1397, with especial reference to gifts of personal property.

(*j*) In addition to the general principle stated by Mr. Jarman, it may be mentioned that there are classes of cases in which vesting is especially favoured: namely (1) gifts to children by way of portion (*Re Knowles*, 21 Ch. D. 806, post, p. 1420); (2) Gifts of residue (infra, sect X.); (3) In *Re Gossling*, ([1902] 1 Ch. 945), Swinfen Eady, J., seemed to accede to the argument that vesting is more favoured in gifts to individuals than in gifts to a class. Stuart, V.-C., appears to have thought that the rule was the other way. (*King* v. *Isaacson*, 1 Sm. & G. 371).

The general principle in favour of vesting prevails in the law of Scotland, *Carlton* v. *Thompson*, L. R., 1 Sc. Ap. 232; *Taylor* v. *Graham*, 3 A. C. 1287.

protracting the vesting, or point merely to the deferred possession or enjoyment."

Direction to transfer property in future.

A simple illustration of this question occurs in those cases where property is given to a person, followed by a direction that it shall be paid or transferred to him on his attaining a certain age, or on some other event. Thus in *Farmer* v. *Francis* a testator gave his real and personal estate, subject to certain life interests, to the children of A. living at her death, "to be divided share and share alike when and as they shall respectively attain the age of twenty-four years, and to their respective heirs, executors, administrators and assigns." It was held, both as to the realty (*k*), and as to the personalty (*l*), that all the children (the youngest of whom was four years old) took vested interests at A.'s death. But the gift and the direction must be independent, for if the only gift is in the form of a direction to pay or transfer on the happening of a future event, the principle does not apply (*m*). So a simple gift to A. "if" or "when" he attains a certain age, confers on him a contingent and not a vested interest (*n*). The question arises most frequently with reference to gifts of personalty (*o*).

Estates in possession and remainder.

Mr. Jarman continues (*p*): "It may be stated as a general rule, that where a testator creates a particular estate, and then goes on to dispose of the ulterior interest, expressly in an event which will determine the prior estate, the words descriptive of such event, occurring in the latter devise, will be construed as referring merely to the period of the determination of the possession or enjoyment under the prior gift, and not as designed to postpone the vesting. Thus, where a testator devises lands to A. for life, and after his decease to B. in fee, the respective estates of A. and B. (between whom the entire fee-simple is parcelled out) are both vested at the instant of the death of the testator, the only difference between the devisees being, that the estate of the one is in possession, and that of the other is in remainder (*q*).

Devises of reversions and remainders.

"On the same principle, where a person who is entitled to a reversion or remainder in fee, expectant on an estate tail in himself, or in any other person, by his will devises the property in question, in the event of the person who is tenant in tail dying without issue, this is construed as an immediate disposition of the testator's

(*k*) 2 Bing. 151.
(*l*) 2 S. & St. 505.
(*m*) *Leake* v. *Robinson*, 2 Mer. 363, stated, post, p. 1403.
(*n*) *Grant's Case* and other authorities cited post, p. 1371.
(*o*) Infra, p. 1401.
(*p*) First ed. p. 726.
(*q*) Ambiguous words are not enough to prevent this construction; *Re Venn*, [1904] 2 Ch. 52.

reversion or remainder; though, upon the face of the will, the devise presents the aspect of an executory gift, to arise on a general failure of issue, which would clearly be void (*r*), unless, indeed, the will were subject to the newly enacted rules of testamentary construction, in which case the words would refer to issue living at the death (*s*). If the contingency described corresponds precisely with the event which determines the existing estate tail, no difficulty exists in applying this rule of construction; but it frequently happens that the terms used by the testator do not completely answer to the event in question; as, for instance, where the reference is to issue generally, and the subsisting estate is restricted to issue of a particular marriage or sex. In such cases, the reasonable conclusion would seem to be, that the discrepancy arises merely from an inaccuracy in the description of the reversion or remainder, and that it does not show a different interest to have been in the testator's contemplation; and such, accordingly, seems to have been the prevailing doctrine of the cases (*t*).

Words "in default," or "for want of," object of prior estates, how construed.

"It is to be observed, also, that where a remainder is limited *in default* or *for want* of the object or objects of the preceding limitation, these words mean, on the failure or determination of the prior estate or estates, and do not (as literally construed they would) render the ulterior estate contingent on the event of such prior object or objects not coming into existence. In short, they signify all that is comprehended in the word 'remainder,' being merely an expression employed by the testator in carrying on the series of limitations (*u*). The ulterior estate, therefore, is a vested

(*r*) Ante, p. 321.

(*s*) It will of course be remembered that Mr. Jarman wrote in 1844.

(*t*) *Wellington* v. *Wellington*, 1 W. Bl. 645, 4 Burr. 2165, post; *French* v. *Caddell*, 3 B. P. C. Toml. 257, post; *Jones* v. *Morgan*, Fea. C. R. 451; *Lytton* v. *Lytton*, 4 B. C. C. 441; *Egerton* v. *Jones*, 3 Sim. 409. Mr. Jarman adds, "The case of *Bankes* v. *Holme*, 1 Russ. 394, n., indeed, favours a more rigid construction; but Lord Eldon's strictures upon this case, in *Morse* v. *Lord Ormonde*, 1 Russ. at p. 405, afford ground to infer that it did not coincide with his own opinion. The strict rule there adopted certainly exacts from testators more of technical correctness than it has been usual to require, and clearly would not now be followed." See further as to the above cases, Chapter LII., and *Lewis* v. *Templer*, 33 Bea. 625.

(*u*) "In a former publication, the writer contented himself with simply stating this position, and a single case in support and illustration of it, conceiving that the rule of construction was too well established to be called in question; but subsequent experience taught him that it has not obtained so ready and unanimous an assent in the profession as, from the state of the authorities, was to have been expected. Indeed, even so recently as the case of *Ashley* v. *Ashley*, 6 Sim. 358, the Master reported that, under a devise to A. for life, with remainder to her children, and, for want of such issue to B., the devise to B. failed on A. having a child, —a conclusion which the V.-C. appears to have regarded as too plainly untenable for serious refutation. The reluctance to acquiesce in a construction at once so reasonable, and so well sustained by authority, is remarkable, but probably is to be ascribed to the yet lingering influence of the long-exploded

CHAP. XXXVII.

remainder, absolutely expectant on the failure or determination of the prior estate (*v*).

"Thus, it has been decided (*w*) that, where lands are devised to the first and other sons of A. successively in tail, *and, in default of such sons*, to the daughters of A. in tail, although it should happen that A. has a son or sons, yet on his or their subsequently dying without issue, the devise in remainder to the daughters takes effect.

"So, where (*x*) a testator devised to E. for life, and, after her decease, to the first and every other son of her body lawfully to be begotten, the elder to be preferred to the younger, and, for want of such sons, to the daughter or daughters of E., share and share alike, *and in default of such issue of E.*, then to M.; it was held, that the devise to M. was a vested remainder, expectant on the determination of the prior successive life estates of E. and her sons and daughters, (the will being subject to the old law,) and those estates having expired *by the death of E.'s only daughter*, M.'s remainder fell into possession.

"Again, where (*y*) A. devised certain lands to D. for life; remainder to a trustee, to preserve contingent remainders; remainder to the first and other sons of D. and their heirs, *and for want of such issue*, to J. for life with remainders over; it was held that the sons of D. took successive estates tail, with a vested remainder.

"It is clear too, that where real estate is devised to A. in tail, and, in case he shall die without issue, then to B. in fee, and it happens that A. dies in the testator's lifetime, leaving issue, the ulterior devise to B. is held to take effect, although, literally, the contingency on which such devise is made dependent has not occurred; the intention being, it is considered, that the ulterior devise shall confer a vested remainder on B., which is *absolutely to take effect in possession on any event which removes the prior estate out of the way* (*z*). The case just suggested, however, cannot now arise under a will made or republished since 1837, as a devise in tail contained in such a will does not, by the recently enacted law, lapse by the death of the devisee in the testator's lifetime, leaving issue.

case of *Keene* v. *Dickson*, 1 B. & P. 254, n., where a contrary construction prevailed; and serves to show that the uncertainty produced by contradictory decisions is not easily dispelled." (Note by Mr. Jarman.)

(*v*) Mr. Jarman's statement of the rule was adopted by Parker, J., in *White* v. *Summers*, [1908] 2 Ch. 256.

(*w*) *Doe* v. *Dacre*, 1 B. & P. 250, 8 T. R. 112; Hayes' Principles, p. 35.

(*x*) *Goodright* v. *Jones*, 4 M. & Sel. 88.

(*y*) *Lewis* v. *Waters*, 6 East, 336. See also *Hennessey* v. *Bray*, 33 Bea. 96; *Honywood* v. *Honywood*, 89 L. T. 378, 92 L. T. 814.

(*z*) *Hutton* v. *Simpson*, 2 Vern. 722; *Hodgson* v. *Ambrose*, Doug. 337.

Rule where prior estate takes effect, but is determined in a different manner.

"Where, however, the ulterior estate is expressed to arise on a contingent determination of the preceding interest, and the prior gift does in event take effect, but is afterwards determined in a mode different from that which is so expressed by the testator, the ulterior gift fails.

"As where (*a*) the devise was to A. for life, remainder to his first and other sons in tail, on condition that he and his issue male should assume a particular name, and in case he or they refused, then that devise to be void, and in such case the testator devised the lands over. A. survived the testator, complied with the condition, and then died without issue; and it was held in B. R., on a case from Chancery, and ultimately in the House of Lords, that the limitation over did not arise (*b*).

Devise during widowhood, with devise over on marriage.

"An exception to this rule, however, may seem to exist in a case which deserves especial attention, on account of the frequency of its occurrence, namely, where a testator makes a devise to his widow for life, if she shall so long continue a widow, *and if she shall marry*, then over; in which the established construction is, that the devise over is not dependent on the contingency of the widow's marrying again, but takes effect, at all events, on the determination of her estate, whether by marriage or death.

Devise over extended by implication to determination by death.

"In *Luxford* v. *Cheeke* (*c*), which is a leading authority for this doctrine, the testator devised to his wife for life, *if she should not marry again, but if she did*, then that his son H. should presently after his mother's marriage enjoy the premises, to him and the heirs of his body, with remainders over. The widow died without marrying again; but it was held, that the remainder took effect.

"*Gordon* v. *Adolphus* (*d*) was a case of the same kind. The bequest was to the testator's wife 'during her natural life, that is to say, so long as she shall continue unmarried; *but in case she*

(*a*) *Amhurst* v. *Darnelly*, 8 Vin. Ab. 221 pl. 21, 5 B. P. C. Toml. 254; see also *Sheffield* v. *Lord Orrery*, 3 Atk. 282, post, p. 1362.

(*b*) "Compare this case with *Avelyn* v. *Ward*, 1 Ves. sen. 420, and *Doe* v. *Scott*, 3 M. & Sel. 300, in which the lapse of a prior estate, on whose contingent determination the subsequent estate was to arise, was held not to defeat the subsequent estate. In order to reconcile these cases with *Amhurst* v. *Darnelly*, we must infer, that, in the latter case, had the estate of A. and his sons failed by lapse, the devise over would have taken effect. Pari ratione, it must be concluded, that had the prior devisee in those cases survived the testator and performed the condition, the devise over (if the whole interest had not been absorbed as it was by the first devisee) would not have taken effect." (Note by Mr. Jarman.)

(*c*) 3 Lev. 125; *Walpole* v. *Laslett*, 7 L. T. N. S. 526; *Re Martin*, 53 L. T. 34; *Re Cane*, 63 L. T. 746.

(*d*) 3 B. P. C. Toml. 306; see also *Brown* v. *Cutler*, T. Ray. 427.

shall choose to marry, then and in that case' it was to be for the immediate use of the testator's daughter, and in case she should die without leaving issue, then over; and it was considered by Lord Camden, and afterwards in the House of Lords, that the bequest over was not contingent on the event of the marriage of the wife.

"In these cases, therefore, the widow takes an estate durante viduitate, and the gifts over are vested remainders absolutely expectant on that estate, being to take effect, at all events, on its determination, and not conditional limitations dependent on the contingent determination of a prior estate for life.

"In *Lady Fry's Case* (*e*), Lord *Hale* said, it was all one as if the estate had been devised to the widow for life, and if she married, then to remain, which had been but an estate quamdiu sola vixerit. If, however, the devise had been framed in the manner suggested by this eminent and excellent Judge, the case would have been brought into very close resemblance to the case of *Sheffield* v. *Lord Orrery* (*f*), where a different construction prevailed. There A. devised his house, &c., to his wife for life, upon this express condition only, that *if she should marry again*, then the house, &c., should go forthwith to his eldest son and his issue. Lord *Hardwicke* held, that it was a contingent limitation to the son, to take effect only on the wife's marrying again. In *Luxford* v. *Cheeke*, he said, the penning was different; there, after the devise, were added these words, 'if she do not marry again,' which restrained the original limitation, and were the same as if they had been to the wife for life, 'if she so long continued a widow.' Here there were no such words in the original limitation; and though his Lordship added, 'but I do not lay much weight on this,' and proceeded to comment on other grounds for the construction, yet the remarks above quoted have always been considered as pointing out the true principle of the decision.

Devise over on marriage again, strictly construed.

"On the whole, then, the distinction would seem to be, that where the circumstance of not marrying again is interwoven into the original gift, the testator, having thus, in the first instance, created an estate durante viduitate, must generally be considered, when he subsequently refers to the marriage, to describe the determination *by any means* of that estate, and, consequently, the

General conclusion from the cases.

(*e*) 1 Vent. 199; see also *Jordan* v. *Holkham*, Amb. 209, where Lord Hardwicke took a distinction between a devise during widowhood, and if she married again within a limited time.

(*f*) 3 Atk. 282.

gift over is a vested remainder expectant thereon (*g*). On the other hand, where a testator first gives an absolute estate for life, and then engrafts thereon a devise over to take effect on the marriage of such devisee for life, the conclusion is, that the devise over is not to take effect unless the contingency happens" (*h*).

The construction in the former class of cases being that the limitations over take effect, at all events, on the determination of the widow's estate, whether by marriage or death, it is not displaced by the circumstance that some of those limitations (e.g. a provision for the widow during the remainder of her life, expressly in case she marries,) can only take effect in the event of her marrying: although she should not marry, the other limitations will still take effect as vested remainders expectant upon her death (*i*).

Converse case.

Conversely, where a testator gives property to his wife so long as she remains unmarried, and directs that "at her death" it shall be divided among certain persons, this gift over takes effect on her remarriage (*j*).

When class ascertained.

The general principle was extended in the case of *Bainbridge* v. *Cream* (*k*), where a testator gave lands to his wife for life, but if she

(*g*) See acc. *Browne* v. *Hammond*, Johns. pp. 210, 213; *Eaton* v. *Hewitt*, 2 Dr. & Sm. 184; *Underhill* v. *Roden*, 2 Ch. D. 494. In *Re Tredwell*, [1891] 2 Ch. 640, the principle here stated was treated by the C.A. as an application of the principle of construction established by *Jones* v. *Westcomb*, post, Chapter LVIII.

(*h*) The question whether the event of not marrying is or is not interwoven in the original gift, may be difficult of solution. In *Meeds* v. *Wood*, 19 Bea. 215, a testator gave real estate to his executor in trust for E. for her life, and directed the executor to pay her the rents every six months, "provided that if E. should marry," then over. The M.R. admitted the distinction taken in the text, but thought the direction to the executor to pay E. the rents limited the previous gift to so long as she remained a spinster, since "it was obvious the testator intended the rents to be paid to her herself," and if she married, she would no longer be entitled to receive them, except by the intervention of a trust for her separate use, which was inconsistent with the intention; he therefore held that the gift over took effect on the death of E., though she had never been married.

"In one case a devise which, in express terms, extended to widowhood only, was held to be enlarged by implication to the period of the vesting in possession of a remainder limited thereon. The devise was to the testator's wife for her life, provided she remained a widow; but if she married a second husband, to I., *when he should attain his age of twenty-three years*; and it was held, that the widow had an estate till I. attained twenty-three, though she married again, *Doe* d. *Dean and Chapter of Westminster* v. *Freeman*, 1 T. R. 389, 2 Chitty's Cas. temp. Lord Mansfield, 498." (Note by Mr. Jarman.) See *Re Cabburn*, 46 L. T. 848.

(*i*) *Underhill* v. *Roden*, 2 Ch. D. 494. See also *Eaton* v. *Hewitt*, 2 Dr. & Sm. 184; *Wardroper* v. *Cutfield*, 33 L. J. Ch. 605. In *Pile* v. *Salter*, 5 Sim. 411, it was held that a gift to the widow of one-third of the corpus 'if she married again" following a life interest in the whole during widowhood, was necessarily contingent; "it would be absurd to give her one-third of the property in the event of her death." But this was disapproved and the absurdity denied by Jessel, M.R., in *Underhill* v. *Roden*. See also *Scarborough* v. *Scarborough*, 58 L. T. 851.

(*j*) *Stanford* v. *Stanford*, 34 Ch. D. 362: *Re Dear*, 61 L. T. 432.

(*k*) 16 Bea. 25. *Walpole* v. *Laslett*, 7 L. T. N. S. 526, is to the same effect.

CHAP. XXXVII.

married again he revoked them, and at her death or second marriage gave the lands to trustees for sale, the produce to be divided among certain persons (naming them), or such of them as should be living at the decease of his wife; the wife married again, and the trustees sold; and it was held by Romilly, M.R., that the proceeds were divisible immediately, notwithstanding the widow was still living. This decision was treated as a binding authority by Chitty, J., in *Stanford* v. *Stanford* (*l*) and was followed, though apparently with some doubt, by Stirling, J., in *Re Tucker* (*m*).

Other applications of the principle.

The general principle is not confined to gifts durante viduitate, but applies where the life estate of the widow is determinable on the happening of other events besides those of death and remarriage (*n*). It also applies where the prior gift is to a spinster until marriage (*o*), or to a person until he becomes bankrupt (*p*), with a gift over in case of marriage or bankruptcy. In these (marriage) cases also the remainder will generally take effect at all events on the determination of the prior estate.

Cases to which principle does not apply.

The principle does not, of course, apply where the original gift is not one for life, but is an absolute gift with a gift over on remarriage (*q*).

Nor does it apply where there is no express gift over. Thus where a testator gave the income of his residuary estate to his wife during widowhood, and bequeathed to her an annuity in the event of her remarriage, and directed that after her death certain legacies should be raised and paid, it was held that these legacies were not payable on her remarriage (*r*).

Vested subject to be divested.

III.—Interests vested subject to be divested.—The inclination of the courts to hold interests to be vested is shewn in many cases in which a gift, in terms apparently contingent, has been held to confer an interest absolute in the first instance, but subject to be divested on the happening of the contingency. "There are three ways in which a legacy may be given. The first case is where it is given to A. B. absolutely, the second case is where it is given to A. B. contingently on his attaining twenty-one, or on some event happening or not happening, and the third case is

(*l*) Supra.

(*m*) 56 L. J. Ch. 449. See *Re Dear*, 58 L. J. Ch. 659; 61 L. T. 432.

(*n*) *Re Cane*, 60 L. J. Ch. 36.

(*o*) *Eaton* v. *Hewitt*, 2 Dr. & Sm. 184; *Walpole* v. *Laslett*, 7 L. T. N. S. 526; *Wardroper* v. *Cutfield*, 33 L. J. Ch. 605; *Meeds* v. *Wood*, 19 Bea. 215, ante, p. 1363, n. (*h*).

(*p*) *Etches* v. *Etches*, 3 Drew. 441.

(*q*) *M'Culloch* v. *M'Culloch*, 3 Giff. 606.

(*r*) *Re Tredwell*, [1891] 2 Ch. 640, explained in *Re Akeroyd's Settlement*, [1893] 3 Ch. 363 (deed). See *O'Donoghue* v. *O'Donoghue*, [1906] 1 Ir. 482.

where the gift is absolute in the first instance, but liable to be defeated on the legatee not attaining twenty-one, or on the happening or not happening of some future event" (*s*). And the classification applies to devises of land. Examples of gifts construed to give a vested interest subject to be divested will be found in a subsequent part of this chapter (*ss*.)

A gift may be liable to be divested in one of three ways.

Rule in *Doe* v. *Eyre*.

First, property may be given to A., subject to a proviso that in a certain event A.'s interest shall be defeated or cease, without regard to the ultimate destination of the property. In such a case, if there is no valid gift over or the gift over does not take effect, the property is undisposed of, and falls into residue, or goes to the testator's heir or next of kin, according to circumstances (*t*).

Partial gift over.

Secondly, property may be given to A. subject to a proviso of defeasance or cesser by way of gift over in favour of other persons, in partial derogation of the prior gift; in such a case the prior gift is only affected to the extent required to give effect to the gift over, and if the latter gift fails the prior gift becomes absolute (*u*).

Prior gift not divested unless gift over takes effect.

Thirdly, property may be given to A. subject to a proviso shewing the testator's intention to be that in a certain event A.'s interest shall cease or be defeated in favour of B.; in such a case if the gift over to B. is invalid, or does not take effect, A.'s interest becomes absolute.

This last construction is frequently adopted in the case of substitutional gifts to the issue of a person in the event of his death leaving issue before a certain time (*v*), and in the case of gifts to survivors (*w*).

Power of appointment.

The case of property being given to A. subject to a power of appointment or disposition given to B., may also be treated as belonging to this class (*x*).

Examples of gifts vested liable to be divested.

In *Re Turney* (*y*) a testator gave a fund upon trust for his daughter during her life, and after her death upon trust for all her children when they should attain the age of twenty-five, but not before,

(*s*) Per Fry, J., in *Re Buckley's Trusts*, 22 Ch. D. at p. 583.

(*ss*) See *Edwards* v. *Hammond* and other cases cited post, p. 1376 seq.

(*t*) *Doe* d. *Blomfield* v. *Eyre*, 5 C. B. 713; *Hurst* v. *Hurst*, 21 Ch. D. 278, and other cases cited post, p. 1437. In most of these cases it is expressly or impliedly admitted by the judges that the rule in *Doe* v. *Eyre* frequently defeats the intention of testators.

(*u*) *Gatenby* v. *Morgan*, 1 Q.B.D. 685, and *Hanbury* v. *Cockrell*, cited post, p. 1435. See *M'Cutcheon* v. *Allen*, 5 L. R. Ir. 268, where the testator failed to provide for a contingency of probable occurrence.

(*v*) See *Salisbury* v. *Petty*, 3 Ha. 86; *Masters* v. *Scales*, 13 Bea. 60, and other cases cited in Chapter LVII.

(*w*) Post, Chap. LV.

(*x*) Ante, Chap. XXIII.

(*y*) [1899] 2 Ch. 739.

and in case there should not be any such child, the fund was to form part of the residue. The testator also provided for payment to the children of interest "on their respective portions." By a codicil, he gave a moiety of the residue in trust for a son during his life, and after his death for his child or children absolutely upon their attaining twenty-five, with a gift over of the "share" of any child dying before attaining twenty-five. It was held that under both gifts the grandchildren took immediate vested interests subject to their being divested in case they did not attain twenty-five.

Reference to "share" important,

but not essential.

The construction turned to a considerable extent on the use of the words "portions" and "share," the importance of which latter word, in cases where the testator has directed that the property shall "vest" at a certain time, has already been pointed out (*z*). But the use of the word "portion" or "share" is not essential. Thus in *Armytage* v. *Wilkinson* (*a*), where a testator gave a fund in trust for his children "so that the interest of a son or sons shall be absolutely vested at the age of twenty-one years, and of a daughter or daughters at that age or marriage," it was held that the children took vested interests subject to be divested.

Dev
land.

The cases in which a devise of land, in terms which import contingency, has been held to confer a vested interest subject to be divested, are referred to in a subsequent part of this chapter (*b*).

Divesting clauses strictly construed.

Vested gift not divested, unless all the events happen.

As a general rule, divesting clauses are strictly construed. The principle is thus laid down by Mr. Jarman (*c*): "As a devise (*d*) expressly made to take effect on a contingency will not arise unless such contingency happen, it follows à fortiori that an estate once vested will not be divested, unless all the events which are to precede the vesting of a substituted devise happen (*e*). And this, it is to be observed, applies as well in regard to events which respect the personal qualification of the substituted devisee, as those which are collateral to him. In every case the original devise remains in force, until the title of the substituted devisee is complete. Thus, if a devise be made to A., to be divested on a given event in favour of persons unborn or unascertained, it will not be affected by the happening of the event described, unless, also, the

(*z*) Ante, p. 1355.
(*a*) 3 A. C. 355 (P. C.)
(*b*) Post, p. 1371.
(*c*) First ed. p. 750.
(*d*) "Devise" is here used by Mr. Jarman in the old-fashioned sense, which includes a bequest of personalty.
(*e*) Co. Lit. 219 b; *Doe* v. *Cooke*, 7 East, 269, ante, p. 618; *Doe* v. *Rawding*, 2 B. & Ald. 441, ante, p. 618; see also *Doe* d. *Usher* v. *Jessep*, 12 East, 288; *Wall* v. *Tomlinson*, 16 Ves. 413; *Vulliamy* v. *Huskisson*, 3 Y. & C. 80; *Aspinall* v. *Audus*, 7 M. & Gr. 912.

object of the substituted gift come in esse, and answer the qualification which the testator has annexed thereto (*f*).

"Thus, in *Harrison* v. *Foreman* (*g*), where a fund was bequeathed to A. for life, and after her decease to P. and S. in equal moieties; and in case of the death of either of them in the lifetime of A., then the whole to the survivor *living at her decease*. Both died in her lifetime; and Sir R. P. *Arden*, M.R., held, that the original gift was not defeated.

"So, in *Sturgess* v. *Pearson* (*h*), it was held, that a gift to a person for life, and after his death to his three children, *or such of them as should be living at the time of his death*, conferred a vested interest on the children, subject to be divested only in favour of those (*i*) who should be living at the prescribed period; so that if all the children died in the lifetime of the tenant for life, the shares of the whole devolved to their respective representatives.

"And the same construction has sometimes been applied in cases, where the intention that the survivors (in whose favour the original gift was divested) should be living at the time of distribution, was less clearly marked.

Devise not divested by contingent clause which failed.

"As, in *Browne* v. *Lord Kenyon* (*j*), where the testatrix gave 1,000*l*. to which she was entitled by virtue of a deed of settlement (and which it seems was charged upon land), upon trust for several persons successively for life, and after the death of the survivor, upon trust to pay the principal to C.; but if he were then dead (which event happened), then to his two brothers in equal shares, *or the whole to the survivor of them*. Both the brothers survived the testator, and died pending the prior life interests. Sir J. *Leach*, V.-C., held, that they took vested interests at the death of the testator, subject to be vested *if one only should survive the tenants for life;* though he intimated a doubt, whether the testatrix did mean that either brother should take any interest without surviving the tenants for life; but his Honor said, the force of the expression was otherwise.

(*f*) Mr. Jarman states the general principle somewhat too broadly. Since he wrote, the decision in *Doe* v. *Eyre* has established a rule of construction which in many cases defeats the intention of testators. See ante, p. 1365, n. (*t*).

(*g*) 5 Ves. 207

(*h*) 4 Mad. 411; *Kimberly* v. *Tew*, 4 D. & War. 139; *Masters* v. *Scales*, 13 Bea. 60; *Peters* v. *Dipple*, 12 Sim. 101; *Clarke* v. *Lubbock*, 1 Y. & C. C. C. 492; *Eaton* v. *Barker*, 2 Coll. 124; *Benn* v. *Dixon*, 16 Sim. 21; *Walker* v. *Simpson*, 1 K. & J. 713; *Marriott* v. *Abell*, L. R. 7 Eq. 478; *Jones* v. *Davies*, 28 W. R. 455; *Penny* v. *Comm. for Railways*, [1900] A. C. 628; *Monck* v. *Croker*, [1900] 1 Ir. 56; *Re Deacon's Trusts*, 95 L. T. 701; and see *Hulme* v. *Hulme*, 9 Sim. 644, stated post, Chap. XXXVIII.

(*i*) *Re Clarke's Trusts*, L. R. 9 Eq. 378.

(*j*) 3 Mad. 410.

"So, in *Belk* v. *Slack* (*k*), where a testator gave the residue of his real and personal estate to trustees, upon trust for A. for life, and after the decease of A. and B. he gave the same to C. and D., to be equally divided between them, share and share alike, *or to the survivor or survivors of them*. C. and D. both died in the lifetime of A. and B.; and it was held that their respective representatives were entitled to the several moieties of the residue."

So, where the gift, after a life interest, is to A., B. and C., "with benefit of survivorship between them" (*l*).

In all these cases the intention of the testator is assumed to be, that the survivorship of the donee under the gift over is part of the contingency on which divesting is to take place (*m*).

Where by the word "survivor" is denoted, not one who shall be living at a defined point of time, but only one of several devisees who outlives the other or others, the construction is of course inapplicable. Thus, in *White* v. *Baker* (*n*), where the gift was to A. for life, and after his death to B. and C. equally, and in case of the death of either of them in the lifetime of A., the whole to the survivor of them: it was held that the word "survivor" referred to the event of one of the two persons, B. and C., surviving the other, and consequently that on the death of B. in the lifetime of A., the whole vested indefeasibly in C., although the latter also died before A.

Other examples of divesting clauses being construed strictly.

The strictness of construction put upon a gift divesting a previous vested interest is further exemplified by *Templeman* v. *Warrington* (*o*), where a testatrix bequeathed her residue in trust

(*k*) 1 Kee. 238. "See also *Bromhead* v. *Hunt*, 2 Jac. & W. 459, and *Jackson* v. *Noble*, 2 Kee. 590, post. These cases seem to overrule *Scurfield* v. *Howes*, 3 B. C. C. 90, where a testator bequeathed 500*l*. to A. for life, and after her decease to the two children of A., share and share alike; but if either of them should die before the decease of their mother, the whole *to the survivor*. Both having died in A.'s lifetime, it was held that the legacy belonged to the representatives of the survivor." (Note by Mr. Jarman, 1st ed. p. 752.) But the question in *Scurfield* v. *Howes* was whether "survivor" meant survivorship as between the children, or survivorship as regards the tenant for life. This question is discussed in Chapter LV., where the later cases of *White* v. *Baker*, 2 D. F. & J. 55, below, and *Re Pickworth*, [1899] 1 Ch. 642, are referred to. Other cases on the effect of a divesting clause in favour of "survivors" are *Littlejohns* v. *Household*, 21 Bea. 29; *Page* v. *May*, 24 Bea. 323 (correcting *M'Donald* v. *Bryce*, 16 Bea. 581); *Cambridge* v. *Rous*, 25 Bea. 415; and see and consider *Gibson* v. *Hale*, 17 Sim. 129.

(*l*) *Wiley* v. *Chanteperdrix*, [1894] 1 Ir. 209.

(*m*) See per Jessel, M.R., in *Jones* v. *Davies*, 28 W. R. at p. 455.

(*n*) 2 D. F. & J. 55. See this case cited again, Chapter LV., where gifts to "survivors" are treated at large.

(*o*) 13 Sim. 267; see also *Bromhead* v. *Hunt*, 2 J. & W. 459; *Gordon* v. *Hope*, 3 De G. and S. 351; and *Terrell* v. *Cooke*, 5 L. J. Ch. N. S. 68; *Re Minor's Trusts*, 28 Bea. 50 (settlement); *Cornick* v. *Wadman*, L. R. 7 Eq. 80. See also *Skey* v. *Barnes*, 3 Mer. 335; *Hope* v. *Potter*, 3 K. & J. 206; *Malcolm* v. *Malcolm*, 21 Bea. 225.

for A. for life, and after her death in trust for her children; but in case there should be but one child at A.'s death then to go to that one, and on failure of issue, as A. should appoint. A. had eleven children, three of whom died in her lifetime; and it was held that as there were more children than one living at A.'s death, the deceased children were not divested of the interests which they took under the primary gift.

And in *Strother* v. *Dutton* (*p*), where a testator gave to his daughter R. 1,000*l*. to be invested and the interest to be paid to her for her life, and at her death to be called in and distributed equally amongst her children; "in case any lawful children are living from son or daughter being dead, the issue of their marriage, that such child or children shall be equally entitled to the part or share their parent would be entitled to if they had been living." R. had several children, of whom four died in her lifetime, without issue; and it was held that the shares which vested in them on their births, were not divested; for the gift in favour of the issue of the children who had issue did not affect the shares of the children who died without leaving issue.

Again, in *Desbody* v. *Boyville* (*q*), a gift over in the event of the legatee marrying without consent, was held to mean marrying without consent during minority, in order not to defeat the prior gift.

The principle of the foregoing authorities prevails not only where the original gift is vested, but also where it is contingent, provided the contingency be not such as to prevent the contingent interest from being transmissible (*r*).

To the principle above stated may also be referred those cases in which it is held that where there is a gift over in the event of the tenant for life dying "without leaving issue," these words are to be construed, "without having had issue," in order not to defeat the vested interests of children who predecease the tenant for life (*s*).

Gift over of annuity fund.

It seems that the principle laid down in the foregoing authorities does not apply to the case of trustees being directed to buy an

(*p*) 1 De G. & J. 675. See also *Baldwin* v. *Rogers*, 3 D. M. & G. 649; *Etches* v. *Etches*, 3 Drew. 447, 2nd point; *Re Bennett's Trust*, 3 K. & J. 280; *Re Searle*, [1905] W. N. 86; but cf. *Stuart* v. *Cockerell*, L. R. 5 Ch. 713; *Read* v. *Gooding*, 21 Bea. 478.

(*q*) 2 P. W. 547.

(*r*) *Waystaff* v. *Crosby*, 2 Coll. 746; *Re Sanders' Trusts*, L. R. 1 Eq. 675 (dissenting from *Willis* v. *Plaskett*, 4 Bea. 208). When contingent interests are transmissible, and when not, is pointed out, ante, p. 1353.

(*s*) *Maitland* v. *Chalie*, 6 Madd. 243; *Treharne* v. *Layton*, L. R. 10 Q. B. 459; *Re Roberts*, [1903] 2 Ch. 200; *Re Cobbold*, ibid. 299. Post, Chapter XLI.

annuity and to pay it to the annuitant, with a gift over in the event of his assigning it: if the annuitant dies before the annuity is purchased the gift fails (*t*).

Gift over defeated by disentailing deed.

In *Richards* v. *Davies* (*u*) a testator devised land to A. J. for life and after her death in trust for her children or their issue as she should appoint, and in default of appointment in trust for [illegible] children and the heirs of their bodies, with a gift over in the [illegible] of her dying without leaving any child her surviving, and in the event of such child or children her surviving and dying without issue: A. J. had a son who died in her lifetime having previously joined with her in executing a disentailing deed: it was held that the son took a vested estate tail, and that the gift over was defeated by the disentailing deed.

Alternative limitations.

Where a gift to several persons or such of them as shall be living at a certain time, is followed by limitations over in case of their dying under alternative circumstances, (for instance, under twenty-one leaving issue, and under twenty-one without issue,) these executory gifts are held to apply only to the shares of objects who are living at the prescribed period; to decide otherwise would be to reduce the words, "or such of them as shall be then living," to silence (*v*).

Mr. Jarman adds (*w*): "The rule that estates vested are not to be divested, unless all the events upon which the property is given over happen, seems to have been generally adhered to, although an absurd and whimsical intention be thereby imputed to the testator," for which he cites *Graves* v. *Bainbrigge* (*x*). But where the original gift is in ambiguous terms which may import contingency, the conclusion that this is their true import is aided by the improbability of the testator intending to make the vesting or indefeasibility of a legacy to a class, depend on whether one or two only of the class survive a given period (*y*).

Leaning against divesting clauses.

An example of the reluctance of the courts to allow a vested interest to be divested, is to be found in the case of gifts to children (*z*). So in *Re Bogle* (*a*), where a testator bequeathed a fund to trustees

(*t*) *Power* v. *Hayne*, L. R. 8 Eq. 262; *Re Draper*, 57 L. J. Ch. 942. Kindersley, V.-C., decided otherwise in *Day* v. *Day*, 22 L. J. Ch. 878. These cases are referred to ante, p. 1146.

(*u*) 13 C. B. N. S. 69, 861.

(*v*) *Howes* v. *Herring*, 1 M'Cl. & Y. 295.

(*w*) First ed. 752, note.

(*x*) 1 Ves. jun. 562.

(*y*) *Shum* v. *Hobbs*, 3 Drew. 93; *Daniel* v. *Gosset*, 19 Bea. 478 (as to which, however, see L. R. 7 Eq. at p. 82); *Selby* v. *Whittaker*, 6 Ch. D. 239. See also post, p. 1430.

(*z*) See *Maitland* v. *Chalie*, 6 Mad. 243, and other cases cited in Chapter XLII.; *Home* v. *Pillans*, 2 Myl. & K. 15, stated in Chapter LVII

(*a*) 78 L. T. 457.

upon trust for A. for life, and after his decease, if he should have three or more children who should attain twenty-one, for his executors or administrators, and if he should have two such children, as to a moiety for his executors or administrators, and as to the other moiety for X.; and if he should die leaving no child or only one child who should attain twenty-one, then as to the whole fund upon trust for X. A. had two children who attained twenty-one; it was held that he was absolutely entitled to the fund, "leaving" being construed "having had."

Several cases have been decided on gifts over to take effect in the event of the prior legatee dying unmarried, but in most of them no question of divesting arose, as the prior legatee had merely a life interest (*aa*).

Devises vested, notwithstanding expressions of seeming contingency.

IV.—Devises construed to be vested, notwithstanding Expressions importing Contingency.—Mr. Jarman continues (*b*): "The construction which reads words that are seemingly creative of a future interest, as referring merely to the futurity of possession occasioned by the carving out of a prior interest, and as pointing to the determination of that interest, and not as designed to postpone the vesting, has obtained, in some instances, where the terms in which the posterior gift is framed import contingency, and would, unconnected with and unexplained by the prior gift, clearly postpone the vesting. Thus, where a testator devises lands to trustees until A. shall attain the age of twenty-one years, and if or when he shall attain that age, then to him in fee, this is construed as conferring on A. a vested estate in fee-simple, subject to the prior chattel-interest given to the trustees, and, consequently, on A.'s death, under the prescribed age, the property descends to his heir-at-law; though it is quite clear that a devise to A., if or when he shall attain the age of twenty-one years, standing isolated and detached from the context, would confer a contingent interest only (*c*).

(*aa*) *Doe* d. *Everett* v. *Cooke*, 7 East. 269; *Re Sanders' Trusts*, L. R. 1 Eq. 675; *Crosthwaite* v. *Dean*, L. R. 5 Eq. 245; *Re King*, 62 L. T. 789; *Re Chant*, [1900] 2 Ch. 345. See Chapter XXXV., ante, p. 1285 (as to the meaning of "unmarried"), and Chapter XXXVI.

(*b*) First ed. p. 733.

(*c*) *Grant's Case*, cited 10 Rep. 50; Sugd. Law of Prop. 291; *Alexander* v. *Alexander*, 16 C. B. 59; *Love* v. *Love*, 7 L. R. Ir. 306; *Re Francis*, [1905] 2 Ch. 295; and per James, L.J., *Andrew* v. *Andrew*, 1 Ch. D. at p. 417. However, the decision of this last point was expressly avoided by the judges in *Phipps* v. *Ackers*, 9 Cl. & F. 583; see *Tapscott* v. *Newcombe*, 6 Jur. 750; and *Simmonds* v. *Cock*, 29 Bea. 455 (stated below). As to gifts to classes, see *Browne* v. *Browne*, 3 Sm. & G. at p. 587; *Judd* v. *Judd*, 3 Sim. 525; *Bull* v. *Pritchard*, 1 Russ. 213, and other cases cited post, p. 1423 et seq.

Boraston's Case.

" A leading authority for this construction is *Boraston's Case* (*d*), which was as follows:—A testator devised land to A. and B. for eight years, and after the said term, the land to remain to his executors, for the performance of his will, till such time as H. should accomplish his age of twenty-one years; and *when* the said H. should come to his age of twenty-one, then to him, his heirs and assigns for ever. H. died under twenty-one. It was contended, that the remainder was not to vest in him, unless he attained the prescribed age; but the Court held it to be vested immediately, the case being, it was said, nothing else in effect than a devise to the executors, till H. attained the age of twenty-one, remainder to H. in fee; and that the adverbs of time, *when*, &c., do not make any thing necessary to precede the settling (i.e., the vesting) of the remainder, but merely expressed the time when it shall take effect in possession.

Word "when" referred to determination of prior estate.

" The most recent case of this class is *Doe* d. *Cadogan* v. *Ewart* (*e*), where a testator devised his real estate to trustees, upon trust for his wife during widowhood, and after her decease or marriage again, upon trust to apply the rents towards the maintenance of his daughter, *until she should attain the age of twenty-five years, and from and after her attaining that age*, then upon trust for his said daughter, her heirs and assigns for ever; but in case his said daughter should depart this life without leaving issue, then the testator devised the said real estate over. The daughter, after the decease of the widow, and before she attained the age of twenty-five years, suffered a common recovery; and it was held, that such recovery was effectual to acquire the equitable fee simple, she having a *vested* estate tail in equity at the time.

Words "from and after" similarly construed.

" It is observable, that in the greater number of the cited cases, the prior interest was created for the benefit of the ulterior devise; but this circumstance does not seem to vary the principle, the material fact, and that which constitutes the special characteristic of this class of cases, is, that there is a prior interest extend-

Remark on preceding cases.

(*d*) 3 Rep. 16, 19; see also *Manfield* v. *Dugard*, 1 Eq. Ca. Ab. 195, pl. 4, Gilb. Eq. Rep. 36; *Taylor* v. *Biddall*, 2 Mod. 289; *Doe* d. *Morris* v. *Underdown*, Willes, 293; *Goodtitle* d. *Hayward* v. *Whithy*, 1 Burr. 228; *Denn* d. *Satterthwaite* v. *Satterthwaite*, 1 W. Bl. 519; *Doe* d. *Wheedon* v. *Lea*, 3 T. R. 41; *Doe* d. *Wight* v. *Cundall*, 9 East, 400; *Edwards* v. *Symons*, 6 Taunt. 213; *Goodright* d. *Revell* v. *Parker*, 1 M. & Sel. 692 (leaseholds); *Warter* v. *Hutchinson*, 5 Moore, 143, 2 B. & Bing. 349, 3 D. & Ry. 58, 1 B. & Cr. 721; *Jackson* v. *Marjoribanks*, 12 Sim. 93; *Milroy* v. *Milroy*, 14 ib. 48; *Parkin* v. *Knight*, 15 ib. 83; *James* v. *Lord Wynford*, 1 Sm. & Gif. 40; *Re Mottram*, 10 Jur. N. S. 915; *Smith* v. *Spencer*, 6 D. M. & G. 631; but see *Bastin* v. *Watts*, 3 Bea. 97, where, however, the point was not argued; *Blagrove* v. *Hancock*, 16 Sim. 371, where the V.-C. did not notice the question.

(*e*) 7 Ad. & El. 636.

over the whole period for which the devise in question is postponed. It is therefore in effect a devise of the whole estate *instanter* to B., with the exception of a partial interest carved out for some (no matter what) purpose."

Remainder where freehold may be in abeyance.

Mr. Fearne points out, as an exception to the general rules relating to contingent remainders, the case of land being limited to A. for 80 years, if B. so long live, with remainder over after the death of B. to C. in fee: here it is possible that B. may not die until after the expiration of the term, but this event is so improbable that the remainder to C. is considered as vested (*f*). If, however, the term is a short one, as for twenty-one years, it seems that the remainder is contingent (*g*).

Words of apparent contingency referred to the possession merely.

Mr. Jarman continues (*h*): "Another exemplification of the principle in question occurs in those cases where a testator, after giving an estate or interest for life, proceeds to dispose of the ulterior interest in terms which, literally construed, would seem to make such ulterior interest depend on the fact of the prior life interest taking effect; in such cases, it is considered, that the testator merely uses these expressions of apparent contingency, as descriptive of the state of events, under which he conceives the ulterior gift will fall into possession; (the supposition being, that the successive interests will take effect in the order in which they are expressed), and not with the design of making the vesting of the posterior gift depend on the fact of the prior tenant for life happening to live to become entitled in possession.

"Thus, in the case of *Webb* v. *Hearing* (*i*), where a testator devised to his son F. after the death of his wife; *and if his three daughters, or either of them, should overlive their mother and F., their brother, and his heirs*, (which was construed to mean heirs of his body,) they to enjoy the same houses for the term of their lives, remainder to R. and J.; it was held, that the remainder to R. and J. was not contingent on the event of the daughters surviving their mother and brother; the words only shewed when it should commence."

There are other authorities illustrating the same principle (*j*).

(*f*) Fearne, C. R. 21, citing *Napper* v. *Sanders*, Hutt. 118; *Lord Derby's Case*, Lit. Rep. 370.

(*g*) Ib.; *Weale* v. *Lower*, Pollex, at p. 67; *Beverley* v. *Beverley*, 2 Vern. 131.

(*h*) First ed. p. 735.

(*i*) Cro. Jac. 415. "According to the facts represented, it does not appear that the remainder, if contingent, was defeated, as only two of the daughters are stated to have died in the lifetime of their brother." (Note by Mr. Jarman.)

(*j*) Anon. 2 Vent. 363; *Pearsall* v. *Simpson*, 15 Ves. 29; *Massey* v. *Hudson*, 2 Mer. 130, all stated and commented on by Mr. Jarman (see the

CHAP. XXXVII.

The case of *Franks* v. *Price* (*k*) presents an instance both of an apparent and of a real contingency in the same will. There a testator devised to A., B., &c., for their lives, with remainder to M. and N. for their lives, share and share alike; "and in case either of them should, after the deaths of A., B., &c., die without issue," then to the survivor for life; and if M. "should, after the deaths of A., B., &c., die before N., leaving issue male of his body," then one moiety of the estates was to go as therein mentioned; "and in case of such death in manner aforesaid of M. before N., and M.'s leaving issue male," the testator gave one moiety of his personal estate to be laid out in land, to be conveyed and settled to the uses thereinbefore directed of his real estates, "on the issue of M. on the contingency aforesaid." The testator made a similar disposition, mutatis mutandis, of the other moiety, in case of the death of N. after the deaths of A., B., &c., leaving issue male. Lord Langdale thought that the words "after the deaths of A., B., &c.," did not import contingency, but were merely words of reference, shewing that the gifts then in course of expression were subject to the prior gifts, and were not to have effect in possession till those prior gifts became satisfied or inoperative; but from the words used with reference to the event of M. dying before N., leaving issue male, and with reference to the event of N. dying before M., leaving issue male, and even from the care taken to repeat the words as applied to the case of M. and N. respectively, it appeared to him that the words must have their natural meaning, and be taken to provide only for the precise cases which were expressly described.

Maddison v. *Chapman.*

The result of the authorities is thus summed up by Sir W. P. Wood, V. C. (*l*): "Where there is a limitation over, which, though expressed in the form of a contingent limitation, is, in fact, dependent upon a condition essential to the determination of the interests previously limited, the court is at liberty to hold that, notwithstanding the words in form import contingency, they mean no more, in fact,

earlier editions of this work). See also *Key* v. *Key*, 4 D. M. & G. 73; *Wright* v. *Wright*, 21 L. J. Ch. 775; *Walmsley* v. *Vaughan*, 1 De G. & J. 114; *Tuer* v. *Turner*, 18 Bea. 185; *Re Betty Smith's Trusts*, L. R. 1 Eq. 79; *Bolton* v. *Bolton*, L. R. 5 Ex. 145; *Edgeworth* v. *Edgeworth*, L. R. 4 H. L. 35; *Leadbeater* v. *Cross*, 2 Q.B.D. 18; *Re Dundalk, &c., Railway*, [1898] 1 Ir. 219. In *M'Lachlan* v. *Taitt*, 2 D. F. & J. 449, the posterior gift was held to vest immediately, notwithstanding a direction that the objects should "become beneficially entitled" at the death of the tenant for life. Compare these and the preceding cases with *Holmes* v. *Cradock*, 3 Ves. 317, stated post; and see *Davis* v. *Norton*, 2 P. W. 390, first point.

(*k*) 3 Bea. 182, 5 Bing. N. C. 37, 6 Scott, 710.

(*l*) *Maddison* v. *Chapman*, 4 K. & J. 709; 3 De G. & J. 536; *Chellew* v. *Martin*, 21 W. R. 671 (leaseholds).

than that the person to take under the limitation over is to take subject to the interests so previously limited. I apprehend the true way of testing limitations of that nature is this: Can the words, which in form import contingency, be read as equivalent to 'subject to the interests previously limited'? Take the simplest case: a limitation to A. for life, remainder to B. for life, and upon the decease of B., 'if A. be dead,' then to C. in fee. There the limitation to C. is apparently made contingent upon the event of A.'s dying in the lifetime of B. Nevertheless, inasmuch as the condition of A.'s death is an event essential to the determination of the interest previously limited to him, the Court reads the devise as if it were to A. for life, remainder to B. for life, and on B.'s death, *subject to A.'s life interest (if any)*, to C. in fee. That is an intelligible principle of construction; but in order to its application, the condition upon which the limitation over is made dependent must involve no incident but what is essential to the determination of the interests previously limited. For instance, if the limitation be to A. for life, remainder to B. for life, 'and if, at the death of B., A. shall have died under the age of twenty-one,' or 'and if, at the death of B., A. shall have died without leaving children, then to C. in fee,' here in either case room is left for contingency. The condition of A.'s dying in the first case under twenty-one, and in the second, without leaving children, is an event which may or may not have happened when the life-estates in A. and B. are determined; and until it has happened, the limitation over is contingent, not merely in appearance, but actually. To these cases, therefore, the principle of construction I have referred to would obviously not apply." The principle thus laid down was applied in *Re Shuckburgh's Settlement* (*m*).

Devise, if A. shall attain twenty-one, contingent;

—otherwise, if a limitation over in alternative event.

Mr. Jarman continues (*n*): "Although (as already hinted) there is no doubt that a devise to a person, if he shall live to attain a particular age, standing alone, would be contingent; yet if it be followed by a limitation over in case he die under such age, the devise over is considered as explanatory of the sense in which the testator intended the devisee's interest in the property to depend on his attaining the specified age, namely, that at that age it should become absolute and indefeasible; the interest in question, therefore, is construed to vest *instanter* (*o*).

(*m*) [1901] 2 Ch. 794

(*n*) First ed. p. 738.

(*o*) "Even independently of this particular rule, it is obvious that a limitation over disposing of the property to another, in case of the prior devisee

Edwards v. *Hammond.*

"Thus, in *Edwards* v. *Hammond* (*p*), where A. surrendered the reversion in fee in customary lands to the use of himself for life, and, after his decease, to the use of his son H. and his heirs and assigns for ever, *if it should happen that he should live until he attained the age of twenty-one years*, provided always, and under the condition, nevertheless, that *if H. died before he attained that age*, then the premises to remain to A. in fee; it was held, that though upon the first words this seemed to be a condition precedent, yet upon all the words taken together it was an immediate devise to H., subject to be defeated upon a condition subsequent, if he did not attain the age of twenty-one years.

To A. when he attains twenty-one, and if he die before, then over.

"The same construction prevailed in the case of *Doe* d. *Hunt* v. *Moore* (*q*), where the devise was to M., '*when* he attains the age of twenty-one years,' to hold to him, his heirs and assigns for ever; *but in case he should die before he attained* the age of *twenty-one* years, then over; Lord *Ellenborough* observed, that this being an immediate devise, and not, as in some of the other cases, a remainder, formed no substantial ground of distinction. The estate vested immediately, whether there was any particular interest carved out of it to take effect in possession in the meantime or not."

So a legacy to the testator's son A. when he attains twenty-five with a gift over if he dies before attaining twenty-one is vested on A. attaining twenty-one (*qq*).

Devise to a class.

The rule applies where the devise is to a class (*r*).

Effect where another event is associated.

The rule, it seems, applies not only where the devise over is limited, so as to take effect simply and exclusively on the failure of the event on which the prior devise is apparently made contingent, but also where some other event is associated.

Thus, in *Bromfield* v. *Crowder* (*s*), the devise was to certain persons for life, and at the decease of them or the longer liver of them to J. if he should live to attain the age of twenty-one years; and in case he died before he attained that age, and his brother C. should survive him, then over. On case from the Rolls, the Court

dying under certain circumstances, always supplies an argument in favour of the prior devisee taking an immediately vested interest; *Smither* v. *Willock*, 9 Ves. 233; *Peyton* v. *Bury*, 2 P. W. 626; *Murkin* v. *Phillipson*, 3 My. & K. 257; though the contrary is sometimes contended." (Note by Mr. Jarman.) See per Wood, V.-C., L. R. 3 Eq. at p. 322.

(*p*) 3 Lev. 132, 2 Show. 398, and stated from the record, 1 B. & P. N. R. 324, n.

(*q*) 14 East, 601. See also *Greene* v. *Potter*, 2 Y. & C. C. C. 517; *L'Estrange* v. *L'Estrange*, 25 L. R. Ir. 399.

(*qq*) *Re Gunning's Estate*, 13 L. R. Ir. 203.

(*r*) *Doe* d. *Roake* v. *Nowell*, 1 M. & Sel. 327, 5 Dow. 202; see also *Doe* d. *Dolley* v. *Ward*, 9 Ad. & El. 582, 1 P. & Dav. 568.

(*s*) 1 B. & P. N. R. 313; affirmed in D. P., see 14 East, 601, Sugd. Law of Prop. 286.

of Common Pleas certified that J. took a vested fee. Sir J. Mansfield, C.J., relied much on the authority of *Edwards* v. *Hammond*, which he said was on all fours with this. So that if either event happens, the prior devise becomes absolute (*t*).

Doctrine of preceding cases applicable to executory trusts.

The construction also obtains where the lands are devised to trustees, upon trust to convey to limitations of the nature of those under consideration. Thus, in *Phipps* v. *Ackers* (*u*), where a testator devised his real estates to trustees, upon trust to convey certain lands to his godson A. when and so soon as he should attain his age of twenty-one years; but in case he should depart this life before he should attain the said age of twenty-one years, without leaving issue of his body, then the lands in question were to go according to the disposition of his residuary estate. It was held by the House of Lords (affirming the decision of Shadwell, V.-C.), on the authority of the preceding cases, that A. took an immediate interest under this devise, subject to being divested in the event of his dying under twenty-one without leaving issue.

Rule as laid down in *Phipps* v. *Ackers*.

This decision is generally treated as the leading case on the question; the principle on which it was decided is, that the gift over in the event of the devisee dying under twenty-one shews the meaning of the testator to have been, that the first devisee should take whatever interest the party claiming under the gift over is not entitled to, which gives the first devisee the immediate interest, subject only to the chance of its being divested on a future contingency (*v*).

Personal property.

The rule applies to personal property and to residuary gifts (*w*).

Whether it is applicable where the event is unconnected with the age of the devisee.

In *Finch* v. *Lane* (*x*) the rule was applied to a case where the apparent contingency was, not the devisee attaining a particular age, but his surviving the person to whom a prior life estate was devised. The devise was to the testator's wife for life, with remainder, as to part, to his brother for life, and from and immediately after the death of the wife, subject to the brother's interest in the part, to M. in fee if she should be living at the death of the wife, but if M. should die before the wife without leaving issue, then to other persons: M. died before the widow, but left issue; and it was held by Lord Romilly, that

(*t*) *Re Thomson's Trusts*, L. R. 11 Eq. 146 (legacy). Cf. *Malcolm* v. *O'Callaghan*, 2 Mad. 349.

(*u*) 5 Sim. 44, 9 Cl. & F. 583; *Stanley* v. *Stanley*, 16 Ves. 491. So where personal estate is directed to be invested in the purchase of land, *Jackson* v. *Marjoribanks*, 12 Sim. 93.

(*v*) See *Bull* v. *Pritchard*, 5 Ha. 567.

(*w*) *Whitter* v. *Bremridge*, L. R. 2 Eq. 736.

(*x*) L. R. 10 Eq. 501.

CHAP. XXXVII.

the case was governed by *Phipps* v. *Ackers*, and that M. took a vested remainder.

On the other hand, in *Doe* d. *Planner* v. *Scudamore* (*y*), where a testator devised to his brother A. for life, and after the death of A., to B. in fee, in case she should survive A., but not otherwise, and . case B. should die before A., then to A. in fee; it was held in C. P. that the remainder to B. was contingent, and that it had been destroyed by a fine levied by A. *Edwards* v. *Hammond* (which was the only case of this class then decided) was held not to be applicable, on the ground, stated by Lord Eldon, C.J., that it was there "matter of necessary implication that the estate should vest in the eldest son during his infancy, for whatever might be the construction of the prior words it was clearly expressed that, unless the son died before twenty-one, the estate should not remain to the surrenderor" (*z*).

But in *Bromfield* v. *Crowder* it was expressly declared that the circumstance of the devise over being in that case to a stranger made no difference (*a*); for it was clear that the testator meant no one to take his estate unless in the event of J. dying under twenty-one. And this opinion is borne out by the other decisions. At all events, the distinction taken by Lord Eldon was independent of the nature of the contingency; and the rule of construction appears to be as reasonably applicable where the contingency is that of the devisee being alive when the remainder naturally falls into possession, as where it is the attainment by him of the age which presumably in the testator's mind qualifies him for the possession and legal control.

It will have been seen, however, that in *Finch* v. *Lane* the devisee was an ascertained individual. Where this is not the case, and the contingency does not exactly fit on to the prior interest, there is greater difficulty in applying the rule. Thus in *Price* v. *Hall* (*b*) where after a life estate to A. the remainder was to the children of B. if he (B.) should leave any, and if he left none, over: A. died before B.; and it was held by Sir W. P. Wood, V.-C., that the case was not within the rule, but rather within that exemplified by *Festing* v. *Allen* (*c*). The result was that the remainder was contingent, and failed for want of a particular estate to support it.

(*y*) 2 B. & P. 289.

(*z*) Vide ante, p. 1377. But this ground, or a nearly identical one, would have existed also in *Doe* v. *Scudamore*, if A., who was the testator's heir, was heir presumptive at the date of the will.

(*a*) 1 B. & P. N. R. at p. 325.

(*b*) L. R. 5 Eq. 399.

(*c*) Post, p. 1382.

To return to the general doctrine laid down in *Edwards* v. *Hammond* and other cases above cited (*cc*).

"It is impossible," as Mr. Jarman points out (*d*), "to hold the devise to vest immediately, by the application of the doctrine in question, in opposition to an express declaration that the devisees shall not take vested interests until a certain age, especially if even the devise over, which supplies the argument for neutralising this clause, is itself not without expressions which favour the suspension of the vesting.

Construction controlled by express declaration that devisees shall take vested interests.

"Thus, where (*e*) a testator devised a certain estate to his wife during her widowhood, remainder to A. (his nephew) for life, remainder to the children of A. in fee, as tenants in common, and if there should be no child of A. living at his wife's death or second marriage, then over; and, by a codicil of even date, the testator directed that neither A. nor any issue of A., should, *by virtue of his will, take or be considered as entitled to a vested interest, unless they should respectively attain the age of twenty-one years;* and that, in case of the death of any of such children under such age, then the share of such child or children so dying should go to the surviving brothers and sisters, or brother or sister, their, his or her heirs and assigns, *upon their respectively attaining the age of twenty-one years.* It was contended that the testator, by the clause respecting the vesting, intended not to postpone the vesting, but merely to declare when the shares should become absolute and indefeasible, as was shewn by the survivorship clause, which otherwise was superfluous, and, accordingly, that the children took vested interests, subject to be divested on their dying under twenty-one. The Court of Exchequer, however (on a case from Chancery), certified an opinion that the vesting was postponed until the age of twenty-one. Sir L. *Shadwell*, V.-C., on confirming the certificate, observed that the concluding words shewed that the testator had the same intention at the end as at the beginning of the instrument (*f*).

Declaration postponing earlier vesting, by fixing a future period.

"The rule of construction under consideration, is also excluded by a declaration, that the devisee shall take a vested interest at the future period, as such a declaration obviously carries with it an implied negation of an earlier period of vesting (*g*).

(*cc*) Ante, p. 1376.

(*d*) First ed. p. 741.

(*e*) *Russel* v. *Buchanan*, 7 Sim. 628, 2 Cr. & Mee. 561; compare *Bland* v. *Williams*, 3 My. & K. 411, stated post, 1428.

(*f*) Compare *Re Wrightson*, [1904] 2 Ch. 95, referred to post, p. 1448.

(*g*) *Glanvill* v. *Glanvill*, 2 Mer. 38. In *M'Lachlan* v. *Taitt*, 2 D. F. & J. 449, a declaration that children should "become beneficially entitled" on the death of their parent, was construed to

Rule of preceding cases not applicable where condition is to be performed by devisee.

"Nor, it seems does the rule apply where the attainment of the prescribed age is not the only circumstance by which the testator marks the time at which it shall be determined whether the estate shall vest or finally become liable to be divested; but there is a preliminary act to be done by the devisee, in the nature of a condition precedent before his title accrues." In support of this contention. Mr. Jarman cites *Phipps* v. *Williams* (*h*); in that case the residue of the real estate was devised to trustees, upon trust to accumulate the rents until C. should attain the age of twenty-four years, and then to convey unto C., upon his securing certain annuities (therein bequeathed) to the satisfaction of the trustees, the legal estate in the testator's freehold, copyhold and leasehold hereditaments; but in case the said C. should depart this life before he attained the age of twenty-four years, without leaving issue, then upon certain other trusts. Sir L. Shadwell, V.-C., held, upon the principle above suggested, that the devisee derived no interest under the trust, until the attainment of the prescribed age, and the performance of the condition. Upon appeal, Lord Brougham held, that as the terms of the devise involved no more than the law would have implied, namely, that the devisee must take subject to the annuities, there was no condition precedent, or indeed subsequent either: he admitted, however, that, if there had been, it would have made a great difference in the argument (*i*).

Whether there need be an express gift over.

But though the devise over has been generally considered as the characteristic of these cases, yet the construction was adopted in *Snow* v. *Poulden* (*j*), where there was no such devise, the words of the will being, "The rest of my property to be invested in land, and given to my grandson; when of age, to have a commission in the army regulars at twenty-one; to remain in the army seven years, and not to be of age to receive this until he attains his twenty-fifth year, and to be entitled to him and his male heirs, bearing the name of F. for ever." Lord Langdale, M.R., held, that the grandson took an immediate vested interest as tenant in tail in the land to be purchased, subject to be divested if he should not attain twenty-five; and, consequently, that the rents were applicable to his benefit during his minority.

No reasons are reported; but the express direction that the property should be "given to" the grandson may well have been taken to constitute an immediate devise independently of

refer to possession only and not so as to postpone vesting. See also on this point, ante, p. 1354.

(*h*) 5 Sim. 44.
(*i*) *Ackers* v. *Phipps*, 3 Cl. & F. 665.
(*j*) 1 Kee. 186.

the subsequent clause postponing the right of "receipt." But in the two cases next stated there was no such independent gift, nor any express gift over on death before the prescribed age (*k*). Thus, in *Simmonds* v. *Cock* (*l*) the testator gave the rents and income of his real and personal estate to his wife for life, and after her death he gave all his real and personal estate unto and to the use of his sons A., B., and C. and his granddaughter D., provided she lived to attain the age of twenty-one years, their respective heirs, &c., absolutely. It was held that the share of D. vested in her immediately, to be divested if she died under age. A devise to A. "provided she marries my nephew on or before attaining twenty-one," or "provided she goes to Rome before she attains twenty-one," would, said the M.R., give a vested interest, subject to a condition subsequent: why a devise to A. "provided she lived to attain twenty-one" should not also be a condition subsequent he could not understand.

Simmonds v. *Cock.*

Again, in *Andrew* v. *Andrew* (*m*), where a testator devised lands to his son T. for life, "and from and after his decease unto his eldest son if he shall have arrived at the age of twenty-one, or so soon as he shall arrive at that age; and in default of his having a son, then to the eldest son of the testator's son H. for ever"; it was held by Sir C. Hall, V.-C., that nothing vested in the eldest son of T. until he attained the prescribed age, because there was no express gift over on his dying under that age. The intermediate rents therefore were undisposed of. But this was reversed by the L.JJ., who held that T.'s eldest son took an estate in fee subject to being divested if he died under twenty-one. The decision seems to have turned partly on the intention of the testator to make a complete settlement of the property, and partly on the use of the expression "from and after the death" (*n*). *Alexander* v. *Alexander* (*o*) was not cited. There, a testator by will, in 1813, devised his "freehold estate at V." to his son T. for life, "and from and immediately after his decease" the testator devised "the same unto the second son of the body of my son T. on his attaining the age of twenty-one years, but in default of there being a second son of the body of my son T., then I devise them to the second son of the body of my son C. on his attaining

Andrew v. *Andrew.*

(*k*) And see *Peard* v. *Kekewich*, 15 Bea. 166; *Attwater* v. *Attwater*, 18 Bea. 330.

(*l*) 29 Bea. 455.

(*m*) 1 Ch. D. 410. See also *Jull* v. *Jacobs*, 3 Ch. D. 703, 713.

(*n*) As to the force of these words, see *Long* v. *Ovenden*, 16 Ch. D. 691; *Re Jobson*, 44 Ch. D. 154, where *Andrew* v. *Andrew* was commented on by North, J.

(*o*) 16 C. B. 59.

CHAP. XXXVII.

twenty-one, but in default of there being a second son of the body of my son C. then I devise the same to the second daughter of my son C. on her attaining the age of twenty-one, but in default of there being a second daughter of my son C., then to the right heirs of my son T." Here the limitations appear as plainly as in *Andrew* v. *Andrew* to have been intended to make a complete settlement of the property, and the gift to the second son was expressed to be, "from and after" the death of the tenant for life. But it was held that the devise to the second son of T. was a contingent remainder, not a vested estate in fee defeasible on his death under the prescribed age.

In *Re Johnson* (*p*) there was a devise to trustees upon trust to permit E. to receive the rents during her life, and from and after her decease, upon trust for her children equally "on their respectively attaining the age of twenty-one years"; the will contained no direction as to the application of rents after the death of E., and during the minorities of the children: it was held by North, J., that the children did not take vested interests till they attained the prescribed age.

Distinction between gift to children "at" twenty-one, and one to children "who attain" twenty-one.

On the whole, it may be said that the more recent cases shew little of the indisposition to extend the doctrine of *Doe* v. *Moore* which has sometimes been professed (*q*), and which had in the meantime led to the establishment of a very material distinction between a devise to an individual or to a class, if or when he or they attain twenty-one, with a gift over on death under that age, and a devise to "such of the children of A. as shall attain twenty-one," or "to the first son of A. who shall attain twenty-one" (*qq*) or the like, with a corresponding gift over. Thus in *Festing* v. *Allen* (*r*), where there was a devise to the use of the testator's granddaughter for life, and from and after her decease to the use of her children who should attain the age of twenty-one years, if more than one, in equal shares as tenants in common in fee, and if but one, then to that one in fee; and for want of such issue, over. It was contended on the authority of *Phipps* v. *Ackers*, that the children took vested estates in fee, subject only to be divested partially in case of other children coming into being, or wholly in case of death under twenty-one. But Rolfe B., who delivered the judgment of the

Festing v. *Allen*.

(*p*) 44 Ch. D. 154. The property was leasehold.

(*q*) 9 Cl. & Fin. at p. 592.

(*qq*) See *Stephens* v. *Stephens*, Ca. t. Talbot, 228; *Duffield* v. *Duffield*, 3 Bli. N. S. 260.

(*r*) 12 M. & W. 279, 5 Hare 573.

court, said that in *Phipps* v. *Ackers*, and the cases there referred to, there was an absolute gift to some ascertained person or persons, and the Courts held that words accompanying the gift, though apparently importing a contingency or contingencies, did in reality only indicate certain circumstances on the happening or not happening of which the estate previously vested should be divested and pass from the first devisee into some other channel; but that here there was no gift to any person who did not answer the whole of the requisite description, and no one who had not attained twenty-one was an object of the testator's bounty, any more than a person who was not a child of the granddaughter. Even if there were no authority establishing this to be a substantial objection, the Court would not feel inclined to extend the doctrine of *Phipps* v. *Ackers* and *Pipps* v. *Ackers*, to cases not precisely similar. But in fact [illegible] in a great measure formed the ground of the decision in *Dungannon* v. *Smith* (*s*) in the House of Lords, and *Leake* v. *Robinson* it was therefore decided that, as no child of the granddaughter had attained twenty-one when her estate determined, the remainder was defeated for want of a particular estate to support it (*t*).

Again, in *Bull* v. *Pritchard* (*u*), where a testator devised his freehold estates to trustees, in trust for his daughter M. during her life, for her separate use, and after her decease, he directed his trustees to convey the said estates "unto and equally between and among all and every the child and children of his said daughter M. who should live to attain the age of twenty-one years," in fee as tenants in common; "and, if there should be but one such child, then to such one child" in fee; "but, if there should be no such child or children, or, being such, all of them should die under the age of twenty-three years without lawful issue, then upon trust" to convey to the persons therein named: Sir J. Wigram, V. C., said there were two classes of cases; one, where the devise

(*s*) 1 D. & Cl. 268, 314, 3 Bl. N. S. 260. See also *Newman* v. *Newman*, 10 Sim. 51; *Wills* v. *Wills*, 1 D. & War. 439.

(*t*) But as there were infant children who might attain twenty-one, the event on which the alternative remainder was limited had not happened, so that this remainder also failed. See *Astley* v. *Micklethwait*, 15 Ch. D. 59. See now 40 & 41 Vict. c. 33, stated post, Chapter XXXVIII.

(*u*) 5 Hare, 567. See also per Sir W. Grant, *Leake* v. *Robinson*, 2 Mer. at p. 386; and *Stead* v. *Platt*, 18 Bea. 50; *Holmes* v. *Prescott*, 33 L. J. Ch. 264, 10 Jur. N. S. 507 (in which Wood, V.-C., examined the authorities); *Perceval* v. *Perceval*, L. R. 9 Eq. 386 (same will); *Rhodes* v. *Whitehead*, 2 Dr. & Sm. 532; *Price* v. *Hall*, L. R. 5 Eq. 399; *Patching* v. *Barnett*, 28 W. R. 886; *Re Eddels' Trusts*, L. R. 11 Eq. 559. As to *Brackenbury* v. *Gibbons*, 2 Ch. D. 417 see next chapter. These cases have virtually overruled *Browne* v. *Browne*, 3 Sm. & Gif. 568; and *Riley* v. *Garnett*, 3 De G. & S. 629.

CHAP. XXXVII.

was to a party at a given age, and the property was given over if he died under that age; the other, where the description of the devisee was such as to make the given age part of that description; and he held that this case fell under the second class.

But there are no words so plain but they may be controlled by the context (*v*): and in *Muskett* v. *Eaton* (*w*), where a testatrix devised a farm to A. for life, and in the event of his leaving a lawful son born, or to be born in due time after his decease, who should live to attain the age of twenty-one years, unto such son and his heirs if he should live to attain the age of twenty-one years; but if A. should die without leaving a son who should live to attain the age of twenty-one years, then, after the death of A., to B. and his heirs. A. died, leaving an infant son; and Sir G. Jessel, M.R., held that the case was not within the rule in *Festing* v. *Allen*. He said, "The testatrix must be taken to have known the course of nature, and if the child had been born within nine months after the death of the tenant for life, he could not have been twenty-one at the time when the particular estate determined. It is quite impossible that she could have intended the attainment of the age of twenty-one to be part of the description of the person to take. Therefore, in my opinion, the son takes a vested estate subject to be divested in the event of his dying under twenty-one."

Devises after payment of debts.

It was at one period doubted whether a devise to a person *after* payment of debts was not contingent until the debts were paid; but it is now well established that such a devise confers an immediately vested interest, the words of apparent postponement being considered only as creating a charge (*x*).

General remark on preceding cases.

Mr. Jarman remarks (*y*): "The several preceding classes of cases clearly demonstrate that the Courts will not construe a remainder to be contingent, merely on account of the inaccurate and inartificial use of expressions importing contingency, if the nature of the limitations affords ground for concluding that they were not used with a view to suspend the vesting. Such cases may be considered, however, as exceptions to the general rule; and,

(*v*) Per Wood, V.-C., *Holmes* v. *Prescott*, 33 L. J. Ch. at p. 271.

(*w*) 1 Ch. D. 435; *Sulley* v. *Barber*, 59 L. T. 824.

(*x*) *Barnardiston* v. *Carter*, 1 P. W., 505, 509, 3 B. P. C. Toml. 64; *Hathorn* v. *Foster*, 9 T. L. R. 497; 10 T. L. R. 64; see also *Bagshaw* v. *Spencer*, 1 Ves. sen. 142; and some very able opinions stated 1 Coll. Jur. 214 Those of Lord Eldon (then Sir John Scott), and Mr Fearne, are particularly worthy of attention.

(*y*) First ed. p. 743.

agreeably to the maxim, exceptio probat regulam, they confirm, rather than oppose, the doctrine that devises limited in clear and express terms of contingency do not take effect, unless the events upon which they are made dependent happen, which cases we now proceed to consider."

Estates limited in clear terms of contingency.

V.—Devises contingent by express Terms, notwithstanding absurd Consequences.—" The first remark suggested by this class of cases," as Mr. Jarman points out (*z*), " is, that an estate will be construed to be contingent, if clearly so expressed, however absurd and inconvenient may be the consequences to which such a construction may lead, and however inconsistent with what it may be *conjectured* would have been the testator's actual meaning, if his attention had been drawn to those consequences.

" Thus, in *Denn* d. *Radclyffe* v. *Bagshaw* (*a*), where the devise was to the testator's only daughter M. for life, and after her decease to the first son of her body, *if living at the time of her death*, and the heirs male of such first son, remainder to the other sons successively in tail, in like manner, remainder to testator's nephew in tail. M. had issue an only son, *who died in her lifetime*, leaving issue. Whether such issue was entitled under the devise in tail (*b*) to this first son, was the question. It was contended for him, that the testator must have intended that the nephew, who was otherwise amply provided for by him, should not take until failure of all the descendants of his daughter; and that to accomplish this intention, the Court would either construe the estate of the daughter to be an estate tail, or hold that an estate tail vested in the son on his birth; and that the words, ' if living at the time of her death,' merely marked the period when the remainder should commence in possession, as in the cases before discussed. But the Court (reluctantly, on account of the hardship of the case (*c*)), decided, that the son not having survived his mother, his estate never arose. Lord *Kenyon* observed, that the cases cited for him proceeded on informal

(*z*) First ed. p. 744.

(*a*) 6 T. R. 512; see also *Wingrave* v. *Palgrave*, 1 P. W. 401 (arising on the limitation of a term in a settlement).

(*b*) For such it clearly would have been. See infra.

(*c*) " Persons taking instructions for wills, in which the vesting is to depend on the devisee or legatee attaining a particular age or living to a given period, should carefully ascertain that the possibility of his dying in the meantime, *leaving issue*, is in the testator's contemplation. It is probable that in general this event is overlooked; and that if the testator's attention were drawn to the circumstance, he would either make the interest vest in the legatee, in case of his dying leaving issue before the prescribed age or period, or else substitute the issue in such event." (Note by Mr. Jarman.)

words; whereas here correct and technical expressions were used throughout (*d*).

Devises held to be contingent, notwithstanding absurd consequence,

"So, in *Holmes* v. *Cradock* (*e*), where a testator devised freehold, copyhold, and leasehold estates to F., his heirs, &c., upon trust to pay testator's wife an annuity of 100*l.* for her life, and to pay the residue of the annual profits to testator's son W. during the life of his mother; and if his son should happen to die before his mother, without leaving a widow or child, then in trust to pay all such profits to her for life, and subject to the said trusts, that the said F. should stand seised to the use of the testator's said son, his heirs and assigns, for ever, subject and chargeable with the legacies thereinafter given. In a subsequent clause he proceeded thus:—'And if my son shall die, *leaving my wife*, without leaving a wife or any child, after his death *and my wife's*, I give and bequeath,' certain legacies, 'which I charge upon my real estate, hereinbefore limited to my son and his heirs.' The son survived his mother, and died without leaving wife or child; and Sir *R. P. Arden*, M.R., held, that the legacies did not arise, on the ground that he was not warranted in totally rejecting words, unless they were repugnant to the clear intention manifested in other parts of the will (*f*)."

Mr. Jarman cites *Shuldham* v. *Smith* (*g*), as another illustration of the rule.

—or testator's erroneous belief.

The same rigid rule of construction prevails, where a testator has disposed of an estate in a certain event only, under the erroneous impression that his power of disposition is confined to such contingency (*h*).

Where holding the devise to be contingent, will defeat the declared object of the testator.

"Still, however," says Mr. Jarman (*i*), "where the construing of the devise to be contingent, in accordance with the letter of the will, would have the effect of rendering nugatory a purpose clearly

(*d*) Compare *Re Dundalk and Enniskillen Railway, Ex parte Roebuck*, [1898] 1 Ir. 219, where the decision turned on the words "if alive."

(*e*) 3 Ves. 317; see also *Vick* v. *Sutter*, 3 Ell. & Bl. 219.

(*f*) "But was there not ground to contend, on the principle of *Pearsall* v. *Simpson*, and that class of cases, (ante, p. 1373), that the devise might be read 'if my son shall die without leaving a wife or child, then after his decease, *and after my wife's decease, if he shall die leaving my wife*'? There can be little doubt that Sir *W. Grant* would so have construed it. It is observable, that neither *Webb* v. *Hearing*, nor the anonymous case in Ventris, 363, was cited to Sir *R. P. Arden*, who relied much on *Calthorpe* v. *Gough*, cit. 3 B. C. C. 395, and *Doo* v. *Brabant*, 3 B. C. C. 393, 4 T. R. 706." (Note by Mr. Jarman.)

(*g*) 6 Dow. 22, Sug. Law of Prop. 416; see also *Parsons* v. *Parsons*, 5 Ves. 578; *Dicken* v. *Clarke*, 2 Y. & C. 572; *Clarke* v. *Butler*, 13 Sim. 401; *Lenox* v. *Lenox*, 10 Sim. 400.

(*h*) *Doe* d. *Veasey* v. *Wilkinson*, 2 T. R. 209; *Archbold* v. *Austin-Gourlay*, 5 L. R. Ir. 214.

(*i*) First ed. p. 748.

expressed by the testator, the Court will struggle to avoid such a construction.

"Thus, in *Bradford* v. *Foley* (*j*), where the devise was in trust for the testator's son for life, and after his decease unto the first and every other son which he (the son) should have by any future wife in tail; remainder to the daughters of such future marriage in fee; with a proviso, that if his son should thereafter marry with any woman related in blood to M. his then wife, all the above uses, so far as they related to the issue of such future marriage, should cease and determine, it being the testator's steadfast resolution, to hinder that no person any ways of kin to her in blood, or born or descended from any such person, should inherit any part of his said estate; and *in such case*, notwithstanding there should be issue of his said son by such future marriage, living at the time of his (testator's) decease, it was his will that neither they, nor either of them, should take any thing under his will; *but that* the trustees should stand seised to the use of his (the testator's) brother's children, living at his decease, and their heirs; and in case they should all die in his lifetime, or after his decease, without issue, then he devised his said real estate to his own right heirs: he meant such heirs only as should be in no ways related in blood to the said M., all of whom he thereby excluded from any right, title, or benefit, from his estate (*k*). The son died without marrying again. It was contended, that in this event the ulterior estates never arose; but the Court held, that the testator's brother's children were tenants in tail. Lord *Mansfield* said nothing could be clearer than that the testator meant that no child of M. should take in any event; and yet, according to that argument, such child, if there had been one, must have taken (as heir-at-law).

Remark on *Bradford* v. *Foley*.

"The words in this case were certainly very strong, and to a Judge less disposed than Lord *Mansfield* to relax the strict rules of construction, they probably would have appeared to present an insuperable difficulty to holding the testator's brother's children to take in any other event than that of the son's future marriage, especially as this construction extended the devise beyond what was absolutely necessary to effectuate the testator's professed object, namely, the exclusion of the obnoxious persons. He might

(*j*) Doug. 63. This case seems to be exactly the converse of *Driver* d. *Frank* v. *Frank*, 3 M. & Sel. 25.

(*k*) "It seems that these words would not have amounted to a devise to the persons next in descent, *Goodtitle* d. *Bailey* v. *Pugh*, 3 B. P. C. Toml. 454. Consequently, a son or other relation of M., being the testator's heir, would have taken the reversion by descent, notwithstanding this clause. Nothing will exclude the heir, but an actual disposition to some other person." (Note by Mr. Jarman), ante, p. 768.

have intended the devise in question to take effect only in case such persons came in esse. The case, however, stands distinguished from the others before noticed, in the fact, that the devise in its literal terms was inconsistent with a scheme, not merely conjectured, but avowed by the testator (*l*)."

The cases of *Doe* d. *Bills* v. *Hopkinson* (*m*), and *Quicke* v. *Leach* (*n*) seem to have been decided on the same principle.

Gift to a class.

VI.– Implication of Contingency.—The question whether a contingency can be implied arises most frequently in gifts to classes. The implication will of course not be made where the language is clear (*y*), but it will be made if it appears necessary in order to give effect to the testator's intention. Thus in *Leeming* v. *Sherratt* (*z*) a testator gave his residuary real and personal estate upon trust to sell and divide the proceeds equally among his children so soon as the youngest should attain twenty-one: Wigram, V.-C., said: "The testator having postponed the division of the residue until his youngest child attained that age [twenty-one], I think no child, who did not attain that age, could have been intended to take a share therein."

This decision (or rather dictum) was followed by Kindersley, V.-C., in *Parker* v. *Sowerby* (*a*) and by Wood, V.-C. in *Lloyd* v. *Lloyd* (*b*).

But the implication does not arise where the testator has expressly made all the children the objects of his bounty (*c*); or (it seems) where the gift is to named individuals, and the testator shews that each is intended to have a share (*d*). And if the intermediate income of each child's share were made applicable for its maintenance, no doubt that would have the effect of vesting the share (*e*). But a direction to apply the income of the whole property as a common fund for the maintenances of all the children, does not have this effect (*f*).

(*l*) This case is given by Fearne (C. R. 234), as an example of a limitation after a preceding estate, which preceding estate depends on a contingency which never happens, taking effect notwithstanding.

(*m*) 5 Q.B. 223; see *Sulley* v. *Barber*, 59 L. T. 821.

(*n*) 13 M. & W. 218.

(*y*) As in *Boulton* v. *Beard*, and other cases cited post, p. 1390.

(*z*) 2 Ha. 14. Supra, p. 1354.

(*a*) 1 Drew. 488, fuller reported 17 Jur. 752.

(*b*) 3 K. & J. 20. Apparently also by Hall, V.-C., in *Coldicott* v. *Best*, [1881] W. N. 150. The decision in *Ford* v. *Rawlins*, 1 S. & St. 328, may be supported on this ground, but Leach, V.-C., seems to have thought that only those children who were living when the youngest attained twenty-one were entitled; but the trust was in the nature of a power of distribution. In *Sansbury* v. *Read*, 12 Ves. 75, the will was obscure.

(*c*) *Re Grove's Trusts*, 3 Giff. 575; *Boulton* v. *Pilcher*, 29 Bea. 633.

(*d*) *Cooper* v. *Cooper*, 29 Bea. 229.

(*e*) On the principle stated below, p. 1406.

(*f*) *Lloyd* v. *Lloyd*, supra; *Re Hunter's Trusts*, L. R. 1 Eq. 295. In *Boulton* v. *Pilcher*, 29 Bea. 633, Romilly,

In such a case as *Leeming* v. *Sherratt*, each child takes a vested interest on attaining twenty-one, and if he dies before the time of division, his share passes to his representatives. The same rule seems to apply where the gift is to individuals (*g*). But the testator may, by a clause of accruer or gift over, shew an intention that only those legatees who are living at the time of division are to take vested interests (*h*).

Construction of original gift affected by subsequent words.

Closely akin to cases of this kind, are those cases in which the original gift is ambiguous in regard to the period of vesting, and it is held to be contingent by reference to a subsequent clause in the will. Thus if property is given to the children of A. to be transferred to them on their attaining twenty-five, but in case A. shall leave but one child, then the whole to go to that child on his attaining twenty-five, with a gift over in the event of A. not leaving a child who attains twenty-five, the gift to all the children is contingent on their attaining twenty-five, and is consequently void for remoteness (*i*).

Gift to several children contingent; gift to one child vested.

But the converse proposition does not hold good. Thus in *Walker* v. *Mower* (*j*) property was given upon trust for A. for life, and after her death upon trust for her children on their attaining twenty-one, and if there should be but one child, then upon trust for such only child; A. died leaving an only child, who died an infant: it was held by Romilly, M.R., that the child took a vested interest. In that case there was a gift over in the event of A. dying without leaving any child. In *Re Fletcher* (*k*) there was a similar gift to children attaining twenty-one or marrying, and if only one child then to that child, with a gift over in the event of there being no child "who shall live to attain a vested interest"; it was held that this made the interest of an only child (a daughter) contingent on her attaining twenty-one or marrying.

Contingency implied by gift over.

Gift to class in remainder.

Where there is a gift to a class of persons in remainder, the general rule that all members of the class who come into existence during the particular estate, take vested interests, may be displaced by the context. For example, if the gift is to A. for life and after his death to his children in equal shares, followed by a proviso that if A. shall leave only one child, then the whole

M.R., seems to have thought otherwise.

(*g*) *Re Smith's Will*, 20 Bea. 197.

(*h*) *Re Hunter's Trusts*, L. R. 1 Eq. 295.

(*i*) *Judd* v. *Judd*, 3 Sim. 525; *Hunter* v. *Judd*, 4 Sim. 455, and other cases cited infra, p. 1421.

(*j*) 16 Bea. 365; *Johnson* v. *Foulds*, L. R. 5 Eq. 268.

(*k*) 53 L. T. 813.

shall go to that child, this may have the effect of making the gift to all the children contingent on their surviving A. (*l*).

In *Kimberly* v. *Tew* (*m*), however, Sir E. Sugden thought that in such a case the children take vested interests, subject to be divested if one child, and only one child, survives the tenant for life; but he did not decide the point.

Contingent gift to class.

In the case of a gift to a class upon a contingency, the general rule is that the contingency is not imported by implication into the description of the class, so as to confine the gift to those members of the class who survive the contingency. Thus, in *Boulton* v. *Beard* (*n*), the testatrix bequeathed a fund upon trust for A. for life, and after her death upon trust for C. R. for life, and if C. R. died during A.'s lifetime, leaving issue, then upon trust for C. R.'s children as they attained twenty-one; C. R. had several children, one of whom attained twenty-one and died in C. R.'s lifetime: it was held that the deceased child had attained a vested interest. But the language of the will may shew that only those members of the class who survive the contingency are entitled to take. Thus, in *Selby* v. *Whittaker* (*o*), the testator gave a fund upon trust for his two daughters for life in moieties, and after the death of a daughter leaving lawful issue or other lineal descendants her surviving, upon trust to pay, assign and transfer her moiety to her children or other lineal descendants in equal shares per stirpes, to be paid, assigned and transferred to them at twenty-one, "but nevertheless the said parts or shares of the said child or children shall be absolute vested interests in him, her or them immediately on the decease of his, her or their respective parent or parents, and transmissible to his, her or their executors or administrators respectively"; there was a gift over in the event of a daughter dying "without leaving any lawful issue or other lineal descendants her surviving." It was held by the Court of Appeal that children of a daughter who predeceased her did not take.

Question, whether contingency confined to particular estate, or extends to a series of limitations.

VII.—Whether Contingency applies to one or all of several Limitations.—Mr. Jarman continues (*oo*): "When a contingent particular estate is followed by other limitations, a question frequently arises, whether the contingency affects such estate only, or extends

(*l*) *Smith* v. *Vaughan*, Vin. Abr., Devise Z. c. pl. 32; *Spencer* v. *Bullock*, 2 Ves. jun. 687; *Pearce* v. *Edmeades*, 3 Y. & C. 246; *Madden* v. *Ikin*, 2 Dr. & Sm. 207; *Lewis* v. *Templer*, 33 Bea. 625; *Cooper* v. *Macdonald*, L. R. 16 Eq. 258.

(*m*) 4 Dr. & W. 139.

(*n*) 3 D. M. & G. 608. Approved in *Hickling* v. *Fair*, [1899] A.C. 15.

(*o*) 6 Ch. D. 239.

(*oo*) First ed. p. 752.

to the whole series. The rule in these cases seems to be, that if the ulterior limitations be immediately consecutive on the particular contingent estate in unbroken continuity, and no intention or purpose is expressed with reference to that estate, in contradistinction to the others, the whole will be considered to hinge on the same contingency; and that, too, although the contingency relate personally to the object of the particular estate, and therefore appear not reasonably applied to the ulterior limitation.

"Thus, where an estate for life is made to depend on the contingency of the object of it being alive at the period when the preceding estates determine, limitations consecutive on that estate have been held to be contingent on the same event, for want of something in the will to authorize a distinction between them (*p*).

Contingency held to extend to whole line of limitations.

"In *Moody* v. *Walters* (*q*), the limitations in a marriage settlement were to the husband and wife successively for life, remainder to the first and other sons in tail male; with remainder, *in case he (the husband) should die without leaving any issue male then born, and alive, and leaving his wife with child*, to such after-born child or children, if a son or sons: remainder to the brother of the settlor for 120 years, if he should so long live; remainder to trustees for preserving contingent remainders; remainder to his first and other sons in tail male, with reversion to the settlor in fee. Lord *Eldon* expressed a strong opinion (though the case was not decided on the point), that the husband having died, leaving a son, the limitation to the posthumous son would not (if there had been one) have arisen, and that the ulterior limitations failed with it. Such, his Lordship thought, would have been the construction, had it been a will.

Contingency confined to particular estate.

"Instances in which a contingency has been restricted to the immediate estate are of two kinds. First, where the words of contingency are referable to, and evidently spring from, an intention which the testator has expressed in regard to that estate, by way of distinction from the others.

Where the words are referable to particular estate only.

"As, in *Horton* v. *Whittaker* (*r*), where A., by his will, declared his desire to provide for his sisters; but considering that his

(*p*) *Davis* v. *Norton*, 2 P. W. 390; *Doe* d. *Watson* v. *Shipphard*, Doug. 75, stated Fea. C. R. 236; *Tolderey* v. *Colt*, 1 Y. & C. 240, 621, 1 M. & Wels. 250; the same rule applies to personalty, *Lett* v. *Randall*, 10 Sim. 112; *Fitzhenry* v. *Bonner*, 2 Drew. 36; *Cattley* v. *Vincent*, 15 Bea. 198; *Gray* v. *Golding*, 6 Jur. N. S. 474.

(*q*) 16 Ves. 283.

(*r*) 1 T. R. 346; see also *Napper* v. *Sanders*, Hutt. 118; *Bradford* v. *Foley*, Doug. 63, stated. ante, p. 1387; *Doe* d. *Lees* v. *Ford*, 2 Ell. & Bl. 970; *Doutly* v. *Lauer*, 14 Jur. 188; *Darby* v. *Darby*, 18 Bea. 412; *Eaton* v. *Hewitt*, 2 Dr. & Sm. 184. See also *Re Blight*, 13 Ch. D. 858.

sister M., wife of W., was already well provided for during the life of her husband, and therefore would not, *unless she happened to survive him*, want any assistance to enable her to live in the world, he devised his estates to trustees, in trust during the life of M., to pay the rents to his (the testator's) sisters T. and B.; and after the decease of W., *in case his (the testator's) sister M. should be then living*, in trust as to one-third, to the use of the said M. for life; and as to the other two-thirds, to the other two sisters respectively for life; remainder, as to each third, to the respective sons of each successively in tail, with remainders over. M. died in the lifetime of her husband; and the question was, whether the remainders did not fail by this event; but it was held, that the contingency affected her own life estate only, and did not extend to the ulterior limitations.

Where the limitations of ulterior estates stand as independent gifts.

"Secondly. The contingency is restricted to the particular estate with which it stands associated, where the ulterior limitations do not follow such contingent estate in one uninterrupted series, in the nature of remainders, but assume the form of substantive independent gifts. As, in *Lethieullier* v. *Tracy* (*s*), where A. devised land to his daughter for life, remainder to her first and other sons in tail; and, if she should depart this life without issue of her body *living at her death*, then he devised the land to trustees and their heirs, until N. should attain twenty-one, upon certain trusts. *Item—the testator gave and devised* the land in question to N., after he should have attained his age of twenty-one years, for his life, with remainders over. Lord *Hardwicke* held, that the contingency of the daughter dying without issue *living at her death* affected only the estate limited to the trustees until N. attained twenty-one, and not the subsequent limitations. His Lordship said, he took the words, 'Item—I give and devise,' &c., as a substantive devise, and not at all relative to the former devise to the trustees, on the contingency of the daughter dying without issue at her death."

The same principle was applied in *Pearson* v. *Rutter* (*t*), (where the ultimate trust commenced with the words "and subject to the trusts hereinbefore declared,") and in *Boosey* v. *Gardener* (*u*),

(*s*) 3 Atk. 774, Amb. 204; and see *Aislabie* v. *Rice*, 3 Mad. 256, 2 J. B. Moo. 358, 8 Taunt. 459, stated infra; but see *Doe* v. *Wilkinson*, 2 T. R. 209, ante, p. 1388.

(*t*) 3 D. M. & G. 398; approved by Lord St. Leonards, and not appealed on this point, *Grey* v. *Pearson*, 6 H. L. C. 61, at p. 103.

(*u*) 5 D. M. & G. 122. See also *Quicke* v. *Leach*, 13 M. & Wels. 218; *Sheffield* v. *Earl of Coventry*, 2 D. M. & G. 551; *Partridge* v. *Foster*, 35 Bea. 545.

where the ultimate disposition of one half of a fund, although literally contingent on the prior dispositions taking effect, was held to be an independent gift, being connected with the disposition of the other half, which commenced with the word "likewise" and was clearly an independent gift, on the principle above stated.

Observations on words "item," "likewise," &c

It is not, however, to be assumed that whenever the word "item," or "likewise," begins a sentence, it creates a complete severance of all that follows from the previously expressed contingency. It cannot be put higher than this, that such expressions make a primâ facie case for the disconnection, which the context of the will may either maintain or rebut (*v*).

On the other hand, a limitation may be construed as a separate and independent gift, although not introduced by any special word of severance. Thus in *Re Blight* (*w*) there were several clauses directing the payment of an annuity, all connected by the word "and," some of which were subject to a contingency; it was held that the last clause was a separate and independent gift, and that it was not subject to the contingency.

In *Duffield* v. *McMaster* (*x*) a testator gave property upon certain trusts for the benefit of his son G. and G.'s wife, and provided that in case there should be any child of G. living at the death of the survivor of G. and his wife, the property should be held in trust for G.'s children as he should appoint, and in default of appointment in trust for G.'s children who should attain twenty-one: G. had one son who attained twenty-one and died in G.'s lifetime leaving children: it was held that the son took an absolute interest.

VIII.—Vesting of Legacies charged on Land.—A pecuniary legacy, whether charged on land or not, given to a person in esse simply, i.e. without any postponement of payment, vests immediately on the testator's decease (*p*). But if payment is postponed, there are differences between ordinary legacies and legacies charged on land. Mr. Jarman lays it down as a general rule (*q*) that: "Pecuniary legacies charged on land are, so far as they come out of the real estate, to be considered as dispositions pro tanto of that species of property." It may be remarked that leaseholds are

(*v*) *Paylor* v. *Pegg*, 24 Bea. 105. See the remarks of Lord Hardwicke in *Lethieullier* v. *Tracy*, supra; see also *Gordon* v. *Gordon*, L. R. 5 H. L. at p. 282, where several clauses began each with the words "as to"; and *Rhodes* v. *Rhodes*, 7 A. C. at pp. 208, 209.

(*w*) 13 Ch. D. 858.

(*x*) [1906] 1 Ir. 333.

(*p*) As to interest on legacies charged on land, see Chapter XXX.

(*q*) First ed. p. 756.

not land for this purpose, so that a legacy charged on realty and leaseholds may fail as to the realty and take effect as to the leaseholds (*r*). Money to arise from the sale of land is also not land for the purposes of the rule (*s*).

Failure of legacies charged on land.

Mr. Jarman continues (*t*): "In regard to sums payable out of land in futuro, the old rule was, that, whether charged on the real estate primarily, or in aid of the personalty, they could not be raised out of the land if the devisee [or, as we should now say, the legatee] died before the time of payment (*u*); but this doctrine has undergone some modification; and the established distinction now is, that, if the payment be postponed *with reference to the circumstances of the devisee of the money*, as in the case of a legacy to A., to be paid to him at his age of twenty-one years (*v*), the charge fails, as formerly, unless the devisee lives to the time of payment (*w*); and that too, though interest in the meantime be given for maintenance (*x*). But, on the other hand, if the postponement of payment appear to have *reference to the situation or convenience of the estate*, as, if land be devised to A. for life, remainder to B. in fee, charged with a legacy to C., payable at the death of A., the legacy will vest instanter; and, consequently, if C. die before the day of payment, his representatives will be entitled; the raising of the money being evidently deferred until the decease of A., in order that he may in the meantime enjoy the land free from the burthen (*y*). But either of these rules of

Distinction where payment is postponed with reference to circumstances personal to devisee, and where for convenience of the estate.

(*r*) *Re Hudsons*, Dru. t. Sug. 6.

(*s*) *Re Hart's Trust*, 3 De G. & J. 195. Conversely, a legacy charged on land directed to be purchased follows the general rule: *Harrison* v. *Naylor*, 2 Cox, 247.

(*t*) First ed. p. 756.

(*u*) In support of this statement of the doctrine Mr. Jarman cites *Bruen* v. *Bruen*, 2 Vern. 439; Pre. Ch. 195; 1 Eq. Ca. Ab. 267, pl. 2; *Att.-Gen.* v. *Milner*, 3 Atk. 112; *Prowse* v. *Abingdon*, 1 Atk. 482, and adds: "The ground of this rule, it should seem, was that the inheritance might not be unnecessarily burthened." See also *Poulet* v. *Poulet*, 1 Vern. 204; *Jennings* v. *Looks*, 2 P. W. 276; *Duke of Chandos* v. *Talbot*, 2 P. W. 602.

(*v*) It makes no difference whether the legacy is given to the legatee "at twenty-one," or "when he attains twenty-one," or "provided he attains twenty-one," or is simply made "payable at twenty-one": *Parker* v. *Hodgson*, 1 Dr. & Sm. 568, where the old cases are referred to.

(*w*) *Gawler* v. *Standerwicke*, 1 H. C. C. 105, n., 2 Cox, 15; *Harrison* v. *Naylor*, 3 B. C. C. 108, 2 Cox, 247; *Phipps* v. *Lord Mulgrave*, 3 Ves. 613; but see *Jackson* v. *Farrand*, 2 Vern. 424, 1 Eq. Ca. Ab. 268, pl. 8; this case is said to have been termed anomalous by Lord Hardwicke, *Cotton* v. *Cotton*, ib. n., 1 Atk. 486.

(*x*) *Pearce* v. *Loman*, 3 Ves. 135; *Gawler* v. *Standerwicke*, ubi sup.; *Parker* v. *Hodgson*, 1 Dr. & Sm. 568.

(*y*) *King* v. *Withers*, 3 P. W. 414; Cas. t. Talb. 117; 1 Eq. Ca. Ab. 112, pl. 10; Com. Rep. 710; *Lowther* v. *Condon*, 2 Atk. 127; *Emes* v. *Hancock*, 2 Atk. 507; *Sherman* v. *Collins*, 3 Atk. 319; 1 Ves. sen. 44; Amb. 167, 230, 266, 575; 1 B. C. C. 119, n., 124, n., 192, n.; Dick. 529; 1 B. C. C. 119; ib. 191; 9 Ves. 6; 4 Sim. 294; 2 Y. & C. 539; 2 Y. & C. C. C. 134; 3 Hare, 86; 7 ib. 334; 1 M. D. & D. 418; 2 ib. 177; *Evans* v. *Scott*, 1 H. L. C. pp. 43, 57; and see *Remnant* v. *Hood*, 2 D. F. & J. 396. *Re Neary's Estate*, 7 L. R. Ir. 311; *Haverty* v. *Curtis*, [1895]

construction, of course, will yield to an expression of a contrary intention. Thus, even where the payment is made to depend on a contingency, which might, abstractedly viewed, appear to spring from considerations personal to the legatee, as in the case of a sum of money directed to be raised for a person at the age of twenty-one; yet the vesting will take place immediately on the testator's decease, if such be the declared intention (*z*). And if such intention, though not expressly intimated, can be collected from the context, the exclusion of either rule will be no less complete (*zz*).

Gift over in one event favours vesting in all other events.

"And here it may be observed, that it is a circumstance always in favour of the immediate vesting, that the testator has expressly given over the legacy to another in the event of the legatee dying under certain circumstances; the inference being in such case, that the legacy is meant to be raised out of the land for the benefit of the original legatee, in every event, except that on which it was expressly given to the substituted legatee (*a*).

1 Ir. 23. "In *Oakeley* v. *Kichener*, in Chancery, March, 1827 (with a MS. note of which the writer has been favoured), a testator devised to his wife an annuity for her life out of his real estate, and, subject thereto, devised his real estate to trustees for 500 years to raise his debts and legacies. He gave a legacy of 1,000*l.* to each of his four younger children, payable at twenty-one, as to sons, and twenty-one or marriage, as to a daughter, with interest in the meantime, to be applied for their maintenance. He also gave them a further legacy of 1,000*l.* each to be paid *within six months after the death of the wife*, payable at twenty-one, or marriage, as before, with interest from her death. There was (though the fact does not appear to be very material) a gift over of the respective legacies on the death of the sons before twenty-one, without issue, or the daughter unmarried, to the survivors. It was held, that the vesting of the second series of legacies was not postponed until the decease of the wife, and, therefore, did not fail by the decease of the children during her life.

"This case, it will be perceived, agrees with the general distinction stated in the text, as the charge was evidently postponed until the death of the annuitant for the convenience of the estate." (Note by Mr. Jarman.) See also *Brown* v. *Wooler*, 2 Y. & C. C. C. 134. Of course it makes no difference in the construction, that the remainderman, whose interest is charged with the legacy, dies before the tenant for life. The interest passes, cum onere, to the heir. *Morgan* v. *Gardiner*, 1 B. C. C. 103 n.

(*z*) *Watkins* v. *Cheek*, 2 S. & St. 199.

(*zz*) Thus it may appear to be the intention that only those children who survive their parent shall be entitled to portions; per Turner, L.J., in *Remnant* v. *Hood*, 2 D. F. & J. at p. 411, citing *Bradley* v. *Powell*, Ca. t. Talbot, 193, and *Whatford* v. *Moore*, 3 My. & C. 270. See also *Re Brabazon*, 13 Ir. Eq. R. 156.

(*a*) *Murkin* v. *Phillipson*, 3 My. & K. 257, where A. bequeathed to his six grandchildren the sum of 50*l.* each, when the youngest should come of age, they to receive the interest in the meantime, when a certain estate should be sold, adding, "if either of those children should not live to come of age, nor have an heir born in wedlock, the said 50*l.* to be equally divided among the survivlng children." One of the grandchildren attained twenty-one, married, and afterwards died, during the minority of the youngest grandchild, leaving a child. Sir J. Leach, M.R., thought that though there was, in terms, no gift until the youngest grandchild attained twenty-one, yet as interest was given in the meantime, and payment was postponed for the convenience of the estate, the interests were vested; and his Honor assented to the argument (which

"On the same principle, where a testator provides that, in the event of his legatee, or one of the legatees, if more than one, dying in his own lifetime, the legacies should not sink into the land, but be raised for the benefit of some other persons,—a strong argument is naturally suggested, that the testator must intend the legacies to be raised for the benefit of the legatee absolutely, or, in other words, that he should take a vested interest in case he does survive the testator (*b*)."

And, on the other hand, although the time of payment may appear to be fixed with a view to the convenience of the estate, for instance, six months after the death of an annuitant, yet, if the direction be to pay at that time to the legatees, "or such of them as shall be then living," it is clear that the representatives of one who dies before the annuitant cannot claim a share in the fund (*c*). So, in *Taylor* v. *Lambert* (*d*), a legacy charged on land devised to A. in fee, but not to be raised "until A. come into actual possession of the M. estate," of which A. was then tenant for life in remainder, failed through A. dying before the tenant for life in possession of that estate.

In the case of a strict settlement, whether by deed or will, where portions are charged on the estate for younger children, it seems that only those younger children who attain twenty-one, or (being daughters) marry, are entitled to portions (*dd*).

When payable, no time of payment being fixed.

"Sometimes," as Mr. Jarman points out (*e*), "a difficulty occurs in determining at what period a sum of money charged on land is to be raised, from the absence of expressions fixing the time of payment. The cases on this subject are not all reconcileable (*f*), but it seems that, generally, in such a case, the devisee would be

had been strongly urged at the bar), that as the ulterior gift shewed that the legacy was intended not to sink into the land, if the legatee died under age, leaving a child, *à fortiori* it could not be meant that the legacy should sink into the land in the event of the legatee attaining twenty-one, and afterwards dying, leaving a child.

(*b*) *Lowther* v. *Condon*, 2 Atk. pp. 127, 130.

(*c*) *Goodman* v. *Drury*, 2 L. J. Ch. 680; see *Bruce* v. *Charlton*, 13 Sim. 65, and cases cited *supra*, note (*zz*).

(*d*) 2 Ch. D. 177. In *Re Cartledge*, 29 Bea. 583, a bequest "from and after the death of" an annuitant was held to be contingent on the legatee surviving the annuitant; *sed quære*.

(*dd*) *Remnant* v. *Hood*, 2 D. F. & J. 396; *Davies* v. *Huguenin*, 1 H. & M. 730. See *Henty* v. *Wrey*, 21 Ch. D. 332, where *Lord Hinchinbroke* v. *Seymour*, 1 Br. C. C. 395, is discussed; *Haverty* v. *Curtis*, [1895] 1 Ir. 23.

(*e*) First ed. p. 758.

(*f*) "See Mr. Cox's note to *Duke of Chandos* v. *Talbot*, 2 P. W. at p. 612; but it is observable that the cases cited by the learned editor, as decided on the principle that portions 'do not vest, if the children die before they want them,' arose in reference to portions under settlements, where the effect of holding the portions to vest *instanter* would have been to give them to the father, in the event of the children dying at a very early age, contrary to the obvious spirit and design of such provisions." (Note by Mr. Jarman. And see Butler's note IV. to Fearne, C. R. 557.

entitled to have the money raised immediately. In *Cowper* v. *Scott* (*g*). 1,500*l.* was to be raised, *within* six years after the testator's decease, out of the rents and profits, and interest at 4 per cent. in the meantime, for his two youngest daughters, one of whom dying under age, and within the six years, it was held to belong to her representative, on the ground that there was no precise appointment when it should be paid; the six years being mentioned as the ultimate time, and it was to be paid as much sooner as it could. But if the testator have only a reversion in the lands charged, it is probable that the money would be held not to be raiseable until the reversion fell into possession. This principle has prevailed in several cases in regard to annuities (*h*)."

Charges on reversions.

Where a legacy is charged both on real and personal estate, then, so far as the personal estate will extend to pay it, the case is governed by the rules regulating the vesting of gifts of personal property, and as if the legacy were to come out of the personal estate only; and, so far as the real estate is applicable to make up the deficiency in the personal, the case is governed by the same rules as if the legacy were charged on the realty alone (*i*).

Legacy charged on both real and personal estate.

IX.—**Vesting of Bequests of Personalty.**—Mr. Jarman says (*j*): "The same general principles which regulate the vesting of devises of real estate apply, to a considerable extent, to gifts of personalty (*k*). Where any difference exists between them, has arisen from the application to the latter of certain doctrines borrowed from the civil law, which have not obtained in regard to real estate, having been introduced by the Ecclesiastical Courts, who possessed, and still possess (*l*), in common with Courts of Equity, a jurisdiction for the recovery of legacies and distributive shares of personal estate (*m*)."

Vesting of bequests of personal estate.

It has been already mentioned (*n*) that the law is said to favour the vesting of estates, and that consequently an immediate devise of realty, or a bequest of personalty (including, of course, pecuniary

Vesting favoured by law.

(*g*) 3 P. W. 119; see also *Wilson* v. *Spencer*, 3 P. W. 172; *Emes* v. *Hancock*, 2 Atk. 507; *Hodgson* v. *Rawson*, 1 Ves. sen. 44. *Norfolk* v. *Gifford*, 2 Vern. 208, as explained in Raithby's note, went on a different ground.

(*h*) *Ager* v. *Pool*, Dyer, 371 b; *Turner* v. *Probyn*, 1 Anstr. 66.

(*i*) *Duke of Chandos* v. *Talbot*, 2 P. W. 601; *Jennings* v. *Looks*, ib. 276; *Prowse* v. *Abingdon*, 1 Atk. 482; *Re Hudsons*, Dru. 6.

(*j*) First ed. p. 765.

(*k*) Including leaseholds and money to arise from the sale of land: *Re Hudsons*, Dru. t. Sugd. 6; *Re Hart's Trusts*, 3 De G. & J. 195.

(*l*) Since Mr. Jarman wrote, this jurisdiction has been abolished: Stat. 20 & 21 Vict. c. 77, s. 23.

(*m*) As to the division of legacies, according to the rules of the civil law, into *transmissible* and *conditional*, see Hawkins on Wills, 222.

(*n*) Ante, p. 1357.

CHAP. XXXVII.

legacies (*o*)), to a person in esse, gives him a vested interest on the death of the testator, and the principle is said especially to apply to gifts to children (*p*). But the principle is at best a vague one, and, as in devises of realty (*q*), so in bequests of personalty, the Court will not do violence to plain words in order to convert a contingent interest into a vested one; it is only where the words of the will are ambiguous that they are to be read so as to give the legatees a vested rather than a contingent interest (*r*). Thus a gift to the testator's children who attain twenty-one is contingent, and it is not made a vested gift by a gift over to take effect in the event of the testator dying "without leaving any children surviving me" (*s*). But if property is bequeathed to the children of A., "as and when" they attain twenty-one, with a gift over in case A. dies without issue, this may have the effect of giving the children vested interests (*ss*). So if a gift to A. and B. when they attain the age of twenty-one years, is followed by the appointment of a trustee for them during minority, this may have the effect of making the gift vested (*sss*).

Words of contingency disregarded.

An instance of the inclination of the Courts to construe a gift as vested rather than contingent, occurs in *Partridge* v. *Foster* (*t*). There a testator bequeathed certain leaseholds to trustees in trust to pay an annuity to A., and directed that if the testator's son A. should within five years make his claim to the trustees, he should be entitled to one moiety of the leaseholds, "subject, however, together with the other moiety thereof in favour of my son B. to the annuity and trusts before mentioned;" it was held that the gift to B. was not contingent on A.'s making his claim.

Bequest to A. for life and after his death to B.

It may be convenient to refer to some of the general rules, stated above as applicable to devises, which apply also to bequests of personalty. A bequest of stock to A. for life and after his death to B., gives B. a vested interest, subject only to A.'s life interest, so that if B. dies before A., B.'s interest passes to his personal representatives (*u*). And if the gift to A. fails to take effect, by lapse or otherwise, or is determined during his lifetime, B.'s interest is

(*o*) Ante, p. 1393.

(*p*) *Hougrave* v. *Cartier*, 3 V. & B. 79; *Re Roberts*, [1903] 2 Ch. 200, and other cases cited post, Chapter LVII.

(*q*) Ante, p. 1385.

(*r*) *Re Hamlet*, 39 Ch. D. 426; *Whatford* v. *Moore*, 3 My. & Cr. 270.

(*s*) *Re Edwards*, [1906] 1 Ch. 570, where *Kidman* v. *Kidman*, 40 L. J. Ch. 359, is commented on.

(*ss*) Post, p. 1428.

(*sss*) *Branstrom* v. *Wilkinson*, 7 Ves. 420. The bequest seems to have been subject to be divested if both died under age.

(*t*) 35 Bea. 545. The decision in *Re Smith's Will*, 20 Bea. 197, cannot be treated as laying down any general principle.

(*u*) *Monkhouse* v. *Holme*, 1 Br. C. C. 298; *Blamire* v. *Geldart*, 16 Ves. 314; *Bengon* v. *Maddison*, 2 Hr. C. C. 75.

accelerated (*v*). This construction is not necessarily affected by the addition of words which, taken literally, make the bequest to B. contingent on his surviving A. (*w*).

Effect of gift over.

The rule in *Phipps* v. *Ackers* (*x*), as to the effect of a gift over, applies to bequests of personalty (*y*), as does the rule as to the effect of a gift over following a gift during widowhood, or until marriage, &c. (*z*).

Rule in *Maddison* v. *Chapman*.

The rule as to vesting, which is best known by the statement of it in *Maddison* v. *Chapman* (*a*), applies to personalty (*b*).

Vested subject to be divested.

Some of the cases cited above (*c*) as illustrations of the rule that a vested gift will not be divested, unless the exact event specified in the gift over happens, were gifts of personal estate.

Rule in *Boraston's Case*.

It seems that a rule analogous to that established by the decision in *Boraston's Case* (*d*), applies to bequests of personalty (*e*).

Vesting of personal legacies.

With regard to the vesting of personal legacies (*f*), the payment of which is postponed to a period subsequent to the death of the testator, Mr. Jarman states the general rule as follows (*g*): "A leading distinction is, that if futurity is annexed to the *substance* of the gift, the vesting is suspended; but if it appears to relate to the time of payment only, the legacy vests instanter. Thus, where a sum of money is bequeathed to a person at the age of twenty-one years (*h*), or at the expiration of a definite period (say ten years) from the decease of the testator (*i*), the vesting, not the payment merely, is deferred; and, consequently, if the legatee dies before the period in question, the legacy fails. But if the legacy is, in the first instance, given to the legatee, and is then directed *to be paid* at the age of twenty-one years, or at the end of ten years after the testator's decease, the legacy vests immediately, so that, in the

Distinction where time is annexed to substance of gift, and where to time of payment only.

(*v*) *Eavestaff* v. *Austin*, 19 Bea. 591; *Auil* v. *Jacobs*, 3 Ch. D. 703.

(*w*) See *Pearsall* v. *Simpson*, *Massey* v. *Hudson*, and the other cases cited above, p. 1373; *Bradley* v. *Barlow*, 5 Ha. 589.

(*x*) Supra, p. 1377.

(*y*) *Whitter* v. *Bremridge*, L. R. 2 Eq. 736. This was a case of residue, but nothing seems to have turned on that point. See *Fox* v. *Fox*, L. R. 19 Eq. 286, post, p. 1411.

(*z*) *Stanford* v. *Stanford*, 34 Ch. D. 362, and other cases cited ante, p. 1364, including *Re Tredwell*, [1891] 2 Ch. 640.

(*a*) Ante, p. 1374.

(*b*) *Pearsall* v. *Simpson*, 15 Ves. 29; *Re Shuckburgh's Settlement*, [1901] 2 Ch. 794.

(*c*) Ante, p. 1370.

(*d*) Ante, p. 1372.

(*e*) Post, p. 1406.

(*f*) Residuary bequests are considered in the next section, but some of the cases cited by Mr. Jarman in this section deal with residuary bequests.

(*g*) First ed. p. 759.

(*h*) *Onslow* v. *South*, 1 Eq. Ca. Abr. 295, pl. 6; *Cruse* v. *Barley*, 3 P. W. 20; *Re Wrangham's Trust*, 1 Dr. & Sm. 358.

(*i*) *Smell* v. *Dee*, 2 Salk. 415. See also *Re Eve*, 93 L. T. 235; *Bruce* v. *Charlton*, 13 Sim. 65. Compare *Bromley* v. *Wright*, 7 Hare, 334, post, p. 1404.

CHAP. XXXVII.

event of the legatee dying before the time of payment, it devolves to his representative (*j*). As, in *Sidney* v. *Vaughan* (*k*), where a testatrix bequeathed to A. 100*l*., to be paid to him within six months after he should have served his apprenticeship to which he was then bound. A. did not serve out his apprenticeship, but ran away from his master, and, after the expiration of the term, died intestate. It was held, by the House of Lords, that A.'s administratrix was entitled to the legacy, with interest from the expiration of six months.

"So, in *Chaffers* v. *Abell* (*l*), where a testator bequeathed certain sums of stock to trustees, to pay 40*l*. per annum to his daughter M. for life, and, after her decease, 'to pay, assign and transfer the sum of 1,000*l*. stock equally amongst all and every the child and children of M., share and share alike, *to be paid and transferred to them when and so soon as the youngest should attain his or her age of twenty-one years*' (*m*); and directed that, after the decease of his daughter, the dividends should be applied for the maintenance of the children. At the death of the testator, M. had four children, one of whom died before the youngest attained twenty-one. The youngest alone survived M. Sir L. *Shadwell*, V.-C., held that the four children took vested interests in the stock. There was, he observed, in the first place, a clear gift to all the children in the shape of a direction to pay and transfer, followed by another direction to pay and transfer, '*when and so soon as the youngest of such children should attain his or her age of twenty-one years*.'

Superadded words of division or distribution

"Words directing division or distribution between two or more objects at a future time, fall under the same consideration as a direction to pay; and, therefore, where they are engrafted on a gift, which would, without these superadded expressions, confer an immediate interest, they do not postpone the vesting. Thus,

(*j*) *Clobury* v. *Lampen*, 2 Freem. 24, 2 Ch. Cas. 155; *Stapleton* v. *Cheale*, 2 Vern. 673, Pre. Ch. 317; *Harvey* v. *Harvey*, 2 P. W. 21; *Jackson* v. *Jackson*, 1 Ves. sen. 217.

(*k*) 2 B. P. C. Toml. 254. "It seems that if no interest were made payable on the legacy, the representative must wait until the legatee, if living, would have attained his majority; but if it carried interest, he would be entitled immediately. See *Cricket* v. *Dolby*, 3 Ves. 13; *Feltham* v. *Feltham*, 2 P. W. 271." (Note by Mr. Jarman.)

(*l*) 3 Jur. 577; see also *Wadley* v. *North*, 3 Ves. 361; *Williams* v. *Clark*, 4 De G. & S. 472; *Edmunds* v. *Waugh*, 4 Drew. 275; *Knox* v. *Wells*, 2 H. & M. 674; *Shrimpton* v. *Shrimpton*, 31 Bea. 425; *Maher* v. *Maher*, 1 L. R. Ir. 22; *Brocklebank* v. *Johnson*, 20 Bea. 205; whence it appears that the Court is always anxious to find a gift independent of the direction to pay, or a direction to set apart a fund for payment of the legacy. But see *Shum* v. *Hobbs*, 3 Drew. 93.

(*m*) This is said to mean "when the youngest child that lives to the age of twenty-one attains that age"; *Ford* v. *Rawlins*, 1 S. & St. 328; *Evans* v. *Pilkington*, 10 Sim. 412; see *Castle* v. *Eate*, 7 Bea. 286.

a bequest to A. and B. of 3,000*l.*, Navy 5*l.* per Cent. Annuities, and all dividends and proceeds arising therefrom, to be equally divided between them, when they should arrive at twenty-four years of age, has been held to vest the stock immediately in the legatees (*n*)."

It should be remembered that a mere direction that a legacy is not to be paid until the legatee attains an age exceeding twenty-one years, is, by itself, as a general rule, inoperative, and the legatee is entitled to payment on attaining twenty-one (*o*).

The general principle stated by Mr. Jarman prevails where payment is in terms postponed until the testator's debts are satisfied (*p*), or his assets realized (*q*), or an outstanding security is got in (*r*), or until certain real estate is sold (*s*), or money directed by the will to be laid out in the purchase of land is so laid out (*t*), or until the death of another person (*u*). And an immediate gift to several is not made contingent by a superadded direction for distribution between them equally as three barristers should think fit, the discretion not extending to authorize any alteration in the extent of the interests given to the legatees (*v*).

Immaterial that the words of division precede those of gift.

It is of course immaterial whether the gift precedes or follows the direction to pay. Therefore, where a testator bequeathed a sum of money to trustees, in trust for his daughter for life, and after her death in trust to pay the same unto or between or amongst all and every the children of his daughter, as and when they should respectively attain the age of twenty-one, share and share alike, "to whom I give and bequeath the same accordingly," Lord Cottenham held the legacy vested in the children on their birth (*w*).

The rule yields to a clear contrary intention.

But if it is clear from the language of the will that the attainment of a certain age is made a condition precedent to the vesting of a legacy, such legacy will be contingent notwithstanding a gift of the legacy distinct from the direction to pay; so that a gift to A., to be paid in case he attained the age of twenty-one

(*n*) *May* v. *Wood*, 3 B. C. C. 471; *Farmer* v. *Francis*, 2 Sim. & St. 505.

(*o*) *Re Couturier*, [1907] 1 Ch. 470, following *Gosling* v. *Gosling*, Johns. 265, cited post, p. 1422, n. (*m*).

(*p*) *Small* v. *Wing*, 5 B. P. C. Toml. 66.

(*q*) *Gaskell* v. *Harman*, 6 Ves. 159, 11 Ves. 489. The position in the text seems to be warranted by Lord Eldon's observations in this case. The case itself was an extremely special one.

(*r*) *Wood* v. *Penoyre*, 13 Ves. 325 a.

(*s*) *Stuart* v. *Bruere*, 6 Ves. 529, n.; and see *Tily* v. *Smith*, 1 Coll. 434.

(*t*) *Sitwell* v. *Bernard*, 6 Ves. 520; see also *Hutcheon* v. *Mannington*, 1 Ves. jun. 365. 4 B. C. C. 491, n.; *Entwistle* v. *Markland*, 6 Ves. 528, n.; *Whiting* v. *Force*, 2 Bea. 571; *Lucas* v. *Carline*, ib. 367; *Re Dodgson's Trust*, 1 Drew. 440.

(*u*) *Billingsley* v. *Wills*, 3 Atk. 219.

(*v*) *Kavanagh* v. *Morland*, cited by Wood, V.-C., in *Maddison* v. *Chapman*, 4 K. & J. 715.

(*w*) *Re Bartholomew*, 1 Mac. & G. 354; and see *Livesey* v. *Livesey*, 3 Russ. 287, 542; *King* v. *Isaacson*, 1 Sm. & G. 371; *Re Lyman's Trust*, 2 L. T. N. S. 662.

and not otherwise, is contingent upon A.'s attaining that age (*x*). Again, the original gift may be so connected with the direction to pay that the legacy must be held to be contingent (*y*). So, where a testator clearly expressed his intention that the benefits given by his will should not vest till his debts were paid (*z*), or until a sale directed thereby should be completed (*a*), or until assets in a foreign country should be actually remitted to the legatee (*b*), the intention was carried into execution, and the vesting as well as payment was held to be postponed (*c*).

Legacy in uncertain event.

Moreover, as Mr. Jarman points out (*d*), "if the payment or distribution is deferred not merely (as in the cases just noted) until the lapse of a definite interval of time, which will certainly arrive, but until an event which may or may not happen, the effect, it should seem, is to render the legacy itself contingent. This distinction was recognized in *Atkins* v. *Hiccocks* (*e*), where a sum of 200*l.* was bequeathed to A., to be paid at her marriage, or three months afterwards, provided she married with consent; and Lord *Hardwicke* held that A. having died unmarried, her representative was not entitled to the legacy.

Rule where the only gift is in the direction to pay, &c.

"It should seem, too, that, where the only gift is in the direction to pay or distribute at a future age, the case is not to be

(*x*) *Knight* v. *Cameron*, 14 Ves. 389; *Lister* v. *Bradley*, 1 Hare, 10; *Heath* v. *Perry*, 3 Atk. 101. See also *Hunter* v. *Judd*, 4 Sim. 455; and *Merry* v. *Hill*, L. R. 8 Eq. 619, where the construction was aided by the context; see post, p. 1423.

(*y*) *Shum* v. *Hobbs*, 3 Dr. 93.

(*z*) *Bernard* v. *Mountague*, 1 Mer. 422.

(*a*) *Elwin* v. *Elwin*, 8 Ves. 547; *Faulkener* v. *Hollingsworth*, cit. ib. 558; *Re Mabbett*, [1891] 1 Ch. 707 (fund for purchase of annuity).

(*b*) *Law* v. *Thompson*, 4 Russ. 92.

(*c*) But not necessarily to the time when the debts have been actually paid, or the sale completed; for the Court will inquire when these purposes might, in a due course of administration, have been effected, and consider the legacies vested from that period. See the cases cited above, and see *Small* v. *Wing*, 5 B. P. C. Toml. 66; *Astley* v. *E. of Essex*, L. R. 6 Ch. 898. In *Birds* v. *Askey*, 24 Bea. 615, where there was a residuary gift, "after satisfying the trusts" of the will, to A. if then living—one of the trusts being in favour of A. himself for life—and it was decided that this meant if A. was living after provision had been made for the due execution of the will, the M.R. held that this was a duty which fell on the executors immediately on the testator's decease, and that the residue vested in A. at that time.

(*d*) First ed. p. 761.

(*e*) 1 Atk. 500; and see *Ellis* v. *Ellis*, 1 Sch. & Lef. 1; *Morgan* v. *Morgan*, 4 De G. & S. 164; *Re Cantillons*, 16 Ir. Ch. 301. Compare *Booth* v. *Booth*, 4 Ves. 399, and *West* v. *West*, 4 Gif. 198 (legacy on marriage with consent of guardians, was construed to require consent only to marriage under age). See also *Money* v. *Money*, 44 L. T. 639, where certain trusts to take effect on the marriage of the testator's son were held to take effect on the marriage taking place after the testator's death and before payment of the legacy. In *Bartleman* v. *Murchison*, (2 R. & My. 136), an annuity was bequeathed to A. for life and after her decease to B. "if a widow, but not otherwise"; B. was married at the death of A., and it was held that the gift failed, although she afterwards became a widow.

ranked with those in which the payment or distribution only is deferred, but is one in which time is of the essence of the gift.

Leake v. *Robinson.*

"Thus, in a leading case (*f*), where a testator gave certain real and personal property to trustees, upon trust, in a certain event, to pay, apply, and transfer the same unto and amongst all and every the brothers and sisters of R., share and share alike, *upon his, her or their attaining twenty-five, if a brother or brothers, and if a sister or sisters, at such age or marriage with consent;* and the trustees were authorized to apply the rents, profits, and interest, or so much as they should think proper, for the maintenance of such brothers and sisters in the meantime. Sir W. *Grant*, M.R., held, that this was not a case in which the enjoyment only was postponed; the direction to pay was the gift, and that gift was only to attach to children that should attain twenty-five (*g*).

"So, where (*h*) a testator left for his wife's use certain furniture, &c., adding, 'which I desire may be distributed amongst our children, on the youngest attaining twenty-one years, at her and

(*f*) *Leake* v. *Robinson*, 2 Mer. 363; *Bentinck* v. *Duke of Portland*, 4 L. J. (O. S.) Ch. 13; *Meredith* v. *Tooke*, Hov. Sup. Ves. jun. 324; *Murray* v. *Tancred*, 10 Sim. 465; *Mair* v. *Quilter*, 2 Y. & C. C. C. 465; *Boughton* v. *James*, 1 Coll. 26; *Walker* v. *Mosser*, 16 Bea. 365; *Gardiner* v. *Slater*, 25 Bea. 509; *Shum* v. *Hobbs*, 3 Dr. 93; *Locke* v. *Lamb*, L. R. 4 Eq. 372; *Re Edwards*, [1906] 1 Ch. 570. By the position in the text it is not to be understood, that the gift of a legacy under the form of a direction to pay at a future time, or upon a given event, is less favourable to vesting than a simple and direct bequest of a legacy at a like future time, or upon a like event; but that a distinction is to be taken between these two cases on the one hand, and the case, mentioned above, of a gift of a legacy, with a superadded direction to pay at a future time, or upon a given event, on the other hand. Per Wigram, V.-C., 2 Hare, 17, 18. Still a direction to pay may help with other indications to shew that the legacy is intended not to vest till payment. Per Jessel, M.R., 6 Ch. D. 246.

(*g*) It will be noticed that the gift was not to such of the brothers and sisters as should attain twenty-five, &c., but to the brothers and sisters upon their attaining twenty-five, but Sir W. Grant thought that this made no difference. "If there were an antecedent gift, a direction to pay upon the attainment of twenty-five certainly would not postpone the vesting. But if I give to persons of any description *when* they attain twenty-five, or upon their attainment of twenty-five, or from and after their attaining twenty-five, is it not precisely the same thing as if I gave to *such* of those persons as should attain twenty-five? None but a person who can predicate of himself that he has attained twenty-five, can claim anything under such a gift" (2 Mer. p. 386). But there is a distinction between a gift to the children of A. "as" or "when" they attain twenty-five, and a gift to "such" of the children of A. "as" attain twenty-five: *Bull* v. *Pritchard*, post, p. 1424.

(*h*) *Ford* v. *Rawlins*, 1 S. & St. 328. The case of *Taylor* v. *Bacon*, 8 Sim. 100, is also cited by Mr. Jarman as an authority on the doctrine now under discussion, but in that case there was a direction to apply the interim income to the maintenance of the infants, which would bring it within the doctrine of *Fox* v. *Fox*, and other cases cited infra, p. 1411. In *Leake* v. *Robinson* there was also a trust for maintenance, but being what the M.R. described as a discretionary trust, he did not consider it sufficient to make the interests vested. According to Jessel, M.R., the reason was that the income was not divided into aliquot shares; *Re Parker*, post, p. 1413.

my executor's discretion; such part being nevertheless reserved for her own use as may be thought convenient, and at her death to be distributed as above directed;' Sir J. *Leach*, V.-C., on the principle above stated, held, that children who died before the youngest attained twenty-one, took no interest (*i*).

Effect where payment is postponed for convenience of fund.

"But even though there be no other gift than in the direction to pay or distribute in futuro; yet if such payment or distribution appear to be postponed for the convenience of the fund or property, the vesting will not be deferred until the period in question. Thus, where a sum of stock is bequeathed to A. for life; and, after his decease, to trustees, upon trust to sell and pay and divide the proceeds to and between C. and D., or to pay certain legacies thereout to C. and D.; as the payment or distribution is evidently deferred until the decease of A., for the purpose of giving precedence to his life interest, the ulterior legatees take a vested interest at the decease of the testator."

Extent of the doctrine.

Sir J. Wigram, V.-C., has expressed his entire concurrence in the doctrine thus stated by Mr. Jarman (*j*), which is further supported by numerous authorities. The doctrine applies as well in gifts to a class (*k*), as to individuals; and as well where there has (*l*), as where there has not (*m*), been a trust for sale interposed between the prior and ulterior limitations: the sale being intended only to facilitate the distribution, not to postpone the vesting.

Ambiguous words in subsequent clause.

Ambiguous words occurring in a subsequent clause of the will do not, as a general rule, prevent the application of the doctrine. Thus, in *Re Duke* (*n*), where there was a gift to A. and B. for life,

(*i*) See *Leeming* v. *Sherratt*, 2 Hare, 14, stated p. 1354. In that case it was held that a child who attained twenty-one took a vested interest, although he died before the youngest attained that age.

(*j*) *Packham* v. *Gregory*, 4 Ha. at p. 396.

(*k*) *Smith* v. *Palmer*, 7 Ha. 225; *Re Bennett's Trust*, 3 K. & J. 280.

(*l*) *Bromley* v. *Wright*, 7 Hare, 334; *Day* v. *Day*, 1 Drew. 569; *Bayley* v. *Bishop*, 9 Ves. 6; *Parker* v. *Sowerby*, 1 Drew. 488; *Hodges* v. *Grant*, L. R. 4 Eq. 140; *Partridge* v. *Baylis*, 17 Ch. D. 835 (as to the gift over in this case, see post, Chapter LVII.). In *Bayley* v. *Bishop* and *Parker* v. *Sowerby*, the property to be sold was real, but this makes no difference; *Re Hart's Trusts*, 3 De G. & J. 195. See also *Beck* v. *Burn*, 7 Bea. 492; *Cheveux* v. *Aislabie*, 13 Sim. 71; *Davidson* v. *Proctor*, 19 L. J. Ch. 395, which appear to be undistinguishable from, and inconsistent with, the other cases. *Beck* v. *Burn* was doubted by Kindersley, V.-C., in *Parker* v. *Sowerby*, 17 Jur. 752; and by Romilly, M.R., in *Adams* v. *Roberts*, 25 Bea. 658; and though constantly cited, appears never to have been followed.

(*m*) *Hallifax* v. *Wilson*, 16 Ves. 168; *Chalfers* v. *Abell*, 3 Jur. 578; *Cousins* v. *Schroder*, 4 Sim. 23; *Watson* v. *Watson*, 11 Sim. 73; *Baynes* v. *Prevost*, 8 Jur. 506; *Packham* v. *Gregory*, 4 Hare, 396; *Re Wilson*, 14 Jur. 263; *Salmon* v. *Green*, 11 Bea. 453; *Homer* v. *Gould*, 1 Sim. N. S. 541; *Marshall* v. *Bentley*, 1 Jur. N. S. 786; *Strother* v. *Dutton*, 1 De G. & J. 675; *Re Bright's Trust*, 21 Bea. 67; *M'Lachlan* v. *Taitt*, 28 Bea. 407. As to the effect of a gift over in the event of a legatee dying before his legacy or share becomes "payable," see Chapter LVII.

(*n*) 16 Ch. D. 112.

with remainder to their children, followed by a direction that the investment of the fund should not be altered during the lives of A. and B.; "nor until the period arrives for its distribution (after their death) among their children surviving": it was held that the latter clause did not import the contingency of survivorship into the original gift.

Gift over.

A gift over in case of the legatee's death before the period of distribution will not generally prevent the application of this doctrine (*o*).

Occurrence of new words of gift.

On the same principle, the mere introduction into an ulterior gift of new words of disposition, has no effect in postponing the vesting. Thus, where a testator bequeaths personalty to trustees, in trust for A. for life, adding, "and after her decease, then I give," &c., these words do not postpone the vesting of the gift to the posterior legatee until the decease of A., but merely shew that that is the period at which it will take effect in possession (*p*).

Class subject to enlargement before time of payment.

In *Oppenheim* v. *Henry* (*q*), a testator bequeathed property in trust for his grandchildren, to be divided amongst them at the expiration of twenty years after his decease: it was held that the grandchildren living at his death took vested interests, subject to be opened and to let in grandchildren born before the expiration of the twenty years.

Gift to class, followed by gift to one object.

In some cases, where there is a gift to a class, followed by a gift to take effect in the event of only one object answering the description, the construction of the gift to the class may be affected by the terms of the latter gift (*r*). On the other hand, the gift to the class may be contingent, while the gift to the sole object may be vested (*rr*).

Gift seemingly contingent vested by gift of intermediate interest.

Mr. Jarman continues (*s*): "Where a legacy is given to a person if, or provided, or in case, or when, (for it matters not which of these words is used (*t*),) he attains the age of twenty-one years (*u*), or marries (*v*), though such legacy standing alone and unexplained

(*o*) *Shrimpton* v. *Shrimpton*, 31 Bea. 425.

(*p*) *Benyon* v. *Maddison*, 2 B. C. C. 75.

(*q*) 10 Hare, 441.

(*r*) See *Judd* v. *Judd* and *King* v. *Isaacson*, referred to post, pp. 1423, 1424. The principle of these cases seems to apply to ordinary legacies. See *Lewis* v. *Templer*, 33 Bea. 625.

(*rr*) *Johnson* v. *Foulds*, L. R. 5 Eq. 268. In *Re Fletcher*, 53 L. T. 813, the gift was to children who attained twenty-one, &c., in equal shares, "if only one child wholly to him or her," but if no child attained a vested interest, over: there was one child who died under age and unmarried, and it was held that she did not take a vested interest.

(*s*) First ed. p. 764.

(*t*) *Hanson* v. *Graham*, 6 Ves. at p. 243.

(*u*) *Atkinson* v. *Turner*, 2 Atk. 41; *Knight* v. *Cameron*, 14 Ves. 389.

(*v*) *Elton* v. *Elton*, 3 Atk. 504; *Re Wrey*, post, p. 1408.

CHAR. XXXVII.

would clearly be contingent, i.e. would be liable to failure in case of the legatee dying before the prescribed age or event; yet if the interest accruing in the interval between the death of the testator and the future period in question is appropriated to the benefit of the legatee, it is held, in analogy to the doctrine of *Boraston's Case* (*w*), that the words of futurity and contingency refer to the possession only, and that the gift amounts, in substance, to an absolute vested legacy, divided into two distinct portions or interests, for the purpose of protracting, not the vesting, but the possession only. Thus, in *Hanson* v. *Graham* (*x*), where A. gave to his grandchildren B., C., and D., 500*l.* 4*l.* per cent Annuities a-piece, *when* they should respectively attain their ages of twenty-one years, or day or days of marriage, which should first happen with consent, and directed that the interest of the said Bank Annuities should be laid out for the benefit of the grandchildren till they should attain their respective ages of twenty-one years, or day or days of marriage; Sir W. *Grant*, M.R., after a full and able examination of the authorities, held, on the principle above stated, that the legacies vested at the death of the testator.

Annuities.

"So, in *Lane* v. *Goudge* (*y*), where A. bequeathed certain 3*l.* per cent. Consols to L. for his (L.'s) second daughter, that he should have born, for her education till she should attain the age of twenty-one years; and, after she should attain to the said age of twenty-one years, the testator gave the said interest to her and her heirs for ever, she being christened Z. The second daughter was christened Z., and was held to be absolutely entitled, though she died at the age of seventeen (*z*)."

Discretionary trust to pay whole or part.

And a discretionary trust or power to pay the whole or part of the income has the same effect. In *Re Parker* (*a*), the rule was thus stated by Jessel, M.R.: "When a legacy is payable at a certain age, but is, in terms, contingent, the legacy becomes vested when there is a direction to pay the interest in the meantime to the person to whom the legacy is given; and not the less so when

(*w*) Ante, p. 1372.

(*x*) 6 Ves. 239. See also 7 Ves. 121.

(*y*) 9 Ves. 225. See also 2 Freem. 24; Pre. Ch. 317; *Parker* v. *Golding*, 13 Sim. 418; *Hammond* v. *Maule*, 1 Coll. 281; *Hobbs* v. *Parsons*, 2 Sm. & Gif. 212.

(*z*) See also *Lore* v. *L'Estrange*, 5 B. P. C. Toml. 59; *Boulton* v. *Pilcher*, 29 Bea. 633; *Bird* v. *Mayhury*, 33 Bea. 351, *Hardcastle* v. *Hardcastle*, 1 H. & M. 405; *Re Peek's Trusts*, L. R. 16 Eq. 221; *Keily* v. *Monck*, 3 Ridg. P. C. 205; *Vize* v. *Stoney*, 1 Dr. & War. 337; *M'Cutcheon* v. *Allen*, 5 L. R. Ir. 268; *Vivian* v. *Mills*, 1 Bea. 315. In *Sullivan* v. *Edgell*, 23 W. R. 722, the gift was held to be contingent on the construction of the whole will.

(*a*) 16 Ch. D. 44. Quoted and followed by Neville, J., in *Re Williams*, [1907] 1 Ch. 180, post, p. 1422.

there is superadded a direction that the trustees 'shall pay the whole or such part of the interest as they shall think fit.'"

Gift of interest followed by gift of principal.

In *Batsford* v. *Kebbell* (*b*) a testatrix gave to E. the dividends that should become due after her decease upon 500*l.* 3 per cent. annuities until he should arrive at the full age of thirty-two years, at which time she directed her executors to transfer to him the principal sum of 500*l.* of her 3 per. cent. annuities for his own use. E. died under the age of thirty-two, and Lord Loughborough held that the legacy failed. Mr. Jarman, in referring to this case, and *Sansbury* v. *Read* (*c*), and *Ford* v. *Rawlins* (*d*), remarks (*e*): "These cases have been commonly considered as decided on the principle, that, where the interest or dividends alone are the subject of bequest until a particular time, and the principal is then, *for the first time*, to be taken out of it, the intermediate gift of the interest or dividends will not vest the capital: 1 Rop. Leg. p. 581, White's ed. It must not too readily be assumed, however, that any given case falls within the principle, as the Courts have evinced no great inclination to extend it; and, in truth, in some of the cases of this class, the difference of expression was very slight" (*f*). In reality, however, the decision in *Batsford* v. *Kebbell* did not turn on the fact that the gift of capital followed that of the dividends, but on the marked distinction which was drawn between the dividends and the capital (*g*).

In *Westwood* v. *Southey* (*h*), after referring to *Batsford* v. *Kebbell* and *Billingsley* v. *Wills* (*i*), Kindersley, V.-C., said: "These cases have very often been relied upon in support of a proposition, which they do not at all establish, viz. that if in the first instance there is a gift of dividends only, and then the gift of the principal, with a limitation over, for that reason only, there is no vesting. That principle is not, in my opinion, established by these cases." And in *Pearson* v. *Dolman* (*j*), a gift of this kind was held by Wood, V.-C., to confer a vested interest. It is true that in *Spencer* v. *Wilson* (*k*), Malins, V.-C., held that a similar gift did not give a vested interest, but this decision has not been followed, and

(*b*) 3 Ves. 363.
(*c*) 12 Ves. 75.
(*d*) 1 S. & St. 328, ante, p. 1403.
(*e*) First ed. p. 765, note.
(*f*) It was suggested by Arden, M.R., 3 Ves. at p. 367, that *Batsford* v. *Kebbell* was to be referred to the circumstance that the gift of principal was postponed to a more advanced age than that at which the law would put the legatee in possession. Such a postponement is of course ineffectual after twenty one, if the legacy is vested, see ante, p. 561. But this distinction has not been recognized. See *Scotney* v. *Lomer*, post.
(*g*) *Re Hart's Trusts*, 3 De G. & J. 195.
(*h*) 2 Sim. N. S. 192.
(*i*) 3 Atk. 219.
(*j*) L. R. 3 Eq. 315.
(*k*) L. R. 16 Eq. 501, dissented from in *Bolding* v. *Strugnell*, 24 W. R. 339.

the later cases of *Re Bunn* (*l*), *Scotney* v. *Lomer* (*m*), and *Re Wrey* (*n*), seem to shew that *Butsford* v. *Kebbell* would at the present day, if followed at all, be followed only in a case exactly on all fours with it.

Gift on marriage.

In *Re Wrey* the gift was to pay the dividends of stock to G. until his marriage, and at the time of his marriage to hand over the stocks to him: it was held that G. was entitled to have them transferred to him on his attaining twenty-one, although he had not married.

Defeasible gift of income.

In *Pearson* v. *Dolman* and *Scotney* v. *Lomer*, the gift of the income was defeasible on alienation, &c.

Gift of income to a class followed by gift of corpus.

The same principle applies where the gift is to a class. Thus, in *Re Groves' Trusts* (*o*), a testator gave real property upon trust to pay the rents and profits to all and every the child and children of A. until the youngest attained twenty-one, and then on trust to sell and divide the proceeds equally among all the said children: it was held that all the children took vested interests. *Jones* v. *Mackilwain* (*p*) was an even stronger case, but there the gift was residuary.

Gift of maintenance does not necessarily cause vesting,

Mr. Jarman continues (*q*): "A gift of interest, eo nomine, obviously is difficult to be reconciled with the suspension of the vesting, because interest is a premium or compensation for the forbearance of principal, to which it supposes a title; but a mere allowance for maintenance out of, and of less amount than the interest, has, it seems, no such influence on the construction (*r*).

—unless whole income is given as interest.

"If, however, the *entire* interest is made applicable to maintenance, the argument in favour of the vesting exists in full force" (*s*).

(*l*) 16 Ch. D. 47.

(*m*) 29 Ch. D. 535; 31 Ch. D. 380.

(*n*) 30 Ch. D. 507.

(*o*) *Re Groves' Trusts*, 3 Giff. 575, more fully reported 9 Jur. N. S. 38; *Boulton* v. *Pilcher*, 29 Bea. 633; *Re Parker*, 16 Ch. D. 44.

(*p*) 1 Russ. 220. This case is referred to post, p. 1409.

(*q*) First ed. p. 766.

(*r*) *Pulsford* v. *Hunter*, 3 B. C. C. 416. See also *Leake* v. *Robinson*, 2 Mer. at p. 386.

(*s*) *Fonereau* v. *Fonereau*, 3 Atk. 645; *Heath* v. *Heath*, 2 Br. C. C. 3; *Re Bunn*, 16 Ch. D. 47. See also 1 Russ. 220, 1 Tam. 18; *Lister* v. *Bradley*, 1 Ha. 10; *Re Lyman's Trust*, 2 L. T. N. S. 662; *Re Hart's Trusts*, 3 De G. & J. 195; *Bell* v. *Cade*, 2 J. & H. 122; *Tatham* v. *Vernon*, 29 Bea. 604; *Shrimpton* v. *Shrimpton*, 31 Bea. 425. The decision in *Re Ashmore's Trusts*, L. R. 9 Eq. 99, so far as it is contra seems inaccurate; see *Fox* v. *Fox*, L. R. 19 Eq. 286. In *Re Ashmore's Trusts*, James, V.-C., relied on *Pulsford* v. *Hunter*, 3 B. C. C. 416, which has generally (see 2 Mer. 386) been considered an authority only for the position for which it is cited supra. The report is obscure: but it is very improbable that Lord Thurlow, (whose decision it is, but of which there seems to be no entry in R.L.,) intended to overrule his own previous decision in *Heath* v. *Heath*, 2 B. C. C. 3, where he held that "giving the interest for maintenance was precisely the same thing" as giving the interest simpliciter. The decision in *Taylor* v. *Bacon*, 8 Sim. 100, seems to have turned on the

So if the whole income is given, subject to an annuity or the like (*ss*).

But an annual allowance for maintenance, although equal in amount to the interest, will not, unless given as interest, have the same effect. As Lord Cottenham said in *Watson* v. *Hayes* (*t*): "It is the giving the interest which is held to effect the vesting of the legacy, and not the giving maintenance; but when maintenance is given, questions arise, whether it be a distinct gift, or merely a direction as to the application of the interest: and if it be a distinct gift, it has no effect upon the question of the vesting of the legacy."

In *Russell* v. *Russell* (*u*), there was a gift of specific property upon trust for A. upon his attaining twenty-five, with a direction to accumulate the income in the meanwhile upon trust for A. upon his attaining twenty-five, and a discretionary power to apply any part of the income for his maintenance, &c., while under that age: it was held that the gift failed by the death of A. under twenty-five.

Gift of income operates to vest legacy to a class,

Where the legacy is to a class (*uu*), a gift of the interest for maintenance operates to vest the legacy, provided that each member of the class has a distinct title to the interest of his own share. The decision in *Jones* v. *Mackilwain* (*v*) rested on this principle, although there the construction was aided by the fact that the gift was residuary (*w*). In that case the trust was to pay the income of one moiety of the property for the maintenance of the children of A. until they severally attained their several and respective ages of twenty-one, and after they severally and respectively attained that age, as to all the property, "as and when they and each and every of them shall attain his, her and their respective age and ages of twenty-one years," in trust to pay and dispose of the same unto and amongst all and every such child and children: it was held that the children took vested interests (*x*).

—unless given as a common fund.

But where the interest is given as a common fund for the

scheme of the whole will. In *Perrott* v. *Davies*, 38 L. T. 52, *Re Ashmore's Trusts* is distinguished.

(*ss*) *Potts* v. *Atherton*, 28 L. J. Ch. 486.

(*t*) 5 My. & Cr. at p. 133; see *Livesey* v. *Livesey*, 3 Russ. 287; *Corr* v. *Corr*, Ir. R. 7 Eq. 397.

(*u*) [1903] 1 Ir. 168.

(*uu*) Of course a gift "to each child of A. who shall attain twenty-one" is not a gift to a class; such a gift falls under the general rule above stated; *Re Byrne*, 23 L. R. Ir. 260.

(*v*) 1 Russ. 220.

(*w*) As to residuary bequests, see post, p. 1420.

(*x*) The decision in *Fox* v. *Fox*, L. R. 19 Eq. 286, appears to follow the same principle; see *Re Mervin*, [1891] 3 Ch. 197, stated post, p. 1413; and the remarks on *Fox* v. *Fox*, post, p. 1414.

maintenance of all the members of the class, it does not vest the legacy. Thus in *Lloyd* v. *Lloyd* (*y*), the testator devised lands to trustees upon trust for his daughter for her life, and after her death upon trust to apply the rents "for and towards the maintenance, education and benefit of all and every the child and children of his said daughter during their minority, and when and as soon as all such children, if more than one, should have attained the age of twenty-one years, upon trust to sell the lands, and pay the money arising therefrom to and amongst all and every such child or children, share and share alike, if more than one, and if but one then the whole to such only child." Wood, V.-C., treated it as settled that a gift in that form, without the gift of income, vested only in such as attained twenty-one (*z*). Then, did the gift of income vest it sooner? He thought not (*a*).

Again, in *Re Parker* (*b*), Jessel, M.R., after stating the general rule that where a legacy is given to a person on his attaining a certain age, a direction to pay the intermediate income to him makes the legacy vested, said: "I am not aware of any case where, the gift being of an entire fund payable to a class of persons equally on their attaining a certain age, a direction to apply the income of the whole fund in the meantime for their maintenance has been held to create a vested interest in a member of the class who does not attain that age."

Discretionary trust for maintenance.

Where personal property is given upon trust for a person on attaining a certain age, with a trust to apply the whole of the income, or so much as the trustees think fit, for his maintenance in the meanwhile, a more difficult question arises, because such a trust is obviously not a gift of the whole income (*c*), and it might therefore be supposed that the case would fall within the rule above

(*y*) 3 K. & J. 20; and see *Vorley* v. *Richardson*, 8 D. M. & G. pp. 126, 129, 130; *Re Hunter's Trusts*, L. R. 1 Eq. 295; *Davenhill* v. *Davenhill*, 5 W. R. 18; *Bickford* v. *Chalker*, 2 Drew. 327; and per Sir J. Romilly, *Sanders* v. *Miller*, 25 Bea. 154. A fortiori if the trustees have power to exclude some of the class from all maintenance, *Re Barnshaw's Trusts*, 15 W. R. 378. See *Re Parker*, 16 Ch. D. 44, infra, and *Sullivan* v. *Edgell*, 23 W. R. 722.

(*z*) See *Parker* v. *Sowerby*, 1 Drew. 488, at p. 496.

(*a*) In the fourth edition of this work (by Mr. Vincent), it was suggested that in the view of the V.-C. the words "during their minority" meant while any child was under age, so as to include children who had attained twenty-one; but this seems inconsistent with the concluding part of the judgment.

(*b*) 16 Ch. D. 44. This passage was cited with approval by Stirling, J., in *Re Mervin*, [1891] 3 Ch. 197, where the gift was one of residue, and the leaning in favour of the shares being vested was consequently even stronger than in the cases now under discussion; post, p. 1421.

(*c*) See the judgment of Wood, V.-C., in *Re Sanderson's Trusts*, 3 K. & J. at p. 507.

stated (*d*), and in *Hardcastle* v. *Hardcastle* (*e*), Wood, V.-C., said that such a provision would be conclusive against vesting, "because in that case [the children] could not be treated as entitled during minority to the whole interest."

Fox v. *Fox*.

However, in *Fox* v. *Fox* (*f*), where a fund was given upon trust, after certain life interests, for the children of T. as they should respectively attain twenty-five, applying from time to time the income of the presumptive share of each child, or so much as the trustees might think proper, for his or her maintenance, until his or her share should become payable, it was held by Jessel, M.R., that the children of T. took vested interests. There was a gift over, and the M.R. added that this, if not conclusive, certainly aided the construction (*g*).

But in *Re Parker* (*h*) the M.R. laid down the general principle as one not requiring the assistance of a gift over: "In my opinion, when a legacy is payable at a certain age, but is in terms contingent, the legacy becomes vested when there is a direction to pay the interest in the meantime to the person to whom the legacy is given; and not the less so when there is superadded a direction that the trustees 'shall pay the whole or such part of the interest as they shall think fit.'" The point did not arise in the case, and the statement of the M.R. is therefore only a dictum, but it was adopted as correct by Neville, J., in *Re Williams* (*i*). In that case the gift was one of residue, and the presumption in favour of a vested interest was therefore stronger.

(*d*) *Pulsford* v. *Hunter*, 3 Br. C. C. 416 (as explained in *Fox* v. *Fox*, L. R. 19 Eq. 286), and *Leake* v. *Robinson*, 2 Mer. 363, ante, pp. 1403, 1408.

(*e*) 1 H. & M. 405.

(*f*) L. R. 19 Eq. 286. The earlier cases of *Eccles* v. *Birkett* and *Re Rouse's Estate*, infra, note (*g*), were not cited in *Fox* v. *Fox*.

(*g*) The M.R. relied on *Harrison* v. *Grimwood*, 12 Bea. 192, where, however, the trust for maintenance (during part of the interval) was only one of several combined grounds for the decision. The judgment as reported in Beavan is not in accordance with the judgment as delivered, for it appears from the reports in the Law Journal and the Jurist (18 L. J. Ch. 485; 13 Jur. 864) that Lord Langdale gave his general views on the subject on one day and his considered judgment some days later; in his considered judgment he did not refer to the trust for maintenance at all. It is quite clear that the gift over was an important element in the case. See post, p. 1414. *Eccles* v. *Birkett*, 4 De G. & S. 105, is open to a similar observation, having regard especially to the contrast between the clearly contingent words "children who, &c," and the more equivocal "as and when," and to the exception of two children by name—as to which last point see 1 Drew. 496; but no reasons are reported. A dictum of Turner, V.-C., in *Re Rouse's Estate*, 9 Hare, 649, has also been sometimes cited to the same effect; but it proceeds on a questionable interpretation of what Lord Kenyon said in *Wynch* v. *Wynch*, 1 Cox, 433, imputing to the latter the doctrine that a gift out of income for maintenance vests a legacy. The V.-C.'s decision is referable to other grounds, post, p. 1418.

(*h*) 16 Ch. D. 44. This doctrine does not apply if the money for maintenance is given, not out of the interest, but out of a separate fund; *Rudge* v. *Winnall*, 12 Bea. 357.

(*i*) [1907] 1 Ch. 180.

The decision in *Fox* v. *Fox* was approved by Lindley, L.J., and Jeune, P., in *Re Turney* (*j*). In that case a testator bequeathed a fund upon trust for a daughter for life, and after her death in trust for all her children when they should attain twenty-five, but not before, and if more than one in equal shares; if there should be no such child the fund was to fall into residue; until the fund should be invested the trustees were directed to pay to the children interest on their respective portions; the trustees were empowered to raise part of the expectant share of any grandchild for his or her advancement, and to apply all or any part of the income of the expectant share of any grandchild for maintenance, and they were directed to accumulate the unapplied income and add it to the capital of the share. It was held by the Court of Appeal (dubitante Romer, L.J.) that the grandchildren took immediate vested interests, subject to their being divested in case they died under twenty-five. Lindley, L.J., said: "I am by no means satisfied that *Fox* v. *Fox* was wrongly decided. So far as I have considered it, my impression is that the decision is very good sense and very good law."

Limitations on doctrine of *Fox* v. *Fox*.

The decision in *Re Turney* turned on the language of the will, and not on the point decided in *Fox* v. *Fox*, for Lindley, L.J., said that he attached great importance to the phrase "interest on their respective portions," but not much importance to the maintenance clause (*k*), which formed the basis of the decision in *Fox* v. *Fox*. It is therefore somewhat difficult to say how far the authority of *Fox* v. *Fox* extends. It is certain that it has its limitations.

Thus, in *Re Grimshaw's Trusts* (*l*), a testator gave a fund upon certain trusts for A. B. and his wife during their lives, and after the death of the survivor upon trust to apply the income, or so much as the trustees should think proper, in the maintenance of their children during their minorities, and upon their attainment to the age of twenty-one years, to pay and divide the fund "with the accumulations thereof" unto and equally amongst such child or children, and if there were no such child, unto G.: it was held by Hall, V.-C., that *Fox* v. *Fox* did not apply, and that the shares of the children were contingent on their attaining twenty-one: the V.-C. thought the case was governed by *Leake* v. *Robinson* (*m*).

(*j*) [1899] 2 Ch. 739.

(*k*) It was a mere discretionary power (not a trust, as in *Fox* v. *Fox*), and probably had reference to the gift of residue, not being consistent with the direction as to payment of interest on the specific fund above referred to. As to the gift of residue, see post, p. 1430, where the later case of *Re Gossling*, [1903] 1 Ch. 448, is cited.

(*l*) 11 Ch. D. 406.

(*m*) Ante, p. 1403.

Again, in *Dewar* v. *Brooke* (*n*), where a fund was given upon trust for children who, being sons, should attain twenty-five, or being daughters, should attain twenty-one or marry, with a discretionary power (not a trust) to apply the income to which any child should be entitled in expectancy for maintenance, this was held not to confer a vested interest on a son who had not attained twenty-five.

And in *Re Parker* (*o*), where there was a gift of residue upon trust to pay the income, or such part thereof as the trustees should from time to time deem expedient, for the maintenance of the testatrix's children until they should attain their respective ages of twenty-one years, and from and immediately after their attaining their respective ages of twenty-one years, upon trust to pay and transfer the capital to the children in equal shares; there was a power of advancement out of the "presumptive share" of any child: Jessel, M.R., held that there was no gift of an aliquot share of income to any individual child, but a trust for maintenance out of the income of the whole fund, and that consequently the interests of the children were contingent on their attaining twenty-one.

Re Morris (*p*) and *Re Martin* (*q*), which were both cases of residuary gifts, seem to have been decided on the same principle.

In *Wilson* v. *Knox* (*r*), there was a legacy to each child of the testator who being sons should attain the age of twenty-one, and being daughters, should attain that age or marry, with power to the trustees to apply the whole or part of the income of each expectant legacy for maintenance: it was held that the legacy of a daughter who died under twenty-one and a spinster did not vest in her.

In *Re Mervin* (*s*), the provision for maintenance was also a power and not a trust. Stirling, J., however, did not rest his decision on this ground, but held that the principle of *Fox* v. *Fox* did not apply, because the income of the whole fund was made applicable for the maintenance of the children, as in *Re Parker* (*t*).

In *Re Wintle* (*u*), the testator gave his residue upon trust for his wife for life, and after her death upon trust for his children and remoter issue per stirpes absolutely upon their respectively attaining twenty-one, and he empowered his trustees to apply the whole or such part as they should think fit of the annual income of the share or presumptive share of any of his children or

(*n*) 14 Ch. D. 529.
(*o*) 16 Ch. D. 44, pp. 1410, 1411.
(*p*) 52 L. T. 840.
(*q*) 57 L. T. 471.
(*r*) 13 L. R. Ir. 349.
(*s*) [1891] 3 Ch. 197.
(*t*) 16 Ch. D. 44.
(*u*) [1896] 2 Ch. 711.

grandchildren during minority, for or towards his, her or their education or maintenance. North, J., did not lay any stress on the fact that the maintenance clause was a mere discretionary power, as he seems to have treated it as equivalent to a discretionary trust for maintenance (*v*), and dissented from *Fox* v. *Fox* as being contrary to the principles recognized in *Hanson* v. *Graham*, *Leake* v. *Robinson*, and *Vaudry* v. *Geddes* (*w*).

This decision is supported by the authority of Wood, V.-C. (*x*), but against it must be set the dictum of two judges of the C. A. in *Re Turney* (*y*) expressing approval of *Fox* v. *Fox*.

Suggested distinction between *Fox* v. *Fox*, and *Re Wintle*.

In *Re Williams* (*z*), Neville, J., said he doubted whether *Fox* v. *Fox* and *Re Wintle* could both stand. There seems, however, to be an important distinction between the two cases: in *Re Wintle* the gift was simply to the children upon their respectively attaining twenty-one, with a discretionary power of maintenance during minority: there was no gift over. In *Fox* v. *Fox* the gift was to the children as they respectively attained twenty-five, with a trust or direction to apply so much of the income as the trustees might think proper for maintenance, and a gift over in the event of all the children dying under twenty-five. In the somewhat similar case of *Harrison* v. *Grimwood* (*a*) (on which Jessel, M.R., relied in *Fox* v. *Fox*), Lord Langdale held that such a gift confers a vested interest, subject to be divested on death under twenty-five. So, in *Re Turney* (*b*), where a gift to children on attaining twenty-five, with a gift over, was held to confer interests subject to be divested, the decision did not turn on the gift of maintenance, but on the gift over, and it is, therefore, submitted that the approval of *Fox* v. *Fox* expressed by the C. A. had reference to the effect of a gift over in conferring vested interests subject to be divested. If this distinction is sound, *Fox* v. *Fox* and *Re Wintle* can both stand.

It is to be remarked that notwithstanding the apparent inconsistency between *Fox* v. *Fox* and *Re Wintle*, the decision in each case carried out the obvious intention of the testator, for in *Fox*

(*v*) As did Stirling, J., in *Re Mervin*, supra. In *Eccles* v. *Birkett*, 4 De G. & S. 105 (ante, p. 1411, note (*g*)), the maintenance clause was in the form of a power.

(*w*) Post, p. 1426.

(*x*) *Hardcastle* v. *Hardcastle*, supra, p. 1411.

(*y*) Supra, p. 1412.

(*z*) [1907] 1 Ch. 180, post, p. 1422.

(*a*) 12 Bea. 192, ante, p. 1411, note (*g*). According to the report in the Law Journal (18 L. J. Ch. 485) and the Jurist (13 Jur. 864, which is clearly more accurate than the L. J.), Lord Langdale laid less stress on the trust for maintenance than would appear from the report in Beavan; he thought the gift to the children ambiguous and decided the case on the whole will.

(*b*) Supra, p. 1412.

v. *Fox* the testator meant the children to take if they attained twenty-five, while in *Re Wintle* the testator meant that the representatives of a child dying under twenty-one were not to take its share, as they would have done if the share had been held to be vested. And it is submitted that the intention would have been equally clear if the testator had directed the trustees to apply such part of the income as they thought proper for the maintenance of each child.

Result of the authorities.

The following rules may be deduced from the foregoing authorities:

(1) A bequest to a class consisting of persons who attain a certain age or marry, &c., is contingent, and a gift of the intermediate income or of maintenance will not give a vested interest to any person before attaining that age or marrying, &c. (*c*).

(2) A bequest to an individual or a class of persons on attaining a certain age or marrying, &c., accompanied by a gift of the intermediate income or a trust to apply the whole of it for maintenance, will generally have the effect of conferring a vested interest (*d*). But according to the latest decisions, if the bequest is to a class or number of individuals, an aliquot share of the income must be appropriated by the will to each legatee; it is not sufficient to direct the whole income to be applied for maintenance as a common fund (*e*).

(3) On the question whether a trust to apply the income of the property, or such part as the trustees think proper, for maintenance, is equivalent to a gift of the whole income for the purposes of the foregoing rule, the decisions are conflicting (*f*). Assuming that the answer is in the affirmative, it does not follow that a mere discretionary power of maintenance has the same effect (*g*); the statutory power of maintenance of course has not (*h*).

It seems, although this is a point which can scarcely be considered settled, that the direction to apply the intermediate income for

(*c*) *Leake* v. *Robinson*, 2 Mer. 363; *Stead* v. *Platt*, 18 Bea. 50; *Atcherley* v. *Du Moulin*, 2 K. & J. 186; *Lloyd* v. *Lloyd*, 3 K. & J. 20; *Dewar* v. *Brooke*, 14 Ch. D. 529; *Locke* v. *Lamb*, L. R. 4 Eq. 372; *Wilson* v. *Knox*, 13 L. R. Ir. 349.

(*d*) Ante, p. 1405, where expressions equivalent to "on attaining," &c., are given, and see *Potts* v. *Atherton*, 28 L. J. Ch. 486, where an annuity was charged on the trust fund.

(*e*) *Re Parker*, 16 Ch. D. 44, and other cases cited ante, p. 1413. See also *Re Gossling*, post, p. 1425.

(*f*) *Fox* v. *Fox*, L. R. 19 Eq. 286; *Re Wintle*, [1896] 2 Ch. 711. The dicta of other judges on the point are referred to ante, p. 1414.

(*g*) In *Re Parker*, 16 Ch. D. 44, Jessel, M.R., did not suggest that a mere discretionary power of maintenance would make the legacy vested; ante, pp. 1410, 1411.

(*h*) *Re Jobson*, 44 Ch. D. 154.

Gift of interest for the whole of the intermediate time implied from direction how to apply it during part of the time.

the maintenance of the legatee, need not extend to the whole time which must elapse before the period appointed for payment arrives. Thus, in *Davies* v. *Fisher* (*i*), where a testatrix bequeathed her residuary personal estate in trust for A. for life, and after his death in trust for his children, as they severally attained the age of twenty-five years, the income to be applied by their guardians during their respective minorities for their maintenance: Lord Langdale, M.R., thought that although there was no distinct gift of the interest yet that such a gift was to be implied from the direction to apply it during minorities. "The inference or implication," he said, "arises from the direction to apply the interest, and, although the direction is limited to the minorities, it is not necessary, or I think reasonable, to limit the inference or implication in like manner, or to the mere time to which the direction applies. At that time the mode of enjoyment expressly directed will cease, but I do not think that it is therefore to be concluded that there is to be no enjoyment." He therefore held that on this ground alone the children would have taken vested interests. But the case did not rest entirely on this ground (*j*); and even if it did, it would not be an authority that a gift of interest arising during a part only of the interval before the time of payment vests the legacy. There are dicta opposed to such a doctrine (*k*); and in the case itself a gift of interest during the whole interval was (as will have been seen) supplied by implication (*l*), a construction which might often be found convenient to fill up a gap

ises.

Gift of interest will not vest the legacy where a contrary intention appears.

hardly necessary to say that a testator is not to be denied the power of giving interest without vesting the legacy, if such be his intention. Thus, in *Re Bulley's Estate* (*m*), where residue was bequeathed in trust for A. for life, and after her death "to be paid to her surviving children in equal shares, as soon as they shall come to the ages of twenty-two years respectively, and not to go to their heirs or assigns or to any other person or persons on

(*i*) 5 Bea. 201. In *Milroy* v. *Milroy*, 14 Sim. 48, the word "minority" was held to mean the whole interval until the youngest child attained twenty-five. See *Maddison* v. *Chapman*, 4 K. & J. 709, 3 De G. & J. 536; *Fraser* v. *Fraser*, 1 N. R. 430; *Lloyd* v. *Lloyd*, supra, p. 1410, and *Harrison* v. *Grimwood*, 13 Jur. 864, and the comments thereon in *Re Wintle*, [1896] 2 Ch. 711, ante, p. 1413.

(*j*) See s.c., post, s. 1429. The same remark applies to *Brennan* v. *Brennan*, [1894] 1 Ir. 69, where there was a gift to children at twenty-four, with a trust for maintenance during minorities.

(*k*) Per Wood, V.-C., L. R. 3 Eq. at p. 321; per Romilly, M.R., 31 Bea. at p. 302.

(*l*) In *Tatham* v. *Vernon*, 29 Bea. 604, this was so expressed, viz. a gift to children at twenty-five, with gift of interest "in the meantime," for their maintenance "during minority."

(*m*) 11 Jur. N. S. 847.

any pretence whatsoever; that is to say, the share of each child which may die after the death of A. and before it arrives at the age of twenty-two years shall go among the others who may arrive" at that age; "and if any of the said children shall be under twenty-two after the death of A. then my will is that only the interest of the share of such child shall be paid to it or for its benefit until it arrives at the age of twenty-two;" it was held by Stuart, V.-C., and on appeal by K. Bruce and Turner, L.JJ., that only those children who attained twenty-two were intended to share.

Effect where principal and interest are blended.

Mr. Jarman continues (*n*): "Where (*o*) the principal and interest are so undistinguishably blended in the bequest that both must vest, or both be contingent, of course no argument in favour of the vesting of the principal can be drawn from the gift of the interest. Thus, where (*p*) a testator gave to each of the daughters of K., as soon as they attained the age of twenty-one years, the sum of 200*l*., with interest at the rate of 5*l*. per cent. per annum, Sir J. *Leach*, V.-C., held that there was no gift either of principal or interest until the daughter attained twenty-one.

"But the construction which suspends the vesting of the interest as well as the principal, inconvenient as it evidently is, will not be adopted, unless the intention be very clear. Thus, in ***Breedon*** v. *Tugman* (*q*), where a testator bequeathed one-third of his personal property to his wife; another third to his son, to be laid out in an annuity; and the other third to his daughter, adding, 'and in case of my decease, to have the interest therein and principal when she arrives at the age of twenty-five years;' it was contended that the words 'in case of my decease,' imported contingency, and which, as in *Knight* v. *Knight*, extended to the interest as well as the principal, and that neither of them was vested until the age of twenty-five; but Sir J. *Leach*, M.R., said that this was plainly an absolute gift to the daughter, and that the payment only was postponed; the testator meant not to qualify or restrict the nature of the previous gift, but to distinguish

(*n*) First ed. p. 766.

(*o*) Mr. Jarman here refers to *Watson* v. *Hayes*, 9 Sim. 500, but this reference seems to be an error.

(*p*) *Knight* v. *Knight*, 2 S. & St. 490. See also *Re Thruston*, 17 Sim. 21; *Chance* v. *Chance*, 16 Bea. 572; *Morgan* v. *Morgan*, 4 De G. & S. 164; *Locke* v. *Lamb*, L. R. 4 Eq. 372; *Butcher* v. *Leach*, 5 Bea. 392, is, perhaps, referable to this principle; sed qu.

(*q*) 3 My. & K. 289. "This is the case of a residue, and therefore may seem to belong to the next section; but as the ground of decision seemed to connect it with *Knight* v. *Knight*, it has been stated here." (Note by Mr. Jarman.)

between the time when she was to receive the interest, and the time when she was to receive the principal.

"So a direction subjoined to a simple bequest of stock, that the 'interest' shall be added to the 'principal' till the legatee attains twenty-one, has been held not to suspend the vesting, though there were vague expressions in the residuary clause of the testator's expectation that the annuities (which term it was contended, pointed to the interest on the legacies) might fall in (*r*)."

Rule in *Boraston's Case* applies to personalty.

It has also been held that a bequest to a person, if or when he attains a particular age, will be vested if the whole intermediate interest, though not given to the legatee himself, is expressly disposed of in the meantime for the immediate benefit or furtherance of some other person or object. It is only an exception out of the whole property meant to vest in the legatee, whose interest is, therefore, in the nature of a remainder which vests immediately, and its actual enjoyment only is postponed. This is in conformity with the principle of *Boraston's Case* (*s*), which, according to Sir W. Grant, M.R. (*t*), there was no ground to say ought to have been differently decided if it had occurred as to a pecuniary legacy.

Thus, in *Lane* v. *Goudge* (*u*), where one of the bequests was to L. till his (L.'s) second daughter should attain the age of twenty-one years, and after she should attain that age to her absolutely, the same Judge held that, supposing the gift to L. was for his own and not for his daughter's benefit (and there was nothing but conjecture for a contrary supposition), yet that the daughter took a vested interest.

Effect where apparently contingent gift must be severed from the estate immediately.

Again, a legacy to be severed from the general estate instanter, for the use and benefit of a legatee, is a very different thing from a legacy to be severed from the estate only on the happening of a particular event. Therefore, in *Saunders* v. *Vautier* (*v*), where

(*r*) *Stretch* v. *Watkins*, 1 Mad. 253. See also *Blease* v. *Burg*., 2 Bea. 221; *Josselyn* v. *Josselyn*, 9 Sim. 63; *Bull* v. *Johns*, Taml. 513; *Oppenheim* v. *Henry*, 10 Hare, 441.

(*s*) 3 Rep. 16, ante, p. 1372.

(*t*) 6 Ves. at p. 247. In *Laxton* v. *Ecdle*, 19 Bea. at p. 323, there is a contrary dictum of the M.R., which, however, appears unnecessary to the decision of that case.

(*u*) 9 Ves. 225.

(*v*) Cr. & Ph. 240. See also *Greet* v. *Greet*, 5 Bea. 123; *Lister* v. *Bradley*, 1 Hare, 10; *Bell* v. *Cade*, 2 J. & H. 122; *Love* v. *L'Estrange*, 5 B. P. C. Toml. 59, cit. 6 Ves. at p. 248; *Thruston* v. *Anstey*, 27 Bea. 335; *Oddie* v. *Brown*, 4 De G. & J. at pp. 1o5, 194; *Re Rouse's Estate*, 9 Hare, 649; *Dundas* v. *Wolfe Murray*, 1 H. & M. 425; *Brennan* v. *Brennan*, [1894] 1 Ir. 69. So, although in

a testator bequeathed his E. I. stock to trustees upon trust to accumulate the dividends until A. should attain his age of twenty-five years, and then to transfer the principal with the accumulated dividend to A., his executors administrators and assigns, absolutely; it was contended on the authority of *Knight* v. *Knight*, that the legacy was contingent on A. attaining the specified age; but Lord Cottenham, on the principle stated above, held it vested, and decreed payment to A. when he was twenty-one years of age.

It seems that the doctrine of *Saunders* v. *Vautier* does not necessarily apply to a specific bequest. In *Re Jobson* (*w*), a testator gave a leasehold house upon trust for his daughter for life, and after her death for all her children in equal shares on their respectively attaining twenty-one: there was no gift of the income after the daughter's death, and no gift over, and it was held by North, J., that the children did not take vested interests until they attained twenty-one.

Effect of gift over.

There are cases in which it has been held that a gift over has the effect of making interests vested, which would otherwise be contingent. Thus, if a fund is given to A. for life and after her death to such of her children as shall then be living as they attain twenty-one, with a gift over if A. dies without leaving issue, it has been held that this may be construed to shew an intention that the children are to take vested interests on the death of A., whether they attain twenty-one or not (*x*). So a bequest of leasehold property for the children of A. as and when they attain the age of twenty-one, with a gift over in case A. dies without leaving issue, may confer vested interests on the children, whether they attain twenty-one or not (*y*).

But the tendency of the modern decisions is to construe plain words according to their ordinary meaning, without regard to a gift over, imperfectly expressed; thus, where a fund was bequeathed to A. for life and after her death to her children "on their attaining twenty-one," with a gift over in the event of her dying witho

one event the legacy is expressly given back to residue, *Pearson* v. *Dolma* L. R. 3 Eq. 315. But compare *Festing* v. *Allen*, 5 Hare, 573; and *Gotch* v. *Foster*, L. R. 5 Eq. 311, suggesting the limits of the doctrine.

(*w*) 44 Ch. D. 154.

(*x*) *Bree* v. *Perfect*, 1 Coll. 128; *Re Bevan's Trusts*, 34 Ch. D. 716 (where the construction seems to have been influenced by a desire to evade the doctrine of reinoteness); *Lang* v. *Pugh*, 1 Y. & C. C. C. 718; and compare the cases on testamentary gifts, post.

Ingram v. *Sucklin*, 7 W. R. 386. *Re Edwards*, [1906] 1 Ch. 570, overruling *Kidman* v. *Kidman*, 40 L. J. Ch.

leaving issue, the interests of the children were held to be contingent on their attaining twenty-one (*a*).

Gift to contingent or restricted class.

The distinction between a gift to a class of children "who shall attain" a certain age, and a gift to children "when" or "as" they attain that age, is discussed in connection with gifts of residue (*b*).

Effect of gift over in construing limitations to children.

The effect of a gift over in aiding a construction in favour of vesting has been frequently referred to in citing the foregoing authorities. A class of cases may here be referred to in which a gift which, standing by itself, would clearly be contingent, has been held to be vested by virtue of a gift over. Thus, in *Re Knowles* (*c*), a testatrix gave the income of certain property upon trust for her three daughters in equal shares, and directed her trustees, after the decease of any daughter, to apply the deceased's share of income to the support of the children of the deceased parent "who may be living at their mother's decease until they become twenty-one years of age, then they will be entitled to their mother's portion, and if the children or child die (if but one) before they become of that age," then over. It was held by Kay, J., that a child who attained twenty-one and died in his mother's lifetime took a vested interest, thus applying the general rule that in construing a settlement on children (whether by deed or will) the Court will, if there is an ambiguity or inconsistency, lean to a construction which will give portions to all the children who may live to require them (*d*).

On the same principle, the Court sometimes regards the express words of a gift over, which, if taken literally would defeat an interest vested in a child by previous words of gift (*e*).

Interest vested subject to being divested.

The effect of a gift over in converting an interest which is apparently contingent, into an interest which is vested subject to being divested, has been already considered (*f*).

Clear gift not affected by gift over.

Where an interest is clearly contingent, a gift over will not make it vested (*g*).

Vesting of residuary bequests.

X.—Vesting of Residuary Bequests.—Most of the rules above stated with regard to the vesting of bequests of personalty, apply

(*a*) *Re Wrangham's Trust*, 1 Dr. & Sm. 358, approved in *Re Edwards*, [1906] 1 Ch. 570 (gift of residue).

(*b*) Post, p. 1424; see also p. 1382.

(*c*) 21 Ch. D. 806. The property in this case was realty, but the principle is of general application.

(*d*) *Perfect* v. *Lord Curzon*, 5 Madd. 442; *Jackson* v. *Dover*, 2 H. & M. 209.

(*e*) This application of the principle is discussed in Chapter XLII., post.

(*f*) Ante, p. 1377; *Edwards* v. *Hammond*, *Phipps* v. *Ackers*, and *Whitter* v. *Bremridge*, all cited ante, 1376 et seq. And see the remarks on *Fox* v. *Fox*, L. R. 19 Eq. 286, ante, p. 1414.

(*g*) Ante, p. 1378.

to residuary bequests, and indeed a fortiori, for, as Mr. Jarman points out (*h*): "It has been generally thought that a very clear intention must be indicated, in order to postpone the vesting under a residuary bequest, since intestacy is often the consequence of holding it to be contingent, or, at least (and this is the material consideration) such *may be* its effect; for, in construing wills, we must look indifferently at actual and possible events.

Possible as well as actual events to be regarded.

"Among the numerous cases which may be cited as illustrative of the leaning of the Courts towards the vesting of residuary bequests, is *Booth* v. *Booth* (*i*), where A. bequeathed the residue of his estate to trustees, upon trust to pay the dividends equally between his great nieces B. and C., until their respective marriages, and from and after their respective marriages, to transfer their respective moieties. Sir R. P. *Arden*, M.R., held that B. acquired a vested interest, although she died without having been married; his Honor relying much on the circumstance that it was the bequest of a residue (*j*).

"So, in *Jones* v. *Mackilwain* (*k*), where a testator gave to trustees all his real and personal estate, upon trust for sale, and as to one moiety of the produce for the benefit of his daughter A. during her life, and after her decease, upon trust to pay to her husband B. an annuity of 100*l.* during his life, and to apply the remainder of the annual income of the said moiety for and towards the maintenance of all and every the child and children of A., until they should severally attain his and their ages or age of twenty-one years, and as to all the said principal monies or produce of the testator's said real and personal estate *as and when they and*

(*h*) First ed. p. 767. The doctrine that the Court leans against an intestacy does not affect the construction of unambiguous provisions; per Romer, L.J., in *Re Edwards*, [1906] 1 Ch. at p. 574.

(*i*) 4 Ves. 399. See also *West* v. *West*, 4 Gif. 198. "Compare *Atkins* v. *Hiccocks*, ante, p. 1402; observing that there the bequest was pecuniary, and there was no gift of the interest in the meantime, nor any gift over. The disinclination so to construe a will as to make a testator die partially intestate, was also admitted in *Lett* v. *Randall*, 10 Sim. 112, where, however, the V.-C. considered himself forced into this undesirable conclusion by the ambiguity of the will; the testator having, in a certain event, made a bequest of the share of a deceased daughter to children then living in such a manner as to leave it doubtful whether he referred to the period of his own death, the death of his wife, or the happening of the contingency." (Note by Mr. Jarman.) And see per Romilly, M.R., 33 Bea. at p. 396, which may be set against 14 Bea. at p. 461. The remainder of this note, dealing with *Archer* v. *Jegon*, 8 Sim. 446, and other cases on the construction of gifts to persons "then living," has been transferred to Chapter XLII., where the rules for ascertaining classes are discussed.

(*j*) As Sir W. Grant points out in *Leake* v. *Robinson* (2 Mer. at p. 386), the decision also turned to a considerable extent on the fact that the whole income was given to the legatees. The effect of a gift of income or maintenance is discussed further, post, p. 1425.

(*k*) 1 Russ. 220.

each and every of them should attain his, her, and their respective age or ages of twenty-one years, in trust to pay and dispose of the same unto and amongst all and every *such* child and children. A. had two sons, both of whom died under twenty-one, and Lord *Gifford*, M.R., held that they respectively acquired vested interests; his Lordship adverting to the fact of its being a residuary bequest, and that the yearly income was given to the children until the prescribed age.

After clear immediate gift, vesting not postponed by equivocal terms.

"It seems that where the testator first gives the residue in terms which would, beyond all question, confer a vested interest, the addition of equivocal expressions of a contrary tendency will not suspend the vesting. Thus, where (*l*) A. by his will gave unto the children of his sister the whole of his real and personal estate (subject to certain legacies), and afterwards expressed his desire that the children should be educated with the yearly interest of whatever portion of his estate might fall to each child's lot or share, *and such portion not to be otherwise claimed or inherited, directly or indirectly, until the children arrived at the age of twenty-two years*, whether married or single—Sir R. P. *Arden*, M.R., held that the subsequent vague words were not sufficient to control the prior clear words, but the meaning was, that the legacy should be absolute, and that the legatees should not have the command of the principal till the age of twenty-two; and his Honor laid some stress on the fact of the interest being given for maintenance.

"So, where (*m*) a testator, after disposing of his real and personal estate in strict settlement, added that none of the devisees should take or come into possession before the age of twenty-five, this was held to refer to the actual possession only, and not to postpone the vesting."

In *Re Williams* (*n*), a testator gave all his residuary estate to trustees upon trust, as to one-third part thereof, to pay the income, or such part thereof as his trustees should think fit, to his son W. for his advancement, preferment, or benefit by equal [sic] weekly instalments until he should attain thirty-five, and then to pay him the corpus; when the testator died the son was twenty-five years of age: it was held that he took a vested interest at

(*l*) *Dodson* v. *Hay*, 3 B. C. C. 404—409. See also *Stretch* v. *Watkins*, 1 Mad. 253; *Brocklebank* v. *Johnson*, 20 Bea. 205; *Pearman* v. *Pearman*, 33 Bea. 394; but see *Shum* v. *Hobbs*, 3 Drew. 93.

(*m*) *Montgomerie* v. *Woodley*, 5 Ves. 522. It is not competent for a testator to defer the receipt by the legatee of a legacy absolutely vested in him beyond the age of legal majority; *Re Jacob's Will*, 29 Bea. 402; *Gosling* v. *Gosling*, Johns. 265; *Phillips* v. *Phillips*, [1877] W. N. 260; *Re Couturier*, [1907] 1 Ch. 470.

(*n*) [1907] 1 Ch. 180.

the testator's death, and was entitled to immediate payment. Neville, J., followed the rule laid down by Jessel, M.R., in *Re Parker* (*o*), and said that the fact of the gift being one of residue, so far as it had any effect, was an added reason for holding that the gift vested at once.

In gift to a class subsequent words may be explanatory where the preceding are ambiguous.

Where the gift is one to a class, the question of vesting is often more difficult than where it is to an individual. Some cases of frequent occurrence are referred to by Mr. Jarman. He says (*p*): "Where the terms of the original gift in favour of a class are ambiguous in regard to the period of vesting, a clear intention to suspend the vesting, manifested in carrying on the gift to the class in the event of its consisting of a single object, will be decisive of the construction; as it is hardly supposable that the testator could mean to create a difference of this nature between a plurality of objects and an individual object. Thus, where (*q*) A. gave the residue of his estate, real and personal, to trustees, as to one-third, in trust for his daughter S. for life, and after her decease for the child or children of his said daughter, if more than one share and share alike, to be paid, assigned, and transferred to them by his trustees upon their respectively attaining the age of twenty-five years; but in case S. should leave but one child her surviving, then the whole of such one-third part *should become the property of such only child, upon his or her attaining the age of twenty-five years*, and be transmissible to his or her heirs, executors or administrators; and in case his said daughter should leave no child her surviving, or in case she should leave a child or children who should not attain the age of twenty-five years, then over. Sir L. *Shadwell*, V.-C., held that the gift, in case the daughter should leave one child only her surviving, was clearly contingent on that child attaining the age of twenty-five; and the same construction, he observed, must be put on the gift, in case she should leave more than one."

Judd v. *Judd*.

The same argument would, without doubt, apply to a case where the ambiguity existed in the gift to the single object, the original gift in favour of the class being clearly conditional. But where no such ambiguity exists, it is of course not allowable, by

(*o*) 16 Ch. D. 44.

(*p*) First ed. p. 770.

(*q*) *Judd* v. *Judd*, 3 Sim. 525; see also *Tracy* v. *Butcher*, 24 Bea. 438; *Knox* v. *Wells*, 2 H. & M. 674 (as to the children surviving their father James); *Madden* v. *Ikin*, 2 Dr. & Sm. 207; *Smith* v. *Vaughan*, 8 Vin. Ab. 381, Tit. Devise (Zc.) pl. 32; *Merry* v. *Hill*, L. R. 8 Eq. 619; per Lord Selborne, L. R. 16 Eq. at pp. 271, 272; *Re Fletcher*, 53 L. T. 813.

CHAP. XXXVII.

inference from the collective gift, to import a contingency into the gift to the individual. This were to add words to the will, not to explain terms already existing in it; a course not warranted by the apparent singularity of the distinction made by the testator (*r*).

King v. *Isaacson* (*s*) was the converse of *Judd* v. *Judd*; the question being, whether a clearly vested bequest to the single object, imparted its own nature to ambiguous expressions contained in the prior gift to the class, when consisting of many. The testator gave the residue of his real and personal estate to trustees, in trust, as to two-thirds of the annual proceeds, for A. for life, and as to the remaining one-third, in trust for B. for her life; and in trust, after the decease of A. and B., or either of them, to convey, pay, assign, transfer and make over all the residue, in the shares following, i.e. upon the decease of A., to convey, &c., two-thirds unto and among all and every the child or children of A. as and when they should severally attain twenty-one, as tenants in common; and if there should be but one child of A., then to such only child, and to whom he gave the same accordingly; with similar trusts of the remaining third, mutatis mutandis, for the children of B. Sir J. Stuart, V.-C., considering the general indisposition to hold a bequest contingent, and looking to the absolute gift to an only child (which was clearly vested (*t*)), and to the direction to convey, which, he thought, was to be observed immediately on the decease of a tenant for life, held that the children took vested interests on the testator's death.

Attainment of particular age made part of the description of the objects.

The vesting is obviously postponed, where the attainment to a particular age is introduced into and made a constituent part of the description or character of the objects of the gift; as where the bequest is to "the children who shall attain," or to "such children as shall attain," the age of twenty-one years; there being in such case no gift, except to the persons who answer the qualification which the testator has annexed to the enjoyment of his bounty (*u*).

Thus, in *Bull* v. *Pritchard* (*v*), where a testator bequeathed the residue of his personal estate to trustees, in trust for his daughter M. for life, and after her decease to pay or transfer the same unto and among all and every the child and children of M. who should

(*r*) *Walker* v. *Mower*, 16 Bea. 365; *Johnson* v. *Foulds*, L. R. 5 Eq. 268; *Re Edwards*, [1906] 1 Ch. 570. As to *Re Fletcher*, 53 L. T. 813, see ante, p. 1389.

(*s*) 1 Sm. & Gif. 371.

(*t*) See *Re Bartholomew*, 1 Mac. & G. 354, ante, p. 1401.

(*u*) See *Newman* v. *Newman*, 10 Sim. 51; *Hatfield* v. *Pryme*, 2 Coll. 204; *Thomas* v. *Wilberforce*, 31 Bea. 299.

(*v*) 1 Russ. 213. And see the cases cited ante, p. 332, n. (*g*).

live to attain the age of twenty-three years, with benefit of survivorship in case of the death of any of them under the age of twenty-three years, as tenants in common; and if there should be but one such child, then to such only child; and in case there should be no such child, or, being such, all should die under the age of twenty-three, then over to the testator's brothers and sisters. The trustees were empowered to lay out and apply the interest of each child's respective share, or so much thereof as they might think necessary, towards their maintenance, notwithstanding such child's share should not be then absolutely vested. Lord Gifford, M.R., was of opinion that those children alone who attained the age of twenty-three were to take, and therefore the gift was void for remoteness; observing, that the attainment of the age of twenty-three years was made a condition precedent to the vesting of any interest in the children.

Cases of this kind (gifts to a restricted or contingent class) must be distinguished from those in which the gift is to children "on attaining," or "if" or "when" they attain, a certain age, for although such a gift is primâ facie contingent, yet a contrary intention may appear from the context. And first as to the effect of a gift of the intermediate income.

Gift of intermediate income.

It has been already pointed out that when a residue is given to a class of persons on attaining a certain age or marrying, &c., and the whole income is given to them, or directed to be applied for their maintenance, in the meantime, this is generally construed as conferring a vested interest.

The principle of the old cases was that the testator had given the whole property to the legatees, and that the direction to pay or apply the income during minorities merely operated as an exception out of the property, and a description of the time when each legatee was to have possession (*w*). With reference to the statement of Jessel, M.R., in *Re Parker* (*x*), quoted on p. 1410 as to the effect of a direction to apply the income of the whole fund (payable to a class equally on attaining a certain age) for their maintenance, it is to be observed that neither *Booth* v. *Booth* nor *Jones* v. *Mackilwain* (both stated ante, p. 1421) were cited in that case. And in *Re Gossling* (*y*), where a testator gave his residue upon trust,

(*w*) See the judgments in *Booth* v. *Booth* and *Jones* v. *Mackilwain*, ante, p. 1421, and *Davies* v. *Fisher*, 5 Bea. 201, ante, p. 1416.

(*x*) 16 Ch. D. 44.

(*y*) [1902] 1 Ch. 945; [1903] 1 Ch. 448.

after the decease of his wife, to pay and divide the same unto and equally between his two children A. and B. on their severally attaining the age of twenty-one years, their heirs, executors, administrators and assigns as tenants in common, the income during their respective minorities to be applied in or towards their maintenance and support: the C. A., in holding that the children took vested interests, proceeded entirely on the ground that, by the terms of the particular will, the income was not to be applied for maintenance as a common fund, but that the income of the share of each child was to be applied for its separate maintenance. In this case, also, *Booth* v. *Booth* and *Jones* v. *Mackilwain* were not cited, and some of the authorities which were cited were gifts of legacies (*z*), the rules as to the vesting of which are stricter than in residuary gifts.

Discretionary trust or power of maintenance.

It has not been finally settled whether a gift of residue, in trust for a class of persons on their attaining a certain age or marrying, &c., confers a vested interest, if it is accompanied by a trust or power to apply the whole, or such part of the income of each share as the trustees think fit, for the maintenance of the legatee of that share in the meantime. *Fox* v. *Fox* (*a*) and *Re Parker* (*b*) are generally considered as having settled the question in the affirmative in the case of legacies (*c*), and if this is the correct view, the principle applies à fortiori to bequests of residue.

Effect of gift over.

Another class of cases in which a gift of residue, apparently contingent, has been held to be vested, is where that intention is inferred from a gift over.

It is clear that if residuary personal estate is given to A. on his attaining twenty-four, but in case of his not attaining that age, then to B., this gives A. a vested interest, subject to being divested in the event of his dying under twenty-four (*d*). And it seems now settled that the same rule applies to gifts to classes, although the authorities are not altogether consistent.

Gift on attaining certain age held contingent.

The principal difficulty is created by *Vawdry* v. *Geddes* (*e*), where A. gave the residue of her estate and effects equally between her four sisters, and directed that, on the death of her sisters, the interest of their respective shares should, at the discretion of her executors, be applied in the maintenance or accumulate for the

(*z*) Ante, p. 1406.
(*a*) L. R. 19 Eq. 286.
(*b*) 16 Ch. D. 44.
(*c*) See the cases cited ante, p. 1411 et seq.
(*d*) *Whitter* v. *Bremridge*, L. R. 2 Eq. 736. Compare *Edwards* v. *Hammond* and *Phippe* v. *Ackers*, ante, p. 1376.
(*e*) 1 R. & My. 203.

benefit of the children of each of her sisters so dying, until they should severally attain the age of twenty-two years, and, "upon any of their attainment to that age," they should be entitled to their proportion of their mother's share of the principal, and "in case of any of their decease under that age," leaving lawful issue, such issue should be entitled to their respective parent's share at such time as such parent would have been entitled, if living, thereto, and there was a gift over in favour of the other children of the testator's sisters, in case of the death of any under twenty-two, without issue, or, being such, they should die before the principal of their respective shares should become payable. Sir J. Leach, M.R., held that the vesting was postponed until the age of twenty-two, and therefore that the gift was too remote. He thought that the case was governed by *Leake* v. *Robinson* (*f*); and that, even if the income had been expressly given to the children until they attained twenty-two, the shares would not have vested. He observed, that where interim interest is given, it is presumed that the testator meant an immediate gift, because, for the purpose of interest, the particular legacy is to be immediately separated from the bulk of the property; but that presumption fails entirely when the testator has expressly given the legacy over in the event of the death of the legatee before a particular period.

Remarks on *Vawdry* v. *Geddes*.

"But," Mr. Jarman asks (*g*), "did not the gift over, to which his Honor here refers, suggest a strong argument for the immediate vesting? Where a testator directs that, on a given event, the 'shares' of persons before named shall go in a certain manner, there seems ground to infer that, in the alternative event, the property is to be retained by the legatees; à fortiori, where there are cross executory gifts disposing of the 'shares' of dying objects in an event in which, if the vesting be postponed, they would have no shares for the clause to operate upon. The construction adopted in the case just stated rendered the terms of the clause of substitution (for such it clearly was) inaccurate throughout (*h*).

(*f*) Ante, p. 1403.

(*g*) First ed. p. 774.

(*h*) "See also *Mackell* v. *Winter*, 3 Ves. 236, and *Barker* v. *Lea*, T. & R. 413, in both which residuary bequests to children, on their attaining a particular age, were held to be contingent in the interim, though, in each case, there was a bequest over in the event of the legatee's dying before the prescribed age; and in the former, the postponement seemed to refer to the time of payment rather than to the gift itself. In these cases, the leaning, often avowed, to the vesting of residuary bequests, was but very faintly discernible; and one cannot help suspecting that the judgment of the Court was somewhat biassed by the actual event, which rendered the adopted construction convenient. If intestacy had happened to be produced by the postponement of the vesting in each instance, the adjudication probably would have been different." (Note by Mr. Jarman.)

Bland v. *Williams.*

Vesting immediate by explanatory effect of gift over.

"More weight, in favour of the immediate vesting, seems to have been ascribed to the argument derived from the gift over, in *Bland* v. *Williams* (*i*), where the testator bequeathed the residue of his estate and effects to trustees, upon trust to receive the annual income thereof, and thereout pay unto his daughter an annuity, and, after her decease, upon trust to apply the income [or a sufficient part thereof] for the maintenance of the children of his daughter until they should severally attain their ages of twenty-four years; and when and as they should respectively attain that age, then upon trust to pay, transfer, and convey all the said residue of his estate, with the interest, dividends, and proceeds thereof, as should not have been applied for their maintenance, equally unto and amongst all her said children, *when and as they should severally and respectively attain their said age of twenty-four years*; and in case any or either of her said children should happen to die before having attained that age, and without leaving lawful issue of his or her body, then in trust to pay, assign, transfer, and convey all the said residue of his estate unto *such of her said children as should live to attain his, her, or their respective ages of twenty-four years*, share and share alike, if more than one, and if but one, then the whole to that one child; but in case all and every of *her said children should happen to die under that age, and without leaving lawful issue*, as aforesaid, then upon trust to pay the annual income thereof unto certain persons. It was contended, that, under the trusts in favour of the daughter's children, the vesting was postponed until the age of twenty-four, and, consequently, the gift was too remote. Sir *J. Leach*, M.R., however, held that the legatees acquired immediately vested interests:—'Whether, in a gift of this nature,' said his Honor, 'the time of vesting is postponed, or only the time of payment, depends altogether upon the whole context of the will. If the gift over is simply upon the death under twenty-four, then the gift could not vest before that age (*j*). In this

(*i*) 3 My. & K. 411.

(*j*) "Why not? A gift over to take effect simply on the event alternative to that on which the prior gift was apparently made to vest, *may* surely have the effect (if such be the intention collected from the whole will) of explaining that the original gift was to be divested in favour of the ulterior substituted legatee on the happening of the prescribed event. This, we may venture to affirm, would, with very little aid from the context, be generally the construction. No such distinction as the M.R. suggests is discoverable in the cases (cited ante, p. 1378), in which, under a devise to A., if he shall attain the age of twenty-one years, with a devise over, in case he shall die under that age, the devise over is (we have seen) held to denote that the prior words (instead of suspending the vesting ab initio) point merely at the period when it becomes absolute. The principle of these cases obviously applies to residuary bequests framed in such terms." (Note by Mr. Jarman.) In *Taylor* v. *Frobisher*, 5 Dow. & S. at p. 200,

case, the gift over is not simply upon the death under twenty-four, but upon the death under twenty-four without leaving issue. If upon a death under twenty-four, at whatever age issue was left, then the gift over is not to take place. It is in effect, therefore, a vested interest, with an executory devise over, in case of death under twenty-four without leaving issue: all the cases upon the subject, except the one before Lord *Gifford* (i.e. *Bull* v. *Pritchard*), are reconcileable with this distinction.' "

Remark on *Bland* v. *Williams*.

Mr. Jarman seems to have had some doubt as to the correctness of the decision in *Bull* v. *Pritchard* (*k*), and he thought *Vawdry* v. *Geddes* and *Barker* v. *Lea* wrongly decided. He remarks (*l*): "It would certainly be a convenient rule of construction to say, that whenever, under a residuary bequest to children as a class, the vesting is, in the first instance, postponed to a given age, and this is accompanied by a direction that the intermediate interest shall be applied for their maintenance; after which the testator proceeds to dispose of the shares of children dying under the age in question, either absolutely or upon some contingency, to the survivors, or to children, or any other person, the gift over is to be considered as explaining the testator's intention to be, that, under the preceding words, the *absolute* ownership only should be suspended until the prescribed age, and that, in the meantime, the legatees should take vested interests, with a liability to be divested on the happening of the prescribed event. But though several of the cases (we have seen) point to such a conclusion, yet the state of the authorities, on the whole, hardly warrants any general position of this nature."

Modern authorities.

Since Mr. Jarman wrote, however, the tendency of the decisions on bequests in this form, whether residuary or not, is almost universally in favour of such a rule.

Thus, in *Davies* v. *Fisher* (*m*), where a testatrix gave the residue of her personal estate to trustees, in trust for W. D. for life, and after his decease, in trust for the children of the said W. D. as

Parker, V.-C., said that the M.R.'s distinction was not meant to be of general application, but referred only to the will before him. In *Re Baxter's Trusts*, 10 Jur. N. S. 845, Wood, V.-C., also treated the supposed distinction as unfounded. See *Davies* v. *Fisher*, infra.

Where real and personal estates are included in the same gift, and the real estate is held to be vested, the personal property follows the same construction, *Farmer* v. *Francis*, 2 S. & St. 505; *Tapscott* v. *Newcombe*, 6 Jur. 755; *James* v. *Lord Wynford*, 1 Sm. & Gif. 40.

(*k*) First ed. p. 772. His remarks are not given here, because they are based on a misapprehension of the grounds of the decision.

(*l*) First ed. p. 776.

(*m*) 5 Bea. 201.

they severally attained the age of twenty-five years, equally to be divided between them if more than one, and if but one then the whole to such one child, the income to be applied during their respective minorities by the guardian for the time being of such children for their maintenance; and in case no child of the said W. D. should live to attain the age of twenty-five years, then in trust as therein mentioned. Lord Langdale, M.R., held that the children of W. D. took an immediate vested interest in the residue. The decision was, indeed, in a great measure, founded on the gift of the intermediate interest (*n*); but as to the argument resting on the dicta of Sir J. Leach in *Vawdry* v. *Geddes* and *Bland* v. *Williams*, that the gift over prevented the residue from vesting in the meantime, he cited authorities to shew that such a proposition was untenable (*o*); and observed that, on the contrary, the gift over afforded some evidence of an intention to divest after a previous vesting. So in *Pearman* v. *Pearman* (*p*), a testator gave his residue upon trust to use such part thereof as might be necessary in maintaining, &c., all his children, and he directed his trustees to pay and divide his residue unto all his said children in equal shares as and when he, she or they should respectively attain the age of twenty-one years, with a substitutionary gift to the issue of children dying under age, and a gift over in the event of his having no children or child attaining the age of twenty-one, or such, if any, dying without leaving issue; it was held by Romilly, M.R., partly on the ground that the gift was one of residue, partly on the ground of the gift over, and partly on the ground of the trust for maintenance (*q*), that the share of each child was vested, subject to being divested in case he or she died under twenty-one without issue. Again, in *Re Turney* (*r*), a testator gave one moiety of his residue in trust to pay the income to A. for life, and after his death for his child or children "absolutely" upon their attaining twenty-five; and in the event of the death of either or all the children before attaining twenty-five, then upon trust "to pay the share of the child or children so dying" to B.: it was held by the C. A. that the children took vested interests, subject to being divested on death under twenty-five.

(*n*) Ante, p. 1415.

(*o*) *Skey* v. *Barnes*, 3 Mer. at p. 340. See also *Davidson* v. *Dallas*, 14 Ves. 576; *Heron* v. *Stokes*, 2 Dr. & War. at p. 115.

(*p*) 33 Bea. 394. See also *Ridgway* v. *Ridgway*, 4 De G. & S. 271, better reported 20 L. J. Ch. 256; *Wetherell* v. *Wetherell*, 1 D. J. & S. 134; *Re Baxter's Trusts*, 10 Jur. N. S. 845.

(*q*) It seems doubtful, according to some modern decisions, whether this argument was admissible, the maintenance being given out of the residue as a common fund, ante, p. 1425.

(*r*) [1899] 2 Ch. 739.

The decision turned to a considerable extent on the use of the word "share" in the gift over (*s*).

Gift over on event different from event mentioned in primary gift.

But a gift over limited to take effect on an event different from that upon which the primary gift depends, will not generally be construed as of itself indicating such an intention, as where property is given to the children of A. on their attaining twenty-one, with a gift over in the event of A. dying without leaving issue (*t*).

It does not seem to have been decided whether the doctrine of *Bree* v. *Perfect* (*u*) applies to gifts of residue. The decisions in *Ingram* v. *Suckling* (*v*) and *Re Bevan's Trusts* (*w*), in which that case was followed, lay stress on the fact that they were concerned with separated funds (*x*).

(*s*) The word also occurred in *Pearman* v. *Pearman*, supra, but no stress was laid upon it.

(*t*) *Re Wrangham's Trust*, 1 Dr. & Sm. 358; *Chadwick* v. *Greenall*, 3 Gif. 221; *Walker* v. *Mower*, 16 Bea. 365. The decision in *Re Wrangham's Trust* was misunderstood by Malins, V.-C., in *Kidman* v. *Kidman*, 40 L. J. Ch. 359; see *Re Edwards*, [1906] 1 Ch. 570.

(*u*) Ante, p. 1346.

(*v*) 7 W. R. 386.

(*w*) 34 Ch. D. 716.

(*x*) See also *Re Edwards*, [1906] 1 Ch. 570, where some doubt is thrown on the doctrine of *Bree* v. *Perfect*.

CHAPTER XXXVIII.

EXECUTORY DEVISES AND BEQUESTS.

	PAGE		PAGE
I. *Nature of an Executory Devise—Shifting Clauses—Clauses of Forfeiture, &c.*	1432	II. *Distinction between Contingent Remainders and Executory Devises*	1443
		III. *Executory Bequests*	1453

Limitation capable of taking effect as a remainder cannot take effect as an executory devise.

I. —Nature of an Executory Devise.—"An executory devise," says Mr. Jarman (*a*), "is a limitation by will of a future estate or interest in land, which cannot, consistently with the rules of law, take effect as a remainder; for it is well settled (and, indeed, has been remarked as a rule without an exception), that when a devise is capable, *according to the state of the objects at the death of the testator*, of taking effect as a remainder, it shall not be construed to be an executory devise (*b*). It is necessary, therefore, in treating of this species of estate, first, to ascertain what constitutes a remainder. A remainder may be described to be a limitation which is so framed as to be immediately expectant on the natural determination of a particular estate of freehold, limited by the same instrument.

Executory devise—what.

It follows, that every devise of a future interest, which is not preceded by an estate of freehold, created by the same will (*c*) (whether consisting of one or more testamentary papers), or which, being so preceded, is limited to take effect *before* or *after*, and not *at* the expiration of such prior estate of freehold, is an executory devise (*d*).

"The first mentioned species of executory estate occurs, as well where the devise is future in its operation, from the non-existence of the object at the death of the testator, as where it is future in the express terms of its limitation. Thus, a devise to the

(*a*) First ed. p. 778.

(*b*) *Purefoy* v. *Rogers*, 2 Lev. 39, 2 Saund. 380; *Reeve* v. *Long*, Carth. 309, 1 Salk. 227; *Goodright* v. *Cornish*, 4 Mod. 256; *Carwardine* v. *Carwardine*, 1 Ed. 27; *Goodtitle* v. *Billington*, Doug. 758; *Brackenbury* v. *Gibbons*, 2 Ch. D. pp. 417, 419; *Re Wrightson*, [1904] 2 Ch. 95; *White* v. *Summers*, [1908] 2 Ch. 256.

(*c*) See *Key* v. *Gamble*, T. Jones, 123; *Moore* v. *Parker*, 1 Ld. Raym. 37, Skinn. 558; *Doe* v. *Earl of Scarborough*, 3 Ad. & El. 2, 897.

(*d*) See *Blackman* v. *Fysh*, [1892] 3 Ch. 209.

children of A., who happens to have no child at the death of the testator (*e*), or to the heirs of the body of A., a person then living, is executory (*f*), for the reason suggested. The creation of a term of years, determinable with the life of the ancestor, to whose heirs the subsequent limitation is made, of course does not vary the principle; a chattel interest being inadequate to support a contingent remainder (*g*). Thus, if lands are devised to A. for ninety-nine years, if he shall so long live, remainder to the heirs of the body of A., the fee-simple, subject to the term, descends to the heir-at-law of the testator during the life of A., at whose decease an estate tail vests in the heirs of his body by executory devise. So, a devise to a person or persons, whether in esse or not, to take effect at a given period after the death of the testator, as to A. at the death of B. (a space of six months from the testator's decease, obviously belongs to the class of limitations under consideration (*h*).

Devise executory for want of a preceding freehold.

"With respect to the cases in which the devise executory, notwithstanding the creation of a prior estate of freehold it is to be observed, that to constitute the ulterior limitation an executory devise in such a case, the precedent estate is not absolutely *liable* to be determined before the ulterior limitation takes effect (as such liability only renders the remainder contingent) but it must be *necessarily* determinable before the vesting effect of the ulterior devise. Thus, a devise to A. for life, and, after his decease, to the unborn children of B., is a contingent remainder to such children, because as A. *may* live until after he has children there is not necessarily any interval between the two events, but under a devise to A. for life, and after his decease to B. *one day* to the children of B., the children would take by executory devise and the interval of a day, which would be undisposed of would belong to the residuary devisee (*i*), if any, or if none to the heir.

Devise executory, notwithstanding prior freehold.

"It is an obvious consequence of the general principle before laid down, that where the event which gives birth to the ulterior limitation, abruptly determines and breaks off the preceding

(*e*) *Hopkins* v. *Hopkins*, Cas. t. Talb. 44; *Stephens* v. *Stephens*, ib. 228; *Gore* v. *Gore*, 2 P. W. 28, 2 Stra. 958; *Bullock* v. *Stones*, 2 Ves. sen. 521.

(*f*) *Snowe* v. *Cutler*, 1 Lev. 135, T. Raym. 162; *Doe* v. *Carleton*, 1 Wils. 225; *Harris* v. *Barnes*, 4 Burr. 2157; *Doe* d. *Fonnereau* v. *Fonnereau*, Dougl. 487; *Doe* d. *Mussell* v. *Morgan*, 3 T. R. 763.

(*g*) Ibid. For an instance of limitations failing for this reason, see *Cunliffe* v. *Brancker*, 3 Ch. D. 393.

(*h*) *Reding* v. *Stone*, 8 Vin. Ab. 215, pl. 5; and see *Clarke* v. *Smith*, 1 Lutw. 793.

(*i*) Supra, p. 948.

estate, the limitation is executory, inasmuch as it is essential to the constitution of a remainder, that it wait for the regular expiration of such estate. Thus, in the case of a devise to A. for life, or in tail, with a limitation over to B., in case A. shall become entitled in possession to a certain estate, or shall omit to assume a certain name, this is an executory devise to B. (*j*).

Executory devise in derogation of a preceding fee.

"It will be apparent from what has been stated, that every devise to a person in derogation of, or substitution for, a preceding estate in fee-simple is an executory limitation. Thus, in the case of a devise to A. and his heirs, and if he shall die under twenty-one and without issue (i.e. without issue living at his death), or if he shall die without issue living B., then to B.; in each of these cases the devise to B. is executory (*k*); in the same manner as if the fee, instead of being limited to A., had been suffered to descend to the heir-at-law of the testator, and the property had been simply devised to B. on either of such events; the only difference being, that in one case the property shifts, on the happening of the contingency, from the prior devisee, and in the other, from the heir of the testator to the devisee of the executory interest. No species of executory limitation is of such frequent occurrence as those which are limited in defeasance of a prior estate in fee (*l*).

"The short but comprehensive definition of an executory devise before given, will be found to comprise every class of limitations of this nature, and, perhaps, will be more easily understood and remembered by the student, than the more elaborate classification which has been generally presented to him. A learned writer, whose labours on this subject are well known to the profession (*m*), has added to the distribution of the cases adopted by Mr. Fearne (*n*),

(*j*) *Nicholl* v. *Nicholl*, 2 W. Bl. 1159; *Nicolls* v. *Sheffield*, 2 B. C. C. 215; *Doe* d. *Heneage* v. *Heneage*, 4 T. R. 13; *Carr* v. *Earl of Errol*, 6 East, 58; *Stanley* v. *Stanley*, 16 Ves. 491; *Doe* d. *Kenrick* v. *Beauclerk*, 11 East, 657. Shifting clauses are referred to more in detail infra, p. 1448.

(*k*) Cro. Jac. 592; Palm. 131; Gilb. 393; 2 Mod. 289; Pre. Ch. 67; ib. 486; 10 Mod. 419; Cas. t. Talb. 228; 8 Vin. Ab. 112, pl. 38; 1 B. C. C. 147; 3 T. R. 143; 2 B. & P. 324; 10 East, 460; 1 B. & Ald. 530; ib. 713; 2 ib. 441; 1 Eq. Ca. Ab. 186, pl. 1; 1 Wils. 105; Fea. C. R. 396; 10 B. & Cr. 201. Many of these cases are referred to in the course of this Chapter and in Chap. LII. See also *Re Parry & Daggs*, 31 Ch. D. 130.

(*l*) It must be borne in mind that in any will coming into operation after the 31st of December, 1882, executory gifts over of land defeating a prior estate in fee or for life or for a term of years absolute or determinable with life, in default or on failure of issue, become void as soon as any issue attains 21 years of age; see the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 10.

(*m*) 2 Prest. Treat. on Abstracts, 139.

(*n*) *For which see *Doe* v. *Carleton*, 1 Wils. 225; Fea. C. R. 400. "These two classes of cases shew that Mr. Fearne's position (C. R. 251 and 530, 8th ed.), 'that a condition or limitation must determine or avoid the whole of the estate to which it is annexed,

* Mr. Fearne's position, that a condition or limitation must defeat the whole estate, questioned.

several classes, two of which, though they clearly fall within the terms by which this species of interest has been before described, are sufficiently peculiar to entitle them to distinct notice.

Estate in fee or in tail reduced to an estate for life

"First, Where an estate tail, or an estate in fee-simple, is in some event reduced to an estate for life. As where (*o*) a testator devised real estate to his two daughters, their heirs and assigns; but if either of them should marry without the consent of his executors, the daughter so marrying should have an estate for life therein; if either of them should die unmarried, then R. to take it, paying the other daughter 500*l*. It was held, that on one of the daughters marrying without consent, her estate was cut down to an estate for life.

Estate partially defeated by executory limitation.

"Secondly. [illegible] an estate is limited in derogation of a preceding est[illegible] in *partial* exclusion of the same. As where (*p*) a testat[illegible]sed certain lands to his son B. in fee, and other lands to [illegible]son C. in fee, subject to a proviso, that if either of his sons should die before marriage, or before twenty-one, and without issue of their bodies, then he gave all the lands of such of his sons as should so die, &c., unto such of his said two sons as should the other survive. It was held, that the sons took in fee, subject to a limitation to the survivor for life, in case of either dying unmarried, or under twenty-one, and without issue; and that, as one of them had attained twenty-one, and died unmarried, the survivor was entitled to his moiety for life."

As this case simply affirmed the validity of the devise over for life, leaving untouched the destination of the ulterior interest, it cannot, perhaps, be treated as a direct adjudication on the point for which it is here cited, namely, that the estate originally devised was affected only to the extent necessary for the introduction of the life interest, and subject thereto remained in the prior devisee; there is, however, no doubt as to the doctrine in question. Thus

and not determine it in part only, and leave it good for the remainder,' must be received with some qualification. A condition properly so called, namely, which descends upon the heir, necessarily determines the whole estate, which is subject to it; but it is difficult to perceive upon what principle any objection can be advanced to an executory devise to take effect in partial derogation of a preceding estate, on the ground that it defeats that estate in part only: and it is observable, that, in [illegible]ble cases cited by this able writer in illustration of his doctrine, the limitation over was either [illegible]ve in the terms of its creation, (on which however, some remarks will be found in the sequel: see *Corbet's* case, 1 Rep. 83 b; and other cases observed upon infra,) or was repugnant to the nature and incidents of the estate on which it was engrafted; or was contrary to the rule of law fixing the period within which such interests must be limited to arise." (Note by Mr. Jarman.) See *Seymour* v. *Vernon*, 10 Jur. N. S. 487, post, p. 1494.

(*o*) *Wright* v. *Wright*, 1 Ves. sen. 409, Fea. C. R. 500.

(*p*) *Hanbury* v. *Cockerell*, 1 Roll. Ab. 835, Fea. C. R. 396.

CH. XXXVIII.

in *Gatenby* v. *Morgan* (*q*), a testator, by a will made in 1811, devised certain hereditaments to E. C. and her heirs, but if E. C. died without leaving lawful issue living at her death, the testator devised the property to other persons: the will being made under the old law, the ulterior devisees took estates for life only, and it was held that subject to these estates, the property remained in E. C. and her heirs.

But if the executory devise is limited in defeasance of the whole of the preceding estate, the general rule is that on the happening of the contingency, the preceding estate is put an end to, even although the executory devise fails to take effect.

Where prior devise is defeated although gift over ineffectual.

Doe v. *Eyre*.

Thus, in *Doe* d. *Blomfield* v. *Eyre* (*r*), where M. S. having an exclusive power of appointing lands by will amongst her children, appointed them to her eldest son, J. B., in fee; but if J. B. and his brother both died before her husband, then she appointed the estate to her father-in-law (a stranger to the power) in fee. J. B. and his brother both died in their father's lifetime, and it was held, in the Exchequer Chamber, that although the father could not take, yet the son lost the estate. Parke, B., delivered the judgment of the Court, and after premising that the question was the same, whether it arose upon an ordinary devise or upon an appointment under a power, he said, "If a testator seised in fee were to devise a real estate to A. B. in fee, and to direct that, in the event of A. B. dying in the lifetime of J. S., the estate should go over to a charity, it surely was perfectly clear that if A. B. should die in the lifetime of J. S., he, or rather his heirs, would lose the estate. The testator could not give to the charity without taking away from the devisee. The testator, therefore, in such a case, by his will said, 'If A. B. dies in the lifetime of J. S., I do not mean that he or his heirs should any longer have the estate.' That which defeated the estate of J. B. was the death of himself and his

(*q*) 1 Q.B.D. 685. See also the earlier case of *Jackson* v. *Noble*, 2 Kee. 590, "which," Mr. Jarman says, "appears to have decided, that where a devise in fee is followed by an executory limitation in fee, in favour of an object or class of objects not in esse, and who, in event, never come into existence, the first devise remains absolute." But this statement of the law was treated by Lord St. Leonards (Powers, 514) as having been overruled by the Exchequer Chamber in *Doe* v. *Eyre*; and the learned author added, "the case of *Jackson* v. *Noble* was not decided on any general rule, but on the ground that looking at all the devises the estate was not intended to go over in the event which happened . . . if it cannot be supported upon the intention as collected by the court it must be considered as opposed to the later decision in the Exchequer Chamber." And in *Hurst* v. *Hurst*, 21 Ch. D. at p. 290, Jessel, M.R., remarked that *Jackson* v. *Noble* laid down no general principle. See however, *Jones* v. *Davies*, 28 W. R. 455, where the M.R. accepted *Jackson* v. *Noble* as an authority.

(*r*) 5 C. B. 713.

brother in his father's lifetime, not the giving over the estate to strangers."

The case put by Parke, B., of a devise over to a charity, afterwards came before Sir R. Kindersley, V.-C., who felt himself bound to decide it in conformity with *Doe* v. *Eyre*, though not approving of the doctrine of that case. He thought a strong argument against it might have been found in the statute (*s*), which declared, all gifts to charity, not made as therein provided, void to all intents and purposes; he also thought it very difficult to reconcile *Jackson* v. *Noble* with *Doe* v. *Eyre*, but concluded that the ground of the decision in the former was that the contemplated contingency had not happened (*t*).

Exception where substituted gift is void for remoteness.

But to the rule thus laid down in *Doe* v. *Eyre*, the case of a gift over which is to defeat a prior devise in a too remote event forms an exception (*u*), since the law refuses permission to await that event for any purpose; so that the prior gift must, of necessity, remain absolute.

Interim income.

An executory devise does not, as a general rule, carry the interim rents; but a residuary devise may do so, if the realty is given with the personalty as a mixed fund (*v*).

Equitable contingent remainders.

It has been already mentioned (*w*) that contingent remainders of equitable estates are not subject to all the rules governing contingent remainders of legal estates. In one sense, therefore, they resemble executory devises, but they are not generally so classified, for "executory devise" usually means such a limitation of a legal estate in land as the law allows in the case of a will, though contrary to the rules of limitation in conveyances at common law (*x*).

And an equitable contingent remainder resembles a legal contingent remainder in two respects: (1) it is subject to the rule in *Whitby* v. *Mitchell* (*y*); and (2) where there is a devise of land upon trust for such of the children of A. as attain twenty-one, the first child who attains that age becomes entitled to the whole of the rents until another child attains twenty-one, and so on (*z*).

(*s*) 9 Geo. 2, c. 36, s. 3.

(*t*) *Robinson* v. *Wood*, 27 L. J. Ch. 726. See Sug. Pow. 514, 8th ed., where *Doe* v. *Eyre* is approved. *Doe* v. *Eyre* was followed in *Hurst* v. *Hurst*, 21 Ch. D. 278. See also *O'Mahoney* v. *Burdett*, L. R., 7 H. L. 388; *Ridgway* v. *Woodhouse*, 7 Bea. 437.

(*u*) Sug. Pow. 514, 8th ed.

(*v*) The rules are stated ante, p. 953.

(*w*) Ante, p. 326.

(*x*) Fearne, C. R. 386. Mr. Fearne treats of equitable contingent remainders in the first part of his work, p. 304.

(*y*) *Re Nash*, [1910] 1 Ch. 1, ante, p. 286.

(*z*) *Re Averill*, [1898] 1 Ch. 523.

CH. XXXVIII.

Shifting clauses.

An important kind of executory devise, already shortly referred to (*a*), is that known as a shifting clause, by which an estate is, on the happening of a certain event, taken away from the person to whom it was originally given, and transferred to another (*b*).

Rule against perpetuities.

Shifting clauses, like other executory devises, must be limited so as to take effect within the period allowed by the Rule against Perpetuities, unless they are to take effect on the determination of an estate tail (*c*). A shifting clause may, of course, be alternative or divisible, so as to be good in one event, and bad in the other (*d*).

Where estate has been diminished in value:

Where land is devised to A. subject to a shifting clause to take effect on A.'s becoming entitled to the possession of another estate, the clause will not, as a general rule, take effect if the estate to which he succeeds is materially less valuable than it was at the time of the testator's death; as where it has been incumbered without A.'s consent (*e*).

or sold.

Nor will the clause take effect, it seems, if the estate has been converted into personalty (*f*).

Construction of shifting clauses.

It is often said that a shifting clause must be construed strictly, but this merely means that the testator's intention must be reasonably manifest (*g*); the clause is construed according to its primary and natural meaning (*h*).

Accordingly, if a testator devises land to C., his youngest son, with a shifting clause to take effect in the event of C. succeeding to another estate, and of any younger son of the testator being then living, this means "younger in order of birth," and the clause will not take effect unless there is a son born after C. (*i*). The cases in which "younger son" has been construed to mean "son not otherwise provided for," or the like, are cases where a parent is making provision for his family (*j*).

Where a shifting clause is expressed in clear language, its

(*a*) Ante, p. 1434; as to shifting clauses in settlements by deed, see Vaizey on Settlements, 1262 et seq., where Mr. Butler's rules are referred to.

(*b*) For an example of a shifting clause operating by way of postponement, see *Milbank* v. *Vane*, [1893] 3 Ch. 79.

(*c*) Ante, p. 322.

(*d*) *Miles* v. *Harford*, 12 Ch. D. 691.

(*e*) *Fazakerly* v. *Ford*, 4 Sim. 390; *Stacpoole* v. *Stacpoole*, 2 Con. & L. 489; *Harrison* v. *Round*, 2 D. M. & G. 190.

(*f*) *Shuttleworth* v. *Murray*, [1901] 1 Ch. 819, s. c. s. nom. *Law Union, &c. Co.* v. *Hill*, [1902] A. C. 263.

(*g*) *Harrison* v. *Round*, 2 D. M. & G. at p. 201; *Micklethwait* v. *Micklethwait*, 4 C. B. N. S. at p. 870. In that case one of the questions was what was the property referred to in the shifting clause. See also *Cope* v. *Earl de la Warr*, L. R., 8 Ch. 982, where the shifting clause was framed with reference to the provisions of letters patent conferring a peerage (*Buckhurst Peerage*, 2 A. C. 1).

(*h*) See *Collingwood* v. *Stanhope*, L. R., 4 H. L. 43; and *Shuttleworth* v. *Murray*, [1901] 1 Ch. 819, in which *Fazakerly* v. *Ford*, 4 Sim. 390, is explained.

(*i*) *Wilbraham* v. *Scarisbrick*, 1 H. L. C. 167.

(*j*) See Chapter XLII.

construction is not affected by the fact that it produces results which it seems improbable that the testator could have contemplated: as where he must have known that its effect would be such that by no possibility could the devisee take any benefit under the devise to him (*k*). So in *Lord Kenlis* v. *Earl of Bective* (*l*), where the limitations of the shifting clause were (apparently by oversight) declared in such terms that they had the effect of bringing back the estate to the person from whom they were directed to shift.

Questions arising on the construction of shifting clauses generally have reference to the persons who are to take under them. Sometimes an estate is limited to A., B. and C. in succession, with a direction that in a certain event the limitation in favour of A. shall cease as if he were dead, and that the estate shall go over to the person next entitled in remainder under the will (*m*): or that the estate shall devolve as if A. had died without issue (*n*). A shifting clause may also affect the construction of the original devise: as for instance by converting the estate of a devisee in fee into an estate tail (*o*).

Sometimes the question arises whether a shifting clause merely accelerates the estates in remainder already limited by the will, or whether it creates new estates (*p*).

Interim rents and profits.

Where a shifting clause takes effect by putting an end to the estate of a devisee, but the person next entitled beneficially in remainder is non-existent or unascertained, it is a question whether the rents and profits are undisposed of, and go to the heir, according to the opinion of Kindersley, V.-C. (*q*), or whether they follow the limitations of the settlement, according to the opinion of Turner, L.J. (*r*).

Alteration in limitations.

Where the shifting clause is to take effect on A. succeeding to an estate which the testator describes as being subject to an existing settlement, this means, as a general rule, that the shifting clause will only operate if A. succeeds by force of the limitations

(*k*) *Lambarde* v. *Peach*, 4 Drew. 553; *Turton* v. *Lambarde*, 1 D. F. & J. 495.

(*l*) 34 Bea. 587.

(*m*) *Doe* v. *Heneage*, 4 T. R. 13; *Lambarde* v. *Peach*, 4 Drew. 553; *Turton* v. *Lambarde*, 1 D. F. & J. 495, where the persons so entitled were trustees to preserve contingent remainders.

(*n*) *Morrice* v. *Langham*, 11 Sim. 260, 8 M. & W. 194; *Sanford* v. *Morrice*, 11 Cl. & F. 667; *Jellicoe* v. *Gardiner*, 11 H. L. C. 323; *Carr* v. *Earl of Errol*, 6 East 58 ("without issue of his body").

(*o*) *Biddulph* v. *Lees*, 28 L. J. Q. B. 211.

(*p*) *Doe* v. *Earl of Scarborough*, 3 A. & E. pp. 2, 897; *Milbank* v. *Vane*, [1893] 3 Ch. 79.

(*q*) *Lambarde* v. *Peach*, 4 Drew. 553.

(*r*) *Turton* v. *Lambarde*, 1 D. F. & J. 495, followed by Romilly, M.R., in *D'Eyncourt* v. *Gregory*, 34 Bea. 36. See also *Sanford* v. *Morrice*, 11 Cl. & F. 667; *Stanley* v. *Stanley*, 16 Ves. 491; see also the authorities on interim rents in the case of executory devises, ante, p. 953.

of that settlement; and therefore if the estate is disentailed and A. takes it by devise or descent, &c., the shifting clause does not operate (*s*). But if the disentailing deed is followed by a re-settlement containing the same limitations as the original settlement, this will, as a general rule, be looked upon as a continuation or renewal of the title, and if A. succeeds under it, the shifting clause takes effect (*t*). According to some of the authorities, indeed, it may be laid down as a general rule that no dealings by A. with his interest in the estate to which he succeeds, will prevent the shifting clause from taking effect (*u*).

Meaning of "entitled."

A shifting clause is often directed to take effect on a person to whom land is devised becoming "entitled" to another specified estate: it seems that primâ facie this means "beneficially entitled in possession" (*v*). In *Monypenny* v. *Dering* (*w*), a testator devised the M. estate upon trust for his wife for life, and after her death upon trust for P. M. and his issue male in strict settlement, with a shifting clause to take effect in the event of P. M. or any of his issue becoming entitled to the J. estate; on the death of the widow, P. M. was entitled to a life estate in remainder in the J. estate expectant on the death of S. H.; it was held by Lord St. Leonards that this did not make P. M. "entitled" within the meaning of the shifting clause, "as the testator could never have intended that a mere accession to a life estate in remainder, which might never be enjoyed, should take away an estate in possession." But on the death of S. H. the life estate of P. M. fell into possession, and it was held that the shifting clause took effect.

"Entitled to possession."

A person may be "entitled to the actual possession or receipt of the rents and profits" of an estate within the meaning of a shifting clause, although he derives no actual benefit from it; e.g., by reason of the testator's widow having the right to occupy part of the property rent free, and of the charges on the estate exhausting the rents of the remainder (*x*). On the other hand,

(*s*) *Taylor* v. *Earl of Harewood*, 3 Hu. 372. See also *Wandesforde* v. *Carrick*, I. R. 5 Eq. at p. 497.

(*t*) Ibid. at p. 384; *Harrison* v. *Round*, 2 D. M. & G. 190. See also *Wright* to *Marshall*, 51 L. T. 781, and *Re Croker's Estate*, I. R. 2 Eq. 58. In *Meyrick* v. *Laws*, L. R. 9 Ch. 237, the decision seems to have turned chiefly on the fact that the estates were diminished in quantity.

(*u*) Per Lord St. Leonards, in *Monypenny* v. *Dering*, 2 D. M. & G. at p. 188; but see Vaizey on Settlements, 1281.

(*v*) Compare *Chorley* v. *Loveband*, 33 Bea. 189, and *Umbers* v. *Jaggard*, L. R. 9 Eq. 200, cited ante, p. 683; *Re Finch*, 17 Ch. D. 211; *Re Maunder*, [1903] 1 Ch. 451. *Re Grylls Trusts*, L. R. 6 Eq. 589.

(*w*) 2 D. M. & G. 145, and see *Curzon* v. *Curzon*, 1 Giff. 248, and *Bagot* v. *Legge*, 34 L. J. Ch. 156.

(*x*) *Re Varley*, 62 L. J. Ch. 652.

if the trustees of a will have powers of management during the minority of the tenant for life or tenant in tail, this may prevent him from being "entitled to the possession" within the meaning of a shifting clause (*y*).

Where title is described.

Where the shifting clause is expressed to take effect on A. becoming entitled to property in the county of X. under any "will or settlement, or other assurance (except actual purchase for money)," it will not take effect by reason of A. succeeding to property in the county of X. by descent (*z*).

In *Micklethwait* v. *Micklethwait* (*a*) (where the facts were very complicated), there was a shifting clause to take effect in the event of a devisee becoming entitled to the settled property of A. "as the heir male of his body"; the devisee became entitled to the property as tenant in tail male by purchase, and it was held that the shifting clause took effect.

Meaning of "eldest son" in shifting clause.

In *Bathurst* v. *Errington* (*b*), a testator devised his estates to the second, third, and fourth sons, by name, of T. S., with a shifting clause to take effect in the event of any of them becoming "the eldest son" of T. S.; T. S. survived the testator, and died, leaving his first, second, and third sons living; the first and the second sons died without male issue, and the third son claimed the estates: it was held that he was entitled to them, because the shifting clause was only intended to take effect in the event of both his elder brothers dying before T. S.: in the natural and ordinary sense of the words, a man cannot be said to become the eldest son of his father after his father's death.

Other events.

Most of the shifting clauses above referred to are intended to take effect on the happening of an event beyond the control of the devisee, but there are instances of shifting clauses directed to take effect on some voluntary act of the devisee, such as "entering into religion and becoming a professed nun" (*c*).

Name and arms clause.

The commonest instance of this kind is a shifting clause to enforce performance of a condition imposed by the testator, such as a clause directing the devisee to assume a particular name or coat of arms (*d*).

A shifting clause may be made to take effect more than once;

(*y*) *Leslie* v. *Earl of Rothes*, [1894] 2 Ch. 499.

(*z*) *Walmesley* v. *Gerard*, 29 Bea. 321.

(*a*) 4 C. B. N. S. 790.

(*b*) 2 A. C. 698, affirming C. A. in *Hervey-Bathurst* v. *Stanley*, and *Craven* v. *Stanley*, 4 Ch. D. 251. Compare the cases on gifts to the "first" or "eldest" son of A., or to children other than an eldest son, which are considered in Chap. XLII.

(*c*) *Biddulph* v. *Lees*, 28 L. J. Q. B. 211.

(*d*) Infra, Chap. XXXIX. As to the way in which a name and arms shifting clause should be framed in pursuance of an executory trust, see *Trevor* v. *Trevor*, 13 Sim. 108; Davidson, Conv. iii. 366. See also *Holmesdale* v. *West*, 12 Eq. 280, as to portions and jointures.

Repeated operation of shifting clause.

for example, Blackacre may be devised to A., B., and C. successively, so that if A. becomes entitled to another property, Blackacre shall devolve to B., and if B. becomes entitled to that property, Blackacre shall devolve to C. But an intention that the clause shall have this operation must be shewn (*e*).

Barring of shifting clause.

Where the operation of a shifting clause, in the event of its taking effect, would be to defeat an estate tail, it is put an end to if that estate tail is barred by a disentailing deed (*f*).

Clauses of cesser or forfeiture

Not infrequently a clause of cesser or forfeiture is found in a will, either alone, or in conjunction with a shifting clause or gift over (*g*). It seems clear that, as a general rule, a clause of cesser is good, and takes effect on the happening of the event provided for, even if there is no gift over (*h*). So if there is a gift over, the clause of cesser or forfeiture may take effect even if the gift over fails (*i*). It is true that, in *Hodgson* v. *Halford* (*j*), Hall, V.-C., said: "When you find a forfeiture clause associated with a gift over, is it not reasonable to read them together?" and he refused to construe the clause of forfeiture separately from the gift over. But it seems clear that no such general rule is established by the authorities (*k*). According to Turner, V.-C., it is a question of construction in each case: "the Court is to collect the intention of the testator, whether his intention was that the life interest should not continue" (*l*). The Courts, however, seem more reluctant to give effect to a clause of forfeiture where it is annexed to the gift of an absolute interest, than where it is annexed to a life interest. Thus, in *Re Catt's Trusts* (*m*), the testatrix required every residuary legatee to take and use the name and arms of W., and declared that if any legatee should neglect to do so, his or her interest should cease and be void and devolve as if he or she were then actually dead: Wood, V.-C., held that the whole clause was ineffectual, because the gift over

(*e*) *Doe* v. *Earl of Scarborough*, 3 A. & E. pp. 2, 897.

(*f*) *Doe* v. *Earl of Scarborough*, 3 A. & E. pp. 2, 897; *Milbank* v. *Vane*, [1893] 3 Ch. 79.

(*g*) As in *Re Cornwallis*, 32 Ch. D. 388, and *Re Baker*, [1904] 1 Ch. 157. As to clauses of forfeiture see Chap. XXXIX.

(*h*) *Re Dickson's Trust*, 1 Sim. N. S. 37; *Rochford* v. *Hackman*, 9 Ha. 475 (personalty), approved in *Hurst* v. *Hurst*, 21 Ch. D. 278 (realty), and in *Adams* v. *Adams*, [1892] 1 Ch. 369.

(*i*) *Hurst* v. *Hurst*, 21 Ch. D. 278; following *Doe* v. *Eyre*, ante, p. 1436. See also per Jessel, M.R., in *Hervey-Bathurst* v. *Stanley*, 4 Ch. D. at p. 265.

(*j*) 11 Ch. D. 959.

(*k*) See per Jessel, M.R., in *Hurst* v. *Hurst*, 21 Ch. D. at p. 293. The subject is also referred to ante, p. 1436.

(*l*) *Rochford* v. *Hackman*, 9 Ha. at p. 481.

(*m*) 2 H. & M. 46. Mr. Vaizey (Settlements, 1287) seems to consider this an anomalous decision. It was not referred to in *Hurst* v. *Hurst*, although it might have been cited in answer to an inquiry of Jessel, M.R. (21 Ch. D. at p. 290).

was expressed in such terms that the Court could not tell in whom the property was intended to be vested; consequently he held that the legatees who neglected to comply with the clause did not forfeit their shares. So, in *Musgrave* v. *Brooke* (*n*), a testatrix devised real estate to A., B. and C. in fee simple, with a proviso requiring each of them to take the surname of J., and declaring that in case any of them should refuse or neglect so to do, the estate limited to her should cease, determine and be utterly void, and that the property should thereupon first go to X. for life, and after her decease to the person or persons "next in remainder" under the trusts of the will, as if the person so refusing or neglecting were dead; X. died during the lifetime of A., without having complied with the clause: it was held by Pearson, J., that the devise being in fee simple, there could not be any person "next in remainder" and that the clause was absolutely void.

II.—Distinction between Contingent Remainders and Executory Devises.—The essential quality in executory devises, which under the old law gave to the distinction between them and contingent remainders its chief importance, is this,—that such interests are not in general liable to be affected by any alteration in the preceding estate (*o*): while, on the other hand, as the rule was that a contingent remainder must take effect, if at all, at the instant of the determination of the preceding estate (*p*), it followed that any act by the owner of the prior estate of freehold, which

Executory interests not affected by acts of owner of precedent estate.

Destructibility of contingent remainders;

(*n*) 26 Ch. D. 792.

(*o*) *Pells* v. *Brown*, Cro. Jac. 590.

(*p*) "Formerly the doctrine of the necessity that the remainder should vest at the very instant of the determination of the particular estate at farthest, was extended to the case of a posthumous son. In the case of *Reeve* v. *Long* (1 Salk. 227), an estate was limited to A. for life, remainder to his eldest son in tail; A. died, leaving his wife *enseint*. She afterwards had a son. It was adjudged that the son, not being *in esse* at the time of the determination of the particular estate, could not take under the limitation. This judgment was afterwards affirmed in the Court of King's Bench; but it was reversed in the House of Lords, against the opinion of all the judges. To obviate all doubts respecting the law in this case, the statute of 10 Will. III. c. 16 was passed, by which it was enacted, that where any estate is, by marriage, or any other settlement, settled in remainder to children, with remainders over, any posthumous child may take in the same manner as if born in the father's lifetime. It is singular that this statute does not expressly mention limitations or devises made by will. There is a tradition, that, as the case of *Reeve* v. *Long* arose upon a will, the lords considered the law to be settled by their determination in that case, and were unwilling to make any express mention of limitations or devises made in wills, lest it should appear to call in question the authority or propriety of their determination. Besides, in the above case of *Reeve* v. *Long*, the words of the act may be construed, without much violence, to comprise settlements of estates made by will, as well as settlements of estates made by deed." [Butler's note to Co. Litt. 298a.] As to the general rule that a child en ventre is considered as a living person, see post, Chap. XLII.

CH. XXXVIII.

amounted to a forfeiture of it, produced the destruction of the dependent contingent remainders, the effect being to place them in the same situation as if the preceding estate had regularly expired before the period of vesting. But their destructibility by such an act is now a doctrine of little practical importance, since, by the Real Property Act, 1845 (stat. 8 & 9 Vict. c. 106), s. 8, contingent remainders are made "capable of taking effect, notwithstanding the determination, by forfeiture, surrender, or merger, of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened."

cured by Real Property Act, 1845.

Liability to failure.

This statute, however, left untouched the general principle that a contingent remainder will fail unless it vests before, or simultaneously with, the regular determination of the particular estate; for it is obvious that a contingent remainder may be of such a nature as to admit the possibility of its continuing in suspense or contingency, after the regular determination of the previous estate of freehold. For instance, suppose freehold lands to be devised (by a will made before 2nd August, 1877) to A. for life, with remainder to such of the children of A. as shall attain the age of twenty-one years, it is evident, that if all the children of A. happen to be under age at the time of A.'s decease, the remainder to the children would, according to the rule before referred to, wholly fail unless preserved by an estate limited to trustees during the life of A., and the further period of the possible minority of one at least of the children (*q*).

Contingent Remainders Act, 1877.

An important modification of the rule above referred to has been made by the Contingent Remainders Act, 1877 (stat. 40 & 41 Vict. c. 33), which enacts that, "every contingent remainder created by any instrument executed after the passing of this act [2nd August, 1877], or by any will or codicil revived or re-published by any will or codicil executed after that date, in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use or executory devise or other limitation, had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use, or executory devise or other executory limitation."

If, therefore, in the instance above supposed, the devise were

(*q*) *Festing* v. *Allen*, 12 M. & W. 279; *Cunliffe* v. *Brancker*, 3 Ch. [illegible] 393. *Holmes* v. *Prescott*, 33 L. J. Ch. 264;

made by a will executed since the 2nd August, 1877, it would not be liable to failure in the event of A.'s children being all under age at the time of his death, because such a devise to them, without any preceding estate of freehold, would be good as an executory devise. On the other hand, if the devise had been to A. for life, with remainder to such of his children as should attain twenty-five, and all his children were under that age at his death, the devise to them would fail, notwithstanding the statute, because such a devise, although good as a contingent remainder (*r*), would be bad for remoteness as an executory devise (*s*).

But suppose that A. (in the case already put) survives the testator, and afterwards dies leaving several children, some of whom have already attained the prescribed age, and others not. Here the rule before the act was (*t*), that those children alone took who attained twenty-one before the particular estate determined, to the exclusion of others who might afterwards attain that age. Now what happens in such a case is this: either the contingent remainder in the entirety vests in the child who first attains the age in the lifetime of A., with a liability to open and let in such others as afterwards attain the age in A.'s lifetime—and this is the commonly received opinion (*u*); or, at latest, the entirety vests, eo instanti that the particular estate determines, in all those children who have then attained the age, to the exclusion of those who have not. In either case the particular estate does not determine before the contingent remainder vests, and thus the event in which alone the act operates has not happened.

It has been suggested that as every infant child in esse during

(*r*) Ante, p. 328.

(*s*) Ante, p. 327.

(*t*) Ante, p. 330.

(*u*) Fea. C. R. 312; *Mogg* v. *Mogg*, 1 Mer. 654; 1 Preston Conv. 52, 53, 3 ib. 555. And see Solicitors' Journ. 1878, pp. 544, 563, 601, 622, 640, 661; *Brackenbury* v. *Gibbons*, 2 Ch. D. 417, as explained by the late Mr. Joshua Williams (Seisin, 205). But it is not quite clear that Hall, V.C., approved of the opinion in question, ante, p. 328, n. (*p*). In the third edition of this work (by Messrs. Wolstenholme & Vincent) the law was thus stated: "If lands of which the testator had the legal inheritance be devised to A. for life, with remainder in fee to the children of A. who shall attain the age of twenty-two, the devise in remainder will be good, for as soon as any child attains twenty-two in the lifetime of A., the whole remainder vests in him, subject to open and let in such other children as attain twenty-two in A.'s lifetime, and on the death of A. those children alone take who have attained twenty-two, to the exclusion of others who may afterwards attain that age (*Mogg* v. *Mogg*, 1 Mer. 654); and if at the death of A. no child has attained twenty-two, the remainder fails (*Festing* v. *Allen*, 12 M. & Wels. 279; *Alexander* v. *Alexander* 16 C. B. 59)." This passage was omitted in the third edition (vol. i. p. 23b, without brackets, as if it formed part of Mr. Jarman's text, and it has been quoted and accepted as such (Williams on Seisin, 206). The original passage as it appears in the first edition is printed supra, p. 328.

the par. estate might by possibility have become entitled to a share by attaining twenty-one during the continuance of the particular estate, such share was a contingent remainder at the time of the determination of the estate, and is consequently saved by the act. But this view seems inconsistent with the nature of a gift to a class: since, under such a gift, those only are objects of the gift who have attained the required qualification when the time for ascertaining the class arrives—viz. (in the present case) the determination of the particular estate,—and they take the whole.

The result seems to be that in the case supposed the act has made no change in the law, and that the children who attain twenty-one before the particular estate determines, take, to the exclusion of those who afterwards attain that age (*v*).

Equitable contingent remainders.

The rule that a contingent remainder is liable to fail by the determination of the particular estate before the happening of the contingency, never applied to so-called equitable contingent remainders (*w*). And it has been decided that where such a contingent remainder is created before the act of 1877, and after 1877 becomes clothed with the legal estate, it does not thereby become liable to failure by the subsequent determination of the particular estate (*x*).

Trust to convey legal estate.

A devise of land to trustees upon trust to convey the legal estate to a person to be ascertained on the happening of a contingent event, does not give that person a contingent remainder; it is an executory devise (*y*).

Restrictions on the creation of contingent remainders and executory devises.

To return to contingent remainders properly so-called. Another distinction between contingent remainders and executory devises has been introduced by sec. 10 of the Conveyancing Act, 1882. The provisions of this section have been already considered (*z*), as has also the question whether contingent remainders, like executory devises, are subject to the rule against remoteness (*a*).

Estate pur auter vie.

An executory devise of an estate pur auter vie is valid, and cannot be defeated by the prior devisee of a quasi estate in fee simple (*b*).

When a devise is a contingent remainder and when an executory devise.

It is obvious that the Contingent Remainders Act, 1877, even in the case of wills made since 1877, has only partially abolished the

(*v*) Williams on Seisin, 206.
(*w*) Ante, p. 303.
(*x*) *Re Freme*, [1891] 3 Ch. 167.
(*y*) *Re Finch*, 17 Ch. D. 211.
(*z*) Ante, p. 1434, n. (*l*)
(*a*) Ante, p. 368.
(*b*) *Re Barber's Settled Estates*, 18 Ch. D. 624; *Re Michell*, [1892] 2 Ch. 87.

distinction between contingent remainders and executory devises, and it is, therefore, still important to consider the points of difference between them.

The question has been frequently discussed in connection with gifts to classes, such as children, brothers, nephews, &c., and the cases are considered in detail, with reference to gifts of personalty as well as realty, in a later chapter of this work (*c*). It may, however, be convenient to state shortly the principal rules as regards real estate :—

(1) An immediate devise to the children of A. primâ facie means children in existence at the testator's death: but if there are no children then in existence, or if the testator clearly shews an intention to include afterborn children, the devise will take effect as an executory devise, so as to include the children of A. whenever born (*d*).

(2) A devise to A. for life, and after his death to his children, vests in all the children in existence at the death of the testator, but so as to open and let in children subsequently born during A.'s lifetime. So where the devise is to such children as attain a certain age, only those who attain that age during A.'s lifetime can take (*e*). Such a devise is therefore a contingent remainder, unless the context shews an intention to give vested interests subject to be divested (*f*).

(3) A devise to A. for life, and after his death to such of his children as, either before or after his death, shall attain twenty-one, is an executory devise, and children who attain twenty-one after A.'s death are included (*g*).

(4) A devise to A. for life, and after his death to the children of B., is a contingent remainder: but if the devise is to the children of B. living at the death of A. or thereafter to be born, this is an executory devise (*h*).

(*c*) Chapter XLII.

(*d*) See Hawkins on Wills, 68: *Wild's Case*, 6 Rep. 16 b; *Mogg* v. *Mogg*, 1 Mer. 654, and the authorities there cited, especially *Singleton* v. *Gilbert*, 1 Cox, 68; s. c. sub. nom. *Singleton* v. *Singleton*, 1 B. C. C. 541 n.; also *Scott* v. *Harwood*, 5 Madd. 332. The question what words are sufficient to shew an intention to include afterborn children is discussed in Chap. XLII.

(*e*) *Festing* v. *Allen*, 12 M. & W. 279; *Holmes* v. *Prescott*, 10 Jur. N. S. 507, and other cases cited ante, p. 1383. This, of course, assumes that the Contingent Remainders Act, 1877, does not apply to such a devise, ante, p. 1446. Compare *Symes* v. *Symes*, [1896] 1 Ch. 272, where the limitations were by deed.

(*f*) Ante, p. 1376 et seq.

(*g*) *Re Lechmere and Lloyd*, 18 Ch. D. 524; dissenting from *Brackenbury* v. *Gibbons*, 2 Ch. D. 417; *Re Lechmere and Lloyd* was followed in *Miles* v. *Jarvis*, 24 Ch. D. 633; *Re Bourne*, 56 L. T. N. S. 388; and *Dean* v. *Dean*, [1891] 3 Ch. 150. Some remarks on *Lechmere* v. *Lloyd* and *Brackenbury* v. *Gibbons* will be found in Challis, R. P. 114.

(*h*) *Miles* v. *Jarvis*, 24 Ch. D. 633.

CH. XXXVIII.

(5) From the general rule above stated (*i*), that a limitation to take effect before the natural determination of a preceding estate of freehold is an executory limitation, it follows that if land is devised to A. for life, with remainder to his children, and A.'s life estate is determined under a clause of forfeiture, the gift to the children takes effect as an executory devise (*j*).

In the case of limitations to individuals, it is sometimes difficult to say whether they take effect as contingent remainders or executory devises. The difficulty is enhanced by the technical rule already referred to (*k*), that a limitation which is capable of taking effect as a remainder can never be construed as an executory devise, whatever the intention of the testator may be. Thus, in *Re Wrightson* (*l*), a testator by his will devised freehold estates to uses in strict settlement, and afterwards made a codicil by which he directed that no devisee of any of his real estates devised under, or by virtue of his will, should have a vested interest therein or in any part thereof, or be entitled to the possession of the same or any part thereof, until the attainment of the age of twenty-four years, anything contained in his said will or any law or usage to the contrary notwithstanding: it was held that the effect of the codicil was to convert the limitations of the will into executory devises, and that they were consequently void for remoteness. The case was brought within the rule laid down by Mr. Fearne (*m*) —that if an ulterior limitation wants that connection with, or relation to, the preceding estate of freehold, which is requisite to constitute it a remainder, it may take effect as an executory devise—because the testator in *Re Wrightson* shewed an intention that a tenant in remainder should not be entitled to possession on the determination of the preceding estate, but should wait until he attained twenty-four, a provision inconsistent with the idea of a remainder at common law.

Re Wrightson.

White v. *Summers.*

On the other hand, in *White* v. *Summers* (*n*), where the testator (who died in 1847) devised land to B. for life, with remainder (in the events which happened) to the eldest or other son of J. S. who should first attain or have attained the age of twenty-one years successively in tail male, and in default of such issue to F. S., &c., and at the death of B. no son of J. S. had attained twenty-one, it was held that the devise to his sons failed: Parker, J., was of

(*i*) Ante, p. 1432.
(*j*) *Blackman* v. *Fysh*, [1892] 3 Ch. 209.
(*k*) Ante, p. 1432.
(*l*) [1904] 2 Ch. 95.
(*m*) Cont. Rem. 398.
(*n*) [1908] 2 Ch. 256.

opinion that the devise was a contingent remainder, and that being so, it was immaterial to consider what the testator's intention was; he also held that the devise to F. S. "in default of such issue" of J. S. did not mean that F. S. was only to take if J. S. had no issue who attained twenty-one, but that the words were merely intended to limit a remainder to F. S. to take effect on the failure of the preceding limitation. Otherwise the devise to F. S. would have failed, for a son of J. S. attained twenty-one about ten years after the death of B.

Nature of limitation sometimes dependent on events happening in testator's lifetime;

"As every devise operates according to the state of the objects at the death of the testator, it frequently happens," as Mr. Jarman points out (*o*), "that a limitation which, on the face of the will, appears to be a contingent remainder, and which, according to the state of events at the date of the will, would have taken effect as such, becomes, by the effect of subsequent events happening in the testator's lifetime, an executory devise. Thus, if lands be devised to A. for life, remainder to the future sons of B., and A. die in the lifetime of the testator, at whose decease no future son of B. is born, the devise will be executory, precisely as if it had been originally limited to the future sons of B., without any preceding freehold (*p*). The consequences of this event on the rights of the respective devisees might be very important: for if the devise had once operated to confer a contingent remainder, or, in other words, if A. had survived the testator, and had afterwards died before any future son of B. was born, the remainder to such future son would have failed by the determination of the preceding estate before it vested.

—and possibly even on subsequent events.

"Where the limitation of a future interest, by way of executory devise, is followed by other limitations expectant thereon, in the nature of remainders, (which, of course, can only happen where the first estate is less than the fee-simple,) such subsequent limitations may, it is evident, according to events happening as well after as before the death of the testator, take effect either as remainders or as executory devises. If, by the removal out of the way of the preceding limitation or limitations, by the death of the object or objects, or otherwise, before the

(*o*) First ed. p. 788.

(*p*) See *Hopkins* v. *Hopkins*, Cas. t. Talb. 44, 1 Atk. 581, 1 Ves. sen. 268; *Doe* d. *Scott* v. *Roach*, 5 M. & Sel. 482. So in the case already considered (ante, p. 1444), of a devise to A. for life, with remainder to such of his children as shall attain twenty-one, if A. died in the lifetime of the testator, leaving children all under age, the limitation to them would take effect as an executory devise.

happening of the contingency on which the whole line of limitations depends, a subsequent devisee is placed at the head of the train; his estate will, on the happening of such contingency, take effect as an executory devise, though had it retained its original position, such estate would have vested as a remainder.

"Thus, in *Doe* d. *Fonnereau* v. *Fonnereau* (*q*), where A. devised to the heirs male of the body of T., his eldest son, (who had an estate for life by deed,) and in default of such issue to his (testator's) second, third, fourth, and fifth sons successively, in tail male; it was held, that, if T. died leaving an heir male of his body, the limitation to A.'s next son took effect as a remainder expectant on the estate tail of such heir male; and that if he died leaving no male issue who survived the testator, it took effect immediately as an executory devise.

Effect where one of the several concurrent contingent remainders is subject to an executory devise.

"Sometimes a limitation is so framed, as to take effect as a remainder in fee in one event, and as an executory limitation engrafted on an alternative contingent remainder in fee in another event. Thus, in *Doe* d. *Herbert* v. *Selby* (*r*), where the devise was to A. for life, and after his decease to his children in fee as tenants in common; and if A. should die without issue, or leaving such issue, and such child or children should die under twenty-one, or (which was read *and* (*s*)) without issue, then over to B. in fee. A. suffered a common recovery, and *died without issue*; and it was held that, in the event which had happened, the limitation to B. would have taken effect as a contingent remainder, and consequently was destroyed by the recovery.

Observations upon *Doe* v. *Selby*.

"It is not quite accurate to say in such a case as *Doe* v. *Selby*, that the limitation is a contingent remainder in one event, and an executory devise in the other. There were, in fact, two alternative remainders in fee: one of which was (as *one* necessarily is in such a case) contingent, and was subject to an executory limitation in favour of the same person, who would have been the object of the alternate remainder. Such a case is clearly distinguishable from that of a devise to A. for life; and if he shall die on the 1st of January, then, from one year afterwards, to B. in fee; but if A. shall die on any other day, then, immediately from the decease of A., to B. in fee. In the first event, the limitation to B. would take effect as an executory

(*q*) Doug. 487; *Hopkins* v. *Hopkins*, Fea. C. R. 510.

(*r*) 4 D. & Ry. 608, 2 B. & Cr. 926.

(*s*) Ante, p. 601; and see *Doe* d. *Evers* v. *Challis*, 18 Q. B. 224.

devise; and in the second, as a remainder; so that his interest would be destructible or not by the act of A., according to the event" (*t*).

A better example of alternative limitations is given by Parker, J., in *White* v. *Summers* (*u*): "In the case of a devise to A. for life, and after his death to B. if he shall then have attained twenty-one years, but if B. shall not have then attained twenty-one years, then to B. if and when he attains that age, there would be alternative gifts to B., one being a remainder and the other an executory devise, and which ultimately took effect would depend upon whether B. had or had not attained the age of twenty-one at the death of A. That such alternative limitations would be good appears from the case of *Evers* v. *Challis* (*v*)."

Executory devise may be changed into a remainder by events subsequent to testator's death.

In *Doe* d. *Harris* v. *Howell* (*w*), where a testator devised real estates to his daughter for life, remainder to her son J. in fee; but in case J. should die before her, and she should have no other child living at her death, then as she should appoint. The daughter and her son both survived the testator, and then the son died before his mother, who afterwards had another son who survived her. It was decided that though the limitation (which, for argument's sake, was supplied by implication (*x*)), to the children of the daughter other than J., could operate only as an executory devise at the time of the testator's death, yet that by J.'s death in his mother's lifetime that limitation was converted into a remainder, and was barred by a fine which had been levied by her.

But not a remainder into an executory devise.

But a limitation which has once operated as a contingent remainder, can never, after the death of the testator, be changed into an executory devise (*y*).

Whether executory limitation to arise out of a contingent remainder is involved in its destruction.

Mr. Jarman continues (*z*): "If, in *Doe* v. *Selby*, the tenant for life had had children, i.e. born after the recovery, who had died under twenty-one, and without issue, the case would have raised a question, not, I think, hitherto decided, namely, whether an executory devise engrafted on a contingent remainder in fee, is involved in the destruction of such remainder. If an executory devise were derived out of the estate in defeasance of which it is

(*t*) It will be remembered that when Mr. Jarman wrote (1844), contingent remainders were destructible by the holder of the preceding estate of freehold; ante, p. 1444.

(*u*) [1908] 2 Ch. p. 266. In that case the wording of the will was not sufficiently explicit to justify the alternative construction.

(*v*) 7 H. L. C. 531. Ante, p. 358.

(*w*) 10 B. & Cr. 191.

(*x*) But see ante, p. 673.

(*y*) 2 Prest. Abst. 172; *Hopkins* v. *Hopkins*, 1 Atk. 581; *Mogg* v. *Mogg*, 1 Mer. pp. 703, 704, arg., and the decree as to the High Littleton estate.

(*z*) First ed. p. 790.

limited to take effect, it is clear that, in such a case, it would be held to share the fate of the parent limitation, out of which it is to spring, and to all the accidents of which it would seem, therefore, to be necessarily subject. Accessorius sequitur naturam sui principalis (*a*). would then present an exception to the position of the learned author of the Treatise on Contingent Remainders that 'an executory devise cannot be prevented or destroyed by any alteration whatsoever in the estate *out of which*, or after which, it is limited' (*b*); (to which, indeed, the case of an executory devise, *being preceded by an estate tail, does* clearly form an exception (*c*)). But it is conceived, that the notion above suggested though seemingly countenanced by the terms of this position, is not correct in point of law. An executory devise is not derived out of, or dependent upon, the estate which it supersedes. It is a future substantive, independent, limitation to arise on a given event; and the circumstance, that that event involves the failure of the objects of a preceding estate, is merely accidental (*d*).

Effect where defeasible and executory fee become vested in same person.

"Here it may be observed, that where the defeasible estate in fee, and the executory fee to arise out of it on a given event, become vested in the same person, the latter is not merged or extinguished in the former, the two interests being successive, and not concurrent. Thus, in *Goodtitle* d. *Vincent* v. *White* (*e*), where a testator devised all his estate to his wife, in case his daughter (who became his heir) died under the age of twenty-one years. The wife died intestate; so that the daughter, to whom the estate had descended from her father, subject to the executory devise, became also entitled, by descent from her mother, to the executory interest so created. The daughter died a minor, upon which the heir ex parte maternâ claimed the property under the executory limitation, which claim was resisted by the heir ex parte paternâ, on the ground that the executory fee had been extinguished by the union of both interests in the person of the daughter. But it was held, that no extinguishment had taken place, and that the maternal heir was entitled (*f*).

Curtesy and dower attach on a defeasible fee.

"It is to be observed, too, that an immediate estate in fee, defeasible on the taking effect of an executory limitation,

(*a*) 3 Inst. 139.
(*b*) Fearne, C. R. 418.
(*c*) As Mr. Fearne himself remarks: Fea. C. R. 423, 424, ante, p. 321.
(*d*) Cf. *Vincent Lee's Case*, Moore, 268.
(*e*) 15 East, 174; 2 B. & P. (N.R.) 383. See also *Goodright* d. *Larmer* v. *Searle*, 2 Wils. 29; *Doe* d. *Andrew* v. *Hutton*, 3 B. & P. 643.
(*f*) "The arguments in this case are replete with instructive learning."

has all the incidents of an actual estate in fee-simple in possession, such as curtesy, dower, &c.; the devisee having the inheritance in fee, subject only to a possibility. Therefore, in *Buckworth* v. *Thirkell* (*g*), where a testator devised lands to trustees and their heirs, in trust for his grand-daughter M. until she arrived at the age of twenty-one, or was married; and after she attained her age of twenty-one, or was married, then he gave the lands to M., and her heirs and assigns, for ever; but in case M. should die before the age of twenty-one years, and without leaving lawful issue of her body, then over. M. died under age, without leaving issue living at her decease, *but having had a child born alive;* and it was held, that the husband (the father of such child) was entitled to an estate for life as tenant by the curtesy."

Unless estate be such as issue could in no case have inherited.

But an exception exists where the prior estate is determined by executory devise over, in case of the birth or existence of children who, but for such devise over, would have inherited the parent's estate: and the circumstance of the executory devise being in favour of the children themselves does not alter the case, since they would not, nor ever could, take by inheritance, but by purchase (*h*).

Same rule as to dower.

The general right to dower in similar cases is equally well established (*i*), and the same exception must exist here as in regard to curtesy; it being equally necessary, in support of either claim, that children of the marriage, if any such there be, may by possibility inherit (*j*).

Executory bequests.

III.—Executory Bequests.—As Mr. Jarman observes (*k*), "No remainders can be limited in real and personal chattels; every future bequest of which, therefore, whether preceded by a partial gift or not, is in its nature executory (*l*). An ulterior bequest of a term for years, after a prior limitation for life, owes its validity to this doctrine; the rule formerly being that, in such a case, the whole interest vested indefeasibly in the first legatee (*m*).

(*g*) 1 Collect. Jur. 332, 3 B. & P. 652, n. The same rule exists with regard to dower out of an estate tail, after failure of issue. Secus of an estate determined by condition at common law, *Payne* v. *Samms*, 1 Leo. 167, Goulds. 81; *Paine's Case*, 8 Rep. 34, 5 Vin. 313, pl. 30.

(*h*) *Sumner* v. *Partridge*, 2 Atk. 47; *Barker* v. *Barker*, 2 Sim. 249.

(*i*) *Moody* v. *King*, 2 Bing. 447; *Goodenough* v. *Goodenough*, 3 Prest. Abs. 372; *Smith* v. *Spencer*, 2 Jur. N. S. 778.

(*j*) Litt. s. 53.

(*k*) First ed. p. 793.

(*l*) Fea. C. R. 402; *Re Tritton*, 61 L. T. 301. The reader will find some interesting remarks on this subject in an article by Professor Gray on "Future Interests in Personal Property," in the Harvard Law Review, xiv, 397, and in §§ 86a, 831 seq. of the second edition of his work on the Rule against Perpetuities.

(*m*) *Horton* v. *Horton*, Cro. Jac. 74; *Woodcock* v. *Woodcock*, Cro. El. 795.

CH. XXXVIII.

"Thus, in *Manning's Case* (*n*), where a man possessed of a term of years, devised it to B., after the death of A. the testator's wife, and directed that, in the meantime, she should have the use and occupation during her life: it was contended, that the devise to A. during her life gave her the whole term, and that, therefore, the devise over was void; but after much argument, three Judges held, that B. took not by way of remainder, but by way of executory devise. And it was ruled that there was no difference between a gift of the land itself, and of the use or occupation or profits of the land.

"Both Courts of Law and Courts of Equity are at this day (*o*) constantly in the habit of entertaining suits, at the instance of an executory legatee, for the recovery of chattels, real as well as personal, and the latter, of pecuniary legacies, after a prior disposition for life or other partial interest.

Successive interests in personal chattels.

"In *Hoare* v. *Parker* (*p*), an ulterior legatee recovered, by action of trover, certain chattels which the legatee for life had pledged to a pawnbroker, who had given a valuable consideration without notice; the rule being, that the property does not, unless sold in market overt, follow the possession of chattels capable of being identified (*q*).

Equitable remedy for their protection and recovery.

"Courts of Equity, too, will enforce the actual delivery of specific chattels, which are of such a nature as that the loss cannot be compensated in damages; the value arising from considerations personal to the owner, as plate bearing family inscriptions, &c. (*r*). They will also, during the continuance of the prior interest, protect the rights of the ulterior legatee; but this protection is now confined to compelling the legatee for life to give an inventory; which, as observed by Lord *Thurlow*, is more equal justice than requiring security, which was the old rule; as there ought to be danger to require that (*s*).

When trover will lie.

"Where the legal title is in trustees, it seems that they may maintain trover for the recovery of personal chattels, which have been taken in execution by the creditor of the person beneficially

(*n*) 8 Rep. 95; *Stevenson* v. *Mayor of Liverpool*, L. R., 10 Q. B. 81. See also *Doswell* v. *Earle*, 12 Ves. 473; *Theobalds* v. *Duffoy*, 9 Mod. 101; *Mallet* v. *Sackford*, 8 Vin. Ab. 89, pl. 5; *Lampet's Case*, 10 Rep. 47; *Catchmay* v. *Nicholas*, Finch, 116; *Roe* d. *Bendale* v. *Summerset*, 5 Burr. 2668. That personalty may be subjected to the same modifications of ownership, by way of executory gifts, as land, see *Martin* v. *Long*, 2 Vern. 151; *Johnson* v. *Castle*, Winch, 116, 8 Vin. Ab. 104, pl. 2.

(*o*) 1844.

(*p*) 2 T. R. 376.

(*q*) See *Hartop* v. *Hoare*, 3 Atk. 44.

(*r*) *Pusey* v. *Pusey*, 1 Vern. 273; *Duke of Somerset* v. *Cookson*, 3 P. W. 389; *Fells* v. *Read*, 3 Ves. 70; *Lloyd* v. *Loaring*, 6 Ves. 773; *Lowther* v. *Lowther*, 13 Ves. 95; *Earl of Macclesfield* v. *Davis*, 3 V. & B. 16.

(*s*) 1 B. C. C. at p. 279.

entitled for life (*t*). But where the first taker was clothed with the legal title, and his creditor had taken the chattels (which consisted of plate) in execution; on a bill by the legatee calling for their restoration to the house with which they were bequeathed, and for security and an inventory, Lord *Thurlow* felt much difficulty. On the one hand, if the Court could take away the articles, it was entitling the ulterior legatee to take from him the use, contrary to the testator's intention; and, on the other, if the creditors obtained the plate, they must succeed in applying it differently from the testator's intention; and there was, his Lordship said, a strong principle of justice for preserving the goods for the benefit of the person entitled, if the Court could so secure them. The point, however, was not decided, the case being disposed of on another ground (*u*).

"It is clear, at all events, that the ulterior legatee might, on his interest falling into possession, have maintained an action of trover for the plate in question; or, if incapable of being compensated in damages, a suit in equity for its delivery. These cases suggest, that, wherever temporary interests are created in chattels personal, the whole legal property should be vested in trustees.

"As personal property of this nature is thus preserved through any number of successive takers, for the benefit of the person entitled to the ulterior and absolute interest, it is evident that bequests of such property are within the dangers of, and are consequently subject to, the rule directed against perpetuities" (*v*).

Consumable articles cannot be limited.

But there can be no limitations of things the proper use of which lies in their consumption (res quæ ipso usu consumuntur): under a specific (*w*) gift of such things to A. for life or other limited interest, A. takes the absolute property (*x*). This rule, however, is not generally applicable to such things where they are the testator's stock-in-trade (*y*), or where personal use by the tenant for life is

(*t*) *Cadogan* v. *Kennet*, Cowp. 432. It seems that they are not within the reputed ownership clauses of the Bankruptcy Acts: *Earl of Shaftesbury* v. *Russell*, 1 B. & Cr. 666.

(*u*) *Foley* v. *Burnell*, 1 B. C. C. 274. Ante, p. 692.

(*v*) Vide ante, p. 296 seq.

(*w*) If included in a residuary bequest they would of course be sold, and the interest of the proceeds enjoyed by the tenant for life, 3 Mer. at p. 195. See *Re Moir's Estate*, [1882] W. N. 139.

(*x*) *Randall* v. *Russell*, 3 Mer. 190; *Andrew* v. *Andrew*, 1 Coll. 690; *Twining* v. *Powell*, 2 ib. 262. This was formerly doubted, see *Porter* v. *Tournay*, 3 Ves. at p. 314.

(*y*) *Phillips* v. *Beal*, 32 Bea. 25 (wine); *Groves* v. *Wright*, 2 K. & J. 347 (farming); *Cockayne* v. *Harrison*, L. R., 13 Eq. 432 (farming); *Myers* v. *Washbrook*, [1901] 1 K. B. 360 (farming); *Maynard* v. *Gibson*, [1876] W. N. 204 (deer). In *Connolly* v. *Connolly*, 56 L. T. 304, it was doubtful whether the legatees took a life interest in the stock in trade, or an absolute interest. But in *Breton* v. *Mockett*, 9 Ch. D. 95, the tenant for life being expressly exempted from liability on account of diminution, was held to be absolutely entitled; and

not contemplated (*z*). So also the rule does not necessarily apply where there is a gift to A. of wines or other consumable articles which he may require for consumption while residing in a house, the occupation of which is bequeathed to him by the testator (*a*).

Gifts over and clauses of cesser.

A clause by which a bequest of personalty in trust for A. is directed to cease or go over in a certain event (as for instance on A. becoming entitled to other property), is analogous to a shifting clause in the case of real estate (*b*). And the rule that where a condition or clause of forfeiture is followed by a gift over, the gift over must fit the previous clause (*c*), applies to personalty as well as realty (*d*).

In *Re Greenwood* (*e*), a testator gave the income of his residuary estate to his children in equal shares, and made provision for a home to be maintained under the charge of M. for such of his unmarried children as chose to take advantage of it, and directed that while any child resided with M. a sum of 50*l.* a year should be deducted from his or her share of the income and paid to M. It was held by the Court of Appeal (Kay, L.J., dissenting) that this operated as a bequest of 50*l.* a year to M. out of the income of each unmarried child, contingently on his or her residing with M.

Absolute gift partially defeated by executory gift over.

We have already discussed the rule that, where an estate is devised on a contingency in partial derogation of a preceding estate in fee, the original devise is only affected to the extent necessary for the introduction of the contingent estate (*f*). "On the same principle," Mr. Jarman remarks (*g*), "it would seem to follow, that, if personal estate were bequeathed in terms which, standing alone, would confer the absolute interest, and there followed a bequest over in a certain event to a person for life, the first legatee would, subject to such executory gift for life, be absolutely entitled. It might appear to be a further deduction from this doctrine, that if the second gift were a contingent bequest of the entire interest in the property, and not for life only, and such contingent and substituted bequest failed in event, the prior legacy, in derogation of which the same was to take effect, would remain absolute. And

as to hay, roots, and cattle on a stock-feeding farm, see *Bryant* v. *Easterson*, 5 Jur. N. S. 166, and the remarks of Darling, J., in *Myers* v. *Washbrook*, supra; in that case there was no gift of the farming business, or direction that it should be carried on.

(*z*) *Re Hall's Will*, 1 Jur. N. S. 974 (bequest of testator's wearing apparel to his widow for life).

(*a*) *Re Colyer*, 55 L. T. 344. In *Clive* v. *Clive*, 2 Eq. R. 913, a bequest of the use and enjoyment of furniture, wines, &c., for life, was held to give the legatee an absolute interest in the consumable things.

(*b*) *Curzon* v. *Curzon*, 1 Giff. 248, ante, p. 1440.

(*c*) Ante, p. 1442.

(*d*) *Bird* v. *Johnson*, 18 Jur. 976, stated post, Chap. XXXIX.

(*e*) 66 L. T. 101.

(*f*) Ante, p. 1344, n. (*n*).

(*g*) First ed. p. 783.

the case of *Taylor* v. *Langford* (*h*) seems to lend some countenance to the hypothesis." But it would appear to be clearly settled that the principle of *Doe* v. *Eyre* (*i*) applies to personalty as well as realty, so that where there is an absolute gift, followed by a gift over on the happening of a certain event, the prior gift is defeated on the happening of the event, although the gift over fails. Thus, in *O'Mahoney* v. *Burdett* (*j*), where a legacy was bequeathed to A. for life, remainder to her daughter; but if the daughter should die unmarried or without children, then to B.; B. died in the testator's lifetime, and afterwards the daughter died without ever having a child. *Doe* v. *Eyre* and *Jackson* v. *Noble* were cited, and it was held in the House of Lords that the gift to the daughter was defeated, although the gift over had failed by lapse.

—although executory gift never takes effect.

And the exception to the principle of *Doe* v. *Eyre*, namely, that it does not apply where the gift over is void for remoteness, exists in the case of personalty as well as realty; the result being that the prior gift remains absolute (*k*).

Gift over void for remoteness.

But the principle does not apply in those cases "in which it is plain that the original gift was not intended to be defeated unless there [are] objects to take under the gift over, as for instance in cases of substitutionary gifts to children" (*l*). For example, where personalty is bequeathed to individuals or to a class, to come into possession at a future period (as, after a life-estate to A.), and in case any of them should die before the period of distribution, then to their children; here, the original gift is divested only in the case of those who have children. Thus, in *Smither* v. *Willock* (*m*), where there was a bequest to the testator's wife for her life, and after her death to his brothers and sisters, named in the will, in equal shares; but in case of the death of any of them in the lifetime of the wife, the shares of him or her so dying were to be divided between his or her children; one of the testator's brothers died in the widow's lifetime, without having ever had a child; and Sir W. Grant declared his share to be vested, subject to be divested only in the

Effect where children substituted on death of original legatees.

(*h*) 3 Ves. 119. See also *Harrison* v. *Foreman*, 5 Ves. 207, and other cases stated ante, p. 1367 et seq. The statement of the case of *Joslin* v. *Hammond*, 3 Myl. & K. 110, which Mr. Jarman considered as militating against such a conclusion as that suggested in the text, has been transferred to Chap. XVII., ante, p. 566.

(*i*) Ante, p. 1436.

(*j*) L. R., 7 H. L. pp. 388, 407. See *Hurst* v. *Hurst*, 21 Ch. D. 278, where Jessel, M.R., referred to *O'Mahoney* v. *Burdett* as having been decided on the same principle as *Doe* v. *Eyre*.

(*k*) Ante, p. 1437. See *Hodgson* v. *Halford*, 11 Ch. D. 959; *Courtier* v. *Oram*, 21 Bea. 91; *Webster* v. *Parr*, 26 Bea. 236.

(*l*) Per Jessel, M.R., in *Hurst* v. *Hurst*, 21 Ch. D. at p. 293.

(*m*) 9 Ves. 233. See also *Hervey* v. *M'Laughlin*, 1 Pri. 264; *Salisbury* v. *Petty*, 3 Ha. 86.

event of his death in the lifetime of the widow, leaving children: and consequently, that event not having happened, his representative was entitled. So if a testatrix gives property to her sister A. absolutely, and goes on to say that it is to be "divided in equal shares after my sister's death, between G. and H., should they survive her," A.'s interest becomes indefeasible if G. and H. predecease her (*n*).

Effect where absolute interests are first given, and then trusts declared of shares of certain objects.

It seems, too, that where a testator, in the first instance, divides his property among his children, and then proceeds to declare certain trusts of his daughters' shares in favour of themselves and their children, these trusts are considered as defeating only pro tanto the absolute interests antecedently given to the daughters in common with the other children.

As, in *Whittell* v. *Dudin* (*o*), where the testator directed the residue of his property to be equally divided between his wife and sons and daughters, subject, as to the shares of the daughters, to certain trusts for the benefit of themselves, and their children: Sir T. Plumer, M.R., held that a daughter dying without a child was entitled absolutely under the original bequest, from which it was to be collected that the testator's design was to make an equal division among his children, which would be frustrated if the shares of daughters were to go to the testator's next of kin as undisposed-of property, on their dying without children.

Qualifying trusts operate pro tanto only.

And the same construction prevailed in *Hulme* v. *Hulme* (*p*), where a testator, in the first instance, made an absolute gift to all his children by his second wife, who should be living when the youngest should attain twenty-one. He then superadded a direction for settling the shares of the daughters, upon trust for them for life, and then for their children. One of the daughters having died childless, it was held that her share belonged absolutely to her representatives. Sir L. Shadwell, V.-C., observed, "The absolute gift remains, except so far as the direction for settling the shares of the daughters has taken it away, and it is not taken away in the case of a daughter dying without having children."

(*n*) *Monck* v. *Croker*, [1900] 1 Ir. 56; *Crozier* v. *Crozier*, L. R., 15 Eq. 282, appears to rest on the same principle: see Chap. XVII., p. 567.

(*o*) 2 J. & W. 279.

(*p*) 9 Sim. 644. See also *Mayer* v. *Townsend*, 3 Bea. 443; *Winckworth* v. *Winckworth*, 8 ib. 576; *Re Forster*, 1 M. D. & D. 418, 2 ib. 177; *Arnold* v. *Arnold*, 16 Sim. 404; *Eaton* v. *Barker*, 2 Coll. 124; *Dawson* v. *Bourne*, 16 Bea. 29; *Re Young's Settlement*, 18 Bea. 199; *Lyddon* v. *Ellison*, 19 ib. 565; *Re Corbett's Trusts*, Joh. 591; *Norman* v. *Kynaston*, 3 D. F. & J. 29; *Bradford* v. *Young*, 29 Ch. D. 617; *Olphert* v. *Olphert*, [1903] 1 Ir. 326; *Fitzgibbon* v. *M'Neill*, [1908] 1 Ir. 1. See *Re Wilcock*, [1898] 1 Ch. 95; *Re Wood*, [1901] 2 Ch. 578, [1902] 2 Ch. 542, and *Hancock* v. *Watson*, post, where the general rule is recognized. *Re Currie's Settlement*, [1910] 1 Ch. 329.

The same principle applies where the ulterior limitations are void for remoteness, or, in the case of an appointment under a special power, because they are in excess of the power (*q*).

Lassence v. *Tierney.*

The rule (which applies to shares of males as well as to shares of females (*r*)) is thus stated by Lord Cottenham: "If a testator leave a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails; but if there be no absolute gift as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate, as not having in such event been given away from it. In the latter case, the gift is only for a particular purpose; in the former, the purpose is the benefit of the legatee, as to the whole amount of the legacy, and the directions and restrictions are to be considered as applicable to a sum no longer part of the testator's estate, but already the property of the legatee" (*s*).

Rule for deciding whether there be an absolute gift in the first place.

It is in the determination of this previous question, whether, namely, the gift to the primary legatee is absolute or qualified, that the real difficulty of these cases generally lies. The intention is, of course, to be collected from the whole will. Suppose, for instance, that after the gift to the primary legatee, there are gifts over in alternative contingencies exhausting every possible event: this is wholly inconsistent with an intention that there should, in any event, be an absolute gift to the primary legatee. But the point can only be material when the first expressions are ambiguous, for if there is a distinct positive gift, and the intention is express, nothing that afterwards follows can affect the construction of the positive gift; but where the first gift is capable of two constructions, other parts of the will are to be looked at to see what the intention was; and no doubt a disposition of the whole property, under all circumstances that can arise, is an important consideration in putting a construction on ambiguous expressions. It does not seem possible that the two intentions could exist together: if they are both found in the same will, the Court may have to decide which is to prevail (*t*); but if the first is ambiguous

(*q*) *Ring* v. *Hardwick*, 2 Bea. 352; *Churchill* v. *Churchill*, L. R., 5 Eq. 44; *Cooke* v. *Cooke*, 38 Ch.D. 202; *Re Boyd*, 63 L. T. 92; *Hancock* v. *Watson*, [1902] A. C. 14, affirming C. A. in *Re Hancock*, [1901] 1 Ch. 482.

(*r*) *Norman* v. *Kynaston*, 3 D. F. & J. 29.

(*s*) *Lassence* v. *Tierney*, 1 Mac. & G. at p. 561, and the cases cited ante, note (*p*). See also *Re Richards*, 50 L. T. 22.

(*t*) See *Findon* v. *Findon*, 1 De G. & J. 380; *Re Lord Sondes' Will*, 2 Sm. & G. 416; *Salmon* v. *Salmon*, 29 Bea. 27.

CH. XXXVIII.

and the other is not, the unambiguous expression must have great effect in controlling that which is ambiguous (*u*).

Qualification by codicil.

Where the original gift is by will, and the qualification is contained in a codicil, the construction is generally a simpler matter than when both are contained in the same testamentary instrument (*v*).

Gift subject to a power which is extinguished.

Where there is a legacy subject to be defeated by the exercise of a discretionary power, and that power is extinguished, the legacy of course becomes absolute (*w*).

Acceleration of gift by lapse of prior absolute gift.

The doctrine that where personal property is given to A. absolutely, with remainder to B. absolutely, the gift to B. takes effect if A. predeceases the testator, is referred to elsewhere (*x*).

(*u*) Per Lord Cottenham, *Lassence* v. *Tierney*, 1 Mac. & G. pp. 562, 567; *Reid* v. *Reid*, 25 Bea. 469; *Butler* v. *Gray*, L. R., 5 Ch. 26. Other cases where the primary gift has been held not absolute are *Rucker* v. *Scholefield*, 1 H. & M. 36; *Sowcin* v. *Watson*, 10 Bea. 200; *Kay* v. *Winder*, 12 Bea. 610; *Gompertz* v. *Gompertz*, 2 Phil. 107; *Whitehead* v. *Rennett*, 22 L. J. Ch. 1020; *Waters* v. *Waters*, 26 L. J. Ch. 624; *Fullerton* v. *Martin*, 1 Dr & Sm. 31; *Savage* v. *Tyers*, L. R., 7 Ch. 356; *Harris* v. *Newton*, 46 L. J. Ch. 268; *Re Richards*, 50 L. T. 22; *Re Buckmaster's Estate*, 47 L. T. 514; *Allen* v. *Allen*, 21 W. R. 747.

In the following cases the first gift was held absolute: *Campbell* v. *Brownrigg*, 1 Phil. 301; *Lord* v. *Lord*, 3 Jur. N. S. 485; *Watkins* v. *Weston*, 3 D. J. & S. 434 (indefinite gift of rents of leaseholds); *M'Culloch* v. *M'Culloch*, 3 Gif. 606; *Combe* v. *Hughes*, 2 D. J. & S. 657; *Martin* v. *Martin*, L. R., 2 Eq. 404; *Bradford* v. *Young*, 29 Ch. D. 617; *M'Tear* v. *M'Dowell*, 11 Ir. Ch. 338; *Welply* v. *Cormick*, 16 Ir. Ch. 74; *Olphert* v. *Olphert*, supra.

(*v*) See *Bell* v. *Jackson*, 1 Sim. N. S. 547; *Norman* v. *Kynaston*, 3 D. F. & J. 29; *Kellett* v. *Kellett*, L. R., 3 H. L. 160; *Re Wilcock*, [1898] 1 Ch. 95. In *Nevill* v. *Boddam*, 28 Bea. 554, there was a complete revocation by codicil of the original gift.

(*w*) *Keates* v. *Burton*, 14 Ves. 434.

(*x*) Ante, p. 452.

CHAPTER XXXIX.

CONDITIONS AND RESTRICTIONS.

	PAGE
I. *Creation of Conditions*..	1461
II. *Void Conditions* :—	
(i.) *Illegal Conditions*	1464
(ii.) *Uncertainty*	1465
(iii.) *Perpetuities and Remoteness* ...	1465
(iv.) *Impossible Conditions*	1465
(v.) *Inconsistent Conditions*	1466
(vi.) *Repugnant Conditions*	1466
(vii.) *Conditions in terrorem*	1467
(viii.) *Result of Condition being Void*	1469
III. *Conditions, whether Precedent or Subsequent*...	1470
IV. *Acceptance of Conditional Gift*	1477
V. *Performance of Conditions* :—	
(i.) *Period allowed*...	1478
(ii.) *Mode of Performance*	1478
(iii.) *When Performance excused* ...	1480
(iv.) *Relief against Forfeiture*	1482
VI. *Conditions Incapable of Performance*	1482
VII. *Conditions Restrictive of Voluntary Alienation* :—	
(i.) *Estates in Fee* ...	1487
(ii.) *Estates-tail*	1491
(iii.) *Absolute Interests in Personal Estate*	1494
(iv.) *Life Interests and Annuities*	1495
(v.) *What will cause a Forfeiture* ...	1497
VIII. *Conditions against Involuntary Alienation* :—	
(i.) *General Principles*	1500
(ii.) *Discretionary Trusts*	1502
(iii.) *Life Interest Determinable on Bankruptcy* ...	1505
IX. *Restraint on Anticipation by Married Woman*...	1514
What Words will create a Separate Use	1518
What Words will create a Restraint on Anticipation	1523
X. *Conditions in Restraint of Marriage* :—	
(i.) *Partial Restraint*	1525
(ii.) *Conditions requiring Consent*	1528
(iii.) *Total Restraint*..	1539
XI. *Condition to assume a Name or Arms*	1542
XII. *Condition requiring Residence*.....	1546
XIII. *Various Conditions*.....	1548

I.—Creation of Conditions.—No precise form of words is necessary in order to create conditions in wills; any expression disclosing the intention will have that effect. Thus a devise to A, "he paying" or "he to pay 500*l.* within one month after my decease," without more, would at common law create a condition, for breach of which the heir might enter (*a*). So a bequest

Creation of conditions.

(*a*) Co. Litt. 236 b; *Barnardiston* v. *Fane*, 2 Vern. 366, post, p. 1482; *Re Oliver*, 62 L. T. 533. But as to the modern construction of such gifts, see Lord St. Leonards' statement quoted below.

CHAP. XXXIX.

" in consideration " of the legatee paying certain debts and legacies, creates a condition (*b*). But the intention must be definitely expressed: thus, in *Yates* v. *University College* (*c*), a testator made a bequest to a college to found a professorship, " for the regulation of which I purpose preparing a code of rules and regulations "; if the college did not accept them within a certain time, the bequest was to be void: he died without making any rules, and it was held that the intention of the testator with regard to the rules did not create a condition.

Condition operating as gift.

Conversely, a provision in a will, expressed in the form of a condition, may operate as a substantive gift, by creating a trust or charge (*d*). Thus, if a testator gives property to A. upon condition that he pays B. a sum of money, this operates as a gift to B. which does not lapse by the death of A. in the testator's lifetime (*e*). And, as Lord St. Leonards points out (*f*), " what by the old law was deemed a devise upon condition, would now, perhaps, in almost every case, be construed a devise in fee upon trust, and by this construction, instead of the heir taking advantage of the condition broken, the cestui que trust can compel an observance of the trust by a suit in equity." This statement of the law was approved and acted on in *Wright* v. *Wilkin* (*g*), where it was held that a devise upon an express condition requiring the devisee to pay legacies created a trust and not a condition upon breach of which the heir could enter.

Condition creating personal liability.

In several cases it has been held that if property is given to a person upon condition of his making certain payments (debts, legacies, annuities, &c.), and he accepts the gift, this makes him personally liable for the payments, even if their amount exceeds the value of the property (*h*). But a contrary intention may appear from the context, as in *Re Oliver* (*i*), where words importing a condition were held to create only a charge. And a gift " subject to " certain payments creates a charge and not a trust (*j*).

In *Re Welstead* (*k*), a bequest towards the endowment of a

(*b*) *Messenger* v. *Andrews*, 4 Russ. 478. Compare *Re Welstead*, below.

(*c*) L. R., 7 H. L. 438; *Re Panter*, 22 T. L. R. 431; *Re Williams*, 24 T. L. R. 716 (gift held to be absolute).

(*d*) See *Merchant Taylors' Co.* v. *Att.-Gen.*, L. R., 6 Ch. 512; *Att.-Gen.* v. *Wax Chandlers' Co.*, L. R., 6 H. L. 1; *Foot* v. *Cunningham*, Ir. R., 11 Eq. 306; *Cunningham* v. *Foot*, 3 A. C. 974.

(*e*) *Oke* v. *Heath*, 1 Ves. sen. 135, supra, p. 436; *Wigg* v. *Wigg*, 1 Atk. 382; *Hills* v. *Wirley*, 2 Atk. 605; *Re Kirk*, 21 Ch. D. 431; *Bird* v. *Harris*, L. R., 9 Eq. 204.

(*f*) Sugden on Powers, 106.

(*g*) 2 B. & S. 232; affd. 31 L. J. Q. B. 196.

(*h*) *Messenger* v. *Andrews*, 4 Russ. 478; *Doe* v. *Holmes*, 8 T. R. 1; *Pickwell* v. *Spencer*, L. R., 7 Ex. 105; *Re* v. *Engelbach*, L. R., 12 Eq. 225; *Re M'Mahon*, [1901] 1 Ir. 489.

(*i*) 62 L. T. 533.

(*j*) *Re Cowley*, 53 L. T. 494.

(*k*) 25 Bea. 612.

church, in consideration of which the testator's nephew and his heirs were to nominate every third incumbent, was held not to create a condition, but to be equivalent to 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 (*l*).

Negative condition.

It seems that a condition requiring a person to whom land is devised, not to use it in a certain way, creates an obligation which may be enforced even although there is no gift over on breach. Thus, in *Blagrave* v. *Blagrave* (*m*), certain restrictions as to the use of a mansion, house and park were enforced by injunction at the suit of the person next entitled in remainder. But of course such a condition must be consistent with the rights of property (*n*).

Condition operating as limitation.

Again, a disposition which is in form capable of being construed as a condition will be construed as a limitation, if that appears to be the testator's intention (*o*). Thus, if a testator bequeaths a life interest in certain property to a single woman, with a proviso for its cesser in the event of her marrying, this will generally be construed as shewing an intention to provide for her while she is unmarried, and not as a condition in restraint of marriage (*p*). So a devise to A. upon condition that he marries a designated person, or a person answering a certain description, may be construed to create an estate in special tail in A. (*q*). The construction of gifts over in the event of the original devisee or legatee marrying has been already considered (*r*).

In *Re Moore* (*s*), a testator directed his trustee to pay to his sister, "during such time as she may live apart from her husband," a certain sum per week "for her maintenance whilst so living

(*l*) *Barker* v. *Barker*, L. R., 10 Eq. 438.

(*m*) 1 De. G. & S. 252. As to conditions annexed to an estate tail, see *Gulliver* v. *Ashby*, 1 W. Bl. 607; 4 Burr. 1929, and post, sect. VII. (ii.).

(*n*) See post, sect. II. (vi.).

(*o*) See *Gulliver* v. *Ashby*, 1 W. Bl. 607; *Doe* v. *Lakeman*, 2 B. & Ad. 30; and the authorities cited in *Mary Portington's Case*, 10 Rep. 40 b; the subject of determinable and conditional estates is beyond the scope of this work: see Challis, Real Prop., chap. xvii., xviii.

(*p*) *Heath* v. *Lewis*, 3 D. M. & G. 954; *Jones* v. *Jones*, 1 Q. B. D. 279; *Re Moore*, 39 Ch. D. 116; *Meeds* v. *Wood*, 19 Bea. 215. See *Webb* v. *Grace*, 2 Ph. 701 (covenant), and the cases on conditions in restraint of marriage, cited post.

(*q*) *Page* v. *Hayward*, 2 Salk. 570; *Pelham Clinton* v. *Duke of Newcastle*, [1902] 1 Ch. 34, [1903] A. C. 111.

(*r*) *Luxford* v. *Cheeke*; *Sheffield* v. *Lord Orrery*, and the other cases cited Chap. XXXVII.

(*s*) 39 Ch. D. 116, 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, *Suteliffe* v. *Richardson*, L. R., 13 Eq. 606.

CHAP. XXXIX.

apart from her husband": it was held that this was not a condition which might be rejected as illegal, but a limitation, and that the gift was void.

Words of description.

Words descriptive of the place or mode of life of a person at the death of the testator do not, properly speaking, create a condition (*t*). But a gift to a person at a future time, if he shall then answer a certain description, is primâ facie contingent on his answering that description (*u*).

Bequest to evade Mortmain Act.

A bequest to trustees for the erection of buildings for a charitable purpose "as soon as land shall be given or obtained" for that purpose, does not primâ facie constitute a bequest upon condition, but is a good charitable bequest, to be applied cy-près if necessary (*v*).

Illegal conditions.

II.—Void Conditions.—(i.) *Illegal Conditions.*—A condition which requires the performance of an unlawful act, as to kill a man, is void (*w*). And although a gift to a married woman, in the event of her separation from her husband (*x*), or in case she should not be living with her husband at the testator's death (*y*), is good, yet a condition that a woman shall cease to reside with her husband is bad, being contrary to public policy (*z*). And a condition which is not legally enforceable seems to be illusory and of no effect (*a*). Thus, in *Re Gassist* (*b*), a testator bequeathed to a corporation a picture upon the condition that it should be hung in a conspicuous part of their common hall and always retained in that position: it was held that the gift was valid, the condition being a condition subsequent.

A condition that a person shall not marry a Christian or become

(*t*) *Woods* v. *Townley*, 11 Ha. 314; *Shewell* v. *Dwarris*, Johns. 172, below, n. (*y*).

(*u*) See *Bartleman* v. *Murchison*, 2 R. & My. 136. See Chap. XXXVII.

(*v*) *Chamberlayne* v. *Brockett*, L. R., 8 Ch. 206; *Re Gyde*, 79 L. T. 261.

(*w*) Shep. Touch. 132; *Mitchel* v. *Reynolds*, 1 P. W. 181; *Brannigan* v. *Murphy*, [1896] 1 Ir. 418 (condition involving breach of public duty). Formerly a condition requiring money arising from the rents of realty to be paid to a charity was void; *Ridgway* v. *Woodhouse*, 7 Bea. 437.

(*x*) *Bedborough* v. *Bedborough*, 34 Bea. 286. The grounds of the decision are not reported; it may possibly be supported either on the ground that the annuity was given as a provision for the woman in the event of her husband's death or misconduct, or on the ground that the words were a limitation and not a condition. See *Re Hope Johnstone*, [1904] 1 Ch. 470 (settlement).

(*y*) *Shewell* v. *Dwarris*, Johns. 172.

(*z*) *Bean* v. *Griffiths*, 1 Jur. N. S. 1045; *Wren* v. *Bradley*, 2 De G. & S. 49; *Wilkinson* v. *Wilkinson*, L. R., 12 Eq. 604; *Re Moore*, 39 Ch. D. 116. See also *Carturight* v. *Carturight*, 3 De M. & G. 982; *H.* v. *W.*, 3 K. & J. 382. Other examples of conditions being held void on the ground of public policy will be found in *Egerton* v. *Earl Brownlow*, 4 H. L. C. 1, and the cases cited post, p. 1469, n. (*p*). As to conditions against the liberty of law, see *Cooke* v. *Turner*, stated post, sect. XIII., and see p. 1469.

(*a*) See *Brown* v. *Burdett*, 21 Ch. D. 667, stated ante, p. 702.

(*b*) 70 L. J. Ch. 242.

a Christian (*c*), or become a nun (*d*), or a member of the Roman Catholic Church, or of any sisterhood (*e*), is not void on the ground of public policy. But a condition not to enter the military or naval service is void (*f*). Instances of conditions not void on this ground.

(ii.) *Uncertainty.*—A condition may be void for uncertainty. Thus where a testator gave a life interest to A., followed by a declaration that if A. "in any way associated, corresponded or visited with any of my present wife's nephews or nieces" the life interest was to be forfeited and go over, it was held that the condition was void for uncertainty (*g*). So a condition in the nature of a clause of defeasance is void if its operation is uncertain (*h*). Uncertainty.

It has been held that a clause of defeasance to take effect in the event of a woman marrying "a person of ample fortune to maintain her in comfort and affluence" is not too vague to be enforced (*i*).

(iii.) *Perpetuities and Remoteness.*—The question whether a common law condition can be void for remoteness under the modern Rule against Perpetuities is discussed elsewhere (*j*). Rule against Perpetuities.

Any condition not being a common law condition is clearly void for remoteness if it infringes the Rule against Perpetuities, except in the case of charities; a conditional gift operating as a transfer from one charity to another is not void on this ground (*k*): nor is a charitable gift made invalid by a condition which is merely a direction as to the application of the property, if the property is effectually devoted to charity within the period allowed by the Rule against Perpetuities (*l*).

(iv.) *Impossible Conditions.*—A condition which is impossible ab initio is void: such as a condition that a man shall go to Rome in an impossibly short space of time (*m*). Impossible condition.

(*c*) *Hodgson* v. *Halford*, 11 Ch. D. 959.

(*d*) *Re Dickson's Trust*, 1 Sim. N. S. 37.

(*e*) *Wainwright* v. *Miller*, [1897] 2 Ch. 255. See also *Re Robinson*, [1897] 1 Ch. 85 (condition that clergyman shall wear a black gown held to be legal).

(*f*) *Re Beard*, [1908] 1 Ch. 382.

(*g*) *Jeffreys* v. *Jeffreys*, 84 L. T. 417. See also *Clavering* v. *Ellison*, 7 H. L. C. 707; *Ridgway* v. *Woodhouse*, 7 Bea. 437; *Duddy* v. *Gresham*, 2 L. R. Ir. 442 (retirement into a nunnery), and the cases on conditions requiring residence, post.

(*h*) *Re Viscount Exmouth*, 23 Ch. D. 158.

(*i*) *Re Moore's Trusts*, 96 L. T. 44.

(*j*) Ante, p. 373.

(*k*) *Re Tyler*, [1891] 3 Ch. 252, ante, p. 280. See *Re Beard's Trusts*, [1904] 1 Ch. 270 (gift over of fund for voluntary school).

(*l*) *Re Swain*, [1905] 1 Ch. 669.

(*m*) Shep. Touch. 132.

Inconsistent conditions.

(v.) *Inconsistent Conditions.*—If a testator imposes two conditions in such a way that on breach of one the property is to go to A. and on the breach of the other it is to go to B., and a breach of both takes place simultaneously, no forfeiture is incurred, and the original gift becomes absolute (*n*).

Repugnant conditions.

(vi.) *Repugnant Conditions.*—"Conditions that are repugnant to the estate to which they are annexed, are," says Mr. Jarman (*o*), "absolutely void. Thus, if a testator, after giving an estate in fee, proceeds to qualify the devise by a proviso or condition, which is of such a nature as to be incompatible with the absolute dominion and ownership, the condition is nugatory, and the estate absolute. Such would, it is clear, be the fate of any clause providing that the land should for ever thereafter be let at a definite rent (*p*), or be cultivated in a certain manner (*q*); this being an attempt to control and abridge the exercise of those rights of enjoyment which are inseparably incident to the absolute owners .p. But, of course, a direction that the rents of the *existing* tenants should not be raised, or that 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 favour of those individuals."

(*n*) *Ormerod* v. *Riley*, 12 Jur. N. S. 112, stated p. 1350.

(*o*) First ed. p. 809.

(*p*) *Att.-Gen.* v. *Catherine Hall*, Jac. 395; *Att.-Gen.* v. *Greenhill*, 33 Bea. 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 note to Fearne C. R. 530,] where a testator, 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 the 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 pay and apply the same in manner therein mentioned. 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." (Note by Mr. Jarman.) The latter appears to be the true ground; see Butler's note cited above. The trusts included the accumulation of surplus rents, and the purchase of other lands therewith.

(*q*) Compare *Brown* v. *Burdett*, 12 Ch. D. 667, ante, p. 702.

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

In *Sir Anthony Mildmay's Case* (*s*) it was resolved that if a man makes a gift in tail, on condition that he [the donee] shall not suffer a common recovery, that this condition is repugnant to the estate-tail, and against law. "For there are divers incidents to an estate-tail. (1) To be dispunished for waste. (2) That his wife shall be endowed. (3) The husband of a woman tenant in tail after issue, shall be tenant by the courtesy. (4) That tenant in tail may suffer a common recovery, and thereby bar the estate-tail and the reversion or remainder also. And these inseparable incidents which the law annexes to an estate-tail cannot be prohibited by condition" (*t*).

If there is a devise to a person in fee subject to a condition, with a gift over on breach to the person "next in remainder," this gift over is void, because there cannot be any such person (*u*).

The most important class of conditions void for repugnancy are those designed to restrain alienation, and to protect a beneficiary against the bankruptcy laws. These are considered in a subsequent part of this chapter (*v*).

Legacy given on condition.

Cases have occurred in which a testator has bequeathed a legacy to A. upon the condition that if he succeeds to a certain estate the legacy is to be null and void: it has been held that in such a case A. is entitled to payment of his legacy, without security (*w*), from which it would appear that the condition is considered to be valid (*x*). On principle it would seem that such a condition is repugnant to the nature of a pecuniary legacy and therefore void. The proper way of effecting the desired object is by means of a trust (*y*).

Conditions in terrorem.

(vii.) *Conditions in terrorem.*—In certain cases, to be presently mentioned, a condition in restraint of marriage or a condition not to dispute a will, may be annexed to a testamentary gift, but where the subject of gift is personalty, such a condition must, as a general rule, be accompanied by a gift over, otherwise the condition will be treated as merely in terrorem, and therefore void. It will be seen, however, that there is some doubt as to the application of the doctrine to conditions precedent in partial restraint of marriage (*z*).

Personal estate.

(*s*) 6 Rep. 40 a at p. 41 a. See also *Mary Portington's Case*, 10 Rep. 35 b; *Seymour* v. *Vernon*, 33 L. J. 690.

(*t*) That this is still the law appears from *Dawkins* v. *Lord Penrhyn*, 6 Ch. D. 318, 4 A. C. 51. See as to conditions attempting to restrain alienation by a tenant in tail, post, sect. VII. (ii.).

(*u*) *Musgrave* v. *Brooke*, 26 Ch. D. 792.

(*v*) Post, sect. VIII.

(*w*) As to the cases in which security may be required, see post, p. 1476.

(*x*) *Fawkes* v. *Gray*, 18 Ves. 130, following *Griffiths* v. *Smith*, 1 Ves. jun. 97, where there was a gift over. Compare *Peyton* v. *Bury*, 2 P. W. 626, post, p. 1473, and see Roper Leg. 864.

(*y*) As in *Lloyd* v. *Branton*, 3 Mer. 108.

(*z*) Post, sect. X. (i.).

Real estate.

The doctrine does not apply to real estate (*a*).

As to other cases of personal estate.

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 Trust* (*b*), 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 Rolfe, V.-C. (afterwards Lord Cranworth), held that the condition being legal was effectual, and that the daughter having become a nun had forfeited the legacy. So, in the earlier case of *Colston* v. *Morris* (*c*), 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.

Remarks on the doctrine.

With reference to the case of *Cooke* v. *Turner* (*d*), it was remarked in an earlier edition of this work (*e*): "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 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 (*f*)), so a legal condition should never be rendered ineffectual by the absence of such a gift."

The unsatisfactory nature of the doctrine has also been repeatedly pointed out by eminent judges (*g*), but it is now too late to question it.

Whether revocation is as effective as a gift over.

In *Re Dickson's Trust* (*gg*), the testator gave a legacy to his daughter; by a codicil he declared that finding that she intended to become a nun, he revoked the bequest in the event of her carrying her intention into effect. The decision was based on the principle that the in terrorem doctrine does not apply to such a condition, but in

(*a*) Post, sect. X. (iii.). The reason for this seems to be that at common law where a condition was annexed to a devise of land, the heir of the testator could enter on breach of the condition.

(*b*) 1 Sim. N. S. 37.

(*c*) 6 Mad. 89.

(*d*) 15 M. & W. 727, post, p. 1548.

(*e*) Third ed., by Messrs. Wolstenholme and Vincent, Vol. ii. p. 53.

(*f*) *Morley* v. *Rennoldson*, 2 Ha. 570; *Lloyd* v. *Lloyd*, 2 Sim. N. S. 255.

(*g*) 1 per Lord Cranworth, in *Re Dickson's Trust*, 1 Sim. N. S. at p. 44, and see per Wood, V.-C., in *Re Catt's Trusts*, 2 H. & M. at p. 52, and the judgment in *Evanturel* v. *Evanturel*, L. R., 6 P. C. 1.

(*gg*) Supra.

Re Catt's Trusts (*h*), Wood, V.-C., treated it as laying down the principle, as applicable to gifts on condition, that "if a testator desires a gift to be revoked, the mere fact that there is no gift over will not prevent the revocation from taking effect." And he referred to the observations of Turner, L.J., in *Rochford* v. *Hackman* (*i*), as supporting that principle. It certainly would be somewhat absurd if a clause of revocation were held to be less effectual than a gift over in excluding the doctrine of in terrorem.

Proviso for cesser.

A proviso for cesser, if annexed to an annuity or other life interest, seems to have the same effect as a gift over (*j*).

Result if condition void.

(viii.) *Result of Condition being Void.*—If a condition is void in its creation, the result varies according to the nature of the property and the nature of the condition.

Land.

Where land is devised upon a void condition, and the condition is precedent, the devise is itself void (*k*); if the condition is subsequent, the devise is absolute (*l*).

Distinctions in case of personal bequest.

Where personal estate is bequeathed on a void condition, if the condition is subsequent, the same rule applies as in the case of a devise of land, that is to say, the bequest is absolute (*m*). But 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 (*n*); the rule of the civil law being that where a condition precedent is originally impossible (*o*), or is illegal as involving malum prohibitum (*p*), 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 (*q*), or its impossibility was unknown to the testator (*r*), or the condition which was possible in its creation has since become impossible by the act of God (*s*), 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 (*t*).

(*h*) 2 H. & M. 52.
(*i*) 9 Ha. at p. 481.
(*j*) See *Adams* v. *Adams*, [1892] 1 Ch. 369.
(*k*) Shep. Touch. pp. 132, 133.
(*l*) Ibid. Co. Litt. 206.
(*m*) *Poor* v. *Mial*, 6 Mad. 32.
(*n*) *Reynish* v. *Martin*, 3 Atk. 330.
(*o*) *Lowther* v. *Cavendish*, 1 Ed. at p. 116.
(*p*) *Brown* v. *Peck*, 1 Ed. 140; *Harvy* v. *Aston*, Com. Rep. 726; *Wren* v. *Bradley*, 2 De G. & S. 49. See *Re Moore*, 39 Ch. D. 116, 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; ante, p. 1464.
(*q*) Wms. Exec. 6th ed. p. 1174; *Rishton* v. *Cobb*, 5 My. & C. 145.
(*r*) 1 Swinb. pt. iv. s. vi. pl. 8, 9.
(*s*) 1 Swinb. pt. iv. s. vi. pl. 14; *Lowther* v. *Cavendish*, 1 Ed. 99; 1 Rop. Leg. 755, 4th ed. *Priestley* v. *Holgate*, 3 K. & J. 286; *Patching* v. *Barnett*, 51 L. J. Ch. 74.
(*t*) 1 Swinb. pt. iv. s. vi. pl. 16.

Rule where legacy comes out of both realty and personalty.

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 (*u*).

Conditions precedent and subsequent.

III.—Conditions, whether Precedent or Subsequent.—"Conditions," as Mr. Jarman points out (*v*), "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. 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 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 (*w*), we shall proceed to the immediate consideration of the cases; adducing some instances, first, of conditions precedent; and, secondly, of conditions subsequent.

Instances of conditions precedent.

"In an early case (*x*), 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 (*y*) A. charged his real estate with £500 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 his consent, the £500 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 (*z*) 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

(*u*) *Reynish* v. *Martin*, 3 Atk. at p. 335.

(*v*) First ed. p. 796.

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

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

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

(*z*) *Acherley* v. *Vernon*, Willes, 153. See also *Gillet* v. *Wray*, 1 P. W. 284; *Harvey* v. *Aston*, 1 Atk. 361, Com. Rep. 726; *Re Welstead*, 25 Bea. 612, ante, p. 1462.

a condition precedent, and that an action, which the husband's 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. 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 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* (*a*), where a man agreed to pay J. S. £50, he making plain a good estate in certain lands (*b*).

What makes a condition precedent.

"Again, in the case of *Randal* v. *Payne* (*c*), 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 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 (*d*); 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.

Other cases of conditions precedent.

"So in the case of *Lester* v. *Garland* (*e*), where L., by his will,

(*a*) 1 Vent. 147.

(*b*) A condition requiring a legatee to claim the benefit given him by the will within a certain time is primâ facie precedent; *Horrigan* v. *Horrigan*, [1904] 1 Ir. 271. See the other cases on this kind of condition, cited post, and compare *Murphy* v. *Broder*, Ir. R. 9 C. L. 123, where a condition of returning was held to be subsequent.

(*c*) 1 B. C. C. 55; *Beaumont* v. *Squire*, 17 Q. B. 905.

(*d*) As to this, see *Page* v. *Hayward*, 2 Salk. 570, stated infra, p. 1474; *Lowe* v. *Manners*, 5 B. & Ald. 917; *Davis* v. *Angel*, 4 D. F. & J. 524, infra, p. 1534.

(*e*) 15 Ves. 248.

CHAP. XXXIX.

bequeathed the residue of his personal estate to trustees, upon trust, that in case his sister S. 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 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 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 that this was a condition precedent; and the only question was, whether the computation of the six months was *inclusive* or *exclusive* of the day of the testator's decease, he having died on the 12th of January, and the security having been given on the 12th of July. Sir *W. Grant*, M.R., considered that the reason of the thing required the exclusion of the day, 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 (*f*).

Computation of time.

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

"So, in *Ellis* v. *Ellis* (*g*), where a testator bequeathed to his grand-daughter, 'if she be unmarried, and does not marry without the consent of my trustees,' the sum of £400; 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 to 'sink in the personal fortune.' Lord *Redesdale*

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

(*g*) 1 Sch. & Lef. 1. Cf. *Wheeler* v. *Bingham*, 3 Atk. 364. See further, as to conditions precedent, *Fry* v. *Porter*, 1 Ch. Cas. 138; *Bertie* v. *Faulkland*, 3 Ch. Cas. 129; *Falkland* v. *Bertie*, or *Cary* v. *Bertie*, 2 Ver. 333; *Semphill* v. *Bayly*, Pre. Ch. 562; *Pulling* v. *Reddy*, 1 Wils 21; *Elton* v. *Elton*, ib. 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; *Latimer's Case*, Dyer, 596; *Atkins* v. *Hiccocks*, 1 Atk. 500; *Morgan* v. *Morgan*, 20 L. J. Ch. 109; *Fitzgerald* v. *Ryan*, [1899] 2 Ir. 637; *Re Nourse*, [1899] 1 Ch. 63.

was of opinion that marriage was a condition precedent, and that the legacy was wholly contingent until that event.

Cases of conditions subsequent.

"One of the earliest examples of a condition subsequent in wills, is afforded by *Woodcock* v. *Woodcock* (*h*), 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.

"So, in *Popham* v. *Bampfeild* (*i*), 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 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 the case of *Peyton* v. *Bury* (*j*), 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 (*k*). In this case, he observed, the bequest over shewed what the testator meant, by making marriage without consent a condition in the previous gift, namely, that marriage without consent was to be a forfeiture (*l*). The case seems somewhat analogous, in principle, to those (*m*) in which a

Cases of condition subsequent.

(*h*) Cro. El. 795.

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

(*j*) 2 P. W. 626. See also *Gulliver* v. *Ashby*, 4 Burr. 1929, post, p. 1478. *Duddy* v. *Gresham*, 2 L. R. Ir. 442.

(*k*) 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.

(*l*) *Knight* v. *Cameron*, 14 Ves. 389.

(*m*) Ante, p. 1376.

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.

"Again, in *Page* v. *Hayward* (*n*), 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 (*o*).

"So, in the more recent case of *Aislabie* v. *Rice* (*p*), 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 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 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 (*q*), and she might execute the power. Sir *J. Leach*, V.-C., in conformity to this certificate, decreed a specific performance of the

(*n*) 2 Salk. 570.

(*o*) *Pelham Clinton* v. *Duke of Newcastle*, [1902] 1 Ch. 34, [1903] A. C. 111, was a somewhat similar case: see ante, p. 1463.

(*p*) 3 Mad. 256.

(*q*) As to this, see infra, p. 1483.

Remark on *Aislabie* v. *Rice*.

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.

"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" (*r*).

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 (*s*). 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 (*t*).

Conclusions from the preceding cases.

Mr. Jarman continues (*u*): "It would seem, from the preceding cases, that the argument in favour of the condition being precedent, is stronger where a gross sum of money is to be raised out of land (*v*), than where it is a devise of the land itself; where a pecuniary legacy is given, than a residue (*w*); 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 (*x*); where the condition is capable of being performed instanter, than where time is requisite for the performance (*y*); while, on the other hand, the circumstance of a definite time being appointed for the performance of the condition, but none for the vesting of the estate, favours the supposition of its being a condition subsequent" (*z*).

(*r*) *Lloyd* v. *Branton*, 3 Mer. 108.

(*s*) *Wynne* v. *Wynne*, 2 M. & Gr. 8. See *Webb* v. *Grace*, 2 Phill. 701.

(*t*) *Egerton* v. *Earl Brownlow*, 4 H. L. C. 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.

(*u*) First ed. p. 804.

(*v*) Indeed, such cases seem to fall *a fortiori* under the principle of the cases (referred to ante, p. 1394), in which such charges were held to fail, by the death of the devisee before the time of payment.

(*w*) *Peyton* v. *Bury*, 2 P. W. 626, ante, p. 1473.

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

(*y*) *Gulliver* d. *Corrie* v. *Ashby*, 4 Burr. at p. 1940.

(*z*) *Thomas* v. *Howell*, 1 Salk. 170, as to which, see infra, p. 1483: and see per Lord Hardwicke, *Avelyn* v. *Ward*, 1 Ves. sen. at p. 422; *Walker* v. *Walker*, 2 D. F. & J. 255, 29 L. J. Ch. 856. See, however,

CHAP. XXXIX.

Presumption in favour of conditions subsequent.

The question whether a condition is precedent or subsequent often arises in the case of name and arms clauses (*a*) and provisoes requiring a devisee or legatee to execute a release (*b*). In the absence of clear words, the inclination of the Courts is to treat a name and arms clause as imposing a condition subsequent (*c*). Indeed, in *Re Greenwood* (*d*), the Court laid this down as a general proposition applying to all conditions.

Conditions subsequent are construed strictly.

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 [illegible] in a former chapter (*e*); it will suffice here to refer to some of the later cases, in which it has been asserted and [illegible] (*f*).

Pecuniary legacy subject to condition subsequent.

Most of the cases [illegible] conditions subsequent relate to land or (in the case of [illegible]) to property held upon trust, so that in either case there is [illegible] giving effect to the condition. But in some cases a [illegible] has been given subject to a condition subsequent, and [illegible] question arises how effect is to be given to [illegible]. It seems that where a legacy is given upon a condition to do or abstain from a certain act, the Court will require security from the legatee for the observance of the condition (*g*), as in *Colston* v. *Morris* (*h*), where the legacy was given to a father upon condition that he did not interfere with the education of his daughter. But if the act on which the forfeiture or [illegible] is to take effect does not depend on the volition of the legatee, then he is entitled to be paid his legacy without security (*i*).

Roun[illegible], 2 B. C. C. 67; *Robin*[illegible] *Wetherig*[illegible] D. M. & G. 535.

(*a*) [illegible] XI.

(*b*) [illegible] 1482. See *Tanner* v. *Tebbutt*, 2 Y. & C. C. C. 225, post, p. 1479, and *Earl of Northumberland* v. *Granby*, 1 Ed. 489, s. c., sub. nom. *Earl of Northumberland* v. *Aylesford*, Amb. 540, 657, where a proviso requiring a legatee to execute a release was held by Lord Henley (afterwards Lord Northington) to create a condition precedent, and by Lord Camden to be a condition annexed to the body of the [illegible] *Simpson* v. *Vickers*, 14 V[illegible]

(*c*) [illegible]*lliver* v. *Ashby*, 4 Burr. 1929, post, p. 1478; *Bennett* v. *Bennett*, 2 Dr. & Sm. 266; *Woodhouse* v. *Herrick*, 1 K. & J. 352; *Re Greenwood*, [1903] 1 Ch. 749; David's Conv. iii. 357, note.

(*d*) [1903] 1 Ch. 749.

(*e*) Ante, p. 1366.

(*f*) *Clavering* v. *Ellison*, 3 Dr[illegible] 7 H. L. C. 707; *Kiallmark* v. *Kia*[illegible] 26 L. J. Ch. 1; *Bean* v. *Griffiths*, 1 Jur. N. S. 1045; *Langdale* v. *Briggs*, 8 D. M. & G. pp. 429, 430; *Hervey Bathurst* v. *Stanley*, 4 Ch. D. at p. 272. And see post, p. 1489 seq. 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*, 23 Ch. D. 158, ante, p. 1465.

(*g*) Roper Leg. 865.

(*h*) 6 Mad. 89; *Aston* v. *Aston*, 2 Vern. 452.

(*i*) *Griffiths* v. *Smith*, 1 Ves. jun. 97; *Fawkes* v. *Gray*, 18 Ves. 131. As to these cases, see ante, p. 1467.

Continuing conditions.

In *Re Robinson* (*j*), a testatrix bequeathed a sum of money towards the endowment of a church upon certain conditions, one of which was "the abiding condition" that the black gown should be used in the pulpit; it was held that this was a continuing condition so as to entitle the incumbent of the church to the income of the fund so long as he performed the condition.

Conditions as to residence, name and arms, &c.

To this class seem to belong conditions requiring a devisee to reside in a particular house, or to use and bear the name and arms of the testator, &c. (*k*). Strictly speaking, however, continuing conditions are merely a variety of conditions subsequent (*l*).

When acceptance of gift makes the annexed condition binding.

IV.– Acceptance of Conditional Gift.—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 (*m*), or from declining a duty which he is thereby required to perform. This principle was applied in *Att.-Gen.* v. *Christ's Hospital* (*n*), where a testator bequeathed to the governors of the hospital (who had power to accept such gifts) an annuity of 400*l.* for ever, 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. And in *Gregg* v. *Coates* (*o*), a person who had accepted a devise of buildings for so long as he should think proper to occupy them, "he keeping them in good and tenantable repair," was held bound to reinstate them at his own expense when they were burnt down.

(*j*) [1892] 1 Ch. 95, [1897] 1 Ch. 85.
(*k*) See post, sections XI. and XII.
(*l*) See *Clavering* v. *Ellison*, 7 H. L. C. 707, where a condition that children to be educated in a certain way was treated as a condition subsequent.
(*m*) *Egg* v. *Devey*, 10 Bea. 444. See *Northumberland* v. *Aylesford*, Amb. 540, 657; *Norton* v. *Granby*, 1 Ed. 71; Ves. 341.

Period allowed for performance of condition.

V.—Performance of Conditions.—(i.) *Period allowed.*—It is often difficult, from the absence of declared intention on the point, or from the ambiguity of the testator's language (*p*), to determine what is the period allowed for the performance of a condition, i.e. whether the devisee or legatee is bound to perform the act within a convenient time, or has his whole life for its performance. The question was raised but not decided in *Gulliver* v. *Ashby* (*q*).

The general rule seems to be that if a condition is imposed on a devisee for the benefit of A. (as to pay A. 500*l.*), and no time is specified for its performance, he is bound to perform it as soon as demand is made by A. (*r*). In other cases it seems that the condition must be performed within a reasonable time. Thus, in *Davies* v. *Lowndes* (*s*), a testator devised land to W. L. "on condition he changes his name to S." : there was litigation, which lasted two or three years, and W. L. did not change his name until after a final decree was made, giving him the possession of the property ; it was held that he had a reasonable time within which to comply with the condition, and that he had complied with it.

Name and arms clause.

As a general rule, a person to whom property is devised on condition of his taking some particular name and arms, is not bound to perform the condition until he becomes entitled in possession (*t*).

Condition of marriage.

The question whether a person to whom property is given on condition of his marrying in a particular way has his whole life in which to perform the condition, or whether he commits a breach by marrying in a different way, is considered in a subsequent part of this chapter (*u*). As to the computation of time when the testator fixes the period, see *Lester* v. *Garland* stated in section III. of this chapter, and *Riggs-Miller* v. *Wheatley*, 28 L. R. Ir. 144.

Mode of performance.

(ii.) *Mode of Performance.*—As a general rule, a condition can only be performed by a substantial compliance with its terms. Thus a condition requiring a devisee or legatee to disentail lands and settle them to certain uses is not satisfied by his disentailing them and settling them to other uses (*v*). Again, a condition precedent

(*p*) See *Langdale* v. *Briggs*, 3 Sm. & G. 255, 8 D. M. & G. 391 ; *Blagrove* v. *Bradshaw*, 4 Drew, 230.

(*q*) 1 W. Bl. 607.

(*r*) Shepp. Touch. 134. See n. (T. 1), 1 Rep. 25 b ; Co. Litt. 208 a, where some fine distinctions are taken with reference to conditions in feoffments and bonds.

(*s*) 2 Scott, 71. See *Bennett* v. *Bennett*, 2 Dr. & Sm. 266.

(*t*) *Re Greenwood*, [1903] 1 Ch. 749. See *Re Finch*, 17 Ch. D. 211. As to the cases on wills which fix a time, see post, p. 1543 seq.

(*u*) Post, p. 1533.

(*v*) *Duke of Montagu* v. *Lord Beaulieu*, 3 Br. P. C. 277. As to what are "hereditaments" within the meaning of a condition to resettle, see *Re Gosselin*,

requiring a legatee to "return to England" is not complied with by the legatee embarking on a British ship to return to England, the ship and passengers being lost on the voyage (*w*). And a condition requiring a sum of 10,000*l.* to be applied in a certain manner is not satisfied by the application of a smaller sum: such a condition is not apportionable (*x*). A condition requiring a release within a given time must be complied with within that time (*y*).

What is a substantial compliance.

But where property was devised to a person upon condition that she should personally appear before the executors and deliver to them a testimonial of her identity, and she was too aged and infirm to do so, it was held that the condition was complied with by one of the executors and the agent of the other attending the devisee at her house and receiving satisfactory proofs of her identity (*z*). In *Evans* v. *Stratford* (*a*), property was limited to A. for life, with remainder to X. and Y., and the will gave B. an option of purchase within a year after A's death: A. predeceased the testatrix by two years, and it was held that the option could be exercised within a year after the testatrix's death, that being the obvious intention of the will. So where a legacy is bequeathed to an infant on condition of his giving the executors a good and valid discharge, he can satisfy the condition by the institution of an administration action (*b*). And a gift to a person on condition that he should at a specified time be "living" in a particular country or place, would probably be satisfied if he had a place of residence in that country or place, although at the particular time he might be travelling somewhere else (*c*). Other cases in which the question has arisen how certain conditions ought to or may be performed will be found in the footnote (*d*).

Conditions of residence are considered more in detail in section XII. of this chapter; conditions requiring the assumption of a name or arms in section XI.

"Refusal" or "neglect."

In some of the cases where a condition as to residence was imposed, the gift over was to take effect in the event of the devisee

[1906] 1 Ch. 120. As performance of such a condition, see *Scarlett* v. *Lord Abinger*, 34 Bea. 338.

(*w*) *Priestley* v. *Holgate*, 3 K. & J. 286. Compare *Re Arbib and Class*, [1891] 1 Ch. 601. See also *Tulk* v. *Houblitch*, 1 V. & B. 248.

(*x*) *Caldwell* v. *Cresswell*, L. R., 6 Ch. 278.

(*y*) *Simpson* v. *Vickers*, 14 Ves. 341.

(*z*) *Tanner* v. *Tebbutt*, 2 Y. & C. C. C. 225.

(*a*) 2 H. & M. 142.

(*b*) *Ledward* v. *Hassells*, 2 K. & J. 370. As to an administration action being equivalent to a claim, see *Tollner* v. *Marriott*, 4 Sim. 19.

(*c*) See *Woods* v. *Townley*, 11 Ha. 314.

(*d*) *Franco* v. *Alvares*, 3 Atk. 342 (accepting composition within a certain time); *Galway* v. *Barden*, [1869] 1 Ir. 508 (entering into a profession, trade, or calling).

CHAP. XXXIX.

"refusing" to reside. In *Doe* v. *Beauclerk* (*e*), Lord Ellenborough said that "a refusal imports that the thing refused was proposed to the refusing party," but in *Doe* v. *Hawke* (*f*), Lawrence, J., said: "the word 'refused' is only a figurative expression: meaning, if the first taker ceased to dwell there. There was certainly no occasion for any person previously to enquire of him, whether he would reside there or not: and that he should expressly refuse it." A gift over in the event of a person "refusing or neglecting" to reside in a house does not take effect where the devisee is an infant, because an infant cannot choose his place of residence (*g*).

The manner in which conditions requiring a devisee or legatee to assume the testator's name must be complied with is considered in a later part of this chapter (*h*).

Ignorance of condition.

(iii.) *When Performance excused.*—As a general rule, ignorance of a condition annexed to a devise or bequest does not protect the devisee or legatee from the consequences of non-performance, at all events where there is a gift over (*i*).

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

But under the old law this rule was subject to an exception, which is thus stated by Mr. Jarman (*j*): "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 cognisant of the condition (*k*); and the fact of notice must be proved; it will not be inferred" (*l*). This doctrine would appear to have been abrogated by the Land Transfer Act, 1897 (Part I.), in the case of persons dying since 1897.

Infancy.

Infancy is a ground for excusing a devisee or legatee from performance of a condition requiring residence (*m*), but not from

(*e*) 11 East, 657.

(*f*) 2 East, 481; Le Blanc, J., agreed. See *Dunne* v. *Dunne*, 7 D. M. & G. 207, and other cases cited infra, p. 1546.

(*g*) *Partridge* v. *Partridge*, [1894] 1 Ch. 351.

(*h*) Post, sect. XI.

(*i*) *Fry* v. *Porter*, 1 Ch. Cas. 138: 1 Mod. 300; *Lady Anne Fry's Case*, 1 Vent, [illegible]; *Burgess* v. *Robinson*, 3 Mer. 7; [illegible] v. *Carter*, 3 K. & J. 617; *Chauncy* [illegible]*gdon*, 2 Atk. 616; *Hawkes* v. [illegible]*n*, 9 Sim. 355; *Re Hodges' Legacy*, L. R., 16 Eq. 92; *Powell* v. *Hawle*, L. R., 18 Eq. 243; *Astley* v. *Earl of Essex*, ib. 290. In *Re Lewis*, [1904] 2 Ch. 656, the executor was entitled under the gift over, but it was held that he was not bound to inform the legatee of the fact: see, however, *Re Mackay*, [1906] 1 Ch. 25, where *Brittlebank* v. *Goodwin*, L. R., 5 Eq. 545 is commented on.

(*j*) First ed. p. 809.

(*k*) *Doe* d. *Kenrick* v. *Lord Beauclerk*, 11 East, 657.

(*l*) *Doe* d. *Taylor* v. *Crisp*, 8 Ad. & El. 770.

(*m*) *Parry* v. *Roberts*, 10 W. R. 1000; *Partridge* v. *Partridge*, [1894] 1 Ch. 351.

performance of a condition requiring him to assume a name or arms (*n*).

Restraint on anticipation

In *Robinson* v. *Wheelwright* (*o*), a legacy was bequeathed to A., a married woman, upon condition that within a certain time she conveyed an estate to B.; the estate was settled upon A. for her separate use without power of anticipation: it was held that the Court could not release the restraint so as to enable A. to comply with the condition, and she therefore forfeited the legacy.

Lunacy.

The Court can enable a lunatic to perform a condition (*p*).

Illegal or impossible ab initio.

It has been already mentioned that a condition subsequent which is illegal or impossible ab initio, or otherwise void, is treated as non-existent (*q*).

Impossible by act of testator or court.

Performance of a condition precedent is excused if it is made impossible by the act or default of the testator (*r*), or by the act of the Court (*s*).

"Reasonable impossibility."

In *Re Conington's Will* (*ss*), property was given for the benefit of the vicar for the time being of a parish church upon condition of his holding certain services on certain days throughout the year, and the testator declared that every vicar who failed to observe the condition should receive no benefit from the endowment: owing to the failure of the parishioners to attend the services it was held by Wood, V.-C., that it was not necessary for the vicar to go through the form of attending on each of the days, and that there had been no forfeiture, there being no reasonable possibility of performing the condition: an inquiry was directed whether the intention of the testator could be carried out in some other way (*t*).

General rule as to conditions becoming impossible ex postfacto.

In cases not falling within the special rules above stated, conditions precedent and subsequent differ considerably in regard to the effect of events rendering the performance of them impracticable (*tt*).

(*n*) *Doe* d. *Luscombe* v. *Yates*, 5 B. & Ald. 544; *Bevan* v. *Mahon-Hagan*, 31 L. R. Ir. 342; *Partridge* v. *Partridge*, supra. *Re Edwards*, 54 Sol. J. 325.

(*o*) 6 D. M. & G. 535. See now Conveyancing Act, 1881, s. 39.

(*p*) *Re Earl of Sefton*, [1898] 2 Ch. 378.

(*q*) Ante, p. 1469.

(*r*) *Darley* v. *Langworthy*, 3 Br. P. C. 359; *Gath* v. *Burton*, 1 Bea. 478. See *Wedgwood* v. *Denton*, L. R., 12, Eq. 290; *Middleton* v. *Windross*, L. R., 16 Eq. 212.

(*s*) *Croskery* v. *Ritchie*, [1901] 1 Ir. 437, where there was a devise of a farm to A. with a gift over to B. conditionally on his returning and settling in his native country: the farm was sold by order of the Court, and subsequently the proceeds were paid over to B.

(*ss*) 6 Jur. N. S. 992.

(*t*) Compare the cases referred to ante, p. 886, where performance of a trust becomes impossible.

(*tt*) A donee cannot, of course, take advantage of his own acts rendering performance impossible; *Philips* v. *Walter*, 2 Br. P. C. 250.

CHAP. XXXIX.

Collusion.

(iv.) *Relief against Forfeiture.*—If property is given to tenant for life and remainder man subject to a condition, with a gift over on default to C., and the tenant for life collusively agrees with C. to make default, relief against the forfeiture will be granted to the remainderman (*u*).

Relief against forfeiture.

Where there is no gift over and no clause of revocation, and the condition is of a nature to admit of compensation being made, equity will, on subsequent performance, relieve against a forfeiture incurred. There are numerous old cases in which the heir has been prevented from taking advantage of a forfeiture incurred by non-compliance with a condition for payment of money within a certain time (*uu*), or for the execution of a release (*v*).

But this rule does not apply to conditions not admitting of after-satisfaction, such as a condition requiring marriage with consent (*vv*), or forbidding the legatee to become a nun (*w*).

Conditions becoming incapable of performance.

VI.—Conditions Incapable of Performance.—"It is clear," as Mr. Jarman points out (*ww*), "that where a condition *precedent* becomes impossible to be performed, even though there be no default or laches on the part of the devisee himself, the devise fails (*x*).

If condition be precedent, estate never arises.

"Thus, where (*y*) a testator 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*

(*u*) *Hayes* v. *Hayes*, Finch, 231.

(*uu*) *Salmon* v. *Vaux*, Toth. 105; *Underwood* v. *Swain*, 1 Rep. Ch. 161; *Barnardiston* v. *Fane*, 2 Vern. 366; *Grimston* v. *Bruce*, ibid. 594; *Wallis* v. *Crimes*, 1 Ch. Ca. 89; *Paine* v. *Hyde*, 4 Bea. 468.

(*v*) *Cage* v. *Russel*, 2 Vent. 352; *Taylor* v. *Popham*, 1 Br. C. C. 168; *Simpson* v. *Vickers*, 14 Ves. 341; *Rollinrake* v. *Lister*, 1 Russ. 500. See *Steuart* v. *Frankland*, 16 Jur. 738 (where an effectual release could not be given, one of the cestuis que trustent being a married woman), and *O'Callaghan* v. *Cooper*, 5 Ves. 117, stated post.

(*vv*) *Cage* v. *Russel*, supra. In *Fry* v. *Porter*, 1 Ch. Cas. 138, 1 Mod. 300, there was a gift over, but the decision would, semble, have been the same without it.

(*w*) *Re Dickson's Trust*, 1 Sim. N. S. 37.

(*ww*) First ed. p. 805.

(*x*) Co. Litt. 206 b.

(*y*) *Roundel* v. *Currer*, 2 B. C. C. 67; 1 Swanst. 383, n. See also *Bertie* v. *Faulkland*, 3 Ch. Cas. 129, 2 Vern. 333, 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.

recovery; and, in default of his suffering such recovery, to convey his (testator's) estates to other uses. 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. (*z*).

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, the estate to which it is annexed becomes by that event absolute.

"Thus, in the case of *Thomas* v. *Howell* (*a*), 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."

Name and arms clauses.

So, in *Re Greenwood* (*b*), a testator devised real estate upon trust for his daughter for life and after her death for her children, and if she had no child, he devised his real estate to N. in fee upon condition that N. should "take and use" the testator's name:

(*z*) Compare *Boyce* v. *Boyce*, 16 Sim. 476, 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 M. should not choose to his daughter C.; M. died in the testator's lifetime, and Sir L. Shadwell, V.-C., considering the gift to C. to be of those houses that should remain provided M. should choose one of them (ante, p. 466), held that the condition having become impossible by M.'s death, the gift to C. failed. See also *Philpott* v. *St. George's Hospital*, 21 Bea. 134; *Evans* v. *Stratford*, 2 H. & M. 142, and *Doe* d. *Davies* v. *Davies*, 16 Q.B. 951, post, p. 1486.

(*a*) 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); *Re Bird*, 8 R. 326, post, p. 1486.

(*b*) [1903] 1 Ch. 749.

CHAP. XXXIX.

N. died during the testator's lifetime without having taken the testator's name: it was held that the condition was subsequent: that it was only to operate upon N. becoming entitled in possession: and that performance having become impossible by the act of God, the devise to N. was absolute. And if a condition subsequent requiring a devisee to assume a coat of arms becomes impossible because the College of Arms refuses to grant it, the devisee is discharged from complying with it (*c*).

Distinction suggested where there is a gift over.

"It is far from clear, however," says Mr. Jarman (*d*), "that this principle applies even to conditions subsequent, *if the property be given over on non-performance.* The rule, indeed, has been often laid down in very general terms; and the case of *Graydon* v. *Hicks* (*e*) might seem to countenance its application even to such a case. A testator there gave £1,000 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 the death of the persons whose consent was necessary relieved her from the restriction.

Remarks on *Graydon* v. *Hicks.*

"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 (*f*); 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 case, therefore, leaves the question untouched. Unless a direct authority can be shewn for extending to the cases suggested, the doctrine, that estates subject to conditions subsequent, become absolute by the effect of events rendering the performance impracticable, it is conceived the Courts would be reluctant to apply it to such cases. Where property is devised to a person, with a proviso divesting his estate in favour 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 meantime 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

(*c*) *Re Croxon*, [1904] 1 Ch. 252, post, sect. XI.

(*d*) First ed. p. 807. Mr. Jarman's remarks on this point have been retained notwithstanding the decisions in *Collett* v. *Collett* and *Re Bird* (post, pp. 1485, 1486), because there seems, on principle, much to be said for Mr. Jarman's contention.

(*e*) 2 Atk. 16. Also *Peyton* v. *Bury*, 2 P. W. 626; but see infra.

(*f*) See *King* v. *Withers*, 1 Eq. Ca. Ab. 112, pl. 10.

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 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 favour 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."

Conditions subsequent, how affected by devise over.

Mr. Jarman's view, however, has not found favour with the Courts. Thus, in *Collett* v. *Collett* (*g*), 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 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

Collett v. *Collett.*

(*g*) 35 Bea. 312.

CHAP. XXXIX.

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 shew that the gift over would not take effect if the performance of the condition had become impossible by the act of God. It would, therefore, seem that the M.R., in coming to this decision, was largely influenced by the authority of *Graydon* v. *Hicks*; but as Mr. Jarman points out (*h*), if the claimant in that case had attained the age of twenty-one, it was immaterial whether she married with consent or not, and from the way in which the cross bill was brought, it is clear that she had attained twenty-one and was therefore entitled to the legacy.

Re Bird.

Again, in *Re Bird* (*i*), a testator made a bequest subject to a proviso that if the legatee, who was abroad, did not within a certain period return to England and appear before the trustees of the will, he should forfeit the bequest. The legatee became a lunatic, but had within the period lucid intervals, during any of which he might have returned, but did not. It was held that he was not bound to seize the first opportunity, afforded by a lucid interval, of complying with the condition, and that as compliance was ultimately made impossible by the act of God, the principle of *Graydon* v. *Hicks* applied, and that the bequest was not forfeited.

Of course the doctrine laid down in this case does not apply to conditions precedent, for it is clear that if an estate is given to A. upon condition that he tenders a certain deed to B. for execution, and B. dies before the deed is tendered to him, A. cannot claim the estate (*j*).

Effect of gift over.

Gift over.—The general rule (*k*) is that where property is given upon a condition subsequent with a gift over in default of performance, and default is made, the gift over takes effect, whatever may be the nature of the property or of the act which is enjoined or prohibited (*l*).

Effect of residuary gift.

A direction that on non-compliance with the condition the

(*h*) Supra.

(*i*) 8 R. 326.

(*j*) *Doe* d. *Davies* v. *Davies*, 16 Q. B. 951.

(*k*) The general rule does not, of course, apply where the condition is void, ante. p. 1469, and according to *Collett* v. *Collett*, 35 Bea. 312, it also does not apply where performance has been impossible by the act of God: above, p. 1485.

(*l*) *Cleaver* v. *Spurling*, 2 P. W. 526; *Duke of Montagu* v. *Lord Beaulieu*, 3 Br. P. C. 277; *Simpson* v. *Vickers*, 14 Ves. 341; *Tulk* v. *Houldsitch*, 1 V. & B. 248; *Burgess* v. *Robinson*, 1 Mad. 172, 3 Mer. 7.

property shall fall into residue, is a gift over, for the purposes of this doctrine, but a mere residuary gift, it seems, is not (*n*).

Gift over not implied.

A gift over will not be implied (*o*).

Ineffectual gift over.

If a gift over is so framed as not to fit the condition, the clause of cesser or defeasance is ineffectual and the gift is absolute; as where a testator declares that in the event of a legatee failing to comply with a condition the property bequeathed shall go as if he were dead (*p*). As to revocation, see *Re Dickson's Trust* stated in section II. (vii.).

General principle.

VII.—Conditions Restrictive of Voluntary Alienation.—"An attempt to vest in a person an interest which shall adhere to him, in spite of his own voluntary acts of alienation, is," as Mr. Jarman points out (*v*), "no less nugatory and unavailing than is, we have seen, the endeavour to create an interest which shall be unaffected by bankruptcy or insolvency (*w*), as the law of England does not (like that of Scotland (*x*)) admit of the creation of personal inalienable trusts, for the purpose of maintenance, or otherwise, except in the case of women under coverture, who it is well known may be restrained from anticipation (*y*). But this doctrine is not applicable to unmarried women, a restriction on the aliening power of a woman not under coverture being no less inoperative than a similar restraint on the *jus disponendi* of a person of the male sex" (*z*). And when a married woman becomes discovert by the death of her husband, the restraint on anticipation is suspended until she marries again (*a*); or she may, while discovert, so deal with the property as to extinguish the restraint (*b*).

Exception in the case of married women.

The general rule that a restriction on alienation is void rests on the principle of repugnancy which has been already considered (*c*).

General restraint on alienation by devisee in fee is void.

(i.) *Estates in Fee.*—The general rule is thus stated by Mr. Jarman (*d*): "A power of alienation is necessarily and

(*n*) *Lloyd* v. *Branton*, 3 Mer. 108, where the earlier cases of *Harvey* v. *Aston*, 1 Atk. 361; *Wheeler* v. *Bingham*, 3 Atk. 364; *Scott* v. *Tyler*, 2 Br. C. C. 431, and *Garret* v. *Pritty* (or *Pretty*), 2 Vern. 293, 3 Mer. 119, n., are referred to.

(*o*) *Gulliver* v. *Ashby*, 1 W. Bl. 607.

(*p*) *Re Catt's Trusts*, 2 H. & M. 46; *Pengrave* v. *Brooke*, 26 Ch. D. 792.

(*q*) First ed. p. 830.

(*w*) "But, of course, as a life interest may be made to cease on bankruptcy or insolvency, so it may be determined on voluntary alienation" (note by Mr. Jarman). As to this, and as to forfeiture on bankruptcy, &c., see the next section.

(*x*) See *Re Fitzgerald*, [1904] 1 Ch. 573

(*y*) As to this, see post, section IX.

(*z*) *Barton* v. *Briscoe*, Jac. 603; *Jones* v. *Salter*, 2 R. & My. 208; *Woodmeston* v. *Walker*, 2 R. & My. 197; *Re Wheeler's Settlement Trusts*, [1899] 2 Ch. 717.

(*a*) See *Tullett* v. *Armstrong*, and the other cases cited post, section IX.

(*b*) *Buttanshaw* v. *Martin*, John. 89.

(*c*) Ante, section II. (vi.).

(*d*) First ed. p. 811.

inseparably incidental to an estate in fee. If, therefore, lands be devised to A. and his heirs, upon condition that he shall not alien, the condition is void (*e*).

So of alienation in specified mode.

"And a condition restraining the devisee from aliening by any particular mode of assurance is bad. Thus, where (*f*) a testator devised lands to A. and his heirs for ever, 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 not to alien except by way of exchange or for reinvesting in other land (*g*), or forbidding the devisee to charge the land with an annuity (*h*), is equally bad.

The invalidity of executory gifts intended to take effect on alienation by a person to whom an absolute interest is given, has been already discussed (*i*).

Equitable interests.

The general principle applies to equitable as well as to legal interests (*j*).

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

In *Re Rosher* (*k*) a condition that a devisee in fee, if he desired to sell, should offer the estate to a particular person at a fixed price below its full value, was held to be void as being repugnant to the devise. In that case 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 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. It is not easy to see why the learned judge laid so much stress on the difference

(*e*) Co. Litt. 206 b, 223 a. The general principle was discussed in *Re Dugdale*, 38 Ch. D. 176; *Corbett* v. *Corbett*, 14 P. D. 7.
(*f*) *Ware* v. *Cann*, 10 B. & Cr. 433.
(*g*) *Hood* v. *Oglander*, 34 Beav. 513.
(*h*) *Willis* v. *Hiscox*, 4 My. & Cr. 197.
(*i*) Ante, Chap. XVII.
(*j*) *Corbett* v. *Corbett*, 14 P. D. 7.
(*k*) 26 Ch. D. 801.

between the 3000*l.* and the 15,000*l.*: if the condition was void for repugnancy, it would, it is submitted, have been void whatever the price fixed by the testator might have been.

An option of purchase, or right of pre-emption, at a fixed price may be given by will (*l*).

In *Re Elliot* (*m*) a condition requiring a devisee, in the event of her selling the property, to pay a certain sum out of the proceeds of sale, was held repugnant and void.

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

But a partial restraint on the disposing power of a tenant in fee may be imposed to this extent, that he shall not alien to such a one, or to the heirs of such a one, or that he shall not alien in mortmain (*n*).

It seems clear, too, that a condition imposed on a devisee in fee not to alien except to a particular class of persons is good, provided the class is not too restricted. Thus, where (*o*) 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.

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

But the limit within which a restraint of this nature is good, is shewn by *Muschamp* v. *Bluet* (*p*), where it was held, that a condition not to alienate to any but J. S., imposed on a devisee in fee simple, was void: "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 any but himself, or such other person by name whom [sic] he may well know cannot, nor never will, purchase the land. . . Neither is there any authority to warrant this restraint, for Littleton leaves the feoffee at liberty to alien to any but J. S."

In *Attwater* v. *Attwater* (*q*), Romilly, M.R., held that this principle

(*l*) Ante, p. 79.
(*m*) [1896] 2 Ch. 353, ante, p. 564.
(*n*) Co. Litt. 223 a. As to *Ludlow* v. *Bunbury*, 35 Bea. 36, qu.
(*o*) *Doe* d. *Gill* v. *Pearson*, 6 East, 173, citing *Daniel* v. *Ubley*, Sir W. Jones, 137. Latch. 9, 39, 134; and a case in Dalison, 58.
(*p*) J. Bridgm. pp. 132, 137.
(*q*) 18 Bea. 330. Compare *Crofts* v. *Beamish*, [1905] 2 Ir. 349, a somewhat similar case.

CHAP. XXXIV

Attwater v. *Attwater.*

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* (*r*), 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 (*s*), not to one person only, 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. This reasoning, however, is not altogether satisfactory, and the question cannot be regarded as settled (*t*).

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 prohibited alienation until after a defined and not too remote period of time (*u*), that is to say, a reasonable time, not trenching on the Rule against Perpetuities (*v*). But *Large's Case* (*w*), which is generally cited as supporting the doctrine in question, seems really to have been decided on the ground that the interest to which the condition was annexed was contingent.

(*r*) L. R. 20 Eq. 186.

(*s*) 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.

(*t*) See the observations of Pearson, J., in *Re Rosher*, 26 Ch. D. 801.

(*u*) *Large's Case*, 2 Leon, 82, 3 Leon, 182; *Barnett* v. *Blake*, 2 Dr. & Sm. 117.

(*v*) See Mr. Preston's note to Shep. Touchst., 7th ed. p. 130.

(*w*) Supra. Compare the cases on gifts of personal estate, infra, p. 1494. It is said in *Churchill* v. *Marks*, 1 Coll. at p. 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 questioned, see Davidson's Conveyancing, 3rd ed. Vol. iii. Pt. 1, p. 111, n.

And in *Re Rosher* (*x*) a condition against alienation was held by Pearson, J., to be void, although its operation was limited to the life of a living person, who was not the devisee.

Condition requiring alienation within a given time.

It has been already mentioned (*y*) that if land is given to a person in fee, with a gift over if he does not alienate in his lifetime, the gift over is void, and it would seem to follow that 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 (*z*).

Contingent interest.

An exception to the general rule that a condition against alienation following a devise in fee is repugnant and void, occurs where a contingent interest is devised, for in such a case it seems that a condition against alienation during the period of contingency may be attached to the devise (*a*).

Settled Land Acts.

Reference may here be made to the provisions of the Settled Land Acts, under which every condition, gift over, or other provision is void so far as it tends to prevent a tenant for life from exercising his statutory powers of alienation (*b*).

Restraints on alienation by tenant in tail invalid.

(ii.) *Estates-tail.*—Mr. Jarman continues (*c*): "Conditions restraining alienation by a tenant in tail are also void, as repugnant to his estate (*d*), 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 (*e*); but it was 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 (*f*). 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

(*x*) 26 Ch. D. 801, cited ante, p. 1488. See *Renaud* v. *Tourangeau*, L. R., 2 P. C. 4, 18; *Re Dugdale*, 38 Ch. D. 176; *Powell* v. *Boggis*, 35 Bea. 535.

(*y*) Ante, p. 562.

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

(*a*) *Large's Case*, 2 Leon. 82, 3 Leon. 182. As to this case, which is obscurely reported, see *Re Rosher*, 26 Ch. D. 801, and compare the cases on gifts of personal property, post, p. 1495. The principle above stated is also recognized in *Corbett* v. *Corbett*, 14 P. D. 7.

(*b*) See *Re Ames*, [1893] 2 Ch. 479, and the cases on conditions of residence, discussed below.

(*c*) First ed. p. 813.

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

(*e*) 10 Rep. 36, Fea. C. R. 260.

(*f*) Co. Lit. 223 b. Or from granting a lease for his own life: ib.

CHAP. XXXIX.

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 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. (*g*), but which, of course, was equally void on the principle already stated.

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

"One of the latest attempts to interfere indirectly with the power of alienation incidental to an estate tail, occurs in *Mainwaring* v. *Baxter* (*h*), 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 £5,000 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."

Fines and Recoveries Act.

It is hardly necessary to point out that the right of a tenant in tail to bar his entail under the Fines and Recoveries Act, 1833, cannot be restricted by any condition, gift over, or direction, whatever form it may assume (*i*).

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

"Here it may be noticed," says Mr. Jarman (*j*), "that an objection is advanced in some of the early cases, and has been adopted by text writers of high reputation (*k*), to conditions or provisoes 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

(*g*) *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. 697; all stated Fea. C. R. 253 et seq.

(*h*) 5 Ves. 458. "The same principle applies to wills" (note by Mr. Jarman). As to these attempts to create unbarrable entails, or "perpetuities," as they were formerly called, see ante, p. 281.

(*i*) *Dawkins* v. *Lord Penrhyn*, 6 Ch. D. 318, 4 App. Ca. 51. A restraint on alienation does not prevent a married woman from barring an estate tail; *Cooper* v. *Macdonald*, 7 Ch. D. 288.

(*j*) First ed. p. 814.

(*k*) Fea. C. R. 253; Harg. & Butl. Co. Litt. 223 b, note, 132; Sand. Uses, ch. 2, s. iv. 4. See also Vaizey on Settlements, Vol. ii., p. 1289.

he were dead *without issue*; or, as we are told, would be most correct (*l*), 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 (*m*), (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 (*n*), 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* (*o*); the proviso in which, so far as it respected the sons of the tenant for life, was obnoxious to this objection."

However, in *Bird* v. *Johnson* (*p*), 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 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,

(*l*) Mr. Butler's note, Fea. C. R. 254.
(*m*) *Anon.*, 1 And. 33, pl. 84.
(*n*) *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. 697.
(*o*) Butl. Fea. 617, App.
(*p*) 18 Jur. 976; *Re Catt's Trusts*, 2 H. & M. 46, referred to in Chapter XVII., ante, p. 566.

CHAP. XXXIX.

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 (*q*), 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* (*r*), where the devise was to A. in tail, with a proviso that in a given event his estate should cease and the property devolve as if he were naturally dead, the words "without issue" were (in effect) supplied by 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.

(iii.) *Absolute Interests in Personal Estate.*—Mr. Jarman continues (*s*): "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, would be also rejected, as a qualification repugnant to the preceding absolute gift" (*u*).

Gift over void for repugnancy.

The general rule that a gift over in the event of the legatee disposing of the property, or dying without disposing of it, or not

(*q*) 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. See ante, p. 1435, n. (*n*).

(*r*) L. R., 18 Eq. pp. 290, 296. See also *Bund* v. *Green*, 12 Ch. D. 819. In *Jellicoe* v. *Gardiner*, 11 H. L. C. 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.

(*s*) First ed. p. 815.

(*t*) Co. Litt. 223 a; *Metcalfe* v. v. *Metcalfe*, 43 Ch. D. 633; *Corbett* v. *Corbett*, 14 P. D. 7.

(*u*) *Bradley* v. *Peixoto*, 3 Ves. 324; *Ross* v. *Ross*, 1 Jac. & W. 154. See *Re Dugdale*, 38 Ch. D. 176, where the general principle is discussed. In *Re Wolstenholme*, 43 L. T. 752, it was held that if property is given to a person for life, with a general power of appointment by deed or will, a clause prohibiting alienation of the income during the life of the beneficiary is void, even in the case of a married woman.

disposing of the whole of it, is void for repugnancy, has been already considered (*v*), as has also the exception which is allowed in cases where the testator shews an intention that the legatee shall take a life interest, with a power of appointment (*w*).

Contingent or reversionary interest.

An interest which is not absolutely vested in possession may, however, be made subject to a condition against alienation. Thus, in *Re Porter* (*x*), a testator gave his residue to trustees upon trust for certain persons during their lives and then upon trust for his nephews and nieces: the will contained a declaration that if any of the nephews or nieces should during the lives of the tenants for life or the survivor of them, assign or attempt to assign his or her expectant share, he or she should forfeit all benefit under the will, and the share should go to the other nephews or nieces; one of the nieces, during the lifetime of the surviving tenant for life, attempted to assign her share, and it was held that the forfeiture took effect (*y*). But a mere clause of forfeiture without a gift over is inoperative (*z*).

Words required to create forfeiture.

No particular form of words is required to create a condition restrictive of voluntary alienation (*a*). But the intention must be expressed with reasonable clearness. In *Re Carew* (*b*), property was given to A. subject to a divesting clause to take effect in the event of his being under "any legal disability" preventing him from taking the property for his own personal and exclusive benefit: it was held that this meant a disability of the person arising from act of law, and did not include liabilities arising from his voluntary acts, such as mortgages.

Life interest cannot be made inalienable,

(iv.) *Life Interests and Annuities.*—Conditions restraining alienation by a tenant for life of real or personal property are also void,

(*v*) Ante, p. 562. The case of *Re Sax*, 62 L. J. Ch. 688, where a gift over to take effect in the event of the legatees ceasing to carry on a business, is referred to supra, p. 564, on the question of repugnancy, and infra, p. 1498, on the question what amounts to an alienation.

(*w*) Ante, p. 1208.

(*x*) [1893] 3 Ch. 481; *Campbell* v. *Campbell*, 72 L. T. 294.

(*y*) See *Churchill* v. *Marks*, 1 Coll. 441; *Re Payne*, 25 Bea. 556 (in both of which the bequeathed interest was during the specified period contingent as well as reversionary); *Kearsley* v. *Woodcock*, 3 Ha. 185; *Kiallmark* v. *Kiallmark*, 26 L. J. Ch. 1; *Pearson* v. *Dolman*, L. R., 3 Eq. 315; *Samuel* v. *Samuel*, 12 Ch. D. 152; *Graham* v. *Lee*, 23 Bea. 388 (in the two last-mentioned cases of which the validity of such a condition was unquestioned). But see *Re Spencer*, 30 Ch. D. 183 (as regards the shares of the unmarried daughters).

(*z*) *Powell* v. *Boggis*, 35 Bea. 535.

(*a*) See *Shee* v. *Hale*, 13 Ves. 404 ("authorize or intend to authorize any person to receive"); *Brandon* v. *Askew*, 2 Y. & C. C. C. 24 ("incumber or anticipate"); *Re Amherst's Trusts*, L. R., 13 Eq. 464; *Re Baker*, [1904] 1 Ch. 157. As to what amounts to an alienation or attempt to alienate, see post, p. 1498. As to a condition of forfeiture on the legatee making a composition with his creditors, see *Sharp* v. *Cosserat*, 20 Bea. 470.

(*b*) [1896] 2 Ch. 311.

for a power of alienation is as much incident to that kind of interest as it is to an absolute interest (*c*). "The law of England," as Mr. Jarman points out (*d*), "does not (like that of Scotland) (*e*) admit of the creation of personal inalienable trusts, for the purpose of maintenance, or otherwise, except in the case of women under coverture, who, it is well known, may be restrained from anticipation" (*f*).

except in the case of a married woman.

May be made determinable on alienation.

But a life interest in real or personal property or an annuity may be made determinable on voluntary alienation (*g*) either by being limited until alienation (*h*) or by an express gift over or clause of forfeiture on alienation (*i*). If, however, a life interest is given to a person, followed by limitations or trusts which in effect give him an absolute interest (such as a general power of appointment), then the ordinary rule applies, and any restriction on alienation is void for repugnancy (*j*).

In the case of an annuity, if the annuitant dies before the annuity is purchased, or if the testator's estate is deficient, other considerations arise (*k*).

Purchase of annuity.

Where a sum of money is given to be invested in the purchase, in the names of trustees, of an annuity for the benefit of A. during his life, with a gift over on alienation, this gift over is effective (*p*). If, however, there is no gift over, but simply a declaration that in the event of the annuitant alienating his annuity, it shall cease as if he were dead, this, it seems, is merely in terrorem, and has no operation (*q*). Or if the testator directs the annuity to be purchased in the name of the annuitant, and declares that he shall not be entitled to have the value of it, and that if he sells his annuity

(*c*) *Brandon* v. *Robinson*, 18 Ves. 429. See this and the other cases cited post, p. 1500 seq. In *Lewis* v. *Lewis*, 6 Sim. 304, a declaration that a tenant for life should not have power to alienate his interest, followed by a proviso that if he should in any way "impede or frustrate the trusts" of the will, the income should no longer be paid to him, was held to be equivalent to an interest determinable on alienation. But a clause empowering a trustee to require the personal attendance and receipt of the tenant for life does not make his interest inalienable: *Arden* v. *Goodacre*, 11 C. B. 883.

(*d*) First ed. p. 830.

(*e*) Under a settlement of Scotch property executed in Scotland in Scotch form, a domiciled Englishman may be entitled to an "alimentary provision" which cannot be taken by his general creditors: *Re Fitzgerald*, [1904] 1 Ch. 573. It would seem that a similar result would follow under a Scotch testamentary disposition.

(*f*) Post, section IX.

(*g*) As to bankruptcy and involuntary alienation, see post, p. 1500. And see *Re Carew*, [1896] 2 Ch. 311 above.

(*h*) As in *Carter* v. *Carter*, 3 K. & J. 617.

(*i*) As in *Wilkinson* v. *Wilkinson*, 3 Sw. 515; *Rochford* v. *Hackman*, 9 Ha. 475; *Hurst* v. *Hurst*, 21 Ch. D. 278.

(*j*) *Re Wolstenholme*, 43 L. T. 752.

(*k*) See Chapter XXXI.

(*p*) *Shee* v. *Hale*, 13 Ves. 404; *Hatton* v. *May*, 3 Ch. D. 148. See *Day* v. *Day*, 22 L. J. Ch. 878.

(*q*) See *Re Mabbett*, [1891] 1 Ch. 707, citing *Roper* v. *Roper*, 3 Ch. D. 714.

it shall cease and form part of the testator's residuary estate, this is repugnant to the original gift of the annuity, on principles already explained (*r*), and has no operation (*s*).

Reversionary annuity.

What happens when an annuity, determinable on alienation, is directed to be purchased on a future event, and the annuitant dies before the event happens, without having aliened the annuity, is discussed elsewhere (*t*).

Discretionary trusts are considered in section VIII. (ii.) below.

What will cause a forfeiture.

(v.) *What will cause a Forfeiture.*—The cases on this question are, perhaps, not quite consistent, but the following points seem to have been decided.

Ignorance.

Ignorance of the existence of the condition does not prevent a forfeiture from taking effect (*u*).

Instrument not intended to operate as an alienation.

An instrument which is not intended to operate as an assignment unless it can do so without causing a forfeiture, does not amount to an alienation (*v*). In *Re Sheward* (*w*), a person signed a document which amounted in terms to an assignment of his life interest, but it was proved that as between him and the creditor the document was not intended to have this effect: it was held by Kekewich, J., that it did not operate as a forfeiture.

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 (*x*).

An instrument which, but for the condition, would operate as an alienation, is an alienation for that purpose, although the condition prevents it from having any operation (*y*).

No particular form of words is required to effect an alienation within the meaning of a clause of forfeiture (*z*).

(*r*) Ante, p. 502.

(*s*) *Hunt-Foulston* v. *Furber*, 3 Ch. D. 285.

(*t*) Chapter XXXI.

(*u*) *Carter* v. *Carter*, 3 K. & J. 617, ante, p. 1496. Compare *Re Baker*, [1904] 1 Ch. 157.

(*v*) *Samuel* v. *Samuel*, 12 Ch. D. 152. An assignment which constitutes an act of bankruptcy may be a breach of a condition against alienation: *Kearsley* v. *Woodcock*, 8 Jur. 120.

(*w*) [1893] 3 Ch. 502.

(*x*) *Re Wormald*, 43 Ch. D. 630.

(*y*) Per Lindley, L.J., in *Hurst* v. *Hurst*, 21 Ch. D. at p. 295, but see *Re Crawshay*, [1891] 3 Ch. 176, as to the construction of an agreement for settlement.

(*z*) See *Re Sheward*, [1893] 3 Ch. 502. 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 Bea. 48; as to which, see *South Western 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, *Oldam* v. *Oldham*, L. R., 3 Eq. 404;

What is an alienation.

An assignment to trustees upon trust for the assignor is not, it is said, such an alienation as to cause a forfeiture, even if the assignor appoints the trustees, his attorneys, to receive the income and pay their expenses out of it (*a*). But if persons entitled to property were to transfer it to an incorporated company, that would no doubt be held to be an alienation, even if they retained the management and owned all the shares (*b*). A letter addressed by the tenant for life to the trustee or custodian of the fund requesting him to pay part of the income when received to a certain person will not cause a forfeiture (*c*).

Taking the benefit of the Insolvents Acts may operate as a forfeiture under a condition restraining voluntary alienation (*d*); and the same result may be produced by a petition by the debtor himself for adjudication or liquidation under the Bankruptcy Act of 1861, or of 1869 (*e*), or of 1883 (*f*); but adjudication in a hostile bankruptcy does not, as a general rule, have this effect (*g*). And even a declaration of insolvency, leading to an adjudication in bankruptcy, is not a voluntary alienation (*h*).

Nor is a seizure of the property under judicial process (*i*). The appointment of a receiver is not a "charge" within the meaning of a clause of forfeiture (*j*).

What is an attempt to alienate.

Negotiations for an assignment or charge do not produce a forfeiture under a clause prohibiting "attempts" to alienate (*h*). To constitute an "attempt" there must be some act which, but for

and so held notwithstanding an arrangement between the debtor and creditor that the authority should be binding in honour only, this being considered a mere contrivance to evade the condition, ib. A covenant to allow a person to receive income is an equitable assignment. *Re Spearman*, 82 L. T. 302.

(*a*) *Re Tancred's Settlement*, [1903] 1 Ch. 715; *Re Swannell*, 101 L. T. 76; *Lockwood* v. *Sikes*, 51 L. T. 562 (settlement).

(*b*) *Re Sax*, 62 L. J. Ch. 688, ante, p. 564

(*c*) *Durran* v. *Durran*, 91 L. T. pp. 187, 819.

(*d*) *Shee* v. *Hale*, 13 Ves. 404; *Martin* v. *Margham*, 14 Sim. 230; *Brandon* v. *Aston*, 2 Y. & C. C. C. 24; *Rochford* v. *Hackman*, 9 Ha. 475; *Churchill* v. *Marks*, 1 Coll. 441. *See Townsend* v. *Early*, 34 Bea. 23 (Colonial Insolvent Act).

(*e*) *Lloyd* v. *Lloyd*, L. R., 2 Eq. 722; *Re Amherst's Trusts*, L. R., 13 Eq. 464.

(*f*) *Re Colgrave*, [1903] 2 Ch. 705.

(*g*) *Wilkinson* v. *Wilkinson*, Coop. 259; *Lear* v. *Leggett*, 2 Sim. 479, 1 R. & My. 690; *Whitfield* v. *Prickett*, 2 Kee. 608; *Pym* v. *Lockyer*, 12 Sim. 394. The decision in *Cooper* v. *Wyatt*, 5 Mad. 482, is contra.

(*h*) *Jones* v. *Wyse*, 2 Kee. 285; *Graham* v. *Lee*, 23 Bea. 388. 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 Bea. 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.

(*i*) *Rex* v. *Robinson*, Wightm. 386.

(*j*) *Campbell* v. *Campbell*, 72 L. T 294.

the clause of forfeiture, or some rule of law, would operate as an alienation (*k*).

Accrued income.

The general rule seems to be that a provision against alienation only applies to future income. "I think that the epoch at which the destination of any instalment of income is to be determined is the moment when that instalment either accrues due or is in the hands of the trustees ready for application in accordance with the trusts of the will. For the present case it is not necessary to determine which. If at that instant the son [the beneficiary] has not by his own act or default or by process or operation of law been deprived of the enjoyment of it, I think he is entitled to receive it. The trustees have not conferred on them by the will any discretion to retain it in their hands with a view to its application at a later period, and it seems to me that the right of the son to receive cannot be affected by subsequent events" (*l*). Accordingly an assignment of accrued income does not operate as a forfeiture under the ordinary form of provision against alienation (*m*). Where the instrument of assignment is ambiguous, the Court will, if possible, construe it as applying to accrued income, so as to avoid a forfeiture (*n*).

Effect of a release or re-assignment.

Where a reversionary interest in property is given to a person subject to a valid provision making his interest liable to forfeiture on future alienation, and he makes an assignment or charge which is got rid of before the interest falls into possession, no forfeiture takes place (*o*). If this is not done, it is not always easy to say what operates as a forfeiture. One view is that the clause of forfeiture does not take effect if the assignment or charge is got rid of before any property or income is actually receivable (*p*). Another view is that forfeiture takes place if the charge or assignment continues in force until the period of distribution has arrived (*q*). Some judges seem to think that the question may depend on

(*k*) *Graham* v. *Lee*, supra; *Re Wormald*, 43 Ch. 630, supra, p. 1497; *Re Porter*, [1892] 3 Ch. 481; *Re Tancred's Settlement*, [1903] 1 Ch. 715. Compare *Stephens* v. *James*, 4 Sim. 499, where the forfeiture was to result from any act done "with a view to charge" the life interest.

(*l*) Per Stirling, J., in *Re Sampson*, [1896] 1 Ch. at p. 636, adopted by Farwell, J., in *Re Greenwood*, [1901] 1 Ch. 887, post, p. 1511.

(*m*) *Re Stulz's Trusts*, 4 D. M. & G. 404.

(*n*) *Durran* v. *Durran*, 91 L. T. 187.

(*o*) *Re Parnham's Trusts*, 46 L. J. Ch. 80; *Samuel* v. *Samuel*, 12 Ch. D. 152; *Hurst* v. *Hurst*, 21 Ch. D. 278. A binding agreement to release would no doubt be equivalent to an actual release, on the principle laid down in *Ancona* v. *Waddell*, 10 Ch. D. 157; see *Robertson* v. *Richardson*, and *Metcalfe* v. *Metcalfe*, post.

(*p*) *White* v. *Chitty*, L. R., 1 Eq. 372; *Re Parnham's Trusts*, L. R., 13 Eq. 413, 46 L. J. Ch. 80; *Robertson* v. *Richardson*, 30 Ch. D. 623; *Re Broughton*, 57 L. T. 8; *Metcalfe* v. *Metcalfe*, [1891] 3 Ch. 1 (all cases of forfeiture on bankruptcy).

(*q*) *Samuel* v. *Samuel*, 12 Ch. D. 152.

CHAP. XXXIX.

whether the assignee or incumbrancer has taken any steps to enforce his rights (*r*). The point is still undecided (*s*).

If the assignment or charge is effected after the interest has fallen into possession, a forfeiture is produced, even if the assignment or charge is got rid of before the assignee or incumbrancer has taken any benefit (*t*). This result, however, can of course only follow where the interest is a life interest.

Where forfeiture is only to take place on the happening of an event whereby, if the income belonged absolutely to the tenant for life, he would be "deprived of the personal enjoyment" of it, then it seems that an assignment or charge does not produce a forfeiture if it is vacated before any income is available to satisfy it (*u*).

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

VIII.—Conditions against Involuntary Alienation.—(i.) *General Principles.*—Mr. Jarman continues (*v*): "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; and property cannot be so settled as to be unaffected by bankruptcy or insolvency, which is a transfer, by operation of 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. 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."

Thus, in *Brandon* v. *Robinson* (*w*), 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 became 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,

(*r*) *Lloyd* v. *Lloyd*, L. R., 2 Eq. 722; *Robertson* v. *Richardson*, 30 Ch. D. 623; *Re Broughton*, 57 L. T. 8.
(*s*) *Re Loftus-Otway*, [1895] 2 Ch. 235.
(*t*) *Hurst* v. *Hurst*, 21 Ch. D. 278; *Re Baker*, [1904] 1 Ch. 157.
(*u*) *Re Mair*, [1909] 2 Ch. 280.
(*v*) First ed. p. 815.
(*w*) 18 Ves. 429.

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, and it was held by Lord Eldon, C., that the assignees were entitled to the benefit of the bequest.

Assignees in bankruptcy entitled to benefit of trust for maintenance.

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

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

In *Re Machu* (*y*), 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." And a subsequent part of the will was contained a proviso that in case A. should at any time be declared a bankrupt then and thenceforth the devise thereinbefore made to her should be void, and the premises should thenceforth go, remain, and be to the use of her children. It was held that the proviso was repugnant and void.

In *Re Dugdale* (*z*), a testatrix gave property upon trust for J., and declared that if he should do, execute, commit, or suffer any act, deed, or thing whereby, or by reason or in consequence whereof, or if by operation of law, he would be deprived of the personal beneficial enjoyment, then the trust for his benefit should cease and the property should be held in trust for other persons: it was held that he took an absolute interest.

Gift may be made defeasible on bankruptcy, &c., before receipt by legatee.

It seems, however, that property may be given to A. subject to a provision for forfeiture in the event of his becoming bankrupt before he acquires actual possession, with a gift over in that event (*a*). But the bankruptcy must be a genuine one: thus, in *Re Carew* (*b*),

(*x*) 1 Sim. 66.
(*y*) 21 Ch. D. 838.
(*z*) 38 Ch. 176. See also *Corbett* v. *Corbett*, 14 P. D. 7; *Metcalfe* v. *Metcalfe*, 43 Ch. D. 633.
(*a*) *Re Goulder*, [1905] 2 Ch. 100. *Kiallmark* v. *Kiallmark*, 26 L. J. Ch. 1 (settlement by deed).
(*b*) [1896] 2 Ch. 311.

CHAP. XXXIX.

where A., the beneficiary, was adjudicated a bankrupt on his own application, and the adjudication was shortly afterwards annulled on the ground that it ought not to have been made, this was treated as a mere trick and contrivance, the object being to make the gift over take effect, and thus defeat A.'s creditors.

Contingent or defeasible interest.

And although property cannot be given absolutely to a person, with a gift over on his bankruptcy or involuntary alienation, yet property in which a person takes a contingent interest, or a vested interest liable to be divested, may be given over on his bankruptcy, &c., before his interest becomes absolutely vested. Thus, in *Pearson* v. *Dolman* (*c*), a fund was given upon trust to pay the income to A. until he attained twenty-five, unless he became bankrupt, or compounded with his creditors, or disposed of his interest, in any of which cases the fund was to go over to other persons; on his attaining twenty-five the fund was to be paid to him, and there was a gift over on his dying under that age leaving children; it was held that these trusts were valid and effectual.

Where trustees have a discretion as to mode of application.

(ii.) *Discretionary Trusts.*—As Mr. Jarman points out (*d*): "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."

Thus, in *Green* v. *Spicer* (*e*), 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 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

(*c*) L. R., 3 Eq. 315.
(*d*) First ed. p. 821.
(*e*) 1 R. & My. 395, Tam. 396.

for the benefit of R., and their discretion applied only to the manner of their application.

The decisions in *Piercy* v. *Roberts* (*f*) (where the gift was of capital) and *Younghusband* v. *Gisborne* (*g*) are to the same effect (*h*).

In *Re Coleman* (*hh*), a testator directed the income of his property to be applied in the maintenance, education, and advancement of his four children in such manner as his trustees should deem most expedient, until the youngest child attained twenty-one, and then to divide the property equally among the children then living. While the youngest child was still under age, one of the children, J., who had attained twenty-one, assigned all his interest under the will to H. It was held that during the continuance of the trust no child was entitled to the payment of any part of the income, and that H. took no interest in the income, except such moneys or property, if any, as might be paid or delivered to or appropriated for J. Consequently, if the trustees paid money or delivered goods to J., they would be liable to H. for the amount of the money or the value of the goods (*i*). But apparently the trustees might apply the money for the benefit of J. in such a way as not to give him anything but a personal right, which would not pass to his assignee, as by paying for his board and lodging.

Distinction where trustees have discretion as to amount.

But if the trust is so expressed that any income not expended by the trustees for the maintenance of the spendthrift may be applied or accumulated for the benefit of other persons, then the spendthrift has no interest which is capable of voluntary or involuntary assignment. Thus, in *Twopeny* v. *Peyton* (*ii*), 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; Shadwell, V.-C., held, that the assignees took no interest.

Again, in *Re Bullock* (*j*), where there was a discretionary trust to pay to A. or apply for his benefit either the whole, or so much, and so much only of the income of a certain fund as the trustees

(*f*) 1 Myl. & K. 4.

(*g*) 1 Coll. 400; cited ante, p. 885.

(*h*) As to the effect of a discretionary trust under the law of Scotland, see *Chambers* v. *Smith*, 3 A. C. 795.

(*hh*) 39 Ch. D. 443.

(*i*) So held acc. in *Re Neil*, 62 L. T. 649. This case and *Re Coleman* were both cases of assignment, not bankruptcy.

(*ii*) 10 Sim. 487 (practically overruling the V.-C.'s previous inconsistent decision in *Snowdon* v. *Dales*, 6 Sim. 524). See *The Queen* v. *The Judge of the County Court of Lincolnshire*, 20 Q. B. D. 167.

(*j*) 60 L. J. Ch. 341.

should in their uncontrolled discretion think fit, and subject thereto to hold the fund and the income thereof in trust for other persons, it was held that the trust for A. was valid, and although the income could not be properly paid to A., the whole or part thereof might be applied by the trustees for his maintenance. In this case, the trustee in A.'s bankruptcy withdrew his claim to receive the income.

In such cases as these, it seems that the trustees can only apply the income in such a way as to give the beneficiary a personal right incapable of passing by assignment, as by providing him with board and lodging (*k*): they must not pay money, or deliver goods, or pay for goods to be delivered to him (*l*).

Creditors entitled to bankrupt's undivided share, if ascertainable.

If the trusts of the property be declared in favour of several, as a man, his wife and children, to be applied for their benefit, at the discretion of the trustees, the man's creditors, 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 in a case (*n*) where the man was entitled to nothing separately, but only to an enjoyment of the property jointly with his wife and children at the discretion of the trustees, it was held that the creditors had no claim. The effect of a trust of this kind is that the trustees have a discretion as to the amount which they can allow to each object of the trust, so that by allowing to one a merely nominal share they can practically exclude him (*o*). And where the trustees are expressly authorized to apply the income for the benefit of A. and his wife and children, or any of them, this authorizes them to exclude A. altogether, and A.'s creditors, in the event of his bankruptcy, take only such defeasible interest as A. himself had (*p*).

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

(*k*) See *Godden* v. *Crowhurst*, 10 Sim. at p. 656.

(*l*) See *Re Coleman*, 39 Ch. D. 443, stated above. In *Re Ashby*, [1892] 1 Q. B. 872, Vaughan Williams, J., said, "It seems to me . . . that if the trustees, in the exercise of their discretion, do pay the rents and profits of this estate to the bankrupt, to the extent to which sums are paid to the bankrupt in excess of the amount necessary for his mere support, then the trustee in bankruptcy will be able to insist upon the bankrupt accounting to him for the rents and profits so received." This no doubt is true, but it is submitted that the dictum is erroneous if it is meant to imply that the trustees under the settlement would be justified in paying the income to the bankrupt.

(*m*) *Page* v. *Way*, 3 Bea. 20; *Kearsley* v. *Woodcock*, 3 Hare, 185; *Lord* v. *Bunn*, 2 Y. & C. C. C. 98; *Wallace* v. *Anderson*, 16 Bea. 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*, 39 Ch. D. 443; but the decision itself has been questioned in *Kearsley* v. *Woodcock*; see *Younghusband* v. *Gisborne*, 1 Coll. 400.

(*o*) See *Re Coleman*, supra.

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

In *Rippon* v. *Norton* (*s*), the objects of a discretionary trust were A. and his three children; A. became bankrupt, and it was held that A.'s creditors were entitled to one-fourth of his life interest. But no reasons are given for the decision, which is clearly wrong (*t*).

Life interest may be made to cease on bankruptcy.

(iii.) *Life Interest Determinable on Bankruptcy, or other Involuntary Alienation.*—"But though," says Mr. Jarman (*u*), "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 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 manner as to be divested on bankruptcy or insolvency (*v*), 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* (*w*), where 4000*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 (*x*).

(*s*) 2 Bea. 63. The fact that the original trustees refused to act was not the ground of the decision, as new trustees were appointed by the Court. In *Re Coe's Trust* (4 K. & J. 199) a testator gave a fund upon trust for the maintenance or advancement of his son at the discretion of the trustees, expressing a wish that his son should have the whole fund if he conducted himself to the satisfaction of the trustees, with a gift over of the unapplied part; the trustees paid the money into Court; it was held that as the trustees had declined to exercise their power of depriving the son of the fund and there being no suggestion of misconduct on his part, the Court could not exercise their power, and that the trust for the son was absolute. But this case obviously has nothing to do with the rule discussed in the text.

(*t*) See per Fry, J., in *Re Coleman*, 39 Ch. D. at p. 448.

(*u*) First ed. p. 823.

(*v*) As to this, see *Wilson* v. *Greenwood*, 1 Sw. 471; *Ex parte Mackay*, L. R., 8 Ch. 643; *Ex parte Williams*, 7 Ch. D. 138.

(*w*) 2 Stra. 947. "This case (among many others) shews 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." (Note by Mr. Jarman.) Of course clauses of this nature do not affect arrears of income, *Re Stulz's Trusts*, 4 D. M. & G. 404. See also *South Western Loan Company* v. *Robertson*, 8 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. 1487) 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. 1500.

(*x*) 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

CHAP. XXXIX.

"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 (*y*).

"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.

Where bankruptcy is a forfeiture under a clause restraining alienation.

"Thus, in *Dommett* v. *Bedford* (*z*), 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 the said term; and, *if so alienated, the said annuity should cease.* A. having become bankrupt, it was held that the annuity had determined.

"So in *Cooper* v. *Wyatt* (*a*), 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*, 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; his Honor 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.

Bankruptcy held *not* to be a forfeiture.

"On the other hand, in the case of *Wilkinson* v. *Wilkinson* (*b*), 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,

not apply the whole of the income, the unapplied surplus goes to those entitled under the gift over, *Re Bullock*, 60 L. J. Ch. 341, ante, p. 1503.

(*y*) As to bankruptcy produced by the contrivance of the beneficiary with intent to defeat his creditors, see *Re Carew*, [1896] 2 Ch. 311, ante, p. 1501. In that case the beneficiary's interest was absolute, and not merely a life interest, but the principle appears to be the same.

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

(*a*) 5 Mad. 482. "A case of doubtful authority": Davids. Conv. iii. 113, note (*b*).

(*b*) Coop. 259, 3 Sw. 515, see p. 528.

or interest, of him, her, or their heirs respectively (*c*), 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.

"So in the case of *Lear* v. *Leggett* (*d*), 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 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. . . . The case was afterwards brought before Lord *Lyndhurst*, C., on appeal, when his Lordship affirmed the decree of the V.-C., observing that the prohibition in *Dommett* v. *Bedford* (*e*), 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 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.

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

"Thus, in *Rex* v. *Robinson* (*f*), where an annuity of £400 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,

(*c*) Sic. orig. as reported.

(*d*) 2 Sim. 479, 1 R. & My. 690. See also *Whitfield* v. *Prickett*, 2 Kee. 608; *Graham* v. *Lee*, 23 Bea. 388; *Re Pixley*, 60 L. T. 710; *Re Harvey*, 60 L. T. 710.

(*e*) 6 T. R. 684, ante, p. 1506.

(*f*) Wightw. 386.

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* (*g*), that the seizure of the annuity under the outlawry, at the suit of the Crown, arising merely from the negative, 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*.

Clause restraining should extend to involuntary alienation.

"These cases shew 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.

Taking benefit of Insolvent Debtors Act a voluntary alienation.

"It seems that taking the benefit of an insolvent act is construed to be an alienation, when bankruptcy would not, as it requires certain 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 partakes more of the nature of a compulsory measure" (*h*).

Bequest to purchase annuity.

Where a sum of money is given to be invested in the purchase of an annuity for A. during his life, and the testator wishes the annuity to cease on A.'s bankruptcy, it seems that in order to produce this result the annuity must be directed to be purchased in the names of trustees, with a gift over in the event of A.'s bankruptcy (*l*). It has been already explained that a mere direction for the cesser of an annuity on voluntary alienation, without a gift over, is inoperative, even where the annuity is directed to be purchased in the names of trustees, and that where the annuity

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

(*g*) 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 to a creditor for the express purpose of enabling him to take the lease in execution, was held to be a fraud on the covenant, and to enable the landlord to recover in ejectment, under a clause of re-entry, on the breach of any of the covenants of the lease. Lord *Kenyon* observed, '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.' It will be perceived that neither the decision nor the dictum of the C.J. quite touches the case of a warrant of attorney to confess judgment, given without any special intent to evade the restriction on alienation." (Note by Mr. Jarman.) The distinction was recognized in *Doe* v. *Hawke*, 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.

(*h*) See the cases cited ante, p. 1498.

(*l*) See *Day* v. *Day*. 22 L. J. Ch. 878.

is directed to be purchased in the name of the annuitant, a gift over on alienation is inoperative (*m*). The same rules seem to apply to clauses of forfeiture on bankruptcy, &c.

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

Lord Eldon is sometimes supposed to have intended in *A'Court* v. *Robinson* (*n*), 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 cease on bankruptcy. His remarks, however, are not to be taken as going to that extent (*o*); and *Dommett* v. *Bedford* (*p*), and *Joel* v. *Mills* (*q*), in which the life interest was held to cease upon the proviso for cesser without any gift over, are direct authorities to the contrary.

Foreign bankruptcy.

It seems that "bankruptcy" in a will primâ facie means bankruptcy under English law, and that consequently a life interest determinable on bankruptcy is not necessarily forfeited by the legatee or devisee becoming bankrupt under the law of a foreign country (*r*). However, in *Re Aylwin's Trusts* (*s*), it was held by Wickens, V.-C., that a gift until bankruptcy or insolvency was forfeited by judicial insolvency in Australia, and in *Re James* (*t*) it was held by Kekewich, J., that a Scotch sequestration was equivalent to an English bankruptcy; in that case it was also held that there was no forfeiture, because the meaning of the whole clause shewed that the income was not to go over unless the legatee was actually deprived of it, and this did not happen, as the sequestration was annulled before it became effective (*u*).

Composition with creditors.

Sometimes a life interest is made determinable on the legatee entering into a composition with his creditors (*v*), or becoming insolvent.

'Insolvency' means inability to pay in full.

Where "insolvency" is made a cause of forfeiture, it is 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 (*w*).

Insolvent Debtors Acts.

In former days, the case not infrequently happened of property being given to a person until he took the benefit of the acts for

(*m*) Ante, p. 1496.

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

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

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

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

(*r*) *Re Levy's Trusts*, 30 Ch. D. 119; *Re Hayward*, [1897] 1 Ch. 905, both cases of colonial bankruptcy.

(*s*) L. R., 16 Eq. 585.

(*t*) 62 L. T. 454.

(*u*) See *Re Sartoris*, post, p. 1510.

(*v*) *Sharp* v. *Cosserat*, 20 Bea. 470 (settlement); *Billson* v. *Crofts*, L. R., 15 Eq. 314.

(*w*) *De Tastet* v. *Le Tavernier*, 1 Kee. 161; *Re Muggeridge's Trusts*, Joh. 625; *Freeman* v. *Bowen*, 35 Bea. 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.

CHAP. XXXIX.

the relief of insolvents: it has been held that executing a deed of inspectorship, under the Bankruptcy Act, 1861, is not (*x*), but that making a composition under the Bankruptcy Act, 1869, is (*y*) a forfeiture under such a clause.

Colonial insolvency.

A declaration of insolvency under a colonial statute may constitute insolvency within the meaning of an English will (*z*).

"Do or suffer."

To "do or suffer" (*a*) or to "do or permit" (*b*) any act causing alienation has been held to include an act done in invitum.

"Vested in."

Where the interest is to determine on its becoming "vested in" any other person, a forfeiture is of course produced by an adjudication in bankruptcy or by a creditor obtaining a charge under stat. 1 & 2 Vict. c. 110, s. 14 (*d*): or by the tenant for life electing to take against the instrument under which his interest arises (*e*); but not by the filing of a bankruptcy petition or the execution of a composition deed (*f*), nor, it seems, by the making of a receiving order under the Bankruptcy Act, 1883 (*g*). On the other hand, if the words are "payable to," a forfeiture is produced by a receiving order (*h*).

"Payable to."

"Liable to be deprived."

And if the forfeiture is to take effect on the beneficiary doing or suffering any act or thing whereby he would, if absolutely entitled, "be deprived or liable to be deprived" of the beneficial enjoyment of the gift, it takes effect on his committing an act of bankruptcy (*i*).

Conviction for felony.

But a conviction for felony does not cause a forfeiture under a proviso for cesser in the event of the beneficiary being deprived by operation of law of the "absolute personal enjoyment" of his interest (*j*).

(*x*) *Montefiore* v. *Enthoven*, L. R., 5 Eq. 35.

(*y*) *Nixon* v. *Verry*, 29 Ch. D. 196 (settlement by deed).

(*z*) *Re Aylwin's Trusts*, L. R., 16 Eq. 585, supra, p. 1509.

(*a*) *Roffey* v. *Bent*, L. R., 3 Eq. 759, *Dixon* v. *Rowe*, 35 L. T. N. S. 548 (sequestration).

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

(*c*) The forfeiture relates back to the act of bankruptcy: *Montefiore* v. *Guedalla*, [1901] 1 Ch. 435. See also cases cited in note (*f*), infra. As to foreign bankruptcy, see infra, p. 1511.

(*d*) *Montefiore* v. *Behrens*, 35 Bea. 95.

(*e*) *McCarogher* v. *Whieldon*, L. R., 3 Eq. 236; *Carter* v. *Silber*, [1891] 3 Ch. 553.

(*f*) *Ex parte Dawes*, 17 Q. B. D. 275 (settlement by deed). But of course such an act may be expressly made a cause of forfeiture: *Sharp* v. *Cosserat*, 20 Bea. 470.

(*g*) See *Rhodes* v. *Dawson*, 16 Q. B. D. 548. *Re Sartoris*, [1892] 1 Ch. 11. If the clause of forfeiture is to take effect on an "alienation by law," a receiving order may, it seems, produce a forfeiture: *Re Spearman*, 82 L. T. 302.

(*h*) *Re Sartoris*, supra. In this case the C.A. apparently disapproved of the decision of Kekewich, J., in *Re James*, 62 L. T. 454. As to the effect of the words "cease to be payable to," see *Re Brewer's Settlement*, [1896] 2 Ch. 503.

(*i*) *Re Loftus-Otway*, [1895] 2 Ch. 235. See *Re Mair*, [1909] 2 Ch. 280, where the words were simply "would be deprived"; ante, p. 1500.

(*j*) *Re Dash*, 57 L. T. 219.

If (in a case not within the Married Women's Property Act, 1882), property is given to a woman subject to a condition against involuntary alienation, the question whether she incurs a forfeiture by marrying depends on the wording of the condition (*k*).

Marriage of woman.

It seems also that if a person domiciled in England is adjudicated bankrupt in a foreign country, this does not cause his property in England to "vest in or be payable to" any other person within the meaning of the ordinary forfeiture clause, because the administrator in the bankruptcy must apply to the English Courts before he can claim the property (*l*). But if the interest is determinable on its becoming "forfeited" to any other person, the clause takes effect on the legatee being adjudicated bankrupt in a foreign country. (*m*).

Foreign bankruptcy.

A clause of forfeiture on bankruptcy or other involuntary alienation does not apply to income which is in the hands of trustees of the will ready for payment to the tenant for life; if the tenant for life incurs a forfeiture in those circumstances the money belongs to his trustee in bankruptcy or other alience by operation of law. Whether it applies to income which has accrued, but has not been actually received: in other words, whether the period for determining the destination of the income is the time of its being receivable, or the time of its actual receipt, by the trustees of the will: does not seem to have been decided (*n*).

Accrued income.

It follows that if a creditor of the beneficiary obtains a garnishee order, under which accrued income in the hands of the trustees is paid over to the judgment creditor, this does not operate as a forfeiture under a provision against involuntary alienation in the usual form (*o*).

Garnishee order.

Mr. Jarman continues (*p*): "Sometimes the question arises, whether a proviso of this nature extends to bankruptcy or

Effect of bankruptcy in lifetime of testator.

(*k*) *Bonfield* v. *Hassell*, 32 Bea. 217 (deed); *Craven* v. *Brady*, L. R., 4 Eq. 209; 4 Ch. 296; ante, p. 1498, note (*h*).

(*l*) *Waite* v. *Bingley*, 21 Ch. D. 674; *Re Levy's Trusts*, 30 Ch. D. 119; *Re James*, 62 L. T. 454 (as to this case see *Re Sartoris*, [1892] 1 Ch. 11); *Re Hayward*, [1897] 1 Ch. 905. In the last case, Kekewich, J., thought the point settled by *Re Blithman*, L. R., 2 Eq. 23, but it is submitted that the true principle is that stated above, and that it is unnecessary to rely on *Re Blithman*; the judgment in that case is not conclusive and there is strong authority the other way; see *Re Davidson's Settlement Trusts*, L. R., 15 Eq. 383; *Re Levy's Trusts*, 30 Ch. D. 119; *Re Lawson's Trusts*, [1896] 1 Ch. 175.

(*m*) *Re Levy's Trusts*, supra. Compare *Re Loftus-Otway*, supra, p. 1570.

(*n*) See the rule stated by Stirling, J., in *Re Sampson*, [1896] 1 Ch. 630, ante, p. 1499.

(*o*) *Sutton Carden & Co.* v. *Goodrich*, 80 L. T. 765; *Re Greenwood*, [1901] 1 Ch. 887, dissenting from *Bates* v. *Bates*, [1884] W. N. 129.

(*p*) First ed. p. 828.

CHAP. XXXIX.

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.

"As in the case of *Yarnold* v. *Moorhouse* (*q*), 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 testator died. As it appeared that the act of 1 Geo. 4 gave to the Insolvent Debtors' Court a control over stock in the public funds, and the future property generally of a discharged prisoner (*r*), 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 on appeal, 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."

Principle of the cases.

The words of futurity, in such 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

(*q*) 1 R. & My. 364. So in *Seymour* v. *Lucas*, 1 Dr. & Sm. 177, though the words were "thereafter become bankrupt." As to the construction where the settlement is by deed, see *Manning* v. *Chambers*, 1 De G. & S. 282; *Sharp* v. *Cosserat*, 20 Bea. 470; *West* v. *Williams*, [1899] 1 Ch. 132.

(*r*) "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." (Note by Mr. Jarman.)

person (*s*). And so far has this doctrine been carried, that a forfeiture clause has been held to apply to a bankruptcy which took effect before the date of the will, although it was known to the testator (*t*).

No forfeiture if, before any payment is due, the bankruptcy is annulled.

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 (*u*). 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 (*v*).

Distinction where solvency is a condition precedent, qu.

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

(*s*) *Trappes* v. *Meredith*, L. R., 7 Ch. 248; *Samuel* v. *Samuel*, 12 Ch. D. 152; *Metcalfe* v. *Metcalfe*, [1891] 3 Ch. 1.

(*t*) *Trappes* v. *Meredith*, supra; *Ancona* v. *Waddell*, 10 Ch. D. 157. But the doctrine does not apply to other kinds of forfeiture, e.g. on marriage; *Re Chapman*, [1904] 1 Ch. 431; *Chapman* v. *Perkins*, [1905] A. C. 106.

(*u*) *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; *Robins* v. *Rose*, 43 L. J. Ch. 334; *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; *Hurst* v. *Hurst*, 21 Ch. D. 278; *Re Broughton*, 57 L. T. 8; *Re Loftus-Otway*, [1895] 2 Ch. 235. See ante, p. 1500.

(*v*) *Metcalfe* v. *Metcalfe*, 43 Ch. D. 633, affirmed on another point. [1891] 3 Ch. 1, ante, n. (*s*).

(*w*) L. R., 6 Eq. 482.

CHAP. XXXIX.

death; but within six months afterwards the bankruptcy was annulled. It was held by Lord Romilly, M.R., that the gift nevertheless failed.

Composition with creditors or insolvency.

And it seems the principle does not apply where the act or event on which forfeiture is to take effect is not in its nature such as to deprive the legatee of the personal enjoyment of the legacy; as where there is a gift over on his compounding with his creditors, or becoming insolvent; in such a case a forfeiture is incurred, even if the composition or insolvency takes place during a prior life interest, and does not affect the legatee's interest (*x*).

Accrued share.

In *Dorsett* v. *Dorsett* (*y*) a residuary legatee under a will became bankrupt, and in accordance with a clause in the will he thereby forfeited his original share: he afterwards obtained his certificate and subsequently became entitled to a further share, subject to the same limitations as the original share: it was held by Romilly, M.R., that the accrued share was also forfeited. Sed quære.

Restraint on anticipation.

IX. Restraint on Anticipation by Married Woman.—When property is given to a woman for her separate use (whether the separate use be created by express words (*z*) or by the effect of the Married Women's Property Act, 1882 (*a*), a restraint upon alienation or anticipation may be annexed to the separate use (*b*), but "the restraint is annexed to the separate estate only, and the separate estate has its existence only during coverture; whilst the woman is discovert, the separate estate, whether modified by restraint or not, is suspended and has no operation, though it is capable of arising upon the happening of a marriage. The restriction

(*x*) *Sharp* v. *Cosserat*, 20 Bea. 470; *Muggeridge's Trusts*, Johns. 625. These were both cases of settlements inter vivos.

(*y*) 30 Bea. 256.

(*z*) As to which see infra. It is immaterial that the restraint on anticipation is imposed first and the separate use is attached afterwards; *Baggett* v. *Meux*, 1 Coll. 138; *Re Molyneux's Estate*, 6 Ir. R. Eq. 411.

(*a*) *Baggett* v. *Meux*, 1 Coll. 138: 1 Ph. 627; *Shadon* v. *Lee*, [1891] 1 Q. B. 661; *Re Lumley*, [1896] 2 Ch. 690 (settlement).

(*b*) "The old way of expressing a trust for a married woman was, that the trustees should pay into her proper hands, and upon her own receipt only, yet this Court always said she might dispose of that interest, and her assignee would take it: as, if there was a contract, entitling the assignee, this Court would compel her to give her own receipt, if that was necessary to enable him to receive it. It was not before Miss Watson's case that these words 'not to be paid by anticipation,' &c., were introduced. I believe these were Lord Thurlow's own words; with whom I had much conversation upon it. He did not attempt to take away any power the law gave her, as incident to property, which, being a creature of equity, she could not have at law: but, as under the words of the settlement it would have been hers absolutely, so that she could alien, Lord Thurlow endeavoured to prevent that by imposing upon the trustees the necessity of paying to her from time to time, and not by anticipation; reasoning thus: that equity, making her the owner of it, and enabling her, as a

cannot be considered distinctly from the separate estate of which it is only a modification (*e*)."

Forfeiture on alienation.

Where a married woman is restrained from anticipation, an assignment by her of her interest is wholly inoperative, and therefore does not cause a forfeiture under a clause containing a gift over on alienation (*d*). If, however, the clause prohibits not only alienation, but attempted alienation, an assignment, although inoperative, causes a forfeiture (*e*).

Right to immediate value of annuity, or to accumulation of income.

It has been explained elsewhere that if an annuity is bequeathed or directed to be purchased for the benefit of a person he can insist on having the capital value paid to him (*f*), and that if property is given to a person absolutely, with a direction that the income shall be accumulated for his exclusive benefit during a certain time, he can stop the accumulation and have the property handed over to him (*g*). These rules, however, do not apply in the case of a married woman restrained from anticipation (*h*).

Future coverture.

A restraint on anticipation may be made to extend to every coverture, present or future, or may be restricted to an existing or contemplated coverture (*i*).

Corpus and income.

A restraint on anticipation may apply to both corpus and income or to income only (*j*).

Accrued income.

Where the income of property is given to a married woman, subject to a restraint on anticipation, income accruing de die in diem, but not yet actually payable (such as accruing rents or interest) cannot be dealt with (*k*), but the restraint does not apply to income actually received by the trustee or to arrears of income, such as overdue rents or interest (*l*).

married woman, to alien, might limit her power over it." Per Lord Eldon, in *Brandon* v. *Robinson*, 18 Ves. at p. 434. The same explanation is given by Lord Brougham in *Woodmeston* v. *Walker*, 2 R. & My. at p. 205.

(*c*) Per Lord Langdale, M.R., *Tullett* v. *Armstrong*, 1 Beav. 1, 4 My. & C. 377. The earlier cases of *Newton* v. *Reid*, 4 Sim. 141, and *Brown* v. *Pocock*, 5 Sim. 663, are overruled. See also *Barton* v. *Briscoe*, Jac. 602; *Jones* v. *Salter*, 2 R. & M. 208; *Woodmeston* v. *Walker*, 2 R. & M. 197; *Re Wheeler's Settlement Trusts*, [1899] 2 Ch. 717.

(*d*) *Re Wormald*, 43 Ch. D. 630.

(*e*) *Re Porter*, [1892] 3 Ch. 481, where the assignment was inoperative on another ground.

(*f*) Ante, Chap. XXXI.

(*g*) Ante, p. 561.

(*h*) *Re Spencer*, 30 Ch. D. 183. *Re Ross*, [1900] 1 Ch. 162.

(*i*) *Re Gaffee*, 1 Mac. & G. 541; *Hawkes* v. *Hubback*, L. R., 11 Eq. 5 (settlement); *Re Molyneux's Estate*, 6 Ir. R. Eq. 411; see also the cases on separate use, infra, p. 1518, note (*c*).

(*j*) *Baggett* v. *Meux*, supra; *Cooper* v. *Macdonald*, 7 Ch. D. 288; see *Shute* v. *Hogge*, 58 L. T. 546 (settlement), *Crosby* v. *Church*, 3 Beav. 485; *Hanchett* v. *Briscoe*, 22 Beav. 496.

(*k*) *Re Brettle*, 2 D. J. & S. 79. In this case the wording of the clause was special, but the decision does not appear to have turned on it. See *Hood Barrs* v. *Heriot*, post.

(*l*) *Hood Barrs* v. *Heriot*, [1896] A. C. 174, where *Harnett* v. *MacDougall*, 8 Beav. 187; *Pemberton* v. *M'Gill*, 1 Dr. & Sm. 266; *Rowley* v. *Unwin*, 2 K. & J. 138, and other older authorities are

Barring entail where restraint only affects life estate.

In *Cooper* v. *Macdonald* (*m*), a testator devised real estate in trust for his daughter in tail, with a clause restraining her from alienating or anticipating the income during her life: it was held that this did not prevent her from barring the entail and devising the property by her will.

Capital value of annuity.

So if a married woman is entitled to receive the capital value of an annuity bequeathed to her, with a restraint on anticipation, on her death during coverture the fund passes to her representatives (*n*).

Release of testamentary power.

If a life interest in personal property is given to a married woman subject to a restraint on anticipation, with a testamentary power of appointment over the corpus, she can, by unacknowledged deed, release the power, notwithstanding the restraint on anticipation: and the same rule seems to apply to real property (*o*).

Restraint void for remoteness.

A restraint on anticipation may be void for remoteness. If, for example, an appointment is made to an object of the power who was not in existence at the time of its creation, a superadded restraint on anticipation is void and will be rejected, so that the appointment is absolute (*p*).

Domicil.

Where a married woman is restrained from anticipation, the fact that she is domiciled in a foreign country where such a restraint is not recognized, does not affect its operation under English law (*q*).

No distinction as to income bearing or not income bearing fund.

It was formerly considered that there was a difference between a restraint on anticipation and a restraint on alienation (*r*), and that a restraint on anticipation was inapplicable to a sum of cash or a fund which was not producing income, and that in such a case the corpus was payable to the feme covert during coverture (*s*); although a different rule prevailed if the property consisted of

referred to. See also *Whiteley* v. *Edwards*, [1896] 2 Q. B. 48; *Bolitho* v. v. *Gidley*, [1905] A. C. 98; *Hood Barrs* v. *Cathcart*, [1894] 2 Q. B. 559; *Cox* v. *Bennett*, [1891] 1 Ch. 617; *Pillers* v. *Edwards*, 71 L. T. 788.

(*m*) 7 Ch. D. 288. As to the power of a married woman to dispose by will of property which she is restrained from alienating, see above, p. 53. A judgment against a married woman cannot be satisfied out of property which she is restrained from anticipating, but if by her will she directs her debts to be paid, this makes the property assets; *Sprange* v. *Lee*, [1908] 1 Ch. 424.

(*n*) *Re Ross*, [1900] 1 Ch. 162.

(*o*) *Re Chisholm*, [1901] 2 Ch. 82. See *Heath* v. *Wickham*, 5 L. R. Ir. 285.

(*p*) *Fry* v. *Capper*, Kay, 163, ante, p. 306, where the cases as to separable gifts are referred to. As to the expedieney of applying the rule against perpetuities to restraints on anticipation, see *Re Ridley*, 11 Ch. D. 645, and Gray on Perpetuities.

(*q*) *Peillon* v. *Brooking*, 25 Bea. 218.

(*r*) *Re Ellis*, L. R., 17 Eq. 409. In its original form the restraint on anticipation clearly applied to income only: ante, p. 1514, note (*b*). Hence the doubt.

(*s*) *Re Croughton's Trusts*, 8 Ch. D. 460; *Re Clarke's Trusts*, 21 Ch. D. 748; *Re Coombes*, [1883] W. N. 169; *Armitage* v. *Coates*, 35 Bea. 1; *Re Taber*, 46 L. T. 805.

land or of an income bearing fund (*t*). But in *Re Bown* (*u*), the Court of Appeal 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 shewn an intention that the trustees of his will shall keep the fund and only pay the income, if any, to the married woman. In that particular case the testator bequeathed a fund upon trust for A. for life and after her death directed the trustees to pay it to B., a married woman, for her separate use without power of anticipation: it was held that the clause restraining the legatee from anticipation was satisfied by being applied to the bequest while it was reversionary: when the bequest fell into possession the restraint ceased to operate (*v*). It follows from this principle that if a testator directs a legacy to be raised and paid to a legatee for her separate use without power of anticipation, and directs that a share of residue shall be held upon trust for her for her separate use without power of anticipation, she is entitled to receive the legacy, but not the share of residue (*w*). And where there is no direction to pay or transfer, but the property is directed to be held in trust for a married woman restrained from anticipation, the mere fact that it is reversionary does not make the restraint cease to operate when the property falls into possession (*x*).

Re Bown.

There is no distinction between a restraint on anticipation and a restraint upon alienation (*y*).

Anticipation and alienation.

A woman upon whom property has been settled with a restraint on anticipation may, while discovert, so deal with it as to put an end to the restraint (*z*).

Extinguishment of restraint.

Since January 1, 1882, "notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, when it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property" (*a*).

The Court may bind the interest of a married woman restrained from anticipation.

And under the Married Women's Property Act, 1893, section 2, where proceedings are brought by or on behalf of a married woman,

(*t*) *Baggett* v. *Meux*, 1 Coll. 138: 1 Ph. 627; *Re Sarel*, 10 Jur. N. S. 876; *Re Gaskell's Trusts*, 11 Jur. N. S. 780; *Re Sykes's Trusts*, 2 J. & H. 415; *Re Ellis' Trusts*, L. R., 17 Eq. 409; *Re Benton*, 19 Ch. D. 277.

(*u*) 27 Ch. D. 411.

(*v*) So in *Re Milward*, 87 L. T. 476.

(*w*) *Re Grey's Settlements*, 34 Ch. D. 712; *Re Fearon*, 45 W. R. 232; *Re Spencer*, 30 Ch. D. 183; *Re Bankes*, [1902] 2 Ch. 333 (settlement); *Russell* v. *Lawder*, [1904] 1 Ir. 328.

(*x*) *Re Tippett's and Newbould's Contract*, 37 Ch. D. 444; *Re Holmes*, 67 L. T. 335.

(*y*) *Re Currey*, 32 Ch. D. 361. See also the same case as reported 56 L. T. 80.

(*z*) *Bullanshaw* v. *Martin*, John. 89.

(*a*) Conveyancing Act, 1881, s. 39.

CHAP. XXXIX.

the Court may order the costs of the opposite party to be paid out of property belonging to her subject to a restraint on anticipation.

Old law still important.

What Words will create a Separate Use under the Old Law.—Although since the passing of the Married Women's Property Act, 1882, the question by what words and to what extent a separate use can be created, is gradually becoming of less importance, yet there still remain many cases to which the act does not apply, and it is necessary shortly to consider the effect of the decisions on the point, because, as already pointed out, a restraint on anticipation cannot be attached to property unless it is separate estate.

Future coverture.

It was formerly doubted whether a trust for separate use could be created in favour of an unmarried woman, so as to arise on her marriage (*b*), but these doubts have long since been removed, and it is now settled, as a general rule, that if property is given to a woman, whether married or unmarried, for her separate use, without reference to any specific coverture, the separate use applies to every coverture. If, however, an intention appears that the separate use should only attach during some existing or contemplated coverture, effect will be given to it (*c*).

Corpus and income.

Where property is given to the separate use of a woman, the separate use, as a general rule, applies to the corpus as well as the income, but it may of course be restricted to the income by apt words (*d*).

Principle of construction.

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 (*e*)

Not created by implication.

A declaration that a married woman shall be restrained from anticipation does not create a separate use by implication, and is,

(*b*) *Massey* v. *Parker*, 2 My. & K. 174; *Johnson* v. *Johnson*, 1 Kee. 648.

(*c*) *Scarborough* v. *Borman*, 1 Bea. 34: 4 My. & Cr. 377, 407; *Beable* v. *Dodd*, 1 T. R. 193; *Re Gaffee*, 1 Mac. & G. 541, and the cases there cited; *Moore* v. *Morris*, 4 Drew. 33; *Hawkes* v. *Hubback*, L. R., 11 Eq. 5; *King* v. *Lucas*, 23 Ch. D. 712 (settlement). See *Re Molyneux's Estate*, 6 Ir. R. Eq. 411; *Stogdon* v. *Lee*, [1891] 1 Q. B. 661 (deed); *Shute* v. *Hogge*, 58 L. T. 546 (settlement), and *Steedman* v. *Poole*, 6 Ha. 193, where the bequest (referring to any *future* husband) was to a woman married at the date of the will, and it was held that the separate use attached during the existing coverture.

(*d*) *Taylor* v. *Meads*, 4 D. J. & S. 597; *Troutbeck* v. *Boughey*, L. R., 2 Eq. 534; *Cooper* v. *Macdonald*, 7 Ch. D. 288, ante, p. 1516. As to the principle of construction where income alone is given, see infra, p. 1520.

(*e*) *Lumb* v. *Milnes*, 5 Ves. 517; *Rich* v. *Cockell*, 9 Ves. 369; *Ex parte Ray*, 1 Madd. 199; *Tyler* v. *Lake*, 2 R. & My. 183; *Massey* v. *Parker*, 2 My. & K. 174; *Kensington* v. *Dollond*, ibid. 184. 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.

therefore, inoperative unless the property is made separate estate by statute (*f*).

"Separate."

"Separate" is an accepted technical word for excluding the marital right (*g*); consequently, unless it is clear that the testator has used the word in some other sense, the Court will give to it its technical effect, and there does now seem to be any reported case in which the word "separate" in a will has not received its proper technical signification.

Equivalent expressions.

But any words clearly intended to exclude marital control are sufficient (*h*). "No particular form of words is necessary in order to vest property in a married woman to her separate use. That intention, although not expressed in terms, may still be inferred from the nature of the provisoes annexed to the gift; as where, for example, the direction is that the property shall be at the wife's own disposal or that her receipts shall be a good discharge; circumstances which raise a manifest implication that the marital right was meant to be excluded" (*i*).

"Sole."

At one time the view was put forward that the word "sole" had a fixed technical meaning equivalent to separate (*j*), but that has long since been exploded, and it is now well settled that the word "sole" has not of itself, *proprio vigore*, the same or an equal technical meaning with the word "separate" (*k*). If then there is a gift to an unmarried woman for her sole use, and there is nothing more to shew any intention to exclude an after taken husband, the gift will not be for her separate use. If, however, the word "sole" is used in an ante nuptial marriage settlement it is almost inevitable to conclude that the intention is to exclude the husband (*l*). And similarly a gift for the sole use and benefit of a woman whom the testator contemplates as about to marry, is a gift for her separate use. Thus, in *Re Tarsey's Trust* (*m*), Wood, V.-C., said "I cannot treat the word 'sole' when it is applied to the contemplated case of the marriage of a single woman, as connected with anything else than her marriage." Similarly if the gift is to a married woman the word

Woman about to marry; or married.

(*f*) *Stogdon* v. *Lee*, [1891] 1 Q. B. 661.

(*g*) *Massy* v. *Rowen*, L. R., 4 H. L. 288; *Archer* v. *Rorke*, 7 Ir. Eq. R. 478.

(*h*) *Wagstaff* v. *Smith*, 9 Ves. 520; *Bain* v. *Lescher*, 11 Sim. 397.

(*i*) Per Brougham, C., in *Stanton* v. *Hall*, 2 Russ. & Myl. at p. 180.

(*j*) See *Lindsell* v. *Thacker*, 12 Sim. 178; *Cox* v. *Lyne*, Younge, 562; *Ex parte Killick*, 3 Mont. D. & De G. 480; *Adamson* v. *Armitage*, 19 Ves. 416.

(*k*) *Massy* v. *Rowen*, supra; *Gilbert* v. *Lewis*, 1 D. J. & S. 38; *Green* v. *Marsden*, 1 Dr. 646 (gift to testator's widow); *Lewis* v. *Mathews*, L. R., 2 Eq. 177; and see *Parker* v. *Brooke*, 9 Ves. 583; *Archer* v. *Rorke*, 7 Ir. Eq. R. 478; *Hulme* v. *Tenant*, 1 Br. C. C. 16.

(*l*) *Ex parte Ray*, 1 Madd. 199.

(*m*) L. R., 1 Eq. 561. See also *Ex parte Killick*, 3 Mont. D. & De G. 480.

CHAP. XXXIX.

"sole," in the absence of other indications, shews an intention to exclude the husband. For the Court must attribute to the testator the knowledge that a gift to a married woman, if not to her separate use, would be under the control of her husband (*n*). In *Hartford* v. *Power* (*o*), Chatterton, V.-C., put the matter in the following words: "Although the primary and grammatical meaning of the word 'sole' does signify exclusion, the real question to be solved is exclusion of whom? When the woman is unmarried, and the instrument does not, in terms or from the circumstances, point this expression to a future coverture, the exclusion is now settled to be of others in general, and therefore not to apply with the required particularity to an after taken husband. But if the woman is married, it seems to me that the exclusion most natural to occur to the mind of the donor aware of her coverture is that of her husband; and he can be excluded only by holding the property to be to the separate use of the wife."

Distinction between income and corpus as regards the word "sole."

Income being more commonly devoted to separate use than corpus, "sole" may more readily be understood as intended to annex such a use to income than to corpus (*p*). But if a testator, after directing that the income bequeathed to females shall be "under their sole control" (words which, standing alone, would clearly exclude the marital right), shews 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 (*q*).

To "pay into the proper hands."

In *Hartley* v. *Hurle* (*r*), Arden. M.R., thought that a trust to pay income "into the proper hands" of A. was a trust for her separate use. But in *Tyler* v. *Lake* (*s*), Shadwell, V.-C., held that a trust to pay a share of a fund into the "own proper hands" of a married woman, "to and for her own use and benefit," did not create a separate use: and the decision was affirmed by Lord Brougham (*t*)

(*n*) *Bland* v. *Dawes*, 17 Ch. D. 794; *Inglefield* v. *Coghlan*, 2 Coll. 247; *Farrow* v. *Smith*, [1877] W. N. 21; *Re Amies' Estate*, [1880] W. N. 16; *Green* v. *Britten*, 1 D. J. & S. 649; and see *Re Graham's Trusts*, 20 W. R. 289.

(*o*) 2 Ir. R. Eq. 204.

(*p*) Per Lord Cairns, L. R., 4 H. L. at p. 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; *Troutbeck* v. *Boughey*, L. R., 2 Eq. 534. The decision in *Hartley* v. *Hurle* (infra) might perhaps have been justified on this ground, but the distinction is ignored in the later cases.

(*q*) *Massey* v. *Parker*, 2 My. & K. 174. See also *Ex parte Ray*, 1 Mad. 199, supra. 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 later cases; with which also *Cox* v. *Lyne*, Younge, 562, and *Lindsell* v. *Thacker*, 12 Sim. 178, are difficult to reconcile.

(*r*) 5 Ves. 540.

(*s*) 4 Sim. 144 (gift by deed).

(*t*) 2 R. & My. 183. See also the cases cited post, p. 1522, n. (*k*).

and reluctantly followed by Wigram, V.-C., in *Blacklow* v. *Laws* (*u*), where the trust was "to pay an annuity into the proper hands of A., for her own proper use and benefit." 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* (*v*), held to create a trust for her separate use.

Power to woman to give receipt.

One method of indicating an intention to exclude the husband is to direct that the wife's receipt should be a sufficient discharge, but in the cases referred to in the footnote below (where this construction was adopted) the will shewed that the testator knew that the woman was married (*w*). If the legatee was unmarried, and not contemplating marriage at the date of the will, it is not clear whether a power to give receipts would create a separate use during a future coverture.

Intention to exclude husband.

Again, words shewing a clear intention to exclude the husband, such as "independent of her husband" (*x*), or directing that the husband "is to have no control" (*y*), or any similar expressions (*z*), create a separate use. And words shewing that the wife is to have a power of disposition apart from her husband, as "to do therewith as she shall think fit" (*a*). will have the same effect at any rate if the bequest is to a married woman.

Even the words "independent of any other person" have in one case been held to mean independent of all mankind, and therefore of the husband (*b*).

Where a testatrix directed that if A. and his wife should not be living together at the time of her death, then certain property should go as to one half to A.'s wife "absolutely" and as to the other half to A: it was held that the wife took her moiety as her separate estate (*c*).

A bequest of a mortgage and bonds to a married woman "to be delivered up whenever she shall demand or require the same" is a bequest to her separate use (*d*).

(*u*) 2 Hare, p. 49. See also *Rycroft* v. *Christy*, 3 Bea. 238.

(*v*) 1 D. F. & J. 146.

(*w*) *Lee* v. *Prieaux*, 3 B. C. C. 381. *In Re Lorimer*, 12 Bea. 521; *Cooper* v. *Wells*, 11 Jur. N. S. 923; *Re Molyneux's Estate*, 6 Ir. R. Eq. 411 (settlement). See also *Stanton* v. *Hall*, supra, and *Surman* v. *Wharton*, [1891] 1 Q. B. 491 (deed of gift by husband).

(*x*) *Wagstaff* v. *Smith*, 9 Ves. 520; *Re Sarel*, 4 N. R. 321.

(*y*) *Edwards* v. *Jones*, 14 W. R. 815.

(*z*) Such as a direction that a tenant for life of property shall receive the rents "whether married or single"; *Goulder* v. *Camm*, 1 D. F. & J. 146.

(*a*) *Kirk* v. *Paulin*, 7 Vin. Abr. 95, pl. 43. See *Prichard* v. *Ames*, T. & R. 222; *Bland* v. *Dawes* (supra).

(*b*) *Margetts* v. *Barringer*, 7 Sim. 482; *Glover* v. *Hall*, 16 Sim. 568; but see L. R., 4 H. L. at p. 298.

(*c*) *Shewell* v. *Dwarris*, Johns. 172.

(*d*) *Dixon* v. *Olmius*, 2 Cox, 414.

CHAP. XXXIX.

In *Johnes* v. *Lockhart* (*e*), Arden, M.R., is reported to have said that a legacy to husband and wife, but so that the husband should not dispose of it without her consent, was a gift to her separate use.

Trust for maintenance.

In *Darley* v. *Darley* (*f*), 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 (*g*). In *Packwood* v. *Maddison* (*h*), Leach, V.-C., said that by a gift 'for the support of" a feme covert a trust for her separate use was not created (*i*). In *Cape* v. *Cape* (*j*), 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.

Words which will not create a separate use.

Upon the general principle of construction that in order to create a separate use there must be a clear intention to exclude the husband, mere expressions implying that the gift is for the benefit of the married woman, as a gift to "her own use and benefit" (*k*), even where payment is directed to be made "into her proper hands" (*l*), are not sufficient to create a separate use. Other cases on wills in which it has been held that no separate use is created, are collected in the footnote (*m*).

Extrinsic circumstances not regarded.

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 (*n*); unless the circumstances are expressly referred to in the will, as when, in the event of the husband and wife being separated at the testator's death, the bequest was to the wife "absolutely" (*o*).

(*e*) 3 Br. C. C. 383, note by Belt.

(*f*) 3 Atk. 399.

(*g*) See note by Sanders, 3 Atk. 399, and per Arden, M.R., 3 Br. C. C. 383.

(*h*) 1 S. & St. 232.

(*i*) And see *Gilchrist* v. *Cator*, 1 De G. & S. 188, and per Hall, V.-C., *Austin* v. *Austin*, 4 Ch. D. at p. 236, where the trust was discretionary.

(*j*) 2 Y. & C. 543.

(*k*) *Wills* v. *Sayers*, 4 Madd. 409; *Roberts* v. *Spicer*, 5 Madd. 491; *Johnes* v. *Lockhart*, 3 Br. C. C. 383 n., supra; *Kensington* v. *Dollond*, 2 My. & K. 184; *Beales* v. *Spencer*, 2 Y. & C. C. C. 651; *Taylor* v. *Stainton*, 2 Jur. N. S. 634; *Blacklow* v. *Laws*, 2 Hare, 49.

(*l*) Supra, p. 1520.

(*m*) *Dakins* v. *Berisford*, 1 Ch. Ca. 194; *Lumb* v. *Milnes*, 5 Ves. 517; *Jacobs* v. *Amyatt*, 1 Madd. 376 n.; *Rycroft* v. *Christy*, 3 Bea. 238; *Massey* v. *Parker*, 2 My. & K. 174; *Gilbert* v. *Lewis*, 1 D. J. & S. 38; *Lewis* v. *Mathews*, L. R., 2 Eq. 177; *Massy* v. *Rowen*, L. R., 4 H. L. 288; *Re Graham's Trusts*, 20 W. R. 289; *Chipchase* v. *Simpson*, 16 Sim. 485; *Brown* v. *Clark*, 3 Ves. 166; *Wardle* v. *Claxton*, 9 Sim. 524.

(*n*) *Palmer* v. *Trevor*, 1 Vern. 261, Raithby's ed.

(*o*) *Shewell* v. *Dwarris*, Johns. 172, supra, p. 1521.

But the fact of the husband being one of the trustees (*p*), or even that of the prior trust being for him determinable on bankruptcy (the trust in that event being simply to pay "unto" the wife (*q*)), does not afford ground for inferring a separate trust. If the husband were made sole trustee, the inference might be stronger (*r*).

What Words will create a Restraint on Anticipation.—No technical form of words is necessary to create a restraint upon anticipation, but the intention must be clear (*s*).

Thus a direction that no sale or mortgage of the property or the rents arising from it shall take place during the life of a woman to whom the rents and profits have been given for her separate use, is sufficient to create a restraint upon anticipation (*t*); and a declaration that a married woman who is a devisee in fee to her separate use shall not sell, charge, or incumber the property, has been held to attach a restraint on anticipation to the corpus (*u*). The words "free from her debts or engagements, whether any such might be contracted by herself or any husband," create a restraint on anticipation (*v*).

Precatory words.

But if a testator gives property to a woman absolutely, and adds that it is his "wish and request" that she should not sell or dispose of it, these words do not create a restraint on anticipation (*w*).

In *Re Wolstenholme* (*x*), a testator gave a share of his residue upon trust for each of his children for life (in the case of daughters for their separate use), with a general power of appointment by deed or will subject to a clause of forfeiture in the event of the income of the share ceasing from any cause during the life of the child, to be payable "into his or her own hands as an inalienable personal provision." One of the children, a married woman, assigned her share to trustees, and it was held by Malins, V.-C., that the assignment was operative on the ground that the attempted restraint on alienation was wholly void on the general principle already considered (*y*). But might it not be void in the case of

(*p*) *Kensington* v. *Dollond*, 2 My. & K. 184.

(*q*) *Stanton* v. *Hall*, 2 R. & My. 175.

(*r*) Per Leach, V.-C., *Ex parte Beilby*, 1 Gl. & J. 167, and see p. 1522, above.

(*s*) See *Wagstaff* v. *Smith*, 9 Ves. 520.

(*t*) *Goulder* v. *Camm*, 1 D. F. & J. 146.

(*u*) *Baggett* v. *Meux*, 1 Coll. 138 affirmed 1 Ph. 627, and see *Steedman* v. *Poole*, 6 Ha. 193 (leaseholds).

(*v*) *White* v. *Herrick*, 21 W. R. 454.

(*w*) *Re Hutchings to Burt*, 59 L. T. 490.

(*x*) 43 L. T. 752.

(*y*) Ante, p. 562.

CHAP. XXXIX.

sons and unmarried daughters and yet valid in the case of married daughters?

Trust for payment of income when due.

By a trust for the separate use of a married woman and a declaration that the receipt of herself or the persons to whom she should appoint the income *after the same should become* due should be effectual, it was held that a restraint on anticipation was created (*z*). On the other hand, a direction to pay the income from time to time, or as it shall become due, or into the proper hands of the feme covert (*a*),or even upon her personal appearance and receipt (*b*), will not take away the power of anticipation.

In *Alexander* v. *Young* (*c*), the rule requiring clear words was carried to its full extent, Wigram, V.-C., holding that a trust for the separate use of a married woman for 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.

Power of appointment and trust in default.

Cases have occurred in which a power to appoint the annual income of property is given to a married woman during her life, followed by a trust in default of appointment to pay the income into her hands, with a restraint on anticipation so expressed as to make it doubtful whether, as a matter of strict grammatical accuracy, it applies only to the power of appointment or only to the trust in default of appointment, and whether the married woman is consequently free, in the one case to assign her life interest, and in the other to exercise the power of appointment. Some narrow-minded decisions of Shadwell, V.-C., for a time made the law uncertain, but they have been either expressly or impliedly overruled, and in a case of this kind effect is now given to the obvious intention of the testator that the married woman should be debarred from disposing of the income until it actually falls due (*d*).

Executory trust.

Where a testator after a gift of real and personal estate to trustees for his daughter directed that in case she should marry her share of the estate should be so settled that she might enjoy the income thereof during her life for her separate use, it was held that the

(*z*) *Field* v. *Evans*, 15 Sim. 375. See *Parker* v. *Bradley*, 7 De G. M. & G. ; *Re Smith*, 51 L. T. 501. The decision in *Acton* v. *White*, 1 S. & St. 429, is explained in *Baker* v. *Bradley*, supra.

(*a*) *Pybus* v. *Smith*, 3 B. C. C. 340; 1 Ves. jun. 189; *Parkes* v. *White*, 11 Ves. 209; *Acton* v. *White*, 1 S. & St. 429 (supra, note (*z*)). *Glyn* v. *Baster*, 1 Y. & J. 329.

(*b*) *Ross's Trust*, 1 Sim. N. S. 196; *Wagstaff* v. *Smith*, 9 Ves. 520.

(*c*) 6 Hare, 393.

(*d*) *Barrymore* v. *Ellis*, 8 Sim. 1; *Brown* v. *Bamford*, 11 Sim. 127; 1 Ph. 620; *Medley* v. *Horton*, 14 Sim. 222; see *Moore* v. *Moore*, 1 Coll. 54; *Harrop* v. *Howard*, 3 Ha. 624; *Harnett* v. *Macdougall*, 8 Bea. 187; Lewin on Trusts; Vaizey on Settlements, p. 532 seq.

trust should be carried into execution, with a restraint upon anticipation (*e*).

Implication.

Where two separate provisions are made by will in favour of a woman, and a restraint on anticipation is expressly attached to one of them, it may by implication be extended to the other (*f*).

X. Conditions in Restraint of Marriage.—(i.) *Conditions in Partial Restraint of Marriage.*—Mr. Jarman continues (*g*): "It is now proposed to treat of conditions in restraint of marriage (*h*). The numerous and refined distinctions on this subject, however, do not apply to devises of, or pecuniary charges upon, real estate (*i*), but are confined exclusively to personal legacies; and with regard to the latter, they owe their introduction to the ecclesiastical courts, who, in the exercise of their jurisdiction over personal legacies, it is well known, borrowed many of their rules from the civil law.

Conditions in partial restraint of marriage.

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 (*j*); 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 (*k*); but this doctrine did not apply to widows.

Rule of the civil law.

"Our Courts, however, have not adopted this rule in its unqualified extent, but have subjected it to various modifications. 'By the law of England,' says an eminent judge, 'an injunction to ask consent is lawful, as not restraining marriage generally (*l*). A condition that a widow shall not marry, is *not*

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

(*e*) *Re Dunnill's Trusts*, Ir. R. 6 Eq. 322. See the cases cited ante, p. 906.

(*f*) *Re Lawrenson*, [1891] W. N. 28.

(*g*) First ed. p. 836.

(*h*) To constitute a breach of a condition of this nature the marriage must of course be a valid one. *Re M'Loughlin's Estate*, 1 L. R. Ir. 421. If a marriage is valid it constitutes a breach, although solemnized under a false name and by means of false statements; *Re Rutter*, [1907] 2 Ch. 592. See post, p. 1536, n. (*m*).

(*i*) *Reves* v. *Herne*, 5 Vin. Abr. 343, pl. 41; *Harvey* v. *Aston*, 1 Atk. 361; *Reynish* v. *Martin*, 3 Atk. 330. As to conditions in partial restraint of marriage annexed to gifts of real estate, see *Tricker* v. *Kingsbury*, 13 W. R. 652, and post, p. 1527, and as to conditions in total restraint, post, subsec. (iii.). Money arising from the sale of lands is subject to the same rule as personal legacies; *Bellairs* v. *Bellairs*, L. R., 18 Eq. 510.

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

(*k*) Ib. p. 3, c. 17.

(*l*) *Sutton* v. *Jewke*, 2 Ch. Rep. 95; *Creagh* v. *Wilson*, 2 Vern. 572; *Ashton* v. *Ashton*, Pre. Ch. 226; *Chauncy* v. *Graydon*, 2 Atk. 616; *Hemmings* v. *Munckley*, 1 B. C. C. 303; *Dashwood* v. *Bulkeley*, 10 Ves. 230; *Lloyd* v. *Branton*, 3 Mer. 108; *Re Whiting's Settlement*, [1905] 1 Ch. 96. See further as to conditions requiring consent, especially with reference to the question whether a gift over is required, post, p. 1528.

unlawful (*m*). An annuity during widowhood (*n*), a condition to marry or not to marry T., is good (*o*). A condition prescribing due ceremonies and place of marriage is good (*p*); still more is the condition good which only limits the time to twenty-one (*q*), or any other reasonable age (*r*), provided it be not used as a cover to restrain marriage generally" (*s*). Conditions not to marry a Papist (*t*); or a Scotchman (*u*); or any person within certain near degrees of kindred (*v*); or not to marry any but a Jew (*w*), have also been held good.

Other conditions in partial restraint of marriage.

On the other hand, a condition not to marry a man who is not seised of an estate in fee, or of perpetual freehold of the annual value of 500*l*., is said to be too general, and therefore void (*x*).

Condition apparently partial may be too general in effect.

In an old collection of cases (*y*) there is a note by the compiler (*z*) to this effect: "A devise upon condition not to marry at all, or not to marry a person of such a profession or calling, is void by our law, whether there be a limitation over or not: but if it were upon condition not to marry a Papist, or a certain person by name, it may be good. 1 Vern. 20." It is submitted that the rule as to marrying persons of certain professions or callings is too widely expressed, and that the question in each case is whether the restraint is reasonable. The case of *Jenner* v. *Turner* (*a*) seems to have been

Professions and callings.

(*m*) See *Lloyd* v. *Lloyd*, 2 Sim. N. S. 255, post, p. 1541. Mr. Jarman cites in support of this proposition *Jordan* v. *Holkham*, Amb. 209. In that case a testator devised land to his wife during widowhood, with a proviso that if she married during the life of the testator's daughter, the daughter should enter into possession. Lord Hardwicke seems to have thought that though a devise during widowhood, with remainder over on marriage at any time, is good, yet a remainder over on marriage within a limited time, as in the case at bar, is bad.

(*n*) See *Re Ross*, [1900] 1 Ch. 162. Mr. Jarman cites in support of this proposition *Barton* v. *Barton*, 2 Vern. 308, but that was not the case of an annuity.

(*o*) *Jervis* v. *Duke*, 1 Vern. 19; *Bertie* v. *Falkland*, 3 Ch. Cas. 129; *Falkland* v. *Bertie*, 2 Vern. 333. See also *Randal* v. *Payne*, 1 B. C. C. 55, ante, p. 1471; *Davis* v. *Angel*, 4 D. F. & J. 524. The case of *W*—— v. *B*——, 11 Bea. 621, where there was a condition against marriage with a certain person, is too shortly reported to be intelligible (see post, p. 1532, n. (*c*)).

(*p*) 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.

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

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

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

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

(*u*) *Perrin* v. *Lyon*, 9 East, 170 (real estate).

(*v*) *Re Chapman*, [1904] 1 Ch. 431, s. c. sub. nom. *Chapman* v. *Perkins*, [1905] A. C. 106.

(*w*) *Hodgson* v. *Halford*, 11 Ch. D. 959. As to this case, which was that of an appointment under a special power, see Farwell on Powers, 423. See also *Re Knox*, 23 L. R. Ir. 542.

(*x*) *Keily* v. *Monck*, 3 Ridg. P. C. 205. See *Long* v. *Dennis*, 4 Burr. 2052, where the condition was against marrying a woman not having a competent marriage portion, unless with the consent of the trustees.

(*y*) 1 Eq. Ca. Ab. 110, pl. 1, marg.

(*z*) As to the identity of the compiler, see 16 Ch. D. p. 193 n.

(*a*) 16 Ch. D. 188.

rightly decided on this principle. There a testatrix devised real estate to her brother and his sons in tail, and declared that if he should marry a domestic servant, or any person who had been a domestic servant, the devise should be null and void, and in lieu thereof she devised the real estate to other persons: it was held by Bacon, V.-C., that the condition was valid. So a condition restraining a devisee from marrying "a man beneath her in life, that is to say, below her in social position," is valid (*b*).

Waiver of condition by testator.

Where a testator bequeaths property upon condition that the legatee marries T., and the legatee marries someone else during the testator's lifetime and with his assent, this does not relieve the legatee from the condition so as to entitle him to the legacy (*c*). It is not clear whether the same rule applies where the condition is that the legatee shall not marry before a certain age, and he (or she) marries under that age with the testator's assent (*d*).

Condition that legatee shall marry.

It will be remembered that where property is given to a person on condition of his marrying, he has his whole life to perform the condition (*e*).

Marriage during testator's lifetime.

The general rule applicable to clauses of forfeiture on bankruptcy, &c., namely that such a clause takes effect if the bankruptcy, &c., occurs during the lifetime of the testator, does not apply to clauses of forfeiture on marriage: it is a question of construction in each particular case whether the clause applies only in the case of marriage after the testator's death (*f*).

Condition in partial restraint of marriage annexed to gift of real estate.

In saying that "the numerous and refined distinctions" on the subject of conditions in restraint of marriage do not apply to devises of, or pecuniary charges on, real estate (*g*), Mr. Jarman seems to refer to the general principle that if a condition annexed to such a devise or charge is good at all, it does not require a gift over to make it valid. The existence of this principle is expressly or tacitly recognized in many of the old books (*h*), where it is said to be based on the rule that on breach of a condition the heir of

(*b*) *Greene* v. *Kirkwood*, [1895] 1 Ir. 130.

(*c*) *Davis* v. *Angel*, 4 D. F. & J. 524. The decision in *Smith* v. *Cowdery*, 2 S. & St. 358, professes to follow *Clarke* v. *Berkeley* and other cases where the condition required marriage with consent; these cases rest on a special rule, infra, p. 1535. See *Violett* v. *Brookman*, 26 L. J. Ch. 308.

(*d*) *Younge* v. *Furse*, 8 D. M. & G. 756. Compare the cases on gifts until marriage, post, p. 1542.

(*e*) *Randal* v. *Payne*, 1 B. C. C. 55, infra, p. 1533. So if the condition is that the legatee shall marry a particular person, the gift is in suspense during their joint lives; *Kiersey* v. *Flahaven*, [1905] 1 Ir. 45.

(*f*) *Re Chapman*, [1904] 1 Ch. 431, [1905] A. C. 106 (*Chapman* v. *Perkins*). It may be doubted whether the decision in *Greene* v. *Kirkwood*. [1895] 1 Ir. 130, can be supported.

(*g*) Ante, p. 1525.

(*h*) See the cases cited ante, p. 1525, and the note at the end of *Harvey* v. *Aston*, 1 Atk. at p. 381.

CHAP. XXXIX.

the testator could enter, and in a modern case in Ireland (*i*), Christian, L.J., laid it down as a general rule that the in terrorem doctrine does not apply to devises of real estate. In that case, however, the condition was directed against the re-marriage of a widow, and was not, therefore, a condition in partial restraint of marriage.

Condition requiring marriage with consent.

(ii.) *Conditions requiring Consent.*—In the case of conditions requiring marriage with consent, or prohibiting marriage without consent (*j*), it is clear that there is a distinction between gifts of personal legacies and moneys arising from the sale of land on the one hand, and devises of land and bequests of money charged upon land on the other. For under a gift to A. of land, or money charged on land, upon condition that A. marries with the consent of X., the condition is precedent, and A. takes nothing unless he marries in accordance with the condition (*k*); so if land is devised to A. subject to a condition that he shall not marry without the consent of X., the condition is subsequent, and if he marries without consent, his estate is divested (*l*). It is clear that no gift over is required where the condition is precedent, and it is said that the same rule applies to conditions subsequent, but there does not seem to be any clear authority on the latter point (*m*).

Real estate.

Condition to ask consent, when *in terrorem*.

With regard to gifts of personalty, including money arising from the sale of lands (*o*), Mr. Jarman points out (*p*) that "to make a condition to ask consent effectual, there must be a bequest over in

(*i*) *Duddy* v. *Gresham*, 2 L. R. Ir. 443, stated post, p. 1541.

(*j*) Ante, p. 1525, and authorities cited in note (*l*).

(*k*) *Reves* v. *Herne*, 5 Vin. Abr. 343, pl. 41; *Harvey* v. *Aston*, 1 Atk. 361, and note on p. 381; *Reynish* v. *Martin*, 3 Atk. 330.

(*l*) *Fry* v. *Porter*, 1 Mod. 300.

(*m*) See Mr. Jarman's statement of the rule as applied to legacies charged on real estate in aid of the personalty, post, p. 1533. For this statement he cites *Reynish* v. *Martin*, 3 Atk. 330; but in that case the condition was precedent, and according to Lord Hardwicke there is a distinction between conditions precedent and subsequent, for he says: "Where the condition is precedent, the legatary takes nothing till the condition is performed, and consequently has no right to come and demand the legacy; but it is otherwise where the condition is subsequent, for in that case the legatary has a right, and the Court will decree him the legacy; *but this difference only holds where the legacy is a charge on the real assets.*" In *Fry* v. *Porter*, 1 Mod. 300, and *Aston* v. *Aston*, 2 Vern. 452, there was a devise over. *Haughton* v. *Haughton*, 1 Moll. 611 (ante, p. 1526, note (*p*)), is sometimes cited in support of the statement that in the case of real estate a condition subsequent in partial restraint of marriage is effectual without a gift over, but it would appear that the will contained a devise over, for one of the arguments was that the condition was void, and that consequently "the devise over" was void. As to whether the rule applies where real and personal estates are given together, see *Duddy* v. *Gresham*, 2 L. R. Ir. 443, stated post.

(*o*) See *Lloyd* v. *Lloyd*, 2 Sim. N. S. 255; *Bellairs* v. *Bellairs*, L. R., 18 Eq. 510; in both these cases the condition was in total restraint of marriage, but the principle is obviously the same.

(*p*) First ed. p. 837.

default, otherwise the condition will be regarded as *in terrorem* only (*q*).

"Different 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 (*r*). 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 (*s*).

In terrorem doctrine as to conditions subsequent;

"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

and precedent.

(*q*) As to the in terrorem doctrine, see ante, sect. II. (vii.). The rule that a condition subsequent making marriage at any age without consent a cause of forfeiture, is valid if accompanied by a gift over, has been affirmed by the C.A. in *Re Whiting's Settlement*, [1905] 1 Ch. 96; following *Dashwood* v. *Lord Bulkeley*, 10 Ves. 230, and *Lloyd* v. *Branton*, 3 Mer. 108. The earlier cases cited by Mr. Jarman are *Sutton* v. *Jewke*, 2 Ch. Rep. 95; *Hicks* v. *Pendarvis*, 2 Freem. 41; *Bellasis* v. *Ermine*, 1 Ch. Cas. 22; *Stratton* v. *Grymes*, 2 Vern. 357; *Aston* v. *Aston*, 2 Vern. 452; *Semphill* v. *Bayly*, Pre. Ch. 562; Sel. Cas. in Ch. 26; *Harvey* v. *Aston*, 1 Atk. 361; *Chauncy* v. *Graydon*, 2 Atk. 616; *Reynish* v. *Martin*, 3 Atk. 330; *Wheeler* v. *Bingham*, 3 Atk. 364; *Clarke* v. *Parker*, 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 douhted by Lord *Loughborough*, in *Hemmings* v. *Munckley*, 1 B. C. C. 303; s. c. 1 Cox, 39; and denied by Lord *Thurlow*, in *Scott* v. *Tyler*, 2 B. C. C. at p. 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 although it cannot be advanced, it is conceived, as a general principle, 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. 1483); 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 consequences of which would be, that the first legacy is absolute, and the substituted gift fails. The same observations apply to the case of *Peyton* v. *Bury*, 2 P. W. 626." (Note by Mr. Jarman, 1st ed. p. 837.)

(*r*) That this is the true reason is, it is submitted, shewn by the authorities, which give to a clause of revocation or cesser the same effect as a gift over, ante, p. 1468.

(*s*) Per Sir W. Grant, in *Lloyd* v. *Branton*, 3 Mer. at p. 108.

CHAP. XXXIX.

few such cases 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 savour of excessive refinement, and were not recognised 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 (*t*) 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*.

Where the legatee takes an alternative provision.

"First, Where the legatee takes a provision or legacy in the alternative of marrying without the consent, *Creagh* v. *Wilson* (*u*), *Gillet* v. *Wray* (*v*). 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 principle be, as apparently it is, that the testator, by providing for the event of the condition being broken, shews that he did not intend it to be *in terrorem* only. In *Gillet* v. *Wray*, the alternative provision was an annuity of £10; and Lord *Cowper* held, that as the legatee was provided for, equity could not relieve (*w*).

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 par-

(*t*) See Lord Loughborough's judgment in *Stackpole* v. *Beaumont*, 3 Ves. at p. 98.

(*u*) 2 Vern. 572, 1 Eq. Ca. Ab. 111, pl. 5.

(*v*) 1 P. W. 284.

(*w*) The same principle was applied in *Re Nourse*, [1899] 1 Ch. 63. "The case of *Hicks* v. *Pendarvis*, 2 Freem. 41, s. c. 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. Ed. 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 (which was made in the Irish Court of Exchequer), there was an appeal to the House of Lords, which was compromised. But the case of *Reynish* v. *Martin*, 3 Atk. 330, seems to go to the same point." (Note by Mr. Jarman.) In *Re Nourse*, supra, *Reynish* v. *Martin* was distinguished.

ticular age, *Hemmings* v. *Munckley* (*x*), *Scott* v. *Tyler* (*y*). 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 *quâcunque viâ*, by marrying without consent before that age.

Where marriage with consent is restricted to minority.

"Thirdly, Where marriage with consent is confined to minority, *Stackpole* v. *Beaumont* (*z*). 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 licence] with the consent of parents: and the testator merely places trustees in the room of parents (*a*).

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 shew 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 *in terrorem* doctrine, as applicable to conditions precedent (*b*). 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

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

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

(*z*) 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.

(*a*) "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. temp. Talb. 117, s. c. 1 Eq. Ca. Ab. 112, pl. 10." (Note by Mr. Jarman.) See also *Duggan* v. *Kelly*, 10 Ir. Eq. Rep. 473; *West* v. *West*, 4 Gif. 198. However, in *Younge* v. *Furse*, 8 D. M. & G. 756, a condition precedent not to marry under twenty-eight was held effectual, though there was no gift over, and no other circumstance to bring it within either of the three categories mentioned above. And a condition against marriage at any age without consent is good; *Re Whiting's Settlement*, [1905] 1 Ch. 96.

(*b*) "Such a conclusion would overturn *Reynish* v. *Martin*, 3 Atk. 330, stated infra, and many other cases decided upon great deliberation." (Note by Mr. Jarman.)

CHAP. XXXIX.

on real estates, conditions precedent or subsequent. His decision may, and it is conceived does, rest on solid grounds; but his lordship's observations do not evince that respect for authority and established principles which has characterised his successors.

Marriage necessary, when.

"But it should be remembered that no question exists as to the applicability of the *in terrorem* doctrine to conditions *subsequent* (*c*); 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 (*d*).

Residuary bequest does not amount to a gift over.

"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 (*e*), unless there is an express direction that the forfeited legacy shall fall into the residue (*f*)."

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

And it was held in *Keily* v. *Monck* (*g*), 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 Harcourt (*h*), 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;

(*c*) See *Marples* v. *Bainbridge*, 1 Mad. 590; *Wheeler* v. *Bingham*, 3 Atk. 364; *Bellasis* v. *Ermine*, 1 Eq. Ca. Abr. 110, pl. 1; *Garret* v. *Pritty*, 2 Vern. 293; *Stratton* v. *Grymes*, ib. 357; *Re Whiting's Settlement*, [1905] 1 Ch. 96. *W.*— v. *B.*—, 11 Bea. 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.

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

(*e*) *Semphill* v. *Bayly*, Pre. Ch. 562; *Paget* v. *Haywood*, cit. 1 Atk. 378; *Scott* v. *Tyler*, as reported Dick. 712; which overrule *Amos* v. *Horner*, 1 Eq. Ca. Abr. 112, pl. 9.

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

(*g*) 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 their 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 would 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. See post, p. 1539.

(*h*) Pre. Ch. 350.

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 extended so as to include a case where a clear undoubted gift over lapses (*i*).

Effect where legacy is chargeable on real and personal estate.

Mr. Jarman continues (*j*): "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 (*k*), 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 (*l*).

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

"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 condition 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 *Randal* v. *Payne* (*m*), 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 (*n*), 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 *Randal* v. *Payne*, particularly a legacy payable at twenty-one or marriage, by way of alternative provision, which shewed that the testator had a *first* marriage in contemplation."

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 (*o*). Thus, in *Clifford* v. *Beaumont* (*p*), 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

(*i*) This paragraph is taken verbatim from the third edition of this work (Vol. II. p. 43) by Messrs. Wolstenholme and Vincent.

(*j*) First ed. p. 842.

(*k*) Including money arising from the sale of land, ante, p. 1528.

(*l*) *Reynish* v. *Martin*, 3 Atk. 330. As to mixed gifts of realty and personalty, see ante, p. 1528.

(*m*) 1 B. C. C. 55, ante, p. 1471. See also *Page* v. *Hayward*, 2 Salk. 570; *Davis* v. *Angel*, 4 D. F. & J. 524; *Malcolm* v. *O'Callaghan*, 2 Mad. 349.

(*n*) *Lowe* v. *Manners*, 5 B. & Ald. 917.

(*o*) Vide ante, p. 1530.

(*p*) 4 Russ. 325.

CHAP. XXXIX.

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 (*q*). Afterwards, 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. That decision, however, appears in fact to have left the point untouched; and Sir J. Leach's judgment has consequently been questioned (*r*).

Legatee marrying in testator's lifetime.

Mr. Jarman continues (*s*): "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 (*t*). 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 (*u*), 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 (*v*)." 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 (*w*), or requiring marriage with A. (*x*), or not to marry again (*y*), 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

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

(*r*) See *Beaumont* v. *Squire*, 17 Q. B. 905.

(*s*) First ed. p. 843.

(*t*) *Crommelin* v. *Crommelin*, 3 Ves. 227; *Hutcheson* v. *Hammond*, 3 Br. C. C. 128.

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

(*v*) *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.

(*w*) *Younge* v. *Furse*, 8 D. M. & G. 756.

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

(*y*) *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.

statute (*z*). So a condition not to marry after the testator's death without the consent of persons named in the will, is not waived by the testator giving his consent to the marriage (*a*).

Assent to marriage, when presumed.

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 (*b*). Assent may also be presumed from other circumstances, for, as Mr. Jarman points out (*c*), "It seems that the assent of trustees will sometimes be presumed from the non-expression of their dissent, according to the maxim, *qui tacet consentire videtur*, especially if the express assent were withheld with a fraudulent intent (*d*); 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* (*e*), 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* (*f*), observed that it would be difficult to support the decision if it had been. On the other hand, Lord *Hardwicke*, in *Strange* v. *Smith* (*g*), 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.

Consent in writing.

"Sir *John Leach* (*h*) thought that the inadvertent 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

(*z*) 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. And see *Cooper* v. *Cooper*, 6 Ir. Ch. 217.

(*a*) *Lowry* v. *Patterson*, Ir. R. 8 Eq. 372.

(*b*) *Re Birch*, 17 Bea. 358.

(*c*) First ed. p. 843.

(*d*) *Mesgrett* v. *Mesgrett*, 2 Vern. 580; *Berkley* v. *Ryder*, 2 Ves. sen. 533.

(*e*) 2 Vern. 580.

(*f*) 19 Ves. at p. 12.

(*g*) Amb. 263.

(*h*) *Worthington* v. *Evans*, 1 S. & St. 165.

by the trustee before the marriage, though a more formal writing was in contemplation (*i*).

Expressions of consent, how construed.

"The Courts are disposed to construe liberally the expressions of persons whose consent is required (*j*), especially if they have sanctioned, by their acquiescence, the growth of an attachment between the parties (*k*). In *Pollock* v. *Croft* (*l*), a general permission to the legatee to marry according to her discretion, appears to have been deemed sufficient, without any further consent.

As to marriage in wrong name.

"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, and with the fraudulent design of deceiving the trustees as to his identity, assume the name of A. (*m*) (supposing the marriage, under such circumstances, to be lawful) (*n*).

Trustees withholding consent.

"It seems, that if trustees withhold their consent from a vicious, corrupt, or unreasonable cause, the Court of Chancery will interfere (*o*); 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 (*p*), notwithstanding the doubt thrown out by Lord *Hardwicke*, in *Hervey* v. *Aston* (*q*), and by Lord *Mansfield*, in *Long* v. *Dennis* (*r*): but of course the refusal of such a person would be viewed with particular jealousy. And where a trustee refuses either 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 (*s*).

Retracting consent.

"It seems that consent once given, with a knowledge of the

(*i*) See also *Le Jeune* v. *Budd*, 6 Sim. 441.

(*j*) *Daley* v. *Desbouverie*, 2 Atk. 261; but as to which, see *Clarke* v. *Parker*, 19 Ves. at p. 12; *D'Aguilar* v. *Drinkwater*, 2 V. & B. 225; *Re Smith*, 44 Ch. D. 654.

(*k*) *D'Aguilar* v. *Drinkwater*, 2 V. & B. 225.

(*l*) 1 Mer. 181; see also *Mercer* v. *Hall*, 4 B. C. C. 326.

(*m*) 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 hâc vice, will not, under the statute of 3 Geo. 4, c. 75, invalidate a marriage, unless the misnomer is known to both parties. See *Re Rutter*, [1907] 2 Ch. 592, referred to ante, p. 1525, n. (*h*).

(*n*) *Dillon* v. *Harris*, 4 Bli. N. S. 321. 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.

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

(*p*) 19 Ves. at p. 22.

(*q*) 1 Atk. at p. 390.

(*r*) 4 Burr. 2052.

(*s*) *Goldsmid* v. *Goldsmid*, Coop. 225; 19 Ves. 368.

circumstances, and where there is no fraud, cannot be retracted (*t*) without an adequate reason, unless it be given upon a condition, (as that of the intended husband making a settlement (*u*),) 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 (*v*).

Renouncing executor and trustee; his consent not necessary.

" Whether a renouncing executor or trustee must concur, is not quite clear upon the authorities. Lord *Hardwicke*, in *Graydon* v. *Hicks* (*w*), 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 *John Leach*, V.-C., (before whom Lord *Hardwicke's* decision was not cited,) held (*x*), 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 followed by Lord Plunket, C. Ir., in *Boyce* v. *Corbally* (*y*), 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* (*z*), 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 (*a*); his Lordship's opinion being, that the required consent of 'guardians,' might be given by a survivor, though he admitted that it was collateral to the office "(*b*). And with this agrees the decision in *Dawson* v. *Oliver-Massey* (*c*),

(*t*) *Lord Strange* v. *Smith*, Amb. 263; *Merry* v. *Ryves*, 1 Ed. 1; *Le Jeune* v. *Budd*, 6 Sim. 441; *Re Brown*, [1904] 1 Ch. 120.

(*u*) *Dashwood* v. *Lord Bulkeley*, 10 Ves. 230. It seems that a settlement after marriage is sufficient to satisfy such a conditional consent, ib. 244; *Daley* v. *Desbouverie*, 2 Atk. 261.

(*v*) See *Clarke* v. *Parker*, 19 Ves. 1.

(*w*) 2 Atk. 16.

(*x*) *Worthington* v. *Evans*, 1 S. & St. 165.

(*y*) 2 Ll. & Go. 102. See also *Ewens* v. *Addison*, 4 Jur. N. S. 1034. *White* v. *McDermott*, I. R. 7 C. L. 1.

(*z*) 2 P.W. 626.

(*a*) See *Jones* v. *Earl of Suffolk*, 1 B. C. C. 528.

(*b*) See this point, in regard to powers generally, 1 Powell Dev., Jarm. 239.

(*c*) 2 Ch. D. 753. See also per Lord Eldon, *Grant* v. *Dyer*, 2 Dow. at p. 84. In *Peyton* v. *Bury*, supra, 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 the last-surviving executor or trustee, per Lord Eldon, supra.

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 (*d*). 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 (*e*).

Subsequent approbation.

"It seems to be clear," says Mr. Jarman (*f*), "that approbation subsequent to a marriage, is not in general a sufficient (*g*) compliance with a condition requiring consent; but Lord *Hardwicke*, in *Burleton* v. *Humfrey* (*h*), took a distinction between the words 'consent' and 'approbation,' holding the latter to admit subsequent 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 (*i*).

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 (*j*).

"Against" consent, construed *without*.

"It remains only to be observed, that in a case (*k*) 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."

(*d*) *Booth* v. *Meyer*, 38 L. T. 125; *Curran* v. *Corbett*, [1897] 1 Ir. 343.
(*e*) *Re Brown's Will*, 18 Ch. D. 61.
(*f*) First ed. p. 847.
(*g*) *Fry* v. *Porter*, 1 Ch. Cas. 138; *Reynish* v. *Martin*, 3 Atk. 330.
(*h*) Amb. 256.
(*i*) See *Clarke* v. *Parker*, 19 Ves. a p. 21.
(*j*) *O'Callaghan* v. *Cooper*, 5 Ves. 117
(*k*) *Long* v. *Ricketts*, 2 S. & St. 179 See also *Creagh* v. *Wilson*, 2 Vern. 572 *Re Brown*, [1904] 1 Ch. 120.

It would appear from the authorities above cited to be doubtful whether the following conditions in partial restraint of marriage are good unless there is a gift over: a condition annexed to a devise of land that the devisee shall not marry without consent (*l*), or shall not marry a person of a particular rank in life or occupation (*m*).

(iii.) *Conditions in Total Restraint of Marriage.*—With regard to personal estate, (including money arising from the sale of land, and of course, a mixed fund (*n*),) there is no doubt that, subject to the exceptions to be presently mentioned, a condition in total restraint of marriage is void (*o*), and Mr. Jarman says (*p*), that "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 (*q*), 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."

Void as regards personal estate, and, semble, as to real estate.

In support of the proposition laid down by Mr. Jarman, there may be cited the following authorities (*r*): Sheppard's Touchstone (*s*), *Fry* v. *Porter* (*t*), *Harvey* v. *Aston* (*u*), *Lowe* v. *Peers* (*v*), *Long* v. *Dennis* (*w*), *Keily* v. *Monck* (*x*), *Egerton* v. *Earl Brownlow* (*y*), and *Cooke* v. *Turner* (*z*), all of which either expressly state or impliedly assume that a condition in general restraint of marriage is illegal by the rules of the common law, from which it follows that such a condition cannot be annexed to a gift of real estate (*a*).

(*l*) Ante, p. 1528, note (*m*).

(*m*) *Jenner* v. *Turner*, 16 Ch. D. 188.

(*n*) *Lloyd* v. *Lloyd*, 2 Sim. N. S. 255; *Morley* v. *Rennoldson*, 2 Ha. 570: [1895] 1 Ch. 449; *Bellairs* v. *Bellairs*, L. R., 18 Eq. 510; *Re Wright*, [1907] 1 Ch. 231; *Re Bellamy*, 48 L. T. 212.

(*o*) Ibid.; and see ante, p. 1525.

(*p*) First ed. p. 842.

(*q*) *Perrin* v. *Lyon*, 9 East, 170.

(*r*) For many of these I am indebted to an article by Mr. T. Cyprian Williams in the L. Q. R. xii. 36, agreeing with Mr. Jarman's conclusions [C. S.].

(*s*) P. 132.

(*t*) 1 Mod. 300.

(*u*) Com. 726; 1 Atk. 361.

(*v*) 4 Burr. 2225. Wilmot's Cas. 364.

(*w*) 4 Burr. 2052.

(*x*) 3 Ridg. P. C. 205.

(*y*) 4 H. L. C. at p. 125.

(*z*) 15 Mee. & W. 727. "The state, from obvious causes, is interested that its subjects should marry; and therefore it will not in general allow parties, by contract or by condition in a will, to make the continuance of an estate depend on the owner not doing that which it is or may be the interest of the state that he should do." Per Rolfe, B.

(*a*) In *Allen* v. *Jackson*, 1 Ch. D. at p. 399, a general restraint on marriage is assumed to be against the policy of the law of England.

CHAP. XXXIX.

In *Jenner* v. *Turner* (*b*) and *Greene* v. *Kirkwood* (*c*), the rule that such a condition is void in the case of real estate is taken for granted.

In *Jones* v. *Jones* (*d*), 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 C. married she should be maintained by her husband. Blackburn, J., said, "The real question seems to be whether the testator intended to discourage marriage or not." And Lush, J., said: "The question is whether we are to construe this devise as a provision for the testator's niece while she remains single, or as a condition that she shall remain in a state of celibacy under the penalty of losing her share" (*e*).

Condition precedent.

All the preceding cases were cases of conditions subsequent. It seems, however, that a condition precedent may be so expressed as to amount to a condition in total restraint of marriage, and to be therefore void. Thus a condition precedent requiring the legatee to marry a person seised of hereditaments of the clear yearly value of 500*l.* has been held to be void (*f*). It is said that the same rule applies where property is given to a person if he lives to a certain age (not being a reasonable age) without having married (*g*), or where the condition requires the legatee to contract

(*b*) 16 Ch. D. 188.
(*c*) [1895] 1 Ir. 130.
(*d*) 1 Q. B. D. 279.
(*e*) Against Mr. Jarman's view may be cited: *Earl of Arundel's Case*, Jenk. 243, 3 Dyer, 342, where it seems to be laid down that a condition against marriage is void in the case of an estate tail, but not in the case of a fee; there, however, the question was one of repugnant, not of illegal, conditions: *Bellairs* v. *Bellairs*, L. R., 18 Eq. 510, where Jessel, M.R., accepted without examination the statement of counsel to the effect that there is no rule of the common law making void conditions in restraint of marriage; that this statement is inaccurate appears abundantly from the authorities cited above. It was suggested by Christian, L.J., in *Duddy* v. *Gresham*, 2 L. R. Ir. 443, that the judgment in *Bellairs* v. *Bellairs* is not accurately reported.
(*f*) *Keily* v. *Monck*, 3 Ridg. P. C. 205.
(*g*) See the passage quoted from Lord Thurlow's judgment in *Scott* v. *Tyler*, 2 Br. C. C. 488, ante, p. 1526, and *Younge* v. *Furse*, referred to ibid. n. (*r*).

an impossible marriage, such as marriage with the consent of a person who the testator knows is certain not to give it (*h*).

It will be remembered that a condition precedent that the devisee or legatee shall marry a certain person is good, being only in partial restraint of marriage, and no gift over is required (*i*).

Conditions against re-marriage.

The only real exception to the rule that a condition in total restraint of marriage is void seems to occur in the case of gifts to persons who are or have been married. It is clear that a gift by a testator to his widow on condition of her not marrying again is good (*j*), and the doctrine has been extended to a gift to a married woman by a testator who is not her husband (*k*). It has been held that where the corpus of personalty is given, there must be a gift over on re-marriage, otherwise the condition is considered to be merely *in terrorem* (*l*). But this doctrine does not apply to a devise of real estate (*m*).

In terrorem doctrine does not apply to real estate, *semble*.

In *Duddy* v. *Gresham* (*n*), a testator gave his real and personal estate to his wife on condition that she should retire into a convent and not marry: there was no gift over: the reasons given by the judges differed, but Ball, C., and Christian, L.J., were clearly of opinion that if it had been a devise of real estate only the condition against re-marriage would have been good: "the *in terrorem* doctrine does not apply to a devise of real estate": Christian, L.J., was, however, of opinion that as the realty and the personalty were given together, the realty followed the same rule as the personalty, and that the condition was *in terrorem* and void. This opinion was accepted as correct by Byrne, J., in *Re Pettifer* (*o*).

Condition against second marriage of a man.

In *Allen* v. *Jackson* (*p*), a testatrix gave the income of property to her niece and her niece's husband during their joint lives and to the survivor for life, with a proviso that if the husband survived his wife and married again, the property should go over; this event happened, and it was held that the gift over took effect. James, L.J., thought that even if the will had imposed the condition without a gift over it would have been valid.

Gift to mother of illegitimate child.

In *Potter* v. *Richards* (*q*), a testator gave an annuity to a single woman by whom he had had an illegitimate child, on condition that she should remain single, declaring his reason to be that if

(*h*) See *Reily* v. *Monck*, supra.
(*i*) Ante, p. 1527.
(*j*) *Barton* v. *Barton*, 2 Vern. 308; *Lloyd* v. *Lloyd*, 2 Sim. N. S. 255; *Morley* v. *Rennoldson*, 2 Ha. 570. As to gifts during widowhood, see post, p. 1542.
(*k*) *Newton* v. *Marsden*, 2 J. & H. 356.
(*l*) *Marples* v. *Bainbridge*, 1 Madd. 590.
(*m*) *Newton* v. *Marsden*, supra.
(*n*) 2 L. R. Ir. 443.
(*o*) [1900] W. N. 182.
(*p*) 1 Ch. D. 399.
(*q*) 24 L. J. Ch. 488.

she married the child would be neglected: Kindersley, V.-C., held that the reason was good and that the condition was valid.

Limitation until marriage.

An apparent exception to the general principle is the rule that a gift of a life interest until marriage 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*). It is a question of construction in each case whether the testator has created a condition or a limitation (*t*).

Marriage during testator's lifetime.

Where property is given to a person for life, or until he shall marry, and he marries during the testator's lifetime, but after the date of the will, the gift fails, even if the marriage takes place with the knowledge and approval of the testator (*u*).

Gift during widowhood.

A gift during widowhood is equivalent to a gift for life or until the legatee marries again (*v*). The somewhat fine distinction between such a gift and a gift to a widow "so long as she shall continue single and unmarried," has been already referred to (*w*), as has also the peculiar rule of construction adopted in cases where a testator gives a life interest to his widow, with a gift over in the event of her marrying (*x*).

Condition to assume name or arms.

XI.—Condition to assume a Name or Arms.—Mr. Jarman continues (*y*): "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 licence 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 the case of *Lowndes* v. *Davies* (*z*), where a testator constituted A. his lawful heir, on condition he changed his name to

(*r*) *Scott* v. *Tyler*, Dick. 712; *Heath* v. *Lewis*, 3 D. M. & G. 954; *Potter* v. *Richards*, 24 L. J. Ch. 488; *Evans* v. *Rosser*, 2 H. & M. 190. And see *Right* v. *Compton*, 9 East, 267; *Bullock* v. *Bennett*, 7 D. M. & G. 283; *Webb* v. *Grace*, 2 Phill. 70. *Re Paine*, [1882] W. N., p. 77.

(*s*) Per Wilmott, C.J., Wilm. Op. 373. It was said by Blackburn, J., in *Jones* v. *Jones*, 1 Q. B. D. 279, stated supra, that the distinction does not hold in gifts of real estate.

(*t*) See the cases cited in the last two notes.

(*u*) *Bullock* v. *Bennett*, 7 D. M. & G. 283; *Andrew* v. *Andrew*, 1 Coll. 686; *Re King's Trusts*, 29 L. R. Ir. 401.

(*v*) *Jordan* v. *Holkham* (*Holcombe*), Amb. 209, ante, p. 1526, note (*m*). *Evans* v. *Rosser*, 2 H. & M. 190. As to the effect of divorce on a gift of an annuity "to my wife so long as she continues my widow," see *Re Boddington*, 25 Ch. D. 685; ante, p. 1139.

(*w*) Chap. XXXIII.

(*x*) Ante, p. 1361.

(*y*) First ed. p. 848.

(*z*) 2 Scott, 71.

G., it was held that A.'s unauthorized assumption of the name was sufficient.

"So, in the case of *Barlow* v. *Bateman* (*a*), a testator gave a legacy of £1,000 to his daughter, upon condition that she married a man *who bore the name and arms of Barlow*; and in case she married one who should not bear the name and arms of Barlow, he gave the legacy to another. The daughter married a person whose name was Bateman, but who, three weeks before the marriage, called himself Barlow, and this was held to be a compliance with the condition; the Master of the Rolls, Sir *J. Jekyll*, observing, that the usage of passing acts of parliament for the taking upon one a surname, was but modern, and that anyone 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 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*).

"So, in the case of *Doe* d. *Luscombe* v. *Yates* (*c*), 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 (*d*), had voluntarily 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" (*e*).

(*a*) 3 P. W. 65. The terms of the will are not accurately stated in the report, which Mr. Jarman follows. The condition was that the legatee should marry with a person of the surname of Barlow; it did not require him to bear the arms of Barlow. The husband admitted that he assumed the name on the occasion of his marriage in order to entitle himself to the legacy.

(*b*) 2 Br. P. C. 272. See *Leigh* v. *Leigh*, 15 Ves. 92, and other cases cited post, Chap. XLI. on gifts to persons of the testator's name, &c.

(*c*) 5 B. & Ald. 544. See also *Hawkins* v. *Luscombe*, 2 Sw. 375; *Re Crozon*, post.

(*d*) "He was under age at the time, and this perhaps is not an immaterial circumstance, as Lord C. J. *Abbott* 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.'" (Note by Mr. Jarman.) No such distinction, however, can be collected from the authorities. See Davidson, Conv. iii. 360, note.

(*e*) As to gifts to persons of a prescribed name, vide *Jobson's Case*, Cro. El. 576, and other cases cited post, Chap. XLI.

Where mode of assumption is specified.

But where a testator expressly requires a name to be taken by act of parliament, or any other specified mode, or under the King's licence (*f*), the devisee or legatee must comply with the requirement, and no other mode falling short of the specified mode can be substituted for it (*g*).

Christian name or surname.

In *Bennett* v. *Bennett* (*h*), a condition requiring the assumption of the name of M. was held to be complied with by the baptism of the successor to the estate in that name, without the adoption of the name as a surname. And if the condition requires the devisee to assume and use "the surname of S. alone or together with his family surname," he may use the prescribed name either before or after his own surname (*i*). In *D'Eyncourt* v. *Gregory* (*j*), on the other hand, where the condition required a devisee named W. to take and use "the surname of G.," it was held that the assumption and use of the name G. before that of W. was not a compliance with the condition.

Condition of "using" a name.

Questions sometimes arise how a condition requiring a person to "use" a name must be complied with (*k*).

Grant of arms.

The proper mode of complying with a condition requiring a devisee or legatee to take and bear a certain coat of arms is to obtain a grant of arms from the College of Arms (*l*), and therefore if a condition requires that the arms should be "lawfully" assumed, the condition cannot be complied with in any other way (e.g. by a mere voluntary assumption) (*m*). The question whether a condition simply requiring the devisee to bear a certain coat of arms (without using the word "lawfully") can be performed by a mere voluntary assumption and use of the arms, does not appear to have been decided, but the better opinion is that it cannot (*n*). Of course, if the condition provides that every devisee who at the time he becomes entitled to the estate does not bear a certain coat of arms, he shall assume it, then the condition does not affect a devisee who in fact bears the arms at the time he becomes entitled under the devise, although he has assumed them unproperly and without authority (*o*).

(*f*) "The King's licence is nothing more than permission to take the name, and does not give it. A name, therefore, taken in that way, is by voluntary assumption"; per Lord Eldon, in *Leigh* v. *Leigh*, 15 Ves. at p. 100.

(*g*) Per Abbott, C.J., in *Doe* d. *Iliscombe* v. *Yates*, supra.

(*h*) 2 Dr. & Sm. 266.

(*i*) *Re Eversley*, [1900] 1 Ch. 96.

(*j*) 1 Ch. D. 441.

(*k*) See *Re Drax*, 75 L. J. Ch. 317.

(*l*) A royal licence or warrant to use certain arms is practically inoperative unless the arms are "exemplified" in the College of Arms; see the cases cited in the next two notes.

(*m*) *Re Croxon*, [1904] 1 Ch. 252.

(*n*) Ibid; *Austen* v. *Collins*, 54 L. T. 903, [1886] W. N. 91. And see the note in Davidson, Conv. iii. 361.

(*o*) *Re Croxon*, supra.

Conversely, the fact that a person is entitled to bear certain arms does not operate as a compliance with a condition requiring him to use them (*p*).

In *Austen* v. *Collins* (*q*), it was held that a condition requiring a devisee to bear certain arms was complied with by obtaining a grant from the College of Arms of the right to use a slightly different coat of arms, the College having refused to grant the right to use the identical arms.

Name and arms clause.

Not infrequently, a will making a strict settlement of real estate contains a name and arms clause requiring every future owner of the property to assume the name and arms of the testator (*r*).

Gift over on breach of condition.

It has been already noticed that if land is devised subject to a name and arms clause, with a gift over on breach, this gift over is good if annexed to an estate tail, but void in the case of an estate in fee simple (*s*). A devise of an estate in fee simple can, however, be made subject to a condition precedent requiring the devisee to take a name and arms, and a condition subsequent requiring every future owner to take and use a name and arms, with a gift over on breach, may be annexed to such a devise if their operation is confined to the period allowed by the rule against perpetuities (*t*). And the gift over, to be effectual, must be so framed that the proviso for cesser and the limitation over fit one another (*u*). The gift over will also be void if it is repugnant to the original gift: as where an estate is devised to a person in fee, subject to a name clause, with a gift over on breach to the person "next in remainder" (*v*).

Gift over by reference to entailed realty.

Where personalty is settled subject to a name and arms clause, with a gift over by reference to the limitations of settled real estate, the gift over is effectual, notwithstanding that the real estate has been disentailed (*w*).

Time for performance.

The question within what period a condition requiring the assumption of a name, or name and arms, must be performed, where no time is limited by the will, has been already considered (*x*).

(*p*) *Bevan* v. *Mahon-Hagan*, 31 L. R. Ir. 342.

(*q*) Supra.

(*r*) See the well-known note in Davidson, Conv. iii. 356. For an instance of a name and arms clause taking effect on a life estate, see *Re Michell*, [1892] 2 Ch. 87.

(*s*) Supra, p. 1442. The better opinion, as the editor submits, is that the condition itself is good, if it is what is called a common law condition, supra, p. 374.

(*t*) *Bernett* v. *Bennett*, 2 Dr. & Sm. at p. 275. *Re Cornwallis*, infra. Vaizey on Settlements, 1270.

(*u*) *Re Catt's Trusts*, 2 H. & M. 46.

(*v*) *Musgrave* v. *Brooke*, 26 Ch. D. 792.

(*w*) *Re Cornwallis*, 32 Ch. D. 388.

(*x*) Ante, sec. V. (i.) *Gulliver* v. *Ashby*, 1 W. Bl. 607; *Lowndes* v. *Davies*, 2 *Scott*, 71.

"Entitled."

Sometimes a devisee is required to assume a name (or name and arms) on becoming "entitled" to the estate: in such a case "entitled" generally means "entitled in possession" (*y*).

"Actual possession."

A person may be "entitled to the actual possession or receipt of the rents and profits" within the meaning of a clause of this kind, although the testator's widow is entitled to the actual possession of part of the property and the rents of the remainder are exhausted by the charges (*z*).

Condition requiring residence.

XII.—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 (*a*); but where no 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 (*b*). In *Fillingham* v. *Bromley* (*c*), 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 (*d*), or to make it his principal or usual place of abode (*e*), 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

(*y*) *Re Finch*, 17 Ch. D. 211. Compare *Lady Langdale* v. *Briggs*, 8 D. M. & G. 391, where the interest devised was reversionary.

(*z*) *Re Varley*, 62 L. J. Ch. 652, and see the cases on shifting clauses to take effect on a devisee becoming entitled to the possession of another estate, &c.

(*a*) See cases, ante, Vol. I., p. 1298. In *Roe* d. *Sampson* v. *Down*, 2 Chitty, 529, a gift of a residence to A. for life in case she should choose to live and reside there was held to take effect although A. never actually resided in the house, she having shewn an intention to do so.

(*b*) Per Wood, V.-C., Kay, at p. 545. See however, *Stone* v. *Parker*, 29 L. J. Ch. 874, where this difficulty was not alluded to.

(*c*) T. & R. 530. See also *Potter* v. *Richards*, 24 L. J. Ch. 488, where an annuity was given on condition that the annuitant should reside in a certain town so long as she lived. Kindersley, V.-C., doubted whether the condition was not void for uncertainty. See also *Ridgway* v. *Woodhouse*, 7 Bea. 437; *Re Ingilby*, 6 T. L. R. 446 (condition requiring a priest to be resident). A condition not to reside in a particular place may be void on the ground of public policy, ante, p. 1464.

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

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

of that day there (*f*). But a condition requiring a devisee to reside and dwell in a house and make it his principal place of abode, is sufficiently definite to create a forfeiture if the devisee states that he never has resided in the house and does not intend to do so (*g*). Or, if the devisee were to let the house, or the greater part of it, this would probably cause a forfeiture (*h*). 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 (*i*), is a breach of the condition. A life annuity given to A., during her life, so long as she and B. should live together, but to cease when A. and B. should cease to reside together, was held not to be determined by the death of B. (*j*). A condition of residence is, as a general rule, inapplicable to an infant (*k*).

Re Wright.

In *Re Wright* (*l*), a testator gave a house to trustees upon trust to permit C. to occupy the same, "subject to the proviso hereinafter mentioned and to her residing upon the said premises during her lifetime": in a subsequent part of the will the testator declared that the use and occupation were given on condition that C. should remain single, and that in the event of her marrying she was to forfeit the bequest and it was to fall into residue: she married, and ceased to reside in the house: it was held by Kekewich, J., that the two clauses should be read together, and that the words "residing during her lifetime" meant during her lifetime while she was capable of residing, namely, as a spinster, and that the condition as to residence consequently did not apply after her marriage. It is submitted that the testator intended C.'s right of occupation to be conditional on her residing in the house and remaining unmarried, and that she incurred a forfeiture by breaking the condition as to residence.

In this connection, regard must be paid to secs. 51 and 52 of

(*f*) Per Wood, V.-C., *Walcot* v. *Botfield*, Kay, at p. 550; per Jessel, M.R., *Astley* v. *Earl of Essex*, L. R., 18 Eq. at p. 295. In *Re 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. See *Tagore* v. *Tagore*, 1 Ind. App. 387.

(*g*) *Dunne* v. *Dunne*, supra. "A wilful non-occupation would be equivalent to a refusal to occupy"; per Kindersley, V.-C., in *Stone* v. *Parker*, 29 L. J. Ch. at p. 874. Compare also *Re Wright*, stated below, where the legatee of a leasehold house let the whole of it except one room, and it was held that she had not resided in it within the meaning of the condition.

(*h*) *Re Wright*, [1907] 1 Ch. 231.

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

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

(*k*) Ante, p. 1480.

(*l*) [1907], 1 Ch. 231.

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

the Settled Land Act, 1882 (*m*), 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 life may therefore sell or demise the settled 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 sale, or to the rents arising under the demise (*n*). But if the tenant for life breaks the terms of a condition of residence before exercising his statutory powers, the forfeiture takes effect (*o*).

Condition that a legatee shall not dispute the will.

XIII.—Various Conditions.—Mr. Jarman continues (*p*): "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 litigandi* (*q*), unless, it seems, the legacy be given over upon breach of the condition (*r*). This doctrine has never been applied to devises of real estate."

Devise of real estate.

The validity of such a condition, annexed to a devise of land, was called in question in *Cooke* v. *Turner* (*s*), where certain life interests in real estate were given to the testator's daughter subject to a proviso that if she disputed the will, the gifts in her favour should be revoked and she should only receive out of the rents an annuity of 300*l.* and that the surplus rents should be accumulated for the benefit of the persons entitled in remainder. It was argued that the condition was void as being contrary to the liberty of the law (*t*); but it was answered by the Court, that it was no more

(*m*) 45 & 46 Vict. c. 38.

(*n*) *Re Paget's, S. E.* 30 Ch. D. 161; *Re Ames*, [1893] 2 Ch. 479; *Re Edwards*, [1897] 2 Ch. 412; *Re Eastman's, S. E.*, 68 L. J. Ch. 122, explained in *Re Trenchard*, infra; *Re Richardson*, [1904] 2 Ch. 777; *Re Fitzgerald*, [1902] 1 Ir. 162. See also the cases cited ante, p. 1298.

(*o*) *Re Haynes*, 37 Ch. D. 306; *Re Trenchard*, [1902] 1 Ch. 378.

(*p*) First ed. p. 849.

(*q*) *Powell* v. *Morgan*, 2 Vern. 90; *Loyd* v. *Spillet*, 3 P. W. 344; *Morris* v. *Burroughs*, 1 Atk. 399. And see *Phillips* v. *Phillips*, [1877] W. N. 260.

(*r*) *Cleaver* v. *Spurling*, 2 P. W. 526; 1 Rep. 304; *Stevenson* v. *Abington*, 11 W. R. 935. A gift to the executors of the first legatee will not suffice, *Cage* v. *Russel*, 2 Vent. 352.

(*s*) 15 M. & Wel. 727, 14 Sim. 493; 15 Sim. 611; 16 Sim. 482.

(*t*) Citing Shep. Touchst. 132; which however, says only that "such conditions as are against the liberty of law, as that a man shall not marry, or the

so than a condition not to dispute a person's legitimacy, which was good (*u*): 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 favour (*v*).

Remarks on *Cooke* v. *Turner*.

The decision was cited in earlier editions of this work as establishing the proposition that a condition not to dispute a will is valid in the case of real estate without a gift over, but the editor submits that it is not an authority for that proposition; first, because the condition was enforced by a clause of revocation (*w*); secondly, because the direction to pay the daughter out of the rents 300*l*. a year in the event of her disputing the will would in any event have made the *in terrorem* doctrine inapplicable (*x*); and thirdly, because the direction to accumulate the surplus rents was in effect a gift over. But the case is so far an authority for the proposition that the *in terrorem* doctrine does not apply to devises of real estate, that the Court did not refer to the point in its judgment.

Condition not to dispute will of another person.

The validity of a condition that the devisee shall not dispute another testator's will was assumed in *Violett* v. *Brookman* (*y*), 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; and further, that he had not re-imposed it by subsequent codicils, which simply confirmed the will.

What amount to a breach.

On the question what acts amount to a breach of a condition not to take any action or proceeding, or not to make a claim against the testator's estate, reference may be made to the cases mentioned below (*a*).

like are void"; not that a condition not to dispute a will is against the liberty of law. And see *Anon.*, 2 Mod. 7.

(*u*) *Stapilton* v. *Stapilton*, 1 Atk. 2.

(*v*) As a matter of fact no forfeiture was incurred, for the proceedings by which the validity of the will was questioned were taken by the trustees under the direction of the Court; *Cooke* v. *Cholmondeley*, 2 Mac. & G. 18; *Massy* v. *Rogers*, 11 L. R. Ir. 409.

(*w*) See ante, sec. II. (vii.)

(*x*) Ante, p. 1467.

(*y*) 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. Under French law such a condition imports that the testator intended only to forbid the contestation of his will upon frivolous and vexatious grounds. The English law seems to be substantially similar; see *Adams* v. *Adams*, infra.

(*a*) *Warbrick* v. *Varley*, 30 Bea. 347; *Re Allen*, 12 Times L. R. 299.

Frivolous actions against trustees.

In *Adams* v. *Adams* (*b*), a testator devised his real estate to trustees in trust to pay certain annuities to his son for life and after his death to his unborn sons in fee, with a condition of forfeiture if the son interfered with the management of the testator's real or personal estate. It was held by Fry, L.J., and by the Court of Appeal, 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: if the actions had been brought bonâ fide in defence of the annuitant's rights no forfeiture would have been incurred.

Condition too wide.

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 wholly void (*c*).

Legacy.

In *Boughton* v. *Boughton* (*d*), a testator before 1837 devised real estate to A. and gave a contingent legacy to B. subject to a clause of forfeiture in the event of her disputing the will: the devise failed, because the will was not executed so as to pass real estate; B. was the testator's heiress at law: it was held that she must elect.

Condition of claiming legacy.

A testator in bequeathing a legacy sometimes imposes the condition that the legatee shall claim the legacy within a certain time; if he fails to comply with the condition, the legacy is forfeited (*e*), although he was in ignorance of the condition (*f*).

Decree in administration action.

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 (*g*). But this rule does not apply to an order for limited administration made on summons (*h*).

Condition of return.

A legacy may be given upon condition that the legatee returns to England within a certain time. Such a condition is primâ facie precedent (*i*).

In a recent Scotch case (*Auld* v. *Pinney*, referred to in the Solicitor's Journal, Vol. 54, p. 399) the testator bequeathed a share

(*b*) [1892] 1 Ch. 369. See *Wilkinson* v. *Dyson*, 10 W. R. 681; *Lewes* v. *Lewis*, 6 Sim. 304, referred to ante, p. 1496, n. (*c*).

(*c*) *Rhodes* v. *Muswell Hill Land Co.*, 29 Bea. 560.

(*d*) 2 Ves. sen. 12, ante, p. 539.

(*e*) *Tulk* v. *Houldditch*, 1 V. & B. 248.

(*f*) *Hawkes* v. *Baldwin*, 9 Sim. 355; *Burgess* v. *Robinson*, 3 Mer. 7; *Powell* v. *Rawle*, L. R., 18 Eq. 243; *Re Lewis*, [1904] 2 Ch. 656; *Horrigan* v. *Horrigan*, [1904] 1 Ir. 271.

(*g*) *Tollner* v. *Marriott*, 4 Sim. 19. Compare *Franco* v. *Alvares*, 3 Atk. 342.

(*h*) *Re Hartley*, 34 Ch. D. 742.

(*i*) *Priestley* v. *Holgate*, 3 K. & J. 286. The decision in *Murphy* v. *Broder*, Ir. R., 9 C. L. 123, is contra.

to the three children of his brother, and declared that the provisions in their favour should only take effect "in the event of his and their returning to Scotland within the period of three years from the date of my decease and thereafter continuing to reside permanently in Scotland." One of the children had married an American citizen who lived in America. It was held to be *contra bonos mores* to hold the condition of forfeiture applicable to her (*j*).

Widowhood.

If a testator bequeaths an annuity to his wife so long as she shall continue his widow, she is not entitled to it if the marriage is dissolved (*k*).

Various other examples of conditions have been incidentally referred to in earlier parts of this chapter (*l*).

Conditional gift to charity.

Cases frequently occur in which property is given to a charity, subject to a condition or gift over in certain events (*m*).

As to whether a legacy substituted by a codicil is subject to a condition contained in the will, see *Re Joseph* (*n*).

The nature of a fee simple conditional in copyholds is referred to in Chapter XLV.

(*j*) See *Wilkinson* v. *Wilkinson*, L. R., 12 Eq. 604, ante, p. 1464.

(*k*) *Re Boddington*, 25 Ch. D. 685; *Re Kettlewell*, 98 L. T. 23.

(*l*) *Croskery* v. *Ritchie*, ante, p. 1481, note (*s*). *Re Dickson's Trust* and *Colston* v. *Morris*, ante, p. 1468. *Robinson* v. *Wheelwright*, *Re Earl of Sefton*, ante, p. 1481. *Re Beard*, [1908] 1 Ch. 383; *Re Robinson*, ante, p. 1477. See also *Poole* v. *Bott*, 11 Hare 33 (condition to enter into a bond not to illegally cohabit); *Re Glubb*, [1900] 1 Ch. 354 (condition that charity should obtain equal sum from the public); *Galway* v. *Barden*, [1899] 1 Ir. 508 (condition to enter a calling).

(*m*) *Christ's Hospital* v. *Grainger*, 1 Mac. & G. 460; *Re Tyler*, [1891] 3 Ch. 252; *Re Beard's Trusts*, [1904] 1 Ch. 270; *Re Blunt's Trusts*, [1904] 2 Ch. 767; *Re Emson*, 74 L. J. Ch. 565.

(*n*) [1908] 2 Ch. 507.

CHAPTER XL.

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

	PAGE
I. *General Principles of Construction of Gifts to the Heir*	1552
II. *Gifts to the Heir with superadded Qualification*	1558
III. *The Word "Heir" when construed "Heir Apparent"*	1564
IV. *The Word "Heir" explained by the Context of the Will to denote a Person who is not the Heir-general*	1567
V. *Construction of the Word "Heir" varied by the Nature of the Property*	1569
VI. *The Word "Heirs," &c., when construed "Children"*	1578
VII. *Period at which the Object of a Devise to the Heir is to be ascertained*	1579

Gifts to "heir," how construed.

I.—General Principles of Construction of Gifts to the Heir.—As Mr. Jarman points out (*a*), "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 (*b*), must be interpreted according to its strict and technical import (*c*); in which sense it obviously designates the person or persons appointed by law to succeed to the real estate in question in case of intestacy. It is clear, therefore, 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 persons answering this description at his death, and who, under the recent enactment regulating

(*a*) First ed. Vol. II. p. 1.

(*b*) It must also be remembered that the construction of the word "heir" may be affected by the nature of the property disposed of by the gift, post, p. 1569.

(*c*) As to the validity of a gift of real or personal property to A. for his own life and the life of his heir, see *Re Amos*, [1891] 3 Ch. 159, ante, p. 1121.

the law of inheritance (*d*), would take the property in the character of devisee, and not, as formerly, by descent. And the circumstance that the expression is *heir*, (in the singular) and that the heirship resides in, and is divided among, several individuals as co-heirs or co-heiresses, would create no difficulty in the application of this rule of construction; the word 'heir' being in such cases used in a collective sense, as comprehending any number of persons who may happen to answer the description (*e*); and which persons, if more than one, would, if there were no words to sever the tenancy, be entitled as joint tenants" (*f*).

Devise to "heirs" passes fee simple.

A devise to "the heirs" of the testator or any other person, (though contained in a will made before 1838,) vests in the heir an estate in fee simple, without words of limitation or any equivalent expression, "for being plurally limited it includeth a fee simple, and yet it vesteth but in one by purchase" (*g*).

In *Re Waugh* (*h*), the testator devised a cottage to a granddaughter "and her heirs" and another cottage to a grandson "and his heirs," with a gift over, if either of them died without an heir, "to the survivor's heir or heirs"; it was argued that as each grandchild took an estate tail under the original gift (*i*), the same construction ought to be placed on the gift over, but the argument failed, and it was held that "the survivors heir or heirs" meant his or her heirs general.

"Next-of-kin and nearest heir."

In *Re Maher* (*j*), a testator directed that in a certain event his property, which consisted of both real and personal estate, should go to "my next of kin and nearest heir of my name and family." It was contended that the testator meant by this description to indicate one person, but it was held that his personal estate went to his next of kin, and that his real estate went to his heir-at-law.

A devise to the right heirs of a husband and wife is a devise to such person as answers the description of heir to both (*jj*).

Heirs of the body as purchasers.

With reference to the general principle of construction above laid down (*k*), Mr. Jarman continues (*l*): "Upon the same principle it is well settled, that a devise to *the heirs of the body* of the testator

(*d*) 3 & 4 Will. 4, c. 106, s. 3.

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

(*f*) Litt. s. 254. *Re Baker*, 79 L. T. 343; *Owen* v. *Gibbons*, [1902] 1 Ch. 636. The latter cases also decide that the word "heir" in sec. 3 of the Inheritance Act includes "heirs"; ante, p. 97. Compare *Berens* v. *Fellowes*, 56 L. T. 391.

(*g*) Co. Litt. 10 a. See *Durdant* v. *Burchet*, Skinn. 205; *Marshall* v. *Peascod*, 2 J. & H. 73 (deed); *Moore* v. *Simkin*, 31 Ch. D. 95 (deed).

(*h*) [1903] 1 Ch. 744.

(*i*) Under the rule stated post, Chap. XLVII.

(*j*) [1909] 1 Ir. 70.

(*jj*) *Roe* d. *Nightingale* v. *Quartley*, 1 T. R. 630.

(*k*) Ante, p. 1553.

(*l*) First ed. Vol. II. p. 2.

CHAPTER XL.

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.

Mandeville's Case.

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

The authority of *Mandeville's Case* was fully recognized by the House of Lords in *Vernon* v. *Wright* (*n*).

Mr. Jarman seems to have assumed that sec. 28 of the Wills Act has not altered the rule above stated, which rests on cases decided under the old law. It might no doubt be held that such a devise shews a "contrary intention" within the meaning of the section, but the point does not seem to have arisen.

Whether devise to heir, in singular, gives the fee.

Whether a devise (by will dated before 1838) to "heir" in the singular is as effectual to confer an estate in fee simple as a devise to "heirs" in the plural, seems never to have been decided. The affirmative is supported by a dictum of Holt, C.J. (*o*); and by some observations of Sir W. P. Wood, V.-C., who said (*p*) that,

(*m*) Co. Litt. 26 b. See also *Southcot* v. *Stowell*, 1 Mod. 226, 237, 2 Mod. 207, Freem. pp. 216, 225; *Wills* v. *Palmer*, 5 Burr. 2615, 2 W. Bl. 687. 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. at p. 363; 8 Ex. 160; per Bosanquet, J., 9 Cl. & Fin. at p. 625. *Moore* v. *Simkin*, 31 Ch. D. 95; post, p. 1570.

(*n*) 7 H. L. C. 35; s.c. sub. nom. *Wright* v. *Vernon*, 2 Drew. 439.

(*o*) *Beveston* v. *Hussey*, Skin. 385, 563.

(*p*) *Marshall* v. *Peascod*, 2 J. & H. at p. 75. Distinguish between such a devise and a will thus, "I make A. heir of my land"; which gives A. the fee

though Coke's reasoning pointed to the plural as necessary (*q*), "later authorities appeared to have settled that the same consequence follows where heir was used in the singular." The passage in Coke here referred to deals with a limitation to A. and his heirs, and the later authorities alluded to (but not specified) by the V.-C. were probably those which are cited in Hargrave's note to that passage, and most of which deal with gifts to A. and his heir, not to gifts to the heir by purchase. On the other hand, Lord Cottenham seems to have thought it clear that the devisee would take no more than an estate for life (*r*), and it is impossible to read the judgment of Taunton, J., in the case of *Doe* v. *Perratt* (*s*), without seeing that the learned judge entertained a similar opinion. In *Doe* d. *Sams* v. *Garlick* (*t*), a devise to "such person or persons as at the time of my decease shall be the heir or heirs at law of H.," was held to be a mere designatio personæ, and to confer a life estate only. The question is of rapidly diminishing importance.

"Heir of the body."

The question whether a devise (by will dated before 1838) 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, seems also never to have been decided. In *Chambers* v. *Taylor* (*u*), the question arose on the construction of a limitation by deed to the "heir female of the body" of A., and it was held that the daughters of A. and B. took estates for life by purchase. Lord Cottenham referred to the cases of *Dubber* v. *Trollope* (*v*) and *White* v. *Collins* (*w*), which turned on the effect of a devise to A. for life with remainder to the heir of his body (in the singular) (*x*), and remarked: "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 words of limitation are superadded to the word heir, it is considered as conclusively shewing 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

simple, "for such estate as the ancestor hath such is A. to inherit," *Spark* v. *Purnell*, Hob. 75; *Jenkins* v. *Lord Clinton*, 26 Bea. 108, 8 H. L. C. 571 (*Jenkins* v. *Hughes*); ante, p. 455, n. (*l*).

(*q*) Co. Litt. 8 b.

(*r*) *Chambers* v. *Taylor*, infra, and see *Wood* v. *Ingersole*, 1 Bulst. pp. 62, 63.

(*s*) 9 Cl. & F. pp. 614, 616; cited post. See also per Bosanquet, J., ibid. at p. 624.

(*t*) 14 M. & W. 698.

(*u*) 2 My. & C. 376. There were previous limitations for life to A. the settlor and B. his wife, but these did not affect the construction.

(*v*) Amb. 453.

(*w*) 1 Com. Rep. 289.

(*x*) Post, Chap. XLVII.

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."

But even assuming, in a case governed by the old law, 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," Mr. Jarman thinks (*y*), "was evidently the opinion of Mr. Justice *Taunton*, in the case of *Doe* d. *Winter* v. *Perratt* (*z*), who, after citing *Mandeville's Case* (*a*), and *Southcot* v. *Stowell* (*b*), said: "In these instances the estate tail arises out of proper words of limitation *in the plural number* denoting a certain continuous line of posterity 'heirs of the body.' But no such effect can be given to the word 'heir,' 'heir of the body,' 'right heir,' or 'next,' or 'first heir,' where they constitute only a mere 'designatio personæ' (*c*). The case, however, did not raise this precise point, as the words 'male *heir*,' occurring in the will then before the Court, were held to mean male *descendant*, in which sense they could not operate to confer an estate tail by force of the doctrine under consideration any more than those words themselves would if employed by the testator. It seems difficult, however, to reconcile with this doctrine the case of *Whitelock* v. *Heddon* (*d*),

Whitelock v. *Heddon.*

(*y*) First ed. Vol. II. p. 4.

(*z*) 9 Cl. & Fin. at p. 616.

(*a*) Ante, p. 1554

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

(*c*) "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 tenour 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." (Note by Mr. Vincent in the fourth edition of this work, Vol. II. p. 64.)

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

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* (e) *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 'issue,' 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 te[rm] 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 (*f*), inasmuch as the devise was held to take effect in favour of the son of B. in the lifetime of his father, so that the words were read as importing heir *apparent* of the body—a mode of construction which seems to bring the case into direct collision with *Doe* v. *Perratt* in regard to the nature of the estate conferred by the devise; and, upon this point, *Whitelock* v. *Heddon* (but which, unfortunately was not cited in *Doe* v. *Perratt*), must be considered as overruled."

Remarks upon *Whitelock* v. *Heddon*.

No case raising either of the questions above discussed as to the effect of a devise to the "heir of the body" of A. (without A. taking any estate) in a will made since the Wills Act seems to have come before the Courts. If the judges are right who thought that under the old law a devise to the "heir of the body" conferred only an estate for life, it seems to follow that under sec. 28 of the Wills Act such a devise would give the person answering

Effect of Wills Act on devise to "heir of the body."

(e) "*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 he succeeding words of the context." (Note by Mr. Jarman.)

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

the description an estate in fee simple, unless a contrary intention (as from a gift over or the like) appeared by the will.

"Heirs and assigns."

In *Quested* v. *Michell* (*g*), where there was a gift of real and personal estate upon trust for A. for life and after her death to her heirs, executors, administrators, and assigns, Kindersley, V.-C., (following a suggestion thrown out by Willes, C.J., in *Tapner* v. *Merry* (*h*)) held that this gave her a power of appointment over the realty with a limitation to her heirs in default of appointment (*g*). But this decision cannot be regarded as laying down any general principle, and in *Milman* v. *Lane* (*i*), a devise to A. for ninety-nine years if he should so long live, with remainder to his four sons for a similar term, with remainder to the heirs and assigns of the survivor of the four sons was held to give the fee to the heir at law of the last surviving son, the word "assigns" being rejected as surplusage.

"Heir" with superadded qualification.

II.—Gifts to the Heir with Superadded Qualification.—Mr. Jarman continues (*j*): "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 testator's name (as the case may be); and, consequently, on the principle just stated, if the character of heir should happen to devolve to a person not answering to the prescribed sex or name, the devise would fail (*k*).

"Right heirs male," how construed.

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

"So, in *Counden* v. *Clerke* (*m*), where a testator, having issue a

(*g*) 24 L. J. Ch. 722, ante, p. 793.

(*h*) Willes, 177.

(*i*) [1901] 2 K. P. 745; *Brookman* v. *Smith*, L. R., 6 Ex. 291; 7 Ex. 271.

(*j*) First ed. Vol. II. p. 5.

(*k*) It should be remembered that in all these cases the whole scheme of the will must be considered. In *Micklethwait* v. *Micklethwait* (4 C. B. N. S. 790), there was a shifting clause to take effect in the event of A. becoming entitled to a settled estate "in the character of the then heir male of the body" of X., his father; A. became entitled to the estate as tenant in tail by purchase, but it was held that the shifting clause took effect.

(*l*) Cited Hob. 34.

(*m*) 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. Litt. 25 a; *Dawes* v. *Ferrers*, 2 P. W. 1, 8 Vin. Ab. 317, pl. 13, Pre. Ch. 589.

son and daughter, 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 lands should descend unto his son, and, if he died without issue of his body, then to go unto his (the testator's) *right heirs of his name and posterity*, equally to be divided, part and part alike; and then to his 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" (*n*). And the principle of these decisions was adopted in *Wrightson* v. *Macaulay* (*o*), 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. *Thorpe* v. *Thorpe* (*p*) is to the same effect.

"Right heirs of my name and posterity."

But the doctrine of "very heir," as it is sometimes called, does not apply where the word "heir" is used in a special sense: as where the gift is to the "heir male (or female) now living" (*q*). And in accordance with the modern rule as to the construction of gifts to heirs male of the body, the doctrine will be excluded where a gift to "male heirs" is taken to mean heirs male of the body; as in *Doe* d. *Angell* v. *Angell* (*r*), where the will shewed that the

Doctrine excluded.

(*n*) "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 for ever (*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 favour of such a construction in *Lord Ossulston's Case*, 3 Salk. 336, s.c. Co. Litt. 25 a, where one Ford, having issue three sons and a daughter, and also a brother, devised to his three sons successively in tail male, with remainder to his own right heirs male for ever; 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 the recent case of *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." (Note by Mr. Jarman.) See also *Doe* d. *Angell* v. *Angell*, 9 Q. B. 328.

Whether devise to heirs male means heirs male of the body.

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

(*p*) 1 H. & C. 326. See also *Re Maher*, [1909] 1 Ir. 70 ("nearest heir of my name and family").

(*q*) *Chambers* v. *Taylor*, 2 My. & C. at p. 385.

(*r*) 9 Q. B. 328.

testator intended to give the preference to a male descendan
traeing a descent entirely through males, over the heir genera
not traeing a descent entirely through males.

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

"It remains to be considered," Mr. Jarman says (*s*): "how far the doctrine of the preceding eases is applicable to limitations to heirs *of the body*. Sir *Edward Coke* (*t*), lays down the following distinetion:—'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 ease of a purehase, 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 subjeet of mueh eontroversy. Lord *Cowper*, in the well-known case of *Brown* v. *Barkham* (*u*), [denied] it to be law, and so decided; and though the propriety of his determination was questioned by Lord *Hardwicke*, before whom the ease was brought by a bill of review (*v*), and though Mr. *Hargrave* has defended the position of his author with his usual aeuteness and learning (*w*), yet subsequent eases appear to have established, in opposition to *Coke's* doctrine, that a limitation, either in a will or deed, to the l.'rs speeial of the body by purehase, will take effeet in favour of the designated heir of the body (if any) *though he or she be not the heir general of the body*. Thus, in the ease of *Wills* v. *Palmer* (*x*), 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 seeond son of A. was entitled as heir *male* of the body, though he was not heir general of the body, whieh eharaeter belonged to a granddaughter, the ehild of a deeeased elder son.

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

"This ease was followed by *Evans* d. *Weston* v. *Burtenshaw* (*y*), in whieh the same eonstruetion was applied to the limitations of a marriage settlement. In this state of the authorities, it seems unnecessary to eneumber the present work with a statement of

(*s*) First ed. Vol. II. p. 7.
(*t*) Co. Litt. 24 b.
(*u*) Pre. Ch. 442, 461. 1 Stra. 35, 2 Vern. 729; and see per Hale, C.J., *Pybus* v. *Mitford*, 1 Freem. 369.
(*v*) Amb. 8.
(*w*) Co. Litt. 24 b, n. (3).
(*x*) 5 Burr. 2615.
(*y*) Co. Litt. 164 a, n. (2).

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

Limits of the "very heir" doctrine.

It is now clearly settled that so far as estates tail are concerned, Lord Coke's doctrine is no longer applicable (*b*), and even in other cases it will not be applied if it would defeat the clear intention of the testator, as in *Chambers* v. *Taylor* and *Doe* d. *Angell* v. *Angell* (*c*).

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

"And here it may be proper to notice," Mr. Jarman continues (*d*): "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 the heirs male.*'

Aliter as to heirs taking by purchase.

"It is otherwise, however, in the case of gifts to the heir male or female by *purchase;* for, if lands be devised to A. for life, and, after his decease, to the heirs male of the body of B., and B. have a daughter who dies in his lifetime, leaving a son, who survives B., (all this happening in the lifetime of A., the tenant for life,) such

(*z*) "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, 3rd 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." (Note by Mr. Jarman.)

(*b*) *Wrightson* v. *Macaulay*, 14 M. & W. at p. 231.

(*c*) Supra, p. 1559.

(*d*) First ed. Vol. II. p. 9.

(*e*) Sec. 24.

CHAPTER XI.

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*).

"It should be observed, however, that in the case of *Oddie* v. *Woodford* (*h*), which arose on the celebrated 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 rule in question seem to have been impugned, the decision having, in each instance, been founded on the context. In *Oddie* v. *Woodford*, Lord *Eldon* dwelt much on the association of the word '*lineal*' with male descendant; the expression being 'eldest male lineal descendant' (*j*). 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."

Modern doctrine.

Mr. Jarman's distinction has not so far received any support, either from the judges or from the text writers.

In *Thellusson* v. *Rendlesham*, where the gift was to the "eldest

(*f*) Hob. p. 31; Co. Litt. 25 b.

(*g*) "This distinction, however, seems to have been lost sight of by Mr. Justice *Taunton*, in the recent case of *Doe* d. *Winter* v. *Perratt*, 3 M. & Sc. 586, 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." (Note by Mr. Jarman.)

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

(*i*) 3 My. & Cr. 559. "This is rather a decision on the question who shall *inherit*, than on that of 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." (Note by Messrs. Wolstenholme and Vincent, in the third edition of this work, Vol. II. p. 62.)

(*j*) "Eldest" was afterwards held to mean prior in line, not senior by birth, *Thellusson* v. *Rendlesham*, 7 H. L. C. 429 (same will).

male lineal descendant," Lord St. Leonards said (*k*): that "as to the word 'male,' the meaning of that was thought for a long while to be very doubtful, but it has been held to mean males claiming through males." And in *Lywood* v. *Kimber* (*l*), where personalty was given to the "issue male" of a person, Romilly, M.R., said that the words must be construed in their strict technical sense, which means issue male claiming through males. The distinction is disapproved of by Mr. Davidson (*m*) and Mr. Vaughan Hawkins (*n*).

Devise to heir male may apply to several grandsons.

The following remarks by Mr. Jarman must be read subject to what has just been said with reference to the distinction taken by him between heirs by inheritance and heirs by purchase. He says (*o*): "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 shewing that he had in his view a single individual; as in the case suggested by Lord *Coke* (*p*), who says, 'If lands be devised to one for life, the remainder to the next heir male of B., in tail, and B. hath issue two daughters, and each of them hath issue a son, and the father and the daughters die; some say the remainder is void for uncertainty; some say the eldest shall take, because he is the worthiest; and others say that both of them shall take, for that both make but one heir.'"

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

Technical sense of "heir male" not always adopted.

Assuming that Mr. Jarman's conclusions on the question above discussed are erroneous, it is clear that the expression "heir male" or "heir female" will not be construed in its technical sense if thereby the obvious intention of the testator would be defeated. This appears from a majority of the opinions of the judges in *Doe* d.

(*k*) 7 H. L. C. at p. 512. See also *Doe* d. *Angell* v. *Angell*, 9 Q. B. 328. *Lafone* v. *Stoney*, 17 Ir. Ch. 178.
(*l*) 29 Bea. 38.
(*m*) Conv. iii. 347 n.
(*n*) Wills, 171.
(*o*) First ed. Vol. II. p. 11.
(*p*) Co. Litt. 25 b.

CHAPTER XI.

"First male heir" in similar case.

Winter v. *Perratt* (*q*), where a devise in remainder was "to the first male heir of the branch of my uncle Richard Chilcott's family" (*qq*); the facts being that, at the date of the will, the uncle was dead, 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 (*r*). That construction was upheld indeed by two of the judges, but opposed by nine others; of whom two favoured 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 (*s*), while the remaining two held the will void for uncertainty (*t*).

Nemo est hæres viventis.

III.—The Word "Heir" when construed "Heir Apparent."—Mr. Jarman continues (*u*): "It is clear, that no person can sustain the

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

(*qq*) "Words in which it would probably require the eye of a lawyer to discern the germ of interminable litigation." Davidson, Conv., Vol. iii. at p. 349.

(*r*) This was the only question before D. P. on appeal in ejectment, on the demise of the second daughter's son. "In favour of the claim of the stock of the eldest daughter, some reliance appears to have been placed on *Harper's Case*, which is thus stated in Hale's MSS., Co. Litt. 10 b:—'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. *Pearce*; Hale's MSS. See s.c. in Palmer 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." (Note by Mr. Jarman.)

(*s*) As to this see next paragraph.

(*t*) "Heir of a family" was said to be an expression not known to the law; but, in *Horsfield* 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.

(*u*) First ed. Vol. II. p. 12.

character of heir, properly so called, in the lifetime of the ancestor, according to the familiar maxim, nemo est hæres viventis.

"Therefore, where (*v*) 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 (*w*).

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

Heir when construed to mean heir at parent or heir presumptive.

"Sometimes the context of the will shews 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 (*x*).

Heirs male "now living."

"As in the case of *James* v. *Richardson* (*y*), 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 (*z*).

"So, in the case of *Lord Beaulieu* v. *Lord Cardigan* (*a*), a bequest

(*v*) *Challoner* v. *Bowyer*, 2 Leon. 70. See also *Archer's Case*, 1 Rep. 66; *Anon.*, Dyer, 99 b, pl. 64; *Frogmorton* d. *Robinson* v. *Wharrey*, 2 W. Bl. 728, 3 Wils. pp. 125, 144.

(*w*) "It will be observed that the failure of the devise in this case is a consequence of the rule which requires that a contingent remainder should vest at the instant of the determination of the preceding estate." (Note by Mr. Jarman.) But see now 40 & 41 Vict. c. 33, ante, p. 1444.

(*x*) * "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 favoured 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." (Note by Mr. Jarman.) 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 meantime, *Richards* v. *Richards*, Joh. 754.

* Difference between an heir apparent and heir presumptive.

(*y*) T. Jon. 99, 1 Vent. 334, 2 Lev. 232, 3 Keb. 832, Pollex. 457, Raym. 330; *Durdant* v. *Burchet*, 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.

(*z*) Ante, Vol. I. Chap. XII.

(*a*) Amb. 533.

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.

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

"Again, in the more recent case of *Carne* v. *Roch* (*b*), 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.

Remark on *Carne* v. *Roch*.

"In this case, it was probably considered, that the testator had, by the word 'children,' explained himself to use the words 'heir at law' as synonymous with *eldest son*. And this construction has prevailed in some other cases where the indication of intention was less decisive and unequivocal."

Conflict between the cases.

The construction in question prevailed in *Darbison* d. *Long* v. *Beaumont* (*c*) and *Goodright* d. *Brooking* v. *White* (*d*), in each of which cases the testator referred to the ancestor of the heir in such a way as to lead the Court to infer that by heir he meant heir apparent, while in *Collingwood* v. *Pace* (*e*), and *Doe* d. *Knight* v. *Chaffey* (*f*) "heir" was construed in its technical sense. The question was much discussed in *Doe* d. *Winter* v. *Perratt* (*g*); seven judges were in favour of the heir apparent, and five in favour of the "first male heir" whose ancestors were dead. It ultimately appeared that the precise point was not before the House, and it was therefore not decided. Lord Brougham remarked that *Darbison* v. *Beaumont* and *Goodright* v. *White* "are less reconcilable with the general current of decision than might have been wished" (*h*).

Gift to true heir of living person is an executory devise.

It is hardly necessary to point out that where in a devise to the heir of A., a person living at the testator's death, "heir" means the true heir of A., and not his heir apparent, the devise is executory, and vests, on the death of A., in the person who is then his heir (*i*).

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

(*c*) 1 P. W. 229; 3 Br. P. C. Toml. 60, et vide *James* v. *Richardson*, supra. The question is referred to in Challis, R.P. 114.

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

(*e*) O. 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. & W. 656.

(*g*) Supra, p. 1564.

(*h*) 9 Cl. & F. at p. 694.

(*i*) Post, p. 1580.

IV.—The Word "Heir" explained by the Context of the Will to denote a Person who is not the Heir-general.—Mr. Jarman continues (*j*): "Where a testator shews 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 favour of the person described. Thus, if a testator says, 'I make A. B. my sole heir,' or 'I give Blackacre to my heir male, *which is my brother, A. B.*;' this is, it seems, a good devise to A. B., although he is not heir general (*k*).

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

"Again, in the case of *Baker* v. *Wall* (*o*), where the testator, having issue two sons, devised to A., his eldest son, his farm called Dumsey, to him and his heirs male for ever; adding, 'if a female, my next heir shall allow and pay to her £200 in money, or £12 a-year out of the rents and profits of Dumsey, and shall have all the rest to himself, I mean my next heir, to him and his heirs male for ever.' A.

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

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

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

(*j*) First ed. Vol. II. p. 18.

(*k*) Hob. 33. See also *Dormer* v. *Phillips*, 3 Drew. 39; *Parker* v. *Nickson*, 1 D. J. & S. 177.

(*l*) Hob. 34. But a devise of customary lands to the *heir* simpliciter gives them to the common-law heir, Co. Litt. 10 a; post, p. 1569.

(*m*) Pre. Ch. 464, per Lord Cowper.

(*n*) 1 Vent. at p. 381.

(*o*) 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 Bea. 77, ante, Vol. I. p. 479.

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. . . .

"But in the case of *Goodtitle* d. *Bailey* v. *Pugh* (*p*), 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*) *for ever, 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 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 favour 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 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 (*q*). It scarcely

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

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

(*q*) *Forster* v. *Sierra*, 4 Ves. 766; *Rawlinson* v. *Wass*, 9 Hare, 673. See *Gundry* v. *Pinniger*, 14 Bea. 94, 1 D. M. & G. 502. *Re Willomier*, 16 Ir. Ch. R. 389.

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.

"Heirs" may mean "issue."

In *Fowler* v. *Cohn* (*r*), a power to appoint real estate to "the children of A., and their, his or her heirs," was held on the context, to confer a power of appointing to the issue of A.'s children.

V.—Construction of the Word "Heir" varied by the Nature of the Property.—Mr. Jarman continues (*s*): "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.

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

"If the subject of disposition be real estate of the tenure of gavelkind, or borough English, or copyhold lands held of a manor in which a course of descent different from that of the common law prevails, it becomes a question, whether, under a disposition to the testator's heir as a purchaser, the intended object of gift is the heir general at common law, or his heir quoad the particular property which is the subject of the devise; and the authorities at a very early period, established the claim of the common law heir (*t*); supposing, of course, that there is nothing in the context to oppose the construction."

—as between pars paterna and pars materna:

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* (*u*), 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

(*r*) 21 [illegible] 0.

(*s*) First ed. Vol. II. p. 21.

(*t*) Co. Litt. 10 a (devise to heir of stranger); Rob. Gavelk. 117, 118; *Thorp* v. *Owen*, 2 Sm. & Gif. 90 (devise "to male heir" of testator); *Garland* v. *Beverley*, 9 Ch. D. 213 (devise in remainder to "right heir" of testator). See *Polley* v. *Polley*, 31 Bea. 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.

(*u*) 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. at p. 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.

CHAPTER XL.

heir-at-law." It was held by Sir W. P. Wood, V.-C., that the descent was broken by the devise, and that the heir ex parte paternâ was therefore entitled (*v*).

—in reference to personal estate, how construed.

Mr. Jarman continues (*w*): "With respect to the personalty, too, it is often doubtful (*x*) 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 (*y*). Where the gift to the heirs is by way of substitution, the latter construction has sometimes prevailed;

"To A. or his heirs" (by substitution

an example of which occurs in the case of *Vaux* v. *Henderson* (*z*), where a testator bequeathed to A. £200, 'and, failing him by decease before me, *to his heirs*'; and the legacy was held to belong to the next of kin of A. living at the death of the testator. Sir *R. P. Arden*, M.R., too, in *Holloway* v. *Holloway* (*a*), was strongly disposed to give the same construction to the word 'heirs' applied to personalty; though his opinion on another question rendered the point immaterial."

And a similar decision was made in *Gittings* v. *M'Dermott* (*b*). Of this case Lord St. Leonards observed (*c*) that the gift over was to prevent a lapse: the argument, he thought, 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 heirs, it was understood that he meant the same persons who would have taken after him in case there had not been a lapse (*d*). This principle has since been followed in other cases (*e*), 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 a "to be divided in equal shares between my brothers and sisters the

(*v*) See *Moore* v. *Simkin*, 31 Ch. D. 95, where the question whether the descent was broken arose under a settlement by deed executed in 1818.

(*w*) First ed. Vol. II. p. 22.

(*x*) Mr. Jarman means that a doubt may arise from the context, for the general rule, as stated by him (*post*, p. 1574) is that in gifts of personal estate "the word 'heir,' unexplained by the context, must be taken to be used in its proper sense."

(*y*) That is, under the Statute of Distribution; including a widow, but not a husband; *Doody* v. *Higgins*, 2 K. & J. 729. As to this see Chap. XLI.

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

(*a*) 5 Ves. 399.

(*b*) 2 Myl. & K.

(*c*) *De Beauvoir* v. *De Beauvoir*, 3 H. L. C. at p. 557.

(*d*) This is the substance of Lord St. Leonard's remarks, which seem to be inaccurately reported.

(*e*) *Doody* v. *Higgins*, 9 Hare, App. 32, 2 K. & J. 729; *Jacobs* v. *Jacobs*, 1 Bea. 557; *Re Power's Trust*, 4 K. & J. 188; *Re Philpot Hill*, L. R., 7 Eq. 151; *Finlason* v. *Tailock*, L. R., 9 Eq. 258; *Parsons* v. *Parsons*, L. R., 8 Eq. 260 (perpetual personal annuity); *Malins* v. *Munro*, 27 W. R. 936; *Re Stannard*, 48 L. T., N. S. 6[illegible].

living or their heirs it was held by 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 the personalty the statutory next of kin according to the Statute of Distribution (*f*).

"Heirs and assigns" of deceased person.

So in *Re Newton's Trusts* (*g*), where a testator bequeathed one-seventh of his personal estate "to my brother A. his heirs and assigns for ever," another seventh "to my brother B., his heirs and assigns for ever," and so on, and the remaining seventh "to the heirs and assigns for ever of my late sister C. now deceased": it was held by Wood, V.-C., that this last was quasi substitutional and went to the testator's next of kin; that by the previous gift, the testator must be supposed personal estate would devolve, and wished to give the representatives of C. in the same position as if the had been entitled to her share and thus devolved from her.

"Heirs of the body" construed issue.

Where the subsequent gift is to "heirs of the body," such of the next of kin of the propositus will be entitled as are descended from him that is, his children or other issue (*h*).

"Heirs" construed "issue."

"Heirs" will also be held to mean issue, if the context requires the construction (*i*).

"To be divided among the heirs of A."

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, (where one person with rare exceptions, be entitled to the whole but which will generally be satisfied by construing "heirs" as next of kin. Thus, in *Re Steevens' Trusts* (*j*), where a testatrix directed her 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 Bacon, V.-C., that "heirs" meant next of kin. And in *Low* v. *Smith* (*k*), where a testator gave all his real and personal estates upon trusts which implied conversion (*l*), and to be divided among his nephews, grand-nephews and nieces, the several shares to

(*f*) *Wingfield* v. *Wingfield*, 9 Ch. D. 708, followed in *Keay* v. *Boulton*, 25 Ch. D. 212. See post, p. 1577.

(*g*) L. R., 4 Eq. 171.

(*h*) *Pattenden* v. *Hobson*, 22 L. J. Ch. 697; *Price* v. *Lockley*, 6 Bea. 180, ("heirs lawfully begotten"). See also *Re Jeaffreson's Trusts*, L. R., 2 Eq. 270, stated below.

(*i*) *Speakman* v. *Speakman*, 8 Hare, 180. See *Fowler* v. *Cohn*, 21 Bea. 360, ante, p. 1569.

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

(*k*) 25 L. J. Ch. 503. See *Re Peppitt's Estate*, 36 L. T. 560 ("to be divided amongst my heirs and to their children").

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

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." It was held by Kindersley, V.-C., that at the death of A. his share went to his next of kin (*m*).

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, 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 (*n*).

The effect of words of distribution is more clearly exemplified in *Re Jeaffreson's Trusts* (*o*), 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. (*p*), but indicated the interests of a set of persons co-existing,

(*m*) The V.-C. added: "There is, however, this difficulty about it, which is, that the property will not, in this instance, go equally, but the widow will take one-third and the daughters two-thirds." On this it has been remarked that the difficulty "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." (Note by Mr. Vincent, in the fourth edition of this work, Vol. II. p. 124.) Compare the cases on gifts to relations, post, Chap. XLI.

(*n*) See *White* v. *Briggs*, 2 Phil. 583. In *Smith* v. *Butcher*, 10 Ch. D. 113, the decision in *Low* v. *Smith* was explained as resting on the words of distribution, and Jessel, M.R., appears to have accepted the explanation.

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

(*p*) See Chap. XLIV.

and that the next of kin of A. descended from her and living at her death were entitled (*q*).

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

In *Re Gamboa's Trusts* (*r*), 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" construed personal representatives.

In *Powell* v. *Boggis* (*s*) in a gift to A. for life and after her death "to her heirs as she shall give it by will, and if she die without leaving a will to her right heirs for ever," the phrase "right heirs" was held by Romilly, M.R., to mean executors or administrators, because in other parts of the will the testator had used "heirs" in that sense, but as in two other places in the will he had used "heirs" in the sense of next of kin, the reasoning of the M.R. does not seem convincing.

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

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 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 (*t*).

Distribution among "heirs" is under the statute.

In a gift to next of kin expressly according to the Statutes of Distribution, the statutes not only determine the objects of gift, but also regulate the manner and proportions in which they take (*u*). And a gift to "heirs," where that expression is construed to mean statutory next of kin, is brought by the implied reference to the statute under the same rule, except that in the latter case a

(*q*) See also *Bull* v. *Comberbach*, 25 Bea. 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 shewing 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. In commenting on *Ware* v. *Rowland*, Bacon, V.-C., in *Re Stevens' Trusts*, drew a distinction between a gift to the testator's own heirs and a gift to the heirs of a stranger, sed quære.

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

(*s*) 35 Bea. 535.

(*t*) *Re Thompson's Trusts*, 9 Ch. D. 607. Compare *Re Newton's Trusts*, ante, p. 1571, where the expression "heirs and assigns" was explained by its previous use as words of limitation.

(*u*) Post, p. 1608.

widow is included as a person entitled under the statute in cases of intestacy (*v*). It does not seem to have been clearly decided whether a direction for equal division will, among "heirs," be given effect to, where "heirs" is construed to mean statutory next of kin (*w*).

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

In all the foregoing cases, special grounds were assigned for departing from the proper sense of the word *heirs;* and as Mr. Jarman points out (*x*), they "must not be understood to warrant the general position, that the word *heirs*, in relation to personal estate, imports *next of kin*, especially if real estate be combined with personalty in the gift; which circumstance, according to the principle laid down by Lord *Eldon* in *Wright* v. *Atkyns* (*y*), 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."

A fortiori where realty and personalty combined.

"To my nighest heir at law."

Thus, in *Gwynne* v. *Muddock* (*z*), 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.

"Heir at law of my family."

So in *Tetlow* v. *Ashton* (*a*), 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 colour of title.

In *De Beauvoir* v. *De Beauvoir* (*b*), the word used was "heirs"

(*v*) *Jacobs* v. *Jacobs*, 16 Bea. 557; *Low* v. *Smith*, 25 L. J. Ch. 503; *Re Steevens' Trusts*, L. R., 15 Eq. 110; *Wingfield* v. *Wingfield*, 9 Ch. D. 658. 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.

(*w*) See the remarks on *Low* v. *Smith*, ante, p. 1572, note (*m*).

(*x*) First ed. Vol. II. p. 22.

(*y*) Coop. pp. 111, 123. "See also *Pyot* v. *Pyot*, 1 Ves. sen., 4th ed., 335, where, however, the words of the will being applicable rather to personalty, the construction which obtains, in regard to this species of property, predominated as to both real and personal estate." (Note by Mr. Jarman.) The principle laid down by Lord Eldon does not apply where the gift to the heirs is substitutional, or where the word "heirs" is contrasted with family; see *Wingfield* v. *Wingfield*, 9 Ch. D. 658, stated supra; and per Lord Cottenham, *White* v. *Briggs*, 2 Phil. at p. 590.

(*z*) 14 Ves. 488.

(*a*) 20 L. J. Ch. 53.

(*b*) 15 Sim. 163, 3 H. L. C. 524.

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 trustees 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 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 (*c*), said (*d*), "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 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 or question but that 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 labour 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."

Ultimate remainder to "my own right heirs."

So in *Haslewood* v. *Green* (*e*), 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."

(*c*) Vide infra, p. 1576.
(*d*) 3 H. L. C. at p. 557.
(*e*) 28 Bea. 1. See also *In bonis Dixon*, 4 P. D. 31, and *Todhunter* v. *Thompson*, 26 W. R. 883 ("my legal heirs").

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

Mr. Jarman continues (*f*): "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 (*g*), 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* (*h*), 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," adds Mr. Jarman (*i*), "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 (*j*). Thus, under the words 'to my heir £4,000,' 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'" (*k*).

"Heirs," in the plural, similarly construed.

And although the word used, in a gift of personal estate only, is "heirs" (*l*), in the plural, it will, unless explained by the context, retain its proper sense. Sir R. P. Arden, in *Holloway* v. *Holloway* (*m*), was strongly disposed to construe it next of kin; though his opinion on another question rendered the point immaterial. But in *De Beauvoir* v. *De Beauvoir* (*n*), 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,

(*f*) First ed. Vol II. p. 23.

(*g*) Shep. Touch. 446.

(*h*) 1 Vern. 35. See also *Southgate* v. *Clinch*, 27 L. J. Ch. 651, 4 Jur. N. S. 428; *Re Rootes*, 1 Dr. & Sm. 228.

(*i*) First ed. Vol. II. p. 23.

(*j*) See 2 Ld. Raym. 829.

(*k*) *Mounsey* v. *Blamire*, 4 Russ. 384. Jessel, M.R., is reported, 10 Ch. D. at p. 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. by Sir J. Leach, that in cases of succession "heir" meant next of kin.

(*l*) "Heirs-at-law" has been thought less flexible than "heirs," L. R., 15 Eq. p. 113; but see 15 Sim. p. 593.

(*m*) 5 Ves. at p. 403.

(*n*) 3 H. L. C. pp. 524, 557, disapproving of *Evans* v. *Salt*, 6 Bea. 266.

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."

One of the authorities noticed by Lord St. Leonards was *Pleydell* v. *Pleydell* (*o*), 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.

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

And in *Smith* v. *Butcher* (*p*), 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 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. 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* (*q*) and *Keay* v. *Boulton* (*r*), where there was an independent gift by way of substitution to the heirs of deceased children.

Various meanings of "heirs."

In *Powell* v. *Boggis* (*s*), the word "heirs" was used seven times in a will; in two places it was held to mean executors or administrators, in three places it was held to mean next of kin, and in one place it was held to mean heir-at-law: in another clause, by which the testator gave personalty to his nephews and nieces "their heirs or assigns," this was held to be an absolute gift to the nephews and nieces.

In *Macpherson* v. *Stewart* (*u*), a testator left all his property, real and personal, to trustees upon trust to invest the same for the benefit of his heirs; it was held that by "heirs" he meant all persons interested under his will, namely his mother (to whom a life interest was given), two life annuitants, two legatees, and a nephew upon whom the whole residue was ultimately to be settled as real estate in strict settlement.

The construction of "heirs," "right heirs," &c., in an executory trust is treated of elsewhere (*v*).

(*o*) 1 P. W. 748.
(*p*) 10 Ch. D. 113; *Skinner* v. *Gumbleton*, [1903] 1 Ir. 36 ("right heirs and assigns"); *Re Bishop and Richardson*, [1899] 1 Ir. 71 ("eldest son or heir at law"); *Re Russell*, 52 L. T. 559. See also *Hamilton* v. *Mills*, 29 Bea. 193 (decd).
(*q*) Ante, p. 1571.
(*r*) 25 Ch. D. 212.
(*s*) 35 Bea. 535.
(*u*) 28 L. J. Ch. 177.
(*v*) Chap. XLVIII

CHAPTER XL.

Difference between real and personal estate.

Mention may here be made of the general rule that in a bequest of personal estate to A. or his heirs, the word "heirs" is read as a word of substitution, so as to prevent a lapse, while in a devise of real estate to A. or his heirs the word "or" was, in the case of wills under the old law, read "and," so as to give A. the fee (*w*). Since the Wills Act, this reason no longer applies, and it is therefore arguable that in such a devise "heirs" would be read as a word of substitution, so as to give effect to the obvious intention of the testator (*x*).

"Heirs or assigns."

Where personal property is given to a number of persons "or their heirs or assigns," the construction is different, for the addition of "assigns" is taken to shew that the testator used the words "or their heirs or assigns" as words of limitation, so that the legatees take absolutely (*y*).

"Heirs and assigns."

If there is a bequest of personal estate to several persons in succession, with an ultimate remainder to the testator's "heirs and assigns," it is hardly necessary to say that the addition of assigns does not affect the construction, and the property goes to the testator's heir-at-law (*z*).

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

VI.—The Word "Heirs," &c., when construed "Children."—Mr. Jarman continues (*a*): "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.

"As, in the case of *Loveday* v. *Hopkins* (*b*), where the words:—'Item, I give to my sister Loveday's *heirs* "£6,000"'—'I give to my sister Brady's children equally "£1,000."' 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 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

(*w*) Ante, p. 611.

(*x*) *Re Ibbetson*, 88 L. T. 461. Mr. Vaughan Hawkins, however, thinks that the old rule still applies (Wills, 180).

(*y*) *Re Walton's Estate*, 8 D. M. & G. 173; *Powell* v. *Boggis*, 35 Beav. 535. See per Shadwell, V.-C., in *Waite* v. *Templer*, 2 Sim. at p. 542, stated supra, p. 476. As to devises of real estate to "heirs and assigns," vide supra, p. 1558.

(*z*) *Skinner* v. *Gumbleton*, [1903] 1 Ir. 36 ("right heirs and assigns").

(*a*) First ed. Vol. II. p 23.

(*b*) Amb. 273.

Court could not construe the will so as to let them in to take. His Honor, therefore, held the surviving child to be entitled to the legacy."

And in *Bull* v. *Comberbach* (*c*), where a testator devised 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."

Same construction applied in the case of real estate.

This construction is equally applicable to a devise of real estate. Thus, in *Milroy* v. *Milroy* (*d*), 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.

Heirs of the body.

The expression "heirs of the body" will also be held to mean children, where the context requires that construction (*e*).

At what period the heir is to be ascertained.

VII.—Period at which 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

(*c*) 25 Bea. 540. No claim was made for next of kin other than children. See also *Roberts* v. *Edwards*, 33 Bea. 259. "Heirs" sometimes means issue and not children only, see ante, p. 1571.

(*d*) 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.

(*e*) *Symers* v. *Jobson*, 16 Sim. 267; *Gummoe* v. *Howes*, 23 Bea. 184. *Fowler* v. *Cohn*, 21 Bea. 360, supra, p. 1569 (where "heirs" was construed "issue"). See also *Speakman* v. *Speakman*, 8 Hare, 180.

CHAPTER XL.

Gift to testator's heir.

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 for ever, the remainder was held to vest at the testator's death in his eldest son C., who was his male heir at law at that time.

A similar decision was come to in *Re Frith* (*g*).

Gift to the heir of a stranger.

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* (*h*), 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 favour of the former.

Same rule as to real and personal estate.

This case also shews, 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 (*i*); yet that the rule also holds good generally with regard to personal property for the purposes of the present question.

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

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* (*j*), 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

(*f*) 5 B. & Ad. 731. See also per Bayley, J., *Doe* v. *Martyn*, 8 B. & Cr. at p. 511; *Re Maher*, [1909] 1 Ir. 70.

(*g*) 85 L. T. 455 ("heir at law"); *Re Baker*, 79 L. T. 343 ("right heirs"); *Owen* v. *Gibbons*, [1902] 1 Ch. 636 ("right heirs").

(*h*) 1 Vern. 35.

(*i*) Vide ante, p. 1443.

(*j*) 9 Hare, 673.

he had died intestate" point expressly to the period of the testator's death, and in an even balance of arguments must weigh in favour 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 (*l*).

What is sufficient to cause a departure from the rule.

However, the intention of the testator prevailed in *Doe* d. *King* v. *Frost* (*m*); there 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 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 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 (*n*).

Death of devisee intestate.

If a person takes land under a devise to him as heir of the testator, then on his decease intestate descent is traced from him (*o*); but if a testator devises land to the heir, or the heir of the body, of J. S., and the person so entitled dies intestate, descent is traced from J. S. (*p*).

(*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.

(*l*) *Boydell* v. *Golightly*, 14 Sim. 327. *Wrightson* v. *Macaulay*, 14 M. & W. 214. *Re Grayson*, 48 L. J. Ch. 354.

(*m*) 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. LII.) 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.

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

(*o*) *Owen* v. *Gibbons*, [1902] 1 Ch. 636.

(*p*) Inheritance Act, 1833, s. 4, Williams, R. P. (20th ed.), 348, n. (*i*).

CHAPTER XLI.

GIFTS TO FAMILY, DESCENDANTS, ISSUE, ETC.

		PAGE
I.	*Gifts to Family*	1582
II.	——— *Descendants*	1587
III.	——— *Issue* :—	
	(i.) "*Issue*" *properly means Descendants of every Degree; Mode of Division*	1590
	(ii.) "*Issue*," *when construed* "*Children*"	1596
IV.	——— *Next of Kin*	1604
V.	——— *Legal or Personal Representatives, Executors or Administrators* :—	
	(i.) *How construed generally*	1612
	(ii.) *Gifts to Executors, &c., of Testator himself*	1622
	(iii.) *Gifts to Executors, when annexed to the Office*	1622
VI.	*Gifts to Relations*	1627
VII.	——— *Special Classes of Relations*	1635
VIII.	*At what Period Relations, Next of Kin, &c., are to be ascertained*	1641
IX.	*Gifts to Persons of Testator's Name*	1650
X.	——— *Friends*	1654

Construction of the word "family."

I.—Gifts to Family.—"The word *family*," Mr. Jarman remarks (*a*), "has been variously construed, according to the subject-matter of the gift and the context of the will (*b*). Sometimes the gift has been held to be void for uncertainty.

Gifts to "family," when void for uncertainty.

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

(*a*) First ed. Vol. II. p. 25.

(*b*) See *Sinnott* v. *Walsh*, 5 L. R. Ir. 27.

(*c*) 1 Br. C. C. 142. His lordship also considered that the expression "hoping" was precatory not imperative. See ante, Chap. XXIV.

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

Word "family" rejected.

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

"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* in devise of realty by itself.

"Sometimes the word *family* or 'house' (which is considered as synonymous) has been held to mean 'heir.' A leading authority

(*d*) 3 East, 172; *Re Cullimore's Trusts*, 27 L. R. Ir. 18.

(*e*) 8 Sim. 134. "I cannot say that that case is quite satisfactory to my mind," per Lord Cranworth, V.-C., 1 Sim. N. S. at p. 246. See also *Stubbs* v. *Sargon*, 2 Kee. 255, ante, p. 481.

(*f*) "No doubt the testator's real intention was to assimilate the residuary bequest to the legacies; but the V.-C. seems to have considered that this hypothesis savoured too much of mere conjecture." (Note by Mr. Jarman.)

for this construction is the often-cited proposition of Lord *Hobart*, in *Counden* v. *Clerke* (*g*), that if land be devised to a stock, or family, or house, it shall be understood of the heir principal of the house."

And this construction has been adopted in other cases, where the gift was one of real estate by itself (*h*).

"Family" held to mean heir apparent.

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

"Nearest family" held to mean heir.

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.

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

In *Lucas* v. *Goldsmid* (*k*), 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," it was held that the sons were entitled as tenants in common in tail.

"Family" construed "children" in devise of realty.

As will presently be mentioned, the popular use of "family" as meaning "children" has been recognized by the Courts in the case of bequests of personal estate, and it will be so construed even in devises of real estate, if the context requires. Thus, in *Burt* v. *Hellyar* (*l*), 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," Wickens, V.-C., held, that "families" meant "children."

In bequests of personalty or in mixed gifts, "family" means "children."

In a bequest of personalty (including, of course, the proceeds of sale of real estate (*m*)), or a mixed gift of realty and personalty (*n*),

(*g*) Hob. 29.

(*h*) *Wright* v. *Atkyns*, 17 Ves. 255; 19 Ves. 299; Coo. 111; T. & R. 143, in which the earlier authorities were discussed, including *Chapman's Case*, Dyer, 333 b.

(*i*) 5 M. & Sel. 126.

(*j*) 5 Bea. 241.

(*k*) 29 Bea. 657.

(*l*) L. R., 14 Eq. 160.

(*m*) *Woods* v. *Woods*, 1 My. & C. 401. *Reay* v. *Raulinson*, 29 Bea. 88.

(*n*) As to the effect of a trust to settle real and personal property for the benefit of a person and his family, see *White* v. *Briggs*, 15 Sim. 17, 2 Ph. 583, stated in Chap. XXIV.

the primary meaning of "family" is children (*o*). Whether they take per stirpes or per capita, as joint tenants or as tenants in common, depends upon the form of the gift. Thus under a gift to A. and B. and their respective families, if any, one half goes to A. and his children living at the testator's death as joint tenants, and the other half goes in like manner to B. and his children (*p*). So if property is given to the testator's brothers and sisters in equal shares, "and to the families of such of them as shall be then dead" (that is, at the period of distribution), the children of the brothers and sisters take per stirpes and as joint tenants inter se (*q*). But if the gift is simply "to the families of X. and Y.," the children of X. and Y. take per capita, and not per stirpes and as joint tenants (*r*). In *Barnes* v. *Patch* (*s*), where a testator gave his real and personal estate to be equally divided between L. and E.'s families, the children of L. and E. took per capita, but whether as joint tenants or as tenants in common, does not appear. In *Owen* v. *Penny* (*t*), under a gift to the family of A., it was held that the children of A. took as tenants in common.

"Family" does not include parents.

Where the gift is to the families of named persons, the parents are excluded (*u*). It may also be laid down, as a general rule, that a gift to the "family" of a particular person does not include a husband (*v*), a wife (*w*), or collateral relations (*x*), or descendants of children, whether living or dead (*y*).

Illegitimate children.

A gift to the children of A. does not include his illegitimate children, but under a power to appoint to the family of A., an appointment in favour of his illegitimate child has been upheld (*z*).

Where "family" construed "relations."

The word "family" has also been construed as synonymous with "relations." Thus, in *Cruwys* v. *Colman* (*a*), where a testatrix,

(*o*) *Re Terry's Will*, 19 Bea. 580; *Pigg* v. *Clarke*, 3 Ch. D. 672 (gift to the testator's family); *Re Muffett*, 55 L. T. 671; *Sinnott* v. *Walsh*, 5 L. R. Ir. 27.

(*p*) *Re Parkinson's Trust*, 1 Sim. N. S. 242. See *Morton* v. *Tewart*, 2 Y. & C. C. C. 67.

(*q*) *Re Battersby's Trusts*, [1896] 1 Ir. 600.

(*r*) *Gregory* v. *Smith*, 9 Ha. 708; *Commissioners of Charitable Donations* v. *Dey*, 27 L. R. Ir. 289.

(*s*) 8 Ves. 604.

(*t*) 14 Jur. 359.

(*u*) *Gregory* v. *Smith*, supra; *Re Muiqueen's Trusts*, 7 L. R. Ir. 127.

(*v*) *M'Leroth* v. *Bacon*, 5 Ves. 159. In this case an appointment in favour of a husband was upheld on the special terms of the will.

(*w*) *Wood* v. *Wood*, 3 Ha. 65; *Re Hutchinson and Tenant*, 8 Ch. D. at p. 542, per Jessel, M.R.

(*x*) *Wood* v. *Wood*, supra.

(*y*) *Gregory* v. *Smith*, 9 Ha. 708; *Burt* v. *Herlyar*, L. R., 14 Eq. 160; *Pigg* v. *Clarke*, 3 Ch. D. 672.

(*z*) *Humble* v. *Bowman*, 47 L. J. Ch. 62; *Lambe* v. *Eames*, L. R., 6 Ch. 597.

(*a*) 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. 319; *Grant* v. *Lynam*, 4 Russ 292; *Snow* v. *Teed*, L. R., 9 Eq. 622. And in *Williams* v. *Williams*, 1

CHAPTER XLI.

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 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 (*b*), and the situation of the parties made it improbable that there should be any, or that the birth of any was contemplated. Every case, however, must depend upon its particular circumstances. "Family" is not a technical word, and is of flexible meaning (*c*). It may mean ancestors (*d*). "In one sense it means the whole household, including servants and perhaps lodgers (*e*). In another 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 (*f*). In the sense I have just mentioned the family of A. includes A. himself; A. must be a member of his own family (*g*). 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

Sim. N. S. 358, where the testator drew a distinction between "children" and "family," it was held that the latter word included descendants of every degree. See Chap. XXIII.

(*b*) See this circumstance mentioned as making "children" an improbable construction, by Romilly, M.R., 19 Bea. 581. It would appear from *Re Hutchinson and Tenant*, 8 Ch. D. 540, and *Sinnott* v. *Walsh*, 5 L. R. Ir. 27, that a power to appoint among "the family" of A. means his children if he has any.

(*c*) Per Kindersley, V.-C., *Green* v. *Marsden*, 1 Drew. at p. 651.

(*d*) Per Romilly, M.R., *Lucas* v. *Goldsmid*, 29 Bea. at p. 660. And see *James* v. *Lord Wynford*, 2 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."

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

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

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

which have been cited; and independently of them I should have come to the same conclusion" (*h*).

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 (*i*). 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 family, the word "family" will not be rejected as surplusage (*j*), or (which amounts to the same thing) treated as a word of limitation, but will give a substantive interest to the children (*k*) 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* (*l*), 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* (*m*), 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 (*n*).

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

(*i*) See *Peap Cheah Neo* v. *Ong Cheng Neo*, L. R., 6 P. C. 381; *Re Cullimore's Trusts*, 27 L. R. Ir. 18.

(*j*) See *Robinson* v. *Waddelow*, 8 Sim. 134 (stated ante, p. 1583), where this construction prevailed.

(*k*) *Parkinson's Trust*, 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, Chap. L.

(*l*) 2 C. M. & R. 638.

(*m*) 3 B. & Ald. 546.

(*n*) *Ralph* v. *Carrick*, 11 Ch. D. 873; *Re Morgan*, [1893] 3 Ch. 222. As to powers to appoint to descendants, see

CHAPTER XLI.

In *Crossly* v. *Clare* (*o*), 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 "now living" excluding him. In *Leyard* v. *Haworth* (*p*), the word "descendants" was held to refer to children and grandchildren who were objects of an antecedent gift.

"Relations by lineal descent."

In *Craik* v. *Lamb* (*q*), 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.

Whether collaterals may be included.

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* (*r*), Romilly, M.R., held that by a gift to descendants of J. S., the testator meant "collateral descendants" (children and grandchildren of a brother) of J. S. The M.R. seems to have been misled by the use of the word "descent" in the law of inheritance (*s*). 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 (*t*).

Gift to descendants; they take per capita.

"Under a gift to descendants *equally*," says Mr. Jarman (*u*), "it is clear that the issue of every degree are entitled per capita, i.e. each individual of the stock takes an equal share concurrently with, not in the place of, his or her parent (*v*). And even where the gift is to descendants simply, it seems that the same mode

Chap. XXIII. "Offspring" has the same primary meaning, but is sometimes construed as meaning "children," post, p. 1596, n. (*t*)

(*o*) Amb. 397, 3 Sw. 320, n. See *Re Flower*, 62 L. T. 216; 63 L. T. 201.

(*p*) 1 East, 120.

(*q*) 1 Coll. 489.

(*r*) 34 Bea. 66, 2 D. J. & S. 537.

(*s*) Co. Lit. 10 b, 13 b, 25 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.

(*t*) 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.

(*u*) First ed. Vol. II. p. 32.

(*v*) *Butler* v. *Stratton*, 3 B. C. C. 367.

of distribution prevails; unless the context indicates that the testator had a distribution per stirpes in his view.

Contrary intention.

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

Reference to statute.

So if descendants are expressly desired to take in the proportions directed by the statute, they cannot take concurrently with, but only in the place of, their parents (*x*). And in one case (*y*), 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 (*z*).

Substitution.

And where the gift to descendants is substitutional, or quasi-substitutional, independently of the Statute of Distribution, the general rule is that they take per stirpes (*a*).

Mode of division per stirpes.

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," Romilly, M.R., thought A. and B. were the stirpes in the first instance to be considered, so that the primary 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 fund primarily into a

(*w*) 2 Cox, 187.

(*x*) *Smith* v. *Pepper*, 27 Bea. 86, marg. note.

(*y*) *Tucker* v. *Billing*, 2 Jur. N. S. 183.

(*z*) Compare *Dick* v. *Lacy*, 8 Bea. 214, where property was given to A. for life and after her decease "to her nieces and their descendants per stirpes"; it was held that the nieces took absolutely and that their issue took nothing, the gift to them being by substitution. And compare the cases on gifts to "issue," post, sect. III.; and "children," post, p. 1713.

(*a*) *Ralph* v. *Carrick*, 11 Ch. D. 873, stated post, p. 1599. See the cases on gifts to issue, post, p. 1503.

(*b*) *Ralph* v. *Carrick*, supra; *Re Rawlinson*, [1909] 2 Ch. 36.

(*c*) *Robinson* v. *Shepherd*, 32 Bea. 665; 4 D. J. & S. 129.

CHAPTER XLI.

corresponding number of parts. However, in a subsequent case the M.R. acted on his own opinion (*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 preferred by North, J., in *Re Wilson* (*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 the 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.

Whether "descendants" can mean children.

It is possible that a clear context might require "descendants" to be construed as meaning "children": as is sometimes done in the case of the word "issue" (*f*). But "descendants" is less flexible than "issue" (*g*).

Bequest to "issue," how construed.

III.—Gifts to Issue: (i.) "*Issue*" *properly means Descendants of every Degree; Mode of Division.*—Mr. Jarman continues (*h*): "The word *issue*, when not restrained by the context, is co-extensive and synonymous with descendants, comprehending objects of every degree (*i*). And here the distribution is per capita, not per stirpes. The case of *Davenport* v. *Hanbury* (*j*) presents a simple example. The bequest was to M., or her issue. M. died in the lifetime of the testator, leaving one son living, and two children of a deceased daughter. Sir *R. P. Arden*, M.R., held, that these three objects were entitled per capita; and, there being no words of severance, they took as joint tenants" (*k*).

(*d*) *Gibson* v. *Fisher*, L. R., 5 Eq. 51. See also *Dick* v. *Lacy*, 8 Bea. 214, ante, note (*z*); *Booth* v. *Vicars*, 1 Coll. 11.

(*e*) 24 Ch. D. 664.

(*f*) Infra, p. 1596.

(*g*) *Ralph* v. *Carrick*, 11 Ch. D. 873.

(*h*) First ed. Vol. II. p. 33.

(*i*) *Haydon* v. *Haldane*, 3 T. R. 372; *Hockley* v. *Mawbey*, 1 Ves. jun. 143; *Wythe* v. *Thurlston*, Amb. 555, 1 Ves. sen. 196, more correctly at 3 Ves. p. 258; *Horsepool* v. *Watson*, 3 Ves. 383; *Bernard* v. *Montague*, 1 Mer. 422; *Hall* v. *Nalder*, 22 L. J. Ch. 242; *South* v. *Searle*, 2 Jur. N. S. 390; *Re Jones' Trusts*, 23 Bea. 242; *Maddock* v. *Legg*, 25 Bea. 531; *Hodgen* v. *Neale*, L. R., 11 Eq. 48; *Re Corbass*, 1 Ch. D. 460; *Edyvean* v. *Archer*, [1903] A. C. 379. "Offspring" is synonymous with "issue," see *Thompson* v. *Beasley*, 3 Drew. 7; *Re Smith*, 35 Ch. D. 558; *Bradshaw* v. *Bradshaw*, [1908] 1 Ir. 288 (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 Bea. 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 Bea. 38, vide ante, p. 1563.

(*j*) 3 Ves. 257.

(*k*) In *Weldon* v. *Hoyland*, 4 D. F. & J. 564, and *Law* v. *Thorp*, 27 L. J. Ch. 649, where there were words of severance, the issue took as tenants in com-

In *Leigh* v. *Norbury* (*l*), Grant, M.R., 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 (*m*).

It will, of course, be remembered that we are here dealing with cases in which the issue take by direct gift, as purchasers. Where the gift is to A. "and" his issue, or to A. "or" his issue, and A. dies before the testator, the question arises whether the gift to the issue is substitutional (*n*); if A. survives the testator other considerations may arise. Different rules apply according to whether the gift is of real estate only (*o*), or of personal estate only (*p*), or of real and personal estate together (*q*).

Devise of real estate to issue.

"It will be perceived," says Mr. Jarman (*r*), "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 not barred, devolve (as in *Mandeville's Case* (*s*)). But whatever may be the plausibility or force of such analogical reasoning, it has received but little countenance from the cases; there being, it is believed, no direct adjudication in favour of such a construction, while positive authority may be cited against it: as, in the case of *Cook* v.

mon. As to the severance of a joint tenancy where the share of a deceased joint tenant is given to his issue, see *Hoasman* v. *Pearse*, L. R., 7 Ch. 275, and other cases cited post, Chap. XLIV.

(*l*) 13 Ves. 340. See also *Freeman* v. *Parsley*, 3 Ves. 421.

(*m*) "The legal and proper import" of issue is descendants; per Knight Bruce, V.-C., in *Head* v. *Randall*, 2 Y. & C. C. C. at p. 235; see *Edyvean* v. *Archer*, [1903] A. C. p. 384. As to the case of *Norman* v. *Norman*, Beat. 430, which does not relate to the law of wills, see Farwell on Powers, 496.

(*n*) Chap. XXXVI.

(*o*) Chap. LI.

(*p*) Chap. XXXIII.

(*q*) Chap. XXXIII.

(*r*) First ed. Vol. II. p. 34.

(*s*) Ante, p. 1554.

"To the issue of J. S."

Remark on *Cook* v. *Cook*.

Cook (*t*), where it was held, that, under a devise to the issue of J. S., the children and grandchildren took concurrently an estate for life.

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

Effect where the devise is to the issue as tenants in common in fee.

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

Effect of express desire to keep estate together.

It is equally clear, on the other hand, that if the context manifests an intention to keep the devised estates 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 formally 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 in one person;" the devise to issue was read as a devise to the heirs of the body (*v*).

Distribution per capita or per stirpes.

To return to gifts of personal estate. It has been already mentioned (*w*) that under a gift to issue, descendants of every degree are, as a general rule, entitled per capita as tenants in common or as joint tenants, according as there are or are not words of severance, children taking concurrently with their parent (*x*). And a gift to the issue of two or more persons follows the same rule (*y*). But, as in the case of gifts to descendants, so in a gift to issue, the testator may expressly or impliedly direct a division per stirpes (*z*), in which case children are not allowed to take concurrently

(*t*) 2 Vern. 545.

(*u*) *Mogg* v. *Mogg*, 1 Mer. 651.

(*v*) *Allgood* v. *Blake*, L. R., 7 Ex. 339; 8 Ex. 160. See also *Whitelock* v. *Haddon*, 1 B. & P. 243, ante, p. 1556.

(*w*) Supra, p. 1590.

(*x*) *Freeman* v. *Parsley*, 3 Ves. 421; *Cancellor* v. *Cancellor*, 2 Dr. & S. 194.

(*y*) *Surridge* v. *Clarkson*, 14 W. R. 979. (Gift to M. for life, with remainder to her two surviving sisters' issue.) Compare the cases on gifts to the children of two or more persons, post, p. 1711 seq.

(*z*) Supra, p. 1589. *Dick* v. *Lacy*, 8 Bea. 214; *Re Orlow's Trust*, L. R., 3 Eq. 375; *Gibson* v. *Fisher*, L. R., 5 Eq. 51; *Re Rawlinson*, [1909] 2 Ch. 36 See *Stonor* v. *Curwen*, 5 Sim. 264 (executory trust).

with their parent. The manner in which the stocks are to be ascertained has also been discussed (*a*).

Gifts to persons of different generations.

In the case of a gift to the issue of a person per stirpes, the general principle is that children never take concurrently with their parent (*b*). And in other cases, where a division per stirpes is not directed, "it is certainly not very probable, à priori, that a testator should intend that parents and children and grandchildren should take together as tenants in common *per capita*; and the Court will not very willingly adopt such a construction. But if such an intention is clearly expressed, and there is nothing in the will to control it, and to shew that such was not his intention, that construction must of course prevail" (*c*). Thus, in *Law* v. *Thorp* (*d*), a testator gave property to his daughter for life and after her decease to her children and their issue, and it was held that all the children and their issue were entitled per capita. But a contrary intention may appear. Thus, in *Davis* v. *Bennett* (*e*), a testator gave his residue to be equally divided between his sisters J. and M. and the issue of his deceased sisters E. and A., in equal shares if more than one of such respective issue. E. left living at the testator's death five children, twenty-four grandchildren, and twelve great grandchildren: A. left one child. Lord Westbury remarked that if the bequest had ended with the words, "if more than one" J. and M. and the descendants of E. and A. would have taken per capita, but the words "respective lawful issue" implied a primary division per stirpes: consequently J. and M. and the child of A. took each one-fourth, and the descendants of E. took the remaining fourth per capita.

Substitutional gifts.

Again, where the gift to the issue is substitutional, or quasi-substitutional (*f*), the division is, as a general rule, per stirpes. Accordingly, if property is given to a number of persons with a gift by way of substitution to the issue of any of them dying in the lifetime of the testator, or before the period of distribution, or if property is given to a number of persons living at a certain time, and the issue of such of them as are then dead, the primary division is per stirpes (*g*), the issue of each of the deceased persons taking per capita between themselves (*h*).

(*a*) Supra, p. 1589. *Re Wilson*, 24 Ch. D. 664.

(*b*) See *Re Raulinson*, [1909] 2 Ch. 36.

(*c*) Per Kindersley, V.-C., in *Cancellor* v. *Cancellor*, 2 Dr. & S. at p. 192.

(*d*) 27 L. J. Ch. 649.

(*e*) 4 D. F. & J. 327.

(*f*) As to substitutional and quasi-substitutional gifts, see Chap. XXXVI.

(*g*) Where the distribution among persons of different generations is per stirpes, the general rule is that children never take concurrently with their parents (ante, p. 1589). See *Re Lund's Settlement*, 89 L. T. 606 (limitation by deed to the children "or remoter issue" of A.), following *Re Cleland's Trusts*, 7 L. R. Ir. 74.

(*h*) *Armstrong* v. *Stockham*, 7 Jur. 230; *Gourling* v. *Thompson*, L. R., 11 Eq.

Gift of "share."

If reference is made to the "shares" of the original legatees, this does not make the issue of a deceased legatee take per stirpes as between themselves. Thus where property is given to A. for life, and after his death to B. and C., and the testator directs that if either of them should be then dead, his share is to go to his issue, and B. and C. both die before A., leaving issue, B.'s issue take one half and C.'s issue the other half, the issue of each taking per capita as between themselves (*i*).

Issue to take "parents'" share.

Where the gift to the issue directs that they shall take their parents' share (or their respective parents' shares), the question is more difficult. In *Ross* v. *Ross* (*j*), where there was a gift to A. for life, with remainder to the children of A. living at her death and the issue of such of her children as might have died in her lifetime, the issue to take the share which their parent would have been entitled to if living, it was held by Romilly, M.R., that "parent" was not confined to a child of A., but might mean a grandchild who died leaving issue, the result being that the division was per stirpes throughout. A. had five children, of whom two predeceased her, one leaving children, and the other leaving no issue except a grandchild: consequently the grandchild took one-fifth. The same principle was followed by Malins, V.-C., in *Re Orton's Trust* (*k*).

But in a case before Sir J. Stuart (*l*), where property was given to A. for life and then to B., C., D. and E. equally, and the issue of any of them who should be then dead, the issue to take the share which their parent would have been entitled to if living, the V.-C. seems to

366 n. *Re Sibley's Trusts*, 5 Ch. D. 494. Compare *Barnaby* v. *Tassell*, L. R., 11 Eq. 363, where the gift was to children and grandchildren. In *Shailer* v. *Groves* (11 Jur. 485), where the gift was to A. for life and after her decease to the testator's surviving brothers and sister or their issue, share and share alike, and all the brothers and sister died in A.'s lifetime, four of them leaving issue; it was held that the property was divisible into fourths, and that the division among the issue of each brother or sister was also to be per stirpes. Sed quære. The case is remarkable for the discrepancies between the various reports. The report in 6 Hare, 162, is obviously inaccurate in giving the words of the will (post, Chap. LV.).

(*i*) *Weldon* v. *Hoyland*, 6 L. T. 96; *Santham* v. *Blake*, 2 W. R. 446. The decision of Romilly, M.R., in *Robinson* v. *Sykes*, 23 Bea. 40, is contra; that was a case of settlement by deed.

(*j*) 20 Bea. 645. The exact words of the will are given post, p. 1598. The construction appears to have been assisted by the reference to "a child's share."

(*k*) L. R., 3 Eq. 375. Compare *Palmer* v. *Cruttwell*, 8 Jur. N. S. 479, where the will was elaborately worded, and correspondingly obscure.

(*l*) *Birdsall* v. *York*, 5 Jur. N. S. 1237. In *Minchell* v. *Lee*, 17 Jur. 727, before the same judge, where the gift was in trust for A. for life, and after his death for all the children of A. living at his death, except B., and for the issue of any children of A. who should be then dead, and for the issue of B., "such issue taking their respective parents' share," it was held that the primary division was per stirpes, as though a share had been given to B. and his issue were taking by substitution; it does not appear whether any of the children left issue remoter than children.

have read "parent" as meaning "ancestor," namely that person who would have taken a share if he had been living; B. died in A.'s lifetime leaving three children, X., Y., and Z., who also died in A.'s lifetime, X. leaving four children, Y. one child, and Z. six: the V.-C. therefore held that these eleven grandchildren of B. took his one-fourth share per capita as between themselves. So far as the decision admitted the grandchildren to share in the fund, the decision no doubt carried out the intention of the testator, but technically it seems contrary to the so-called rule in *Sibley* v. *Perry*, and even assuming that that rule was not applicable in *Birdsall* v. *York* (*m*), there still remains the difficulty that according to the principle laid down in *Ross* v. *Ross* (*n*) and *Ralph* v. *Carrick* (*o*), where there is a gift to "issue," and it appears from the whole will that "issue" is to be construed in its proper sense, then the effect of a direction that "issue" are to take their parents' share, is that the distribution is per stirpes throughout (*p*). It is therefore submitted that in *Birdsall* v. *York* the grandchildren of B. should have taken per stirpes as between themselves, assuming, as already mentioned, that "issue" was properly construed as meaning "descendants" and not "children."

When issue ascertained.

The general rule when the class of issue is to be ascertained seems to be similar to that hereinafter stated with regard to gifts to children (*q*). Thus under an immediate gift to the issue of A., the class is ascertained at the testator's death, while if the gift is subject to a prior life interest, the class is not closed until the death of the tenant for life, so that it includes all who are born between the death of the testator and that of the tenant for life (*r*). Where the class take as joint tenants the result often is that the issue living at the death of the tenant for life take the whole by survivorship (*s*).

Substitutional gift.

Where the gift to the issue is substitutional a somewhat different rule prevails (*t*).

Accruing shares.

In *Re Ridge's Trusts* (*u*), the testator bequeathed residue in trust

(*m*) As to this see post, p. 1597.

(*n*) 20 Bea. 645, post, p. 1598.

(*o*) 11 Ch. D. 873, post, p. 1599.

(*p*) See *Shand* v. *Kidd*, 19 Bea. 310, where the gift was to the issue of six tenants for life and the issue of any deceased issue, "such class of issue, whether in the first or second degree," to take only the share which their deceased parent or parents would have been entitled to if living; held to require a distribution per stirpes as between children and grandchildren.

(*q*) Post, p. 1664, seq.

(*r*) *Surridge* v. *Clarkson*, 14 W. R. 979. The reason of the rule is explained by Kindersley, V.-C., in *Lee* v. *Lee*, 1 Dr. & Sm. at p. 87.

(*s*) See *Re Jones's Estate*, 47 L. J. Ch. 775.

(*t*) See Chap. XXXVI.

(*u*) L. R., 7 Ch. 665.

CHAPTER XLI

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 among 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. 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 (*uu*); and moreover the gift of the whole to the issue of one 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.

"Issue" explained to mean *children*.

(ii.) "*Issue*," *when construed* "*Children*."—The word "issue," however, may be, and frequently is, explained by the context to bear the restricted sense of "children" (*v*).

Where a will declares that in the event of the deaths of original

(*uu*) But the accruing share cannot be vested, though it may be transmissible before the contingency happens upon which the accruer takes place.

(*v*) "In the ordinary parlance of laymen ['issue'] means children, and only children," per James, L.J., in *Ralph* v. *Carrick*, 11 Ch. D. at p. 883. Sed quære. If a man died leaving grandchildren, but no children, would any layman say that he died without issue? It seems that in Ireland in a settlement of personalty by deed or will on a person and his issue, the word "issue" prima facie means "children"; *Harris* v. *Loftus*, [1899] 1 Ir. 491. There is no such rule in England; *Re Warren's Trusts*, 25 Ch. D. 208. "Offspring" is sometimes construed to mean "children"; *Tibuteau* v. *Nixon*, 15 T. L. R. 485.

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 (*w*).

Reference to "father" or "mother,"

And a clause substituting issue for their parents, it seems, has the same effect, the word "parents" so used being considered to denote the original legatees, and not the parents of their issue remoter than children.

or to "parent."

Thus, in *Sibley* v. *Perry* (*x*), 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 in the other bequests (*y*).

Sibley v. *Perry.*

It is a mistake to suppose that Lord Eldon laid down any general rule of construction in *Sibley* v. *Perry*: his decision expressly went upon the whole will taken together (*z*). With reference to the rule James, L.J., observes: "It is, however, I think settled, but rather by the case of *Pruen* v. *Osborne* (*a*), than by *Sibley* v. *Perry*, that as a general rule, when you find a gift to a person and then a gift to the issue of that person, such issue to take only the parent's share, the word issue is cut down to mean

Remarks on *Sibley* v. *Perry.*

(*w*) *Buckle* v. *Fawcett*, 4 Hare, 536, 544; *Martin* v. *Holgate*, L. R., 1 H. L. 175.

(*x*) 7 Ves. 522; *Pruen* v. *Osborne*, 11 Sim. 132; *Bradshaw* v. *Melling*, 19 Bea. 417 (real estate); *Smith* v. *Horsfall*, 25 Bea. 628; *Maynard* v. *Wright*, 26 Bea. 285 (real estate); *Rhodes* v. *Rhodes*, 27 Bea. 413; *Stevenson* v. *Abingdon*, 31 Bea. 305; *Lanphier* v. *Buck*, 2 Dr. & Sm. 484; *Heasman* v. *Pearse*, L. R., 7 Ch. 275; *Re Smith*, 58 L. J. Ch. 861; *Re Birks*, [1900] 1 Ch. 417. In *Crozier* v. *Crozier*, 3 Dr. & War. 373, 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.

(*y*) See also *Ridgeway* v. *Munkittrick*, 1 Dr. & War. 84, and the other cases cited, p. 1603. 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 Bea. 551, and other cases cited post, p. 1604.

(*z*) Per Cotton, L.J., in *Ralph* v. *Carrick*, 11 Ch. D. at p. 886. "And there is a manifest distinction between the case where, as in *Sibley* v. *Perry*, the only gift to the issue is contained in the direction that they shall take the shares which their respective parents would have taken if living, and the more usual case where there is a distinct gift to the issue, followed by a direction that the issue shall take only a parents' share. In the latter case the direction as to the share *may* be construed distributively; e.g. that a grandchild shall take a child's share, and a great-grandchild take a grandchild's share." Hawkins on Wills, 88.

(*a*) 11 Sim. 132.

CHAPTER XLI.

children. I am not sure that some of the consequences of such a rule have always received the attention they ought to have received. Suppose a man to leave his property to his wife for life, and at her death to all his children then living and the issue of such of them as should be then dead, equally to be divided between them, the issue of any of them who might be then dead to take only their parent's share. Suppose then his children all to die before the period of division, having had children who predeceased them, leaving families, the grandchildren might go to the workhouse, and the family property go to a stranger under the residuary gift. That seems a possible result of that rule" (*b*).

A case similar to that suggested by the L.J. occurred in *Birdsall* v. *York* (*c*), where the result of applying the so-called rule in *Sibley* v. *Perry* would have been to produce an intestacy as to one-fourth of the residue, and Stuart, V.-C., for reasons not stated in the report, held that "issue" included grandchildren.

Another example of the way in which the so-called rule in *Sibley* v. *Perry* operates to defeat the obvious intention of the testator is of constant occurrence. In such a case as that suggested by James, L.J., if one of the testator's sons were to die before the period of division, leaving grandchildren, but no child, the other children of the testator and the children of such of them as were dead, would take, to the exclusion of the grandchildren of the deceased son.

Effect of gift over on failure of issue.

Whether the so-called rule in *Sibley* v. *Perry* is a rule of general application or not, it is clear that it does not apply in cases where there is a gift over on a general failure of issue of the original legatee. Thus, in *Ross* v. *Ross* (*d*), a testator bequeathed a share of a fund to his niece C. for life, and after her death 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 take a 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:

(*b*) Per James, L.J., in *Ralph* v. *Carrick*, 11 Ch. D. at p. 882. As to the argument based on a possible intestacy, see *Re Campbell's Trusts*, 33 Ch. D. 98.

(*c*) 5 Jur. N. S. 1237, stated ante, p. 1594.

(*d*) 20 Bea. 645; *Re Kavanagh's Will*, 13 Ir. Ch. 120.

Romilly, M.R., 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 (*e*). In other words, the substitution would take place according to circumstances through all the degrees of issue.

Ralph v. *Carrick*.

This decision was approved by the Court of Appeal in *Ralph* v. *Carrick* (*f*), where a testator bequeathed a 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" (*g*): the C.A. held that the gift to "descendants" was not confined to children; they thought that "descendants" could not be so easily controlled by the context as "issue," but if the word used had been "issue," James, L.J., thought it would have been impossible to distinguish the case from *Ross* v. *Ross*. He said (*h*): "Here 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" (*i*).

The decisions in *Ross* v. *Ross* and *Ralph* v. *Carrick* seem to

(*e*) That, where "issue" is unrestricted, issue of several degrees taking by substitution will not take concurrently, see also *Robinson* v. *Sykes*, 23 Bea. 40; *Amson* v. *Harris*, 19 Bea. 210; *Re Orton's Trust*, L. R., 3 Eq. 375; *Gibson* v. *Fisher*, L. R., 5 Eq. 51. *Re Rawlinson*, [1909] 2 Ch. 36. But see *Birdsall* v. *York*, 5 Jur. N. S. 1237. Commented on ante, p. 1595.

(*f*) 5 Ch. D. 984, 11 Ch. D. 873. The difference between "issue" and "descendants" has been already referred to, ante, p. 1590.

(*g*) 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.

(*h*) 11 Ch. D. at p. 884.

(*i*) The decision in *Berry* v. *Fisher*, [1903] 1 Ir. 484, may possibly be supported on the same ground; sed quære, for in that case the primary gift was clearly confined to children by the reference to their mother's interest, and the fact that the testator in other parts of the will used "issue" in its proper sense ought not to have influenced the construction.

CHAPTER XLI.

Possible construction of direction as to parents' shares.

suggest that in lieu of the rule supposed to be laid down in *Sibley* v. *Perry*, a more convenient principle of construction might be adopted, namely, that where a testator in a gift to the issue of a person directs that they shall take their parents' share, whether there is a gift over or not, he merely means that the division is to be per stirpes throughout. On this principle, in cases where there is a distinct gift to the issue in the first instance, as Mr. Hawkins points out (*j*), the direction that issue shall take their parents' shares would be construed distributively, e.g., that a grandchild shall take a child's share, and a great grandchild take a grandchild's share. Such a construction is more natural and convenient than that which makes "issue" mean children, for while it avoids the inconvenient result of making remote descendants take concurrently with their living ancestors, it avoids the danger of a possible intestacy in cases such as those suggested by James, L.J., and exemplified by *Birdsall* v. *York* (*k*), and also allows remote issue to take in place of their deceased parent, which may be assumed to have been the intention of the testator (*l*). However, recent decisions shew no disposition on the part of the Courts to adopt any such general principle (*m*).

"Issue" used to mean "children."

Another instance of a gift to "issue" being restricted by the context to children is to be found in *Re Birks* (*n*). There a testator, after giving a legacy, provided that in the event of the legatee predeceasing him, his issue should be entitled to the legacy, in equal shares if more than one, "and if only one, the whole to such one child:" this was held to mean that the testator used "issue" in the sense of "children."

"Issue of issue."

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" (*o*). Even without the latter circumstance it is difficult to see how, if restricted at all, the term can mean anything but children, unless it means issue

(*j*) Cons. of Wills, 88, supra, p. 1597, note (*z*).

(*k*) Ante, p. 1598. In *Re Birks*, [1900] 1 Ch. 417, below, the construction of "issue" as meaning children probably defeated the intention of the testator.

(*l*) Ante, p. 1598.

(*m*) See *Re Birks*, [1900] 1 Ch. 417, post, p. 1604, n. (*k*).

(*n*) [1900] 1 Ch. 417. In *Roddy* v. *Fitzgerald*, 6 H. L. C. 823, there was a limitation to the issue of a person equally if more than one, "and if only one child to said child"; Lord Cranworth said that this did not give a restricted meaning to "issue."

(*o*) *Pope* v. *Pope*, 14 Bea. 591.

living at a particular period. Thus, in *Livesay* v. *Walpole* (*p*), a gift over in the event of the testator's daughter dying without leaving "issue or issue of her issue" was held to shew that the testator throughout the will used issue in the sense of children. In *Williams* v. *Teale* (*q*), there was an executory trust to settle real and leasehold estates upon the testator's children for their lives and their issue for their respective lives, with elaborate clauses of survivorship and gifts over, some of them to take effect in the event of the issue of the children dying without leaving issue: it was held that in the gift to the issue of the testator's children, and in some other parts of the will, "issue" meant "children," although in other parts of the will it might be necessary to read the word "issue" in a different sense. And in *Fairfield* v. *Bushell* (*r*), where there was a gift at the death of A. to her lawful issue and the children of such of them as should be then dead, the children of such deceased issue to take their deceased parent's share, it was held that the "issue" of A. meant her children.

"Issue of children."

"Children of issue."

Where there was a gift to "the legal issue by marriage" of A., to be divided among them equally at twenty-one, this was held to mean children (*s*).

In *Hampson* v. *Brandwood* (*t*), 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 favour 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 (*u*). 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 death*, it was held by Sir E. Sugden that the word "issue" meant *children* (*v*).

"Issue begotten by A."

(*p*) 23 W. R. 825.

(*q*) 6 Hare, 239. *M'Gregor* v. *M'Gregor*, 1 D. F. & J. 63; *Cursham* v. *Newland*, 2 Scott, 105, 4 M. & W. 101.

(*r*) 32 Bea. 158. As to the meaning of the words "then living" or "then dead," see Chap. XLII.

(*s*) *Reed* v. *Braithwaite*, L. R., 11 Eq. 514.

(*t*) 1 Madd. 381; *Gordon* v. *Hope*, 3 De G. & S. 351.

(*u*) *Caulfield* v. *Maguire*, 2 Jo. & Lat. at p. 176; *Evans* v. *Jones*, 2 Coll. 516; *Haydon* v. *Wilshere*, 3 T. R. 372. And see *King* v. *Melling*, 1 Vent. 225.

(*v*) *Thompson* v. *Simpson*, 1 D. & War. pp. 459, 480.

Gift to issue referred to as gift to children.

A gift to issue may also be restricted to children by a codicil (*w*), or another clause of the will (*x*), referring to it as a gift to "children," or by declaring the trusts by reference to trusts for children (*y*).

Effect where words "issue" and "children" are used indifferently.

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

Where "children" prevails.

On the other hand, the word "children" will control the word "issue," if that construction appears to be consistent with the testator's intention. Thus in *Goldie* v. *Greaves* (*b*), a testatrix bequeathed her personal estate to her sisters, or in case of the death of either or any of them leaving issue, then the share of her so dying to go to such child or children equally: it was held that "issue" meant child or children. So, in *Farrant* v. *Nichols* (*c*), where the gift was to the "respective issues," "whether sons or daughters," of certain persons.

Effect given to each word.

There is, of course, nothing to prevent a testator from using "issue" and "children" in their proper meanings in different parts of his will. As in *Waldron* v. *Boulter* (*d*), where a testator

(*w*) *M'Gregor* v. *M'Gregor*, 1 D. F. & J. 63.

(*x*) *Baker* v. *Bayldon*, 31 Bea. 209.

(*y*) *Marshall* v. *Baker*, ib. 608 (deed).

(*z*) First ed. Vol. II. p. 37.

(*a*) *Wyth* v. *Blackman*, 1 Ves. sen. 196, Amb. 555 (deed), 3 Ves. 258. See also *Horsepool* v. *Watson*, 3 Ves. 383; *Royle* v. *Hamilton*, 4 Ves. 437; *Dalzell* v. *Welch*, 2 Sim. 319; *Doe* d. *Simpson* v. *Simpson*, 5 Scott, 770, stated post; *Harley* v. *Mitford*, 21 Bea. 280. In *Cancellor* v. *Cancellor*, 2 Dr. & Sm. 194, the testator sometimes used both words together, "children and issue," sometimes "children" only, and all degrees were held entitled. See also *Jennings* v. *Newman*, 10 Sim. 219.

(*b*) 14 Sim. 348. *Benn* v. *Dixon*, 16 Sim. 21. *Carter* v. *Bentall*, 2 Bea. 551; *Earl of Orford* v. *Churchill*, 3 V. & B. 59; *Bryan* v. *Mansion*, 5 De G. & S. 737; *Edwards* v. *Edwards*, 12 Bea. 97; *Re Heath's Settlement*, 23 Bea. 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, Chap. LI.

(*c*) 9 Bea. 327. *Baker* v. *Bayldon*, 31 Bea. 209.

(*d*) 22 Bea. 284. [Compare *Dalzell* v. *Welch*, 2 Sim. 319.

bequeathed certain leaseholds to his four grandchildren, and after their decease to their lawful issue, and he bequeathed other leaseholds to the same grandchildren, and after their death to their children.

"Issue" used in different senses in different parts of the same will.

It will be remembered that in *Sibley* v. *Perry* (*e*), Lord Eldon gave "issue" the meaning of children in one part of a will, because he thought that it was clearly used in that sense in another part. This principle of construction has been much discussed, especially with reference to the well-known dictum of Lord St. Leonards in the case of *Ridgeway* v. *Munkittrick* (*f*), which is as follows: "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." Mr. Jarman remarks (*g*): "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 the case of *Dalzell* v. *Welch* (*h*), affords an example. In such cases, the general plan of the will must be regarded; and if we find that the testator's dispositive scheme would be violated by not giving to any term a uniform construction throughout the will, the argument for its adoption is very strong. Where the dispositions of the will are of a nature not to afford any such light, the task of its expounder becomes very embarrassing."

The rule in *Ridgeway* v. *Munkittrick*.

Lord St. Leonards' dictum has also been commented on by the Privy Council (*i*): "That dictum, asserted perhaps too positively as a general rule of construction, does not help one much in construing such a will as this. What is a clear intention? That which is clear to one man is not always clear to another. A sounder, or at any rate a safer, rule is to be found in the observations of

(*e*) Supra, p. 1597.
(*f*) 1 Dr. & W. 84.
(*g*) First ed. Vol II. p. 356 n.
(*h*) 2 Sim. 319.
(*i*) *Edyvean* v. *Archer*, [1903] A. C. p. 384.

CHAPTER XLI.

Knight Bruce, V.-C., on the meaning of this very word 'issue.' 'Before I can restrain that word,' said the Vice-Chancellor in *Head* v. *Randall* (*j*), 'from its legal and proper import, I must be satisfied that the contents of the will demonstrate the testator to have intended to use it in a restricted sense.'"

Notwithstanding the criticisms which have been passed on it, Lord St. Leonards' dictum is in high favour, and has been frequently followed (*k*).

Effect of context.

Whatever the value of Lord St. Leonards' canon of construction may be, it clearly does not apply where the context furnishes a guide to the testator's meaning, for it frequently happens that a testator uses "issue" in one part of his will, as meaning "children," and in another part as meaning "issue" in the proper sense of the word (*l*). As in *Re Corrie's Will* (*m*), where a testator gave property to A. and B. and after their deaths "equally among their issue if there shall be any child or children to take the share of their deceased parent," with a gift over in case either of them died "without issue"; it was held by Romilly, M.R., that in the former place "issue" meant children and in the latter issue generally.

"Eldest issue male."

A gift to the "eldest issue male" of a person primâ facie means his eldest son (*n*).

Illegitimate children.

A gift to the "issue" of a person may include his illegitimate children, if the context of the will allows that construction (*o*).

IV.—Gifts to Next of Kin (*p*).—A devise of land or bequest of

(*j*) 2 Y. & C. C. C. at p. 235.

(*k*) *Edwards* v. *Edwards*, 12 Bea. 97; *Rhodes* v. *Rhodes*, 27 Bea. 413; *Foster* v. *Wybrants*, Ir. R., 11 Eq. 40; *Re Harrison's Estate*, 3 L. R. Ir. 114. *Re Birks*, [1900] 1 Ch. 417. In the last case the will was a difficult one to construe, but it is submitted that the proposition laid down by Lindley, M.R., that we must not start with any predisposition to read the word issue as meaning descendants is incorrect. It will be noticed that Romer, L.J., in the same case uses words which shew that he intended to dissociate himself from Lord Lindley's proposition, which is in direct conflict with many cases, including *Clifford* v. *Koe*, 5 A. C. 447, and *Pelham Clinton* v. *Newcastle*, [1903] A. C. III. If the decision in *Re Birks* is correct, *Re Warren's Trusts*, 26 Ch. D. 208 (on which Kekewich, J., relied), is no longer law. In *Re Adams*, 94 L. T. 720, Romer, L.J., said: "The term 'issue' is equivalent, in the absence of any context, to 'heirs of the body.'"

(*l*) *Carter* v. *Bentall*, 2 Bea. 551. *Head* v. *Randall*, 2 Y. & C. C. C. 231; *Hedges* v. *Harpur*, 9 Bea. 479; *Caulfield* v. *Maguire*, 2 Jo. & Lat. at p. 176; *Williams* v. *Teale*, 6 Ha. 239; *Berry* v. *Fisher*, [1903] 1 Ir. 484; *Edyvean* v. *Archer*, [1903] A. C. 379. As to the application of Lord St. Leonards's canon to deeds, see *Re Warren's Trusts*, 26 Ch. D. 208. Supra, n. (*k*).

(*m*) 32 Bea. 426.

(*n*) *Lovelace* v. *Lovelace*, Cro. El. 40; *Sheridan* v. *O'Reilly*, [1900] 1 Ir. 386.

(*o*) *Re Walker*, [1897] 2 Ch. 238. *Re Smitter*, [1903] 1 Ch. 198. See Chap. XLIII.

(*p*) This section deals only with gifts to next of kin where that expression, or the expression "nearest of kin" or "nearest of kindred" (*Markham* v. *Ivatt*, 20 Bea. 579) is used. As to the effect of a devise of land to "my next of blood," see infra, p. 1629. A gift to "heirs," "family," "relations," &c., may operate as a gift to next of kin, as

personal property to "next of kin" without more, enures for the benefit of the nearest blood-relations in equal degree of the propositus, such objects being determined without regard to the Statutes of Distribution; and they take as joint tenants in equal shares (*q*). This rule, however, more particularly as it affects the rights of persons who claim by representation under the express clause of the statute (*r*), 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 favour of the claim of these representatives were the dictum of Lord Kenyon (*s*), and the decisions of Buller, J. (*t*), and Sir J. Leach (*u*). On the other side were ranged the strongly expressed opinions of Lord Thurlow (*v*), Lord Eldon (*w*), and Sir W. Grant (*x*), and a decision of Sir T. Plumer (*y*).

Gift to next of kin, how construed.

Such was the perplexing state of the authorities prior to *Elmsley* 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. Leach, M.R., held, that the children of the deceased brother were entitled to a moiety of the fund; his opinion being, that the words "next of kin" imported next of kin according to the Statutes of Distribution (*z*). 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, excluding persons entitled by representation under the statute, and consequently, that A.'s sister was entitled to the whole fund (*a*).

Next of kin confined to persons strictly answering to this character.

explained elsewhere in this chapter and in Chap. XL. In *Scott* v. *Moore*, 14 Sim. 35 (stated ante, p. 1048), it was contended unsuccessfully that a direction that a particular fund should in certain events be considered as part of the testator's personal estate and be disposed of in a due course of administration, operated as a gift to the next of kin. As to powers of appointment in favour of next of kin, see Chap. XXIII.

(*q*) *Withy* v. *Mangles*, 4 Bea. 358, 10 Cl. & Fin. 215; *Baker* v. *Gibson*, 12 Bea. 101; *Lucas* v. *Brandreth*, 28 Bea. 274 (decd); *Horn* v. *Coleman*, 1 Sm. & G. 169. See *Stockdale* v. *Nicholson*, L. R., 4 Eq. 359.

(*r*) 22 & 23 Car. 2, c. 10, explained by 29 Car. 2, c. 30. The Intestates' Estates Act, 1890, does not apply to cases of partial intestacy; *Re Twigg*, [1892] 1 Ch. 579.

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

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

(*u*) *Hinckley* v. *Maclarens*, 1 My. & K. 27.

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

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

(*x*) *Smith* v. *Campbell*, Coop. 275.

(*y*) *Brandon* v. *Brandon*, 3 Sw. 312.

(*z*) 2 My. & K. 82.

(*a*) 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*" has been twice held to exclude representatives, *Wimbles* v. *Pitcher*, 12 Ves. 433; *Anon.* 1 Mad. 36.

"Next of kin and nearest heir."

In *Re Maher* (*b*), there was a gift of real and personal property to the testator's next of kin and nearest heir, and it was held that the personal property went to the next of kin and the real estate to the heir-at-law.

Parents and children, being of kin in equal degree, take together as "next of kin."

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* (*c*), where the question was who was entitled under the ultimate limitation in a marriage settlement in favour 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, and his decision was affirmed by the House of Lords (*d*).

The degrees are reckoned according to the civil law (*e*), so that kindred of the half-blood stand on equal ground with those of the whole blood (*f*).

Secus, where statute of distribution is referred to.

A reference to the statute, whether express (*g*), or implied from a mention of intestacy (*h*), will admit all kindred, and only those, who are within the statutory limit. Consequently, the children of deceased brothers and sisters will take concurrently with living brothers and sisters (*i*).

"Persons entitled under the statute."

It will not, however, admit a husband or wife, who are not of kin to each other, nor, indeed, considered as such by the statute (*j*). It follows that where the same reason for exclusion does not exist, as in the case of a gift "to the person or persons who would under the statute have been entitled to the testator's personal estate in case he had not disposed of the same by will," the wife will take

(*b*) [1909] 1 Ir. 70, ante, p. 1553.

(*c*) 4 Bea. 358, 10 Cl. & Fin. 215.

(*d*) And see *Cooper* v. *Denison*, 13 Sim. 290 (brothers and sisters admitted with grandchildren).

(*e*) *Cooper* v. *Denison*, 13 Sim. 290.

(*f*) 2 Bl. Comm. 505; *Brown* v. *Wood*, Alleyn. 36; *Colton* v. *Scarancke*, 1 Mad. 45; *Grieves* v. *Rawley*, 10 Hare, 63.

(*g*) *Nichols* v. *Haviland*, 1 K. & J. 504. See also 4 Bea. p. 368. In *Harris* v. *Newton*, 46 L. J. Ch. 268, property was given to the testator's two daughters for life and "to descend to their legal or next of kin"; it was held that this did not import a distribution according to the statute.

(*h*) *Garrick* v. *Lord Camden*, 14 Ves. pp. 372, 385, 386.

(*i*) *Re Gray's Settlement*, [1896] 2 Ch. 802.

(*j*) *Garrick* v. *Lord Camden*, 14 Ves. 372; *Nichols* v. *Savage*, cit. 18 Ves. p. 53; *Watt* v. *Watt*, 3 Ves. 244, and other cases cited post, p. 1633. *Cholmondeley* v. *Lord Ashburton*, 6 Bea. 86; *Kilner* v. *Leech*, 10 Bea. 362; *Lee* v. *Lee*, 29 L. J. Ch. 788. In *Re Collins's Trusts*, [1877] W. N. 87, the widow was upon the context held entitled to share, sed qu.; *Re Fitzgerald*, 61 L. T. 221; *Re Parry*, [1888] W. N. 179.

a share (*k*). But a husband cannot take even under a gift of this nature (*l*).

In *Re Hudson* (*m*), a testator gave his real and personal estate upon trust for the person or persons who would have been entitled under the statute if the testator had died seised or possessed thereof intestate; it was held that the realty went to the heir-at-law and the personalty to the next of kin.

Woman dying "intestate and unmarried."

Where personal property is limited, in case of the death of a married woman in her husband's lifetime, to such persons as would have been entitled thereto in case she had died intestate and unmarried, the word "unmarried" is generally held to mean, "not having a husband at the time of her death" (*n*). To ascribe to the word its other meaning would plainly exclude the children of the marriage; and slight circumstances, such as an express provision made for the children in another part of the will, either out of the same (*o*), or a different (*p*) fund, have been held not to control the rule. In short, the object of the provision is considered to be merely to exclude the husband (*q*).

And the mere circumstance that the woman is unmarried at the date of the will does not supply a reason for putting a different construction on the word, since when it occurs with such a context it is clear that her marriage at some future time is contemplated (*r*).

Without having been married.

Where personal property is bequeathed, after the death of a married woman, to the persons who would have been entitled to it "if she had died intestate and without having been married" the general rule is that these words, being clear and unambiguous,

(*k*) *Martin* v. *Glover*, 1 Coll. 269; *Jenkins* v. *Gower*, 2 Coll. 537; *Starr* v. *Newberry*, 23 Bea. 436. And if the will contains no express gift, but merely says that the property shall devolve according to the statute, the widow is entitled to share; *Ash* v. *Ash*, 33 Bea. 187, stated ante, p. 27 n. (*h*).

(*l*) *King* v. *Cleaveland*, 26 Bea. 166; 4 De G. & J. 477; *Milne* v. *Gilbart*, 2 D. M. & G. 715; 5 D. M. & G. 510; *Watt* v. *Watt*, 3 Ves. 244.

(*m*) 72 L. T. 892.

(*n*) *Day* v. *Barnard*, 1 Dr. & Sm. 351; *Maugham* v. *Vincent*, 9 L. J. Ch. 329 (settlement); *Hoare* v. *Barnes*, 3 Br. C. C. 316, ed. by Eden, n. (*a*); *Hardwick* v. *Thurston*, 4 Russ. 380; *Pratt* v. *Mathew*, 22 Bea. 328, 8 D. M. & G. 522 (settlement); *Re Gratton's Trusts*, 26 L. J. Ch. 648; *Re Saunders' Trust*, 3 K. & J. 152 (settlement). As to the prima facie meaning of "unmarried," see ante, p. 1285.

(*o*) *Coventry* v. *Earl of Lauderdale*, 10 Jur. 793; *Pratt* v. *Mathew*, supra; *Clarke* v. *Colls*, 9 H. L. C. 601, affirming *Mitchell* v. *Colls*, Johns. 674.

(*p*) *Re Norman's Trust*, 3 D. M. & G. 965 (settlement). In this case the words were "without being married."

(*q*) See *Hawkins* v. *Hawkins*, 7 Sim. 173 (and *Anonymous*, 1 Giff. 392), where personal property belonging to a woman was settled on her marriage on her and her husband and their issue and in default of issue on the wife's statutory next of kin, as if she had died without having been married; there being no issue and no next of kin it was held that the fund resulted to the wife and that the husband was entitled to it as her administrator.

(*r*) *Day* v. *Barnard*, 1 Dr. & Sm. 351.

CHAPTER XLI.

are to be taken in their natural meaning, so as to exclude her issue as well as her husband, if any, and thus prevent him from becoming entitled to the shares of any children who die before acquiring a vested interest (*s*). The same rule applies to settlements by deed (*t*).

In *Re Collyer* (*u*), a widow gave her property upon trust for her daughter for life, with an ultimate trust for the persons who would have been entitled thereto as her (the testatrix's) statutory next of kin if she had died intestate and unmarried: it was held that "unmarried" meant "never having been married."

How statutory next of kin take.

If a testator directs payment and division under the statute, and does not expressly state how the objects are to take, they take in the shares directed by the statute, and as tenants in common (*v*). This mode of distribution would be excluded by an express direction to divide in equal shares (*w*), but not by a mere direction to take as tenants in common, without specifying the shares (*x*), nor by the circumstance 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 (*y*).

The reference to the statute must, however, be unambiguous. Thus a gift to the "next of kin" of a married woman "as if she

(*s*) *Re Watson's Trusts*, 55 L. T. 316.

(*t*) *Re Smith's Settlement*, [1903] 1 Ch. 373; *Re Brydone's Settlement*, [1903] 2 Ch. 84, approving *Emmins* v. *Bradford*, 13 Ch. D. 493. The cases contra, *Re Ball's Trust*, 11 Ch. D. 270; *Upton* v. *Brown*, 12 Ch. D. 872; *Re Arden's Settlement*, [1890] W. N. 204; *Stoddart* v. *Saville*, [1894] 1 Ch. 480; *Re Forbes*, [1899] W. N. 6, and *Re Mare*, [1902] 2 Ch. 112, seem to have been based on a mistaken view of the decision in *Wilson* v. *Atkinson*, 4 D. J. & S. 455. The Irish cases of *Hardman* v. *Maffett*, 13 L. R. Ir. 499 and *Re Deane's Trusts*, [1900] 1 I. 332, followed *Emmins* v. *Bradford*.

(*u*) 24 T. L. R. 117.

(*v*) *Bullock* v. *Downes*, 9 H. L. C. 1; *Martin* v. *Glover*, supra; *Jenkins* v. *Gower*, supra; *Horn* v. *Coleman*, 1 Sm. & G. 169; *Re Nightingale*, [1909] 1 Ch. 385 Lords Campbell and Brougham thought it more accurate to say that statutory next of kin do not take as joint tenants; 9 H. L. C. pp. 14, 17; *Re Ranking's Settlement*, L. R., 6 Eq. 601; contra, *Re Greenwood's Will*, 3 Gif. 390, sed qu. The rule established by *Bullock* v. *Downes* applies where the gift is to the next of kin of a person dead at the date of the will; *Re Rees*, 44 Ch. D. 484.

(*w*) Per Lord Langdale, *Mattison* v. *Tanfield*, 3 Bea. 132. And see corresponding cases on gifts to "relatives," post, sec. VI. *Phillips* v. *Garth*, 3 Br. C. C. at p. 69. In *Holloway* v. *Radcliffe*, 23 Bea. 163, where the gift was "unto and equally amongst my legal personal representatives in such and the like manner as if the same had been to be paid under the Statute of Distribution," it was held by Romilly, M.R., that the testator's widow took one-third and his son two-thirds. See *Smith* v. *Palmer*, post, p. 1613, 7 Hare, 225.

(*x*) *Mattison* v. *Tanfield*, 3 Bea. 131; *Lewis* v. *Morris*, 19 Bea. 34. Contra *Richardson* v. *Richardson*, 14 Sim. 526, and *Godkin* v. *Murphy*, 2 Y. & C. C. C. 351 ("persons entitled under the statute"); but both cases were plainly disapproved, 9 H. L. C. pp. 28, 29, and the former was questioned by the judge who decided it, 8 Hare, p. 307.

(*y*) *Bullock* v. *Downes*, dub. Lord Wensleydale, 9 H. L. C. 1, pp. 22, 26.

had died unmarried" has been held too doubtful a reference to the statute to let in any but the nearest relations (*z*). And a gift to the "legal or next of kin" has been held to bear the same construction as a gift to the next of kin (*a*).

Construction of gift to next of kin, exclusive of A.

Where personal property is bequeathed to the persons, exclusive of A., who under the statute would be the testator's next of kin, and A. is in fact his sole next of kin, the property goes to those persons who, if A. were out of the way, would be the testator's next of kin (*b*).

Exclusion by implication.

If a testator bequeaths personal property to A. for life and after his death to B. for life, and then to "my other next of kin," and A. happens to be the sole next of kin at the testator's death, he is excluded by force of the word "other" (*c*). *Bird* v. *Wood* (*d*) is another example of true next of kin being excluded by the context. But if a testator gives a life interest to A. and B., with remainder to his own next of kin, and A. and B. answer that description, they are not excluded by the fact that a life interest has been expressly given them (*e*).

Gift to next of kin of a particular name.

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 (*f*). The question was discussed, but a decision expressly avoided, in *Doe* d. *Wright* v. *Plumptre* (*g*).

Assumption of name.

Where there is a devise of land to the "first and nearest of my kindred being male and of my name and blood," only those who are of the name as well as of the blood can claim; and the qualification as to the name is not satisfied by an assumption of it by royal license (*h*). According to some of the older cases, a woman

(*z*) *Holton* v. *Foster*, L. R., 3 Ch. 505. See also *Lucas* v. *Brandreth*, (No. 2) 28 Bea. 274; *Re Webber*, 17 Sim. 221, but qu. as to the ratio decidendi.

(*a*) *Harris* v. *Newton*, 46 L. J. Ch. 268.

(*b*) *White* v. *Springett*, L. R., 4 Ch. 309; *Re Taylor*, 52 L. T. 839. Compare *Lindsay* v. *Ellicott*, 46 L. J. Ch. 878 (limitation in settlement by deed to statutory next of kin "exclusive of A. and his representatives").

(*c*) See *Cooper* v. *Denison*, 13 Sim. 290, post p. 1647.

(*d*) 2 S. & St. 400, stated post, p. 1646; *Emsley* v. *Young*, 2 My. & K. pp. 86, 89.

(*e*) *Gorbell* v. *Davison*, 18 Bea. 556.

(*f*) See the corresponding cases on gifts to the heir, ante, p. 1559.

(*g*) 3 B. & Ald. 142 (deed). The decision was that the plaintiff's wife answered neither branch of the description. If "name" was to be literally understood (as to which, post, sec. IX.), 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. at p. 609; but see s.c. 16 L. J. Ch. 433.

(*h*) *Leigh* v. *Leigh*, 15 Ves. 92. See *Barlow* v. *Bateman*, 2 Br. P. C. 272, stated ante, p. 1543. If the gift were to next of kin *bearing* the testator's name the result might be different. See *Re Roberts*, 19 Ch. D. 520, post, p. 1652.

Change of name by marriage.

whose maiden name is that of the testator cannot claim under such a devise if she changes her name by marriage during the testator's lifetime (*i*), or even before the devise takes effect (*j*). In *Carpenter* v. *Bott* (*k*), it was held by Shadwell, V.-C., that a woman whose maiden name was C. was entitled under a bequest to the testator's next of kin of the surname of C., although she married (after the testator's death) before the fund fell into possession. The V.-C. seems to have thought that "surname" meant "stock" (*l*).

Gift to next of kin ex parte maternâ.

Under 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 on the mother's side, will be entitled (*m*), unless the testator has expressly excluded the former (*n*).

In *Dugdale* v. *Dugdale* (*o*), the gift was to the testator's next of kin, both maternal and paternal. It was held that they took per capita.

"Nearest of kin in the male line, in preference to the female line."

In *Boys* v. *Bradley* (*p*), 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; and by a more remote male relation claiming wholly through males. It was held by Wood, V.-C., that the sister was entitled. 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.

"Next male kin."

In *Re Chapman* (*q*), 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 next male kin." It was held by 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.

(*i*) *Jobson's Case*, Cro. El. 576.
(*j*) *Bon* v. *Smith*, Cro. El. 532.
(*k*) 15 Sim. 606.
(*l*) See *Pyot* v. *Pyot*, 1 Ves. sen. 335, referred to post, p. 1651.
(*m*) *Gundry* v. *Pinniger*, 14 Bea. 94, 1 D. M. & G. 502.
(*n*) 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, at p. 399, 4 D. M. & G. 58; 5 H. L. C. pp. 892, 900.
(*o*) 11 Bea. 402.
(*p*) 10 Hare, 389. 4 D. M. & G. 58. 5 H. L. C. 873 (*Sayer* v. *Bradly*).
(*q*) 32 W. R. 424.

"Nearest of kin by way of heirship."

In *Williams* v. *Ashton* (*r*), 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 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. 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 (*rr*).

"Heirs or next of kin."

"Next kin or heir at law."

"Heirs or next of kin."

In *Lowndes* v. *Stone* (*s*), a testator by unattested will dated in 1795, gave all his estate and effects to his "next kin or heir at law whom I appoint my executor": it was held that the personalty went to the next of kin. There was no realty. In *Re Thompson's Trusts* (*t*) the testator bequeathed personalty to "the heirs or next of kin" of A.: it was held that the statutory next of kin of A. were entitled, and not the next of kin in the proper sense of the term: this was owing to the use of the word "heirs" (*u*).

Next of kin of persons other than testator.

Questions on gifts to next of kin generally arise where the relationship is to be defined with reference to the testator himself, but sometimes it has reference to other persons. In *Pycroft* v. *Gregory* (*v*), there was a devise of land to the next of kin of J. and T., the father and mother of the testatrix, who was their only descendant, so that no person could be next of kin to both J. and T.: it was held that the devise failed. In *Rook* v. *Att.-Gen.* (*w*), where the testator gave his residue to his wife for life and after her death "upon trust for my and her next of kin in equal shares," it was held to be a gift to a class which, if the testator had had any next of kin, would have been composed of them and of the wife's next of kin, all taking per capita.

Next of kin of foreigner.

If personalty is bequeathed by a domiciled Englishman to the "next of kin" of a foreigner, the next of kin must be ascertained according to English law (*x*).

Illegitimate next of kin.

The principle recognized in *Seale-Hayne* v. *Jodrell* (*y*), namely, that if a testator in one part of his will treats named illegitimate relations as legitimate, he may fairly be presumed to include

(*r*) 1 J. & H. 115.
(*rr*) *Re Thompson's Trusts*, 9 Ch. D. 607.
(*s*) 4 Ves. 649. See 10 Cl. & F. p. 253, and compare *Re Hudson*, supra, p. 1607.
(*t*) 9 Ch. D. 607.
(*u*) Ante, p. 1573.
(*v*) 4 Russ. 526.
(*w*) 31 Bea. 313.
(*x*) *Re Fergusson's Will*, [1902] 1 Ch. 483.
(*y*) [1891] A. C. 304, affirming C.A. in *Re Jodrell*, 44 Ch. D. 590.

or next of kin of bastard.

them in a gift to legitimate relations as a class, applies to gifts to next of kin, and consequently in *Re Wood* (*z*), where a testator gave his residue upon trusts for each of his seven named children (three of whom were illegitimate), with an ultimate trust for the next of kin of each daughter, it was held that the gift took effect in the same way as if all the children had been legitimate.

"Legal representatives" or "personal representatives," how construed.

V.—Gifts to Legal or Personal Representatives, Executors or Administrators:—(i.) *How construed generally.*—Mr. Jarman continues (*a*): "The construction of the words 'legal representatives' (*b*), or 'personal representatives,' has presented another perplexing and fruitful topic of controversy. 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 (*c*); but as these persons sustain a fiduciary character, it is improbable that the testator should intend to make them beneficial objects of gift; and almost equally so, that he should mean them to take the property as part of the general personal estate of their testator or intestate, which is, in effect, to make *him* the legatee (*d*). 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." Consequently, if the deceased left a widow, she will be included (*e*). But a husband is not entitled under such a gift (*f*).

In order, however, that "representatives" (with or without

(*z*) [1902] 2 Ch. 542, overruling *Re Standley's Estate*, L. R., 5 Eq. 303 post, Chap. XLIII. Compare *Re Deakin*, [1894] 3 Ch. 565 and the cases cited or referred to post, sec. VI.

(*a*) First ed. Vol. II. p. 39.

(*b*) 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. p. 736. But see 2 Hare, pp. 523, 524; 2 Drew. at p. 235; 4 De G. & J. at p. 484.

(*c*) *Saberton* v. *Skeels*, 1 R. & My. 587; *Hinchliffe* v. *Westwood*, 2 De G. & S. 216; *Smith* v. *Barneby*, 2 Coll. 728; *Re Crawford's Trusts*, 2 Dr. 230. *Re Ware*, 45 Ch. D. 269.

(*d*) Mr. Jarman must be understood as referring to cases where the gift is to take effect at the death of the testator; if there is a previous life estate the general rule is that "personal representatives" means "executors or administrators"; *Re Crawford's Trusts*, post, p. 1614 n. (*m*).

(*e*) *Cotton* v. *Cotton*, 2 Bea. 67; *Smith* v. *Palmer*, 7 Ha. 225; *Holloway* v. *Radcliffe*, 23 Bea. 163. But the testator may shew that he means the true next of kin and not the statutory next of kin. See cases cited infra, pp. 1614, 1615. And as to the claim of the widow, see *Booth* v. *Vicars*, ibid.

(*f*) *King* v. *Cleaveland*, 26 Bea. 166; 4 De G. & J. 477. *Doody* v. *Higgins*, 2 K. & J. 729.

the addition of "legal" or "personal") should be so construed, there must be something in the scheme or context of the will from which the testator's intention may be inferred. The most important class of cases in which this construction has prevailed are those in which the gift to the representatives is by way of substitution.

"Legal representatives" held to denote next of kin.

Thus, in *Bridge* v. *Abbot* (*g*), (which is a leading authority for this construction,) a testatrix made a bequest to certain persons, and, in case of the death of any of them before her (the testatrix), to his or her legal representatives; and Arden, M.R., held the next of kin to be entitled. This construction has been also adopted in several other cases. As in *Cotton* v. *Cotton* (*h*), 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 Langdale, M.R., held that the statutory 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 (*i*).

"Personal representative" held to mean next of kin.

Again, in *Baines* v. *Ottey* (*j*), 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 representative of the said A.; Leach, M.R., held the next of kin to be entitled.

And in *Smith* v. *Palmer* (*k*), 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"; Wigram,

(*g*) 3 B. C. C. 224. See also *Long* v. *Blackall*, 3 Ves. 486; *Jacob* v. *Calling*, [1881] W. N. 105; *Re Thompson*, [1886] W. N. 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, but the decision seems to be erroneous. *Leak* v. *Macdowall*, 33 Bea. 238, referred to infra, p. 1621, was an exceptional case.

(*h*) 2 Bea. 67.

(*i*) At p. 1619.

(*j*) 1 My. & K. 465, 2 Coll. 733 n.

(*k*) 7 Hare, 225; see also *Wilson* v. *Pilkington*, 11 Jur. 537; *King* v. *Cleaveland*, 26 Bea. 26, 4 De G. & J. 477; *Holloway* v. *Radcliffe*, 23 Bea. 163.

V.-C., held that these words meant next of kin according to the Statutes of Distribution, and that they took in equal shares.

"Legal representatives according to the course of administration."

Again, in *Jennings* v. *Gallimore* (*l*), where, by deed, a fund was vested in trustees, in trust to pay it to such persons as A. should by 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 Arden, M.R., that the next of kin of A. were entitled under the appointment. "The testator (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 do, to B.

In the three 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.

"Representatives."

The same principle of construction applies where the gift is to "the representatives," without the addition of "legal" or "personal" (*m*). Without some controlling context, a substitutional gift to personal representatives, in cases where there is a preceding life estate, is primâ facie construed a gift to the executors or administrators (*n*).

Effect of limitation to executors or administrators in same will.

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

Thus, in *Walter* v. *Makin* (*p*), where a testator gave 450*l.* to

(*l*) 3 Ves. 146. See also *Briggs* v. *Upton*, L. R., 7 Ch. 376.

(*m*) *Re Horner*, 37 Ch. D. 695. The primary meaning of "representatives" is "legal personal representatives." *Re Crawford's Trusts*, 2 Dr. 230; *Re Ware*, 45 Ch. D. 269.

(*n*) *Re Crawford's Trusts*, 2 Dr. 230. *Re Ware*, 45 Ch. D. 269, and other cases, cited post, p. 1619.

(*o*) The mere use by the testator of the words "executors and administrators" in other parts of the will does not usually affect the construction; *Hinchliffe* v. *Westwood*, 2 De G. & S. 216; *Re Ware*, 45 Ch. D. 269.

(*p*) 6 Sim. 148. The opposite inference is obviously deducible from the circumstance of "personal representatives" being elsewhere used in the

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; Shadwell, V.-C., held, that the words "legal representatives" meant next of kin (*q*).

Gift to "executors or administrators."

Formerly, the leaning in favour of the construction which gives to words pointing at succession or representation the sense of next of kin, was so strong that even a gift to "executors" or "administrators" has been thus construed (*r*). 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 (*s*).

Effect of added words.

A testator may also shew that he uses "representatives" as meaning next of kin by adding explanatory words: as where the gift is to "the next legal or personal representatives" (*t*). In *Re Gryll's Trusts* (*u*), there were trusts for such persons related by blood to A. as she should appoint, and in default for such persons as would be the personal representatives of A. in case she died unmarried, and in a codicil these trusts were referred to as being "for the benefit of A.'s relations and next of kin": it was held that by "personal representatives," the statutory next of kin were meant. So a gift to "such persons as shall be the legal personal representatives" of the testator or another person at some future time will generally be construed to mean the statutory next of kin (*v*). But if the gift is to the "personal representatives or next of kin," it seems that the next of kin in the proper sense of the word, and

sense of "executors," *Dixon* v. *Dixon*, 24 Bea. 129.

(*q*) *Robinson* v. *Smith*, 6 Sim. 47. See also *Re Thompson*, 55 L. T. 85; *Jennings* v. *Gallimore*, 3 Ves. 146; *Nicholson* v. *Wilson*, 14 Sim. 549; *Walker* v. *Marquis of Camden*, 16 Sim. 329; *Booth* v. *Vicars*, 1 Coll. pp. 10, 11; per Wickens, V.-C., L. R., 7 Ch. at p. 378 n. But see per Kindersley, V.-C., *Re Crawford's Trusts*, 2 Drew. at p. 240.

(*r*) *Palin* v. *Hills*, 1 My. & K. 470; and see *Bulmer* v. *Jay*, 4 Sim. 48, 3 My. & K. 197.

(*s*) *Re Clay*, 54 L. J. Ch. 648. See also *Wallis* v. *Taylor*, 8 Sim. 241, stated post, p. 1622; *Long* v. *Watkinson*, 17 Bea. 471, post, p. 1621; *Webb* v. *Sadler*, L. R., 8 Ch. pp. 419, 429 (settlement). *Palin* v. *Hills* must be regarded as overruled.

(*t*) *Booth* v. *Vicars*, 1 Coll. 6; *Stockdale* v. *Nicholson*, L. R., 4 Eq. 359. In such a case it is not clear whether the persons entitled are the true next of kin or the statutory next of kin. It is submitted that the opinion of Knight Bruce, V.-C., in *Booth* v. *Vicars*, in favour of the statutory next of kin, is to be preferred to that of Malins, V.-C. Although in *Booth* v. *Vicars*, Knight 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. 47, proceeded on special grounds, as did *Bulmer* v. *Jay*, 4 Sim. 48, 3 My. & K. 197.

(*u*) L. R., 6 Eq. 589.

(*v*) *Long* v. *Blackall*, 3 Ves. 486; *Robinson* v. *Evans*, 43 L. J. Ch. 82.

not the statutory next of kin, are meant, and they take as joint tenants (*w*). And the same result follows if the gift is to "the executors, or administrators, or other legal representatives of her proper own blood and kindred" (*x*).

Where "representatives" means the statutory next of kin, the manner and proportions in which they take are regulated by the statute (*y*), unless they are expressly directed to take equally (*z*).

Where "representatives" means the true next of kin, they take as joint tenants (*a*).

"Personal representatives" held to mean "descendants."

In some cases, however, "personal representatives" has been held to mean "descendants." In *Styth* v. *Monro* (*b*), a testatrix bequeathed her residuary estate "in various shares to the respective representatives" of persons who were related as sisters: it was held that this meant their descendants. So, in *Atherton* v. *Crowther* (*c*), 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 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 Romilly, M.R., that the words personal representatives meant descendants. The same construction prevailed in *Re Knowles* (*d*).

"Natural representatives."

In *Re Bromley* (*e*), the expression "natural representatives according to the statute rule of distribution," was held to mean lineal descendants.

"Personal representatives" strictly construed.

The general rule that the expression "representatives" or "personal representatives," primâ facie, means "executors or

(*w*) *Philps* v. *Evans*, 4 De G. & S. 188; *Baker* v. *Gibson*, 12 Bea. 101.

(*x*) *Re Morgan's Trust*, 2 N. R. 439.

(*y*) See *Booth* v. *Vicars*, 1 Coll. 6; *Rowland* v. *Gorsuch*, 2 Cox, 187, ante, p. 1589; *Alker* v. *Barton*, 12 L. J. Ch. 16. The decision in *Walker* v. *Marquis of Camden*, 16 Sim. 329, is generally considered to be erroneous.

(*z*) *Smith* v. *Palmer*, 7 Hare, 225. In *Holloway* v. *Radcliffe*, 23 Bea. 163, "equally" was neutralized by "in like manner as under the statute." 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. See *Fielden* v. *Ashworth*, L. R., 20 Eq. 410, post, p. 1631.

(*a*) *Stockdale* v. *Nicholson*, L. R., 4 Eq. 359, following *Withy* v. *Mangles*, 10 Cl. & F. 215.

(*b*) 6 Sim. 49. Compare *Horsepool* v. *Watson*, 3 Ves. 383, where "representatives" seems to have been construed "issue," and *Re Booth's Estates*, [1877] W. N. 129, where "legal" representatives was held to mean "children."

(*c*) 19 Bea. 448.

(*d*) 59 L. T. 359.

(*e*) 83 L. T. 315.

administrators," is illustrated by the case of *Smith* v. *Barneby* (*f*) where a testator gave leasehold and copyhold property upon trusts in strict settlement, and declared that in default of any person becoming entitled thereto under those trusts the same should be in trust for "my personal and not my real representative"; he gave the residue of his personal estate to his wife, and appointed her sole executrix: it was held that she was entitled, both as executrix and beneficially, although the testator's reference to his "real representative" (meaning his heir) might plausibly be held to show that by "personal representative" he meant his next of kin.

"Executors or administrators" used as words of limitation.

Those cases in which legal personal representatives take by direct gift must, however, be carefully distinguished from 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. (*g*).

Life estate given to A. and ultimate trust for A.'s executors or personal representatives.

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 (*h*) or personal representatives (*i*). 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 (*j*). And a trust for children which fails (*k*), or a clause of forfeiture on alienation or bankruptcy which is not called into action (*l*), interposed between

(*f*) 2 Coll. 728.

(*g*) *Lugar* v. *Harman*, 1 Cox, 250; *Taylor* v. *Beverley*, 1 Coll. 108; *Appleton* v. *Rowley*, L. R., 8 Eq. 139. Chap. XXXIII.

(*h*) Co. Lit. 54 b; *Sockett* v. *Wray*, 4 B. C. C. 483. See other cases, post, Chap. XLVIII. *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.

(*i*) *Alger* v. *Parrott*, L. R., 3 Eq. 329.

(*j*) *Suberton* 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). See Chap. XXXIII. 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*, [1888] W. N., 167 (settlement, f. c. since M. W. P. Act, 1882).

(*k*) *Allen* v. *Thorp*, 7 Bea. 72 (settlement); *Re Wyndham's Trusts*, L. R., 1 Eq. 290; *Re Best's Trusts*, L. R., 18 Eq. 686 (settlement).

(*l*) *Webb* v. *Sadler*, L. R., 8 Ch. 419.

CHAPTER XLI.

the life estate and the ultimate trust, will not affect the construction. But this rule of construction will be excluded if the testator adds a clause fixing the manner in which the executors or representatives are to be ascertained (*m*).

Limitation to executors, administrators, *and assigns.*

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 *Graffley* v. *Humpage* (*n*), 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. It was held that this gave her an absolute interest.

Gifts to "representatives" by substitution.

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

(*m*) *Re Hall*, [1893] W. N. 24.

(*n*) 1 Bea. 46. See also *Waite Templer*, 2 Sim. 524; *Hames* v. *Hames*, 2 Kee. 646; *Howell* v. *Gayler*, 5 Bea. 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. 1571.

(*p*) 6 Madd. 159. See also *Corbyn* v. *French*, 4 Ves. 418; *Hinchliffe* v. *Westwood*, 2 De G. & S. 216; *Taylor* v. *Beverley*, 1 Coll. 108; *Re Crawford*, 2 Drew. 230; *Re Henderson*, 28 Bea. 656; *Chapman* v. *Chapman*, 33 Bea. 556; *Re Turner*, 2 Dr. & Sm. 501; *Re Wyndham's Trusts*, L. R., 1 Eq. 290.

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: Leach, V.-C., held, that legal representatives must be understood in their ordinary sense of "executors or administrators," and that this 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.

Distinction in regard to substitution between immediate and future gift.

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 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.

Accordingly, in *Re Ware* (*u*), under gifts to A. and B. for life, with powers of appointment in favour of X., Y., and Z., "in failure of appointment to be equally divided between the three or their respective representatives," it was held that "representatives" meant executors or administrators.

Deferred gift to representatives in equal shares, &c.

But it does not follow that where a gift to representatives is preceded by a life estate, "representatives" is necessarily held to mean executors or administrators, for if the testator directs that

(*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, Chap. LVII.

(*r*) *Re Crawford's Trusts*, 2 Drew. at p. 242.

(*s*) 3 B. C. C. 224, ante, p. 1613.

(*t*) 2 Bea. 67, ante, p. 1613.

(*u*) 45 Ch. D. 269.

the representatives are to take in equal shares (*v*), or that they are to take only the share which the original legatee would have taken (*w*), or otherwise indicates that they are to take beneficially (*x*), "representatives" will generally be held to mean statutory next of kin, unless the words of division can be referred to the original legatees: as in *Wing* v. *Wing* (*y*), where a fund was bequeathed to four persons for their lives and then to "the legal representatives" of the tenants for life, "to be equally divided between them, share and share alike"; it was held that the executors or administrators were entitled, and not the next of kin, the direction as to equal division being taken to refer to the sets of representatives.

Those cases in which the words "executors and administrators" are not used as words of limitation must now be considered.

Gifts to "executors or administrators" as purchasers.

Gifts to "executors" or "executors or administrators" are more strictly construed than gifts to "representatives" (*z*), and consequently a substitutional gift to "executors" will not, without further words, enure for the benefit of the next of kin (*a*). Thus, in *Long* v. *Watkinson* (*b*), 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; Romilly, M.R., decided that neither the residuary legatee nor the next of kin of A. took the residue *ex personæ designatæ*, but that it went to her executrix as part of her personal estate.

So, in *Re Valdez's Trusts* (*c*), 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.

(*v*) *King* v. *Cleaveland*, 4 D. & J. 477; *Smith* v. *Palmer*, 7 Ha. 225.

(*w*) *Re Horner*, 37 Ch. D. 695 (either next of kin or descendants).

(*x*) *Baines* v. *Ottey*, 1 M. & K. 465.

(*y*) 24 W. R. 878.

(*z*) See per Lord Cottenham, *Daniel* v. *Dudley*, 1 Phil. at p. 6; and per Sir J. Romilly, M.R., *Atherton* v. *Crowther*, 19 Bea. pp. 450, 451.

(*a*) See *Re Clay*, 54 L. J. Ch. 648, and other cases cited ante, p. 1615, note (*s*).

(*b*) 17 Bea. 471.

(*c*) 40 Ch. D. 159.

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, primâ facie, go to the legal personal representatives, and not to the next of kin (*d*). And a gift to the "executors" or "representatives" of A., (who is dead at the date of the will,) receives the same construction (*e*).

Whether executors or administrators are entitled for their own benefit;

But of course a testator may add explanatory words which shew that by "executors or administrators" he means next of kin (*f*).

Notwithstanding the decision in *Evans* v. *Charles* (*g*), in which it was held that under a bequest to the legal personal representatives of a deceased person, his administratrix took for her own benefit, it may now be considered established, that, unless a contrary intention appears by the context, whatever is bequeathed to the executors or administrators of a person (*h*) vests in them as part of his personal estate.

Thus, where (*i*) 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 B. should by will appoint, and, in default of appointment, to his executors or administrators; Lord Langdale, M.R., held that the executor of B. was bound to apply the legacy according to the purposes of the will.

And the same rule prevails though the original gift is immediate, and the legatee dies in the testator's lifetime (*j*), or is dead at the date of the will (*k*).

—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 (*l*).

If, however, the testator explicitly declares that the executors or administrators shall be entitled for their own benefit, this

(*d*) *Re Seymour's Trusts*, Joh. 472.

(*e*) *Trethewy* v. *Helyar*, 4 Ch. D. 53; *Leak* v. *Macdowall*, 33 Bea. 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.

(*f*) As in *Re Morgan's Trust*, 2 W. R. 439, ante, p. 1616.

(*g*) 1 Anstr. 128. See *Long* v. *Blackall*, 3 Ves. 486; and *Churchill* v. *Dibben*, Sugd. Pow. 8th ed. 313.

(*h*) By this is meant a person other than the testator himself; as to gifts by a testator to his own executors, see ante, Chap. XVIII. and Chap. XXX.

(*i*) *Stocks* v. *Dodsley*, 1 Kee. 325; See *Collier* v. *Squire*, 3 Russ. 467; *Morris* v. *Howes*, 4 Hare, 599 (deeds).

(*j*) *Long* v. *Watkinson*, 17 Bea. 471; ante, p. 1615. See also *Re Clay*, 32 W. R. 516, 52 L. T. 641.

(*k*) *Re Valdez's Trusts*, 40 Ch. D. 159; *Leak* v. *Macdowall*, 33 Bea. 238; *Maxwell* v. *Maxwell*, Ir. R. 2 Eq. 478; *Trethewy* v. *Helyar*, 4 Ch. D. 53.

(*l*) Per Romilly, M.R., *Dixon* v. *Dixon*, 24 Bea. at p. 135; *Wellman* v. *Bowring*, 2 Russ. 374, 3 Sim. 328.

CHAPTER XLI.

construction must prevail against any suggestion as to the improbability of such a mode of disposition.

Gifts to executors "for their own use."

As, in *Wallis* v. *Taylor* (*m*), where a testatrix bequeathed a fund to trustees in trust to pay the interest for the separate use of her daughter for life, and, after her decease, upon trust to transfer the principal to her executors or administrators, to and for his, her, or their use and benefit absolutely for ever; Shadwell, V.-C., held that the husband of the daughter, on his taking out administration, was absolutely entitled for his own benefit.

General conclusion.

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 shew 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*).

Construction of gift to executors of testator himself.

(ii.) *Where gift is to executors, &c., of testator himself.*—Where a testator bequeaths property to his own executors, the question sometimes arises whether they take beneficially or not. This question is discussed in another chapter (*o*).

Lapse.

Where there is a gift to executors beneficially as tenants in common, and one of them dies in the testator's lifetime, the question may arise whether his share lapses (*p*).

(iii.) *Gifts to executors, when annexed to the office.*—The question whether a bequest to an executor is beneficial or fiduciary, generally arises with reference to residuary gifts (*q*), but sometimes it arises with reference to a specific or pecuniary bequest (*r*).

When a testator gives to his executors, describing them as such, a specific or pecuniary legacy, which is clearly beneficial, the

(*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*, 8 Bea. 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.

(*n*) Per Wigram, V.-C., *Holloway* v. *Clarkson*, 2 Hare, at p. 523.

(*o*) Chap. XVIII.

(*p*) See above, p. 438.

(*q*) See Chap. XXI., ante, p. 715.

(*r*) See Chap. XXX., ante, p. 1118.

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" (*s*), either by proving the will, or by taking upon himself the duties of executor (*t*).

Beneficial legacy to executor generally presumed to be given to him in that character.

Thus, if a testator says "I give 50*l.* to A. as my executor" (*u*), or "for his trouble" (*v*), or "I appoint A. my executor, desiring him to accept 100*l.*" (*w*), or if he appoints A. his executor and in a subsequent part of the will gives a legacy to "the said A." (*x*), 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 (*y*), or even if the appointment as executors follows the bequest of the legacy (*z*), in all such cases the legacy is regarded as annexed to the executorship.

Where an additional executor is appointed by codicil, this does not, without more, entitle him to share in benefits given by the will to the original executors (*a*).

Additional executor.

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. In *Stackpoole* v. *Howell* (*b*), Grant, M.R., said, "The question is whether you must not find circumstances to shew that the legacy was intended for the executor in a distinct character; otherwise, the presumption is *primâ facie* that it is given to him as executor."

The presumption may be rebutted by indication of contrary intention.

(*s*) Per Lord Alvanley, M.R., in *Harrison* v. *Rowley*, 4 Ves. at p. 216. See also *Freeman* v. *Fairlie*, 3 Mer. at p. 31. As to the effect of a revocation of the appointment in also revoking the legacy, see ante, p. 174.

(*t*) Ib., *Lewis* v. *Mathews*, L. R., 8 Eq. 277, and other cases cited post, p. 1627.

(*u*) *Abbot* v. *Massie*, 3 Ves. 148.

(*v*) *Re Hawkin's Trusts*, 33 Bea. 570.

(*w*) *Reed* v. *Devaynes*, 2 Cox, 285; but see the remarks on this decision, post, p. 1624, note (*h*).

(*x*) *Calvert* v. *Sebbon*, 4 Bea. 222; *Hanbury* v. *Spooner*, 5 Bea. 630.

(*y*) *Slaney* v. *Watney*, L. R., 2 Eq. 418.

(*z*) *Piggott* v. *Green*, 6 Sim. 72; *Re Appleton*, 29 Ch. D. 893.

(*a*) *Hillersdon* v. *Grove*, 21 Bea. 518; ante, p. 684.

(*b*) 13 Ves 417.

CHAPTER XLI.

What will be sufficient to indicate contrary intention.

A renouncing executor will be entitled to claim his legacy, if he can shew 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 (*c*), by adducing parol evidence of such intention.

Word expressive of regard and affection.

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. Thus, in *Cockerell* v. *Barber* (*d*), a testator, after giving a legacy to his "friend and partner P.," appointed him one of the executors of the will, and made other devises and bequests in his favour, so that P. was entitled under the will to much greater benefits than any of the other executors (*e*). By a codicil, in which P. was referred to as 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.

The cases of *Re Denby* (*f*) and *Bubb* v. *Yelverton* (*g*), were similar.

Again, in *Burgess* v. *Burgess* (*h*), 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. 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.

Mention of testator's relationship to the legatee-executor.

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 (*i*).

The presumption has in several cases been held to be rebutted

(*c*) Per Cotton, L.J., in *Re Appleton*, 29 Ch. D. at p. 895, *dubitante* Fry, L.J., at p. 898.

(*d*) 2 Russ. 585.

(*e*) See, however, on this point, post, p. 1626.

(*f*) 3 De G. F. & J. 350.

(*g*) L. R., 13 Eq. 131.

(*h*) 1 Coll. 367. And where a testator gave "to my executors herein named 50*l.* each for the trouble they may have in the execution of this my will and also to mark my friendship and regard for them," it was held by Kekewich, J., that one of the executors was entitled to the legacy although he did not prove the will: *Crawford* v. *Forshaw*, 43 Ch. D. at p. 644. 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.

(*i*) *Dix* v. *Reed*; 1 Sim. & St. 237. ("I give to my cousin T. K. 50*l.*, whom I appoint joint executor.") *Compton* v. *Bloxham*, 2 Coll. 201. ("My brother C. my executor.")

where a legacy to a person named executor was given in remainder expectant on the determination of a life-interest. Thus (*j*), 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., 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 (*k*).

Legacy subject to prior life-interest.

So, where (*l*) 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 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 (*m*) 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.

Gift of residue.

Shadwell, V.-C., held in two cases (*n*) 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 (*o*).

(*j*) *Wildes* v. *Davies*, 1 Sm. & G. 475; better reported in 22 L. J. Ch. 495. See *Re Appleton*, 29 Ch. D. at p. 896.

(*k*) 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 acknowledgement" for their trouble.

(*l*) *Re Reeve's Trusts*, 4 Ch. D. 841.

(*m*) *Re Bunbury*, I. R. 10 Eq. 408.

(*n*) *Griffiths* v. *Pruen*, 11 Sim. 202; *Christian* v. *Devereux*, 12 Sim. 264, followed in *Re Maxwell*, [1906] I Ir. 386. See also *Parsons* v. *Saffery*, 9 Pri. 578. The question whether, under a gift of residue to executors, they take beneficially or as trustees for the next of kin, is discussed above, p. 1621.

(*o*) 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 ante, p. 438.

CHAPTER XLI.

Legacy to executor by name.

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 (*p*), 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 (*q*).

Difference between legacies to executors.

It is not satisfactorily settled whether the fact that the bequests to several persons appointed executors differ in amount or subject-matter is enough of itself to rebut the presumption. The decision in *Cockerell* v. *Barber* (*r*) seems to have been partly influenced by this consideration. And in *Jewis* v. *Lawrence* (*s*), where a testator bequeathed a leasehold house to A., "one of my executors hereinafter named," and a pecuniary legacy to B., "one of my executors hereinafter named," it was held by James, V.-C., that the inequality in the gifts rebutted the presumption. But in *Re Appleton*, Cotton, L.J. said (*t*), that it must not be taken as a general rule "that a difference either in the nature or amount of legacies given to the persons named as executors is of itself sufficient to shew that the gift is not attached to the office." This, however, is a question of construction in each case.

What is sufficient assumption of executorship to support claim to legacy.

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.

It is clear that if the legatee proves the will with a bonâ 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 (*u*). And he may prove at any time before the estate is fully administered (*v*). Proving the will is primâ facie regarded as an acceptance of the trust (*w*).

Acting as executor.

It will also be a sufficient assumption of office if the legatee, though he does not prove the will, unequivocally shews by his conduct 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,

(*p*) *Piggott* v. *Green*, 6 Sim. 72; *Re Appleton*, 29 Ch. D. 893.
(*q*) *Stackpoole* v. *Howell*, 13 Ves. 417.
(*r*) 2 Russ. 585; ante, p. 1624.
(*s*) L. R., 8 Eq. 345.
(*t*) 29 Ch. D. at p. 896.
(*u*) *Hollingsworth* v. *Grasett*, 15 Sim. 52; *Angermann* v. *Ford*, 29 Bea. 349.
(*v*) *Reed* v. *Devaynes*, 2 Cox, 285.
(*w*) *Mucklow* v. *Fuller*, Jac. 198.
(*x*) 4 Ves. 212.

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 Malins, V.-C., that the executor had sufficiently shewn 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 shewn 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*).

Probate fraudulently obtained.

And 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 bonâ fide intention to act in the trusts of the will; *a fortiori* if in consequence of misconduct as executor he is restrained from interfering in the administration of the estate (*c*).

Cesser of annuity given to executor for his trouble

Sometimes a testator gives an annuity to his executors or trustees for their trouble in administering his estate, and events may occur raising the question as to whether the annuity should cease to be payable. It may be stated, as a general rule, that it continues to be payable, although the trustees employ an agent to collect rents (*d*), or although a suit for the administration of the testator's estate may have been instituted, unless the trustees are thereby relieved of their duties (*e*). But if the annuity is expressly given for collecting the rents, and the trustees employ a collector, they are not entitled to the annuity in addition to the collector's salary (*f*).

Gifts to "relations," how construed.

VI.—Gifts to Relations.—Mr. Jarman continues (*g*): "The word *relations* taken in its widest extent embraces an almost illimitable range of objects; for it comprehends persons of every degree of consanguinity, however remote, and hence, unless some line were drawn, the effect would be, that every such gift would be void for

(*y*) L. R., 8 Eq. 277.
(*z*) *Hanbury* v. *Spooner*, 5 Bea. 630.
(*a*) *Re Hawkin's Trusts*, 33 Bea. 570.
(*b*) *Griffiths* v. *Pruen*, 11 Sim. 202.
(*c*) *Harford* v. *Browning*, 1 Cox, 302.
(*d*) *Wilkinson* v. *Wilkinson*, 2 S. & St. 237.
(*e*) *Baker* v. *Martin*, 8 Sim. 25.
(*f*) *Re Muffett*, 55 L. T. 671; 56 L. T. 685.
(*g*) First ed. Vol. II. p. 45.

Objects of a gift to relations determined by Statutes of Distribution.

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 (*h*).

As to real estate.

"It was formerly doubted whether this construction extended to devises of real estate, but the affirmative was decided in the case of *Doe* d. *Thwaites* v. *Over* (*i*), 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 counterclaim was made by the heir at law, who was the child of a deceased first cousin, and who contended, that the devise was void for uncertainty. One of the first cousins, who was the nearest paternal relation, also claimed the whole, as being designated by the words 'on my side'; but the Court was of opinion that those words did not exclude the maternal relations, they being as nearly related to the testator as the relations ex parte paternâ.

"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, sisters, and the children of a deceased brother, of the testator" (*j*).

On the other hand, in *Greenwood* v. *Greenwood* (*k*), 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

(*h*) 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 ib. 234; 4 ib. 207; 8 Ves. 38; 9 ib. 319; 16 ib. 27; *Walter* v. *Maunde*, 19 ib. 423; *Pope* v. *Whitcombe*, 3 Mer. 689; overruling *Jones* v. *Beale*, 2 Vern. 381. So "friends and relations," *Gower* v. *Mainwaring*, 2 Ves. sen. pp. 87, 110; *Re Caplin's Will*, 2 Dr. & Sm. 527. But as to powers of selection in favour of relations, vide ante, p. 823, post, p. 1633. 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*, 62 L. T. 383; ante, p. 702.

(*i*) 1 Taunt. 263.

(*j*) *Rayner* v. *Mowbray*, 3 B. C. C. 234.

(*k*) 1 B. C. C. 33, n. See *Stamp* v. *Cooke*, 1 Cox, 234, stated post; *Griffith* v. *Jones*, 2 Freem. 96.

by the statute, were held to take jointly with the Greenwoods and Dows, who were.

To "relation" in the singular.

Mr. Jarman adds (*l*): "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 (*m*) where the expression was 'my *nearest* relation of the name of the Pyots.'"

"Relatives."

The expressions "blood relations" and "relatives" have the same meaning as "relations" (*n*).

"Next of blood."

In a deed, a limitation of land to the "next of blood," or "nearest of blood," of A. would, it seems, enure in favour of the individual answering that description according to the rules of descent; thus, supposing there were two brothers, A. and B., and B. died, leaving two sons, C. and D., and C. died, leaving issue, and land were limited to A. for life, remainder to his next of blood in fee, here D. would take the remainder, although he would not be the heir at law (*o*). It seems that a similar construction would be placed on a devise. But, if there are two or more of equal degree, (as would be the case in the preceding example if D. had a younger brother,) the question whether they all take equally, or whether the eldest takes, seems to be a matter of some doubt (*p*).

Whether "relations" take per stirpes or per capita.

Mr. Jarman was of opinion that a gift to relations ought to fall within the same rule as a gift to statutory next of kin, so far as regards the manner in which they take, and he stated the law thus (*q*): "The Statute of Distributions not only determines the objects of a gift to relations, but also regulates the proportions in which they take, the gift being held to apply to the next of kin, and the persons whom the Statute admits by representation, the whole taking per stirpes, not per capita; that is, the property is distributed proportionably among the stocks, not equally among the several individual objects of every degree." On principle, Mr. Jarman's view is, it is submitted, correct, for though the rule limiting the

(*l*) First ed. Vol. II. p. 46.

(*m*) *Pyot* v. *Pyot*, 1 Ves. sen. 335; and see per Lord *Loughborough*, *Marsh* v. *Marsh*, 1 B. C. C. at p. 294.

(*n*) *Salisbury* v. *Denton*, 3 K. & J. 529. *Re Patterson*, [1899] 1 Ir. 324.

(*o*) Co. Litt. 10 b.

(*p*) *Perimán* v. *Pierce*, Palm. 303; Co. Litt. 10 b., note (2). See *Power* v. *Quealy*, 2 L. R. Ir. 227, 4 L. R. Ir. 20, where the devise was "to the nearest and most deserving male cousin and a regular Power of the family."

(*q*) 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 restated his former view, though without reference to any authority, in the words above quoted, 1st ed. of this work, Vol. II. p. 46. And see per Kindersley, V.-C., 2 Sim. N. S. pp. 111, 112.

CHAPTER XLI.

class of persons entitled under a gift to relations is founded on the inconvenience of a wider interpretation, still it is a rule of construction (*r*) and as such supposes the testator to have had the statute in his contemplation. But authority, though not perfectly distinct, inclines to an opposite view. Thus in *Tiffin* v. *Longman* (*u*), where a testator gave personalty to his daughter for life, and if she died 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 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*.

Tiffin v. *Longman.*

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 (*v*).

Again in *Eagles* v. *Le Breton* (*w*), where a testatrix gave all her property to her sisters A. and B., and by codicil directed that at their death it should "pass to my relatives 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 (*x*);

Eagles v. *Le Breton.*

(*r*) 1 Gilb. Eq. Ca. 92; 1 Br. C. C. 33.

(*u*) 15 Bea. 275.

(*v*) See per Selwyn, L.J., L. R., 4 Ch. at p. 303; per Lord Cairns, 4 A. C. at p. 451.

(*w*) 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").

(*x*) As to this see below.

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.

Here again the class was an artificial one, being limited to those in America, and excluding the surviving sister (*y*). This limit happened 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 (*z*) and a previous decision (*a*) of his own.

Effect of words directing an equal distribution.

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

Where the gift contains words indicating that the objects are to take in manner directed by the statute, and adds that they shall take equally, or "share and share alike," it might be supposed that the testator meant that the objects should be ascertained by reference to the statute, and when so ascertained should take equally. However, in *Fielden* v. *Ashworth* (*d*), Malins, V.C., rejected the

(*y*) The cousins not being properly next of kin, would they have been entitled if the gift had been to "*next of kin* in America"? See *Doe* v. *Plumptre*, ante, p. 1609. 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. [This note, and the remarks in the text on *Tiffin* v. *Longman* and *Eagles* v. *Le Breton*, are taken verbatim from the 4th ed. of this work, by Mr. Vincent, Vol. II. p. 122 seq.]

(*z*) In *Lucas* v. *Brandreth*, 28 Bea. 278.

(*a*) *Jacobs* v. *Jacobs*, 16 Bea. 557, ante, p. 1570.

(*b*) First ed. Vol. II. p. 47.

(*c*) *Thomas* v. *Hole*, Cas. t. Talb. 251; *Green* v. *Howard*, 1 B. C. C. 31; *Rayner* v. *Mowbray*, 3 ib. 234; *Butler* v. *Stratton*, ib. 367.

(*d*) L. R., 20 Eq. 410. Compare *Holloway* v. *Radcliffe*, 23 Bea. 163, ante, p. 1612. *Low* v. *Smith*, 25 L. J. Ch. 503, ante, p. 1571.

words "share and share alike" and held that the next of kin took per stirpes.

"Near" and "nearest" relations.

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 (*f*), 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 (*g*), or a living child or grandchild, the issue of a deceased child or grandchild (*h*). Where, however, the testator added to a devise to nearest relations, the words "as sisters, nephews, and nieces," Sir Ll. Kenyon, M.R., directed a distribution according to the statute; and they were held to take per stirpes, though it was contended that all the relations specified should take per capita, including the children of a living sister. His Honor, however, thought that the testator had a distribution according to the statute in his view; at all events, that the contrary was not sufficiently clear to induce him to depart from the common rule. The children of the living sister, therefore, were excluded (*i*).

Nearest relations, "as sisters, nephews, and nieces."

Relations of the half-blood.

Mr. Jarman continues: "As relations by the half-blood are within the statute, so they are 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" (*j*).

Illegitimate relations.

In accordance with the general rule, a gift to "relations" primâ facie means legitimate relations, but a gift to the relations of a person who is to the knowledge of the testator a bastard and childless, may be construed to mean those persons who would have been his relations if he had been legitimate (*k*).

Again, a testator may be his own dictionary; that is, he may by his language shew that he uses the term "relations" as including

(*e*) *Whithorne* v. *Harris*, 2 Ves. sen. 527, see also 19 Ves. 403.

(*f*) *Re Nash*, 71 L. T. 5.

(*g*) *Pyot* v. *Pyot*, 1 Ves. sen. 335; *Marsh* v. *Marsh*, 1 B. C. C. 293; *Smith* v. *Campbell*, 19 Ves. 400, Coop. 275. But see *Edge* v. *Salisbury*, Amb. 70, and *Goodinge* v. *Goodinge*, 1 Ves. 231.

(*h*) It is suggested by Messrs. Wolstenholme and Vincent, in the third edition of this work (Vol. II. p. 111). that, "upon the same principle, all who stand in the same degree must take under the will, though only some of them would have been entitled under the statute," in support of which proposition they refer to *Withy* v. *Mangles*, 4 Bea. 358, 10 Cl. & Fin. 215, ante, p. 1606.

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

(*j*) 1st ed. Vol. II. p. 48. *Cotton* v. *Scarancke*, 1 Mad. 45. No doubt the construction might be excluded by the context of the will; *Re Reed*, 36 W. R. 682.

(*k*) *Re Deakin*, [1894] 3 Ch. 565. Compare the cases of gifts to next of kin, ante, p. 1611.

illegitimate relations. Thus in *Seale-Hayne* v. *Jodrell* (*l*), a testator in one part of his will referred to certain persons who were not legitimately related to him as "my cousins," and gave his residue to "my relatives hereinbefore named"; it was held that his illegitimate relations were included in the gift.

Relations by affinity.

Mr. Jarman continues (*m*): "A gift to next of kin or relations, of course, does not extend to relations by affinity (*n*), unless the testator has subjoined to the gift expressions declaratory of an intention to include them. Such, obviously, is the effect of a bequest expressly to relations 'by blood or marriage,' which lets in all persons married to relations (*o*).

Husband or wife.

"It is clear that a gift to next of kin or relations does not include a husband (*p*) or wife (*q*); and such has been also the adjudged construction of a bequest to 'my next of kin, *as if I had died intestate*' (*r*); the latter words being considered not to indicate an intention to give to the persons entitled under the statute at all events; i.e. whether next of kin or not."

Power to appoint to relations.

It is explained elsewhere (*s*) that where a person has an exclusive power of appointing among relations, he may select persons who, although relations, are not the statutory next of kin, being more distantly related to the propositus. If, however, the donee of such a power fails to exercise it, and a gift is consequently implied in favour of the objects of the power (*t*), the persons who take are the statutory next of kin (*u*).

In *Re Patterson* (*v*), there was a power of appointment among the blood relations of the testator without any gift in default of appointment; no valid appointment having been made, it was held that the statutory next of kin took per capita, and that as the power was a distributive one they took as tenants in common.

(*l*) [1891] A. C. 304, post, Chap. XLIII.

(*m*) First ed. Vol. II. p. 49.

(*n*) *Maitland* v. *Adair*, 3 Ves. 231; *Harvey* v. *Harvey*, 5 Bea. 134. See *Craik* v. *Lamb*, 1 Coll. pp. 489, 494.

(*o*) *Devisme* v. *Mellish*, 5 Ves. 529. As to what will or what will not suffice to include particular relations by affinity, see post, pp. 1635 seq.

(*p*) *Watt* v. *Watt*, 3 Ves. 244; *Anderson* v. *Dawson*, 15 ib. 532; *Bailey* v. *Wright*, 18 ib. 49, 1 Sw. 39. [These were all cases to limitations to next of kin in settlements. C. S.]

(*q*) *Nichols* v. *Savage*, cit. 18 Ves. p. 53 (bequest to next of kin).

(*r*) *Garrick* v. *Lord Camden*, 14 Ves. 372. In *Davies* v. *Baily*, 1 Ves. sen. 84, the gift was to the testator's relations, according to the Statute of Distribution; *Worseley* v. *Johnson*, 3 Atk. 758.

(*s*) Chap. XXIII.

(*t*) Ante, p. 650.

(*u*) *Cole* v. *Wade*, 16 Ves. 27. *Salusbury* v. *Denton*, 3 K. & J. 529. As to the period for ascertaining the class, see post, p. 1647.

(*v*) [1899] 1 Ir. 324.

Mr. Jarman continues (*w*): "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 (*x*); and the better opinion, according to the authorities is, that the word *poor* also is inoperative to vary the construction, though the cases are somewhat conflicting (*y*). In an early case (*z*) it was said that the word 'poor' was frequently used as a term of endearment and compassion; as one often says, 'my poor father,' &c.; and accordingly a countess, (but who it seems had not an estate equal to her rank,) was held to be entitled under such a bequest. In *Widmore* v. *Woodroffe* (*a*), a testator bequeathed two-thirds of his property *to the most necessitous of his relations* by his father's and mother's side; [the testator 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, and would extend to relations *ad infinitum*. The Court cannot stop at any other time.] And Lord *Camden* said the bequest would stand upon the word relations alone, *the word poor being added made no difference;* there was no distinguishing between the degrees of poverty. This decision may be considered to have overruled the earlier cases of *Jones* v. *Beale* (*aa*) and *Att.-Gen.* v. *Buckland* (*b*), in each of which a gift to *poor relations* was extended to necessitous relations *beyond* the Statutes of Distribution."

Gifts "to poor relations," how construed.

But it is by no means clear that the decision in *Widmore* v. *Woodroffe* justifies the conclusion which Mr. Jarman draws from it. In that case there was only one relation within the statute, and consequently the only point decided was that the addition of the word "necessitous" did not make the word "relations" include those beyond the statute: the case is no authority for the

(*w*) First ed. Vol. II. p. 49.

(*x*) *Doyley* v. *Att.-Gen.*, 4 Vin. Abr. 5, pl. 16, 2 Eq. Ca. Abr. 194, pl. 15.

(*y*) *Widmore* v. *Woodroffe*, Amb. 636.

(*z*) Anon., 1 P. W. 327. [As the reporter justly remarks "this seems to have been a strained interpretation in favour of the Earl and Countess of Winchelsea," and would probably not be adopted at the present day. C. S.]

(*a*) Amb. 636.

(*aa*) 2 Vern. 381.

(*b*) Cited 1 Ves. sen. 231. [An explanation of the ratio decidendi in this case is suggested ante, p. 220. C. S.]

proposition that if there are several statutory next of kin, a gift to "poor relations" will necessarily include those of them who are in affluent circumstances. On the other hand, *Brunsden* v. *Woolredge* (*c*) is an authority to the contrary; in that case B. by will dated 1734 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 (*d*).

Gift to poor relations regarded as charity.

The cases in which gifts to poor relations have been held to create charitable trusts have been already discussed (*e*).

VII.—Gifts to special classes of Relations.—In the construction of wills, the class of relations with regard to which questions most frequently arise is that of children, and this subject is accordingly reserved for a separate chapter. The general principle there stated, namely, that the legal construction of the word "children" accords with its popular signification, applies also, mutatis mutandis, to gifts to other classes of relations, as nephews, nieces, cousins, &c. Thus great-nephews and great-nieces are not included in a gift to "nephews and nieces" (*f*), nor a great grand-nephew in a gift to "grand-nephews" (*g*). So descendants of first cousins will not take under a gift to "first cousins or cousins german" (*h*); nor a first cousin once removed under a gift to second cousins (*i*). And "cousins" primâ facie means first cousins (*j*). Again, relations by affinity do not, without the aid of a context (*k*), take under

"Nephews," "first cousins," &c., do not include great nephews or second cousins.

"Cousins" means first cousins.

(*c*) Amb. 507. The case is also discussed ante, p. 220 n. (*e*).

(*d*) See also a valuable note in Lewin on Trusts (8th ed. p. 836), where a dictum of Lord Thurlow in *Green* v. *Howard*, 1 B. C. C. at p. 33, and the decision in *Gower* v. *Mainwaring*, 2 Ves. sen. 87, are cited on this point.

(*e*) Ante, p. 220.

(*f*) *Shelley* v. *Bryer*, Jac. 207; *Falkner* v. *Butler*, Amb. 514.

(*g*) *Waring* v. *Lee*, 8 Bea. 247.

(*h*) *Sanderson* v. *Bayley*, 4 My. & C. 56.

(*i*) *Corporation of Bridgnorth* v. *Collins*, 15 Sim. 538; *Re Parker*, 15 Ch. D. 528, 17 Ch. D. 262.

(*j*) *Stoddart* v. *Nelson*, 6 D. M. & G. 68; *Stevenson* v. *Abingdon*, 31 Bea. 305; overruling contrary dictum of Shadwell, V.-C., *Caldecott* v. *Harrison*, 9 Sim. 457. *Copland's Executors* v. *Milne*, [1908] Ct. of Sess. Ca. 426. *Burbey* v. *Burbey*, 9 Jur. N. S. 96.

(*k*) Vide ante, p. 1633. In *Frogley* v. *Phillips*, 3 D. F. & J. 466, a bequest to the testator's nephews and nieces "on both sides" was held to include his wife's nephews and nieces.

CHAPTER XLI.

gift to "relations" generally (*l*), or to relations of a particular denomination, as nephews and nieces (*m*). And a gift to nephews or nieces will not include all great-nephews or great-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*).

Unless the context proves a different intention;

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. 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, Shadwell, V.-C., held that the testator had unequivocally shewn 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 his great-niece, but he did not shew 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 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

(*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. pp. 380, 727, 2 P. & D. 8, contra, is opposed to the general current of authority.

(*n*) *Shelley* v. *Bryer*, Jac. 207; *Thompson* v. *Robinson*, 27 Bea. 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; *Williamson* v. *Moore*, 10 W. R. 536.

(*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. In *Re Cozens*, [1903] 1 Ch. 138, the testatrix referred in one part of her will to a nephew of her husband as "my nephew" and to a great-niece as "my niece", it was held that they were not included in a gift to "my own nephews and nieces." In *Re Gue*, 61 L. J. Ch. 510, persons erroneously described in another part of the will as nephews and nieces were included by reference in the residuary gift.

(*q*) 14 Sim. 214.

(*r*) L. R., 2 Eq. 333.

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 mis-statement 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."

—or the gift strictly construed would not have an object.

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 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 (*v*). And under corresponding circumstances first cousins once removed may take under a gift to "second cousins" (*w*). Where the gift is to the relations of a person other than the testator, it will not be presumed that the testator knew the exact state of the family; it must be proved that he knew it (*x*).

Uncertainty.

If there is a gift to nephews and nieces, and it is clear from the facts that the testator did not mean nephews and nieces, and it is impossible to enable the Court to ascertain whom he did mean, the gift is void for uncertainty (*y*).

Where testator provides his own dictionary.

The difficulty in most of these cases arises from the fact that the testator has in one part of his will used a word importing relationship in an inaccurate sense, from which it may be argued that he uses the word in that sense throughout the will. The tendency of the Courts has hitherto been towards a strict construction; consequently if a testator gives legacies to persons who are nieces of his wife, describing them as "my nieces," and gives his residue to "my nephews and nieces," only his nephews and nieces by blood are entitled to share in the residue (*z*). But if the testator has no nephews or nieces in the primary sense of the

(*s*) *Stringer* v. *Gardiner*, 4 De G. & J. 468.

(*t*) *Sherratt* v. *Mountford*, L. R., 8 Ch. 928.

(*u*) *Hogg* v. *Cook*, 32 Bea. 641; *Sherratt* v. *Mountford*, L. R., 8 Ch. 928.

(*v*) *Adney* v. *Greatrex*, 38 L. J. Ch. 414. It was assumed that a woman aged 60 was past child-bearing. In *Crook* v. *Whitley*, 7 D. M. & G. 490, there was no evidence that the testatrix was aware of the state of the family.

(*w*) *Slade* v. *Fooks*, 9 Sim. 386; *Mayott* v. *Mayott*, 2 Br. C. C. 125 (Belt's note). *Re Bonner*, 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*, 17 Ch. D. at p. 265.

(*x*) *Crook* v. *Whitley*, 7 D. M. & G. 490.

(*y*) *McHugh* v. *McHugh*, [1908] 1 Ir. 155.

(*z*) *Smith* v. *Lidiard*, 3 K. & J. 252; *Wells* v. *Wells*, L. R., 18 Eq. 504; *Merrill* v. *Morton*, 17 Ch. D. 382.

CHAPTER XLI.

word, the door is open to admit the nephews and nieces of his wife (*a*). Some judges indeed seem to think that the strict rule of construction laid down in the earlier cases has been modified by the decision in *Seale-Hayne* v. *Jodrell* (*b*). In that case a testator made dispositions in favour of certain named persons some of whom he described as his cousins and others as his nieces, and he gave his residue to "my relatives hereinbefore named": the persons described as the testator's nieces were his wife's nieces, and some of the persons described as his cousins were illegitimate relatives: it was held that "the relatives hereinbefore named" included relatives by affinity and illegitimate relatives. The principle is of general application (*c*), and it seems to follow, as a primâ facie rule of construction, that if a testator uses such a word as "nephew" or "cousin" in one part of his will in a secondary or inaccurate sense, the probability is that he uses it in that sense throughout his will (*d*), but this construction can of course be excluded by the context. There is in truth no hard and fast rule, and each case depends on the terms of the will and the facts known to the testator (*e*).

And the larger construction may after all be excluded by the context; as in *Stevenson* v. *Abingdon* (*f*), 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.

Full meaning curtailed.

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 (*g*).

(*a*) *Sherratt* v. *Mountford*, L. R., 8 Ch. 928.

(*b*) [1891] A. C. 304, affirming C. A. in *Re Jodrell*, 44 Ch. D. 590.

(*c*) See *Re Wood*, [1902] 2 Ch. 542; *Re Smillie*, [1903] 1 Ch. 198; *Re Kiddle*, 92 L. T. 724. Compare also *In bonis Ashton*, [1892] P. 83, and the other cases cited in Chap. XV., with reference to questions of latent ambiguity.

(*d*) Kekewich, J., acted on this principle in *Re Parker*, [1897] 2 Ch. 208. See also *Re Gue*, [1892] W. N. 132, 61 L. J. Ch. 510, where the testator referred to S., a nephew of his wife, and S.'s wife, as "my nephew and niece."

(*e*) Per Swinfen Eady, J., in *Re Cozens*, [1903] 1 Ch. 138, ante, p. 1636, note (*p*).

(*f*) 31 Bea. 305.

(*g*) *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 construction of "cousins" has not been followed, supra.

In *Silcox* v. *Bell* (*h*) there was in effect a gift to the testator's first and second cousins and the representatives of first and second cousins: it was held by Leach, V.-C., that certain persons who were first cousins twice removed of the testator were entitled to share in the bequest, "because they were within the degrees of relationship mentioned in the will."

Gift to a mixed class of relations of different degrees.

Lord Cottenham explained the decision in this and similar cases (*j*) thus: "In all those cases the gift was to all the testator's first *and* second cousins, and in all, first cousins once removed were held to be entitled, but not because they were first cousins, but because they were within the degree of second cousins." (*k*) According to this the decision turned on the gift being to a mixed class of relations of different degrees. It seems, however, that the decision in *Mayott* v. *Mayott* (*l*) really turned on the fact that the testator had no second cousins in the proper sense of the word, and consequently his second cousins in the popular sense of the word, namely first cousins once removed, were held to be included (*m*). In any case it is clear that the principle supposed to be laid down by the cases in question does not apply where there is a gift to first cousins and a separate gift to second cousins (*n*).

"Eldest," &c.

The meaning of "eldest," "youngest," "next eldest," and similar expressions, is discussed in connection with gifts to children (*o*).

A gift to a class of relations includes those of the half-blood.

As a general rule, a gift to brothers and sisters extends to half brothers and sisters, and a gift to nephews and nieces to the children of half brothers and sisters (*p*): and so with regard to every other degree of relationship. But, of course, this construction may be excluded by clear words (*q*).

Gift to A. B., described as a relation.

Sometimes a testator makes a gift to an individual whom he describes as his nephew, cousin, and the like, and there is no person of that name to whom the description exactly applies; or there may be two persons wholly or partially answering the description; cases of this kind have been already discussed (*r*).

Illegitimate relations.

A gift to "brothers," "nephews," "cousins," and other classes of relations is primâ facie confined to persons who are legitimate

(*h*) 1 S. & S. 301.

(*j*) *Mayott* v. *Mayott*, as reported, 2 Br. C. C. 125. *Charge* v. *Goodyer*, 3 Russ. 140.

(*k*) *Sanderson* v. *Bayley*, 4 My. & Cr. 56.

(*l*) As stated in Mr. Bell's note.

(*m*) See per Jessel, M.R., in *Re Parker*, 15 Ch. D. at p. 531.

(*n*) *Re Parker*, (C. A.) 17 Ch. D. 262.

(*o*) Chap. XLII.

(*p*) *Grieves* v. *Rawley*, 10 Ha. 63; *Re Hammersley*, 2 T. L. R. 459; *Re Cozens*, [1903] 1 Ch. 138.

(*q*) *Re Reed*, 57 L. J. Ch. 790; *Re Dowson*, [1909] W. N. 245.

(*r*) Chap. XXXV.

CHAPTER XLI.

relations, but this rule may be excluded by the context of the will and the facts in the particular case (*s*).

"Male nephews."

In *Lucas* v. *Cuddy* (*t*), the expression "male nephews" was held to mean sons of the testator's brothers, to the exclusion of sons of his sisters.

When class ascertained.

It seems clear that the rules which determine the period at which, in a gift to children, the class is to be ascertained, apply also to gifts to other classes 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 (*u*). Thus, a gift to A. for life and after his death to his brothers, will include the brothers born during the life of A. (*v*); and the same has been held with regard to nephews and nieces (*w*), and cousins (*x*).

Where objects take per capita.

Under a gift to A. and the brothers of B. and the nephews of C., all take per capita (*y*).

Division per stirpes.

Where the gift is to a class of relations and their issue and a division per stirpes is expressly directed, questions sometimes arise as to the manner in which the stocks are to be ascertained. These questions have been already referred to, and the case of *Re Wilson* (*z*), where the gift was to cousins and their issue, has been stated (*a*).

Relations dead at date of will.

The general rule is well established that when a testator makes a simple gift to "my brothers" or "the nephews of A.," or the like, he primarily means those who are living at the date of the will, and does not refer to those who are then dead. But if he goes on to provide for the children of a deceased brother it may appear that the gift was framed in this way in order to shew how the property was to be divided, each brother, whether alive at the date of the

(*s*) *Seale-Hayne* v. *Jodrell*, [1891] A. C. 304, affirming C. A. in *Re Jodrell*, 44 Ch. D. 590; *Re Parker*, [1897] 2 Ch. 208; *Re Bryon*, 30 Ch. D. 110; *Re Brown*, 37 W. R. 472; *Re Corsellis*, [1906] 2 Ch. 316. Compare *In bonis Ashton*, [1892] P. 83, and the other cases cited ante, p. 529, and the cases on gifts to illegitimate children, post, Chap. XLIII. where the rules for ascertaining legitimacy are explained; these apply to nephews and other relations; *Re Andros*, 24 Ch. D. 637.

(*t*) Ir. R. 10 Eq. 514.

(*u*) See per Turner, L.J., in *Baldwin* v. *Rogers*, 3 D. M. & G. at p. 656.

(*v*) *Devisme* v. *Mello*, 1 B. C. C. 537; *Doe* d. *Stewart* v. *Sheffield*, 13 East. 526. See also *Leake* v. *Robinson*, 2 Mer. 363. Mr. Jarman thought (1st ed. Vol. II. p. 78) that "the rule which makes a gift to children comprehend all who come into existence before the time of distribution, is peculiar to these favoured objects," and that it was only extended to brothers and sisters and nephews and nieces, because such a gift "is substantially a gift to children."

(*w*) *Balm* v. *Balm*, 3 Sim. 492. See also *Shuttleworth* v. *Greaves*, 4 My. & C. 35; *Cort* v. *Winder*, 1 Coll. 320; *Re Partington's Trust*, 3 Gif. 378.

(*x*) *Baldwin* v. *Rogers*, 3 D. M. & G. 649.

(*y*) *Amson* v. *Harris*, 19 Bea. 210; *Baker* v. *Baker*, 6 Ha. 269. Compare the rule in the case of gifts to children, and the exceptions to it, post, p. 1711 seq.

(*z*) 24 Ch. D. 664.

(*a*) Ante, p. 1590.

will or not, being treated as a *stirps* (*b*). There is, however, a strong presumption against this; where there is a gift to "my brothers," followed by a clause of substitution or an independent gift in favour of the children of deceased brothers, this is primâ facie taken to apply only to children of brothers living at the date of the will and dying before the period of distribution (*c*). The presumption may, of course, be rebutted by the context or by the state of facts at the date of the will (*d*).

Independently of the general rule, a provision for the children of deceased brothers or other relations may appear to be intended to apply only to the children of brothers, &c., who were living at the date of the will: as where the income of the property is directed to be paid to "my brothers" during their respective lives (*e*).

A gift to great-nieces "born previously" to the date of the will includes a great-niece en ventre sa mère at that time (*f*).

When death of testator is the period.

VIII.—At what Period Relations, Next of Kin, &c., are to be ascertained.—Mr. Jarman continues (*g*): "The question, however, which more than any other has been the subject of controversy in gifts to next of kin and relations, refers to the period at which the objects are to be ascertained; in other words, whether the person or persons who happen to answer the description at the testator's death, or those to whom it applies at a future period, are intended. Where a devise or bequest is simply to the testator's own next of kin, it necessarily applies to those who sustain the character at his death (*h*). 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 (*hh*); 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,

(*b*) This happens where there is a direct gift to the primary and secondary classes (brothers and the children of deceased brothers) is in one clause, as in *Tytherleigh* v. *Harbin*, 6 Sim. 329.

(*c*) See the authorities cited in Chap. XXXVI.

(*d*) Ibid.

(*e*) *Re Wood*, [1894] 3 Ch. 381, approving *Re Chinery*, 39 Ch. D. 614.

(*f*) *Re Salaman*, [1908] 1 Ch. 4.

(*g*) First ed. Vol. II. p. 51.

(*h*) See *Re Winn*, [1910] 1 Ch. at p. 286.

(*hh*) *Harrington* v. *Harte*, 1 Cox, 131. See also 3 B. C. C. 234; 4 ib. 207; 3 East, 278. Taml. 346; 4 Jur. N. S. 407.

not when the objects are to be ascertained, but when the gift takes effect in possession (*i*).

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" (*k*). The rule has been thus stated in a modern case (*l*): "According to *Philps* v. *Evans* (*m*), 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 ascertaining 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."

But the rule does not apply if the terms of the will impliedly require the next of kin to be ascertained at the death of the propositus. Thus, in *Re Ham's Trust* (*n*), 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

(*i*) The general principle is laid down in *Bullock* v. *Downes*, 9 H. L. C. 1; and in *Lee* v. *Lee*, 1 Dr. & Sm. 85. It is not necessary that the gift should contain any reference to intestacy, or to the Statutes of Distribution; *Re Ford*, 72 L. T. 5. The rule applies to a mixed fund; *Cusack* v. *Rood*, 24 W.R. 391. The construction is the same if the gift is to the persons "who shall be my next of kin," or in similar terms; *Rayner* v. *Mowbray*, 3 Br. C. C. 234. "Mere words of futurity are insufficient"; per Wood, V.-C., in *Wharton* v. *Barker*, 4 K. & J. at p. 489. But if the gift after the death of the tenant for life is to the persons "who shall then be my next of kin," other considerations arise; see post, pp. 1643 seq.

In *Wharton* v. *Barker* (4 K. & J. 483), the gift (after previous life estates 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." It was held by Wood, V.-C., that both classes of next of kin were to be ascertained at the death of the surviving tenant for life, but the decision on the former half was influenced by the construction made as to the latter. In *Re Maher*, [1909] 1 Ir. 70, there was a gift to the testator's children, and if they died without issue, to "my next of kin"; it was held that the next of kin were to be ascertained at the testator's death.

(*k*) *Vaux* v. *Henderson*, 1 J. & W. 388, n.

(*l*) *Wharton* v. *Barker*, 4 K. & J. at p. 502, per Wood, V.-C. It is supported by *Re Philps' Will*, L. R. 7 Eq. 151, and *Re Rees*, 44 Ch. D. at p. 488.

(*m*) 4 De G. & S. 188.

(*n*) 2 Sim. N. S. 106.

vested in those who survived the testator. Kindersley, V.-C., agreed that it would have been so, if the gift had been simply to the wife's relations (*o*); 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 (*p*). The shares of those who died before the testator therefore lapsed. So, in *Re Rees* (*q*), where there was a gift to the persons who would have been the statutory next of kin of the testatrix's deceased husband "had he died intestate and without leaving any widow him surviving," these words were held to take the case out of the general rule above stated.

—of person who survives testator.

Mr. Jarman continues (*r*): "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 (*s*). 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 (*t*).

Testator's next of kin living at a future period.

"The rule of construction, which makes the death of the testator the period of ascertaining the next of kin, is adhered to, not withstanding the terms of the will confine the gift to next of kin *living* at the period of distribution; for this merely adds another ingredient to the qualification of the objects, and makes no farther change in the construction. Indeed, it rather affords an argument the other way. Thus, where (*u*) a testator directed personal estate, and the produce of real estate, to be laid out for accumulation for ten

(*o*) See *Lee* v. *Pain*, 4 Hare, at p. 250, and other cases cited post, Chap. XLII. s. II.

(*p*) See per Hall, V.-C., *Sturge* v. *Great Western Rail. Co.*, 19 Ch. D. at p. 449.

(*q*) 44 Ch. D. 484.

(*r*) First ed. Vol. II. p. 52.

(*s*) *Danvers* v. *Earl of Clarendon*, 1 Vern. 35. "There is no such character in law as the heir of a living person, or as his statutory next of kin." Per Kay, J., *Re Parsons*, 45 Ch. D. at p. 63.

(*t*) *Crawys* v. *Colman*, 9 Ves. 319; *Smith* v. *Palmer*, 7 Hare, 225; *Gundry* v. *Pinniger*, 14 Bea. 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. p. 504, 8 Hare, p. 307.

(*u*) *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*, etc.—as to which vide infra, p. 1647, n. (*k*).

CHAPTER XLI.

years, and then a certain part thereof divided among such of th next of kin and personal representatives of B.'s *as should then living*, Lord *Thurlow* held, that the next of kin at the testa tor's death, *surviving the specified period*, were entitled; *for it wa plain that the testator meant some class of persons, of whom it wa doubtful whether they would live ten years*" (*v*).

Where tenant for life is next of kin.

Cases sometimes occur where there is a gift to A. for life an then to the testator's next of kin, or to A. for life and after hi death to his children or appointees, with a gift over in defaul to the testator's next of kin. According to some of the olde authorities, if in such a case A. is one of the next of kin (*w*), or th sole next of kin, at the testator's death the gift will be considere as referring to the persons who are the testator's next of kin a A.'s death (*x*). But it is now settled that the improbability i such a case of the testator meaning to give a contingent benefit to A as next of kin is not, taken by itself, of sufficient weight to preven the application of the general rule of construction. Thus, in *War* v. *Rowland* (*y*), a testator gave a fund to his daughter (his only surviving child) for life and after her death to her children, and if she left no children, to his heirs at law, share and share alike she died a spinster, and it was held that the fund belonged to he personal representatives, and not to the persons who were th testator's heir at law or next of kin at her death (*z*).

Question of intention.

In all these cases, however, it is a question of intention, and

(*v*) Quoted with approval by Lord Davey in *Re Nash*, 71 L. T. 5, at p. 7. *Re Winn*, [1910] 1 Ch. 278.

(*w*) A. may of course be the widow and therefore one of the statutory next of kin; *Jenkins* v. *Gower*, 2 Coll. 537; *Starr* v. *Newberry*, 23 Bea. 436.

(*x*) *Briden* v. *Hewlett*, 2 My. & K. 90; *Miller* v. *Eaton*, Coop. 272; *Butler* v. *Bushnell*, 3 My. & K. 232. In each of these cases the decision turned to some extent on the wording of the particular will. See also *Clapton* v. *Bulmer*, 10 Sim. 426; 5 My. & Cr. 108; *Minter* v. *Wraith*, 13 Sim. 52, and the remarks of Wood, V.-C., in *Wharton* v. *Barker*, 4 K. & J. at p. 500.

(*y*) 2 Ph. 635.

(*z*) Other cases are *Baker* v. *Gibson*, 12 Bea. 101; *Murphy* v. *Donegan*, 3 Jo. & Lat. 534; *Bird* v. *Luckie*, 8 Hare, 301; *Re Barber's will*, 1 Sm. & Gif. 118; *Gorbell* v. *Davison*, 18 Bea. 556; *Markham* v. *Ivatt*, 20 ib. 579; *Harrison* v. *Harrison*, 28 ib. 21; *Re Lang's will*, 9 W. R. 589; *Michell* v. *Bridges*, 1 W. R. 200; *Elmsley* v. *Young*, 2 My & K. 82, 780 (settlement); *Smith* v *Smith*, 12 Sim. 317 (settlement); *Aller* v. *Thorp*, 7 Bea. 72 (settlement); *Hollo way* v. *Holloway*, 5 Ves. 399; *Master* v. *Hooper*, 4 B. C. C. 207; *Doe* d. *Garne* v. *Lawson*, 3 East, 278; *Lasbury* v *Newport*, 9 Bea. 376; *Jenkins* v *Gower*, 2 Coll. 537; *Wilkinson* v *Garrett*, ib. 643, *Wilson* v. *Pilkington* 11 Jur. 537 (settlement); *Holloway* v *Radcliffe*, 21 Bea. 163; *Starr* v *Newberry*, ib. 436; *Re Greenwood's will*, 31 L. J. Ch. 119, the report o which 3 Gif. 390 is wrong, see R. L. A. 1861, fo. 2402. *Urquhart* v. *Urqu hart*, 13 Sim. 613; *Seifferth* v. *Badham* 9 Bea. 370; *Nicholson* v. *Wilson*, 14 Sim. 549; *Lee* v. *Lee*, 1 Dr. & Sm 85; *Re Wilson*, [1907] 1 Ch. 450 [1907] 2 Ch. 572. In *Pearce* v. *Vincent* 2 Kee. 230, the rule was applied to a devise of realty to the testator's next of kin.

each case depends on the wording of the particular will. In *Jones* v. *Colbeck* (*a*), a testator gave 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. 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 whom the expression "my relations" was, in the opinion of the M.R., quite inappropriate. In *Lees* v. *Massey* (*b*), which was a somewhat similar case, it was not necessary to decide the point, but Lord Campbell thought that the relations should be ascertained at the death of the daughter, and Turner, L.J., said that the ground on which the decision in *Jones* v. *Colbeck* rested was perfectly sound, namely, that the testator had sufficiently indicated his intention that the property should go to his next of kin on the death of his daughter: he seemed to think that it would be easier to establish this intention where the gift is to the next of kin simply than where it is to the statutory next of kin (*c*).

Rule not strictly applied to gifts to relations.

The distinction between gifts to "relations" and gifts to "next of kin," as regards the time when the legatees are to be ascertained, has been taken in other cases (*d*).

Where the devise is to the next of kin of a third person.

In 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* (*e*), 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

(*a*) 8 Ves. 38.

(*b*) 3 D. F. & J. 113.

(*c*) See also *Say* v. *Creed*, 5 Hare, 580; *Minter* v. *Wraith*, 13 Sim. 52, and *Cooper* v. *Denison*, 13 Sim. 290, where the fact that the tenant for life had a power of appointment affected the construction. Wood, V.-C., in *Wharton* v. *Barker* (4 K. & J. at p. 500), approved of the principle on which *Jones* v. *Colbeck* was decided, but he seemed to think that it had been practically overruled by *Ware* v. *Rowland*.

(*d*) *Tiffin* v. *Longman*, 15 Bea. 275; *Holloway* v. *Radcliffe*, 23 Bea. 163.

(*e*) 5 Bing. N. C. 434.

CHAPTER XLI.

person bearing the name of H. as shall be the male relation nearest in blood to R. H." (*f*): 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 (*g*).

What expressions authorize a departure from the rule.

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 individual who happens to answer that description at the death of the testator or other ancestor, the context has been held to shew an intention to refer to some other persons than those who answer the description at that time. *Bird* v. *Wood* (*h*) 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 favour 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 appointment, to her (the testatrix's) next of kin, to be considered as a vested interest from the testatrix's death, except as to any child afterwards born of her daughter. The daughter having died childless and without making any appointment, Leach, V.-C., held that by the exception the testatrix had shewn 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 (*i*).

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

(*f*) These terms were considered equivalent to a bequest to next of kin, see per Bosanquet, J., 5 Bing. N. C. at p. 441.

(*g*) Ante, p. 1643.

(*h*) 2 S. & St. 400, corrected 2 My. & K. pp. 86, 89.

(*i*) See also *Eagles* v. *Le Breton*, 42 L. J. Ch. 362, ante, p. 1630.

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 persons belonged, those persons should be excluded from the bequest, and if the matter is thus left in doubt the general rule prevails (*j*).

Effect of power of appointment.

Where there is an express gift in remainder to relations or 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 testamentary power of appointment (that is, a power to appoint by will only), given to the tenant for life, then the death of the tenant for life is the period to be regarded, whether the power be one of selection (*k*), or only of distribution (*l*). This principle, however, does not apply where the power may be exercised by any writing (*m*), or where there is no estate for life: in the latter case the distribution not being suspended, those who are to take in default of appointment are, it seems, those who answered the description of next of kin at the testator's death (*n*).

If there is a life estate given to some person other than the donee, it seems, on principle, that the death of the tenant for life is the period for ascertaining the class (*o*), even if the donee of the power

(*j*) *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); *Cooper* v. *Denison*, 13 Sim. 290 ("other the next of kin").

(*k*) *Att.-Gen.* v. *Doyley*, 4 Vin. Abr. 485; *Harding* v. *Glyn*, 1 Atk. 469, cit. 5 Ves. p. 501; *Crawys* v. *Coleman*, 9 Ves. 319; *Cooper* v. *Denison*, 13 Sim. 290. *Re Susanni's Trusts*, 47 L. J. Ch. 65. In *Sinnott* v. *Walsh* (5 L. R. Ir. 27) the power was restricted to persons living at the date of the testator's will; see Chap. XXIII. In *Carthew* v. *Enraght*, 20 W. R. 743, there was a power to select ten of the descendants of H.; at the death of the tenant for life there were only six descendants living; it was held that they took the legacy.

(*l*) *Pope* v. *Whitcombe*, 3 Mer. 689, corrected Sug. Pow. 953, 8th ed., ante, Vol. I. p. 653. *Finch* v. *Hollingsworth*, 21 Bea. 112; *Walsh* v. *Wallinger*, 2 R. & M. 78; *Re Caplin's will*, 2 Dr. & S. 527; *Re Patterson*, [1899] 1 Ir. 324.

(*m*) Ante, p. 653, and post, Chap. XLII.

(*n*) Sugden on Powers, 662, citing *Cole* v. *Wade*, 16 Ves. 27; *Walter* v. *Maunde*, 19 Ves. 424. The point did not arise in the case, as Lord St. Leonards himself remarks.

(*o*) In *Re White's Trusts*, John. 656, where the power was to appoint among such of the testator's issue as A. should think fit, Wood, V.-C., said: "In a case where the donee of the power survives the tenant for life, there would be a possible ground for arguing that the class must be kept in suspense long enough to let in all who might be born while the power was in existence." And see Farwell on Powers, 475. But this argument equally applies to the ordinary case of a power to appoint by deed or will. See also *Att.-Gen.* v. *Doyley*, supra, and the remarks of Chitty, J., in *Wilson* v. *Duguid*, 24 Ch. D. at p. 244.

survives the tenant for life (*p*). In *Birch* v. *Wade* (*q*), where property was (in effect) given to A. for life and then to B. for life, with a declaration that it should "be left entirely to the disposal of A. among such of her relations as she may think proper after the death of" B., it was held that the class must be ascertained at the death of A. "The cases on 'relations' are very peculiar" (*r*).

Gift expressly to next of kin or relations at a future period.

It has been already pointed out that mere words of futurity are not sufficient to displace the general rule which makes the death of the testator the period for ascertaining relations and next of kin (*s*): as in the case of a gift to A. for life and afterwards "to those who shall be my next of kin" (*t*). But, as Mr. Jarman points out (*u*), "if property be given upon certain events to such persons as shall *then* be next of kin or relations of the testator, the persons standing in that relation at the period in question, whether so or not, at the death of the testator, are, upon the terms of the gift, entitled" (*v*).

So if property is given to A. for life and "at her death to be equally divided among my brothers and sisters at her death," this means brothers and sisters living at her death (*w*). Or the testator may expressly give the property to the persons who at a specified future time (such as the death of the tenant for life) shall be his next of kin, and then the class is an artificial class, to be ascertained on the hypothesis that the testator dies at that time (*x*). The same result follows if he gives it to the persons who would be his next of kin if he died at a specified future time (*y*). Where the gift is to the persons who would be the next of kin of a married woman if she had survived her husband and died intestate, it has been held in some cases that the sole object of these or similar words is to exclude the husband, and that the next of kin should be ascertained at the wife's death (*z*). But this construction seems erroneous (*a*). In cases where the period for ascertaining the next

Artificial class of next of kin.

(*p*) *Carthew* v. *Enraght*, 20 W. R. 743.

(*q*) 3 V. & B. 198.

(*r*) Per Chitty, J., in *Wilson* v. *Duguid*, supra. As to the doctrine of implication from powers of appointment, see supra, p. 650.

(*s*) Ante, p. 1641.

(*t*) Per Wood, V.-C., in *Wharton* v. *Barker*, 4 K. & J. at p. 489.

(*u*) First ed. Vol. II. p. 58.

(*v*) *Long* v. *Blackall*, 3 Ves. 486; *Boys* v. *Bradley*, 10 Hare, 389, stated supra, p. 1610. *Wharton* v. *Barker*, 4 K. & J. 483; *Valentine* v. *Fitzsimons*, [1894] 1 Ir. 93.

(*w*) *Re Dowson*, [1909] W. N. 245.

(*x*) *Sturge and G. W. Ry.*, 19 Ch. D. 444.

(*y*) *Bessant* v. *Noble*, 26 L. J. Ch. 236; *Horn* v. *Coleman*, 1 Sm. & G. 169; *White* v. *Springett*, L. R., 4 Ch. 300.

(*z*) *Druitt* v. *Seaward*, 31 Ch. D. 234; *Re Bradley*, 58 L. T. 631.

(*a*) *Clarke* v. *Hayne*, 42 Ch. D. 529; *Re King's Settlement*, 60 L. T. 745; *Re Peirson's Settlement*, 88 L. T. 794, where the earlier cases on settlements are cited.

of kin is not clearly defined, the class will be ascertained at the testator's death (*b*).

Gift to persons "then entitled."

Where 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, but those who would then be entitled if the testator, when he died, had died intestate (*d*). Moreover, "then" has more meanings than one, each equally common: it may mean "at that time" or "in that case" (*e*); 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. This construction was carried to its extreme limit in *Cable* v. *Cable* (*f*), where a testator bequeathed a fund in trust for his wife for life, and at her death for his children; but if he left no children at his decease, then and in such case the fund was, from and immediately after his wife's decease, to become the property of the person or persons who should then become entitled to take out administration as his personal representative or representatives, under the statute of distribution, in case he had died intestate and unmarried. The testator left no children, and Romilly, M.R., held that the next of kin at the death of the testator were entitled to the fund.

"Then" not always an adverb of time.

Re Wilson.

The authorities were much discussed in *Re Wilson* (*g*), where the gift was to the testator's nephew S. for life, and after his death for his children who should attain twenty-one, &c., and the issue of children dying in his lifetime; if no child or other issue of S. attained a vested interest, the fund was to be held in trust "for such person or persons as on the death of S. shall be entitled to [*sic*] as my next of kin under the statute;" consequently the death of S. and the time of distribution were not necessarily the same; so that the case in this respect resembled *Sturge* and *G. W.*

(*b*) *Fletcher* v. *Fletcher*, 3 D. F. & J. 775.

(*d*) *Bullock* v. *Downes*, 9 H. L. C. pp. 1, 19; *Mortimore* v. *Mortimore*, 4 A. C. 448, affirming *Mortimer* v. *Slater*, 7 Ch. D. 322; *Michell* v. *Bridges*, 13 W. R. 200; *Doy* v. *Day*, Ir. R. 4 Eq. 385. *Re Morley's Trusts*, 25 W. R. 825, is contra, sed qu.

(*e*) See 7 H. L. C. at p. 119. *Harrington* v. *Harte*, 1 Cox, 131.

(*f*) 16 Bea. 507; see also *Wheeler* v. *Addams*, 17 Bea. 417; *Lees* v. *Massey*, 3 D. F. & J. 113; *Moss* v. *Dunlop*, Joh. 490 ("next of kin for the time being"); *Archer* v. *Jegon*, 8 Sim. 446; *Fletcher* v. *Fletcher*, 3 D. F. & J. 775.

(*g*) [1907] 1 Ch. 400, affirmed C. A., [1907] 2 Ch. 572.

Railway Co., but it was held by Parker, J., that the word "entitled distinguished the case before him from *Sturge* and *G. W. Railway Co* and that the class to take were the next of kin of the testator at t time of his death.

Gifts to persons of testator's name.

IX.—Gifts to Persons of Testator's Name.—Mr. Jarm continues (*h*): "Sometimes (as in the last case) (*i*) it is ma part of the description or qualification of a devisee or legate that he be of the testator's name. :e word 'name,' so used, admi of either of the following interpretations:—First, as designati one whose name answers to that of the testator (which seems be the more obvious sense); and, secondly, as denoting a pers of the testator's family; the word 'name' being, in this cas synonymous with 'family' or 'blood.' The former, as being t more natural construction, prevails in the absence of an explanato context; and such is most indisputably its meaning, when fou in company with some other term or expression, which would synonymous with the word 'name,' if otherwise construed; f no rule of construction is better established, or obtains a mo unhesitating assent, than that where words are susceptible several interpretations, we are to adopt that which will give effe to every expression in the context, in preference to one that wou reduce some of those expressions to silence.

To next of kin of testator's name.

"Thus, where a testator gives t the next *of kin* of his name (or to the next of his name *and blood* (*k*), it is evident that he does n use the word 'name' as descriptive of his relations or fami only, because that would be the effect, if the mention of the na were wholly omitted, and the gift had been simply to his next kin or the next of his blood; and hence, according to the princi of construction just adverted to, it is held that the testator mea additionally to require that the devisee or legatee shall bear namc. Where, on the other hand, the testator gives to the ne of his name (*l*), there is ground to presume that he intends merely

(*h*) First ed. Vol. II. p. 61.

(*i*) The case referred to by Mr. Jarman is *Pearce* v. *Vincent*, 2 Kee. 230, where the devise was to "the next or nearest relation or nearest of ki· [the testator] of the name of Pear: , e.

(*j*) *Jobson's case*, Cro. Eliz. 5, .. See *Re Roberts*, 19 Ch. D. 520, post, p. 1652.

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

(*l*) "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 devi should have borne the testator's na The point, however, did not call adjudication; and the propriety of dictum was (as we shall see) questio by Lord *Hardwicke*, in *Pyot* v. *P* 1 Ves. sen. 337, post, who seems to h included in his condemnatory strictu *Jobson's case*, Cro. El. 576, where language of the will was different; devise being 'to the next *of kin* of name,' and which, therefore, acco ing to the reasoning in the text,

point out the persons belonging to his family or stock, without regard to the surname they actually bear. Such was the construction which prevailed in the case of *Pyot* v. *Pyot* (*m*), where a point of this nature underwent much discussion." In that case 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 for ever; provided that, if she (Mary) died before twenty-one or marriage, then in trust to convey and assign all the residue of her estate to her *nearest relation of the name of the Pyots*, and to his or her heirs, executors, administrators, and assigns. Mary died under twenty-one, and unmarried. At the death of the testatrix there were three persons then actually of the name of Pyot, namely, the plaintiff, and also his two sisters who were then unmarried, but who married before the happening of the contingency. There was also a sister, who, prior to the making of the will, was married, and, consequently, at the death of the testatrix, was not of that name. An elder brother of these persons had died before the testatrix, leaving a son also of the name of Pyot, who was her heir-at-law, but who, of course, was one degree more remote than the others. Lord Hardwicke, taking "relation" to be nomen collectivum, (like "heir" or "kindred,") said he thought "*the Pyots*" described a particular stock, and that the name stood for the stock; and that the heir-at-law was excluded, not being within the description of the nearest relation: he therefore held that the plaintiff and his three sisters were entitled (*n*).

To the "nearest relation of the name of the Pyots."

So, in *Mortimer* v. *Hartley* (*o*), 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.

Mr. Jarman continues (*p*): "Where a gift to persons of the

properly construed as importing that the devisee should, in addition to being of the testator's family, bear his name." (Note by Mr. Jarman.)

(*m*) 1 Ves. sen. 335, Belt's ed.

(*n*) Followed by Shadwell, V.-C., in *Carpenter* v. *Bott*, 15 Sim. 606 (gift to "next of kin of the surname of C.").

(*o*) 6 Exch. 47.

(*p*) First ed. Vol. II. p. 65.

CHAPTER XLI.

As to females losing name by marriage.

testator's name is held, according to the more obvious sense, point to persons whose names answer to that of the testator, course it does not apply to a female who was originally of that nam but has lost it by marriage. As in *Jobson's Case* (*pp*), often befo cited, which was a devise of lands in tail, the remainder to the ne of kin of the testator's name. The next of kin, at the date of t will, and also at the death of the testator, was his brother's daughte who was then married t[illegible]; and, on the death of the tenant tail, without issue, the question was, whether she should have h the land? and it was held, that she should not, because she w not then of the name of the devisor.

Acquisition or assumption of name.

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

Devise to persons of testator's name and blood.

"In the case of *Leigh* v. *Leigh* (*r*), the testator, after limiting estat to his two sisters and their issue in strict settlement, devised t property, on failure of those estates, to the first and nearest of h kindred, being male *and of his name and blood*, that should be livi at the determination of the estates before devised, and to the hei of his body; Lord *Eldon*, with Mr. Baron *Thompson*, and Mr. Justi *Lawrence*, held, that a person, who answered the other parts the description, but of another name, was not qualified, in respe of the name, by his having, before the determination of the precedi estates, obtained his Majesty's licence that he and his issue mig use the surname of Leigh instead of his own name, and havi since assumed it. That the design of the testator, in this cas was the exclusion of the female line, and that he was not influenc solely by attachment to the name, (one of which objects he mu have had in view,) appeared from his not having imposed t obligation of assuming his name upon the issue of his sisters taki under the prior limitations."

But, in *Re Roberts* (*s*), where a person had assumed the name R. G., and the gift was to his descendants who should bear the nam of R. G. only, and there was a clause of forfeiture on abandoni the name, it was held that the gift included a descendant of R. G

(*pp*) Cro. El. 576. See also *Bon* v. *Smith*, ib. 532; *Doe* d. *Wright* v. *Plumptre*, 3 B. & Ald. 474.

(*q*) As to the voluntary assumption of a name, ante, p. 1542.

(*r*) 15 Ves. 92.

(*s*) 19 Ch. D. 520.

who had assumed the name by royal licence. The question in these cases is whether the testator wishes to confine his bounty to members of a certain family (*t*), or whether he wishes to perpetuate a certain name.

Person assuming new name may take under original name.

In *Leigh* v. *Leigh* (*u*), Lord Eldon said that if a person acquires a new name by royal licence or by act of parliament, he does not thereby lose his original name: "a legacy given by that name might be taken." The licence or statute is simply permissive.

At what period legatee must answer prescribed description.

Mr. Jarman continues (*v*): "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* (*w*), and *Jobson's Case* (*x*), where lands were devised to A. in tail, with remainder to the next of the testator's name, or the next of kin of his name; and it was admitted, in both cases, that the testator's daughter, if she had answered the description *at the death of the testator*, would have been entitled.

"But in *Pyot* v. *Pyot* (*y*), 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?] (*z*); 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 (*a*).

"If such a construction can be sustained, it must embrace all

(*t*) As in *Barlow* v. *Bateman*, 2 Br. P. C. 272, ante, p. 1543.
(*u*) Ante, p. 1652.
(*v*) First ed. Vol. II. p. 66.
(*w*) Cro. El. 532.
(*x*) Ibid. 576.
(*y*) 1 Ves. sen. 335, Belt's ed.; ante, p. 1651.
(*z*) The quære is Mr. Jarman's.
(*a*) See further, on this point, *Gulliver* v. *Ashby*, 4 Burr. at p. 1940; *Lowndes* v. *Davies*, 2 Scott, 71; ante, p. 1542.

CHAPTER XLI.

Remarks upon Lord Hardwicke's doctrine in *Pyot* v. *Pyot*.

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 (*b*): 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."

Gifts to "friends."

X.—Gifts to Friends.—In *Coogan* v. *Hayden* (*c*), a testator devised lands to his wife for life, provided she remained unmarried, and directed that on her death or marriage the lands should revert to his friends and be their property: it was held that the testator's heir at law became entitled under the devise.

The meaning of "friends and relations" in a power of appointment has been already considered (*d*).

(*b*) Ante, p. 1648.
(*c*) 4 L. R. Ir. 585.
(*d*) Chap. XXXIII.

CHAPTER XLII.

DEVISES AND BEQUESTS TO CHILDREN, GRANDCHILDREN, ETC.

PAGE

I. *Who are included in the Expressions "Children," "Grandchildren," &c.*.... 1655

II. *Time of ascertaining Class:*
(A) *Preliminary* 1664
(B) *Where the Gift is immediate* 1664
(C) *Where the Gift is future* 1667
(D) *Gift to Children "then living"* 1672
(E) *Where Distribution is postponed till a given Age*..... 1675
(F) *Where no Object exists at the Time when the Gift falls into Possession:*
(1) *Immediate Gift*..... 1687
(2) *Gift in Remainder*... 1691
(G) *Effect of Words "born," or "begotten," or "to be born," &c*.... 1694
(H) *As to Children "en ventre"*..... 1701
(I) *Where Children take in Default of Appointment*..... 1705

III. *Misstatement as to Number of Children* 1706

IV. *Gift to Children of several Persons—Distribution per stirpes or per capita* 1711

V. *Limitation over, as referring to having or leaving Children*..... 1718

VI. *Gifts to Younger Children—Gifts excluding Eldest Son* 1726

VII. *Gifts to "eldest," "first," or "second" Son*..... 1741

VIII. *Gifts to "other" Children or Sons* 1743

IX. *Gifts to Parent and Children* 1745

I.—Who are included in the Expressions "Children," "Grandchildren," &c.—In this chapter Mr. Jarman treats of gifts to children (or grandchildren) as purchasers. The use of the word "children" as a word of limitation is considered in a subsequent chapter, where also the construction of such gifts as "to A. and his children" is explained. Gifts to children as purchasers.

The rule that a gift to "children" primâ facie imports legitimate children, and the rules for determining questions of legitimacy, are considered in a subsequent chapter (*b*). Illegitimate children.

(*a*) Chap. L.

(*b*) Chap. XLIII. It is hardly necessary to say that a monster is not regarded by the law as a child: *Inter liberos non computantur . . . qui contra formam humani generis converso more procreantur, ut si mulier monstruosum vel prodigiosum sit enixa.* Bract. 5, Co. Litt. 7 *b*, Black. Comm. ii. 246. But an hermaphrodite is a child, according to the prevailing sex; Co. Litt. 8 *a*; Shepp. Touch. 235.

CHAPTER XLII.

"Children," how construed.

"The legal construction of the word *children*," says Mr. Jarman (*c*), "accords with its popular signification (*d*); 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 (*e*). It has sometimes been asserted, however, that a gift to children extends to grandchildren, where there is no child. Thus, in *Crooke* v. *Brookeing* (*f*), 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 taken. Lord *Alvanley*, too, in the subsequent case of *Reeves* v. *Brymer* (*g*), 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 (*h*) in which there was a gift to the children of several persons deceased equally per stirpes, and one of the persons was, at the making of the will, dead, leaving grandchildren, but no child; his Honor being of opinion, that, as there were children living of the other persons, as to whom, therefore, the gift was clearly confined to those objects, he was precluded from giving the word a different signification in the other instance. The same learned judge, on another occasion (*i*), 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."'"

Whether it extends to grandchildren, and when.

Gift to children of A.

If the gift is simply to the children of A., who is mentioned in the will as being dead (e.g. "to the children of my late brother A."), 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 favour of the grandchildren (*j*). But if the gift is to the children of the

(*c*) First ed. Vol. II. p. 69.

(*d*) The French word *enfants* receives the same construction: *Duhamel* v. *Ardovin*, 2 Ves. sen. 162. As to the rule in those parts of Canada where the old French law prevails, see *Martin* v. *Lee*, 9 W. R. 522.

(*e*) *Wythe* v. *Blackman* or *Wythe* v. *Thurlston*, Amb. 555, 1 Ves. sen. 196; *Gale* v. *Bennet*, Amb. 681; *Chandless* v. *Price*, 3 Ves. 99; *Royle* v. *Hamilton*, 4 Ves. 437. As to *Gale* v. *Bennet*, see *Pride* v. *Fooks*, 3 De G. & J. 252, post. p. 1659.

(*f*) 2 Vern. 106.

(*g*) 4 Ves. at p. 698. See also his judgment in *Royle* v. *Hamilton*, 4 Ves. at p. 439.

(*h*) *Radcliffe* v. *Buckley*, 10 Ves. 195; *Moor* v. *Raisbeck*, 12 Sim. 123.

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

(*j*) Per Kay, J., in *Re Smith*, 35 Ch. D. at p. 559. The principle thus laid down was followed by Romilly, M.R., in *Fenn* v. *Death*, 23 Bea. 73, and by Stuart, V.-C., in *Berry* v. *Berry*, 3 Giff. 134.

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 "children," only once used, can have a different meaning where there are in one case children and in another case grandchildren (*k*).

Gift to children of A., B. and C.

This was Sir W. Grant's difficulty in *Radcliffe* v. *Buckley* (*l*), and the argument prevailed with Pearson, J., in *Re Kirk* (*m*). In that case one share of residue was given to the children of the late A., another to the children of the late B., and so on; there were living at the date of the will children of A. and grandchildren (but no children) of B.; it was held that the grandchildren of B. did not take. But in the exactly similar case of *Re Smith* (*n*), Kay, J., decided in favour of the grandchildren, distinguishing the case before him from *Radcliffe* v. *Buckley* for the reason that in the older case the residue was given in the mass, while in *Re Smith* it was given in separate shares. *Re Kirk* was not cited.

Knowledge of state of family must be proved.

In such cases as those under discussion it seems to be essential that the state of the family should be known to the testator and that his knowledge of it should be proved: it cannot be presumed (*o*).

Whether issue remoter than grandchildren can take.

The decision in *Re Smith* was based on the theory that the testator used the word "children" in the sense of "offspring," and it seems to follow that where this construction is adopted, all the issue or descendants of the propositus take per capita (*p*). It is true that in *Fenn* v. *Death* (*q*), Romilly, M.R., came to a different conclusion; in that case there was a gift to the children of A. B.; at the date of the will A. B. and all his children were dead, but there were grandchildren and great-grandchildren of A. B. living; it was held that the grandchildren living at the death of the testatrix were entitled, to the exclusion of the great-grandchildren. But this seems contrary to principle, and also to the dicta of the L.JJ. in *Pride* v. *Fooks* (*r*). In that case, Turner, L.J., said (*s*): "The principle which extends the limitation to the grandchildren must, as I conceive, extend it also to the more remote issue. I can see no ground on which the limitation, if it extends beyond the children, can be confined to the grandchildren, or on which

(*k*) Per Kay, J., in *Re Smith*, supra.
(*l*) Supra, p. 1656.
(*m*) 52 L. T. 346.
(*n*) 35 Ch. D. 558.
(*o*) Per Lord Cranworth, *Crook* v. *Whitley*, 7 D. M. & G. at p. 496.
(*p*) Compare the cases on gifts to "issue" and "descendants" supra. pp. 1588, 1590.
(*q*) 23 Bea. 73.
(*r*) Post, p. 1659.
(*s*) 3 De G. & J. at p. 275

the great-grandchildren mentioned in the course of the argument can be excluded."

Construction is confined to cases where the gift otherwise never could have had an object.

The extension of gifts to children to more remote descendants is an illustration of the principle that words may be carried beyond their ordinary signification, from the want of other persons or things more nearly answering to the terms of description used, in order to avoid the evident absurdity of supposing the testator to have made a gift without an actual or possible object (*t*). "But this reasoning," as Mr. Jarman points out (*u*), "does not apply to a case in which the gift, being to the children of a person *living*, might in event include objects subsequently coming in esse; so that no inference, that the testator does not mean children properly so called, arises from the fact of there being no child when he makes the gift. To apply the doctrine in question to such a case, is to allow the construction to be 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. It seems probable, therefore, that the Courts at this day would not apply to grandchildren a gift to children, on account of there being in event no immediate objects, as such a construction is clearly inconsistent with sound principles of interpretation; and all the authority which can be adduced in its favour, consists of dicta, which, in some cases (*v*), are rather weakened by the decisions with which they stand associated" (*w*).

(*t*) For other illustrations of the principle see *Day* v. *Trig*, 1 P. W. 286, ante, p. 1254; *Doe* d. *Humphreys* v. *Roberts*, 5 B. & Ald. 407, ante, p. 1280; *Gill* v. *Shelley*, 2 R. & My. 336.

(*u*) First ed. Vol. II. p. 71.

(*v*) See *Radcliffe* v. *Buckley*, 10 Ves. 195.

(*w*) "In the case of *Lowday* 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. 6th ed., Vol. II. 273 [8th ed. 664]), that a power to appoint among children cannot be exercised in favour 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 endeavoured to refute, such a power would *in that event*, extend to grandchildren." (Note by Mr. Jarman.)

The principle here contended for by Mr. Jarman was subsequently established by the decision of the Court of Appeal in *Pride* v. *Fooks* (*x*), 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 residue 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" ought to 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 being so, and the case not being one in which the gift over without issue could be read "without such issue" (*y*), the residue was undisposed of.

Pride v. *Fooks.*

And even where, according to the state of facts at the date of the will, the gift could never have taken effect in favour of children, the context may be such as to exclude remoter issue. Thus, in *Loring* v. *Thomas* (*z*), 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.—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

And may be excluded, even from such cases, by context.

(*x*) 3 De G. & J. 252. The decision in *Moor* v. *Raisbeck*, 12 Sim. 123, seems to have been based on the same principle.

(*y*) As to this, vide post, Chap. LII.

(*z*) 1 Dr. & Sm. pp. 497, 508. See also *Stevenson* v. *Abingdon*, 31 Bea. 305, stated ante, p. 1638.

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 (*a*).

Whether "grandchildren" includes great-grandchildren.

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* (*b*), expressed an opinion that the word grandchildren would, without further explanation, comprehend great-grandchildren; the term being, he thought, in common parlance used rather in opposition to children, than as confined to the next generation. "But," as Mr. Jarman points out (*c*), "in the case before his Lordship, the testator had explained this to be his construction, by applying in another part of his will the term 'grandchild' to a great-grandchild. And the contrary of Lord Northington's doctrine was determined by Sir *W. Grant*, in the case of the *Earl of Orford* v. *Churchill* (*d*), in which, however, it is remarkable, that neither his Lordship's dictum nor decision was noticed."

"Children" when synonymous with "issue."

Mr. Jarman continues (*e*): "It should be observed, however, that, in a considerable class of cases, the word child or children has received an interpretation extending it beyond its more precise and obvious meaning, as denoting immediate offspring, and been considered to have been employed as nomen collectivum, or as synonymous with *issue* or *descendants*; in which general sense it has often the effect, when applied to real estate, of creating an estate tail. Where this construction has prevailed, however, it has generally been aided by the context."

The cases to which Mr. Jarman refers appear to be those in which there is a gift to "A. and his children," and the question is whether "children" is used as a word of limitation, as synonymous with "issue." This, of course, is quite a different question from the one now under discussion, namely, whether in a gift to "the children of A." the word "children" can be treated as synonymous with "issue." It is certain that this can be done in a clear case, as in

(*a*) 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."

(*b*) 2 Ed. 194, Amb. 603 (*Hussey* v. *Dillon*).

(*c*) First ed. Vol. II. p. 72.

(*d*) 3 V. & B. 59.

(*e*) First ed. Vol. II. p. 73.

Wyth v. *Blackman* (*g*), or where the will is so obscurely worded that the meaning is more or less a matter of conjecture, and the balance is in favour of the wide construction (*h*). The decision in *Gale* v. *Bennet* (*i*) appears to have turned on this question (*j*). In *Re Crawhall's Trust* (*k*), a testator bequeathed a fund in trust for A. for life and after her death upon trust for "the children of my late sister Mary Vickers, (the issue of Ann Ion excepted,) of my late sister Hannah Alcock, and of my said sister Francis Bates"; Ann Ion was a daughter of Mary Vickers, and died before the testator: Mrs. Farrar, one of the children of Hannah Alcock, predeceased the tenant for life, leaving children; it was held that the words in the parenthesis shewed that the testator did not use "children" in its strict sense, and that consequently the children of Mrs. Farrar were entitled to the share which she would have taken if living.

Wide construction of gifts to children and other issue.

The Courts do not willingly restrict the generality of a gift to children or more remote issue. On this principle, it has been held that if a testator bequeaths legacies to a large number of his grandchildren by name, and afterwards gives the residue to "my grandchildren," this includes all his grandchildren, and is not limited to the grandchildren previously named (*l*). Another decision of Romilly, M.R. (*m*), carried this principle to its extreme limit: in that case a gift which, taken literally, was confined to the testator's children born or en ventre at the date of the will, as personæ designatæ, was on "a fair construction" of the whole will held to include a child born four years afterwards. In *Re Stansfield* (*n*), Bacon, V.-C., went to the opposite extreme in order to save the share of a deceased child from lapse. But of course the word "children" will be given a restricted meaning if the intention of the testator is clear. Thus, in *Wallis* v. *Wallis* (*o*), testator gave

(*g*) 1 Ves. sen. 196; or *Wythe* v. *Thurlston*, Amb. 555, 3 Ves. 257. The case is stated shortly ante, p. 1602. See also *Chandless* v. *Price*, 3 Ves. 99; *Dalzell* v. *Welch*, 2 Sim. 319, and the other cases cited ante, p. 1602.

(*h*) As in *Royle* v. *Hamilton*, 4 Ves. 437.

(*i*) Amb. 681.

(*j*) See per Turner, L.J., in *Pride* v. *Fooks*, 3 De G. & J. 275. It may be noticed that the decision of Romilly, M.R., in *Pride* v. *Fooks* seems to have been that "children" was used as synonymous with "issue" (28 L. J. Ch. 84, note), although for some unexplained reason he excluded the issue remoter than grandchildren.

(*k*) 8 D. M. & G. 480.

(*l*) *Moffatt* v. *Burnie*, 18 Bea. 211. In the case of *Fullford* v. *Fullford*, 16 Bea. 565, Romilly, M.R., held that a clear gift by codicil to the testator's children then living by name, was overridden by a gift in the will to his children as a class. The same judge's decision in *Fitzroy* v. *Duke of Richmond*, 27 Bea. 186, seems also of doubtful accuracy.

(*m*) *Goodfellow* v. *Goodfellow*, 18 Bea. 356. Compare *Pasmore* v. *Huggins*, 21 Bea. 103, ante, p. 600.

(*n*) 15 Ch. D. 84, stated and commented on ante, p. 437. Compare *White* v. *Wakley*, 26 Bea. 23.

(*o*) 13 L. R. Ir. 258.

CHAPTER XLII.

pecuniary legacies to each of his children B., C., and D., and gave his residue to his eldest son A.; he directed that "in case of any of the younger children dying" under twenty-one or without leaving issue, their portion or portions should be divided "among the survivors;" shortly after the death of the testator, his wife gave birth to a fifth child, E.: afterwards C. died under twenty-one and unmarried: it was held that neither A. nor E. was entitled to any share of C.'s legacy.

Children "born," "to be born," &c.

The effect of the expressions "born," "begotten," "to be born," "to be begotten," "hereafter to be born," and "surviving," as applied to children, is considered in a later part of this chapter, in connection with the rules for ascertaining classes; gifts to posthumous children and children en ventre, are also discussed (*p*).

Child taking as individual and as member of class.

The mere fact that property is given specifically to one child by name will not prevent him from taking a share in the residue given to the children as a class (*q*). But he may be referred to in the residuary gift or gift over in such a way as to exclude him (*r*).

Child taking double share.

If a testator gives his residue to the children of his deceased nephews and nieces per stirpes," and my great-niece J.," it seems that J. takes a share as "special legatee," and another share as a member of the class (*s*).

Child not excluded from class by implication.

Sometimes a testator gives property to one of his children for life, and after his death (there being generally intermediate limitations which fail) to the testator's children, and then the question arises whether the tenant for life takes as a member of the class, or whether it can be inferred from the scheme of the will that the testator did not intend to include him. The Courts seem reluctant to make this inference. Thus, in *Jennings* v. *Newman* (*t*), a testator gave a fund in trust for his daughter M. for life, with power to appoint to her children, and if she died without leaving a child, then he gave it to such of his children as should be living at his decease, and if either of his said children should die before they should be entitled to receive a share, leaving issue, the share was to be divided among the children of such deceased child. M. and four other children survived the testator, and afterwards M. died without issue: it was held by Lord Cottenham that her personal representatives were entitled to one-fifth of the fund.

Issue not included in class by implication.

Conversely, the Court will not include persons in a class unless the language of the will is clear. Thus, where a testator gave

(*p*) Post, pp. 1699, 1701.
(*q*) *Reay* v. *Rawlinson*, 29 Bea. 88; *Carver* v. *Burgess*, 18 Bea. 541.
(*r*) *Hanna* v. *Bell*, 7 Ir. Ch. 208.
(*s*) *Woods* v. *Townley*, 11 Ha. 314.
(*t*) 10 Sim. 219. See *Almack* v. *Horn*, 1 H. & M. 630.

property to "all and every the children of my late brother J. C. who shall be living at my decease, or who shall have died in my lifetime, leaving issue, living at my death, in equal shares," it was held by Jessel, M.R., that only the children who survived the testator were entitled under the gift, and that the issue of a child who had died in the testator's lifetime took nothing (*u*).

"Children" includes children of different marriages.

Under a gift to the children of a person, his children by different marriages will generally be entitled; and it is not necessary to shew 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 (*v*), in which latter case effect will of course be given to the testator's language (*w*). So in a gift to the children of A., a woman who has been twice married, the addition of the words "whether by her present or any future husband," do not exclude her children by her first husband (*x*). In a case of *Stavers* v. *Barnard* (*y*), where a testator bequeathed his personal estate to trustees, in trust to apply the interest thereof "in the maintenance 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"; Knight-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.

Children by affinity not included.

"It remains to be observed," says Mr. Jarman (*z*), "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 (*a*)."

Step-children.

But a gift to "children" may take effect in favour of step-children, if circumstances shew that that was the testator's intention. Thus

(*u*) *Re Coleman and Jarrom*, 4 Ch. D. 165.

(*v*) *Barrington* v. *Tristram*, 6 Ves. 345; *Critchett* v. *Taynton*, 1 R. & My. 541; *Peppin* v. *Bickford*, 3 Ves. 570; *Ex parte Heisester*, 7 Ves. 348; *Isaac* v. *Hughes*, L. R., 9 Eq. 191; *Andrews* v. *Andrews*, 15 L. R. Ir. 199; *Nash* v. *Allen*, 42 Ch. D. 54 (executory trust).

(*w*) *Coleman* v. *Seymour*, 1 Ves. sen. 253; *Stopford* v. *Chaworth*, 8 Bea. 331. *Re Parrott*, 33 Ch. D. 274 (executory trust); *Nash* v. *Allen*, supra.

(*x*) *Pasmore* v. *Huggins*, 21 Bea. 103; *Re Pickup's Trusts*, 1 J. & H. 389. Other examples of the liberal construction given to the word "children" are referred to post, p. 1697.

(*y*) 2 Y. & C. C. C. 539; and see *Lovejoy* v. *Crafter*, 35 Bea. 149.

(*z*) First ed. Vol. II. p. 73.

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

CHAPTER XLII.

in *Re Jeans* (*b*) a testator had been married for thirteen years and had no children of his own: he and his wife were each about sixty years old when he made a will in favour of his "children": it was held that his step-children, whom he had treated as his own children, were entitled under the gift.

As to class of children entitled.

II. Time at which Class of Children is to be ascertained.—(A) *Preliminary.*—Mr. Jarman remarks (*c*) that "the question which has been chiefly agitated in devises and bequests to children is, as to the point of time at which the class is to be ascertained, or, in other words, as to the period within which the objects must be born and existent; supposing 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 (*d*), 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 (*e*).

"The following are the rules of construction regulating the class of objects entitled in respect of period of birth under general gifts to children.

Immediate gifts confined to children living at death of testator.

(B) *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 (*f*) or a deceased person (*g*), and whether to children simply or to all the children (*h*),

(*b*) 72 L. T. 835. *Re Baynham*, 7 T. L. R. 587, was an even stronger case, but there the step-children were held not entitled.

(*c*) First ed. Vol. II. p. 73.

(*d*) *James* v. *Richardson*, 1 Vent. 334, T. Raym. 330. *Burchett* v. *Durdant*, 2 Vent. 311. 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. at p. 433.

(*e*) *Allen* v. *Callow*, 3 Ves. 289; *Turner* v. *Hudson*, 10 Bea. 222. It is hardly necessary to point out, that as these are gifts to classes, 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. See *Viner* v. *Francis*, 2 Cox, 190, and the other cases cited ante, p. 431.

(*f*) 2 Vern. 105; 1 Eq. Ca. Ab. 202, pl. 20; Pre. Ch. 470; 2 Vern. 545; *Horsley* v. *Chaloner*, 2 Ves. sen. 83; *Loveday* v. *Hopkins*, Amb. 273; *Hodges* v. *Isaac*, Amb. 348; *Roberts* v. *Higman*, 1 B. C. C. 532, n.; *Jones* v. *Earl of Suffolk*, ib. 528; *Singleton* v. *Gilbert*, 1 Cox, 68; *Viner* v. *Francis*, 2 Cox, 190, 2 B. C. C. 658; *Davideon* v. *Dallas*, 14 Ves. 576.

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

(*h*) *Heathe* v. *Heathe*, 2 Atk. 121; *Singleton* v. *Gilbert*, 1 B. C. C. 542 n., 1 Cox, 68; *Scott* v. [illegible], 5 Madd. 332.

and whether there be a gift over in case of the decease of any of the children under age or not (*i*), comprehends *the children living at the testator's death* (*if any*), and those only; notwithstanding some of the early cases, which make the date of the will the period of ascertaining the objects (*j*).

Rule applies to issue of every degree.

"It is scarcely necessary to observe that this and the succeeding rules apply to issue of every degree, as grandchildren, great-grandchildren, &c., though cases to the contrary are to be found, especially at an early period. As in *Cook* v. *Cook* (*k*), 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."

Rule does not apply where distribution postponed.

The rule under discussion is generally considered to have been adopted by the Courts as a matter of convenience. The law sees no impossibility of having children at any subsequent period; and the not keeping demands of this sort open for proper induced the Court to confine this to such children as are in being at death of testator, when the number is known and the proportions they are entitled to, and the time when to receive it" (*l*). The rule usually defeats the intention of testators (*m*), and the tendency of the Courts is not to apply it unless it is necessary. It does not therefore apply in cases where the period of distribution is postponed or where there is no child in existence at the time when the gift is ready to take effect (*n*). It might also be supposed that it would not apply where the gift is one not of corpus but of income (*o*), but in *Re Powell* (*p*) Kekewich, J., held that this makes no difference, and that a gift of income to the children of A. during their lives is confined to children born at the date of the testator's death.

But applies to gifts of income.

Rule may be excluded by clear words.

The operation of the rule may also be excluded by clear words; as where a testator gave property to certain children (naming them) of A. the wife of B. and "every other child hereafter to be

(*g*) *Davidson* v. *Dallas*, 4 Ves. 576; *Harrison* v. *Harrison*, 5 Mad. 332. "But a gift over necessarily suspends the vesting as to all, until the eldest attains twenty-one, ought not the children in the interval to have been let in seeing that these always aim at including as many objects as possible?" (Note by Mr. Jarman.)

(*h*) *Coleman* v. *Seymour*, 1 Vern. sen. 209. See *Northey* v. *Strange*, 1 P. W. 340; and nom. *Northey* v. *Burbage*, Gilb. Rep. Eq. 136, Pre. Ch. 470.

(*i*) 2 Vern. 545. See *Weld* v. *Bradbridge*, Vern. 705, and the notes to that case.

(*j*) Per Strange, M.R., in *Hawley* v. *Chaloner*, 2 Ves. sen. at p. 8.

(*k*) Per Lord Thurlow, *Hill* v. *Chapman*, 1 Ves. jun. at p. 407; 3 Br. C. C. 391.

(*l*) Post, pp. 1675, 1687.

(*m*) See *Re Wenmoth's Estate*, 37 Ch. D. 266, referred to post, p. 1680.

(*n*) [1899] 1 Ch. 227. As to a provision for the accumulation of the income of a child's share of income during minority to form part of the residuary estate, see *Fulford* v. *Hardy*, [1909] A. C. 570 (appeal from Ontario).

born of the said A. during the life of the said B. or within nine months after his decease" (*q*).

Clause of substitution.

Where there is a gift to children, followed by a clause of substitution in the event of the death of any child before a certain time, different considerations arise. These cases are dealt with elsewhere (*r*).

Gift to children for life with remainder to their children.

Where there is a gift to the children of the testator for their respective lives in equal shares, with remainder upon the death of each child to his or her children, the children of a child of the testator who was dead at the date of the will are not entitled to share (*s*). Such a conclusion follows almost necessarily from the scheme of the will, for it is hardly credible that a testator would give a life estate to a deceased child. In such cases as this, the primary meaning of "children" in the original gift is children living at the date of the will. A similar construction prevails, primâ facie, in cases of substitution (*t*). But the construction may be excluded, either by the context, or by the state of facts at the date of the will. Thus where a testator gave his residue (in effect) to his brothers and sisters in equal shares during their respective lives, with remainder as to their respective shares to their respective children, and it appeared that at the date of the will the testator had only one brother, his other brother and his sister being then dead, it was held that the property was divisible among the three families per stirpes (*u*).

Effect of gift over.

It will be remembered that, according to Mr. Jarman's statement of the general rule now under consideration (*v*), it applies "whether there be a gift over in case of the decease of any of the children under age or not." But it seems that if there is a bequest to the children of A., with a gift over in the event of A. having no children, all A.'s children are entitled to share, whether born before or after the testator's death. This is the conclusion come to by Mr. Roper (*w*), and it seems to be justified by the cases cited by him (*x*), although the actual decisions in these cases may be supported on another ground (*y*).

(*q*) *Hodson* v. *Micklethwaite*, 2 Dr. 294. Compare *Scott* v. *Scarborough*, 1 Bea. 154, post.

(*r*) Chap. XXXVI.

(*s*) *Re Wood*, [1894] 3 Ch. 381.

(*t*) See Chap. XXXVI.

(*u*) *Walsh* v. *Blayney*, 21 L. R. Ir. 140. Compare *Gowling* v. *Thompson*, 11 Eq. 366 n.; *Re Jordan's Trust*, 2 N. R. 57, and other cases cited in Chap. XXXVI.

(*v*) Supra, p. 1664.

(*w*) Legacies, pp. 41-2, 57.

(*x*) *Shepherd* v. *Ingram*, Amb. 448; *Hutcheson* v. *Jones*, 2 Madd. 124. Compare the analogous cases of *Mills* v. *Norris* and *Defflis* v. *Goldschmidt*, cited post, pp. 1680, 1681.

(*y*) See the statement of *Shepherd* v. *Ingram* and pp. 1692, 1693 as to *Hutcheson* v. *Jones*, post, p. 1688.

In these cases in which the general rule does not apply, and in which the class is consequently liable to increase from time to time by the birth of other children, if the gift is one of residue or of an income-bearing fund, the income is divisible among those members of the class who are for the time being in existence, so that as the class increases the share of each member in the income diminishes. A member is not entitled to share in the by-gone income which accrued before his birth (z).

Intermediate income.

(C) *Where the Gift is future.*—Mr. Jarman continues: (a) "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* (b). 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 preceding interest,) to A. for life, and after his decease to the children of B., the children (if any) of B. living at the death of the testator, together with those who happen to be born during the life of A., the tenant for life, are entitled, but not those who may come into existence after the death of A. (c).

In future gifts, children born before period of distribution let in.

"The rule is the same where the life interest is not of the testator's own creation, but is anterior to his title (d).

Rule applies where interest bequeathed is reversionary.

"In cases falling within this rule, the children, if any, living at the death of the testator, take an immediately vested interest in their shares, 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

Children take vested shares, liable to be divested pro tanto.

(z) *Shepherd* v. *Ingram*, Amb. 448; *Mills* v. *Norris*, 5 Ves. 335. See post, p. 1689. The authorities are cited and compared in *Re Holford*, [1894] 3 Ch. 30.

(a) First ed. Vol. II. 75.

(b) 9 Mod. 104; 1 Atk. 509; 2 Atk. 329; *Bartlett* v. *Hollister*, Amb. 334; *Ellison* v. *Airey*, 1 Ves. sen. 111; *Ayton* v. *Ayton*, 1 Cox, 327; Cowp. 309; *Devisme* v. *Mello*, 1 Br. C. C. 537; *Middleton* v. *Messenger*, 5 Ves. 136; *Walker* v. *Shore*, 15 Ves. 122; *Mogg* v. *Mogg*, 1 Mer. 654; *Crone* v. *Odell*, 1 Ba. & Be. 449; *Odell* v. *Crone*, 3 Dow. 61; *Holland* v. *Wood*, L. R., 11 Eq. 91; *Re Pilkington*, 29 L. R. Ir. 370.

(c) *Ayton* v. *Ayton*, 1 Cox, 327. *Ellison* v. *Airey*, 1 Ves. sen. 111.

(d) *Walker* v. *Shore*, 15 Ves. 122. The rule also applies to appointments under powers: *Harvey* v. *Stracey*, 1 Dr. at p. 126. See Chap. XXIII.

is transmissible) devolve to their respective representatives (*e*); though the rule is sometimes inaccurately stated, as if existence at the period of distribution was essential (*f*).

Construction applicable to *executory* gifts.

"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 (*g*). The principle, indeed, seems to extend to every future limitation." Thus if there is a gift to the testator's grandchildren, to be divided among them at the end of twenty years after the testator's death, this gives vested interests to the grandchildren living at the testator's death, subject to the class being opened to let in grandchildren born before the expiration of the twenty years (*h*).

This rule is applicable where there is an object in esse at the time when the anterior gift determines. If there is no such object a different rule prevails (*i*).

The effect of a gift in remainder to children who attain a certain age, is considered in the next section.

Where gift to class does not fit prior limitation.

Reference should here be made to the case (of not infrequent occurrence) where the limitation of the particular estate or interest and the limitation in remainder are not consistent: as where a testator gives property to his wife during widowhood with remainder to a class of persons who shall be living at her death, without providing for the event of her remarriage. In such a case the general rule is that, if the widow marries again, the class

(*e*) *Att.-Gen.* v. *Crispin*, 1 B. C. C. 386; *Devisme* v. *Mello*, ib. 537; *Middleton* v. *Messenger*, 5 Ves. 136; *Cooke* v. *Bowen*, 4 Y. & C. 244; *Watson* v. *Watson*, 11 Sim. 73; *Locker* v. *Bradley*, 5 Bea. 593; *Salmon* v. *Green*, 13 Jur. 272; *Evans* v. *Jones*, 2 Coll. pp. 516, 524; *Pattison* v. *Pattison*, 19 Bea. 638. Compare the cases on gifts to issue, ante, Chap. XLI. And as an instance where the rule was excluded by the context, see *Spencer* v. *Bullock*, 2 Ves. jun. 687.

(*f*) See judgment in *Matthews* v. *Paul*, 3 Sw. at p. 339; *Hoghton* v. *Whitgreave*, 1 J. & W. at p. 150. See also *Crooke* v. *Brookeing*, 2 Vern. 106; *Baldwin* v. *Karver*, Cowp. 309.

(*g*) *Haughton* v. *Harrison*, 2 Atk. 329; *Ellison* v. *Airey*, 1 Ves. sen. 111; *Stanley* v. *Wise*, 1 Cox, 432; *Baldwin* v. *Rogers*, 3 D. M. & G. 649.

(*h*) *Oppenheim* v. *Henry*, 10 Hare, 441. Gray on Perp. pp. 95, 481. As to the effect of directing postponement of payment beyond the age of twenty-one, see *Kevern* v. *Williams*, 5 Sim. 171; ante, p. 329, and post, p. 1679.

(*i*) Post, p. 1687.

is ascertained at the date of her marriage and the gift takes effect immediately (*j*).

Effect of gift over.

It is generally considered that the narrow doctrine laid down in *Davidson* v. *Dallas* (*k*) applies to gifts to children following a life estate, and that consequently a gift over in case of the death of any of the children under age does not affect the rule of construction. If this is so, the class is ascertained at the death of the tenant for life. But the case which is usually cited in support of this proposition (*l*) is not a very satisfactory one (*m*). and in *Re Smith* (*n*), where there was a gift to children preceded by a life interest, and followed by a gift over on the death of children under twenty-one, it seems to have been taken for granted that all children born before the eldest child attained that age were entitled, subject to their attaining twenty-one (*o*). Mr. Jarman's criticism of *Davidson* v. *Dallas* (*p*) is equally applicable to *Berkeley* v. *Swinburne*, but if *Davidson* v. *Dallas* is good law, it seems difficult to contend that *Berkeley* v. *Swinburne* is wrong.

Gift over on bankruptcy.

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 (*q*). But if there is a gift to A. for life and after his death to his children, with a proviso that in the event of his becoming bankrupt or aliening his life interest, then his interest shall cease as if he were dead, or to the like effect, the proviso does not, as a general rule, disturb the previous gift: consequently all the children, living at A.'s death, including those born after the bankruptcy, are entitled (*r*).

Where prior interest revoked.

If a testator revokes a life interest given by his will, so as to accelerate the period of distribution, the class will, as a general

(*j*) *Stanford* v. *Stanford*, 34 Ch. D. 362; *Re Tucker*, 56 L. J. Ch. 449; *Re Dear*, 58 L. J. Ch. 659; *Bainbridge* v. *Cream*, 16 Bea. 25; ante, p. 1363.

(*k*) Supra, p. 1665, note (*i*).

(*l*) *Berkeley* v. *Swinburne*, 16 Sim. 275.

(*m*) See *Re Emmet's Estate*, 13 Ch. D. 484.

(*n*) 2 J. & H. 594.

(*o*) It was stated in the 4th and 5th editions of this work that no child was, in fact, born between the determination of the life estate and the eldest child's majority, and consequently the point did not arise, but this is not quite accurate; the dates of the younger children's births had not been proved, and an inquiry was directed as to this.

(*p*) Supra, p. 1665, note (*i*).

(*q*) The general doctrine is laid down in *Re Smith*, 2 J. & H. 594 (where *Brandon* v. *Aston*, 2 Y. & C. C. C. at p. 30, is referred to); *Re Aylwin's Trusts*, L. R., 16 Eq. at p. 590.

(r) See *Re Bedson's Trusts*, 28 Ch. D. 523; *Blackman* v. *Fysh*, [1892] 3 Ch. 209. In both these cases and also in *Re Smith*, the gift was to children who attained twenty-one, but the principle seems to be the same. Some observations on *Re Bedson's Trusts* will be found infra. In *Donohoe* v. *Mooney*, 27 L. R. Ir. 26. the tenant for life was unmarried when the forfeiture took place, and it was held that the interim income fell into residue.

rule, be ascertained at the testator's death, or whatever the new period of distribution may be (*s*).

Contrary intention.

But the general rule that a class is to be ascertained at the period of distribution will yield to an indication of a contrary intention (*t*). Thus in *Goodier* v. *Johnson* (*u*) the testator directed his trustees after the death of the longest liver of certain persons, to sell his real estate and to stand possessed of the proceeds upon trust for the children of his son and daughter a..d the issue "of such of them as may then be dead leaving issue, such issue to be entitled to no more than their parent or respective parents would have been if living." It was held by the Court of Appeal that the gift was not to a class composed of the children and their issue living at the period of distribution (*v*), but that the first part of the gift was to all the children, and that the gift to the issue of deceased children was substitutional.

Where partial life interest is given.

Where an annuity or similar life interest is given which does not exhaust the whole income, and the property itself is given to children as a class subject to the annuity, &c., the general rule is that the class is to be ascertained at the death of the testator. As regards real estate Mr. Jarman states the rule thus (*w*): "The subjecting of lands devised to trusts for partial purposes, as the raising of money, payment of annuities, or the like, by which the vesting in possession is not postponed, does not let in children born during the continuance of those trusts." For this proposition he cites *Singleton* v. *Gilbert* (*x*), 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; it was held that a child born after the death of A., but in the lifetime of the annuitants, could not take jointly with two others born before A.'s death.

Mere charging of lands does not let in future children.

Same construction as to charge on personal estate.

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

(*s*) *Re Johnson*, 68 L. T. 20. See *Entwistle* v. *Austin*, 19 Bea. 591. In *Re Johnson*, the gift was of real estate, but the principle seems to apply to personalty.

(*t*) Vague expressions are not sufficient to exclude the rule; *Middleton* v. *Messenger*, 5 Ves. 136.

(*u*) 18 Ch. D. 441.

(*v*) In that case the gift would have been bad for remoteness, as the property was not distributable until after the death of a person who might be unborn at the testator's death. As it was, the gift to the children was good, and the trust for sale being bad, the property devolved as realty: *Goodier* v. *Edmunds*, [1893] 3 Ch. 455.

(*w*) First ed. Vol. II. p. 77.

(*x*) 1 Cox, 68.

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 (*y*).

And the rule applies where part of the residue is subject to a life interest and part to a trust for accumulation for a term of years (*z*).

Whether the construction applies when funds are treated as distinct.

The result might be different if the context shewed 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* (*a*), 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] (*b*) 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 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 (*c*) interest in the general residue.

Where residue is given "after the decease" of annuitants, &c.

Where a testator gives life interests in part of his property or annuities to various persons and "after their decease" gives all his residue to children as a class, the class must, it seems, be ascertained at the testator's death, the words "after their decease" are equivalent to saying "subject to their interests," for there is no tenant for life of the residue, and it is not to be supposed that the testator intended that there should be an intestacy during the lifetime of the annuitants, &c. (*d*). Bacon, V.-C., refused to apply this principle in *Re Hiscoe* (*e*), where a testator gave certain annuities, and directed his trustees, "from and after the determination of the

(*y*) *Hill* v. *Chapman*, 3 B. C. C. 391, 1 Ves. jun. 405; *Hagger* v. *Payne*, 23 Bea. 174; see *Cort* v. *Winder*, 1 Coll. 320. *Middleton* v. *Messenger*, 5 Ves. 136.

(*z*) *Coventry* v. *Coventry*, 2 Dr. & Sm. 470.

(*a*) 2 De G. & S. 252. See also *Gardner* v. *James*, 6 Bea. 170, where distribution was by the will expressly postponed.

(*b*) The words in brackets were held to be imported into this clause from the preceding clause, which provided for the case of children dying without issue.

(*c*) The word "vested" was held to mean *vested in possession*, on the same ground.

(*d*) *Lill* v. *Lill*, 23 Bea. 446; *Bortoft* v. *Wadsworth*, 12 W. R. 523.

(*e*) 48 L. T. 510.

estates and interests thereinbefore limited and given," to divide the residue among the testator's grandchildren; it was held that the class must be ascertained on the death of the last surviving annuitant. The accuracy of the decision may be questioned, notwithstanding the definite language of the will.

Gift to children "then living," or to children of person "then dead."

(D) *Gift to Children "then living."*—Hitherto we have considered those cases in which the gift is to a person for life, and after his death to children as a class, without more. It is now necessary to consider what is the effect of adding to the gift to the children the requirement that they shall be "then living" or that their parent shall be "then dead" (*f*).

Literal construction.

If the language of the will is clear, effect must be given to it, although the probable intention is thereby defeated. Thus in *Ex parte Hunter* (*g*) a testator gave property to his wife for life and after her decease to such of his children as should be then living, and if any of his "said children" died leaving lawful issue such issue should take their parent's share: only one child, a son, survived the wife, but a daughter, who predeceased her, left issue: it was held that the son took the whole. In *Olney* v. *Bates* (*h*) a testator gave property to his wife for life, and after her death to his children, but if any of them should be then deceased, leaving issue, the deceased child's share was to be given to such issue. The widow died before the testator; one of the testator's daughters survived her and predeceased the testator, leaving issue: it was held that they did not take their mother's share. Again it may happen that a testator gives a life interest to A., and after A.'s death bequeaths the property to B. "if he shall be then living" and if not then to C., and omits to provide for the event of B. surviving A., and of both A. and B. dying in his (the testator's) lifetime (*i*); in such a case the Court is unable to avoid a literal construction of the will, although the result is that the gifts to B. and C. both fail.

(*f*) If there is no prior life estate, and the gift is to children on their attaining twenty-one, the words "then living" may refer to the date when the eldest attains twenty-one: *Hilliard* v. *Fulford*, 42 L. J. Ch. 624.

(*g*) 3 Y. & C. 610; *Laroche* v. *Davies*, 1 Jur. 574; *Howes* v. *Herring*, 1 M'Cl. & Y. 295. But would this strictness of construction be followed at the present day? In *Jeyes* v. *Savage*, L. R., 10 Ch. 555, the Court refused to put on the word "such" a construction which was inconsistent with the scheme of the settlement. See also *Duffield* v. *M'Master*, [1906] 1 Ir. 333.

(*h*) 3 Drew. 319. The same construction was followed in *Re Milne*, 57 L. T. 828, with the result that there was an intestacy. See also *Powis* v. *Matthews*, 11 W. R. 662, and *Sprackling* v. *Ranier*, 1 Dick. 344, which seems to have turned on this point, although commonly cited in support of a different principle, post, p. 1695.

(*i*) *Williams* v. *Jones*, 1 Russ. 517, was a case of this kind.

In the cases above referred to, the literal construction put upon the words "then living" often defeats the intended gift to C. The Court therefore endeavours to avoid such a construction if possible, and if the word "then" does not clearly refer to any particular time, the presumption seems to be that it is meant to refer to the period of distribution. Thus, 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; B. died in A.'s lifetime: 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 (*j*).

Where meaning of "then living" is ambiguous.

And the Court will strive to avoid putting a strict construction on the expression "then living" or "then dead" if it is inconsistent with the general scheme of the will (*k*). Thus in *Gaskell* v. *Holmes* (*l*) a testator gave his residue to his son absolutely, but if his son should die under twenty-one without issue, the testator gave the same to his wife during widowhood, with remainder as she should by will appoint, and in default of appointment, or in case she should marry again after the testator's decease, he directed that from and after her second marriage or decease, which should first happen, a moiety of the trust estate should be held in trust for the daughters who should be then living of his sister Mary Miles, and the issue then living of the issue of them as should be then dead, equally amongst them per stirpes. The testator's son died under twenty-one, without issue, in the testator's lifetime, and the testator's wife also died in his lifetime. A daughter of Mary Miles was living at the death of the testator's wife, but died in the lifetime of the testator, leaving issue: it was held by Wigram, V.-C., that the testator's death was the period at which the persons entitled under the residuary gift were to be ascertained, and that consequently the issue of the deceased daughter were entitled to the share which their parent would have taken if living (*m*).

Where strict construction would defeat intention.

(*j*) *Harvey* v. *Harvey*, 3 Jur. 949; *Hetherington* v *Oakman*, 2 Y. & C. C. C. 299; *Gill* v. *Barrett*, 29 Bea. 372; *Widdicombe* v. *Muller*, 1 Dr. 443; *Cormack* v. *Copous*, 17 Bea. 397; *Coulthurst* v. *Carter*, 15 Bea. 421.

(*k*) As to the importance of considering the general scheme of a will in cases of this kind, see *Heasman* v. *Pearse*, L. R., 7 Ch. 275, and *Cooper* v. *Macdonald*, L. R., 16 Eq. 258.

(*l*) 3 Ha. 438.

(*m*) Compare *Re Deighton's Settled Estates*, 2 Ch. D. 783, where a literal construction of the words "then living" would have led to absurd results. In *Heasman* v. *Pearse*, L. R., 7 Ch. 275, there was no question that in the gift of an original share to the issue of A., the words "then living" referred to the period of distribution; the difficulty was that the same words, which

Whether "then living" applies to whole class.

In *Turner* v. *Hudson* (*n*) property was given to A. for life and after her death to the testator's brothers and sisters and such of their children as should be then living, it was held that the qualification of surviving A. applied to the brothers and sisters as well as their children. But this construction would not be adopted if the brothers and sisters were referred to by name (*o*).

Stirpital construction of "then living."

In *Cooper* v. *Macdonald* (*p*) a testator made a series of specific devises upon trust for each of his sons and daughters nominatim for life, with remainder to the children of each as tenants in common in tail with cross remainders between them, and failing such issue, in trust for the testator's other children equally as tenants in common in tail, or if there should be only one of his said children "then living," in trust for that child and the heirs of his or her body; he afterwards gave his residuary real and personal estate upon such trusts as should correspond with those declared concerning the estates specifically devised. It was held by Lord Selborne, L.C., that the true construction of the words "then living" was a stirpital construction, so that the limitation in question was to be read thus: "failing such issue of my said son C. in trust for my other children, who, or the heirs of whose bodies may be living at the time of such failure of issue."

"Then surviving."

In *Re Coulden* (*q*) the testator in effect directed that on the death of A. his property should be equally divided amongst "my then surviving children and their respective issue": it was held that the property was divisible into as many shares as there were children who either survived A. or died before him, leaving issue who so survived; that each surviving child took one share, and that the surviving issue of each child who predeceased A. took the share which their parent would have taken if he had survived.

Where several life interests are given, "then" refers to immediate antecedent.

It sometimes happens that the words "then living" are ambiguous by reason of life interests being given to two or more persons. The general rule in such cases is thus stated by Mr. Jarman (*r*):

occurred in the gift of an accruing share to the issue of A., if taken literally, referred to another period; it was held by the C. A. that the same class of issue was entitled under both gifts, as "it would be most unreasonable and almost absurd" to give the words a different meaning in the two clauses.

(*n*) 10 Bea. 222.

(*o*) *Cormack* v. *Copous*, 17 Bea. 397. Compare *Leader* v. *Duffey*, 13 A. C. 294 (settlement; "grandchildren or other issue then in being").

(*p*) L. R., 16 Eq. 258.

(*q*) [1908] 1 Ch. 320.

(*r*) First ed. Vol. I. p. 768 (note *k*), where the passage formed part of the chapter on Devises and Bequests, whether Vested or Contingent (now Chap. XXXVII). [I have transferred the note to this chapter, where it seems properly to belong, and have placed it in the text on account of the importance of the subject matter. C. S.] Mr. Jarman's statement of the rule has been frequently approved; see *Re Milne*, 57 L. T. 828; *Palmer* v. *Orpen*, [1894] 1 Ir. 32.

"Where (as often occurs) life interests are bequeathed to several persons in succession, terminating with a gift to children, or any other class of objects *then* living, the word 'then' is held to point to the period of the death of the person last named (whether he is or is not the survivor of the several legatees for life), and is not considered as referring to the period of the determination of the several prior interests (*s*)."

Where gift is substitutional.

The same principle applies when the gift to children is substitutional. Thus in *Hodgson* v. *Smithson* (*t*) the gift was to A. for life and after her decease to B. or in case of her decease to be "equally divided between her children living": B. died in the testator's lifetime and her only child, who survived the testator, died in A.'s lifetime: it was held that "living" referred to the last antecedent, and that the personal representatives of the child were entitled to the legacy.

Rule where distribution is postponed till a given age.

(E) *Where Distribution is postponed till a given Age.*—Mr. Jarman continues (*u*): "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 (*v*). And the result is the same where the expression is '*all* the children' (*w*).

Does not clash with the preceding rules.

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

(*s*) *Archer* v. *Jeyon*, 8 Sim. 446; *Powis* v. *Matthews*, 11 W. R. 602; *Re Wollaston's Settlement*, 27 Bea. 642; *Cain* v. *Teare*, 7 Jur. 567; *Palmer* v. *Orpen*, [1894] 1 Ir. 32.

(*t*) 21 Bea. 354; 8. D. M. & G. 604.

(*u*) First ed. Vol. II. p. 78.

(*v*) *Ellison* v. *Airey*, 1 Ves. sen. 111; *Congreve* v. *Congreve*, 1 Br. C. C. 530; *Gilmore* v. *Severn*, 1 Br. C. C. 582; *Hoste* v. *Pratt*, 3 Ves. 730; *Barrington* v. *Tristram*, 6 Ves. 345; *Pearse* v. *Catton*, 1 Bea. 352; *Blease* v. *Burgh*, 2 Bea. 221; *Mower* v. *Orr*, 7 Hare, 473; *Hagger* v. *Payne*, 23 Bea. 474. And see as to *income*, post, p. 1685.

(*w*) *Whitbread* v. *Lord St. John*, 10 Ves. 152.

of A. who may subsequently come into existence before one shall have attained that age will be also included (*x*).

Ascertainment of class not accelerated by advancement out of children's shares.

"And the construction is not varied by the circumstance of the trustees being empowered to apply all or any part of the shares of the children for their advancement before the distribution (the word 'shares' being considered as used in the sense of '*presumptive* shares' (*y*)); nor is any such variation produced by a clause of accruer, entitling the survivors or a single survivor, in the event of the death of any or either of the children, as the expression 'said children,' so occurring, means the children designated by the prior gift, whoever they 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 (*z*).

Judicial opinions upon rule.

"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* (*a*), 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 (*b*). In marriage settlements, however, one at least of the parents generally takes a life interest, so that the shares do not vest in possession until the number of objects is fixed. The rule has gone, Lord *Eldon* remarked (*c*), 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 (*d*), 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

(*x*) *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.

(*y*) *Titcomb* v. *Butler*, 3 Sim. 417. Mr. Jarman means, of course, that a power of advancement will not hasten the ascertainment of the class. As to the effect of such a clause in postponing the ascertainment of the class, see below, p. 1685.

(*z*) *Balm* v. *Balm*, 3 Sim. 492; cf. *Matchwick* v. *Cock*, 3 Ves. 609; *Freemantle* v. *Taylor*, 15 ib. 363.

(*a*) 3 B. C. C. 401. See also per Lord Rosslyn, *Hoste* v. *Pratt*, 3 Ves. at p. 732; per K. Bruce, V.-C., *Brandon* v. *Aston*, 2 Y. & C. C. C. at p. 30; *Darker* v. *Darker*, 1 Cr. & M. 850.

(*b*) In *Re Knapp's Settlement*, [1895] 1 Ch. 91, North, J., held that the rule in *Andrews* v. *Partington* applies to a voluntary settlement.

(*c*) In *Barrington* v. *Tristram*, 6 Ves. at p. 348.

(*d*) See post, pp. 1683, 1684.

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.

Share vesting on marriage.

"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" (*e*).

Where gift is contingent.

When the shares are 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 (*f*). 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.

Where rule not applicable.

The general rule is, of course, not applicable in cases where the testator expresses an intention to include all the children whenever born (*g*), nor (it seems) is it applicable if there is no child in existence at the death of the testator (*h*).

Where there is a prior life interest determinable on bankruptcy.

It sometimes happens that a testator gives property to A. during his life until he shall become bankrupt or alienate his interest, and then to his children who attain twenty-one: in such a case, if A.'s eldest child attains twenty-one before A.'s life interest determines, the class is closed, when the forfeiture takes place, and no children born afterwards will be included: if A.'s eldest child attains twenty-one after the forfeiture, children born in the meantime are included, subject to their attaining twenty-one (*i*).

(*e*) See *Andrews* v. *Partington*, 3 Br. C. C. 401 (shares payable at twenty-one or marriage); *Prescott* v. *Long*, 2 Ves. jun. 690; *Pulsford* v. *Hunter*, 3 Br. C. C. 416 (commented on in *Fox* v. *Fox*, L. R., 19 Eq. 286); *Blease* v. *Burgh*, 2 Bea. 221; *Dawson* v. *Oliver-Massey*, 2 Ch. D. 753.

(*f*) *Clarke* v. *Clarke*, 8 Sim. 59; *Gillman* v. *Daunt*, 3 K. & J. 48; *Locke* v. *Lamb*, L. R., 4 Eq. 372.

(*g*) See *Mainwaring* v. *Beevor*, 8 Ha. 44, post, p. 1683. *Scott* v. *Scarborough*, 1 Bea. 154, post, p. 1697. In *Ellis* v. *Maxwell*, 12 Bea. 104, the terms of the will were unusual. A gift to *all* the children, as already mentioned, does not, of itself, prevent the application of the rule, supra, p. 1675. As to the effect of the words "then living" in a gift to children on attaining twenty-one, see *Hilliard* v. *Fulford*, 42 L. J. Ch. 624.

(*h*) Post, p. 1687.

(*i*) This appears to be the principle laid down in *Re Smith*, 2 J. & H. 594, in which case Wood, V.-C., remarked

But the interests of the children are not generally made to take effect in this manner: the usual way is to give a determinable life interest to A., with a gift to the children on his death, and a declaration that in the event of his life interest being determined during his life the income shall be applied in the same manner as if he were dead. If the clause is properly drawn, no question can arise: otherwise it may cause difficulties. Thus, in *Re Bedson's Trusts* (*j*), a testator gave a fund upon trust for A. during his life, and after his death for his children at twenty-one, with a proviso that if A. should become bankrupt the fund and the income thereof should thenceforth immediately go and be payable or applicable to or for the benefit of his children in the same manner as if he was naturally dead. After the death of the testator A. was adjudicated bankrupt; at that time (1865) he had two children, the elder of whom was born in 1862; after the adjudication he had four other children, all born before 1883, when the eldest child attained twenty-one. It was held by Pearson, J., that all six children were entitled to share, subject to their attaining twenty-one, and his decision was affirmed by the Court of Appeal, but it is not very easy to say on what ground the decision proceeded; none of the judges seem to have attached any importance to the dates of the births of the children. Cotton and Lindley, L.JJ., both said that the period of distribution was not the bankruptcy, but the death of the son, although to arrive at this result it was necessary to ignore the testator's express declaration that on A.'s bankruptcy the capital of the fund was to go as if he was then dead. In *Blackman* v. *Fysh* (*k*), a testator devised realty to his son for life, and after his death to all the children of the son, born or to be born, who should attain twenty-one, with a clause directing that if the son's interest should be taken in execution the devise to him should become void and cease as if he were then dead, and the land should vest in the persons "who, under the devises and limitations hereinbefore contained would be next entitled thereto." The son's life interest having been forfeited, it was held by Kekewich, J., and by the C. A., that the limitations to the children were executory devises, and, by virtue of the words last

Re Bedson's Trusts.

that the decision in *Brandon* v. *Aston*, 2 Y. & C. C. C. 24, seemed to have turned on special circumstances. As to the point decided in *Re Smith*, see ante, p. 1669, note (*r*). Compare *Re Aylwin's Trusts*, L. R., 16 Eq. 585, where, however, the gift was to the children irrespective of age.

(*j*) 25 Ch. D. 458; 28 Ch. D. 523.

(*k*) [1892] 3 Ch. 209. *Blackman* v. *Fysh* does not affect the settled rule, that in a gift to A. for life, and at his death to all the children of B. who attain 21, the class is closed at the death of A. *Re Canney's Trust*, 54 Sol. J. 214.

above quoted, took effect in favour of all the children, whether born before or after the forfeiture, who attained twenty-one.

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 to vest at the age of twenty-two (*l*). But if a distinct 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* (*m*), 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 (*n*).

Gift to A. for life, remainder to children of B., payable at twenty-five; class held ascertainable at death of A.

Gift to children of A. at twenty-two, held to include children living at testator's death only.

In *Elliott* v. *Elliott* (*o*), a strained construction was put upon the words of the will in order to prevent the gift from failing by remoteness. In that case 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 Shadwell, V.-C., said that he saw no objection, "in principle," to holding that by this description the testator meant those children who

(*l*) *Leake* v. *Robinson*, 2 Mer. pp. 363, 383; *Arnold* v. *Congreve*, 1 R. & My. 209; *Comport* v. *Austen*, 12 Sim. 218; *Boughton* v. *James*, 1 Coll. at p. 43, 1 H. L. C. 406. See *Pearks* v. *Moseley*, 5 A. C. 714, 719; *Re Mervin*, [1891] 3 Ch. 197. If any one of the class has attained the age in the testator's lifetime, the gift is good, because no after-born child is admissible, *Pickes* v. *Matthews*, 10 Ch. D. 264. And distinguish the case of a share being vested, subject to being divested on the death of the child under twenty-five, as in *Re Turney*, [1899] 2 Ch. 739. The subject is discussed more in detail, ante, p. 327.

(*m*) 5 Sim. 171, cited 16 Sim. 285.

(*n*) This paragraph is reprinted verbatim from the 4th ed. of this work by Mr. Vincent (Vol. II. p. 1672). The question whether *Kevern* v. *Williams* was rightly decided, and if so on what principle, is discussed by Mr. Gray (Rule against Perpetuities (§§ 638 seq.)). I submit that as a direction postponing enjoyment of a vested interest beyond the age of twenty-one is void (*Rocke* v. *Rocke*, 9 Beav. 66; *Saunders* v. *Vautier*, Cr. & Ph. 240); the gift in *Kevern* v. *Williams* was in effect simply a gift to A. for life with remainder to the grandchildren of B. [C. S.]

(*o*) 12 Sim. 276; followed by Stirling, J., though with some doubt, in *Re Coppard's Estate*, 35 Ch. D. 350.

CHAPTER XLII.

were then living or might be living at his death; and then there was no objection to the gift. It has been suggested that the direction as to interest shewed an intention to make the children's shares vested on the testator's death. Unless the decision can be justified on this ground, it seems clearly wrong (*p*).

Where class ascertained at testator's death.

It will be remembered that if there is an immediate gift to the children of A. who attain an age exceeding twenty-one, and at the death of the testator one of the children has attained the prescribed age, the class is closed, and the gift is consequently good (*q*).

Exception as to general legacies.

An important exception to the general rule 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); as where a legacy of 1,000*l.* is given to each of the children of A., payable on attaining twenty-one years. In such a case the bequest is confined to children in existence at the death of the testator, on account of the inconvenience of postponing the distribution of the general personal estate until the majority of the eldest legatee, which would be the inevitable effect of keeping open the number of pecuniary legatees (*r*). If there is no [illegible] in existence at the testator's death, the legacies fail altogether (*s*). But this argument of inconvenience, it is obvious, does not apply where the number of objects affects the *relative* shares only, and not the aggregate amount (*t*), 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 (*u*). And, of course, the testator may so clearly express his intention of including all the children, whenever born, that effect must be given to it. As in *Defflis* v. *Goldschmidt* (*v*), where the testator gave a legacy of 2,000*l.* to each of his sister's children,

(*p*) See the remarks of Chitty, J., in *Re Wenmoth's Estate*, 37 Ch. D. at p. 269, and of Stirling, J., in *Re Mervin*, [1891] 3 Ch. at p. 200, and of Joyce, J., in *Re Barker*, 92 L. T. at p. 831.

(*q*) *Picken* v. *Matthews*, 10 Ch. D. 264, ante, p. 1670, where the effect of a substitutional gift to the issue of deceased children is also considered.

(*r*) *Ringrose* v. *Bramham*, 2 Cox, 384; *Peyton* v. *Hughes*, 7 Jur. 311; *Mann* v. *Thompson*, Kay, 638. And see *Storrs* v. *Benbow*, 2 My. & K. 46.

(*s*) *Rogers* v. *Mutch*, 10 Ch. D. 25.

(*t*) *Gilmore* v. *Severn*, 1 B. C. C. 582.

(*u*) *Evans* v. *Harris*, 5 Bea. 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 ib. and 19 Ves. p. 570.

(*v*) 1 Mer. 417. But the general principle is inaccurately stated by Sir W. Grant, and the authority of the decision is proportionately lessened; see *Butler* v. *Lowe*, 10 Sim. 317. It has, however, been frequently referred to as sound; *Mann* v. *Thompson*, Kay at p. 643; *Dias* v. *De Livera*, 5 A. C. at p. 134.

"now born or hereafter to be born," payable at twenty-one, and directed his executors to appropriate a sufficient fund to meet the legacies as they became due, and to pay the income to his sister in the meantime, and in case she died before all her children attained twenty-one or married, the income was to be applied for the benefit of the infant children: it was held that all the children of the sister were included.

Cases in which the rule has been departed from.

Mr. Jarman continues (*w*): "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 (*x*) a testator bequeathed £300 to the children of his sister S., to be equally divided *at their respective ages of twenty-one or marriage*, with interest, and failing the share of any, to the survivors, and failing the share of *all*, then to G. One of the questions was, whether the legacy belonged to a child of S. born at the making of the will, to the exclusion of those since born, or to be born? Lord *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 (*y*).

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 entitled. Thus, where (*z*) a testator devised, on a certain event, the produce of the sale of certain freehold estates to be divided between the children of his daughters E. and R., such of the children as should be sons *to be paid at their respective ages of twenty-one*, and such as should be daughters at their respective ages of twenty-one, or days of marriage respectively; and the testator bequeathed the residue

(*w*) First ed. Vol. II. p. 81.

(*x*) *Maddison* v. *Andrew*, 1 Ves. sen. 58.

(*y*) Mr. Jarman here goes on to state *Hughes* v. *Hughes* (3 Br. C. C. pp. 352, 434), but as the decision in that case is now generally supposed to be referable to another doctrine, it is stated post, p. 1684, n. (*l*).

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

CHAPTER XLII.

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

Remark on *Mills* v. *Norris.*

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

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

Mr. Jarman's conclusions criticized.

It may, perhaps, be doubted whether the law is so clearly settled as Mr. Jarman seems to have supposed, and whether the principle laid down in *Shepherd* v. *Ingram* (*d*) is not really the correct one. Mr. Roper says that *Mills* v. *Norris* was decided on the authority of *Shepherd* v. *Ingram*, and thus defends the decision (*e*): "It is obvious that the testator meant to provide for all the children of his daughters, and that the whole residue should go over to his brothers, if his daughters died without leaving a child, or the descendant of a child. This great object would have been disappointed if the fund became vested and distributable upon the eldest child attaining twenty-one, to the exclusion of after-born

(*a*) See *Vandergucht* v. *Blake*, 2 Ves. jun. 534, and other cases treated of in Chap. LV.

(*b*) 6 Ves. 43. The M.R. appears to have been Sir R. Arden, and not Sir W. Grant.

(*c*) See cases referred to ante, p. 1675.

(*d*) Post, pp. 1688, 1689.

(*e*) Legacies, 52.

children; for in such case, if all the first class had died before their mothers (*f*), and they had left the second class of children surviving them, then, although the second description of children could take nothing, they would prevent the fund going to the testator's brothers, and he would have died intestate."

Rule not to be applied except when necessity requires

Lord Loughborough said of the rule that though it is an extremely convenient construction, it is convenient only to the parties who profit by it; not to the children who are excluded (*g*). And Knight-Bruce, V.-C., remarked (*h*): "The rule recognised in the case of *Whitbread* v. *Lord St. John* (*i*) as to after-born children is artificial, and I think only to be adopted when necessity requires. Lord Eldon, in cases coming very near it, but distinguishable from it, held after-born children to be entitled."

Gift to grandchildren when all have attained twenty-one.

Accordingly, the rule is not applicable in cases where distribution is postponed until all the children attain the prescribed age, or (what is the same thing) until the youngest child attains that age. Thus, in *Mainwaring* v. *Beevor* (*k*), where a testator bequeathed the residue of his investments 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, Wigram, V.-C., refused to decree a division of the fund as soon as all the grandchildren living had attained twenty-one. He pointed out the reason of the general rule: "Where a testator has given two inconsistent directions, and says that the children, or (which is the same thing) all the children, shall participate in the fund, and then directs that there shall be a division when or as soon as each attains twenty-one, in that case you must do one of two things—you must either sacrifice the direction that gives a right to distribution at twenty-one, or sacrifice the intention that all the children shall take. The Court has in such cases decided in favour of the eldest child taking at twenty-one, as the will directs, and sacrificed the intention that all the children shall take." But the reason of the rule, as the V.-C. pointed out, does not apply where the right of the eldest child to distribution is postponed until the youngest child attains twenty-one: in such a case there is no way of

(*f*) Mr. Roper assumes that none of them attained twenty-one.

(*g*) *Hoste* v. *Pratt*, 3 Ves. at p. 732.

(*h*) *Brandon* v. *Aston*, 2 Y. & C. C. C. at p. 30. "The rule is never applied unless it is necessary:" per Buckley, J., in *Re Stephens*, [1904] 1 Ch. at p. 328.

(*i*) 10 Ves. 152, ante, p. 1675.

(*k*) 8 Ha. 44. See *Darker* v. *Darker*, 1 Cr. & Mee. 850.

CHAPTER XLII.

avoiding the inconvenience of making the eldest child wait an indefinite time (*l*).

Contrary intention.

On the other hand, if the testator clearly expresses an intention

(*l*) *Mainwaring* v. *Beevor* was followed in *Armitage* v. *Williams*, 7 W. R. 650, and *Pilkington* v. *Pilkington*, 29 L. R. Ir. 370. In *Smith* v. *Jackson*, 1 L. J. (O. S.) Ch. 231, where there was a gift to A. for life and after her death to all and every the child and children of his grandchildren in equal shares, to be paid to such child or children when the youngest or survivor of them should attain twenty-one; it was held by Leach, V.-C., that great grandchildren, born after the death of A., were excluded from the gift, even although born before the youngest great grandchild living at A.'s death attained twenty-one. The decision is inconsistent with the other authorities.

In his judgment in *Mainwaring* v. *Beevor*, the V.-C. referred to the case of *Hughes* v. *Hughes* (3 Br. C. C. pp. 352, 434; 14 Ves. 256), where 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 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 favour 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. 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 3rd June, 1782, R. L., [1791] A. fol. 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" in the decree 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. The case subsequently came on a petition for rehearing before Lord Eldon (14 Ves. p. 258), 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," R. L., [1807] A. fol. 1091. It appears 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.

In criticizing Lord Thurlow's spoken judgment Mr. Jarman points out that the expression "all the children" has been held to be inadequate to enlarge the construction, referring to *Whitbread* v. *Lord St. John*, 10 Ves. 152; *Heathe* v. *Heathe*, 2 Atk. 121; *Singleton* v. *Gilbert*, 1 Cox, 68; *Scott* v. *Harwood*, 5 Mad. 332, all cited ante, pp. 1675, 1664.

to include only those children who are born before the youngest in esse attains twenty-one, effect will of course be given to it (*m*).

Provision for maintenance and advancement may exclude rule.

It seems that a trust for maintenance may have the effect of admitting after-born children. Thus, in *Bateman* v. *Foster* (*n*), a testator gave property upon trust for all and every the children or child of A., born and to be born, who should attain twenty-one, as tenants in common, and directed that the income of the share, or expectant share, of each such child should be paid to A. during his life for the maintenance and advancement of each such child: it was held that a child of A. who was living at the testator's death, and had attained twenty-one, was not entitled to a transfer of his share.

Discretionary trust for maintenance or power of advancement.

Whether a discretionary trust or power of maintenance or advancement can of itself have the effect of admitting after-born children, does not seem to be satisfactorily settled. A very special clause of maintenance and advancement was held by Romilly, M.R., to have that effect in *Iredell* v. *Iredell* (*o*), but the decision cannot be said to lay down any general principle. In *Bateman* v. *Gray* (*p*), where there was a gift to all the children of A. "now or hereafter to be born, who shall attain twenty-one," with a discretionary power of advancement out of "the vested or presumptive share or respective shares of any child or children," the same judge held that children born after the eldest attained twenty-one were included in the class. It is clear that a power of maintenance out of presumptive shares has no such effect (*q*). *Iredell* v. *Iredell* was followed in *Re Courtenay* (*r*).

Rule excluded by trust for accumulation.

The operation of the rule may be excluded by a trust for accumulation. Therefore, if there is a trust to accumulate income for twenty-one years from the testator's death, and a gift of the accumulated fund to the children of A. who attain twenty-one, the children born during the period of accumulation are entitled to share, whether born before or after the eldest child attains twenty-one (*s*).

Rule does not apply to gifts of income.

On the same principle (namely, that the rule ought not to be applied except in cases of necessity), the rule does not apply where

(*m*) *Gooch* v. *Gooch*, 3 D. M. & G. 366. Compare *Hughes* v. *Hughes*, ante, note (*l*). A testator in a gift to his own children may postpone distribution until the youngest attains a specified age (*Hale* v. *Marsland*, 4 L. T. 781), or until some other event (*Berry* v. *Brand*, 2 Dr. & S. 1).

(*n*) 1 Coll. 118.

(*o*) 25 Bea. at p. 485.

(*p*) L. R., 6 Eq. 215.

(*q*) *Gimblett* v. *Purton*, L. R., 12 Eq. 427. In this case Malins, V.-C., expressed disapproval of *Bateman* v. *Gray*

(*r*) 74 L. J. Ch. 654.

(*s*) *Watson* v. *Young*, 28 Ch. D. 436; *Re Stephens*, [1904] 1 Ch. 322.

CHAPTER XLII.

the income of a fund is given to the children of A. on their respectively attaining the age of twenty-one, during their respective lives (*t*). In such a case, the share of each child who has attained twenty-one is diminished from time to time whenever a younger child attains that age (*u*).

Intermediate income.

In cases where property is given to a class of persons contingently on their attaining a certain age or marrying, questions sometimes arise as to the destination of the income while the ultimate constitution of the class is uncertain. So far as gifts of residue or of an income-bearing fund are concerned, the rule is clearly settled that each contingent member is entitled to the income of his contingent share; and this is so whether the class is capable of increase or not (*v*). In the former case, the children for the time being in existence are entitled to the income, so that whenever a child is born the share of each in the subsequent income is diminished (*w*). If the class is incapable of increase, the share of each child cannot be diminished, but may be increased by the death of any child before attaining a vested interest.

Maintenance.

The question has frequently been raised in recent years in connection with sec. 43 of the Conveyancing Act, 1881, providing for the maintenance of infants. It is now settled that if residuary personal estate is given upon trust for the children of A. who attain twenty-one, the income is available for the maintenance of all of them while they are all under age (*x*), and after one or more have attained twenty-one, and thus acquired vested interests in their shares, the income of the remaining shares is available for the maintenance of the infant children (*y*).

The same result follows where real estate is given upon the same trusts as the residuary personal estate (*z*).

Pecuniary Legacy.

A pecuniary legacy to each member of a class (such as the children of A.) contingently on his attaining twenty-one, does not, as a general rule (*a*), carry interest, and consequently the income arising

(*t*) *Re Wenmoth's Estate*, 37 Ch. D. 266. See *Re Powell*, [1898] 1 Ch. 227, referred to ante, p. 1665.

(*u*) *Re Stephens*, [1904] 1 Ch. 322.

(*v*) *Hawkins* v. *Combe*, 1 Br. C. C. 335; *Brandon* v. *Aston*, 2 Y. & C. C. C. at p. 30; *Stone* v. *Harrison*, 2 Coll. 715.

(*w*) *Mainwaring* v. *Beevor*, 8 Ha. 44. *Rochford* v. *Hackman*, 9 Ha. 475. *Re Jeffery*, [1895] 2 Ch. 577.

(*x*) *Re Adams*, [1893] 1 Ch. 329.

(*y*) *Re Holford*, [1894] 3 Ch. 30, overruling *Re Jeffery*, [1891] 1 Ch. 671.

(*z*) *Re Burton's Will*, [1892] 2 Ch. 38.

(*a*) As to the exception where the testator stands in loco parentis to the legatee, see Chap. XXX. And a testator may of course expressly give the intermediate income to the legatee, as in *Re Bowlby*, [1904] 2 Ch. 685. And a general intention to provide maintenance may cause interest to be payable from the testator's death; *Re Churchill*, [1909] 2 Ch. 431, following *Pelt* v. *Fellows*, 1 Swans. 561 n. as explained

from, or attributable to, the legacy is not available for maintenance (*b*). But if a legacy is directed to be held in trust for children who attain twenty-one, the general rule is that the legacy is segregated from the residue and that children under age are entitled to their share of the income (*c*), which is therefore available for maintenance (*d*).

Specific bequest.

The same rules apply where the gift is a specific bequest of leaseholds or other personalty (*e*).

Real estate.

It has been already pointed out (*f*) that a contingent devise of land, whether specific or residuary, does not carry the intermediate rents and profits. And under a devise to the children of A. contingently on their attaining twenty-one, the first child who attains twenty-one is entitled to all the rents until the next child attains twenty-one, when the latter becomes entitled to a half of the rents, and so on (*g*). The rule is the same if the devise is to a trustee, so that the limitations are equitable (*h*).

Rule where no object exists at period of distribution.

(F) *Where no Object exists when Gift falls into Possession.*—(1) *Immediate Gift.*—Mr. Jarman continues (*i*): "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 (*j*), 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.

Where the gift is immediate, all afterwards born entitled.

"Thus, in *Weld* v. *Bradbury* (*k*), a testator bequeathed certain monies to be put out at interest; one moiety to be paid to the younger children of M. living at his (the testator's) death, and the other moiety *to the children of S. and N.* Neither S. nor N. had any child living at the date of the will (*l*), 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.

by Sugden, L.C., in *Leslie* v. *Leslie*, Ll. and G. t. Sugden pp. 1, 3.

(*b*) *Re Dickson*, 29 Ch. D. 331; *Re Inman*, [1893] 3 Ch. 518, where the earlier authorities are cited.

(*c*) *Kidman* v. *Kidman*, 40 L. J. Ch. 359. *Re Medlock*, 55 L. J. Ch. 738.

(*d*) *Re Clements*, [1894] 1 Ch. 665.

(*e*) *Re Woodin*, [1895] 2 Ch. 309, disapproving *Furneaux* v. *Rucker*, [1879] W. N. 135.

(*f*) Ante, p. 953.

(*g*) *Re Averill*, [1898] 1 Ch. 523.

(*h*) Ibid.

(*i*) First ed. Vol. II. p. 84.

(*j*) "Where a person taking a preceding life interest dies in the testator's lifetime, the gift is of course treated as immediate; *Haughton* v. *Harrison*, 2 Atk. 329." (Note by Mr. Jarman.)

(*k*) 2 Vern. 705. See also *Haughton* v. *Harrison*, 2 Atk. 329; *Barker* v. *Barker*, 1 Cr. & M. 850, post, p. 1089.

(*l*) "This," as Mr. Jarman remarks, "was immaterial."

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

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

Destination of income until birth of 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 (*n*). 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 (*o*); nor would the circumstance of there being an immediate devise of the real estate to trustees (*p*) vary the principle, the only difference being, that the heir would take the equitable, instead of the legal interest. The great difficulty, however, in these cases, is to determine whether the will indicates an intention to accumulate the immediate rents for the benefit of unborn objects. A question of this kind was much considered in the case of *Gibson* v. *Lord Montfort* (*q*), where A. gave his freehold and personal estate to trustees, in trust to pay certain annuities and legacies out of the produce of his personal, and, in case of deficiency, out of his real estate, and he gave the residue of his real and personal estate *to such child or children as his daughter B. should have*, whether male or female, equally to be divided between or among them. If B. should die without issue of her body, then over. By another clause, A. directed, that, upon the deaths of the persons to whom the annuities for lives were given, such annuities as should fall in from time to time should go back to the residue, *and go to those in remainder*

Immediate income was held to accumulate.

(*m*) Amb. 448. Also reported under the name of *Gibson* v. *Rogers*, Amb. 92 and *Gibson* v. *Lord Montfort*, 1 Ves. sen. 485, below.

(*n*) *Harris* v. *Lloyd*, T. & R. 310; see *Bullock* v. *Stones*, 2 Ves. sen. 521.

(*o*) *Harris* v. *Lloyd*, T. & R. 310, and *Hopkins* v. *Hopkins*, Cas. t. Talb. 44.

(*p*) *Bullock* v. *Stones*, 2 Ves. sen. 521.

(*q*) 1 Ves. sen. 485.

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 undisposed 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; his Lordship thinking, upon the whole, there was an intention to accumulate; for which he relied partly on the fact of the real and personal estate being comprised in one clause (*r*), and on the expression in the will and codicil respecting the annuities."

In *Darker* v. *Darker* (*s*), land was devised in trust for the testator's nephews and nieces by name, "when the younger shall come of age," and if the testator's brother T. D. should have children, they were to have equal shares with the named nephews and nieces: it was held that on the youngest of the latter coming of age, they were entitled to the rents and profits, but in the event of T. D. having any children, they would share equally from their birth.

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

Children for the time being take the whole income.

"This question came before Lord *Northington*, in *Shepherd* v. *Ingram* (*u*), on the construction of the will already stated, at the instance of three of the children of the testator's daughter, who had, subsequently to the judicial consideration of the will on the former occasion, come into existence, and now prayed (their parent being yet alive) to have an account of the profits, and that so much as became due from the birth of the first child until the second was born, might be declared to belong to the first,

(*r*) On this point, vide *Genery* v. *Fitzgerald*, Jac. 468, and other cases, cited ante, Vol. I. p. 954.

(*s*) 1 Cr. & M. 850.

(*t*) First ed. Vol. II. p. 87.

(*u*) Amb. 448, ante, p. 1688.

CHAPTER XCII.

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 (*v*) 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, then the residue should go over; that would be an absolute devise with a defeasible clause, and the daughters in that case would be clearly entitled to the interest and profits till that contingency happened" (*w*).

Where gift is to children on attaining twenty-one.

Where the gift is to the children of A. on attaining twenty-one, and no child of A. is in existence at the testator's death, it is doubtful whether all the children of A. who attain twenty-one will be entitled, or only those who are in existence when the eldest attains that age. In *Haughton* v. *Harrison* (*x*), where the gift was to the children of the testator's daughter, arriving at the age of twenty-one, the question did not arise, but Lord Hardwicke said: "It is plain the grandchildren born after the testator's death are entitled, for as they were not in esse in his lifetime, the testator must have had in his view future children of his daughter." In *Armitage* v. *Williams* (*y*), 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. At the death of the testator neither A. nor B. had any children; after his death they both had several children. It was held by 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* (*z*).

But if distribution postponed till twenty-one, none let in after eldest attains twenty-one.

(*v*) Mr. Jarman observes in a note: "The word in the report is 'daughters'; but this was evidently used in mistake for children," but the children must have been all daughters, otherwise Lord Northington's illustration would be unintelligible.

(*w*) Compare *Mills* v. *Norris*, 5 Ves. 335; *Scott* v. *Earl of Scarborough*, 1 Bea. 154; *Mainwaring* v. *Beevor*, 8 Hare, 44; *Ellis* v. *Maxwell*, 12 Bea. 104, and other cases cited, ante, p. 1586. Mr. Jarman misunderstood the decision in *Mills* v. *Norris* (see Roper on Legacies, 1345, and the 3rd edition of this work, by Messrs. Wolstenholme and Vincent, Vol. II. p. 157).

(*x*) 2 Atk. 329.

(*y*) 7 W. R. 650. The M.R.'s statement of the "rule of the Court for ascertaining the period of distribution" must not be taken as the general rule.

(*z*) Ante, p. 1683.

Bequest of a certain sum to each member of a class.

It has been already mentioned that a gift of a certain sum to each of a class of objects at a future period (as to each of the children of A. who attain twenty-one) is confined to those living at the testator's death, and that consequently if no object is living at the testator's death the gift fails altogether (*a*).

Disposition of intermediate income in such cases.

With reference to the two questions above stated, namely (1) as to the destination of the income between the period of the testator's death and the birth of a child, and (2) as to the appropriation of the income between the birth of the first and the birth of the last child, the rule was thus stated in the third and subsequent editions of this work: "If the bequest be contingent, a child only presumptively or contingently entitled is, for the purpose of answering either of the above 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 (*b*), and in the second, to the children who have attained a vested interest, notwithstanding the existence of children who may be eventually entitled to a share" (*c*). But the answer to the second question depends on the nature of the property and the provisions of the will. The question has been already discussed (*d*).

Effect where there is no object at or before time of distribution.

(2) *Gift in Remainder.*—Mr. Jarman continues (*e*): "The next inquiry is, as to the rule of construction which obtains, where the gift to the children is preceded by an anterior interest, and no object comes into existence before its determination; as in the case of a gift to A. for life, and after his decease, to the children of B.; and B. has no child until after the death of A. It is clear that in such a case, if the limitation to the children of B. were a legal remainder of freehold lands, it would (*f*) fail by the determination of the preceding particular estate before the objects of the remainder came in esse (*g*). This rule, however, originating

Legal contingent remainder.

(*a*) *Rogers* v. *Match*, 10 Ch. D. 25; ante, p. 1080.

(*b*) *Haughton* v. *Harrison*, 2 Atk. 329; *Shawe* v. *Cunliffe*, 4 B. C. C. 144.

(*c*) "This seems a necessary conclusion, though no express authority has been found. See *Stone* v. *Harrison*, 2 Coll. 715, but see *Brandon* v. *Aston*, 2 Y. & C. C. C. 30."

The passage in the text, and notes (*b*) and (*c*) are reprinted verbatim from the 3rd edition of this work, by Messrs. Wolstenholme and Vincent (Vol. II. p. 157). In the 4th edition the editor (Mr. Vincent) added that the "necessary conclusion" referred to in note (*c*) appeared to be supported by *Furneaux* v. *Rucker*, [1870] W. N. 135. *Furneaux* v. *Rucker*, however, is not regarded as a satisfactory authority (see *Re Woodin*, [1895] 2 Ch. 309). The property was leasehold (*Re Burton's Will*, [1892] 2 Ch. 38).

(*d*) Ante, p. 1689.

(*e*) First ed. Vol. II. p. 88.

(*f*) Unless saved by the Contingent Remainders Act, 1877, ante, p. 1444.

(*g*) Ante, p. 1443.

CHAPTER XLII.

Equitable contingent remainder.

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 favour of such objects whenever they come into existence. Thus, in *Chapman* v. *Blissett* (*h*), 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 the children of A., and as to the other moiety in trust for the children of B. B. had no child born until after the decease of A.; and it was held that such after-born child was entitled to the latter moiety; Lord *Talbot* observing, that, 'in regard to trusts, the rules are not so strict as at law; for the whole legal estate being in the trustees, the inconvenience of the freehold being in abeyance, if the particular estate determines before the contingency (upon which the remainder depends) does happen, is thereby prevented.'"

Personal estate.

The rule is also not applicable to bequests of personal estate. The law on the subject does not seem to have been clearly settled in Mr. Jarman's time, but he considered that on principle, notwithstanding some apparently adverse authority, the rule applicable to bequests of personal estate is that "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 favour of all the subsequently born children as they arise" (*i*). The correctness of the rule thus stated is clearly established (*j*).

Where fund distributable on death of tenant for life.

The rule last stated does not apply if the class is to be ascertained when the fund falls into possession; for if a period is distinctly fixed when the distribution is to take place, the children born after that period are not entitled. *Godfrey* v. *Davis* (*k*) was decided on this principle (*l*).

(*h*) Cas. t. Talb. 145.

(*i*) First ed. Vol. II. p. 92. Mr. Jarman's difficulty arose chiefly from the judgment of Sir W. Grant, M.R. (Lord Alvanley), in *Godfrey* v. *Davis* (post). "That case was, in my opinion, in the opinion of Sir Thomas Plumer, and I should have said in the opinion of almost every lawyer, well decided; but unfortunately in the report (6 Ves. 43) of what was said by Lord Alvanley on that occasion, his language is certainly too unqualified;" per Stuart, V.-C., in *Conduitt* v. *Soane*, 4 Jur. N. S. at p. 504. Mr. Jarman's comments on *Godfrey* v. *Davis* will be found in the earlier editions of this work.

(*j*) *Wyndham* v. *Wyndham*, 3 Br. C. C. 58. *Hutcheson* v. *Jones*, 2 Mad. 124; *Conduitt* v. *Soane*, 4 Jur. N. S. 502. Mr. Jarman also refers to *Horseman* v. *Abbey*, 1 J. & W. 381 (which, however, he admits "was not distinctly decided upon this point"), and to *Beaulieu* v. *Cardigan*, Amb. 533.

(*k*) 6 Ves. 43. Mr. Jarman's lengthy comments on this case are omitted in this edition, there being no question that the decision itself was correct, ante, note (*i*).

(*l*) Per Plumer, M.R., in *Hutcheson* v. *Jones*, 2 Madd. at p. 129; *Conduitt* v. *Soane*, supra.

Existence up to time of distribution not necessary.

"And here," says Mr. Jarman (*m*), "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 shewn, that all who have existed in the interval between the death of the testator and the period of distribution, whether living or dead at the latter period, are objects of the gift, and may therefore not improperly be termed objects *at that period*; their decease before the period of distribution having no other effect than to substitute their respective representatives, supposing, of course, the interest to be transmissible.

Whether gift over in default of children enlarges class of objects entitled.

"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* (*mm*) 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* (*n*) a pecuniary legacy to *all* the children of A., payable at twenty-one or marriage, with a bequest over in case *all* the children died before their shares became payable, was confined to children who were in esse when the first share became payable. So, in the more recent case of *Scott* v. *Harwood* (*o*), where the devise was to the use and behoof of all and every the child and children of A. lawfully begotten, and their heirs for ever; 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."

Remark on *Scott* v. *Harwood*.

(*m*) First ed. Vol. II. p. 97.
(*mm*) 2 Madd. 124.
(*n*) 3 B. C. C. 401.
(*o*) 5 Mad. 332.

Gift to children *to be born* or *to be begotten.*

(G) *Effect of Words "born," or "begotten," or "to be born," &c.*—Mr. Jarman continues (*p*): "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,

Where they extend the class.

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.

Mogg v. *Mogg.*

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

Distinction in regard to general pecuniary legacies.

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

"Thus, in the case of *Sprackling* v. *Ranier* (*r*), where a testator in a certain event gave a legacy to the sons and daughters of his

(*p*) First ed. Vol. II. p. 98.

(*q*) 1 Mer. pp. 654, 658.

(*qq*) "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." (Note by Mr Jarman.)

The decision in *Mogg* v. *Mogg* was followed by Romilly, M.R., in *Eddowes* v. *Eddowes*, 30 Bea. 603.

In *Gooch* v. *Gooch*, 14 Bea. 565, Romilly, M.R., considered that a gift to "all the children which A. hath or shall have" would primâ facie come within the doctrine laid down in *Mogg* v. *Mogg*, but on the whole will it was held, both by the M.R. and by Lord Cranworth (3 D. M. & G. 366), that the class was closed as soon as the youngest child for the time being attained twenty-one; see ante, p. 1683.

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*, [1882] W. N. 158.

(*r*) 1 Dick. 214; but as to this case see post, note (*t*).

daughter lawfully begotten *or to be begotten*: a child born after the death of the testator was held to be excluded.

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

(*s*) 2 My. & K. 46, affirmed 3 D. M. & G. 390, and *Townsend* v. *Early*, 28 Bea. 429, 3 D. F. & J. 1 (same will). See also *Butler* v. *Lowe*, 10 Sim. 317. As to *Defflis* v. *Goldschmidt*, 19 Ves. 566, 1 Mer. 417, see ante, p. 1680.

(*t*) "The reason lastly assigned by the M.R. is the only one which characterises this class of excepted cases. The former argument would apply equally to cases within the general rule stated ante, p. 1694." (Note by Mr. Jarman.) The rest of this note is taken verbatim from the 4th edition of this work, by Mr. Vincent, Vol. II. p. 179. "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 A. C. 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 A. C. 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." [The reference to *Sprackling* v. *Ranier* as a "direct authority" is contained in the judgment of Leach, M.R., in *Storrs* v. *Benbow*. The passage is cited in the judgment of the P.C. in *Dias* v. *De Livera*. It should be noticed that *Sprackling* v. *Ranier* is not an authority for the points on which it was cited by Leach, M.R., and Mr.

Comment on the state of the authorities.

It may, perhaps, be doubted whether the general rule stated by Mr. Jarman, so far as bequests of personalty are concerned, is in accordance with the principle adopted by the Court in dealing with gifts to children, namely, that such gifts are restricted to children living at the testator's death, unless there is some strong reason to extend the class to after-born children. Thus, as we have seen, an immediate gift to "all the children" of A. (the meaning of which on the part of the testator is obvious) is restricted to children born or en ventre at the testator's death. This being so, it is difficult to see, on principle, why mere words of futurity, such as "to be born" or "to be begotten," should extend the class, inasmuch as they can be referred to the period between the date of will and the testator's death (*u*). How the rule in *Mogg* v. *Mogg* came to be established is not clear, for the judges gave no reasons for their decision. Mr. Preston in his argument urged that the equitable rule established by *Ellison* v. *Airey*, *Heath* v. *Heath*, and other cases, did not apply to devises of land, and that the effect of the words "to be begotten" in the case at bar was to give the born children an estate which "afterwards opens to let in any other child who may be born": he treated it as an executory devise (*v*). In this state of the authorities it seems that the rule, as stated by Mr. Jarman, has not been established so far as bequests of personalty are concerned.

Words of futurity do not vary the construction of a *future* gift.

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

"Thus, in *Paul* v. *Compton* (*x*), where a testator bequeathed the residue of his personal estate in trust for his wife for life, and after her decease unto such of his daughters and such of their children as she should by will appoint, recommending her 'to provide for such child or children as may *hereafter be born* of my said two daughters'; and in default of such disposition, then in trust for the children of the daughters; Lord *Eldon* held that this power to the wife

Jarman, for the bequest was not of a legacy to each of the children of M., but of a sum of 600*l.* to the children of M. "begotten or to be begotten," equally per stirpes. C. S.]

(*u*) See *Scott* v. *Scarborough*, 1 Bea. at p. 168; *Storrs* v. *Benbow*, *Townsend* v. *Early*, and *Dias* v. *De Livera*, supra. Mr. Jarman himself admits this, ante, p. 1695, note (*t*).

(*v*) 1 Mer. pp. 682 seq.

(*w*) First ed. Vol. II. p. 100.

(*x*) 8 Ves. 375.

did not authorise her to appoint to children *not born in her lifetime*.

"So, in *Whitbread* v. *Lord St. John* (*y*), his Lordship 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 (*z*). 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 (*a*) or not.

Words of futurity do not necessarily confine devise to *future* children.

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

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

(*y*) 10 Ves. 152, followed in *Gilbert* v. *Boorman*, 11 Ves. 238.

(*z*) See ante, p. 1675. In *Eddowes* v. *Eddowes*, 30 Bea. 603, the bequest was not so confined: *Whitbread* v. *Lord St. John*, however, was not cited.

(*a*) *Scott* v. *Earl of Scarborough*, 1 Bea. 154. In *Parsons* v. *Justice* (34 Bea. 598), 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; and the testator directed 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; one of the children attained twenty-one during A.'s lifetime, and it was held by Romilly, M.R., that the class was closed at A.'s death, although B. was still alive. The decision in effect struck several material provisions out of the will, and cannot be regarded as an authority to be followed.

(*b*) *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. at p. 344. n.

(*c*) Co. Lit. 20 b.

(*d*) Accordingly in *Almack* v. *Horn*, 1 H. & M. 630, 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, and the apparently future import of the expression "to be begotten," it was held by 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. See analogous cases upon gifts to next of kin, ante, pp. 1643, 1644.

CHAPTER XLII.

"Hereafter to be born," does *not* exclude existing children.

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

In a case (*g*) 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 Wood. V.-C., that 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, 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."

"Shall happen to"

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

(*e*) *Hebblethwaite* v. *Cartwright*, Cas. t. Talb. 30; "which seems to overrule the position of Lord *Hale*, that the words 'in posterum procreandis' exclude sons born before, on account of the peculiar force of 'in posterum'; Hal. MSS. cit. Harg. and Butl. Co. Lit. 20. b, n. 3; 3 Leon. 87." (Note by Mr. Jarman.) In the case put by Lord Coke, the words "hæredibus procreandis" are words of limitation, not of purchase.

(*f*) *Harrison* v. *Harrison*, Ir. R. 10 Eq. 290 was decided on the same principle.

"Compare the principle of these cases with that of *Shuldham* v. *Smith*, 6 Dow, 22, ante, p. 1386. 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 favour 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." (Note by Mr. Jarman.) See *Freemantle* v. *Taylor*, 15 Ves. 363.

(*g*) *Re Pickup's Trusts*, 1 J. & H. 389.

(*h*) In *Christopherson* v. *Naylor*, 1 Mer. at p. 325. See also *Re Sheppard's Trust*, 1 K. & J. 269.

the rule that the prior limitation being, by what means soever, out of the case, the subsequent limitation takes place.

Intention to exclude existing children.

But the context may require expressions of this kind to be construed strictly as importing a future time (*i*). Thus, in *Early* v. *Benbow* (*j*), 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, Knight-Bruce, V.-C., held that none 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 living at the date of the codicil, although not named. Romilly, M.R., before whom the latter point was afterwards argued (*k*), 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 (*l*).

The authorities were examined by Stirling, J., in *Locke* v. *Dunlop* (*m*), where there were strict limitations in tail to the testator's second, third, fourth, fifth, and every other son and sons to be begotten, born, or en ventre sa mère at the time of his decease; it was held that the eldest son was excluded.

Express gift to posthumous child, or child en ventre.

It seems that if a testator expressly provides that in the event of a child of his being born after his death, his property shall go to that child, a child born in his lifetime (although an only child and born after the date of the will) cannot take under the gift (*n*). There is, however, authority the other way (*o*).

(*i*) It seems that in a will devising land in strict settlement the words "who shall be born in my lifetime," primâ facie, apply only to persons born after the date of the will: *Gibbons* v. *Gibbons*, 6 A. C. 471.

(*j*) 2 Coll. 342. And see *Wilkinson* v. *Adam*, 1 V. & B. pp. 422, 468.

(*k*) *Early* v. *Middleton*, 14 Bea. 453.

(*l*) *Townsend* v. *Early*, 3 D. F. & J. 1, affirming 28 Bea. 429.

(*m*) 39 Ch. D. 387. The decision was affirmed by the C. A.

(*n*) *Doe* v. *Haslewood*, 10 C. B. 544, ante, p. 678. As to the effect of a devise to a posthumous child, see post, p. 1701.

(*o*) See *White* v. *Barber*, 5 Burr. 2703. 2 Amb. 701; *Re Lindsay*, 5 Ir. Jur. 97. In *Goodfellow* v. *Goodfellow*, 18 Bea. 356, a testator made a bequest in favour of his children T. and J. and the children or child of which his wife was then enceinte; the child so referred to was born, and four years later another son; the testator subsequently made a codicil confirming his will. Romilly,

CHAPTER XLII.

Children born after date of will excluded.

Conversely, a gift to "children" may appear from the context to be confined to children previously named in the will, so as to exclude after-born children (*p*).

Words "born" and "begotten" do not exclude after-born children.

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

"Thus, where (*s*) a testator bequeathed certain funds to trustees in trust for his wife for life, and after her decease, in trust to transfer the same unto and among all and every the child and children lawfully *begotten* of the testator's nephews and niece by their then or their late respective wives and husband: Sir *J. Leach*, V.-C., held, that the bequest comprehended after-children. Indeed, his Honor's decision in their favour, seems to have been carried so far as to let in children born after the death of the widow, which was the period of distribution; in which respect the decision is clearly untenable (*t*).

Legacy to every child E. *hath* extended to future children.

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

M.R., held that the fourth son was included. The decision is a little difficult to justify, as the gift was to *personæ designatæ*, and not to a class.

(*p*) Ante, p. 1662.

(*q*) First ed. Vol. II. p. 102.

(*r*) The expression "born in due time" generally refers to the period of gestation, but in *Re Wass*, [1882] W. N. 158, Kay, J., put a somewhat artificial construction on the words.

(*s*) *Browne* v. *Groombridge*, 4 Mad. 495.

(*t*) The case is badly reported; it would seem from the argument of counsel that the fund was not divisible on the death of the wife, but at some later period. Unless this was so the decision is unintelligible, because the wife died two months before the testator.

(*u*) 2 Cox, 384. 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." Compare *Goodfellow* v. *Goodfellow*, supra.

particularly that it would have the effect of postponing the distribution of the general residue, until the number of pecuniary legatees could be ascertained.

"It is not to be inferred, however, that because the Courts in the preceding cases have refused to allow the claims of after-born children to be negatived by expressions of a loose and equivocal character, they would deny all effect to words studiously inserted with the design of restricting a gift to children to existing objects, though the reason or purpose of the restriction may not be apparent: as in the instance of a gift to children 'now living,' which we have seen is confined to children in existence at the date of the will" (*v*). And effect has sometimes been given to the word "born" or "begotten" by considering it as intended to apply to illegitimate children born or en ventre at the date of the will, where otherwise the word would have been inoperative (*w*).

Gift to children "born" or "living" at a time named.

And here it may be observed that, under a devise to children *born* at a particular time, children take a vested interest immediately on their birth, not subject to be divested by death before the specified period (*x*). But it is otherwise, of course, if the gift is to children *living* at the time. In *Fox* v. *Garrett* (*y*), 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.

Gift to children surviving testator or another person.

In *Re Clark's Estate* (*z*), a gift to A. for life and after her death to "all and every the children of the said A. who shall survive me," was held to include children born after the death of the testator, while in *Gee* v. *Liddell* (*a*) where a similar construction would have made a gift over void for remoteness, Romilly, M.R., held that the word "survive" imported that the person to survive, must be living at the death of the person who is to be survived (*b*).

Whether "born" means "procreated."

The question whether a child which is en ventre at a particular time can be considered as "born" at that time, is considered in the next section.

Children en ventre, when included.

(H) *As to Children "en ventre."*—Mr. Jarman continues (*c*): It should be observed, that in the application of the preceding rules,

(*v*) Vide ante, Chap. XII.
(*w*) See next chapter.
(*x*) *Paterson* v. *Mills*, 18 L. J. Ch. 449.
(*y*) 28 Bea. 19.
(*z*) 3 D. J. & S. 111.
(*a*) L. R., 2 Eq. 341.
(*b*) As to the construction of the word surviving, see Chap. LV.
(*c*) First ed. Vol. II. p. 103.

and indeed, for all purposes of construction, a child en ventre sa mère is considered as a child in esse (*d*). This was finally established in the case *Doe* v. *Clarke* (*e*), which was an ejectment directed by Lord *Thurlow*, in consequence of a difference of opinion between his Lordship and Sir *Lloyd Kenyon*, M.R., on the claim of a posthumous child under a gift to all the children of C. who should be *living* at the time of his death; his Lordship maintained the competency, and his Honor the incompetency, of the child en ventre sa mère to take as a 'living' child (*f*).

Held to take as objects *living* at a given period.

"The case of *Clarke* v. *Blake* afterwards came before Lord *Loughborough* (*g*), on the equity reserved, and his Lordship, in conformity to the decision of the Court of Common Pleas, held the posthumous child to be entitled. Indeed, so completely is the point now set at rest, that the claim of a child en ventre sa 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* (*h*).

Child en ventre entitled under description of children *born*.

"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 (*i*). 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.

Whether children en ventre take under a gift to *relations*;

"It should be observed, that in *Bennett* v. *Honywood* (*j*) 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

(*d*) Subject to the limitations stated below, p. 1703.

(*e*) 2 H. Bl. 399. Other cases are *Doe* v. *Lancashire*, 5 T. R. 49; *Long* v. *Blackall*, 7 T. R. 100; *Blackburn* v. *Stables*, 2 V. & B. 367, and the authorities cited post. See also *Millar* v. *Turner*, 1 Ves. sen. 85 (marriage articles).

(*f*) *Clarke* v. *Blake*, 2 B. C. C. 320; overruling *Pierson* v. *Garnet*, 2 B. C. C. 38; *Cooper* v. *Forbes*, ib. 63; *Freemantle* v. *Freemantle*, 1 Cox, 248.

(*g*) 2 Ves. jun. 673.

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

(*i*) *Trower* v. *Butts*, 1 S. & St. 181. See also *Whitelock* v. *Heddon*, 1 B. & P. 243.

(*j*) Amb. 708.

doctrine, and the principle upon which the late cases have proceeded, that a child en ventre sa mère is for all purposes a child in existence, and even *born*, conclusively negative any such distinction" (*k*).

—— under a devise to A. and his children.

It has also been suggested (*l*), 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* (*m*), 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.

Child "living."

It seems that a child en ventre is considered as a child "living" at a particular time, whether it is for the child's benefit to be so considered or not. Thus, in *Re Burrows* (*n*), where there was a gift to B. absolutely, "in case she has issue living at the death of A," and B. was delivered of a living child the day after A.'s death, Chitty, J., held that B. took absolutely.

Child en ventre is not considered "born" except for its own benefit.

The rule of construction that a child en ventre comes under the description of a child *born*, prevails wherever it makes the unborn child an object of gift, or of a power of appointment (*o*), or prevents a gift to it (*p*), or an estate otherwise vested in it, as by descent (*q*), from being divested. But it is limited to cases where the unborn child is benefited by its application. Thus, in *Blasson* v. *Blasson* (*r*), 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.

(*k*) See acc. Sugd. Pow. 653, 8th ed. *Re Gardiner's Estate*, L. R., 20 Eq. 647 (gift to brothers and sisters) is contra, and obviously wrong; see *Re Hallett*, [1892] W. N. 148. The rule also applies where the word used is "issue" *Re Burrows*, below.

(*l*) By Kelly, C.B., *Roper* v. *Roper*, L. R., 3 C. P. at p. 35.

(*m*) Post, Chap. L.

(*n*) [1895] 2 Ch. 497, following the dictum of Lord Eldon in *Thellusson* v. *Woodford*, 11 Ves. at p. 149, in which he comments on the case of *Gulliver* v. *Wickett*, 1 Ves. 105. See *Villar* v. *Gilbey*, [1907] A. C. 139.

(*o*) *Re Farncombe's Trusts*, 9 Ch. D. 652.

(*p*) *Pearce* v. *Carrington*, L. R., 8 Ch. 969.

(*q*) *Burdet* v. *Hopegood*, 1 P. W. 483, and see other cases cited 1 S. & St. pp. 182, 183.

(*r*) 2 D. J. & S. 665.

After some difference of judicial opinion, this doctrine has been conclusively established as a general rule of construction (*s*). Consequently, a son en ventre at the testator's death does not come within the operation of a clause cutting down the estate tail of every son "born" in the testator's lifetime (*t*).

"Born previously" to date of will.

And even if the gift is to a class of relations "born previously to the date of this my will," this does not shew an intention on the part of the testator to confine the benefit of the bequest to persons of whose existence he knew, so as to exclude a person en ventre at the date of the will and born afterwards (*u*).

Where number stated in will excludes child en ventre.

The fact that a child is en ventre at the date of the will may influence the construction in cases where the fact explains what might otherwise be uncertain or ambiguous (*v*).

Rule against Perpetuities.

A child en ventre is considered as a child in esse for the purpose of deciding a question of remoteness under the Rule against Perpetuities (*w*).

Revocation.

Under the old law, marriage and the birth of a posthumous child revoked a will made before marriage (*x*).

Contingent remainders.

An exception to the general doctrine with reference to children en ventre formerly prevailed in the case of contingent remainders, by reason of the technical rule which required that the feudal possession should never be vacant. This exception was abolished by stat. 10 & 11 Will. 3, c. 16, which enables posthumous children to take estates limited "by marriage and other settlements," as if born in their father's lifetime (*y*).

If a testator bequeaths to each of his children a legacy with interest to be computed from the day of his death, a child en ventre at the testator's death is only entitled to interest from the time of his or her birth (*z*).

Posthumous heir not entitled to intermediate rents.

In case of intestacy, a posthumous heir is not entitled to the intermediate rents; they belong to the qualified heir (*a*).

In *Re Corlass* (*b*), a testator left property to A. for life, and afterwards to his lawful issue: one of A.'s daughters married ten days after her father's death and had a child about six months

(*s*) *Villar* v. *Gilbey*, [1905] 2 Ch. 301; [1906] 1 Ch. 583; [1907] A. C. 139; *Re Burrowes*, [1895] 2 Ch. 497.

(*t*) Ibid.

(*u*) *Re Salaman*, [1908] 1 Ch. 4.

(*v*) *Re Emery's Estate*, 3 Ch. D. 300, post, p. 1711.

(*w*) *Re Wilmer's Trusts*, [1903] 2 Ch. 411. See ante Chap. X.

(*x*) *Doe* v. *Lancashire*, 5 T. R. 49.

(*y*) This act may have been passed in consequence of the discussion in *Luddington* v. *Kime*, 1 Ld. Raym. 203. As to the decision in *Reeve* v. *Long*, 1 Salk. 227, see ante, p. 1443.

(*z*) *Rawlins* v. *Rawlins*, 2 Cox, 425.

(*a*) *Thellusson* v. *Woodford*, 4 Ves. at p. 335; *Richards* v. *Richards*, Johns. 754; *Goodale* v. *Gawthorne*, 2 Sm. & G., 375.

(*b*) 1 Ch. D. 460.

afterwards: it was held that this child, although legitimate at the time of its birth, was illegitimate at the period of distribution, and therefore could not take.

Child illegitimate at period of distribution cannot take although afterwards legitimated.

(l) *Where Children Take in Default of Appointment.*—Where property is given to children, expressly or by implication, subject to a power of appointment which is not exercised, the class to take in default of appointment is ascertained according to the following rules (*d*).

Rules for ascertaining class taking in default of appointment.

(i.) Under a direct gift to children, subject to a power of appointment, all the children living at the death of the testator take, to the exclusion of those born afterwards (*e*). The same rule applies where the gift to the children in default is implied (*f*).

(ii.) Under a gift to A. for life with a direct gift in remainder to his children in such shares as he shall appoint, all of A.'s children take who are living at the testator's death, or born afterwards, whether the power of appointment is exercisable by deed or will, or by will only (*g*). But where there is no direct gift to the children, then only those can take by implication, in default of appointment, who could have taken under the power. Therefore, if the power is to appoint by deed or will, those children take who are living at the testator's death, or are born during A.'s lifetime (*h*), unless the power is confined to children living at A.'s death, in which case only those children take who survive A. (*i*). On the other hand, if the power is merely testamentary, only those children take by implication who survive A. (*j*).

(iii.) It sometimes happens that the tenant for life and the donee

(*d*) As to the rules for ascertaining classes of relations, next of kin, &c., see Chap. XLI., ante.

(*e*) *Coleman* v. *Seymour*, 1 Ves. sen. 209.

(*f*) *Longmore* v. *Broom*, 7 Ves. 124. *Brown* v. *Higgs*, and other cases on the implication arising from powers of selection or distribution are referred to ante, pp. 651 seq.

(*g*) *Casterton* v. *Sutherland*, 9 Ves. 445; *Pattison* v. *Pattison*, 19 Bea. 638; *Grieveson* v. *Kirsopp*, 2 Kee. 651; *Lambert* v. *Thwaites*, L. R., 2 Eq. 151; *Wilson* v. *Duguid*, 24 Ch. D. 244. The dictum of Lord Langdale in *Woodcock* v. *Renneck*, 4 Bea. at p. 196, is erroneous (L. R., 2 Eq. at p. 158), but the decision itself is correct.

(*h*) *Kennedy* v. *Kingston*, 2 J. & W. 431; *Faulkner* v. *Lord Wynford*, 15 L. J. Ch. 8; *Wilson* v. *Duguid*, 24 Ch. D. 244 (settlement). As to *Brown* v. *Pocock* 6 Sim. 257; see L. R., 2 Eq. at p. 157. In all these cases it is assumed that there is no gift over in default of appointment, which would, of course, negative the implication, ante, p. 652.

(*i*) *Stolworthy* v. *Sancroft*, 33 L. J. Ch. 708; *Re White's Trusts*, Johns. 656; *Carthew* v. *Enraght*, 20 W. R. 743; *Re Phene's Trusts*, L. R., 5 Eq. 346. As to *Winn* v. *Fenwick*, 11 Hea. 438, see L. R., 2 Eq. at p. 160.

(*j*) *Walsh* v. *Wallinger*, 2 R. & M. 78, and other cases cited ante, p. 651; but as to *Kennedy* v. *Kingston*, 2 J. & W. 431, and *Freeland* v. *Pearson*, L. R., 3 Eq. 658; see *Re Jackson's Will*, 13 Ch. D. 189, post, Chap. XXIII. As to what words will create a testamentary power, see Chap. XXIII.

of the power are different persons. In such a case, where there is a direct gift to the children, it would seem, on principle, that the class includes the children living at the testator's death and those born during the lifetime of the tenant for life. If, however, the donee of the power is required to exercise a discretion in selecting fit members of the class, (as where property is given to A. for life and after his death upon trust for such of a class as B. shall think fit, for the interest and good of the testator's family), and the donee of the power predeceases the tenant for life, then the class is ascertained at the death of the tenant for life (*k*). The same rule seems to apply if the donee of the power survives the tenant for life (*l*). But if the power is not exercisable until A.'s death, and all the children predecease him, no gift to the children can be implied (*m*).

Where there is a power of appointment to issue and a gift "in default of such appointment such issue to take equally as tenants in common"; all issue to whom appointments could have been made take, whether they live to the period of distribution or not (*mm*).

Rule where number of children is erroneously referred to.

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

Gift to A.'s *three* children, there being four, held to comprehend *all*.

"Thus, in *Tomkins* v. *Tomkins* (*o*), where a testator, after bequeathing £20 to his sister, gave to her *three* children 50*l.* each;

(*k*) *Re White's Trusts*, Johns. 656; *Re Pheue's Trusts*, L. R., 5 Eq. 346. A different explanation of the ratio decidendi in this case is suggested in *Wilson* v. *Duguid*, 24 Ch. D. 244. Compare *Moore* v. *Ffolliot*, 19 L. R. Ir. 499.

(*l*) *Carthew* v. *Enright*, 20 W. R. 743. See Chap. XLI. ante, p. 1647.

(*m*) *Halshead* v. *Shepherd*, 28 L. J. Q. B. 248; *Moore* v. *Ffolliot*, supra.

(*mm*) *Re Hutchinson*, 55 L. J. Ch. 574.

(*n*) First ed. Vol. II. p. 108. In all previous editions this section is preceded by a section dealing with the question whether a substitutional gift to the children of a legatee dying before the period of distribution is subject to the same contingency of ownership. So much of that section as is still of practical importance has been incorporated in Chap. XXXVI.

(*o*) Cit. 2 Ves. sen. at p. 564, cit. 3 Atk. p. 257, and stated from the Register's Book, 19 Ves. p. 126; *Morrison* v. *Martin*, 5 Hare, 507; *Spencer* v. *Ward*, L. R., 9

and the legatee had *four*: Lord *Hardwicke* held that they were *all* entitled.

"So, in *Scott* v. *Fenoulhett* (*p*), 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.

Bequest to the *two* daughters of T., there being three.

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

Pecuniary legacy given to *three*, held that the fourth took one of equal amount.

"So, in *Garvey* v. *Hibbert* (*r*), 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* (*s*), adopted the latter construction."

Gift to *four* with a blank as if for names, there being five.

And in *M'Kechnie* v. *Vaughan* (*t*), where 500*l*. was bequeathed "to 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 shewed 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

Eq. 507; *Re Bassett's Estate*, L. R., 14 Eq. 54. See the same principle applied to bequests to servants, in *Sleech* v. *Thorington*, 2 Ves. sen. 560.

(*p*) 1 Cox, 79, cit. 2 B. C. C. 85, where it is erroneously stated to be a bequest to *two* daughters.

(*q*) 2 B. C. C. 85, 1 Cox, 250; *Lee* v. *Pain*, 4 Hare, at p. 249; *Lee* v. *Lee*, 10 Jur. N. S. 1041.

(*r*) 19 Ves. 125.

(*s*) Supra, p. 1706.

(*t*) L. R., 15 Eq. 289.

of the state of the family, and was not enough to take the case out of the general rule.

Division into *eight*, there being seven objects only.

A numerical mistake was also corrected in *Berkeley* v. *Palling* (*u*), 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.

Where number specified in will exceeds actual number.

Mr. Jarman continues (*v*): '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 (*w*); and, in [*Lord Selsey* v. *Lord Lake* (*x*),] a trust for the five daughters of the testator's niece, E., [and the survivors and survivor of them], was held to apply to a daughter of E. (and who was the only daughter at the date of the will), and not to sons, of whom there were five at the date of the will; it being considered, it should seem, that the mere correspondence of number was not sufficient to indicate that the word 'daughters' was written by mistake for *sons*."

"To the *five* daughters of E." there being one daughter and five sons.

To the four sons of A., there being three sons and one daughter.

But, in *Lane* v. *Green* (*y*), under a bequest of 100*l.* each to the four sons of A., A. having, in fact, three sons and a daughter; Knight-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.

The case of *Harrison* v. *Harrison* (*z*) 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.

Testator's knowledge of the real number does not affect the rule.

The ground on which the Court has proceeded is that it is a mere slip in expression (*a*), 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 were held entitled to a legacy (*b*).

(*u*) 1 Russ. 496.

(*v*) First ed. Vol. II. p. 109.

(*w*) So held in *Re Sharp*, [1908], 2 Ch. 130; see also *Re Dutton*, [1893] W. N. 65. In *Re Sharp* the gift was to "the six children of A." and it took effect in favour of one.

(*x*) 1 Bea. p. 151.

(*y*) 4 De G. & S. 239.

(*z*) 1 R. & My. 71. And see *Hare* v. *Cartridge*, 13 Sim. 165.

(*a*) Per Grant, M.R., 19 Ves. at p. 126.

(*b*) *Daniell* v. *Daniell*, 3 De G. & S. 337; *Scott* v. *Fenoulhett*, 1 Cox. 79.

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 Knight-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* (*c*), 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.

Rule inapplicable unless there is uncertainty in the objects.

But, as was implied in the very statement of the rule, it 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 (*d*). 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 (*e*).

Gift to four, there being four of one marriage and two of another.

Again, in *Hampshire* v. *Peirce* (*f*), 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

(*c*) 16 Bea. 170. Criticised by Jessel, M.R., in *Newman* v. *Piercey*, post.

(*d*) *Glanville* v. *Glanville*, 33 Bea. 302. So a gift "to all the children of A., namely," &c., was confined to those named, in *Re Hull's Estate*, 21 Bea. 314.

(*e*) *Wrightson* v. *Calvert*, 1 J. & H. 250. So a gift to "five unmarried daughters" was confined to the two daughters (out of three) who were unmarried; *Re Lutton*, [1893] W. N. 65.

(*f*) 2 Ves. sen. 216.

CHAPTER XLII.

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 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 survivorship 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* (*g*), "whether this was right, but the decision on the whole case was undoubtedly correct; for the circumstances of the family, and their ages, which no doubt were admissible, were quite sufficient to have sustained the judgment without the questionable evidence" (*h*).

Newman v. Piercey.

So, in *Newman* v. *Piercey* (*i*), 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 shewed 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.

But where the gift is to the two children of W. by his late wife, and

(*g*) 5 M. & W. at p. 371, ante, Vol. I. p. 407.

(*h*) The question of the admissibility of evidence of intention was discussed by Farwell, J., in *Re Mayo*, [1901] 1 Ch. 404.

(*i*) 4 Ch. D. 41. It is singular that *Hampshire* v. *Peirce*, was not cited in this case.

W. has four children by his late wife, two of whom are daughters, the mere fact that the bequest is to the "two children" on their respectively attaining twenty-one, or marrying, is not sufficient to confine it to the two daughters (*j*).

Illegitimate children.

In *Re Mayo* (*k*), the gift was to "the three children of A. born prior to her marriage:" A. had four such children, but the testator had only acknowledged the paternity of the three younger children, and there was no evidence that he was aware of the existence of the eldest: it was held that the eldest was not included.

Where number agrees with actual number of children born at date of will.

"Of course," as Mr. Jarman points out (*l*), "if the number mentioned by the testator agree with the number existing at the date of the will, there is no ground for extending the gift to after-born children (*m*).

Gift to testator's *seven* children, naming only *six*, there being in fact eight.

"On the same principle as that which governed the preceding cases, it has been decided, that where (*n*) 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."

To the children of A. and B., or to A. and the children of B.

IV.—Gift to Children of several Persons—Distribution per stirpes or per capita.—The general rule is thus stated by Mr. Jarman (*o*): "Where a gift is to the children of several persons, whether it be to the children of A. and B. (*p*), or to the children of A. and the children of B. (*q*), they take per capita, not per stirpes." So if the gift is to A. and the children of B. (*r*). Thus, in *Kekewich* v. *Barker* (*s*), the gift was to G. B., M. B., and the

(*j*) *Re Groom*, [1897] 2 Ch. 407.

(*k*) [1901] 1 Ch. 404.

(*l*) First ed. Vol. II. p. 110.

(*m*) *Sherer* v. *Bishop*, 4 B. C. C. 55. And the fact that a child is en ventre at the date of the will does not affect the construction, if the number of children actually born agrees with the number mentioned by the testator. *Re Emery's Estate*, 3 Ch. D. 300.

(*n*) *Humpheys* v. *Humphreys*, 2 Cox, 184. See also *Garth* v. *Meyrick*, 1 B. C. C. 30; *Eddels* v. *Johnson*, 1 Giff. 22.

(*o*) First ed. Vol. II. p. 111.

(*p*) *Weld* v. *Bradbury*, 2 Vern. 705; *Lugar* v. *Harman*, 1 Cox, 250; *Pattison* v. *Pattison*, 19 Bea. 638; *Armitage* v. *Williams*, 27 ib. 346; *Mason* v. *Baker*, 2 K. & J. 567; *Peacock* v. *Stockford*, 3 D. M. & G. 73. A gift "to the children of A. and B." is ambiguous; in the cases cited the ambiguity was removed by the context or the circumstances; see post, p. 1717.

(*q*) *Lady Lincoln* v. *Pelham*, 10 Ves. 166; see also *Barnes* v. *Patch*, 8 Ves. 604; *Walker* v. *Moore*, 1 Bea. 607; *Bolger* v. *Mackell*, 5 Ves. 509; *Eccard* v. *Brooke*, 2 Cox, 213; *Heron* v. *Stokes*, 2 D. & War. 89. *Fletcher* v. *Fletcher*, 9 L. R. Ir. 301 (deed).

(*r*) *Butler* v. *Stratton*, 3 B. C. C. 367; *Dowding* v. *Smith*, 3 Bea. 541; *Rickabe* v. *Harwood*, 8 Bea. 579; *Paine* v. *Wagner*, 12 Sim. 184; *Amson* v. *Harris*, 19 Bea. 210.

(*s*) 88 L. T. 130; s.c. nom. *Capes* v. *Dalton*, 86 L. T. 129.

CHAPTER XLII.

children now living of R. H. who shall attain twenty-one, &c., and if more than one in equal shares; there were four children of R. H., who had all attained twenty-one: it was held that the fund was divisible in equal sixths between G. B., M. B., and the four children of R. H.

To "my brother A. and the children of my brother B."

"The same rule applies, where a devise or bequest is made to a person described as standing in a certain relation to the testator, and the children of another person standing in the same relation, as to 'my brother A. and the children of my brother B.' (*t*); 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. And of course it is immaterial that the objects of gift are the testator's own children and grandchildren; as where (*u*) a legacy was bequeathed 'equally between my son David and the children of my son Robert.'" So if the gift be to A. and B. and their children, or to a class and their children, or to the children and grandchildren of A., 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 (*v*).

A direction that the parents and children are to be classed together and share in equal proportions, puts the question beyond doubt (*w*).

Construction where context indicates different intention.

"But this mode of construction," as Mr. Jarman remarks, "will yield to a very faint glimpse of a different intention in the context. Thus the mere fact, that the annual income, until the

(*t*) *Blackler* v. *Webb*, 2 P. W. 383 (A. and B. were in fact sons, not brothers of the testator); *Hyde* v. *Cullen*, 1 Jur. 100; *Lenden* v. *Blackmore*, 10 Sim. 626; *Tomlin* v. *Ratfeild*, 12 Sim. 167; *Tyndale* v. *Wilkinson*, 23 Bea. 74. *Fletcher* v. *Fletcher*, 9 L. R. Ir. 301; *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 Bea. 541; *Lenden* 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 with the rule in *Wild's case*.

(*u*) *Williams* v. *Yates*, 1 C. P. Coop. 177.

(*v*) *Cunninghame* v. *Murray*, 1 De G. & S. 366; *Abbay* v. *Howe*, ib. 470; *Northey* v. *Strange*, 1 P. W. 340; *Murray* v. *Murray*, 3 Ir. Ch. Rep. 120; *Law* v. *Thorp*, 27 L.J. Ch. 649; *Re Fox's Will*, 35 Bea. 163; *Cancellor* v. *Cancellor*, 2 Dr. & S. 194; *Barnaby* v. *Tassell*, L. R., 11 Eq. 363. So where a gift is implied from a power to appoint to children *or* issue, *Re White's Trusts*, 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, Chap. L.

(*w*) *Turner* v. *Hudson*, 10 Bea. 222.

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" (*x*). And the same effect was held by Knight-Bruce, V.-C., to be 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 (*y*). And a residue given to the children of a testator's son and daughters, A., B., C., and D., was held by 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 (*z*). By this clause the testator shewed 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 (*a*). But an inference of this kind will not control a clear gift. Thus, if property is given to "all the children of A., B., and C. in equal shares and proportions," the fact that so long as A., B., and C. or any of them are living the income is divisible per stirpes, is not of itself sufficient to prevent the ultimate division of the capital from being per capita (*b*). Those cases in which property is given to two or more persons for their lives, with remainder to their children, are referred to in detail below.

In *Re Walbran* (*c*), where the property was to be equally divided between the children of A. and B. or their heirs, Joyce, J., held that one half went to A.'s children and the other half to B., the word "between" implying a division into two parts (*d*).

Substitutional gift.

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 (*e*).

(*x*) *Brett* v. *Horton*, 4 Bea. 239; see *Crone* v. *Odell*, 1 Ba. & Be. 449, 3 Dow. 61; *Overton* v. *Banister*, 4 Bea. 205. It is hardly necessary to say that a direction that children are to take their parents' share imports a division per stirpes: *Shand* v. *Kidd*, 19 Bea. 310.

(*y*) *Nettleton* v. *Stephenson*, 18 L. J. Ch. 191. See also *Archer* v. *Legg*, 31 Bea. 187. *Ayscough* v. *Savage*, 13 W. R. 373.

(*z*) *Hawkins* v. *Hamerton*, 16 Sim. 410.

(*a*) *Smith* v. *Streatfield*, 1 Mer. 358; *Bolger* v. *Mackell*, 5 Ves. 509; *Armitage* v. *Ashton*, 20 L. T. 102 (combined effect of will and codicil).

(*b*) *Nockolds* v. *Locke*, 3 K. & J. 6; *Re Stone*, [1895] 2 Ch. 196, in which the Court of Appeal declined to follow *Brett* v. *Horton* (4 Bea. 239).

(*c*) [1906] 1 Ch. 64, infra, p. 1717. In *Hawes* v. *Hawes*, 14 Ch. D. 614 (a settlement of land by deed), the stocks were distinguished.

(*d*) See the notes to *Malcolm* v. *Martin*, 3 Br. C. C. 50, where it seems to have been assumed that the word "betwixt" did not produce a division per stirpes.

(*e*) *Price* v. *Lockley*, 6 Bea. 180; *Burrell* v. *Baskerfield*, 11 Bea. 525; *Congreve* v. *Palmer*, 16 Bea. 435; *Timins* v. *Stackhouse*, 27 ib. 434; *Re Cleland's Trusts*, 7 L. R. Ir. 74; *Re Battersby's Trusts*, [1896] 1 Ir. 600, where the children took as joint tenants. But see *Atkinson* v. *Bartrum*, 28 Bea. 219.

Quasi-substitutional gift.

And even where the gift is not, strictly speaking, substitutional by reason of some of the first takers being dead at the date of the will, or by reason of some of the children being expressly excluded from participation in the gift, the fact that the original legatees are to be taken into account in the distribution of the property may shew that the primary division is to be per stirpes (*f*).

To A. and B. for their lives, remainder to their children.

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 in common. If the latter, then, as the share of any one will, on his decease, go over immediately, without waiting for the other shares, 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.

First, where A. and B. are tenants in common.

Accordingly, where property is given to A., B., and C. for their lives as tenants in common, and "afterwards" or "at their death" it is given to their children in equal shares, this is generally construed to mean that "at their deaths" it is to go to their respective children; that is, the division is per stirpes (*g*). But of course this construction is inadmissible if the income is expressly disposed of until the death of all the tenants for life, and the capital is then given to all the children in equal shares (*h*); in such a case the division will be per capita, unless there are words in the ultimate gift requiring a division per stirpes (*i*).

(*f*) *Gowling* v. *Thompson*, L. R., 11 Eq. 366 n.; *Minchell* v. *Lee*, 17 Jur. 727, stated ante, p. 1594, n. (*l*); *Davis* v. *Bennett*, 4 D. F. & J. 327, stated ante, p. 1593.

(*g*) See accordingly *Pery* v. *White*, Cowp. 777; *Tancire* v. *Pearkes*, 2 S. & St. 383; *Willes* v. *Douglas*, 10 Bea. 47; *Flinn* v. *Jenkins*, 1 Coll. 364; *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 Bea. 417; *Hunt* v. *Dorsett*, 5 D. M. & G. 570; *Coles* v. *Witt*, 2 Jur. N. S. 1226; *Ayscough* v. *Savage*, 13 W. R. 373; *Waldron* v. *Boulter*, 22 Bea. 284; *Re Notts*, 26 L. T. 679; *Turner* v. *Whitaker*, 23 Bea. 196; *Archer* v. *Legg*, 31 Bea. 187; *Milnes* v. *Aked*, 6 W. R. 430; *Wills* v. *Wills*, L. R., 20 Eq. 342; *Re Hutchinson's Trusts*, 21 Ch. D. 811.

In the third edition of this work, by Messrs. Wolstenholme and Vincent, it was pointed out, as an argument in favour of a division per stirpes, "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 certainly be entitled to participate in a share of any tenant for life who died afterwards." On the other hand it must be remembered that if the stirpital construction is adopted, and one of the tenants for life dies without issue, there may be an intestacy as to his share; and this is not allowed to affect the construction: *Re Campbell's Trusts*, 33 Ch. D. 98.

(*h*) As in *Nockolds* v. *Locke* and *Re Stone*, supra. See also *Re Rubbins*, 78 L. T. 218, 79 L. T. 313, where "after the death of A., B. and C." was held to mean after the death of all of them.

(*i*) As in *Re Campbell's Trusts*, 33 Ch. D. 98, where the gift was to the children of "each" of the tenants for life.

Contrary intention.

And in any case an intention that the children should take per capita, however improbable, must of course prevail if clearly indicated. Thus, in *Stephens* v. *Hide* (*j*), 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 shew his intent, that whether there was one or more children, in either case the child or children should take the whole. *Abrey* v. *Newman* (*k*), 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 the age of twenty-one, 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 (*l*). And in *Scarbey* v. *Goldie* (*m*), the Court of Appeal held that the argument from inconvenience on which the decisions in *Willes* v. *Douglas* and similar cases are based, does not apply to a will which has been carefully framed and is free from ambiguity. The cases of *Lowe* v. *Knowles* (*n*) and *Stevenson* v. *Gullan* (*o*) are also examples of the per capita construction following almost inevitably from the language of the will.

Where remainder is given to children of some only of the tenants for life.

Where the property is given to several for life and afterwards to the children of some only of the tenants for life, the children are entitled per capita. So, where a testator gave the interest to be divided among four named persons for their lives, and the property to "devolve" on the children 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 (*p*). In such a case it is obvious that there may be some additional members of the class at the time each

(*j*) Ca. t. Talb. 27. But see *Waldron* v. *Boulter*, 22 Bea. 284. In *Smith* v. *Streatfield*, 1 Mer. 358, Sir W. Grant, M.R., after some hesitation, felt bound by the explicit language of the will.

(*k*) 16 Bea. 431. See also *Peacock* v. *Stockford*, 3 D. M. & G. 73.

(*l*) In *Sarel* v. *Sarel*, 23 Bea. 87, the gift was to the grandchildren by name. In *Wills* v. *Wills*, L. R., 20 Eq. 342, the property was, at the death of A. and B., "to be divided equally between the children of A. and B.," which makes the case almost indistinguishable from *Abrey* v. *Newman*, post.

(*m*) 1 Ch. D. 380.

(*n*) 3 Y. & C. 246, stated post, p. 1796.

(*o*) 18 Bea. 590.

(*p*) *Swan* v. *Holmes*, 19 Bea. 471.

share falls in, but that is an inconvenience (if it be one) whi frequently arises on wills of this description (*q*).

Secondly, where A. and B. are joint tenants.

On the other hand, if the tenants for life take jointly, or (whi is for this purpose equivalent) as tenants in common with expre or implied survivorship, the whole subject of the devise remai undivided until the death of the survivor, and then goes over in mass. In this case there is but one period of distribution, an presumably one class of objects; who therefore primâ facie tak per capita (*r*).

Successive generations.

Sometimes grandchildren as well as children are referred to i the gift. Thus, in *Barnaby* v. *Tassell* (*s*), the gift was to the brothe of A. for life, with remainder to their children and grandchildre it was held that the families of the brothers took per stirpes, bu that the children and grandchildren of each brother took per capit inter se. If, however, there is a substitutional gift to children o grandchildren, with a reference to the share which the parent o grandparent would have been entitled to if living, no grandchil can take in competition with its parent (*t*).

"Children and their issue."

A gift to "the children of A. and their issue" primâ facie mean the descendants of A. living at the period of distribution, pe capita (*u*). But the word "and" sometimes has the effect o making a gift to issue substitutional (*w*).

To the younger sons of J. and S., J. having none.

Mr. Jarman continues (*x*): "Where (*y*) a testator bequeathed hi 'fortune' to be equally divided between any second or younge sons of his brother J. and his sister S.; and in case his said brothe and sister should not leave any second or younger son, the testato gave and bequeathed his said fortune to his said brother and sister it was held that there being no son of J., and but one younger so of S., such younger son took the whole.

Gift to A. and B.'s children.

"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

(*q*) Per Romilly, M.R., ibid., at p. 478.

(*r*) *Parker* v. *Clarke*, 6 D. M. & G. 104; *Parfitt* v. *Hember*, L. R., 4 Eq. 443; *Taaffe* v. *Conmee*, 10 H. L. C. 64; *Begley* v. *Cook*, 3 Drew. 662. It seems doubtful whether *Malcolm* v. *Martin* (3 B. C. C. 50) is now a binding authority, having regard to *Arrow* v. *Mellish*, 1 De G. & S. 355, and *Wills* v. *Wills*, L. R., 20 Eq. 342, supra.

(*s*) L. R., 11 Eq. 363.

(*t*) *Palmer* v. *Crutwell*, 8 Jur. N. S. 479; *Powell* v. *Powell*, 28 L. T. 730; *Re Orlon's Trust*, L. R., 3 Eq. 375. Compare *Ross* v. *Ross*, 20 Bea. 645, ante, p. 1598.

(*u*) *Lea* v. *Thorp*, 27 L. J. Ch. 649; *Cancellor* v. *Cancellor*, 2 Dr. & S. 194.

(*w*) See Chap. XXXVI.

(*x*) First ed. Vol. II. p. 112.

(*y*) *Wicker* v. *Mitford*, 3 Br. P. C. 442. See *Malcolm* v. *Martin*, 3 Br. C. C. 50.

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 (*z*).

"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" (*a*).

The rule is, perhaps, laid down too widely by Mr. Jarman. It has no doubt been said by eminent judges that the proper grammatical meaning of a gift "to the children of A. and B." is "to B. and the children of A." (*b*), on the theory that if the testator had intended to indicate the children of B. he ought to have said: "to the children of A. and of B." (*c*); but, on the other hand, if he had intended to indicate B. individually, he ought to have said: "to the children of A. and to B." (*d*). The cases in which a gift "to the children of A. and B." has been held to refer to B. individually seem all to have been decided on special grounds. In *Lugar* v. *Harman* (*e*), the circumstance that A. was dead at the date of the will, made it reasonable to infer that this was the reason why the testator gave a share of the property to A.'s children, but there was no apparent reason why he should give the other share to the children of B. who was living (*f*).

"To the children of A. and B."

In *Re Featherstone's Trusts* (*g*), the testator, among other legacies, gave a legacy to "the children of A." by name, and another legacy to B., and gave the residue of his property "unto and equally amongst all the children of the said A. and the said B."; it was held that this meant B. individually and not his children. Again, in *Re Walbran* (*h*), a testatrix directed property "to be equally divided between the children of F. W. and J. W. or their heirs."

(*z*) 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." (Note by Mr. Jarman.)

(*a*) *Lugar* v. *Harman*, 1 Cox, 250. See also *Re Ingle's Trusts*, L. R., 11 Eq. pp. 578, 590 (where the construction was aided by a reference to "the legacy left to B."); *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.

(*b*) Assuming, of course, that A. and B. are not husband and wife; supra, note (*z*); and per Joyce, J., in *Re Walbran*, [1906] 1 Ch. at p. 66.

(*c*) *Peacock* v. *Stockford*, 3 D. M. & G. 73, where the gift was for the benefit of the children of every deceased tenant for life and "of" the survivors or survivor of the other tenants for life; it was held that the word "of" referred to "children." *Re Walbran*, supra.

(*d*) Per Wood, V.-C., in *Mason* v. *Baker*, 2 K. & J. at p. 570.

(*e*) Supra, n. (*a*).

(*f*) The same argument justifies the decision in *Hawes* v. *Hawes*, 14 Ch. D. 614 (voluntary settlement); *Re Davies' Will*, 29 Bea. 93, may be disregarded: see post, note (*k*).

(*g*) 22 Ch. D. 111.

(*h*) [1906] 1 Ch. 64.

F. W. and J. W. were nephews of the testatrix. F. W. had six children, but for some years before the date of the will he had deserted his wife and children: J. W. had two children. It was held, first, that the gift was to J. W. and the children of F. W., and secondly, that J. W. took one half and the children of F. W. the other.

Where there is no reasnn to prefer one parent.

But where there is nothing to shew that the testator meant to draw a distinction between the two persons named in the gift—and à fortiori where he shews an intention to treat them equally—it seems that the proper construction of a gift "to the children of A. and B." is that it means the children of both. Thus, in *Mason* v. *Baker* (*i*), the testator gave equal legacies to A. and B., his brother and sister, and gave his residue "to all the children of my brother A. and my sister B., to be equally divided amongst them, share and share alike," it was held by Wood, V.-C., that the children of both took in equal shares. The construction would apparently have been the same even if no legacies had been given to A. and B. (*j*). Whether the construction would have been different if A. had been a relation of the testator, and B. a stranger in blood, may be doubted (*k*).

Gift explained by state of facts.

Sometimes the construction of a gift "to the children of A. and B." is made clear by the circumstances. Thus, if at the date of the will and the testator's death neither A. nor B. has a child, the gift takes effect in favour of the children which both or either may at any time have (*l*). So if A. is living but B. is, to the knowledge of the testator, dead leaving children, the gift must mean "the children of A. and the children of B." (*m*).

Whether dying without children means *having* or *leaving* a child.

V.—Limitation over, as referring to having or leaving Children.—Mr. Jarman continues (*n*): "Another subject of inquiry is, whether a gift over, in case of a prior devisee or legatee dying without *children* (*o*), means without *having had* or without *leaving* a child.

(*i*) 2 K. & J. 567.

(*j*) See per Lord Eldon in *Lincoln* v. *Pelham*, 10 Ves. at p. 176: "A bequest to the younger children of A. and to the younger children of B. means the same exactly as a bequest to the younger children of A. and B."

(*k*) This was the case in *Stummvoll* v. *Hales*, 34 Bea. 124, where, however, the decision seems to have been turned on a misconception of *Lugar* v. *Harman*. As Jessel, M.R., observed in *Hawes* v. *Hawes* (14 Ch. D. 614) the decisions in *Re Davies* and *Stummvoll* v. *Hales* may be set off against one another.

(*l*) *Weld* v. *Bradbury*, 2 Vern. 705, generally cited on another point: ante, p. 1687.

(*m*) Per Joyce, J., in *Re Walbran*, [1906] 1 Ch. at p. 66.

(*n*) First ed. Vol. II. p. 112.

(*o*) "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." (Note by Mr. Jarman.)

Upon A. and B. both dying without children.

"In *Hughes* v. *Sayer* (*p*), a testator bequeathed personalty to A. and B., and upon either of them dying without children, then to the survivor; and if both should die without children, then over; and it was held to mean children living at the death. The great question in this case was, whether the word 'children' was not used as synonymous with *issue* (*q*) 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 (*r*).

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

And this construction has been adopted when, in another part of the will, the testator has used words signifying death without having ever had any children (*t*).

Whether principle in favour of vesting affects construction.

Where the gift is to A. absolutely, with a gift over in the event of his dying without child or children, there being no gift to the child or children, the general principle in favour of absolute vesting as soon as possible affords an argument for construing the gift over as intended to take effect only if A. never has a child, so that the gift to him becomes indefeasible as soon as a child is born. But in a case of this kind (*u*), Byrne, J., refused to allow the construction of the will to be affected by the principle referred to, and held that "die without child or children" meant die without leaving a child or children (*v*).

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

(*q*) As to which, see *Doe* d. *Smith* v. *Webber*, 1 B. & Ald. 713, and ante, p. 1660.

(*r*) But see *Massey* v. *Hudson*, 2 Mer. 130.

(*s*) 3 B. P. C. Toml. 365.

(*t*) *Jeffreys* v. *Connor*, 28 Bea. 328. In *Re Hambleton*, [1884] W. N. 157, the words "die without children" were read as meaning "die without having had a child," but the decision is unintelligible.

(*u*) *Re Booth*, [1900] 1 Ch. 768.

(*v*) Under the Conveyancing Act, 1882, s. 10, A.'s estate would become indefeasible on a child attaining twenty-one, whether it survived A. or not, ante, p. 1434, n. (*l*), and the Court made a declaration that the original legatee was absolutely entitled, subject to the gift over in the event of her not

"Children" held to mean "issue."

Where land is devised to A. absolutely, subject to a gift over in the event of his dying without child or children, it seems that A. takes an estate in fee simple, defeasible in the event of his leaving no issue living at his death (*x*), "child or children" being treated as equivalent to "issue."

There is authority for saying that the same construction applies in the case of personalty. The point was taken, but not decided, in *Hughes* v. *Sayer* (*y*). In *Re Synge's Trusts* (*z*), however, where the gift over was to take effect in the event of the original legatee dying without leaving children, "children" was held to mean "issue." If this principle is correct, it would seem that the declaration made in *Re Booth* (*a*) was premature, for the child of the original legatee might die in her lifetime before attaining twenty-one, leaving issue surviving the original legatee, and then the case would resemble *Re Synge's Trusts*.

"Without children" importing indefinite failure of "issue."

Cases have occurred in which a testator under the old law has devised land to A. for life or some other limited interest, with an executory devise to take effect in the event of his dying without children, and this has been held to give A. an estate tail, "children" being treated as equivalent to "issue," and the gift over being held to import an indefinite failure of issue (*b*). It was probably on this ground that Knight-Bruce, V.-C., decided *Bacon* v. *Cosby* (*c*); there a testator, who died in 1837, gave his real and personal estate to his daughter, with a gift over in case of her dying without children, and it was held that the daughter took an estate tail in the realty and an absolute interest in the personalty.

"Without having children," how construed.

"But the words *without having children*," as Mr. Jarman points out (*d*), "are construed to mean, as they obviously import, without having *had* a child.

"Thus, in the case of *Weakley* d. *Knight* v. *Rugg* (*e*), 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* (*f*), a residue which was given to A.

having any child who should survive her, or attain twenty-one in her lifetime, but as to this declaration see above in text.

(*x*) *Parker* v. *Birks*, 1 K. & J. 156, in which the earlier cases of *Wyld* v. *Lewis*, 1 Atk. 432, *Doe* v. *Webber*, 1 B. & Ald. 713, and *Raggett* v. *Beaty*, 5 Bing. 243 are cited, post, p. 1722.

(*y*) Supra, p. 1719.

(*z*) 3 Ir. Ch. 379, post, p. 1722.

(*a*) Ante, p. 1719, note (*v*).

(*b*) *See Raggett* v. *Beaty*, 5 Bing. 243, post, Chap. L., p. 1922.

(*c*) 4 De G. & S. 261.

(*d*) First ed. Vol. II. p. 113.

(*e*) 7 T. R. 322. See also *Findon* v. *Findon*, 1 De G. & J. 380; *Jeffreys* v. *Conner*, sup.

(*f*) 16 Ves. 413.

'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.'"

In *Bell* v. *Phyn* (*h*), where the bequest was to the testator's three children A., B., and C., but in case of the death of any of them without being married and having children, then over, Grant, M.R., held that the share of A. was absolutely vested in her upon the birth of a child.

In *Stone* v. *Maule* (*i*), the bequest was to A. absolutely, with a gift over in the event of his dying without having any child or children; he died without ever having had a child; it was argued that "child or children" was synonymous with "issue," and that A. (the will being subject to the old law) consequently took absolutely (*j*), but it was held that the gift over took effect.

Word "leaving" refers to period of death.

Mr. Jarman continues (*k*): "The word *leaving* obviously points at the period of death (*l*). Thus a gift to such children or issue as a person may leave, is held to refer to the children or issue who shall survive him, in exclusion of such objects as may die in his lifetime; and this construction was applied in a recent case (*m*) to 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."

Whether "children" can be read "issue."

It is hardly necessary to say that the rules above stated as applicable to those cases where the gift is to A. absolutely, with a gift over in the event of his dying without children (where "without children" means "without leaving children") (*n*), apply to those cases where the gift over is expressly made to take effect in the event of A. dying without leaving children: in such a case the gift to A. does not become indefeasible on his having a child (*o*). Whether the gift over takes effect on the death of A. leaving no

(*h*) 7 Ves. 453. "Without being married" was construed to mean "without having ever been married"; and the word "and" as "or," ante, Chap. XVIII.

(*i*) 2 Sim. 490.

(*j*) Apparently on the ground which prevailed in *Bacon* v. *Crosby*, supra, p. 1720.

(*k*) First ed. Vol. II. p. 114.

(*l*) See *Read* v. *Snell*, 2 Atk. at p. 647.

(*m*) *Cross* v. *Cross*, 7 Sim. 201, (1834).

(*n*) Ante, pp. 1719, 1720.

(*o*) *Re Ball*, 40 Ch. D. 11 ("without leaving issue male"); *Armstrong* v. *Armstrong*, 21 L. R. Ir. 114 ("leaving no family") both cited post, p. 1725.

child, but only remoter issue, is another matter. The following is the present state of the authorities.

Realty.

Where land is devised to A. absolutely, subject to a gift over in the event of his dying and leaving no child or children, "child or children" is read as meaning "issue," so that the gift over does not take effect if A. leaves issue living at his death (*p*).

Personalty.

In *Re Synge's Trusts* (*q*), there was a bequest of personalty to A. absolutely, with a gift over if she died without leaving children; she died leaving no child, but a grandchild, living at her death; it was held that "children" meant "issue," and that the gift over failed. The decision seems correct. In *Re Booth* (*r*), which at first sight appears to be inconsistent with it, the point did not arise.

Indefinite failure of issue.

The cases in which a gift over on death without leaving children was, under the old law, held to import a general failure of issue, and therefore to give the original devisee an estate tail in realty, or an absolute interest in personalty, are considered elsewhere (*s*).

In case of two persons, husband and wife, leaving no children.

Mr. Jarman continues (*t*): "Where the gift over is in the event of *two* persons, husband and wife, not leaving children, the question arises, whether the words are to be construed, in case both shall die without leaving a child living at the death of *either*, or in case both shall die without leaving a child, who shall survive *both*.

"As in the case of *Doe* d. *Nesmyth* v. *Knowls* (*u*), 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 for ever; it was held, that the fee simple became vested under the last devise, when the survivor of *William* and *Mary* (namely William), died leaving no children of their marriage surviving him, though a child was living at the death of Mary, Mr. Justice *Bayley*, observing—'they cannot be said to leave no children till both are gone.'

Distinction where they are not husband and wife.

"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 respective decease,' supposing, of course, that the testator is not contemplating a marriage between these persons, and their having

(*p*) *Doe* v. *Webber*, 1 B. & Ald. 713; *Doe* v. *Simpson*, 4 Bing. N. C. 333; s.c. in Cam. Sc. 3 M. & Gr. 929. See *Parker* v. *Birks*, 1 K. & J. 156, ante, p. 1720. In *Mathews* v. *Gardiner*, 17 Bea. 254, the point did not arise.

(*q*) 3 Ir. Ch. R. 379.

(*r*) [1900] 1 Ch. 768, ante, p. 1719.

(*s*) Chap. LII. See *Bacon* v. *Cosby*, 4 De G. & S. 261, ante, p. 1720.

(*t*) First ed. Vol. II. p. 115.

(*u*) 1 Barn. & Ad. 324.

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."

"Leaving" sometimes construed "having," so as not to divest previous gift.

An important exception to the general rule is thus stated by Mr. Jarman (*x*): "Although, as we have seen, the word 'leaving' primâ 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."

Maitland v. *Chalie*.

Mr. Jarman does not cite any authority in support of this proposition, but it is well established. Besides the favour always shewn to provisions for children, it requires very strong words to defeat a prior vested gift (*y*). Thus, in *Maitland* v. *Chalie* (*z*), 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-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*,

(*x*) First ed. Vol. II. p. 114.

(*y*) 8 Jur. 14. The doctrine was originally applied to settlements, in order to give younger children a vested interest in their portions on attaining twenty-one, and is therefore sometimes referred to as the rule in *Emperor* v. *Rolfe* (1 Ves. sen. 208) or the rule in *Howgrave* v. *Cartier* (3 V. & B. 79).

(*z*) 6 Mad. 243.

and *Powis* v. *Burdett* (*a*), he declared that the two daughters having attained twenty-one took vested interests (*b*).

And it is now well settled that if there is a gift by will to A. for life, and after A.'s death to his children in terms which would give them an absolute interest in A.'s lifetime, and then a gift over simply "if A. dies without leaving children," the word "leaving" is so to be construed as not to destroy any prior vested interest: that is to say, "without leaving children" should be read as "without leaving children who have not attained vested interests" (*c*). The rule is not confined to the case in which the tenant for life stands in loco parentis to the legatee in remainder (*d*); nor does it necessarily make a difference that the testator himself knew of the existence of a child, and that his knowledge appears upon the face of the will (*e*).

In *Maitland* v. *Chalie* (*f*), a specified time for vesting was appointed, but, as appears from *Re Cobbold* (*g*), the appointment of a specified term for vesting, though it may strengthen the case (*h*), 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 (*i*).

Cases in which there is no ambiguity in the term used, as "without leaving any issue at the time of her decease" (*j*), or "should all his children die before himself" (*k*), are not within the rule. So also where the expression is "die without leaving any child her surviving" (*l*).

Rule does not necessarily apply where no gift to children.

The rule in *Maitland* v. *Chalie* does not necessarily apply to cases where the gift which is liable to be divested is not to the children, but to the person on whose death without leaving children the gift over is to take effect: as where property is given to A.

(*a*) Post, Chap. LVII.

(*b*) This statement of *Maitland* v. *Chalie*, and the sentence which immediately precedes it, were cited with approval by North, J., in *Re Ball* (59 L. T. 801; post, p. 1725), from the 4th edition of this work, where they are to be found in Chap. XLIX., corresponding to Chap. LVII., post.

(*c*) *Re Cobbold*, [1903] 2 Ch. 299; *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 Sondes' Will*, 2 Sm. & Gif. 416.

(*d*) *Casamajor* v. *Strode*, [1843] 8 Jur. 14.

(*e*) *Re Cobbold*, supra.

(*f*) 6 Mad. 243.

(*g*) [1903] 2 Ch. 299.

(*h*) See *Gibbons* v. *Langdon*, 6 Sim. 260.

(*i*) *Treharne* v. *Layton*, L. R., 10 Q. B. 459 in Ex. Ch. affirming Q. B.; *Re Bradbury*, 90 L. T. 824. See also *White* v. *Hill*, L. R., 4 Eq. 265; *Re Jackson's Will*, 15 Ch. D. 190; *Marshall* v. *Hill*, 2 M. & Scl. 608; *Barkworth* v. *Barkworth*, 75 L. J. Ch. 754. As to *ex parte Hooper*, 1 Drew. 264, vide post, Chap. LII.

(*j*) *Young* v. *Turner*, 1 B. & S. 550.

(*k*) *Chadwick* v. *Greena"*, 3 Giff. 221.

(*l*) *Re Hamlet*, 38 Ch. D. 183; 39 Ch. D. 426.

absolutely, followed by a gift over in the event of his dying without leaving children; here there is no gift to the children, and if A. has no child, or has children who all predecease him, the gift over takes effect. To hold otherwise would be merely to alter the event upon which the divesting of a gift previously vested is to take place (*m*). But the rule applies if the result of reading the words "without leaving" as equivalent to "without having had" is to make the gift over fit in with the intention of the testator as previously expressed, and avoid divesting a previously vested gift (*n*).

Gift over of an annuity on death without leaving issue construed strictly.

And 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 (*o*).

"Leaving" not construed "having had" if prior gift to children is contingent.

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* (*p*), 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, to be paid and payable at twenty-one, 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.

But if one child survives parent, all will take;

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

(*m*) Per North, J. (affirmed by C.A.), in *Re Ball*, 59 L. T. at p. 800. The report of the judgment of Cotton, L.J., in this case in 40 Ch. D. 11 is misleading (see *Barkworth* v. *Barkworth*, 75 L. J. Ch. 754). The decision of Bacon, V.-C., in *White* v. *Hight*, 12 Ch. D. 751, is overruled. See also *Armstrong* v. *Armstrong*, 21 L. R. Ir. 114 ("leaving no family"); *Clay* v. *Coles*, 57 L. T. 682 ("without issue").

(*n*) As in *Re Bogle*, 78 L. T. 457, stated ante, p. 1370.

(*o*) *Re Hemingway*, 45 Ch. D. 453.

(*p*) 23 L. J. Ch. 1004, affirming Wood, V.-C., 17 Jur. 645. The will contained a declaration that the interests of the children should be considered vested, but it was held to be too ambiguous to affect the construction.

generally, upon a contingency (viz. "leaving any child") which would have happened. And this appears to be the rule (*q*).

—unless excluded by context.

But if after introductory words importing contingency (as "in case he shall leave any child or children"), the gift itself is to *such* children, it is confined to those who themselves survive their parent (*r*). 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 (*s*). 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 (*t*). 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 (*u*), especially if there is an accumulation of such indications (*v*).

Gift over to issue of legatee dying leaving issue.

The general rule seems to be that if property is given to a person contingently on his attaining twenty-one, or the like, with a gift over to his issue in the event of his dying leaving issue, this means death at any time, and consequently the original gift does not vest indefeasibly unless and until he dies without leaving issue (*w*).

VI.—Gifts to Younger Children—Gifts excluding Eldest Son.—Mr. Jarman continues (*x*): "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

(*q*) *Boulton* v. *Beard*, 3 D. M. & G. 608 (no gift over); *M'Lachlan* v. *Taitt*, 28 Bea. 407, 2 D. F. & J. 449. *Winn* v. *Fenwick*, 11 Bea. 438, contra, is questioned by Lord St. Leonards, Pow. 596, 8th ed.

(*r*) *Sheffield* v. *Kennett*, 27 Bea. 207, 4 De G. & J. 593; *Re Watson's Trusts*, L. R., 10 Eq. 36. See also *Re Heath's Settlement*, 23 Bea. 193; *Joyes* v. *Savage*, L. R., 10 Ch. 555. *Bryden* v. *Willett*, L. R., 7 Eq. 472, has not been followed.

(*s*) *Selby* v. *Whittaker*, 6 Ch. D. 239, ante, p. 1390.

(*t*) Per James, L.J., 6 Ch. D. at p. 249.

(*u*) *Wilson* v. *Mount*, 19 Bea. 292. See also *Stevens* v. *Pyle*, 30 Bea. 284; *Hedges* v. *Harpur*, 3 De G. & J. 129.

(*v*) *Selby* v. *Whittaker*, supra.

(*w*) *Re Schnadhorst*, [1902] 2 Ch. 234, following *O'Mahoney* v. *Burdett*, L. R., 7 H. L. 388, and distinguishing *Home* v. *Pillans*, 2 Myl. & K. 15. All these cases are referred to in Chap. LVII.

(*x*) First ed. Vol. II. p. 116.

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* (*y*), to the exclusion of a child taking the estate, whether elder or not (*z*). 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 (*a*).

Where "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 (*b*); and, by parity of reason, the appointee of the estate, though a younger son, will be excluded" (*c*).

So if land is devised to A. for life, with remainder to his first and other sons in tail, charged with portions for his younger children: if the eldest son dies in A.'s lifetime without issue, the second son, having thus become the eldest, will not take a share of the portions, but the representatives of the deceased eldest son will (*d*).

Exclusion of eldest son or son entitled to estate.

A similar result follows where the gift is to all the testator's children, exclusive of an eldest son, or exclusive of a son (or child) entitled to the estate (*e*), but not (it seems) where the person who is the eldest son at the date of the will is excluded by name (*f*).

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 (*g*). 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

(*y*) *Chadwick* v. *Doleman*, 2 Vern. 528; *Beale* v. *Beale*, 1 P. W. 244; *Butler* v. *Duncomb*, ib. 448; *Heneage* v. *Hunloke*, 2 Atk. 456; *Pierson* v. *Garnet*, 2 B. C. C. 38.

(*z*) *Bretton* v. *Bretton*, Freem. Ch. 158, pl. 204, 3 Ch. Rep. 1, 1 Eq. Ca. Ab. 202, pl. 18. The intent to be imputed to the parties to a marriage settlement "is a desire to provide equality for the children, that one child should not take a double portion, and that no child should be excluded": per Lord Hatherley, L.C., in *Collingwood* v. *Stanhope*, L. R., 4 H. L. at p. 52.

(*a*) *Hall* v. *Luckup*, 4 Sim. 5. See the cases cited in note (*p*). For the exceptions to the general rule, see post, p. 1729.

(*b*) *Duke* v. *Doidge*, 2 Ves. 203 n.

(*c*) In such a case the younger son takes under the settlement; but if the settlement is revoked, and a new settlement made, the principle does not apply; see *Wandesford* v. *Carrick*, post.

(*d*) See *Ellison* v. *Thomas*, 1 D. J. & S. 18, and other cases cited post, p. 1733.

(*e*) See *Ellison* v. *Thomas*, 1 D. J. & S. 18, and other cases cited, post, pp. 1733, 1734. These are chiefly cases of settlement by deed, but there is no difference between deeds and wills in this respect: *Shuttleworth* v. *Murray*, [1901] 1 Ch. 819.

(*f*) *Wood* v. *Wood*, L. R., 4 Eq. 48. The case was not really within the rule now under consideration, as the gift was by a person not in loco parentis.

(*g*) See per Wood, V.-C., *Sing* v. *Leslie*, 2 H. & M. at p. 87; per Lord Langdale, *Peacocke* v. *Pares*, 2 Kee. at p. 699.

the rule [illegible] the settlement is destroyed, and though he becom eldest [illegible] act, it can never give him the estate; and shou he afterwards acquire the estate by a new title, as by descer or devise from the elder brother, yet as this will not be under t settlement, it will not exclude him from participating in portio provided by the will or settlement for younger children (*h*). N will a younger son who takes by virtue of the exercise of a pow of revocation and new appointment, be excluded, if he afterwar becomes an eldest son, for he does not take as eldest son, but b a new title (*i*). But the eldest son, who has concurred with h father in resettling the property, will be excluded, if by the r settlement he takes back substantially what the settlement gav him; as a life-estate with remainder to his issue in tail, instead o the estate tail in himself; or the property burdened with a charg of which he has had the benefit (*j*), or if he joins with his father i raising money by mortgage of the estate, and receives out of it th equivalent in value of a younger child's share (*k*). And the fac 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 righ to participate in the portions (*l*).

Only one "eldest son."

Only one person can be excluded as "eldest son" under the rul in question: consequently where the eldest son joined with his father in a resettlement under which he received benefits equal in value to a younger child's portion, and died without issue before succeeding to the estate, it was held that his representatives were excluded from sharing in the portions fund, and that the younger son, who succeeded to the estate, was consequently not excluded (*m*).

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 (*n*). But in *Re Bayley's Settle-*

(*h*) *Spencer* v. *Spencer*, 8 Sim. 87; *Macaubrey* v. *Jones*, 2 K. & J. 684 (virtually overruling *Peacocke* v. *Pares*, 2 Kee. 689); *Tennison* v. *Moore*, 13 Ir. E. 424; *Ex parte Smyth*, 12 Ir. Ch. 487. 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; *Adams* v. *Beck*, 25 Bea. 648.

(*i*) *Wandesford* v. *Carrick*, 5 Ir. R. Eq. 486.

(*j*) *Collingwood* v. *Stanhope*, L. R., 4 H. L. 43. And see per Lord Selborne, *Meyrick* v. *Laws*, L. R., 9 Ch. at p. 242; and per Kay, J., *Domvile* v. *Winnington*, 26 Ch. D. at p. 386. *Re Stawell's Trusts*, [1909] 1 Ch. 534.

(*k*) *Re Fitzgerald's S. E.*, [1891] 3 Ch. 394. See *Rooke* v. *Plunkett*, [1902] 1 Ir. 299.

(*l*) *Reid* v. *Hoare*, 26 Ch. D. 363 (settlement), where an estate charged with 5000*l.* for portions for children other than an eldest son, was sold for 2500*l.* before the eldest son came in possession.

(*m*) *Re Fitzgerald's S. E.*, [1891] 3 Ch. 394. *Re Rivers's Settlement Trust*, 40 L. J. Ch. 87. *Rooke* v. *Plunkett*, [1902] 1 Ir. 299. Compare *Domvile* v. *Winnington*, 26 Ch. D. 382, post, p. 1729.

(*n*) By Lord Hardwicke, *Heneage* v. *Hunloke*, 2 Atk. at p. 457.

ment (*o*), 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.

Rule does not apply where eldership is not the test.

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 (*p*).

Shifting clauses.

The rule does not apply to a shifting clause, or an exception in the nature of a shifting clause (*q*). The construction of clauses of this kind is considered elsewhere (*r*).

What parental provisions are not within the rule.

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 (*s*). 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 (*t*). 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.

So if a testator settles estate A. on his eldest son, estate B. on his second son, and estate C. on his third son, a shifting clause in favour of a younger son is construed in its ordinary sense (*u*).

The rule will yield to contrary intention indicated by will.

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 (*v*). Thus, in *Re Prytherch* (*w*), a testator gave a portions fund 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

(*o*) L. R., 9 Eq. 491, 6 Ch. 590. In *Hall* v. *Luckup*, 4 Sim. 5, this construction was aided by the context.

(*p*) *Incledon* v. *Northcote*, 3 Atk. at p. 438.

(*q*) Per Lord Westbury, in *Collingwood* v. *Stanhope*, L. R., 4 H. L. at p. 57; *Shuttleworth* v. *Murray*, [1901] 1 Ch. 819; s.c. s.n. *Law Union*, &c., *Co.* v. *Hill*, [1902] A. C. 263.

(*r*) Chap. XXXVIII.

(*s*) See per Lords Hatherley and Westbury, *Collingwood* v. *Stanhope*, L. R., 4 H. L. at pp. 52, 55, 57.

(*t*) As in *Collingwood* v. *Stanhope*, sup.; *Re Bayley's Settlement*, L. R., 9 Eq. 491, 6 Ch. 590. Compare *Harvey-Bathurst* v. *Stanley*, 4 Ch. D. 251, 2 A. C. 698, (*Harvey Bathurst* v. *Errington*,) stated ante, p. 1441, and *Domvile* v. *Winnington*, 26 Ch. D. at p. 387, where there was no reference to the settlement of the estate.

(*u*) *Wilbraham* v. *Scarisbrick*, 1 H. L. C. 167.

(*v*) The construction is not affected by a gift over of a younger son's share of the portions fund in the event of his becoming an eldest son before attaining twenty-one: *Re Bayley's Settlement*, L. R., 6 Ch. 590.

(*w*) 42 Ch. D. 590.

CHAPTER XIII.

years, whether the preceding trust shall be determined or n
The two eldest sons, A. and B., died without issue male. C. attai
twenty-one years in the lifetime of B., and succeeded to the set
real estate. It was held by North, J., that C. was entitled to sh
in the portions fund.

Only child held to take as youngest child.

It may be observed, that a bequest to "the youngest child
A. has been held to apply to an only child (*x*). An only son
also been held to be excluded by an exception of "the eldest s
from a devise to "second, third, and other sons" (*y*).

Rule confined to parental provisions.

"The rule under consideration," as Mr. Jarman remarks
"applies only to gifts by parents or persons standing in
parentis, and not to dispositions by strangers, in which the w
younger children receive their ordinary literal interpretation" (*a*)

Again where there is a gift, by a person not in loco parentis
the children of A., excluding the eldest son, the words of exclu
receive their ordinary interpretation (*b*).

A grandparent does not place himself in loco parentis tow
his grandchildren merely by making provision for them by will

Clear language not controlled by expression of motive.

A mere expression of the testator's reason for excluding
eldest son will not generally make a non-parental provision sub
to the rule above considered. Thus, in *Livesey* v. *Livesey*
a testatrix bequeathed a nominal legacy to "the eldest son of
daughter E. who shall be living at my decease," declaring
she gave him no more because he would have a handsome provi
from the estates of his grandfather and father. She then g
a moiety of the residue of her estate to the children of E. "(ex
her eldest son or such of her sons as shall by the death of an e
brother become an eldest, it being my will that the son wh
or shall become an eldest son shall not be entitled to take anyth
under this devise), equally to be divided among them when
youngest shall attain twenty-one." The eldest son at the dec
of the testatrix was provided for as mentioned by her. He

(*x*) *Emery* v. *England*, 3 Ves. 232.
(*y*) *Tuite* v. *Bermingham*, L. R., 7 H. L. 634.
(*z*) First ed. Vol. II. p. 116.
(*a*) See *Lord Teynham* v. *Webb*, 2 Ves. sen. 197; *Hall* v. *Hewer*, Amb. 203; *Lady Lincoln* v. *Pelham*, 10 Ves. 166; *Lyddon* v. *Ellison*, 19 Bea. 565; *Sandeman* v. *Mackenzie*, 1 J. & H. at p. 628; *Shuttleworth* v. *Murray*, [1901] 1 Ch. 819; s.c. s.n. *Law Union* v. *Hill*, [1902] A. C. 263. *Longfield* v. *Bantry*, 15 L. R. Ir. 101 at p. 135. See contra 8 Pow. 680.
(*b*) *Domvile* v. *Winnington*, 2 D. 382.
(*c*) *Lyddon* v. *Ellison*, 19 Bea. *Longfield* v. *Bantry*, 15 L. R. Ir. 10
(*d*) 13 Sim. 33, 2 H. L. C. 419. also *Lyddon* v. *Ellison*, 19 Bea. In *Sandeman* v. *Mackenzie*, 1 J. 613, the eldest son was exclude name.

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, the language of the will being clear and unambiguous.

Exclusion of son entitled to other property.

If a testator devises land to the sons of his nephew R., except an eldest son for the time being entitled in possession to the C. estate, this does not exclude the eldest son of R. if, before the testator's death, the C. estate has been sold, although the eldest son having been tenant in tail of that estate has a beneficial interest in the proceeds of the sale (*e*).

Meaning of "entitled."

Where the will excludes a son "entitled" to other property, this may mean entitled to the possession, or to a vested remainder (*f*); a contingent interest would primâ facie not be sufficient (*g*).

As to period of ascertaining who are "younger children."

Mr. Jarman continues (*h*): "Another question, which has been much agitated in construing gifts to younger children, respects the period at which the objects are to be ascertained.

Immediate gifts.

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

Gifts by way of remainder.

"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 favour of future objects coming in esse during the life of [the tenant for life].

"In the case of *Lady Lincoln* v. *Pelham* (*j*), 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

(*e*) *Law Union* v. *Hill*, supra see; *Wyndham* v. *Fane*, 11 Ha. 287 ("entitled in possession by virtue of the limitations hereinafter contained"); *Johnson* v. *Foulds*, L. R., 5 Eq. 268 ("entitled in tail in remainder"). Compare *Re Maunder*, [1903] 1 Ch. 451, cited in Chap. XXXVI.

(*f*) *Chorley* v. *Loveband*, 33 Bea. 189; *Re Grylls' Trusts*, L. R., 6 Eq. 589.

(*g*) *Umbers* v. *Jaggard*, L. R., 9 Eq. 200.

(*h*) First ed. Vol. II. p. 117.

(*i*) *Coleman* v. *Seymour*, 1 Ves. sen. 209.

(*j*) 10 Ves. 166.

that this construction was aided by the terms of another bequest; and his Lordship laid some stress on the circumstance that the bequest did not proceed from a parent, or a person standing in loco parentis.

Parental provision for younger children.

Appointment to younger children held subject to implied condition of their not becoming elder.

"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* (*k*), 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, 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 favour of another son; and the Lord Keeper 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.

Objects are ascertained when portions are payable.

"It should seem, then (*l*), that a gift by a father or a person assuming the parental office, in favour 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 suspense of payment, probably is to prevent a child from taking a portion as younger child, who has become, in event, an elder child (*m*), and also, perhaps, to prevent the

(*k*) 2 Vern. 528. See also *Loder* v. *Loder*, 2 Ves. sen. 531; *Broadmead* v. *Wood*, 1 B. C. C. 77; *Savage* v. *Carroll*, 1 Ba. & Be. 265; *Macoubrey* v. *Jones*, 2 K. & J. at p. 692; *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 afterwards became eldest; but as to this case, see Sug. Pow. 679, 8th ed.

(*l*) "It is settled that the words 'other than a son for the time being entitled to the estates' mean entitled at the time appointed for raising and distributing the portions." Per Kay, J., *Reid* v. *Hoare*, 26 Ch. D. at p. 369.

(*m*) "Under this rule, however, a younger child might happen to lose his portion by becoming an elder child, without acquiring the family estate. For instance, suppose lands to be devised to A. for life, with remainder to his first and other sons in tail male, charged with portions to his younger children, payable at the decease of A. A. has three sons, the eldest of whom dies in the lifetime of A., leaving issue male; the second having, by the decease of his elder brother, become in event the eldest son, would lose his portion as younger son, though the estate had devolved to the issue of his elder brother; probably, however, it would be held, that, under such circumstances, the second son was not such an elder son as the rule contemplated, namely, the elder son *taking the estate*. From some remarks of Sir *Thomas Plumer*, in the case of *Matthew* v. *Paul*, it is to be inferred, that his Honor did not consider that the construction could be carried to this extent; but in this and some other parts of his judgment the line is not very distinctly drawn between parental provisions and dispositions by a stranger in favour of younger children. It is to the former only that the construction here suggested could, it is conceived, apply." (Note by Mr. Jarman, 1st ed. Vol. II. p. 119.) The point does not seem to have been

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 estate, will not take a share of the portions (*n*), but the representatives of the deceased eldest son will (*o*). It would be otherwise if the eldest son left issue (*p*), or had joined his father in barring the entail so as substantially to enjoy the estate (*q*); for the second son would not in either case have become eldest within the rule, namely, the son taking the estate.

The principle applies where the fund for portions and the settled estate are settled by different persons and instruments (*r*).

expressly decided, but there is no doubt that the rule is settled in accordance with Mr. Jarman's opinion; see per Wood, V.-C., in *Macoubrey* v. *Jones*, 2 K. & J. at p. 698.

(*n*) *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"). The decision in *Ellison* v. *Thomas* was treated as correct in *Collingwood* v. *Stanhope*, L. R., 4 H. L. 43. See also *Re Smith's Estate*, 27 L. R. Ir. 121; *Rooke* v. *Plunkett*, [1902] 1 Ir. 299; *Re Morton's Trusts*, ih. 310 n. 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.

(*o*) *Ellison* v. *Thomas* and *Davies* v. *Huguenin*, supra; 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 Bea. 587, 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.

(*p*) See per Wood, V.-C., 2 K. & J. at p. 698.

(*q*) *Collingwood* v. *Stanhope*, L. R., 4 H. L. 43, and cases cited ante, p. 1728, n. (*j*). See also *Harvey Bathurst* v. *Errington*, 2 A. C. 698, 4 Ch. D. 251 (shifting clause).

(*r*) *Collingwood* v. *Stanhope*, L. R., 4 H. L. 43.

Contrary intention.

But the rule of construction will of course yield to a clear expression of intention. Thus, in *Windham* v. *Graham* (*s*), a portions fund was settled on the younger children, to be a vested interest in such of them as attained twenty-one, and there was a clause of accruer, to take effect in the event of a younger son dying or becoming an eldest or only son and entitled in possession to the settled estates, before attaining twenty-one: it was held that the character of younger child was to be ascertained by reference to the time when the portions vested, and not to the time when they became payable. In *Re Bayley's Settlement* (*t*), on the other hand, the limitation was simply to the children other than an eldest or only son, without any declaration as to vesting, but with a clause of accruer somewhat similar to that in *Windham* v. *Graham*. Romilly, M.R., held that the class was to be ascertained at the period of distribution, and that the clause of accruer was not a sufficiently clear expression of intention to exclude the general rule.

Whether objects of non-parental gift must sustain the character at period of distribution.

After stating the rule of construction applicable to gifts by fathers or persons in loco parentis (*u*), Mr. Jarman continues (*v*): "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, 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 (*w*), or any other period, the gift would take effect in favour of those who sustained the character at the death of the testator, and who subsequently came into existence before the contingency happened, as in the case of gifts to children generally; and, consequently, that a child in whom a share vested at the death of the testator, would not be excluded by his or her becoming an elder before the period of distribution. With this conclusion, however, it is not easy to reconcile the two following cases.

Hall v. *Hewer*.

"Thus, in *Hall* v. *Hewer* (*x*), A. having devised lands to trustees, to raise £6,000, afterwards wrote a letter (which was proved as a

(*s*) 1 Russ. 331, referred to post, p. 1739. *Re Rivers's Settlement Trust*, 40 L. J. Ch. 87; *Ex parte Smyth*, 12 Ir. Ch. 487; *Re Stawell's Trusts*, [1909] 1 Ch. 534, reversed [1909] 2 Ch. 239.

(*t*) L. R., 9 Eq. 491, 6 Ch. 590.

(*u*) Supra, p. 1732.

(*v*) First ed. Vol. II. p. 119.

(*w*) *Livesey* v. *Livesey*, 2 H. L. C. 419.

(*x*) Amb. 203.

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, 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 did not vest until the death of J., and then in such persons as were at that time younger children of W.; and, consequently, that a younger child who became an elder during the life of J. was excluded. The grounds of this decision are wholly unexplained, and are not apparent.

Ellison v. *Airey*

"In *Ellison* v. *Airey* (*y*), £300 was bequeathed to E., to be paid at her age of twenty-one or marriage, and interest in the meantime 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.*

Remarks on *Hall* v. *Hewer* and *Ellison* v. *Airey.*

"But as the fact of their being younger children at the period of distribution was no part of their qualification, could it properly form a ground for varying the construction? In the case of a devise to A. in fee, and if he die under twenty-one, to B., it has long been established that B. takes an executory interest, transmissible to his representatives (*z*), and it cannot be material whether the executory devise is in favour 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 (*a*).

"It does not appear that either of the preceding cases involved the application of the peculiar rule respecting parental provisions, or that Lord *Hardwicke* so regarded them (*b*); nor is it even clear that his Lordship considered the construction

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

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

(*a*) As to the general distinctions between gifts to classes and individuals, see ante, Chap. XIII.

(*b*) In *Hall* v. *Hewer*, Lord Hardwicke expressly noticed that it was the case of a stranger; see *Shuttleworth* v. *Murray*, [1901] 1 Ch. at p. 831.

exclusively applicable to gifts to younger children; for it will remembered that in the case of *Pyot* v. *Pyot* (*c*) the same emine judge laid down the rule generally, that an executory or contingent gift to persons by a certain description, applied to such of the only as answered the description at the happening of the con tingency. If there is any such rule, of course the cases und consideration do not exist as a distinct class (*d*). We are too muc in the dark as to the ground of decision in *Hall* v. *Hewer*, an *Ellison* v. *Airey*, to found any general conclusion upon those case nor, on the other hand, is it safe wholly to disregard them (*e*

Exception of elder son at the time of distribution.

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

Expression an "eldest son" construed to mean elder son at time of distribution.

Matthews v. *Paul.*

"And the same construction was given to the expression 'a eldest son,' in *Matthews* v. *Paul* (*g*), which deserves some con sideration. A testatrix gave to trustees certain bank stock, upon trust to pay the dividends to her daughter M. for life, and after her decease to P., her husband, for his life, and, after his decease, upon trust to transfer the said stock unto all the children of M., if more than one (*except an eldest son*,) share and share alike, *the same to be vested interests*, and transferable *at their, his, or her, ages or age of twenty-one years*, and in the meantime 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

(*c*) Ante, p. 1651.

(*d*) There is no such general rule: per Turner, L.J., *Boulton* v. *Beard*, 3 D. M. & G. at p. 612.

(*e*) 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, ante, p. 1394. 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. R. L., [1747] A. fo. 700 b. [These remarks are taken verbatim from the 4th edition of this work by Mr. Vincent, where they form part of the text, Vol. II. p. 208.]

(*f*) *Billingsley* v. *Wills*, 3 Atk. 219.

(*g*) 3 Sw. 328.

over. The testatrix then gave certain terminable imperial annuities and other stock to the same trustees, in trust to receive the dividends, and invest the same in government stock, to accumulate until the expiration of the imperial annuities, and thereupon to transfer all such stocks, as well original as accumulated, unto and among all and every the children of her said daughter, if more than one (*except an eldest son,*) equally, share and share alike; 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 shewing that neither the first nor the second could be intended, he came to the conclusion, that, in all cases of legacies, payable to a class of persons at a future period, the constant rule has been, that all persons coming in esse, and answering the description at the period of distribution, should take. The same rule must, he thought, be applied to persons excluded. There could not be one time for ascertaining the class of those who are to take, and another to ascertain the character which excludes.

Time of vesting.

"Eldest son," to what period referable.

"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 (*h*); and, by parity of reasoning, it would seem to

Observations upon *Matthews* v. *Paul*.

Gifts to younger children.

(*h*) Ante, p. 1675.

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 (*i*).

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 shew that the legacy did not vest until one at least of the younger children attained twenty-one, and he used the fact as an answer to the argument for applying the description to the death of the testator yet he never once addresses himself to the inquiry, whether *the period of vesting* was not that to which the term 'eldest son' was to be referred. It is submitted, upon the general principles which govern these cases, and which were applied by Lord *Eldon* to a bequest to younger children, in *Lady Lincoln* v. *Pelham*, that this *was* the period of ascertaining the individual upon whom the character of eldest son had devolved, whether he was marked out as the sole object of the gift, or for the purpose of being excluded from it. If the gift had been to A. for life, and after her decease to an 'eldest son' of A., to be vested and transferable when the younger children or child of A. should attain twenty-one, it could not have been doubted for a moment that the person who was eldest son at the period of vesting, whether in the lifetime of A. or not, was absolutely entitled; and yet this is precisely the case of *Matthews* v. *Paul*, substituting a gift for the exception. Another remark occurs on this judgment: that though at the outset his Honor treats the case as one in which the provision proceeded from a stranger (being by a grandmother in the lifetime of 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.

Effect of gift to the elder son for the time being.

"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 (*j*). Such seems at least to be the effect of the case of *Bowles* v. *Bowles*, though in the judgment of Lord *Eldon* no general position of this nature is distinctly advanced.

(*i*) "But if the *youngest* child were excepted, it would obviously be necessary to wait until the period of distribution, in order to know who would be the youngest, the exception embracing the last-born object of the class." (Note by Mr. Jarman.) See the observations on the decision in *Matthews* v. *Paul*, made by Kay, J., in *Domvile* v. *Winnington*, 26 Ch. D. at p. 388, where his Lordship expressed his concurrence with the criticism in the text.

(*j*) *Bowles* v. *Bowles*, 10 Ves. 177. See *Sansbury* v. *Read*, 12 Ves. 75, where younger children were held to be entitled on a very obscure will.

"It is clear that if there be an express limitation over in case of a younger son becoming the eldest before a given age or period, this prevents his being excluded by becoming the eldest son under *other* circumstances, by force of the often cited principle (*k*) exclusio unius est inclusio alterius. Indeed, Lord *Gifford*, in the case referr' to, was of opinion that a declaration that the children attaining twenty-one, &c., in the lifetime of the parent should take vested interests, was sufficient to entitle a child who was a younger child at this period but subsequently became the eldest. This conclusion, it is conceived, goes far to support the doctrine which has been here contended for, in opposition to *Matthews* v. *Paul*: for as the doubt is not , 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.

Exception of an eldest child referred to time of vesting in devise of real estate.

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

Remarks on *Adams* v. *Bush*.

"This case relieves the point of construction which has been the subject of discussion in the preceding remarks, from the uncertainty

(*k*) *Windham* v. *Graham*, 1 Russ. 331, ante, p. 1734. The case was within the rule regarding parental provisions, although this does not appear to have been noticed by Mr. Jarman.

(*l*) 8 Scott, 405.

(*m*) Mr. Jarman's statement is not quite accurate. The Court certified that C. took, on the death of A., his father, an estate in fee simple in possession defeasible on his dying under twenty-one.

CHAPTER XLII.

which previously existed, so far at least as respects devises of estate, and it is hoped that the same sound principles will be app to bequests of personal estate, at least such of them as are governed by the peculiar doctrine applicable to parental provisi in favour of younger children. There seems to be no solid differe between such bequests and devises of real estate."

Settlement of personalty.

The principle contended for by Mr. Jarman was applied to construction of a settlement of personalty, in *Re Theed's Set ment* (*n*), where the trusts of a sum of money were for H. for life, a if (as happened) he should have no child, then for M. for her li and after her death to pay it to all the children of M. *except eldest or only son*, in equal shares, at twenty-one. The eldest-bo son died, and the second attained twenty-one, both in the lifeti of H. (who survived M.), and it was argued that the second so being eldest at the period of distribution (H.'s death), was exclud by the exception; but it was held by Sir W. P. Wood that t interest which vested in him at twenty-one was not divested b his afterwards becoming eldest son.

Exception exhausted on any eldest son being excluded at period of vesting;

And where one child has been excluded as being the eldest so at the period of vesting, the clause of exclusion is exhausted, an the next son, when he attains twenty-one, is not excluded b reason of his becoming, in event, the eldest son (*o*).

It is true that these cases, and others to the like effect (*p*), do no cover the precise point which appears to have arisen in *Hall* v *Hewer* and *Ellison* v. *Airey*, viz. that of a transmissible contingen interest; but the doubts expressed above, concerning the soundnes of those authorities, are strongly confirmed by the decision i *Bryan* v. *Collins* (*q*), where a testatrix bequeathed a legacy in trus for the eldest daughter of M. D., to be paid when she attained he 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 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 shew an intention that the class to

(*n*) 3 K. & J. 375.

(*o*) *Domvile* v. *Winnington*, 26 Ch. D. 382. *Re Morton's Trusts*, [1902] 1 Ir. 310 n.

(*p*) *Adams* v. *Adams*, 25 Bea. 652; *Sandeman* v. *Mackenzie*, 1 J. & H. 613.

(*q*) 16 Bea. 14. See also *Lady Lincoln* v. *Pelham*, supra, p. 1731.

be 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 (*r*).

—— not where context shews contrary intention.

VII.—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 primâ facie to the order of birth (*s*). 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 (*t*), or if he speaks of a son who is not first-born "becoming eldest" (*u*), or of the eldest at a given period (*v*), or for the time being (*w*).

Where only one son or child.

The term "eldest" or "youngest" may apply to an only son or only child (*x*).

"First" son living at date of will takes as persona designata.

In the case of a gift to the "eldest son" of A., if at the date of the will a son is living who answers the description he takes as persona designata (*y*); so that if he dies before the testator the gift lapses (*z*); unless it is within the protection given by stat. 1 Viet. c. 26, ss. 32, 33 (*a*); or unless the testator has, in the event, disposed of the subject otherwise, as in *Thompson* v. *Thompson* (*b*), 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

(*r*) *Madden* v. *Ikin*, 2 Dr. & Sm. 207. See also *Stevens* v. *Pyle*, 30 Bea. 284; *Harvey* v. *Towell*, 7 Hare, 231, better rep. 12 Jur. 241; *Livesey* v. *Livesey*, 13 Sim. 33, 2 H. L. C. 419; and see *Cooper* v. *Macdonald*, L. R., 16 Eq. at p. 272.

(*s*) *Trafford* v. *Ashton*, 2 Vern. 660; *Bennett* v. *Bennett*, 2 Dr. & Sm. 266; *Meredith* v. *Treffry*, 12 Ch. D. 170.

(*t*) *King* v. *Bennett*, 4 M. & Wel. 36.

(*u*) *Harvey Bathurst* v. *Errington*, 2 A. C. pp. 698, 709 (shifting clause).

(*v*) *Livesey* v. *Livesey*, 13 Sim. 33, 2 H. L. C. 419.

(*w*) *Bowles* v. *Bowles*, 10 Ves. 177.

(*x*) *Emery* v. *England*, 3 Ves. 232; *Tuite* v. *Bermingham*, L. R., 7 H. L. 634.

(*y*) *Meredith* v. *Treffry*, 12 Ch. D. 170; *Saunders* v. *Richardson*, 18 Jur. 714 (settlement).

(*z*) *Amyot* v. *Dwarris*, [1904] A. C. 268, disapproving *Re Harris*, 2 W. R. 689.

(*a*) Per Hall, V.-C., *Meredith* v. *Treffry*, supra. But as to implying an estate tail from the gift over "in default of issue male" (as was there suggested), vide post, Chap. LII.

(*b*) 1 Coll. at p. 388. See *Perkins* v. *Micklethwaite*, ante, Vol. I. p. 203, n. (*u*); cf. ib. p. 397.

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.

Devise to "second son" where none at date of will or testator's death, held to mean second-born.

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 time of the testator's death, the first who afterwards comes in esse and answers the description is entitled. Thus in *Trafford* v. *Ashton* (*c*), 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.

Son who comes in esse after the will and dies before the testator, not reckoned.

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* (*d*), 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 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.

So, in *King* v. *Bennett* (*e*), 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.

(*c*) 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; *Sheridan* v. *O'Reilly*, [1900] 1 Ir. 386.

(*d*) 1 Ves. sen. 290.

(*e*) 4 M. & Wel. 36.

In *West* v. *Primate of Ireland* (*f*), Sir Septimus R. desired that his executor would, at his (the executor's) decease, bequeath 1000 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 bequeathed 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 favour of the youngest child then living (*g*).

Bequest to "seventh or youngest child"; seventh surviving, but eighth born, held not entitled.

Where a shifting clause is to take effect in the event of a younger son of A. becoming his "eldest son," this only applies to a son who becomes the eldest son during A.'s lifetime (*h*).

"Becoming eldest son of A."

Where a testator devises estate A. to his eldest son by name, estate B. to his second son by name, and so on, with a gift over, in the event of any son dying without issue, to his "next surviving son according to seniority of age and priority of birth," this means "next younger," the testator having himself arranged the sons according to their order of birth (*i*).

"Next surviving son."

"Next eldest brother," as applied to one of the testator's sons, may mean next younger (*j*).

"Next eldest."

In *Lett* v. *Osborne* (*k*), the gift was to the family of A. "from S. downwards": S. was the second child of A.: it was held that S. was entitled to share.

Children "from S. downwards."

It may be observed that a devise of land to the first and other sons of A. for life or in tail, implies succession (*l*).

First and other sons.

VIII.—Gifts to "other" Children or Sons.—As a general rule, the word "other" or "others" is construed in its ordinary signification. Thus, if there is a gift to each of the testator's sons and daughters, A., B., C., D., and E. for life, and after the death of each

(*f*) 2 Cox, 258, 3. B. C. C. 148.

(*g*) Mr Jarman, who cites the case (Vol. II. p. 110) somewhat less fully than in the text, adds this note: "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?"

(*h*) *Bathurst* v. *Errington*, 2 A. C. 698. See Chap. XXXVIII.

(*i*) *Eastwood* v. *Lockwood*, L. R., 3 Eq. 487. Compare the cases in the next section, especially *Re Blake*, and *Locke* v. *Dunlop*, in each of which the words "seniority of age and priority of birth" also occurred.

(*j*) *Crofts* v. *Beamish*, [1905] 2 Ir. 349. The process by which the C. A. arrived at this result is described with delectable humour by Mr. Theobald in the preface to the 7th edition of his book on Wills. See *Wills* v. *Wills*, [1909] 1 Ir. 274.

(*k*) 47 L. T. 40.

(*l*) Post, p. 1784.

CHAPTER XLII.

to his or her children, with a gift over in default of children t " the others " of the sons and daughters, this primâ facie mean the individuals other than the deceased legatee, and not the survivor who are living at his or her death (*m*). If the gift over is to " th others or other, and if more than one in equal shares," the questio arises whether these words shew that the testator contemplated diminution in the number of persons to take under the gift ove In *Re Hagen's Trusts* (*n*), Hall, V.-C., held that the words mad no difference, and that on the death of C. without leaving childre the representatives of A. and B. (who predeceased C.) were entitle to share. On the other hand, in *Re Chaston* (*o*), Fry, J., hel that on the death of any of the original legatees without leavin issue the class to take consisted of all the others except those wh had died without leaving issue.

Langston v. *Langston.*

Mr. Jarman concludes the present chapter with a statement o the case of *Langston* v. *Langston* (*p*), which, as he remarks (*q*), " i remarkable for the great difference of opinion that existed i regard to the true construction of the will. The question was whether the first son of the testator's son A. was excluded, unde a clause which directed trustees to convey to him (A.) for life, wit 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 o birth, in tail male, with remainder to the testator's second and other sons successively in tail male, with numerous remainders over. The eldest son of A. claimed an estate tail male expectant on the decease of A. The Court of King's Bench, on a case from Chancery, certified that he took no estate. Sir *J. Leach*, M.R., (being, as it should seem, dissatisfied with this opinion,) sent a case to the Judges of Common Pleas, who certified that the first son of A. took an estate tail male, and the M.R. decreed accordingly, at the same time recommending that the case should be carried to the House of Lords, which was done; and that House, after much consideration, affirmed the decree of the Court below."

Devise to first son supplied by implication from the entire will.

Intention to exclude eldest son.

It may, perhaps, be doubted whether the decision lays down any general principle. At all events it is clear that if the general scheme of the will shews an intention to exclude the eldest son, he will not be included under a general limitation to " other sons." Thus,

(*m*) *Re Hagen's Trusts*, 46 L. J. Ch. 665; per Fry, J., in *Re Chaston*, 18 Ch. D. at p. 223.

(*n*) Supra.

(*o*) 18 Ch. D. 218. The gift over was on the death of a legatee without leaving issue.

(*p*) 8 Bligh. N. S. 167.

(*q*) First ed. Vol. II. p. 127.

in *Locke* v. *Dunlop* (*r*), the testator devised real estate to his second son F. in strict settlement, with remainder to his third son G. in like manner, with remainder to "my fourth, fifth, and all and every other son . . . to be begotten," in tail male, with remainder to his daughters; all the sons except the eldest died without issue male: it was held that he could not take under the expression "every other son" (*s*).

Whether eldest son can take as "other child."

In *Tavernor* v. *Grindley* (*t*), the will contained provisions which shewed as clearly in those in *Locke* v. *Dunlop* that the testator intended to exclude his eldest son, but it was held that he was entitled to share under the expression "other child."

Express exception of eldest son.

If the limitation to "other sons" contains an express exception of the eldest son, he cannot take, even if he is the only son (*u*).

IX.—Gifts to Parent and Children.—As a general rule a gift to A. and his children is construed as a gift to them concurrently (*v*). But in certain cases (especially where the gift is to a wife and children) more or less slight indications of a contrary intention are allowed to prevail, with the result that the parent takes only a life interest (*w*).

Where there is a gift to X. for life, and after his death to one or more persons and their children then living, the requirement of being then living, does not, as a general rule, apply to the parents (*x*).

The rule in *Wild's Case* forms the subject of Chapter L.

(*r*) 39 Ch. D. 387.

(*s*) The case of *Re Blake*, 19 W. R. 765, was a very special one; it is commented on in *Locke* v. *Dunlop*; *Grattan* v. *Langdale*, 11 L. R. Ir. 473, was not cited in *Locke* v. *Dunlop*. See also *Eastwood* v. *Lockwood*, L. R., 3 Eq. 487, and *Lett* v. *Osborne*, 47 L. T. 40, supra, p. 1743.

(*t*) 32 L. T. 424.

(*u*) *Tuite* v. *Bermingham*, L. R., 7 H. L. 634.

(*v*) *Newill* v. *Newill*, L. R., 7 Ch. 253, and other cases cited in Chap. L.

(*w*) These cases are referred to in Chap. L.

(*x*) *Cormack* v. *Copous*, 17 Bea. 397, citing *Burrell* v. *Baskerfield*, 11 Bea. 525, and *Turner* v. *Hudson*, 10 Bea. 222, where only parents who survived the tenant for life, were included in the class.

CHAPTER XLIII.

DEVISES AND BEQUESTS TO ILLEGITIMATE CHILDREN AND OTHER RELATIONS.

	PAGE
I. *How Legitimacy is determined*	1746
II. *Illegitimate Children in Existence when the Will is made capable of taking. What is a Sufficien Description of them*	1748
III. *Gifts to Illegitimate Children en ventre*	176
IV. *Gifts to Future Illegitimate Children*	177
V. *General Conclusion from the Cases*	177
VI. *Other Illegitimate Relations*	178

Effect of domicil.

I.—How Legitimacy is determined.—In cases of gifts by wi to the children of a person, the question of legitimacy is, as general rule, determined by the law of the parents' domicil (*a*) whether the subject of the gift is personalty (*b*), or realty (*c*), o land devised upon trust for sale (*d*).

Consequently, if two persons of the Jewish faith, domiciled i England, contract a marriage which is void by the law of England although valid by the Jewish law (so-called), their children ar illegitimate (*e*).

And although the English Courts do not, as a general rul question the validity of a marriage celebrated abroad, which valid according to the law of the parties' domicil, they do no recognize a marriage which is contrary to the doctrines universall accepted by Christian countries, such as a polygamous or incestuou union (*f*).

Where a foreigner or person domiciled abroad enters into

(*a*) The same rule applies in the case of intestacy, so far as the devolution of personal property is concerned. But in the case of real estate situate in England, in the event of its devolution under an intestacy, the question of legitimacy is determined by English law, *Doe* d. *Burtwhistle* v. *Vardill*, 6 Bing. N. S. 385; s.c. sub. nom. *Birtwhistle* v. *Vardill*, 7 Cl. & F. 895.

(*b*) *Re Andros*, 24 Ch. D. 637.

(*c*) *Re Grey's Trusts*, [1892] 3 Ch. 88. In *Atkinson* v. *Anderson*, 21 Ch. D. 100, the children were illegitima according to the law of the domic but they took under a devise them nominatim.

(*d*) *Skottowe* v. *Young*, L. R., 11 E 474.

(*e*) *Re De Wilton*, [1900] 2 Ch. 481.

(*f*) *Hyde* v. *Hyde*, L. R., 1 P. & 130; *Brook* v. *Brook*, 9 H. L. C. 19 *Sottomayor* v. *De Barros*, 3 P. D. 5 P. D. 94; *Re Bozzelli's Settlemen* [1902] 1 Ch. 751.

marriage with a British subject or a person domiciled in England, difficult questions as to its validity may arise (*g*).

Legitimatio per sub. matr.

In many foreign countries (including Scotland) the law allows an illegitimate child to be legitimized by the marriage of its parents. Where the father is domiciled in a country where this law prevails, both at the date of the birth of the child and at the date of the marriage and of the other formalities (if any) required by the foreign law, no question can arise, and the child will be recognized as legitimate for the purposes of the rule above stated (*gg*). But if at the date of the birth of the child its father was domiciled in a country where *legitimatio per subsequens matrimonium* is not allowed (such as England), it cannot afterwards be legitimized so as to be recognized as a legitimate child by the English Courts, even although the parents acquire a domicil and are married in a foreign country according to the law of which the child is thereby legitimized (*h*).

Foreign divorce.

If two persons, domiciled in England, are lawfully married according to English law, and are afterwards divorced by the decree of a foreign tribunal, the divorce will not be recognized by the English Courts, unless the parties were, at the time of the decree, bonâ fide domiciled according to English law in the country where it was pronounced. Consequently if, after the so-called divorce, either of the parties goes through the form of marriage with another person, no child of that union will be recognized as legitimate by the English Courts (*i*).

Jewish law.

It follows à fortiori, that if a Jew is domiciled in England, his illegitimate children cannot be legitimized by his marrying their mother, although the doctrine of *legitimatio per subsequens matrimonium* is part of the Jewish law (*j*).

Child illegitimate though born in wedlock.

The child of a married woman, born during the lifetime of her husband, is primâ facie legitimate, but if non-access for the necessary period is proved, the child is illegitimate (*k*).

Marriage by repute.

Strict evidence of the solemnization of a marriage is not always required: reputation of marriage may be sufficient (*l*).

(*g*) *Ogden* v. *Ogden*, [1907] P. 107; *Chetti* v. *Chetti*, [1909] P. 67.

(*gg*) *Re Goodman's Trusts*, 17 Ch. D. 266; *Re Andros*, 24 Ch. D. 637, both disapproving *Boyes* v. *Bedale*, 1 H. & M. 798.

(*h*) *Re Wright's Trust*, 2 K. & J. 595; *Re Goodman's Trusts*, supra; *Re Grove*, 40 Ch. D. 216.

(*i*) *Shaw* v. *Gould*, L. R., 3 H. L. 55, affirming Kindersley V.-C., in *Re Wilson's Trusts*, L. R., 1 Eq. 247; *Re Stirling*, [1908] 2 Ch. 344.

(*j*) *Levy* v. *Solomon*, 25 W. R. 842.

(*k*) *Hawes* v. *Draeger*, 23 Ch. D. 173. The presumption of legitimacy may be rebutted in other ways: *Morris* v. *Davies*, 5 Cl. & F. 163.

(*l*) *Lyle* v. *Ellwood*, L. R., 19 Eq. 98; *Re Green*, 25 T. L. R. 222; *Re Haynes*, 94 L. T. 431.

Children en ventre treated as illegitimate.

A child born in lawful wedlock is primâ facie legitimate, although born at such a time that it must have been begotten before its mother was married, but it may nevertheless not be entitled to share in a gift to its mother's children, if it was en ventre sa mère at the time when the class of children was ascertained, and she was not then married (*m*).

Existing illegitimate children capable of taking.

II.—Illegitimate Children in Existence when the Will is made capable of taking. What is a Sufficient Description of them.—Mr. Jarman states the general rule thus (*n*): "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 (*o*). Hence, in the case of a gift to the natural children of a man or of a woman, or of one by the other, it is simply necessary to prove that the objects in question had, at the date of the will, acquired the reputation of being such children. It is not *the fact* (for that the law will not inquire into), *but the reputation of the fact*, which entitles them. The only point, therefore, which can now be raised in relation to such gifts is, whether, according to the true construction of the will, it is clear that illegitimate children were the intended objects of the testator's bounty; for, let it be remembered, that though illegitimate children in esse may take, under any disposition by deed or will adequately describing them, yet it has long been an established rule, that a gift to children, sons, daughters, or issue, imports primâ facie *legitimate* children or issue (*p*), excluding those who are illegitimate, agreeably to the rule, 'Qui ex damnato coitu nascuntur, inter liberos non computentur' (*q*). Nor will expressions, or a mode of disposition affording mere conjecture of intention, be a ground for their admission.

Gifts to children, primâ facie, mean legitimate children.

"This is well illustrated by the case of *Cartwright* v. *Vawdry* (*r*), 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

(*m*) *Re Corlass*, 1 Ch. D. 460. Stated ante, p. 1704.

(*n*) First ed. Vol. II. p. 129.

(*o*) *Metham* v. *Duke of Devon*, 1 P. W. 529.

(*p*) "The rule cannot be stated too broadly, that the description 'child, son, issue,' every word of that species, must be taken primâ facie to mean legitimate child, son, or issue;" per Lord Eldon in *Wilkinson* v. *Adam*, 1 V. & B. at p. 462.

(*q*) *Hart* v. *Durand*, 3 Anst, 684, post p. 1756. See also *Cartwright* v. *Vawdry*, 5 Ves. 530. *Harris* v. *Stewart*, cit. 1 V. & B. 434; *Re Cooper*, 2 T. L. R. 10. A surrender of copyholds to the use of a will was never supplied in equity in favour of illegitimate children, *Fursaker* v. *Robinson*, Prec. Cha. 475; *Tudor* v. *Anson*, 2 Ves. sen. 582.

(*r*) 5 Ves. 530. *Re Wells' Estate*, L. R., 6 Eq. 599, was a similar case.

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 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, shewing 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 (*s*). 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 (*t*), 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 (*u*), that the illegitimate child was to take by implication with the others, as much as if she had been in the plainest and clearest terms persona designata; *and my opinion is that this circumstance is by no means sufficient.* The will would have operated in favour of all his children, however numerous they might have been, and in favour 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

Lord Eldon's observations upon *Cartwright* v. *Vawdry.*

(*s*) This is not accurately stated, as a general proposition: since Mr. Jarman wrote it has been clearly established that illegitimate and legitimate children can take concurrently under a gift to "children," post. p. 1758.

(*t*) See judgment in *Wilkinson* v. *Adam*, 1 V. & B. at p. 464, which is replete with learning on this subject.

(*u*) As to "necessary implication," see post, p. 1752.

legitimate and illegitimate. Without extrinsic evidence, it wa impossible to raise the question. The will itself furnished n question whether legitimate or illegitimate children were intended the question upon which the Court was to decide was furnishe by matter arising out of, not in the will.'

"These observations afford a more satisfactory explanation o the grounds of Lord *Loughborough's* decision, than is to be foun in his Lordship's own judgment. It will be useful to keep in vie the circumstances of the case, and Lord *Eldon's* comment upo them, when we proceed to examine some later adjudication 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 tha illegitimate children when the will takes effect, or at any othe period, so that the gift, if confined to legitimate children, ha eventually failed for want of objects, does not warrant the appli cation of the word 'children' to the former objects.

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

The cases of *Kenebel* v. *Scrafton* (*x*), *Harris* v. *Lloyd* (*y*), *Warne* v. *Warner* (*z*), *Mortimer* v. *West* (*a*), and *Arnold* v. *Preston* (*b*) illustrate the same principle.

(*v*) 6 Ves. 43, ante, p. 1692.
(*w*) The M.R. was Sir R. P. Arden.
(*x*) 2 East, 530.
(*y*) T. & R. 310.
(*z*) 15 Jur. 141, post, p. 1753.
(*a*) 3 Russ. 370.
(*b*) 18 Ves. 288. 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 O[illegible] Trust*, ib. 362; *Kelly* v. *Hammond*, 26 Bea. 36; the cases of *Dorin* v. *Dorin*, L. R., 7 H. L. 568, and *Re Brown*, 63 L. T. 159, are both referred to post.

Principle of the cases.

"In all the preceding cases," as Mr. Jarman points out (*c*), "legitimate children were, or might have been entitled under the bequest; and this possibility (according to the principles of construction already laid down) was fatal to the claim of illegitimate children. In none of the wills was there such a manifestation of an intention to use the word *children* in any other than its ordinary legal signification (namely, legitimate offspring), as could form the ground of a judicial determination."

Express reference to illegitimacy.

The simplest case of a gift taking effect in favour of illegitimate children is where they are expressly described or referred to as illegitimate, either by name, or as a class. In the latter case, illegitimate children living at the date of the will take (*d*): whether the gift also includes after-born children is a question discussed later.

So a gift to the natural children of A., a man, by a particular woman, or of B., a woman, by a particular man, may be good as to existing children, for in all these cases the question, as already mentioned (*e*), is one of reputation (*f*).

A testator may also shew that he refers to illegitimate children by expressing doubts as to their legitimacy, or to the validity of their parents' marriage (*g*).

Illegitimate children referred to by number.

If a testator makes a bequest to "the three children of A. born prior to her marriage with her present husband," and it turns out that there are in fact four such children, and that as regards three of them their existence was known to the testator, the fourth child will not be included in the gift unless the testator is proved to have been aware of its existence at the date of the will (*h*).

Identified by name.

Illegitimate children may, of course, be identified by name, as in the case of a legacy to "my son John," or "my grand-daughter Mary," the testator leaving no child or grandchild of those names, except such as are illegitimate (*i*). But if he has two grandchildren both named A. B., one legitimate and the other illegitimate, and bequeaths a legacy to "my grandchild A. B.," the legitimate grandchild will take (*j*), unless the language of the will shews that

(*c*) First ed. Vol. II. p. 134. As to the case of *Bagley* v. *Mollard*, also cited by Mr. Jarman, see post, p. 1759.

(*d*) *Bentley* v. *Blizard*, 4 Jur. N. S. 652; *Barnett* v. *Tugwell*, 31 Bea. 232.

(*e*) Ante, p. 1748.

(*f*) *Metham* v. *Duke of Devon*, 1 P. W. 529.

(*g*) *Snelham* v. *Bayley*, 5 Ves. 534, n. 1 S. & St. 78; *Howarth* v. *Mills*, L. R., 2 Eq. 389. *Re Brown's Trust*, L. R., 16 Eq. 239.

(*h*) *Re Mayo*, [1901] 1 Ch. 404. As to the effect of a similar mistake in the case of legitimate children, see ante, p. 1706 seq.

(*i*) *Rivers's Case*, 1 Atk. 410.

(*j*) *Re Fish*, [1894] 2 Ch. 83.

the testator used "grandchild" as including illegitimate grandchildren, in which case extrinsic evidence would be admissible to shew which grandchild he meant (*k*).

And if a testator refers to his illegitimate children by name as his children, and afterwards makes a gift in favour of "my children," having no legitimate children, the "illegitimate children will take" (*l*).

So where the gift is to the children of a woman (*m*).

Implication in favour of illegitimate children.

An intention to benefit existing illegitimate children may be shewn in various ways, without naming them, and without expressly referring to their illegitimacy, or doubtful legitimacy.

In some of the earlier cases (*n*), it was laid down by Lord Eldon and other judges that such an intention must appear by necessary implication upon the will itself, but this is far too strong a way of putting the rule. In the first place, as pointed out by Mr. Jarman (*o*), the doctrine so stated "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' (*p*), or 'to the children of A.' a *deceased person* (*q*), it is not known by a mere perusal of the will whether legitimate or illegitimate children were intended; and yet when it is ascertained that there were no other than the latter objects in existence, the conclusion that he meant illegitimate children, is irresistible." And with regard to the meaning of the expression "necessary implication," Lord Eldon himself explained it as meaning "not natural necessity, but so strong a probability of intention, that an intention contrary to that which is imputed to the testator, cannot be supposed" (*r*). In fact, "necessary implication," at the present day, would appear to mean little more than construction (with the aid, if necessary, of extrinsic evidence), as opposed to conjecture (*s*).

Necessary implication.

Gift by unmarried testator to his children.

Since the Wills Act, a will not operating as an appointment is, under all circumstances, absolutely revoked by marriage, and a gift by an unmarried person by will to his or her children can never, therefore, take effect in favour of legitimate children. Consequently, if a testator, being unmarried, has illegitimate children,

(*k*) See Chap. XV., ante, p. 470.
(*l*) *Hartley* v. *Tribber*, 16 Bea. 510.
(*m*) *Re Connor*, 2 J. & L. 456.
(*n*) *Wilkinson* v. *Adam*, 1 V. & B. 422, and the cases cited ante, p. 1750.
(*o*) First ed. Vol. II. p. 139.
(*p*) *Blundell* v. *Dunn*, infra, p. 1753.
(*q*) *Lord Woodhouselee* v. *Dalrymple*, infra, p. 1754.
(*r*) 1 V. & B. p. 465.
(*s*) See per James, L.J., in *Crook* v. *Hill*, L. R., 6 Ch. at p. 315; and per Lords Chelmsford and Cairns, in *Hill* v. *Crook*, cited post, p. 1758.

and makes a will giving his property to "my children," this is good as regards the children then in existence and reputed to be his (*t*). It seems, however, that the principle does not apply where the testator is ignorant of the fact that the children are illegitimate (*u*) (as where he does not know that his supposed wife has a husband still living). And of course the principle does not apply to after-born children (*v*); a gift to after-born illegitimate children may be good, but such cases rest on a different principle (*w*).

Again, as Mr. Jarman points out (*x*), "if a married man, after making a disposition in favour of his children by a particular woman, shews, by the context of the will, that he expects both his wife and the woman in question to survive him, this, being incompatible with the supposition of his contemplating marriage with her, is considered to indicate that he means *illegitimate* children only" (*y*).

Gift to children of two persons who cannot marry.

It seems clear that if there is a gift to "the children of A. and B.," two persons who are within the prohibited degrees, and there are at the date of the will children whom the testator knows by reputation as children of A. and B., they are entitled under the gift (*z*).

Children "now living" or "born."

It is clear that where the gift 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, at all events if their existence is known to the testator (*a*). So where the gift is to the children

(*t*) *Clifton* v. *Goodbun*, L. R., 6 Eq. 278. In this case the will was that of a single woman, and the question of reputation did not, therefore, arise. Compare also *In the Estate of Frogley*, [1905] P. 137.

(*u*) Per Bowen, L.J., in *Re Bolton*, 31 Ch. D. at p. 553.

(*v*) See per Kay, J., in *Re Bolton*, 31 Ch. D. at p. 547.

(*w*) Post, p. 1771 seq.

(*x*) First ed. Vol. II. p. 137.

(*y*) *Wilkinson* v. *Adam*, 1 V. & B. 422; 12 Pr. 470. 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. 141.

(*z*) In the 4th and 5th editions of this work it was laid down that "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," and in support of this doctrine, *Re Goodwin's Trust*, L. R., 17 Eq. 345, was cited. In that case the testatrix, who had gone through the ceremony of marriage with X., her deceased sister's husband, gave her property upon trust for all and every her children and child by X.: at the date of the will she had one child, and she afterwards had another; they both had the reputation of being her children by X. It was admitted, *sub silentio*, that the first-born child was entitled to take under the gift, and it was held by Jessel, M.R., on the authority of *Occleston* v. *Fullalove* (post, p. 1773), that the second child was entitled to share. This part of the decision is clearly bad law (*Re Bolton*, post, p. 1778), but it seems equally clear that the first-born child was entitled to the whole fund, as a *persona designata*, for the reasoning of North, J., in *Re Shaw*, [1894] 2 Ch. 573, would not apply to such a case. See *Lepine* v. *Bean*, L. R., 10 Eq. 160.

(*a*) *Blundell* v. *Dunn*, cit. 1 Mad. p. 433, "though," as Mr. Jarman remarks (1st ed. Vol. II. p. 135, n.), "the construction was somewhat aided by the context." In this case the gift

" born or to be born," or " begotten or to be begotten," of A.: if the date of the will A. has none but illegitimate children, and th existence is known to the testator, they will take, unless, it seer A. afterwards has legitimate children born during the testato lifetime (*b*). And the fact that the testator believes the childr to be legitimate is immaterial (*c*).

Children of deceased person.

Upon the same principle, a gift to " the children of C.," a pers who at the date of the will was dead, leaving illegitimate, but legitimate, children, is good as to such illegitimate children, the facts that C. was dead and that he had children were know to the testator (*d*), but it is not (apparently) necessary that th testator should know that they were illegitimate; it is sufficie that he should know of the existence of persons reputed to be th children of a deceased person (*e*).

Gift to children of single woman past child-bearing.

It would also seem to follow that if a testator gives propert to the children of a woman who, to his knowledge, has childre living at the date of the will, and is also known by him to be pas the age of child-bearing, those children will take under the gift although they are illegitimate, provided she has no legitimat children (*f*).

So if the testator has no children by his wife, who is living and past the age of child-bearing at the date of the will, a gift to " my children " may take effect in favour of his illegitimate children living at the date of the will (*g*).

Intention to refer to existing children.

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

was to the testator's own children, so that it properly falls under the principle stated infra, p. 1762.

(*b*) *Holt* v. *Sindrey*, 38 L. J. Ch. 126. The principle of the decision was treated as doubtful by James, L.J., in *Crook* v. *Hill*, L. R., 6 Ch. at p. 317; but it was quoted as a binding authority in *Re Du Boehet*, [1901] 2 Ch. at p. 445. The decision in *Re Nixon*, 2 Jur. N. S. 970, turned on the validity of the marriage by reputation. *Gabb* v. *Prendergast*, 1 K. & J. 439, was a settlement inter vivos.

(*c*) *Holt* v. *Sindrey*, supra.

(*d*) *Lord Woodhouselee* v. *Dalrymple*, 2 Mer. 419; *Re Herbert's Trusts*, 1 J. & H. 121; *Milne* v. *Wood*, 42 L. J. Ch. 545.

(*e*) See *Re Herbert's Trusts*, supra.

(*f*) Since the above passage was written the point has been decided in *Re Eve*, [1909] 1 Ch. 796. *Re Brown's Trust*, L. R., 16 Eq. 239, seems to have been decided on the principle above stated, and it is recognized in *Re Brown*, 63 L. T. 159. The decisions in *Re Overhill's Trusts*, 1 Sm. & G. 362, and *Paul* v. *Children*, L. R., 12 Eq. 16, are not inconsistent with the principle, as in them the evidence of the testator's knowledge was insufficient.

(*g*) *Lepine* v. *Bean*, L. R., 10 Eq. 160.

son (*h*); 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. (*i*).

How intention to include illegitimate children may appear.

The foregoing cases fall under the general principle that illegitimate children may take under a gift to "children" where it is impossible, from the circumstances of the parties, that any legitimate children should take under the gift (*j*). Consequently, it is essential that there should be no legitimate children, for in the class of cases which we have just considered illegitimate children can never take in competition with legitimate children (*k*). We have now to consider a different class of cases, in which legitimate children, if there are any, take together with illegitimate children. In this class of cases, "there is upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term 'children' not merely according to its primâ facie meaning of legitimate children, but according to a meaning which will apply to, and which will include, illegitimate children" (*l*). It will be noticed that the difference between this class of cases and those above referred to is that in them it was impossible that legitimate children should take, while in those now to be considered the term "children" may include legitimate as well as illegitimate children.

Where number is specified.

For example, as Mr. Jarman points out (*m*), "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."

Where number of children affects the construction.

So if a testator gives property to "the children" of a deceased person, and at the date of the will there are, to the knowledge of the

(*h*) *Durrant* v. *Friend*, 5 De G. & S. 343.

(*i*) *Savage* v. *Robertson*, L. R., 7 Eq. 176.

(*j*) Per Lord Cairns in *Hill* v. *Crook*, L. R., 6 H. L. at p. 282.

(*k*) Compare *Re Fish*, [1894] 2 Ch. 83.

(*l*) Per Lord Cairns, in *Hill* v. *Crook*, L. R., 6 H. L. at p. 283.

(*m*) First ed. Vol. II. p. 147.

testator, two or more children of that person living, only one whom is legitimate, the illegitimate child or children will be includ in the gift (*n*).

Legitimate and illegitimate children referred to by name.

On the same principle, if a testator refers by name to sever persons, some of whom are legitimate and the others illegitimat as the "children" of A., and in the same will makes a gift in favo of "the children of A.," the illegitimate children will, as a gener rule, be included in the gift (*o*).

Effect of "including" illegitimate child.

In earlier days this doctrine was applied somewhat strictly Thus, in *Meredith* v. *Farr* (*p*), there were two gifts, one to "th children of A.," and the other to "the children of A., including he daughter Elizabeth"; at the date of the will A. had six legitimat children and two illegitimate children, one named Elizabeth, an the other named Keziah: it was held that Elizabeth was no entitled to share in the first gift: that she was entitled to shar in the second gift, and that Keziah was altogether excluded Again, in *Re Wells' Estate* (*q*), the testator made various gifts t "my son Thomas," and afterwards directed six shares of hi property to be divided among "all my children living at m decease, except my son Thomas"; he left seven children, of whon two, Thomas and Ann, were illegitimate; it was held that An was not entitled to a share. In other words, by styling *som* illegitimate children of A. his "children," the testator does no

(*n*) *Gill* v. *Shelley*, 2 R. & My. 336 (where the illegitimacy was known to the testatrix, but this seems not to be essential). *Leigh* v. *Byron*, 1 Sm. & G. 486. *Re Humphries*, 24 Ch. D. 691. Mr. Jarman criticizes the cases of *Hart* v. *Durand*, 3 Anst. 684, and *Swaine* v. *Kennerley*, 1 V. & B. 469. As he points out (1st ed. Vol. II. p. 137): the only apparent distinction between *Swaine* v. *Kennerley* 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. It is submitted, therefore, that the cases of *Swaine* v. *Kennerley*, and *Hart* v. *Durand*, may be considered as overruled." See *Leigh* v. *Byron*, supra, as to words referring to an only child. In *Edmunds* v. *Fessey*, 29 Bea. 233, the testator gave to each of the sons and daughters of his late cousin a legacy of 100*l*. The cousin had two legitimate sons, one illegitimate son, and one illegitimate daughter: it was held by Romilly, M.R., that the illegitimate daughter was entitled to a legacy, but that the illegitimate son was not. At the present day the principle laid down in *Hill* v. *Crook* (post) would probably be applied to such a case, so as to admit all the children.

(*o*) *Evans* v. *Davies*, 7 Ha. 498. See *Hartley* v. *Tribber*, 16 Bea. 510; *Meredith* v. *Farr*, 2 Y. & C. C. C. 525; *Owen* v. *Bryant*, 2 D. M. & G. 697; *Worts* v. *Cubitt*, 19 Bea. 421. And see *Smith* v. *Jobson*, 59 L. T. 397, where it was held that a share given to an illegitimate daughter went over under a clause providing for the death of "any of my children."

(*p*) 2 Y. & C. C. C. 525. See *Re Cornellis*, [1906] 2 Ch. 316.

(*q*) L. R., 6 Eq. 599, cited ante, p. 1748, in connection with the rule laid down in *Carteright* v. *Vawdry*, &c.

necessarily prove that he means *all* illegitimate children of A. to be viewed in the same light (*r*). The distinction made [in *Meredith* v. *Farr*] 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 (*s*).

Separate reference to illegitimate child.

Again, in *Bagley* v. *Mollard* (*t*), a testator gave certain property to his "grandchild Elizabeth, the only surviving child" of his son William, and gave the residue of his property to all the children of his sons James and William, and of his daughter Sarah; Elizabeth was illegitimate and William had no other child; it was held by Leach, M.R., that she did not share in the residue, on the ground that "whenever the general description of children will include legitimate children it cannot also be extended to illegitimate children." This principle is erroneous (*u*), and in such cases it is merely a question of intention. Thus, in *Megson* v. *Hindle* (*v*), a testator gave to "my grandson James, the son of my daughter Alice Jane," the sum of 500*l*., with power to apply the income for his maintenance, but if he died under twenty-one the 500*l*. and the unapplied income were to go in augmentation of a legacy of 2,000*l*. "hereinafter bequeathed upon trusts in favour of the children and issue of my said daughter Alice Jane"; the legacy of 2,000*l*. referred to was bequeathed for the benefit of "all the children of my said daughter" living at a certain time and the issue of deceased children: Alice Jane left seven children, of whom James was illegitimate; it was held that the whole scheme of the will shewed an intention on the part of the testator to make a separate provision for the illegitimate grandson, and not to include him in the gift to the "children" of Alice Jane. If, however, the scheme of the will is consistent with illegitimate children, previously named, being included in a gift to "children," they will, as a general rule, be admitted to share, in accordance with the principle of the modern cases (*w*).

(*r*) See per Wigram, V.-C., *Dover* v. *Alexander*, 2 Hare, at p. 281; *Edmunds* v. *Fessey*, 29 Bea. 233 (as to the illegitimate sons).

(*s*) The concluding portion of this paragraph (from "In other words") is taken from the fourth edition of this work, by Mr. Vincent, Vol. II. p. 228. In *Re Smillter* (post), where the passage was referred to in argument, Kekewich, J., said that in *Meredith* v. *Farr* nothing turned on the meaning of the word "including."

(*t*) 1 R. & My. 581.

(*u*) Ante, p. 1755, post, p. 1758.

(*v*) 15 Ch. D. 198.

(*w*) *Re Parker*, [1897] 2 Ch. 208, and other cases cited post.

"Dictionary" principle of construction.

For since *Bagley* v. *Mollard* [1830], and *Meredith* v. *Farr* [184 were decided, a more liberal principle of construction has be adopted, which may be shortly described as the "dictionary principle." It was clearly laid down in *Hill* v. *Crook* (*x*). In th

Hill v. *Crook*.

case the testat had a daughter Mary, who (as he knew) had go through the form of marriage with John Crook, her deceas sister's husband, and had issue by that connection; by his wil after referring to his "son-in-law John Crook," he bequeathe certain leasehold in trust for "my daughter Mary, the wife of th said John Crook, for her separate use, "independent of her presen or any after-taken husband," and afterwards in trust for "the child if only one, or all the children if more than one, of my said daughte Mary Crook, with clauses referring to his daughter as 'Mary Crook"; it was held by the House of Lords that, although there was no reason why illegitimate children might not take under th bequest, yet that the testator's daughter by John Crook, who was born before the date of the will, and had acquired the reputation of being children of John Crook, were entitled Lord Chelmsford said: "I know of no objection in law to a gift to children, with a clear intention that it shall apply to existing legitimate children, being so applied, although after-born illegitimate children must be excluded, and the gift be extended to future legitimate children." Lord Cairns treated it as clear that a testator might, by appropriate words, shew an intention to use the general term 'children' so as to include illegitimate along with legitimate children." The only question was whether in that case, upon a just and proper construction of the will, there was 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 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 the 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

(*x*) L. R., 6 H. L. 265, affirming *Crook* v. *Hill*, 6 Ch. 311.

meaning of the terms he has used, that is all which the law, as I understand the cases, requires."

Modern cases.

The "dictionary" principle laid down in *Hill* v. *Crook* has been followed in numerous modern cases (*y*), and the canon of construction acted on by Leach, M.R., in *Bagley* v. *Mollard* (*z*), and by Lord Lyndhurst in *Fraser* v. *Pigott* (*zz*), is clearly erroneous. Thus, in *Re Brown* (*a*), a testator, after referring to J. L. B. as "my son-in-law," gave property to "my daughter M. A. M., the wife of the said J. L. B.," and "my daughter A., the wife of W. W.," and gave his residue to his "children." His daughter M. A. M. B. was illegitimate, but it was held that she was entitled to share in the residue as one of the testator's "children."

Extension of the "dictionary" principle.

The decision in *Re Loveland* (*b*) seems to be based on the "dictionary" principle of construction, but it goes considerably beyond the principle laid down by Lord Cairns in *Hill* v. *Crook*. In *Re Loveland* there was no reference to illegitimate children (*c*), the gift was to the children of an unmarried woman who was not described as "the wife" of the testator with whom she was living, but alternatively by her own surname and by his surname ("D. D. W., otherwise D. D. L.") (*d*), and it was restricted to her children living at his decease: it was held that a child en ventre at the date of the will and born a few weeks afterwards, was entitled under the gift: not, apparently, on the ground that the gift was in favour of children who should acquire the reputation of being the offspring of the testator and D. D. W., but on the ground that the testator intended to provide for the illegitimate children of D. D. W. born in his lifetime, without regard to their paternity or reputed paternity. The inference was drawn from the relation between the parties, the way in which the woman was described in the will, and the fact that the gift was restricted to children living at the testator's decease.

(*y*) *Re Horner*, 37 Ch. D. 695. *Re Jodrell*, 44 Ch. D. 590, aff. s. n. *Seale Hayne* v. *Jodrell*, [1891] A. C. 304; *Re Harrison*, [1894] 1 Ch. 561; *Re De Wilton*, [1900] 2 Ch. 481 (the headnote of which is incomplete), and see the cases on gifts to illegitimate relation (*Re Fish, In bonis Ashton, Re* &c., cited, post). As to *I* 92 L. T. 724, and *Re C* L. T. 560, see post, p. 176

(*z*) Ante, p. 1757.

(*zz*) You. 354. The d *Brown*, 58 L. J. 420, also a contrary to the modern construction.

(*a*) 62 L. T. 899. *Re Walker*, [1897] 2 Ch. 238. *Re Parker*, [1897] 2 Ch. 298. *Re Smiller*, [1903] 1 Ch. 198.

(*b*) [1900] 1 Ch. 542; stated post, p. 1775.

(*c*) As in *Re H* *Trusts*, 35 Ch. 728, i

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This principle of construction may be said to have been carried to its extreme limit in *O'Loughlin* v. *Bellew* (*e*), where the gift was to the children of "my daughter Mary E. O'Loughlin"; the daughter's real name was Bellew, but she was living with a man named O'Loughlin, and had several illegitimate children by him, who were treated by the testatrix as her grandchildren: it was held that they were the objects of the gift.

Testator's knowledge that parties were not legally married.

It is to be observed that in *Hill* v. *Crook* it appeared, though the decision does not appear 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. The importance of the fact seems to lie in this, that it made it unnecessary to prove that the testator knew that the parties were not legally married. For if a testator describes A. as the wife of B., and bequeaths property to "the children of A.," this will not entitle the illegitimate children of A. and B. to take, unless it is proved that the testator knew the actual nature of the connection between A. and B. (*f*).

Testator's belief that children are legitimate may be immaterial.

Under a gift to the children of A., his illegitimate children in existence at the date of will are entitled, if sufficiently indicated, even although the testator believes them to be the legitimate children of A. (*g*).

In *Re Lowe* (*h*), the testator gave to each of his brother Joseph's children, "except his eldest son E. J. and his daughter M. L., 100*l*.," and made various other dispositions in favour of "the present wife" of Joseph and his "children"; elsewhere in the will he referred to "my nephew E. J." and the "brother of E. J. next in seniority." Joseph had been married many years before and had two legitimate daughters, of whom M. L. was one. After his wife's death he cohabited with B., by whom he had seven illegitimate children, including E. J.; one of them was born after the date of the will. The testator believed that Joseph was lawfully married to B. It was held that the illegitimate children, other than the child born after the date of will, were entitled to the benefits given to Joseph's "children" in the same way as if they had been legitimate.

Separate provision made for illegitimate child.

The doctrine laid down in *Hill* v. *Crook* does not apply in cases

(*e*) [1906] 1 Ir. 487.

(*f*) *Re Brown*, 63 L. T. 159. This appears to have been the ground of the decision in *Re Ayles' Trusts*, 1 Ch. D. 282 (see per Stirling, J., in *Re Horner*, 37 Ch. D. at p. 695), although in *Ellis* v. *Houstoun*, post, Malins, V.-C., seemed to think that the decision in *Re Ayles's Trusts* turned on the fact that A. and B. married after the date of the will and had a legitimate child.

(*g*) *Holt* v. *Sindrey*, 38 L. J. Ch. 126. *Re Plant*, 47 W. R. 183.

(*h*) 61 L. J. Ch. 415.

where the context shews that the testator intends to make a difference between legitimate and illegitimate children (*i*).

Where testator is married and has no legitimate children.

In the case of a testator who at the time of making his will is married, and has illegitimate, but no legitimate, children, it was formerly considered that (in the absence of other indications of intention) a bequest by him to "my children" might be taken to refer to his illegitimate children. But this doctrine is erroneous, and even if the circumstances strongly point to the conclusion that the testator intended to provide for his illegitimate children, this is, after all, mere conjecture, which cannot prevail unless it is supported by the wording of the will.

Dorin v. *Dorin*.

The general principle is clearly laid down in *Dorin* v. *Dorin* (*j*), 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 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?"

Gift to "children" of another person.

The same principle applies where the gift is to the "children" of another person: thus, in *Ellis* v. *Houstoun* (*k*), the testatrix bequeathed property to her brother Charles and his wife Elizabeth for their lives, and after their decease to all the children of her brother living at the death of the survivor: at the date of the will Charles had three children by his first wife, two children by his second wife, Elizabeth, before marriage, and one child by her after marriage: it was held that the illegitimate children could not take. The reason given by Malins, V.-C., namely, that the illegitimate

(*i*) *Megson* v. *Hindle*, 15 Ch. D. 198.

(*j*) L. R., 7 H. L. 568, reversing L. R., 17 Eq. 463. *Godfrey* v. *Davis*, 6 Ves. 43, ante, p. 1750, has been cited for the same point; but there the will was not by the putative father.

(*k*) 10 Ch. D. 236. Compare *Warner* v. *Warner*, 15 Jur. 141.

children could not take because there were legitimate children to answer the description is, it is submitted, unsound (*l*): the true reason is that as Elizabeth was the wife of Charles at the date of the will the case fell within the principle of *Dorin* v. *Dorin*. So in *Re Browne* (*m*), the testator had a son G. who was married and had long been separated from his wife, by whom he had no children at the date of the will (his wife being still living) G. had several children by another woman, all of whom were known by the testator to be illegitimate, but were treated by him as the children of G.: it was held that they could not claim under a gift to "the children" of G.

Application of rule in *Dorin* v. *Dorin*.

The decision in *Dorin* v. *Dorin* undoubtedly re-established the old rule, as to the strict interpretation of the word "children" when used without explanatory context, but even now the application of the rule is often a matter of some difficulty. Thus, in *Laker* v. *Hordern* (*n*), where the testator had no legitimate children a gift to "my daughters" was held to mean existing illegitimate daughters. So in *Re Haseldine* (*o*), the testator bequeathed "the following legacies to the following persons, (that is to say)"—here followed legacies to persons mentioned by name, and then—"and 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." He afterwards made a codicil giving further benefits to "the children of the said M. A. L." M. A. L. had been married seven years at the date of the will: she never had any legitimate children, but she had at the date of the will three young children by her husband before marriage. The testator was aware of these facts. Kay, J., thought the case was governed by *Dorin* v. *Dorin*: on appeal, Cotton, L.J., was of the same opinion, but Bowen and Fry, L.JJ., thought that the will and codicil referred to existing persons, and that the illegitimate children were entitled.

Intention to benefit existing persons.

The decision in *Re Haseldine* seems to lay down an intelligible principle, namely that a testator may, by using words which obviously point to circumstances existing at the date of the will shew that he refers to illegitimate children then living. On this principle the much discussed case of *Beachcroft* v. *Beachcroft* (*p*)

(*l*) See per Stirling, J., in *Re Horner*, 37 Ch. D. at p. 709.
(*m*) 61 L. T. 463.
(*n*) 1 Ch. D. 644.
(*o*) 31 Ch. D. 511.
(*p*) 1 Mad. 430. The decision was criticized at some length by Mr. Jarman 1st ed. Vol. II. p. 140, seq., and was disapproved in *Re Orrehill's Trust*, 8m. & G. 362, and in *Holt* v. *Sindre* 38 L. J. Ch. 126.

appears to have been rightly decided. There 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 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, and Plumer, V.-C., decided in the affirmative. As he pointed out, the language of the will and the nature of the dispositions, clearly shewed that the testator had existing persons in his mind. The same principle was followed by Wood, V.-C., in *Dilley* v. *Mathews* (*q*).

Re Du Bochet.

The case of *Re Du Bochet* (*r*) offers some difficulty. There a testatrix bequeathed her residuary estate upon certain trusts for the children being daughters of her nephew R., of her niece Mrs. A., and of her niece Mrs. H. R. had illegitimate daughters, but no legitimate ones: the testatrix believed that R. was married and that his daughters were legitimate. It was held by Joyce, J., that the illegitimate daughters of R. born before the date of the will were entitled to share with the legitimate daughters of A. and H.: he relied chiefly on *Holt* v. *Sindrey* (*s*), and *Hill* v. *Crook* (*t*), but in both those cases the testator referred to his daughter, as the wife of a named person to whom she was not married. In *Re Du Bochet*, the mother of R.'s illegitimate daughters was not referred to by the testatrix, so that there was nothing on the face of the will to shew that the testatrix meant to refer to R.'s illegitimate daughters. There is, however, this point of resemblance between *Holt* v. *Sindrey* and *Re Du Bochet*, that in both cases the testator believed that the person referred to was legally married and that the children were legitimate. In this respect these cases differ from *Dorin* v. *Dorin*, for there the testator knew that the children were illegitimate, and he ought to have used language to shew that he meant them to benefit by his will: in *Holt* v. *Sindrey* and *Re Du Bochet* the testator had no reason to believe that the children were illegitimate, and therefore no reason to use special language in referring to them. Whether this is sufficient to exclude the operation of the rule in *Dorin* v. *Dorin* may be a question. *Re Brown* (*u*) was an even stronger case than *Re Du Bochet*, for in *Re Brown* the testatrix referred to both the supposed wife and husband by name: yet the gift to their children was held bad.

(*q*) 11 Jur. N. S. 425.
(*r*) [1901] 2 Ch. 441.
(*s*) 38 L. J. Ch. 126; L. R., 7 Eq. 170.
(*t*) Supra, p. 1758.
(*u*) 63 L. T. 159, ante, p. 1759.

Effect of *Dorin* v. *Dorin*.

The decision in *Dorin* v. *Dorin* does not affect such cases as *Hill* v. *Crook* (*v*), where the testator refers to two people as man and wife, and bequeaths property to their children, knowing that they are not married, and that their children are illegitimate. The decisions, in *Re Horner* (*w*), and *Re Harrison* (*x*), proceeded on this ground. Nor does it affect those cases in which the testator refers to two people as man and wife, not knowing that they are not legally married, and shews by the language of his will that in giving property to their "children" he means to benefit their existing children (*y*).

Whether relationship may be inferred.

On principle it would seem that to enable an illegitimate person to share in a gift to "children," "grandchildren," or the like under the dictionary rule of construction, it is not essential that he should be expressly referred to as a "child" or "grandchild," and that it is sufficient if the relationship is stated indirectly. It is true that a different conclusion was arrived at in *Re Hall* (*z*) where the testator described R. W. and H. B. as "my two nephews," and gave his residue to the "children" of his brothers and sisters R. W. was an illegitimate child of one of the testator's sisters: H. B. was a legitimate nephew: it was held that the fact of R. W. being described as a "nephew" of the testator did not entitle him to share as a "child" of the testator's sister. But in *Re Kiddle* (*a*) where the testatrix referred to her illegitimate son as "my son George," and gave her residue to her grandchildren, it was held that the children of George were entitled to share. Again, in *Re Couturier* (*b*), a testatrix gave legacies to various persons by name, describing them as her grandsons: some of them were the legitimate, others the illegitimate, children of her daughter F.: she gave her residue to the children of her daughter F.: it was held that the illegitimate children of F. were entitled to share.

Illegitimate children en ventre.

III.—Gifts to Illegitimate Children en ventre.—"It is now clear," says Mr. Jarman (*c*), "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* (*d*). where a testator recited that he had reason to believe that A. was then pregnant

(*v*) Supra, p. 1758.
(*w*) 37 Ch. D. 695.
(*x*) [1894] 1 Ch. 561.
(*y*) *Holt* v. *Sindrey*, ante, p. 1760. The case of *Re Plant*, 47 W. R. 183, was extremely near the line.
(*z*) 35 Ch. D. 551. In *Re Walker*, [1897] 2 Ch. 239 and *Re Smiller*, [1903] 1 Ch. 198, the question turned the meaning of the word "issue."
(*a*) 92 L. T. 724.
(*b*) 96 L. T. 560.
(*c*) First ed. Vol. II. p. 149.
(*d*) 1 Mer. 141. See also judgme in *Earle* v. *Wilson*, 17 Ves. at p. 53 *Dawson* v. *Dawson*, 6 Mad. 292.

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 favour.'

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 of his paternal parent at least, filius nullius,) and which it cannot, properly, permit to be inquired into; and the devise is therefore, unless the fact in question can be assumed, necessarily void. 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 the case of *Earle* v. *Wilson* (*e*), 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. There was no gift, he said, to the child of which M. might be enceinte, except as the child of the testator. It was not a matter of indifference to him whether that child should have been begotten by him or another man; therefore he could not do what was required, that is, reject the words 'by me' as superfluous. 'Suppose,' the learned judge observed, 'the words,' "as she may happen to be enceinte

Such a gift held invalid, though proceeding from the father.

(*e*) 17 Ves. 528.

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 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 the case of *Gordon* v. *Gordon* (*f*) cautiously abstains from giving an opinion on the point decided by Sir *W. Grant* in *Earle* v. *Wilson*, and had, it seems, obtained the concurrence of that learned Judge in the opinion he then pronounced. But the authority of *Earle* v. *Wilson* has been since questioned in the case of *Evans* v. *Massey* (*g*), 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, and that some of the judges had intimated upon several occasions dissatisfaction with it. After adverting to what fell from Lord *Eldon* in *Gordon* v. *Gordon*, the learned Chief Baron proceeded: 'We have therefore only to inquire, in this case, whether there be in the terms of the present bequest, worded as it is, such a condition precedent annexed to it by the testator as by necessary construction requires, in order to give effect to the bequest, the child must be shown to be the testator's child, and that he meant to give

Evans v. *Massey.*

Gift to illegitimate child en ventre held good.

Earle v. *Wilson* questioned by *Richards*, C.B.

(*f*) 1 Mer. 141, stated ante, p. 1765. (*g*) 8 Pri. 22.

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 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 particularising 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 shew 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.'

Remarks on *Evans* v. *Massey*.

"It is to be inferred from the observations of the Chief Baron, 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 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 Courts will not act upon the principle of that case, unless the testator's intention to make the

fact of his parentage to the unborn infant an essential part of its description be unequivocally demonstrated."

Whether child en ventre may have a name by reputation.

It has been said, however, that a child en ventre sa mère is a child in esse, and may have a name by *reputation* (*h*). 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 (*i*). There appears, at least, to be no case 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 (*j*).

Crook v. *Hill*, cor. Hall, V.-C.

The question would seem to have been involved in the facts of *Crook* v. *Hill* (*k*), 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 Lord Justices, and before 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."

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

(*h*) By Sir E. Sugden, 2 Jo. & Lat. at p. 460; also by Romilly, M.R., 22 Bea. pp. 339, 340. The expression is not accurate. What is meant is that a child en ventre may have the reputation of being the child of a particular man.

(*i*) 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.

(*j*) In *Occleston* v. *Fullalove*, L. R., 9 Ch. 158.

(*k*) 3 Ch. D. 773, will stated ante, p. 1758.

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 (*l*); 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 (*l*). 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 there 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.

Child afterwards born and gaining repute before testator's death.

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 (*m*).

(*l*) The statement that testator "knew" of his daughter's pregnancy (even supposing that could be taken for "reputation") seems to imply a species of evidence which the law will not permit to be given. [Note by Mr. Vincent in the 4th ed. of this work Vol. II. p. 243.]

(*m*) *Occleston* v. *Fullalove*, L. R., 9 Ch. pp. 147, 159, 170; *Re Goodwin's Trust*, L. R., 17 Eq. 345; *Perkins* v. *Goodwin*, [1877] W. N., p. 111 (testator not the father). 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. But 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

CHAP. XLIII.

The foregoing remarks on the question whether a child en ventre can have or acquire the reputation of being the child of a particular man, are taken from an earlier edition of this work by Mr. Vincent (*n*). With regard to the last paragraph, there is no doubt that if a testator gives property to his reputed children by a particular woman, and she is, at the date of the will, pregnant of a child which is born before the testator's death and acknowledged by him as his child, it is entitled to take under the gift (*o*). But whether a child en ventre at the testator's death can take under such a gift is a question which is still open (*p*). It is also doubtful what words and circumstances are sufficient (in the absence of express words) to shew that a gift to the "children" of a woman is intended to take effect in favour of her children reputed to be by a particular man (*q*).

Remarks on the old cases.

With regard to express gifts to illegitimate children en ventre, it may be remarked that the distinctions taken in the early cases are somewhat artificial. Where a testator gives property to "the child of which A. is now pregnant by me," this is merely a short way of saying what the testators in *Gordon* v. *Gordon* (*r*), and *Evans* v. *Massey* (*s*), said at greater length: it is an admission or expression of belief by the testator, not requiring any further proof, and such a gift ought to be held good. A gift to "the child of which A. is now pregnant by B.," offers more difficulty, but even in this case there seems no sufficient reason for holding the gift to be void: the statement of paternity is merely an expression of opinion on the testator's part. The gift is certainly not void on the ground of public policy (*t*).

defendant) by Mrs. H. The plaintiff alleged that five only, including herself, were born before the date of the deed-poll (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-poll." 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. (Note by Mr. Vincent in the 4th ed. of this work, Vol. II. p. 213.)

(*n*) 4th ed. Vol. II. p. 242.

(*o*) *Occleston* v. *Fullalove*, L. R., 9 Ch. 147.

(*p*) *Re Bolton*, 31 Ch. D. 542. As to trusts created by deed, see *Re Shaw*, [1894] 2 Ch. 573; *Ebbern* v. *Fowler*, [1909] 1 Ch. 578.

(*q*) See next section.

(*r*) Ante, p. 1764.

(*s*) Ante, p. 1766.

(*t*) See per Hall, V.-C., in *Crook* v. *Hill*, 3 Ch. D. at p. 778.

IV.—Gifts to Future Illegitimate Children.—Mr. Jarman continues (*u*): "The preceding sections leave untouched the question respecting the validity of a devise or bequest to the illegitimate children, *not* in esse, of a particular woman, without reference to the father. The state of the law on the subject seems to be this: the early authorities are opposed to gifts to such objects, on the ground 'that the law will not favour such a generation, nor expect that such shall be' (*v*); and modern authority is silent upon the subject (*w*); dicta, however, have been thrown out by recent judges which cast a doubt upon the old opinion. In *Wilkinson* v. *Adam* (*x*), Lord *Eldon* observed, that he knew no law against such a devise; but, his Lordship afterwards said (*y*), that whether the cases in Lord *Coke* (*z*), 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 necessary to decide in that case. He would leave that point where he found it, without any adjudication.

Whether gifts to bastards not in esse good.

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

"To support the great interests of morality, is part of the policy of every well-regulated State, and has long been a principle of the law of England, which has uniformly refused validity to provisions offering a direct incentive to vice; as in the case of bonds given with a view to cohabitation, the fate of which is well known. The same principle, it may be contended, applies to gifts in favour 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.

Objection on grounds of public policy.

(*u*) 1st ed. Vol. II. p. 153.

(*v*) See *Blodwell* v. *Edwards*, Cro. El. 510.

(*w*) Mr. Jarman wrote, it will be remembered, in 1844, and since then the law on the subject has been settled more clearly.

(*x*) 1 V. & B. 446. But the context shews that he was speaking only of such as were begotten in the testator's lifetime and born "within the longest period allowed for gestation."

(*y*) 1 V. & B. 468.

(*z*) Co. Lit. 3 b.

CHAP. XLIII.

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 as such a question is not likely to occur since in gifts to future illegitimate children they are generally described as the offspring of a particular man, which renders them indisputably void, the writer will only farther observe, that the view which has been taken of the subject is not at all prejudiced by the decisions, establishing the validity of gifts to bastards en ventre; for as in these cases the immoral act, which it is the policy of the law to discourage, has been done, the argument on which the objection is founded, does not apply, and they fall within the principle which allows validity to provisions founded on the consideration of *past* cohabitation."

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 (*a*).

Objections as to children begotten after testator's death;

As regards provisions for children to be begotten after the instrument comes into operation, namely, 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 (*b*).

—— but not as to children begotten between the will and testator's death.

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 Romilly, M.R. (*c*), and Page Wood, V.-C. (*d*). Indeed, no dis-

(*a*) *Re Connor*, 2 Jo. & Lat. at p. 459.

(*b*) Per James and Mellish, L.JJ., 9 Ch. pp. 160, 166, 167, 171: *Crook* v. *Hill*, 3 Ch. D. 773 (as to Edward). *Re Harrison*, [1894] 1 Ch. 561.

(*c*) *Medworth* v. *Pope*, 27 Bea. 71, and *Lepine* v. *Bean*, L. R., 10 Eq. 160 (gifts by reputed father). See also *Pratt* v. *Mathew*, 22 Bea. 334, and per Lords Chelmsford and Colonsay, L. R., 6 H. L. pp. 272, 280.

(*d*) *Howarth* v. *Mills*, L. R., 2 Eq. 389 (gift by mother).

tinction 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* (*e*), 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 said 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. 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, and the decision was therefore reversed (*f*).

Occleston v. *Fullalove.*

(*e*) L. R., 9 Ch. 147.

(*f*) The following remarks on *Occleston* v. *Fullalove* are taken from the 4th ed. of this work by Mr. Vincent (Vol. II. p. 247): In *Occleston* v. *Fullalove*, 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* (22 Bea. 334), 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 *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.

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 because 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. (See 4 Ch. D. 173.)

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; 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* (3 Ch. D. 773) no objection to

Rule established by *Occleston* v. *Fullalove*.

The fact that the illegitimate child was en ventre at the date of the will was immaterial, for the general principle established by *Occleston* v. *Fullalove*, is that a gift to illegitimate children not born at the date of the will, but to be born during the lifetime of the testator, is good, if they can be ascertained without inquiring into the fact of paternity. Reputation of paternity is a fact which can be proved, and therefore a gift to the reputed children of a woman by a particular man is good, if limited to children born during the testator's lifetime (*g*).

Future illegitimate children of a woman.

It follows, à fortiori, that a gift to the future illegitimate children of a woman is good, if confined to children born during the testator's lifetime (*h*).

The principle is that as a will is in its essence a secret and revocable document during the testator's lifetime, it does not afford any inducement to immorality (*i*).

Gifts to "children" of a woman;

The question still remains to be considered whether a gift to the "children" of a woman can mean or include unborn illegitimate children. In *Mortimer* v. *West* (*j*), a testator who was married, and was living with a woman named Martha D., gave his real and personal property upon trust after the death of his wife and Martha D. for four persons, A., B., C., and D. (described as the children of Martha D.), and "every other child born of the body of Martha D. and living at my decease": the four children so named were illegitimate, and after the date of the will Martha D. had two other children, also illegitimate: Lord Lyndhurst held that the two after-born children did not take, because "children," primâ facie, means legitimate children, and there was nothing in the will to shew "by necessary implication" that illegitimate children were intended to take (*k*).

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 favour of the two elder children. Mr. Vincent also refers to *Lepine* v. *Bean*, L. R., 10 Eq. 160, post, p. 1777, and *Perkins* v. *Goodwin*, [1877] W. N. 111, post, p. 1776, n. (*t*), in further illustration of the doctrine that under a gift to illegitimate children as a class those take who are capable, and take the whole.

(*g*) *Re Hastie's Trusts*, 35 Ch. D. 728, post.

(*h*) Ibid; In the *Estate of Frayley*, [1905] P. 137 (where the gift was to the testatrix's own children, she being a single woman). *Re Loveland*, [1906] 1 Ch. 542, commented on ante, p. 1759, and post, p. 1775.

(*i*) Some of the cases also lay stress on the moral duty of a parent to provide for his or her illegitimate children.

(*j*) 3 Russ. 370.

(*k*) There was a question whether they could take a share of the personalty by reason of the testator having made a codicil after their birth, but this point also was decided against them.

——may mean her illegitimate children.

On the other hand, in *Re Hastie's Trusts* (*l*), where the testator gave property in trust for "my four natural children by M. E. M., viz. J., C., E., and J. H., and all and every other children and child which may be born of the said M. E. M. previous to and of which she may be pregnant at the time of my death," it was held by Stirling, J., that three illegitimate children born of M. E. M. after the date of the will and before the death of the testator, were entitled to share in the gift (*m*). *Mortimer* v. *West* was not cited, but it may, it is submitted, be treated as overruled. The decision in *Re Hastie's Trusts* is, in fact, an extension of the "dictionary" principle of construction, laid down in *Hill* v. *Crook* (*n*), to future illegitimate children. "The effect of the will," said the learned judge, "will best be given if we interpolate in the will after the words 'pregnant at my death' the words 'all of whom I am willing to treat as my natural children.'" This simple and rational mode of construction avoids all difficulty as to paternity; it assumes that if the connection were broken off, the testator would make a new will, providing only for the illegitimate children then in existence.

Re Loveland.

The case of *Re Loveland* (*o*) was decided on the same principle. In that case the testator, Loveland, had gone through the form of marriage with his niece, Daisy Dorcas Wootton: he made his will just before starting on a journey, knowing that she was pregnant; by it he gave his residue upon trust for "Daisy Dorcas Wootton, (otherwise Daisy Dorcas Loveland)" for life, and after her death upon trust for "all her children living at my decease": her child was born a few weeks after the date of the will: the testator, who was informed of the birth, died abroad a few months afterwards without having seen the child: it was held by Swinfen Eady, J., that the child was entitled under the gift.

Future illegitimate children of a man.

We have seen that a gift to the "children" of a man may include his reputed illegitimate children born at the date of the will, if the context and the circumstances support that construction (*p*). Whether a gift to the "children" of a man can include his reputed illegitimate children, born or begotten between the date of the will and the date of the testator's death is not satisfactorily settled.

It seems clear that if a testator gives property to "the children"

(*l*) 35 Ch. D. 728.

(*m*) It is stated in the case that they were known by the testator's surname, but this seems immaterial, as the meaning of the testator was to include all illegitimate children of M. E. M., without reference to paternity or reputed paternity.

(*n*) Ante, p. 1758.

(*o*) [1906] 1 Ch. 542, ante, p. 1759.

(*p*) Ante, p. 1752. As to children en ventre, p. 1764 seq.

Where testator is not the putative father.

of A. (a man), his future illegitimate children cannot take under the gift, even although, owing to the context of the will or the circumstances of the case, existing illegitimate children are included (*q*). If, however, A. is to the knowledge of the testator, unmarried, and living with a woman whom the testator refers to in the will as A.'s wife, there would, on the principle of *Hill* v. *Crook* (*r*), seem to be some ground for holding that by "children" the testator meant "reputed children," so that A.'s illegitimate children born in the testator's lifetime, who acquire that reputation, would be entitled to share. The question does not seem to have arisen (*s*). It has, however, been suggested that unless such a gift is restricted to children born or en ventre during the testator's lifetime, it cannot take effect in favour of children begotten after the date of the will, because if it were good as regards children not then in esse, it would include children who might be born after the testator's death and they clearly cannot be the objects of his bounty (*t*).

Where testator is the putative father.

Again, it is clear as a general rule, that where the testator is married, a gift by him to "my children" cannot include future illegitimate children (*u*). So if he has gone through the form of

(*q*) *Re Du Bochet*, [1901] 2 Ch. 441, ante, p. 1763 and post, n. (*s*).

(*r*) Ante, p. 1758.

(*s*) In *Re Lowe*, ante, p. 1760, the testator believed that A. was lawfully married to the woman referred to in the will as his "present wife," and a similar state of facts existed in *Re Du Bochet*, [1901] 2 Ch. 441, ante, p. 1763. In neither case, moreover, was the gift restricted to children born during the testator's lifetime.

(*t*) Per Mellish, L.J., in *Occleston* v. *Fullalove*, L. R., 9 Ch. at p. 171; per Stirling, J., in *Re Hastie's Trusts*, 35 Ch. D. at p. 734; *Re Lovedand*, [1906] 1 Ch. 542. If the suggestion is sound, the decision in *Perkins* v. *Goodwin* ([1877] W. N. 111) is open to objection on this score. In that case, 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* were held by Jessel, M.R., to be entitled in equal shares. It is submitted, however, that the decision is correct, and that Mellish, L.J.'s, explanation of the dicta of Lords Chelmsford and Colonsay in *Hill* v. *Crook*, that "no gift to unborn illegitimate children is allowed by law," is more ingenious than sound. Lord Cairns expressly dissociated himself from those dicta, which are evidently based on the theory held by Sir E. Sugden and other judges of the old school (*Re Connor*, 2 J. & Lat. 456; *Mortimer* v. *West*, 3 Russ. 370; *Pratt* v. *Mathew*, 22 Bea. p. 334) that a gift to unborn illegitimate children, or at all events, to unborn illegitimate children by a particular man, is wholly void. That theory was exploded by the decision in *Occleston* v. *Fullalove*, as regards gifts to future illegitimate children born during the testator's lifesime.

(*u*) Unless, perhaps, his wife is past the age of child-bearing, as in *Lepine* v. *Bean*, post, and ante, p. 1774.

marriage with a woman whom he believes to be his wife but who has in fact a husband still living, a gift to "my children" cannot include future children by her, although she is in the will referred to as "my wife" (*v*). If, however, a testator who is unmarried and is living with a woman who he knows is not his wife, by his will refers to her as "my wife," and gives property to "my children," it is impossible to suppose that he can intend to provide for his future legitimate children, for the will would be revoked by his marriage; it is clear, both from this consideration and from the reference to the person whom he calls his wife, that he intends to provide for his reputed children by her, whether already born or thereafter to be born. The former would take, under the rule in *Hill* v. *Crook* (*w*), and it is difficult to see how the latter can be excluded, for they would have taken under the rule in *Occleston* v. *Fullalove* (*x*), if the gift had been to "my reputed children by my said wife now born or hereafter to be born," and it is impossible to suppose that the testator used the expression "my children" in any other sense. It is true that in *Pratt* v. *Matthew* (*y*), Romilly, M.R., decided, "with much regret," that an after-born illegitimate child could not take under a gift of this character, but the decision proceeded on the notion that an illegitimate child can only take as persona designata, and that under no circumstances can a man make a valid bequest to his future illegitimate children, "for they can have acquired no title by repute." The same remark applies to the decision in *Lepine* v. *Bean* (*z*), 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, Romilly, M.R., observed that although the testator intended after-born children by this woman to be included, in contemplation of law he had none; because "the law will not allow a gift to be made to after-born illegitimate children": this, however, is an erroneous view. It is also true that in *Occleston* v. *Fullalove* (*a*), James, L.J., thought that a gift to "my future children by A. B." implied a condition that they should be really the testator's children,

(*v*) *Re Bolton*, 31 Ch. D. 542.
(*w*) Ante, p. 1758.
(*x*) Ante, p. 1773.
(*y*) 22 Bea. at p. 334.
(*z*) L. R., 10 Eq. 160.
(*a*) L. R., 9 Ch. at p. 163.

which would make the gift void, but as a gift to " my children by A. B. already born " takes effect in favour of the testator's reputed children by A. B. already born (*b*), it is difficult to see why a gift to " my children by A. B. hereafter to be born " should not take effect in favour of A. B.'s after-born children who acquire the reputation of being by the testator. In *Re Bolton* (*c*), Bowen, L.J., said: " It is true that although the fact of paternity cannot be inquired into, the reputation of paternity may. The law does not forbid that, and if we could make out from this will that the testator meant that all children of the woman born during his cohabitation with her should be considered or reputed to be his, they might take," and the learned judge went on to point out that such a construction was inadmissible in that case, because the testator thought he was lawfully married to the woman.

The principle here suggested was acted on by Jessel, M.R., in *Re Goodwin's Trust* (*d*), 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 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. It is true that in *Re Bolton* (*e*) Cotton, L.J., dissented from this view. The point, however, did not arise in *Re Bolton*, for in that case the testator did not know that his marriage was invalid: and Bowen and Fry, L.JJ., both declined to express any opinion on the point (*f*). It is therefore submitted that the decision in *Re Goodwin's Trust* has not been overruled by any of the later cases, and is good law.

V.—General Conclusion from the Cases. It will be seen that the authorities are not in a satisfactory state. This arises to some extent from a gradual change in the view held by the Courts with reference to gifts to illegitimate children. There was formerly a leaning against such gifts, it being supposed that they tended to encourage immorality, and were therefore against public policy. Hence the extreme strictness shewn in the old cases in applying

(*b*) Ante, p. 1753.
(*c*) 31 Ch. D., p. 553.
(*d*) L. R., 17 Eq. 345.
(*e*) 31 Ch. D., p. 552.
(*f*) The point also did not arise in *Re Shaw*, [1894] 2 Ch. 390 (deed), or *Re Du Buchet*, [1901] 2 Ch. 411, ante, pp. 1763 and 1776, n. (*s*).

the rule that "children" primâ facie means legitimate children, and can only mean illegitimate children by "necessary implication." At the present day, slight peculiarities of language contained in a will, taken in conjunction with the circumstances of the case, are allowed to shew that by "children" the testator meant to include illegitimate children (*g*). So with regard to gifts to future illegitimate children. Sir E. Sugden said in 1845 that a bequest to such children was void, and that there was no authority for making a distinction between illegitimate children described as being the children of a particular mother, and those who are described as the children of a particular father. "It is on the ground of public policy," he said, "that such gifts are held to be void" (*h*). The doctrine that gifts to future illegitimate children are void on grounds of public policy, being *contra bonos mores*, was also laid down by Romilly, M.R. (*i*), Page Wood, V.-C. (*j*), and Stuart, V.-C. (*k*). In *Occleston* v. *Fullalove* (*l*), Lord Selborne adhered to this view, but the view expressed in that case by James and Mellish, L.JJ., that a gift to future illegitimate children, born during the testator's lifetime, and capable of being identified without evidence of paternity, is not against public policy, seems now to be established (*m*). It cannot be said, however, that the Courts have yet completely emancipated themselves from the narrow views held by the judges in former times, especially with regard to gifts to unborn illegitimate children described by reference to paternity (*n*).

Mr. Jarman's "general conclusions."

Perhaps the clearest way of shewing the changes made in the law by recent decisions is to set forth "the general conclusions from the cases" stated by Mr. Jarman in the first edition of this work (*o*), and to supplement them by a reference to the modern doctrines.

Mr. Jarman's general conclusions are:

"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,

"2nd. They are not objects of a gift to *children*, or *issue* of any other degree, unless a distinct intention to that effect be manifest

(*g*) See *Re Hasseldine*, 31 Ch. D. 511; *Re Lowland*, [1906] 1 Ch. 542; *O'Loughlin* v. *Bellew*, [1906] 1 Ir. 187, all referred to ante. As to the decision in *Re Du Bochet*, which seems contrary to principle, see ante, p. 1763.

(*h*) *Re Connor*, 2 J. & L., at p. 459.

(*i*) *Medworth* v. *Pope*, 27 Bea. at p. 73.

(*j*) *Howarth* v. *Mills*, L. R., 2 Eq., p. 391.

(*k*) *Holt* v. *Sindrey*, 38 L. J. Ch., p. 132.

(*l*) L. R., 9 Ch. 147.

(*m*) *Re Hastie's Trusts*, 35 Ch. D. 728, and other cases cited, ante, p. 1774.

(*n*) Ante, p. 1765.

(*o*) Vol. II., p. 155.

upon the face of the will; and if, by possibility, *legitimate* children could have taken as a class under such gift, illegitimate children *cannot*; though children, legitimate and illegitimate, may take concurrently under a designatio personarum applicable to both."

With regard to the degree of "distinct intention," which must be manifested in order to enable illegitimate children to take under a gift to "children," the tendency of modern cases is to infer an intention to benefit illegitimate children from expressions which would not have had that effect in former times (*p*); and it may be evident from the state of the facts, as when a bachelor makes a will in favour of his children, that children must mean illegitimate children.

The notion that legitimate and illegitimate children cannot take concurrently under a gift to "children," as a class was finally exploded by the decision of the House of Lords in *Hill* v. *Crook* (*q*).

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

This proposition has never been questioned. It applies also to cases where a gift to the "children" of a woman is construed to mean her illegitimate children, and she is pregnant of an illegitimate child at the date of the will (*r*).

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

The doctrine is undoubtedly accurate in all cases where the gift is conditional on proof of paternity, but it does not apply where the gift is to future children, reputed to be by a particular man, born during the testator's lifetime (*s*). And even where the gift is to "the children hereafter to be born of A. by B." it may be doubted whether the testator means the gift to be conditional on proof of paternity; it is probable that when a testator makes a gift to the future illegitimate children of a woman by a particular man he really means children who have the reputation of that paternity; this construction would bring the case within the doctrine of *Occleston* v. *Fullalove* (*t*). The decision of Jessel, M.R., in *Re Goodwin's Trust* (*u*) is, it is submitted, right.

If the gift is to the future children of a man and woman whom

(*p*) *Hill* v. *Crook*, L. R., 6 H. L. 265; *Re Hastie's Trusts*, 35 Ch. D. 728; and the cases referred to ante, p. 1759, n. (*y*).
(*q*) L. R., 6 H. L. 265.
(*r*) *Crook* v. *Hill*, 3 Ch. D. 773.
(*s*) Ante, p. 1777.
(*t*) *Occleston* v. *Fullalove*, ante, p. 1773.
(*u*) Ante, p. 1778.

the testator believes to be lawfully married, it fails as to their unborn illegitimate children (*v*).

"5th. That a gift by a testator to his *own* illegitimate child en ventre sa mère has been decided in one instance (namely in *Earle* v. *Wilson*,) to be also void; but the point admits of considerable doubt."

Mr. Jarman's doubt is strengthened by the tendency of the modern decisions, which are in favour of putting a rational construction on gifts of this nature (*w*). Where a testator makes a gift to "the child of which A. is now pregnant by me," it is incredible that he should desire the fact to be proved: he states it as a matter of his own belief.

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

This doctrine is exploded (*x*).

It should be added that a gift cannot be made to illegitimate children born after the testator's death (*y*).

VI.—Other Illegitimate Relations.—As a gift to children or other issue imports primâ facie legitimate children or issue (*z*), so under a gift to nephews, nieces, or other relations, only legitimate relations of the specified degree are as a general rule entitled to take (*a*). Similarly the words "relatives" (*b*) or "next of kin" primâ facie means legitimate kindred.

Gift to relations means legitimate relations.

The rule laid down in *Hill* v. *Crook* (*c*) in the case of gifts to children applies also to gifts to collateral relations. Thus, in *Seale-Hayne* v. *Jodrell* (*d*), a testator made bequests to various persons by name, including some persons whom he described as his "cousins," and gave the residue of his estate upon certain trusts for "my relatives hereinbefore named"; it was held that the persons described as "cousins" were entitled to share in the residue, although they were not legitimately related to the testator. So, in *Re Parker* (*e*), the testator, after giving a legacy to his wife's "nephew," R., gave his

"Dictionary" principle of construction.

(*v*) *Re Lowe*, 61 L. J. Ch. 415; *Re Du Bochet*, [1901] 2 Ch. 441.

(*w*) See for example, the gift in *Re Hastie's Trusts*, as explained by Stirling, J., ante, p. 1775.

(*x*) *Occleston* v. *Fullalove*; *Re Hastie's Trusts*; In the *Estate of Frogley*; *Re Lowland*, all cited ante.

(*y*) *Occleston* v. *Fullalove*; *Crook* v. *Hill*, ante.

(*z*) Supra, p. 1748.

(*a*) *Re Hall*, 35 Ch. D. 551; *Re Brown*, 37 W. R. 472.

(*b*) *Re Saville's Trusts*, 14 W. R. 603; *Re Deakin*, [1894] 3 Ch. 565.

(*c*) Supra, p. 1758.

(*d*) [1891] A. C. 304.

(*e*) [1897] 2 Ch. 208.

residuary estate in trust, as to one moiety, for his wife's nephews and nieces; R. was an illegitimate nephew of the testator's wife; she had also several legitimate nephews and nieces: it was held that R. was entitled to share equally with them. If, however, the wife had had two nephews of the name of R., one legitimate and the other illegitimate, the legitimate one would have taken to the exclusion of the other and no extrinsic evidence would have been admissible (*f*); unless, it seems, the language of the will shewed that the testator applied the description of "nephew" to legitimate and illegitimate relatives indiscrimately (*g*).

Where testator is illegitimate.

If a testator is illegitimate and cannot therefore have any legitimate relatives except descendants, a reference in his will to his brothers, sisters, nephews, nieces, cousins, or other collateral relatives must (if we assume that the testator meant anything) mean illegitimate relatives (*h*). The case is similar to that of a bachelor or spinster who refers to his or her children, which cannot mean legitimate children (*i*). In these cases there is, of course, no necessary implication on the face of the will; the "necessary implication" arises from the state of facts and the words of the will.

Gift to relations of an illegitimate person.

A similar result follows when a testator makes bequests in favour of any collateral relations of an illegitimate person (*j*). In the same way a gift to the "next of kin" of an illegitimate person, in default of such person having issue, cannot mean legitimate next of kin. Thus, in *Re Wood* (*k*), the testator gave a legacy to each of his seven children by name, and in the case of each daughter directed that in the event of her dying without having had any children, her legacy should go to her statutory next of kin: three of the children were illegitimate, including a daughter, who died without having had any children; it was held that her legacy went to the persons who would have been her next of kin if she and all the other children had been legitimate.

(*f*) *Re Fish*, [1894] 2 Ch. 83.

(*g*) *In bonis Ashton*, [1892] P. 83.

(*h*) See *Re Cornellis*, [1906] 2 Ch. 316. It is submitted that in such a case it is not a question of "sufficient" certainty, but an inevitable conclusion from the state of facts.

(*i*) *In bonis Fraglay*, [1905] P. 137. Compare *Re Jeans*, 72 L. T. 835 (step-children).

(*j*) *Re Deakin*, [1894] 3 Ch. 565.

(*k*) [1902] 2 Ch. 542, overruling *Re Standley's Estate*, L. R., 5 Eq. 303, which had already been questioned in *Re Deakin*, and in which Wood, V.-C.'s reasoning is inconsistent with the principle laid down in *Crook* v. *Hill* (supra).

CHAPTER XLIV.

JOINT TENANCY, AND TENANCY IN COMMON.

	PAGE		PAGE
I. *Joint-tenancy*	1783	III. *Lapse and other Miscellaneous Questions*	1799
II. *What words create a Tenancy in Common*	1790		

I. Joint Tenancy.—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*). 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*); but this rule is subject to exceptions. Devisees joint-tenants, when.

The first exception 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 as the devisees cannot Devisees in tail tenants in common, when;

(*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. The rules relating to this question do not come within the scope of the present work. It may be mentioned that Stat. 2 Will. 4, c. 17 contains a provision (s. 9) to the effect that where a lease containing a covenant against assignment is bequeathed to two or more persons they take as joint-tenants and have no power to sever the joint-tenancy. This act appears only to have applied to Ireland, and it was repealed by the Statute Law Revision Act, 1874.

(*b*) A limitation to two persons and the survivor of them, and the heirs of such survivor, 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; *Quarm* v. *Quarm*, [1892] 1 Q. B. 184. But if the gift were to two and the survivor, and *their* heirs, they would probably be held to take jointly, *Oakley* v. *Young*, 2 Eq. Ca. Ab. 537, pl. 6; *Doe* d. *Young* v. *Sotheron*, 2 B. & Ad. 628. The question seems to turn on whether the devisees are trustees, and if so whether they must take the fee in order to execute the trust; see post, p. 1824.

For an attempt to set up a secret trust by the statement of one joint-tenant against the other, see *Turner* v. *A.-G.*, Ir. R. 10 Eq. 386.

CHAP. XLIV.

either in fact or in contemplation of law (as the case may be) have common heirs of their bodies, they are "by necessity of reason," as Littleton says, "tenants in common in respect of the estate tail" (*c*). As this reason, however, applies only to the inheritance in tail, and not to the immediate freehold, the devisees are joint-tenants for life, with several inheritances in tail, so that on the death of one of them, whether he leave issue or not the surviving devisee becomes entitled for life to his share under the joint-tenancy (*d*), and the inheritance in tail descends to the issue (if any) subject to such estate for life.

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* (*e*), where a testator devised to his nieces E. & J., equally between them to take as joint-tenants and their several and respective heirs and assigns for ever; and it was held that they took estates as joint-tenants for life with remainder, expectant in the decease of the survivor, to them as tenants in common.

Nor are those cases within the rule where the devise is to the first, second and other sons of A. for life or in tail, for this form of gift is held to imply succession (*f*).

Corporations.

A second exception arising from the fact that a corporation and a natural person could not hold property as joint-tenants but only as tenants in common (*g*), occurs in cases of devises or bequests to a natural person and a corporation contained in Wills which came into operation before the 9th of August, 1899. But now by sec. 1 of the Bodies Corporate (Joint-Tenancy) Act, 1899, it is enacted that "a body corporate shall be capable of acquiring and holding any real or personal property in joint-tenancy in the

(*c*) 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.

(*d*) *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.

(*e*) 4 M. & Wels. 229. See also *Folkes* v. *Western*, 9 Ves. 456; *Ex parte Tanner*, 20 Bea. 374; *Haddelsey* v. *Adams*, 22 Bea. 266; *Re Atkinson*, [1892] 3 Ch. 52.

(*f*) *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 *Surlees* v. *Surlees*, L. R., 12 Eq. 400, acc. In *Allgood* v. *Blake*, L. R., 7 Ex. at p. 355, 8 Ex. at p. 166 the words "all and every the *issue*" were construed by the context to be words of limitation equivalent to "heirs of the body"; and see *Honywood* v. *Honywood*, 89 L. T. 378, 92 L. T. 814, where the reasoning of *Cradock* v. *Cradock* and *Lewis* v. *Waters* was applied and the testator's most probable intention defeated.

(*g*) Co. Lit. 190 *a*: *Law Guarantee, etc. Society* v. *Bank of England*, 24 Q. B. D. 406.

same manner as if it were an individual; and where a body corporate and an individual, or two or more bodies corporate, become entitled to any such property under circumstances or by virtue of any instrument which would, if the body corporate had been an individual, have created a joint-tenancy, they shall be entitled to the property as joint-tenants"; this enables a corporation to be appointed a trustee jointly with a natural person (*h*).

A third exception arose where the objects of the devise were husband and wife, who were in law regarded for many purposes as one person; so that formerly they took not as joint-tenants, but by entireties; the consequence of which was that neither could by his or her own separate conveyance affect the estate of the other (*i*).

Formerly husband and wife took by entireties.

But now as regards Wills which have come into operation since the year 1882, a husband and wife (unless they are trustees) take as joint-tenants and not by entireties by reason of the operation of the Married Women's Property Act, 1882 (*j*).

The construction as regards the amount taken by the husband and the wife, in the case of gifts made to them concurrently with other persons, is not however altered by the act (*k*).

Husband and wife take only one part between them;

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 (*l*); and so thought Sir J. Romilly, M.R. (*m*), and apparently Sir L. Shadwell also (*n*). But in *Warrington* v. *Warrington* (*o*), 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* (*p*) 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

(*h*) *Re Thompson's Settlement Trusts*, [1905] 1 Ch. 229. Now that a public trustee, who is a corporation sole, has been constituted, a devise or bequest to the public trustee jointly with one or more natural trustees will probably be common.

(*i*) *Doe* d. *Freestone* v. *Parratt*, 5 T. R. 652; *Back* v. *Andrew*, 2 Vern. 120, Pre. Ch. 1.

(*j*) *Thornley* v. *Thornley*, [1893] 2 Ch. 229.

(*k*) See Chap. XLI.

(*l*) *Lewin* v. *Cox*, Moo. 558.

(*m*) *Marchant* v. *Cragg*, 31 Bea. 398.

(*n*) *Paine* v. *Wagner*, 12 Sim. 184.

(*o*) 2 Hare, 54.

(*p*) 2 D. M. & G. 724.

husband and wife, and not of one of them only, have been thought sufficient in some cases (*q*) 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 (*r*).

The rule above stated governing devises to husband and wife is also applicable to personalty (*s*).

—unless the gift is to a class.

But the rule does not apply to a gift to a class. Thus in *Re Gue* (*t*) the testator devised and bequeathed his residuary estate "for all and every my nephews and nieces living at my decease or born in due time afterwards who shall live to attain the age of twenty-one years to be equally divided between them, if more than one, including my nephews and nieces to whom I have given legacies as aforesaid." The testator had bequeathed to "my nephew C. S. and his wife memorial rings . . . to be procured by my executors for my said nephew and niece." It was held that C. S. and his wife were entitled to one share each of the residuary estate and not to one share between them.

In *Re Smith* (*u*), the testator bequeathed his residue to all his nephews and nieces living at his decease with a gift over to the children of nephews and nieces who should die in his lifetime, such children to take in equal shares the share which their respective parent would have taken if he or she had survived the testator. A nephew and niece had intermarried and died, leaving children, before the testator. It was held that the children were entitled to two shares one in respect of each parent.

Devise to co-heiresses.

It may be mentioned here that under a devise to the testator's right heirs, where the testator leaves co-heiresses they take, by virtue of sec. 3 of the Inheritance Act, 1833, as joint-tenants and not as coparceners (*v*).

Gift to parent and children.

A fourth exception to the rule that a gift to two or more simply creates a joint-tenancy is found in those cases more fully discussed hereafter (*w*), where a gift to A. and his children has, on slight

(*q*) *Warrington* v. *Warrington*, 2 Hare, 54; *Paine* v. *Wagner*, 12 Sim. 184. See *Bricker* v. *Whatley*, 1 Vern. 233; *Re Dixon*, 42 Ch. D. 306.

(*r*) *Gordon* v. *Whieldon*, 11 Bea. 170; *Re Jupp*, 39 Ch. D. 148; but see the observations of North, J., on this decision in *Re Dixon*, supra, at p. 309.

(*s*) *Atcheson* v. *Atcheson*, 11 Bea. 485; *Moffatt* v. *Burnie*, 18 Bea. 211; *Ward* v. *Ward*, 14 Ch. D. 506.

(*t*) 67 L. T. 823, affd. [1892] W. N., 132.

(*u*) [1892] W. N. 106.

(*v*) *Owen* v. *Gibbons*, [1902] 1 Ch. 636; *Re Baker*, 79 L. T. 343.

(*w*) *Newill* v. *Newill*, L. R., 7 Ch. 253, and other cases post. Chap. L.

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 lands to A. in fee, and in another part of his will devises the same lands to B. in fee the weight of authority inclines to a joint-tenancy between A. and B. (*x*).

Joint-tenancy in chattels:

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 (*y*), and that whether the gift be by way of trust or not (*z*), and, notwithstanding the disposition of the Courts of late years to favour tenancies in common, the same rule is now established as to money legacies, and residuary bequests (*a*), in opposition to some early authorities (*b*), and the doubts thrown out by Lord Thurlow in *Perkins* v. *Baynton* (*c*). It is observable, however, that in another case (*d*) 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 (*e*); 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" (*f*).

—— in pecuniary legacies and residues of personalty.

Rule applies to gifts to children as a class;

The rule that a gift to two or more simple creates a joint-tenancy, applies indiscriminately to gifts to individuals and gifts to classes (*g*), including, it should seem, dispositions in favour of children, notwithstanding Lord Harwicke's objection in *Rigden* v. *Vallier* (*h*)

(*x*) Vol. I., p. 572.

(*y*) Lit. s. 381; *Shore* v. *Billingsly*, 1 Vern. 482; *Willing* v. *Baine*, 3 P. W. 113; *Barnes* v. *Allen*, 1 B. C. C. 181.

(*z*) *Aston* v. *Smallman*, 2 Vern. 556; *Bustard* v. *Saunders*, 7 Bea. 92.

(*a*) *Shore* v. *Billingsly*, 1 Vern. 482; *Webster* v. *Webster*, 2 P. W. 347; *Cray* v. *Willis*, ib. 529; *Willing* v. *Baine*, 3 ib. 113; *Campbell* v. *Campbell*, 4 B. C. C. 15; *Morley* v. *Bird*, 3 Ves. pp. 629, 632; *Whitmore* v. *Trelawny*, 6 Ves. 129; *Crooke* v. *De Vandes*, 9 Ves. 197.

(*b*) *Cox* v. *Quantock*, 1 Ch. Cas. 238; *Sanders* v. *Ballard*, 3 Ch. Rep. 214; *Tollet* v. *Tollet*, 2 P. W. 489; *Taylor* v. *Shore*, T. Jones, 162.

(*c*) 1 B. C. C. at p. 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.

(*d*) *Jolliffe* v. *East*, 3 B. C. C. 25.

(*e*) See *Morley* v. *Bird*, 3 Ves. at p. 630.

(*f*) *Crooke* v. *De Vandes*, 9 Ves. at p. 204.

(*g*) "Family," *Wood* v. *Wood*, 3 Hare, 65; *Gregory* v. *Smith*, 9 Hare, 708. "Next of kin," *Withy* v. *Mangles*, 4 Bea. 358; *Baker* v. *Gibson*, 12 Bea. 101, unless the class is by reference to the Statute of Distributions, *Re Nightingale*, [1909] 1 Ch. 385, post, p. 1793. "Issue," *Hill* v. *Nalder*, 17 Jur. 224; *Williams* v. *Jekyl*, 2 Ves. sen. 681; *Re Corlass*, 45 L. J. Ch. 119, 1 Ch. D. 460.

(*h*) 2 Ves. sen. at p. 258.

—— although members of the class may become entitled at different times;

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 (*i*). 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 favour 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, 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" (*j*). But his doctrine has been usually considered as not applying to conveyances to uses (*k*) or to wills, a distinction thus explained by Sir W. P. Wood, 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 uses and devises, viz.

(*i*) *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 Bea. 409.

(*j*) Co. Litt. 188 *a*.

(*k*) *Matthews* v. *Temple*, Comb. 467, 1 Ld. Raym. 310, nom. *Earl of Sussex* v. *Temple*; *Stratton* v. *Best*, 2 B. C. C. 233; *Doe* d. *Hallen* v. *Ironmonger*, 3 East, 533; Sugd. Gilb. Uses, 134, 135, and n. (10).

the intent; and the intent, as appearing by the words, is to create a joint-tenancy" (*l*).

Thus, in *Cates* d. *Hatterley* v. *Jackson* (*m*), 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* (*n*), 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 (*o*).

—— but not if the gift vests in them at different ages.

But where the remainder is limited to vest in such only of the class as attain twenty-one, then of necessity a tenancy in 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 (*p*).

Tenancy in common not implied in substituted gift;

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* (*q*), 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

(*l*) 11 Hare, 196. See *Samme's Case*, 13 Rep. 55; *Shelley's Case*, 1 Rep. 101.

(*m*) 2 Str. 1172.

(*n*) 1 D. F. & J. 63.

(*o*) *Morgan* v. *Britten*, L. R., 13 Eq. 28. See also *Surtees* v. *Surtees*, L. R., 12 Eq. pp. 400, 406; *Binning* v. *Binning*, 13 R. 654, [1895] W. N. 116.

(*p*) *Woodyate* v. *Unwin*, 4 Sim. 129, as explained 1 D. F. & J. at p. 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. pp. 282, 283.

(*q*) 12 Sim. 645; see also *Amies* v. *Skillern*, 14 Sim. 428; *Penny* v. *Clarke*, 1 D. F. & J. at p. 431, per Turner, L.J.; *Leak* v. *Macdowall*, 32 Bea. 28; *Coe* v. *Bigg*, 1 N. R. 536; *Lanphier* v. *Buck*, 2 Dr. & Sm. at p. 499; *Heasman* v. *Pearse*, L. R., 11 Eq. 522, 7 Ch. 275; *Re Yates*, [1891] 3 Ch. 53; *Re Battersby's Trusts*, [1896] 1 Ir. 600. But see *Shepherdson* v. *Dale*, 12 Jur. N. S. 156 post p. 1794; and *Crosthwaite* v. *Dean*, [1879] W. N. 93.

CHAP. XLIV.

dead, such issue taking only " the deceased parent's share; it w held that the terms of severance referred only to the children, a that the issue of a deceased child, though taking in common wi the surviving children, yet inter se were joint-tenants of the parent's share. It is otherwise if there are double words severance, or if the words of severance are repeated and would b tautologous unless applied to the issue (*r*). So, accruing share will not be held in common merely because that quality is attache to the original shares (*s*). Neither will words importing a tenanc in common in one bequest be extended by implication to anothe bequest which is connected with the former by the term " also " (*t*)

——nor in gift of accruing shares;

——nor from another gift connected by the word " also."

Executory trusts.

It should be observed, that, in carrying into effect executor trusts, the Courts will not make the objects joint-tenants, withou a positive and unequivocal expression of intention to that effect Thus, where (*u*) trustees were directed, as soon as the testator's three daughters attained their respective ages of twenty-one, t 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* (*v*), where 6000*l.* having been given to and among such children as A. should appoint, A. made her will thus: " Robert give three of the 6000*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.

What words create a tenancy in common.

II.—What Words create a Tenancy in Common.—It may be stated generally, that all expressions importing division by equal or

(*r*) *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; *Re Smith*, 58 L.J. 661; *Re Quirk*, 61 L. T. 364, post, p. 1791, n. (*z*).

(*s*) *Webster's Case*, 3 Leo. 19, pl. 45; *Jones* v. *Hall*, 16 Sim. 500; *Leigh* v. *Mosley*, 14 Bea. 605; *Re Woolley*, [1903] 2 Ch. 206.

(*t*) *Cookson* v. *Bingham*, 17 Bea. 262; and see *Jury* v. *Jury*, 9 L. R. Ir. 207 and cases cited Vol. I. p. 594.

(*u*) *Marryat* v. *Townly*, 1 Ves. sen. 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. 583; and a trust to settle or convey (*De Havilland* v. *De Saumarez*, 14 W. R. 118; *Re Bellasis' Trust*, L. R., 12 Eq. 218) or that property shall " be left " (*Mence* v. *Bagster*, 4 De G. & S. 162; *Noble* v. *Stow*, 29 Bea. 409) is not necessarily executory. As to issue taking per stirpes under a direction to settle personalty upon A. and her issue see *Stanley* v. *Jackman*, 23 Bea. 450. See further on this subject post, Chap. XLVIII.

(*v*) 4 Dr. & War. 380. See *Mathews* v. *Bowman*, 3 Anst. 727.

unequal (*w*) 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" (*x*), or "to be divided" (*y*), will have this effect; and so, of course, will [illegible]ction that the subject of gift shall "be distributed in joint and equal proportions" (*z*).

"To be divided."

"In joint and equal proportions."

Anything which in the slightest degree indicates an intention to divide the property must be held to abrogate the idea of a joint-tenancy, and to create a tenancy in common (*a*). Accordingly, a devise or bequest to several persons, "equally amongst them" (*b*), or "equally" (*c*), or "in equal moieties" (*d*), or "share and share alike" (*e*), or "respectively" (*f*), or with a limitation to their heirs "as they shall severally die" (*g*), or "to *each* of their respective heirs" (*h*), or "to their executors and administrators respectively" (*i*), or to several "between" (*j*), or "amongst" them (*k*), or to "each" of several persons (*l*), has been held (in contradiction of some of the very early cases (*m*)), to make the objects tenants in common. And a similar construction has been given (*n*) to a

Words importing division create tenancy in common.

"Equally."

"Respectively."

"Severally."

"Each of their respective heirs."

"Between."

"Amongst."

"Each" of several.

(*w*) *Gibbon* v. *Warner*, 14 Vin. Ab. pp. 484, 485.

(*x*) 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; ib. 215; 1 D. & Ryl. 52; 5 B. & Ald. 464, 636.

(*y*) *Peat* v. *Chapman*, 1 Ves. sen. 542; *Ackerman* v. *Burrows*, 3 V. & B. 54.

(*z*) *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*, [1889] W. N. 148; *Re S. Smith's Trusts*, ibid., 164, 58 L. J. Ch. 661; *Re Flower*, 62 L. T. 216.

(*a*) Per Lord Hatherley, in *Robertson* v. *Fraser*, L. R., 6 Ch. at p. 699, cited by Joyce, J., in *Re Woolley*, [1903] 2 Ch. 206.

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

(*c*) *Lewen* v. *Dodd*, Cro. El. p. 443, 695, (*Lewin* v. *Cox*), Moore, 555, pl. 759; *Denn* v. *Gaskin*, Cowp. 657.

(*d*) *Harrison* v. *Foreman*, 5 Ves. 207.

(*e*) *Rudge* v. *Barker*, Ca. t. Talb. 124; *Heathe* v. *Heathe*, 2 Atk. 122; *Perry* v. *Woods*, 3 Ves. 204.

(*f*) *Torret* v. *Frampton*, Sty. 434; *Stephens* v. *Hide*, Ca. t. Talb. 27; *Folkes* v. *Western*, 9 Ves. 456. See also *Marryat* v. *Townly*, 1 Ves. sen. 102; *Hawes* v. *Hawes*, ib. 13, 1 Wils. 165; *Vanderplank* v. *King*, 3 Hare, 1.

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

(*h*) *Gordon* v. *Atkinson*, 1 De G. & S. 478. Compare *Ex parte Tanner*, 20 Bea. 374, and *Re Atkinson*, [1892] 3 Ch. 52.

(*i*) *Re Moore's Settlement Trusts*, 31 L. J. Ch. 368.

(*j*) *Lashbrook* v. *Cock*, 2 Mer. 70; *Att.-Gen.* v. *Fletcher*, L. R., 13 Eq. 128.

(*k*) *Campbell* v. *Campbell*, 4 B. C. C. 15; *Richardson* v. *Richardson*, 14 Sim. 526.

(*l*) *Eales* v. *Cardigan*, 9 Sim. 384; *Hatton* v. *Finch*, 4 Bea. 186.

(*m*) 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, (Ed. of 1671) is cited a case of *Lowen* v. *Lowen*, also apparently the same case, and held a tenancy in common.

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

CHAP. XLIV.

"All to have part alike," &c.

devise to several their heirs and assigns, "all to have part and, alik every of them to have as much as the other." So, where (*o*) th devise was to A. and B. of lands, "to be enjoyed alike," Lor Mansfield held that they were tenants in common, considering tha word as synonymous with "equally."

Charge upon the legatees in moieties.

Again, where (*p*) A. bequeathed a term of years to her tw daughters, they paying yearly to her son 25*l.* by quarterly pay ments, viz. *each of them* 12*l.* 10*s.* yearly out of the rents of the pr mises, during his life, if the term so long continued; Jefferies, L.C held this [illegible] be a tenancy in common, the 25*l.* being to be paid by th daught[illegible] moieties.

Direction in respect of one legatee's "share."

In [illegible]er case (*q*), A. bequeathed his personal estate to his son R. and J., and provided that if J. should be desirous to be put ou apprentice, a competent sum should be raised "in part of the share to which he would become entitled; and Macdonald, C.B., hel that the latter words were decisive of the testator's intention t create a tenancy in comm[illegible] Again, where by will residue wa given to A. and B., and by [illegible]eil the testator desired that C. shoul "participate" with them, it was held they were all tenants i common (*r*), and a gift to two, with survivorship as to one moiety has been held to negative the general right of survivorship characte istic of a joint-tenancy, and to create a tenancy in common (*s*).

In an Irish case (*t*), it was held that a power of advancement wa in its terms inconsistent with a joint-tenancy and that consequentl the beneficiaries took as tenants in common. But a gift over o "the estate" of one of two joint-tenants upon a cont[illegible] [illegible]oe not create a tenancy in common (*u*).

Leaning in favour of tenancy in common.

Referring to such of the cases above cited as had b[illegible] [illegible] a the time he wrote, Mr. Jarman remarks (*v*): "The preceding case evince the anxiety of later judges to give effect to the slightes expressions affording an argument in favour of a tenancy in com mon; an anxiety which has been dictated by the conviction, tha this species of interest is better adapted to answer the exigencie of families than a joint-tenancy, of which the best quality is, tha the right of survivorship may, at the pleasure of the co-owner

(*o*) *Loveacres* d. *Mudge* v. *Blight*, Cowp. 352.

(*p*) *Kew* v. *Rouse*, 1 Vern. 353, 1 Eq. Ca. Ab. 292, pl. 7. See also *Milward* v. *Milward*, cited 2 Atk. at p. 309.

(*q*) *Gant* v. *Laurence*, Whitw. 395. See also *Ive* v. *King*, 16 Bea. 46; *Jones* v. *Jones*, 44 L. T. 642.

(*r*) *Robertson* v. *Fraser*, L. R., 6 Ch. 696.

(*s*) *Paterson* v. *Rolland*, 28 Bea 347; *Ryves* v. *Ryves*, L. R., 11 Eq 539.

(*t*) *L'Estrange* v. *L'Estrange*, [1902 1 Ir. 372, and see *Re Woolley*, [1903 2 Ch. 206.

(*u*) *Edwardes* v. *Jones*, 33 Bea. 348.

(*v*) First ed. Vol. II. p. 163.

respectively (if personally competent), be defeated by a severance of the tenancy.

"This leaning to a tenancy in common was acknowledged in a case (*w*), where a testator bequeathed to A. and B. £10,000, to be equally divided between them, when they should arrive at twenty-one years, and to carry interest until they should arrive at that age. It was contended that the fund was to be divided *at twenty-one*, the legatees in the meantime 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."

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" (*x*); 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."

Under a gift to a class by reference to the Statute of Distribution they take as tenants in common (*xx*).

However, in *Barker* v. *Giles* (*y*), where a testator devised "to A. and B., and the survivor of them, and their heirs and assigns, to be equally divided between them, share and share alike," it was 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 (*z*).

In *Forrest* v. *Whiteway* (*a*), where there was a devise to A. and B., and their heirs, with a gift over in certain events to C. and D. and

(*w*) *Jolliffe* v. *East*, 3 Br. C. C. 25.

(*x*) *Booth* v. *Alington*, 27 L. J. Ch. 117; *Oakley* v. *Wood*, 16 L. T. 450 ("to be held jointly or divided equally").

(*xx*) *Re Nightingale*, [1909] 1 Ch. at p. 389.

(*y*) 2 P. W. 280, 3 B. P. C. Toml. 104.

(*z*) *Lord 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 Bea. 423, as to which qu. *Haddelsey* v. *Adams*, 22 ib. 266. In *Brown* v. *Oakshot*, 24 Bea. 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.

(*a*) 3 Exch. 367.

CHAP. XLIV.

their heirs as tenants in common, the Court refused to infer from the gift over that A. and B. were intended to take as tenants in common.

Gift to compound class.

To the general principle above stated (*b*)—that the Court decrees a tenancy in common as much as it can, and that the slightest indication of an intention to divide the property creates a tenancy in common (*c*)—a curious exception has been established in cases where the gift is to a compound class. If a testator gives a fund to A. for life and at his death to his children then living and the issue of children then dead, the issue of a deceased child to take the share which their parent would have taken if living, it would naturally be supposed that the word "divide" governs the whole gift, and that the issue, as well as the children, take as tenants in common. But it seems to be settled that in such a case double words of severance are required to make the issue of deceased children take as tenants in common (*d*). It is true that the contrary was decided by Stuart, V.-C., in *Shepherdson* v. *Dale* (*e*) and by Wood, V.-C., in *Penny* v. *Clarke* (*f*), but in the latter case the gift was followed by a direction that the issue should take "as a class as if by representation, and not as individuals," and the V.-C.'s decision was overruled by the Court of Appeal (*h*). This decision was subsequently treated by Wood, V.-C., as establishing the exception above stated, even in cases where there are no words to counteract the effect of the primary direction to "divide" the fund (*i*), and this view has been adopted by other judges (*j*).

Double words of severance required.

The same exception obtains when the words of severance follow, instead of preceding, the gift (*k*).

Where gift to a class creates a tenancy in common.

It has been already mentioned that where the gift is to a class, in such a way that the interests of some may be vested while those of others are contingent, a tenancy in common is created (*l*).

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

(*b*) Ante, p. 1792.
(*c*) Ante, p. 1791.
(*d*) *Bridge* v. *Yates*, 12 Sim. 645, ante, p. 1789.
(*e*) 12 Jur. N. S. 156.
(*f*) John. 619, where *Bridge* v. *Yates* is attempted to be distinguished. In *Penny* v. *Clarke* the words of severance followed the gift, but that is immaterial.
(*h*) 1 D. F. & J. 425. In *Re Quirk*, 61 L. T. 364, the words counteracting the effect of the primary direction for division were in their turn counteracted by duplicate words of severance.
(*i*) *Coe* v. *Bigg*, 1 N. R. 536.
(*j*) By North, J., in *Re Yates*, [1891] 3 Ch. at p. 58, where, however, the learned judge erroneously stated the decision of Wood, V.-C., in *Penny* v. *Clarke*. See *Re Smith*, 58 L. J. Ch. 661, where the question did not arise but the general rule appears to be recognized by Stirling, J.
(*k*) Ante, p. 1793.
(*l*) Ante, p. 1789.

own children, and of causing the property to devolve per stirpes; the children taking inter se as joint-tenants (*m*).

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 (*n*). 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" (*o*).

Mr. Jarman remarks (*p*): "Of course expressions which, standing alone, would create a tenancy in common, may be controlled and neutralised by the context (*q*): and such, it seems, is the effect of the testator's postponing the enjoyment of an ulterior devisee, or legatee, until the decease of the *survivor* of the several co-devisees or legatees for life, which, it is thought, demonstrates an intention that the property shall, in the meantime, devolve to the survivors, under the jus accrescendi which is incidental to a joint-tenancy.

Words creating a tenancy in common rejected by force of context.

"Thus, in *Armstrong* v. *Eldridge* (*r*), 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

(*m*) *Re Hodgson's Trust*, 1 K. & J. 178; *Hobgen* v. *Neale*, L. R., 11 Eq. 48; *Re Jones's Estate*, 47 L. J. Ch. 775 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 Settlement Trusts*, ib. 368, ante, p. 1791.

(*n*) *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. 643. *Chalfield* v. *Berchtoldt*, 18 W. R. 887.

(*o*) *Hatton* v. *Finch*, 4 Bea. 186.

(*p*) First ed. Vol. II. p. 163.

(*q*) See *Clerk* v. *Clerk*, 2 Vern, 323.

(*r*) 3 B. C. C. 215. See also *Doe* d. *Calkin* v. *Tomkinson*, 2 M. & Sel. 165; *Cranswick* v. *Pearson*, 31 Bea. 624, as to which see per Rolt, L.J., L. R., 3 Ch. at p. 186; *Kelsey* v. *Ellis*, 38 L. T. 471.

create a tenancy in common, yet where the context shewed a joint-tenancy to be intended, the words should be construed accordingly; and in this case the interest was to be divided among four while four were living, among three while three were alive, and nothing was to go to the children while any of the mothers were living.

"And the same construction has prevailed even where the ulterior devise was not, in terms, after the decease of the survivor, but after the decease or the deceases of the prior legatees; it being considered that the property is not to go over until the decease of all the legatees, though the words, especially in the latter case, might seem to admit of being construed 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* (*s*), where the testator devised to A. and B., to be equally divided between them during their natural lives, *and after the deceases of A. and B.* to the right heirs of A. for ever: 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.

"After decease of E. and G." read after decease of *survivor*.

"So, in the case of *Pearce* v. *Edmeades* (*t*), where a testator bequeathed the residue of his estate to trustees, in trust to pay the interest dividends and produce thereof to his daughter M. for life, and after her decease unto and between her two children E. G. and G. G., during their *respective* lives *in equal shares; and from and after the decease of the said E. G. and G. G.*, upon further trust to pay or transfer and divide the same unto and between all and every the child or children, if more than one, of the said E. G. and G. G. in

(*s*) 3 Bac. Ab. Joint-Tenants (F), 681, 6th ed., Holt, 370, 11 Mod. 108–9. See also *Stephens* v. *Hide*, Ca. t. Talb. 27; *Malcolm* v. *Martin*, 3 B. C. C. 50, (but as to which see cases post, p. 1798, n. (*w*)); *Townley* v. *Bolton*, 1 My. & K. 148; *M'Dermott* v. *Wallace*, 5 Bea. 142; *Alt* v. *Gregory*, 8 D. M. & G. 221; *Begley* v. *Cook*, 3 Drew. 662. See and compare *Re Drakeley's Estate*, 19 Bea. 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 Bea. 471; *Sarel* v. *Sarel*, 23 Bea. 87; *Lill* v. *Lill*, ib. 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 Bea. 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 Bea. 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 favour of survivors untouched if there are no children, *Walmsley* v. *Foxhall*, 1 D. J. & S. 605.

(*t*) 3 Y. & C. 246; *Ashley* v. *Ashley*, 6 Sim. 358.

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,' said his Lordship, 'by a series of decisions, that the words "respectively," and in "equal shares," when not controlled by other words in a will shall be taken to [illegible] the nature of an estate or interest bequeathed, and shall constitute a tenancy in common. But when these words are connected with, or followed by others which would make a tenancy in common inconsistent with the manifest design of the subsequent bequest of the testator, they may be taken to indicate, not the nature, but the proportion of the interest each party is to take. In the present case the bequest to G. G. and E. G. during their lives, is of the interest and dividends only of the residue of the testator's estate. The corpus of the residue is not to be divided or possessed by the legatees till after the decease both of G. G. and E. G.; and then it is to be divided amongst such of their children only as shall be living at the death of the survivor. It is clear, therefore, that the mass of the property is to be divided amongst the children who might survive both the parents, per capita and not per stirpes. This would be quite inconsistent with a tenancy in common of the parents. Again, the testator, by his care in pursuing this property through three generations, and bequeathing it, upon failure of these, to his then personal representatives, shews 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.'

Remark on preceding cases.

"As in the three preceding cases no act had been done to sever the joint-tenancy (if any,) between the several devisees or legatees, it was not necessary to determine whether the effect of the will was to confer a joint-interest, with its incidental right of survivorship, or to create a tenancy in common with an implied gift to the survivor for life. Indeed, no allusion is made to the latter point, except in *Pearce* v. *Edmeades*, and even there it does not appear to have

formed the prevailing ground of determination, though perhaps less violence is done to the language of the will by implying a positive gift to the survivor than by rejecting the words of severance" (*u*).

Intention must be clear.

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 favour of children, in spite of the apparently antagonistic terms (*v*). And this construction is readily made where, after the 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" (*w*).

Gift over "at their death."

And, if there is a gift to A., B., and C., for their respective lives, and subject thereto for their respective children, on the death of each tenant for life one-third of the property goes to his children (*x*); à fortiori if the gift is of separate properties (*y*).

Tenancy in common, with express survivorship, not a joint-tenancy.

Where the will creates a tenancy in common with express survivorship, there is, of course, no pretence for implying a joint-tenancy (*z*),

(*u*) *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." (Note by Mr. Jarman.) *Minton* v. *Cave*, 10 Jur. 86. See also *Marryat* v. *Townly*, 1 Ves. sen. 102.

(*v*) *Hawkins* v. *Hamerton*, 16 Sim. 410; *Ewington* v. *Fenn*, 16 Jur. 398; *Doe* d. *Patrick* v. *Royle*, 13 Q. B. 100; and see *Atkinson* v. *Holtby*, 10 H. L. C. pp. 313, 325; *Re Hutchinson's Trusts*, 21 Ch. D. 811.

(*w*) *Arrow* v. *Mellish*, 1 De G. & S. 355; *Willes* v. *Douglas*, 10 Bea. 47; *Re Laverick's Estate*, 18 Jur. 304; *Turner* v. *Whittaker*, 23 Bea. 196; *Archer* v. *Legg*, 31 Bea. 187; *Wills* v. *Wills*, L. R., 20 Eq. 342. See *Re Rubbins*, 78 L. T. 218; 79 L. T. 313 ("upon the death" of A. B. & C. held to mean upon the death of the survivor).

(*x*) *Suteliffe* v. *Howard*, 38 L. J. Ch. 472.

(*y*) *Swan* v. *Holmes*, 19 Bea. 471 and other cases cited ante, p. 1796, note (*s*).

(*z*) *Doe* d. *Borwell* v. *Abey*, 1 M. & Sel. 428; stated post, Chap. LV. *Hatton* v. *Finch*, 4 Bea. 186; *Haddelsey* v. *Adams*, 22 Bea. 266; *Minton* v. *Minton*, 9 W. R. 586; *Taaffe* v. *Conmee*, 10 H. L. C. pp. 64, 78.

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* (*a*), 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 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.

Distinction between joint-tenancy and tenancy in common as to lapse, &c.

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 (*b*), or subsequently revoked (*c*), or by reason of the decease of the devisee in the testator's lifetime (*d*), the other or others will take the whole. But the rule is different as to tenants in common, whose shares, in case of the failure (*e*) or revocation of the devise to any of them, descend to the heir-at-law or residuary devisee of the testator (*f*); 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 (*g*).

Gift implied from power creates a tenancy in common.

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 (*h*), it is now settled that the objects take as

(*a*) 17 Bea. 262, 3 D. M. & G. 668.

(*b*) *Dowset* v. *Sweet*, Amb. 175 (void for uncertainty); *Young* v. *Davies*, 2 Dr. & Sm. 167 (devisee attesting witness).

(*c*) *Humphrey* v. *Tayleur*, Amb. 136; *Larkins* v. *Larkins*, 3 B. & P. 16; *Short* v. *Smith*, 4 East, 418; *Ramsay* v. *Shelmerdine*, L. R., 1 Eq. 129, cited ante, p. 429 in Chap. XIII.

(*d*) *Davis* v. *Kemp*, 1 Eq. Ca. Ab. 216, pl. 7; *Buffar* v. *Bradford*, 2 Atk. 220; *Morley* v. *Bird*, 3 Ves. 628.

(*e*) *Owen* v. *Owen*, 1 Atk. 494; *Norman* v. *Frazer*, 3 Hare, 84.

(*f*) *Cresswell* v. *Cheslyn*, 2 Ed. 123, 3 B. P. C. Toml. 246; *Boulcott* v. *Boulcott*, 2 Drew. 25.

(*g*) *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. 358; *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. p. 431. But see and consider *Re Chaplin's Trusts*, 33 L. J. Ch. 183, cited ante, Vol. I. p. 337. *Re Featherstone's Trusts*, 22 Ch. D. 111; and *Re Allen*, 29 W. R. 480, 44 L. T. 240. In *Kingsbury* v. *Walter*, [1901] A. C. 187, the question what determines a class is discussed.

(*h*) See Vol. I., p. 650.

tenants in common (*i*), and it should seem that under an implied gift resulting from a power of selection the same rule prevails (*j*).

In *Re Kerr's Trusts* (*k*), a fund was given upon trust for such of the children of M. as she should by will appoint and in default of appointment for her children equally. M. by will appointed to her "children" E. and C., their administrators and assigns for their own absolute use and benefit. E. was not a legitimate child and therefore not an object of the power. Sir G. Jessel, deciding the case according to common sense and according to what must have been the clear intention of the testatrix, held that the appointment was to E. and C. as tenants in common, that one half of the fund went to C. and the other half in default of appointment.

Effect upon power of lapse of some of the shares.

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 (*l*). 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 (*m*).

The preceding paragraph was quoted with approval by Stirling, J., in *Re Ware* (*n*). The latter rule seems to be derived from the old doctrine that under a power to appoint to a number of persons a substantial share must be appointed to each, and that doctrine

(*i*) *Reade* v. *Reade*, 5 Ves. 744; *Casterton* v. *Sutherland*, 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"); overruling *Maddison* v. *Andrew*, 1 Ves. sen. 57, and Lord Hardwicke's dictum in *Duke of Marlborough* v. *Lord Godolphin*, 2 ib. at p. 81; *Re Phene's Trust* was distinguished in *Armstrong* v. *Armstrong*, 7 Eq. 518.

(*j*) *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").

(*k*) 4 Ch. D. 600.

(*l*) *Boyle* v. *Bishop of Peterborough*, 1 Ves. jun. 299, *Butcher* v. *Butcher*, 9 Ves. 382, 1 V. & B. 79; *Paske* v. *Haselfoot*, 33 Bea. 125; *Ricketts* v. *Loftus*, 4 Y. & C. 519. As to *Woodcock* v. *Renneck*, 1 Ph. 72, see Chap. XXIII., ante, p. 824.

(*m*) "*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. 3rd 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 favour 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." (Note by Mr. Jarman.)

(*n*) 45 Ch. D. at p. 275.

having been abolished the foundation for the rule which is supposed to be laid down in *Reade* v. *Reade*, appears to have been removed (*o*).

If, however, under the gift in default of appointment, 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 favour of a deceased child whose share under the gift over had vested, the only mode by which the testator's bounty can be made to reach his representatives is to leave a portion of the fund unappointed; in which case the representatives of the deceased child will take his share (but of course only his share) in the unappointed portion. Lord Eldon, it is true, expressed his disapproval of this "device," in *Butcher* v. *Butcher* (*p*), 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 (*q*), 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.

(*o*) Farwell on Powers, p. 162, and see Stirling, J.'s, judgment in *Re Ware*.

(*p*) 1 V. & B. at p. 92.

(*q*) 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 XLV.

ESTATES IN FEE.

I. *Old Law*..... PAGE 1802 | II. *Wills Act*, 1837 ..... PAGE 1806

Devise without words of limitation before 1 Vict. c. 26.

I.—Old Law.—"Nothing is better settled," says Mr. Jarman (*a*), "than that a devise of messuages, lands, tenements, or hereditaments (not estate), without words of limitation, occurring in a will which is not subject to [the Wills Act, 1837], confers on the devisee an estate for life only (*b*), notwithstanding the testator may have commenced his will with a declaration of his intention to dispose of his whole estate (*c*), or may have given a nominal legacy to his heir (*d*), or may have declared an intention wholly to disinherit him, or the will may contain an antecedent devise to the heir for life of the testator's property, which is the subject of dispute (*e*), or the devise in question may be to a class embracing the heir, as to the testator's children (*f*), or, lastly, notwithstanding there may, in another part of the will, or in the immediate context, be a devise expressly for life, affording the argument, therefore, that the testator meant something more, or at least different, by an indefinite devise (*g*); [or notwithstanding that in the immediate context another property may be devised to the same person in fee, and both properties are subsequently in one set of words made subject to one set of ulterior limitations (*h*).] Though any, or, it is conceived, the whole of these circumstances concur in the same will, it is indisputably clear that such a devise will confer only an estate for life.

"This rule of construction is entirely technical, as, according to popular notions, the gift of any subject simply comprehends all

(*a*) First ed. Vol. II. p. 170.

(*b*) *Taylor* v. *Hodges*, cit. 3 Ch. Rep. 87; *Doe* d. *Crutchfield* v. *Pearce*, 1 Pri. 353; *Doe* d. *Roberts* v. *Roberts*, 7 M. & Wels. 382, and other cases which will be found in the 4th ed. of this work, Vol. II., pp. 267 and seq., where the subject is discussed in detail.

(*c*) *Doe* d. *Knocker* v. *Ravell*, 2 Cr. & J. 617.

(*d*) *Roe* d. *Peter* v. *Daw*, 3 M. & Sel. 518.

(*e*) *Right* d. *Compton* v. *Compton*, 9 East, 267.

(*f*) *Harding* v. *Roberts*, 10 Exch. 819.

(*g*) *Silvey* v. *Howard*, 6 A. & E. 253.

(*h*) *Coltsmann* v. *Coltsmann*, L. R., 3 H. L. 121.

the interest therein. A conviction that the rule is generally subversive of the actual intention of testators, always induced the Courts to lend a willing ear whenever a plausible pretext for a departure from it could be suggested. Hence have arisen the various cases in which indefinite devises have been, by implication enlarged to a fee-simple."

Grounds for enlarging indefinite devise to a fee.

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 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 charged relatively to the value of the land, did not prevent the enlargement of the estate (*i*). And the future or contingent nature of the charge did not prevent it from enlarging the estate (*j*). Secus, where the charge was merely on the land generally (*k*), or where there was in the will another devise without words of limitation, not subject to a charge (*l*).

Charge 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 by the devisee, without more, or by the devisee out of the land (*m*); but not so if the annuity was simply imposed on the devised lands (*n*).

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 (*o*).

Whether annuity enlarged estate of devisee or ceased at his death.

(*i*) 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. 266 (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.

(*j*) 3 Russ. 350; 3 B. & Ad. 753.

(*k*) *Denn* v. *Mellor*, 5 T. R. 558; s.c. in D. P. 2 B. & P. 247; see also Pre. Ch. 67; Mose, 240; 1 M. & Wels. 698; 3 Ell. & Bl. 219; 3 K. & J. 170.

(*l*) 9 East, 267; 33 L. J. Ex. 202.

(*m*) 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 *Dickwell* v. *Spencer*, L. R., 6 Ex. 198 [illegible] 105 (direction to pay yearly wage [illegible].

(*n*) 8 East, 141; 11 Exch. 3[illegible].

(*o*) 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. & Ald. 710. See also *Bolton* v. *Bolton*, L. R., 5 Ex. 145.

Enlargement to a fee by effect of devise over.

The fee simple was also held to pass by an indefinite devis where it was succeeded by a gift over in the event of the devis dying under the age of twenty-one years or any other specified ag such devise over being considered to denote that the prior devis was to have the inheritance in the alternative event of his attaini the age in question, since, in any other supposition, the making t ulterior devise dependent on the contingency of the devisee dyi under the prescribed age would have been capricious if n absurd (*p*). So, also, where there was a devise over on the pri devisee dying, without leaving issue, whether under a specifi age (*q*) or not (*r*).

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 pers or a class without any words of limitation, it was settled that unl a contrary intention appeared by the context (*rr*), the cestui que tru took an equitable interest co-extensive with the legal estate of t trustees, i.e. a fee (*s*).

Conversely, where lands were devised to trustees, without wor of inheritance, upon trust for one in fee, the trustees took the fee (

Under the old law, the technical mode of limiting an estate in f simple was to give the property to the devisee and his heirs (*u*), b even under wills made before 1838, an estate in fee simple mig have been created by any expressions, however informal, whi denoted the intention. Thus, the inheritance in fee was held pass by a devise to A. "in fee simple" (*v*), to A. "for ever" (*w* or to him "and his assigns for ever" (*x*), (but not to a person a his assigns simply, which gives an estate for life only (*y*),) or to

(*p*) *Doe* v. *Cundall*, and other cases, 9 East, 400; 2 M. & Sel. 608; 6 Pri. 179; 11 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 *Frogmorton* v. *Holyday*, and other cases. 3 Burr. 1618, 1 W. Bl. 535; 6 Pri. 179; 9 East. 400.

(*q*) 10 East, 460.

(*r*) See *Moone* v. *Heaseman*, Willes, at p. 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*, [1880] W. N., 141. But see per Lord Cairns, in *Coltsmann* v. *Coltsmann*, L. R., 3 H. L. p. 133.

(*rr*) See *Re Pollard's Estate*, 3 D. & S. 541; *Sherwin* v. *Kenny*, 16 Ch. 138.

(*s*) *Challenger* v. *Sheppard*, 8 T. 597; *Knight* v. *Selby*, 3 M. & Gr. 92, Scott, N. R 409; *Moore* v. *Cleghor* 12 Jur. 591, 17 L. J. Ch. 400; *Hods* v. *Ball*, 14 Sim. 558; *Smith* v. *Smith*, C. B. N. S. 121. See *Yarrow* *Knightly*, 8 Ch. D. 736.

(*t*) 2 Str. 798.

(*u*) Even if he was a bastard; *I* v. *Cook*, 1 P. W. at p. 78. As to t operation of the rule in *Shelley's Ca* see Chap. XLVIII.

(*v*) And. 51, 8 Vin. Ab. 206, pl. 8.

(*w*) Co. Lit. 9 *b.*; 8 Vin. Ab. 206, 6; 2 Ld. Raym. 1152; Cro. Car. 12 Jones, 195. 1 B. C. C. 148.

(*x*) Co. Lit. 9 *b.*

(*y*) Ib.

"and his successors" (*z*), or to A. "et sanguini suo" (*a*); to A. and "his house," or A. and "his family" (*b*), or "stock" (*c*), to A. "or" his heirs (*d*), to A. and his executors (*e*), to two "et heredibus" (omitting suis) (*f*); to a man "and his, and to do what he will with it" (*g*), and even to him "and his" simply (*h*); to A. "to give and sell" (*i*); to A. "to give and sell, and do therewith at his will and pleasure" (*j*), or to a person to her own use, "to give away at her death to whom she pleases" (*k*); or "to be at the discretion of" a person (*l*).

But the words "freely to be possessed and enjoyed" have been decided to pass, under the old law, only an estate for life (*m*).

Word *estate* carries a fee, when.

It had 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 (*n*). And the same effect has been given to such words as "property" (*o*), "inheritance" (*p*), "reversion" or "remainder" (*q*), "right and title" (*r*), "all my interest" (*s*), or "real effects" (*t*). And it was ultimately settled that the words "estate," "property," &c., would carry the

(*z*) Roll. Rep. 399, pl. 25, 8 Vin. Ab. 209, pl. 1; 3 Bulst. 194; 10 Bea. 517.

(*a*) Co. Lit. 9 *b*; 8 Vin. Ab. 206, pl. 10.

(*b*) Dy. 333; 17 Ves. 261. See *Lucas* v. *Goldsmid*, 29 Bea. 657, where "family" was explained to mean heirs of the body.

(*c*) Hob. 33.

(*d*) 2 Atk. 645; and see Plowd. 289.

(*e*) *Rose* d. *Vere* v. *Hill*, 3 Burr. 1881; and see 10 Bea. 21.

(*f*) Br. Estates, pl. 4; 8 Vin. Ab. 208, pl. 18.

(*g*) Latch, 36, Benl. and Dal. 11, pl. 9.

(*h*) 1b. In some manors, copyholds are so limited.

(*i*) Co. Lit. 9 *b*; 8 Vin. Ab. 206, pl. 7.

(*j*) Br. Dev. pl. 30, 1 Leon. 156, 8 Vin. Ab. 234, pl. 2; ib., 1 Leon. 283.

(*k*) 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 Bea. 246; and for cases since 1 Vict. c. 26, see infra.

(*l*) 1 Leon. 156, 8 Vin. Ab. 235, pl. 7. See also 2 Wils. 6.

(*m*) 11 East. 220; 2 C. M. & R. 23; 9 Ha. 378; see also L. R., 2 Q. B. 269.

(*n*) 2 Lev. 91; 3 Keb. 180; 1 Mod. 100; 3 Mod. 45, 228; 3 Keb. 49; 4 Mod. 89; 1 Show. 349; 1 Salk. 2[illegible]; 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 ib. 48; 2 W. Bl. 938; 1 H. Bl. 223; Willes, 206; 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.

(*o*) 16 East, 221; 18 Ves. 193; 1 J. & W. 183; 11 Ad. & Ell. 1000, 3 Per. & D. 578; 2 Drew. 7; 19 Bea. 225; L. R., 3 H. L. 121.

(*p*) Hob. 2, Godb. 207, Moore, 873, ca. 1218.

(*q*) 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.

(*r*) 4 M. & Pay. 445; 6 Bing. 630.

(*s*) 5 T. R. 292.

(*t*) *Hoyan* v. *Jackson*, Cowp. 299, 3 B. P. C. Toml. 388, stated Vol. I. p. 994; Coop. 241; 22 L. J. Ch. 236. See also *Grayson* v. *Atkinson*, 1 Wils, 333, stated Vol. 1. p. 995.

CHAP. XLV.

inheritance, though accompanied by words of locality (*u*), or r
ferring to occupancy (*v*), or other expressions referable exclusive
to the corpus of the property (*w*).

With respect to the word "estate" and other words of similarl
extensive signification, the general rule was that in order to carr
the fee it was necessary that they should be in the operative par
of the devise (*x*).

When words "part," "share," "moiety," carried a fee.

It was at one time a question whether under a devise by a testato
of "his moiety," "his part," or "his share," of lands the devise
would take an estate in fee, but it seems ultimately to have bee
settled that he would (*y*); unless a contrary intention appeare
by the will, as, where the indefinite gift was one in the mids
of a regular series of limitations expressed as remainders one t
another (*z*). The words, however, had this force only where th
moiety, part, or share belonged as such to the testator himself (*a*).

Words of exception.

An estate in fee was sometimes held to be given by virtue o
words of exception. So, a devise of an "estate at B." except
particular house, passed the fee in the house (*b*).

And the word "estate," or other words of similar signification
occurring merely in the introductory clause in the will, by whicl
the testator professed in the usual manner his intention to dispos
of all his estate, did not have the effect of enlarging the subsequen
devises in the will (*c*). And of course such words might be restricte
by the context (*d*).

A devise without words of limitation, to pass the fee.

II.—Under Wills Act, 1837.—As Mr. Jarman remarks (*e*)
"Perhaps there was no one of the old rules of testamentary con-
struction which so directly clashed with popular views, as that
which required words of limitation, or some equivalent expression,

(*u*) 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.

(*v*) 3 J. B. Moo. 565, 1 Br. & B. 72. See also 5 M. & Sel. 408.

(*w*) 7 Taunt. 35; 2 Ves. 48; 6 Ex. 510.

(*x*) *Doe* v. *Clayton*, 8 East, 141; *Doe* d. *Burton* v. *White*, 2 Ex. 797; *Hill* v. *Brown*, [1894] A. C. 125.

(*y*) 3 C. B. 274; 3 Jo. & Lat. 47; 1 Drew. 646, 653; L. R., 1 Ex. 235.

(*z*) *Re Arnold's Estate*, 33 Bea. 163.

(*a*) 2 Vern. 388; Cro. Eliz. 52; 19 Beav. 135; 2 D. & Ry. 678, 1 B. & Cr. 638. And in *Bentley* v. *Oldfield*, 19 Bea. 225, the fee passed by the words "share of property."

(*b*) *Doe* d. *Knott* v. *Lawton*, 6 Scott, 303, 4 Bing. N. C. 455. And see *Bennet* v. *Bennet*, 2 Dr. & Sm. at p. 273; *Hill* v. *Ratley*, 2 J. & H. 634 (anuuity, perpetual or for life).

(*c*) 6 Taunt. 317; 8 East, 141; 1 Cr. & Mee. 39; *Hill* v. *Brown*, [1894] A. C. 125.

(*d*) 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.

(*e*) First ed. Vol. II. p. 194. See *Coltsmann* v. *Coltsmann*, L. R., 3 H. L. at p. 136.

to pass the inheritance ; and hence the attention of the framer of the [Wills Act, 1837,] was naturally directed to the abolition of this technical doctrine. Accordingly, by sec. 28 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.'

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 rule. Formerly, nothing more than an estate for life would pass by an indefinite devise, unless a contrary intention could be gathered from the context. Now, an estate in fee will pass by such a devise, 'unless a contrary intention shall appear by the will.' The onus probandi (so to speak) will, under the new law, lie on those who contend for the restricted construction ; but as that construction rarely accords with the actual intention of a testator, it will, probably, not often occur, that the Courts will be called on to apply the proviso, which saves the effect of a restrictive context ; so that there seems no reason to apprehend that the newly-enacted rule will be so prolific of qualifications and exceptions as that doctrine which it has superseded. Upon the whole, the enlargement of the operation of an indefinite devise may be regarded as one of the most salutary of the new canons of interpretation which have emanated from the legislature."

What will shew a contrary intention.

The restricted construction will not be adopted merely on the ground that another devise in the will contains formal words of limitation (*f*), or that a special power of appointment is (in terms) given to the devisee (*g*), 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, and to shew that the testator meant a gift to A. for life, with remainder to B. in fee (*h*).

(*f*) *Wisden* v. *Wisden*, 2 Sm. & Gif. 396.

(*g*) *Brook* v. *Brook*, 3 Sm. & Gif. 280. See also *Weale* v. *Ollive*, (No. 2) 32 Bea. 421 ; and as to personalty *Re Mortlock's Trust*, 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. See Chaps. XXIII. and XXXIII.

(*h*) *Gravenor* v. *Watkins*, L. R., 6 C. P. 500. But for the words of limitation A. and B. would be joint-tenants, Chap. XLIV. As to the cases where a gift primâ facie absolute is cut down

So if a testator devises land to several persons as joint-tenants and to the survivor of them, his or her heirs and assigns for ever, the language shews a contrary intention within the meaning of sec. 28 with the result that the devisees are joint-tenants for life, with a contingent remainder to the survivor in fee simple (*i*).

Devise of income of land.

A devise of rents and profits or of income of land now carries the fee simple (*j*). Under the old law it carried only an estate for life, unless words of inheritance were added (*k*).

Use and occupation of land.

A devise of the "use and occupation" of land seems to give only a life interest, unless an intention to give a greater interest appears (*l*).

Statutory rule does not apply to interests created de novo.

The new 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 (*m*). 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 right of pasturage; 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 (*n*).

The decision of the House of Lords in the second appeal in *Foxwell* v. *Van Grutten* (*o*), may here be referred to. The principal question in that case was the operation of the rule in *Shelley's Case*. The testator after devising real estate to trustees upon trusts under which his only child took an equitable estate tail, directed that on the death of his child the property should be "legally conveyed and assured unto such heirs of my child or children in equal shares as they shall severally and respectively attain the age of twenty-one years or be married, and to their several and respective heirs and assigns for ever." The question was whether these words were

by subsequent words to an estate for life with a power of appointment, see Chap. XXXIV.

(*i*) *Quarm* v. *Quarm*, [1892] 1 Q. B. 184.

(*j*) *Plenty* v. *West*, 6 C. B. 201; *Mannox* v. *Greener*, L. R., 14 Eq. 456. See Chap. XXXV., ante, p. 1297; but it seems that a devise of a specific annual sum out of the lands which happens to be the whole amount of the rent does not pass the fee. *Going* v. *Hanlon*, I. R., 4 C. L. 144.

(*k*) *Hodson* v. *Ball*, 14 Sim. at p. 571.

(*l*) See *Re Coward*, 57 L. T. 285: s.c. *Coward* v. *Larkman*, 60 L. T. 1. Section 28 of the Wills Act does not apply to such a devise the right being one created de novo; see infra, and Chap. XXXV., ante, p. 1298, n. (*nn*).

(*m*) Chap. XXXI., ante, p. 1152.

(*n*) *Reay* v. *Rawlinson*, 29 Bea. 88; and see *Pym* v. *Harrison*, 32 L. T. N. S. 817, revd. 33 ib. 796 (will before 1838). As to the creation of an easement by implication, or because it is an easement of necessity, see ante, p. 75, and Chap. XXXV., ante, p. 1293, n. (*a*).

(*o*) 82 L. T. 272.

merely ancillary to the words which created the estate tail, or whether they had an independent operation and gave a fee simple to the heir of the testator's daughter. The latter construction prevailed. It is necessarily a technical construction, because the testator was obviously ignorant of the rule in *Shelley's Case*, and therefore could not have used the words in question in the sense attributed to them.

Fee simple conditional in lands not within stat. *De Donis.*

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 inheritable under the limitation (*p*), and the same rule applies to a similar gift of a personal inheritance; which cannot be entailed (*q*).

Or in a personal inheritance.

(*p*) *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. *Clark*, 5 B. & Ald. 458.

(*q*) *Stafford* v. *Buckley*, 2 Ves. sen. 170; *Turner* v. *Turner*, 1 B. C. C. 316.

CHAPTER XLVI

ESTATES OF TRUSTEES

	PAGE
I. *Land Transfer Act*, 1897...	1810
II. *When Trustees take the Legal Estate:*	
(1) *General Principles* ...	1811
(2) *Legal Estate by Implication from Direction to apply Rents, &c.*	1816
(3) *Effect of Direction to convey or to sell* ...	1820
(4) ——— *Charge of Debts*	1822
(5) ——— *Power to Lease*	1826
(6) ——— *Informal Expressions*	1829
III. *Determination of Nature and Quantity of Estates of Trustees:*	
(1) *General Principles* ...	1831
(2) *How far General Rule affected by Nature of Property*.....	1836
(3) *Implication of Chattel Interest under Old Law*	1839
(4) *As to Devises to Trustees to preserve Contingent Remainders*..	1840
(5) *Provisions of the Wills Act, secs.* 30, 31 ...	184

Land Transfer Act, 1897.

I.—Land Transfer Act, 1897.—Reference has already been made to the provisions of Part I. of this act (*a*). The operation of the act has not been the subject of many judicial decisions, but the view generally held seems to be that its object was twofold; first to enable the personal representatives of a deceased owner of land to administer it for the purpose of paying debts, &c.; as they have always been able to do in the case of chattels real (*b*); and secondly to enable them to be registered as proprietors under the Land Transfer Act, 1875. The second object does not fall within the scope of this work. With regard to the first object, probably no difficulty would have arisen if the framers of Part I. of the act had been content to follow the analogy of chattels real throughout Part I.; unfortunately they thought it necessary to provide by sec. 2 that the personal representatives of a deceased perso

(*a*) Ante, p. 64, where the important sections are set out.

(*b*) "The true object of the Act is to appoint those persons already having or entitled to have control over personal estate, to have and be entitled to have control over the real estate": p Byrne, J., in *Re Cohen's Executors a* *L.C.C.*, [1902] 1 Ch. at p. 190; and s per Kekewich, J., in *Re Kempste* [1906] 1 Ch. at p. 448.

"shall hold the real estate as trustees for the persons by law beneficially entitled thereto" (*c*). In the simple case of a specific devise to A., no difficulty can arise, unless A. is an infant (*d*). But if the testator appoints X. to be his executor, and devises land to A. upon trust for B. for life, with remainder to C. in fee, the question arises whether A. takes any estate; for the act says that X. shall hold the land as trustee for B. and C. It is submitted that the act was not intended to affect the construction of a will of land at all, and that it was not intended to affect the operation of such a will, except so far as may be necessary for the purposes of administration (*e*). If this view is correct, A. would, in the case above put, be entitled, as soon as the administration had been completed, to call upon X. to assent to the devise, or to convey the land to him, under sec. 3 of the act.

Until the point has been judicially decided, the statements contained in the following sections of this chapter must be considered as subject to qualification in the event of the view above suggested being held to be erroneous (*f*).

II.—When Trustees take the Legal Estate.—(1) *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," says Mr. Jarman (*g*), "been the subject of much learned controversy (*h*). The prevailing, and, it is conceived, the better opinion is in favour of the latter hypothesis; the only objection to which seems to be, that, as the Statute of Uses preceded the Statutes of Wills, uses created under the testamentary power conferred by the latter statutes could not, at the time of the passing of the Statute of Uses, have been in the contemplation of the legislature. The futility of this objection has been so often exposed, that it is not intended here to

Whether devises are within the Statute of Uses.

(*c*) This must mean from the death of the testator and not from the time when administration is completed. It is not clear what becomes of the legal estate before the will is proved: see ante, p. 64, n. (*d*).

(*d*) See *Re Cowley*, [1901] 1 Ch. 38, where Cozens Hardy, J., required a disclaimer by the personal representative before appointing trustees under s. 42 of the Conveyancing Act, 1881.

(*e*) There is a dictum of Kekewich, J., in *Re Peel*, 81 L. T. at p. 504, which seems in favour of the contrary view, but the decision agrees with the view above suggested. And in *Re Kempster*, [1906] 1 Ch. at p. 450, the same learned judge said, with reference to the doctrine of marshalling: "The act has not altered the construction."

(*f*) As to the effect of the act in altering the old rule that a direction to pay debts in certain cases gives the executors the legal estate in land devised to them, see post, p. 1825.

(*g*) First ed. Vol. II. p. 196.

(*h*) 1 Sand. Uses, 195; 2 Fonbl. Treat. Eq. 24; and Sugd. Pow. 8th ed. 146.

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 shew (*i*), that a devise to A. and his heirs, simply to the use of B. and his heirs, would vest the fee simple in B., if not by force of the statute, yet in order to give effect to the manifest intention of the testator. Such intention, however, seems to be apparent only when examined through the medium of the Statute of Uses. We must suppose the testator to be acquainted with the effect of that statute, in order to gather from such a devise an intention to confer the legal estate on the ulterior devisee. On the other hand, it is clear that a devise to the use of A. and his heirs, in trust for or for the use of B. and his heirs, would vest the legal inheritance in A. in trust for B., and not carry it on to B. (*j*). 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 (*k*). And in practice little or no attention seems to have been paid to the difficulty suggested by an eminent writer (*l*), 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 favour 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

(*i*) *Symson* v. *Turner*, 1 Eq. Ca. Ab. 383, pl. 1, n.; *Harris* v. *Pugh*, 4 Bing. 335. And see *Hawkins* v. *Luscombe*, 2 Sw. at p. 392; *Doe* v. *Field*, 2 B. & Ad. 564.

(*j*) As to the effect of devise "unto and to the use of" trustees, see *Riley* v. *Garnett*, 3 De G. & Sm. 629.

(*k*) The question is discussed by Jessel, M.R., in *Baker* v. *White*, L. R. 20 Eq. 166, *Cunliffe* v. *Brancker*, 3 Ch. D. 393, and *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465.

(*l*) 1 Sugd. Pow. 7th ed. 173 (but omitted, 8th ed. 148). See Butler's note to Co. Lit. 272 *a*, VIII. 1.

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 (*m*).

Principle which determines whether persons apparently so, are trustees.

"Where property, in which a testator has an estate of freehold, is devised to one person in trust for or for the benefit of another, the question necessarily arises, whether the legal estate remains in the first-named person, or passes over to, and becomes vested in, the beneficial or ulterior devisee. If the devise is to the use of A., in trust for B., the legal estate (we have seen) is vested in A., even though no duty may have been assigned to him which requires that he should have the estate. Where, however, the property is devised to A. and his heirs, to the use of, or in trust for, B. and his heirs, the question, whether A. does or does not take the legal estate depends chiefly on the fact whether the testator has imposed upon him any trust or duty the performance of which requires that the estate should be vested in him (*n*). If he 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 (*o*).

"Thus, where (*p*) a testator devised lands to A. and his heirs, in

(*m*) "See, further, on this subject, Sugd. Pow. 4th ed. 173 [8th ed. 148], where it is shewn that an important question on the construction of powers created by will, depends upon this point." (Note by Mr. Jarman.)

(*n*) As in *Re Brooke*, [1894] 1 Ch. 43, where the devise was to A. and B. and their heirs upon trust for A. and his children: a direction to A. and B. to pay debts was held sufficient to give them the legal estate, post, p. 1823. Compare *Re Youman's Will*, [1901] 1 Ch. 720. In *Re Hart's Estate*, [1883] W. N. 161, a devise to A. and his heirs to the use of A., a married woman, for life for her separate use was held not to give A. the legal estate. See *Richardson* v. *Harrison*, 16 Q. B. D. 85.

(*o*) In *Re Buckton*, [1907] 2 Ch. 406, the devise was to trustees in fee "upon trust to the use of my eldest son" &c.; the property was copyhold, and was enfranchised after the testator's death, when the limitations apparently took effect at law, but the question was immaterial.

(*p*) *Doe* d. *Terry* v. *Collier*, 11 East, 377.]

CHAP. XLVI.

Words *use* and *trust* used indifferently.

trust and for the several uses and purposes after-mentioned, viz. to pay the rents to certain persons for the life of B., and after her decease *to the use* of C. and D. during their lives and the life of the longest liver, remainder to the use of A. and his heirs during the lives of C. and D., and the life of the longest liver, to preserve contingent remainders; and, after the several deceases of C. and D., then *in trust* for the heirs male of the bodies of C. and D.; remainder to the use of T. in fee. After B.'s death, C. and D. suffered a recovery, which was contended to be void, on the ground that the limitation to the heirs male of their bodies was equitable, and, therefore, did not make them tenants in tail (—a point which is discussed in a future chapter); but Lord *Ellenborough* observed, that the testator employed the words 'use' and 'trust' indifferently and both were within the operation of the statute" (*q*).

The mere fact that construing the limitations of a will as giving legal estates causes the failure of unprotected contingent remainders, is not sufficient to justify the court in holding that the devisees to uses take the legal estate (*r*).

Effect of changing language of limitations by introducing words of direct gift.

"So, it is clear," continues Mr. Jarman (*s*), "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 (*t*).

"But the Courts strongly incline 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 (*u*).

Restrictive operation of words of direct gift.

"Thus, where (*v*) the testator's real estate was devised to trustees, their survivors or survivor, and their or his heirs, &c., to secure a

(*q*) "It is evident, therefore, that his Lordship concurred in the doctrine that uses created by will are within the Statute of Uses." (Note by Mr. Jarman.)

(*r*) *Cunliffe* v. *Brancker*, 3 Ch. D. 393. The construction in that case was very clear, as a term of years was limited to the devisees to uses. The remainders would have taken effect if the case had been within the Contingent Remainders Act, 1877, see *Re Brooke*, [1894] 1 Ch. 43.

(*s*) First ed. Vol. II. p. 199.

(*t*) *Doe* d. *Tomkyns* v. *Willan*, 2 B. & Ald. 84; *Marthewaite* v. *Jenkinson*, 3 D. & Ryl. 764, 2 B. & Cr. 357. See also *Sanford* 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.

(*u*) This passage was referred to with approval in *Stevenson* v. *Mayor of Liverpool*, L. R., 10 Q. B. at p. 85.

(*v*) *Doe* d. *Budden* v. *Harris*, 2 D. & Ryl. 36. See also *Goodtitle* d. *Hayward* v. *Whitby*, 1 Burr. 228; *Edwards* v. *Symons*, 6 Taunt. 213; *Ackland* v. *Lutley*, 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. 160.

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."

But if in such a case the limitations are throughout expressed in the form of trusts, there is nothing to prevent the application of the general rule, that where a trust or power of sale is given to trustees they take the legal fee simple (*w*).

Alternate limitations.

The principles of construction applicable to a will where there are successive or alternate limitations to the trustees and beneficiaries, are considered in the subsequent part of this chapter (*x*).

Power of appointment.

It seems that if a testator exercises a power of appointment by devising property to A. to the use of B., this vests the legal estate in A. (*y*).

Where devise includes other property as to which trustees take the legal estate.

"It seems," says Mr. Jarman (*z*), "that where a will is so expressed as to leave it doubtful whether the testator intended the trustees to take the fee or not, the circumstance that there is included in the same devise other property which necessarily vests in the trustees for the whole of the testator's interest, affords a ground for giving to the will the same construction as to the estate in question." In support of this opinion Mr. Jarman cites *Houston* v. *Hughes* (*a*), where Bayley, J., remarked: "The freehold property being mixed with property in which the trustees must have the whole interest, is a circumstance which may assist the court in determining whether the trustees take the whole fee or less than th fee. In this instance they must take an absolute interest, both in the copyholds and in the leaseholds for years; and if they do not take an absolute interest in the freeholds of inheritance and the freeholds for life, the consequence would be that one would be separated entirely from the other, which would be directly contrary to the intention of the testator." This principle, or "doctrine of attraction," as it has been called, was followed by Lord Romilly, M.R., in *Baker* v.

(*w*) *Richardson* v. *Harrison*, 16 Q. B. D. 85, infra, p. 1834.
(*x*) Infra, p. 1834.
(*y*) Infra, p. 1836.
(*z*) First ed. Vol. II. p. 228.
(*a*) 6 B. & Cr. 403.

Parson (*b*). In that case the testator devised freeholds and copyholds to A. and B. their heirs, executors, &c., upon trust during the life of J. B. to pay the rents to him for life or permit him to receive them; the will contained a trustees' receipt clause. As the Statute of Uses does not apply to copyholds, the trustees took the legal estate in the copyholds, and applying the doctrine of attraction, the M.R. held that they took the legal estate in the freeholds. However, the same will came before Jessel, M.R., a few years later (*c*), and it then appeared that the Common Pleas had also adjudicated upon it in a case of *Doe* d. *Baker* v. *Winchester* (*d*) and had decided that the legal estate was in J. B. (*e*). The M.R. therefore considered himself at liberty to disregard Lord Romilly's decision, and held that J. B. took a legal estate in the freeholds, and an equitable estate in the copyholds. In *Re Townsend's Contract* (*f*) Stirling, J., accepted as accurate the doctrine laid down by Jessel, M.R., in *Baker* v. *White* that in deciding what estate trustees take in freeholds and copyholds devised to them, the question must be decided irrespectively of the circumstance that both are comprised in the same devise. The point, however, did not arise, as the only question was whether the trustees took a quasi fee simple in the copyholds or an estate pur autre vie. It is submitted that the doctrine laid down in *Houston* v. *Hughes* and *Baker* v. *Parson* is a convenient doctrine and more likely to carry out the intention of the testator than that adopted by Jessel, M.R. (*g*).

Doctrine of attraction rejected by Jessel, M.R.

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 (*h*).

Trustee takes legal estate, when directed to apply the rents;

(2) *Legal Estate by Implication from Direction to apply Rents, &c.*—Mr. Jarman continues (*i*): "Where the person to whom the real estate is devised for the benefit of another is intrusted with

(*b*) 42 L. J. Ch. 228.

(*c*) *Baker* v. *White*, L. R., 20 Eq. 166.

(*d*) Shortly noted in 15 L. T. (O. S.) 68.

(*e*) The doctrine of attraction was obviously not referred to, as the only authority given for the decision is *Doe* v. *Biggs*.

(*f*) [1895] 1 Ch. 716.

(*g*) The rule in *Genery* v. *Fitzgerald*, Jac. 468 (commented on by Jessel, M.R., in *Bellairs* v. *Bellairs*, L. R., 18 Eq. 510), is an instance of the doctrine of attraction being applied to a different subject matter.

(*h*) *Cox* v. *Parker*, 22 Bea. 168. As to the result of a bequest of leaseholds to trustees failing by the disclaimer of the trustees, see *Wyman* v. *Carter*, L. R., 12 Eq. 309.

(*i*) First ed. Vol. II. p. 200.

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 (*j*).

—— or to pay taxes and repairs;

" In the case of *Shapland* v. *Smith* (*k*) 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* (*l*). Mr. Baron *Eyre*, sitting for Lord *Thurlow*, thought there was no difference between a trust to pay the rents to a person, and a trust to permit him to receive them (see contra in the 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 apply rents for maintenance of cestui que trust;

" In *Silvester* v. *Wilson* (*m*), 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.].

" Indeed, without regard to the exact degree of discretionary power lodged in the trustees, the mere fact that they are made agents in the application of the rents, is sufficient to give them the legal estate, as in the case of a simple devise to A. upon trust to pay the rents to B. And it is immaterial in such a case that there is no direct devise to the trustees, if the intention that they shall take the estate can be collected from the will. Hence a devise to the intent that A. shall receive the rents and pay them over to B., would clearly vest the legal estate in A. (*n*).

—— or to pay rents to a person.

(*j*) As to the effect of a direction to an executor to let real estate and apply the rents for a particular purpose, see ante, p. 923.

(*k*) 1 B. C. C. 74. See also *Browne* v. *Ramsden*, 2 J. B. Moo. 612; *Tenny* d. *Gibbs* v. *Moody*, 3 Bing. 3.

(*l*) The question whether the trustees take any and what estate is often raised in this manner. See *Jones* v. *Lord Say and Seal*, 8 Vin. Ab. 262, pl. 19, 1 Eq. Ca. Abr. 383, pl. 4, as to which case see per Lawrence, J., 5 East, at p. 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.

(*m*) 2 T. R. 444. Clearly a trust to apply rents to the maintenance of a minor gives the trustees the legal estate: *Van Grutten* v. *Foxwell*, [1897] A. C. 658. See also *Doe* v. *Ironmonger*, 3 East, 533; *Reynell* v. *Reynell*, 10 Bea. 21; *Berry* v. *Berry*, 7 Ch. D. 657; and see *Plenty* v. *West*, 6 C. B. 201.

(*n*) *Doe* d. *Gatrex* v. *Homfray*, 6 Ad. & Ell. 206. See also cases cited post, p. 1818.

CHAP. XLVI.

To permit receipt of rents, gives trustee no estate.

"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 (*o*). The distinction between a direction to pay the rents to a person, and a direction to permit him to receive them, though often condemned, cannot now be questioned. In the case of *Doe* d. *Leicester* v. *Biggs* (*p*), 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?

Effect where both expressions are used.

"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 (*q*)), be governed by the posterior expression. Thus, in *Doe* d. *Leicester* v. *Biggs* (*r*), 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. (*s*).

Trust to permit receipt, with other duties;

"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.

—— as to preserve contingent remainders;

"Thus, in *Biscoe* v. *Perkins* (*t*), where a testator devised his real estate to his executors, their heirs, &c., for the life of his son A., to the intent to support the contingent remainders after limited, 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 testator devised the same to the first son of A.

(*o*) *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. 1819.

(*p*) 2 Taunt. 109; and see 1 Ed. 36, n., and 1 B. C. C. by Eden, 75, n.

(*q*) Chap. XVII.

(*r*) 2 Taunt. 109; so in *Baker* v. *White*, L. R., 20 Eq. 166. See also *Re Allsop and Joy*, 61 L. T. 213.

(*s*) "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." (Note by Mr. Jarman.) 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. But in *Baker* v. *White*, L. R., 20 Eq. 166, the M.R. said that *Doe* v. *Biggs* had always been recognized as good law, and he followed it. And in *Re Adams and Perry's Contract*, [1899] 1 Ch. 554, *Doe* v. *Biggs* was treated as a binding authority and followed. But the rule is not to be extended: *Re Lashmar*, [1891] 1 Ch. 258.

(*t*) 1 V. & B. 485. See also *White* v. *Parker*, 1 Bing. N. C. 573.

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."

—— as to raise and pay legacies.

In *Re Tanqueray-Willaume and Landau* (*u*), the testator directed his executors to pay his debts, and devised his real estate to the same persons (his 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 son in fee. The Court of Appeal held that the wife and son took the legal estate as joint-tenants in fee: there being "a good charge of debts, a good power of sale, and a good legal estate."

But if there had been no charge of debts, there would have been nothing to prevent the rule in *Doe* v. *Biggs* from applying (*v*).

Maintenance.

Where there is a devise to trustees to the use of the children of A. with a provision for their maintenance out of the income, this prevents the legal estate from vesting in the children (*w*). And even where there is no devise to the executors, a direction that the testator's real estate shall be sold by them and that in the meantime the income shall be applied in the support and maintenance of the wife and children, will give the executors the legal estate (*x*).

Separate use.

Mr. Jarman continues (*y*): "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 (*z*).

Receipts with the approbation of trustees to be good.

"And where (*a*) 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.

(*u*) 20 Ch. D. 465.

(*v*) *Adams & Perry's Contract*, [1899] 1 Ch. 554, post, p. 1822. The point taken by Jessel, M.R., in *Re Tanqueray-Willaume and Landau*, that the wife was one of the trustees and that there was, therefore, no inconsistency between the trust to pay the rents to her and the trust to permit her to receive them, seems somewhat fine.

(*w*) *Berry* v. *Berry*, 7 Ch. D. 657; what became of the legal estate during the preceding life estate was not decided. Compare *Re Bourne*, 56 L. J. Ch. 566.

(*x*) *Re Fisher and Haslett*, 13 L. R. Ir. 546.

(*y*) First ed. Vol. II. p. 203.

(*z*) *Harton* v. *Harton*, 7 T. R. 652; *Doe* d. *Woodcock* v. *Barthrop*, 5 Taunt. 382. See also *Doe* d. *Stevens* v. *Scott*, 4 Bing. 505, 1 M. & Pay. 317; à fortiori, where the direction is to pay them to her, *Nevil* v. *Saunders*, 1 Vern. 415, 1 Eq. Ca. Ab. 382, pl. 1; *Robinson* v. *Grey*, 9 East, 1; *Hawkins* v. *Luscombe*, 2 Sw. 375; and see *Re Hart's Estate*, [1883] W. N. 164; *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.

(*a*) *Gregory* v. *Henderson*, 4 Taunt. 772, which compare with *Broughton* v. *Langley*, Salk. 679.

CHAP. XLVI.

To permit A. to receive *net* rents.

" And in a more recent case (*b*), a similar construction was given to a direction to the trustees to 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."

Direction to sell or convey gives legal estate to devisee.

(3) *Effect of Direction to convey or to sell.*—Mr. Jarman continues (*c*): " Where the duty imposed on the devisee is to sell or convey (*d*) the fee simple, he is held to take the inheritance to enable him to comply with the direction; though in 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 (*e*).

" In *Bagshaw* v. *Spencer* (*f*), a devise to trustees and their heirs, upon trust out of the rents, or by sale or mortgage, to raise so much as should be sufficient for the payment of debts, legacies and funeral expenses, and then as to one moiety upon trust for and to the use of B. for life, remainder to trustees to preserve contingent uses, &c., was held, by Lord *Hardwicke*, to vest the fee in the trustees, as they were 'to sell the lands' by virtue of their estate.

(*b*) *Barker* v. *Greenwood*, 4 M. & Wels. 421.

(*c*) First ed. Vol. II. p. 204.

(*d*) *Garth* v. *Baldwin*, 2 Ves. sen. 646; *Doe* d. *Booth* v. *Field*, 2 B. & Ad. 564; *Doe* d. *Shelley* v. *Edlin*, 4 Ad. & Ell. 582.

(*e*) The rule, as stated in the text, was commented on by Lord Esher, M.R., in *Richardson* v. *Harrison*, 16 Q. B. D. at p. 105.

(*f*) 1 Ves. sen. 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 Bea. 21; *Rackham* v. *Siddall*, 1 Mac. & G. 607; *Doe* d. *Noble* v. *Bolton*, 11 Ad. & Ell. 188; *Cropton* v. *Davies*, L. R., 4 C. P. 159; *Underhill* v. *Roden*, 2 Ch. D. 494, but see *Hawker* v. *Hawker*, 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.

"In this case the testator evidently intended the trustees to take the inheritance, as they were to raise the money either out of the rents, or by sale or mortgage of the estate, and the former purpose could not be answered by a mere power; though it is observable that the construction adopted by the Court rendered nugatory the trust for preserving contingent remainders."

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 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 (*g*).

"In trust and to be conveyed accordingly."

But where there was a formal devise to trustees in fee to the use of themselves for a term of years, followed by successive uses in settlement (with a limitation to the trustees after the life estate to preserve contingent remainders) it was held that it was not sufficient in order to give the legal fee to the trustees (thereby converting all the uses into equitable interests), that there were contingent remainders which in the result fail for want of an estate of freehold to support them (*h*). The will contained a power authorizing the trustees to convey in exchange or on partition, by way of revocation and appointment of the uses, but this shewed clearly that they were not intended to take the legal estate.

Power of sale by revocation of uses.

On the other hand, where land is devised to trustees and their heirs upon trust for A. for life for her separate use, and after her death for her children, a power of sale given to the trustees is an indication of intention that the trustees should take the legal fee simple, unless that inference is contradicted by the whole scheme of the will (*i*).

Power of sale where interests are equitable.

It seems that where there is no devise to the trustees, ambiguous words will not give them the legal estate, even if the testator clearly contemplated the possibility of a sale by them being necessary (*j*).

Where no devise to trustees.

Mr. Jarman refers (*k*) to a case under the old law (*l*) in which "a devise of copyhold lands in trust for a minor, and *to be transferred*

Devise of copyholds "to be transferred" to A. at majority.

(*g*) *Maden* v. *Taylor*, 45 L. J. Ch. 569. See *Doe* v. *Nicholls*, 1 B. & Cr. 336; *Re Youman's Will*, [1901] 1 Ch. 720, where the effect of a trust to convey was assumed as obvious.

(*h*) *Cunliffe* v. *Brancker*, 3 Ch. D. 393.

(*i*) *Richardson* v. *Harrison*, 16 Q.B.D. 85, stated post, p. 1834.

(*j*) *London & S. W. Ry.* v. *Bridger*, 12 W. R. 948.

(*k*) First ed. Vol. II. p. 200.

(*l*) Post, p. 1836.

CHAP. XLVI.

to him at twenty-one, has been held to give to the trustees a chattel interest only, determinable at the majority of the cestui que trust; the Court thinking that the words 'to be transferred,' did not refer to a legal transfer of the estate by surrender (in which case the trustees must have taken the fee to enable them to make such surrender), but merely to the delivery of possession, and admission on the rolls of the manor" (*m*).

Lands being charged with debts and legacies will not vest the estate in the trustees.

(4) *Effect of Charge of Debts.*—Mr. Jarman continues (*n*): "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 (*o*).

"Thus, where (*p*) 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, or administrators of such survivor, should in the first place apply the testator's personal estate in discharge of debts, funeral expenses, and such legacies as he might direct; and 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 (*q*). But this, his Lordship added, was only

(*m*) *Doe* d. *Player* v. *Nicholls*, 1 B. & Cr. 336. In the case of freeholds, a trust to convey to the beneficiaries on the termination of the preceding trusts primâ facie gives the trustees the fee: *Maden* v. *Taylor*, 45 L. J. Ch. 569, post, p. 1825.

(*n*) First ed. Vol. II. p. 205.

(*o*) See *Re Adams and Perry's Contract*, [1899] 1 Ch. 554, where this passage was cited with approval by Stirling, J.

(*p*) *Kenrick* v. *Lord W. Beauclerk*, 3 B. & P. 175. Compare *Jones* v. *Lord Say & Seal*, 8 Vin. 262, pl. 19, ante, p. 1817.

(*q*) This deficiency was afterwards supplied by 1 Will. 4, c. 47, s. 12, 13 & 14 Vict. c. 60, and 15 & 16 Vict. c. 55, but in cases of testator's dying since 1897 the provisions of Part I. of the Land Transfer Act, s. 7, are applicable: see above, p. 1810.

an argument ab inconvenienti, from which we cannot construe the testator to have said what, in fact, he has not said."

Secus, where devisees directed to pay debts.

But if the testator has devised the land to the trustees in fee simple and has appointed them executors, and directed them to pay his debts, the legal estate in fee will vest in the trustees (*r*).

To pay debts in aid of personalty.

"Here, it may be observed," continues Mr. Jarman (*t*), "that where real estate is devised to trustees for the payment of debts and legacies, though the property becomes applicable only in case of the deficiency of the personal estate, the trustees take the legal estate instanter, independently of the fact of the personalty proving deficient (*u*). But it is otherwise where the devise is in terms made contingent on this event (the language of the will being, '*in case* my personal estate shall not be sufficient to pay debts, &c., then I devise, &c.') (*v*). But even in such case the trustees, on the happening of the contingency, take an absolute fee simple in the whole, which continues in them as to the residue of the property, after they have, by a sale of part of the estate, raised sufficient money to answer the charge (*w*).

Where *devise* is in terms contingent on personalty being insufficient.

Where *trust* is contingent on that event.

"In the case of *Hawker* v. *Hawker* (*x*), where an estate was made saleable by trustees, in the event of the proceeds of another estate proving deficient to pay the testator's debts, it appears to have been considered, that having regard to the terms in which the estate was given to the beneficial devisees, in the event of its 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 had a power of sale only and 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 (*y*).

(*r*) *Creaton* v. *Creaton*, 3 Sm. & G. 386; *Spence* v. *Spence*, 12 C. B. (N. S.) 199; *Smith* v. *Smith*, 11 C. B. (N. S.) 121; *Re Tanqueray-Willaume and Landau*, 20 Ch. D. pp. 465, 479; *Marshall* v. *Gingell*, 21 Ch. D. 790; *Re Brooke*, [1894] 1 Ch. 43. In *Doe* d. *Müller* v. *Claridge*, 6 C. B. 641, it was held that a direction to pay debts did not enlarge an estate pur autre vie, given to trustees, to a fee-simple. Compare *Bolton* v. *Bolton*, L. R., 5 Ex. 145, ante, p. 1803.

(*t*) First ed. Vol. II. p. 206.

(*u*) *Murthwaite* v. *Jenkinson*, 2 B. & Cr. 357. See also *Doe* v. *Field*, 2 B. & Ad. 564.

(*v*) *Goodtitle* d. *Hart* v. *Knot*, Cowp. 43.

(*w*) *Doe* d. *Cadogan* v. *Ewart*, 7 Ad. & Ell. 636. But here the trust only was contingent.

(*x*) 3 B. & Ald. 537.

(*y*) Sugd. Pow. 6th ed. ii. 127: 8th ed. 111. The decision seems to have turned on the fact that the proceeds of the estate first directed to be sold were sufficient, but this was immaterial. See also per Jervis, C.J., *Poad* v. *Watson*, 6 Ell. & Bl. at p. 619.

CHAP. XLVI.

Trustees held to take the fee, notwithstanding expressions apparently conferring a power only.

"A different construction prevailed in the recent case of *Doe* d. *Cadogan* v. *Ewart* (*z*), where a testator devised to A., B., and C., and the survivors or survivor of them and the heirs of such survivor (*a*), all his real estate, charged with the payment of a life annuity and so much of his debts, legacies, funeral expenses, and the costs of proving his will, as his personal estate should not extend to, upon the trusts following: upon trust to pay the rents to his wife during widowhood, and after her decease, or marriage again, upon trust, to apply the rents for the maintenance of his daughter J. until she should attain twenty-five, and after her attaining that age, upon trust, charged as aforesaid, for her and her heirs and assigns; but in case she should die without leaving issue, lawfully begotten, then the testator gave the said real estate to D. and E., their heirs and assigns for ever. 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 for ever, 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.

(*z*) 7 Ad. & Ell. 636, 3 Nev. & P. 197. But see *Doe* v. *Shotter*, 8 Ad. & Ell. 905.

(*a*) "These words might seem to make the trustees joint-tenants for life, with a contingent remainder to two survivors, and a contingent remainder in fee to the survivor (a construction which would be obviously inconvenient), but it has been decided that where real estate is devised to several persons, and the survivors and survivor of them, and the heirs of such survivor, upon certain trusts commensurate with the fee simple, the devisees in trust are joint-tenants in fee; *Doe* d. *Young* v. *Sotheron*, 2 B. & Ad. 628." (Note by Mr. Jarman.) The devise in *Doe* v. *Sotheron* was of all the testator's real estate to A. and B. jointly in trust, &c., "and I do appoint them executrixes of this my will and do give them the residue or remainder of all my real and personal estate, to them and the survivor of them, their heirs and executors for ever." Mr. Charles Butler agreed with Mr. Jarman that a devise to A. and B. and the survivor of them and the heirs and assigns of such survivor, upon trust for sale, makes A. and B. joint tenants in fee: Co. Litt. 191*a* note, ad. fin. See Lewin on Trusts, 8th ed. p. 214.

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" (*b*). The Court also held 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 (*c*). This principle has been frequently enunciated in later cases (*d*), and would seem to make it immaterial whether 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 mere possibility of the whole being required for the debts was sufficient in Lord Hardwicke's opinion "to consider them as trustees throughout" (*e*).

Effect of Land Transfer Act, 1897.

In the case of a testator whose will was made since 1897, or even in the case of a testator dying since that year, it may be a question how far a direction to his executors, being also devisees of his real estate, to pay debts, will have the effect of giving them the legal estate. It is submitted that Part I. of the Land Transfer Act, 1897, was not intended to affect the construction of wills, and that the old rule should not be disturbed.

(*b*) *"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*, 2 Kee. 664; but, as to this case, see 4 M. & Cr. 460." (Note by Mr. Jarman.)

(*c*) 7 Ad. & Ell. 666, 667, citing *Doe* v. *Edlin*, and *Doe* v. *Nicholls*; see also *Doe* d. *Kimber* v. *Cafe*, post, p. 1828.

(*d*) See *Pond* 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 Bea. 190; but that case has been said to stand alone, per Jessel, M.R., L. R., 17 Eq. at p. 257.

(*e*) *Gibson* v. *Rogers*, Amb. 93. 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.

*Sale to be made during continuance of trusts.

Authority to grant leases when it confers the fee.

(5) *Effect of Power to Lease.*—Mr. Jarman continues (*f*): "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.

Doe d. *Tomkyns* v. *Willan.*

"Thus, in the case of *Doe* d. *Tomkyns* v. *Willan* (*g*), 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 (*h*).

Power to lease, with direction to pay taxes.

"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.

"Thus, in the case of *White* v. *Parker* (*i*), 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 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, 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

(*f*) First ed. Vol. II. p. 208.
(*g*) 2 B. & Ald. 84.
(*h*) See also *Doe* d. *Keen* v. *Walbank*, 2 B. & Ad. 554; *Riley* v. *Garnett*, 3 De G. & Sm. 629. Mr. Jarman's lengthy quotation from the judgment of Bayley, J., in *Doe* v. *Willan*, and his statement of the facts and arguments in *Doe* v. *Walbank*, are omitted.
(*i*) 1 Scott, 542.

premises, and to keep the premises in repair. It was held that the legal estate in the whole vested in the trustees (*j*).

"But in the recent case of *Ackland* v. *Lutley* (*k*), 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 for ever. 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 decided that the estate of the trustees terminated on the discharge of the debt and legacies.

Remarks on *Ackland* v. *Lutley*.

"It does not appear from the judgment whether the Court considered this case to be distinguishable from *Doe* v. *Willan* and *Doe* v. *Walbank*, or that those cases had gone too far. In *Doe* v. *Willan* (as here) the disposition in favour of the beneficial devisees was in the language not of a trust but of an independent devise: but there were other purposes besides the power of leasing, requiring the trustees to take some estate (and it would seem an estate 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."

Explanation of *Ackland* v. *Lutley*.

It should be added that the will in *Ackland* v. *Lutley* afterwards came before the Court of Common Pleas, and that Court arrived at the same conclusion (*m*). The Court distinguished the case 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 (*n*).

(*j*) Mr. Jarman's statement of the case is not quite complete. The power of leasing was restricted to seven years. Tindal, C.J., said that the legal estate was vested in the trustees at least during the coverture of the testator's daughters: Fosanquet, J., said that the will contained a variety of directions that were perfectly incompatible with anything short of a fee in the trustees as to the entire property.

(*k*) 9 Ad. & Ell. 879.

(*m*) *Ackland* v. *Pring*, 2 M. & Gr. 937.

(*n*) See also *Doe* d. *White* v. *Simpson*, 5 East, 162; *Heardson* v. *Williamson*, 1 Kee. 33, both stated post. In *Collier* v. *Walters*, L. R., 17 Eq. 252, Jessel, M.R., questioned the soundness of this distinction.

Mr. Jarman's view commented on.

Mr. Jarman's examination of these cases has been retained because it is still sometimes referred to. Thus, in *Collier* v. *Walters* (*o*) in answer to the statement (made arguendo): "Mr. Jarman deduces from the cases that an authority to grant leases is not a sufficient ground for holding trustees to take a fee," Jessel, M.R. said: "I rather understand him to be of opinion that where the estate is devised to the trustees upon trust to lease, and they must at least have a life estate, there they take a fee."

Modern view.

Notwithstanding the doubt suggested by Mr. Jarman, the general rule now constantly acted upon is that where an estate is given to trustees all the trusts must primâ facie be performed by them by virtue or out of the estate vested in them; and it seems to follow that if the devise is in fee, and there is a trust to grant leases of indefinite duration, the trustees will primâ 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 (*p*). 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 very strained and artificial construction to hold, first that the natural meaning of the words is to be cut down because they would give an estate more extensive than the trust requires, and then, when the trust does in fact require the whole fee simple to hold that that must be supplied by way of power, defeating the estate of the subsequent devisees, and not out of the interest of the trustees" (*q*).

To rebut this primâ facie construction it must be shewn 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 (*r*). Thus in *Doe* d. *Kimber* v. *Cafe* (*s*), 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 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

Definite power to lease held exercisable only during other (clear) trusts.

Doe v. *Cafe*.

(*o*) L. R., 17 Eq. p. 257.

(*p*) See per Jessel, M.R., *Collier* v. *Walters*, L. R., 17 Eq. at p. 265.

(*q*) Per Parke, B., *Watson* v. *Pearson*, 2 Ex. at p. 593.

(*r*) Ib.; per Holroyd, J., 4 B. & Ald. at p. 93.

(*s*) 7 Ex. 675.

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 favour 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."

The argument in favour of giving the fee to the trustees afforded by the power to lease for a limited term was thus treated as not differing 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.

Where no estate devised to trustees.

It seems that where no estate is devised to the trustees or executors, and they are merely directed to let the land and apply the rents for a specified purpose, this certainly does not give them any estate extending beyond the accomplishment of the purpose indicated (*t*), possibly the right construction of such a direction is that it gives them merely a power.

Implication from powers of management.

Where real estate is devised to trustees a power given to them to accept surrenders of leases, though capable of a different interpretation if the context requires it, means primâ facie the acceptance of the particular estate by a person having an estate in reversion (*u*). 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 (*v*).

(6) *Effect of informal Expressions.*—Mr. Jarman continues (*w*): "The case of *Trent* v. *Hanning* (*x*) is remarkable for the difference of opinion which prevailed in regard to the effect of some very

(*t*) *Lambert* v. *Browne*, Ir. R. 5 C. L. 218. See *Smith* v. *Smith*, 1 L. R. Ir. 266.

(*u*) *Blagrave* v. *Blagrave*, 4 Ex. 550.

(*v*) *Collier* v. *Walters*, L. R., 17 Eq. at p. 265.

(*w*) First ed. Vol. II. p. 212.

(*x*) 1 E. & P. N. R. 116.

ambiguous words. The will was in the following terms: 'I do hereby give unto my wife £200 per annum during her natural life in addition to her jointure' (which was an annuity secured to her before marriage, out of his real estate), 'my just debts being previously paid, and I do give unto my younger children £6,000 each, to be paid when they severally come to the age of twenty-one; and I do appoint B., C., and D., as *trustees of inheritance* for the execution thereof.' The Court of C. P., on a case from Chancery, held, that the trustees took no estate, and had no power to create any; but Lord *Eldon* being dissatisfied with this opinion, and considering that upon this point turned the question, whether the annuity, debts, and portions, were a charge upon the real estate, sent a case to the King's Bench, three of the judges of which (*Ellenborough*, *Grose*, and *Le Blanc*, dissentiente *Lawrence*) certified that the trustees took an estate in fee; they being of opinion that the words 'trustees of my inheritance,' meant 'trustees to inherit my estates for the execution of this my will'" (*y*).

Appointment of persons to perform trusts of will;

Again, in *Plenty* v. *West* (*z*), 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 (*a*), but only a direction as to the division of such real estate, were held to give W. an 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 (*b*).

—— "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 (*c*).

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 (*d*),

(*y*) This is not quite accurate: the certificate was that the phrase used by the testator ("trustees of inheritance") was equivalent to "trustees of *my* inheritance" or "trustees to inherit my said estates." (7 East, at p. 105.) Lord Eldon decided in conformity with this certificate and his decision was affirmed by the House of Lords: *Trent* v. *Trent*, 1 Dow. 102.

(*z*) 6 C. B. 201. See *Murphy* v. *Donelly*, 4 Ir. R. Eq. 111, ante, p. 1006.

(*a*) 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 Bea. at p. 175.

(*b*) *Bennett* v. *Bennett*, 2 Dr. & Sm. at p. 272.

(*c*) *Sidebotham* v. *Watson*, 11 Hare, 170.

(*d*) *Doe* d. *Gillard* v. *Gillard*, 5 B. & Ald. 785; *Doe* v. *Woodhouse*, 4 T. R. 89. See *Bush* v. *Allen*, 5 Mod. 63; *Jenkins* v. *Jenkins*, Willes, 650.

or of the will (*e*), or trustees "to see justice done" (*f*), or the direction alone without such appointment (*g*), 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 (*h*).

Estate not created by implication beyond what is required.

But in cases of this nature the general principle is that the executors or trustees take only a limited estate, if that is sufficient for the performance of the trust (*i*). This principle is the converse of that which applies where the fee simple is expressly given to the trustees, for there it lies on the parties alleging that they take a less estate to shew what less estate will serve the purpose (*j*).

Leaseholds.

The same principles apply to leaseholds. Thus in *Stevenson* v. *Mayor of Liverpool* (*k*) there was a gift of leaseholds to A. for life, with a direction that the rents should be received and the property be under the management of the testator's executors: it was held that they took the legal estate during A.'s lifetime.

Substitution of trustee.

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 (*l*).

Principle which regulates the *quantity* of estate.

III.—Determination of the Nature and Quantity of Estates of Trustees.—(1) *General Principles.*—Mr. Jarman continues (*m*): "The reader will have perceived (though the position has not hitherto been distinctly advanced), that the same principle which determines whether the trustees take any estate, regulates also the nature and duration of that estate; the established doctrine being (subject to certain positive rules of construction, lately propounded by the legislature, and which will be presently considered) that trustees take exactly that quantity of interest which the purposes of the trust require; and the question is not whether the testator has used

(*e*) *Oates* v. *Cooke*, 3 Burr. 1684.

(*f*) *Anthony* v. *Rees*, 2 Cr. & J. 75.

(*g*) *Doe* d. *Beezley* v. *Woodhouse*, 4 T. R. 89. See also *Ex parte Wynch*, 5 D. M. & G. at p. 220; *Re Boyce*, 33 L. J. Ch. 390; and cf. *London and South Western Rail. Co.* v. *Bridger*, 10 Jur. (N. S.) 650.

(*h*) *Davies to Jones and Evans*, 24 Ch. D. 190. As to the effect of a receipt clause, see *Baker* v. *White*, L. R., 20 Eq. 166.

(*i*) *Doe* d. *White* v. *Simpson*, 5 East, 162.

(*j*) *Collier* v. *Walters*, L. R., 17 Eq. 252, post, p. 1833.

(*k*) L. R., 10 Q. B. 81.

(*l*) *Re Hough's Will*, 4 De G. & S. 371; *Re Turner*, 2 D. F. & J. 527.

(*m*) First ed. Vol. II. p. 213. The reader will notice that the nature of a trust imposed on the trustees of a will may operate in one of two ways: where no estate is expressly devised to them, the trust may give them an estate by implication; and where an estate is expressly devised to them, the trust may have the effect of preventing them from being mere devisees to uses.

CHAP. XLVI.

words of limitation, or expressions adequate to carry an estate
inheritance: but whether the exigencies of the trust demand th
fee-simple, or can be satisfied by any and what less estate (*n*).

Estate of trustees commensurate with duties.

"Thus, in the case of a devise to a trustee and his heirs, upo
trust *to pay and apply the rents* for the benefit of a person for lif
and after his decease to hold the lands *in trust* for other persons
the direction to apply the rents being limited to the cestui qu
trust for life, the estate of the trustee will terminate at his decease (*o*
And it seems that a limitation to trustees and their heirs may b
restrained by implication to an estate pur autre vie even in
deed" (*p*).

To pay life annuity out of rents;

Again, in *Adams* v. *Adams* (*q*), there was a devise to trustees an
their heirs upon trust to permit and suffer J. to take the rents durin
his life, "subject with this proviso to pay my wife or her assign
an annuity of four guineas during her life; if J. die before my wif
to permit my wife to enjoy the lands during her life," and afte
the decease of J. and the testator's wife, the lands were devised t
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 lega
rent-charge (*r*) and that the trustees took some estate in order t
enable them to pay the annuity, that such estate lasted only durin
the life of the annuitant; J. therefore had, at all events, a previou
estate of freehold which, joined to the subsequent limitation to th
heirs male of his body, gave him an estate tail.

—— out of corpus.

But if the annuity is charged on the corpus of the estate th
trustees take the fee, because the trust may continue after the deat
of the annuitant, or arrears may be raised by sale or mortgage (*s*).

(*n*) 8 Vin. Ab. 262, pl. 19; 3 B. P. C. Toml. 113, 1 Eq. Ca. Ab. 3 pl. 4; 3 Taunt. 326, and Fea. C. R. Butl. n.; Lucas' Rep. 523, 10 Mod. ; 2 Str. 798; Willes, 650; Cas. t. Ta. 145; 1 Ves. 485; 3 Burr. 1684; 2 T. R. 444; 7 ib. 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.

(*o*) *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; and compare *Doe* d. *Woodcock* v. *Barthrop*, 5 Taunt. 382, post, p. 1842. *Farmer* v. *Francis*, 2 Bing. 151, 9 J. B. Moo. 310, seems contra, but the attention of the Court was directed exclu sively to another point. See also *R Hart's Estate*, W. N., 1883 p. 161 stated ante, p. 1813, note (*n*).

(*p*) *Venables* v. *Morris*, 7 T. R. 342 438; *Blaker* v. *Anscombe*, 1 B. & P., N R. 25; *Curtis* v. *Price*, 12 Ves. 89 The rules of construction affectin deeds are not the same as in the case o wills; *Lewis* v. *Rees*, 3 K. & J. 132 *Cooper* v. *Kynock*, L. R., 7 Ch. 398 See *Colmore* v. *Tyndall*, 2 Y. & J. 605 *Fowler* v. *Lightburne*, 11 Ir. Ch. 495.

(*q*) 6 Q. B. 860.

(*r*) See Chap. XXXI.

(*s*) *Fenwick* v. *Potts*, 8 D. M. & G 506. *Whittemore* v. *Whittemore*, 3 L. J. Ch. 17. As to when a direction to raise money out of "rents and profits" charges the corpus, see Chap. LIII.

As to commencement of estate of trustees.

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 a devise to trustees and their heirs 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 (*t*).

Fee simple expressly devised, not cut down except by clear provisions.

It will be noticed that in all the preceding cases, words of inheritance were used in the devise to the trustees, and where this happens, the general rule is that due effect is to be given to the language of the will, and that the trustees take the fee, unless the context shews an intention to give a more limited estate (*u*). "Words of devise to trustees and their heirs are to have their natural effect to give a fee simple, unless something shews 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 shewn, it remains an estate in fee" (*v*). If it is possible at the testator's death that the trustees may require the fee simple, they take it, whatever the event may be: it is only when a less estate would certainly enable the trustees to fulfil all the trusts, that the fee simple will be cut down to that estate (*w*).

Copyholds and leaseholds.

The same rule applies mutatis mutandis to devises of copyholds and leaseholds (*x*).

Absolute interest not cut down if trusts may have indefinite duration.

This principle has been already referred to in connection with the effect of a power to pay debts, &c. (*y*), or to lease (*z*). So a power to trustees to reimburse themselves their charges and expenses prevents a devise to them and their heirs to uses from making them mere conduit pipes for the legal estate (*a*). The application of the general principle is illustrated by *Collier* v. *Walters* (*b*), where there was a devise of lands to trustees and their heirs upon trust that they should stand seised of them during the

(*t*) *Doe* d. *Noble* v. *Bolton*, 11 Ad. & E. 188; *Re Adams and Perry's Contract*, [1899] 1 Ch. 554. See *Berry* v. *Berry*, 7 Ch. D. 657, post, p. 1844.

(*u*) *Blagrave* v. *Blagrave*, 4 Exch. 550. As to the rule where there are no words of inheritance, and it is contended that the trustees take an estate in fee simple by implication, see p. 1830 supra.

(*v*) Per Coleridge, J., *Poad* v. *Watson*, 6 E. & B. at p. 617.

(*w*) Per Erle, J., in *Poad* v. *Watson*. See also the statement of the general principle laid down in *Doe* v. *Davies*, 1 Q. B. 430, cited by Jessel, M.R., in *Collier* v. *Walters*, L. R., 17 Eq. at p. 262; *Re Townsend's Contract*, [1895] 1 Ch. 716.

(*x*) Post, pp. 1836, 1837.

(*y*) *Doe* v. *Ewart*, supra, p. 1823.

(*z*) Supra, p. 1826.

(*a*) *Poad* v. *Watson*, supra.

(*b*) L. R., 17 Eq. 252.

CHAP. XLVI.

life of A., and also until the whole of the testator's debts and legacies were paid, upon trust to lease and apply the rents and profits (including ripe timber) in paying the debts and legacies, and thenceforward to pay the rents and profits to A. during his life, and after the death of A. the testator devised the lands to the heirs of the body of A. If it had not been for the power of leasing and the trust for payment of the debts and legacies it seems that the trustees would merely have taken the legal estate during the life of A. (*c*), but those provisions made it necessary for them to have the fee. So, in *Re Townsend's Contract* (*d*), there were trusts which might go beyond the life of the tenant for life, and it was therefore impossible to cut down the estate of the trustees to an estate during her lifetime.

Devise to trustees in fee followed by discretionary authority to sell.

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 will a legal estate in fee simple.

Recurring trusts.

It has been already noticed that where land is devised to trustees in such terms as would primâ facie give them the fee, it may be cut down to an estate pur autre vie, or an estate in fee in remainder, if at the time of the testator's death it is clear that the purposes of the trust do not require them to take the whole fee. But if the trustees have two or more distinct trusts to perform, each of which requires them to have the legal estate, and these are separated by a period during which no such necessity exists, a special rule prevails, which has been thus stated: "Where there are recurring occasions for the exercise of active duties by the trustees, and no repeated devises to them to enable them to perform their duties, the legal estate, if once in the trustees, is to be deemed to be vested in them throughout, notwithstanding the duration in the meantime of what would but for the recurring duties be construed

(*c*) *Doe* v. *Ironmonger* and *Adams* v. *Adams*, supra, p. 1832.

(*d*) [1895] 1 Ch. 716 (copyholds).

(*e*) 16 Q. B. D. 85.

as uses executed in the beneficiaries" (*f*). In the case in which these observations were made the trusts were to apply the rents during the minorities of certain children, to permit them to receive the rents after attaining majority during their lives (which standing by itself would give them the legal estate) and after their death to convey the lands to the heirs of their bodies; it was held that the legal estate vested in the trustees throughout.

Trustees take the fee, though trust not strictly commensurate.

The principle is thus stated by Mr. Jarman (*g*): "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.

***Harton* v. *Harton*.**

"Thus, in *Harton* v. *Harton* (*h*), where the devise was to A. and B. and their heirs, in trust to permit C. (a feme covert) to receive the rents during her life, for her separate use, and so as not to be subject to the debts, &c., of her husband, with remainder to the use of her sons successively in tail, remainder to her daughters in tail; and in default of such issue (without fresh words of gift) upon trust to permit D. (another feme covert) to receive the rents for her separate use, with remainder to the use of her sons and daughters in tail in like manner, and so on to another feme covert and her children, and then to the use of E. in tail, with reversion to the use of the testator's own right heirs. It was held, that the trustees took the fee; 'that construction,' it was said, 'being necessary to give legal effect to the testator's intention to secure the beneficial interest to the separate use of the femes covert.'

Lord Eldon's comment on *Harton* v. *Harton*.

"Of this case, Lord *Eldon* has observed, that 'there being various trusts for the separate use of married women, after various trusts not for married women, those trusts could not subsist unless the legal estate was in the trustees from the beginning to the end; and they relied on the non-repetition of a legal estate, there being a gift to the wife of one of the parties; and if there had been a repetition of the legal estate after every trust for a married woman, they would not have held the whole legal estate to be in the trustees'" (*i*).

In the case of *Brown* v. *Whiteway* (*j*), which was somewhat similar in circumstances to *Harton* v. *Harton*, Sir J. Wigram, V.-C., felt bound by its authority, and decided accordingly; yet said he

(*f*) Per Lord Davey in *Van Grutten* v. *Foxwell*, [1897] A. C. at p. 683.
(*g*) First ed. Vol. II. p. 221.
(*h*) 7 T. R. 652. See also *Hawkins* v. *Luscombe*, 2 Sw. at p. 391.
(*i*) See *Hawkins* v. *Luscombe*, 2 Sw. at p. 391.
(*j*) 8 Hare, 145.

could not see why it was necessary to hold that the intermediate estates should not be good legal estates. However, the doctrine of *Harton* v. *Harton* has been recognized and acted on in recent cases, and must, therefore, be considered established (*k*).

Indefinite devises to the *use* of trustees susceptible of enlargement or restriction.

(2) *How far General Rule affected by Nature of Property.*—Mr. Jarman continues (*l*): "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 (*m*).

Rule as to appointments under powers.

"And here it is proper to observe, that where a will takes effect as an appointment under a power to appoint the use, any devise which it contains will vest the legal estate in the devisee, irrespectively of any purpose or duty requiring that he should have the estate, as such devise amounts to a mere declaration of the use of the instrument creating the power, in other words, a mere nomination of the cestui que use; consequently any limitation engrafted on the devise operates only on the equitable interest, though it be in terms *to the use* of the person or persons intended to take the estate beneficially.

As to devises of copyholds.

"And the result is the same in the case of devises of copyhold land (*n*), as wills of such property take effect merely as instruments directory of the uses of the previous surrender to the use of the will, which was formerly essential to the validity of the devise, and the operation of which is now, by the statutes dispensing with the necessity of such surrender (*o*), 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

(*k*) See *Toller* v. *Attwood*, 15 Q. B. 929; *Doe* d. *Müller* v. *Claridge*, 6 C. B. 641; *Cropton* v. *Davies*, L. R. 4 C. P. 159. The paragraph in the text is taken verbatim from the 3rd edition of this work, by Messrs. Wolstenholme and Vincent; it was referred to with approval by Lord Davey in *Van Grutten* v. *Foxwell*, supra.

(*l*) First ed. Vol. II. p. 214.

(*m*) "See *Curtis* v. *Price*, 12 Ves. 89, where the limitations were in a deed, which makes the case stronger." (Note by Mr. Jarman.) And see per K. Bruce, V.-C., *Riley* v. *Garnett*, 3 De G. & S. at p. 632.

(*n*) See *Houston* v. *Hughes*, 6 B. & Cr. 403.

(*o*) 55 Geo. 3, c. 192, and 1 Vict. c. 26, s. 3; ante, Vol. I. pp. 69, 70.

inheritance in A. for the benefit of B., in fee (*p*). Still, however, it should seem, according to the principle just stated in regard to devises of freehold lands *to the use* of trustees, that the extent and duration of an estate conferred by an *indefinite* devise of copyholds would, like that of a devisee cestui que use of freeholds (whose estate is undefined), depend upon, and be regulated by, the nature of the trust reposed in the devisee.

Indefinite devise of copyholds limited by nature of trust.

"But in the case of *Houston* v. *Hughes*, it was argued at the bar, and assumed by the Court, that as the copyholds included in the devise were not within the Statute of Uses, the trustees necessarily took the entire fee; however, this point does not appear to have been much canvassed, and the doctrine is not only irreconcilable with the principles of the analogous cases just stated, but is in direct opposition to the case of *Doe* d. *Woodcock* v. *Barthrop* (*q*), 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 (*r*).

Bequests of leaseholds, how far influenced by nature of trusts.

"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 ownership; and, by necessary consequence, A. must, in such

(*p*) *Houston* v. *Hughes*, 6 B. & Cr. 403.

(*q*) 5 Taunt. 382. See also *Baker* v. *White*, L. R., 20 Eq. at p. 177; *Allen* v. *Bewsey*, 7 Ch. D. at p. 457.

(*r*) In *Re Townsend's Contract*, [1895] 1 Ch. 716, the trustees took a quasi fee simple, because the trust did not necessarily come to an end on the death of the tenant for life, ante, p. 1834.

(*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." (Note by Mr. Jarman.) Since Mr. Jarman wrote, part of the inconvenience to which he refers has been removed by the Law of Property Amendment Act, 1859.

CHAP. XLVI.

a case, take the entire term, there being nothing to restrict or qualify his estate. It does not follow, however, that where a definite duty or office is imposed on the trustee, he would take the entire legal estate in the term; for, as the law allows chattel interests in lands to be made the subject of an executory bequest after a prior limitation, not exhausting the whole term, even though the prior interest were an estate for life, it seems to be a necessary result of this doctrine, that such an executory bequest may be made ulterior to the partial or limited estate of a trustee; and it cannot be material whether the restriction of the trustee's estate was in express terms, or resulted from the nature of the duty imposed on him. For instance, if a term of years were bequeathed to A., until B. should attain the age of twenty-one years, in trust for the maintenance of B., and when he attained the age of twenty-one, then to B., there can be no doubt that the estate of the trustee would terminate at the majority of B., from which time the property would vest in possession of 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*).

Effect where testator, who apparently creates a trust, has an equitable interest only.

"And here it may be observed, that where a testator has an equitable interest only, in the land which is the subject of a devise in trust, and such devise would, if the testator had the legal ownership, carry the dry legal estate only, unaccompanied by any duty or office, the trustee takes nothing under the devise; the effect being the same as if the land had been devised directly to the cestui que trust. If, however, the trusteeship created by the will is of a nature to involve the performance of any office or duty (as a trust to sell or grant leases), the devise, though failing so far as it purports to vest the legal estate in the trustee, has the effect of onerating him with the prescribed duty in respect of the devised equitable interest, no less than if the legal estate had passed under

(*t*) See *Stevenson* v. *Mayor of Liverpool*, L. R., 10 Q. B. 81, where there was no direct bequest to the executors, *ante*, p. 1831. In the case of leaseholds the question of assent by the executors arises as the legal estate does not pass until they assent to the bequest.

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 would pass directly to B. If, on the other hand, the testator had devised such equity of redemption to trustees, upon trust for sale, though the trustees would not have acquired any actual estate at law (the testator himself having none), yet the property would be saleable by the trustees in the same manner as if the legal ownership had become vested in them."

Devises to pay debts, legacies, &c.

(3) *Implication of Chattel Interest under Old Law.*—Under the old law, it was sometimes a question of difficulty to determine whether a devise to persons, without words of limitation, to pay debts and legacies, raise a sum of money, secure a jointure, or the like gave them the inheritance or a chattel interest only. In *Cordall's Case* (*u*), where the devise was to two persons, to hold for payment of legacies and debts, and afterwards to A. for life with remainders over, it was resolved that this was no freehold in them, but only a term of years, "though it could not be said for any certain number of years."

But as Mr. Jarman remarks (*v*), "The construction which gives to trustees an undefined chattel interest, either with or without a prior freehold, has been considered so inconvenient in its consequences, and so difficult of application, that its exclusion has (as we shall presently see) been made one of the objects of the recent legislative change in the rules of testamentary construction" (*w*).

Trustees held to take a determinable fee.

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 (*x*). 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 (*y*) or by sale or mortgage of the estate (*z*). That construction,

(*u*) *Cordall's Case*, Cro. Eliz. 316. See also *Carter* v. *Barnardiston*, 1 P. Wms. 505, 3 Br. P. C. 64; *Hitchens* v. *Hitchens*, 2 Vern. 403; *Gibson* v. *Lord Montfort*, 1 Ves. sen. 485; *Doe* d. *White* v. *Simpson*, 5 East, 162 (where the trustees took the legal estate for the lives of certain annuitants and a term of years sufficient for the purpose of raising a gross sum). *Ackland* v. *Lutley*, 9 A. & E. 879; *Heardson* v. *Williamson*, 1 Kee. 33.

(*v*) First ed. Vol. II. p. 221.

(*w*) Referring of course to ss. 30 and 31 of the Wills Act, passed a few years before Mr. Jarman wrote.

(*x*) 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.

(*y*) *Wellington* v. *Wellington*, 4 Burr. 2165, 1 W. Bl. 645. See also *Doe* d. *Brune* v. *Martyn*, 8 B. & Cr. 497.

(*z*) *Glover* v. *Monckton*, 3 Bing. 13.

CHAP. XLVI.

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 (*a*): their very existence was lately denied (*b*).

Trustees held to take a fee if required.

It has been already pointed out, 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 (*c*).

(4) *As to Devises to Trustees for preserving Contingent Remainders.*—Mr. Jarman continues (*d*): "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" (*e*).

Thus, in *Doe* d. *Compere* v. *Hicks* (*f*), where the devise was to the trustees and their heirs, it was held 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.

Remarks on doctrine of *Venables* v. *Morris*.

In *Venables* v. *Morris* and *Doe* v. *Hicks*, Lord Kenyon seems to have thought that where a will contains a power of appointment under which contingent remainders may be created, the trustee must take the fee in order to protect them, but as Mr. Jarman remarks (*g*), this "involves a very extensive and no less novel doctrine, and one which, in the absence of any confirmatory

(*a*) *Blagrave* v. *Blagrave*, 4 Ex. 550. And see *Poad* v. *Watson*, 6 Ell. & Bl. 606.

(*b*) By Jessel, M.R., *Collier* v. *Walters*, L. R., 17 Eq. at p. 261. On the other hand, Mr. Challis seems to have thought that *Wellington* v. *Wellington* was still good law: Real P., 2nd ed. p. 232. See this question more fully discussed in the 4th Edition of this Work, Vol. II. pp. 313 et seq., where *Collier* v. *M'Bean*, 34 Bea. 426, L. R., 1 Ch. 81, is referred to. The case of *Wykham* v. *Wykham*, 18 Ves. 395 (power to jointure by deed), is discussed in all the earlier editions of this work.

(*c*) Ante, p. 1835.

(*d*) First ed. Vol. II. p. 224.

(*e*) See *Curtis* v. *Price*, 12 Ves. at p. 100; *Venables* v. *Morris*, 7 T. R. pp. 342 and 438; *Haddelsey* v. *Adams*, 22 Bea. 266; *Saunders* v. *Eppe*, 9 W. R. 69; *Beaumont* v. *Marquis of Salisbury*, 19 Bea. 198; *Fowler* v. *Lightburn*, 11 Ir. Ch. 495. Some of these were cases on deeds; as to the distinction between deeds and wills in this respect, see *Lewis* v. *Rees*, 3 K. & J. 132, and cases there cited.

(*f*) 7 T. R. 433.

(*g*) First ed. Vol. II. p. 226.

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.

Whether the creation of contingent remainders is a ground for giving trustees the fee.

"Thus, in the recent case of *Heardson* v. *Williamson* (*h*), Lord *Langdale*, M.R., does not appear to have regarded the fact that the will contained a contingent remainder of the devised estate as a sufficient ground for holding the inheritance in fee to be in the trustees; while, on the other hand, in *Cursham* v. *Newland* (*i*), 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. *Tillan* (*j*), and *Houston* v. *Hughes* (*k*), Mr. Justice *Bayley* considered that the circumstance of contingent remainders being created by the will, favoured the conclusion that the trustees took the legal inheritance.

"In the case of *Barker* v. *Greenwood* (*l*), too, it seems to have been regarded by Mr. Baron *Parke*, 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 the learned Judge considered it to be doubtful whether the trustees of such an estate would be bound, in the absence of an express trust, to preserve contingent remainders" (*m*).

At all events, the mere existence of contingent remainders will not give the legal fee to the trustees where the will contains express limitations to them of particular estates which would be nugatory if they already had the fee (*n*). 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 (*o*); 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

(*h*) 1 Kee. 33.
(*i*) 2 Scott, at p. 113. But see *Cunliffe* v. *Brancker*, post.
(*j*) 2 B. & Ald. 84, ante, p. 1826.
(*k*) 6 B. & Cr. at p. 420.
(*l*) 4 M. & Wels. at p. 431.
(*m*) See as to this *Collier* v. *Walters*, L. R., 17 Eq. pp. 265, 266.
(*n*) *Cunliffe* v. *Brancker*, 3 Ch. D. at p. 401.
(*o*) *Nash* v. *Coates*, 3 B. & Ad. at p. 839.

CHAP. XLVI.

this nature for their preservation (*p*); nor, it is presumed, when the contingent remainder is protected by stat. 40 & 41 Vict. c. 33 (*q*).

Implication of indefinite term of years abolished.

(5) *Provisions of the Wills Act, secs.* 30, 31.—Mr. Jarman continues (*r*): "Of all the adjudged points connected with the subject, that which has been deemed the least satisfactory, is the doctrine of those decisions (*s*) 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 of 1 Vict. c. 26. The 30th Section provides, 'That where any real estate (other than or no 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.

Estate of trustees, if not expressly limited, to be either freehold or an estate in fee.

"Section 31 provides, 'That where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee-simple or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.'

"These clauses have been the subject of much criticism (*t*). It is not easy to perceive why the provision respecting the estate of trustees should have been split into two sections, and still more difficult is it to give to each of those sections such a construction as will preserve it from collision with the other. The design of the 30th section would seem to be simply to negative the construction which, in certain cases (*u*), gave to a trustee

(*p*) See *Doe* d. *Woodcock* v. *Barthrop*, 5 Taunt. 382.

(*q*) Vol. I. p. 1444.

(*r*) First ed. Vol. II. p. 228.

(*s*) Ante, p. 1839.

(*t*) See H. Sugd. Wills, 127; George 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. at p. 514.

(*u*) Ante, p. 1839.

Remarks on stat. 1 Vict. c. 26, ss. 30, 31.

an undefined term of years, for it allows him to take an estate of freehold, or a *definite* term of years, either expressly or by implication; but the 31st section takes a wider range, as it admits of neither of these exceptions, nor that of a devise of the next presentation to a church. Its effect is to propound, in regard to wills made or republished since the year 1837, the following general rule of construction: that whenever real estate is devised to trustees (and it would seem to be immaterial whether the devise is to the trustees indefinitely, or to them and their heirs, or to them and their executors or administrators), for purposes requiring that they should have *some* estate, without any specification of the nature or duration of such estate, and the beneficial interest in the property is not devised to a person for life, or being so devised, the purposes of the trust may endure beyond the life of such person, the trustees take (not, as in *Carter* v. *Barnardiston*, an estate for years, or, as in *Doe* v. *Simpson*, an estate for life, with a superadded term of years, but) an estate in fee-simple. The result, in short, is that trustees, whose estate is not expressly defined by the will, must, in every case, *and whatever be the nature of the duty imposed on them*, take either an estate for life or an estate in fee. It is observable that this section allows the trustees to take an estate of freehold, not whenever the purposes of the trust require such an estate, but only in the specified case of the 'surplus rents and profits being given to a person for life,' making no provision, therefore, for the case (a possible though not a frequently occurring one) of a trust of any other kind being created for a purpose coextensive with life; for instance, a trust to keep on foot a policy of life insurance. Possibly it would be held that such a case is excluded from the 31st section by the exception in the 30th section, and thus some effect would be given to this otherwise apparently idle clause of the statute; farther than this (even if so far), it is presumed the exceptive part of the 30th section could not be construed to qualify or control the operation of the 31st section, but decision alone can settle the point.

Points not excluded by the Act.

"The enactments in question do not, beyond the particular cases which have been pointed out, interfere with the general doctrines of construction discussed in the present chapter. Even under wills made or republished since the year 1837, it may still be questionable whether trustees take *any* estate or only a power; also whether they take an estate limited to the lives of the tenants for life of the beneficial interest, or an estate in fee-simple; and consequently there should be no relaxation in the anxious care of

CHAP. XLVI.

framers of wills to preclude ambiguity in this particular. I cannot, however, according to the suggested construction of th 31st section, under *such* wills become a question, whether trustee take an estate in fee, or a chattel interest, in order to raise money or for any other purpose.

"The new doctrine would not, it is conceived, preclude th construction that trustees take an estate pur autre vie, with a powe of sale over the inheritance. The writer is not aware, however, o any adjudged instance of such a construction, for where an estat is devised to trustees indefinitely, the authorities (with one solitar exception (*v*), in which there seems to have been an opposin context) conduct to the conclusion, that whatever duty is subse quently imposed on them, must be in virtue of their estate, th quality and duration of which are to be measured accordingly. Th point, of course, depends on the conclusion to be fairly drawn fro the entire will."

The general rule, however, seems now to be that where there a devise to trustees and their heirs, and they have some duty t perform requiring the legal estate, they take the legal estate an not merely a power (*w*).

Trust for separate use of f. e. with power to lease for twenty-one years;

Similar questions may arise regarding other powers, as, to leas or to apply rents for the maintenance of minors. Thus, in *Re Eddel Trusts* (*x*), where a testator devised real estate to trustees, to hol unto them and the survivor of them his heirs and assigns, upo trust for his wife for her separate use for life, and after her death f his niece for her separate use for life; and after the death of th niece upon trust for such of her children as should attain twenty one; and he declared that it should be lawful for his trustee with the consent of his wife during her life, to lease the property f any term not exceeding twenty-one years at the best rent; it w held by Sir J. Bacon, V.-C., that the trustees took the legal estate fee, apparently on the ground that any lease granted by them mu be in virtue of their estate, and that this purpose might require a estate in them beyond the lives of the tenant for life.

—— to apply rents during minority.

So in *Berry* v. *Berry* (*y*), where a testator devised real estate trustees "their heirs and assigns to the use of" A. for life; remaind "to the use of" such children of A. as should attain twenty-one

(*v*) See *Hawker* v. *Hawker*, 3 B. & Ald. 537.

(*w*) Per Jessel, M.R., *Re Tanqueray-Willaume and Landau*, 20 Ch. D. at p. 479, where there was a trust to pay legacies after the death of the tena for life: ante, p. 1819.

(*x*) L. R., 11 Eq. 559.

(*y*) 7 Ch. D. 657.

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 (z) the provision for maintenance constituted a trust of the rents which the terms of that provision shewed 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 shew that all the limitations in the will were to be legal uses.

(z) As to the estate of trustees not commencing until wanted, vide sup., p. 1833.

CHAPTER XLVII.

WHAT WORDS CREATE AN ESTATE TAIL.

	PAGE		
I. *Words denoting Devise of Estate to Lineal Heirs* ...	1846	II. *Rule in Archer's Case* ...	1
		III. *Effect of Gift over*	1

Proper terms of limiting an estate tail.

I.—Words denoting Devise of Estate to Lineal Heirs.—T rule is thus stated by Mr. Jarman (*a*): "A limitation to a person a the heirs of his body creates an estate tail general. If it be to h and the heirs *male* or the heirs *female* of his body, he takes an esta tail special, descendible in the male or female line, as the case m be. In the one case the land devolves upon the male issue a (unless the tenure be gavelkind or Borough-English (*b*)) accordi to the law of primogeniture, in the other upon the females coparceners. If the estate tail be general, it will run in this mann through both lines, in their established order of succession.

What informal expressions create an estate tail.

"But though these are the correct and technical terms of limiti an estate tail, yet such an estate may be created in a will by l formal language; indeed by any expressions denoting an intenti to give the devisee an estate of inheritance, descendible to his some of his *lineal*, but not to his *collateral* heirs, which is the chara teristic of an estate tail as distinguished from a fee-simple. T former is transmissible to *lineal* descendants only; the latter default of lineal devolves to *collateral* and now to ascenda heirs.

Limitation to "heirs male," or "right heirs male, for ever,"

"A devise to A. and his heirs male for ever (*c*), or to A. and h heirs male living to attain the age of twenty-one (*d*), or to A. f life, and after his death to his heirs male, or his right heirs mal for ever (*e*), has been held to confer an estate tail male; the additi

(*a*) First ed. Vol. II. p. 232.

(*b*) See *Trash* v. *Wood*, 4 My. & Cr. 324; *Roe* d. *Aistrop* v. *Aistrop*, 2 W. Bl. 1228; *Anon.*, Dy. 179 b, pl. 45. *Re Buckton*, [1907] 2 Ch. 406 (Manor—custom to entail copyholds—gavelkind descent).

(*c*) *Baker* v. *Wall*, 1 Ld. Raym. 185, 1 Eq. Ca. Ab. 214, pl. 12, stated an p. 1559.

(*d*) *Doe* d. *Tremeewen* v. *Permeewen*, Ad. & Ell. 431.

(*e*) *Lord Ossulston's Case*, 3 Sal 336; *Doe* d. *Earl of Lindsey* v. *Colyer* 11 East, 548, and see *Crumpe* *Crumpe*, [1900] A. C. 127.

of the word 'male,' as a qualification of 'heirs,' shewing that a class of heirs less extensive than heirs general was intended" (*f*). Of course a devise to A. for life with remainder to his right heirs by a particular wife for ever gives A. an estate tail special, "heirs by" a particular wife being equivalent to "heirs of the body by" a particular wife (*g*). And in *Idle* v. *Cook* (*h*) it was said that if land were devised to A. and his wife for their lives and their heirs and assigns, and for default of such issue over, this would give them an estate tail.

—— or to heirs by a particular wife.

"It has even been decided that a devise to one, et hæredibus suis legitimè procreatis, creates an estate tail (*i*), though the addition merely describes a circumstance which is included in the definition of heir simply, an heir being ex justis nuptiis procreatus. Such was the doctrine of the early authorities, and it was recognized and followed in the more recent case of *Nanfan* v. *Legh* (*j*), where a devise to H. when he should attain twenty-one, 'and to his heirs *lawfully begotten* for ever,' 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 favour 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 on the description of heir, and consequently must have meant an estate tail." In *Good* v. *Good* (*k*), 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 (*l*). And if the devise is to a bastard and his heirs, this gives him a fee simple, and not an estate tail, although he cannot have any heirs except heirs of his body (*m*).

To A. and "his heirs lawfully begotten."

To A. and his "lawful heirs."

A devise to A., with a direction that neither he nor his heirs to

"Heirs to the third generation."

(*f*) The line of descent of lands cannot be qualified, except through the medium of an entail, Co. Lit. 27 *b*.

(*g*) *Wright* v. *Vernon*, 2 Drew. 439, 7 H. L. C. 35, and see *Pelham Clinton* v. *Newcastle*, [1903] A. C. 111, and *Magee* v. *Martin*, [1902] 1 Ir. 367.

(*h*) 1 P. W. 70.

(*i*) *Church* v. *Wyat*, Moore, 637, Co. Lit. 20 *b*, Harg. n. 2.

(*j*) 2 Marsh. 107, 7 Taunt. 85.

(*k*) 7 Ell. & Bl. 295.

(*l*) *Mathews* v. *Gardiner*, 17 Bea. 254; *Simpson* v. *Ashworth*, 6 Bea. 412; and see *Stratford* v. *Powell*, 1 Ba. & Be. 1; but see per Bushe, C.J., in *Moffet* v. *Catherwood*, Ale. & Nap. at p. 472.

(*m*) *Idle* v. *Cook*, 1 P. W. at p. 78.

CHAP. XLVII.

the third generation should mortgage or sell the devised property will, it seems, create an estate tail (*n*).

To several and their heirs "successively."

And a devise "to the first and other sons of A. successively according to priority of birth and their respective heirs for ever," gives the sons successive estates in tail, as the only way of satisfying the intention that they should take in succession (*o*). The same rule applies to a devise to the sons or children of A. "in succession," or "in priority" without words of limitation, where the will is since the Wills Act (*p*).

"Descend in the male line."

In *Jenkins* v. *Hughes* (*q*), an intention to create an estate in tail male was shewn by a general direction that the testator's estates should always descend in the male line, coupled with various limitations which could hardly be carried into effect except by adopting that construction.

In *Re Score* (*r*), after a devise to his two sons for life, the testator proceeded: "If my sons marry, and have issue, I give to each of their heirs their father's share, and to their heirs for ever; if there is no male issue with either of my two sons, and there is female issue, then the father's share shall be divided between them, share and share alike, as tenants in common, and to their heirs for ever. Should either of my sons die without issue, then such son's share shall go to my other son, and to his heirs for ever." Kay, J., held, applying the rule in *Shelley's Case* (*s*), that the sons took estates in tail male.

Devise to A. and his issue, &c.

A devise to A. et semini suo (*t*) or to A. and his issue, clearly creates an estate tail, as is shewn more at large in a subsequent chapter (*u*). A devise to A. and his offspring (*v*), and a devise to A. and his family according to seniority (*w*), have also been held to create an estate tail general.

Devise to A. and his children.

The cases in which a devise to A. and his children gives A. an estate tail, are discussed in Chapter L.

Clause of forfeiture.

An intention to create an estate tail may appear from a clause of forfeiture; as in *Crumpe* v. *Crumpe* (*x*), where a testator gave the

(*n*) *Mortimer* v. *Hartley*, 6 Ex. 47, 3 De G. & S. 316; but see s. c., 6 C. B. 819, contra.

(*o*) *Lewis* v. *Waters*, 6 East, 337; *Hennessey* v. *Bray*, 33 Bea. 96, and other cases cited post, Chap. LII.

(*p*) *Studdert* v. *Von Steiglitz*, 23 L. R. Ir. 564: *Re Pennefather* (*Sarile* v. *Sarile*), [1896] 1 Ir. 249. But a different construction has been placed on a devise "to A. and to his children in succession": *Tyrone* v. *Waterford*, 1 D. F. & J. 613: post, Chap. L.

(*q*) 8 H. L. C. 571.

(*r*) 57 L. T. 40.

(*s*) See Chap. XLVIII.

(*t*) Co. Lit. 9 *b*.

(*u*) Chap. LI.

(*v*) *Young* v. *Davies*, 2 Dr. & Sm. 167.

(*w*) *Lucas* v. *Goldsmid*, 29 Bea. 657. "To A. and his family" simply, gives a fee simple, ante, p. 1805.

(*x*) [1899] 1 Ir. 359, [1900] A. C. 127. The construction was aided by the name and arms clause and the gift over, but the revocation clause was sufficient; a man cannot revoke what he has not given.

rents of his estate to S., but if he encumbered them the testator revoked the gift "from the said S. and from his heirs male"; it was held that S. took an estate tail.

To heir of the body in the singular.

Mr. Jarman continues (*y*): "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 for ever, A. is tenant in tail (*z*); and a devise to A. and such heir of her body as shall be living at her decease (*a*), [or to A. and his heir male living to attain twenty-one, and for want of such issue male the inheritance to go over (*b*),] has received the same construction.

Limitation to next or first heir male.

"Nor is the effect varied by the word *next* or *first* being prefixed to "heir." Thus, in *Burley's Case* (*c*), 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 (*d*) 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 (*e*).

To "next heir male," with superadded words of limitation.

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," as Mr. Jarman points out (*f*), "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 shewn at large in the sequel) does not, in general, belong to such superadded expressions of this nature. This rule of

(*y*) First ed. Vol. II. p. 233.

(*z*) *Pawsey* v. *Loudall*, Sty. 249, 273. See also *Whiting* v. *Wilkins*, 1 Bulst. 219, 1 Roll. Ab. 836; *Clerk* alias *Cheek* v. *Day*, Cro. Eliz. 313; *White* v. *Collins*, 1 Com. Rep. 289.

(*a*) *Richards* v. *Bergavenny*, 2 Vern. 324.

(*b*) *Doe* d. *Tremewen* v. *Permewen*, 11 Ad. & Ell. 431, 3 Per. & D. 303.

(*c*) Cited 1 Vent. 230.

(*d*) *Miller* v. *Seagrave*, Rob. Gavelk. 122, 16 Vin. Ab. Parols (H), pl. 4, n.; and see 1 Ves. sen. at p. 337.

(*e*) *Dubber* d. *Trollope* v. *Trollope*, Amb. 453, Lee t. Hardw. 160; and see *Goodright* v. *Pullyn*, 2 Ld. Ray. 1437, 2 Strn. 729; *O'Keefe* v. *Jones*, 13 Ves. 413.

(*f*) First ed. Vol. II. p. 234.

CHAP. XLVII.

Archer's Case.

construction is founded on the authority of *Archer's Case* (*g*), where lands were devised to A. for life, and after to the next heir male and the heirs male of the body of such next heir male, and it was unanimously agreed by the Court that this was a contingent remainder to the heir, and that A. was but tenant for life, and having made a feoffment of the devised lands, it was held that such contingent remainder was destroyed.

"But it should seem that this construction is not peculiar to such a case as Archer's; namely, where the word 'next' is prefixed, and words of limitation are superadded to 'heir male;' for a similar construction was adopted in a recent case (*Willis* v. *Hiscox*) (*h*) 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 favour, but compelled the defendant trustee to pay the costs (*i*) of the suit which was occasioned by his refusal to convey without the direction of the Court. His Lordship said, 'The mother has an estate expressly for life; and after her death the devise is to the heir male of her body, in the singular number, with words of limitation to the heirs general of such heir, which, it is clearly settled, gives an estate for life only to the parent, and the inheritance, by purchase, to the heir of the body, as

"To heir male of the body," and his heirs.

(*g*) 1 Rep. 66.

(*h*) 4 My. & Cr. 197.

(*i*) "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. 1849), 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 favour of the construction which the Court rejected, sufficiently plausible, one should have thought, to justify 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 undertake trusteeships." (Note by Mr. Jarman.)

was decided in *Archer's Case* (*j*), and assumed by *Hale* in *King* v. *Melling* (*k*), 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.'"

Words required by rule in *Archer's Case*.

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 shew that the heir was intended to be a new stirps (*l*). 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. (*m*). 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 (*n*).

"To heir male of the body for life."

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 (*o*).

III.—Effect of Gift over.—The terms of a gift over may have the effect of shewing that the testator meant the prior gift to confer an estate tail, and not an estate in fee simple.

Meaning of prior gift explained by gift over.

Accordingly, as Mr. Jarman points out (*p*), "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 shew that he used the word 'heirs,' in the prior devise, in the restricted sense of heirs of the body; such devise, of course, confers only an estate tail, the effect being the same as if the latter expression had

(*j*) 1 Rep. 66.

(*k*) 1 Vent. 214; and see Fearne, C. R. p. 148.

(*l*) *Pawsey* v. *Lowdall*, Sty. 249, 273, stated above. See also *Fuller* v. *Chamier*, L. R., 2 Eq. 682, 35 L. J. Ch. 772; 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.

(*m*) *Greaves* v. *Simpson*, 33 L. J. Ch. 641.

(*n*) *Chamberlayne* v. *Chamberlayne*, 6 Ell. & Bl. 625.

(*o*) *White* v. *Collins*, 1 Com. Rep. 289. See *Pedder* v. *Hunt*, 18 Q. B. D. pp. 565, 572.

(*p*) First ed. Vol. II. p. 236.

CHAP. XLVII.

been originally employed. Thus, if lands are devised to A. and his heirs, and if he shall die without heirs of his body, or without heirs male of his body, or without an heir or an heir male of his body, then over to another, such devise vests in the devisee an estate tail general, or an estate tail male, as the case may be (q).

"Indeed, so well has this been settled from an early period, that, to found an argument in favour of a contrary construction, recourse is always had to special circumstances.

"Thus, where (r) a testator devised lands to his wife for life, and after her death to J. his eldest son and his heirs, upon condition that J., as soon as the land should come unto him in possession, should grant to S., testator's second son, and his heirs, an annual rent of £4, and that *if J. should die without heirs of his body*, the land should remain to S. and the heirs of his body, it was contended that the intent was shewn that J. should have a fee, otherwise he could not legally grant such a rent, to have continuance after his death: but it was resolved to be an estate tail; for being limited that if he died without issue then it should be to S. and his heirs of his body, *shewed what heirs of J. were intended*, viz. *heirs of his body*; and though he was to make a grant of the rent, yet that 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 as conferring *a power*, or rather, perhaps, a trust coupled with a power, in which view it was consistent with an estate tail."

Default of a child,

So in *Doe* d. *Jearrad* v. *Bannister* (s), the testator gave land to S. and her heirs, "if she has any child; if not, then after the decease of herself and her husband, I give it to M.": it was held that S. took an estate tail.

—— or son.

The same principle of construction has been applied where the devise over is in default of a son (t).

In *Biddulph* v. *Lees* (u), a devise to A. for life, and to his sons in

(q) *Tracie* 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; *Romsey* v. *Griffiths*, 4 M. & S. 61; *Tenny* v. *Agar*, 12 East, 253; *Romilly* v. *James*, 6 Taunt. 263. The rule is also applicable to deeds, Co. Lit. 21 *a*. 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 [illegible]" the first devisee takes not an estate tail, but an estate in fee, with an executory devise over, *Pells* v. *Brown*, Cro. Jac. 590; *Eastman* v. *Baker*, 1 Taunt. 174; *Denn* v. *Kemeys*, 9 East, 366; *Doe* v. *Chaffey*, 16 M. & Wels. 656, ante, p. 1566.

(r) *Dutton* v. *Engram*, Cro. Jac. 427.

(s) 7 M. & W. 292.

(t) Post, Chap. L.

(u) El. Bl. and Ell. 289.

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 for ever 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 of A., 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 favour 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."

Devise controlled by subsequent clause shewing an estate tail to be intended.

An estate in fee simple is not cut down to an estate tail by [illegible] words. Thus, where a testator by his will had devised an estate [illegible] simple remainder to A., and by a codicil added a proviso that it should not be lawful for A. during his life to suffer any recovery or enter into any deed, matter or thing whatsoever, whereby to cut off, dock, or destroy the entail of his said freehold lands, it was held that the effect of the codicil was not to cut down A.'s estate to an estate tail (*v*).

In discussing the effect of the words "in default of issue," or words to that effect, Mr. Jarman remarks (*w*), that the expression "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, 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 (*x*), unless there is ground for restraining the term 'issue' to issue living *at the death*. Preceded by a devise indefinitely or expressly for life to the person whose issue is referred to, the words in question (occurring in a will which is subject to the

Default of issue.

(*v*) *Van Grutten* v. *Foxwell*, [1897] A. C. 658.

(*w*) First ed. Vol. II. p. 361.

(*x*) Ante, p. 657, and post, Chap. LII. *Idle* v. *Cook*, 1 P. W. 70; *Walter* v. *Drew*, Com. 372; *Browne* v. *Jerves*, Cro. Jac. 290; *Chadock* v. *Cowley*, ib. 695; *Doe* d. *Neville* v. *Rivers*, 7 T. R. 276; *Doe* d. *Ellis* v. *Ellis*, 9 East, 382; *Doe* v. *Ewart*, 7 A. & E. 636; *Biddulph* v. *Lees*, Ell. Bl. & Ell. 289; *Bowen* v. *Lewis*, 9 A. C. 890; *Bamford* v. *Chadwick*, 2 W. R. 531; *Crumpe* v. *Crumpe*, [1900] A. C. 127; and see ante, Chap. XXXVI. See as to deeds, *Morgan* v. *Morgan*, L. R., 10 Eq. 99; *Olivant* v. *Wright*, 9 Ch. D. 646; *Arthur* v. *Walker*, [1897] 1 Ir. 68.

CHAP. XLVII.

old law) have the effect of enlarging such prior devise to an estat tail (*y*), unless they are restrained as before suggested, or *unles there is an intermediate devise to some class or denomination of issu to which they can be referred.*"

The first doctrine referred to by Mr. Jarman—namely, that devise to A. and his heirs, followed by a limitation over in case of hi dying without issue, gives A. an estate tail, unless "issue" mean issue living at his death—has lost its practical importance, b reason of the rule of construction introduced by sec. 29 of th Wills Act (*z*).

The second doctrine referred to by Mr. Jarman is still sometime of importance, in cases where the devise over is capable of a referential construction. This subject is discussed in Chapter LII. where the authorities are referred to.

The doctrine did not apply, even before the Wills Act, in cases where the gift over imported a failure of issue at a period not too remote, for then the prior devisee took an estate in fee subject to an executory devise over (*a*). And the same rule applies to cases within the Wills Act (*b*).

Devise over on failure of heirs to a person in line of descent creates estate tail.

"And here it should be observed," says Mr. Jarman (*c*), "that where real estate is devised over, in default of *heirs* of the first devisee, and the ulterior devisee stands related to the prior devisee so as to be in the course of descent from him, whether in the lineal or collateral line and however remote, as the prior devisee in that case could not die without heirs, while the devisee over exists, the word 'heirs' is construed to mean heirs *of the body*, and accordingly the estate of the first devisee, by the effect of the devise over, is restricted to an estate tail, and the estate of the devisee over becomes a remainder expectant on that estate (*d*). This construction is

(*y*) Ante, p. 656.

(*z*) Ante, p. 658, and post, Chap. LII., where the effect of the section is discussed.

(*a*) *Doe* v. *Frost*, 3 B. & Ald. 546; *Ex. p. Davies*, 2 Sim. N. S. 114; *Parker* v. *Birks*, 1 K. & J. 156; *Blinston* v. *Warburton*, 2 K. & J. 400; *M'Enally* v. *Wetherall*, 15 Ir. C. L. 502; *Coltsmann* v. *Coltsmann*, L. R., 3 H. L. 121; *Gwynne* v. *Berry*, Ir. R. 9 C. L. 494.

(*b*) Ante, p. 658.

(*c*) First ed. Vol. II. p. 238.

(*d*) 1 Roll. Ab. 836; *Tilly* v. *Collier*, 2 Lev. 162; *Webb* v. *Hearing*, Cro. Jac. 416; *Allen* v. *Spendlove*, 1 Freem. 74, 2 Eq. Cas. Abr. 305, pl. 2; *Parker* v. *Thacker*, 3 Lev. 70; *Law* v. *Davis*, 2 Stra. 849; *Pickering* v. *Towers*, Amb. 363; *Bodens* v. *Lord Galway*, 2 Ed. 297; *Tyte* v. *Willis*, Cas. t. Talb. 1; *Preston* v. *Funnell*, Willes, 164; *Goodright* v. *Goodridge*, Willes, 369; *Nottingham* v. *Jennings*, 1 P. W. 23; *Goodright* v. *Dunham*, Dougl. at p. 266; *Morgan* v. *Griffiths*, Cowp. 234; *Comberbach* v. *Perryn*, 3 T. R. 484 at p. 491; *Ives* v. *Legge*, 3 T. R. 488 *n*; *Nanfan* v. *Legh*, 2 Marsh. 107; *Doe* d. *Hatch* v. *Bluck*, 6 Taunt. 485; *Simpson* v. *Ashworth*, 6 Bea. 412. Fearne, C. R. 466, citing *Doe* v. *Bluck*. A few early decisions to the contrary, such as *Hearn* v. *Allen*, Cro. Car. 57, are over-

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."

The rule extends not only to the case where the person to whom the limitation over is made is capable of being collateral heir to the first devisee, but also to any case where "the event on which the gift over is made necessarily depends on the existence of a collateral heir of the first devisee on such first devisee's death." Thus, in *Re Waugh* (*e*), a testator gave his two cottages Nos. 9 and 12, Chapel Street, to his daughter C. G. for life, "after her death No. 12 to go to her youngest daughter E. G. and her heirs, and No. 9 to go to her son W. G. and his heirs, if either the said E. G. or W. G. should die without an heir their share is to go to the survivor's heir or heirs." E. G. died in 1891 a spinster; W. G. died in 1897 a bachelor; C. G. died in 1902. Farwell, J., held that E. G. and W. G. took estates tail in the cottages devised to them respectively.

In *Fay* v. *Fay* (*f*), land was devised to descend to the heirs of J. and T. for ever, but in the event of both dying without issue, then over; it was held that J. and T. took estates tail with cross remainders between them.

Otherwise where to a stranger in blood.

Mr. Jarman continues (*g*): "But the Courts will not so construe the word heirs where the devise over is to a stranger, however plausible may be the conjecture that it was so intended, and consequently the devise over is void for remoteness (*h*); and formerly a relation of the half-blood, or a parent or grandparent was, for this purpose,

ruled by the current of authorities. *Doe* d. *Littledale* v. *Smeddle*, 2 B. & Ald. 126; *Wall* v. *Wright*, 1 Dr. & Wal. 1, and *Re Smith's Estate*, 27 L. R. Ir. 121 are cases on deeds.

The statement of the rule by Mr. Jarman above quoted has not been dissented from. It is similar to the statement in Hawkins on Wills, p. 177: "If real estate be devised to B. on failure of heirs of A., and B. is capable of being heir to A. the word 'heirs' is construed to mean heirs of the body for otherwise the devise to B. could never come into operation," and in many of the cases above cited the rule is stated in similar terms; but it is submitted that the correct statement of the rule is that given in Fearne on Contingent Remainders, 10th ed. vol. i. p. 406: "But we are to remember, however, that although a devise over after a dying without heirs is in general void, yet this rule is not without exceptions; for if the person to whom the limitation over is made, be a relation of and capable of being collateral heir to the first devisee, in that case the first devisee takes only an estate tail." In the case of a devise to A. and his heirs and on failure of his heirs then to B. a lineal descendant of A. there would, it is submitted, be no ground for giving an estate tail to A. The point does not appear to have been decided.

(*e*) [1903] 1 Ch. 744.

(*f*) 5 L. R. Ir. 274.

(*g*) First ed. Vol. II. p. 238.

(*h*) *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.

considered as a stranger, such persons being then excluded fro taking by descent (*i*); but the law, at least as to persons dyin since the 31st of December, 1833, is now regulated by the statu 3 and 4 W. 4, c. 106, which has admitted relations of the hal blood, and parents and other ancestral relations in the ascendin line, to the heirship" (*j*).

To several, one of whom is a stranger in blood.

In *Harris* v. *Davis* (*k*), the gift over in default of heirs of th first devisee was to several other persons, one of whom was nc related to the first devisee, but as all the others were related t him, he was held to take an estate tail. It would seem, there fore, sufficient to give the first devisee an estate tail that any one c a number of devisees over was related to him.

As to limitation over to the right heirs of the devisee.

Mr. Jarman continues (*l*): "Of course the limiting of the estat over, in default of heirs of the body or issue, to the right heirs of th devisee, does not vary the construction farther than to give th devisee the remainder in fee expectant on the estate tail. Thus where (*m*) a testator devised certain lands unto his son P. and hi heirs for ever, on condition that he paid W. £30 within one yea after the death of the testator's wife, and he gave other tenement 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 withou issue*, then I give the estate of him or her so dying unto his or thei *right heirs* for ever;' and it was held that the children took estates tail, with remainder in fee to themselves."

"Heirs" in gift over construed by reference to original gift.

In *Simpson* v. *Ashworth* (*n*), the testator devised land to each o his daughters "and her lawful heirs," with a gift over, in case any of them died without lawful heirs, "to my other children that have lawful heirs;" it was held, in accordance with the rule above stated (*o*), that each daughter took an estate tail under the original devise, and that in the gift over the testator "meant the same quantity of estate to go over which he had given in the first instance;" in other words, an estate tail. But in *Re Waugh* (*p*), where the gift over was "to the survivor's heir or heirs," Farwell, J., held that it was a gift to the heirs general of the survivor.

"Sometimes," as Mr. Jarman points out (*q*), "an estate tail

(*i*) *Tilburgh* v. *Barbut*, 1 Ves. sen. 89, 3 Atk. 617; and see *Preston* d. *Eagle* v. *Funnell*, Willes, 164; *Moffet* v. *Catherwood*, Alc. & Nap. 472.
(*j*) See 1 Hayes's Introd. 5th ed. p. 319.
(*k*) 1 Coll. 416.
(*l*) First ed. Vol. II. p. 239.
(*m*) *Brice* v. *Smith*, Willes,
(*n*) 6 Bea. 412.
(*o*) Ante, p. 1854.
(*p*) [1903] 1 Ch. 744, supra, p. 1855.
(*q*) First ed. Vol. II. p. 239.

Estate tail general cut down to an estate tail special by implication.

general is cut down to an estate tail special by implication. As where (*r*) the devise was to the use of the testator's eldest son John and his heirs for ever, and failing issue of John, to the use of James the second son and his heirs for ever, and failing issue of that son, to the use of the third son George and his heirs for ever, 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 for ever, and for want of issue female, then to the use of his (the testator's) heirs for ever: 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, shewing 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" (*s*).

(*r*) *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. 580.

(*s*) 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. C. at p. 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." (Note by Mr. Jarman.)

CHAPTER XLVIII (*a*).

RULE IN SHELLEY'S CASE.

PAGE

I. *The Rule as applied to Direct Limitations* :—
(1) *Nature of the Rule* 1858
(2) *What is a sufficient Estate of Freehold in the Ancestor* 1862
(3) *What Limitations to the Heirs are sufficient* ... 1865
(4) *Questions where one or all of the Limitations relate to several Persons* 186
II. *Executory Trusts* 187
III. *Practical Effect of the Rule considered* 188

Nature of the rule in *Shelley's Case*.

I.—The Rule as applied to Direct Limitations.—(1) *Nature o the Rule.*—The rule in *Shelley's Case* is a rule of law, and not o construction (*b*). The rule simply is, that, where an estate o freehold is limited to a person, and the same instrument contain a limitation, either mediate or immediate, to his heirs or the heir of his body, the word *heirs* is a word of limitation, i.e., the ancesto takes the whole estate comprised in this term. Thus, if the limita tion be to the heirs of his body, he takes a fee tail; if to his heir general, a fee simple (*c*).

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

(*a*) In this chapter Mr. Jarman's words are used, the additions by subsequent editors are placed in brackets.

(*b*) 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 A. C. 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 th estate shall travel through the issu generally of a certain person.]

(*c*) *Shelley's Case*, 1 Rep. 93, 104*a* The question was not directly raised i this case, but was incidentally muc discussed. [Gavelkind lands are within the rule. *Doe* d. *Bosnall* v. *Harvey*, 4 B & Cr. 610.] See some observations o the nature and origin of the rule, Fea C. R., and Hayes's Supplem.; Prest Est., Vol. I. c. 3; [for a short history o the rule see Lord Macnaughten's judg ment in *Van Grutten* v. *Foxwell*, [1897 A. C. at p. 668]. See also *Earl o 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 case passim in the next chapter.

[of remainder, as distinguished from a limitation by way of executory devise or a shifting use, which, though it be to the heirs of a person taking a previous estate of freehold, vests in the heir as a purchaser (*d*).

Perrin v. Blake.

The rule] is well illustrated in the celebrated case of *Perrin* v. *Blake* (*e*). There A., by his will, declared, that if his wife should be enceinte with a child at any time thereafter (but which never happened), and it were a male, he devised his real and personal estate equally to be divided between the said infant and his son W., when the infant should attain twenty-one; and he declared it to be his intent that none of his children should dispose of his estate for longer than his life; and to that intent he devised all his estate to the said W. and the said infant, *for the term of their natural lives;* remainder to G. and his heirs for the lives of the said W. and the infant; remainder *to the heirs of the bodies of the said W. and the said infant* lawfully begotten or to be begotten; remainder to the testator's daughters for the term of their natural lives, equally to be divided between them; remainder to G. and his heirs during the lives of the daughters; remainder to the heirs of the bodies of the said daughters, equally to be divided. The question was, what estate W. took. Lord *Mansfield*, Mr. Justice *Aston*, and Mr. Justice *Willes*, (Mr. Justice *Yates*, 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.

Rule never infringed.

Since this solemn determination (*f*) the rule in question has been regarded as one of the most firmly established rules of property,

[(*d*) *Lloyd* v. *Carew*, Pre. Ch. 72, Show. P. C. 137; per Lord Cranworth, C., *Coape* v. *Arnold*, 4 D. M. & G. at p. 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. at p. 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 favour 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. 948.]

(*e*) 4 Burr, 2579, 1 W. Bl. 672, 1 Coll. Jnr. 283, Harg. Law Tracts, 489, n., Hayes's Inquiry, 227, n.

(*f*) 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.

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 (*g*); 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.

Preliminary question of construction.

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 (*h*). The blending of the two questions tends to involve both in unnecessary perplexity.

The rule applies to copyholds and estates pur autre vie.

[The principle of the rule in *Shelley's Case* applies to limitations of copyholds (*i*) and of estates pur autre vie (*j*).

Gift to A. for life, remainder to his executors.

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 the testators and the executors *correlativa* as to any chattel" (*l*). But this would seem to be rather a rule of construction, in order to promote the intention.]

Limitations must be created by same instrument.

It is to be observed, that to let in the application of the rule in *Shelley's Case*, the limitations to the ancestor, and to his heirs, must be created by the same instrument. 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.

(*g*) See next chapter.

(*h*) As to where heirs of the body, children, sons, and issue, are used as words of limitation, see post.

[(*i*) *Busby* v. *Greenslate*, 1 Str. 445, *Re Catling's Estate*, [1890] W. N. 75, 6 T. L. R. 417, apparently in the manor of which the copyholds were holden there was no custom to entail. *Re Buckton*, [1907] 2 Ch. 406 (where there was a custom to entail).

(*j*) *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 Ha. 521; *Duvall* v. *Dickens*, 9 Jur. 550; *Page* v. *Soper*, 11 Ha. 321.]

(*m*) *Moore* v. *Parker*, Ld. Raym. 37, Skinn. 558.

Will and schedule.

But a will, and a schedule to it, are considered as one instrument for the purposes of this rule (*n*); and the same principle undoubtedly applies to a will and a codicil, or several codicils.

Deeds creating and exercising powers.

It is 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 will apply (*p*); but the position has been, with much reason, questioned by other learned writers (*q*).

Legal and equitable interests.

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 estate clothed with a trust.

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 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

(*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 Bea. 21; *Baile* v. *Coleman*, 2 Vern. 670; Fearne, C. R. 124 et seq. See also *Richardson* v. *Harrison*, 16 Q. B. D. 85. *Re Youman's Will*, [1901] 1 Ch. 720. And there are no degrees of equity, *Nouaille* v. *Greenwood*, T. & R. 26; *Re White and Hindle's Contract*, 7 Ch. D. 201. It is presumed that sec. 1 of the Land Transfer Act, 1897 has not had the result of preventing any devise in a will (other than a devise to executors) being legal for the purpose of determining whether the rule in *Shelley's Case* applies, but the point has not come before the Courts, and it might be contended that, since the rule in *Shelley's Case* is a rule of law, all devises contained in wills which are subject to the Land Transfer Act, 1897, are equitable unless the devisee is also executor (C. P. S.).]

(*s*) Ante, p. 1817.

(*t*) An unsuccessful attempt to support such a construction was made in *Nash* v. *Coates*, 3 B. & Ad. 839, ante, p. 1841, 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 shew 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*.

(*u*) C. R. 35.

editor and Mr. *Preston* (*x*), on the well-known principle, that tr
estates [were] not objects of the jurisdiction of Courts of Law.

Limitation of life estate to separate use of married woman.

In the recent case of *Douglas* v. *Congreve* (*y*), real and perso
estate were given to a feme covert for life *for her separate use*, a
after her decease, to her husband for life, with remainder to
heirs of her body in tail, accompanied by a declaration that
aforesaid limitations were intended by the testator to be in str
settlement; and it was contended, that, as the testator h
created a trust for the separate use of the devisee, she h
merely an equitable interest, (the husband being a trustee
her,) with which the legal limitation to the heirs would not unit
but Lord *Langdale* conclusively answered this reasoning by
serving that the legal estate was vested in the wife, and th
the power which the law gave to the husband over the real esta
of his wife does not alter the nature or quality of that estate.

Rule considered in relation to *estate for life*.

(2) *What is a sufficient Estate of Freehold in the Ancestor.*
The estate of freehold may be an estate for the life of the devis
himself, or of another person, or for the joint lives of several person
and may be either absolute or determinable on a contingency,
an estate durante viduitate (*z*), and may arise either by expre
devise, or by implication of law (*a*), which must be, we have see
a *necessary* implication (*b*).

Freehold resulting for life.

Coape v. *Arnold*.

[In what cases the freehold shall be said to result by operatio
of law is a preliminary question of construction. In *Coape*
Arnold (*c*), there was a devise to G. H., the testator's eldest son, fo
ninety-nine years if he should so long live, and subject to the sai
term to trustees and their heirs during the life of G. H., upon trus

(*x*) Treat. on Estates, Vol. I., p. 311.

(*y*) 1 Bea. 59. [See *Verulam* v. *Bathurst*, 13 Sim. 374. But see *Re Harts's Estate*, [1883] W. N. 164, 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. 1832; 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*, 6 Bea. 241.]

(*a*) *Pibus* v. *Milford*, 1 Ventr. 372, Freem. K. B. pp. 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. XIX.

[(*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.

[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 remainders 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 shew 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, [illegible]t,

[(*d*) Particularly *Adams* v. *Savage*, and *Rawley* v. *Holland*, stated Fea. C. R. p. 43; Preston on Merger, (Conveyancing, Vol. iii.,) 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.

CHAP. XLVIII.

[whatever is not well given to someone else (*f*), merger furnishes n valid argument against his title. Where was the beneficial interes during the life of G. H., if not in him? The trustees of the ter were expressly excluded (*g*).

But the V.-C. relied on this further ground, that when th particular purpose of the codicil, viz., raising the jointure an debts, was satisfied, the trustees of the codicil would be bound t reconvey according to the limitations of the will, and *in its ver language*. And on this latter ground exclusively the decisio was affirmed. Lord Cranworth's judgment contains some obser vations which, taken alone, might seem to favour the doctrine tha the rule would not apply if it could be collected that the testato 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

[(*f*) Ante, Chap. XXI.

(*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. at p. 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.]

[changing it. On no other ground could the Court have avoided deciding what became of the beneficial interest during the life of G. H.]

Expressions negativing a larger estate than for life.

It is to be observed, too, that words, however positive and unequivocal, expressly negativing the continuance of the ancestor's estate beyond the period of its primary express limitation, will not exclude the rule (*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.

Interposition of trustees to preserve contingent remainders, &c.

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 (*j*), nor a declaration that the first taker shall have a power of jointuring (*k*), or that his estate shall be without impeachment of waste (*l*), or, if a woman, for her separate use (*m*), or that the devisee shall [only have an estate for life, or be "strict" tenant for life (*n*),] will prevent the remainder to the heirs attaching in the ancestor.

(3) *What Limitations to the Heirs are sufficient.*—[With respect to the limitation to heirs general of the tenant for life it is clear that the expressions "heir," or "next heir," have the same effect as "heirs," provided no words of limitation are added (*o*). Thus, in *Fuller* v. *Chamier* (*p*), a devise to A., B., and C., and after their decease to the next lawful heir of A. for ever, was held to give A. an estate in fee simple. But words of limitation in fee added to the word "heir" make it a word of purchase, so that if lands are devised to A. for life, and after his death to his heir and the heirs

(*i*) *Robinson* v. *Robinson*, 1 Burr. 38, 2 Ves. sen. 225, 3 B. P. C. Toml. 180 nom. *Robinson* v. *Hicks*, stated infra; *Perrin* v. *Blake*, 4 Burr. 2579, ante, p. 1859; *Hayes* d. *Foorde* v. *Foorde*, 2 W. Bl. 1059; *Thong* v. *Bedford*, 1 B. C. C. 313; [*Roe* d. *Thong* v. *Bedford*, 4 M. & Sel. 362.]

(*j*) *Coulson* v. *Coulson*, 2 Stra. 1125, *Hodgson* v. *Ambrose*, 1 Doug. 337, 3 B. P. C. Toml. 416; *Sayer* v. *Masterman*, Amb. 344; *Measure* v. *Gee*, 5 B. & Ald. 910.

(*k*) *King* v. *Melling*, 2 Lev. 58, 1 Vent. 225, 3 Keb. 42.

(*l*) *Papillon* v. *Voice*, 2 P. W. 471; *Dunn* d. *Webb* v. *Puckey*, 5 T. R. 299, *Frank* v. *Stovin*, 3 East, 548; *Jones* v. *Morgan*, 1 B. C. C. 206; *Bennett* v. *Earl of Tankerville*, 19 Ves. 170.

(*m*) *Lady Jones* v. *Lord Say and Seal*, 8 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.

(*n*) *Roe* d. *Thong* v. *Bedford*, 4 M. & Sel. 362, 1 B. C. C. 313, [and see also *Macnamara* v. *Dillon*, 11 L. R. Ir. 29 and *Re Keane's Estate*, [1903] 1 Ir. 215].

(*o*) Per Sir W. Grant in *Blackburn* v. *Staples*, 2 V. & B. 367, stated post p. 1876. See also *Lewthwaite* v. *Thompson*, 36 L. T. 910 (A. for life and after her decease to descend to her female heir).

(*p*) L. R., 2 Eq. 682.

[of such heir, A. takes only an estate for life with a contingent remainder in fee to the person who at his death is his heir (*q*).]

Rule in regard to limitation to the heirs.

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*).

Immaterial under what denomination heirs are described.

Limitation to the heirs by implication.

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 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.

As to declaration that heirs shall take by purchase.

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 (*v*).

[It has been already mentioned that a limitation to the "heir of the body," or "heir male of the body," or "next heir male," or "first heir male," with no words of limitation added, has the

(*q*) Fearne Cont. Rem. 148: *Greaves* v. *Simpson*, 10 Jur. N. S. 609; 12 W. R. 773; *Evans* v. *Evans*, [1892] 2 Ch. 173.

(*r*) *Robinson* v. *Robinson*, 1 Burr. 38, 2 Ves. sen. 225; *Mellish* v. *Mellish*, 2 B. & Cr. 520, 3 D. & Ry. 804; *Griffiths* v. *Evan*, 5 Bea. 241; *Harvey* v. *Towell*, 7 Hare, 231, see s.c. 12 Jur. 241; *Tate* v. *Clarke*, 1 Bea. 100; *Doe* v. *Rucastle*, 8 C. B. 876; *Lewis* v. *Puxley*, 16 M. & Wels. 733; *Re Buckton*, [1907] 2 Ch. 406; and see Chap. L.

(*s*) See post, Chap. XLIX., and *Brookman* v. *Smith*, L. R., 7 Ex. 271, 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*, ib. at p. 363.]

(*t*) See ante, Vol. I., p. 656.

(*u*) See Lord *Hardwicke's* judgment in *Lethieullier* v. *Tracy*, as reported 1 Ken. at p. 56.

(*v*) See Harg. Law Tracts, 562.

same effect in giving the devisee for life an estate tail as if the plural had been used (*w*). If, however, words of limitation are added, these expressions give an estate by purchase to the heir. Thus, if land is devised to A. for life, and after his death to his next heir male and the heirs male of such next heir male, this gives A. an estate for life, with remainder in tail male to the heir male of his body (*x*), or an estate in fee simple can be given to the heir male of A. (*y*).]

Effect of contingent limitation to the heirs.

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 the heirs of the body of him who shall die first, the heir takes by descent (*z*).

Such limitation contingent, when.

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 (*a*) 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* (*b*).

Possibility of freehold determining in lifetime of ancestor.

The difference between these and the former cases is, that there the limitation is contingent in the very terms of its creation, and the rule, therefore, does not alter it in this respect; but in the latter cases the limitation is merely contingent by the application of a principle of law governing remainders; and when the rule under consideration operates to prevent its taking effect as a remainder, it destroys its contingent quality. The same principle is applicable in the case of a devise to A. for the life of B., remainder to the heirs of his body; for as the limitations operate by force of this rule to give an executed estate tail, that estate is not affected by the circumstance of B., the cestui que vie, dying in the lifetime of A., and, consequently, before he has any heir of his body (*c*).

Limitation to heirs of tenant of freehold *and of another person.*

(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*

[(*w*) *Bawsey* v. *Lowdall*, Sty. 249; *Barley's Case*, cit. 1 Vent. 230; *Richards* v. *Bargavenny*, 2 Vern. 324, and other cases cited supra, p. 1849.

(*x*) *Archer's Case*, 1 Rep. 66, supra, p. 1849.

(*y*) *Willis* v. *Hiscox*, 4 My. & Cr. 197, supra, p. 1850.]

(*z*) [Co. Lit. 378*b*, and] see 1 Prest. Est. 316.

(*a*) *Curtis* v. *Price*, 12 Ves. 89.

(*b*) T. Ray. 126, 1 Keb. 888. But see 1 Sid. 247.

(*c*) See Perkins, s. 337; *Merrill* v. *Rumsey*, 1 Keb. 888, T. Ray. 126, Fea. C. R. 31.

Case, that the heirs of the body should proceed from the pers
taking the estate of freehold, and of that person only; for,
the devise be to A. for life, and, after his decease, to the heirs
the body of A., *and of another person*, who might have a comm
heir of their bodies, it is a contingent remainder in tail to the heir

To wife for life, remainder to heirs of the bodies of husband and wife.

Thus, in *Gossage* v. *Tayler* (*d*), where the limitations were to
wife for life, remainder to the heirs to be begotten on the body
the wife by the husband, the heirs were held to take by purcha
And the same construction prevailed in *Frogmorton* d. *Robinson*

To wife and heirs of body of husband and wife.

Wharrey (*e*), where S. surrendered copyholds to the use of M.,
then intended wife, [and] the heirs of their two bodies lawfully
be begotten; [although the limitation to the heirs was not
pressed to be by way of remainder, and the estate of the wife
not limited expressly to a life estate].

It may be observed, that, under such limitations, if the pers
taking the estate for life die in the lifetime of the other, the c
tingent remainder to the heirs fails (*f*); for, as there could be
heir of their bodies until the death of both, (nemo est hæres viventi
the failure of the particular estate before that period defeats
remainder (*g*).

Distinction where there could not be joint heirs of the bodies.

But if, in such a case, the tenant for life and the other pers
to whose heirs the limitation is made are of the same sex, or, be
of different sexes, are not actually married, and are so related
consanguinity or affinity, that they cannot have, or be presum
to have, common heirs of their bodies, the effect is obviou
different; for, as the testator cannot mean heirs issuing fr
them both, the limitation is to be read as a limitation to
heirs of the body of A., the tenant for life, and to the heirs of
body of the other person respectively. The consequence is, th
the former becomes, by force of the rule, tenant in tail of
undivided moiety, and the heir of the latter takes the other moie
by purchase.

Where ancestor is tenant in common of freehold.

Pari ratione, if A. and B. were tenants in common for life, wi
remainder, as to the entirety, to the heirs of the body of A.,
would be tenant in tail of one undivided moiety, and there wou
be a contingent remainder in tail to the heirs of his body in
other moiety.

(*d*) Sty. 325, cited again post, p. 1869.

(*e*) 3 Wils. 125, 144, 2 W. Bl. 728. See also *Lane* v. *Pannell*, 1 Roll. Rep. pp. 238, 317, 438.

(*f*) *Lane* v. *Pannell*, 1 Roll. Rep. 238, pp. 317, 438; *Anon.*, Dy. 99 b.

(*g*) See this rule adverted to, a Chap. XXXVIII.; [and remember 40 & 41 Vict. c. 33, by virtue of wh contingent remainders are now capa of taking effect in such cases as execut devises.]

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 (*h*). 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 (*i*).

Limitation to heirs of one joint-tenant of freehold.

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 (*j*). . . .

Further observations on limitations of this nature.

Questions of this kind have most frequently occurred under limitations in marriage settlements, but they may of course arise under wills. In deciding on the application of the rule to such cases, the first object should be, to see out of whose body the heirs are to issue; and if it be found that they are to proceed from any person who takes an estate of freehold, and him or her only, such person becomes tenant in tail. If from a person who takes an estate of freehold jointly with another not taking any such estate, it seems he or she will take an estate tail sub modo only (*k*). 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.

Distinction between heirs *of* the body and heirs *on* the body to be begotten.

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 (*l*); 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 (*m*).

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

(*h*) See *Roe* d. *Aistrop* v. *Aistrop*, 2 W. Bl. 1228.

(*i*) *Stephens* v. *Britridge*, 1 Lev. 36, T. Ray. 36. [And see 1 Preston, Est. 336.]

(*j*) *Marquess of Winchester's Case*, 3 Rep. 1.

(*k*) See Fea. C. R. 36.

[(*l*) *Stephens* v. *Britridge*, 1 Lev. 36, T. Ray. 36;] *Dunn* d. *Trickett* v. *Gillot*, 2 T. R. 431.

(*m*) *Gossage* v. *Tayler*, Sty. 325.

takes an estate tail special, by force of the rule under conside tion (*n*). The distinction, it will be perceived, is between heirs the body and heirs *of* the body.

So if the limitation were to the husband for life, remainder the heirs of the body of the husband on the wife to be begotte he would, by the application of the same principle, have an esta tail special (*o*). But if, in the former case, the estate for life h been limited to the *husband*, and, in the latter, to the *wife*, t heirs of the body would have taken by purchase.

Tenant in tail after possibility of issue extinct.

Under limitations in special tail, if the tenant in tail survive t other person from whom the heirs are to spring, and there be no issu such surviving tenant in tail becomes, as is well known, tenant tail after possibility of issue extinct. In the case of *Platt* v. *Powles* (it was decided that such was the situation of the testator's wido to whom lands were devised *for life, and after her decease to t heirs of her body by him*, at the expiration of the period duri which she might have had issue by the testator, namely, nine or t months after his death. During that time, issue being, in conter plation of law, possible, (irrespective of age,) and the devise therefore, being tenant in tail, she might have acquired the fee b means of a common recovery.

Rule considered in regard to executory trusts

II.—Executory Trusts.—It has been already observed, that th rule in *Shelley's Case* applies as well to equitable limitations as t legal estates. Mr. *Fearne* has laboured to establish this conclusio in opposition to the case of *Bagshaw* v. *Spencer* (*q*), which wa decided by Lord *Hardwicke*, on the ground of the difference construction applicable to legal and equitable interests a doctrin which has been overruled in a long series of cases (*r*), including subsequent decision of this eminent judge himself (*s*).

The preceding remarks, it should be observed, apply only t *executed* trusts; for between trusts *executed* and *executory* ther is a very material difference, which requires particular examinatio

Executory trust, what.

A trust is said to be executory or directory where the object take, not immediately under it, but by means of some further ac to be done by a third person, usually him in whom the legal estate i

(*n*) *Alpass* v. *Watkins*, 8 T. R. 516.

[(*o*) *Roe* d. *Aistrop* v. *Aistrop*, 2 W. Bl. 1228.]

(*p*) 2 M. & Sel. 65.

(*q*) 1 Ves. sen. 142, 2 Atk. pp. 246, 570, 577; see Fea. C. R. p. 124 et seq.

(*r*) *Baile* v. *Coleman*, 2 Vern. 670, 1 P. W. 142; [*Papillon* v. *Voice*, 2 P. W. pp. 471, 477;] *Wright* v. *Pearson*, 1 E 119; *Austen* v. *Taylor*, ib. 361, Amb 376; *Jones* v. *Morgan*, 1 B. C. C. 20 See also *Jerwoise* v. *Duke of Northum berland*, 1 J. & W. 559, inf.; [*Reyne* v. *Reynell*, 10 Bea. 21.]

(*s*) *Garth* v. *Baldwin*, 2 Ves. sen. 64

vested. As where a testator (*t*) 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 (*u*).] In these cases, the direction to convey or settle is considered merely in the nature of instructions, or heads of a settlement, which are to be executed, not by a literal adherence to the terms of the will, which would render the direction to settle nugatory, but by formal limitations adapted to give effect to the purposes which the author of the trusts appears to have had in view (*v*).

Uses in strict settlement, when directed.

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 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 (*w*).

Settlement to be made on A. and the heirs of his body.

So, in *Leonard* v. *Earl of Sussex* (*x*), 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* (*y*):—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

(*t*) See Hayes's Inquiry, 248, 249, and 270.

(*u*) *Earl Stamford* v. *Hobart*, 3 B. P. C. Toml. 31.

[(*v*) Cited with approval by Lord Cairns, L. R., 4 H. L. at p. 572.]

(*w*) *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.

(*x*) 2 Vern. 526.

(*y*) See [also *Thompson* v. *Fisher*, L. R., 10 Eq. 207. But] see observation infra.

Direction that it should not be in his power to dock the entail.

without impeachment of waste (*z*): because here the estate w *not executed*, but only *executory*, and therefore the intent an meaning of the testatrix was to be pursued: she had declared h mind to be, that her sons should not have it in their power to b their children, which they would have if an estate tail were to b conveyed to them. And the Court took it to be as strong in th case of an *executory* (trust in a) devise, for the benefit of the issu as if the like provision had been contained in marriage articles but had the testatrix by her will devised to her sons an estate tai the law must have taken place; and they might have barred thei issue, notwithstanding any subsequent clause or declaration in th will that they should not have power to dock the entail (*a*).

To convey to A. for life, without impeachment, &c., remainder to issue of her body.

So, in *Lord Glenorchy* v. *Bosville* (*b*), where the devise was t trustees and their heirs, in trust, till the marriage or death of A. to receive the rents and pay her an annuity for her maintenance and as to the residue, to pay his debts and legacies, an after payment thereof in trust for A.; and if she married a Pro testant, after her age, or with consent, &c., then *to convey* th estate after such marriage to the use of her *for life*, without im peachment of waste, remainder to her husband for life, remainde to the *issue of her body*, with remainders over: Lord *Talbot* held that though A. would have taken an *estate tail*, had it been the case of an *immediate devise*, yet that the trust being *executory* was to be *executed in a more careful and more accurate manner* and that a conveyance to A. for life, remainder to the husband fo life, with remainder to their first and every other son, with re mainder to the daughters, would best serve the testator's intent.

To be purchased and settled to A. and his issue in tail male.

Again, in *White* v. *Carter* (*c*), where a testator gave his personal estate to trustees to purchase land, to be settled and assured as counsel should advise unto and upon the trustees and their heirs, upon trust and to go for the use *of A. and his issue in tail male, to take in succession and priority of birth*; and there was a direction to the trustees to pay the dividends of the moneys until the purchase to A. *and his sons* and issue male, Lord *Northington* decreed a strict settlement. [This decree was affirmed by Lord Camden upon a rehearing (*d*), 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."

[(*z*) For the rights of the first taker are to be cut down only so far as necessary to prevent alienation by him; see post, p. 1882, note (*o*).]

(*a*) As to this, see ante, p. 1487.

(*b*) Cas. t. Talb. 3. See also *Ashton* v. *Ashton*, 1 Coll. Jur. 402.

(*c*) 2 Ed. 366.

[(*d*) Amb. 670.

[And in *Roberts* v. *Dixwell* (*e*), 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 interm iddle 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.

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* (*f*), 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* (*g*), the testator directed an estate "to be purchased and made *hereditary and settled upon* my here constituted 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.

To be purchased and settled on A., his heirs and successors in the direct male line.

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 (*h*).]

But a distinction has been sometimes taken between the effect

[(*e*) 1 Atk. 607, cited 2 Ves. sen. p. 652, nom. *Sands* v. *Dixwell*.

(*f*) 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.

(*g*) 16 Sim. 543. *Duncan* v. *Bluett*, Ir. R. 4 Eq. 469.

(*h*) *Sackville-West* v. *Holmesdale*, L. R., 4 H. L. 543; *Lord Dorchester* v. *Earl of Effingham*, 3 Bea. 180, n.; *Woolmore* v. *Burrows*, 1 Sim. 512; see also *Bankes* v. *Le Despencer*, 10 Sim. 576, 11 Sim. 508. *Montagu* 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*, 26 Ch. D. 538, 549; but see *Re Gerard*, [1906] W. N. 21.]

* To be settled for the *sole* use of A. and her issue.

Alleged distinction where testator himself declares uses of lands to be purchased.

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* (*i*), where the testator devised lands to A. for life, without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of A.; and bequeathed personal estate to be laid out in land, *which should remain, continue, and be* to the same uses as the land before devised; Lord *Northington*, after observing in reference to *Papillon* v. *Voice* and *Leonard* v. *Earl of Sussex*, that there the trustees were directed *to settle, and that an estate tail would have been no settlement*, held, that the case before him was distinguishable, inasmuch as the testator had referred to no settlement by the trustees, but had declared his own uses and trusts; which being declared, he knew no instance where the Court had proceeded so far as to alter or change them; accordingly, A. was to be tenant in tail in the lands to be purchased.

Disapproved by Lord Eldon.

This case is stated by Mr. Ambler to have been dissatisfactory to the profession, which is denied by Lord *Henley* (*j*); but Lord *Eldon* has spoken of the decision in terms which imply doubt of its soundness (*k*). His lordship also observed, that the judges who decided *Papillon* v. *Voice*, and *Austen* v. *Taylor*, agreed in the principle, but differed in the application of it. The distinction upon which the latter case is founded, (or at least is usually supposed to be founded,)

Disregarded in certain cases.

certainly has not been invariably adopted; for in *Meure* v. *Meure* (*l*), where lands were devised to trustees in trust to sell, who with the money arising 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 profits for his life, and after his decease to permit the plaintiff and his assigns to receive the interest

Devise of lands to be purchased to A. for life, remainder to his issue.

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*,

(*i*) 1 Ed. 361, Amb. 376.

(*j*) See note, 1 Ed. 369.

(*k*) See *Green* v. *Stephens*, 17 Ves. at p. 76; *Jervoise* v. *Duke of Northumberland*, 1 J. & W. at p. 574.

(*l*) 2 Atk. 265. [The issue will generally take successive estates tail, *Grier* v. *Grier*, L. R., 5 H. L. at p. 707, where *Ibd* v. *Ibd*, Amb. 274, *Hart* v. *Middlehurst*, 3 Atk. 371, are cited; 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 Bea. 551, words were added importing a tenancy in common, and the children were held to be tenants in common in tail. and see *Trevor* v. *Trevor*, 1 H. L. C. 239.]

and in default of such issue, over; Sir *J. Jekyll*, M.R., held that, in executing the trust, lands should be purchased *and the plaintiff made tenant for life only.*

Here the lands to be purchased were devised immediately to these limitations, without any express direction to settle; and the terms used would, if applied to lands directly devised, clearly have made A. tenant in tail (*m*), and yet he was held to be tenant for life only.

Devise of lands to be purchased to A. and the heirs male of his body;

So in *Harrison* v. *Naylor* (*n*), 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 for ever; 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.

trust executed by simply interposing trustees to preserve contingent remainders.

By interposing the estate in the trustees Lord *Thurlow* evidently treated the trust as executory, though the testator had in direct terms devised the purchased lands. In this respect, 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

Austen v. *Taylor* explained.

(*m*) See post, Chap. LI.

(*n*) 2 Cox, 247.

CHAP. XLVIII.

only of the lands to be purchased, would have created a diversit between them and the lands devised, which the testator evidentl intended should be held together. This distinguishes the ca from and reconciles it with those just stated.

Indication that testator did not intend an estate tail, required.

But even where there is a clear direction to the trustees t frame the settlement, the doctrine of some of the cases require that, to warrant the introduction of limitations in strict settlement it should be indicated by the context that the testator did no intend an estate tail to be created, according to the technical effec of the expressions used.

Direction to settle on A. and the heirs of his body.

Thus, in the case of *Seale* v. *Seale* (*o*), where a testator bequeathe money to be laid out in the purchase of lands, to be settled *on A. an the heirs male of his body*, Lord *Cowper* held that A. was absolutel entitled to the money not laid out; and, though it wa suggested that the Court would order a strict settlement, hi lordship observed, that in marriage articles the children are con sidered as purchasers, but in the case of a will (as this was), wher the testator expresses his intent to give an estate tail, a Court o Equity ought not to abridge the bounty given by the testator.

This principle was carried to a great length in the subsequent cas of *Blackburn* v. *Stables* (*p*), where the testator devised the remainde 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 o 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 after-wards born, and attained twenty-four: Sir *W. Grant*, M.R., observed, that "It is settled that the words 'heir,' or 'heir male of the body,' in the singular number, are words of limitation, not of purchase, unless words of limitation are superadded, or there is something in the context to shew 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 commonly been relied on as shewing

That a "proper entail be made to the male heir";

(*o*) Prec. Ch. 421, 1 P. W. 290. (*p*) 2 V. & B. 367.

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 the subsequent case *Marshall* v. *Bousfield* (*q*), 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 his grandchildren of the male kind, *and their issue in tail male*, and for want of such issue, upon his female grandchildren who should be living at his decease; but the testator declared that the shares and proportions of the male and female grandchildren, and their respective issues, should be in such proportions as his wife should by deed or will appoint; and, for want of such appointment, to the testator's own right heirs for ever. The wife appointed in favour 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 (*r*).

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 favour of a strict settlement. The estate was to be settled *by able counsel* (*s*), and the word was *issue*, not heirs of the body (*t*). Confidence in the case, too, is weakened by the fact, that another determination of the same judge on a question of this nature has been impeached (*u*).

Remark on *Marshall* v. *Bousfield*.

(*q*) 2 Mad. 166.

(*r*) 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.

(*s*) See *White* v. *Carter*, 2 Ed. 366, Amb. 670; *Bastard* v. *Proby*, 2 Cox, 6.

(*t*) See judgment in *Meure* v. *Meure*, 2 Atk. 265. And *Blackburn* v. *Stables*, 2 V. & B. 367, ante, p. 1876.

(*u*) See *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 559.

The reader should suspend any conclusion he may be disposed to draw from the two preceding cases of *Blackburn* v. *Stable* and *Marshall* v. *Bousfield*, until he has carefully weighed the with Lord *Eldon's* decision in the subsequent case of *Jervoise* *Duke of Northumberland* (*v*), where the words were, "To my so R. I leave all my estates at" B. &c. "*to be entailed upon his ma heirs*: and, failing such, to pass to his next brother, and so o from brother to brother, allowing £2,500 each to be raised upo the estates for female children. The above-named estates a to be liable to all my debts at my decease, and to the fortun left to my younger children, unless otherwise discharged. direct my estates at M. to be sold, in order to raise money for th above-named legacies, and what falls short to be raised or charged o the other property at" B. &c. The legal estate was not in th testator. In a suit for declaring the right of all parties, Sir *Plumer*, V.-C., decreed, that R. was entitled to an *estate tail*. Th estate was afterwards settled on the marriage of R., and wa purchased by the Duke of Northumberland, under a power sale in the settlement; but his grace objecting to the title, bill was filed to enforce specific performance. It was contende for him that the trust was merely directory, and that the Cour in executing it, would mould the limitations in the nature of strict settlement; and Lord *Eldon* thought the contrary s doubtful, that he could not compel a purchaser to take th title. His Lordship, indeed, expressed a strong opinion that th trust was directory; and his observations leave us not much roo to doubt that, if called upon to execute it, he would have decree a strict settlement, and not have given R. an estate tail (*w*).

Devise to R. *to be entailed* upon his male heirs;

not a clear estate tail in R.

As to giving tenants in tail power to charge.

Lord *Eldon* in this case intimated that he did not think tha the circumstances of the power being given to the devisee to charg a sum of money on the estate was a conclusive argument that h was to be only tenant for life, since, in many cases, powers ar usefully given to a tenant in tail, enabling him to do certain act more conveniently than by destroying the entail.

Distinction between marriage articles and wills.

Most of the cases of this kind have arisen on marriage articles (*x*) to which the same principles are applicable as to executory trusts by will, with this difference, that, as it is in every case the object of marriage articles to provide for the issue of the marriage, the nature of the instrument affords a presumption of intention in

(*v*) 1 J. & W. 559.

(*w*) But see *Lowry* v. *Lowry*, 13 L. R. Ir. 317.]

(*x*) See Fea. C. R. 90; 1 Prest. Est 354.

favour of the issue, which does not belong to wills; and Lord *Eldon*, in the last case (*y*), intimated, that the observations imputed to him in *Countess of Lincoln* v. *Duke of Newcastle* (*z*), [questioning the distinction,] were to be received with this qualification (*a*).

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 shewn 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 (*b*); 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 (*c*); 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. The case of *Leonard* v. *Earl of Sussex*, it is true, had only the additional circumstance of a direction that it should not be in the power of A. to dock the entail, with respect to which the writer fully concurs in the observation of a learned friend (*d*), "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 the case of *Seale* v. *Seale* (*e*) is a direct authority against applying the doctrine to the simple case suggested.

Indeed some judges have denied its application even to the

(*y*) 1 J. & W. pp. 571, 574.

(*z*) 12 Ves. pp. 227, 230.

(*a*) See *Rochford* v. *Fitzmaurice*, 1 Conn. & La. 158, [2 D. & War. 1; *Sackville-West* v. *Holmesdale*, L. R., 4 H. L. 543.]

(*b*) See Hayes's Inq. 262, n.

(*c*) 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 favour of the hypothesis suggested.

(*d*) Hayes's Inq. 262, n.

(*e*) 1 P. W. 290, ante, p. 1876. See also *Sweetapple* v. *Bindon*, 2 Vern. 536; [*Harrison* v. *Naylor*, 2 Cox, 247; *Maryat* v. *Townly*, 1 Ves. sen. 102; *Randall* v. *Daniel*, 24 Bea. 193.]

CHAP. XLVIII.

Whether a direction to settle on A. for life, remainder to the heirs of his body, authorizes a strict settlement.

case of a direction to settle lands upon A. *for life*, and, after h death to the heirs of his body. Such was the opinion expresse by Sir *J. Jekyll* in *Meure* v. *Meure* (*f*), and Sir *W. Grant* in *Blac burn* v. *Stables*, though the former decided that a different co struction was to be given to the word "issue," and the latter, w have seen, was disposed to yield to a declaration that the estat should be *without impeachment of waste*, or that there should b a limitation *to trustees to preserve contingent remainders* (*g* This distinction is certainly very refined. How can a testato intimate that he intends the object of the trust to be tenant fo life more strongly than by expressly so limiting the estate? I the rule in *Shelley's Case* be objected as destroying that inference o intention, the answer is, that neither of the other circumstances to which this potency of operation is admitted to belong, prevents the application of that rule. In this respect they are all equally inoperative, though they all indicate an intention to confer an estate for life only. Even, therefore, if we hesitate to subscribe to the more general (though perhaps the more reasonable) doctrine that a direction to settle authorizes the Court to adopt its own mode of settlement, without regard to the particular force of the terms used by the testator, and requires *distinct indication of intention* that 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.

Affirmative established by *Bastard* v. *Proby*.

In fact, the case of *Bastard* v. *Proby* (*h*) is a direct authority in favour 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.

Observations upon *Blackburn* v. *Stables*.

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

(*f*) 2 Atk. 265, ante, p. 1874.
(*g*) l.c. he relied on the absence of these *and other* clauses.]
(*h*) 2 Cox, 6.

language forbids it: he may be supposed to have intended to exclude a strict interpretation by the use of terms the farthest removed from technicality, and which, in their popular sense, certainly mean something very different from placing the estate in the power of the first taker. No conveyancer receiving instructions for a settlement in these terms would hesitate to insert limitations in strict settlement; and the principle upon which Courts of Equity proceed in the execution of directory trusts is not very widely different. Considering Lord *Eldon's* determination, in *Jervoise* v. *Duke of 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 his Lordship, in his comment upon the cases, makes no allusion (*i*). [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 (*j*).

To be settled "on A. and his heirs in strict entail."

In *Trevor* v. *Trevor* (*k*), a testator devised lands to trustees in trust to settle them to the use of G. R. for life, with remainder to his issue in tail male, in strict settlement, and in default of such issue over: it was held that the words "in tail male" did not exclude G. R.'s daughters.

"All trusts," said Lord St. Leonards (*l*), "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 you, and to convert them into legal estates?"]

Mere direction to convey does not make a trust executory.

(*i*) See further, as to executory trusts, ante, Ch. XXXIII.; 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 labours of this very eminent writer by those whose profound knowledge of the laws of real property enabled them to appreciate those labours. [See also *Stonor* v. *Curwen*, 5 Sim. 264; *Boswell* v. *Dillon*, 1 Dru. 291.

(*j*) *Graves* v. *Hicks*, 11 Sim. 536; *Woolmore* v. *Burrows*, 1 Sim. at p. 526.

(*k*) 1 H. L. C. 239.

(*l*) *Egerton* v. *Brownlow*, 4 H. L. C. at p. 210, 23 L. J. Ch. at p. 406, 18 Jur. at p. 104; and see *East* v. *Twyford*, 9 Hare, at p. 733; *Herbert* v. *Blunden*, 1 D. & Wal. at p. 90; *Randall* v. *Daniel*, 24 Bea. 193; *Doncaster* v. *Doncaster*, 3 K. & J. at p. 35; *Fullerton* v. *Martin*, 1 Dr. & Sm. 31 (personalty).]

Trust in terms partly direct and partly executory.

It is clear, that where a testator devises real estate to trustee upon trusts, and then directs, that, in certain events, they sha convey the estate in a prescribed manner, the fact that the wil contains such a direction does not constitute a ground for regard ing the whole series of trusts as executory, and for applying to th former that liberality of construction which is peculiar to trust of this nature (*m*).

The Court will not appoint protectors.

[The Court will, of course, execute directions for any settlemen that can legally be made, whether such directions are specific o general, provided the intention is apparent; but will not, in orde to tie up the estate for a longer period than would be secured b making the first taker tenant for life with remainder to his son successively in tail male, &c., appoint any persons protectors o the settlement (*n*).

Powers authorized by executory trust to settle.

It is beyond the scope of the present chapter to deal with the subject of carrying into effect executory trusts, except so far as it bears on the rule in *Shelley's Case*; but it may be convenient to refer to the cases on the question whether, in a settlement in pursuance of an executory trust, a tenant for life can be made dispunishable for waste; they are collected in the footnote (*o*). The cases on the question what powers and provisions can be inserted in a settlement are referred to in Chapter XXIV. (*p*).]

Practical bearings of the rule in *Shelley's Case*.

III.—Practical Effect of the Rule considered.—It may be useful, as supplementary to the preceding discussion of the Rule in *Shelley's Case*, to state, for the use of the student, the practical bearings of the alternative whether the heir takes by descent or by purchase; which will be best shewn 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

As to lapse.

(*m*) *Franks* v. *Price*, 3 Bea. 182. [See also *Jackson* v. *Noble*, 2 Kee. 590; *Re Nelley's Trusts*, [1877] W. N. 120.

(*n*) *Bankes* v. *Le Despencer*, 11 Sim. 508; but see *Woolmore* v. *Burrows*, 1 Sim. 512.

(*o*) The principle appears to be that where the executory trust is in such a form as would give the first taker an estate of inheritance, but the general object of the trust can only be effected by cutting down that estate to an estate for life, then such life estate is made unimpeachable for waste (*Leonard* v. *Earl of Sussex*, 2 Vern. 526; *White* v. *Briggs*, 15 Sim. 17, 2 Ph. 583; *Woolmore* v. *Burrows*, 1 Sim. 512; *Banks* v. *Le Despencer*, 11 Sim. 508; *Sackville-West* v. *Viscount Holmesdale*, L. R., 4 H. L. 543); but where a life estate is clearly given by the words of the executory trust, the Court will not make such life estate unimpeachable for waste (*Davenport* v. *Davenport*, 1 H. & M. 775; *Stanley* v. *Coulthurst*, L. R., 10 Eq. 259); à fortiori if the life estate is given to a woman for her separate use without power of anticipation (*Clive* v. *Clive*, L. R., 7 Ch. 433).

(*p*) Ante, p. 903 et seq.

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, and, therefore, 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 (*q*).]

On the other hand, in the latter supposed case, if B. should die in the testator's lifetime, it would not affect his heir, who claims, not derivatively through his ancestor, but originally in his own right by *purchase;* and who would, therefore, [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 (*r*) 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.

As to dower and curtesy.

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 (*s*), . . . 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 (*t*). On the other hand, where the heir takes by purchase, of course none of these rights, which are incident to estates of inheritance, attach, the ancestor being merely tenant *for life*.

Alienation by an enrolled conveyance.

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 (*u*). On the other hand, the heir claiming by

[(*q*) 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; *Hartopp's Case*, Cro. El. 243; *Hilton* v. *Simpson*, 2 Vern. 722; *Hodgson* v. *Ambrose*, Dougl. 337, 3 B. P. C. Toml. 416; *Wynn* v. *Wynn*, ib. 95; *Warner* v. *White*, ib. 435; [*Goodright* v. *Wright*, 1 P. W. 397; *Fuller* v. *Fuller*, Cro. El. 422.] The abstract prefixed to *Warner* v. *White* is singularly inaccurate.

(*r*) *Mandeville's Case*, Co. Lit. 26 b, ante, p. 1554. See Fea. C. R. 80.

[(*s*) It now makes no difference whether the estate be legal or equitable only], stat. 3 & 4 Will. 4, c. 105.

[(*t*) Curtesy attaches to property saved from lapse by the 1 Vict. c. 26, s. 33, see *Eager* v. *Furnivall*, 17 Ch. D. 115. The same rule would apparently apply under s. 32.]

(*u*) Ante, p. 1467.

CHAP. XLVIII.

purchase is unaffected by the acts of his ancestor, except so far a those acts [might before the statute 8 & 9 Vict. c. 106, sect. 8,] hav happened to destroy the contingent remainder of such heir, if no supported (as it always should [have been]) by a preceding veste

Operation of disentailing assurance upon estates intervening between the freehold and the limitation to the heirs.

estate of freehold. The conveyance, it should be observed, of person becoming tenant in tail by force of the rule in *Shelley's* under a limitation to the heirs of his body not *immediately* expectan on his estate for life, had no effect upon the mesne estates, unles they happened to be legal remainders contingent and unsupported Thus, in the case of a limitation to A. for life, remainder to his firs 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 operatio of the rule, may make a disentailing assurance; but though suc assurance will bar the remainders ulterior to the limitation to th heirs of his body, it will not affect the intervening estate of th first and other sons, unless there were no son born at the time and no estate interposed to preserve the remainders of the son in which case such remainders, being contingent, would, [befo the statute above referred to, have] clearly [been] destroye [That statute puts it out of the power of the owner of the precedin estate of freehold to destroy the contingent remainders dependin thereon.]

Farther points suggested.

It may be useful to illustrate the practical consequences of limitation of another description. Suppose a devise to A. and *jointly* for their lives, remainder to the heirs of their bodies; they were *not* husband and wife (or, it would seem, persons wh may lawfully marry), they would be *joint*-tenants for life, wit *several* inheritances in tail (*v*). An enrolled conveyance by eith would acquire the fee-simple in an undivided moiety, and the would thenceforward be tenants in common: by parity of reaso a similar conveyance by both would comprise the entirety.

If the limitations were to them *successively* for life, A. would tenant for life of the entirety, with the inheritance in tail in o moiety, subject, as to the latter, to B.'s estate for life, and would be tenant for life in remainder of one moiety, and tena in tail in remainder of the other moiety. A. being tenant in tail possession, might make a disentailing assurance, which would gi him the fee-simple in a moiety of the inheritance, but would no as before shewn, affect B.'s estate for life in remainder in th moiety. B., on the other hand, having no immediate estate

[(*v*) See Lit. s. 283; *Ex parte Tanner*, 20 Bea. 374.

freehold, could not during the life of A., and without his concurrence, acquire, by means of an enrolled conveyance, a larger estate than a base fee determinable on the failure of issue inheritable under the entail. A. and B. might conjointly convey the absolute fee-simple in the entirety.

If under a devise to A. and B. jointly for their lives, with remainder to the heirs of their bodies, A. and B. were persons who might lawfully marry, they would be joint-tenants in tail; if actually husband and wife, they would be tenants in tail by entireties (*w*). 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 (*x*), 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.

[(*w*) Co. Lit. 187 b.; but see Chap. XLIV. as to cases within the M. W. P. Act, 1882.

(*x*) See *Green* d. *Crew* v. *King*, 2 W. Bl. 1211.]

CHAPTER XLIX. (a).

WHAT WILL CONTROL THE WORDS "HEIRS OF THE BODY."

	PAGE		PAGE
I. *Superadded Words of Limitation*	1886	III. *Words of Limitation and Modification combined* .	1897
II. *Words of Modification inconsistent with an Estate Tail*	1890	IV. *Effect of Clear Words of Explanation*.....	1899

Effect of context in controlling "heirs of the body."

I.—Superadded Words of Limitation.—It has been already shewn, that a devise to A. and to the heirs of his body (*b*), or to A. *for life*, and after his death, to the heirs of his body (*c*), 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.

Similar [illegible]

Where the superadded words amount to a mere repetition of *the preceding words of limitation*, they are, of course, inoperative to vary the construction. Expressio eorum quæ tacite insunt nihil operatur.

Thus, in *Burnet* v. *Coby* (*d*), 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 is considered as a word of purchase (*e*), and a descriptio personæ;

(*a*) In this chapter Mr. Jarman's words are used. The additions by subsequent editors are in square brackets.

(*b*) Ante, p. 1846.

(*c*) Ante, p. 1858.

(*d*) 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, 1 Eq. Ca. Ab. 394, pl. 7, 1 P. W. 87, cit. 2 Ves. sen. 657, where the trust was *executory*, and would, it is clear, according to the doctrine now established, be executed by a strict settlement. See ante, p. 1870.

[(*e*) See ante, p. 1849.

[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 (*f*).]

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 the case of *Goodright* d. *Lisle* v. *Pullyn* (*g*), 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 for ever;* 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 (*h*).

So, in *Wright* v. *Pearson* (*i*), 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 (*j*), 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* (*k*), where the testator devised lands to S. to hold to him and *the heirs of his body* lawfully to be begotten, *and their heirs for ever*, chargeable with an annuity to M. for life; but in case S. should die without leaving issue of his body, then the testator devised the lands to W. and his heirs, chargeable as aforesaid, and also subject to the payment of £100 to A. *within one year after W. or his heirs should become possessed of the premises*. It was contended, on the authority of *Doe* v. *Laming* (*l*), 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

[(*f*) See *Pelham Clinton* v. *Duke of Newcastle*, [1903] A. C. 111, where the limitation was to the issue male of A. and their male descendants.]

(*g*) 2 Ld. Raym. 1437, 2 Stra. 729.

(*h*) *Morris* d. *Andrews* v. *Le Gay*, noticed 2 Burr. p. 1102, and 2 Atk. p. 249, and more fully and somewhat differently stated s.n. *Morris* v. *Ward*, by Lord Kenyon, 8 T. R. p. 518.

(*i*) 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.

[(*j*) Tho Lord Keeper read these words as in a parenthesis.]

(*k*) Cowp. 410. See also *Alpass* v. *Watkins*, 8 T. R. 516.

(*l*) 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.]

legacy of £100, which must have referred to a dying without issu at the death, and not to an indefinite failure of issue, which migh happen a hundred years thence. But Lord *Mansfield* and the re of the Court of King's Bench, held it to be a clear estate tail in S.

Even if the devise over had been made in express terms depend on the prior devisee leaving no issue *at the time of his deat* this would not, according to the case of *Wright* v. *Pearson* (*m*), hav prevented the *prior* devisee taking an estate tail.

So, in *Measure* v. *Gee* (*n*), where the devise was to J. for his lif remainder to trustees to preserve contingent remainders, and, aft the decease of J., the testator devised the premises to *the heirs the body* of J., lawfully to be begotten, *his, her and their heirs a assigns for ever;* but in case there should be a failure of issue J. lawfully to be begotten, then over. It was contended, that t early cases on this subject had been shaken by modern decisions but the Court of King's Bench considered them to be irrelevant (*o*) 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*, shews that the inte position of trustees to preserve contingent remainders is inoper tive to invest superadded words of limitation with any controllin efficacy.

The next case in order is *Kinch* v. *Ward* (*p*), where a testat devised freehold and leasehold lands to trustees, in trust to perm his son T. to receive the rents for his life, and, after his deceas the testator devised the same to *the heirs of the body* of his said s lawfully begotten, *their heirs, executors, administrators, and assig for ever;* but in case he should die without issue, then over. was assumed, in the discussion of another question, that the devi of the freehold lands vested in T. an estate tail.

As to heirs of the body being directed to assume testator's name.

And it is clear that the circumstance of the heirs of the bo being directed to assume the testator's name does not constitu a ground for varying the construction, although the effect is, enabling the ancestor to acquire the fee-simple, to place with his power the means of rendering the injunction nugatory (*q*

(*m*) Ante, p. 1887.

(*n*) 5 B. & Ald. 910. See also *King* v. *Burchell*, 1 Ed. 424; *Denn* v. *Puckey*, 5 T. R. [illegible]; *Frank* v. *Stovin*, 3 East, 548, where the word was *issue*, as to which see Chap. LI.

(*o*) 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 overrul by the highest authority.

(*p*) 2 S. & St. 409.

(*q*) Such a condition, too, if impos on a person taking an estate tail purchase, would (unless made a con tion precedent) be liable to be defeat by an enrolled conveyance, whi like a common recovery, destroys estates limited in defeasance of, as w as those which are made to take eff

this being, in fact, merely one of the consequences which a testator does not usually intend or foresee, when he employs words that, in legal construction, make the first taker tenant in tail, and which consequences, whether apprehended or not, do not authorize the testator's judicial expositor to divert his bounty into another channel, by giving to his language a strained construction, which would make it apply to a different class of objects (*r*).

Thus, in the case of *Nash* v. [*Coates*] (*s*), 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 for ever;* 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 (*t*), 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 a distinguished Judge attempting to found a distinction between the two cases, on the mere existence in one, and the absence in the other, of superadded words of limitation (*u*).

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 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 (*v*). And the same principle of course would apply where

after, the determination of, the estate tail.

(*r*) Per Lord Kingsdown, *Attorney-General* v. *Holiby*, 10 H. L. C. at p. 332, ac

(*s*) 3 B. & Ad. 839. [See also *Taylor* v. *Attwood*, 15 Q. B. 929, post, p. 1867.]

(*t*) See ante, pp. 1841, 1861.

(*u*) See judgment of Bayley, J., in *Doe* d. *Bosnall* v. *Harvey*, 4 B. & C. at p. 623, [and of Sugden, C., in *Montgomery* v. *Montgomery*, 3 Jo. & Lat. at p. 52; and see observations on the latter case, by Lord Macnaughten in *Van Grutten* v. *Foxwell*, [1897] A. C. at p. 673.]

(*v*) See Anderson in *Shelley's Case*, 1 [illegible] p. 95 b.

CHAP. XLIX.

limitation to the heirs *male* of the body is annexed to a limitati to the heirs *female*, and vice versâ; but the books contain no suc case, and the doctrine rests entirely on the position arguendo *Anderson* in *Shelley's Case*, which, however, has been since muc cited and recognized.

Position of Mr. Preston examined.

An eminent writer has laid it down (*w*), "that as often as t superadded words are included in, and do *not* in their extent exce the preceding words, but the words *heirs*, *&c.* in the several parts the gift are in terms, or at least in construction, of equal exten the latter words are surplusage, and the preceding words, as co nected with the limitation to the ancestor, will be taken to be wor of limitation."

The position, that the preceding words are words of limitati where the superadded words do *not* exceed them, seems to be t reverse of the established rule (*x*); the very case put by Anders as an instance of their being words of purchase is one in which t superadded words *narrowed* the preceding words; and, on th other hand, we have seen, that in all the cases in which the supe added words have been held to be inoperative they have been eith equal to, or more extensive than, the words of limitation upon whi they were engrafted (*y*).

Effect of superadded words of modification inconsistent with an estate tail.

II.—Words of Modification inconsistent with an Estate Ta —We next proceed to inquire as to the effect of coupling a limitati to *heirs of the body* with words of modification importing that th are to take concurrently, or distributively, or in some other mann inconsistent with the course of devolution under an estate ta as by the addition of the words "*share and share alike*," or "*tenants in common*," or "*whether sons or daughters*," or "*with regard to seniority of age or priority of birth*." In such cases, t great struggle has been to determine whether the superadded wo are to be treated as explanatory of the testator's intention to u the term *heirs of the body* in some other sense, and as descriptive another class of objects, or are to be rejected as repugnant to t estate which those words properly and technically create. It w be seen, by an examination of the following cases, that, after mu

(*w*) 1 Preston on Estates, p. 353.

[(*x*) And see Fea. C. R. p. 183. But see *Hamilton* v. *West*, 10 Ir. Eq. Rep. 75, stated Chap. LI. 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" not very intelligible. By an excess particularity, or, in other words, adding to the description, the clas narrowed. Both writers would t appear to be in substantial agreem on this question.]

(*y*) See ante, pp. 1887, 1888.

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 permitting words of a clear and ascertained signification to be cut down by expressions from which an intention equally definite could not be collected. The inconsistent clause shews 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 the case of *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, for ever, *as tenants in common, and not as joint-tenants*; and in case his said daughter should happen to die before twenty-one, or without having issue on her body lawfully begotten, then over; Lord *Kenyon*, and the other Judges of the Court of King's Bench, held, that the daughter took an estate tail.

"For ever as tenants in common, and not as joint-tenants."

So, in *Pierson* v. *Vickers* (*a*), where a testator devised his estates at B. unto his daughter A., and to the heirs of her body lawfully to be begotten, *whether sons or daughters, as tenants in common, and*

"Whether sons or daughters, as tenants in common," &c.

(*z*) 7 T. R. 531. 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.]

CHAP. XLIX.

not as joint-tenants; and in default of such issue, over; Lor *Ellenborough* and the other Judges of the Court of King's Bench held, on the authority of the last case, and *Doe* v. *Cooper* (*b*), tha the daughter took an estate tail.

Again, in the case of *Bennett* v. *Earl of Tankerville* (*c*), whe the devise was to the use of A. and his assigns for his life witho impeachment of waste, and, after his decease, to *the heirs of h body, to take as tenants in common and not as joint-tenants;* an in case of his decease without issue of his body, then over; S *W. Grant*, M.R., held that the devisee took an estate tail.

In such shares, &c., as F. should appoint.

So, in *Doe* d. *Cole* v. *Goldsmith* (*d*), where a testator devised h lands to his son F. to hold to him and his assigns for his natur life, and immediately after his decease the testator devised th same unto the heirs of his body lawfully to be begotten, in suc *parts, shares, and proportions, manner and form, as F. should by wi or deed devise or appoint*, and, in default of such heirs of his bod lawfully to be begotten, then *immediately after his decease* th testator devised the premises over to another son, J., in fee. It was held by the Court of Common Pleas, that F. took an estat tail. *Gibbs*, C.J., observed that it was the testator's evident inte that the estate should not go over to J. until all the "heirs of th body" of F. were extinct.

Observations.

In this and several of the preceding cases, much stress wa laid on the words "in default of issue," or "in default of heirs of th body," occurring in the devise over, or rather in the clause intro ducing such devise, as demonstrating a "general intent" that th estate was not to go over until a general failure of issue of the firs taker; but it is difficult to understand how this intention coul be rendered more distinctly and unequivocally apparent by suc referential language than by an *express* devise to these very objec [viz. "heirs of the body"].

In such shares as W. should appoint, *and if but one child*, &c.

We now proceed to the important case of *Jesson* v. *Wright* (e which was as follows. A testator devised to W. certain real estat for the term of his natural life, he keeping the buildings in tenan able repair; and after W.'s decease devised the same to the *hei of the body of W.* lawfully issuing, *in such shares* and proportion *as W.* by deed or will *should appoint*, and for want of such appoin

(*b*) 1 East, 229, stated Chap. LI.
(*c*) 19 Ves. 170.
(*d*) 7 Taunt. 209. 2 Marsh. 517.
(*e*) 2 Bligh, 1; from which the statement of the will is here taken. ["The only touchstone one can use in trying to separate the true metal from the dro is the ruling in *Jesson* v. *Wright*," p Lord Macnaughten. [1897] A. C. p. 673. See *Bridge* v. *Chapma* Notes of Cases Law Journal, 187 118.]

ment, then to *the heirs of the body of W. lawfully issuing, share and share alike, as tenants in common*, and if but one *child*, the whole to such only *child;* and for want of *such* issue, then over. It was held by the Court of King's Bench that W. took an estate for life only, with remainder to his children for life as tenants in common. A writ of error was brought in the House of Lords, which Court, after a very full argument, *reversed* the decision. Lord *Eldon* observed: "It is definitely 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 the Court below has proceeded upon the notion that no such paramount intent was to be found in the will." His lordship then read the devise, observing, that if he stopped at the end of the first devise to W., it was clear that he was to take for life only; if at the end of the first following words, "lawfully issuing," he would, notwithstanding the express estate for life, be tenant in tail: "and in order to cut down this estate," continued his lordship, "it is absolutely necessary that a particular intent should be found to control and alter it, as clear as the general intent here expressed. The words 'heirs of the body' will indeed yield to a particular intent that the estate shall be only for life, and that may be from the effect of superadded words, or any expressions shewing 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 for ever, and, therefore, that it must mean a person, or class of persons, to take by purchase; that the descendants in all time to come could not be tenants in common; that 'heirs of the body,'

Doe v. *Jesson* in K. B.; reversed in D. P.

Jesson v. *Wright.*

Lord Eldon's observations.

(*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 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. [See (1897) A. C. at p. 672 and at p. 684.

CHAP. XLIX.

Jesson v. *Wright.*

in this part of the will, must mean the same class of persons as th ' heirs of the body ' among whom he had before given the powe to appoint; and, inasmuch as you here find a child described a an heir of the body, you are therefore to conclude that heirs of th body mean nothing but children. Against such a constructio many difficulties have been raised on the other side; as, for in stance, how the children should take in certain events, as whe some of the children should be born and die before others com into being. How is this limitation, in default of appointment i such case, to be construed and applied? The defendants in erro contend, upon the construction of the words in the power, and th limitation in default of appointment, that the words ' heirs of th body ' mean some particular class of persons within the gener description of heirs of the body; and it was further strongly insiste that it must be children, because in the concluding clause of th limitation in default of appointment the whole estate is given one *child*, if there should be only one. Their construction is, th the testator gives the estate to W. for life, and to the children tenants in common for life. How they could so take, in many the cases put on the other side, it is difficult to settle. Childre are included undoubtedly in heirs of the body; and if there ha been but one child, he would have been heir of the body, and h issue would have been heirs of the body; but *because children a included in the words ' heirs of the body,' it does not follow that hei of the body must mean only children*, where you can find upon th will a more general intent comprehending more objects (*g*). The the words '*for want of such issue*,' which follow, it is said, mean f want of children; because the word *such* is referential, and th word *child* occurs in the limitation immediately preceding. O the other hand it is argued, that heirs of the body, being the gener description of those who are to take, and the words ' share an share alike as tenants in common,' being words upon which it difficult to put any reasonable construction, children would b merely objects included in the description, and so would an onl child. The limitation, ' if but one child, then to such only child being, as they say, the description of an individual who would b comprehended in the terms ' heirs of the body,' ' for want of suc issue,' they conclude, *must mean for want of heirs of the body.* the words ' children ' and ' child ' are so to be considered as merel within the meaning of the words *heirs of the body*, which word

[(*g*) See a similar clause similarly treated in *Dunk* v. *Fenner*, 2 R. & My. at p. 56

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."

Lord Redesdale.

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 *Coulson* v. *Coulson* (*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 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 overrule the legal sense of words of settled meaning. In other cases a similar power of appointment has been held not to overrule the meaning and effect of similar words. It has been argued, that heirs of the body

Lord Redesdale's statement of the principle of the decision.

(*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. *Marquis of Stafford*, 7 East, 521; *Doe* d. *Tooley* v. *Gunniss*, 4 Taunt. 313; and other cases stated post.

(*i*) 2 Stra. 1125.

(*k*) Infra.

(*l*) But see cases infra.

CHAP. XLIX.

cannot take as tenants in common; *but it does not follow that t testator did not intend that heirs of the body should take, because th cannot take in the mode prescribed.* This only follows, that havi given to heirs of the body, he could not modify that gift in the tw different ways which he desired, and *the words of modification a to be rejected.* Those who decide upon such cases ought not to re on petty distinctions, which only mislead parties, but look to th words used in the will. The words 'for want of *such* issue' a far from being sufficient to overrule the words 'heirs of the body' (*m*) They have almost constantly been construed to mean an indefini failure of issue, and of themselves have frequently been held t give an estate tail. In this case the words 'such issue' cannot b construed children, except by referring to the words 'heirs of th body,' and in referring to those words they shew another inte The defendants in error interpret 'heirs of the body' to mea children only, and then they say the limitation over is in default c children; but I see no ground to restrict the words 'heirs of th body' to mean children in this will."

Effect of limitation to preserve contingent remainders.

So in *Doe* d. *Bosnall* v. *Harvey* (*n*), where a testator devised h real *estate*, subject to his debts and legacies, to T. for the ter of his natural life, and after the determination of that estate, t A. and B. and their heirs, during the life of T. to preserve contingen remainders; and after the decease of T. the testator devised th same to and among all and every *the heirs of the body of T., a*

"As well female as male to take as tenants in common," &c.

well female as male, lawfully to be begotten, such heirs, as well femal as male, to take as tenants in common, and not as joint-tenants; an for default of such issue, over. The lands were gavelkind. I 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 inferre because they could not take in the particular mode prescribed by the testator, that therefore they were not to take at all."

"Equally to be divided amongst them, share and share alike."

Again, in the case of *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 o E.* by J. already begotten or to be begotten, to *be equally divided*

(*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 shews incontrovertibly they did not), then the words "for want of such issue" meant for want of such *children*. See p. 1895, n. (*k*).

(*n*) 4 B. & Cr. 610.

(*o*) 1 B. & Ad. 944.

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.

Devise of "estate" to heirs of the body, "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 for ever 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.

Some doubt was for a time cast on the scope of the decision in *Jesson* v. *Wright* by the observations of Sir E. Sugden in *Montgomery* v. *Montgomery* (*q*), but this doubt has now been entirely removed by the opinions of Lords Macnaughten and Davey in *Van Grutten* v. *Foxwell* (*r*), "and the question now in every case must be whether the expression requiring exposition, be it 'heirs' or 'heirs of the body,' or any other expression which may have the like meaning, is used as the designation of a particular individual or a particular class of objects, or whether, on the other hand, it includes the whole line of succession capable of inheriting" (*s*).

III.—Words of Limitation and of 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.

"Heirs male who shall live to attain twenty-one and his heirs."

Thus, in *Toller* v. *Attwood* (*t*), 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 for ever;* 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. 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. *Wright*, 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

(*p*) 4 Drew. 125. See also *Anderson* v. *Anderson*, 30 Bea. 209.
(*q*) 3 Jo. and Lat. 47.
(*r*) [1897] A. C. 658.
(*s*) Per Lord Macnaughten, [1897] A. C. at p. 677.
(*t*) 15 Q. B. 929. The trustees were held to take the fee, ante, p. 1818.

CHAP. XLIX.

[of the gift over rather favouring the conclusion of an estate tail i E., than of a limitation by purchase to her sons. The Court did no advert to the form of the limitation being "to *his* heirs and assigns, as shewing that one person only was intended to take at one tim as heir of the body, and as strengthening the conclusion that "hei of the body" must be held to be words of limitation in order t let in all the issue (*u*).

The clause in *Toller* v. *Attwood* which required "heirs" to b of full age (*v*), was no less inconsistent with a devolution by inheri ance than one that would make them tenants in common. Bu actual decision is not wanting on a clause of the latter kind in con bination with superadded words of limitation. Thus, in *Mills* v *Seward* (*w*), where a testator devised his real estate to A. for lif without impeachment of waste, with remainder to the heirs of th body of A. habendum to such heirs and his, her or their heirs an assigns for ever as tenants in common; and if A. should die unde twenty-one, but should leave heirs of his body surviving, then t such heirs of A. and his, her and their heirs and assigns for eve in like manner; but in case A. should die without leaving an such heirs of the body him surviving, then over. It was held b Sir W. P. Wood, V.-C., that neither the words importing a tenanc in common nor the superadded words of limitation were sufficien 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 even he could not leave issue more remote), and that the same con struction must be given to the words in the previous clause. Bu the V.-C. said that the fact that children would be included amon the heirs of the body did not make the phrase signify childre exclusively. He therefore held that the rule in *Shelley's Cas* applied, and that A. was tenant in tail.]

"Heirs of the body and their heirs as tenants in common."

Observations.

The preceding cases present many shades of difference, bu they *all* concur in establishing the principle, that words of incon

[(*u*) See Chap. LI.

(*v*) See similar modification in *Jack* v. *Fetherstone*, stated this Ch. ad fin.

(*w*) 1 J. & H. 733. In *Montgomery* v. *Montgomery*, 3 Jo. & Lat. at p. 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 (excep *Right* v. *Creber*, 5 B. & C. 866, whic he referred to a different ground); ther was not a single decision to be found where the words "heirs of the body" had been read as words of purchase, or the single ground that they were fol lowed by "and their heirs and assigns." See also per Kindersley, V.-C., 4 Drew at p. 133.

sistent modification engrafted on a limitation to heirs of the body are to be rejected. [Every case, therefore, in so far as it is inconsistent with the principles laid down by the House of Lords in *Jesson* v. *Wright* (*x*), *Roddy* v. *Fitzgerald* (*y*), and *Van Grutten* v. *Foxwell* (*z*), must be considered overruled. Such cases are *Doe* d. *Brown* v. *Holme* (*a*), *Doe* d. *Long* v. *Laming* (*b*), *Doe* d. *Hallen* v. *Ironmonger* (*c*), *Doe* d. *Strong* v. *Goff* (*d*), *Crump* d. *Woolley* v. *Norwood* (*e*), *Gretton* v. *Haward* (*f*), *Wilcox* v. *Bellaers* (*g*), and *Right* d. *Shortridge* v. *Creber* (*h*), all of which are discussed by Mr. Jarman in the earlier editions of this work.

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 control or explanation by the effect of superadded expressions, clearly demonstrating that the testator used those words in some other than their ordinary acceptation, and as descriptive of another class of objects. The rule established by those cases only requires a clear indication of intention to this effect. Where the words in question are accompanied by such an explanatory context, the devise is to be read as if the terms which they are explained to mean were actually inserted in the will (*j*).

Effect of clear words of explanation annexed to heirs of the body.

Accordingly, in *Lowe* or *Lawe* v. *Davies* (*k*), where a testator devised to B. and his heirs lawfully to be begotten, "that is to say, to his first, second, third, and every other son and sons successively, lawfully to be begotten of the body of the said B., and the heirs of the body of such first, second, &c.," it was held that B. took

Lowe v. *Davies*.

Heirs, "that is to say," &c.

[(*x*) 2 Bli. 1.
(*y*) 6 H. L. C. at p. 881.
(*z*) [1897] A. C. 658.
(*a*) 3 Wils. pp. 237, 241; 2 W. Bl. 777.
(*b*) 2 Burr. 1100. This case was critically overruled by *Doe* d. *Bosnall* v. *Harvey*, 4 B. and Cr. 610; see Lord Brougham's opinion; *Fetherston* v. *Fetherston*, 3 Cl. and F. 67.
(*c*) 3 East, 573.
(*d*) 11 East, 668.
(*e*) 7 Taunt. 362, 2 Marsh. 161.
(*f*) 6 Taunt. 94, 2 Marsh. 9.
(*g*) Hayes's Inquiry, p. 2.
(*h*) 5 B. & Cr. 866.
(*i*) *Marryat* v. *Townly*, 1 Ves. sen. 102.
(*j*) "The testator may conceivably shew by the context that he has used the words 'heirs,' or 'heirs of the body,' or 'issue,' in some limited or restricted sense of his own, which is not the legal meaning of the words, e.g. he may have used the words in the sense of children, or as designating some individual person who would be heir of the body at the time of the death of the tenant for life, or at some other particular time," per Lord Davey, [1897] A. C. p. 685.]
(*k*) 2 Ld. Ray. 1561, 2 Stra. 849, 1 Barn. B. R. 238.

but an estate for life; for the subsequent clause was explanatory of what "heirs" meant.

Lisle v. *Gray.*

"Heirs male of the body," explained to mean *sons.*

So, in the case of *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 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., shewing that the words "heirs male" in the latter clause meant *sons*, by relation to the preceding [limitation].

Goodtitle v. *Herring.*

Same construction.

Again, in the case of *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.

North v. *Martin.*

"Heirs of body" held to mean children.

[So, in *North* v. *Martin* (*n*), where by a marriage settlement lands were conveyed to the use of A., the intended husband, for life, with remainder to trustees to preserve contingent remainders, with remainder to B., the intended wife, for life, and after the decease of the survivor, to the use of the heirs of the body of A. on the body of B. to be begotten and their heirs, and if more children than one, equally to be divided among them, to take as tenants in common, and in default of such issue, then over. It was contended that, according to the authorities, particularly *Wright* v.

(*l*) 2 Lev. 223, T. Jo. 114, T. Ray., pp. 278, 315, [affirmed in Ex. Ch., Pollex. 582, cit. 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. 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. For some other instances of the same kind, see ante, p. 1565.

(*n*) 6 Sim. 266.

[*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.

Doe v. *Woodall.*

Heirs of body "in manner aforesaid," explained by preceding limitations.

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 it is 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.

Gummoe v. *Howes.*

Heirs of the body explained to mean children.

In *Gummoe* v. *Howes* (*p*), the devise was upon trust for 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 often as he, she or they

[(*o*) 3 C. B. 349; and see *Green* v. *Green*, 3 De G. & S. 480.

(*p*) 23 Bea. 184.

CHAP. XLIX.

[should attain his, her or their respective age or ages of twenty-one years; 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.

Jordan v. *Adams.*

Heirs male of the body held to mean sons, by mention of "their father."

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 shewn 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 Exchequer Chamber 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 forbad them to ascribe to the words of modification the effect claimed for them.]

Remark on preceding cases.

In all the preceding cases it will be seen that the testator had annexed to the term "heirs of the body" words of explanation which left no doubt of his having used the expression as synonymous with *sons*. These cases, therefore, may be supported without impugning the general principle, as stated by Lord *Alvanley* in the case of *Poole* v. *Poole* (*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.

[(*q*) 6 C. B. (N. S.) 748. 9 ib. 483. It is remarkable that no reference was made to *Shaw* v. *Weigh*, 2 Str. 798, stated Chap. LI., where, notwithstanding the word "mother" occurring in similar relation to "*issue*," the latter word was held a word of limitation. See also *Re Score*, 57 L. T. 40.]

(*r*) 3 B. & P. at 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, p. 1893, seq.

On the other hand, in the case of *Jones* v. *Morgan* (, it was decided, and that in perfect consistency with the princi of the cases just stated, that a devise to W. for life, without impeachment of waste, and after his decease to the use of the heirs male of the body of W. lawfully begotten, *severally, 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."

Heirs male of the body, "severally, respectively, and in remainder, the one after the other."

So, in *Poole* v. *Poole* (*t*), where a testat ed all his al estate to the use of trustees, in trust for son durin is life, and also upon trust to preserve conti emainders, a after his decease in trust for the several *le of such* lawfully issuing, so that the elder of *such so* e heirs male of his body should always take before the yo the heirs male of his body, remainder to the second, third , and other son and sons of the testator for their respecti ves, and also upon trust to preserve, remainder in trust for t everal eirs male of their bodies lawfully issuing, so as the eld f such and the heirs male of his body should take before yo such son and the heirs male of his body, remaind to his first and every other daughter for their lives, and upon tr to preser remainder to the several heirs male of their respecti bodies, so that the elder of such daughters and the heirs male of her bod ld alw ys be preferred to the younger of such da ters as male of her and their body and bodies. The testat charged the estates with certain portions, and devised them in ilure of such issue by him as aforesaid, but not otherwise, t his nephew A. for life, and upon trust to preserve, trust for the first and other son and sons of A., as the d be in seniority of age and priority of birth, and the several of their respective bodies lawfully issuing, so that the eld ch sons and the heirs of his body should be preferred to the r of the same sons and the heirs of his and their body and bo s. 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

"Such sons" construed *heirs male* upon the effect of the whole will.

(*s*) 1 B. C. C. 206. (*t*) 3 B. & P. 620.

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.

Remarks upon *Poole* v. *Poole*.

In this case the context certainly much assisted the construction adopted by the Court, for as the other sons of the testator, as well as his daughters, took successive estates tail, it was scarcely supposable that he could intend the first son to have only an estate for life. To have made such a difference between the sons would have violated the general plan of the will. The 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.

To W. and to his heirs male, the elder son surviving and the heirs male of his body always to be preferred, &c.

Again, in the case of *Jack* v. *Fetherston* (*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 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 for ever." The House of Lords held, that W. took an estate tail male. Lord C.J. *Tindal* declared the unanimous opinion of the Judges to be, that the present case was governed by the rule laid down by Lord *Alvanley* in *Poole* v. *Poole*, "that the first taker shall be held to have an estate tail where the devise to him is followed by a limitation to him and the heirs of his body, except where the intent of the testator has appeared so plainly to the contrary that no one could misunderstand it." Here the subsequent words were not wholly incompatible with an estate tail. If W. took an estate tail, the elder son surviving and the heirs male of his body would be preferred to the second or the younger son, and any difficulty created

(*u*) 9 Bligh. N. S. 237, [3 Cl. & Fin. 67 (*Fetherston* v. *Fetherston*), Sug. Law of Prop. 254.]

by the words referring to the majority of the devisees occurred equally whether the estate tail was in W. or in his sons.

By contrasting *Lowe* v. *Davies* and *Lisle* v. *Gray* with *Jones* v. *Morgan*, and *Goodtitle* v. *Herring* with *Poole* v. *Poole* and *Jack* v. *Fetherston*, the limits of the doctrine of the respective cases will be perceived.

Declaration that devise to heirs of the body was intended to be *in strict settlement.*

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 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 [illegible]own right heirs for ever; and the Court of C. P. certified [illegible]on that these ambiguous words did not prevent the devi[illegible]n taking estates tail under the prior words of devise; which [illegible]tificate was afterwards confirmed by Lord *Langdale*, M.R., who observed, "In the present case there is no executory trust. It is a case of direct devise of the legal estate, and in terms which, according to the rules of law, give an estate tail to the plaintiff; and it does not appear to me that the words 'in strict settlement' can have the legal effect of altering that estate. An executory trust would have admitted greater latitude of interpretation, and the effect of the words might have been different."

(*x*) 5 Scott, 223, 4 Bing. N. C. 1, 1 Bea. 59.

CHAPTER L.

RULE IN WILD'S CASE.

I. *Rule in Wild's Case* 19
II. "*Child*," "*Son*," "*Daughter*," &c., *where used as nomina collectiva* 19

Children, where a word of limitation.

I.—Rule in Wild's Case.—Mr. Jarman states the rule (or rat
the first branch of the rule) thus (*a*): "The rule of constructi
commonly referred to as the doctrine of *Wild's Case* (*b*), is th
that where lands are devised to a person *and his children, and*
has no child at the time of the devise, the parent takes an estate ta

Rule in *Wild's Case*.

1. When no child at the time of the devise.

for it is said, 'the intent of the devisor is manifest and certain t
the children (or issues) should take, and as immediate devisees th
cannot take, because they are not *in rerum naturâ*, and by way
remainder they cannot take, for that was not his (the devisor
intent, for the gift is immediate; therefore such words shall
taken as words of limitation.' In support of this position, a c
is referred to, as reported by Serjeant *Bendloes* (*c*), in which
devise was to husband and wife, 'and to the men children of th
bodies begotten,' and it did not appear that they had any is
male at the time of the devise, and therefore it was adjudged t
they had an *estate tail* to them and the heirs male of their bod
The principle has been followed in several subsequent cases.

"Thus, in *Davie* v. *Stevens* (*d*), where a testator devised to

(*a*) First ed. Vol. II. p. 307. As to the second branch, see post, p. 1911. As to devises to "sons," see post, p. 1918.

(*b*) 6 Rep. 16 b; 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 Chap. LI. The rule (which is not stated in Gouldsb. 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. *Liversay* *Vaughan*, 5 B. & Ald. 464; *Beauc* v. *Usticke*, [1880] W. N. 14.

(*c*) 1 Bulstr. 219, Bendl. 30.

(*d*) Dougl. 321. "*Wharton* v. *ham*, 2 W. Bl. 1083, is generally cla with these cases; but as the devise to J. W. and his sons *in tail male*, clear that he took an estate tail wit construing 'sons' as a word of li tion; and the only consequence o non-existence of a son was his excl from taking immediately under devise." (Note by Mr. Jarman.)

son S., when he should accomplish the full age of twenty-one years, the fee simple and inheritance of Lower Shelstone, *to him and his child or children* 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 (*e*).

To A. *and his child or children* for ever.

"So, in the case of *Seale* v. *Barter* (*f*), 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 (*g*).] 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

To J. *and his children* lawfully to be begotten.

(*e*) * "In *Hodges* v. *Middleton*, Dougl. 431, Lord *Mansfield* and the Court of King's Bench inclined to think that where a testator devised to A. for life, and after her death to *her children*, upon condition that she or they constantly paid 30*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 30*l.* a year would have enlarged their devise to a fee simple. See sup. p. 1803." (Note by Mr. Jarman.)

*Observations upon *Hodges* v. *Middleton*.

(*f*) "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 the case of *Heron* v. *Stokes*, 2 D. & War. at p. 107, Sir *Edward 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 shew that this eminent judge considered that the authorities would have left him free to adopt such a construction, if the point had called for decision. He would doubtless have felt himself bound to follow, in regard to real estate, the often-recognized rule in *Wild's Case*, either with or without the modification suggested. With respect to personalty, perhaps, the authorities would not be found to present so formidable an obstacle to the adoption of the doctrine of the Irish Chancellor." (Note by Mr. Jarman.) Vide post, p. 1915.

(*g*) See 2 B. & P. 485.

CHAPTER L.

not involve the inquiry whether the devisee had children or no at the time), held that J. took an estate tail, the Chief Justice (Lord *Alvanley*) expressly intimating that the Court gave no opinion as to what would have been the construction if there had been children born at the time of the devise.

Devise in remainder to B. and to his children lawfully begotten for ever.

"Again, in the recent case of *Broadhurst* v. *Morris* (*h*), where the testator devised all his share of his two estates in W. to his daughter E. for life, and at her decease to F., her husband, during his life; and at the decease of his said son-in-law F. he directed that the whole legacy to him should go to his (testator's) grandson, B., *and to his children, lawfully begotten for ever;* but, in default of such issue *at his decease*, then over. 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 'for ever' the children might take the fee; but the Court of K.B. certified (the case being from Chancery) that the devise conferred an estate tail on B.

"Thus, the cases have established, it should seem, that a devise to a man and his children, he having none at the time of the devise gives him an estate tail.

Suggested modification of the terms of the rule.

"*The time of the devise* appears to denote rather the period of the *making* of the will, than the time of its *taking effect* (*i*), and yet it is impossible not to see that the material period in regard to the evident design of the rule, is the death of the testator, when the will takes effect.

"The object of the rule manifestly is, that the testator's intention in favour 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 favour 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

(*h*) 2 B. & Ad. 1. See also *Clifford* v. *Koe*, 5 A. C. 447.

(*i*) See acc. *Seale* v. *Barter*, stated above; and per Malins, V.-C., *Grieve* v. *Grieve*, 36 L. J. Ch. at p. 934.

which that construction has been resorted to did not exist. Indeed, [if the will is not within the Wills Act] a still more absurd consequence [may follow] from an adherence to the literal terms of this rule of construction in the latter case; for suppose there is no child at the making of the will, but a child subsequently comes into existence, who survives the testator, and the parent does not, the devise would fail altogether, notwithstanding the existence of a child at the death of the testator, if it were held that the parent would have been tenant in tail (*j*). These circumstances actually occurred in *Buffar* v. *Bradford* (*k*), where a testator in a certain event gave real and personal estate to A. *and the children born of her body* (*l*). A. having died in the testator's lifetime, leaving a child, who was born after the making of the will, *when A. had no child*, it was contended, on the authority of *Wild's Case*, that the devise had lapsed; but Lord *Hardwicke* held the child to be entitled. His lordship said, 'It must be allowed that children in their natural import are words of purchase, and not of limitation, unless it is to comply with the intention of the testator, *where the words cannot take effect in any other way*.'

Application of the rule to future devises.

"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 (*m*), 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 the case of *Broadhurst* v. *Morris* (*n*), 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."

(*j*) But now see sec. 32 of the Wills Act.

(*k*) 2 Atk. 220.

(*l*) "In some of the early cases, an absurd distinction is taken between a gift to children and a gift to children *of the body*, as if the latter more strongly pointed to an estate tail. Even Lord *Hale* seriously advanced it in *King* v. *Melling*, 1 Vent. 225. This is indeed 'spelling a will out by little hints.' See same judgment, at p. 230." (Note by Mr. Jarman.)

(*m*) Ante, p. 1667.

(*n*) Ante, p. 1908; and see *Scott* v. *Scott*, 15 Sim. 47.

CHAPTER L.

Rule excluded by context.

Lord Hardwicke's decision in *Bufjar* v. *Bradford* (*o*) is not to
understood as depending on any such modification of the rule.
refused to apply the rule in that case, because the context shew
that it would disappoint the intention. The gift was to t
testator's sister during her widowhood; then the property was to
valued and divided into eight parts, four of which the testator ga
to A. and the children born of her body; but if any part should
thought too highly valued, "such part shall, when the time
possession comes, go to A. and her children, because they will ha
then four of the eight parts." A. having died in the testato
lifetime, leaving a child who was born after the date of the wi
when A. had no child, it was contended, on the authority of *Wild
Case*, that the devise had lapsed. But Lord Hardwicke held t
child to be entitled. He said, "It is the time of possession in t
present case which takes it out of the reasoning in *Wild's Cas*
for here A. and her children are to have four eighths, and are
take at the same time as joint-tenants. . . . The child, being bo
in the lifetime of the testator, would have taken with his moth
as joint-tenants, if she had lived; as she is dead he shall tak
the whole by way of remainder." This, as pointed out by Lo
Cranworth (*p*), is "a conclusion founded, not on the notion th
there could be a varying interpretation of the will according
circumstances which might happen after it was made, but on i
evident meaning when it was made." So, in *Sparling* v. *Parker* (*q*
where the gift was of personalty to be laid out in land "to A. an
to his first and other sons after him in the usual mode of succession,
it was held by Romilly, M.R., that A. (who was a bachelor) too
an estate for his life only.

In *Re Buckmaster's Estate* (*r*) real estate was devised to A. an
B., "share and share alike, and, in their respective proportions
to their children, or according to their wills." Kay, J., con
sidered that the rule in *Wild's Case* did not apply, and hel
that A. and B. took the fee as tenants in common, with a
executory devise over at the death of each of them to hi
children, if any, or to his devisees.

(*o*) Supra.

(*p*) 10 H. L. C. at p. 180. See also per Wood, V.-C., 2 K. & J. at p. 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.

(*q*) 29 Bea. 450. And in *Grieve* v. *Grieve*, L. R., 4 Eq. 180, testatrix gave house to her two nieces (then spinsters) "and to their children, and if the have not any," over; "the furniture t go with the house." The gift of th furniture was held by Malins, V.-C., t shew that the nieces were not intende to take estates tail in the house.

(*r*) 47 L. T. 514.

Rule in *Wild's Case.*

2. When there are children at the time of the devise.

Mr. Jarman goes on to state the second branch of the rule (*s*): "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* (*t*), 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.'

"And in conformity to this doctrine seems to be the case of *Oates* d. *Hatterley* v. *Jackson* (*u*), where a testator devised to his wife J. for her life, and after her decease to his daughter B. *and her children* on her body begotten or to be begotten by W. her husband *and their heirs* for ever. 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*.

To A. and her children, and their heirs.

"But in the more recent case of *Jeffery* v. *Honywood* (*v*), 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 for ever, 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 *John Leach*, V.-C., held that A. had a life estate only; he said, 'There are two gifts, one to the mother, without words of limitation superadded, and another to her children, their heirs and assigns; and these two gifts can only be rendered sensible by construing, as the words import, a life estate to the mother, and a *remainder in fee* to the children. In *Oates* v. *Jackson* the mother was, by the plain force of the expression, comprehended in the limitation in fee.'

Children held to take by way of remainder.

(*s*) First ed. Vol. II. p. 312.

(*t*) 6 Rep. 16 b. The plural "they" and "their" appears to be used by mistake.

(*u*) 2 Stra. 1172. See also *Buffar* v. *Bradford*, 2 Atk. 220; *Caffary* v. *Caffary*, 8 Jur. 329.

(*v*) 4 Mad. 398. See also *Newman* v. *Nightingale*, 1 Cox, 341, stated ante, p. 1316.

CHAPTER L.

Observations upon *Jeffery* v. *Honywood*.

"The difference of expression, however, in the two cases extremely slight. In *Jeffery* v. *Honywood*, the gift is 'to A. an *to* all and every the child and children.' In *Oates* v. *Jackson* 'to A. and her children.' The only differenee eonsists in th word 'to,' and, aceording to the report of the latter ease in Moder Reports (*w*), even this slight difference is extinguished, the expressio there being 'to B. and *to* the children of her body' (*x*).

"Even supposing the words of the limitation not to apply t the mother, (in which case, however, it might have been eontende that she took the fee by force of the word 'estates,') it is difficul to see upon what ground the devise to the children could be hel to be *a remainder* expeetant on the mother's estate, and not to b immediate or in possession as to all the objects. His Honor' objection to the latter construction is, that 'after-born ehildre would be included in this devise, and it is a singular intention t impute to a father, that he means his daughter's personal interes in an estate should continually diminish upon the birth of a new child.' But, according to all the authorities (*y*), ineluding a decision of the Vice-Chancellor himself (*z*), an *immediate* gift *t children vests exclusively in the objects living at the death of the testator*.

"The case of *Jeffery* v. *Honywood* seems to be ineonsistent with and must therefore be considered as overruled by the case of *Broadhurst* v. *Morris* (*a*) already stated. It is true that the former case was cited with seeming approbation in the case of *Bowen* v. *Scowcroft* (*b*) by Mr. Baron *Alderson*, who founded the latter deeision mainly on its authority; but the cases are, it is submitted, distinguishable."

"Children" held to be a word of limitation, notwithstanding the existence of children.

The second branch of the rule will not, any more than the first, be applied where it would defeat the intention as shewn by the eontext. To give effeet to the intention so manifested the Courts

(*w*) 7 Mod. 439.

(*x*) "It has been justly remarked, however, by a recent writer, that the substitution of the words 'his, her, and their' for the simple 'their' of *Oates* v. *Jackson*, shewed the testator's idea that it was probable [qu. possible] that only one, and that either male or female, might become entitled to his bounty; whereas, if he had intended the mother to take as tenant in common in fee, in no case would the estate have gone to one male. Prior on Construction of Issue, &c., pl. 54." (Note by Mr. Jarman.) See also *Re Moyle's Estate*, 1 L. R. Ir. 155 ("to M. and *to* any child, &c.").

(*y*) *Heathe* v. *Heathe*, 2 Atk. 121; *Singleton* v. *Singleton*, 1 B. C. C. 542, n., and other cases cited ante, p. 1664.

(*z*) *Scott* v. *Harwood*, 5 Mad. 332.

(*a*) 2 B. & Ad. 1. See acc. per Wood, V.-C., 2 K. & J. at p. 673, and *Cormack* v. *Copous*, 17 Bea. at p. 403.

(*b*) 2 Y. & C. 640, referred to post, Chap. LVI. ad fin.

will construe "children" a word of limitation, notwithstanding the existence of children. Thus, in *Wood* v. *Baron* (*c*), 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, for ever; 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.

Devise to A. as a "place of inheritance to her and her children, or her issue."

So in *Webb* v. *Byng* (*d*), 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., Archbishop 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 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 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.

Devise to A. and her children of mansion house with articles as heirlooms.

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 (*e*). And a devise "to my daughter A. to her and her children for ever," 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

"To A. and his children in succession."

"To A., to her and her children."

(*c*) 1 East, 259.

(*d*) 2 K. & J. 669; affirmed 8 D. M. & G. 633, and 10 H. L. C. 171 (*Byng* v. *Byng*).

(*e*) *Earl of Tyrone* v. *Marquis of Waterford*, 1 D. F. & J. 613. See *Re Childe*, [1883] W. N. 48 ("eldest and other sons in succession"). *Studdert* v. *Von Steiglitz*, 23 L. R. Ir. 564; *Re Pennefather*, [1896] 1 Ir. 249.

CHAPTER L. " and her children " were words of purchase and not of limitati " To her," &c., was read as the tenendum defining what estate was to take by the previous devise (*f*).

Mr. Jarman continues (*g*): " In *Seale* v. *Barter* (*h*), Lord *Alvan* observed that according to the report of *Wild's Case* in *Moore* two of the judges thought it was an estate tail in him, though th were children at the time of the devise; but probably it did n occur to his Lordship that the devise in that case was to A. and wife, and *after their death* to their children, which it is now admitt on all hands gives an estate for life to the parents, with remainc to their children; so that the notion as to its being an estate t was clearly untenable (*j*). Had the observation been applied a devise to A. and his children simply, it might have had mo weight.

Rule whether applicable to *bequests* of personalty.

" The word ' children ' seems to have been construed as a word limitation (in a very obscure will) in the case of *Doe* d. *Gigg* v. *Bra ley* (*k*), where a testator bequeathed a *leasehold* property to A. and for life, share and share alike, with survivorship for life to A., a after their decease to the children of A., ' to be equally divid between them, share and share alike, and to the survivor of the *and their children* '; it was held that these words were words limitation, applicable to the gift to the children, (though the were children of such children living at the death of the testator (*l* and accordingly it was to be construed as a gift to the childr absolutely (*m*), with survivorship between them for *life* (*n*).

" This case has too much of peculiarity to authorize any gener conclusion. Lord *Hardwicke*, in *Buffar* v. *Bradford* (*nn*), seems have been averse to the application of the rule in *Wild's Case*

(*f*) *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. 1701); 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.

(*g*) First ed. Vol. II. p. 315.

(*h*) 2 B. & P. 485, ante, p. 1907.

(*i*) 397, pl. 519, nom. *Richardson* v. *Yardley*.

(*j*) See also his Lordship's observations upon *Hodges* v. *Middleton*, stated ante, in *Seale* v. *Barter*, 2 B. & P. at p. 494, which are susceptible of the same answer. But a devise to A. for life, remainder to " his children and so for ever, and for want of such children over, is an estate tail in A., *Trash Wood*, 4 My. & Cr. at p. 328.

(*k*) 16 East, 399. See also *Snowb* v. *Procter*, 2 Y. & C. C. C. 478 children and their children after them

(*l*) It does not appear whether an were living at the date of the will possibly there were, as one of th children of A. was then married.

(*m*) See rule discussed Chap. XXXII

(*n*) In *Re Moyle's Estate*, 1 L. R Ir. 155, it was not suggested tha the rule could not be applied t renewable leaseholds, but the decisio was against an estate tail.

(*nn*) Ante, p. 1909.

personal estate, where, he said, the effect of construing *children* to be a word of limitation must be, that the first taker would have all, and the same reluctance is perceptible in the more recent cases of *Stone* v. *Maule* (*o*), elsewhere stated, and *Heron* v. *Stokes* (*p*). [In *Audsley* v. *Horn*, Lord Campbell decided that the rule was not generally applicable to personal estate (*q*).]

Rule not applicable to personal estate.

"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" (*r*).

Bequests of personal annuities.

There is one class of cases, however, where the point 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 (*s*); yet where an annuity is so given, the annuitant takes only for life (*t*).

What context will give life interest to parent with remainder to the children.

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 remainder. Thus, in *Crawford* v. *Trotter* (*u*) (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 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* (*v*), 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*

(*o*) 2 Sim. 490.

(*p*) 2 Dr. & W. 89, Sug. Law of Prop. 236.

(*q*) 1 D. F. & J. 226, affirming 26 Bea. 195; *Re Wilmot*, 76 L. T. 415; *Ward* v. *Grey*, 26 Bea. 485; *Scott* v. *Scott*, 11 Ir. Ch. R. 114; *Re Jones*, [1910] 1 Ch. 167; and Tudor's Leading Cases, 4th ed. pp. 365-367.

(*r*) 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.

(*s*) See Chap. XXXI.

(*t*) Ib. As a personal annuity cannot be entailed, the limitation to children, if construed the rule in *Wild's Case*, would create a conditional fee, *Stafford* v. *Buckley*, 2 Ves. sen. 170.

(*u*) 4 Madd. 361.

(*v*) 2 Sim. 485.

and her children; Sir L. Shadwell, V.-C., held the 5,000*l.* to be trust for the daughter for life, and after her decease for all ... children, whether born in the testator's lifetime or after his decease.

Again, in *Vaughan* v. *Marquis of Headfort* (*w*), a testator bequeathed a legacy to A. and his children, *to be secured for their* 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 shews 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 have in equal shares, and if but one, then the whole to such one; 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 (*y*): so, where the children are to take in unequal shares, which is incompatible with a joint tenancy with the parent (*z*); or where the testator appears to contemplate that their title will arise when 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, "with comprehending the husband of A. and B. unless they should die without issue" (*a*), or to A. "for the benefit of herself and such children as she then had or thereafter might have by her then husband" (*b*); 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 (*c*). The exclusion 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 (*d*) that "generally ...

(*w*) 10 Sim. 639. See also *Combe* v. *Hughes*, L. R., 14 Eq. 415; *Ogle* v. *Corthorn*, 9 Jur. 325.

(*x*) *Garden* v. *Pulteney*, 2 Ed. 323, Amb. 499.

(*y*) *Audsley* v. *Horn*, 25 Bea. 195, 1 D. F. & J. 226.

(*z*) Per James, V.-C., *Armstrong* v. *Armstrong*, L. R., 7 Eq. at p. 522, approved by Lord Hatherley, in *Newill* v. *Newill*, L. R., 7 Ch. at p. 257.

(*a*) *Dawson* v. *Bourne*, 16 Bea. 29. See also *Lampley* v. *Blower*, 3 Atk. 396, post, Chap. LI.; and cf. *Fisher* v. *Webster*, L. R., 14 Eq. 283.

(*b*) *Jeffery* v. *De Vitre*, 24 ... 296.

(*c*) *Re Owen's Trusts*, L. R., 12 ... 316. See also *Cator* v. *Cator*, 14 ... 463; and *Parsons* v. *Coke*, 4 Drew. ... where a gift of accruing shares ... governed by a gift of original shar...

(*d*) *Salmon* v. *Tidmarsh*, 5 Jur. ... 1380, where, however, *on the co...* the wife and children were held ... take concurrently. See also *Wa... Grey*, 26 Bea. 485; Lord St. Leon... remarks cited ante, p. 1907, n.

a gift to a wife and her children, if there was nothing to denote the proportions in which they were to take, the most natural disposition was to give the property to the wife for her l'fe, and afterwards to her children," and he cited *Crockett* v. *Crockett* (*e*) 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 (*f*), and throughout his judgment it appears to be assumed that in 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* (*g*), 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* (*h*), 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.*

and the judgment of Joyce, J., in *Re Jones*, [1910] 1 Ch. 167. 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' Trust*, L. R., 12 Eq. 218; *Cator* v. *Cator*, 14 Bea. 463.

(*e*) 2 Phill. 553, stated ante, p. 893.

(*f*) See 2 Phill. pp. 555, 556.

(*g*) 5 Sim. 458.

(*h*) 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 ib. 184; *Read* v. *Willis*, 1 Coll. 86; *Cunningham* v. *Murray*, 1 De G. & S. 366; *Gordon* v. *Whieldon*, 11 Bea. 170; *Beales* v. *Crisford*, 13 Sim. 592; *Mason* v. *Clarke*, 17 Bea. 126; *Curtis* v. *Graham*, 12 W. R. 998; *Bibby* v. *Thompson*, 32 Bea. 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 Seyton*, 34 Ch. D. 511; *Re Davies*, [1892] 1 Ch. 90.

But in *Re Byrne's Estate* (*i*), where there was a similar gift, followed by a power to the wife to fix the children's portions, it was held that the wife and children did not take as joint-tenants.

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 (*j*), unless it can be collected that the declaration is intended to affect the whole fund (*k*).

Devises to *sons* not distinguishable from devises to *children*.

Mr. Jarman continues (*l*): "The same principle which regulates devises to children applies to devises to *sons*, the only difference being that the estate tail, which the latter term, where used as nomen collectivum, creates, will be an estate tail *male* (*m*). A devise to A. for life, and after his decease to his sons, of course gives to A. an estate for life, with remainder to his sons as joint tenants, which remainder will be either for life or in fee, according to the fact whether the will is regulated by the old or the new law." But a devise to "the eldest son of B. during his life, and then to his sons and their sons in succession" has been held to give the eldest son of B. an estate in tail male (*n*).

The rule in *Wild's Case* has no application where the gift or devise to the children would, without reference to the rule, be a gift in succession to and not concurrently with their parent (*nn*).

"Son," "child," "daughter," &c., where used as nomina collectiva.

II.—"Child," "Son," "Daughter," &c., where used as nomina collectiva.—Mr. Jarman continues (*o*): "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.

(*i*) 29 L. R. Ir. 250. Compare *Re Newsom's Trusts*, 1 L. R. Ir. 373 (where under a gift to S. P. for the sole and separate use of herself and her family it was held that S. P. and her children took as joint-tenants). Cf. *Bradshaw* v. *Bradshaw*, [1908] 1 Ir. 288, where the mother had a power of appointment.

(*j*) *De Witte* v. *De Witte*, 11 Sim. 41; *Bustard* v. *Saunders*, 7 Bea. 92, 7 Jur. 986; *Fisher* v. *Webster*, L. R., 14 Eq. 283.

(*k*) *Froggatt* v. *Wardell*, 3 De G. & S. 685 (a somewhat special case). See also *French* v. *French*, 11 Sim. 257; *Bain* v. *Lescher*, ib. 397; which however in this respect are similar to *De Witte* v. *De Witte* and *Bustard* v. *Saunders*, sup. A declaration that the issue should take vested interests at twenty-one will not prevent the parent and children taking concurrently, *Re Wilmot*, 76 L. T. 415.

(*l*) First ed. Vol. II. p. 317.

(*m*) 1 Bulst. 219, Bendl. 30.

(*n*) *Re Buckton*, [1907] 2 Ch. 406.

(*nn*) *Re Jones*, [1910] 1 Ch. 167.

(*o*) First ed. Vol. II. p. 317.

"One of the earliest cases of this kind is *Bifield's Case* (*p*), where, after a devise to 'A., and, if he dies *not having a son*, then' over to the heirs of the testator, it was held that the word 'son' was used as nomen collectivum, and that the devise created an entail.

To A., and if he die *not having a son*.

"So, in *Milliner* v. *Robinson* (*q*), 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 the case of *Robinson* v. *Robinson* (*r*), where the testator devised his real *estate* to L. for the term of his natural life, and no longer, provided he altered his name and took that of R., and lived at the testator's house at B., and after his decease, *to such son as he should have lawfully to be begotten* taking the name of R., and for default of *such* issue, then over to W. in fee; and the testator willed that L. might present whom he pleased to any vacancy in any of the testator's presentations during his (L.'s) life, and that bonds of resignation should be given in favour of L.'s children who were designed for holy orders; and, after the same should be disposed of as aforesaid, gave the *perpetuity* of the presentations to the said L. in the same manner and to the same uses as he had given his estates. On a bill to establish the will, Sir *Joseph Jekyll*, M.R., held that L. was entitled for life, remainder to his eldest, and but one, 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 judges of the Court of King's Bench, on a case sent to them by Lord *Hardwicke*, certified their opinion 'that L. must by necessary implication, to effectuate the manifest general intention of the testator, be construed to take an estate in tail male.' The Lords Commissioners, who succeeded Lord *Hardwicke* in the custody of the great seal, confirmed this certificate; and their decree was affirmed after great consideration and with the concurrence of all the judges by the House of Lords.

To A. for life, and after his death "to such son as he shall have."

"The authority of this case has long been beyond the reach of controversy, not only from its having been decided by the highest

Remark on *Robinson* v. *Robinson*.

(*p*) Cited by Hale, C.J., in *King* v. *Melling*, 1 Vent. 231. See also *Murphy* v. *Johnston*, 6 Ir. Ch. 230; *Andrew* v. *Andrew*, 1 Ch. D. 410; with which compare *Bennett* v. *Bennett*, 2 Dr. & Sm. 266, stated below. "Die without having a son" is a phrase the construction of which seems now to be governed by 1 Vict. c. 26, sec. 29, as to which see Chap. LII.

(*q*) 1 Moore, 682, pl. 939, said by Jessel, M.R. (*Beauchant* v. *Usticke*, [1880] W. N. 14), to be the same as *Bifield's Case*. See also *Re Bird and Barnard's Contract*, 59 L. T. 166 ("leaving no son").

(*r*) 1 Burr. 38, 2 Ves. sen. 225, 1 Kenyon, 298, 3 B. P. C. Toml. 180 (*Robinson* v. *Hicks*).

CHAPTER I.

tribunal, but in consequence of its frequent recognition. L
Kenyon founded a great number of decisions (*s*) upon it, and thou
his lordship did not invariably advert to the true principle (so
times laying an undue stress on the words 'in default of *s*
issue,' which a long line of cases has established to be mer
referential (*t*)), yet, in *Doe* v. *Mulgrave* (*u*), he distinctly treat
the case a standing on the ground to which it has been h
referred.

To A., and if she marries and has a son, then to that son.

"Again, in the case of *Wallish* v. *Mellish* (*v*), where the devise was
these words: 'Hamels to go to my daughter C. M. as follows: *in c*
she marries and has a son, to go to that son; in case she has m
than one daughter at her death, or her husband's death, *and*
son, to go to the eldest daughter; but in case she has but o
daughter, or no child at that time, I desire it may go to my brot
W. M.' In a subsequent part of his will the testator added, 'Mrs.
to receive £200 a-year from C. M., during the life of Mrs. P.' T
question was what estate C. M. took in Hamels. It was co
tended for her, on the authority of *Wight* v. *Leigh* (*w*), *Wharton*
Gresham (*x*), *Chorlton* v. *Craven* (*y*), *Sonday's Case* (*z*), and *Wyld*
Lewis (*a*), that she took an estate tail. On the other side it w
insisted that C. M. took the fee by the effect of the annuity ma
payable by her (*b*), and which fee was defeasible on either of thr
events: first, if she married, and had a son, it was to go to th
son; secondly, if she had more than one daughter and no son,
was then to go to the eldest daughter; and, thirdly, if she had
child at all (or, it seems, if she had only one daughter), it was to
to W. M. The Court, however, held that C. M. took an estate t

"Son," held to be a word of limitation.

male. *Bayley*, J., said, 'It may be collected from the authoriti
that if the word *son* be used, not as *designatio personæ*, but with
view to the whole class, or as comprising the whole of the ma
descendants, severally and successively, then it is the manife
intention of the testator to give an estate tail; and it is equal

(*s*) See *Hay* v. *Coventry*, 3 T. R. at p. 86; *Doe* v. *Applin* 4 ib. at p. 87; *Denn* d. *Webb* v. *Puckey*, 5 ib. at p. 303; *Doe* d. *Candler* v. *Smith*, 7 ib. at p. 533; *Doe* d. *Bean* v. *Halley*, 8 ib. at p. 8; *Doe* d. *Cock* v. *Cooper*, 1 East, at p. 234.

(*t*) See post, Chap. LII. "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." (Note by Mr. Jarma

(*u*) 5 T. R. 321.

(*v*) 2 B. & Cr. 520. Examine t case of *Seaward* v. *Willock*, 5 East, 19 in reference to this doctrine.

(*w*) 15 Ves. 564, post.

(*x*) 2 W. Bl. 1083: ante, p. 1906, n. (

(*y*) Cit. 2 B. & Cr. 524, post, p. 192

(*z*) 9 Rep. 127.

(*a*) 1 Atk. 432, post.

(*b*) "And other grounds which we clearly inadequate." (Note by M Jarman.)

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 it had stopped here.' *Holroyd*, J., said, the word 'son' should be read *any son*. The Court afterwards certified, 'that C. M. took an estate in tail male, with a reversion in fee (*c*), subject to other estates created by this will.'

Remark on *Mellish* v. *Mellish*.

"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 favour of the *eldest* daughter, of course, would not operate to confer on the parent an estate tail which would descend to daughters.

"Son" held to be a word of limitation.

"Again, in the case of *Doe* d. *Garrod* v. *Garrod* (*d*), where a testator, by his will devised thus:—'As to my worldly estate, I dispose thereof as follows: I give to my nephew T. G. all my lands, to have and to hold during his life, *and to his son, if he has one, if not*, to the eldest son of my nephew J. G., and to his son after him, if he has one, if not, to the regular male heir of the G. family.' By codicil, stating that his nephew T. G. then had a son born, the testator gave all his lands to that son after his father's decease; and to his '*eldest son, if he has one;* but if he has no son, then to the next eldest regular male heir of the G. family.' It was held that by the will and codicil the son of T. G. took an estate tail. Lord *Tenterden*, C.J., considered that the testator did not intend the estate to go over to the G. family while any issue male of his great nephew should remain, and that the giving an estate tail to the devisee was warranted by *Sonday's Case*.

"So, in the case of *Doe* d. *Jones* v. *Davies* (*e*), 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;

(*c*) She was heir-at-law.
(*d*) 2 B. & Ad. 87.
(*e*) 4 B. & Ad. 43.

CHAPTER I.

Word "child" held to be used as nomen collectivum, and to confer an estate tail.

but also to settle on any husband she might take the same or a
part thereof for life, should he survive her, but not without h
being liable to impeachment for waste or non-residence, or neglecti
repairs. He then added, that should '*my daughter have a ch*
I devise it to the use of SUCH CHILD, from and after my daughte
decease, with a reasonable maintenance for the education, &c.,
such child in the meantime. Should *none of these cases happe*
the testator devised the estate to a nephew, subject to a conditi
to reside, &c., and to his first and every other son, and in default
gave the estate to another person on a like condition, and his fi
and every other son. The will then proceeded as follows:—'M
will and meaning for having the house and farm occupied is for t
sake of improving the neighbourhood as far as my poor abiliti
extend, which would be otherwise proportionably impoverishe
for protecting the parish and supporting its poor. This I a
persuaded is my daughter's wish as well as my own, whom I by
means will to restrain as a tenant for life; but in case that eith
of the remaindermen should ill-treat her, or should be likely
turn out an immoral man, or a bad member of society, she ma
by the advice or consent of the trustees, set aside such an one
her own will and testament, that my intention of doing good
the neighbourhood might not be defeated. I recommend it to m
daughter, for *want of issue to herself*, not to leave in legacies abo
five or six hundred pounds, and that out of my charge on Never
(a distinct property of the testator,) ' which I have also articled fo
and entail the rest for the further support of this house.' A
the time of the making of the will, and at the death of the testato
the daughter had no child. It was held, that the word 'child
as here used, was nomen collectivum; it being evident from t
whole tenor of the will that the testator intended that the esta
should not go over to the devisees in remainder until the failu
of issue of his daughter. The Court considered that the case ca
within the principle of those in which the word *son* had been he
to be nomen collectivum, particularly *Bifield's Case*.

"To this class of cases it is conceived also belongs the case
Raggett v. *Beaty* (*f*), where a testator devised a messuage to th
use of G. (the second son of his nephew J.) to enter upon a
possess the same after the decease of his father, and he direct
the said J. and G. to pay the sum of £100 within one year after h
decease to A. and B. upon certain trusts: but in case they did n

(*f*) 2 M. & Pay. 512, 5 Bing. 243.

pay the said sum, he ordered A. and B. to let the premises and receive the rents until the £100 should be paid, they keeping possession of the deeds and not allowing the said J. 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 Common Pleas was, what estate G. had upon the death of his father. It was contended that G. took an estate tail as the result of the apparent intention that the estate should not go over unless there was an ultimate indefinite failure of issue of G.; and the cases relied upon for this construction were those in which words importing a failure of issue had been so construed. On the other side it was argued that the intention to be collected from the whole will was, that G. should take an estate in fee, with an executory devise over in case of his not leaving issue at his death; and the argument for holding the devisee to take a fee was founded mainly on the testator's direction to the devisees to pay the £100; and no attempt seems to have been made to distinguish the word 'child,' as used in this devise, from the word 'issue,' which occurred in the cited cases. The Court, however, certified that G. took an estate tail.

"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* (*g*), (in which Lord *Ellenborough* made very little difficulty of construing the word 'children' in such a position as synonymous with *issue*,) had certainly paved the way to such a result. An example of this species of construction has since occurred (though with an assisting context) in the case of *Doe* d. *Simpson* v. *Simpson* (*h*), where a testator gave certain lands to his son A., his heirs and assigns for ever; 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 for ever as tenants in common, with a limitation over to the

Remark on *Raggett* v. *Beaty*.

Words referring to leaving no *children* held to mean, leaving no *issue*.

(*g*) 1 B. & Ald. 713. See also *Hughes* v. *Sayer*, 1 P. W. 534, ante, p. 1719; *Wyld* v. *Lewis*, 1 Atk. 432, post; *Voller* v. *Carter*, 4 Ell. & Bl. 173; *Coles* v. *Witt*, 2 Jur. N. S. 1226.

(*h*) 5 Scott, 770, 4 Bing. N. C. 333, 3 M. & Gr. 929 (*Doe* d. *Blesard* v. *Simpson*).

CHAPTER L.

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*" (*i*). 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* (*j*), where a testator left "his entire fortune equally 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 (*k*), 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 the settled rule of construction.

Question whether words referring to failure of *issue* meant *children*, as in another gift in same will.

(*i*) "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." (Note by Mr. Jarman.)

* "This power, it is observable, was not considered to raise an implied trust for the children as to the plate."

(*j*) 4 De G. & S. 261. See *Egan* v. *Morris*, 2 Ll. & Goo. *t. Plunk*, 297, where there was a devise to A. for life, with a gift over if he should die unmarried or without children.

(*k*) 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. at p. 954. But this reasoning is not applicable in the case of personal estate alone. *Stone* v. *Maule*, 2 Sim. 490; *Audsley* v. *Horn*, ante, p. 1915.

Mr. Jarman continues (*l*): "An instance of the word 'child' being construed as qualifying the word 'heirs' in the preceding devise, is afforded by the case of *Doe* d. *Jearrad* v. *Bannister* (*m*), 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 (*n*).

"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* (*o*), it is removed by *Parker* v. *Tootal* (*p*). 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 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 (*q*), that such a devise was necessarily implied

Remark on *Chorlton* v. *Craven*.

(*l*) First ed. Vol. II. p. 325.

(*m*) 7 M. & Wels. 292. See *Goodtitle* d. *Cross* v. *Wodhull*, Willes, 592.

(*n*) The actual decision was that the devise over took effect, as A. died without leaving a child; two of the judges thought that A. took an estate tail, but Gurney, B., simply said that the intention of the testator was to give the estate over to B. if A. died without children.

(*o*) 3 D. & Ryl. 808, cited 2 B. & Cr. 524.

(*p*) 11 H. L. C. 143. *Re Cleary's Trusts*, 16 Ir. Ch. 438.

(*q*) *Parker* v. *Tootal*, 11 H. L. C. 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

CHAPTER L.

by those words; and that the words "first and other sons" we not words of limitation enlarging the estate of Thomas, but th they gave all the sons of Thomas successively estates in tail m by purchase in remainder after Thomas's life estate. The decisi in the Court of King's Bench, according to which Thomas w tenant in tail male, and in which (understanding thereby ten in tail male in remainder after the estates tail of his sons) t House was inclined to agree, was considered to depend on subsequent words "in default of *such* issue of that name either Thomas or James," the word "such" being referred to "mal in the previous gift (*r*).

Devise to "eldest son" held not to confer an estate tail male.

A question of this kind was much discussed in *Doe* d. *Bur* v. *Charlton* (*s*), where a testator devised a messuage to his ki man S. C. for his life, and after his decease to the *eldest son* of S. but for want of such issue, then to his (S. C.'s) daughters or daugh share and share alike, for ever; but in case his said kinsman l no issue, then to hold to S. C., his heirs and assigns for ever. was contended, on the authority of the last case, that the w "son" was to be construed as nomen collectivum; and con quently that S. C. took an estate tail male, precedent to the gen estate tail which was assumed to arise by implication from words referring to a failure of issue in the devise over (*t*). But Court decisively negatived this construction, and held that S. took only an estate in tail general.

In *Bennett* v. *Bennett* (*u*), where a testator devised all his p perty to his sister in fee simple, except one tenement, which was to have for her life only, "and afterwards to my sister's eld son on his taking the name of M.; but should he refuse to t that name, or my sister die without a son," then to P. on taking the name of M., and so on to his heirs, each of them tak the name of M.; it was contended that the words "eldest so taken with the gift over "if my sister die without a son," g the sister an estate tail: but it was held by Kindersley, V.- that primarily "eldest son" meant an individual; and t although it might bear the sense of issue male if the context requi

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.

(*r*) As to this last point, see s.c., mentioned again, Chap. LII.

(*s*) 1 Scott, N. R. 290. And *Foord* v. *Foord*, 3 B. P. C. Toml. 12

(*t*) Ante, Chap. XIX.

(*u*) 2 Dr. & Sm. 266. It was that the sister's first-born son took his birth a vested fee simple subject condition subsequent which was for remoteness.

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 (*v*).

And in *Re Bishop and Richardson's Contract* (*w*), where the devise was to J. for life and at his decease to his eldest son or heir at law, it was held that J. took only a life estate with remainder to his eldest son or heir at law as personæ designatæ.

But a testator who does not make a series of limitations sufficient in themselves to create an estate tail, may by general words shew his intention to create such an estate. As in *Jenkins* v. *Hughes* (*x*), where the testator made A. and his eldest son successively heirs to his estates, and directed that if A. should not leave a son the next brother of A. should succeed, "and so on," his desire being that his estates should always descend in the main line: it was held that A. took an estate tail.

Devise to "eldest son" held to give an estate tail, on the context.

It is not always easy to distinguish cases of this kind from those to which the doctrine of cy-près is applicable. Thus, in *Forsbrook* v. *Forsbrook* (*y*), 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 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., for ever" 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 shewn by the direction respecting incumbrances, which would have been unnecessary if the estates were only for life (*z*).

(*r*) Compare *Andrew* v. *Andrew*, 1 Ch. D. 410, where a gift over "in default of a son" (following 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.

(*w*) [1899] 1 Ir. 71.

(*x*) 8 H. L. C. 571.

(*y*) L. R., 3 Ch. 93.

(*z*) See ante, p. 289, n. (*oo*).

CHAPTER L.

"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."

In *Lewis* v. *Puxley* (*a*), a testator devised his real estate in th county of P. to his eldest son John, for life, and to his eldest legit mate son after his death; and in default of such issue, he gave in like manner to his son Richard; and in case Richard had n legitimate issue male, then in like manner to the offspring about t be born of his (testator's) wife, and in default of such issue, to hi own right heirs. And he declared that he made no provision for h son Richard if John lived, because he knew he was otherwise we provided for. It was contended, on the authority of *Doe* v. *Charlto* that the devise to John and his eldest son after him, gave Joh no more than an estate for life, and, on the authority of *Goodtitle* v *Wodhull* (*b*), that this could not be effected by the subsequen 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 ex plained by the subsequent part of the will to be nomen collectivum and gave John an estate tail.

But the case may be reversed, and the words "eldest son, or the like, which might otherwise have conferred an estate ta on the parent, may, by a similar argument, be confined to thei literal meaning. By such referential expressions the testator i supposed to shew the sense in which he understands the precedin devise (*c*).

In *Re Buckton* (*d*), the devise was to trustees upon trust to th use of A. to permit him during his life to occupy the same or receiv the rents arising therefrom, and after his decease to permit th eldest son of A. to occupy or receive the rents during his life, an then "to his sons and their sons in succession." It was held tha the eldest son of A. took an estate in tail male.

(*a*) 16 M. & Wel. 733.
(*b*) Willes, 592.
(*c*) *East* v. *Twyford*, 9 Hare, 713, 4 H. L. C. 517, overruling the decision of the Court of Exchequer on th same will, 9 Hare, 730, n.
(*d*) [1907] 2 Ch. 406.

CHAPTER LI.

"ISSUE" AS A WORD OF LIMITATION IN DEVISES OF REAL ESTATE.

	PAGE
I. *Devise to a Person and his Issue*	1929
II. *Effect of Words creating a Tenancy in Common, and other modifying Expressions*	1932
III. *Devise to A. for Life, with Remainder to his Issue*	1935
IV. *Effect of Superadded Words of Limitation:* (1) *Limitations to Heirs of same Species as the Issue*	1937
(2) *Limitations to Heirs General of the Issue*	1938
(3) *Limitations changing the Course of Descent*	1942
V. *Effect of Words of Distribution and Modification*	1943
VI. *Effect of Clear Words of Explanation—Issue synonymous with Sons or Children*	1951
VII. *Gift over in case of Failure of Issue at the Death*	1956

IN this chapter Mr. Jarman discusses the construction of the word "issue" in devises of real estate. Bequests of personalty are subject to different rules. These will be found discussed in other parts of this work, especially with reference to the question whether a gift to a man for life, with remainder to his issue, gives him an estate for life or an absolute interest (*a*), and with reference to the question whether a gift to a class of persons "or their issue," or "and their issue." is a substantive or substitutional gift to the issue (*b*). The question what persons take under a gift to "issue" as purchasers is also discussed elsewhere (*c*).

"Issue" a word of limitation, when.

I.—Devise to a Person and his Issue (*d*).—"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

(*a*) Chap. XXXIII.
(*b*) Chap. XXXVI.
(*c*) Chap. XLI.
(*d*) In this Chapter the additions of Mr. Jarman's editors are printed in square brackets, the rest of the text is Mr. Jarman's.

which a devise to the issue can be made to run through the wh line of objects comprehended in the term, is by construing it as word of limitation synonymous with *heirs of the body*, by whic means the ancestor takes an estate tail; an estate capable of com prising in its devolution, though not simultaneously, all the objec embraced by the word "issue" in its largest sense.

Opinions certainly have differed as to the signification of th word *issue*. It has been denominated by some judges (*e*) an writers a word of limitation; and a devise to A. and his issue ha even been stated by an eminent judge as "the aptest way of descrih ing an estate tail according to the statute" (*f*); by others, "issue has been called a word of purchase, or an ambiguous word (*g* However, it is not from such dicta that the true legal acceptatio of the word is to be collected, but from the adjudications *fixing i operation*. Unhappily, some discordancy prevails even here, an an examination of the cases will serve to evince that, in the enuncia tion of any general proposition on the subject, the utmost cautio is requisite. [According to the latest decisions, however, "issue is primâ facie a word of limitation, equivalent to "heirs of th body," but more flexible than these and more easily restricte in its meaning by the context (*h*).]

Devise to A. and his issue simply gives estate tail.

With regard to a devise simply to *a person and his issue*, n 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 person and his children (*i*)) dependent on, or, it seems, in th least degree, influenced by the fact of there being or not being issu of the devisee living at the date of the will, or at any other period (*j*)

[(*e*) See per Parke, B., in *Slater* v. *Dangerfield*, 15 M. & Wels. at p. 272; *Roddy* v. *Fitzgerald*, 6 H. L. C. 823; *Pelham Clinton* v. *Newcastle*, [1902] 1 Ch. 34, [1903] A. C. 111.]

(*f*) Per Lord Thurlow, in *Hockley* v. *Mawbey*, 1 Ves. jun. at p. 149.

(*g*) See judgments in *Ginger* d. *White* v. *White*, Willes, 348; *Roe* d. *Dodson* v. *Grew*, 2 Wils. 324; *Doe* d. *Cooper* v. *Collis*, 4 T. R. 294; *Earl of Orford* v. *Churchill*, 3 V. & B. 59; *Lyon* v. *Mitchell*, 1 Mad. 467; *Tate* v. *Clarke*, 1 Bea. 100; *Doe* d. *Gallini* v. *Gallini*, 3 Ad. & Ell. 340.

[(*h*) Per Wood, V.-C., Kay, at p. 24, 1 K. & J. at p. 362. See also *Bradley* v. *Cartwright*, L. R., 2 C. P. 511. In gifts of personalty, the tendency seems to be to treat "issue" as a word of purchase rather than a word of limitation, but the question is one of construction in each case: *Re Coulden*, [1908] 1 Ch. 320.

(*i*) Ante, p. 1906.

(*j*) Lord C. J., *Hale*, in *King* v. *Melling*, 1 Vent. at p. 231, says, "though the word *children* may *be made* nomen collec tivum, the word issue is nomen col lectivum 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. at p. 397), *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

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 (*k*).

Special tail.

[The class of issue may be restricted so as to create an estate in special tail; for instance, a devise "to my wife and the issue of our marriage" (*l*), "to my son C. and such issue male as he may have by marriage with a fit and worthy gentlewoman" (*m*), or a devise to A., "but the said A. shall never have power to sell or mortgage any of these lands, nor no person to inherit any of them, unless a lawful issue of a male child got by marriage with a respectable Protestant female of proper conducted parents" (*n*).

So, to a class and their issue.

So a devise to several persons and their issue (*o*), or to a class and their issue (*p*), confers an estate tail.]

To A. and his issue *living at his death*, held an estate tail.

It has even been held that a devise to A. and his issue *living at his death* creates an estate tail in A. (*q*). In such a case, it is clear, the issue cannot take as joint-tenants with him, since the objects are not ascertainable until the death of the parent. It is only through him that they can become entitled, and the case falls, therefore, within the principle of the rule in *Wild's Case*, namely, that the parent must take an estate tail, in order to let in the other objects. Had the devise been to A. for life, *with remainder* to the issue living at his death, the case would have been different (*r*). All the objects might then have taken by purchase (*s*).

Bea. 249, the question whether there was issue or not at the time of the devise appears to have been thought immaterial, since it was not adverted to.]

(*k*) 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. 87, ante, p. 1921. That the word *next* or *eldest* prefixed to the words heir male in a devise to a person and his heir male, does not prevent the latter words from conferring an estate tail, has long been settled (ante, p. 1849); but since the recent case of *Lees* v. *Mosley*, 1 Y. & C. 589, post, establishing the greater inflexibility of limitations to heirs of the body than limitations to issue, this must not be considered conclusive.

[In *Sheridan* v. *O'Reilly*, [1900] 1 Ir. 386, the words "eldest male issue" were held to be words of purchase. In that case Porter, M.R., said that he was not able to see that *Doe* v. *Garrod* might not very well stand together with *Lovelace* v. *Lovelace*.

(*l*) *Walsh* v. *Johnston*, [1899] 1 Ir. 501.

(*m*) *Pelham Clinton* v. *Newcastle*, [1902] 1 Ch. 34, [1903] A. C. 111; see below, p. 1938.

(*n*) *Magee* v. *Martin*, [1902] 1 Ir. 367.

(*o*) *Parkin* v. *Knight*, 15 Sim. 83 (the gift was to several *or* their issue, and "or" was read "and"). *Underhill* v. *Roden*, 2 Ch. D. 494.

(*p*) *Beaver* v. *Nowell*, 25 Bea. 551; *Campbell* v. *Bouskell*, 27 Bea. 325.]

(*q*) *University of Oxford* v. *Clifton*, 1 Ed. 473. [And see *Jenkins* v. *Hughes*, 8 H. L. C. pp. 571, 585.]

(*r*) See *Lethieullier* v. *Tracy*, 3 Atk. pp. 774, 784, 796, Amb. pp. 204, 220, 1 Ken. at p. 56.

(*s*) Considering the inclination mani-

CHAPTER II.

Effects of words of modification inconsistent with an estate tail.

II.—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 shewn to be now the established rule in regard to limitations to *heirs of the body* (*t*); and there might seem, upon principle, to be strong ground to contend for the application of the same doctrine to the cases under consideration. The word *issue* is not less extensive in its import than heirs of the body: it embraces the whole line of lineal descendants; it is used in the statute *De Donis* (*u*), in some instances at least, synonymously with heirs of the body, and the cases are very numerous in which it has been held to create an estate tail. It will be seen, however, that, in some instances, the word *issue* has been diverted from its general legal acceptation by the occurrence of words of distribution or other expressions which point at a mode of devolution or enjoyment inconsistent with an estate tail, and have been decided to be insufficient to convert the term *heirs of the body* into children, or to prevent its conferring an estate tail.

Some confusion arises in the cases from the neglect to distinguish between a devise to A. and his issue in one unbroken limitation and a devise to A. *for life*, and *after his death* to his issue. It is true they both converge to the same point, when *issue* is construed

Lampley v. *Blower.*

fested in some of the recent cases to construe a devise to a person and his children as amounting to a devise to A. for life, with remainder to his children (ante, pp. 1911, 1915), 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*, 1 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.]

(*t*) Ante, p. 1890.

(*u*) 13 Edw. I, c. 1.

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 shewn 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.

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.

Thus, in the case of *Doe* d. *Davy* v. *Burnsall* (*v*), 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 King's Bench, that M. took for life, with remainder in fee to her children, if she had any; but if she had none, or they died under twenty-one, and without leaving lawful issue, then over; and that this remainder, therefore, being contingent, was barred by the recovery of M. The same devise afterwards came before the Court of Common Pleas (*w*), on a case from Chancery; and that Court certified that M. took only an estate for life (*x*), 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 word 'amongst' in *Doe* v. *Applin* (*y*), 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" (*z*).

(*v*) 6 T. R. 30.

(*w*) *Burnsall* v. *Davy*, 1 B. & P. 215.

(*x*) The certificate does not state who were entitled under the contingent remainders, the case not embracing that point.

(*y*) 4 T. R. 82, post.

(*z*) 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.

CHAPTER LI.

To H. and his issue, his, her or their heirs, *equally* to be *divided*.

So, in *Doe* d. *Gilman* v. *Elvey* (*a*), where a testator devised his real estate to his wife for life, and, after her decease to his son H. *and to the issue of his body* lawfully begotten or to be begotten, *his, her, or their heirs, equally to be divided, if more than one;* and if H. should have no issue of his body lawfully begotten living at his decease, then to A. in fee. H. survived the testator's widow, and before he had any issue, suffered a common recovery. The Court considered the case as falling exactly within *Doe* v. *Burnsall*, the devise being in effect to the issue as tenants in common. It was held, however, that quâcunque viâ datâ, i.e. whether H. took for life or in tail, the title under the recovery was good; the remainders in the former case being contingent, and consequently destroyed by it.

Remarks on *Doe* v. *Burnsall*, and *Doe* v. *Elvey*.

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 (*b*).

As there was no issue of the devisee at the time of the devise taking effect, the testator's bounty could only be made to reach the issue (assuming that word to be intended for a word of purchase), under the joint devise to them and their parent, by giving him an estate tail, unless the gift to the issue were construed as a remainder, which the Court undoubtedly seemed inclined to do; but it is difficult to reconcile such a construction with the principle of the cases establishing that even a devise *to A. and his children* must, under such circumstances, be construed an estate tail, in order to let in the children (*c*). If the children could be treated as taking by way of remainder, there is no necessity for having recourse to such a rule. If in such cases the Court is authorized to turn the devise to the issue into a remainder, the cases treated of in the present section cease to exist as a distinct class, and become blended with those which form the subject of the next section. At present, however, the authorities do not warrant any such conclusion, as the two preceding cases are, for the reason already stated, scarcely to be regarded as adjudications on the point, and are

(*a*) 4 East, 313.

(*b*) [Mr. Jarman's remarks on these cases were approved by Stirling, J., in *Re Wilmot*, 76 L. T. 415.]

(*c*) *Wild's Case*, 6 Rep. 16b; *Davie* v. *Stevens*, Doug. 321; *Seale* v. *Barter*, 2 B. & P. 485, ante, p. 1907.

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* (*d*), 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 for ever*, 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.

[Where there is a gift to A. and "to any lawful issue she may have, such issue to take a vested interest in my said property upon attaining the age of twenty-one years," the issue take as purchasers, because the direction that the issue should take vested interests is inconsistent with the use of the word issue as a term of limitation (*e*).]

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.

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 well-known rule in *Shelley's Case* (*f*), an estate tail.

One of the earliest cases of this kind is *King* v. *Melling* (*g*), where a testator devised lands to A. *for life*, and after his decease

To A. for life, *remainder* to the issue of his body, held an estate tail.

(*d*) 6 Mad. 258, 2 Bli. 59, n.

[(*e*) *Re Wilmot*, 76 L. T. 415. In this case A. died intestate and unmarried and her heir at law became entitled to her real estate, and since she and her issue would have taken the personal estate as joint tenants her legal personal representative was entitled to the personalty.]

(*f*) Ante, Chap. XLVIII.

(*g*) 1 Vent. pp. 225, 232, 2 Lev. pp. 58, 61. See also *Taylor* v. *Sayer*, Cro. El. 742; [*Jordan* v. *Lowe*, 6 Bea. 350; *Re Keane's Estate*, [1903] 1 Ir. 215.]

CHAPTER LI.

he gave the same *to the issue of his body* lawfully begotten o second wife; and for want of such issue, to B. and his heirs ever, provided that A. might make a jointure of the premises such second wife, which she might enjoy for her life. *Twisden* *Rainsford*, JJ., held it to be an estate for life in A., in opposit to *Hale*, C.J., who delivered an elaborate and argumentat opinion in favour of an estate tail, which construction was aft wards adopted by all the Judges in the Exchequer Chamb reversing the judgment of the King's Bench.

To A. and D. for their lives; if either die leaving issue, then to such issue; held an estate tail.

So, in *Shaw* v. *Weigh* (*h*), where the testator devised lands his wife for life, and after her decease in trust for his sisters and D., equally betwixt them, *during their natural lives*, with committing any manner of waste, and if either of his sist happened to die *leaving issue or issues of her or their bodies* l fully begotten, then in trust *for such issue or issues* of the mothe share, or else in trust for the survivor or survivors of them, a their respective issue or issues; and if it should happen that b his said sisters died without issue as aforesaid, *and their issue issues to die without issue lawfully to be begot...* (*i*), then over. chief question was whether this was an estate for life, or an est tail in the sisters. It was adjudged in the House of Lords (affirm a judgment of the Court of Great Sessions for Flintshire, wh had been reversed in B. R.) that the devise created an est tail (*j*).

In *Ginger* v. *White* (*k*), C.J. *Willes* questioned this decisio but subsequent cases have placed its authority beyond all doubt

[In *Haddelsey* v. *Adams* (*m*), the devise was to the testato four granddaughters as tenants in common for life, with bene of survivorship, the remainder to trustees and their heirs up trust to support the contingent remainders thereinafter limit remainder to the issue male of the granddaughters successiv lawfully to be begotten, and in default of such issue to the testato right heirs for ever. Sir J. Romilly, M.R., held that the gra daughters took estates tail.]

(*h*) 2 Stra. 798, 1 Barn. B. R. 54, 1 Eq. Ca. Ab. 184, pl. 28, 3 B. P. C. Toml. 120. [*Sandes* v. *Cooke*, 21 L. R. Ir. 445. Vide ante, p. 1902, n.]

(*i*) As these words would raise an implied gift in the issue of the issue, the case may be classed with those in which words of limitation in tail are superadded to the devise to the issue. See also *Franks* v. *Price*, 3 Bea. 182, post.

[(*j*) This seems to have been one of those cases where lay Lords voted o question of law and decided it agai the opinions of a majority of the Judg only three of whom held it an estate t and *nine* an estate for life.]

(*k*) Willes, 359, post.

(*l*) See cases passim in the sequel this Chapter.

[(*m*) 22 Bea. 266; see also *Wa* v. *Travers*, Ir. R. 2 Eq. 455.]

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 (*n*). Thus, in *Roe* d. *Dodson* v. *Grew* (*o*), 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 (*p*); and if we balance the two intentions, the weightier, is that all the sons of G. should take in succession. *Clive*, J., said too great a regard had been paid to the superadded words "heirs male of the body of such heirs male." *Bathurst*, J., laid it down as a rule, that where the ancestor takes an estate of freehold, if the word "issue" in a will comes after, it is a word of limitation. *Gould*, J., observed that the word is used in the Statute *De Donis* promiscuously with the word "heirs"; *that the term "issue" comprehends the whole generation as well as the words "heirs"* (of the body), and, in his judgment, the word "issue" was more properly a word of limitation than a word of purchase.

To the *heirs male* of the body of such issue male.

This case (which has always been regarded as a leading authority) seems to have overruled *Backhouse* v. *Wells* (*q*), where the devise was to J. *for his life only*, without impeachment of waste, and after his decease then *to the issue male of his body* lawfully to be begotten, if God should bless him with any, *and to the heirs male of the body of such issue* lawfully begotten; and for default of such issue, over. It was adjudged that J. took an estate *for life*, and that the limitation to the issue was a description of the person who was to take the estate tail.

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

Observations upon *Roe* v. *Grew* and *Backhouse* v. *Wells*.

(*n*) See same rule as to heirs of the body, ante, p. 1886. [It has been suggested that the rule only applies to wills before the Wills Act, but it was treated as subsisting in *Pelham Clinton* v. *Newcastle*, [1902] 1 Ch. 34.]

(*o*) 2 Wils. 322; better reported Wilm. 272. See also *Shaw* v. *Weigh*, in the text.

(*p*) Or rather that the issue should take it.

(*q*) 1 Eq. Ca. Ab. 184, pl. 27, Fort. 133. [It has been suggested by Sir E. Sugden, 3 Jo. & Lat. at p. 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. 1938.]

CHAPTER LI.

impeachment of waste," and "if God shall bless him with a
The two first expressions merely shew that the testator intende
confer an estate for life, and nothing more, which sufficie
appeared by the express limitation for life, and the last w
are obviously implied in every gift of this nature.

The authority of *Roe* v. *Grew* has been confirmed by the cas
Hodgson v. *Merest*, where the devise was to A. for the term
his natural life, and, after his decease, then to the issue of
body, and to the heirs of the body of such issue, with remain
over; and it was held that A. took an estate tail (*r*).

[In *Pelham Clinton* v. *Newcastle* (*s*) the devise to be constr
was "to my son Charles if he marries a fit and worthy gentlewo
and has issue male, to such issue male and their male descenda
in failure of which," over; these words were held to be equiva
to, "to my son Charles and such issue male as he may have
marriage with a fit and worthy gentlewoman and their male desc
ants, in failure of which" over. It was held on the authorit
Page v. *Hayward* (*t*), that Charles took an estate in special
It was admitted in argument that the rule in *Shelley's Case* had
application. In the course of his judgment Buckley, J., a
referring to *Roe* v. *Grew* (*u*), and *Roddy* v. *Fitzgerald* (*v*), said:
is, I think, therefore to be presumed that the word 'issue' has b
used by the testator as meaning 'heirs of the body' and it is
the parties seeking to give it another meaning to shew clearly f
the context of the will that the testator intended to give it a diffe
meaning" (*w*).]

Superadded limitation to the heirs *general* of the issue.

IV.—(2) *Limitations to Heirs General of the Issue.*—It is
established, that the addition of a limitation to the heirs *genera*
the issue will not prevent the word "issue" from operating to
an estate tail as a word of limitation (*x*). This position, ind
may appear to be encountered by the well-known case of *Lodd*
ton v. *Kime* (*y*), where under a devise to A. *for life* without
peachment of waste, and in case he should have any issue m
then *to such issue male and his heirs for ever* [and if *he* die with

A. for life, remainder to issue male and *his* heirs, and if *he* die, over.

(*r*) 9 Price, 556. [So stated in marginal note only. See also *Irwin* v. *Cuff*, Hayes. 30; with which compare *Hockley* v. *Mawbey*, 1 Ves. jun. 143.

(*s*) [1902] 1 Ch. 34; affirmed, [1903] A. C. 111.

(*t*) 2 Salk. 570; Pigott on Recoveries, 176.

(*u*) 2 Wils. 322; Wilm. 272.

(*v*) 6 H. L. C. 823.

(*w*) Buckley, J.'s, judgment adopted by Lords Halsbury Macnaughten in the House of Lord

(*x*) This statement is quoted approval by Chitty, J., in *William* *Williams*, 51 L. T. 779. See same ... to heirs of the body, ante, p. 18

(*y*) 1 Salk. 224, Ld. Raym. [3 B. P. C. Toml. 64 nom. *Barnard* v. *Carter*.]

[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.

To A. for life, remainder to his issue male and *their heirs*, held estate tail in A.

It will require some very fine-spun distinctions to reconcile this case with subsequent decisions. In *King* v. *Burchell* (*z*) the testator devised [his houses at Maidstone] to J. *for his life*, and after the determination of that estate unto the *issue male of the body of* J. lawfully to be begotten, *and to their heirs*, and for want of such issue, over; and if J. or his issue should alien the premises, they were charged with £2,000; Lord Keeper *Henley* held that J. was tenant in tail, and that the proviso was repugnant and void: his Lordship distinguished *Loddington* v. *Kime* because there the remainder was expressly contingent; [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 *Goodright* v. *Pullin* (*a*), 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], is not, it may be asked, every remainder to a class contingent in this sense, namely, as respects the event of there being objects to claim under it? Upon this principle, Sir *W. Grant* in *Elton* v. *Eason* (*b*), held that the words "if any," annexed to a limitation to the heirs of the body, did not vary the construction. It is futile, therefore, to attempt to preserve *Loddington* v. *Kime* by any such distinction. The case is clearly overruled.

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 in *Doe* d. *Cooper* v. *Collis* (*c*), 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 for ever, and the other moiety to S. for the term of *her natural life*, and after her decease *to the issue of her body* lawfully begotten *and their heirs* for ever. (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 S. for life, remainder to her issue and *their heirs*, held estate for life in S.

(*z*) 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.

(*a*) 2 Stra. 729, stated ante, p. 1887. And see per Sir E. Sugden, 3 Jo. & Lat. at p. 57, cited above, p. 1937, n. (*q*).]

(*b*) 19 Ves. 73. [See also *Marshall* v. *Grime*, 28 Bea. 375.]

(*c*) 4 T. R. 294.

CHAPTER LI.

to her children (*d*); and the Court decided in favour of the la construction, Lord *Kenyon* observing that issue was either a w of purchase or of limitation, as would best answer the inten the devisor; and his Lordship remarked that the property wa *be equally divided*, which it would not be if S. were held to tak estate tail; for, in that case, the reversion in fee of that mo would be again subdivided between the heirs of the two daught

Remark on *Doe* v. *Collis*.

It is difficult to accede to the reasoning which ascribed to words of division this influence on the construction, since t were merely applied to the *corpus* of the land, not to the inhe ance. At all events, it is enough for our present purpose to s that the case was decided upon special grounds, and not in opp tion to the doctrine that a limitation to the heirs of the is superadded to the devise to the "issue" is inoperative to v the construction. As such, indeed, it would have been cle overruled by subsequent cases.

To A. for life, remainder to his issue and to the *heirs and assigns* of such issue, held an estate tail in A.

Thus, in *Denn* d. *Webb* v. *Puckey* (*e*), the testator devised to grandson N. *for life* without impeachment of waste, and after decease *to the issue male of his body* lawfully begotten, and *to heirs and assigns of such issue male for ever;* and in default *such* issue male, then over. N. suffered a recovery, and the quest raised was whether, under the devise, he was tenant in tail tenant for life only. The Court held that the general intention the testator was that the male descendants of his grandson should take the estate, and that none of those to whom the sub quent limitations were given should take until all such male desce ants were extinct; and, to effectuate this, it was necessary to g him an estate tail; for, if his issue took by purchase, Lord *Keny* thought it would be difficult to extend it to more than one (*f*), a that even if the words comprehended all the male issue as tena in common in tail, yet that would not have answered the devis

[(*d*) 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.]

(*e*) 5 T. R. 299.

(*f*) His Lordship is made to say, "It has been contended that N. took only an estate for life; if so, what estate was given by the words, 'to the issue male of his body lawfully begotten, and the heirs and assigns of such issue male?' Was it to extend to more than one son? would be difficult to extend it to m than one, and I conceive that the el must have taken the *absolute interes the estate*. But that would have feated the devisor's intention, beca if it had *descended* (*Qu.* devolved?) that one son, and he had died with making any disposition of it, it wo have gone over to the other sons of devisor," i.e. by descent, for if it w a devise in fee to the son, of course remainder could be limited on t estate.

intention, because there were no words to create cross-remainders between them (*g*). But it was held it was, even if the issue would have taken by purchase; yet that, being a contingent remainder, it was destroyed by the recovery which was suffered before the birth of issue, so that the defendant, who claimed under the recovery, was entitled quâcunque viâ datâ (*h*).

To B. for life, remainder to his issue male *and their heirs*, held an estate tail.

So, in *Frank* v. *Stovin* (*i*), 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.

[And if the addition of formal words of inheritance will not prevent the word issue from operating as a word of limitation, still less (*j*) will informal words do so though sufficient to carry the inheritance, such as "all my interest" (*k*) or "for ever" (*l*).

Effect of limitation over "in default of such issue."

It should be observed, that in *Frank* v. *Stovin* (*m*), *Le Blanc*, J., made a distinction between that case and *Denn* v. *Puckey* (*n*) and the case of *Doe* v. *Collis* (*o*), 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

(*g*) They would clearly have been implied, but there seem to have been insuperable obstacles to the suggested construction.

[(*h*) 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. XXXVIII.]

(*i*) 3 East, 548. [See also *Sturge* v. *Sturge*, 12 Bea. 229.

(*j*) See *Fuller* v. *Chamier*, L. R., 2 Eq. 682, ante, p. 1851, n. (*l*).

(*k*) *Manning* v. *Moore*, Alc. & Nap. 96.

(*l*) *Griffiths* v. *Evan*, 5 Bea. 241.]

(*m*) 3 East, at p. 551.

(*n*) Ante, p. 1940.

(*o*) Ante, p. 1939.

CHAPTER LI.

[in question, seems very much like reasoning in a circle (*p*). answer is, that when it is a question whether the general "issue" is or is not explained by the context to mean childre *whole* context must be taken into account, and that it is no permissible to exclude the words "in default of such issue" consideration than any other part of the context. Nearly judge who has had to construe a devise to issue, and has such a clause in the will, has expressly relied on it as one grou giving the ancestor an estate tail; and in *Woodhouse* v. *Herri* Sir W. P. Wood distinctly asserted its importance as a ma part of the context. Of course its absence is not conclusi favour of construing "issue" as a word of purchase, and fal short of reconciling *Doe* v. *Collis* with other authorities, which established that a devise to A. for life, remainder to his and the heirs of such issue, with or without a limitation over, e an estate tail on A. (*r*). Lord St. Leonards is sometimes cited he had laid down a contrary rule: but what he says is "a to A. for life, with remainder to his issue, with superadded wo limitation *in a manner inconsistent with a descent from A.* wil the word issue the operation of a word of purchase" (*s*). *Morgan* v. *Thomas* (*t*), land was devised to L. "for life and aft decease to his lawful issue and their heirs for ever if any," an he should die without having any *children* born in wedlock" to E. and his heirs. The Court of Appeal, affirming the decisi Cave, J. (*u*), held that L. took an estate for life only, not an estat

Superadded words of limitation which change the course of descent.

IV.—(3) *Limitations changing the Course of Descent.*— as already shewn (*v*), if the superadded words of limitation na

(*p*) [The argument is Mr. Jarman's who concluded that,] if in *Doe* v. *Collis* "issue" was properly construed to mean children, the words "in default of *such* issue" in *Denn* v. *Puckey* and *Frank* v. *Stovin* (and we may add in *Mogg* v. *Mogg*) ought, according to the class of cases just mentioned, to have been read "in default of such *children*." But, as they were not so construed, the inevitable conclusion is that *Doe* v. *Collis*, so far as it rests on this distinction, is overruled. [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), an sacrificing that in order to give to the "general intent," whi inferred from the gift over in of issue: see further Ch. LII.

(*q*) 1 K. & J. 352.

(*r*) See acc. per Lord Cran *Parker* v. *Clarke*, 6 D. M. & p. 109; Hayes, Inq. 302. Cf. *Phil James*, 2 Dr. & Sm. 404, 3 D. J 72 (executory articles for settle

(*s*) *Montgomery* v. *Montgomery* & Lat. 47. In *Bowen* v. *Lewis* C. at p. 902, Lord Selborne point that the presence or absence of wo distribution are material in assisti construction.

(*t*) 9 Q. B. D. 643.

(*u*) 8 Q. B. D. 575.

(*v*) Ante, p. 1889.

[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 them, so as to satisfy both by construing the first as words of limitation" (*w*). This principle appears to be equally applicable where the prior word is "issue." In *Hamilton* v. *West* (*x*), 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.

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 by the testator in the same qualified sense as the preceding; and then both may be satisfied, by taking the first as words of limitation" (*y*). 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;

Words of distribution inconsistent with an estate tail.

[(*w*) Fea. C. R. 184.
(*x*) 10 Ir. Eq. Rep. 75; see also *Dodds* v. *Dodds*, 11 Ir. Ch. 374.
(*y*) Fearne, C. R., 184, ante, p. 1880.

CHAPTER LI.

[and such is the doctrine which apparently prevails with reg

Old law.

to cases where words of distribution alone are superadded devises to issue contained in wills made before 1838, and wh accordingly, the issue would not take the inheritance in the abse of expressions indicating a contrary intention (*z*).

With regard to this class of cases, though the decisions are altogether in unison, yet, having regard to the fact that the la cases clearly overrule some of those of earlier date, we may vent to lay down the following propositions as now recognized (*a*)

1st. Where words of distribution, but without words to ca an estate in fee, are annexed to the devise to the issue, and th is a gift over in default of issue of the ancestor generally (*b*), or default of "such" issue (*c*), or in default of issue living at the dea of the ancestor (*d*), the ancestor takes an estate tail. As to t validity of this position, the cases seem to admit of no reasonal doubt, and it appears to be immaterial that between the gift to t ancestor and that to the issue, there is a limitation to trustees preserve contingent remainders (*e*).

2ndly. Where the gift is as in the first proposition, but there is gift over in default of issue, still, since the issue taking by purcha could only take for their lives, the ancestor is held to take an esta tail, which, if not barred, will descend to his issue, this being t only mode of carrying the inheritance to the issue (*f*).

These propositions, as will be seen hereafter, are materiall affected by the Statute 1 Vict. c. 26.

Words of distribution and limitation.

But even, under the old law before 1838, the doctrine abov referred to was held to be inapplicable to cases where a devise t issue was accompanied by words of distribution, together wit words of limitation which would carry an estate in fee or expression sufficient to justify the Courts in holding that the fee was intende to pass by the devise (*g*).

[(*z*) See as to this, ante, pp. 1802 et seq.

(*a*) For a full 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.

(*b*) *Doe* d. *Blandford* v. *Applin*, 4 T. R. 82, *Doe* d. *Cock* v. *Cooper*, 1 East. 229; *Ward* v. *Bevil*, 1 Y. & J. 512; *Croly* v. *Croly*, Batty, 1; *Hewitt* v. *Winder*, 5 L. J. N. S. Ch. 41; *Kavanagh* v. *Morland*, Kay, 16; *Roddy* v. *Fitzgerald*, 6 H. L. C. 823 (where the cases on this subject are cited and discussed). *Blackhall* v *Gibson*, 2 L. R. Ir. 49.

(*c*) *Woodhouse* v. *Herrick*, 1 K. & J 352.

(*d*) *Doe* v. *Rucastle*, 8 C. B. 876.

(*e*) *Woodhouse* v. *Herrick*, sup.

(*f*) Per Sugden, C., *Crozier* v. *Crozier* 3 D. & War. at p. 383; per Wood, V.-C. *Kavanagh* v. *Morland*, Kay, at p. 27 *Jackson* v. *Calvert*, 1 J. & H. 235.

(*g*) E.g., by such words as "estate," "part," "share," &c., occurring in the description of the subject of gift, o

[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* (*h*), "Where there is a devise to one for life 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."

Lees v. *Mosley.*

The leading case on this point] is *Lees* v. *Mosley* (*i*), where a testator devised certain lands unto his two sons, Henry James and Oswald Fielden, in moieties as tenants in common, in such manner and subject to such charges as thereinafter mentioned, that is to say, as to one moiety thereof, to his son Henry James for life, *with remainder to his lawful issue and their respective heirs, in such shares and proportions, and subject to such charges as he* (*H. J.*) *should by deed or will appoint; but in case his son Henry James should not marry and have issue, who should attain the age of twenty-one years,* then he devised the said moiety to his son Oswald and his heirs for ever. And, as to the other moiety of the property, the testator devised the same to his son Oswald and his heirs absolutely for ever. At the date of the will, and at the death of the testator, Henry James Fielden was a bachelor. He suffered a recovery of his moiety, and the question (raised in an action between vendor and purchaser) was as to the validity of the title derived under such recovery. The case was elaborately argued, the plaintiff contending that, according to the true construction of the will, there was a gift to the parent for life, with remainder to the children in fee; and the defendants insisting that Henry James Fielden took an estate tail. The Court decided that he was tenant for life only. Mr. Baron *Alderson*, (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 shewed 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 shew such intention than the technical expression "heirs of the body" would do.* The learned Judge then proceeded as follows :—

To H. for life, with power of distribution in fee in favour 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.*

[words imposing a pecuniary charge upon the issue. See ante, pp. 1802 et seq., and post, p. 1947.

(*h*) 15 M. & W. at p. 273, post, p. 1948.]

(*i*) 1 Y. & C. 589. [See *M'Kenna* v. *Eager*, Ir. R., 9 C. L. 79 (Chattel real).]

CHAPTER LI.

"The Court in the present case have to look to the terms in this
in order to ascertain whether, by construing the word 'issue'
as a word of purchase or of limitation, they best effectuate
intention of the devisor. The testator begins by devising
express estate for life to his son Henry James. He then dev
in remainder to his lawful issue. If it stopped there, it would
an estate tail. For the word 'issue' might include all descenda
and here all being unborn, no assignable reason could exist
distinguishing between any of them. And then the rule in *Shell*
Case would apply and would convert the estate for life, previo
given into an estate tail. But the testator then adds, 'and t
respective heirs in such shares and proportions and subject to s
charges as he the said Henry James should by will or deed appoi
Now, according to the case of *Hockley* v. *Mawbey* (*j*). the effect
this clause would be to give the object of the power an interes
an equal distributive share in case power were not execut
The clause there is a gift subject to declaration by the testat
that the issue and respective heirs should take equal shar
but that Henry James should have a power of distributing amon
them the estate, in unequal shares, if he thought fit. Now, if iss
is taken as a word of limitation, the word 'heirs' would be fi
restrained to 'heirs of the body,' and then altogether rejected
unnecessary. The word 'respective' could have no particul
meaning annexed to it; and the apparent intention of the testat
to give to Henry James for life, and afterwards the estate
property in shares amongst the issue, would be frustrated. On t
other hand, if issue be taken as a word of purchase, and
either the immediate issue or those living at the death of
James, the apparent intention will be effectuated, and all the
words will have their peculiar and ordinary acceptation. If, the
the will stopped here, it would seem clear that the Court ough
to read 'issue' as a word of purchase. Then comes the devi

(*j*) 1 Ves. jun. 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 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, at p. 23; Prior on Issue, p. 117; *Re Wilmot*, 7 L. T. 415; but except as to the property described as the testator's "reversion" this point does not seem free from doubt. See Sngd. Pow. 400, 594, 8th ed.; and ante, Chap. XIX.]

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 shew 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* (*k*) 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."

Remark on *Lees* v. *Mosley*.

The case of *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 majority, the issue take estates in fee as tenants in common, and A. is not tenant in tail. It may be also collected from the judgment, that the Court (or at least the very learned Judge who delivered it) would have arrived at the same conclusion if the devise to the issue had been simply to them as tenants in common in fee, without any devise over; in other words, that if a testator devises lands to A. for life, with remainder to his issue and their heirs in equal shares, or as tenants in common, the effect is to give to A. an estate for life, with remainder to the issue in fee. If, however, the devise was so framed as that the issue, if they took as purchasers, would have an estate for life only (a circumstance which is less likely to occur under a will made or republished since 1837 than any other), it is conceded that the leaning to the construction which makes "issue" a word of purchase would be less strong, and the fate of the devise [was, thus far, left] uncertain.

[So, in *Greenwood* [illegible] as Green-wood for life, and [illegible] of the body of the

(*k*) 6 T. R. 30, ante, [illegible]

CHAPTER LI.

To A. for life, with remainder to his issue as tenants in common in fee. Held issue take by purchase.

[*common*, and the heirs of such issue. On a case sent for the opini of the Court of Common Pleas the judges certified that Jon Greenwood took only an estate for life; and Lord Langdal relying on the direction that the issue should take share and sha alike, and on the words of limitation superadded, and adverting al to the absence of a gift in default of issue, affirmed their decision (*m*

Again, in *Slater* v. *Dangerfield* (*n*), where the devise was to G. D for life, and [illegible] and immediately after his decease unto and to th use *of all and every the lawful issue* of the said G. D., *their heirs an assigns* for ever, as tenants in common and not as joint-tenant when and as he, she or they should attain his, her or their age o ages of twenty-one years. There was no devise over in default o issue, but the will contained a general residuary devise which woul have comprised the interest (if any) undisposed of under the firs gift. The Court of Exchequer held that G. D. took an estate fo life only, and relied upon *Greenwood* v. *Rothwell*, as being exactl in point, and on *Lees* v. *Mosley* as going even further, inasmuch a in that case there was what was not found in the case before th Court, namely, a devise over: for the residuary devise was no equivalent.

[(*m*) 6 Bea. 492.

(*n*) 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. 295); 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. 1591), 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. C. 823.]

[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* (*o*), 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 (*p*). Thus, if a testator devised his "estate" or a "part" or "share" of his lands to one for life, and upon 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 (*q*). So also where the devise was to one for life with

Doctrine extended when under the old law a limitation in fee could be implied.

(*o*) 3 Sm. & G. 161, 6 D. M. & G. 104.

[(*p*) See this subject shortly treated of ante, pp. 1802 et seq., and more fully discussed in the 4th Edition of this Work, Vol. II., Chap. XXXIII., pp. 267 et seq.

(*q*) *Montgomery* v. *Montgomery*, 3 J. & L. 47. See *Hockley* v. *Mawbey*, 1 Ves. jun. 143. 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.

CHAPTER LI.

[remainder to his issue, to be divided among them as he shoul appoint, it was held that the issue took an estate in fee by implica tion (*r*). 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 (*s*).

General proposition to be deduced from the cases.

It would seem then that, as to devises to one for life with remainder to his issue, when 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" (*t*), 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 (*u*), and whether there is a gift over on general failure of the issue of the ancestor (*v*) or not (*w*); and the same rule applies where the issue would take an estate tail (*x*).

The result of the cases as applied to wills made since 1837.

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 a gift over or not (*y*), in the same manner as if words of limitation were superadded, and such devises

[(*r*) *Crozier* v. *Crozier*, 3 D. & War. 373, 2 Con. & L. 309; *Bradley* v. *Carturight*, L. R., 2 C. P. 511.

(*s*) *Doe* v. *Burnsall*, 6 T. R. 30. See *Merest* v. *James*, 4 J. B. Moo. 327, 1 Br. & B. 484.

(*t*) *Lees* v. *Mosley*, 1 Y. & C. 589, ante, p. 1945; *Greenwood* v. *Rothwell*, 5 M. & Gr. 628, 6 Scott, N. R. 670, 6 Jur. 492, ante, p. 1947; *Slater* v. *Dangerfield*, 15 M. & Wels. 263, ante, p. 1948; *Golder* v. *Cropp*, 5 Jur. N. S. 562; *Rotheram* v. *Rotheram*, 13 L. R. Ir. 429; *Shannon* v. *Good*, 15 L. R. Ir. at p. 311.

(*u*) *Crozier* v. *Crozier*, 3 D. & War. 373; *Montgomery* v. *Montgomery*, 3 Jo. & Lat. 47; *Bradley* v. *Carturight*, L. R., 2 C. P. 511, where the statement in the text was approved. *Whitelaw* v. *Whitelaw*, 5 L. R. Ir. 120.

(*v*) *Montgomery* v. *Montgomery*, 3 Jo. & Lat. 47.

(*w*) *Lees* v. *Mosley*, *Greenwood* v. *Rothwell*, *Slater* v. *Dangerfield*, all cited ante, n. (*t*).

(*x*) *Parker* v. *Clarke*, 6 D. M. & G. 104, ante, p. 1949.

(*y*) See ante, p. 1944.]

[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 (*z*). The latter, it is presumed, would be its construction in the absence of a restraining context (*a*). 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 the case of *Mandeville* v. *Lackey* (*b*), where a testator devised his real estate in certain counties to K. during his life only, subject to a certain condition, and after the determination of that estate to M.'s *lawful issue male*, and the lawful issue male

(*z*) The case of *Dalzell* v. *Welch*, 2 Sim. 319, seems to bear upon this point, and favours 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 favour of his children only, though he left also grandchildren and great-grandchildren. Sir *L. Shadwell*, V.-C., held the appointment to be invalid, on the ground of its excluding the donee's grandchildren and great-grandchildren, who were objects of the power, as being included under the denomination of issue. The chief argument for the contrary construction was founded on a previous part of the will, in which the testator had bequeathed personalty to A. for life, and, in case she should leave *issue* living, then to be paid and applied among *such child or children* in such proportions, &c., as A. should appoint; and, in default of appointment, among *such issue* in equal shares, and, if but one *child*, the whole to be paid to such one; and, in case there should be no issue of A. living at her decease, or if they should all die before attaining twenty-one, then over. The Vice-Chancellor thought that the word "children" meant *issue* in this instance, for that the testator could not intend that, if A. left a grandchild and no child, the property should go over. *At all events, as a similar phraseology was not adopted in the latter part of the will, the word "issue" must be considered as used in the sense it generally bears.* [Compare this with *Ryan* v. *Cowley*, and *Carter* v. *Bentall*, post, pp. 1952, 1953. And see *Hill* v. *Nalder*, 17 Jur. 224.]

(*a*) As to the mode in which the several degrees of issue take in such cases, see ante, pp. 1590 seq.

(*b*) 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. 1896 et seq.

CHAPTER LI.

of such heirs, the eldest always of *such sons* of M. to be prefe
before the youngest, according to their seniority in age and prio
in birth, and for want of such lawful issue in M., over: the C
of King's Bench in Ireland held that M. took only an estate for
which was affirmed in the House of Lords, with the unanimous
currence of the judges, on the ground that the word "issue"
explained to mean "sons." The Lord Chancellor said the
sequent words of explanation seemed to him to point out the *son*
M. by name, as the persons whom the testator meant by issue m

"Issue" explained to mean *children*.

So, in the case of *Ryan* v. *Cowley* (*c*), where a testator devised
bequeathed to trustees freehold and leasehold and other perso
property, upon trust for his daughter for life; and after her dece
the rents and profits, and interest of money, he gave, devised,
bequeathed to and amongst the *issue* of his said daughter lawfully
be begotten, in such shares and proportions as she should by her
will and testament appoint, provided such *child or children* sho
arrive at the age of twenty-one years; and for want of such is
of his daughter, or in case of the death of such issue, and of
death of his wife, the testator devised all his property to ot
persons. It was contended on behalf of the daughter that the w
"issue" was to be construed as a word of limitation, and con
quently that she took an estate tail in the freehold, and an absol
interest in the chattel property. But the Lord Chancellor (Sugd
held that the daughter took a life interest only. "The te
'issue'" (he observed) "may be employed either as a word
purchase or of limitation; but when the testator adds, 'provid
such child or children shall attain twenty-one, and for want of su
issue, then' over, he translates his own language, and clearly she
that he uses the word 'issue' as synonymous with child or children

[So, in *Bradley* v. *Cartwright* (*d*), where land was devised to S.
for life, remainder to trustees to preserve contingent remainde
remainder to the use of *all and every the issue child or children*
the body of S. B., in such shares, manner and form as S. B. shou
by deed or will appoint, and in default of such issue, over; it w
held that "issue" was explained to mean children.

But in *Roddy* v. *Fitzgerald* (*e*) the words "if only one child

(*c*) 1 Ll. & G. *t. Sugden*, 7. See also *Machell* v. *Weeding*, 8 Sim. 4, ante, Vol. I., p. 657; *Pruen* v. *Osborne*, 11 Sim. 132; [*Bradshaw* v. *Melling*, 19 Bea. 417.

(*d*) L. R., 2 C. P. 511. See this case observed on by Cotton, L.J., *Richardson* v. *Harrison*, 16 Q. B. D. 85, at p. 108. See also *Farrant* v. *Nichols*, 9 Bea. 3 (personalty);] and see a similar co struction applied to articles for settlement, *Campbell* v. *Sandys*, 1 Sc & Lef. 281.

[(*e*) 6 H. L. C. 823.

"Issue" not explained to mean children.

[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" (*f*).

"Issue" explained to mean *children*.

But in the previous case] of *Carter* v. *Bentall* (*g*), 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 (*h*): Lord *Langdale*, M.R., held that the word "issue" was here explained to mean *children*.

Distinction between real and personal property.

[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. *Carter* v. *Bentall* was followed by Sir C. Hall, V.-C., in a case (*i*) 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

[(*f*) Applying what Lord Eldon said in *Jesson* v. *Wright* with reference to "heirs of the body," ante, p. 1893].

(*g*) 2 Bea. 551.

(*h*) 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.

[(*i*) *Re Hopkins' Trusts*, 9 Ch. D. 131.

CHAPTER LI.

[entitled to" the legacy. And of course where personalty w bequeathed to several for their lives, and after the death of e leaving issue her share to be paid to such issue, *if more than child* equally to be divided between them, it was held that "issu was explained to mean children (*j*).

Even a devise of real estate worded as in the last case wo according to *North* v. *Martin* (*k*), be construed in like m The case at least would be quite different from *Roddy* v. *Fit* since a plurality of children taking as tenants in common would 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 favourable to the construct in question, that the testator has in other parts of his will u the words "children" and "issue" indifferently (*l*).

[The rule or dictum in *Ridgeway* v. *Munkittrick* is referre in Chapter XLI., sec. III.]

But of course the word "issue" will not be cut down to *child* by the mere circumstance of the words "children" and "issu being previously used synonymously, if in those prior instan there was fair ground to conclude that both terms were used the sense of issue (*w*).

"Children" held to mean *issue*.

A leading and often-cited example of the word "childr being used in the sense of *issue*, is *Gale* v. *Bennet* (*x*), whe testator gave real and personal estate to his daughter H. for and remainder to her children at twenty-one; and, in defaul such issue, then to his other daughters that should be living the time of the death and failure of issue of H., and the *chil children* of such of his other daughters as should be dead, as tena in common in fee; but such children to take only their pare share; but in case there should be none of his other daught nor any *issue* of his other daughters then living, the testator queathed over the property. H. died childless; and it was that the grandchild of another daughter who died in the lifet of the testator, was entitled, the word child and children b here used as synonymous with issue (*y*).

[(*j*) *Bryden* v. *Willett*, L. R., 7 Eq. 472. As to the general rule that in a bequest of personalty to A. for life, remainder to his issue, "issue" is not a word of limitation, see Chap. XXXIII.)

(*k*) 6 Sim. 266, stated ante, p. 1900.]

(*l*) *Cursham* v. *Newland*, 2 Bing. N.C. 58, 2 Scott, 105, 2 Bea. 145, 4 M. & Wels. 101.

(*w*) *Dalzell* v. *Welch*, 2 Sim. 319, ante, p. 1951, n.; and see further on this point, ante, p. 1602.

(*x*) Amb. 681, [and stated from Lib. 3 De G. & J. 277.] See also v. *Blackman*, 1 Ves. sen. 190, p. 1602, Amb. 555, nom. *Wyt Thurlston*.

(*y*) Much stress in the argumen the bar was laid on the fact of being no child; but the inadmissi of such a principle of construction been elsewhere shewn, ante, p.

The present section will be concluded by the statement of two recent cases of the converse kind, namely, in which the word "issue" has been used in the restricted sense of *children*. In one of these, *Ellis* v. *Selby* (*z*), a testator bequeathed his funded property upon trust for A. for life, and after his decease, should he have *issue* lawfully begotten, whether male or female, to pay the interest for the maintenance and education of such *issue*, if more than one share and share alike, and if only one for the maintenance of such one, during his, her or their nonage; and, on their attaining the age of twenty-one years, to transfer the same to them if more than one, and, if only one then to such one; and, after the decease of B. (to whom the testator had given the dividends on his Bank stock for life), he gave the dividends thereof to A. for the term of his life, and, after his decease, upon trust for the lawful *children or child* if only one of A. *in such manner as he* (the testator) *had thereinbefore willed and directed respecting his funded property;* and, if A. should happen to die without *issue male or female* of his body lawfully begotten, then over: Sir *L. Shadwell*, V.-C., was of opinion that the words "die without issue male or female" in the bequest over referred to *children*, the testator having clearly explained himself to mean children in the prior gift to the issue male and female.

Bequest to children made to govern prior gift to "issue."

The other case referred to is *Peel* v. *Catlow* (*a*), 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" held to mean *children* by reference to another gift.

[In *Re Pennefather*, [1896] 1 Ir. 249, a gift to "his children in priority, the sons to inherit before the daughters," was held to give the children estates tail in the realty.]

(*z*) 7 Sim. 352.

(*a*) 9 Sim. 372.

CHAPTER LI.

issue at her decease, or leaving any, they should die under twen one and should leave no issue living at his, her, or their decease, t over: Sir *L. Shadwell*, V.-C., was of opinion, that the bequest the "issue" of the testator's sister Mary must of necessity taken to mean *children*, by force of the terms of reference to prior bequest to the children of Jane.

Remark on *Peel* v. *Catlow*.

It may be observed, in support of the construction adop by the Court, that the testator had used the word "issue" the sense of *children* in reference to both the share of the child of Jane and the share of Mary, namely, in the clauses which p vided for the event of their respectively dying *under age* with issue living at their decease, where it is obvious the word "issu necessarily meant *children*, as a minor could not leave issue c remoter degree.

Limitation over if the devisee leave no issue at his death.

VII.—Gift over in case of Failure of Issue at the Death

It remains to be observed, that where a devise to a person and issue (or to him and the heirs of his body (*b*)) is followed by a lim tion over in case of his dying without leaving issue *living at death*, the only effect of these special words is to make the remain contingent on the prescribed event. They are not considered explanatory of the species of issue included in the prior devise and, therefore, do not prevent the prior devisee taking an est tail under it (*d*). The result simply is, that if the tenant in tail no issue at his death, the devise over takes effect; if otherw the devise over is defeated, notwithstanding a *subsequent* fail of issue (*e*).

In *Doe* d. *Gilman* v. *Elvey* (*f*) the circumstance of there bein limitation over on failure of issue at the death of the prior devi does not appear to have given rise to an argument against an est

(*b*) *Wright* v. *Pearson*, 1 Ed. 119, ante, p. 1887, 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. pp. 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 term the power (see Vol. I. p. 653) and of gift over.]

(*c*) See *Hutchinson* v. *Stephens*, 1 I 240, post.

[(*d*) *Doe* v. *Rucastle*, 8 C. B. 8 *Marshall* v. *Grime*, 28 Bea. 375.] deed, in one instance, we have (ante, p. 1931) even an express devis A. and the issue living at his de was held to confer an estate tail; this is a construction which probe would not be universally acquiesced

[(*e*) *Eden* v. *Wilson*, 4 H. L. C. 257, 281, ante, Vol. I. p. 598.]

(*f*) 4 East, 313, ante, p. 1934.

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* (*g*). The affirmative, however, seems to be the 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 (*h*).

(*g*) * See an instance of such construction applied to personalty in *Lyon* v. *Mitchell*, 1 Madd. 467, where personal estate was bequeathed to A., B., C., and D., as tenants in common, and to the issue of their respective bodies: but in case of the death of any or either of them without issue living at the time of his or their respective deaths, then over to the survivors, and to the issue of their respective bodies. It was held that the bequest passed absolute interests to A., B., C., and D., subject to an executory bequest in case of their respectively dying without leaving issue at their decease.

(*h*) See *Broadhurst* v. *Morris*, 2 B. & Ad. 1, ante, p. 1908.

* Bequest over on failure of issue at the death, following bequest to A. and B. and their issue.

CHAPTER LII.

WORDS REFERRING TO FAILURE OF ISSUE.

PAGE

I. *Construction of the Words "die without issue," and similar expressions, before the Wills Act* 1958

II. *Effect of Section 29 of the Wills Act* 1961

III. *Where words "in default of issue," &c., are referable to the objects of a prior Devise or Bequest:*

(1) *Construction in regard to Personalty* 1964

(2) *Construction in regard to Real Estate:*

(i.) *Where the Expression is "such issue"* ... 1

(ii.) *Where the Reference is to "issue" simply* 1

(iii.) *Where the Prior Gift is to a contingent Class of Issue* 1

IV. *Devises of Reversions* 1

Old law: "die without issue."

I.—Construction of the Words "die without issue," a similar expressions, before the Wills Act.—Under the old l before the Wills Act, it was settled that words referring to the de of a person without issue, whether the terms were "if he die with issue," "if he have no issue," "if he die without having issu "if he die before he has any issue" or "for want" or "in default issue," unexplained by the context, and whether applied to real personal estate, were construed to import a general indefinite failu of issue, that is, a failure or extinction of issue at any period (*a*).

Exceptions to the old rule.

First, where phrase is, *leaving* no issue.

Even under the old law, this rule admitted of two exceptio which are thus stated by Mr. Jarman (*b*): "The first is, where t phrase is *leaving* no issue; with respect to which the settled d tinction is, that applied to *real* estate it means an indefinite failu of issue, but in reference to *personal* estate, (and real estate direct to be converted (*c*) is for this purpose regarded as personalty (*d*),

(*a*) The full statement of the old law is omitted in the present edition, but will be found in the earlier editions of this treatise. In addition to the cases referred to in the 5th edition, see *Gwynne* v. *Berry*, I. R., 9 C. L. 494 ("unmarried or if married without issue").

(*b*) First ed. Vol. II. p. 418.

(*c*) As to the doctrine of conversi see ante, Chap. XIX.

(*d*) "*Farthing* v. *Allen*, 2 Mad. 31 but there was ground to contend th 'issue' was here synonymous w *children*, who were the objects of t preceding bequest. The judgment, ho ever, is not reported, and the dec is silent as to the limitation over. T

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* (*e*) is the leading authority for this distinction, but it has been confirmed by a long train of subsequent decisions (*f*) extending down to the present period, which shew that it applies even where the real and personal estate are comprised in the same gift. Lord *Kenyon*, indeed, in *Porter* v. *Bradley* (*g*), 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* (*h*) and Sir *W. Grant* (*i*); his Lordship emphatically declaring that it went 'to shake settled rules to their very foundation' (*j*).

marginal note of the case omits the material word 'leaving.'" (Note by Mr. Jarman.) And see *Hawkins* v. *Homerton*, 16 Sim. 410.

(*e*) 1 P. W. 663. Tudors, L. C., 4th ed. p. 374.

(*f*) As to personalty, *Atkinson* v. *Hutchinson*, 3 P. W. 258; *Sabbarton* v. *Sabbarton*, Cas t. Talb. pp. 55, 245; *Sheffield* v. *Orrery*, 3 Atk. 282 (where the additional words "behind him" were used); *Lampley* v. *Blower*, ib. 396; *Sheppard* v. *Lessingham*, Amb. 122; *Gordon* v. *Adolphus*, 3 Br. P. C. Toml. 306; *Taylor* v. *Clarke*, 2 Ed. 202; *Goodtitle* v. *Pegden*, 2 T. R. 720; *Daintry* v. *Daintry*, 6 T. R. 307; *Radford* v. *Radford*, 1 Kee. 486; *Mansell* 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. *Homerton*, 16 Sim. 410; *Re Ball*, 40 Ch. D. 11, overruling *White* v. *Hight*, 12 Ch. D. 751.

As to realty, *Waller* 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. *Dunsbury*, 8 M. & Wels. 514; *Bamford* v. *Lord*, 14 C. B. 708; *Biss* v. *Smith*, 2 H. & N. 105; *Foakes* v. *Standley*, 24 Bea. 485.

(*g*) 3 T. R. at p. 146.

(*h*) *Crooke* v. *De Vandes*, 9 Ves. at p. 203.

(*i*) *Elton* v. *Eason*, 19 Ves. at p. 79.

(*j*) "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. p. 582; [see also *Greenway* v. *Greenway*, 2 D. F. & J. 128]. Each of these respective phrases, however, seems to have been allowed to retain its own peculiar force in the recent case of *Pye* v. *Linwood*, [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

As to supplying the word *leaving*.

Pye v. *Linwood*.

CHAPTER LII.

"The circumstance, that the prior gift is expressly fo the of the first taker, so that the effect of construing the word 'av to refer to issue *at the death*, is, that, in the event of there b such issue, the subject of disposition belongs to neither the p nor the subsequent legatee, affords no ground for departing f this doctrine (*k*). Nor, on the other hand, is the restricted struction of the words in question extended to *real* estate, me because the subject of devise is a copyhold estate, held of a ma the custom of which forbids the creation of entails, so that effect of the contrary (i.e. the indefinite) construction is, that first devisee takes a conditional fee on which no remainder ca engrafted, and the testator's intention, therefore, in favour of ulterior devisee is defeated (*l*).

Second exception to general rule.

"The other exception to be noticed to the general rule is, whe testator, *having no issue*, devises property in default or on fail of issue *of himself*; in which case it is considered that the evid object of the testator is simply to make the devise contingent on event of his leaving no issue *surviving him*, and that he d not refer to an extinction of issue at *any* time (*n*). [This exceptio construction *a fortiori* prevails where the devise over is for purpose of paying debts and legacies (*o*).]

What will restrain the words generally

"But to return to the general rule. Though it is clear th with the exceptions before noticed, the expressions to which relates, applied to either real or personal estate, import an indefin failure of issue, it is equally clear that in regard to either they

to John: Elizabeth had 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

"e, 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 acc plishing. It does not appear whe the particular point for which th ls here cited was presented t V.-C." (Note by Mr. Jarman.)

(*k*) *Andree* v. *Ward*, 1 Russ. 260.

(*l*) *Doe* d. *Simpson* v. *Simpson*, Scott, 770; *Doe* d. *Biesard* v. *Simps* 3 Scott, N. R. 774.

(*n*) *French* v. *Caddell*, 3 B. P. Toml. 257; *Wellington* v. *Wellington* Burr. 2165, 1 W. Bl. 645; *Lytton* v. *Lytton*, 4 B. C. C. 441; *Sanford* v. *Irby*, 3 B. & Ald. 654. See also *Doe* *Lucraft*, 1 M. & Sc. 573, 8 Bing. 3 Mr. Jarman's statement of these ca is omitted.

(*o*) See *Re Rye's Settlement*, 10 Ha 106. In all the cases cited in the p ceding note there was a devise over payment of debts, &c., but the decisio do not appear to have been influenc by this consideration.

yield to a *clear* manifestation of intention in the context to use them in the restricted sense of issue *living at the death*; but, as to personalty, it seems they yield more readily to expressions and circumstances in the will tending so to confine them, than when applied to real estate (*p*)." The general principle of construction, in cases subject to the old law, as stated by Mr. Jarman (*q*) is, that "expressions which will cut down the established signification of the words [that is, words importing an indefinite failure of issue], as applied to personalty, will not necessarily have that effect in reference to real estate; and, by parity of reason, where the restricted construction is adopted in relation to the latter, it applies a fortiori to the former. This diversity of construction in regard to real and personal estate appears to have originated in an anxiety to avoid an interpretation which would render any part of the will inoperative; for as a gift of *personalty* to arise on a general failure of issue, is void for remoteness (*r*), 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."

The present law since 1 Vict. c. 26.

Words importing a failure of issue to mean issue living at the death;

II.—Effect of Sec. 29 of the Wills Act.—The old rule of construction is abrogated in regard to wills made or republished since the year 1837 by sec. 29 of the Wills Act, which provides "that in any devise or bequest of real or personal estate the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want 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 (*s*), 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

(*p*) See Fearne, C. R. 471.

(*q*) First ed. Vol. II. p. 427.

(*r*) See rule against perpetuities, discussed, Chap. X.

(*s*) 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. at p. 172.

described in a preceding gift shall be born, or if there shall be n issue who shall live to attain the age or otherwise answer th description required for obtaining a vested estate by a preceding gi to such issue."

——except in two cases.

The result, says Mr. Jarman (*t*), of sec. 29 "appears to b that the words denoting a failure of issue refer to a failure at th death in every case, unless one of two points can be established First, that the words are referential to the objects of a prior estat or a preceding gift; or, secondly, that they are so clearly and explicitly used to denote a failure of issue at any time as to exclude the statutory rule of construction, which, it will be observed, only obtains where there is an ambiguity, i.e. where the words *may* import *either* a failure of issue [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."

"Male issue."

It has been held that the section applies where the words are "without leaving any male issue" (*u*), or "shall not leave any child or children or issue of the same" (*v*), or where there is a gift over "in case of there being no heir" (*w*), unless, of course, the property is land, and the devisee takes an estate tail under the prior gift (*x*).

Act does not apply to "dying without heirs of body."

The act does not apply where the words are "die without heirs of the body," for there is no ambiguity in them (*y*).

Whether words "having a prior estate tail," &c., apply to personalty.

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 (*z*), "may have loosely applied these words to *personalty*, or may have had reasons for intending a distinction

(*t*) First ed. Vol. II. p. 455.

(*u*) *Re Edwards*, [1894] 3 Ch. 644, following *Upton* v. *Hardman*, Ir. R. 9 Eq. 157. In *Green* v. *Giles*, 5 Ir. Ch. 25, the gift over was on death "without male issue lawfully begotten and arriving at the age of twenty-one years": it was held that these words were within sec. 29, but that the application of the section was excluded, because a contrary intention appeared; the decision seems erroneous.

(*v*) *Re Chinnery's Estate*, 1 L. R. Ir. 296.

(*w*) *Harris* v. *Davis*, 1 Coll. 416.

(*x*) Ibid.

(*y*) 1 Coll. 416. *Re Sallery*, 11 Ir. Ch. 236 ("die without heirs or issue"); *Dawson* v. *Small*, L. R. 9 Ch. 651 ("without heirs male of his body").

(*z*) *Greenway* v. *Greenway*, 2 D. F. & J. at p. 137.

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* (*a*), 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 sec. 29, A. was entitled to the leaseholds absolutely.

Act does not apply where "die without issue" would not previously have been taken indefinitely.

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 *Morris* v. *Morris* (*b*), 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 sec. 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 (*c*).

So, in *Jarman* v. *Vye* (*d*), Sir W. P. Wood, V.-C., held that, inasmuch as it was decided before the act by *Crowder* v. *Stone* (*e*) 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.

(*a*) *Green* v. *Green*, 3 De G. & S. 480. See also *O'Neill* v. *Montgomery*, 12 Ir. Ch. R. 163.

(*b*) 17 Bea. 198.

(*c*) See cases on this subject, ante, Vol. I. p. 601.

(*d*) L. R., 2 Eq. 784. Mr. Theobald (7th ed. p. 709) observes that "It is not quite clear, whether a devise upon failure of issue to such of certain named legatees as should be 'then living,' which would in a will before the Act have been held to take effect upon failure of issue of the ancestor at his death, or at any time during the lives of the surviving legatees, would now be held to take effect only upon failure of issue of the ancestor at his death," and refers to *Murray* v. *Addenbrook*, 4 Russ. 407; *Greenwood* v. *Verdon*, 1 K. & J. 74, in both of which the will was before the Wills Act.

(*e*) 3 Russ. 217.

CHAPTER LII.

Mr. Jarman thought (*f*) that cases giving rise to questions as the exclusion of the statutory rule of construction by ambiguou expressions referring to a failure of issue " will probably be of ra occurrence ; for, as the legal and the popular signification will no coincide, it cannot be supposed that the context of the will wi often furnish grounds for negativing the restrictive interpretation and, for the same reason, there will be less anxiety on the part of th judicial expounders of wills than formerly to discover grounds fo departing from the general rule—an anxiety which contributed no a little to incumber that rule with its numerous d' .inctions an exceptions. Where, however, the context does require that th words should be read as importing a general failure of issue, thi construction must be attended with the same consequence as unde wills not within the statute, whether that consequence be the raisin of an estate tail by implication in the person whose issue is referre to, as in the case already suggested (*g*), or the invalidating of th gift over which is dependent on the failure of issue. Hence, it i not strictly true (as some have supposed) that the recent ac absolutely excludes the implication of an estate tail from word denoting a failure of issue ; it merely requires that the constructio on which such implication is grounded be sustained by *othe* expressions found in the will ; and, as we may confidently assume for the reason already suggested, that such cases will be very infrequent, the act will eventually (though it may not be very speedily) reduce to insignificance the doctrine respecting the implication of estates tail, from the words in question, as well a the numerous points of construction incidentally treated of in the present chapter."

III.—Where words " in default of issue," &c., are referable to the objects of a prior Devise or Bequest.—The question whether words importing a failure of issue refer to the objects of the preceding devise or bequest is, as has been pointed out, unaffected by sec. 29 of the Wills Act, so that the cases decided on wills subject to the old law are authorities with regard to wills subject to the Wills Act ; the principles to be deduced from the authorities will now be considered.

In default of *such* issue.

(1) CONSTRUCTION IN REGARD TO PERSONALTY.—Where the words are " in default of such issue " it is clear that whatever be

(*f*) First ed. Vol. II. p. 455.

(*g*) That is to say, of issue failing at any time, see ante, p. 1963.

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 (*h*).

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 (*i*).

"Without issue as aforesaid," held to refer to objects of prior contingent gift.

Primâ facie the words "as aforesaid" would seem to have the same referential effect as the word "such," and in *Malcolm* v. *Taylor* (*j*) the words "without issue as aforesaid" were held to refer to the objects of a prior contingent gift, but the construction was considered to be aided by an expression in the context.

In default of issue preceded by a bequest to *children*.

But when the words are "in default of issue" simply, the question arises whether or not the word "issue" is to be construed as meaning the class of issue comprised in the preceding gift. Where the preceding gift has been a bequest to "children" it seems to be clear that words denoting a failure of issue refer to objects of that gift (*k*). 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 favour of children (*l*). And on the whole the tendency of the authorities is to give a referential construction to words importing a failure of issue. The general doctrine is thus stated by Sir G. Turner, L.J., in *Pride* v. *Fooks* (*m*):

Statement of the general doctrine by Turner, L.J.

"Amongst the cases on the point, which are almost innumerable, may be placed on the one side *Malcolm* v. *Taylor* and *Ellicombe* v. *Gompertz*,

(*h*) *Maddox* v. *Staines*, 2 P. W. 421; 3 B. P. C. Toml. 108. *Stanley* v. *Leigh*, 2 P. W. 686, and see 3 Myl. & Cr. at p. 153.

(*i*) *Re Hopkins' Trusts*, 9 Ch. D. 131.

(*j*) 2 R. & My. 416. As to the meaning of the words "as aforesaid" see also *Walker* v. *Petchell*, 1 C. B. 652.

(*k*) *Doe* d. *Lyde* v. *Lyde*, 1 T. R. 593; *Salkeld* v. *Vernon*, 1 Ed. 64 (children living at testator's death); *Att.-Gen.* v. *Bayley*, 2 B. C. C. 553 ("if he shall happen to die without issue"); *Vandergucht* v. *Blake*, 2 Ves. jun. 534 ("death without issue"); *Farthing* v. *Allen*, 2 Mad. 310; (but as to which see ante, p. 1958, n. (*d*)); *Robinson* v. *Hunt*, 4 Bea. 450 (without lawful issue); *Cormack* v. *Copous*, 17 Bea. 397 (in default of issue); *Re Wyndham's Trusts*, L. R., 1 Eq. 290 (die without issue); *Re Sanders' Trusts*, ib. 675 (die unmarried and without issue); per Parker, V.-C., *Bryan* v. *Mansion*, 5 De G. & S. 737; *Smyth* v. *Power*, I. R. 10 Eq. 192. But see also per Lord Cottenham, post, and per Turner, L.J., post, and 4 D. M. & G. at p. 88.

(*l*) *Leeming* v. *Sherratt*, 2 Hare, 14, following *Target* v. *Gaunt*, 1 P. W. 432, and *Hockley* v. *Mawbey*, 1 Ves. jun. 143. See also *Hanam* v. *Drew*, 10 Ir. Eq. 333.

(*m*) 3 De G. & J. 252.

CHAPTER LII.

and on the other *Andree* v. *Ward* and *Campbell* v. *Harding*. I the primary limitation be in favour 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."

Statement of general doctrine by Lord Cottenham.

And the earlier statement of the doctrine by Lord Cottenham in *Ellicombe* v. *Gompertz* (*n*) is to a similar effect: "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."

The two cases of *Andree* v. *Ward* and *Campbell* v. *Harding* referred to by Sir G. Turner, in which the referential construction was not adopted, are, as will be seen, rather exceptional and must not be considered to intrench on the general principle of construction

(*n*) 3 Myl. & Cr. 127 ("from and immediately after the decease of all the sons and grandsons of my said son J. J."); *Trickey* v. *Trickey*, 3 My. & K. 560, is another example of the referential construction, but in it, as in *Ellicombe* v. *Gompertz*, the expression gift over was not limited in default of issue, but in default of a class of issue. The general statement of principle in *Ellicombe* v. *Gompertz* is quoted and followed in *Hutchinson* v. *Tottenham*, [1898] 1 Ir. 403, [1899] 1 Ir. 344 (marriage settlement). *Ellicombe* v. *Gompertz* was cited as a leading authority by Sir J. Wigram, in *Leeming* v. *Sherratt*, 2 Hare, at p. 14, see also *Hilleradon* v. *Lowe*, 2 Hare, 355; *Cardigan* v. *Curzon-Howe*, L. R., 9 Eq. 358 (settlement of family plate).

above stated; and if they do conflict with that principle it may be doubted whether they would be followed.

Words held in an executory trust not to refer to prior objects.

In *Andree* v. *Ward* (*o*), 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.

Referential construction rejected.

In *Campbell* v. *Harding* (*p*), 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, 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 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 (*r*).

(*o*) 1 Russ. 260. In *Allanson* v. *Clitherow*, 1 Ves. sen. 24 (an executory trust of realty), the gift over on death without issue was held also non-referential in like circumstances.

(*p*) 2 R. & My. 390 (*Candy* v. *Campbell*). 8 Bli. N. S. 409, 2 Cl. & Fin. 421.

(*r*) 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, which construction the Court (it is considered most properly) negatived. In

CHAPTER LII.

Pride v. *Fooks*.

Pride v. *Fooks* (*s*) is another instance in which the referent construction was rejected; there the bequest was in trust for su child or children as the testator's niece and two nephews shou leave at the time of their respective deceases, one-third to t 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 die without leaving any children or child lawfully begotten, her his third part to be paid to the children or child of the other or othe leaving children or a child, in equal proportions if more than on and in case all of them the nephews and niece should happen to d *without leaving* (*t*) *any issue* lawfully begotten, in trust for th children of X. then living and the issue of his children then dea equally per stirpes. Neither of the nephews left any child at h death, nor did the niece, but the niece left grandchildren. It wa held by Sir J. Romilly, M.R., that "issue" in the gift over was no to be restricted to "children," and that there was an intestacy On appeal, the 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 series of limitations to take effect in succession, but only two set of concurrent contingent limitations. Sir G. Turner said he would not give any opinion upon *Westwood* v. *Southey* (*u*), upon which Sir J. Romilly had much relied.

Suggested distinction where the gift over is on death without issue living at the death.

In *Westwood* v. *Southey* (*v*), 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 first taker without issue means without issue living at his death (*w*). 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

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.

(*s*) 4 Jur. N. S. 678, 3 De G. & J. 252.

(*t*) This as to personally meant leaving at their deaths, see supra, p. 1959.

(*u*) See post.

(*v*) 2 Sim. N. S. at p. 202. See also *Walker* v. *Mower*, 16 Bea. 365. *Re Edwards*, [1906] 1 Ch. 570, approved *Walker* v. *Mower* and disapproved the observations of Malins, V.-C., in *Kidman* v. *Kidman*, 40 L. J. Ch. 359.

(*w*) The V.-C. repeated this statement of the rule in *Madden* v. *Ikin*, 2 Dr. & Sm. at p. 213. So *Parker*, V.-C., *Bryan* v. *Mansion*, 5 De G. & S. 737.

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 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 as if the words had been such issue as before mentioned. Such a construction might in fact wholly defeat the testator's intention; for if the words were construed to mean 'such issue' the effect might be this: 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.

Re Mereeron's Trusts.

But of course, although the primary gift is so expressed that there may be issue who may not take under it, the context may shew that the omission or mistake is not in that gift, but in the gift over. This was considered to be the case in *Re Mereeron's Trusts* (*x*), 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 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.

(2) CONSTRUCTION IN REGARD TO REAL ESTATE.—(i) *Where the Expression is "such issue."*—With regard to real estate also,

(*x*) 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.

"Default of such issue."

(bearing in mind that, where the referential construction is adopt the rules laid down in the earlier decisions still apply), it is cl as Mr. Jarman points out (*y*), "that the words 'in default of issue,' following an express devise to any particular branch issue, as *children, sons, or daughters*, will be construed to refer the issue before described; that is, as meaning in default *'such' children, sons*, &c. (*z*). And in cases of *this* class (as tinguished from those which form the subject of the next sectio this rule prevails, whether the objects of such preceding de take estates of inheritance, or *only* estates *for life* (*a*)."

General principle "in default of *such* issue" is referential.

Mr. Jarman thus states the result of the authorities at the t when he wrote (*b*): "The proposition seems undeniable, t the phrase 'in default of such issue,' 'for want of such iss or 'on failure of such issue,' following a devise to any class issue, or even to any individual child or other descendant, is sim and exclusively referential, and does not enlarge, or in any man affect any of the prior estates." The cases are numerous— construction has been adopted after a devise to children in fee to children for life (*d*); to sons for life (*e*); to daughters for life to sons in tail male (*g*); and to a son in tail male (*h*).

Effect where prior devise is in favour of a single child.

Even where the prior devise embraces a single child only, words "for want of such issue" are construed for want of s child, and have not the effect of conferring an estate tail on parent of that child (*i*).

Of course where the word "issue," occurring in an expr devise to issue, is therein explained to mean *children*, the wo

(*y*) First ed. Vol. II. p. 368.

(*z*) *Letheullier* v. *Tracey*, Amb. pp. 204, 220; *Doe* d. *Briddon* v. *Page*, 11 East, 603, n., 3 T. R. 87, n.; *Hay* v. *Lord Coventry*, 3 T. R. 83; *Doe* d. *Comberbach* v. *Perryn*, ib. 484; *Goodtitle* d. *Sweet* v. *Herring*, 1 East, 264.

(*a*) As to the nature of the remainder created by a limitation over in default of issue, see post.

(*b*) First ed. Vol. II. p. 372.

(*c*) *Doe* d. *Comberbach* v. *Perryn*, 3 T. R. 484; *R.* v. *Marquis of Stafford*, 7 East, 521; *Foster* v. *Hayes*, 2 Ell. & Bl. 27; 4 Ell. & Bl. 717; *Walker* v. *Petchell*, 1 C. B. 652 (die without leaving lawful issue as aforesaid).

(*d*) *Doe* d. *Tooley* v. *Gunniss*, 4 Taunt. 313 (on failure of such issue); *Doe* d. *Liversage* v. *Vaughan*, 1 D. & Ry. 52; 5 B. & Ald. 464 (on failure of such issue); *Ashley* v. *Ashley*, 6 Sim. 358 (want of such issue).

(*e*) *Foster* v. *Lord Romney*, 11 E 594. See also *Goodright* d. *Lloyd Jones*, 4 M. & Sel. 88; *Purcell* v. cell, 2 D. & War. at p. 219, n.; *Bri* v. *Ramsey*, 10 Hare, 320; *Bevan White*, 7 Ir. Eq. Rep. 473; *Re Arno Estate*, 33 Bea. 163; *Re Polla Estate*, 3 D J. & S. 541.

(*f*) *Den* d. *Briddon* v. *Page*, 3 T. 87, n. (in default of such issu *Hay* v. *Earl of Coventry*, 3 T. R. 83.

(*g*) *Doe* d. *Phipps* v. *Lord Mulgr* 5 T. R. 320 (failure of such issue).

(*h*) *Robinson* v. *Robinson*, 1 Burr. 3 B. P. C. Toml. 180; note that word son was used as a word of limi tion; see Lord Kenyon's judgmen *Doe* v. *Mulgrave*, 5 T. R. at p. 323.

(*i*) *Doe* v. *Charlton*, 1 M. & 429, ante, Chap. L. *Boydell* v. lightly, 14 Sim. 327; *Ashburner* *Wilson*, 17 Sim. 204.

in default, or for want of such issue, immediately following, are construed in default of such children (*j*).

"Such heirs" preceded by gift to sons and daughters in fee.

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 (*k*).

There have been cases (*l*) which appear to conflict with the general principle above stated, but unless they can be referred to special circumstances they must be considered as overruled by the authorities quoted above.

"Such issue" preceded by a devise to first and other sons *and their heirs.*

There is, however, an apparent exception to the general principle where successive interests are given or implied in such a way that it is necessary to give estates tail to effectuate the intention and to reject the referential force of the words "such issue."

Thus, in *Lewis* d. *Ormond* v. *Waters* (*m*), 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.

Remark on *Lewis* v. *Waters.*

"This," as Mr. Jarman remarks (*n*), "is a strong case, inasmuch as there was an antecedent class of issue to which the clause might have been applied; but as the words 'first and other' evidently imported that the sons were to take *successively* (*o*), there was no mode of giving effect to the intention except to cut down the fee-simple of the sons to an estate tail."

Remarks on doctrine advanced in *Ginger* v. *White.*

In *Ginger* d. *White* v. *White* (*p*) the devise was to children successively, one after another, as they should be in priority of age, and to their heirs: Willes, C.J., read this as conferring an estate tail only (*q*), though he distinctly held, as Mr. Jarman points out (*r*),

(*j*) *Ryan* v. *Cowley*, 1 I.J. & G.t. *Sugd.* 7.

(*k*) *Polley* v. *Polley*, 29 Bea. 134.

(*l*) *Lomax* v. *Holmden*, 1 Ves. sen. 290; *Evans* d. *Brooke* v. *Astley*, 3 Burr. 1570; *Doe* d. *Harris* v. *Taylor*, 10 Q. B. 718 ("for default of such first issue," held to mean for default of issue of such first son). Sir J. Romilly, M.R., declined to follow this in *Re Arnold's Estate*, 33 Bea. 163. See also Chap. XVIII. p. 587 (*u*).

(*m*) 6 East, 337.

(*n*) First ed. Vol. II. p. 371.

(*o*) See *Kershaw* v. *Kershaw*, 3 Ell. & Bl. 845; *Honywood* v. *Honywood*, 89 L. T. 378 (settlement); *Cradock* v. *Cradock*, 4 Jur. N. S. 626, and *Ginger* v. *White*, infra. *Biddulph* v. *Lees*, E. B. & E. 289, stated in Chap. XLVII.

(*p*) Willes, 348.

(*q*) See also *Hennessey* v. *Bray*, 33 Bea. 96, Chap. XLVII.

(*r*) First ed. Vol. II. p. 371; the case is referred to post.

CHAPTER LII.

" that the subsequent words importing a failure of issue referre to the children themselves (*s*). The learned Judge seems even t have thought that a gift over in default of *male* children to *femal* children, and in default of female children to a person who wa their cousin, explained heirs to mean heirs *of the body*, ' becaus the male children could not die without heirs if any of their sister were living, and the female children could not die without heir if the cousin were living ' (*t*): but he evidently confounded *remainder* with an *alternative limitation*, in other words, he faile to distinguish between a devise over if the children should di without heirs, and a devise over if there should be *no* children With the latter the doctrine to which he refers has no connection.'

Referential construction excluded by context.

In *Chorlton* v. *Craven*, already stated (*u*), it was impossible to rea 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 wh were objects of the preceding devise, for the sons of James wer not the objects of that devise. The intention, it was said, plainl was that the estate should not go over to the daughters unti all the issue male of Thomas had been provided for; to effectuat which it was considered an estate tail might be implied in Thoma in remainder after the estate tail male previously limited to hi sons (*v*). Sufficient operation it was thought was given to th word " such " by referring it to the word " male " in the previou devise,—the intention that 'Thomas' entail should descend i the male line, being also manifested by the express desire to preserv the name of C. This construction by parity of reasoning enable them to give the same estate tail in remainder to James (*w*), an the ultimate remainder to the daughters followed as a veste remainder, and completed the scheme of the will.

In default of issue generally (without the word " such ")

(ii) *Where the Reference is to " issue " simply.*—" It is well settled also," says Mr. Jarman (*x*), " that words importing a failure o issue (without the word *such*), following a devise to *children* in fe simple or fee tail, refer to the objects of that prior devise, and not t issue at large."

This construction has been adopted after a devise to children

(*s*) See post, note (*z*).

(*t*) See as to this doctrine, ante, p. 1854.

(*u*) Ante, p. 1925, and (same devise) *Parker* v. *Tootal*, 11 H. L. C. 143.

(*v*) This construction was thought to have the greater weight as it accounted for the antecedent decisions of K. B. and of Lord Eldon; but, a already stated, no final opinion wa expressed upon it, ante, p. 1925.

(*w*) As to this see Vol. I. p. 656.

(*x*) First ed. Vol. II. p. 372. Thi statement is quoted with approval by Lord Selborne, C., in *Bowen* v. *Lewis*, 9 A. C. at p. 900.

in fee simple (*y*), children in tail (*z*), sons in tail male (*a*), sons successively in tail male followed by daughters in common in tail (*b*), and sons successively in tail (*c*). Words devising over the property on a failure of issue male following a devise to the whole line of sons successively in tail male, are also referential to those objects (*d*).

Die without *leaving* issue.

In *Tarbuck* v. *Tarbuck* (*e*), where there was a devise to children in fee with a devise over on death without leaving lawful issue, Lord Cottenham appears to have been of the opinion that these words meant "in the event of there being no children at the time of the death of the tenant for life, whose estate preceded the gift to the children," but it seems clear from *Doe* d. *Todd* v. *Duesbury* (*f*), that the expression "die without leaving issue" means failure of previous estates in fee to issue, and Rolfe, B., in delivering the judgment of the Court in that case 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."

Death without leaving *children*.

It is now well settled that if you have a gift by will to A. for life, and after A.'s death to his children, in terms which would give them

(*y*) *Goodright* d. *Docking* v. *Dunham*, Doug. 264 ("in case his son died without issue"); *Malcolm* v. *Taylor*, 2 R. & My. 416 ("In case M. T. should die without issue of her body lawfully begotten"); *Goymour* v. *Pigge*, 7 Bea. 475; *Doe* d. *Todd* v. *Duesbury*, 8 M. & W. 514. See also *Doe* v. *Selby*, 2 B. & Cr. 926, ante, Chap. XXXVIII. *Tarbuck* v. *Tarbuck*, stated above; *Hale* v. *Pew*, 25 Bea. 335; *Maden* v. *Taylor*, 45 L. J. Ch. pp. 569, 572.

(*z*) *Ginger* d. *White* v. *White*, Willes, 348 ("In case I should die without issue"). The previous gifts were to male children successively and to their heirs; then to female children and their heirs. The children were considered to take estates tail, see above, p. 1971.

(*a*) *Baker* v. *Tucker*, 3 H. C. 105 (in default of issue), following *Blackborn* v. *Edgley*, 1 P. W. 600. This case was alleged arg. to be misreported, and extracts from R. L. were cited to shew 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. *Grattan* v. *Langdale* 11 L. R. Ir. 473 (in default of issue, male or female of F.); see also *Watkins* v. *Frederick*, 11 H. L. C. 358, at p. 370.

(*b*) *Morse* v. *Marquis of Ormonde*, 5 Mad. 99, 1 Russ. 382 ("In default of all such issue").

(*c*) *Peyton* v. *Lambert*, 8 Ir. Com. Law Rep. 485.

(*d*) *Bamfield* v. *Popham*, 1 P. W. pp. 54, 760; 1 Eq. Ca. Ab. 183, 2 Vern. pp. 427, 449.

(*e*) 4 L. J. Ch., N. S. 129; for a full statement and discussion of this case see the 5th and earlier editions of this work.

(*f*) 8 M. & Wels. 514.

an absolute interest in A.'s lifetime, and then you have a gift o simply in these terms, "if A. dies without leaving children," you to construe the expression "leaving" so as not to destroy any p vested interest. In other words, you construe it as meaning "wi out leaving a child who has not attained a vested interest" (*g*).

Where the preceding devise has been to children and the g over is on death "without leaving issue," it will be observed th the construction which takes "issue" to refer to children expo the vested interest of a child to be divested on decease with a given period, although leaving issue who survive that perio There are, therefore, strong grounds in such a case for not adopti the referential construction.

In *Hutchinson* v. *Stephens* (*h*), the devise was to trustees in upon trust for H. for his life, and after his decease upon trust the child and children of H. lawfully to be begotten, at his, her their respective ages of twenty-one years, if more than one tenants in common; and if there should be but one child living his decease then in trust for such only child at twenty-one: but case H. should die without leaving any issue of his body living the time of his decease, then over. H. had two children, both whom died in his lifetime, one of them leaving children who surviv H. Lord Langdale, M.R., held that, in the event which h happened, the children took estates in fee simple as tenants

Remark on *Hutchinson* v. *Stephens*.

common. In this case the words, "if there shall be but one chi living at his decease," appeared to supply a plausible argume for reading the word "issue," subsequently occurring in juxt position with the same words, in the sense of children, and i rejection serves to shew the strong disinclination of the Courts adopt a construction which exposes the vested interest of a chi to be divested.

"Die without leaving issue" held not to refer to issue before mentioned.

So, in *Ex parte Hooper* (*i*), where the devise was to A. for life, an after her decease to her children, "(in case she shall leave mo than one child) their heirs and assigns as tenants in commo but in case she shall *have* only one child then to such one child i fee;" but in case A. should "die without leaving any issue," the to such children as the testator should leave or have living at th

(*g*) Per Romer, L.J., in *Re Cobbold*, [1903] 2 Ch. at p. 304. It makes no difference that the testator knew of the existence of a child, and that his knowledge appears on the face of the will. See also *White* v. *Hill*, 4 Eq. 265; *Treharne* v. *Layton*, L. R., 10 Q. B. 459, and other cases cited Cha XLII., and also *Re Roberts*, [190 2 Ch. at p. 204. Compare *Re Bra bury*, 90 L. T. 824.

(*h*) 1 Keen, 240.

(*i*) 1 Drew. 264, 21 L. J. Ch. 402.

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*).

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 *Eastwood* 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 it seems that the father might have been held entitled 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 has been seen) is frequently made to supply a gap caused by the exclusiveness of the primary gift.

Effect where words refer to failure of issue of children, objects of prior devise.

"It seems," says Mr. Jarman (*l*), "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

(*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. pp. 269, 270, 7 Eq. p. 476, 10 Q. B. p. 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. p. 268), and therein agrees with his opinion, 2 Sim. N. S. pp. 202, 203, stated ante, p. 1968. See also *Re Ball*, 36 Ch. D. pp. 508, 511, 40 Ch. D. 11.

(*k*) L. R., 4 Ex. 141. But see *Doe* v. *Hopkinson*, post.

(*l*) First ed. Vol. II. p. 379.

(*m*) "*Doe* d. *Barnard* v. *Reason*, cit. 3 Wils. at p. 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

Doe v. *Reason*.

CHAPTER LII.

this construction two different meanings are given to the wor 'issue' in the same sentence (*n*). In the case of *Ives* v. *Legge* (*o*) thi construction was given to the phrase 'in default thereof,' followin 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), th word 'heirs' was read heirs *of the body*" (*p*).

"In default thereof."

When words importing failure of issue raise an estate by implication.

(iii) *Where the Prior Gift is to a contingent Class of Issue.*—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 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* (*q*), where the words "depart their life without leaving issue" were held not to be referable to the issue before mentioned, a son or daughter who should attain twenty-one, and in *Doe* d. *Bills* v. *Hopkinson* (*r*) the words "die without lawful issue" were held not referable to the prior devisees—children who should survive the tenant for life.

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" (*s*). In *Doe* v. *Hopkinson* the Court did both. But in *Sanders* v. *Ashford* (*t*), 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";

"Die without issue to attain twenty-one," referred to prior gift to "first son who should attain twenty-one."

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. sen. 611; *Smith* v. *Horlock*, 7 Taunt. 129." (Note by Mr. Jarman.)

(*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." (Note by Mr. Jarman.)

(*o*) 3 T. R. 488, n.

(*p*) Ante, Chap. XLVII. sec. III.

(*q*) 8 Bing. 386. See also *Alexander* v. *Alexander*, 16 C. B. 59.

(*r*) 5 Q. B. 223.

(*s*) See per Parker, V.-C., *Bryan* v. *Mansion*, 5 De G. & S. at p. 742.

(*t*) 28 Bea. 609.

it was held by 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 shewed that this was the issue he had present to his mind.

"Die without leaving issue male" not confined to sons being prior contingent devisees.

Mr. Jarman also refers (*u*) to "the case of *Franks* v. *Price* (*v*), 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 (*w*).

Principle on which preceding are reconcileable with cases where the referential construction was not adopted.

"By keeping steadily in view the principle above suggested, namely, that the argument in favour of applying to the objects of a prior express devise words denoting a failure of issue, gains or loses force in proportion as such prior devise is more or less comprehensive in its range of objects, we shall be able to reconcile the preceding cases, (in which a clause of this nature, following a devise to the whole line of children or sons, has been held to refer to the objects of such prior devise,) with those that remain to be stated, in which similar words, preceded by a devise to one or more son or sons only, have been decided not to be simply referential, but to import, [under the old law,] a general failure of issue, and, therefore, to confer an estate tail on the parent; such implied estate tail being (as we shall presently see) either an estate in possession or in remainder, expectant on the determination of the estates comprised in the prior express devise" (*x*).

(*u*) First ed. Vol. II. p. 381.

(*v*) 6 Scott, 710, 3 Bea. 182.

(*w*) "It is observable that, A. having died without issue male, B. was held to be tenant in tail *of the entirety*; so that it should seem that the M.R. (Lord *Langdale*) considered that the words (in the text distinguished by italics) had the effect of giving to A. and B. either successive estates tail male by implication in the entirety (as in *Tenny* v. *Agar* and *Romilly* v. *James*, ante, Vol. I. p. 657), or, (as seems more probable,) estates tail male in the respective moieties, with *cross remainders in tail male*. His Lordship did not advert to this point, (which is one of considerable nicety,) conceiving, probably, that B. was entitled in either case." (Note by Mr. Jarman.)

(*x*) Here followed, in the first edition, a statement and discussion of the cases cited in the following notes (other than those enclosed in brackets, which were added by previous editors). For this statement and discussion the reader is referred to the 4th edition of this work, Vol. II. pp. 471 et seq.

CHAPTER LII.

Result of decisions under old law.

Conclusions suggested.

The result of the decisions on the questions referred to by Jarman, under the law before the Wills Act, was thus stated in third edition of this work (*y*):

"1st. That the words, *in default of issue*, or expressions similar import, following a devise to *children in fee-simple*, n in default of *children* [and following a devise to children in mean in default of children or of issue inheritable under entail (*z*)]. This is free from all doubt.

"2nd. That these words following a devise to *all* the s successively in tail male, and daughters concurrently [or cessively] in tail general [or in tail special], are also to be constr as signifying *such issue*, even in the case of an executory trust (*a*)

"3rd. That words devising over the property on failure of is *male*, following a devise to the whole line of sons successively in male, are also referential to those objects (*b*).

[4th. That where the children take a life estate only the wo "in default of issue" introducing the gift over will create estate tail by implication in the parent subject to the childre life estates (*c*).]

"5th. That where there is a prior devise to a *definite number sons only* in tail male, with a limitation over in case of default issue or issue male of the parent, an estate tail will also be impli in the parent, in order to give a chance of succession to the ot sons (*d*).

"6th. That in the case of executory trusts, words importi *a dying without issue*, following a devise to the first and other so of a particular marriage in tail male, authorize the insertion o limitation to the parent in tail general, in remainder expectant those estates (*e*).

(*y*) By Messrs. Wolstenholme and Vincent, Vol. II. pp. 457 seq. Their alterations and additions are indicated by brackets, both in the text and in the notes: the rest is by Mr. Jarman, who added to his summary a recommendation to the reader "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."

(*z*) *Goodright* v. *Dunham*, Doug. 264, ante, p. 1973; [*Doe* v. *Duesbury*, 8 M. & Wels. 514, ante p. 1973;] *Ginger* d. *White* v. *White*, Willes, 348, ante, p. 1971; [*Baker* v. *Tucker*, 3 H. L. Ca. 106, 14 Jur. 771, ante, p. 1973].

(*a*) *Blackborn* v. *Edgley*, 1 P. W. 6 ante, p. 657; *Morse* v. *Marquis Ormonde*, 5 Mad. 99, 1 Russ. 3 ante, p. 1973; [*Peyton* v. *Lambert*, Ir. Com. Law Rep. 485].

(*b*) *Bamfield* v. *Popham*, 1 P. pp. 54, 760, 1 Eq. Ca. Ab. 183, 2 Ve pp. 427, 449.

[(*c*) *Doe* v. *Gallini*, 3 Ad. & Ell. 3 ante, pp. 599 and 657; *Parr* v. *Swinde* 4 Russ. 283, ante, p. 657; and p Lord Kingsdown, *Towns* v. *Wentwort* 11 Moo. P. C. C. at p. 546.]

(*d*) *Langley* v. *Baldwin*, cit. 1 P. 759, 1 Eq. Ca. Ab. 185 pl. 29, cit. 1 Ve sen. 26; *Att.-Gen.* v. *Sutton*, 1 P. 754, 3 B. P. C. Toml. 75, ante, p. 657.

(*e*) *Allanson* v. *Clitherow*, 1 Ve sen. 24.

"7th. That such words (whether they refer to issue or issue male), succeeding a devise to the eldest son [for life or] in tail, are not referable to such son exclusively, but create in the parent an implied estate tail (*f*), in remainder expectant on the estate [for life or in] tail of the son (*g*); and which rule also, it seems, applies where children [only who survive a specified period] take estates tail (*h*).

"8th. That the circumstance of the preceding devise to children, &c., being subject to a contingency (*i*) [or not including the whole subject of the devise over (*j*)] is rather unfavourable to the construction, which reads words importing a failure of issue to refer to a failure of the objects of such preceding devise."

Modern law.

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. In the case of a will made or republished since 1837, the question can still arise whether words importing failure of issue are referable to the objects of the preceding devise: and as Mr. Jarman points out (*k*), "if this question be decided in the affirmative, the construction will not be in the least affected by the change in the law; but if it be adjudged that the words under discussion do not refer to the objects of the prior devise, the result now will be widely different; for, instead of being construed (as formerly) to import an indefinite failure of issue, they must (unless the context forbids) be held to point exclusively to issue living at the death, and, consequently, can never, under any circumstances, by their own intrinsic force, have the effect of creating an estate tail by implication; so that as to wills made or republished since the year 1837, no scope will be afforded for the application of the doctrine of the cases of *Doe* v. *Halley*, *Parr* v. *Swindels*, and *Doe* v. *Gallini*, to the discussion of which so large a space has been devoted.

Effect under the Wills Act of rejecting the referential construction.

"The effect of holding the words in question *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,

(*f*) *Stanley* v. *Lennard*, 1 Ed. 87; [*Key* v. *Key*, 4 D. M. & G. 73,] ante, p. 657.

(*g*) *Doe* d. *Bean* v. *Halley*, 8 T. R. 5, ante, p. 657.

(*h*) *Doe* v. *Gallini*, 5 B. & Ad. 621, 3 Ad. & Ell. 340, ante, p. 657.

(*i*) *Doe* v. *Lucraft*, 8 Bing. 386, 1 M. & Sc. 573; *Alexander* v. *Alexander*, 16 C. B. 59; [*Doe* v. *Gallini*, supra].

(*j*) *Franks* v. *Price*, 6 Scott, 710, 5 Bing. N. C. 37, 3 Bea. 182.

(*k*) First ed. Vol. II. p. 414.

CHAPTER LII.

as in the case of *Hutchinson* v. *Stephens* (*l*), which is a result th accords with probable intention. Such a case, however, can occur where the devise to the children, or any other class of gives estates in fee, as it would under wills which are subject t [present] law, even without words of limitation; for if the devi question confers estates for life only, the determination of estates is involved in the failure of the issue whose extinctio the contingency on which the ulterior devise depends. We therefore, in the effect of the new law, increased motive for adh to the principle of the cases of *Goodright* v. *Dunham* and *Malcol Taylor* (*ll*), which will be remembered authorize the proposit that, where a devise to children in fee is followed by a devise to take effect on the failure of the issue of the parent of children, the words importing a failure of issue refer to the chil or other issue, who are the objects of the prior devise, w principle would, it is conceived, apply to devises embracing other class of children, as sons or daughters (*m*).

"For instance, if lands are devised to A. for life, with remai to his sons, and if A. should die without issue, then to B., son of A., under the original devise, would, immediately on his b take a vested remainder in fee-simple in his own aliquot sh and if the subsequent words were held merely to refer to the obj of the prior devise, the ulterior limitation of course would not turb or affect such vested remainder; but if the words in ques were adjudged not to bear this construction, but to point to i of every degree living at the death of A., they would subject vested estate of the sons of A. to an executory devise, to take e in the event of A. dying without leaving issue *surviving him*, a which it is conceived the Courts, when applying the new rul construction, will not hesitate to reject, in deference to the auth of the cases just referred to. The enactment which makes a de pass the fee-simple without words of limitation will, it is obvi greatly extend the application of the doctrine of *Goodright Dunham*, and *Malcolm* v. *Taylor*; and in this respect seems

(*l*) 1 Kee. 240, ante, p. 1974.

(*ll*) Ante, p. 1973.

(*m*) 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 child, who died before her. It was h in Ex. Ch., affirming Q. B., t "leaving" must be construed "hav had." The Court proceeded wholly the authority of *Maitland* v. *Ch* 6 Mad. 243, and similar cases (as which see Chap. XLII.), and no refere was made to the statute, or (expres to the doctrine discussed in chapter.

operate very beneficially, in concurrence with that which reads words importing a failure of issue as denoting issue living at the death, when not simply referential to the issue described in the prior devise.

"In the preceding remarks, the new enactment [sec. 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."

Various effects of a limitation over in default of issue.

It must be observed that 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 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 (*n*).

Devises of reversions

IV.—Devises of Reversions.—"Devises of reversions," as Mr. Jarman remarks (*o*), "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 (*p*),

(*n*) This statement of the law is taken from the 3rd edition of this work by Messrs. Wolstenholme and Vincent, Vol. II. p. 431, n. It is referred to with approval by Parker, J., in *White* v. *Summers*, [1908] 2 Ch. at p. 272.

(*o*) First ed. Vol. II. p. 406.

(*p*) "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." (Note by Mr. Jarman.) As to *Sanford* v. *Irby* and the other cases referred to by Mr. Jarman, see ante. In

CHAPTER LII.

Whether words refer to determination of subsisting estates.

devises the reversion as property in the event of that per dying *without issue*, which necessarily raises the question whet these words refer to the determination of the subsisting estat or to a general failure of issue, or, in other words, whether they words of description or donation: in the former case the dev operates as an immediate disposition of the reversion (*q*); in latter, it is an executory devise, and, as such, is [in cases gover by the old law] void for remoteness.

"A point of this nature occurred in the case of *Lady Lanesboro* v. *Fox* (*r*), where A., having settled the lands in question on marriage of his son B., to the use of himself (A.) for life, remainde his son B. for ninety-nine years, if he so long lived, remainder to use of the first and other sons of B. *on his intended wife to be bego* successively in tail male, remainder to the heirs *male* of the b of B., with reversion to the right heirs of himself (A.), by his devised the lands contained in the settlement *on failure of i of the body of* B., *and for want of heirs male of his* (A.'s) *body, to daughter* F. *in tail:* and the House of Lords adjudged, in c currence with the unanimous opinion of the Judges, that the did not give an estate tail by implication to B., and that there the devise over to F. was executory, and void, as being on remote a contingency.

Observations upon *Lanesborough* v. *Fox*.

"If this case had rested solely on the circumstances that subsisting estate tail in B. embraced the heirs *male* only, and devise in the will referred to his (B.'s) issue *generally*, (which tainly was argued as the chief point in the case,) the decision, conceived, could hardly have been sustained, consistently with rules of construction deducible from the cases discussed in present chapter, in many of which we have seen, that words refer in terms to issue or issue male have been held to apply to *chil* or *sons*, being the objects of the antecedent limitations (*s*). fortiori, therefore, in the present instance would they have b construed to be referential, where the approximation to a con reference to the subsisting estates was such as to require only

Whether words of contingency refer to subsisting estate tail.

the first edition of this work, the referential principle of construction was discussed in Chap. XL., and the question whether the words "in default of issue," &c., imported an indefinite failure of issue, was discussed in Chap. XLI. In this edition it has been found convenient to throw the two chapters into one and to invert the order in which the two subjects above referred to are discussed.

(*q*) See ante, Chap. XXXVII.

(*r*) Cas. t. Talb. 262. "*Lady La borough* v. *Fox* is not only right, the result of it was to affirm the in tion of the testator, not to contra it;" per Lord Loughborough. *L* v. *Lytton*, 4 Br. C. C. at p. 459.

(*s*) Ante, p. 1978

word 'male' to be supplied; and the case of *Tuck* v. *Frencham* (*t*) 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 favour of issue male created by the same will.

"These remarks assume that the principle which governs the application of phrases of this nature to limitations created by the same will, and to estates antecedently created, is identical. It seems difficult to find a solid distinction between the cases, especially where, as in *Lanesborough* v. *Fox*, the testator refers to the settlement in describing the subject of disposition; the difference between the two cases, indeed, if any, would seem to be, that the courts would incline more strongly to the referential construction in the latter case, where the effect is to support a devise otherwise void (*u*), 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 the case of *Lady Lanesborough* v. *Fox* appears to stand, is afforded by the other words 'and for want of heirs male of my own body;' for, as the testator had no estate tail, and none could be implied, it is clear that, unless the words could be held to refer to issue *living at the decease of the testator*, according to the rule discussed in the next chapter (*v*) (in which it will be seen there was considerable difficulty, inasmuch as the testator had a son living), the devise was void (*w*).

Whether sons of an existing or future marriage were referred to.

"The principle was again agitated in the case of *Jones* v. *Morgan* (*x*); 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

(*t*) Moore, 13, pl. 50, 1 And. 8; ante, Vol. I. p. 586.

(*u*) "It will be remembered that we are here speaking of the *old* law." (Note by Mr. Jarman.)

(*v*) The rule in question is discussed ante, p. 1980; the order of Mr. Jarman's treatment of the subject having been inverted, as explained in note (*p*) above.

(*w*) "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." (Note by Mr. Jarman.)

(*x*) Butl. Fea. App. 577, 3 B. P. C. Toml. 323.

sons' to be born,' was to be understood as meaning after-born s by his wife B. (who was living), or as having in his contemplati the sons of a future marriage. If confined to sons of A.'s pres marriage, it was a good devise of the reversion, as the contingen expressed by him (on which the devise over was to take effect) e braced precisely the estates under the settlement, on the det mination of which his own reversion would fall into possession, being the same as if he had said, 'Whereas my estate is sett upon my first and every other son in tail male by my marria settlement; therefore, in case they all die without issue male their body, I give it to my brother,' which would clearly have be good as a devise of the reversion; and a circumstance mu relied upon for this construction was, that the testator appoint B. a guardian of his children and executrix of his will, whi negatived the supposition of his contemplating a future marriage (On the other hand, it was contended, that the expressions us by the testator included the sons of an after-taken wife, and, such sons could not take an estate by implication, the limitati over to the testator's brother was an executory devise void remoteness. Lord Chancellor *Camden* sent a case to B.R., t Judges of which certified their opinion that the event of second marriage was not in the testator's contemplation, b that, if it were, the sons of that marriage took an estate tail. Lo *Bathurst*, who, in the meantime, had succeeded to the seals, co curred in the former branch of this certificate, and decreed accor ingly; but he dissented from the opinion, that an estate tail w raised by implication, conceiving *Lanesborough* v. *Fox* to be a dire authority against it. The decree was affirmed in the House Lords, on the ground that a future marriage was not in the co templation of the testator, and that the devise to his brother w therefore good (z).

Words held to refer to subsisting estate tail.

Words held not to refer to subsisting estates.

"But in *Bankes* v. *Holme* (a), where lands having been limite upon the marriage of A. with B., to the use of A. for life, wi remainder to trustees to preserve, with remainder to trustees f

(y) See this principle applied to a different species of case, *Wilkinson* v. *Adam*, 1 V. & B. 422, ante, Chap. XLIII. It will be remembered that since the Wills Act a will is revoked by marriage.

(z) "In *Trafford* v. *Boehm*, 3 Atk. 440, 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 t will contained an express reference the settlement (the particular limi tions of which do not appear) another purpose." (Note by Mr. J man.) See also *Lytton* v. *Lyt* 4 Br. C. C. 441, where the cases discussed.

(a) I Russ. 394, n. See also *Brist* v. *Boothby*, 2 S. & St. 465.

certain terms of years, with remainder to B. for life, remainder to trustees to preserve, remainder to the first and other sons of the marriage in tail male, with remainder to the daughters as tenants in common in tail, with cross remainders, with reversion to A., the settlor, in fee; A. made his will, by which he recited that by the settlement in question, he was seised of or entitled to the reversion in fee-simple expectant on the decease of his wife B., in case there should be no child or children of his said wife by him begotten, or, there being such, all of them should happen to depart this life *without issue*. The testator then, in case he should die without leaving any children or child, or, there being such, 'all of them should happen to depart this life *without issue* lawfully begotten,' devised the premises upon certain trusts. Sir *J. Leach*, V.-C., held, that this devise, being after a general failure of issue of the children, was too remote and void; and this decree was affirmed in the House of Lords.

Bankes v. *Holme* questioned.

"Lord *Eldon* observed in *Morse* v. *Lord Ormonde* (*b*) 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 settlement, whatever that reversion was; and the terms used were merely an erroneous and mistaken reference to the events on which such reversion would fall into possession. The case seems irreconcileable with *Jones* v. *Morgan*, which it closely resembles. It is not likely that the decision will be followed (*c*).

"And this conclusion is fortified by *Egerton* v. *Jones* (*d*), where, in pursuance of marriage articles, an estate at C. had been conveyed to the use of A. for life, with remainder to B., his wife, for life, with remainder (subject to a term of 500 years for raising portions for younger children) to the use of the first and other sons of A. and B. successively in tail male, with remainder to the use of trustees for 600 years upon certain trusts, in the event of there being no male issue of A. and B. who should live to attain the age of twenty-one years, with remainder to the use of A., his heirs and assigns,—A., by his will, devised as follows:—'And as to the

(*b*) 1 Russ. 405, Sugd. Law of Prop. 351.

(*c*) This paragraph is referred to by Sir J. Romilly, M.R., in *Lewis* v. *Templer*, 33 Bea. at p. 629.

(*d*) 3 Sim. 409; and see *Eno* v. *Eno*, 6 Hare, 171, further confirming the view taken in the text.

CHAPTER LII.

Devise on failure of issue held to be an immediate devise of reversion.

reversion and inheritance of the freehold estate by me alrea purchased at C. aforesaid, and such other estate or estates as I sh hereafter purchase in pursuance of my marriage articles, *in c of failure of issue of my body by my said wife*, I give,' &c. Sir *Shadwell*, V.-C., expressed a strong opinion that this devise operat as a valid immediate gift of the reversion; but it was not necessa for him to go further than to declare that the title depending the opposite construction was too doubtful to be forced on purchaser.

Remark on *Egerton* v. *Jones*.

"If the V.-C. had been called upon to adjudicate on this point construction, it is conceived his decision must have been in acco ance with his expressed opinion. The case of *Jones* v. *Morg* would have more than warranted, and even *Bankes* v. *Holme* wou not have opposed, such a conclusion; for the Court had not he (as in those cases) to supply words in order to restrict the issue spok of in the will to the issue of a particular marriage (who were t tenants in tail under the settlement), the testator having in t will distinctly referred to the issue of that marriage.

Suggested conclusion from the cases.

"The sound rule would seem to be, that, wherever it may collected from the general context of the will, that it is the testato intention to dispose of his reversionary interest expectant on t subsisting estates tail, such intended disposition will not be defeat by the neglect of the testator to adapt his language with precisi to the events on which the reversion will fall into possession. T consequence of rejecting this construction commonly has be (we have seen), to invalidate the intended devise of the reversi for remoteness (as depending upon a general failure of issu but in this respect the recent act [the Wills Act, 1837] has made alteration," for as we have seen (*e*) where the words denoting failure of issue have the effect neither of referring to the objects the prior devise, nor of creating an estate tail by implication, effect of the Wills Act is to prevent the ulterior devise from be void for remoteness.

(*e*) Ante, p. 1961.

CHAPTER LIII.

WHAT WORDS WILL CHARGE REAL ESTATE WITH DEBTS AND LEGACIES.

	PAGE
I. *Preliminary*	1987
II. *Express Charge of Debts and Legacies*	1989
III. *Effect of a General Direction that Debts shall be Paid.*	1990
IV. *Exception where a Specific Fund is Appropriated.*	1991
V. *Exception where the Direction is to Executors*	1992
VI. *Distinction where the Executors are Devisees of Real Estate*	1993
VII. *Whether a Devise of Real and also Personal Estate after Payment of Debts, &c., charges the Realty*	1997
VIII. *Whether Legacies and Annuities are charged by same Words as Debts, &c.*	1998
IX. *Whether a General Charge extends to Lands specifically devised*	2003
X. *Whether a Direction to raise Money out of Rents and Profits authorizes a Sale or Mortgage*	2005

I.—Preliminary.—Under the old law, the right of the creditors of a deceased person to obtain satisfaction of their debts out of his real estate was extremely limited, for at common law it was restricted to the case of an owner of freehold land dying intestate having contracted debts by specialty, in which his heirs were expressly bound. The combined effect of the Statute of Frauds, the Statute of Fraudulent Devises (*a*), the Debts Recovery Act, 1830 (*b*), and the Administration of Estates Acts, 1833 (*c*) and 1869 (the latter of which is still popularly known as Hinde Palmer's Act), has been to make all the land of a deceased person liable for his debts, and to put all specialty and simple contract debts on an equal footing in this respect (*d*). But under the old law a testator could always

(*a*) Stat. 3 W. & M. c. 14. *Wilson* v. *Knubley*, 7 East, 128; *Hunting* v. *Sheldrake*, 2 M. & W. 256.

(*b*) As to what is a bonâ fide alienation by an heir or devisee so as to exempt the land from execution in the hands of the alienee under the Statute of Fraudulent Devises and the Debts Recovery Act, 1830, see *Coope* v. *Cresswell*, L. R., 2 Ch. 112; *British Mutual Investment Co.* v. *Smart*, L. R., 10 Ch. 567; *Re Hedgely*, 34 Ch. D. 379; *Re Atkinson*, [1908] 2 Ch. 307.

(*c*) As to the operation of this Act, see *Re Hyatt*, 38 Ch. D. 609; *Re Moon*, [1907] 2 Ch. 304.

(*d*) As to the administration of the estate of an insolvent testator, see Judicature Act, 1875, secc. 10; *Re Whitaker*, [1901] 1 Ch. 9; [1904] 1 Ch. 299; Preferential Payments in Bankruptcy Act, 1888; *Re Heywood*, [1897]

CHAPTER LIII.

charge his real estate with the payment of his debts, with th result of making his specialty and simple contract debts payabl pari passu (*e*), and hence it was a question of importance (an sometimes too of no small difficulty) to determine in any particula case whether such a charge was in point of fact created by the wil Although the importance of the subject has been much diminishe by the statutes above referred to, the question may still arise, fo the executor's right of retainer is not taken away by these acts (*f* nor is it extended so as to enable the executor to retain his debt a against a creditor of higher degree than himself (*g*) ; nor do the ac give to an executor a right of retainer as regards real estate (*h* Again, the question whether a testator has charged his deb on his real estate is often of importance with reference to the rig of a legatee to marshal the assets (*i*).

In commenting on the effect of the Act of 1833, Mr. Jarma points out (*j*) that " Under the statute the creditors have not (in the case of an actual charge) any lien on the estate (*k*). I therefore, it is parted with by the heir or devisee before the credit has pursued his remedy, the estate cannot be followed ; though th creditor's lien under an actual charge is of no great value to hi since it does not prevail against a bonâ fide purchaser for pecuniary consideration ; the well-known rule being that su purchasers are not bound to see their money applied in payment debts under a general charge (*l*). Hence it is obvious that t inquiry whether real estate is or is not charged with debts by certa expressions in a will is still important, even in regard to the wi of testators dying since the 29th of August, 1833." Neither t

2 Ch. 593. See further on this subject, and also as to the priority of crown debts and judgment debts in administration out of court, Williams, Pers. Prop. 205–222 (16th ed.). These subjects form no part of the law of wills, and are therefore not discussed in detail in the present work, but references to some of the authorities will be found in the next chapter, in connection with the priorities of debts. As to the question whether a widow's dower is paramount to the claims of her husband's unsecured creditors, see the cases of *Spyer* v. *Hyatt*, 20 Bea. 621 ; *Jones* v. *Jones*, 4 K. & J. 361 ; *Northern Banking Co.* v. *M'Mackin*, [1909] 1 Ir. 374 ; Williams, R. P. (20th ed.), 318, n. (*a*).

(*e*) Williams, Real Prop. 274–6 (20th ed.).

(*f*) *Crowder* v. *Stewart*, 16 Ch. D. 368.

(*g*) *Wilson* v. *Coxwell*, 23 Ch. D. 764 ; *Re Jones*, 31 Ch. D. 440 ; *Re Bentin* [1897] 1 Ch. 673. As to retainer by t heir at law or devisee against a credit by specialty, see *Re Illidge*, 27 Ch. 478.

(*h*) *Walters* v. *Walters*, 18 Ch. 182.

(*i*) Post, Chap. LIV.

(*j*) First ed. Vol. II. p. 511.

(*k*) 4 My. & Cr. at p. 268. See a *Spackman* v. *Timbrell*, 8 Sim. 2 *Richardson* v. *Horton*, 7 Bea. 112; *Pi* v. *Insall*, 1 Mac. & G. 449; *Coope* v. *Cr* *well*, L. R., 2 Eq. 106 ; 2 Ch. 112 ; *Hedgely*, 34 Ch. D. 379 ; *Re Atkins* [1908] 2 Ch. 307.

(*l*) Sug. V. and P. 14th ed. 655. A where debts and legacies are charg the exemption extends to both, even, it seems, to annuities, *Page* *Adam*, 4 Pea. 269, cit. 1 D. M. & at p. 650.

Act of 1869, nor the Land Transfer Act, 1897, has made any difference in this respect.

Power of sale.

A charge of debts, or of debts and legacies, generally confers an implied power of sale, but in whom it is vested, and how far a person purchasing under it is exempt from inquiry, are questions which may still give rise to difficulty, although they can hardly arise in the case of testators dying since 1897 (*m*). The subject is referred to in the chapter on Trusts, in connection with trusts and powers of sale.

Statute of Limitations.

A charge of debts on real estate extends the period of limitation to twelve years; and the Land Transfer Act, 1897, has made no difference in this respect (*n*).

II.—Express Charge of Debts and Legacies.—Sometimes a testator expressly charges his debts, or legacies, or both, on his real estate or on part of it, and then the questions which generally arise are whether the testator intends not only to charge his real estate but to exonerate the personalty, and (in the case of debts) what kinds of debts are included in the charge. The former of these questions is discussed in another chapter (*o*).

With regard to the latter question, the Courts have construed the expression "debts" with considerable latitude, as will be seen from the cases cited below (*p*).

(*m*) As to the effect of the Land Transfer Act, 1897, see *Re Kempster*, [1906] 1 Ch. 446; *Re Balls*, [1909] 1 Ch. 791.

(*n*) *Re Stephens*, 43 Ch. D. 39; *Re Balls*, [1909] 1 Ch. 791.

(*o*) Chap. LIV. Where a devisee of land charged with legacies pays them off he may shew an intention to keep the charge alive for his own benefit: *Re Bayly's Estate*, [1898] 1 Ir. 383.

(*p*) 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. sen. 587; *Lomas* v. *Wright*, 2 My. & K. 769; *Wilson* v. *Leonard*, 3 Bea. 373; *Morse* v. *Tucker*, 5 Hare, 79; *Eardley* v. *Owen*, 10 Bea. 572; *Birmingham* 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. But as to a covenant that a person shall have an aliquot share of the testator's estate, see Chap. XXXII. As to the liability of an incumbent's estate for dilapidations, see *Bisset* v. *Burgess*, 23 Bea. 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. Money lent to the testator during infancy for necessaries may constitute a debt for this purpose (*Marlow* v. *Pitfeild*, 1 P. W. 558). And there are old cases in which the Courts have strained the language of a testator with regard to the payment of his debts, on the theory that such a course is permissible in the interest of "moral justice"; see *Bridgman* v. *Dove*, 3 Atk. 201; *Dormay* v. *Borradaile*, 10 Bea. 263. See further as to the meaning of "my debts" or "moneys owing by me" in a charge of debts, *Re Warnock's Estate*, Ir. R. 11 Eq. 212; *Martin* v. *Smyth*, 3 L. R. Ir. 417, 5 L. R. Ir. 266. As to mortgage debts, see Chap. LIV. sec. V. Debts barred by the Statute of Limitations are not included, *Burke* v. *Jones*, 2 V. & B. 275, but in the case of debts not barred

CHAPTER LIII.

Whether charge of debts includes future debts.

It is also to be observed, as Mr. Jarman remarks (*q*), "that, in construing provisions for payment of debts, the Courts are averse to an interpretation which would restrict the provision to debts subsisting at a given period during the life of the testator; and therefore, although words in the present tense generally refer to the time of making the will (*r*), yet it has been held that, a charge of all the debts, 'I *have* contracted since 1735' extended to future debts" (*s*). Lord Hardwicke said, "If it had been 'all debts that I owe,' still it would be extended to the time of her death."

On the same principle, where a testator 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 (*t*).

"All my debts."

It is hardly necessary to say that the expression "all my just debts" includes all debts owing by the testator at his death (*u*).

III.—Effect of a General Direction that Debts shall be Paid.—It may now be considered settled that a general direction by a testator that his debts shall be paid charges them on the real estate devised by the will (*v*).

at the testator's death, a charge of them on the real estate extends the statutory period to twelve years; *Re Stephens*, 43 Ch. D. 39; *Re Balls*, [1909] 1 Ch. 791. Secus in the case of personalty. See post, p. 2021. A claim though not statute-run may forfeit the benefit of a charge by laches, *Harcourt* v. *White*, 28 Bea. 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. *Huslam*, 5 H. L. C. 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*, 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*, supra. As to liabilities which are debts by foreign but not by English law, see *Re Brewster*, [1908] 2 Ch. 365.

(*q*) First ed. Vol. II. p. 530.

(*r*) This is perhaps too broadly stated; see ante, pp. 396, 416.

(*s*) *Bridgman* v. *Dove*, 3 Atk. 201.

(*t*) *Dormay* v. *Borradaile*, 10 Bea. 263.

(*u*) *Maxwell* v. *Maxwell*, L. R., 4 H. L. 506.

(*v*) Mr. Jarman examines in some detail the authorities, including *Legh* v. *Earl of Warrington*, 1 Br. P. C. 511 (of which he says that it has always been regarded as a leading authority); *Williams* v. *Chitty*, 3 Ves. 545; *Clifford* v. *Lewis*, 6 Mad. 33; *Graves* v. *Graves*, 8 Sim. 43; *Ball* v. *Harris*, 8 Sim. 485; 4 My. & Cr. 264; *Shaw* v. *Borrer*, 1 Keen 559; *Harding* v. *Grady*, 1 D. & War. 430, and *Parker* v. *Marchant*, 1 Y. & C. C. C. 290. In some of the earlier cases there is some unprofitable discussion as to the effect of the direction to pay debts being introduced by the words "in the first place" or "in primis," which Mr. Jarman treats as wholly immaterial. See also *Corser* v. *Cartwright*, L. R., 7 H. L. 731; *Luckcraft* v. *Pridham*, 48 L. J. Ch. 636. Mr. Jarman remarks (Vol. II. p. 520) that in laying down this rule of construction it seems to be generally admitted "that the Courts have allowed their anxiety to prevent mora

"The only doubt," says Mr. Jarman (*w*), "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 favour of such charges, it seems unlikely that any distinction of this nature will be established. So long ago as the case of *Shallcross* v. *Finden* (*x*) we have a dictum of Sir *R. P. Arden* which seems to bear upon the point under consideration: 'I am very clearly of opinion,' said this able Judge, 'that whenever a testator says that his debts shall be paid, that will ride over every disposition, either against his *heir-at-law* or devisee.'"

Absence of any devise or mention of realty.

A charge of debts may be created in the form of a condition imposed on a devisee of the land (*y*), unless the circumstances shew that this cannot be the testator's meaning (*z*).

Condition.

A mere discretionary authority to pay debts does not charge them on the testator's real estate (*a*).

Authority.

IV.—Exception where a Specific Fund is Appropriated.—Mr. Jarman continues (*b*): "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 (*c*).

Exceptions to the general rule.

First exception, where specific fund appropriated.

"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

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."

(*w*) First ed. Vol. II. p. 520.

(*x*) 3 Ves. 738.

(*y*) *Mead* v. *Hide*, 2 Vern. 120; *Re Kirk*, 21 Ch. D. 431. As to whether such a condition exonerates the personalty, see post, Chap. LIV.

(*z*) *Bridyman* v. *Dove*, 3 Atk. 201, where the devisee only took a life interest.

(*a*) *Re Head's Trustees and Macdonald*, 45 Ch. D. 310.

(*b*) First ed. Vol. II. p. 520.

(*c*) In support of this proposition Mr. Jarman cites *Thomas* v. *Britnell*, 2 Ves. sen. 313, and *Palmer* v. *Graves*, 1 Kee. 545, in each of which cases there was a general direction to pay debts, and a subsequent trust or charge for payment of them out of a specific property: it was held that the general charge by implication was destroyed by the subsequent specific provision. See also *Douce* v. *Lady Torrington*, 2 My. & K. 600, *Legh* v. *Earl of Warrington*, 1 B. P. C. Toml. 511, cit. 2 Ves. sen. 272, and Belt's Suppl. 341; *Corser* v. *Cartwright*, L. R., 8 Ch. 971, affirmed in D. P. on independent grounds, L. R., 7 H. L. 731. *West of England & South Wales District Bank* v. *Murch*, 23 Ch. D. 138.

Not affected by express charge on residuary personal estate,

inconsistent with such charge. As where (*e*) a testator, after willi all his just debts, funeral expenses, and the charges of provi his will to be paid, devised real estate, and gave some legacies, a then proceeded to bequeath all the residue of his personal esta *after and subject to the payment of all his just debts, funeral a testamentary expenses and the legacies thereinbefore bequeath* Lord *Lyndhurst*, C., held that the latter words were not inconsiste with an intention to charge the real estate as an auxiliary fun observing, that courts of equity had always been desirous sustaining such charges for the benefit of creditors; and the pr sumption in favour of them was not to be repelled by anythi short of a clear and manifest evidence of a contrary intention.

"And Sir *L. Shadwell*, V.-C., came to a similar conclusion on special and very inaccurately framed will in the case of *Graves Graves*" (*f*).

——nor by charge of specific sums either on particular lands,

——or on all the real estates.

Again, in *Taylor* v. *Taylor* (*g*), Sir L. Shadwell decided th a direction that all the testator's just debts and funeral expens should be fully paid and satisfied, was not cut down by a su sequent charge of specific sums on particular estates. And *Forster* v. *Thompson* (*h*) it was held that no such result followe from a subsequent charge of a specific debt on a specified esta which appeared in fact to be the testator's only real estate.

First exception inapplicable to express charge.

"And here, it should be observed," says Mr. Jarman (*i*), "th the doctrine of the preceding exception extends only to charg on real estate created by general and ambiguous expressions for, of course, a clear and explicit charge on real estate is not liab to be controlled by an express appropriation of particular land to the purpose (*j*), or a qualified charge of the real estate in th same will" (*k*).

Second exception, where the payment is to be made by the executors.

V.—Exception where Direction is to Executors.—Mr. Jarma continues (*l*): "The second exception to the general rule unde discussion occurs where the debts are directed to be paid b *executors*, in which case, unless land be devised to them, it will b

(*e*) *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 burthens, is mere redundancy, affording no inference of any definite purpose;" per Plumer, V.-C., *Noel* v. *Weston*, 2 V. & B. at p. 272.

(*f*) 8 Sim. 43. See *Jones* v. *Williams*, 1 Coll. 156.

(*g*) 6 Sim. 246. See also *Clifford* v. *Lewis*, 6 Mad. 33, ante, p. 1990.

(*h*) 4 D. & War. 303; see also *Cros* v. *Kennington*, 9 Bea. 150; *Dorma* v. *Borradaile*, 10 Bea. 263.

(*i*) First ed. Vol. II. p. 522.

(*j*) *Ellison* v. *Airey*, 2 Ves. sen. 568 *Coxe* v. *Basset*, 3 Ves. 155; *Noel* v *Weston*, 2 V. & B. 269; *Wrigley* v. *Sykes* 21 Bea. 337.

(*k*) *Crallan v. Oulton*, 3 Bea. 1.

(*l*) First ed. Vol. II. p. 523.

presumed that payment is to be made exclusively out of funds which, by law, devolve to the executors in their representative character.

"Thus, in *Brydges* v. *Landen* (*m*), where the testator commenced his will as follows:—'Imprimis, that all my debts and funeral charges and expenses be, in the first place, paid *by my executrix* hereinafter named: then as to my real and personal estate, I dispose of as follows;' and, after making such disposition, he charged and made liable all his real and personal estate with two sums of £150 to each of his daughters. All the cases were considered by Lord *Thurlow*, who was clearly of opinion that the real estate was not charged."

Mr. Jarman also cites, as illustrating this rule of construction, *Keeling* v. *Brown* (*n*), *Powell* v. *Robins* (*o*), and *Willan* v. *Lancaster* (*p*).

Devise subject to debts.

But if a testator directs his debts to be paid by his executors, and "subject as aforesaid" devises his lands, they will be charged with the debts (*q*).

Where executor is devisee.

VI.—Distinction where Executors are Devisees of Real Estate.—"Where, however," says Mr. Jarman (*r*), "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 *Aubrey* v. *Middleton* (*s*), 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* (*t*) to his nephew (who was his heir-at-law), *and appointed him executor of his will;* 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 the case of *Alcock* v. *Sparhawk* (*u*), the testator devised certain lands to A. (his heir-at-law) and his heirs; he then gave a

(*m*) *Brydges* v. *Landen*, 3 Russ. 346, n., cited 3 Ves. at p. 550, where it is said that the circumstance that the debts were to be paid by the executrix was considered very important.

(*n*) 5 Ves. 359.

(*o*) 7 Ves. 209.

(*p*) 3 Russ. 108. In this case the effect of the word "then," following a direction to pay debts and introducing a devise, was discussed. See also *Braithwaite* v. *Britain*, 1 Kee. 206, and *Wisden* v. *Wisden*, 2 Sm. & Gif. 396.

(*q*) *Dowling* v. *Hudson*, 17 Bea. 248.

(*r*) First ed. Vol. II. 525.

(*s*) 2 Eq. Ca. Ab. 497, pl. 16, Vin. Ab. Charge (D), pl. 15; the will also contained an express devise of some lands to another person.

(*t*) 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, Chap. XXVII.

(*u*) 2 Vern. 228. See also *Goodright* d. *Phipps* v. *Allin*, 2 W. Bl. 1041; *Doe* d. *Pratt* v. *Pratt*, 6 Ad. & Ell. 180; *Elliot* 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. sen. 499; and per Lord Thurlow, 3 Ves. jun. at p. 446.

legacy to B. to be paid *by his executor* within five years after decease; and appointed A. sole *executor* of his will, desiring h to see the will performed; it was held that the legacy w charged upon the land devised to A.

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.*

"So, in *Barker* v. *Duke of Devonshire* (*v*), where a testator devi all his real and personal estate unto and to the use of several perso their heirs, &c., in trust by sale or mortgage thereof to pay *wh soever he should thereafter by will or codicil appoint.* He th appointed these persons his executors, and proceeded to direct th *his just debts, funeral expenses, &c. should be paid by his executo* [and devised the residue of his estate (after giving several spec legacies) to his son.] Sir *W. Grant* held that this authorized a s for the payment of debts, though it was contended that the directi being *to the executors* shewed the intention of the testator to conf it to personal estate.

"Again, in the case of *Henvell* v. *Whitaker* (*w*), where a tes tor directed that all his just debts and funeral expenses should paid by his executor thereinafter named, and then gave all real and personal estate to his nephew A., his heirs, executo administrators and assigns, and appointed him executor: *J. S. Copley*, M.R. (*x*), decided that the direction to the nephew pay the debts operated to charge all the property, both real a personal, which he derived under the will."

Same rule where executor is devisee *in trust.*

And even where the land is devised to the executors upon tr for other persons, the effect is the same. Having the estate, a being charged with the payment of the debts, they are to consid the creditors as having the first claim upon the trust. Thus, *Dormay* v. *Borradaile* (*y*), where a testator commenced by giving his property to his wife: he next appointed her and two oth executors, and "to them his executors" gave certain real estat in trust for his wife and children, and concluded thus, "my exec tors are charged with the payment of my just debts," Lord Lan dale, M.R., held that the real estates were charged with the deb

"It is difficult," remarks Mr. Jarman (*z*), "to reconcile with th line of authorities the case of *Parker* v. *Fearnley* (*a*), where, a test

(*v*) 3 Mer. 310.

(*w*) 3 Russ. 343. See also *Dover* v. *Gregory*, 10 Sim. 393; *Harris* v. *Watkins*, Kay, 438; *Cross* v. *Kennington*, 9 Bea. 150 (aided probably by gift of "residue," see post, p. 2000).

(*x*) This should be Sir J. Leach.

(*y*) 10 Bea. 263. See also *Bentley* v. *Robinson*, 10 Ir. Ch. R. 287; *Ha land* v. *Murrell*, 27 Bea. 204; *Tanqueray-Willaume and Landau*, Ch. D. 465; *Re De Burgh Lawson*, Ch. D. 568; *Re Stokes*, 67 L. T. 22 *Re Salt*, [1895] 2 Ch. 203.

(*z*) First ed. Vol. II. p. 526.

(*a*) 2 S. & St. 592.

trix 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, that the pecuniary legacies were not charged on the real estate devised to the executor.

Remark on *Parker* v. *Fearnley*.

"As this case was prior to, it must be considered as overruled by *Henvell* v. *Whitaker*, with which it is clearly inconsistent. Neither *Aubrey* v. *Middleton* nor *Alcock* v. *Sparhawk* was cited to, or noticed by, the *Vice-Chancellor*.

Effect where debts are to be paid by tenant in tail, &c.

"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 (*b*).

Where by tenant for life.

"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* (*c*) 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 (*d*).

Effect where devise is to *one* of several executors.

"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 (*e*). Indeed, such is clearly the rule even where an estate *in fee* is devised to *one* of several executors.

"Thus, in the case of *Warren* v. *Davies* (*f*), where a testator directed that his debts and legacies, funeral expenses and testamentary charges should be paid by his executors thereinafter named; and, after directing certain real estates to be sold by his executors on the decease of his wife, he devised certain messuages and lands to his son Thomas Davies, in fee, and gave

(*b*) In support of this Mr. Jarman states *Clowdsley* v. *Pelham*, 1 Vern. 411.

(*c*) 3 Russ. 345, n.

(*d*) As to this point see also *Doe* d. *Ashby* v. *Baines*, 2 C. M. & R. 23; *Harris* v. *Watkins*, Kay, 438, 447; *Cook* v. *Dawson*, 7 Jur. N. S. 130; 3 D. F. & J. 127. In the case last cited Romilly, M.R., expressed a clear opinion that the life estate was charged. See also the rule as stated by Fry, J., in *Re Bailey*, post.

(*e*) See *Keeling* v. *Brown*, 5 Ves. 359.

(*f*) 2 My. & K. 49.

CHAPTER LIII.

him the residue of his real and personal estate. The testat appointed Thomas Davies *and another* executor. Sir *J. Lea* M.R., held that the estate devised to Thomas Davies was not to considered as charged with the debts and legacies directed to paid by the executors, merely because the devisee happened be one of the executors. And the same rule seems to have be acted upon by the same learned judge, though without any distin recognition of this ground of decision, in the subsequent ca *Wasse* v. *Heslington*" (*g*).

Unequal devises to executors.

In the case last named, the M.R. remarked that it was manife from the whole will (which contained express charges of vario legacies and annuities) that the testator had no intention of chargi his real estate with the payment of his debts. There were separa beneficial devises to the executors, and their interests were differe But if a testator directs that his debts shall be paid by his executo and devises all his real estate to them in such a way that they ta the legal estate upon trusts under which they take unequal ben ficial interests, the debts are charged on the real estate (*h*).

Effect where part only of the realty is given to the executors.

On the other hand, even if the gift to the executors is one a undivided, the implied charge may be rebutted by the contex as, if part only of the real estate is given to them, and other par to other persons; in such a case the distribution of the estate m be such as to make it very improbable that the testator intend that the former part should be charged, and the latter not (*i* especially if the part given to the executors is not for them ben ficially, but in trust for other persons (*j*).

General rule, stated by Fry, J.

The general rule has been thus stated (*k*): "Where there is direction that the executors shall pay the testator's debts, follow by a gift of all his real estate to them, either beneficially or on tru all the debts will be payable out of all the estate so given to them. T same rule applies whether the executors take the whole benefici interest, as in *Henvell* v. *Whitaker* (*l*), or only a life interest, as *Finch* v. *Hattersley* (*m*), or no beneficial interest at all, as in *Hartla* v. *Murrell*" (*n*). But the testator's intention must be ascertain

(*g*) 3 My. & K. 495.

(*h*) *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465, correcting the dictum of Wood, V.-C., in *Harris* v. *Watkins*, Kay, at p. 448.

(*i*) *Symons* v. *James*, 2 Y. & C. C. C. 301.

(*j*) *Re Bailey*, 12 Ch. D. 268, where the debts were held to be charged on the residuary real estate, but not on the real estate specifically devised to t executors.

(*k*) Per Fry, J., in *Re Bailey*, 12 C D. at p. 273, quoted with approval *Re Tanqueray-Willaume and Land* supra.

(*l*) Ante, p. 1994.

(*m*) Ante, p. 1995.

(*n*) Ante, p. 1994, n. (*y*).

from a consideration of the whole will, and if by reason of part of the realty being devised directly to one executor and part either to the other executor, or to some one else, the result of applying the general rule would be to charge the debts on the real estate in unequal proportions, this affords a presumption that the testator had no intention of charging them (*o*).

Where direction to executors to pay debts is followed by a devise to one of them "subject as aforesaid."

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 and legacies, since there is no other way of giving a sense to the words "subject as aforesaid" (*p*).

Whether charge extends to several preceding subjects of disposition.

VII.—Whether a Devise of Real and also Personal Estate after Payment of Debts, &c., charges the Realty.—Mr. Jarman continues (*q*): "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 subject of gift, or apply only to the immediate antecedent, namely, the personal estate.

"Thus, in the case of *Withers* v. *Kennedy* (*r*), 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 his funeral expenses and the charges of proving his will, and of carrying the trusts thereof into execution*, to trustees, their heirs, executors and administrators, upon trust for his wife for life, with other limitations over; it was contended that the personal estate being the natural fund for the payment of debts, it was a more obvious and natural construction to refer these words to the immediate rather than the more remote antecedent; that more remote antecedent being a species of property not legally liable to debts; but Sir *J. Leach*, M.R., though he admitted that the expression in the will afforded some colour to this argument, considered that, in plain construction, the words in question were to be referred to the freehold, copyhold, and leasehold property, as well as to the personal estate. His Honor considered

(*o*) *Re Bailey*, supra.
(*p*) *Dowling* v. *Hudson*, 17 Bea. 248.
(*q*) First ed. Vol. II. p. 528.
(*r*) 2 My. & K. 607; *Beacheroft* v. *Beacheroft*, 2 Vern. 690. See *Clarke* v. *Brereton*, 1 Jones, 165 (an Irish Exchequer case), where the charge was confined to personalty by force of the context.

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 (*s*).

Kidney v. *Coussmaker.*

"In *Kidney* v. *Coussmaker* (*t*) 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." It has, however, been generally considered as having been decided in the affirmative in that case, and the rule is clearly established (*u*).

Whether same words will charge legacies as debts.

VIII.—Whether Legacies and Annuities are charged by the same words as Debts, &c.—Mr. Jarman continues (*v*): "It has sometimes been made a question, whether similar words which will charge real estate with *debts* will suffice to onerate it with legacies; or whether, in order to throw legacies upon the land, a clearer manifestation of intention is not requisite. Sir *R. P. Arden*, and Lord *Loughborough*, were long at issue upon the point; the former maintaining, and the latter denying, the distinction (*w*), which, however, did not originate with Sir *R. P. Arden*; for it is to be traced in the early case of *Davis* v. *Gardiner* (*x*), where the testator commenced his will thus: 'As to my worldly estate, I dispose of the same as follows, *after my debts and legacies paid*;' and then gave several legacies, adding, 'After all my legacies paid, I give the residue of my *personal* estate to my son,' and then devised his lands: and Lord *Macclesfield* held that the legacies were not a charge upon the realty; his Lordship observing, that 'as plain words are necessary to disinherit an heir, so words equally plain are requisite to charge the estate, of an heir, which is a disinherison pro tanto.' In a note to this case the reporter adds that, if there had been a want of assets for the payment of debts, it seems that the land would have been charged therewith.

"As to my worldly estate, *after my debts and legacies paid*."

As to distinction between debts and legacies.

"The distinction in question appears to have been a natural consequence of the extreme length which the Courts had gone in

(*s*) *Moores* v. *Whittle*, 22 L. J. Ch. 207, is to the same effect.

(*t*) 1 Ves. jun. 436, 7 B. P. C. Toml. 573. See also 2 Ves. jun. 267.

(*u*) *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 Bea. 568.

(*v*) First ed. Vol. II. p. 530.

(*w*) *Kightley* v. *Kightley*, 2 Ves. jun. 328; *Williams* v. *Chitty*, 3 Ves. 545; *Keeling* v. *Brown*, 5 Ves. 359.

(*x*) 2 P. W. 187.

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' (*y*).

"In *Trott* v. *Vernon* (*z*), however, and several of the other cases before stated (*a*), 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 held to be charged upon land by expressions of a character scarcely more decisive than those which have this operation in regard to debts."

Words sufficient to charge legacies.

Thus in *Preston* v. *Preston* (*b*), 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. (*c*), that the real estate was charged with the grandson's legacy. *Parker* v. *Fearnley* (*d*), he said, was overruled by *Henvell* v. *Whitaker* (*e*).

So in *Gallemore* v. *Gill* (*f*), 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 that the legacies given by the codicil were charged on the real estate.

Devise "after payment" of legacies.

In *Re Adams and Perry's Contract* (*g*) a testator bequeathed certain legacies and gave the residue of his real and personal estate

(*y*) 3 Ves. 739.

(*z*) 2 Vern. 708. See also *Tompkins* v. *Tompkins*, Pr. Ch. 397; *Alcock* v. *Sparhawk*, 2 Vern. 228.

(*a*) Mr. Jarman here refers to *Newman* v. *Johnson*, 1 Vern. 45, and *Davis* v. *Gardiner*, 2 P. W. 187, which are cited in the first edition in support of the proposition that a general direction to pay debts charges them on the real estate: supra, p. 1990.

(*b*) 2 Jur. N. S. 1040. See also *Cross* v. *Kennington*, 9 Bea. 150.

(*c*) Citing *Alcock* v. *Sparhawk*, 2 Vern. 228, 1 Eq. Ca. Ab. 198, pl. 4, ante, p. 1993.

(*d*) Ante, p. 1994.

(*e*) Ibid.

(*f*) 2 Sm. & G. 158, 8 D. M. & G. 567.

(*g*) [1899] 1 Ch. 554.

CHAPTER LIII.

to trustees upon trusts for his wife and niece during their lives and after the decease of the survivor he directed his trustees t pay two legacies of 150*l.* each, and that after payment thereo they should stand possessed "of my said real estate and the residu of my personal estate" upon certain trusts. It was held that bot under the rule in *Greville* v. *Browne* (*h*) and by reason of the word "after payment," the two legacies of 150*l.* each were charged o the real estate (*i*).

Where real estate not devised to executors.

On the other hand, if the real estate is not devised to the executors a direction to pay legacies out of the testator's estate primâ faci applies only to the personalty. Thus in *Re Cameron* (*j*), a testato empowered his executors to realize such part of his "estate as they should think right to pay certain legacies; but the wi did not contain any devise of real estate except a gift of a par ticular house, it was held that the legacies were not charged o the real estate, the direction to the executors being satisfied by hold ing the word "estate" to apply only to property which they too as executors, i.e. the personalty.

Devise upon condition.

A devise of land to A. upon condition that he pays a legac to B. charges the legacy on the land (*k*).

Mixed fund.

It is clear that the rule in *Kidney* v. *Coussmaker* (*l*) applies t legacies as well as to debts (*m*); although the personalty is no in terms charged with the payment of them (*n*).

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 th residue of the real and personal estate," the legacies are charge on the realty. Thus, in *Hassel* v. *Hassel* (*o*), where the testato devised and bequeathed certain legacies, and then gave, devise and bequeathed all his real and personal estate not thereinbefor disposed of; Lord Bathurst held that the legacies were charge upon the real estate.

In *Greville* v. *Browne* (*p*), where a testator, after bequeathin

(*h*) Below.

(*i*) Compare the cases ante, p. 1998.

(*j*) 26 Ch. D. 19.

(*k*) *Wigg* v. *Wigg*, 1 Atk. 382.

(*l*) Ante, p. 1998.

(*m*) *Bright* v. *Larcher*, 3 D. & J. 148.

(*n*) *Field* v. *Peckett*, 29 Bea. 568; see also *Re Woollard's Trust*, 18 Jur. 1012.

(*o*) 2 Dick. 527, followed in *Re Bawden*, [1894] 1 Ch. 693; *Re Smith*, [1899] 1 Ch. 365. See also *Brudenell* v. *Boughton*, 2 Atk. 268; *Jones* v. *Price*, 11 Sim. 557; *Bench* v. *Biles*, 4 Mad. 187; *Aubrey* v. *Middleton*, ante, p. 1993; *Cole* v. *Turner*, 4 Russ. 376 *Mirehouse* v. *Scaife*, 2 My. & Cr. 695 *Peacock* v. *Peacock*, 34 L. J. Ch. 315 *Francis* v. *Clemow*, Kay, 435; *Wheele* v. *Howell*, 3 K. & J. 198; *Re Bellis' Trusts*, 5 Ch. D. 504; *Smith* v. *Butler* 1 Jo. & Lat. 692.

(*p*) 7 H. L. C. 689, dub. Lor Wensleydale; *Gainsford* v. *Dunn*, L. R 17 Eq. 405 (where on this principl pecuniary legacies were held to b appointments out of a fund the residu of which and of the personal estate wer afterwards given).

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 testator's property, real and personal, the legacies are charged on the realty. "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" (*q*).

Greville v. *Browne.*

Gift of residue before legacies.

It is not essential that the legacies should be bequeathed before the gift of residue: the rule applies whether the legacies are given before or after the gift of the residue (*r*); and it applies to an additional legacy given by codicil to a legatee named in the will (*s*).

What is a residuary gift for this purpose.

In deciding whether any particular property is charged with legacies under the principle now being considered, the substance and not the form of the residuary gift is to be regarded. Thus if a testator, after bequeathing legacies, gives "all the real and personal estate to which at my death I shall be beneficially entitled and not otherwise disposed of," this brings the case within the principle laid down in *Greville* v. *Browne* (*t*).

Property specifically described.

And even if the whole of the testator's realty is included in the residuary gift by its specific description "as my freehold houses at S. and all and singular other the residue and remainder of my estate," the testator having no other realty than the houses at S., this makes them subject to the payment of the legacies (*u*).

These cases are based on the general principle that a residuary gift may comprise property which is specifically described (*v*).

Thus, in *Bray v. Stevens* (*w*), 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 Bacon, V.-C., that the legacies were charged on the

(*q*) See *Gaingford* v. *Dunn*, L. R., 17 Eq. 405 (appointment under special power): ante, p. 827.

(*r*) *Elliott* v. *Dearsley*, 16 Ch. D. 322; *Re Grainger*, [1900] 2 Ch. 756, *Higgins* v. *Dawson*, [1902] A. C. 1; *Re Balls*, [1909] 1 Ch. 791.

(*s*) *Re Hall*, 51 L. T. 86.

(*t*) *Re Bawden*, [1894] 1 Ch. 693; *Re Smith*, [1899] 1 Ch. 365.

(*u*) *Thorman* v. *Hillhouse*, 5 Jur. N. S. 563.

(*v*) See ante, p. 949.

(*w*) 12 Ch. D. 162.

CHAPTER LIII.

freehold estates in the parishes of B., L. and R. He dissented fr the decision in *Castle* v. *Gillett* (*x*).

Limits of the rule.

But a gift (after legacies) of "all my real estate and all t residue of my personal estate" plainly treats the different spec of estates as two masses, and does not bring the case within *Grev* v. *Browne* (*y*).

Of course the rule is not excluded by a direction to the executo (to whom there is no devise of real estate) to pay debts and legacie such a direction is mere surplusage (*z*). But the rule is not app cable to a case where the testator first dealing exclusively wi his personal estate allots certain portions of it to several objects, a then disposes of the residue of his real and personal estate. Th in *Gyett* v. *Williams* (*a*), where a testator bequeathed his perso estate in trust to lay out a sum, "part thereof," as therein mentione and to invest the residue and stand possessed thereof as to o sum, "part of it," in one way, and of other sums, "other pa of it," in other ways; he then gave some small pecuniary legaci simpliciter, and concluded with a gift of all the residue of h estate and effects whatsoever and wheresoever: it was held b Wood, V.-C., that the several sums described as parts of the perso estate were not charged on the realty, and that the small pecunia legacies were so charged.

Legacies not charged on realty by joining realty and personalty in same gift.

And the mere joining in one devise or bequest of the real a personal estate is not of itself enough to charge legacies on re estate. In all the cases some other circumstance has been i volved leading to that conclusion (*b*). And where a testator ga his whole real and personal estate to trustees and executors f the maintenance and education of his infant son and daughte and directed that as they attained majority, his property, real a personal, should be divided as follows, viz., a pecuniary lega to his son, and his property at T. amongst his daughters, it w held that the legacy was not charged on the property at T. (*c*).

Mixed fund.

It must be remembered that, although the principle of *Greville Browne* requires that the residuary real and personal estate shou be treated as one mass, it does not follow that it is to be treat

(*x*) L. R., 16 Eq. 530.
(*y*) *Wells* v. *Row*, 48 L. J. Ch. 476; *James* v. *Jones*, 9 L. R. Ir. 489; *Re Salt*, [1895] 2 Ch. 203. Compare *Re Adams and Perry's Contract*, [1899] 1 Ch. 554, stated ante, p. 1999.
(*z*) *Re Brooke*, 3 Ch. D. 630.
(*a*) 2 J. & H. 429.
(*b*) See *Nyssen* v. *Gretton*, 2 Y. & 222.
(*c*) *Bentley* v. *Oldfield*, 19 Bea. 225

as a mixed fund under the doctrine of *Roberts* v. *Walker* (*d*) so as to make the legacies payable out of the real and personal estate pro rata (*e*).

Annuities usually included in a charge of legacies.

It may here be observed, that, under a charge of legacies, annuities will generally be included (*f*), unless the testator manifests an intention to distinguish them (*g*), as by sometimes using both words (*h*).

Remedies of legatee.

Where a testator devises land charged with a legacy, and the devisee takes possession, the legatee cannot claim rents received by the devisee; his remedy is to obtain the appointment of a receiver (*i*).

IX.—Whether a General Charge extends to Lands specifically devised.—Where a testator has manifested an intention to charge his real estate with the payment of either debts or legacies, the question sometimes arises, whether such charge extends to the specific as well as the residuary lands, or is confined to the latter.

Rule in case of legacies;

And first as to legacies. In *Spong* v. *Spong* (*j*), 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 shewn 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

(*d*) 1 R. & My. 752, post, p. 2033.

(*e*) *Elliott* v. *Dearsley*, 16 Ch. D. 322. The dictum of Jessel, M.R., to the contrary in *Gainsford* v. *Dunn*, L. R., 17 Eq. 405, is overruled: *Re Boards*, [1895] 1 Ch. 499.

(*f*) "Legacy" generally includes "annuity": *Sibley* v. *Perry*, 7 Ves. 522; *Bromley* v. *Wright*, 7 Ha. 334; *Ward* v. *Grey*, 26 Bea. 485; *Mullins* v. *Smith*, 1 Dr. & Sm. 204; *Nicholson* v. *Patrickson*, 3 Giff. 209; *Gaskin* v. *Rogers*, L. R., 2 Eq. 284. Ante, p. 1061.

(*g*) *Shipperdson* v. *Tower*, 1 Y. & C. C. C. 441; or where the scheme of the will excludes that construction, as in *Cunningham* v. *Foot*, 3 A. C. 974.

(*h*) See *Nannock* v. *Horton*, 7 Ves. 391; *Woodhead* v. *Turner*, 4 De G. & S. 429; *Gaskin* v. *Rogers*, L. R., 2 Eq. 284. But this is not conclusive: *Heath* v. *Weston*, 3 D. M. & G. 601; *Ward* v. *Grey*, 26 Bea. 485.

(*i*) *Garfitt* v. *Allen*, 37 Ch. D. 48.

(*j*) 1 Y. & J. 300, 3 Bli. N. S. 84. But see the observations of Lord Cottenham, C., on this decision, *Mirehouse* v. *Scaife*, 2 My. & Cr. at pp. 704, 705.

CHAPTER LIII.

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."

So in *Conron* v. *Conron* (*k*), 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 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.

in case of debts.

But in both cases legacies only were charged. The reason of the rule as stated by Lord Manners is inapplicable to a charge of debts (*l*); 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 (*m*).

Form of will.

According to some of the authorities, the question turns on whether the charge precedes or follows the specific devise: "It seems to me to make a most marked difference whether a man begins by making a charge upon all his property, or whether he begins by making a specific devise or bequest and then charges his property, because, when he has made a specific devise or bequest, and then proceeds to charge his property, it may well be that he means 'all that property which I have not already by this my will disposed of'" (*n*). Conversely, if the testator begins by charging an annuity on all his realty and then makes specific

(*k*) 7 H. L. C. 168; *Campbell* v. *M'Conaghey*, Ir. R., 6 Eq. 20.

(*l*) See e.g. *Harris* v. *Watkins*, Kay, 438; *Mannox* v. *Greener*, L. R., 14 Eq. 456.

(*m*) *Maskell* v. *Farrington* (*re Emmerton's Estate*), 3 D. J. & S. 338; and see *Rowley* v. *Eyton*, 2 Mer. 128.

(*n*) Per Malins, V.-C., in *Mannox* v. *Greener*, L. R., 14 Eq. at p. 459; *Quain* v. *Harvey*, 5 L. R. Ir. 622.

devises, the inference is that he intends the annuity to be a charge on the specifically devised realty as well as the other (*o*).

Where a charge of legacies is effected under the rule in *Greville* v. *Browne* (*p*), and there is also a specific devise of realty, the latter is not charged with the legacies, but only the residuary realty (*q*). 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 (*r*).

In *Wisden* v. *Wisden* (*s*) the testator, after specifically devising real property to each of his sons, directed that neither of his sons should have possession of any of the said premises "until the time that all my just debts shall be paid." It was held that this charged the debts on the properties specifically devised to the sons.

Where there is no residuary devise.

In *Bank of Ireland* v. *McCarthy* (*t*) the testator bequeathed pecuniary legacies, charged in the first place upon his personalty, and (if the same should be insufficient) upon his real and personal estates: he then devised to one son his lands at A., and devised to his other son, "subject as aforesaid," his lands at B., C., D. and E.: there was no residuary devise: it was argued on behalf of persons claiming under the devise of the lands at A. that the words "subject as aforesaid" shewed an intention on the part of the testator to charge the legacies only on the lands at B., C., D. and E., and also that the devise of these lands was in effect residuary. It is hardly necessary to say that neither argument prevailed.

Direction to raise monies out of the rents and profits.

X.—Whether a Direction to raise Money out of Rents and Profits authorizes a Sale or Mortgage.—Mr. Jarman continues (*u*): "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 (*v*); but the question which has chiefly given rise to perplexity in reference to these words is,

(*o*) *Cornwall* v. *Saurin*, 17 L. R. Ir. 595.

(*p*) Ante, p. 2000.

(*q*) Per Bacon, V.-C., *Bray* v. *Stevens*, 12 Ch. D. 169. *Francis* v. *Clemow*, Kay 435, is not contra; the plaintiff (legatee) claimed only against residue.

(*r*) *Wheeler* v. *Claydon*, 16 Bea. 169; *Quain* v. *Harvey*, supra.

(*s*) 2 Sm. & G. 396; 5 Jur. N. S. 455.

(*t*) [1898] A. C. 181, affirming decision of C. A. Ir. *M'Carthy* v. *M'Cartie*, [1897] 1 Ir. 86 (on different ground).

(*u*) First ed. Vol. II. p. 534.

(*v*) *Johnson* v. *Arnold*, 1 Ves. sen. at p. 171; *Baines* v. *Dixon*, ib. at p. 42; *Doe* v. *Lakeman*, 2 B. & Ad. at p. 42; and see ante, p. 1297.

whether a direction or power to raise money out of the *rents and profits* authorizes a sale, the doubt being, whether, in such cases the testator or settlor, by the words 'rents and profits,' mean 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.

Authorizes a sale where definite time is fixed for payment.

"The doctrine on this subject has fluctuated; the early authorities leaning more to the restricted construction than the recent cases. But, it seems, that even those authorities admitted a sale, where the purpose was to pay debts and legacies (*w*), or to raise a portion by a definite period, within which it could not be raised out of the annual rents (*x*); 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 (*y*).

Where no definite time is fixed.

"It was held, however, in the very early cases, that, if the portions were to be raised out of the rents and profits, without any specified time of payment, it could only be raised by a gradual accumulation of the annual profits as they arose (*z*).

"But judges, in later times, looking at the inconvenience of raising a large sum of money in this manner, have inclined much to treat a trust to apply the rents and profits in raising a portion, as authorizing a sale (*a*).

(*w*) *Lingon* v. *Foley*, 2 Ch. Cas. 205; *Anon.*, 1 Vern. 104; *Berry* v. *Askham*, 2 Vern. 26; *Rawlins* v. *Brotherson*, Ex. 1783, cit. 2 Ves. jun. 480 (as to which qu., the expression there being "*annual* rents and profits"). See also *Talbot* v. *Earl of Shrewsbury*, Prec. Ch. 394; *Metcalfe* v. *Hutchinson*, 1 Ch. D. 591.

(*x*) *Sheldon* v. *Dormer*, 2 Vern. 310; *Warburton* v. *Warburton*, ib. 420; *Jackson* v. *Farrand*, ib. 424; *Gibson* v. *Lord Montfort*, 1 Ves. sen. 491; *Okeden* v. *Okeden*, 1 Atk. 550. "Some parts of Lord *Hardwicke's* judgment in this case [*Okeden* v. *Okeden*] are irreconcilable. He is made, in one place, to assume, that the portion was to be raised at the period of vesting, and, in another, to state the contrary. It seems difficult to support the latter hypothesis. And see *Hall* v. *Carter*, 2 Atk. 355." (Note by Mr. Jarman.) See also *Backhouse* v. *Middleton*, 1 Ch. Ca. pp. 173, 176.

(*y*) *Green* v. *Belchier*, 1 Atk. 505. See also *Allan* v. *Backhouse*, 2 V. & B. 65, stated post, p. 2011.

(*z*) Mr. Jarman cites in support of this proposition *Trafford* v. *Ashton*, 1 P. W. 415; *Ivy* v. *Gilbert*, 2 P. W. 13; s.c. *Evelyn* v. *Evelyn*, 2 P. W. 659; *Mills* v. *Banks*, 3 P. W. 1, but *Trafford* v. *Ashton* is really a decision the other way (post, note (*a*)), and the other two cases are by no means conclusive. In *Ivy* v. *Gilbert* there was an express power to lease, which impliedly excluded a sale or mortgage: see *Baines* v. *Dixon*, supra.

(*a*) The doctrine in question is much older than Mr. Jarman supposed; he seems to have overlooked the case of *Heycock* v. *Heycock*, 1 Vern. 256, which recognizes the doctrine that where a sum is directed to be raised out of the rents and profits of land, and they are not sufficient to raise the amount in a convenient time, it may be raised by sale or mortgage (see also *Sheldon* v. *Dormer*, 2 Vern. 310). *Trafford* v. *Ashton*, 1 P. W. 415, was not the case

Lord Hardwicke's dicta.

"Thus, in *Green* v. *Belchier* (*b*), 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 will at law pass the lands (*c*), the raising by rents and profits is the same as raising by sale.'

"So, in *Baines* v. *Dixon* (*d*), the same eminent Judge observed 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 his Lordship admitted, that, in one case in ten, it had not been agreeable to the testator's intention (*e*). Lord *Hardwicke* held, however, that, in the case before him, where legacies were to be paid with all convenience as the profits of the estate should advance the money, the word 'advance' limited it to annual profits (*f*).

Lord Thurlow's and

"The same opinion, too, seems to have been entertained by Lord *Thurlow*, who in the case of *Countess of Shrewsbury* v. *Earl of Shrewsbury* (*g*) 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* (*h*) 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 shew the rule of construction

Lord Eldon's opinion.

Position of text writers.

of a will, but of a settlement made on marriage, and the trust was to raise portions for daughters of the marriage "as soon as conveniently may be," and it was decreed that they should be raised by sale or mortgage, apparently on the ground that the daughters were "purchasers of portions, by their mother's marriage," and that the portions were therefore in the same position as debts. *Stanhope* v. *Thacker*, Prec. Ch. 435, was a similar case.

(*b*) (*Green* v. *Belchier*), 1 Atk. 505.

(*c*) See ante, p. 2005.

(*d*) 1 Ves. sen. 42.

(*e*) Lord Hardwicke really said that there was not one case in ten where such a decree was agreeable to the testator's intention.

(*f*) See also *Okeden* v. *Okeden*, 1 Atk. 550; *Ridout* v. *Earl of Plymouth*, 2 Atk. 104; and *Gibson* v. *Lord Montfort*, 1 Ves. sen. 485.

(*g*) 1 Ves. jun. at p. 234.

(*h*) 1 Mer. at p. 232.

General doctrine of the authorities.

to be rather the reverse (*i*), and that these words are to be taken i their widest sense, namely, as authorizing a sale, unless restraine by the context (*j*); but, perhaps, it more accords with the principl of the authorities to say, that the signification of the phrase i governed wholly by the nature of the purpose for which the mone is to be raised, and the general tenor of the will.

Exception where estate is treated as existing entire after raising of debts.

"If the testator or settlor manifests, by the context of th instrument, that he contemplates the identical subject, out of whos 'rents and profits' the money shall have been raised, being after wards enjoyed by the devisees, or remaining otherwise available for the purposes of the will, it is evident that he intends the curren annual income only to be applied; for by such means alone can the raising of the money be made consistent with the preservation of the entire subject of disposition (*k*).

"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 (*l*).

(*i*) "Vide Mr. *Cox's* note to *Trafford* v. *Ashton*, 1 P. W. 418; Mr. *Raithby's* note to an anonymous case, 1 Vern. 104; and Mr. *Belt's* Suppl. to Ves. sen. 221. Mr. *Belt's* observation, that Lord *Hardwicke*, in *Conyngham* v. *Conyngham*, 1 Ves. sen. 522 (more fully stated by Mr. B., Suppl. 221), seems to have thought that his predecessors had gone too far in holding that money, to be raised out of rents and profits, might be raised by a sale, is quite at variance with the general tenor of his Lordship's judgments, which carried the rule in favour of a sale much farther than any of his predecessors, and may be considered to have established the present doctrine upon the subject. In the particular case referred to, it is true, his Lordship held the charge to affect the annual income only; but the will was so clear on this point, that, with all his partiality to the opposite construction, it was impossible that he could come to any other conclusion. The testator devised his plantation and lands to 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 shipped as C., one of his two trustees, should direct, until his (testator's) funeral charges, debts and legacies should be paid; and he gave C. power out of the said produce, as the same should be remitted, to pay his debts and legacies. Lord *Hardwicke* thought himself not warranted to decree a sale; it happened, he said, to be sometimes attended with inconvenience, as in *Ivy* v. *Gilbert*, 2 P. W. 13; but he could not go further unless there was some other right of incumbrance." (Note by Mr. Jarman.)

(*j*) "You must find on the face of the will a clear restriction of the general meaning of words directing you to raise a gross sum payable immediately, or at a day fixed, out of rents and profits; and the words are not otherwise to be read as annual rents and profits," per Jessel, M.R., in *Metcalfe* v. *Hutchinson*, 1 Ch. D. at p. 598, cited and commented on by Stirling, J., in *Re Green*, 40 Ch. D. at p. 614.

(*k*) See *Wilson* v. *Halliley*, 1 R. & My. 590.

(*l*) *Small* v. *Wing*, 5 B. P. C. Toml. 66. Mr. Jarman's statement of this case is omitted.

Effect where "residue" of rents and profits is given.

"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 (*m*). The latter circumstance, however, was, by Lord *Hardwicke*, considered to be inconclusive in *Okeden* v. *Okeden* (*n*), where the trustee of a term for years was to receive the rents and profits, and apply part thereof for raising £5,000 for A., if he should live to attain twenty-five, and to pay certain charges; and though the other charges were clearly of a nature which must have been intended to come out of the annual profits (being for the maintenance of infants (*o*), and making repairs, and to pay an annuity), yet his Lordship was of opinion, that a sale of the inheritance might be decreed for raising the portion, if the rents during the minority of the devisee of the land, during which the trustees took an estate, did not amount to the sum (*p*).

Rule where some of the prescribed purposes require a sale, and some not.

"Where some of the purposes for which the money is to be raised require a sale, and others do not, there might seem to be ground to contend, that, as the testator has not drawn any line of distinction between them in regard to the mode of raising the money, the whole is raisable in one manner. In the case of *Wilson* v. *Halliley* (*q*), however, where debts and legacies were to be raised out of rents and profits, Sir *J. Leach*, M.R., treated it as clear, that, though a sale might have been effected, if necessary, for the purpose of liquidating the debts, the conclusion from the whole will (which was very long) was, that the legacies, though payable at definite periods, were raisable out of the annual rents only. 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.'"

Clear context required to negative sale for debts.

Referring to this case, Sir G. Jessel, M.R., said (*r*), "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

(*m*) *Heneage* v. *Lord Andover*, 2 Y. & J. 360, cited by Wood, V.-C., in *Forbes* v. *Richardson*, 11 Hare, at p. 359. See also *Taylor* v. *Emerson*, 2 Con. & Law. 558, where however the words were "out of the interest proceeds or annual rents." See Chap. XXXI.

(*n*) 1 Atk. 550.

(*o*) But in *Torre* v. *Browne*, 5 H. L. C. 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.

(*p*) The question how the deficiency should be raised was reserved for further consideration.

(*q*) 1 R. & My. 590.

(*r*) *Metcalfe* v. *Hutchinson*, 1 Ch. D. 591.

CHAPTER LIII.

to be raised by way of bounty, meaning that as the debts must paid the testator never could intend that the creditors were to wait And this distinction in regard to debts he thought would be strong in the case of a modern will, where the creditors can resort to t real estate as a matter of right, and that it would be a very strang intention to impute to a testator that he should by his will inter to delay the creditor, having no legal right so to do. The conte might shew that he did so intend; but, considering the absurdit of the intention, the context must be plain.

Sale notwithstanding gift of "remainder of rents and profits."

In *Metcalfe* v. *Hutchinson* (*s*), the testator directed his debts be paid out of the rents and profits of his real and personal estat and after the debts were paid that the *remainder* of the rents an profits should be paid for life, with remainder over in fee; an it was held by Sir G. Jessel that the words directing payme of the remainder were not sufficient to exclude the general ru that a direction to pay out of rents and profits meant primâ faci out of the estate. Here "rents and profits" necessarily mean the corpus in the gift of the remainder.

To exclude the rule where, subject to a charge of debts or c gross sums, the estate is devised for life, with remainder ove involves another improbability, viz., that the testator intended t throw the whole burden on the tenant for life. This point wa glanced at in *Harper* v. *Munday* (*t*). But aggrandizement o the estate is not unfrequently the primary object of a testator t which the interests of the immediate devisee are postponed (*u*) This is strongly indicated where accumulation of the rents i ordered as the mode of raising the debts (*v*).

Direction to raise out of the rents and profits, *or* by sale or mortgage.

Mr. Jarman continues (*w*), "Where the direction is to raise out o the rents and profits, *or* by sale or mortgage, it is obvious that thes words (being evidently used in contradistinction) cannot mean th same thing; rents and profits, therefore, must import annual rent and profits; and if, in such a case, the charges to be raised by thes respective modes are of two kinds, one annual, and the other i gross, the words will be distributed, the annual charges being

(*s*) 1 Ch. D. 591.

(*t*) 7 D. M. & G. pp. 369, 373, 375. See also *Lord Londesborough* v. *Somerville*, 19 Bea. 295, where the charge was of legacies, to be paid within three months.

(*u*) 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, ib. 75.

(*v*) See *Tewart* v. *Lawson*, L. R., 18 Eq. pp. 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*, 40 Ch. D. 610.

(*w*) First ed. Vol. II. p. 540.

raiseable out of the annual rents, and the sums in gross by sale or mortgage (*x*).

Direction to raise by lease.

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" (*y*).

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 (*z*). And in a settlement which contained a charge in these terms, and another to be effected 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 (*a*).

As to raising fines for renewal of leases.

Mr. Jarman continues: "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.

Expenses of renewed lease to be paid out of rents and profits.

"Thus, in the case of *Allan* v. *Backhouse* (*b*), 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

Sale decreed.

(*x*) *Playters* v. *Abbott*, 2 My. & K. 97; see also *Ridout* v. *Earl of Plymouth*, 2 Atk. 104 ("by perception of the rents, or by leasing or mortgaging"). *Marker* v. *Kekewich*, 8 Ha. 291; *Re Marquess of Bute*, 27 Ch. D. 196 ("by mortgaging or otherwise disposing of . . . or out of the rents, issues and profits"). See however, Davidson, Conv. iii. 450, n.

(*y*) *Ivy* v. *Gilbert*, 2 P. W. 13, Pre. Ch. 583. See also *Ridout* v. *Earl of Plymouth*, 2 Atk. 104; *Mills* v. *Banks*, 3 P. W. 1.

(*z*) *Evelyn* v. *Evelyn*, 2 P. W. 659, 670.

(*a*) Ib.

(*b*) 2 V. & B. 65. See *Garmstone* v. *Gaunt*, 1 Coll. 577.

of annual rents and profits, except the purpose to preserve estate entire (which his Honor thought warranted the sacrif of part for the preservation of the remainder), the money n be raised by sale or mortgage" (*c*). This decision was affir by Lord Eldon (*d*).

Where other words than "rents and profits" are used.

The early judges seem to have thought themselves justifie laying down the general rule now under discussion, by trea the annual rents as "ordinary profits," and the proceeds of a or mortgage as "extraordinary profits" (*e*). Consequentl the phrase used by the testator is not simply "rents and profi the general rule does not necessarily apply. This distinc seems to have influenced the decision in *Re Green* (*f*), where words "rents, dividends, and annual proceeds" were treate equivalent to "annual rents, dividends, and proceeds."

Annual rents and profits.

A charge on corpus is, of course, excluded where the expressio "annual rents and profits" (*g*).

Implied prohibition of mortgage.

Where the testator expressly says that the charges are to raised out of rents and profits, but not by sale, this would, general rule, also prohibit a mortgage or other virtual alienat of the estate (*h*).

(*c*) This is a very compressed statement of the grounds of his Honor's judgment, in which he reviewed the principal authorities.

"As to the mode of contribution towards renewal-fines by tenant for life and remainder-man, see 3 Jarm. Convey. 347, and to the authorities there cited add *Shaftesbury* v. *Duke of Marlborough*, 3 L. J. N. S. 30 [2 My. & K. 111]; *Greenwood* v. *Evans*, 4 Bea. 44. In the former case, 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." (Note by Jarman.) See also *Hudleston* v. W *dale*, 9 Hare, 775; *Greenwood* v. *Ev* 4 Bea. 44; *Mortimer* v. *Watts*, 14 816, and ante, p. 1217.

(*d*) Jac 631.

(*e*) See *Stanhope* v. *Thacker*, Ch. 435.

(*f*) 40 Ch. D. 610, where *Collie* *Walters*, L. R., 17 Eq. 252 ("re issues, and yearly profits") is refe to.

(*g*) *Marsh* v. *Marsh*, 2 Jur. N. S. 3 *Forbes* v. *Richardson*, 11 Ha. 3 *Scott* v. *Clements*, 8 Ir. Ch. R. 1

(*h*) *Bennett* v. *Wyndham*, 23 P

CHAPTER LIV.

ADMINISTRATION OF ASSETS, EXONERATION OF DEVISED LANDS, EXEMPTION OF PERSONALTY, MARSHALLING OF ASSETS, ETC.

	PAGE
I. *Order of Liabilities*	2014
II. *Legal and Equitable Assets*	2020
III. *Order of Application of Assets in Payment of Debts*	2025
IV. *Contribution to Charges—Mixed Fund*	2031
V. *Exoneration of Specific Property :—*	
(1) *Specific Legacies*	2035
(2) *Leaseholds*	2037
(3) *Lands of Inheritance* .	2038
(4) *Exception where the Mortgage was created not by the Testator, but by a Prior Owner*	2043
(5) *Exception where Mortgage Money never went to augment Mortgagor's Personal Estate*	2046
VI. *Real Estate Charges Acts*	2047
VII. *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 other Fund; Mere Charge on Land; &c.*	2055
(2) *Extension of Charge to Funeral and Testamentary Expenses* ..	2059
(3) *Effect of expressly subjecting Personalty to certain Charges*	2061
(4) *Effect of Gift of "all" the Personalty*	2063
(5) *Various Expressions indicating Intention to exempt Personalty from Primary Liability to Debts, &c.* ..	2070
(6) *Where Personalty is undisposed of—Exoneration in Favour of Next of Kin*	2070
(7) *Charge of Specific Sums*	2071
(8) *Effect of charging a Specific Fund with Debts, &c.*	2077
(9) *Legacies and Annuities*	2080
VIII. *Payment of Legacies and Shares of Residue*....	2082
IX. *As to marshalling Assets in Favour of Creditors and Legatees*.....	2093
X. *Estates of Married Women*.....	2097

Foreign assets and foreign creditors.

This chapter deals only with administration under the law of England. The general principle, so far as the payment of debts is concerned, is that administration is regulated by the lex fori: "If a man dies domiciled in England, possessing assets in France, the French assets must be collected in France, and distributed according to the law of France. . . . But if it should happen that a man died domiciled in France, leaving assets in England,

CHAPTER LIV.

those assets can only be collected under an English grant of administration, and being so collected must be distributed according to the law of England" (*a*).

Foreign property and foreign beneficiaries.

In ascertaining the rights of the beneficiaries under a will, the general principle seems to be that in giving effect to the provisions of the will so far as it deals with moveable property, regard must be had to the law of the testator's domicil, and so far as it deals with immoveable property, regard must be had to the lex loci rei sitae (*b*).

I.—Order of Liabilities.—The rules laid down by law for the administration of the estates of deceased persons do not fall within the scope of this work, but as a testator has the power of modifying these rules—not, of course, so as to affect the rights of creditors, but so as to affect the rights of persons claiming under him as volunteers—it is necessary shortly to refer to them.

An executor is bound to apply the personal estate of his testator, first, in payment of the funeral expenses, next of the testamentary expenses, and then of the debts (*c*). The amount which may be spent in funeral expenses depends on whether the testator was solvent or not, and (if he was solvent) on his station in life (*d*), so that if a testator were to direct his executors to expend an extravagant amount upon his funeral, they would not be justified in doing so (*e*).

Funeral expenses.

Testamentary expenses.

Testamentary expenses are expenses incident to the proper performance of the duty of an executor (*f*) in connection with the personal estate (*g*), including the estate duty on property passing to the executor as such (*h*), the costs of proving the will, of

(*a*) Per Pearson, J., in *Re Klæbe*, 28 Ch. D. at p. 177. See *Pardo* v. *Bingham*, L. R., 6 Eq. 485. *Preston* v. *Melville*, 8 Cl. & F. 1; *Cook* v. *Gregson*, 2 Dr. 286; *Blackwood* v. *Reg.*, 8 A. C. 82; *Ewing* v. *Orr Ewing*, 10 A. C. 453.

(*b*) See ante, Chap. 1. *Enohin* v. *Wylie*, 10 H. L. C. 1; *Eames* v. *Hacon*, 16 Ch. D. 407, 18 Ch. D. 347, and cases there cited; *Ewing* v. *Orr Ewing*, 9 A. C. 34; 10 A. C. 453; *Re Trufort*, 36 Ch. D. 600; *Harrison* v. *Harrison*, L. R., 8 Ch. 342; *Re Hewit*, [1891] 3 Ch. 568. As to the law by which questions of legitimacy are governed, see Chap. XLIII.

(*c*) Williams' Pers. P. (16th ed.), 199; Robbins and Maw, 192. A tombstone is not a funeral expense. Ingpen on Executors, p. 308.

(*d*) Robbins and Maw, 450.

(*e*) A similar question might arise if a testator directed an expensive monument to be erected in his memory; see an article by the editor in the Juridical Review for July, 1906, at p. 142.

(*f*) *Sharp* v. *Lush*, 10 Ch. D. 468.

(*g*) *Re Middleton*, 19 Ch. D. 552.

(*h*) *Re Bourne*, [1893] 1 Ch. 188; *Re Clemow*, [1900] 2 Ch. 182; *Re Pullen*, [1910] 1 Ch. 564. As to probate duty under the old law, see *Shepheard* v. *Bertham*, 6 Ch. D. 597. As to colonial death duties, see *Re Brewster*, [1908] 2 Ch. 365.

obtaining legal advice as to the distribution of the estate (*i*), the expenses of ascertaining the persons entitled to a legacy or specific fund (*j*), and the expenses of getting in property abroad (*k*). In *Sharp* v. *Lush* (*l*), Jessel, M.R., said that testamentary expenses included expenses incurred by an executor in taking care of property specifically bequeathed until he assented to the bequest, but in *Re Pearce* (*m*) (where *Sharp* v. *Lush* was not cited), Eve, J., held that when the executor assents to a specific bequest the assent relates back to the testator's death, and that the expenses of preserving the property in the meantime are payable by the legatee. This seems the correct principle.

Where duty not payable by executors.

On the other hand, if a legacy is bequeathed wholly or partly out of the proceeds of real estate, the duty on the whole or the part, as the case may be, is not payable by the executors, and is, therefore, not a testamentary expense (*n*).

Estate duty on realty.

The provisions of the Finance Act, 1894, must be construed with reference to the law as it stood at that time, and not in accordance with the provisions of the Land Transfer Act, 1897 (*o*); consequently real estate which devolves on an executor under the latter act does not pass to him as such within the meaning of the Finance Act, 1894, and the estate duty payable in respect of it is not a "testamentary expense" within the meaning of a direction to pay such expenses out of personal estate (*p*). But a direction to pay "testamentary expenses and duties" out of a particular fund will exonerate the real estate from estate duty (*q*).

Whether testamentary expenses are apportionable.

It seems that the expenses of proving a will under the new law are still payable primarily out of the personal estate, and that the Land Transfer Act, 1897, does not require an executor to

(*i*) *Sharp* v. *Lush*, supra.

(*j*) *Re Baumgarten*, 82 L. T. 711; *Re Vincent*, [1909] 1 Ch. 810. As to costs relating to specific legatees, see *Barton* v. *Cooke*, 5 Ves. 461.

(*k*) *Peter* v. *Stirling*, 10 Ch. D. 279; *Re Maurice*, 75 L. T. 415.

(*l*) Supra.

(*m*) [1909] 1 Ch. 819.

(*n*) *Re Countess of Orford*, [1896] 1 Ch. 257; *Berry* v. *Gaukroger*, [1903] 2 Ch. 116; *Re Spencer Cooper*, [1908] 1 Ch. 130. So fines on admission to copyholds specifically devised are not payable out of the personal estate as "charges of executing the will"; *Cole* v. *Jealous*, 5 Ha. 51. And of course the estate duty payable in respect of property over which the testator had a special power of appointment is not a testamentary expense; *Re Countess of Orford* (supra). Estate duty payable in respect of personalty over which the testator had a general power of appointment, which he did not exercise, is a testamentary expense, although it is recoverable from the persons taking in default of appointment: Austen-Cartmell, Finance Acts, 82. As to the duty where the power has been exercised, see post, p. 2016.

(*o*) *Re Palmer*, [1900] W. N. 9.

(*p*) *Re Sharman*, [1901] 2 Ch. 280; *Re Jolley*, 17 T. L. R. 244; *Re Spencer Cooper*, [1908] 1 Ch. 130, where *Re Trenchard*, [1905] 1 Ch. 82, is distinguished.

(*q*) *Re Pimm*, [1904] 2 Ch. 345. As to settlement estate duty see *Re Lewis*, [1900] 2 Ch. 176; *Re King*, [1904] 1 Ch. 363; *Re Cayley*, [1904] 2 Ch. 781.

CHAPTER LIV.

apportion the expenses of obtaining probate, and of administerin the estate as a whole, between the realty and the personalty (

Appointed property.

The question whether property appointed under a general pow vests in the executor "as such" within the meaning of the Finan Act, 1894, has been the subject of a curious diver genee of judiei opinion: Kekewieh, J. (*s*), Byrne, J. (*t*), Warrington, J. (*u*), an Parker, J. (*v*), having held that in the absence of a direetion b the testator to the contrary, the estate duty in sueh a ease is payab out of the appointed fund, while Buckley, J. (*w*), Swinfe Eady, J. (*x*), and Neville, J. (*y*), held that it is payable out of th general personal estate of the testator. The point (which is referre to elsewhere in this work (*z*)) has now been settled by the decisio of the Court of Appeal in *Re Hadley* (*a*) in favour of the latter viev Whether this decision is right or wrong, it is clear that the dut is a testamentary expense, and therefore, if the testator directs h testamentary expenses to be paid out of the residue, this exonerate the appointed fund (*b*).

Interest in expectancy.

If the interest appointed by the testator is an interest i expectaney whieh is subject to a life interest in himself, and subsequent life interest in a person who survives him, the dut is not payable by the executors, and is, therefore, not testamentary expense (*c*).

Administration suit.

The costs of an administration suit, or of proceedings to ascertai the construction of the testator's will, even on a point concernin only a speeifie fund, so far as the proceedings relate to the persona estate, are testamentary expenses (*d*). But any costs exclusivel occasioned by the administration of the real estate are thrown upo the real estate (*e*). And the Land Transfer Act, 1897, has mad

(*r*) Sec. 2, subsec. iii. See *Re Vickerstaff*, post, p. 2017.

(*s*) *Re Treasure*, [1900] 2 Ch. 648; *Re Maddock*, [1901] 2 Ch. 372.

(*t*) *Re Power*, [1901] 2 Ch. 659.

(*u*) *Re Dodson*, [1907] 1 Ch. 284.

(*v*) *Re Hadley*, [1909] 1 Ch. 20.

(*w*) *Re Moore*, [1901] 1 Ch. 691, and *Re Dixon*, [1902] 1 Ch. 248.

(*x*) *Re Fearnsides*, [1903] 1 Ch. 250, and *Re Creed*, [1905] W. N. 94.

(*y*) *Re Orlebar*, [1908] 1 Ch. 136.

(*z*) Ante, p. 819.

(*a*) [1909] 1 Ch. 20.

(*b*) *Re Treasure*; *Re Fearnsides*, supra; per Parker, J., [1909] 1 Ch. at p. 24.

(*c*) *Re Dixon*, [1902] 1 Ch. 248.

(*d*) *Miles* v. *Harrison*, L. R., 9 Ch 316; *Morrell* v. *Fisher*, 4 De G. & S 422; *Re Young*, 44 L. T. 499; *Harlo* v. *Harloe*, L. R., 20 Eq. 471; *Penny* v *Penny*, 11 Ch. D. 440; *Re Groom* [1897] 2 Ch. 407; *Re Vincent* [1909 1 Ch. 810. But see *Re Towry's Settle Estate*, 41 Ch. D. 64; *Re Biel's Estate* L. R., 16 Eq. 577. If the testato creates a special fund for payment o testamentary expenses the executo need not retain it unless the institutio of administration proceeding is pro bable: *Re Cope*, 36 L. T. 437.

(*e*) *Patching* v. *Barnett*, 51 L. J. Ch 74; [1907] 2 Ch. 154 n.; *Re Middleton* 19 Ch. D. 552; *Re Copland*, 44 W. R 94; *Re Roper*, 45 Ch. D. 126. Olde

no difference in this respect. Consequently, a direction by a testator that his testamentary expenses shall be paid out of his personal estate does not throw on it costs occasioned by the real estate (*f*).

Probate costs.

How far the costs of an action in the Probate Court are testamentary expenses does not seem satisfactorily settled. In *Brown* v. *Rowlett* (*g*), costs incurred by the co-heiresses of a testatrix in disputing the validity of the will—the proceedings being compromised on the terms of their costs being paid out of the estate—were held by Bacon, V.-C., to be testamentary expenses. In *Re Prince* (*h*), the widow of a testator brought an action in the Probate Division impeaching the validity of the will; the Court pronounced in favour of the will and ordered the costs of both parties to be paid out of the estate; it was held in the Chancery Division that the executor's costs in the probate action were testamentary expenses, but that the widow's were not. The Probate Division has no power to order costs of proceedings in that Division to be paid in priority to or pari passu with the ordinary costs of administration (*i*).

Probate costs payable out of real estate.

Before the Land Transfer Act, 1897, the Probate Division had no jurisdiction over real estate, and consequently if the Court ordered the costs of a probate action to be paid "out of the estate," that meant out of the personal estate (*j*). But in the case of a person dying since 1897, his "estate" includes his realty, and consequently costs payable "out of the estate" are payable out of the real as well as the personal estate. If the order makes no distinction between the various portions of the estate they are payable out of the entirety in due order of administration; that is, primarily out of the personal estate, and if that is insufficient, out of the realty (*k*).

Intestacy.

Where a testator provides for the payment of the "testamentary expenses" of another person, who dies intestate, the provision applies to the administration of that person's estate, including the expenses of obtaining letters of administration (*l*).

Executorship expenses.

"Executorship expenses" are the same as testamentary expenses (*m*).

authorities to the contrary, such as *Browne* v. *Groombridge*, 4 Madd. 495; *Ripley* v. *Moysey*, 1 Kee. 578; *Stringer* v. *Harper*, 26 Bea. 585; *Pickford* v. *Brown*, 2 K. & J. 426, seem to be overruled.

(*f*) *Re Betts*, [1907] 2 Ch. 149, following *Re Jones*, [1902] 1 Ch. 92.

(*g*) 48 L. T. 753.

(*h*) [1898] 2 Ch. 225; *Re Price*, 51 Ch. D. 485.

(*i*) *Major* v. *Major*, 2 Dr. 281; *Re Mayhew*, 5 Ch. D. 596.

(*j*) *Re Shaw*, [1894] 3 Ch. 615.

(*k*) *Re Vickerstaff*, [1906] 1 Ch. 762.

(*l*) *Re Clemow*, [1900] 2 Ch. 182.

(*m*) *Sharp* v. *Lush*, supra. See also *Brougham* v. *Lord W. Poulett*, 19 Bea. 119 ("expenses of proving my will and the execution of the trusts hereof"); *Alsop* v. *Bell*, 24 Bea. 451; *Webb* v. *De Beauvoisin*, 31 Bea. 573 ("testamentary and other expenses under this my will"); *Coventry* v. *Coventry*, 2 Dr. & Sm. 470 ("testamentary and legal expenses"). The case of *Stringer*

CHAPTER LIV.

Exoneration of general personal estate.

A testator can direct his funeral or testamentary expenses, both, to be paid out of a specific part of his personal estate, a then that part is primarily liable (*n*). But a mere charge of su expenses on the real estate does not exonerate the personalty (*o*

Where residue deficient.

Where the residuary personal estate is insufficient to defray t costs of administration, the deficiency is borne by the specifica bequeathed personalty and the realty (*p*).

Insolvent estate, administered in Court.

Where the testator's estate is insolvent, and is being admin tered by the Court, the general rule is that all his debts (whet voluntary or for value) (*q*) rank pari passu, except those to wh a preference is given by the Bankruptcy Acts (rates and taxes a certain kinds of wages, &c.) (*r*), and subject to the executor's ri of retainer (*s*).

Administration out of Court.

Where the estate is being administered out of Court, whet the estate is solvent or insolvent (*t*), the priority of debts depends on the nature of the assets. So far as they are legal the executor is bound to satisfy the debts in their proper ord subject to his right of retainer and his right to prefer any credi

v. *Harper*, 26 Bea. 585, is referred to post, p. 2054.

(*n*) See the cases cited post, p. 2055 seq.

(*o*) Post, p. 2059. In *Coventry* v. *Coventry*, 2 Dr. & S. 470, there were express words of exoneration.

(*p*) See *Jackson* v. *Pease*, L. R., 19 Eq. 96; *Re Price*, 31 Ch. D. 485.

(*q*) *Re Whitaker*, [1901] 1 Ch. 9.

(*r*) See *Re Leng*, [1895] 1 Ch. 652; *Re Whitaker*, [1901] 1 Ch. 9 (disapproving *Re Maggi*, 20 Ch. D. 545, and *Smith* v. *Morgan*, 5 C. P. D. 337); *M'Causland* v. *O'Callaghan*, [1904] 1 Ir. 376.

(*s*) Even a married woman who has advanced money to her husband for the purposes of his business is entitled, if she is his executrix, to exercise this right; *Re Ambler*, [1905] 1 Ch. 697. And an executor may retain a statute-barred debt; *Stahlschmidt* v. *Lett*, 1 Sm. & G. 415; *Hill* v. *Walker*, 4 K. & J. 166; *Clinton* v. *Brophy*, 10 Ir. Eq. 139; *Trevor* v. *Hutchins*, [1896] 1 Ch. 844.

(*t*) See *Re Hargreaves*, 44 Ch. D. 236.

(*u*) As to what are debts within the meaning of a direction to pay debts, see ante, p. 1989. As to the debts which an executor is justified in paying, including statute-barred debts, see Robbins and Maw, 453 seq.; *Midgley* v. *Midgley*, [1893] 3 Ch. 282; and the cases on retainer cited in note (*s*) above. A direction by the testa that debts due by his daughter, one his residuary legatees, to any ot residuary legatee, shall be deduc from her share and paid to that ot includes statute-barred debts; *P* v. *Poole*, L. R., 7 Ch. 17. The ba the statute does not interfere with rule that a legatee who is indebted the testator's estate must bring debt into account; *Courtenay* *Williams*, 3 Ha. 539; 15 L. J. Ch. 2 *Re Akerman*, [1891] 3 Ch. 212; *Wheeler*, [1904] 2 Ch. 66. Of course rule does not apply to debts which h been extinguished; *Re Bruce*, [19 2 Ch. 682; *Re Sewell*, [1909] 1 Ch. 8 As to the distinction between de and liabilities, see *Hawkins* v. *Hawk* 13 Ch. D. 470. *Eccles* v. *Mills*, [18 A. C. 360, post, p. 2028. As to colo death duties, see *Re Brewster*, [19 2 Ch. 365; *Butler* v. *Southam*, 99 L 517. It will be remembered t where a trustee (or executor) car on the business of his testator, they the debts of the trustee, and creditors have no claim against estate of the testator except by s rogation. This matter is referred to Chap. XXIV. sec. VI.

(*v*) As to the distinction betw legal and equitable assets, see p p. 2020.

(including himself) to all other creditors of equal degree (*w*), and subject also, in the case of a legatee who is indebted to the estate, to the right of set-off (*x*).

If a testator bequeaths to A. a legacy and also a share of residue, and directs that debts due by A. to the testator's estate shall be set off against his share of residue, this means that the executors are not entitled to set off the debt against the legacy (*y*).

Order of debts payable out of legal assets.

The order of administration, in the case of legal assets, is as follows (*z*) :—

(1) Crown debts by record or specialty (*a*).
(2) Debts having a statutory priority, such as money owing by an overseer of the poor, or by the treasurer of a friendly society, or of a savings bank (*b*).
(3) Judgment debts (registered) (*c*).
(4) Recognizances and statutes.
(5) Judgments recovered against the executor (*d*).
(6) Crown debts not by record or specialty (*dd*).

(*w*) As to the effect of Hinde Palmer's Act on this right, see *Re Samson*, [1906] 2 Ch. 584 (overruling *Re Hankey*, [1899] 1 Ch. 541); and the observations of Neville, J., in *Re Jennes*, 53 Sol. J. 376.

(*x*) There appears to be some inaccuracy in the use of the words "retainer" and "set-off" in questions of administration. The right of retainer is properly the right of an executor to retain out of the assets a debt due to him as against creditors of the same degree (see *Re Benett*, [1906] 1 Ch. 216). The term is sometimes applied to cases where a legatee is indebted to the estate and is therefore bound to bring his debt into account; this is also called set-off (see the cases as to statute-barred debts cited ante, p. 2018, n. (*u*)). *Re Abrahams*, [1908] 2 Ch. 69. The law will be found in Williams on Executors and Robbins and Maw. These matters belong to the law of executors, and not to the law of wills, and are therefore not discussed in this work. As to the effect of appointing a debtor to be executor, see *Re Bourne*, [1906] 1 Ch. 697.

(*y*) *Smith* v. *Crabtree*, 6 Ch. D. 591.

(*z*) The following summary is taken partly from Robbins and Maw, and partly from the 16th ed. of Williams on Personal Property, which contains (p. 222) a very carefully prepared table shewing the different rules. In Carson's R.P. Stat. the order of (4) and (5) is reversed, and claims for ecclesiastical dilapidations come before (9).

(*a*) Including the claim of a surety who has paid a crown debt; *Re Churchill*, 39 Ch. D. 174. It was formerly supposed that since Hinde Palmer's Act a crown debt by simple contract was merely entitled to priority over other simple contract debts and not over specialty debts, and that the assets must therefore be apportioned; *Re Bentinck*, [1897] 1 Ch. 673. But this view seems to be erroneous; *Re Samson*, [1906] 2 Ch. 584. See Robbins and Maw, 202.

(*b*) Other statutes are referred to in Robbins and Maw, 218.

(*c*) Including the claim of a surety who has paid a judgment debt; *Re M'Myn*, 33 Ch. D. 575. An unregistered judgment debt ranks with ordinary debts; *Van Gheluwe* v. *Nerinckx*, 21 Ch. D. 189. Sec. 3 of the Law of Property Amendment Act, 1860 (as to which see *Kemp* v. *Waddingham*, L. R., 1 Q. B. 355), has been repealed by the Land Charges Act, 1900.

(*d*) As to these see *Dollond* v. *Johnson*, 2 Sm. & G. 301; *Jennings* v. *Rigby*, 33 Bea. 198; *Re Williams' Estate*, L. R., 15 Eq. 270; *Re Stubbs' Estate*, 8 Ch. D. 154.

(*dd*) This follows from the decision in *Re Samson*, [1906] 2 Ch. 584, above, n. (*a*).

CHAPTER LIV.

(7) Specialty and simple contract debts (*e*) (other than voluntary bonds and covenants).

(8) Loans under the Partnership Act, 1890, sec. 3.

(9) Voluntary bonds and covenants (*f*).

Equitable assets.

So far as the assets are equitable, they must be applied in paying the claims of creditors pari passu, and without regard to the degree or quality of their debts (*g*). But this rule seems to be subject to the prerogative of the crown to be paid in full in priority to other creditors (*h*).

The executor has no right of preference or retainer in respect of equitable assets (*i*).

What funds liable to creditors.

II.—Legal and Equitable Assets.—"Where a testator possessed of property of various kinds dies indebted, having disposed of his estate among different persons, or not having made such disposition, it often becomes material," says Mr. Jarman (*j*), "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 (*k*).

As to legacies.

"And the same question may arise in regard to pecuniary 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 (*l*).

Creditors admitted pari passu under trusts and charges.

"Under a trust for the payment of debts, they are paid, not in the order of their legal priority (*m*), 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 (*n*); and this rule is now established to apply opposition to the old doctrine,

(*e*) Hinde Palmer's Act, 32 & 33 Vict. c. 46. As to the effect of this Act, especially with reference to the executor's right to prefer the debts of simple contract creditors to those of specialty creditors, see *Re Ormond*, 58 L. T. 24; *Re Samson*, [1906] 2 Ch. 584.

(*f*) Williams, P. P. (16th ed.) 218. As to the distinction between voluntary deeds and instruments not under seal given without valuable consideration, see *Re Whitaker*, 42 Ch. D. 119. An assignee for value of a voluntary bond ranks as a creditor for value: *Payne* v. *Mortimer*, 4 De G. & J. 447.

(*g*) Robbins and Maw, 219; post, sect. II. p. 2021.

(*h*) See *Re Henley & Co.*, 9 Ch. D. 469.

(*i*) Robbins and Maw, 204 seq., 220. *Bain* v. *Sadler*, L. R., 12 Eq. 570.

(*j*) First ed. Vol. II. p. 543.

(*k*) Vide ante, p. 1987.

(*l*) *Greaves* v. *Powell*, 2 Vern. 248. The distinction taken in *Walker* v. *Meager*, 2 P. W. 550, has long been overruled.

(*m*) Ante, p. 2019.

(*n*) But a testator may give priority under such a trust to simple contract creditors; *Millar* v. *Horton*, Coop. 45.

to mere charges, by which the descent is not broken (*o*), and to devises in trust for the payment of debts, though made to the same persons as are constituted executors (*p*). In all such cases, therefore, specialty and simple contract creditors come in pari passu; and it is held that specialty creditors, claiming the benefit of such a trust or charge, must admit the simple contract creditors to an equal participation even of the personal estate (*q*), 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 (*r*).

"It is clear, however, that a trust to pay, or a charge of, debts, does not make simple contract debts carry interest (*s*), or revive a debt which has been barred by the statute of limitations (*t*);

(*o*) *Burt* v. *Thomas*, cit. 7 Ves. 323; *Batson* v. *Lindegreen*, 2 B. C. C. 94; *Bailey* v. *Ekins*, 7 Ves. 319; *Shiphard* v. *Lutwidge*, 8 Ves. 26; *Barker* v. *May*, 9 B. & Cr. 489; overruling *Fremoult* v. *Dedire*, 1 P. W. 430; *Plunket* v. *Penson*, 2 Atk. 290.

(*p*) *Newton* v. *Bennet*, 1 B. C. C. 135, and cases cited ib. 138, 140, n.; *Chambers* v. *Harvest*, Mosc. 123. See also *Prouse* v. *Abingdon*, 1 Atk. 482; *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.

(*q*) *Wride* v. *Clarke*, 1 Dick. 382; *Peg* v. *Peg*, 2 P. W. 412; *Haslewood* v. *Pope*, 3 P. W. 322; *Morrice* v. *Bank of England*, Cas. t. Talb. 217, 2 B. P. C. Toml. 465, 3 Sw. 573. See also *Sheppard* v. *Kent*, 2 Vern. 435, 1 Eq. Ca. Ab. 142, pl. 6. The same rule applies to judgment debts, "forasmuch as a debt by judgment and a debt by simple contract are in conscience equal": *Deg* v. *Deg*, 2 P. W. at p. 416.

(*r*) So where specialty creditors have a right to resort to descended real estate as legal assets: *Chapman* v. *Esgar*, 18 Jur. 341 (the report in 1 Sm. & G. 575 is inaccurate). The practical importance of these distinctions is, however, greatly reduced by Hinde Palmer's 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; ante, p. 1987. It will also be remembered that where an insolvent estate is being administered by the Court, the rules in bankruptcy apply; ante, p. 2018.

(*s*) *Lloyd* v. *Williams*, 2 Atk. 108; *Barwell* v. *Parker*, 2 Ves. sen. 363; *Earl of Bath* v. *Earl of Bradford*, ib. 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.

(*t*) 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 Bea. 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; *Re Hepburn*, 14 Q. B. D. 394. 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; *Re Stephens*, 43 Ch. D. 39.

CHAPTER LIV.

Direction to pay interest confined to debts carrying interest.

though the contrary of both these propositions has been heretofore maintained (*u*). And in *Tait* v. *Lord Northwick* (*v*), 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.

Equitable interests not necessarily distributable as equitable assets.

"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."

Trust of chattels is legal assets,

——including equity of redemption of leaseholds.

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 (*w*). And therefore the trust of all chattels, real as well as personal (*x*), is legal assets, though recoverable only in equity. Formerly an equity of redemption of leaseholds was supposed to be equitable and not legal assets (*y*); but this apparently rested on the precarious nature in former times of the mortgagor's interest in the property (*z*), and would be otherwise determined now that the mortgagor is looked upon as the real owner of mortgaged property, subject only to the security in the mortgagee (*a*).

Simple trust of freeholds made legal assets by Statute of Frauds;

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 (*b*). Freehold lands held upon a simple trust for the debtor, which but for the Statute of Frauds (*c*) would have been equitable assets, were by that statute made liable at law in the hands of the heir,

(*u*) *Carr* v. *Countess of Burlington*, 1 P. W. 228; *Blakeway* v. *Earl of Strafford*, 2 P. W. 373, 6 B. P. C. Toml. 630.

(*v*) 4 Ves. 816.

(*w*) "The distinction refers to the remedies of the creditor, and not to the nature of the property": per Kindersley, V.-C., *Cook* v. *Greyson*, 3 Drew. at p. 549; *Shee* v. *French*, ib. 716; *Att.-Gen.* v. *Brunning*, 8 H. L. C. 243, where purchase-money due to the testator for land contracted to be sold but not conveyed by him was held to be legal assets; *Christy* v. *Courtenay*, 26 Bea. 140.

(*x*) *Mutlow* v. *Mutlow*, 4 De G. & J. 539. See cases cited by Cox, 3 P. W. 344, n. (2).

(*y*) *Case of Sir C. Cox's Creditors*, 3 P. W. 341; *Hartwell* v. *Chitters*, Amb. 308.

(*z*) 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. p. 342.

(*a*) *Cook* v. *Greyson*, 3 Drew. 547. Compare *Casborne* v. *Scarfe*, 1 Atk. 603; *Heath* v. *Pugh*, 6 Q. B. D. 345.

(*b*) Ante, p. 1987. The distinction between legal assets in the hands of an executor (assets enter mains) and legal assets in the hands of an heir (assets by descent) will be found clearly explained in Robbins and Maw, pp. 108 seq.

(*c*) 29 Car. 2, c. 3, ss. 10, 12.

executor, or administrator (*d*), and by subsequent statutes were also made liable at law in the hands of the devisee (*e*), 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 (*f*): thus an equity of redemption of freeholds was equitable assets (*g*). 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 the Administration of Estates Act, 1833 (stat. 3 & 4 Will. 4, c. 104) (*h*), an equity of redemption of freehold (*i*) or copyhold (*j*) 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 (*k*).

Contra since 3 & 4 Will. 4, c. 104.

It seems that the Land Transfer Act, 1897, has not affected the distinction between legal and equitable assets. The act does not give creditors any right of action against an executor in respect of land which devolves to him under the act (*l*).

Land Transfer Act, 1897.

It should be added that where a judgment debt recovered against a tenant in tail is a charge on the land, it can be enforced against the land in the hands of any person whose estate the deceased tenant might have barred without the assent of any other person (*m*).

Tenant in tail.

"It should also be stated," says Mr. Jarman (*n*), "that property over which the testator has a general power of appointment only (and

Effect of exercising power of appointment.

(*d*) *Plunket* v. *Penson*, 2 Atk. 290; *King* v. *Ballett*, 2 Vern. 248.

(*e*) 3 & 4 Will. & M. c. 14, and 11 Geo. 4 & 1 Will. 4. c. 47; *Coope* v. *Cresswell*, L. R., 2 Ch. 112; *Re Atkinson*, [1908] 2 Ch. 307.

(*f*) See Sugd. V. & P. 654, 657, 11th ed.

(*g*) *Plunket* v. *Penson*, 2 Atk. 290; *Plucknet* v. *Kirk*, 1 Vern. 411; *Solley* v. *Gower*, 2 Vern. 61; *Clay* v. *Willis*, 1 B. & Cr. 364. In *Sharpe* v. *Earl of Scarborough*, 4 Ves. 538, the decision turned on the point that the judgment creditors had a right to redeem.

(*h*) Ante, p. 1987.

(*i*) *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 monies arising from the sale of this real estate, see ante, p. 2021, note (*p*).

(*j*) *Re Burrell*, L. R., 9 Eq. 443.

(*k*) *Walters* v. *Walters*, 18 Ch. D. 182.

(*l*) Robbins and Maw, 146. The contrary view suggested in Brickdale and Sheldon's Land Transfer Acts would give rise to great difficulties (see p. 278), and is inconsistent with the decision in *Re Williams*, [1904] 1 Ch. 52.

(*m*) Judgments Act, 1838; Land Charges, &c., Act, 1888; *Re Anthony*, [1893] 3 Ch. 498. As to crown debts see Stat. 33 Hen. 8, c. 39, s. 52. It seems that beneficiaries under the will of the deceased tenant cannot compel the judgment creditor to have recourse to the land; see *Douglas* v. *Cooksey*, Ir. R. 2 Eq. 311.

(*n*) First ed. Vol. II. p. 545.

CHAPTER LIV.

in which he takes no transmissible interest in default of appoin ment), is assets for the payment of creditors, provided the pow be exercised (*o*), but not otherwise (*p*); and it will be remember that, as to wills made or republished since the year 1837, eve general or residuary devise or bequest operates as a testamenta appointment, unless a contrary intention appear."

In the case of judgment creditors since the Act 1 & 2 Vict. 110 (*q*), who have issued execution upon their judgments (*r*), wher by lands over which the debtor has a disposing power, which might without the assent of any other person exercise for his ow benefit, the lands are bound in favour of such creditors, whether t power be exercised or not.

Covenant to appoint.

It makes no difference that the appointment is made in pursuan of a covenant entered into by the testator in his lifetime for valuab consideration (*s*).

Bankrupt appointor.

If a testator who has exercised a general testamentary pow in favour of a specific person is bankrupt at the time of his deat the appointed property is not included in the property divisib among the creditors in the bankruptcy; it is divisible among thos creditors of the deceased whose debts were contracted after th bankruptcy (*t*).

Whether appointed property is legal or equitable assets.

Where personal property passes to the executor of the done of a power by virtue of an appointment made in his will, or unde sec. 27 of the Wills Act, the question whether it is legal or equitabl assets is one on which there is a great divergence of opinion. On view is that nothing is legal assets unless the executor or adminis trator is entitled to it on mere production of the probate of letter of administration, and if this is the test, property which passes b virtue of an appointment is clearly not legal assets. According t Lord Cranworth, the converse proposition is undoubtedly tr—" what an administrator is entitled to recover as administrato virtute officii, can never be equitable assets " (*u*), but he clearl did not mean that property is never legal assets unless it could if the deceased died intestate, have been recovered by his admin

(*o*) *Lassells* v. *Lord Cornwallis*, 2 Vern. 465, Pre. Ch. 232; *Troughton* v. *Troughton*, 3 Atk. 656; *Lord Townshend* v. *Windham*, 2 Ves. sen. p. 8; *Jenney* v. *Andrews*, 6 Mad. 264; *Fleming* v. *Buchanan*, 3 D. M. & G. 976; *Williams* v. *Lomas*, 16 Bea. 1.

(*p*) *Holmes* v. *Coghill*, 7 Ves. 499, 12 Ves. 206. As to the order in which appointed property is applied, see post, p. 2028.

(*q*) Secs. 11, 13.

(*r*) Stat. 27 & 28 Vict. c. 112: Land Charges &c. Act, 1888.

(*s*) *Re Lawley*, [1902] 2 Ch. 799 *Beyfus* v. *Lawley*, [1903] A. C. 411.

(*t*) *Re Guedalla*, [1905] 2 Ch. 331.

(*u*) *Att.-Gen.* v. *Brunning*, 8 H. L. C at p. 258.

istrator virtute officii, for he goes on to say that "in considering whether assets are legal or equitable, the question is not whether the money is recoverable through the agency of a Court of Equity or the agency of a Court of Law, but whether it is money which the personal representative is entitled to recover independently of any directions of the testator." Now the right of an executor, or administrator cum testamento annexo, to recover a fund over which his testator had a general power of appointment which he has exercised, and the right of the creditors to have it applied in satisfaction of their claims, do not depend on any directions of the testator; they follow from the fact that the power has been exercised. The donee of a general power cannot exercise it without making the property liable for his debts. It is therefore submitted that in such a case the property is legal assets (*v*).

III.—Order of Application of Assets in Payment of Debts.—"In stating the order in which the several funds liable to debts are to be applied," Mr. Jarman points out (*w*) that the rule "regulates the administration of the assets only among the testator's own representatives, devisees and legatees, and does not affect the right of the creditors themselves to resort in the first instance to all or any of the funds to which their claim extends (*x*), 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" (*y*).

Right of the creditor to take property out of its proper order.

The order of the application of the several funds liable to the payment of debts is as follows:—

Order in which funds to be applied.

1. The general personal estate (*z*) not expressly or by implication exempted (*a*), including property subject to a general power of appointment which passes under a residuary gift by virtue of sec. 27 of the Wills Act or by express disposition (*b*), but excluding property comprised in a residuary bequest and subject to a secret trust (*c*).

(*v*) The subject is discussed in Ingpen on Executors, 316; Robbins and Maw, 129, where *Pardo* v. *Bingham*, L. R., 6 Eq. 485, and *Commissioner of Stamp Duties* v. *Stephen*, [1904] A. C. 137, are cited. It has also been much referred to in connection with the much debated question whether the appointed properly passes to the executor "as such" under the Finance Act, 1894, although the two questions have really nothing to do with one another; see *Re Hadley*, [1909] 1 Ch. 20, where the earlier cases are referred to.

(*w*) First ed. Vol. II. p. 545.

(*x*) *Davies* v. *Nicolson*, 2 De G. & J. 693, is an illustration of this principle.

(*y*) See post, as to marshalling of assets.

(*z*) *Sir Peter Soames' case*, cit. 1 P. W. 694; *Lord Grey* v. *Lady Grey*, 1 Ch. Cas. 296; *White* v. *White*, 2 Vern. 43; *Johnson* v. *Milksopp*, ib. 112; *Evelyn* v. *Evelyn*, 2 P. W. p. 664. See also *Milnes* v. *Slater*, 8 Ves. p. 304.

(*a*) See post, s. VII. of this Chapter.

(*b*) *Re Hartley*, alias *Williams* v. *Williams*, [1900] 1 Ch. 152.

(*c*) *Re Maddock*, [1902] 2 Ch. 220.

CHAPTER LIV.

2. Land expressly devised or directed to be sold to pay debts whether it descends to the heir or not (*d*).

3. Estates which descend to the heir (*e*), whether acquired before or after the making of the will (*f*).

4. Real estate devised subject to a charge of debts, and personal property specifically bequeathed, subject to a charge of debts (*g*).

5. General pecuniary legacies, pro rata (*h*).

(*d*) *Milnes* v. *Slater*, 8 Ves. 295; *Phillips* v. *Parry*, 22 Bea. 279. Mr. Jarman cites in support of this rule *Attwood* v. *Hardaker*, L. R., 15 Eq. 175; *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. sen. 568; *Tweedale* v. *Coventry*, 1 B. C. C. 240; *Coxe* v. *Basset*, 3 Ves. 155. As to what amounts to a devise to pay debts, see *Stead* v. *Hardaker*, L. R., 15 Eq. 175; *West* v. *Lawday*, Ir. R. 2 Eq. 517.

(*e*) *Chaplin* v. *Chaplin*, 3 P. W. p. 368; *Galton* v. *Hancock*, 2 Atk. 424 et seq.; *Bainton* v. *Ward*, 2 Atk. by Sanders, 172, n. (2); *Manning* v. *Spooner*, 3 Ves. 114; *Barnewell* v. *Lord Cawdor*, 3 Mad. 453. As to lands in the colonies see *Re Rea*, [1902] 1 Ir. 451. The Land Transfer Act, 1897, has, of course, made no alteration in these rules. See also *Re Pullen*, [1910] 1 Ch. 564.

(*f*) See *Milnes* v. *Slater*, 8 Ves. 295.

(*g*) In the first edition of this work (Vol. II. p. 546) the 4th class of assets is thus stated by Mr. Jarman: "Devised or bequeathed property, real or personal, which is charged with debts, and then specifically disposed of, subject to such charge," and in support of this statement he cites *Wride* v. *Clark*, 2 Br. C. C. 261, n.; *Davies* v. *Topp*, 1 Br. C. C. 524; 2 Br. C. C. 259 n.; *Donne* v. *Lewis*, 2 Br. C. C. 257; *Manning* v. *Spooner*, 3 Ves. 117; *Harwood* v. *Oglander*, 8 Ves. 124; *Miles* v. *Slater*, 8 Ves. 306; *Watson* v. *Brickwood*, 9 Ves. 447; *Irvin* v. *Ironmonger*, 2 R. & Myl. 531. It would seem from *Irvin* v. *Ironmonger* (supra), that if a testator directs his debts to be paid and then specifically bequeaths personalty, this charges the debts on the personalty, by analogy to the rule as to real estate (supra, p. 1990). In the 4th ed. of this work (by Mr. Vincent, Vol. II. p. 622) the 4th class of assets is thus stated: "Real or personal property devised or bequeathed, [either to the heir or a stranger,] charged with debts, and disposed of, subject to such charge." This statement was adopted as correct by Stirling, J., in *Re Grainger*, 83 L. T. at p. 211, but it is submitted that Mr. Jarman's statement is more strictly accurate, in so far as it is restricted to specifically bequeathed personalty. In *Re Grainger* the testator first directed payment of his debts; he then specifically devised some real estate, and he specifically bequeathed the residue of two mortgage debts after payment of his debts, &c. Stirling, J., held that the debts were payable out of the specifically devised real estate and the mortgage debts rateably, in exoneration of the general personal estate (see the order [1900] 2 Ch. at p. 758), but in D. P. it seems to have been held that the debts were payable primarily out of the general personal estate, and the legatees of the mortgage debts disclaimed a right to be recouped out of the specifically devised real estate (*Higgins* v. *Dawson*, [1902] A. C. at p. 13). As to contribution by specific legatees, see post, p. 2032.

(*h*) *Clifton* v. *Bart*, 1 P. W. 679; *Burton* v. *Cooke*, 5 Ves. 461. The decision of Lord Chelmsford in *Heusman* v. *Fryer*, L. R., 3 Ch. 420, that a residuary devisee is liable to contribute pro rata with the pecuniary legatees is erroneous; *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. And the decision of Kay, J., in *Re Bate*, 43 Ch. D. 600, that personal estate not specifically bequeathed, including general pecuniary legacies, must be applied in payment of debts before resorting to real estate devised subject to a charge of debts is overruled; *Re Stokes*, 67 L. T. 223; *Re Salt*, [1895] 2 Ch. 203; *Re Butler*, [1894] 3 Ch. 250; *Re Roberts*, [1902] 2 Ch. 834; *Re Kempster*, [1906] 1 Ch. 446.

The classification of assets given in the text is preserved in deference to Mr. Jarman's view and to accepted usage, but it is obviously inaccurate to speak of pecuniary legacies as "assets"; the correct view is that

6. Specific legacies (*i*) and real estate devised, whether in terms specific or residuary (*j*), are liable to contribute pro rata (*k*).

pecuniary legatees are entitled to have the assets marshalled so as to throw the debts on classes (2) (3) and (4): *Aldrich* v. *Cooper*, 8 Ves. 382, post, p. 2094 seq. 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, 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 rateably. And see *Herne* v. *Meyrick*, 1 P. W. 201.

(*i*) *Tombs* v. *Rock*, 2 Coll. 490; *Bateman* v. *Hotchkin*, 10 Bea. 426. Specific property subject to a secret trust, although passing as part of the residue, is treated as a specific bequest for the purposes of this rule: *Re Maddock*, [1902] 2 Ch. 220. And if testator A. bequeaths his residuary personal estate to B., and B. dies before it is fully administered, having specifically bequeathed part of it to C., this leaves A.'s debts payable primarily out of the remainder of his residuary personalty, in exoneration of the property bequeathed to C.: *Lady Langdale* v. *Briggs*, 8 D. M. & G. 391. As to *Powell* v. *Riley*, L. R., 12 Eq. 175, see *Re Ogg*, in which case Jessel, M.R., remarked: "I have always considered that *Powell* v. *Riley* was wrongly decided" (51 L. J. Ch. at p. 667). As to demonstrative legacies, see post, p. 2076.

(*j*) *Hensman* v. *Fryer*, L. R., 3 Ch. 420; *Lancefield* v. *Iggulden*, L. R., 10 Ch. 136. Mr. Jarman remarks (1st ed. Vol. II. p. 547 n.), with reference to the case of *Long* v. *Short*, 2 Vern. 756, that "the distinction taken in it between cases where the devise is specific, and where it is in general terms is clearly untenable, the established doctrine of the cases under the old law being that every devise, however general in terms, was virtually specific. *Forrester* v. *Lord Leigh*, Amb. 173; *Scott* v. *Scott*, 1 Ed. 459; *Shelling* v. *Brown*, 5 Ves. 359; *Milnes* v. *Slater*, 8 ib. 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 point of fact a mere devise of Whiteacre, and was so regarded for all purposes. Therefore, if in such a case the testator owed specialty debts, which were to be satisfied out of his real estate, Whiteacre, the property of B., was not first applicable (as would be the case if the respective subjects of disposition were personal estate), but A. and B. stood upon an equal footing, both estates being applied pro rata. It remains to be seen whether this doctrine will prevail in reference to wills which are subject to the new law, to which the ground of the doctrine does not apply, as a general or residuary devise is, by the recent enactment [stat. 1 Viet. 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. While analogy might seem to require the adoption of a uniform rule in regard to real and personal estate, it is probable that such a construction will not be adopted without a struggle, seeing that the present rule has obtained so firm a footing. The point is one on which adjudication may be looked for with some interest."

Mr. Jarman's prediction was fulfilled. In *Hensman* v. *Fryer*, L. R., 2 Eq. 627; *Rotheram* v. *Rotheram*, 20 Bea. 465, and *Bethell* v. *Green*, 34 Bea. 302, it was held that the Wills Act had altered the old rule, while the contrary view was taken in *Pearmain* v. *Twiss*, 2 Giff. 130; *Clark* v. *Clark*, 34 L. J. Ch. 477, and other cases, and finally established by the decision of Lord Chelmsford in *Hensman* v. *Fryer*, L. R., 3 Ch. 420, and of Lord Cairns and James, L.J., in *Lancefield* v. *Iggulden*, L. R., 10 Ch. 136.

(*k*) *Long* v. *Short*, 1 P. W. 403; *Tombs* v. *Rock*, 2 Coll. 490; *Gervis* v. *Gervis*, 14 Sim. 654 (where Sir L. Shadwell overruled his own previous decision in *Cornewall* v. *Cornewall*, 12 Sim. 298); *Young* v. *Hassard*, 1 Jo. & Lat.

CHAPTER LIV.

7. Real and personal property over which the testator has a general power of appointment (*l*) and which he has in terms (not merely by a general devise or bequest (*m*)) appointed by his will (*n*).

8. The paraphernalia of the testator's widow (*o*).

What is a debt?

For the purpose of these rules, a liability of the testator which constitutes a debt payable by his estate (*q*), is not necessarily considered a debt as between his beneficiaries. Thus in *Hawkins* v. *Hawkins* (*r*), a testator specifically bequeathed certain property to A. subject to his debts and bequeathed his residuary estate to B.; the residue included a leasehold house, considerably out of repair; it was held that B. could not have the liability of the testator's estate in respect of the repair of the house and the future rent discharged out of the specifically bequeathed property.

Undisposed of share of personalty.

Where the gift of a share of residuary personalty fails by lapse or otherwise, the debts and other liabilities are borne rateably by it and by the shares which are well disposed of (*s*).

p. 472; *Jackson* v. *Hamilton*, 3 Jo. & Lat. p. 711; *Jackson* v. *Pease*, L. R., 19 Eq. 96; and see *Fielding* v. *Preston*, 1 De G. & J. 438, in which it was held that freeholds and leaseholds specifically devised and bequeathed must contribute rateably to the payment of annuities charged on them; the case is chiefly remarkable for Lord Cranworth's unsuccessful attempt to define a specific bequest (ante, Chap. XXX.). In *Bateman* v. *Hotchkin*, 10 Bea. 426, the testator so expressed himself as to make the specifically bequeathed personalty applicable before the devised real estate.

(*l*) A power to appoint by will only is a general power within the meaning of this rule (*Petre* v. *Petre*, 14 Bea. 197; see *Drake* v. *Att.-Gen.*, 10 Cl. & F. 257; *Att.-Gen.* v. *Brackenbury*, 1 H. & C. 782). In *Edie* v. *Babington* (3 Ir. Ch. R. 568) it was held that a power to appoint to anyone except A. was a general power of appointment for the purposes of this rule. Compare *Platt* v. *Routh*, 3 Bea. p. 280; s. c. s. n. *Drake* v. *Att.-Gen.*, 10 Cl. & F. 257, a case on the Legacy Duty Act, and *Re Byron's Settlement*, [1891] 3 Ch. 474, as to which see ante, p. 789.

(*m*) *Re Hartley*, [1900] 1 Ch. 152, ante, pp. 813 and 2025.

(*n*) *Fleming* v. *Buchanan*, 3 D. M. & G. 976; *Hawthorn* v. *Shedden*, 3 Sm. & Gif. p. 305; *Williams* v. *Lomas*, 16 Bea. 1; *Reyfus* v. *Lawley*, [1903] A. C. 411; *Re Guedalla*, [1905] 2 Ch. 331 (effect of bankruptcy of testator). See also *Troughton* v. *Troughton*, 3 Atk. pp. 660, 661; *Bainton* v. *Ward*, 2 Atk. 172, n. by Sanders. It is immaterial that the appointment eventually fails to take effect by reason of events happening after the testator's death: *Re Hodgson* [1899] 1 Ch. 666.

As to the effect of an appointment by a married woman, see post, p. 2098.

(*o*) Robbins and Maw, 109, 369, citing *Ridout* v. *Plymouth*, 2 Atk. 104; *Parker* v. *Harvey*, 4 Br. P. C. 604. As to the decision in *Tasker* v. *Tasker*, [1895] P. 1, see *Masson, Templier & Co.* v. *Defries*, [1909] 2 K. B. 831; from which it would appear that in cases within the Married Women's Property Act, 1882, no question of paraphernalia can arise. As to marshalling, see post, p. 2095.

(*q*) See *Sharp* v. *Lush*, 10 Ch. D. 468.

(*r*) 13 Ch. D. 470. See *Eccles* v. *Mills*, [1898] A. C. 360.

(*s*) The earlier cases (including *Cresswell* v. *Cheslyn*, 2 Ed. 123; *Skrymsher* v. *Northcote*, 1 Sw. 566; *Att.-Gen.* v. *Earl of Winchelsea*, 3 Br. C. C. 374; *Att.-Gen.* v. *Hurst*, 2 Cox, 364) are examined in *Eyre* v. *Marsden*, 4 Myl. & C. 231; *Luckcraft* v. *Pridham*, 48 L. J. Ch. 630 (mixed fund); *Tretheury* v. *Helyar*, 4 Ch. D. 53; *Fenton* v. *Wills*, 7 Ch. D. 33; *Blann* v. *Bell*, 7 Ch. D. 382. In most of these cases the gift failed by lapse; in others it failed by being revoked, or because it was to a charity, and failed as to the impure personalty. The same rule applies where an accumulation of income is void under the Thellusson Act

Point as to descended assets.

"In fixing these several gradations of liability," says Mr. Jarman (*t*), "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 favour of the prior liability of the heir (though with disapprobation of the rule), by Lord *Thurlow* in *Donne* v. *Lewis* (*u*), and by Lord *Alvanley* in *Manning* v. *Spooner* (*v*). And in *Harmood* v. *Oglander* (*w*), 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 (*x*) 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 (*y*)."

The order in which the descended estates are liable is not generally varied in favour of the heir by their being included with the devised estates in the charge of debts (*z*), nor by the circumstance that they come to the heir by lapse and not as simply undisposed of (*a*), nor by both of these circumstances together (*b*). 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 (*c*).

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 passu with the shares effectually devised (*d*).

and there is consequently an intestacy; *Eyre* v. *Marsden*, supra; *Oddie* v. *Brown*, 4 De G. & J. 179; *Ralph* v. *Carrick*, 5 Ch. D. 984. *Gowan* v. *Broughton*, L. R., 19 Eq. 77, lays down a wrong principle. Compare *Peacock* v. *Peacock*, post, p. 2030.

(*t*) First ed. Vol. II. p. 548.

(*u*) 2 B. C. C. 257.

(*v*) 3 Ves. 114.

(*w*) 8 Ves. 125.

(*x*) But now see stat. 3 & 4 Will. 4, c. 106, s. 3; ante, Vol. I. p. 96.

(*y*) *Biederman* v. *Seymour*, 3 Bea. 368. And since 3 & 4 Will. 4, c. 106, see *Strickland* v. *Strickland*, 10 Sim. 374.

(*z*) *Williams* v. *Chitty*, 3 Ves. 545; *Barber* v. *Wood*, 4 Ch. D. 885.

(*a*) *Williams* v. *Chitty*, sup per Kindersley, V.-C., *Dady* v. *Hartridge*, 1 Dr. & Sm. at p. 241; *Scott* v. *Cumberland*, L. R., 18 Eq. 578.

(*b*) *Williams* v. *Chitty*, supra.

(*c*) *Stead* v. *Hardaker*, L. R., 15 Eq. 175.

(*d*) *Fisher* v. *Fisher*, 2 Kee. 610; *Wood* v. *Ordish*, 3 Sm. & Gif. 125.

CHAPTER LIV.

These two cases (*Fisher* v. *Fisher* and *Wood* v. *Ordish*) wer treated by Wood, V.-C., as laying down the principle that a between the heir-at-law, the next of kin and the residuary devisee and legatees, a lapsed *share* of real and personal estate ought t be applied in the same order as if the legatee had survived; an they were followed by him accordingly (*e*).

Life interest.

On the same principle, if land is devised to A. for life with re mainders over, and A.'s life estate is forfeited under the provision of the will, so that it descends to the heir, it is only liable to the same extent as it would have been if there had been no forfeiture (*f*).

Portions and legacies charged on land.

It has been already mentioned (*g*) that a legacy payable out of land may be specific. It would therefore follow, on principle that if the other assets of the testator are insufficient, the legacy and the land out of which it is payable are liable to contribute rateably to payment of the debts. In *Long* v. *Short* (*h*), a testator gave A. a rent charge of 40*l.* a year out of a lease for years, and bequeathed the lease to B.; it being necessary to have recourse to the property specifically disposed of by the will for payment of the testator's debts, it was held by Lord Cowper that the rent charge and the lease were liable to contribute rateably because both gifts were specific. The decision seems to have been approved of by Lord Cottenham (*i*) and by Lord St. Leonards (*j*). In *Raikes* v. *Boulton* (*k*), real estate was devised subject to a term limited upon trust to raise "the full and clear sum of 10,000*l.*" for A., and it was held by Romilly, M.R., that A. was not liable to contribute to the testator's debts: no authorities were cited, and the decision obviously turned on the words "full and clear" (*l*). In *Re Saunders-Davies* (*m*), where lands were devised in strict settlement, subject to a trust to raise portions for younger children, North J., approved of *Raikes* v. *Boulton*, and held that the portioned not bound to contribute to the debts, which were payable out of the real estate. The reasons given for the decision do not

(*e*) *Peacock* v. *Peacock*, 34 L. J. Ch. 315; *Ryves* v. *Ryves*, L. R., 11 Eq. 539. The decision in *Scott* v. *Cumberland*, L. R., 18 Eq. 578, proceeded on a misapprehension of the authorities; see *Hurst* v. *Hurst*, 28 Ch. D. 159, where *Row* v. *Row*, L. R., 7 Eq. 414, is explained.

(*f*) *Hurst* v. *Hurst*, 28 Ch. D. 159.

(*g*) Ante, p. 1062.

(*h*) 1 P. W. 403. The case seems to be wrongly reported, but the case is always cited as having decided the point above stated: see Roper, 1.., *Jackson* v. *Hamilton*, 9 Ir. Eq. R. 430.

(*i*) *Creed* v. *Creed*, 11 Cl. & F. p. 508.

(*j*) *Jackson* v. *Hamilton*, 3 J. & Lat. 702.

(*k*) 29 Bea. 41.

(*l*) The decision in *Legh* v. *Legh*, 15 Sim. 135, also turned on the express language of the will.

(*m*) 34 Ch. D. 482. See *Roche* v. *Jordan*, [1896] 1 Ir. 494.

quite convincing. In *Re Bawden* (*n*), where legacies were held to be charged on land under the doctrine of *Greville* v. *Browne* (*o*) it was also held by Kekewich, J., that the legacies were not liable to contribute to the debts; the learned judge seemed himself to prefer the principle of *Long* v. *Short*, but he thought himself bound to follow *Re Saunders-Davies*. But even if *Re Saunders-Davies* was wrongly decided, it may be doubted whether the principle of *Long* v. *Short* applies to such a case as *Re Bawden*, for the principle of *Long* v. *Short* is that the devise of a rent charge issuing out of land is as specific as a devise of the land itself, while an ordinary annuity or pecuniary legacy, even if it is charged on land, is a general bequest, payable primarily out of the personal estate (*p*).

Insolvent legatee.

Where a testator's estate is being administered by the court, and the general personal estate is insufficient for payment of debts, so that it becomes necessary for the specific legatees to contribute, and one of them is insolvent, a further contribution may be required from the solvent legatees (*q*).

Foreign immovable property.

It must be remembered that the "real estate" referred to in the foregoing rules is real estate in England. If a testator domiciled in England dies entitled to immovable property situate abroad, the question whether, and in what manner, it can be made liable for his debts depends on the lex loci rei sitae (*r*).

Principle of contribution, when applied.

IV.—Contribution to Charges—Mixed Fund.—"Here it should be observed," says Mr. Jarman (*s*), "that where several distinct properties, subject to a common charge, are disposed of among several persons, recourse is had, by an obvious rule of justice, to the principle of contribution. Thus, if the testator, after subjecting his real estate to the payment of his debts or legacies, devise Blackacre to A. and Whiteacre to B., and these estates in the administration of the assets become applicable, the charge will be thrown upon the devisees in proportion to the value of their respective portions of the property (*t*). And, by parity of reason, where

(*n*) [1894] 1 Ch. 693.

(*o*) Ante, p. 2000.

(*p*) See per Lord Cottenham, in *Creed* v. *Creed*, 11 Cl. & F. p. 506 seq.

(*q*) *Conolly* v. *Farrell*, 10 Ben. 142; *Re Peerless*, [1901] W. N. 151. The question could hardly arise in an administration out of court, as it would be the duty of the executor to defer his assent to the specific legacies until the debts were paid.

(*r*) *Harrison* v. *Harrison*, L. R., 8 Ch. 342. As to the case of a person domiciled abroad, see *Re Hewit*, [1891] 3 Ch. 568; *Blackwood* v. *Reg.*, 8 A. C. 82; *Henty* v. *Reg.*, [1896] A. C. 567.

(*s*) First ed. Vol. II. p. 548.

(*t*) See *Herrningham* v. *Herrningham*, 2 Vern. 355, 1 Eq. Ca. Ab. 117, pl. 5; *Growcock* v. *Smith*, 2 Cox. 397; *Carter* v. *Barnardiston*, 1 P. W. 505; *Johnson* v. *Child*, 4 Hare, 87. See also 3 P. W.

CHAPTER LIV.

several estates, subject to a common charge, devolve by descen upon different persons (which happens where they descended t the last owner from opposite lines of ancestry, and his own paterna and maternal heirs are different persons, or they are held by severa tenures, involving different courses of descent), the same principl of contribution obtains (*u*).

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 differen persons; as the charge would, we have seen, affect the whole property so given, real as well as personal, the devisees and legatees will bear their respective shares of the burden pro ratâ (*v*).

"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 (*w*)."

So if a testator mortgages real and personal property, the debt must be borne by them rateably (*x*), unless of course one is made the primary security (*y*).

Charges must be ejusdem generis.

The liability to contribution does not arise unless the two properties are equally charged; consequently, if one is specifically charged and the other is only subject to a general lien, no case for contribution arises (*z*).

Mr. Jarman continues (*a*): "In precise accordance with this

p. 98. A residuary devise is specific for the purposes of this rule; *Gibbins* v. *Eyden*, L. R., 7 Eq. 371.

(*u*) See Lord Eldon's judgment in *Aldrich* v. *Cooper*, 8 Ves. at p. 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 is to be first applied. See also *Early* v. *Early*, 16 Ch. D. 214, n.; *Re Athill*, 16 Ch. D. 211 (freeholds and leaseholds); *Re Pimm*, 91 L. T. 190 (freeholds and life policy). So if a testator devises part of his real estate and dies intestate, as to the rest, the devisee and heir must contribute rateably to any common charge; *Eyre* v. *Green*, 2 Coll. 527.

(*v*) *Irvin* v. *Ironmonger*, 2 R. & My. 531; *Re Grainger*, 83 L. T. p. 211, supra. p. 2026, n. (*g*).

(*w*) That the rule of contribution only applies where the personalty is specifically bequeathed, see ante, p. 2026, n. (*g*).

(*x*) *Trestrail* v. *Mason*, 7 Ch. D. 655, notwithstanding Locke King's Act, post, p. 2047; *Leonino* v. *Leonino*, 10 Ch. D. 460; *Evans* v. *Wyatt*, 31 Bea. 217.

(*y*) *Bute* v. *Cunynghame*, 2 Russ. 275. As to *Lipscomb* v. *Lipscomb*, L. R., 7 Eq. 501, and *De Rochefort* v. *Dawes*, L. R., 12 Eq. 540, see *Leonino* v. *Leonino*, supra.

(*z*) *Re Dunlop*, 21 Ch. D. 583. Other special questions as to contribution are discussed in *Solicitors' and General Life Ass. Soc.* v. *Lamb*, 2 D. J. & S. 251; *City Bank* v. *Sovereign Life Ass. Co.*, 50 L. T. 565 (policy of assurance partially valid mortgaged with other property).

(*a*) First ed. Vol. II. p. 549.

principle, too, where a testator creates out of real and personal estate a mixed fund to answer certain charges, he is considered as intending, not that the personalty shall be the primary and the realty the auxiliary fund for those charges, but that each shall contribute rateably to the common burden. And it is immaterial that the combined fund comprises the whole of the testator's real and personal estate" (*b*).

Effect where real and personal estate constitute a mixed fund to answer charges.

If a testator, after giving a legacy out of a mixed fund, makes a codicil releasing the realty from liability to the legacy, this does not revoke a proportionate part of the legacy, but throws the whole on the personalty (*c*).

Codicil releasing realty.

If a testator specifically devises realty to A. for life with remainders over, and gives his residuary real and personal estate upon trust for conversion and payment of debts, &c., and the remainders of the specifically devised realty fail, so that on A.'s death it falls into residue, its value for the purpose of contribution to debts, &c., is its value when the remainders fall in (*d*).

Remainders failing.

Whether in the particular case a mixed fund has been created 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 (*e*). 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, interest, and profits thereof to pay debts, legacies, or annuities, has been often held insufficient to exempt the personal estate from its primary liability (*f*). And it was said by Sir G. Turner, L.J., in *Tench* v. *Cheese* (*g*), 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" (*h*).

How a mixed fund is created.

(*b*) *Roberts* v. *Walker*, 1 R. & My. 752; *Stocker* v. *Harbin*, 3 Bea. 479; *Shallcross* v. *Wright*, 12 Bea. 505; *Salt* v. *Chattaway*, 3 Bea. 576; *Att.-Gen.* v. *Southgate*, 12 Sim. 77. If the debts have been paid out of the personalty, the real estate must make good the interest on its proportion of the amount; *Ashworth* v. *Munn*, 34 Ch. D. 391; see also *Dunk* v. *Fenner*, 2 R. & My. 557; *Fourdrin* v. *Gowdey*, 3 My. & K. 383; *West* v. *Cole*, 4 Y. & C. 460; *Crudock* v. *Owen*, 2 Sm. & Gif. 241; *Young* v. *Hassard*, 1 J. & Lat. 466; *Robinson* v. *London Hospital*, 10 Hare, 19; *Simmons* v. *Rose*, 6 D. M. & G. 411; *Bedford* v. *Bedford*, 35 Bea. 584.

(*c*) *Tatlock* v. *Jenkins*, Kay, 654.

(*d*) *Re Moore*, [1907] W. N. 181.

(*e*) Infra, s. VI.

(*f*) *Boughton* v. *Boughton*, 1 H. L. C. 406, reversing 1 Coll. 26; *Blann* v. *Bell*, 5 De G. & S. at p. 665; *Tidd* v. *Lister*, 3 D. M. & G. 857; *Bentley* v. *Oldfield*, 19 Bea. 225; *Tench* v. *Cheese*, 6 D. M. & G. 453; *Ellis* v. *Bartrum*, (No. 3) 25 Bea. 110.

(*g*) 6 D. M. & G. at p. 467.

(*h*) See the cases above cited, n. (*b*). See also *Hopkinson* v. *Ellis*, 10 Bea. 169, and *Bright* v. *Larcher*, 3 De G. & J. 148, where the proceeds of sale of the real estate were directed

Allan v. *Gott.*

But this dictum was criticized by James, L.J., in *Allan* v. *Gott* (where a testator gave his trustees a discretionary power of conv sion, and the intention to create a mixed fund was inferred from t whole will, but especially from a reference to "the fund to ar from the residue" of his real and personal estate.

Constructive charge of debts not sufficient.

The mere fact that a testator creates a mixed fund for purpo of distribution does not exempt the personalty from its prima liability to debts, unless they are made payable out of the mix fund. Thus in *Luckcraft* v. *Pridham*(*j*), where the testator, af directing his debts to be paid, gave his real and personal esta upon trust for conversion and division among various beneficiari it was held that the personalty was not exempted from its prima liability to debts, although they were charged on the real esta by the operation of the doctrine discussed in an earlier chapter (

Constructive charge of legacies not sufficient.

Where pecuniary legacies are given, and afterwards "the resid of the real and personal estate," so that under the rule in *Greville* *Browne* (*l*) the legacies are charged on the realty, the realty is lia only in aid of the personalty; unless the testator has direct the payments to be made out of the mixed fund, in which case t realty and personalty are liable pari passu (*m*).

Income treated as mixed fund.

If a testator gives his real and personal property to truste upon trust out of the rents and income to pay certain annuitie they are payable rateably out of the whole income as one fun The rule in *Boughton* v. *Boughton* (*n*) does not apply to such case (*o*).

Implied exoneration of a legatee from order of administration directed.

The order in which a testator directs his estate to be administere may be such as impliedly to shew that one of two devisees legatees is to have priority over the other, though under the gi simply to them they would have contributed rateably to paymen of debts (*p*).

to be disposed of in the same way as the residuary personal estate, and it was held that this created a mixed fund; *Simmons* v. *Rose*, 6 D. M. & G. 411, and *Shallcross* v. *Wright*, 12 Bea. 505, were similar cases.

(*i*) L. R., 7 Ch. 439. Compare *Howard* v. *Dryland*, 38 L. T. 24.

(*j*) 48 L. J. Ch. 636.

(*k*) Ante, p. 1990.

(*l*) 7 H. L. C. 689, ante, p. 2000. 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; b not where the gift is of *all* the real and the residue of the personalt *Wells* v. *Row*, 48 L. J. Ch. 476.

(*m*) *Elliott* v. *Dearsley*, 16 Ch. 322; *Re Ovey*, 31 Ch. D. 113; *Bourds*, [1895] 1 Ch. 499, ante, p. 200 *Re Balls*, [1909] 1 Ch. 791.

(*n*) Supra, p. 2033.

(*o*) *Falkner* v. *Grace*, 9 Ha. 28 *Howard* v. *Dryland*, 38 L. T. 24.

(*p*) *Legh* v. *Legh*, 15 Sim. 135. S also *Raikes* v. *Boulton*, 29 Bea. 4 *Earl of Portarlington* v. *Darner*, 4 D. & S. 161; *Bateman* v. *Hotchkin*, 10 Be 426. *Raikes* v. *Boulton* is discusse ante, p. 2030.

V.—Exoneration of Specific Property.—(1) *Specific Legacies.*— It is clear that the legatee of any chattel, specifically bequeathed, is entitled to be exonerated by the general personal estate from an incumbrance to which the testator, either before or after the making of his will, has subjected it. Incumbrances.

" Thus if," says Mr. Jarman (*q*), " 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 absolutely disposed of the property and thereby have defeated the bequest (*r*) ; 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 (*s*). Chattel must be redeemed for specific legatee.

Debentures charged on land are within the rule, not being an " interest in land " within the meaning of Locke King's Act (*t*).

The rule only applies to the general personal estate, and the legatee of an incumbered chattel or chose in action is not entitled to exoneration or contribution by other specific legatees or devisees, even if the testator has by his will directed the incumbrance to be paid off out of the general personal estate (*u*), or given a general direction for payment of his debts (*v*). Right as against other specific legatees, &c.

And the rule only applies to incumbrances created by the testator : it does not apply to liabilities incident to the property bequeathed and not resulting in a debt due by the testator in his Liabilities.

(*q*) First ed. Vol. II. p. 552.

(*r*) *Knight* v. *Davis*, 3 My. & K. 358. In this case the mortgage was created for the benefit of the legatee himself.

(*s*) *Bothamley* v. *Sherson*, L. R., 20 Eq. 304. *Ellis* v. *Eden*, 25 Bea. 482.

(*t*) *Halliwell* v. *Tanner*, 1 R. & My. 633.

(*u*) *Re Butler*, [1894] 3 Ch. 250.

(*v*) *Re Chantrell*, [1907] W. N. 213, post, p. 2051.

lifetime (*w*). Thus, if the testator holds shares not fully paid and bequeaths them to A., the testator's estate is liable for calls made during his lifetime, and A. must pay any calls m subsequently (*x*).

Several earlier cases, so far as they conflict with the princi above stated, must be considered over-ruled. In some of th however, the decision appears to have turned on the fact t the . .ator had entered into a contract to pay the calls wit a certain period (*y*). The decision of North, J., in *Re Stevens* seems to rest on this principle. There the testator gave to partner notice of his intention to exercise an option given to h by the articles of partnership to purchase the partner's share the business, but died before completion of the purchase, havi by his will bequeathed all his estate and interest in the partnersh business in trust for L., it was held that L. was entitled to t share which the testator was bound to purchase, and to ha the same paid for out of the testator's general estate. It is hard necessary to say that the general rule does not apply if the testat gives express directions as to payment of calls (*a*).

Tenant for life of shares.

Where shares are given to a person for life with remainc over, different considerations arise (*b*). Thus in *Re Box* (*c*) t testator bequeathed the residue of his personal estate upon tru for his wife for life, and after her death he gave certain shar forming part of the residue, to different persons absolutely. Ca were made on these shares during the widow's lifetime, and Woo V.-C., decided that as the shares were not to be severed fro the general residue until her death, the calls were payable o of the residue, and not by her. If the shares had been given her for life as a specific bequest, "such shares would be taken by th legatees cum onere, and that the tenant for life, and those entitle in remainder, would have to provide for the payment of the call either out of the shares themselves or otherwise, as they migh

(*w*) *Bothamley* v. *Sherson*, supra. The case of *Stewart* v. *Denton* (4 Doug. 219), where the customs duties on wines specifically bequeathed were held to be payable out of the general personal estate, is commented on in *Bothamley* v. *Sherson*. As to a bequest of property belonging to a partnership, and subject to the partnership debts, see *Farquhar* v. *Hadden*, L. R., 7 Ch. 1; *Re Holland*, [1902] 2 Ch. 88, post. p. 2038.

(*x*) *Armstrong* v. *Burnet*, 20 Bea. 424; *Addams* v. *Ferick* 26 Bea. 384. *Day* v. *Day*, 1 Dr. & Sm. 261.

(*y*) *Blount* v. *Hipkins*, 7 Sim. 43; *Jacques* v. *Chambers*, 2 Coll. 435, Railw. Ca. 205, 11 Jur. 295; *Wright* *Warren*, 4 De G. & Sm. 367; see *Bar* v. *Harding*, 1 Jo. & Lat. 475. T decision in *Moffett* v. *Bates*, 3 Sm. & 468, seems to have turned partly on t question of the repudiation by t legatee; see ante, p. 556.

(*z*) [1888] W. N., 110.

(*a*) *Bevan* v. *Woterhouse*, 3 Ch. 752.

(*b*) In *Clive* v. *Clive*, Kay, 600, Woo V.-C., simply followed *Blount* v. *Hi kins*.

(*c*) 1 H. & M. 552.

think fit; the residue of the testator's estate would have nothing further to do with them" (*d*). As between the tenant for life and the remainder man, it seems that in such a case, in accordance with the principle stated in Chapter XXXIV., the tenant for life would be entitled to have the amount required for payment of the calls raised out of capital, she paying the interest on it during her life (*e*).

Incumbrances.

(2) *Leaseholds.*—As regards incumbrances, leaseholds were formerly subject to the same rules as freehold land; these rules are stated below (*f*). Locke King's Act and the amending act of 1867 did not apply to leaseholds (*g*), but the act of 1877 has brought them within the operation of all three acts (*h*).

Liabilities.

As regards liabilities other than incumbrances within the scope of Locke King's Act (which, it will be remembered, includes vendor's liens and judgment debts), the general rules applicable to specific bequests of chattels personal apply also to leaseholds. Accordingly all rents and other debts which accrue due in respect of leaseholds during the testator's lifetime are payable out of the general personal estate: all future rents and liabilities must be borne by the legatee (*i*). Dilapidations under a repairing lease, although existing at the time of the testator's death, constitute a liability and not a debt within the meaning of the rule (*j*).

Tenant for life.

If leaseholds are specifically bequeathed to A. for life with remainder to B. absolutely, A. is bound, as between himself and the testator's estate, to pay the head rent and perform the covenants to repair, &c., during his life (*k*): but not as between himself and the remainderman (*l*). If the property is out of repair at the testator's death, it seems that the cost of putting it in repair ought to be borne by A. and B. in proportion to their interests; clearly A. cannot be called upon to make good dilapidations existing

(*d*) 1 H. & M. at p. 556.

(*e*) See *Fitzwilliams* v. *Kelly*, 10 Ha. at p. 279.

(*f*) Pp. 2039 seq. If the general personal estate was insufficient, the specific legatee of leaseholds took them cum onere, as is still the rule in the case of chattels personal (supra, p. 2035). *Hallilwell* v. *Tanner*, 1 R. & Myl. 633.

(*g*) *Solomon* v. *Solomon*, 33 L. J. Ch. 473; *Re Wormsley's Estate*, 4 Ch. D. 655.

(*h*) *Re Kershaw*, 37 Ch. D. 674.

(*i*) *Barry* v. *Harding*, 1 Jo & Lat. at p. 489. As to the effect of a gift of leaseholds "free from" or "subject to" outgoings, see *Re Taber*, 46 L. T. 805; *Re Crawley*, 28 Ch. D. 431; Vaizey on Settlements, 332.

(*j*) *Hawkins* v. *Hawkins*, 13 Ch. D. 470; *Hickling* v. *Boyer*, 3 Mac. & G. 635.

(*k*) *Re Redding*, [1897] 1 Ch. 876; *Re Betty*, [1899] 1 Ch. 821; *Kingham* v. *Kingham*, [1897] 1 Ir. 170; *Re Gjers*, [1899] 2 Ch. 54. The earlier cases of *Re Baring*, [1893] 1 Ch. 61, and *Re Tomlinson*, [1898] 1 Ch. 232, so far as this point is concerned, may be considered as overruled.

(*l*) *Re Parry and Hopkin*, [1900] 1 Ch. 160.

CHAPTER LIV.

at the testator's death (*m*). As regards expenditure which properly payable out of capital, the principle stated above in case of shares in companies seems also applicable to leasehold If, therefore, a fine for the renewal of a lease becomes payable during the lifetime of the testator, it is payable out of his general personal estate: any fine becoming payable during the life of tenant for life must be borne by the tenant for life and remainderm in proportion to their interests, either by making it a charge on property, in which case the tenant for life keeps down the interest or by dividing it between the tenant for life and remainderm by actuarial valuation (*o*).

Leaseholds included in residue.

If leaseholds are bequeathed as part of a residue to be enjoy in specie by A. for life with remainder to B., it seems that they governed by the rule stated above as applying to shares in companies. If therefore the property is out of repair at the testato death, the repairs must be borne by the residue and not by t tenant for life (*p*). And if the testator has entered into a covena to erect buildings on the property, it must be performed at t expense of the residue (*q*).

Partnership property.

If a testator has a share in a business and the partnership asse include leaseholds, and by his will he bequeaths his share of t leaseholds to A., this entitles A. to take it free from liability contribute to the partnership debts; they must be satisfied out the other partnership assets (*r*). But if the business is insolven A. takes subject to the partnership debts; he cannot claim to hav them satisfied out of the general personal estate (*s*).

Ordinary outgoings.

(3) *Lands of Inheritance.*—A devisee of land takes it subject to charges and outgoings incident to it—such as quit-rents, chief rents, &c. (*t*), and obligations towards the tenants (*u*).

Partnership property.

Under a devise of land forming part of the assets of a partnership

(*m*) *Re Courtier*, 34 Ch. D. 136, explaining the decision in *Re Fowler*, 16 Ch. D. 723; *Brereton* v. *Day*, [1895] 1 Ir. 519.

(*n*) *Fitzwilliams* v. *Kelly*, 10 Ha. 266.

(*o*) *Re Baring*, [1893] 1 Ch. 61. See *Re Hotchkys*, 32 Ch. D. 408, and ante, p. 1217.

(*p*) *Harris* v. *Poyner*, 1 Drew. 174. See Vaizey on Settlements, p. 332.

(*q*) *Marshall* v. *Holloway*, 5 Sim. 196. See the remarks on this case in *Fitzwilliams* v. *Kelly* and *Moffatt* v. *Bates*, supra, and in *Eccles* v. *Mills*, [1898] A. C. 360.

(*r*) *Re Holland*, [1902] 2 Ch. 88. In this case the property was freehold, but the principle is the same.

(*s*) *Farquhar* v. *Hadden*, L. R., 7 Ch. 1.

(*t*) As to the liability of a terre tenant to pay rent-charges (a difficul and obscure subject), see Blyth & Jar man by Sweet, Vol. IX, 344; *Thoma* v. *Sylvester*, L. R., 8 Q. B. 368, and a article on that case by Mr. T. Cypria Williams, Law Quarterly Review, xiii 288. The later cases, following *Thoma* v. *Sylvester*, are referred to in *Re Herbage Rents*, [1896] 2 Ch. 811.

(*u*) *Mansel* v. *Norton*, 22 Ch. D. 769.

the devisee takes subject to the partnership debts, if the other assets are insufficient to pay them (*v*).

Contracts to spend money on land.

In *Holt* v. *Holt* (*w*), J. H. entered into an agreement for building a house on land belonging to him and covenanted to pay the builder 1000*l*. for it. J. H. died intestate before the house was built; it was held that his heir at law was entitled to have the house built at the cost of the personal estate. This decision was followed in *Cooper* v. *Jarman* (*x*). And the rule applies to devised land. Thus in *Re Day* (*y*), where a testator entered into a contract for the erection of buildings on land belonging to him, and died before they were completed, having devised the land to A. B., it was held that A. B. was entitled to have the buildings completed at the cost of the personal estate. But the rule does not apply to a contract for the erection of buildings on land belonging to the devisee by an independent title (*z*).

Covenant running with reversion.

In *Eccles* v. *Mills* (*a*), a lessor entered into a qualified covenant with his lessee to finish some uncompleted improvements on the demised land within a certain time; he died before the period had expired, without having performed the covenant, and having specifically devised the land subject to the lease; it was held that the testator's personal estate must bear the liability. If, however, the covenant had been unqualified, and had been incident to the relation of landlord and tenant (the J.C. held that it related to a matter "preparatory to the complete establishment of that relation") it seems that it would have run with the reversion and bound the devisee.

Mortgage debts, &c.

Before the passing of Locke King's Act (17 & 18 Vict. c. 113), referred to in the following section of this chapter, the general rule was that if a man borrowed money on mortgage of his land, and by his will devised the land, or allowed it to descend to his heir, the mortgage debt was payable primarily out of his general personal estate, in exoneration of the land (*b*). So if he contracted to purchase land and died before completing the purchase, the money was payable primarily out of his personal estate (*c*).

(*v*) *Re Holland*, [1902] 2 Ch. 88; *Farquhar* v. *Hadden*, L. R., 7 Ch. 1; ante, p. 2038.
(*w*) 2 Vern. 322.
(*x*) L. R., 3 Eq. 98.
(*y*) [1898] 2 Ch. 510.
(*z*) *Re Day*, supra.
(*a*) [1898] A. C. 360 (J. C.).
(*b*) *Galton* v. *Hancock*, 2 Atk. at p. 436; *Johnson* v. *Milksopp*, 2 Vern. 112; *Cope* v. *Cope*, 2 Salk. 449; *Howel* v. *Price*, 1 P. W. 292; *Chester* v. *Powell*, 7 Jur. 389.
(*c*) See *Hood* v. *Hood*, 3 Jur. N. S. 684; *Barnwell* v. *Iremonger*, 1 Dr. & Sm. at p. 255.

CHAPTER LIV.

This rule still applies in cases not falling within Locke K
Act or the amending acts. Thus if land belonging to a tena
tail is taken in execution under the Judgments Act, 1838, and
dies before the judgment is satisfied, the debt is payable prima
out of his personal estate in exoneration of the land (*d*).

In cases not falling within the act, the points which, as
Jarman points out (*e*), "have been chiefly in controversy and
here to be considered, are:—

Mortgaged estate, when to be exonerated.

"1st, whether the will indicates an intention that the devise
legatee shall take cum onere (*f*); and, if not, then, 2ndly, out of w
funds he is entitled to claim exoneration (*g*). The Courts r
very clear expressions in order to fasten the incumbrance on
devisee or legatee of the property in question.

Devise *subject to the mortgage*.

"Thus it is settled that a devise of lands, *subject to the mortg
or incumbrance thereupon*, does not so throw the charge on
estate, as to exempt the funds, which by law are preferably liable (
the testator being considered to use the terms merely as descript
of the incumbered condition of the property, and not for the purp
of subjecting his devise to the burthen—a construction whi
though well established, it is probable, generally defeats
intention."

Devise subject to specified part of mortgage.

So where a testator having two estates subject to one mort
devised one estate to A. subject to the payment of part of the de
and the other to B. subject to the payment of the residue, it was he
that this only fixed the proportions in which the estates inter
were to bear the charge, and did not imply that the devisees were
take them cum onere (*i*).

Devise upon trust to sell and pay mortgages does not make mortgaged lands primarily liable.

And even where lands were devised upon trust for sale, and t
proceeds were to be applied in the first place to pay off a mortga
debt of 6,000*l.* charged on another estate (*j*), and in the next pla
to pay off all other mortgages charged on the lands devise

(*d*) *Re Anthony*, [1893] 3 Ch. 498.

(*e*) First ed. Vol. II. p. 353.

(*f*) 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 versâ, *Whieldon* v. *Spode*, 15 Bea. 537.

(*g*) As to the right to exoneration being barred by lapse of time, see *Newhouse* v. *Smith*, 2 Sm. & Gif. 344.

(*h*) *Serle* v. *St. Eloy*, 2 P. W. 386; *Duke of Ancaster* v. *Mayer*, 1 B. C. C. 454; *Astley* v. *Earl of Tankerville*, 2 B. C. C. 545, 1 Cox, 82; *Barnewell* v *Lord Cawdor*, 3 Mad. 453; *Phillips* v. *Parker*, 1 Sim. 136; *Lewis* v. *Cru well*, 3 [illegible] & Gr. *Townshend* *Mosty* 26 Bea. See Lo Eldo judgment *Gilnes* ate 8 Ves. p. 306, v. *Blu ll*, Mer 225, and v. *Lord H* in 1 P., 1 Dan. at 236, 1 Pri (*i*) *Goodwin* v. *Lee*, 1 K. 377

(*j*) The payment of the mortgag debt was by a codicil expressly throw on the mortgaged estate in exoneratio of the personal estate, and it is pr sumed, though the report is not clear o the subject, that the personalty was no in direct contravention of the codici held liable to the discharge of the debt

Sir J. Leach, M.R., held that, as it appeared on the whole will that the testator did not intend to exonerate his personal estate from the mortgage 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 (*k*).

[illegible] direction to pay off a mortgage on estate A. does not release [illegible] personalty from paying off a mortgage on estate B. (*l*).

Effect of words "he paying the mortgage thereon."

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 (*m*).

M[illegible]man con[illegible]: (*n*) "Suppose, then, that the will contains no intimation of an intention to the contrary, the devisee of a mortgaged [illegible] entitled to have the encumbrance discharged out of the following [illegible]:—1[illegible]. *The general personal es[illegible]* (*o*); 2ndly, *Lands [illegible] payment [illegible] debts* (*p*); 3r[illegible] *Lands descended [illegible]*: [illegible]thly, [illegible]*nds devised charged with debts* (*r*): and [illegible]ened [illegible]each the last class of estates, and if [illegible] devise[illegible]ed estat[illegible]re included therein (as it of course [illegible] be i[illegible] charge were ge[illegible]al), the devisee in question would be [illegible] to co[illegible]ribute rateably with the other devisees (*s*).

Funds liable to exonerate mortgaged estate.

Not specific legacies;

But the devisee of a mortgaged estate is not entitled to have it [illegible]onerated out of *personalty specifically bequeathed*,—a point which [illegible] determined in the case of *O'Neal* v. *Mead* (*t*); where a testator having devised lands, which he had mort[illegible] to his eldest son in fee, and bequeathed a leasehold estate [illegible], it was held that the leasehold premises, being specifica[illegible]thed, were not liable to pay off the mortgage.

"[illegible]nd à fortiori a specific legatee of en[illegible]ed leaseholds cannot call upon a specific legatee of unen[illegible]ed leaseholds to contribute towards the liquidation of the mortgage debt affecting the former exclusively; and a direction that the mortgage money

(*k*) *Wythe* v. *Henniker*, 2 My. & K. [illegible]. But according to *Webb* v. *Jones*, post, the decision should have been otherwise, for another reason.

(*l*) *Re Bull*, 49 L. T. 592 (leaseholds).

(*m*) *Lockhart* v. *Hardy*, 9 Bea. 379. See *Bridgman* v. *Dove*, 3 Atk. 201; *Mead* v. *Hide*, 2 Vern. 120; *Hatch* v. *Skelton*, 20 Bea. 453; *Re Kirk*, 21 Ch. D. 431.

(*n*) First ed, Vol. II. p. 554.

(*o*) *Philips* v. *Philips*, 2 B. C. C. 273, and cases cited.

(*p*) *Serle* v. *St. Eloy*, 2 P. W. 386; *Lomax* v. *Lomax*, 12 Bea. 285; and other cases cited ante, p. 2026.

(*q*) *Galton* v. *Hancock*, 2 Atk. pp. 424, 427, 430; *Davies* v. *Topp*, 2 B. C. C. 259, n.; and other cases cited ante, p. 2026.

(*r*) *Bartholomew* v. *May*, 1 Atk. 487, 1 West, 255; *Middleton* v. *Middleton*, 15 Bea. 450.

(*s*) *Carter* v. *Barnardiston*, 1 P. W. 505; *Middleton* v. *Middleton*, 15 Bea. 450; *Harper* v. *Munday*, 7 D. M. & G. 369.

(*t*) 1 P. W. 693; *Emuss* v. *Smith*, 2 De G. & S. pp. 737, 738.

CHAPTER LIV.

shall be paid out of the general personal estate, would not confe such right (*u*).

nor pecuniary legacies;

"It is clear, also, that the devisee of a mortgaged estate canno claim exoneration as against pecuniary legatees. Thus, in *Lutkin* v. *Leigh* (*v*), where the testator, having mortgaged certain land devised them to his wife for life, with remainder over, and gav her a legacy of £1,500, and bequeathed the residue of his persona estate to other persons. The personal estate not being sufficien to pay the £1,500 and liquidate the mortgage, Lord *Talbot* hel that the devisee must take the devised estate cum onere.

nor other devised lands.

"And, of course, such a devisee is not entitled to call upon th devisees of other lands, not charged by the testator with debts, fo contribution, although such other estates were liable to th *creditor* (*w*). It is true that a devisee of encumbered land ca only claim exoneration out of property which [the creditor of th testator] can reach, but the converse of the proposition is not true.

Heir entitled to exoneration.

"So where an estate *descends* subject to a mortgage, the hei is entitled to exoneration out of those funds which in the establishe order of application (*x*) are anterior to the descended assets, namely the general personal estate, and realty expressly devised for th payment of debts (*y*)."

In *Wisden* v. *Wisden* (*z*) the testator specifically devised rea estate to each of his sons: that devised to the sons T., G., an W. was subject to one mortgage for 2,000*l*., and that devised t the sons E. and J. was subject to a mortgage for 700*l*.; by hi will he charged all the properties with all his debts: it was hel by Stuart, V.-C., that the set of properties devised to T., G., an W. were primarily liable for the 2,000*l*. mortgage and the set o properties devised to E. and J. for the 700*l*. mortgage, and tha if either set of properties were insufficient, the other would b secondarily liable for the deficiency.

(*u*) *Halliwell* v. *Tanner*, 1 R. & My. 633; *Re Butler*, [1894] 3 Ch. 250.

(*v*) Cas. t. Talb. 53. See also *Lucy* v. *Gardener*, Bunb. 137; and Lord *Loughborough's* judgment in *Hamilton* v. *Worley*, 2 Ves. jun. at p. 65; *Johnson* v. *Child*, 4 Hare, 87. *Re Smith*, [1899] 1 Ch. 365.

(*w*) Lord Hardwicke's judgment in *Galton* v. *Hancock*, 2 Atk. 438; *Emuss* v. *Smith*, 2 De G. & S. 722. Nor does the fact that every testator's lands are now liable to his debts affect the question; *Rodhouse* v. *Mold*, 35 L. J. Ch. 67.

(*x*) See ante, p. 2026.

(*y*) *Hill* v. *Bishop of London*, 1 Atk at p. 621; *Chester* v. *Powell*, 7 Jur. 389 *Yonge* v. *Furse*, 20 Bea. 380. Th first case is a peculiar one. The mort gaged lands were copyholds (which wer not then assets either at law or i equity), and the copyhold heir wa held entitled to be exonerated out o lands specifically devised, though merel *charged* with debts. If he had bee heir of fee-simple lands, the land descended would have been liabl before the lands charged, see order o liability, ante, p. 2026.

(*z*) 5 Jur. N. S. 455.

It is hardly necessary to say that if a testator directs his mortgage debts to be paid out of his personal estate, this does not shew an intention to exonerate the mortgaged property so as to throw any unsatisfied mortgage debts on the residuary real estate (*a*).

Exoneration doctrine does not extend to estates which came to the testator cum onere.

(4) *Exception to the General Rule as to Exoneration, where the Mortgage was created not by the Testator, but by a Prior Owner.*—Mr. Jarman continues (*b*): "The principle of the preceding cases, however, extends only to encumbrances 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, 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 (*c*).

Unless he manifest an intention to adopt the debt.

"Thus it has been held that the giving a bond or covenant on the transfer of the mortgage has no such effect (*d*), even though it include an agreement to pay a higher rate of interest (*e*), or a

Acts *not* amounting to adoption.

(*a*) *Rodhouse* v. *Mold*, 35 L. J. Ch. 67. This was before the Real Estate Charges Act, 1867, so that the testator's declaration that his personal estate should be liable for his debts was equivalent to a direction that his mortgage debts should be borne by the personal estate.

(*b*) First ed. Vol. II. p. 556.

(*c*) This rule applies even where the devisee is also residuary legatee of the first mortgagor and as such has sufficient assets to pay off the mortgage; *Scott* v. *Beecher*, 5 Mad. 96; *Earl of Ilchester* v. *Earl of Carnarvon*, 1 Bea. 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*.

(*d*) *Bagot* v. *Oughton*, 1 P. W. 347; *Evelyn* v. *Evelyn*, 2 ib. at p. 664; *Leman* v. *Newnham*, 1 Ves. sen. 51; *Lacam* v. *Mertins*, lb. 312. See also *Robinson* v. *Gee*, lb. 251; *Duke of Ancaster* v. *Mayer*, 1 B. C. C. 454; *Earl of Tankerville* v. *Fawcett*, 1 Cox, 237, 2 B. C. C. 57.

(*e*) *Shafto* v. *Shafto*, 1 Cox, 207, 2 Cox's P. W. 664, n. See *Donisthorpe* v. *Porter*, 2 Ed. 162.

CHAPTER LIV.

further sum be advanced to pay an arrear of interest on
mortgage (*f*), in which case the effect is merely to convert int
into principal; and in the case of *Duke of Ancaster* v. *Maye*
it was so decided, though a small further principal sum
advanced, and a further real security given for the whole.

"Nor in such a case is the personal estate of the last o
rendered primarily liable by a covenant or bond given for
ticular purposes, as upon the apportionment of the debt an
several persons entitled to different parts of the property sub
to the charge" (*h*). Nor where the equity of redemption
become divided among several persons does a new proviso
redemption, providing for reconveyance to each person of
own share, throw the debt upon such persons personally, s
it only expresses what the law would imply (*i*).

Where new mortgage is created.

But if the devisee so deals with the mortgage as in effec
take the debt upon himself or create a new mortgage, his pers
estate is primarily liable (*j*).

Charge of debts confined to testator's own debts.

Mr. Jarman continues (*k*): "Upon the same principle, w
a testator charges his estate with the payment of his debts,
incumbrance on a real estate devised or descended to him
not be considered as his debt, so as to bring it within
operation of the charge.

"Thus, in *Lawson* v. *Lawson* (*l*), where A., being the dev
of real estate which was subject to certain incumbrances, d
leaving the estate onerated with the charge, having by his
charged his real and personal estate with the payment of his de
and devised the real estate to B., and appointed his wife execut
The wife having in the administration of the assets paid off
charge on the real estate devised by the first testator, it w

(*f*) *Earl of Tankerville* v. *Fawcett*, 1 Cox, 237, 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, *Burges* 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. sen. 312.

(*g*) 1 B. C. C. 454; but see *Woods* v. *Huntingford*, 3 Ves. 128; and *Lushington* v. *Sewell*, 1 Sim. 435.

(*h*) *Forrester* v. *Leigh*, Amb. 171 Cox's P. W. 664, n.; *Billinghurst Walker*, 2 B. C. C. 604, as to which, Sir W. Grant's judgment in *Earl Oxford* v. *Rodney*, 14 Ves. at p. 425

(*i*) *Hedges* v. *Hedges*, 5 De G. & 330.

(*j*) *Barham* v. *Earl of Thanet*, 3 M & K. 607; *Bruce* v. *Morice*, 2 De & S. 389; *Townshend* v. *Mostyn*, 26 B 72; *Earl of Clarendon* v. *Barke* 1 Y. & C. C. C. 688.

(*k*) First ed. Vol. II. p. 558.

(*l*) 3 B. P. C. Toml. 424. See a *Lawson* v. *Hudson*, 1 B. C. C. *Hamilton* v. *Worley*, 2 Ves. jun. 62, 4 C. C. 199.

held that she was entitled to satisfaction from B., whose estate was thus exonerated; for that A., in charging his estate with his debts, could not intend to encumber it with debts which were not his in contemplation of law.

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 mortgage of the devisor or ancestor's estate to raise money for payment of the debts (*m*), or to a legatee to secure his legacy (*n*), he has not by these acts primarily subjected his personal estate. Such also was adjudged to be the result where the heir mortgaged an estate to pay simple contract debts owing by his ancestor to which it does not appear that the real estate was liable (*o*).

Rule where testator purchases cum onere.

"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; 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 shew 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' (*p*); but at his death the person upon whom the estate devolves takes it cum onere (*q*).

Covenant with the *vendor*; ——with the *mortgagee*: this amounts to adoption of debt.

"And it is immaterial whether the covenant with the vendor be to pay the debt or to indemnify him against it (*r*).

"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 (*s*).

"And the same principle of course applies where upon the

(*m*) *Perkyns* v. *Baynton*, 2 Cox's P. W. 664, n.; *Basset* v. *Percival*, 1 Cox, 268; *Noel* v. *Lord Henley*, 7 Pri. 241, 12 Pri. 213 (*Noel* v. *Noel*).

(*n*) *Hamilton* v. *Worley*, 2 Ves. jun. 62, 4 B. C. C. 199; *Matheson* v. *Hardwicke*, 2 Cox's P. W. 665, n.

(*o*) *Earl of Tankerville* v. *Fawcett*, 1 Cox, 237, 2 B. C. C. 57.

(*p*) Per Sir R. P. Arden, M.R., in *Woods* v. *Huntingford*, 3 Ves. at p. 132.

(*q*) *Cornish* v. *Mew*, 1 Ch. Cas. 271; *Pockley* v. *Pockley*, 1 Vern. 36; *Duke of Lancaster* v. *Mayer*, 1 B. C. C. 454.

(*r*) *Tweddell* v. *Tweddell*, 2 B. C. C. pp. 101, 152; *Butler* v. *Butler*, 5 Ves. 534.

(*s*) *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 (as Mr. Jarman thought) opposed to the authorities cited in the last note, as to which see per Sugden, C., in *Barry* v. *Harding*, 1 Jo. & Lat. pp. 485, 486. *Earl of Oxford* v. *Lady Rodney*, 14 Ves. 417; *Waring* v. *Ward*, 5 Ves. 670, 7 Ves. 332.

CHAPTER LIV.

purchase the mortgage is transferred to a new mortgagee, v advances a further sum of money (*t*)."

How far an actual dealing with the mortgagee is essential to m the debt personal to the purchaser was formerly a subject of cussion. The cases (*u*) are stated at length in the earlier editi of this work. The statute 17 & 18 Vict. c. 113 has rendered th distinctions comparatively unimportant. For even assuming purchaser to have made the debt his own, it seems that the stat interposes, and, unless a contrary intention is signified by so further act of the deceased, makes the mortgaged land the prim fund for payment of the charge upon it (*v*).

Money settled and secured by mortgage held primarily a charge on the land.

(5) *Exception to the General Rule as to Exoneration, where Mortgage Money never went to augment the Mortgagor's Perso Estate.*—Another exception to the general rule is where the mortg money never was strictly a debt but merely money agreed to settled, even though the security comprise a covenant for payme In such cases the mortgaged property is primarily charged. Th where a testator on the marriage of his daughter agreed to secure trustees 6,000*l.* for her marriage portion, to be paid at the end twelve months after his death, and for that purpose devised cert lands to the trustees for a term of years by way of mortgage securing the principal sum and interest, for the payment of wh he also bound himself personally by covenant, and then devised lands subject to the charges and incumbrances existing there Sir L. Shadwell, V.-C., said the covenant was a mere matter of fo and only auxiliary, and that at the time the charge was created was not the personal debt of the party, but merely a provision settlement which must be satisfied out of the property on which was secured (*w*).

Money raised under power by tenant for life not his personal debt;

Again, where a tenant for life of settled property raises mortgage under a power a sum of money for his own use, a covenants for payment of it, his personal estate is not primar

(*t*) *Woods* v. *Huntingford*, 3 Ves. 128. Compare this case with *Duke of Ancaster* v. *Mayer*, 1 B. C. C. 454, noticed ante, p. 2044, which it is remarkable was not cited by the M.R.; *Woods* v. *Huntingford* is discussed in detail in the earlier editions of this work.

(*u*) *Billinghurst* v. *Walker*, 2 B. C. C. at p. 608; *Tweddell* v *Tweddell*, 2 B. C. C. pp. 101, 151. *Earl of Oxford* v. *Lady Rodney*, 14 Ves. at p. 423; *Earl of Belvedere* v. *Rochfort*, 5 B. P. C. Toml. 2 *Barry* v. *Harding*, 1 Jo. & Lat. 4 *Waring* v. *Ward*, 7 Ves. at p. 337.

(*v*) Per Romilly, M.R., in *Hepwo* v. *Hill*, 30 Bea. at p. 483.

(*w*) *Graves* v. *Hicks*, 6 Sim. at p. 3 and *Coventry* v. *Coventry*, 2 P. W. 2 1 Str. 596; *Edwards* v. *Freeman*, P. W. at p. 437; *Lanoy* v. *Duke of Ath* 2 Atk. 444; *Lechmere* v. *Charlton*, Ves. 193; *Loosemore* v. *Knapm* Kay, 123.

liable, though it received the benefit (*x*); 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 (*y*), and if the settlor subsequently pays off any of the charges he becomes himself an incumbrancer to that extent (*z*). On the other hand where the settlement contains a covenant for payment of the charge by the settlor his personal estate is primarily liable (*a*).

nor money previously charged, and to which the settlement is made subject.

Contra where a covenant to pay the charge.

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 (*b*), 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 (*c*). 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 (*d*).

Whether failure of limitations in lifetime of tenant for life affects primary liability of land, and vice versâ.

VI.—Real Estate Charges Acts.—By the Real Estate Charges Act, 1854, commonly called Locke King's Act, 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 not, by his will or deed or other document,

Real Estate Charges Act, 1854.

(*x*) *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.

(*y*) *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.

(*z*) Ib.; *Redington* v. *Redington*, 1 Ba. & Be. 131; per Lord Eldon, *Ex parte Digby*, Jac. at p. 238; *Jameson* v. *Stein*, 21 Bea. 5; in *Vandeleur* v. *Vandeleur*, the settlor paid off some of the charges, and declared such payment to be in case of the estate, and the remainder only continued on the estate.

(*a*) *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.

(*b*) See per Lord Redesdale, *Noel* v. *Lord Henley*, Dan. at pp. 331, 332: *Lady Langdale* v. *Briggs*, 8 D. M. & G. 391.

(*c*) See *Scott* v. *Beecher*, 5 Mad. 96; *Lord Ilchester* v. *Lord Carnarvon*, 1 Bea. 209. But see per K. Bruce, V.-C., 1 Y. & C. C. C. at p. 711.

(*d*) Per Turner, V.-C., *Barham* v. *Earl of Clarendon*, 10 Hare at p. 133.

CHAPTER LIV.

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 (*e*), 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 day of January, 1855."

Real estate and interests within the Act.

Copyholds are within this act (*f*), but the words "heir or devisee to whom such lands or hereditaments shall descend or be devised," had the effect of excluding leaseholds (*g*), and a share of money to arise by sale of land previously settled on trust to sell (*h*), although the preceding words "interest in land or hereditaments" would have included them. But if the testator devises land upon trust for sale, the persons to whom the proceeds of sale are given are liable to pay the mortgages on the land (*i*).

Equitable mortgage.

The act applies to an equitable mortgage by deposit of title deeds (*j*); but it appeared doubtful whether the words "charged by

Trust for sale.

way of mortgage" covered a charge under which foreclosure was

Vendor's lien.

not the remedy, e.g. a conveyance on trust for sale. A vendor's lien for unpaid purchase money was clearly not within those

General charge of debts.

words (*k*). And land charged by will generally with debts and legacies, and so devised, is not, in the hands of the devisee, land

(*e*) I.e. other than that so descended or devised, per Jessel, M.R., 9 Ch. D. at p. 17.

(*f*) *Piper* v. *Piper*, 1 J. & H. 91.

(*g*) *Solomon* v. *Solomon*, 33 L. J. Ch. 473; *Gall* v. *Fenwick*, 43 L. J. Ch. 178; *Re Wormsley's Estate*, 4 Ch. D. 665. They are within the act of 1877, post, p. 2051. In cases not within the act of 1877, where the mortgage includes freeholds and leaseholds, the mortgage debt is apportioned: *Gall* v. *Fenwick*, supra.

(*h*) *Lewis* v. *Lewis*, L. R., 13 Eq. 218. See *Re Bennett*, [1899] 1 Ch. 316.

(*i*) *Elliott* v. *Dearsley*, 16 Ch. D. 322.

(*j*) *Pembrooke* 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*, 24 W. R. 962 (deposit without memorandum).

(*k*) *Hood* v. *Hood*, 26 L. J. Ch. 616; *Barnwell* v. *Iremonger*, 1 Dr. & Sm. p. 255. See *Day* v. *Day*, 14 W. R. 261, where the intestate had covenanted to pay off some mortgage debts on other estates.

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" (*l*).

The act does not apply to a mortgage by A. of his own land to secure a debt due by a firm in which he is a partner and of which the assets are sufficient to pay the debt (*m*).

What words will exclude the statute.

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 (*n*), or his personal estate (*o*), upon trust for, or charged with, the payment of his debts, without express reference to mortgage debts. A mere direction that his debts should be paid or paid out of his estate, was not sufficient (*p*).

Residuary real estate, when liable for mortgage debts.

In *Allen* v. *Allen* (*pp*) the testatrix directed her debts to be paid out of her residuary real and personal estate, with the result that the mortgage debts on certain specifically devised real estate were payable out of the residuary real and personal estate. But a mere direction that the testator's personal estate should be liable for his debts did not throw the mortgage debts on the residuary real estate (*q*).

Real Estate Charges Act, 1867.

The Real Estate Charges Act, 1867, 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 (sec. 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 (sec. 2), that "in the construction

Vendor's lien.

(*l*) *Hepworth* v. *Hill*, 30 Bea. 476. The point here decided seems not to be touched by the subsequent acts.

(*m*) *Re Ritson*, [1899] 1 Ch. 128.

(*n*) *Stone* v. *Parker*, 1 Dr. & Sm. 212; *Allen* v. *Allen*, 30 Bea. 395; *Newman* v. *Wilson*, 31 Bea. 33; *Maxwell* v. *Hyslop* (*Maxwell* v. *Maxwell*), L. R., 4 Eq. 407; 4 H. L. 506; *Greated* v. *Greated*, 26 Bea. 621 ("mortgage and other debts").

(*o*) *Smith* v. *Smith*, 3 Gif. 263; *Mellish* v. *Vallins*, 2 J. & H. 194; *Eno* v. *Tatham*, 3 D. J. & S. at p. 451; *Porcher* v. *Wilson*, 14 W. R. 1011; *Moore* v. *Moore*, 1 D. J. & S. 602; overruling *Rowson* v. *Harrison*, 31 Bea. 207.

(*p*) *Pembrooke* v. *Friend*, 1 J. & H. 132; *Coote* v. *Lowndes*, L. R., 10 Eq. 376; *Woolstencroft* v. *Woolstencroft*, 2 D. F. & J. 347; *Brownson* v. *Lawrance*, L. R., 6 Eq. 1.

(*pp*) 30 Bea. 395.

(*q*) *Rodhouse* v. *Mold*, 35 L. J. Ch. 67.

CHAPTER LIV.

of the said act and of this act the word 'mortgage' shall be deem to extend to any lien for unpaid purchase-money upon any lan or hereditaments purchased by a *testator*."

What words exclude the statutes.

The meaning of sec. 1, "though it is not perhaps so happily pressed as it might be," appears to be this, that if a testator wishes give a direction which shall be deemed a declaration of an intenti contrary to the rule laid down by Locke King's Act, "it must be direction applying to his mortgage debts in such terms as distinc and unmistakeably to refer to or describe them" (*r*). And althou the act speaks only of the insufficiency of a direction to pay deb out of personal estate, it has been decided that a direction to p out of real estate, or out of real and personal estate, is al insufficient to exonerate the mortgaged property, unless mortga debts are expressly or impliedly referred to (*s*). It has also be held that such a reference cannot be implied from a direction to p the debts "in aid of the personal and in exoneration of the re estate" (*t*), or simply "in exoneration of the real estate" (*u*), from a direction to pay "debts of every kind, including special debts" (*v*). But where a testator bequeathed the residue of h personal estate subject to the payment of his "trade debts," an died, having, after the date of his will, deposited with his banke the title deeds of real estate to secure an overdrawn trade accoun it was held that there was a sufficient declaration of contra intention, so as to exonerate the real estate from the banker lien (*w*). So where a testator made a distinction between his trad property and trade debts on the one hand and his private propert and private debts on the other hand (*x*).

Exception of specific mortgage debt.

A direction to pay debts, "except mortgage debts on Black acre," out of residue, implies that other mortgage debts are to be pai out of residue (*xx*).

The word "testator" as used in sec. 2 was another of th "unhappy" expressions occurring in these acts. Its effect wa to exclude a lien for purchase-money where the purchaser die

(*r*) Per Giffard, V.-C., in *Nelson* v. *Page*, L. R., 7 Eq. at pp. 27, 28.

(*s*) *Re Newmarch*, 9 Ch. D. 12; *Gall* v. *Fenwick*, 43 L. J. Ch. 178; *Re Rossiter*, 13 Ch. D. 355; *Elliott* v. *Dearsley*, 16 Ch. D. 322. 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. at p. 227. And see now 40 & 41 Vict. c. 3 stated post.

(*t*) *Re Newmarch*, 9 Ch. D. 12, du Ba[illegible]y, L.J.

(*u*) *Re Rossiter*, 13 Ch. D. 355.

(*v*) *Buckley* v. *Buckley*, 19 L. R. I 544.

(*w*) *Re Fleck*, 37 Ch. D. 677.

(*x*) *Re Nevill*, 59 L. J. Ch. 51 followed in *Thompson* v. *Bell*, [190 1 Ir. 489.

(*xx*) *Re Valpy*, [1906] 1 Ch. 531.

intestate (*g*). Moreover, this act omitted to provide for the case of leaseholds excluded from the first.

Real Estate Charges Act, 1877.

By yet another act, therefore, it is provided (*z*) 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 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; and such contrary intention shall not be 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."

Includes leaseholds; ——any equitable charge.

What is a charge within the acts.

The charge created by the delivery of land in execution under a writ of elegit (duly registered) is within this enactment (*a*). So is an equitable interest in land created to secure an annuity (*b*), and a statutory charge of estate duty (*c*).

All the acts now apply to leaseholds and next of kin.

The effect of this act is to make the earlier acts apply to leaseholds in the case of a person dying since 1877 (*d*). Next of kin taking chattels real under an intestacy are within the acts (*e*).

Not to debentures.

They do not apply to debentures charged on land (*f*), or to the proceeds of sale of land (*g*).

Option of purchase.

Nor do they apply to the case of a person to whom an option to purchase land at a fixed price is given by will (*h*).

Goodwill.

It seems to have been suggested that a goodwill may be incident to a house in such a way as to be subject to the acts (*i*), but how this can be is not apparent.

(*g*) *Harding* v. *Harding*, L. R., 13 Eq. 493. But the act applies to real estate, the beneficial interest in which is not disposed of by the testator's will: *Dowdall* v. *M'Cartan*, 5 L. R. Ir. 313, 642.

(*z*) Real Estate Charges Act, 1877 (40 & 41 Vict. c. 34).

(*a*) *Re Anthony*, [1892] 1 Ch. 450. See *Nesbett* v. *Lander*, 17 L. R. Ir. 53.

(*b*) *Re Sharland*, 74 L. T. 664.

(*c*) *Re Bowerman*, [1908] 2 Ch. 340. The rule seems to be that every charge created by statute is an equitable charge; see *Re Hole*, [1906] 1 Ch. p. 682.

(*d*) *Re Kershaw*, 37 Ch. D. 674 (rent charge on leaseholds); *Re Fraser*, [1904] 1 Ch. pp. 111, 726.

(*e*) *Re Fraser*, supra.

(*f*) *Re Chantrell*, [1907] W. N. 213.

(*g*) *Lewis* v. *Lewis*, L. R., 13 Eq. 218; ante, p. 2048.

(*h*) *Given* v. *Massey*, 31 L. R. Ir. 126; *Re Wilson*, [1908] 1 Ch. 839.

(*i*) *Re Bennett*, [1899] 1 Ch. 316.

CHAPTER LIV.

Doctrine of conversion—how affected by acts.

In *Re Cockcroft* (*j*) a testator who had contracted to buy sou houses devised them to A. for life with remainder to her childre and died without having completed the contract; after his deat the contract was by arrangement put an end to: it was contende by the devisees that the contract worked a conversion by th testator of his personal estate to the extent of the purchase-mone and that the subsequent cancellation did not affect this result (*k* but it was held that as the vendor had a lien the act of 1867 applied (*l* Kay, J., pointed out some singular results which follow from th clumsy drafting of the acts. In the case of an intestate, an intentio to exclude the operation of the acts can be expressed by deed o other document if the charge is created by mortgage, but no if it is a vendor's lien; and if a testator or intestate purchase real estate under a contract which gives the vendor no lien, th acts do not apply, and the devisee or heir is entitled to have th purchase-money paid out of the personal estate.

"Contrary intention" not shewn by provision for payment out of another fund.

Where a testator throws the primary burden of a mortgag debt on a special fund, this does not shew a "contrary intention," within the meaning of the act: the act is excluded only to th extent of the substituted fund, so that if this proves insufficien the right to exoneration is exhausted and the mortgaged lan is liable for the balance. The correct principle was laid dow by Chatterton, V.-C., in *Corballis* v. *Corballis* (*n*) where the testato made a special fund primarily liable for certain mortgage debts "To the extent of this primary fund, the operation of the [Rea Estate Charges] Acts is, in my opinion, excluded, but not farther."

In *Smith* v. *Moreton* (*o*) a testator conveyed Whiteacre to A subject to the payment of certain mortgages on Blackacre: by his will he devised Blackacre to A.: after the testator's death A. claimed that the provision in the conveyance of Whiteacre shewed an intention to exclude the operation of Locke King's Act and that he was entitled to have the mortgage on Blackacre dis charged out of the general personal estate. Stuart, V.-C., decided against him. The decision is obviously correct, whatever may be thought of the reasons given for it.

Again, in *Re Birch* (*p*) the testator made various specific devises,

(*j*) 24 Ch. D. 94.

(*k*) *Hudson* v. *Cook*, L. R., 13 Eq. 417; *Whittaker* v. *Whittaker*, 4 Br. C. C. 31.

(*l*) See also *Re Kidd*, [1894] 3 Ch. 558, where the testatrix had an option to purchase ground rents which she exercised shortly before her death.

(*n*) 9 L. R. Ir. 309. See *Allen* v. *Allen*, 30 Bea. at p. 403, post, n. (*p*), and *Rodhouse* v. *Mold*, 35 L. J. Ch. 67.

(*o*) 37 L. J. Ch. 6.

(*p*) [1909] 1 Ch. 787, where a mis-leading dictum of Romilly, M.R., in *Allen* v. *Allen*, 30 Bea. at p. 403, is referred to. The dictum in question is

including one of Whiteacre to A. and B., and directed that "any mortgage debt affecting the hereditaments hereinbefore devised" should be discharged out of the proceeds of sale of Blackacre, which he directed to be sold for that purpose, the balance to fall into residue; the proceeds of sale of Blackacre were insufficient to discharge the mortgage debt on Whiteacre; it was held by Swinfen Eady, J., that A. and B. were not entitled to have the deficiency paid out of the general personal estate.

"Contrary intention" inferred from trusts of will.

The acts do not prescribe any particular means for signifying an intention to exclude the new rule. To ascertain whether such an intention is shewn, 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 (*q*); 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 (*r*).

Subsequent dealings.

If at the time a testator makes his will, he contemplates executing a mortgage of the real estate devised by his will, the deeds executed by him after the will for the purpose of carrying out the arrangement may be referred to for the purpose of shewing an intention to exclude the operation of the acts (*s*).

Since Locke King's Acts a collective devise of lands of any tenure to the same devisee primâ facie throws the aggregate charges on the aggregate lands in exoneration of the testator's personal estate (*t*).

In *Syer* v. *Gladstone* (*u*), Pearson, J., expressed the opinion that Locke King's Acts impose no personal liability on a devisee of incumbered land to indemnify the personal estate against the mortgage debt if the land is an insufficient security (*v*).

How charge apportioned between the different parts of the land charged;

The first of the three acts directs that every part of the mortgaged hereditaments, according to its value, shall bear a proportionate part of the mortgage debts charged on the whole thereof; subject, however, with the other provisions of the act, to a contrary or other intention appearing by the will or deed or other document

less unintelligible if the word "personal" is substituted for "real" in the passage "there is nothing . . . that exonerates the real estate from paying these debts"; compare report of *Re Birch* in the Weekly Notes, [1909] 85.

(*q*) See per Wood, V.-C., *Pembrooke* v. *Friend*, 1 J. & H. at p. 134; *Coode* v. *Lowndes*, L. R., 10 Eq. 376.

(*r*) *Eno* v. *Tatham*, 3 D. J. & S. 443.

(*s*) *Re Campbell*, [1893] 2 Ch. 206.

(*t*) *Re Kensington*, [1902] 1 Ch. 203.

(*u*) 30 Ch. D. 614, ante, p. 557.

(*v*) See [1902] 1 Ch. at p. 211.

CHAPTER LIV.

of the person creating the charge (*w*). In *Brownson* v. *Lawrance* (*x*) it was held by Lord Romilly that the fact of the mortgagor having specifically devised 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 the reasoning on which this decision is based is inconsistent with *Hensman* v. *Fryer* (*y*), and *Brownson* v. *Lawrance* may be regarded as overruled (*z*).

——where real and personal property are mortgaged together.

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 (*a*). 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.

Acts apply in favour of the Crown, where no next of kin.

Considering 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 favour of the Crown taking the personalty for want of next of kin (*b*).

To what cases the second proviso in the first act applies.

The concluding proviso of the first act declares that nothing contained in the act shall affect the rights of persons claiming under any will, deed, or document made before 1st January, 1855. The new rule therefore cannot apply to any case where a testator

(*w*) On the construction of directions for apportionment of the charge between the different estates charged, see *Woodward* v. *Woodward*, 5 Jur. N. S. 1281.

(*x*) L. R., 6 Eq. 1.

(*y*) L. R., 3 Ch. 420, ante, p. 2027, n. (i).

(*z*) *Sackville* v. *Smyth*, L. R., 17 Eq. 153; *Gibbins* v. *Eyden*, L. R., 7 Eq. at p. 375; *Re Smith*, 33 Ch. D. 195. In *Stringer* v. *Harper*, 26 Bea. 33, the testator exempted his personal estate from his debts.

(*a*) *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 Bea. 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. 2032, n. (*u*). In *Re Bennett* [1899] 1 Ch. 316, it seems to have been assumed that if the mortgage of a public-house had included the goodwill, the latter would have had to bear its proportion of the mortgage debt, sed quære; however, it was decided that the goodwill was not included.

(*b*) *Dacre* v. *Patrickson*, 1 Dr. & Sm. at p. 186.

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 (*c*). But the new rule does apply as against an heir who takes by reason of the failure of a devise contained in a will made before 1855 (*d*), or by reason of the mortgagor dying, 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 conveyance (*e*).

Statutes do not apply to Scotland; —nor to personal chattels.

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 (*f*). The law therefore is certainly not simplified.

What will exempt personal estate.

VII.—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 other Fund; Mere Charge on Land, &c.*—Mr. Jarman continues (*g*): "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.

Addition of another fund does not.

"That the making a provision for debts or legacies out of the real estate does not discharge the personalty, is implied in the very terms of this question. There must be an intention not only to onerate the realty, but to exonerate the personalty; not merely to supply another fund, but to substitute that fund for the property antecedently liable (*h*).

Mere charge on land does not exonerate personally.

"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

(*c*) *Rolfe* v. *Perry*, 3 D. J. & S. 481.

(*d*) *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); *Power* v. *Power*, 8 Ir. Ch. R. 340.

(*e*) *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.

(*f*) Ante. p. 2025.

(*g*) First ed. Vol. II. p. 504.

(*h*) *Bootle* v. *Blundell*, 1 Mer. 193; *Boughton* v. *Boughton*, 1 H. L. C. 406.

CHAPTER LIV.

of them (*i*), nor a devise upon trust for sale, however formally or anxiously framed (*j*), nor the creation of a term of years for the purpose of such charge (*k*), will exonerate the 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" (*l*).

Mixed fund.

It has been already mentioned that if a testator creates a mixed fund of real and personal estate and directs it to be applied in payment of his debts or legacies, the realty contributes rateably to the common burden, and the personalty is to that extent exonerated (*m*). Attention has also been drawn to the rule in *Boughton* v. *Boughton* (*n*), that a gift of real and personal estate together, upon trust to pay debts or legacies, does not necessarily prevent the personal estate from being the fund primarily liable.

History of the implication doctrine.

Mr. Jarman continues (*o*): "In order to exonerate the personal estate, the very early cases required express words (*p*); 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 (*q*). Judges of a later period, however, feeling the evils to which this latitude of interpretation had given rise, and proceeding upon sounder principles of construction, have, without rejecting implication, required that it should be supported by such evidence eviscerated from the will, as ought fairly to satisfy a judicial mind of the testator's intention. A wish has been sometimes intimated, that the old rule had been restored, but this was impracticable in the state of the authorities, and perhaps would have been hardly consistent with right principles of construction, but it is difficult to perceive any solid ground for excluding implication in this more than in any other species of case. The

(*i*) *White* v. *White*, 2 Vern. 43; *French* v. *Chichester*, ib. 568; *Bridgman* v. *Dove*, 3 Atk. 201; *Walker* v. *Hardwick*, 1 My. & K. 396; *Ouseley* v. *Anstruther*, 10 Bea. 453; *Quennell* v. *Turner*, 13 ib. 240. See also *Kilford* v. *Blaney*, 31 Ch. D. 56; *Rhodes* v. *Rudge*, 1 Sim. 79, post, p. 2069.

(*j*) *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. at p. 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.

(*k*) *Tower* v. *Lord Rous*, 18 Ves. 132.

(*l*) *Bridgman* v. *Dove*, 3 Atk. 201; *Mead* v. *Hide*, 2 Vern. 120; *Watson* v. *Brickwood*, 9 Ves. 447; but see *Lockhart* v. *Hardy*, 9 Bea. 379, ante, p. 2041.

(*m*) Ante, p. 2033.

(*n*) 1 H. L. C. 406, ante, p. 2034.

(*o*) First ed. Vol. II. p. 565.

(*p*) *Fereyes* v. *Robertson*, Bunb. 301.

(*q*) *Adams* v. *Meyrick*, 1 Eq. Ca. Ab. 271, pl. 13, as to which, see 2 Atk. p. 626; 3 Ves. p. 110; *Walker* v. *Jackson*, 2 Atk. 624, and the other cases referred to post.

evil seems to have consisted in the extreme laxity with which the implication-doctrine was, at one period, applied, which tended in effect to subvert altogether the rule establishing the primary liability of the personal estate; but this has been so far corrected by later adjudications, as greatly to diminish the uncertainty which the numerous cases occurring on the subject indicate to have prevailed half a century ago. From the nature of the question, however, which is ever presenting itself under new combinations of circumstances, it is even now often attended with no little perplexity (*r*).

Rule now established.

"It is well settled that the intent is to be collected from the whole will (*s*), 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."

Examples of "necessary implication."

An example of such a "necessary implication" is afforded by *Kilford* v. *Blaney* (*t*), where a testatrix devised her real estate upon trust for sale and directed the proceeds to be applied in payment of her funeral and testamentary expenses, debts, and legacies: if the proceeds were insufficient, the proceeds of sale of her leaseholds were to be applied for that purpose: she gave any surplus of the proceeds of sale of the real estate to one class of persons, and the proceeds of sale of the leaseholds, or any surplus of those proceeds, to another class, and gave all her "personal estate" to charity; it was held that the whole will shewed an intention to exonerate the general personal estate from its primary liability to debts, legacies, &c.

(*r*) *Gittins* v. *Steele*, 1 Sw. 24, was an exceptionally clear case.

(*s*) "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.'" (Note by Mr. Jarman.)

(*t*) 31 Ch. D. 56.

Other examples are given in a subsequent part of this chapter (*u*).

There is a class of cases in which an intention to exonerate the general personal estate has been inferred from the fact that the real estate is given to trustees in trust to pay debts, &c., and "all the personal estate" is given to X.; these cases are considered in a subsequent part of this chapter (*v*). The inference is not drawn where the debts, &c. are merely charged on the real estate (*w*).

An intention to exonerate the general personal estate may also be shewn by a direction that the testator's debts shall be paid out of a specific portion of the personal estate (*x*).

Parol evidence inadmissible.

Mr. Jarman continues (*y*): "It has long been established, in opposition to some early decisions (*z*), that, in order to exonerate the personalty, parol evidence is not admissible (*a*), 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 (*b*); for the fact that the charges will exhaust the whole subject-matter of the residuary bequest does not vary the construction.

Relative amount of debts and personalty not to be considered.

"This was decided in the case of *Tait* v. *Lord Northwick* (*c*), which is a leading authority on the general doctrine. The testator appointed certain estates to trustees, upon trust, by sale or mortgage thereof, or by sale of timber thereon, *to pay his debts*, and directed the trustees to convey the lands not so applied to certain uses. He gave £100 to each of his trustees, and all the residue of his personal estate whatsoever between his two sisters, and appointed two of the trustees executors. Lord *Loughborough* held that the personal estate was first to be applied, as far as it would go, to pay the debts.

"But in *Gray* v. *Minnethorpe* (*d*), the same judge thought that where the purchase-money of an estate, devised in trust to be sold to pay debts and certain pecuniary legacies, was inadequate to pay the debts alone, this circumstance furnished an argument *against* exempting the personal estate. Such an argument, however, seems to be obnoxious to the reasoning which applies against making the amount of the personal estate a ground *for* the exemption;

(*u*) Post, pp. 2059 & 2068.
(*v*) Post, p. 2065.
(*w*) *Re Banks*, [1905] 1 Ch. 547.
(*x*) Post, p. 2077.
(*y*) First ed. Vol. II. p. 567.
(*z*) *Gainsborough* v. *Gainsborough*, 2 Vern. 252. In *Granvill* v. *Beaufort*, ib. 648, the evidence was admitted only to rebut an equitable presumption, which was allowable, see ante, Vol. I. p. 497.
(*a*) *Inchiquin* v. *French*, 1 Cox, 1; *Stephenson* v. *Heathcote*, 1 Ed. at p. 39.
(*b*) Cro. El. 205; Cowp. 833; 1 Cox, 9; 2 B. C. C. 273, 297; 2 Ves. jun. 593; 3 Ves. 299; 1 Ed. 43, 1 Ba. & Be. 345, 542; 1 Mer. 222, which overruled Pre. Ch. 101; Cas. t. Talb. 202; 1 H. C. C. 457, n.
(*c*) 4 Ves. 816.
(*d*) 3 Ves. 103.

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."

Mere extension of the charge to funeral and testamentary expenses not sufficient.

(2) *Extension of Charge to Funeral and Testamentary Expenses.*— Mr. Jarman continues (*e*): "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 sh' ld 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 prima , onus to the new fund.

As to funeral expenses, &c., being included.

"Many opinions have been expressed on this point. Thus Lord *Hardwicke*, in *Walker* v. *Jackson* (*f*) 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* (*g*) seems to have concurred. The circumstance of funeral expenses being included in the charge was also disregarded by Lord *Northington*, in *Stephenson* v. *Heathcote* (*h*), and by Lord *Kenyon* in *Williams* v. *Bishop of Llandaff* (*i*), (though the latter judge decided in favour of the exemption, on grounds perhaps not less equivocal), and by Lord *Manners*, in *Aldridge* v. *Wallscourt* (*j*). On the other hand, Sir *R. P. Arden*, in *Burton* v. *Knowlton* (*k*) thought a direction to pay funeral expenses a strong circumstance in favour 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* (*l*) and Lord *Eldon* (*m*), 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* (*n*), where the testator

(*e*) First ed. Vol. II. p. 568.
(*f*) 2 Atk. 624.
(*g*) 6 Ves. at p. 570.
(*h*) 1 Ed. 38.
(*i*) 1 Cox, 254.
(*j*) 1 Ba. & Be. 312; post, p. 2065.
(*k*) 3 Ves. at p. 108.
(*l*) See *Tait* v. *Lord Northwick*, 4 Ves. at p. 823.
(*m*) *Boodle* v. *Blundell*, 1 Mer. at p. 229.
(*n*) 3 Ves. 103, ante, p. 2058.

CHAPTER LIV.

devised certain lands to W. and J. and their heirs, in trust to sell, and out of the monies 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."

Mr. Jarman cites *Hartley* v. *Hurle* (*o*), and *M'Cleland* v. *Shaw* (*p*), as supporting the general rule.

Trust to pay legacies, funeral and testamentary expenses.

"It is not denied, indeed," says Mr. Jarman (*q*), "that the subjecting of the real estate to *all* the charges which belong to the personalty, as legacies, funeral and testamentary expenses, favours the supposition that the personalty is intended to be given as a specific legacy, and consequently to be exempt (*r*); but no case which rests on this simple circumstance is now to be relied on. Such seems to be the situation of the case of *Gaskell* v. *Gough*, cited by Sir *R. P. Arden* in *Burton* v. *Knowlton* (*s*), 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* (*t*), the extension of the charge to funeral and testamentary expenses seems to have been treated by Lord *Eldon* as having much weight, though it was there aided by the circumstance, that some particular charges incident to the administration of the estate, namely, that of supporting the will against any 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'" (*u*).

The result of the cases seems to be that a charge of debts and 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

(*o*) 5 Ves. 540.
(*p*) 2 Sch. & L. 538.
(*q*) First ed. Vol. II. p. 571.
(*r*) See Sir W. Grant's judgment in *Tower* v. *Lord Rous*, 18 Ves. at p. 139. Also *Greene* v. *Greene*, 4 Mad. 148; *Michell* v. *Michell*, 5 Mad. 69; *Driver* v. *Ferrand*, 1 R. & My. 681.
(*s*) 3 Ves. at p. 111. See also *Kynaston* v. *Kynaston*, 1 B. C. C. 457, n., post, p. 2064, n. (*l*).
(*t*) 1 Mer. 193.
(*u*) See *Coote* v. *Coote*, 3 J. & Lat. 175.

not merely to onerate the real estate but to exonerate and discharge the personal estate (*v*).

Where personalty is expressly subjected to legacies or a class of debts.

(3) *Effect of expressly subjecting Personalty to certain Charges.*—Mr. Jarman continues (*w*): "It has been decided that the *expressly* subjecting the personal estate to certain charges, to which it was before liable, does not, by force of the principle *expressio unius est exclusio alterius*, raise a necessary implication that it is not to bear other charges *not* so expressly directed to be payable out of it, but which are thrown upon the land.

"Thus, in *Brydges v. Phillips* (*x*), 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.

"This principle, too, was strongly recognized by the same learned Judge in *Watson* v. *Brickwood* (*y*), which also establishes, that an intimation, however anxiously made, as to the proportions and mode in which the charge is to be borne among the devisees of the real estate, will not have the effect of onerating it primarily; such a clause being considered only as providing for the event, *in case the land does become chargeable*, and not as charging it at all events" (*z*).

(*v*) *Kilford* v. *Blaney*, 31 Ch. D. 56; *Re Banks*, [1905] 1 Ch. 547.

(*w*) First ed. Vol. II. p. 572.

(*x*) 6 Ves. 567; and see *Davies* v. *Ashford*, 15 Sim. 42.

(*y*) 9 Ves. 447; and see 1 Jo. & Lat. at p. 363.

(*z*) "But see *Anderton* v. *Cook*, cit. 1 B. C. C. 456; *Williams* v. *Bishop of Landaff*, 1 Cox, 254, where an estate was charged *in case another estate devised upon trust to pay debts should be insufficient*; and the personal estate was held to be exempt. Such a case seems to fall directly within the principle stated in the text. It does not appear, however, whether the decisions rested on the words in question. See another case of this kind, *Dawes* v. *Scott*, 5 Russ. 32." (Note by Mr.

CHAPTER LIV.

Personalty held not to be exempt though land charged.

In that case the testator directed that the residuary legatee, who was also appointed executor, should pay out of the personal estate all legacies, funeral expenses, and simple contract debts, and he made provision for the discharge of his specialty debts by the persons from time to time entitled to the real estate, which was devised in strict settlement. By a codicil he authorized his trustee to raise money for payment of his debts and legacies by mortgage of the real estate.

Sir W. Grant's judgment in *Watson* v. *Brickwood*.

"It was contended that the personal estate was discharged from the debts, or at least subject only to the *simple contract* debts: but Sir *W. Grant* was of a different opinion. He admitted that there was some indication of an intention to exonerate the personalty; but thought *that it was not so conclusive as to come up to the requisition of the rule laid down by Lord Thurlow, in the Duke of Ancaster* v. *Mayer* (*a*), *that is, a plain intention;* and that by directing the executor, to whom he gave all his personal estate, to pay thereout all the legacies, funeral expenses and simple 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 (*b*); there must be a charge clearly and distinctly upon the real estate (*c*) to make it liable. . . . 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* (*d*). 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.

Jarman.) His statement of *Watson* v. *Brickwood*, which is lengthy, is omitted in this edition.

(*a*) "1 B. C. C. 454. This case was decided by Lord *Thurlow* principally upon another point (see ante), but the positions laid down by him on the doctrine in discussion have been much referred to." (Note by Mr. Jarman.)

(*b*) Cited and followed by Sugden, L.C., in *Bateman* v. *Earl of Roden*, 1 J. & Lat. 356.

(*c*) And that *only*. See the sequel of the judgment.

(*d*) 4 Ves. 816; ante, p. 2058.

Watson v. *Brickwood* approved by Lord Eldon.

" Of this case Lord *Eldon* has said (*e*), that he thought it was rightly decided, taking the will and codicil together; ' but if (said his Lordship), the codicil had not existed, there are circumstances which appear to me to be such as might have given occasion to some observations which do not occur either in the judgment or in the argument; *still I repeat that I think that case was rightly decided.*'

" The case of *Watson* v. *Brickwood* is an important authority on the general doctrine, since no case better exemplifies the species of evidence which is necessary to exonerate the personal estate, as distinguished from mere conjecture. It would have been well if this principle had been steadily adhered to."

Effect where the gift is of *all* the personal estate to person made executor.

(4) *Effect of Gift of "all" the Personalty.*—Mr. Jarman continues (*f*): " 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 favour 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* (*g*) 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 conveyed by deed should out of the trust estate pay his debts legacies and funerals; and devised to his wife, whom he made executrix, *all his personal estate not otherwise disposed of*, intending thereby a provision for her, she having been prevailed upon to sell away part of her own inheritance. Lord Keeper *Wright*, and afterwards Lord *Cowper*, held that the devise being in the same clause in which she was named executrix, and not said exempt from the payment of debts, she must therefore take it as executrix, and the same must be applied in payment of debts (*h*).

Bequest of *all* the personal estate *not otherwise disposed of* to executrix.

" But in this case the words ' not otherwise disposed of ' renders it scarcely distinguishable from that of a residuary bequest. A

(*e*) In *Bootle* v. *Blundell*, 1 Mer. at p. 230.

(*f*) First ed. Vol. II. p. 577.

(*g*) 2 Vern. 568, 3 B. P. C. 16; see the facts and points in this case more fully stated in *Trott* v. *Buchanan*, 28 Ch. D. 446. And see *Harewood* v. *Child* and *Bromhall* v. *Wilbraham*, cit. Cas. t. Talb. at p. 204.

(*h*) The main question argued in the House of Lords seems to have been whether the testator's personal estate was exonerated by virtue of the trust deed; *Trott* v. *Buchanan*, 28 Ch. D. 446.

similar remark applies to *Watson* v. *Brickwood* (*i*) and *Bootle* v. *Blundell* (*j*); but as in both these cases there were anterior specific bequests, to which the words 'hereinbefore disposed of' might relate, no argument against the exemption could be drawn from them. It is only where the will contains no other disposition than the charges which are to come out of the personal estate that such an argument applies; and it would seem, by parity of reason, that it is then only that even the circumstance of the gift being *residuary* raises any very strong inference *against* the exemption, though in every case the fact of the bequest *not* being residuary in its terms may afford an argument *in favour of* the exemption.

Trust to pay *all* the debts and bequest of *all* monies, &c. to executor.

"The case of *Brummel* v. *Prothero* (*k*), 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 *monies, 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 (*l*).

(*i*) 9 Ves. 447.

(*j*) 1 Mer. 193.

(*k*) 3 Ves. 111.

(*l*) "This is not quite correct. There are several cases in which a contrary decision has occurred under circumstances hardly distinguishable. Thus, in *Kynaston* v. *Kynaston*, 1 B. C. C. 457, n., a testator charged his whole estate with the payment of all his debts, legacies, and funeral expenses, and for that purpose devised particular lands to trustees, upon trust to sell the same and pay his debts, legacies and funeral expenses; and he gave to his wife *all* his personal estate whatsoever, and constituted her sole executrix. The debts exceeded the personal estate (a circumstance which is now immaterial). Lord *Bathurst* determined the personal estate to be exempt.

"So, in *Holliday* v. *Bowman*, cit. 1 B. C. C. 145, A. devised a manor to trustees, in trust to sell, and directed the monies 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. *Ramfield* v. *Wyndham*, Prec. Ch. 101, is a case of the same kind,

Devise subject to debts, &c., and bequest of *all* the personalty to executors upon trust.

"So, in *Aldridge* v. *Lord Wallscourt* (*m*), where A. devised all his lands to trustees (subject to the payment of his just debts, funeral expenses, and several portions afterwards charged for his daughters) to certain limitations, and directed his trustees to raise certain portions for his daughters. He appointed T., his son, executor, and bequeathed him *all* his personal estate in trust for such persons as he (the testator) should appoint. By a codicil reciting that bequest, he directed his executor to hold the personal estate in trust for his daughter M. Lord *Manners* thought there was nothing to exempt the personal estate from its primary liability to debts.

Remark on *Aldridge* v. *Lord Wallscourt.*

"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."

Trust to sell realty and pay debts and bequest of all personalty to person not executor.

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 *Collis* v. *Robins* (*n*) 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. Knight-Bruce, V.-C., decided that the personal estate was not exonerated.

Conclusion from preceding cases.

Though these cases may seem to authorize the conclusion that, whether the legatee is appointed executor or not (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 (*o*).

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." (Note by Mr. Jarman.)

(*m*) 1 Ba. & Be. 312.

(*n*) 1 De G. & S. 131. In *Ouseley* v. *Anstruther*, 10 Bea. 453, where the debts were charged on the real estate, the decision was to the same effect.

(*o*) *Tower* v. *Lord Rous*, 18 Ves. at p. 139; *Bootle* v. *Blundell*, 1 Mer. at p. 228. 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. p. 223); Lord Alvanley's in *Burton* v. *Knowlton*, 3 Ves. at p. 108; Lord Hardwicke's in *Walker* v. *Jackson*, 2 Atk. at p. 624.

CHAPTER LIV.

Bequest of *all* the ready money, &c., and personal estate.

Cases of exemption upon grounds not now deemed satisfactory.

"In several subsequent cases, indeed," says Mr. Jarman (*p*), "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 enumeration of articles, notwithstanding that in one of them it may be inferred that the trustees of the real estate were executors; but it is observable that in all these cases the real estate was charged 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* (*q*), 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 monies arising from such sale, to pay *his debts, funeral expenses, and the costs of proving his will*; and, after payment thereof, to invest the residue upon certain trusts for his wife for life, and then for his children; and he appointed his wife and A., B. and C. executrix and executors. Sir *John Leach*, V.-C., held the personal estate to be exempt. . . . His Honor distinguished the case from *Duke of Ancaster* v. *Mayer* (*r*), *Stephenson* v. *Heathcote* (*s*), *Inchiquin* v. *O'Brien* (*t*), *Tait* v. *Northwick* (*u*), and *Watson* v. *Brickwood* (*v*), on the ground that, in those cases, the bequest was of a residue; and observed that in the latter it was given expressly after payment of debts, funeral expenses, and legacies. He relied upon *Burton* v. *Knowlton* (*w*) and *Kynaston* v. *Kynaston* (*x*). —But in reference to *Watson* v. *Brickwood*, it is to be observed that the clause expressly subjecting the personalty

Devise of real estate upon trust to pay debts, funeral and testamentary expenses, and gift of *all* personal estate.

(*p*) First ed. Vol. II. p. 582.
(*q*) 4 Mad. 148.
(*r*) 1 B. C. C. 454.
(*s*) 1 Ed. 38.
(*t*) Amb. 33 (*Lord Inchiquin* v. *French*).
(*u*) 4 Ves. 816.
(*v*) 9 Ves. 447.
(*w*) 3 Ves. 107; "but this case has been noticed with disapprobation both by Lord *Loughborough* in *Tait* v. *Northwick*, 4 Ves. 823, and by Lord *Eldon* in *Hoodle* v. *Blundell*, 1 Mer. 229. Besides, it was a bequest of *the residue*, which increases the surprise that it should be cited by Sir *John Leach*, who rested the exemption mainly on the circumstance of the bequest being of the whole, as distinguished from the residue, of the personal estate." (Note by Mr. Jarman.)
(*x*) 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 irreconcileable with the current of authorities, particularly *French* v. *Chichester*, ante, *Brummel* v. *Prothero*, ante, and *Aldridge* v. *Lord Wallscourt*, ante, being nothing more than a charge upon the land of all the debts, and a gift of all the personal estate to the individual who was appointed executrix. According to those cases, therefore, the personalty was not exempt." (Note by Mr. Jarman.)

to the payment of legacies, funeral expenses, and debts, referred to simple contract debts only; whereas the only argument in favour of the exemption much insisted on, was in relation to specialty debts, the exclusion of which from the clause in question favoured their being thrown exclusively on the real estate.

Remarks upon *Greene* v. *Greene*.

"The principal circumstances in which the case of *Greene* v. *Greene* differs from *Brummel* v. *Prothero* (*y*) 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; but in *Brummel* v. *Prothero* with the debts only.

Gift of *all* the personalty and charge extending to funeral and testamentary expenses.

"So, in *Michell* v. *Michell* (*z*), 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 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 Vice-Chancellor did not consider the union of the two characters of trustees and executors sufficient to negative the exemption in such a case.

"The same remark applies to the case of *Driver* v. *Ferrand* (*a*), decided by the same learned judge, where a similar construction prevailed; the charge on the real estate (*b*) extended to debts, legacies, funeral and testamentary charges, and the bequest of personalty was not residuary in its terms, but the legatee was one of the executors. A difficulty in the way of the construction was that the legacies were directed to be paid by the executors, but Sir *J. Leach* considered this to be inconclusive, as they were also trustees; and that the testator in such direction had in view the real estate was, he thought, shewn by a clause which

(*y*) Ante, p. 2064.
(*z*) 5 Mad. 69.
(*a*) 1 R. & My. 681.

(*b*) [It was more than a charge: it was a devise to trustees upon trust to pay the debts, &c. C. S.]

CHAPTER LIV.

immediately followed, authorizing the trustees to deduct their expenses out of the real estate.

"So, in the case of *Blount* v. *Hipkins* (*c*), 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. Latter held also charged on land primarily.

"So, in the case of *Jones* v. *Bruce* (*d*), where a testator gave to his wife absolutely all his goods, chattels and personal estate whatsoever and wheresoever, and charged his real estate in D. and S. with the payment of his funeral and testamentary expenses and debts, and he exempted, so far as he was able, his personal estate from the payment thereof. He then gave certain legacies to children, and charged all his real estate with the payment thereof, and directed that until the legacies were payable the trustees should raise out of the rents any annual sums by way of maintenance not exceeding 4 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."

Will creating mixed fund for payment of debts, funeral expenses, &c., and codicil giving *all* personal estate: the latter held exempted.

And in *Lance* v. *Aglionby* (*e*), 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

(*c*) 7 Sim. 43. See also *Plenty* v. *West*, 16 Bea. 173; where, however, undue weight appears to have been allowed to the phrase "in the first place": see *Newbegin* v. *Bell*, 23 Bea. 386.

(*d*) 11 Sim. 221; and see *Coote* v. *Coote*, 3 Jo. & Lat. 175.

(*e*) 27 Bea. 65. See also *Gilbertson* v. *Gilbertson*, 34 Bea. 354; *Powell* v. *Riley*, L. R., 12 Eq. 175. The actual decision in *Powell* v. *Riley* was erroneous: see ante, p. 2027.

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: Romilly, M.R., held that the wife took the personalty free from the funeral and testamentary expenses, debts and legacies.

General conclusion from preceding cases.

"These cases, then," says Mr. Jarman (*f*), "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, this constitutes the primary fund for their liquidation. 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 and funeral and testamentary expenses, the principle of these cases is of course inapplicable (*g*).

Mere charge insufficient.

And it seems that the principle does not apply unless there is an express trust for payment of debts, and funeral and testamentary expenses; a mere charge of them on the real estate is not sufficient (*h*).

Non-exemption from mere charging of real estate.

"That Sir *John Leach* did not mean by his preceding adjudications to deny the general rule appears," says Mr. Jarman (*i*), "from the subsequent case of *Rhodes* v. *Rudge* (*j*), where a testator gave all his real and personal estate to A. and B. upon trust, in the first place, to sell and dispose of the living of C., and the money to arise from the sale thereof to go in discharge of his debts and legacies and the charges of the trusts thereby created, and if such money were not sufficient to discharge the said debts and legacies, upon trust to cause timber to be felled on his real estates to the amount of £500, to be applied in discharge thereof; and if that should not be sufficient, then upon trust by mortgage or sale to raise such deficiency out of his real estates; and the testator then proceeded to give certain legacies, and appointed A. and B. executors of his will. Sir *J. Leach*, V.-C., thought that there was nothing in this will to change the usual order of application, and therefore that the personalty was primarily to be applied (*k*).

(*f*) First ed. Vol. II. p. 586.

(*g*) *Paterson* v. *Scott*, 1 D. M. & G. 531. The bequest was of the personal estate "not thereinbefore otherwise disposed of"; as to which see ante, p. 2063.

(*h*) *Re Banks*, [1905] 1 Ch. 547.

(*i*) First ed. Vol. II. p. 587. The "preceding adjudications" are *Greene* v. *Greene*, *Michell* v. *Michell*, and *Driver* v. *Ferrand*, ante, pp. 2066, 2067.

(*j*) 1 Sim. 79.

(*k*) [The decision seems erroneous, being based on the absence of a gift of the residuary personal estate, post, p. 2071. C. S.]

CHAPTER LIV.

Remark on *Rhodes* v. *Rudge*.

" 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."

Residue of real fund *to be added to personalty*.

(5) *Various Expressions indicating an Intention to exempt Personalty from Primary Liability to Debts, &c.*—Mr. Jarman continues (*l*) : " 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* (*m*), 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* (*n*).

Personalty to " come clear " to the legatee.

Estate made *secondary* fund in exoneration of personalty.

" 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 shews that the latter estate is the secondary fund in exoneration of the personal estate " (*o*). So a direction 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 (*p*). And where a testatrix gave her real estate in moieties to her two daughters M. and S. and their families, and by codicil directed certain debts to be " exclusively and in the first instance " paid out of the M. moiety, her intention being that the S. moiety should be exempt from payment of them, it was held by Malins, V.-C., that the personal estate was exonerated from these particular debts (*q*). The case of *Kilford* v. *Blaney* (*r*) has been already stated (*s*).

Personalty to pay in aid of realty.

Effect where bequest of exempted personalty fails;

(6) *Where Personalty is undisposed of—Exoneration in Favour of Next of Kin.*—The exemption of the personalty in favour of a legatee does not necessarily extend to the next of kin, in case of the failure of the bequest by lapse or otherwise. Thus it was

(*l*) First ed. Vol. II. p. 587.

(*m*) *Webb* v. *Jones*, 2 B. C. C. 60, 1 Cox, 245 ; *M'Cleland* v. *Shaw*, 2 Sch. & L. 538. And see 1 Jo. & Lat. 365, 366 ; 12 Bea. 505. As to *Wythe* v. *Henniker*, 2 My. & K. 635, see ante, p. 2041. The cases now under discussion must be distinguished from those in which the proceeds of the realty are directed to be added to the personalty, so as to create a mixed fund : ante, p. 2033, n. (*b*).

(*n*) *March* v. *Fowke*, Finch, 414.

(*o*) *Dawes* v. *Scott*, 5 Russ. 32. See also *Bateman* v. *Earl of Roden*, 1 Jo. & Lat. at p. 366; *Evans* v. *Evans*, 17 Sim. at p. 106; *Bessant* v. *Noble*, 26 L. J. Ch. 236.

(*p*) Semb., see *Wills* v. *Bourne*, L. R., 16 Eq. 487.

(*q*) *Forrest* v. *Prescott*, L. R., 10 Eq. 545.

(*r*) 31 Ch. D. 56.

(*s*) Ante, p. 2057.

laid down by Sir R. P. Arden in *Waring* v. *Ward* (*ss*), 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.

—— where personalty originally undisposed of.

On the other hand, where a testator directed that his personal estate should not be applied in payment of mortgages, and gave the mortgaged estates to different persons, they paying out of them the mortgages, but made no disposition of the personalty, it was held that the devisees took the estates cum onere even as against the next of kin (*t*).

The distinction is that if there is no particular bequest of the personal estate, and yet the testator exonerates it, it is 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 (*tt*).

Distinction between a general charge of *legacies* and a trust to pay certain sums.

(7) *Charge of Specific Sums.*—Mr. Jarman continues (*u*): "It has been already stated that under a general charge of or a trust to pay *legacies*, the several funds liable to their liquidation are applied in the same order as in the case of *debts*, and therefore the general personal estate, if not exempted, is first applicable (*v*); but such cases are carefully to be distinguished from those in which the trust is to pay certain specified sums, when, *as the only gift is in the direction to pay them out of the land*, that fund alone is liable (*vv*).

(*ss*) 5 Ves. at p. 676. See *Hale* v. *Cox*, 3 B. C. C. 322; *Noel* v. *Lord Henley*, 7 Price, 241, Dan. 211; *Ducre* v. *Patrickson*, 1 Dr. & Sm. at p. 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 Bea. 573, where the question of charging real estate did not arise. Compare *Fisher* v. *Fisher*, 2 Keen, 610. In *Kilford* v. *Blaney* (supra), the Court declined to follow *Browne* v. *Groombridge* (4 Madd. 495), so far as that case decided by implication that where the general personal estate is directed to be exonerated out of a specific fund of personalty, the exoneration enures for the benefit of persons taking by lapse.

(*t*) *Milnes* v. *Slater*, 8 Ves. at p. 305.

(*tt*) Per Kindersley, V.-C., in *Ducre* v. *Patrickson*, 1 Dr. & Sm. pp. 186, 189.

(*u*) First ed. Vol. II. p. 593.

(*v*) *Roberts* v. *Roberts*, 13 Sim. at p. 349; *Ouseley* v. *Anstruther*, 10 Bea. 453; *Davies* v. *Ashford*, 15 Sim. 42; *Boughton* v. *Boughton*, 1 H. L. C. 406, reversing 1 Coll. 26; *Whieldon* v. *Spode*, 15 Bea. 537; *Patching* v. *Barnett*, [1880] W. N. 135.

(*vv*) *Whaley* v. *Cox*, 2 Eq. Ca. Ab. 549, pl. 29; *Amesbury* v. *Brown*, 1 Ves. sen. at p. 482; *Phipps* v. *Annesley*, 2 Atk. 57; *Ward* v. *Dudley*, 2 Br. C. C. 316, 1 Cox, 438, 7 Br. P. C. 566; *Reade* v. *Litchfield*, 3 Ves. 475; *Hartley* v. *Hurle*, 5 Ves. at p. 545; *Brydges* v. *Phillips*, 6 Ves.

CHAPTER LIV.

"Thus where a testator devises his estate to trustees, upon trust to sell, and out of the proceeds to pay legacies generally, and afterwards gives to A. a legacy of £100, that legacy will be charged upon the land in aid of the personalty only; but if the devise be upon trust to sell, and out of the produce to pay to A. £100, the sum so given will be considered as a portion of the real estate, and will in no event be payable out of the personalty; and if the testator sell the estate in his lifetime, the legacy will be adeemed (*w*).

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.

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 (*xx*).

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* (*y*), for he held that a devise of real estate to trustees upon trust to sell, and to pay a mortgage due on some part of the testator's property, subjected the land in the first instance, although the personalty was given 'after payment of debts,' but which his Honor thought might be construed, after payment of debts *not before provided for*.

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* (*z*) was professedly decided. The testator devised lands upon trust for sale, and directed the trustees to stand possessed of the monies

at p. 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; *Rickets* v. *Ladley*, 3 Russ. 418; *Jones* v. *Bruce*, 11 Sim. 221; *Ashby* v. *Ashby*, 1 Coll. 549; *Roberts* v. *Roberts*, 13 Sim. at p. 345; *Evans* v. *Evans*, 17 ib. at p. 102; *Dickin* v. *Edwards*, 4 Hare, 273; *Bessant* v. *Noble*, 26 L. J. Ch. 236. But see *Halford* v. *Wood*, 4 Ves. 76; *Colvile* v. *Middleton*, 3 Bea. 570.

(*w*) *Newbold* v. *Roadknight*, 1 R. & My. 677.

(*x*) 9 Ves. 483.

(*xx*) *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. at p. 25. Mr. Jarman's statement of *Welby* v. *Rockcliffe*, 1 R. & M. 571, is omitted.

(*y*) 11 Ves. 179. See as to legacies, *Dickin* v. *Edwards*, 4 Hare, 273.

(*z*) 7 Pri. 241, Dan. 211.

arising therefrom upon trust to pay a mortgage debt of £2,000 affecting one of his estates; and in the next place to pay all costs, &c. attending the execution of the trust for sale, &c.; *and then to pay a sum of* £20,000 *due on mortgage of certain parts of the testator's other estates thereinbefore devised;* and upon further trust to pay £5,000 to his wife (which devise lapsed) and the sum of £3,000 to T., both which last-mentioned sums the testator directed to be paid as soon as sufficient monies 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 monies 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 monies 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, her heirs, executors, administrators, and assigns, and appointed his said wife and two other persons executrix and executors. One question was, whether the sums of £2,000, £20,000 and £3,000, were payable out of the land exclusively, or only in aid of the personal estate. *Richards*, C.B., thought there was not sufficient evidence for an intention to exonerate the personalty from these sums; for, although he admitted that there was no doubt that the testator, in giving the residue of his personal estate after payment of such of his debts as were not therein otherwise provided for, intended to exonerate some part of his personal estate from its liability to pay some of his debts, yet it did not appear what debts, and there was no intimation that he meant the sums particularized as distinguished from the rest of his debts. His Lordship thought that this was the ordinary case of a testator giving his personal estate to A., and his real estate to B. subject to the payment of his debts, and that the circumstance of the testator having enumerated particular debts made no difference. *He could not make any distinction between a direction that real estate should be chargeable with a PARTICULAR debt of* £20,000 *and a devise of real estate subject to ALL the testator's debts; for the* £20,000 *was only part of these debts.* But he thought that legacies stood upon a very different

No distinction between direction to pay particular debts and debts generally.

CHAPTER LIV.

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 intentions of the testator; therefore such *legacies* as were not thrown upon the personal estate were not to be paid out of it. The Court accordingly held that the mortgage of £2,000 (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 (*zz*)) with the £3,000 and the legacy duty on both these sums were to be paid out of the real estate exclusively; but that the testator's mortgage debt of £20,000 and duty were to be raised out of it only in aid of the personal estate.

"As to the £20,000 the decree was reversed in the House of Lords (*a*), 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 (*aa*).

Remarks on *Noel* v. *Lord Henley.*

"If there had been nothing more than a general provision for debts, as the learned Chief Baron appears from some of his observations to have thought, the case is not an adjudication upon the point in question: but considering the testator's anxious discrimination between the enumerated debts and the others (*b*), and his subsequent reference to the debts as consisting of two classes, there was perhaps some difficulty in so treating it (*bb*). At all events the doctrine in the judgment is in direct opposition to that of Sir *W. Grant's* determination in *Hancox* v. *Abbey*. Upon principle, the distinction taken by that learned judge, between a trust to pay particular debts and debts generally, seems to be hardly tenable. There is no apparent reason why a testator, who provides an additional fund, should intend to discharge the fund primarily liable, more in the one case than in the other; or why debts, which before subsist as a charge upon the personal estate, independently of the will, should necessarily be considered as governed by the same rule as legacies, which owe their existence to the trust to pay them."

(*zz*) As to this, see p. 2042.

(*a*) Dan. 322, 12 Pri. 213.

(*aa*) See this treated of, ante, p. 2043.

(*b*) "It seems, however, that in general the charging of a particular debt or legacy expressly gives it no priority over debts or legacies subsequently charged in general terms. *Clark* v. *Sewell*, 3 Atk. 96." (Note by Mr. Jarman.)

(*bb*) Lord Eldon in the House of Lords laid great stress on the distinction thus drawn by the testator, 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. Law of Prop. 366.

Charge of particular debt *previously* secured on real estate.

It must be observed (c) 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" (cc).

So, in *Evans* v. *Cockeram* (d), where a testator, after devising an estate which he had mortgaged, and giving a power to raise thereout 200*l.* for each of his two daughters, proceeded thus: "And I charge and make liable my said estate for the repayment of 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 favour of the creditor the testator could not charge the estate, or make it more liable than before.

In *Welby* v. *Rockcliffe* (dd), where the testator, after devising an

(c) The rest of this section is taken verbatim from the fourth edition of this work, by Mr. Vincent, Vol. II. p. 677 seq.

(cc) 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 Chap. XXII. s. VII.).

(d) 1 Coll. 428. But see *Johnson* v. *Milksopp*, 2 Vern. 112. Since Locke King's Acts (ante, p. 2047) the express charge is, in a case like *Evans* v. *Cockeram*, as little needed for the one purpose as for the other.

(dd) 1 R. & My. 571.

CHAPTER LIV.

Charge of a particular debt with a personal obligation on devisee.

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* (*e*), 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 (*f*). This class would seem to afford a closer analogy to charges of particular debts than legacies that are only specific. Thus in *Lamphier* v. *Despard* (*g*), 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; 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

(*e*) 13 Bea. 240.

(*f*) Per Wood, V.-C., 1 H. & M. at p. 668. As to the ademption of specific and demonstrative legacies, see Chap. XXX.

(*g*) 2 D. & War. 59.

W. Grant's decision to the distinction between a particular and a general charge (*h*). 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.

Charge of a particular sum towards payment 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* (*i*), 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.

Where *personal* fund is subjected to certain charges.

(8) *Effect of charging a Specific Fund with Debts, &c.*—"It should seem," says Mr. Jarman (*j*), "that where a specific portion of *personal* estate is appropriated to charges to which the general personalty is liable, such fund is not, as in the case of land, subsidiary only, but is primarily applicable.

General personalty held to be exempt.

"Thus, in the case of *Browne* v. *Groombridge* (*k*), where a testator gave to his executors his Exchequer bills, money at the bankers and due to him on policies of insurance, money in the funds, and debts, upon trust thereout to pay his wife £200, and then *to pay his debts, funeral and testamentary expenses*, and, after making the said payments, to pay certain legacies, and then to stand possessed of the monies upon certain trusts; it was contended, on the authority of *Waring* v. *Ward*, and *Noel* v. *Lord Henley*, that the specific fund

(*h*) *Bateman* v. *Earl of Roden*, 1 Jo. & Lat. at p. 369; *Coote* v. *Coote*, 3 ib. 175. 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. *Hancox* v. *Abbey* is referred to in *Bickham* v. *Cruttwell*, 5 My. & C. 703, but in that case the question was one of exoneration before Locke King's Act; ante, p. 2039. As to the result where the testator excludes Locke King's Act by providing a special fund for payment of mortgage debts which is insufficient for the purpose, see *Corballis* v. *Corballis*, 9 L. R. Ir. 309, and other cases cited ante, p. 2052.

(*i*) 1 My. & K. 15.

(*j*) First ed. Vol. II. p. 598.

(*k*) 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, *Harloe* v. *Harloe*, L. R., 20 Eq. 471, and cases cited ante, p. 2016.

CHAPTER LIV.

was charged with the debts and legacies only in aid of the personal estate; but Sir *J. Leach*, V.-C., held, that the fund was immediately liable, observing that *Waring* v. *Ward* was the case of a devisee of *real* estate, who was entitled to the aid of the personal estate.

"So, in *Choat* v. *Yeats* (*l*), 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* (*m*), 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.

Contrary doctrine in *Holford* v. *Wood*.

"But a different construction prevailed in the anterior case of *Holford* v. *Wood* (*n*), where a testatrix bequeathed certain leasehold hereditaments, household goods, furniture, and personal estate, then late belonging to W., to F., his executors, &c., for his own use and benefit, *subject to the payment of 'the following annuities and legacies.'* The testatrix then specified certain legacies and annuities, and appointed F. executor. One question was, whether the specific property was liable to the legacies and annuities in the first instance, or only in aid of the general personal estate. Sir *R. P. Arden*, M.R., held that the specific fund was *not* primarily charged: his Honor adverting to the hardship of making legatees liable to lose their legacies, if the fund upon which they were specifically charged was deficient.

Remarks on case of *Holford* v. *Wood*.

"Admitting that, in this case, the legacies were not payable out of the specific fund *alone* (*o*); yet it is clear, according to the doctrine *now* established by *Browne* v. *Groombridge*, and *Choat* v. *Yeats*, that even if the legacies were general, the fund charged, being personal, was primarily applicable. In regard to this point, the case may be considered as overruled by the two last-mentioned authorities, in which unfortunately it was not cited. The doctrine of those authorities seems upon the whole to be the more reasonable; for, although, where a testator subjects real estate to charges to which the personal estate, and most frequently that only, was

(*l*) 1 J. & W. 102; and see *Evans* v. *Evans*, 17 Sim. at p. 106; *Phillips* v. *Eastwood*, 1 Ll. & G. *t. Sugd.* 294; *Webb* v. *De Beauvoisin*, 31 Bea. 573; *Vernon* v. *Earl Manvers*, ib. 623; *Lomyfield* v. *Bantry*, 15 L. R. Ir. 101; *Trott* v. *Buchanan*, 28 Ch. D. 446.

(*m*) 1 Mer. 193. The statement of *Bootle* v. *Blundell* (covering more than four pages), in the first edition of this work, has been omitted in the present edition.

(*n*) 4 Ves. 76.

(*o*) See cases collected ante, p. 2071.

before liable, there is no reason why the added fund should be applied before the original one, yet in regard to personal property, the whole of which was antecedently applicable to debts, as additional security to the creditor could not be the object of the provision, the natural inference is, that the testator, in appropriating for this purpose a particular portion of that estate, intended that it should be primarily applied."

It will be noticed that in *Holford* v. *Wood* the general residue was undisposed of, and in several cases this circumstance appears to have affected the construction (*p*). But it is submitted that it ought not to do so, and that the whole question is whether the testator intended the special fund to be liable primarily or only as an auxiliary to the general personal estate. This principle was acted on in *Re Grainger* (*q*). In that case, the Court of Appeal having held that a specific fund was expressly given subject to the payment of certain legacies (*r*), it was contended that the legacies were primarily payable out of the general personal estate, which was undisposed of; the Court held that there was no foundation for the claim, and that the circumstance that the general personal estate was undisposed of was irrelevant.

Lapse, &c.

But if there is a gift of the general residue which fails by reason of lapse or otherwise, the doctrine of *Browne* v. *Groombridge*, *Choat* v. *Yeats*, and the other cases cited above, does not apply (*s*).

Charge on a particular fund and exemption of the others, do not alter liability of others inter se.

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* (*t*), 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

(*p*) *Howse* v. *Chapman*, 4 Ves. 542; *Rhodes* v. *Rudge*, 1 Sim. 79; *Hewett* v. *Snare*, 1 De G. & S. 333; *Newbegin* v. *Bell*, 23 Bea. 386; *Corbet* v. *Corbet*, Ir. R. 8 Eq. 407. See the remarks of Sugden, L.C., in *Phillips* v. *Eastwood*, Ll. & G. *t. Sugd.* at p. 294.

(*q*) [1900] 2 Ch. 756.

(*r*) The decision of the C. A. on this point was reversed in D. P. (*Higgins* v. *Dawson*) [1902] A. C. 1; see ante, p. 1071.

(*s*) *Kilford* v. *Blaney*, 31 Ch. D. 56; *Re Williams*, 59 L. T. 310. It is curious that in *Browne* v. *Groombridge* it seems to have been assumed that the general doctrine applied in cases of lapse, &c., but so far as it so decided *Browne* v. *Groombridge* is overruled.

(*t*) 2 De G. & S. 425, affirmed 1 H. & Tw. 142. See also *Colvile* v. *Middleton*, 3 Bea. 570.

CHAPTER LIV.

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 devisees 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.

Secus, where part only of the others is exempted.

But where all the personalty is bequeathed in terms expressly exempting it from payment of the usual charges 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 (*u*). And in *Powell* v. *Riley* (*v*), where the exemption of the personal estate was not express, but was inferred from its being given as a specific legacy, and where the property 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 J. K. Bruce in *Lord Brooke* v. *Earl of Warwick*, which, however, was not cited.

Distinction between debts and legacies.

(9) *Legacies and Annuities.*—In many of the cases cited in the preceding sub-divisions of this section, the decision was that the general personal estate was exonerated from legacies (or annuities) as well as from debts, &c., but the term "exoneration," as applied to legacies and annuities, is not always used in the same sense as when applied to debts. There is an obvious distinction with regard to this question between debts and legacies; "a creditor has a claim by operation of law; but a legatee can only claim his legacy in the manner and form in which it is given by

(*u*) *Morrow* v. *Bush*, 1 Cox, 185; *Young* v. *Young*, 26 Bea. 522.

(*v*) L. R., 12 Eq. 175, see ante, p. 2027.

the will" (*w*). Consequently, where a testator makes his real estate primarily liable for his debts, this is necessarily a case of exoneration, but if he directs a sum of money to be raised out of his real estate (or out of a specific part of his personal estate), and then bequeaths that sum, the real estate (or specific personalty) is alone liable; no question of exoneration arises, because the general personal estate was never onerated. Such a bequest is really a specific legacy (*x*).

Implied exemption.

Even where there is a direct bequest of legacies or annuities—which would primâ facie make them payable out of the general personal estate—an intention to make them payable exclusively out of specific real or personal property may appear from the context. Thus 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. 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.

But the term "exoneration" is sometimes applied to cases of this kind (*z*).

Exoneration of legacies in strict sense.

In the strict sense of the term, as has been already pointed out (*a*), "exoneration," as applied to legacies and annuities, implies that they are payable out of the general personal estate, but that the testator has made some specific part of his real or personal estate primary liable for their payment, so that they are not payable out of the general personal estate unless the primary source is

(*w*) Per Shadwell, V.-C., in *Jones* v. *Bruce*, 11 Sim. at p. 227. The meaning of "exoneration" was discussed in *Re Rossiter*, 13 Ch. D. 355.

(*x*) *Hancox* v. *Abbey*, 11 Ves. 179; other cases are *Gray* v. *Minnethorpe*, 3 Ves. 103 (citing *Hone* v. *Medcraft*, 1 Br. C. C. 261); *Hartley* v. *Hurle*, 5 Ves. 540; *Brydges* v. *Phillips*, 6 Ves. 567; *Dawes* v. *Scott*, 5 Russ. 32 (stated ante, p. 2070); *Jones* v. *Bruce*, 11 Sim. 221 (stated ante, p. 2068); *Dickin* v. *Edwards*, 4 Ha. 273; *Bessant* v. *Noble*, 26 L. J. Ch. 236.

(*y*) 28 Bea. 379; *Re Needham*, 54 L. J. Ch. 75, was a somewhat similar case. See also *Lomax* v. *Lomax*, 12 Bea. at p. 290; *Woodhead* v. *Turner*, 4 De G. & S. 429. *Roberts* v. *Roberts*, 13 Sim. 336; *Rhodes* v. *Rudge*, 1 Sim. 79, ante, p. 2069; post, n. (*b*). In *Gittins* v. *Steele*, 1 Sw. 24, the general personal estate was expressly exempted.

(*z*) *Lance* v. *Aglionby*, 27 Bea. 65, stated ante, p. 2068; *Re Needham*, 54 L. J. Ch. 75.

(*a*) Ante, p. 2061.

insufficient; in such a case the legacies or annuities are demonstrative (*b*).

A similar result follows where the testator directs 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" (*c*).

There is also an intermediate class of cases, where legacies and annuities are payable out of the residuary real and personal estate, pari passu (*d*).

VIII.—Payment of Legacies and Shares of Residue.—The well-established rule that the general personal estate is, in the absence of an expression of intention to the contrary, the fund out of which pecuniary legacies are payable, has been already referred to (*e*). And the cases in which the payment of legacies is thrown on a specified part of the testator's real or personal estate, or on a mixed fund, have also been referred to (*f*).

The general rules as to the time when legacies are payable; as to the time from which legatees are entitled to interest or income; and as to the rights of a legatee under a contingent bequest, are discussed in an earlier chapter (*g*).

Right of retainer or set-off.

The right of an executor to retain a benefit given by a will in satisfaction of a debt owing by the beneficiary belongs to the law of executors and not to the law of wills, and is therefore not discussed in detail in this work (*h*).

Rights of creditors —against executor;

As a general rule, if an executor distributes the estate of his testator among the legatees and other beneficiaries before all the debts and liabilities are paid or satisfied, he is personally liable to the unpaid creditors (*i*). But under Lord St. Leonard's Act (Law of Property Act, 1859, s. 29) an executor who issues proper advertisements to creditors is justified in distributing the estate after satisfying or providing for all claims of which he has notice, without prejudice to the right of the creditors to follow the assets into the hands of the beneficiaries (*j*). Under the same Act (ss. 27, 28) where

—against beneficiaries.

(*b*) *Boughton* v. *Boughton*, 1 H. L. C. 406; *Kilford* v. *Blaney*, 31 Ch. D. 56. This construction was adopted in the cases of *Browne* v. *Groombridge* and *Choat* v. *Yeats*, stated ante, pp. 2077, 2078, where *Holford* v. *Wood* and *Re Grainger* are also referred to. The case of *Rhodes* v. *Rudge*, 1 Sim. 79, which seems to have been erroneously decided, is stated ante, p. 2069.

(*c*) *Bunting* v. *Marriott*, 19 Bea. 163.

(*d*) Ante, p. 2076.

(*e*) Ante, p. 2071. *Boughton* v. *Boughton*, 1 H. L. C. 406; *Robertson* v. *Broadbent*, 8 A. C. 812.

(*f*) Ante, p. 2071, p. 2033.

(*g*) Chapter XXX.

(*h*) Some cases on the subject are referred to ante, p. 2019; *Re Abrahams*, [1908] 2 Ch. 69.

(*i*) Robbins and Maw, 423, seq.

(*j*) Ib. 452.

leasehold or freehold land belonging to a testator has been sold, the executor is protected from personal liability in respect of future claims for rent, &c., and is only bound to provide for "any fixed and ascertained sums" which the testator was liable to lay out on the property; the assets of the testator, however, still remain liable in the hands of the beneficiaries.

Liabilities in respect of land.

Abatement of Legacies and Annuities.—Specific legacies do not, of course, abate with general legacies, but if the specific legatees are required to contribute to the payment of debts (*k*) they abate rateably inter se (*l*). Demonstrative legacies (*m*) also do not abate with general legacies (*n*), so long as the specific fund out of which they are primarily payable is sufficient, but if that is insufficient, so that they come on the general personal estate for the unpaid balance, they abate as to that rateably with general legacies (*o*).

Abatement of specific and demonstrative legacies: for payment of debts;

If the general personal estate is insufficient for payment of debts, specific and demonstrative legacies abate rateably (*p*).

Specific and demonstrative legacies of money or stock are also liable to abatement if the fund out of which they are payable is insufficient. Thus where a testator disposes of a particular fund by giving legacies of fixed amount out of it to various persons, and the fund is insufficient, the legatees abate among themselves (*q*). So if the bequests are of stock (*r*). If the testator states that the fund amounts to a particular sum, and gives specific amounts to one or more persons, and the residue or surplus to another, the gift of the residue is, as a general rule, treated as a specific gift of what it would have been if the fund had produced the amount stated by the testator (*s*). But if the testator treats the fund as of uncertain amount, or makes it subject to payments of uncertain amount (such as debts or expenses) the general rule does not apply (*t*). A

—for insufficiency of fund.

(*k*) Ante, p. 2027.

(*l*) Roper, 356; *Clifton* v. *Burt*, 1 P. W. at p. 680; *Duke of Devon* v. *Atkins*, 2 P. W. 381.

(*m*) It will be remembered that for purposes of abatement "legacy" includes "annuity." See post, p. 2088. An annuity may be demonstrative.

(*n*) *Acton* v. *Acton*, 1 Mer. 178.

(*o*) *Mullins* v. *Smith*, 1 Dr. & Sm. 204.

(*p*) *Re Turner*, [1908] 1 Ir. 274.

(*q*) *Page* v. *Leapingwell*, 18 Ves. 463, ante, p. 1053; *Humphreys* v. *Humphreys*, 2 Cox, at p. 186; *Wright* v. *Weston*, 26 Bea. 429; *Haslewood* v. *Green*, 28 Bea. 1; *Harley* v. *Moon*, 1 Dr. & S. 623; *Walpole* v. *Apthorp*, L. R., 4 Eq. 37; *Baker* v. *Farmer*, L. R., 3 Ch. 537. In *Re Tunno*, 45 Ch. D. 66, the testatrix bequeathed two legacies out of a fund which would have been insufficient to meet both of them; one legacy failed, and it was held that the other legatee was entitled to be paid in full. Compare the cases on abatement of sums appointed under powers, ante, Vol. I. p. 848.

(*r*) *Sleech* v. *Thorington*, 2 Ves. sen. 560; *Elwes* v. *Causton*, 30 Bea. 554.

(*s*) See the cases cited ante, note (*q*). As to the case where the fund is wasted after the testator's death, see *Ex p. Chadwin*, 3 Sw. 380.

(*t*) *Harley* v. *Moon*, supra; *Re Tunno*, 45 Ch. D. 66. See also the cases cited ante, Vol. I. p. 861.

CHAPTER LIV.

testator may, however, so deal with a fund of uncertain amount as to shew that the gift of the residue of it is not to include such parts of it as are bequeathed upon trusts which fail (*u*).

Abatement of single specific legacy.

If a testator makes a specific bequest of a certain amount of stock, and at the time of his death he has not sufficient stock to answer the bequest, the legacy fails pro tanto (*uu*).

Abatement prevented by terms of will.

In *Evans* v. *Harris* (*v*) the testatrix gave 11,000*l*. stock upon trust for S. until some child of his should attain twenty-one and when and as his children attained twenty-one upon trust to pay or transfer to each such child 1,000*l*. stock: it seems that there might not eventually be sufficient stock to provide for all S.'s children, but Lord Langdale held that the directions of the will must be followed, and that each child as it attained twenty-one was entitled to 1,000*l*. stock, although the result might be that the later born children would take nothing.

Demonstrative legacies.

Demonstrative legacies partake of the character both of specific and of general legacies; it would therefore seem to follow that if the fund out of which several demonstrative legacies are primarily payable is insufficient, they abate among themselves so far as regards that fund, while as regards the portions which thus remain unpaid they are treated as general legacies and abate with the other general legacies if the general personal estate is not sufficient to pay all the general legacies (*w*). But if the general personal estate is insufficient to pay debts, demonstrative legacies abate rateably with specific bequests and devises (*x*).

General legacies may be charged on land.

The fund for payment of general legacies (*y*) is primâ facie the general personal estate, but a testator can, if he so wishes, charge the general legacies bequeathed by his will on his real estate, either in exoneration of his personal estate or pari passu with his personal estate, or as an auxiliary fund, in the event of the personal estate proving insufficient. The question what words will charge the real estate with legacies has been already considered (*z*).

Effect of devastavit.

In *Richardson* v. *Morton* (*a*) the testator gave certain legacies including a legacy to an infant, payable at twenty-one, with maintenance in the meantime, and charged certain lands with the payment of so much of his debts, legacies, &c. as his personal

(*u*) *Fee* v. *M'Manus*, 15 L. R. Ir. 31.

(*uu*) *Gordon* v. *Duff*, 3 D. F. & J. 662.

(*v*) 5 Bea. 45. As to the time for ascertaining the class in a case of this kind, see ante, p. 1055.

(*w*) See *Mullins* v. *Smith*, 1 Dr. & S. 204. *Tempest* v. *Tempest*, 7 D. M. & G. 470.

(*x*) *Re Turner*, [1908] 1 Ir. 274.

(*y*) Including annuities, post, p. 2088.

(*z*) Ante, p. 1998.

(*a*) L. R., 13 Eq. 123. See *Hepworth* v. *Hill*, 30 Bea. 476. *Tatlock* v. *Jenkins*, Kay, 654.

estate should be inadequate to discharge; the personal estate was sufficient for all the purposes of the will at the time of the testator's death, but was subsequently wasted by the executor; Romilly, M.R., held that the legatee was not entitled to have his legacy charged on the realty. But there are Irish decisions to the contrary (*b*). Of course if the executor is also devisee of the land, he cannot be heard to say that the land is not charged because the personal estate was originally sufficient (*c*).

Default of creditor.

If the personal estate was sufficient, and a creditor loses his right against the executors by his own default, he cannot come on the realty (*d*); he must follow the personal estate into the hands of the persons among whom the executors have distributed it.

General legacies payable out of residue.

In the absence of a direction by the testator, general legacies (*e*) are payable out of the general personal estate, and therefore take priority over the residuary legatee (*f*).

Waste of assets.

It was indeed at one time supposed that if the assets were wasted by the executor, or otherwise lost after the death of the testator, the general and residuary legatees ought to abate rateably, but this is clearly not so, and in such a case the loss falls on the residuary legatee (*g*), unless the general legatees have assented to their legacies being mixed with the residue as one common fund, in which case any loss which happens to it must be borne by the general and residuary legatees rateably (*h*).

Deficiency arising after some legacies paid.

If the assets were originally sufficient to satisfy all the legacies, and the executor pays some of them, and afterwards wastes the estate, so as to make it insufficient, the unpaid legatees cannot oblige the satisfied legatees to refund (*i*). Nor, à fortiori, can they do so when the loss has arisen without any fault of the executor (*j*). But if the assets were originally deficient, an executor who pays a legacy in full is guilty of a devastavit, and the legatee is therefore liable to refund (*k*).

(*b*) *Re Massy's Estate*, 14 Ir. Ch. 355; *M'Carthy* v. *M'Cartie*, [1897] 1 Ir. 86: in this case, however, the point did not really arise; *Bank of Ireland* v. *McCarthy*, [1898] A. C. 181.

(*c*) *Humble* v. *Humble*, 2 Jur. 690; *Howard* v. *Chaffers*, 2 Dr. & S. 236; *Re Bradford's Estate*, [1895] 1 Ir. 251.

(*d*) *Trousdale* v. *Hayes*, [1883] W. N. 13.

(*e*) Including annuities; post, p. 2088.

(*f*) Roper, 411; *Willmott* v. *Jenkins*, 1 Bea. 401.

(*g*) *Dyose* v. *Dyose*, 1 P. W. 305; *Fonnereau* v. *Poyntz*, 1 Br. C. C. at p. 478; *Humphreys* v. *Humphreys*, 2 Cox, 184; *Ex parte Chadwin*, 3 Sw. 380; *Baker* v. *Farmer*, L. R., 3 Ch. 537.

(*h*) *Ex parte Chadwin*, 3 Sw. 380. Compare *Re Campbell*, [1893] 3 Ch. 468, post, p. 2092.

(*i*) Roper, 459.

(*j*) *Fenwick* v. *Clarke*, 4 D. F. & J. 240; *Re Hurst*, 67 L. T. 90.

(*k*) Roper, 459.

CH. PTER LIV.

Share of residue.

The same rules apply to shares of residue (*l*).

Abatement of general legacies.

If the personal estate is insufficient to pay all the general legacies in full, they abate rateably (*m*).

Accession to assets.

On the general principle above stated (namely, that the residuary legatee takes nothing until all the general legatees are paid), if further assets come in, or if a fund falls in on the cesser of an annuity, or the like, after an abatement, the general legatees get the benefit of the accession until they have been paid in full (*n*). Sometimes, however, a testator inserts an express direction that if his estate is insufficient to pay all the legacies in full, they shall abate proportionately, and then the question arises whether the abatement is intended to be permanent; for example, if the legacies abate in accordance with the direction, and afterwards a fund falls in (as by the failure of a contingent legacy or the like), the question is whether it goes to the residuary legatee or whether it ought to be applied in making up the legacies to their proper amounts. The balance of authority seems to be in favour of the former conclusion (*o*).

Priority of legacies.

If a general legacy has priority over the others, it does not abate with them, but is entitled to be paid in full before they receive anything.

Legacy in lieu of dower.

Some legacies have priority by law. Thus a legacy given in satisfaction of dower has priority, if the right to dower exists at the testator's death, and if the testator leaves real estate of which the widow is dowable (*p*).

Legacy for valuable consideration.

The rule with regard to legacies in lieu of dower is generally considered to be an illustration of a general principle, which has been thus stated. "When a general legacy is given in consideration of a debt owing to the legatee, or of his relinquishing any right or interest, since the bequest is not made as a bounty, like other general bequests, but as purchase money for the collateral right or interest, it will be entitled to a preference of payment to the other general legacies, which are merely voluntary" (*q*).

(*l*) *Peterson* v. *Peterson*, L. R., 3 Eq. 111; *Re Winslow*, 45 Ch. D. 249; *Re Lepine*, [1892] 1 Ch. 210.

(*m*) Roper, 410; *Barton* v. *Cooke*, 5 Ves. at p. 464; *Re Tootal's Estate*, 2 Ch. D. 628. As to the calculation where legacies are given free of duty, see *Re Turnbull*, [1905] 1 Ch. 726.

(*n*) *Willmott* v. *Jenkins*, 1 Bea. 401.

(*o*) *Farmer* v. *Mills*, 4 Russ. 86; *Hichens* v. *Hichens*, 36 L. T. 8. In *Re Lyne's Estate*, L. R., 8 Eq. 482, Stuart, V.-C., held that the fund which fell in went to the general legatees whose legacies had abated.

(*p*) *Burridge* v. *Bradyl*, 1 P. W. 127; *Blower* v. *Morret*, 2 Ves. sen. 420; *Heath* v. *Dendy*, 1 Russ. 543; *Davies* v. *Bush*, Yo. 341; *Acey* v. *Simpson*, 5 Bea. 35; *Stahlschmidt* v. *Lett*, 1 Sm. & G. 421; *Roper* v. *Roper*, 3 Ch. D. 714; *Re Greenwood*, [1892] 2 Ch. 295. See p. 1117.

(*q*) Roper, 431, cit. *Blower* v. *Morret*, 2 Ves. sen. 422, and the cases on legacies in lieu of dower, supra.

In satisfaction of a debt.

As regards the first part of this proposition, the rule does not seem to be of great practical importance, for the legatee has no priority unless he can prove the existence of a debt (*r*): and if a testator who owes A. 1,000*l*. bequeaths 3,000*l*. to him in satisfaction of the debt, and A. elects to take the legacy, it is liable to abatement with the other legacies (*s*).

Intention to give legacy priority.

As a general rule, legacies are payable pari passu, in whatever order they appear in the will (*t*); and no legacy has priority unless a clear intention appears (*u*). It is immaterial that the legacies are made payable at different dates or periods (*v*), or are given in succession, some being payable "in the first place," or "in the next place," and others "afterwards" (*w*). But where a testator distinguishes between legacies given generally, and legacies given out of residue (meaning what is left after the former legacies have been paid), this shews an intention that the legacies given generally shall have priority (*x*). So where a testator directs a sum to be set apart for the benefit of certain persons, and then directs that the "residue" of his personal estate shall be invested and held on certain trusts, and afterwards bequeaths pecuniary legacies, the first-named sum takes priority over all the other gifts (*y*).

In *Re Hardy* (*z*) the testator directed his trustees "in the first place" to raise and invest certain sums upon trust for his wife and brother and sisters during their lives, and also bequeathed various pecuniary legacies to his brothers and sisters and other persons absolutely: it was held by Malins, V.-C., that there was such a "marked distinction" between the legacies in which life interests only were given and those given absolutely, that the former had priority, but the learned judge seems to have been influenced by guesses as to what the testator would have desired if he had foreseen that his estate would prove insufficient. The same notion appears in some of the older cases, where legacies for

(*r*) *Davies* v. *Bush*, Yo. 341. See *Coppin* v. *Coppin*, 2 P. W. at p. 296, where the testator had compounded with his creditors. A direction to pay the debts of another person is merely an ordinary legacy: *Shirt* v. *Westby*, 16 Ves. 393.

(*s*) *Re Wedmore*, [1907] 2 Ch. 277.

(*t*) *Whitehouse* v. *Insole*, 7 L. T. 400.

(*u*) *Miller* v. *Huddlestone*, 3 Mac. & G. 513.

(*v*) *Nickisson* v. *Cockill*, 3 D. J. & S. 622.

(*w*) *Blower* v. *Morret*, 2 Ves. sen. 420; *Beeston* v. *Booth*, 4 Madd. 161; *Thwaites* v. *Foreman*, 1 Coll. 409; 10 Jur. 483; *Street* v. *Street*, 2 N. R. 56.

(*x*) *Haynes* v. *Haynes*, 3 D. M. & G. 590; *Re Smith*, [1899] 1 Ch. 365; *Browne* v. *Malone* (*Re Malone*), [1897] 1 Ir. 571. In *Eavestaff* v. *Austin*, 19 Bea. 591 a testatrix by her will gave a legacy "out of the residuo of her property;" and by a codicil she gavo another legacy "out of the residue of her estate, in case there should be sufficient": it was held that the two legacies were payable pari passu.

(*y*) *Gyett* v. *Williams*, 2 J. & H. 429.

(*z*) 17 Ch. D. 798.

CHAPTER LIV.

the maintenance of the testator's wife and children, who would have been otherwise unprovided for, have been held to be entitled to priority, on the theory that such a provision is a duty which the testator owes to nature (*a*), but this theory is not now allowed to influence the construction of wills (*b*).

Immediate legacy to wife.

Accordingly a legacy to the testator's wife, to be paid immediately, or within a short time after the testator's death, or expressed to be for her immediate requirements, has no priority (*c*).

Bequest conditional on sufficiency of assets.

If a testator bequeaths two sets of legacies, and clearly shews that he intends the second set to be paid only in the event of there being a surplus after payment of the first set, the first set has priority (*d*).

Executor.

A legacy to an executor for his care and pains has no priority (*e*).

Annuities.

It has been already mentioned (*f*) that annuities are for most purposes treated as general legacies. Annuitants have therefore the same right of priority over the residuary legatee as general legatees and in case of deficiency of assets annuities abate rateably with general legacies (*g*).

Calculation of value.

For the purpose of abatement, where an annuity is payable from the testator's death, and the annuitant is living when the deficiency of assets is ascertained, the present value of the annuity is calculated, and the arrears are added to it (*i*). If the annuitant is dead, the value is the amount which he would have actually received if the fund had not been deficient (*j*). In the case of a reversionary annuity, if the deficiency is ascertained at the death of the testator, the value of the annuity is calculated on the basis of its being a reversionary interest (*k*). But if the annuity falls into possession before the deficiency is ascertained, its present value is calculated at the time when the deficiency is ascertained, and any arrears since it fell into possession are added (*l*). Where there are

(*a*) *Lewin* v. *Lewin*, 2 Ves. sen. 415; *Blower* v. *Morret*, ib. 420.

(*b*) *Re Schweder's Estate*, [1891] 3 Ch. 44; *Cazenove* v. *Cazenove*, 61 L. T. 115.

(*c*) Ibid.

(*d*) Roper, 429; *Att.-Gen.* v. *Robins*, 2 P. W. 23; *Stammers* v. *Halliley*, 12 Sim. 42; *Beeston* v. *Booth*, 4 Madd. at p. 170; *Brown* v. *Brown*, 1 Keen, 275.

(*e*) *Att.-Gen.* v. *Robins*, 2 P. W. at p. 25; *Duncan* v. *Watts*, 16 Bea. 204; *Fretwell* v. *Stacy*, 2 Vern. 434; *Heron Heron*, 2 Atk. 171.

(*f*) Chap. XXX.

(*g*) *Hume* v. *Edwards*, 3 Atk. 693; *Miller* v. *Huddlestone*, 3 Mac. & G. 513. See *Anderson* v. *Anderson*, 33 Bea. 223; *Re Cottrell*, [1910] W. N. 21.

(*i*) *Heath* v. *Nugent*, 29 Bea. 226. *Re Wilkins*, 27 Ch. D. 703. In this case one of the annuities was given free of duty, and a special apportionment had to be made. See ante, p. 1137. See also *Delves* v. *Newington*, 52 L. T. 512 (decd).

(*j*) *Todd* v. *Bielby*, 27 Bea. 353. See *Wroughton* v. *Colquhoun*, 1 De G. & S. 357; *Carr* v. *Ingleby*, ib. 362; *Long* v. *Hughes*, ib. 364. As to an annuity subject to forfeiture, &c., see *Gratrix* v. *Chambers*, 2 Giff. 321; *ite Sinclair*, [1897] 1 Ch. 921.

(*k*) Per Farwell, J., in *Re Metcalf*, [1903] 2 Ch. at p. 428.

(*l*) *Potts* v. *Smith*, L. R., 8 Eq. 683.

two annuities, one payable from the death of the testator, and the other payable from a future time, and the deficiency is not ascertained for some years after the testator's death, during which time the immediate annuity is paid in full, that annuitant is not bound to bring the sums received by him into hotchpot in calculating the values of the two annuities (*m*).

Amount how payable.

When an annuity abates, the capital amount ascertained to be attributable to it is paid to the annuitant, or, if he is dead, to his personal representatives (*n*).

Separate funds for separate annuities.

In accordance with the general principle, that where annuities are bequeathed, the residuary legatee takes nothing until they are satisfied, it is established that if separate funds are directed to be set apart to meet separate life annuities, and to fall into residue on the death of the respective annuitants, and the estate is insufficient to provide the full amount of the annuities, then, as each annuitant dies, the fund appropriated to his annuity does not go to the residuary legatee, but is available for satisfying the other annuities in full (*o*). If, however, the testator expressly provides that the annuities shall be reduced in the event of the estate being insufficient, then the abatement is permanent, and enures to the benefit of the residuary legatee (*p*).

Priority of annuities.

As with legacies, so with annuities, no annuity has priority over other annuities, or over general legacies, unless a clear intention to that effect appears by the will (*q*). Accordingly, if a testator directs that his residue shall "in the first place" be applied in paying certain sums, "and then" in providing for annuities bequeathed by the will, "and in the next place," in payment of legacies bequeathed by the will, this does not give the annuities priority over the legacies (*r*). But a testator may shew an intention to give one annuity priority over another by expressly directing the latter to be paid out of residue (*s*).

(*m*) *Re Metcalf*, [1903] 2 Ch. 424. In that case it was also held that sums paid out of capital to the immediate annuitants need not, having regard to the terms of the will, be brought into hotchpot.

(*n*) See cases cited supra, n. (*j*).

(*o*) *Arnold* v. *Arnold*, 2 My. & K. 365; *Re Tootal's Estate*, 2 Ch. D. 628. The decision in *Scott* v. *Salmond*, 1 My. & K. 363, seems to have turned on the special wording of the will.

(*p*) *Farmer* v. *Mills*, 4 Russ. 86.

(*q*) *Miller* v. *Huddlestone*, 3 Mac. & G. 513; *Coore* v. *Todd*, 7 D. M. & G. 520 (annuities charged on land).

(*r*) *Thwaites* v. *Foreman*, 1 Coll. 409; 10 Jur. 483. See *Ingham* v. *Daly*, 9 L. R. Ir. 484; *Re Hardy*, 17 Ch. D. 798. A power of distress and entry to enforce payment of annuities does not give them priority over legacies where all are charged on the real estate: *Roper* v. *Roper*, 3 Ch. D. 714.

(*s*) *Haynes* v. *Haynes*, 3 D. M. & G. 590; *Re Smith*, [1899] 1 Ch. 365. Compare the cases on priority of legacies, ante, p. 2087.

Annuity in lieu of dower.

The same rules as to priority which apply to legacies given in lieu of dower apply to annuities given in that way (*t*).

Rent-charge.

It is hardly necessary to say that if a testator gives an annuity by way of rent-charge, and afterwards bequeaths legacies charged on the same real estate in aid of the personalty, the annuity has priority over the legacies so far as the real estate is concerned (*u*).

Land Transfer Act.

Appropriation of Legacies and Shares of Residue.—The Land Transfer Act, 1897, s. 4, contains some provisions for the appropriation of legacies and shares of residue which are inoperative as no rules have been made under the section. It does not appear to affect the powers of appropriation which executors or trustees have apart from the act (*v*).

Right of legatee.

A person to whom a vested legacy, payable in futuro, is given may require the executor to set aside a sufficient sum to meet it (*w*). The legatee under a contingent bequest has no such right, but he is entitled to have security for payment (*x*).

Power of executor.

If the person entitled to an immediate vested legacy cannot be found, or if the legacy is payable in futuro or in a contingency, the executor may appropriate a sufficient sum or invested fund to meet it, so as to be able to divide the residue (*y*). But unless power is given by the will, expressly or impliedly, to make such an appropriation, it does not bind the legatee, and therefore if the fund turns out to be insufficient, the legatee can claim against the residuary legatees. The executor is not liable if the appropriation is fairly made (*z*).

Trust for appropriation.

Where there is an express direction or trust to appropriate, the executor or trustee can of course be compelled to comply with it (*a*).

A power or trust to appropriate a fund to meet a future or contingent legacy may often be inferred from the terms of the will; as where a testator directs a sum to be invested in trust for persons in succession (*b*). "And, even if there is a contingent legacy, and by the will some of the income arising from the legacy is to go to the legatee before the contingency on which it becomes payable happens, then you may properly infer that the testator intended

(*t*) *Norcott* v. *Gordon*, 14 Sim. 258; *Roper* v. *Roper*, 3 Ch. D. 714; *Re Greenwood*, [1892] 2 Ch. 295.

(*u*) *Creed* v. *Creed*, 11 Cl. & F. 491. See also *Bell* v. *Bell*, Ir. R., 6 Eq. 239.

(*v*) *Re Beverly*, [1901] 1 Ch. 681, where there was a trust for conversion; post, p. 2093.

(*w*) Roper, 931; *Re Hall*, [1903] 2 Ch. 226.

(*x*) *King* v. *Malcott*, 9 Ha. 692; *Re Hall*, supra.

(*y*) *Re Hall*, supra.

(*z*) Ibid.

(*a*) *Prendergast* v. *Prendergast*, 3 H. L. C. 195.

(*b*) *Ames* v. *Parkinson*, 7 Bea. 379; *Kidman* v. *Kidman*, 40 L. J. Ch. 359.

that a fund should be set apart and invested to answer the legacy" (*c*).

Security for payment of contingent legacy.

Where a contingent legacy is bequeathed, and the will contains no direction either express or implied for the investment of it (*d*), the legatee cannot require a sum to be appropriated to answer the legacy (*e*); and conversely the executors without the consent of the legatee have no power to make an appropriation which may be detrimental to him (*f*). But an executor before distributing the estate ought to make reasonable provision for a contingent legacy, and if he does so it seems that he would not be personally liable to the legatee if the provision so made turned out to be insufficient (*g*). Of course the appropriation is not binding on the legatee, unless he assents to it, and if the investment turns out insufficient he can claim against the residuary legatees.

Infant.

In the case of a legacy to an infant, the executor cannot free the residue by setting apart securities or investments to meet the legacy, but he can pay the legacy into court (*h*).

Effect of appropriation.

If a particular fund is appropriated to the payment of a legacy, with the consent of the legatee or in accordance with the directions of the testator, and if by devastavit, or breach of trust or otherwise, the fund is diminished, the other legatees cannot be called upon to contribute to the loss (*i*). On the other hand, the fund cannot be resorted to by the executors to meet a debt due by the legatee to the testator's estate (*j*), or to indemnify themselves against liabilities incurred with reference to other parts of the estate (*k*).

So a residuary legatee, to whom an investment has been appropriated, in part satisfaction of his share, will suffer if its value falls, and benefit if its value increases (*l*). If the value of the remaining parts of the residuary estate is diminished he cannot be required to bring the appropriated investment into account (*m*).

Unappropriated legacy not entitled to share in increased value of residue.

If a testator bequeaths a legacy to his executor upon trust for A. for life with remainder to his children, and the executor does not appropriate any investments to meet the legacy, but retains the residue in its original state for several years, paying A. interest

(*c*) Per Romer, L.J., *Re Hall*, [1903] 2 Ch. at p. 233.

(*d*) In *Defflis* v. *Goldschmidt*, 1 Mer. 417, there was a direction to set apart a sufficient sum to meet contingent legacies, and Grant, M.R., said that the whole residue must be impounded, if necessary.

(*e*) See the statement of the rule by Turner, V.-C., in *King* v. *Malcott*, 9 Hare, 692. As to vested legacies payable in futuro, see ante, p. 2090.

(*f*) *Re Hall*, [1903] 2 Ch. 226.

(*g*) Ibid.

(*h*) *Re Salaman*, [1907] 2 Ch. 46.

(*i*) *Willmott* v. *Jenkins*, 1 Bea. 401.

(*j*) *Ballard* v. *Marsden*, 14 Ch. D. 374.

(*k*) *Fraser* v. *Murdoch*, 6 A. C. 855.

(*l*) *Re Richardson*, [1896] 1 Ch. 512.

(*m*) *Re Lepine*, [1892] 1 Ch. 210.

CHAPTER LIV.

at 4 per cent. per annum, A. and his children are not entitled to participate in any increase in the value of the residuary estate, even if the executor is one of the residuary legatees (*n*).

Administration by Court.

Where there is an administration action, the Court will allow the residuary legatee to receive the whole fund, upon giving security for the payment of the contingent legacy, or it may require a sufficient sum to be set aside (*o*).

Annuitant.

An annuitant is entitled to have his annuity sufficiently secured (*p*). Or the Court may set apart a sufficient sum to meet it, and thus release the residuary estate (*q*). But where the will itself contains directions as to the investments which are to be appropriated to meet an annuity, it seems that they must be followed, and that the trustees cannot appropriate any other investments, even such as are authorized by the Trustee Act (*r*).

Loss of appropriated fund.

If a testator directs a fund to be invested to produce 100*l*. a year and that if the fund, from any cause whatever, proves insufficient to meet the annuity, the deficiency shall be made good out of the residue, this does not give the annuitant any claim on the residue if the fund is lost by the misapplication of the trustees (*s*).

Share of residue.

Apart from the Land Transfer Act, 1897, s. 4, executors and trustees have power, with the consent of a legatee of a share of residue, to appropriate any part of the residuary personal estate (such as stocks or a mortgage debt), in or towards satisfaction of his share, without making any appropriation in respect of the other shares. Such an appropriation, if fairly made, is binding on all persons interested in the estate (*t*).

Where a share of residue is given upon trust for infants, the trustees can, of their own authority, appropriate part of the residue in or towards satisfaction of the share, provided the investments so appropriated are proper ones (*u*).

(*n*) *Re Campbell*, [1893] 3 Ch. 468. If A. had been absolutely entitled to the legacy, and had assented to its being mixed with the residue as one common fund, the case would have been different: see *Ex parte Chadwin*, 3 Sw. 380.

(*o*) *Webber* v. *Webber*, 1 S. & St. 311; *Re Hall*, [1903] 2 Ch. 226; *Defflis* v. *Goldschmidt*, 1 Mer. 417. See *Prendergast* v. *Prendergast*, 3 H. L. C. 195, ante, p. 2090.

(*p*) *Re Parry*, 42 Ch. D. 570, following *Webber* v. *Webber*, 1 S. & St. 311; *Re Potter*, 50 L. T. 8, and *King* v. *Malcott*, supra.

(*q*) *Harbin* v. *Masterman*, [1896] 1 Ch. 351.

(*r*) *Re Owthwaite*, [1891] 3 Ch. 494.

(*s*) *Barnett* v. *Sheffield*, 1 D. M. & G. 371.

(*t*) *Re Lepine*, [1892] 1 Ch. 210; *Re Richardson*, [1896] 1 Ch. 512; *Re Brooks*, 76 L. T. 771; *Re Nickels*, [1898] 1 Ch. 630. See also as to the powers of an administrator, *Elliott* v. *Kemp*, 7 M. & W. 306; *Barclay* v. *Owen*, 60 L. T. 220.

(*u*) *Re Nickels*, supra.

The better opinion seems to be that the Land Transfer Act, 1897, has not affected the powers of executors in these respects. It has been decided that in the case of a will which contains a trust for conversion, trustees have the same powers of appropriation as they had before the Act (*v*).

Land and chattels real.

Where the will contains a trust for conversion, the power of appropriation extends to chattels real, and, it would seem, to residuary real estate devised upon trust for conversion (*w*).

Marshalling of assets.

IX.—As to marshalling Assets in Favour of Creditors and Legatees.—Mr. Jarman continues (*x*): "It remains to consider in what cases assets are marshalled in favour of legatees or creditors.

General rule as to marshalling assets.

"On this subject it may be stated, as a general rule, that, wherever a creditor, having more than one fund, resorts to that which, as between the debtor's own representatives, is not primarily liable, the person whose fund is so taken out of its proper order, is entitled to be placed in the same situation as if the assets had been applied in a due course of administration, in other words, to occupy the position of the creditor in respect of that fund, or those funds, which ought to have been applied, to the extent to which his own has been exhausted.

In favour of legatees against the heir.

"Thus, if the specialty creditors of a testator who died before the 29th of August, 1833 (*y*), 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 favour of such legatees, by placing them in the room of the creditors, as it respects their claim on the descended lands (*z*); such descended assets, according to the order of application before stated, being liable before pecuniary legacies or even personalty specifically bequeathed (*a*).

But not against devisees.

"But legatees are not entitled to have the assets marshalled against the *devisees* of real estate, either specific or residuary (*b*); for to throw the debts upon the devisees, in such a case, would

(*v*) *Re Beverly*, [1901] 1 Ch. 681.
(*w*) Ibid.
(*x*) First ed. Vol. II. p. 600.
(*y*) See stat. 3 & 4 Will. 4. c. 104, ante, p. 1988.
(*z*) *Clifton* v. *Burt*, 1 P. W. 679.
(*a*) See ante, p. 2026.
(*b*) *Mirehouse* v. *Scaife*, 2 My. &. Cr. 695; *Forrester* v. *Lord Leigh*, Amb. 171; *Scott* v. *Scott*, Amb. 383; 1 Ed. 458; *Clifton* v. *Burt*, 1 P. W. 679; *Hamly* v. *Fisher*, Dick. 104, Amb. 127 (*Hanby* v. *Roberts*); *Keeling* v. *Brown*, 5 Ves. 359; *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. The decision to the contrary in *Hensman* v. *Fryer*, L. R., 3 Ch. 420, was an error.

CHAPTER LIV.

be to apply devised *real* estate before personal estate *not* specifically bequeathed, and thereby break in upon the established order of application before stated (*c*)."

Unless lands are charged with debts.

But if the lands devised are *charged* with debts, it is clear, upon the same principle, that the assets will be marshalled in favour of pecuniary and specific legatees; lands so charged being applicable before pecuniary or specific legacies (*d*). Thus, in *Foster* v. *Cook* (*e*) (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 later times (*f*). The rule in this respect is not affected by Part I. of the Land Transfer Act, 1897 (*g*).

Assets marshalled against devisees, &c., of mortgaged lands.

So, if the mortgagee of a devised or descended estate resort in the first instance (as he clearly may) to the personal estate of the deceased mortgagor, to the prejudice of specific or even of general pecuniary legatees (who, it will be remembered, were not, even under the old law, and, of course, are not now, liable to exonerate a devised or descended mortgaged estate (*h*)), equity will give those legatees a claim on the estate to the extent to which their funds may have been applied in its exoneration (*i*).

Rule as to vendor's lien for purchase-money.

Under the old law, it was at one time much debated whether, where a vendor, who had an equitable lien for his purchase-money on the property, as well as a claim on the personal estate of the deceased purchaser, resorted to the latter, to the prejudice of specific or pecuniary legatees, the legatees were entitled to have the assets marshalled against the heir or devisee of such property: their right was, however, finally established (*k*).

(*c*) Ante, p. 2026.

(*d*) Ante, p. 2028.

(*e*) 3 B. C. C. 347. See also *Bradford* v. *Foley*, 3 Br. C. C. 351, n.; *Webster* v. *Alsop*, 3 Br. C. C. 352, n.; *Fenhoulet* v. *Passavant*, Dick. 253; Lord Hardwicke's judgment in *Arnold* v. *Chapman*, 1 Ves. sen. at p. 110; *Norman* v. *Morrell*, 4 Ves. 769; *Aldrich* v. *Cooper*, 8 Ves. at p. 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. 369.

(*f*) *Paterson* v. *Scott*, 1 D. M. & G. 531; *Rickard* v. *Barrett*, 3 K. & J. 289; *Surtees* v. *Parkin*, 19 Bea. 406; *Re Stokes*, 67 L. T. 223; *Re Salt*, [1895] 2 Ch. 203; *Re Roberts*, [1902] 2 Ch. 834. The decision of Kay, J., in *Re Bate*, 43 Ch. D. 600, is to be treated as overruled.

(*g*) *Re Kempster*, [1906] 1 Ch. 446.

(*h*) Vide ante, p. 2042.

(*i*) *Lutkins* v. *Leigh*, Cas. t. Talb. 53; *Forrester* v. *Lord Leigh*, Amb. 171; *Wythe* v. *Henniker*, 2 My. & K. 635; *Anon*, 2 Ch. Ca. 4; *Culpepper* v. *Aston*, 2 Ch. Ca. 115; *Johnson* v. *Child*, 4 Hare, 87; *Binns* v. *Nichols*, L. R., 2 Eq. 256.

(*k*) *Sproule* v. *Prior*, 8 Sim. 189; *Birds* v. *Askey*, (No. 2) 24 Bea. 618; *Lord Lilford* v. *Powys Keck*, L. R., 1 Eq. 347. The earlier cases of *Austen* v. *Halsey*, 6 Ves. 484; *Coppin* v. *Coppin*, 2 P. W. 291; *Trimmer* v. *Bayne*,

Effect of Locke King's Act.

Since Locke King's Act (*l*) not only specific and pecuniary legatees, but also residuary legatees and next of kin, are entitled to have mortgage debts and other charges on the land of the testator or intestate, as between themselves and the devisee or heir, thrown on the land in exoneration of the personal estate, unless the operation of the act is excluded. In cases where it is excluded, however, the old rule as to marshalling applies, and therefore if a testator directs his mortgage debts to be satisfied out of his personal estate, the pecuniary legatees are entitled to have the assets marshalled under the old rule (*m*).

Locke King's Act has not taken away any right of marshalling.

In *Buckley* v. *Buckley* (*n*) a testator gave annuities charged on real estate and not payable out of the personalty: the real estate was subject to mortgages: as the mortgagees had two funds to resort to—the real estate and the personal estate—and the annuitants had only one—the real estate—it was held that the annuitants were entitled to marshal the assets so as to throw the mortgage debts on the personal estate in exoneration of the realty. Locke King's Act has not made any alteration in the law in questions of this kind.

Paraphernalia.

There are several old cases on the right of a widow to throw the debts of her deceased husband on his real assets, so as to retain her bona paraphernalia (*o*), but the doctrine is of no practical importance at the present day (*p*).

Marshalling, where one party has several funds, and another one only.

Mr. Jarman continues (*q*): "The preceding cases, however, in which equity interferes to prevent an eventual derangement, by the act of third persons, of the order of applying the assets, do not completely exemplify an important principle by which the Courts, in marshalling assets, are governed, and which forms the peculiar feature of the doctrine; it is this,—that wherever a party has a claim upon one fund only, and another upon more than one, the party having several funds must resort, in the first instance, to that on

9 Ves. 209; 4 Russ. 339, n.; *Pollexfen* v. *Moore*, 3 Atk. 272; *Headley* v. *Readhead*, Coop. 50; *Selby* v. *Selby*, 4 Russ. 336, are commented on in the earlier editions of this work.

(*l*) Ante, p. 2047.

(*m*) *Porcher* v. *Wilson*, 14 W. R. 1011; *Re Smith*, [1899] 1 Ch. 365, not following *Smith* v. *Smith*, 10 Ir. Ch. R. pp. 89, 461, and *Burley* v. *Armstrong*, 12 Ir. Ch. R. 270.

(*n*) 19 L. R. Ir. 544. If a judgment creditor has a right to enforce payment of his debt out of property over which the testator had no power of disposition by will, the beneficiaries under the will have no equity of marshalling as against that creditor; *Douglas* v. *Cooksey*, Ir. R., 2 Eq. 311.

(*o*) *Tipping* v. *Tipping*, 1 P. W. 729; *Tynt* v. *Tynt*, 2 P. W. 542, and cases referred to in Mr. Cox's note; *Boynton* v. *Parkhurst*, 1 Br. C. C. 576.

(*p*) See *Masson, Templier & Co.* v. *Defries*, [1909] 2 K. B. 831, ante, p. 2028.

(*q*) First ed. Vol. II. p. 606.

CHAPTER LIV.

which the other has no claim, or, in other words, the Court will so arrange the funds as to let in as large a number of claims as possible, and if the person having the several funds should, in violation of this rule, have resorted to the fund common to himself and the person having no other fund, the Court will place that person in his room, to the extent to which the common fund has been so applied (*r*).

"This principle is applied in favour of both creditors and legatees" (*s*).

Effect of stats. 3 & 4 Will. 4, c. 104, and 32 & 33 Vict. c. 46, upon the doctrine.

In regard to the former, however, it is to be remembered that the statute of 3 & 4 Will. 4, c. 104 (*t*), renders all real estate, including copyholds, liable to the claims of creditors of every class, and that Hinde Palmer's Act (stat. 32 & 33 Vict. c. 46) places specialty and simple contract creditors on an equal footing. 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 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 (*u*).

Marshalling among legatees.

Mr. Jarman continues (*uu*) "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.

(*r*) The general principle of marshalling which is laid down by Lord Eldon in *Aldrich* v. *Cooper*, 8 Ves. 382, has been already referred to in connection with gifts to charities (ante, Vol. I. p. 264). It is hardly necessary to say that it is not confined to the administration of assets: *Aldrich* v. *Cooper* (supra). It will not be applied to the prejudice of third persons, *Dolphin* v. *Aylward*, L. R., 4 H. L. 486.

(*s*) As to creditors, see *Neave* v. *Alderton*, 1 Eq. Ca. Abr. 144, pl. 21; *Aldrich* v. *Cooper*, supra. *Hazlewood* v. *Pope*, 3 P. W. 322; *Chapman* v. *Egar*, 18 Jur. 341, and other cases cited ante, p. 2021: *M'Carthy* v. *M'Cartie*, [1904] 1 Ir. R. 100. Where there was delay in payment of the simple contract creditors, they were held not entitled to stand in the place of 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; *Wilson* v. *Fielding*, 2 Vern. 763; *Selby* v. *Selby*, 4 Russ. 336. As to the effect of a devastavit, see *Ellard* v. *Cooper*, 1 Ir. Ch. R. 376.

(*t*) Ante, p. 1987.

(*u*) This rule is not affected by Part I. of the Land Transfer Act, 1897; *Re Kempster*, [1906] 1 Ch. 446.

(*uu*) First ed. Vol. II. p. 607.

"Thus, in *Hanby* v. *Roberts* (*v*), 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, *with the payment of which he charged his real estate;* the personal estate having been exhausted in the payment of the £3,000 legacy, Lord *Hardwicke* held that the other pecuniary legatees should stand in the place of the satisfied legatee to this extent.

Exception where legacy, as a charge upon the land, failed.

"But in *Prowse* v. *Abingdon* (*w*), Lord *Hardwicke* refused to marshal assets in favour 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 (*x*); 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 (*y*); and this has been since followed in *Pearce* v. *Loman*" (*z*).

Demonstrative legacies.

The rule as to marshalling applies to demonstrative legacies; and accordingly, if there are two demonstrative legacies, one payable out of fund A., and the other out of funds A. and B., the legatee of the latter legacy must first exhaust fund B., and if there is a deficit, he and the other legatee resort pari passu to fund A. (*a*).

X.—Estates of Married Women.—A few special rules applying to married women may be here referred to. A husband who pays his wife's funeral expenses is entitled to be repaid out of her separate estate (*b*).

Funeral expenses.

A married woman who lends money to her husband for the purpose of his business is postponed to his other creditors, if his estate is insolvent and is administered by the Court (*c*). But if she is his executrix she can retain the amount out of assets in her hands (*d*).

Loan to husband.

(*v*) Amb. 127, 2 Coll. 512, s. c., s. n. *Hamly* v. *Fisher*, Dick. 104. See also *Masters* v. *Masters*, 1 P. W. 421 (referring to *Hyde* v. *Hyde*, 3 Ch. R. 83); *Bligh* v. *Earl of Darnley*, 2 P. W. 619; *Norman* v. *Morrell*, 4 Ves. 769; *Bonner* v. *Bonner*, 13 Ves. at p. 383; *Scales* v. *Collins*, 9 Hare, 656.

(*w*) 1 Atk. 482.

(*x*) "As to this doctrine, see ante, p. 1394; 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." (Note by Mr. Jarman.)

(*y*) "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?" (Note by Mr. Jarman.)

(*z*) 3 Ves. 135.

(*a*) *Sellon* v. *Watts*, 9 W. R. 847.

(*b*) *Willeter* v. *Dobie*, 2 K. & J. 647; *Re M'Myn*, 33 Ch. D. 575.

(*c*) *Re Leng*, [1895] 1 Ch. 652.

(*d*) *Re May*, 45 Ch. D. 499; *Re Ambler*, [1905] 1 Ch. 697.

CHAPTER LIV.

Separate property.

Property belonging to a married woman for her separate use under the doctrines of equity, is equitable assets, distributable among her creditors pari passu (*e*). And earnings made her separate estate by the M. W. P. Act, 1870, followed the same rule (*f*). Whether property made the separate estate of a married woman by the M. W. P. Act, 1882, is legal or equitable assets has not yet been decided. By the Married Women's Property Act, 1893, the contracts of a married woman, entered into since the 5th of December, 1893, bind her after-acquired free separate estate, whether she had separate estate at the time or not (*g*).

Restraint on anticipation.

The contracts of a married woman bind only her free separate estate, and not such estate as is subject to a restraint on anticipation. But it seems that property derived from her separate estate which she is restrained from anticipating (such as the arrears of an annuity subject to restraint) is on her death liable to her debts; whether this is so or not it has been decided that she makes it liable if by her will she directs her debts to be paid (*h*).

Power of appointment.

The effect of the Married Women's Property Act, 1882, is that the execution of a general power by will by a married woman makes the property appointed liable for her debts, contracted between the 31st December, 1882, and the 5th December, 1893, provided that she had separate estate at the time they were contracted (*i*). If contracted since the latter date, it is immaterial whether she had separate estate or not (*j*). Even as regards debts contracted before 1883, property appointed by a married woman by will under a general power is liable for her ante-nuptial debts (*k*), and for debts contracted by her while under a protection order (*l*). Under the old law the better opinion seems to have been that the execution by a married woman of a general power of appointment by will only did not make the property subject to her engagements (*m*): but she could of course charge it by her will, expressly or by implication,

(*e*) By "creditors" is here meant persons contracting with a married woman with reference to and upon the credit of her separate estate belonging to her at the time and free from any restraint on anticipation; *Pike* v. *Fitzgibbon*, 17 Ch. D. 454, and cases there cited. See also the authorities cited in *Re Poole's Estate*, 6 Ch. D. 739. As to the case of a married woman, subject to the old law, who survives her husband and then dies leaving "engagements" contracted by her during coverture, see *Mayd* v. *Field*, 3 Ch. D. 587, commented on in *Re Roper*, 39 Ch. D. 482.

(*f*) *Re Poole's Estate*, supra.

(*g*) As to the law under the Act of 1882, see *Palliser* v. *Gurney*, 19 Q. B. D. 519; *Stogdon* v. *Lee*, [1891] 1 Q. B. 661.

(*h*) *Sprange* v. *Lee*, [1908] 1 Ch. 424.

(*i*) Sec. 4; *Re Fieldwick*, [1909] 1 Ch. 1, overruling *Re Ann*, [1894] 1 Ch. 549. The scope of the Act is extended by the M. W. P. Act, 1893.

(*j*) M. W. P. Act, 1893.

(*k*) *Re Parkin*, [1892] 3 Ch. 510.

(*l*) *Re Hughes*, [1898] 1 Ch. 529.

(*m*) The authorities are cited in *Re Roper*, 39 Ch. D. 482. See also *Re Hodgson*, [1899] 1 Ch. 666.

with her "debts" (*n*). And if property was limited to a married woman for life for her separate use, with a general power of appointment by will, it seems that it became assets for payment of her engagements, if she so exercised the power as to make the property her separate estate, or if there was a limitation in default of appointment to her heirs or (in the case of personal property) to her executors or administrators (*o*).

Order of application.

Where property becomes assets for payment of the debts of a married woman by reason of its being subject to a power of appointment which she has exercised, her separate estate must first be exhausted (*p*).

(*n*) *Re De Burgh Lawson*, 41 Ch. D. 568.

(*o*) *Johnson* v. *Gallagher*, 3 D. F. & J. 494; *London Chartered Bank* v. *Lemprière*, L. R., 4 P. C. 572; *Re Harvey's Estate*, 13 Ch. D. 216; *Hodges* v. *Hodges*, 20 Ch. D. 749; Farwell on Powers, 263. See Chapter XXIII.

(*p*) *Re Hodgson*, [1899] 1 Ch. 666. See *Re Isabel Williams*, 59 L. T. 310, where a married woman made a will disposing of her separate estate and exercising a general power of appointment and containing a trust for payment of her debts; she survived her husband and died in 1887 without having republished the will; during widowhood she contracted debts and became entitled to personal estate, which, under the law as it then stood, did not pass by her will; it was held that this personal estate and her separate estate were liable rateably for her debts, before the appointed property. See *Re Price*, 28 Ch. D. 709; Married Women's Property Act, 1893, s. 3; *Re Wylie*, [1895] 2 Ch. 116, ante, p. 59.

CHAPTER LV.

LIMITATIONS TO SURVIVORS.

PAGE

I. *On construing Survivor as synonymous with Other:—*
- (1) *Survivor if unexplained is construed strictly* 2100
- (2) *Effect of Gift over following a Gift to Survivors* 2104
- (3) *The so-called "Stirpital" Construction* 2107
- (4) *As to construing "Survivor" as "Other" after an Estate Tail* 2110
- (5) *As to construing "Survivor" as "Longest Liver"* 2114

II. *As to Clauses of Accruer:—*
- (1) *Whether Accruing Shares are subject to Clauses of Accruer* .. 2115
- (2) *Whether Qualifications affecting Original Shares extend to Accruing Shares* 2117

III. *Words of Survivorship, to what Period referable:—*
- (1) *Where the Gift is immediate* 2120
- (2) *Where the Gift is not immediate; Rule in* Cripps *v.* Wolcott... 2122
- (3) *Gifts to Survivors upon a Contingency* 2132
- (4) *Rule where the Period of Distribution depends on two Events, one Personal, the other not* 2139
- (5) *Words amounting to an Express Gift to the Survivor*..... 2141

"Survivors" when construed *other*.

I.—On construing Survivor as synonymous with Other.—(1) *Survivor if unexplained is construed strictly.*—Mr. Jarman remarks (*z*): "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*).

(*z*) First ed. Vol. II. p. 609.

(*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. It is submitted that the decision in *Re Connellan's Trust*, 16 Ir. Ch. 524, would not now be followed. It seems that "others or other" is not read as "survivors or survivor": *Re Chaston*, 18 Ch. D. 218; *Re Hagen's Trusts*, 46 L. J. Ch. 665.

[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."

Primâ facie the word "survivor" is taken in its natural meaning.

The cases of *Ferguson* v. *Dunbar* (*b*), *Milsom* v. *Awdry* (*c*), *Davidson* v. *Dallas* (*d*), *Crowder* v. *Stone* (*e*), *Ranelagh* v. *Ranelagh* (*f*), *Cromek* v. *Lumb* (*g*), *Winterton* v. *Crawfurd* (*h*), *Leeming* v. *Sherratt* (*i*), *Lee* v. *Stone* (*j*), and *De Garagnol* v. *Liardet* (*k*), all of which are stated in the last edition of this work, are authorities in favour of the proposition that primâ facie the words "survivors" or "survivor" are to be construed in their literal and natural sense, and the recent case of *Inderwick* v. *Tatchell* (*l*) in the House of Lords is a strong authority in favour of this proposition. In that case the testator gave seven portions of his property in trust for his seven children for their respective lives, and upon their respective deceases upon trust to convey to their respective children then living as tenants in common absolutely, with a proviso that in the event of any of the testator's children dying without leaving children entitled to their, his, or her share under the will, then the shares of such children should go to "their then surviving brothers and sisters" as tenants in common for their respective lives, and after their respective decease to their respective children, and if there should be but one such surviving brother or sister, then to him or her absolutely. All the seven children survived the testator: three sons died without issue, then a fourth son died leaving children, and then a daughter died without issue: it was held that the children of the fourth son were not entitled to participate in the daughter's share. Referring to the words "then surviving," Lord Halsbury, C., said: "Reading the words as I think they ought to be read, in their natural and ordinary construction, the will is intelligible and is rational, and even if I thought the result was unjust there is no canon of construction

(*b*) 3 B. C. C. 468, n.

(*c*) 5 Ves. 465. See also *Wollen* v. *Andrews*, 9 J. B. Moo. 248, 2 Bing. 126.

(*d*) 14 Ves. 576. See also *Mann* v. *Thompson*, Kay, pp. 644, 645, and *Re Dunlevy's Trusts*, 9 L. R. Ir. 349.

(*e*) 3 Russ. 217.

(*f*) 2 My. & K. 441.

(*g*) 3 Y. & C. 565.

(*h*) 1 R. & My. 407.

(*i*) 2 Hare, 14. See also *Willetts* v. *Willetts*, 7 Hare, 38, and *Moate* v. *Moate*, 16 Jur. 1010.

(*j*) 1 Ex. 674. See also *Stead* v. *Platt*, 18 Bea. 50; *Parsons* v. *Coke*, 4 Drew. 296; *Greenwood* v. *Percy*, 26 Bea. 572; *Re Corbett's Trusts*, Joh. 591; *Blundell* v. *Chapman*, 33 Bea. 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.

(*k*) 32 Bea. 608 (where the gift over was to survivors of a different class). See also *Re Usticke*, 35 Bea. 338; *Taylor* v. *Beverley*, 1 Coll. 108 (gift to one child for life, and if she die without issue, to testator's surviving children); *Re Bates*, 11 W. R. 768.

(*l*) [1903] A. C. 120.

CHAPTER LV.

which entitles me on that ground to alter my construction of the words as they stand. The only question, therefore, is whether there is anything in the context which enables me to read these words in a sense different from that which they ought in the ordinary use of the English language to bear" (*m*).

It may now be taken as settled that where the gift is to A., B., and C. equally for their respective lives and after the death of any to his children, but if any die without children to the survivors for life with remainder to their children, only children of survivors can take under the gift over (*n*).

The mere circumstance that there occurs in the same will, in reference to another subject or other subjects, an instance of the words "survivor" and "other" being used conjunctively and as if synonymous, is not considered to imply an intention that "survivor," standing alone, shall have the same force or signification as the term with which, in other instances, the testator has associated it (*o*).

Effect where gift over is combined with a collateral event.

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 cases referred to above did not apply, but that the word "survivor" might be construed *other*, on the ground, it should seem, that, as in such cases the ulterior or substituted gift is not to take effect absolutely and simply on the decease of the prior objects, it is the less likely that the testator should intend survivorship to be an essential ingredient in the qualification of the ulterior or substituted legatees.

Word "survivor" construed *other*.

In that case, a testator bequeathed 1500*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

(*m*) Other recent cases in favour of construing the word "survivor" according to its natural meaning are, *Harrison* v. *Harrison*, [1901] 2 Ch. 136; *Re Robson*, [1899] W. N. 260; and *Garland* v. *Smyth*, [1904] 1 Ir. 35. See also *Browne* v. *Rainsford*, I. R., 1 Eq. 384; *Twist* v. *Herbert*, 28 L. T. 489.

(*n*) This is known as the first rule in *Re Bowman*, 41 Ch. D. 525. If there is added a limitation over in the event of all the tenants for life dying without children, then the case falls within the second rule in *Re Bowman*, post, p. 2104.

(*o*) *Winterton* v. *Crawford*, 1 R. & My. 407. In *Slade* v. *Parr*, 7 Jur. 102, the words "survivors" and "survivor" and "others" and "other" were held to be governed by "others." But "other surviving" is synonymous with "surviving": *Beckwith* v. *Beckwith*, 46 L. J. Ch. 97. "Survivors" means "survivors or survivor": *Bowyer* v. *Douglass*, [1876] W. N. 279; *Bowyer* v. *Currall*, 2 W. R. 328.

(*p*) 7 Sim. 204.

interest in the meantime 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.*"

Remark on doctrine advanced in *Aiton* v. *Brooks.*

Mr. Jarman observes (*pp*): "There appears to be much good sense in the distinction here suggested by his Honor, and had it originally obtained, a large amount of litigation would probably have been prevented; but the authorities seem now to present an insuperable obstacle to its adoption, for, in almost every instance in which the strict construction of the word 'survivor' has prevailed, the gift to the survivors was to take effect in the event of the death of the predeceasing objects without issue, or combined with some other contingency. In *Ferguson* v. *Dunbar*, *Milsom* v. *Awdry*, *Davidson* v. *Dallas*, and lastly in *Crowder* v. *Stone* (which is a 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*)."

Meaning of "survive."

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 affirmative in *Re Clark's Estate* (*r*), but in the negative in *Gee* v. *Liddell* (*s*).

(*pp*) First ed. Vol. II. p. 617.
(*q*) 2 Hare, 14.
(*r*) 3 D. J. & S. 111.
(*s*) L. R., 2 Eq. 341; and see *Trickey* v. *Trickey*, 3 My. & K. 560.

It is submitted that the latter construction is the correct one, since the natural meaning of "survive" is "outlive" and not "live after."

Effect of gift over on death of *all* in a given manner.

(2) *Effect of Gift over following a Gift to Survivors.*—But where a gift to the "survivors" of several legatees, limited to 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." The cases establishing this rule were considered by Kay, J., in *Re Bowman* (*t*), and the result was stated by him to be that where the gift is to A., B., and C. equally for their respective lives, and after the death of any to his children, but if any die without children to the survivors for life, with remainder to their children, with a limitation over, if all the tenants for life die without children, then the children of a deceased tenant for life participate in the share of one who dies without children after their parent (*u*); the cases which establish this rule will be found in *Re Bowman* (*t*), and it has not been thought necessary in this place to state the effect of the cases of *Doe* d. *Watts* v. *Wainewright* (*v*), *Cole* v. *Sewell* (*w*), and *Wilmot* v. *Wilmot* (*x*), which are set out in the last edition of this work.

Re Bowman.

In *Wilmot* v. *Wilmot* (*y*), 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 favourable to this construction; and have since been held sufficient of themselves to shew that by "surviving" the testator meant "other," his assumption obviously being that the others would survive (*z*). 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

(*t*) 41 Ch. D. 525.

(*u*) This is known as the second rule in *Re Bowman*.

(*v*) 5 T. R. 427 (realty settled by deed. Note that cross remainders were not *implied*: that cannot be done in a deed (ante, p. 660); the gift to surviving children was held to create them expressly though inaccurately).

(*w*) 4 D. & War. 1, 2 H. L. C. 186 (realty settled by deed). See also *Smith* v. *Osborne*, 6 H. L. C. 375; *Re Tharp*, 1 D. J. & S. 453. It makes no difference whether the expression used is "survivors" or "such as shall survive": *Re Tharp*. As to gifts to children "then living," see ante, p. 1672.

(*x*) 8 Ves. 10 (personalty). See also *Lucena* v. *Lucena*, 7 Ch. D. pp. 255, 269, stated post, p. 2107. *Re Jackson's Trust*, 14 Ir. Ch. 472; *Re Connellan's Trust*, 16 Ir. Ch. 524; *Jackson* v. *Sparks*, 38 L. J. Ch. 75 (on the special wording of an accruer clause).

(*y*) 8 Ves. 10.

(*z*) *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.

contingency, which can only be secured by means of cross limitations between them.

"Survivors" construed "others" by force of gift over.

In the common case of ...f real or personal estate to several persons for life, with several remainders to their children, and if any of them die without children, then to the survivors for life, and afterwards to their children, 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 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" (*a*). The authorities from Lord Thurlow's time downwards are almost uniformly in favour of reading "survivors" as "others" in such a case (*b*).

What is a sufficient gift over.

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 (*c*). And the gift o...r 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 (*d*).

But if property is given to several as tenants in common for

(*a*) See per James, V.-C., *Badger* v. *Gregory*, L. R., 8 Eq. pp. 84, 85.

(*b*) *Harman* v. *Dickenson*, 1 B. C. C. 91, 5th edition (where the original report is corrected from R. L.); *Lowe* v. *Land*, 1 Jur. 377; *Re Keep's Will*, 32 Bea. 122; *Badger* v. *Gregory*, L. R., 8 Eq. 78; *Waite* v. *Littlewood*, L. R., 8 Ch. 70; *Re Row's Estate*, 43 L. J. Ch. 347; *Re Palmer's Settlement Trusts*, 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 Bea. 498, a gift over was by construction imported from another bequest. Note that in *Ferguson* v. *Dunbar*, 3 B. C. C. 468, n., where "survivors" was construed strictly, the events upon which the gift ... 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 favour of issue.

(*c*) *Wake* v. *Varah*, 2 Ch. D. at p. 357.

(*d*) *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. at p. 573.

Gift over inoperative on the context.

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 (*e*). Here, at least, the argument that the literal construction imputes a capricious 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 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 shews no intention to dispose completely and in a mass of the particular property, will not supply the place of an ultimate gift over (*f*).

The so-called third rule in *Re Bowman* is not good law.

But in *Re Arnold's Trusts* (*g*), 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* (*h*), deciding the contrary, was erroneous. In the case of *Re Bowman* (*i*), Kay, J., followed *Re Arnold's Trusts* and on the authority of that case and the cases of *Hodge* v. *Foot* (*j*), and *Re Walker's Estate* (*k*), enunciated the so-called third rule in *Re Bowman*. But in *Harrison* v. *Harrison* (*l*), Cozens-Hardy, J., after a careful review of the authorities (*m*), decided that the third rule in *Re Bowman* was not warranted by the authorities, and in *Inderwick* v. *Tatchell* (*n*) the Court of Appeal dissented from the third rule in *Re Bowman*; so that at the present

(*e*) *Maden* v. *Taylor*, supra. See *Davidson* v. *Kimpton*, 18 Ch. D. 213; *Re Roper's Estate*, 41 Ch. D. 409; and *King* v. *Frost*, 15 A. C. 548; and distinguish *Cooper* v. *Macdonald*, L. R., 16 Eq. at p. 269, where real estate was devised *in tail*, and the personalty upon which the question arose was directed to go along with it; this case is shortly stated ante, p. 685. See also *Askew* v. *Askew*, 57 L. J. Ch. 629, where the devise was in tail.

(*f*) Semb., see *Maden* v. *Taylor*, 45 L. J. Ch. pp. 569, 575.

(*g*) 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. 2102, n. (*o*). See also *Cross* v. *Maltby*, 20 Eq. 378; *Re Beck's Trusts*, 37 L. J. Ch. 233, 16 W. R. 189.

(*h*) 5 Ves. 465. See *Re Ustieke*, 35 Bea. 338.

(*i*) 41 Ch. D. 525.

(*j*) 34 Bea. 349.

(*k*) 12 Ch. D. 205.

(*l*) [1901] 2 Ch. 136. See also *Garland* v. *Smyth*, [1904] 1 Ir. 35.

(*m*) *Re Benn*, 29 Ch. D. 839 (on this case see *Re Blantern*, W. N. [1891] 54); *Re Corbett's Trusts*, Joh. 591; *Wake* v. *Varah*, 2 Ch. D. 348; *Re Horner's Estate*, 19 Ch. D. 180; *Beckwith* v. *Beckwith*, 46 L. J. Ch. 97, 25 W. R. 282 (stated in the last edition of this work); *Milsom* v. *Awdry*, 5 Ves. 465. See also *Re Rubbins*, 78 L. T. 218, 79 L. T. 313, where Stirling, J., distinguished *Re Bowman*.

(*n*) [1901] 2 Ch. 738. Affirmed in D. P., [1903] A. C. 120.

time it may be considered 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.

"Stirpital" construction.

(3) *The so-called "Stirpital" Construction.* — In *Waite* v. *Littlewood* (*o*), 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.

Lucena v. *Lucena.*

This construction (which was probably suggested by a figure of speech used by the Court in *Doe* v. *Wainewright* (*p*) when describing the operation in that case of cross remainders in tail) was tested in *Lucena* v. *Lucena* (*q*), where a testator gave the residue of his estate in trust for his three sons and three daughters equally, the shares of the 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 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 come into operation, if such son should die without issue (*r*), 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

(*o*) L. R., 8 Ch. at p. 73. See also *Cooper* v. *Macdonald*, L. R., 16 Eq. 258, before the same judge.

(*p*) 5 T. R. 427.

(*q*) 7 Ch. D. 255.

(*r*) 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.

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 predeceased 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 (*s*), 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 children, 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 of all children and issue who are objects of the testator's bounty, are circumstances each of which may properly be relied upon as shewing 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 daughters' 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 circumstances 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

(*s*) As in *Wilmot* v. *Wilmot*, 8 Ves. 10; and see *Forrester* v. *Smith*, 2 Ir. Ch. 70 ("with benefit of survivorship").

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."

The stirpital construction was disapproved by the Court of Appeal in Ireland (*t*), but was adopted by Joyce, J., in the case of *Re Bilham* (*u*), in which the facts were as follows: The testatrix gave one-third of the income of a fund to her daughter M. for life, and after her death one-third of the capital of the fund to all the children of M. whom she might leave surviving who should attain twenty-one in equal shares, and she made similar gifts of the other two-thirds to her daughters C. and E. and their children. And in case of the decease of any of her said three daughters without leaving lawful issue surviving who should attain twenty-one, the testatrix gave the income of the share of the fund thereby given to her said daughters so dying to her surviving daughters in like manner as the income thereinbefore given to them for their respective lives, and after their decease she gave the capital to the children of her said surviving daughters who should attain twenty-one per stirpes; and there was an ultimate gift over of the fund in case of the decease of all the daughters without either of them leaving lawful issue who should attain twenty-one. C. died first, leaving her surviving two children who attained twenty-one, but died in the lifetime of E., the last surviving daughter; M. died next, leaving her surviving two children who attained twenty-one and were still living. E. died last without leaving any issue her surviving. It was held that the word "surviving" ought to be construed "surviving in stock," and that the children of M. were alone entitled to participate in E.'s share.

Re Bilham.

The stirpital construction, in the case where *all* the shares are settled, has thus finally received judicial sanction; but in the present state of the authorities it cannot yet be taken to be established.

In the more recent case of *Re Friend's Settlement* (*v*), real estate was (by deed) settled upon trusts for the six daughters and one son of A. for their respective lives as tenants in common, with remainder as to the share of each tenant for life to his or her child or children who being a son should attain the age of twenty-one, or being a daughter should attain that age or marry, and if more than one as tenants in common in fee; provided that if any one or more of the seven tenants for life should die without issue, or leaving issue and such issue being a son, should die under the age of twenty-one, or being a daughter should die under that age without having

Re Friend's Settlement.

(*t*) *O'Brien* v. *O'Brien*, [1896] 2 Ir. 459.

(*u*) [1901] 2 Ch. 169.

(*v*) [1906] 1 Ch. 47.

CHAPTER LV.

been married, then the original as well as the accrued share of any such tenant for life should go and be equally divided between the survivors and survivor of these, the said seven tenants for life and their, her and his issue respectively for such estates and interests and in such shares and proportions in all respects as the original shares of the seven tenants for life were directed to be divided; and there was an ultimate limitation to the settlor in fee if all the seven tenants for life died without leaving issue who should live to attain twenty-one or marry as aforesaid. Four of the tenants for life died without issue. Another married and died leaving one child who attained twenty-one and afterwards died. Another married and died leaving several children, all of whom attained twenty-one and some of whom were still living. Farwell, J., distinguished *Re Bilham*, and held that the words "survivors and survivor" must be construed "others and other," and that all the children of tenants for life who attained twenty-one acquired absolute vested interests, irrespective of whether they did or did not survive deceased tenants for life or the tenant for life who was still living. The learned judge relied on the words "in the same manner in all respects."

"Survivors" construed *others* after an estate tail.

(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* (*w*), 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 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* (*x*), where the devise was to "grandchildren their heirs male and the heirs male of the survivors and survivor for ever," 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 (*y*) *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 (*z*).

(*w*) Joh. at p. 597.
(*x*) L. R., 20 Eq. 194.
(*y*) As to this, see ante, p. 1783.
(*z*) *Barlow* v. *Salter*, 17 Ves. 479, ante, p. 2100, n. (*a*). See also *Williams* v. *James*, 20 W. R. 1010, presently stated, which turned on its special language.

Smith v. *Osborne.*

In *Smith* v. *Osborne* (*a*), 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 (*b*) of his daughters should die without issue, that 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."

Williams v. *James.*

But, of course, such ultimate gift over is not the only means of shewing an intention in cases of this class to use the word "surviving" in the sense of "other." Thus, in *Williams* v. *James* (*c*), 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 of 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

(*a*) 6 H. L. C. pp. 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. 126.

(*b*) 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. at p. 74. And in *Cole* v. *Sewell*, supra, p. 2104, Sir E. Sugden adverted to "the event upon which the estate was to go over" as a ground on putting the more liberal construction on "survivors or survivor": i.e. he collected the intent without resorting to the description of the donee.

(*c*) 20 W. R. 1010.

CHAPTER LV.

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.

"Survivors" read "others" to effect intention that children should stand in their parents' place.

In *Eyre* v. *Marsden* (*d*), "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 (*e*) 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. under 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

(*d*) 4 My. & C. 231, affirming 2 Kee. 564.

(*e*) See s. II.

(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."

"Survivor" in gift of residue explained by another clause referring to it.

Again, in *Hawkins* v. *Hamerton* (*f*), 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 amongst the children of his (testator's) three daughters as hereinafter 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 daughter 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 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 shewed 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."

"Survivors" not read "others" if the gift thereby becomes too remote.

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* (*g*), 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

(*f*) 16 Sim. 410, 13 Jur. 2.

(*g*) 2 Coll. 331.

CHAPTER LV.

"other," such failure would have been indefinite; Sir J. Knigh Bruce, V.-C., therefore refused to adopt the latter construction.

Can "survivor" mean "longest liver"?

(5) *As to construing "Survivor" as "Longest Liver."*—The wor "survivor" requires a context. Survivor of whom? Survivo when? (*h*) But in some cases the words "survivors or survivor" have been held to mean "longest livers or longest liver" (*i*) in spite of the difficulty that a person cannot survive himself

Maden v. *Taylor.*

Thus in *Maden* v. *Taylor* (*j*), the testator gave property in trust fo four nieces as tenants in common for their lives, and after the deat of any of them in trust as to her share for her children, and in eas any of the nieces should die without leaving issue living at her deat her share was to go to the survivors or survivor of them and he heirs; the last survivor was unmarried and beyond the age of child-bearing, and Jessel, M.R., held that she took her one-fourth absolutely. The decision was followed by Fry, J., in *Davidson* v. *Kimpton* (*k*) (where, however, the decision can be supported on the ground that in the first instance there was an absolute gift to the daughters), and by Chitty, J., in *Re Roper's Estate* (*l*); but the contrary construction had been adopted by Sir W. Page Wood in *Re Corbett's Trusts* (*m*), and *Maden* v. *Taylor* had been disapproved by Kay, J., in *Re Mortimer* (*n*), and by North, J., in *Askew* v. *Askew* (*o*). Subsequently, in *King* v. *Frost* (*p*), the Privy Council rejected the contention that "survivor" meant "longest liver," so that *Maden* v. *Taylor* may be considered as overruled (*q*), and the view that a person can survive himself as unsupported by the highest authorities.

General conclusion from the cases.

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 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."

(*h*) See per Lord Halsbury, C., in *Inderwick* v. *Tatchell*, [1903] A. C. at p. 123.

(*i*) See per Lord Westbury, *Taaffe* v. *Conmee*, 10 H. L. C. at p. 78.

(*j*) [1876] 45 L. J. Ch. 569. See *Nevill* v. *Boddam*, 28 Bea. 554; *Haddelsey* v. *Adams*, 22 Bea. 266, and analogous cases, *Smart* v. *Clark*, 3 Russ. 365; *Tilson* v. *Jones*, 1 R. & My. 553; *Bowen* v. *Scowcroft*, 2 Y. & C. 640; post, p. 2152.

(*k*) 18 Ch. D. 213.

(*l*) 41 Ch. D. 409; and also in an Irish case, *Re Hutchins*, 19 L. R. Ir. 215.

(*m*) Joh. 591.

(*n*) 33 W. R. 441.

(*o*) 36 W. R. 620.

(*p*) 15 A. C. 548.

(*q*) *Ranelagh* v. *Ranelagh*, 41 W. R. 549. See also *Nevill* v. *Boddam*, 28 Bea. 554; *Re Hill to Chapman*, 33 W. R. 570, 54 L. J. Ch. 595; *Olphert* v. *Olphert*, [1903] 1 Ir. 326 (in which, as in *Davidson* v. *Kimpton*, there was an absolute gift in the first instance).

But the present state of the authorities seems hardly to justify the hope that litigation has reached its limits on this often-occurring slip, and should teach to framers of wills the necessity of increased attention to its avoidance.

II.—As to Clauses of Accruer.—(1) *Whether Accruing Shares are subject to Clauses of Accruer.*—Mr. Jarman states the rule thus:—(*qq*) "It has long been an established rule, that clauses disposing of the shares of devisees and legatees dying before a given period, do not, without a positive and distinct indication of intention, extend to shares accruing under the clauses in question. 'As where a man gives a sum of money to be divided amongst four persons as tenants in common, and declares, that if one (qu. any) of them 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' (*r*).

"This doctrine, though it has been much disapproved of, is now well established (*s*); 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 early period (*t*) has been held *not* to have this operation, though the contrary was decided by Lord *Hardwicke* in the case of *Pain* v. *Benson* (*u*); but the authority of this case has been repeatedly denied (*v*), and the point has long ceased to be the subject of controversy."

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 (*w*).

Word "*portion*" does not carry accruing share, unless aided by the context.

(*qq*) First ed. Vol. II. p. 621.

(*r*) Per Lord Hardwicke in *Pain* v. *Benson*, 3 Atk. at p. 80. See also *Perkins* v. *Micklethwaite*, 2 Ch. Rep. 171, 1 P. W. 274; *Rudge* v. *Barker*, Cas. t. Talb. 124; *Barnes* v. *Ballard*, before Lord King, cit. 3 Atk. 79; *Fitzgerald* v. *Fitzgerald*, I. R. 7 Eq. 436.

(*s*) *Ex parte West*, 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 Bea. 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 arguments against the decision in *Worlidge* v. *Churchill* (post) unnecessary.

(*t*) *Woodward* v. *Glasbrook*, 2 Vern. 388; *Crowder* v. *Stone*, 3 Russ. 217; *Jones* v. *Hall*, 16 Sim. 500; *Goodwin* v. *Finlayson*, 25 Bea. 65; *Evans* v. *Evans*, ib. 81; *Maddison* v. *Chapman*, 4 K. & J. at p. 716; *Cambridge* v. *Rous*, 25 Bea. at p. 416; *Rickett* v. *Guillemard*, 12 Sim. 88.

(*u*) 3 Atk. 78.

(*v*) See *Ex parte West*, 1 B. C. C. 575; *Vandergucht* v. *Blake*, 2 Ves. jun. 534.

(*w*) *Bright* v. *Rowe*, 3 My. & K. 316; *Perkins* v. *Micklethwaite*, 1 P. W. 274.

Mr. Jarman continues (*ww*): "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 (*x*)."

Effect of ultimate gift over extends to intermediate accrue.

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 (*y*).

"Benefit of survivorship" held to carry accrued shares.

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 (*z*). It seems also that

"Interest."

"share and interest" will carry accrued shares proprio vigore (*a*).

"His or her share or *shares*."

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 (*b*).

In *Vandergucht* v. *Blake* (*c*), 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

(*ww*) First ed. Vol. II. p. 622.

(*x*) *Worlidge* v. *Churchill*, 3 B. C. C. 465; *Eyre* v. *Marsden*, 2 Keen, 564, 4 My. & C. 231; *Sillick* v. *Booth*, 1 Y. & C. C. C. pp. 121, 739; *Langley* v. *Langley*, 6 L. R. Ir. 277. See also *Leeming* v. *Sherratt*, 2 Hare, 14, and *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.

(*y*) *Doe* d. *Clift* v. *Birkhead*, 4 Ex. 110, expressly overruling *Edwards* v. *Alliston*, 4 Russ. 78; *Douglas* v. *Andrews*, 14 Bea. 347. See also *Dutton* v. *Crowdy*, 33 Bea. 272; *Re Henriques' Trusts*, [1875] W. N. 187 (settlement).

(*z*) See *Re Crawhall's Trusts*, 8 D. M. & G. 480. See, however, *Vorley* v. *Richardson*, ib. 126.

(*a*) Per Romilly, M.R., *Douglas* v. *Andrews*, 14 Bea. at p. 353; and see *Re Henriques' Trusts*, [1875] W. N. 187; also *Goodman* v. *Goodman*, 1 De G. & S. 695, 12 Jur. 258.

(*b*) *Wilmot* v. *Flewitt*, 11 Jur. N. S. 820. *Re Chaston*, 18 Ch. D. 218. See also *Re Jarman's Trusts*, L. R., 1 Eq. 71, post, p. 2118.

(*c*) 2 Ves. jun. 534.

remainders 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 to C., the last survivor: but Sir R. P. Arden, M.R., decided that such portion belonged to B.'s administrator.

Accruing shares not necessarily subject as the original.

(2) *Whether Qualifications affecting Original Shares extend to Accruing Shares.*—"It may be observed," says Mr. Jarman (*cc*), "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 (*d*); 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 (*e*).

"So, where a testator limits an estate to three or more objects, subject to many provisions, with a devise over 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 (*f*). . . .

Unequal division.

"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

(*cc*) First ed. Vol. II. p. 626.

(*d*) *Vandergucht* v. *Blake*, 2 Ves. jun. 534; *Ranelagh* v. *Ranelagh*, 4 Bea. 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.

(*e*) As to what is and is not such, see also ante, Chap. XIX.

(*f*) *Georges* v. *Georges*, Hayes's Inquiry, 52; *Gibbons* v. *Langdon*, 6 Sim. 260. Mr. Jarman's statement of *Georges* v. *Georges* is omitted.

CHAPTER LV.

relative proportions (*g*)." Neither will words creating a tenancy in common in a gift of original shares be extended by implication to accrued shares (*h*). But in *Eyre* v. *Marsden* (*i*), 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.

Gift of accrued shares "in the same manner" as original.

Survivorship clauses are not often so split up as in *Georges* v. *Georges* (*j*): 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 (*k*). 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"; 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 (*l*). And in *Re Jarman's Trusts* (*m*), where, after a life estate in the whole to his wife, a testator bequeathed a sum of money to his 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.

"Shares" held to include original and accrued shares consolidated by previous provision.

(*g*) *Walker* v. *Main*, 1 J. & W. 1.
(*h*) *Jones* v. *Hall*, 16 Sim. 500; *Leigh* v. *Mosley*, 14 Bea. 605.
(*i*) 2 Kee. 564, ante, p. 2112; not appealed on this point, 4 My. & C. 231.
(*j*) Hayes's Inquiry, 52.
(*k*) *Milsom* v. *Awdry*, 5 Ves. 465; *Melsom* v. *Giles*, L. R., 5 C. P. 614, 6 C. P. 532, 6 H. L. 24. *Cursham* v. *Newland*, 2 Bea. 145 ("in the same manner.")
(*l*) *Re Hutchinson's Settlement*, 5 De G. & S. 681. See *Moore* v. *Godfrey*, 2 Vern. 620.
(*m*) L. R., 1 Eq. 71.

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 (*n*).

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 (*o*).

Effect where qualification is necessary to validity of gift of accruing shares.

"Here it is proper to observe," remarks Mr. Jarman (*oo*), "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 the case of *Trickey* v. *Trickey* (*p*), where a testator bequeathed the residue of his personal estate to trustees in trust for his daughter, and after her decease for all and every the child or children of his daughter, share and share alike, when they should respectively attain twenty-one, with maintenance in the meantime; 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

Gifts of accrued shares supported by engrafting thereon a qualification expressly applied to original shares.

(*n*) *Carver* v. *Burgess*, 18 Bea. 541.

(*o*) *Re Ridge's Trusts*, L. R., 7 Ch. 665. See also *Heusman* v. *Pearse*, ib. at p. 285, where the words "then living" were got over on much the same principle.

(*oo*) First ed. Vol. II. p. 629.

(*p*) 3 My. & K. 560.

CHAPTER LV.

the share or shares of such child or children should go to the survivor or survivors, and the issue of any deceased child or children who should marry and die under twenty-one, to be equally divided between them if more than one; the issue of any deceased child or children to stand in the place of the parent or parents, with a limitation over, *provided there should be no child of his daughter, or, there being any such, no one of them should live to attain twenty-one nor leave any issue who should live to attain that age.*"

By a codicil the testator willed that, on failure of children and grandchildren of his daughter, as in his will was expressed, his bank stock, &c., should be transferred to certain relations. It was contended that the testator's intention was that all such grandchildren of his daughter as should attain twenty-one should take a vested interest, and that the limitation over, which was to take effect only upon failure of such grandchildren was too remote; but Sir *J. Leach*, M.R., observed that it was "reasonable to intend that the testator meant that the same grandchildren, who, by the former clause, were to take their parent's original share should take that portion of the share which accrued by the death of another child of the daughter without leaving issue, and which their deceased parent, if living, would have taken, namely, the grandchildren only *who should survive the daughter*. If the prior gifts were only in favour of grandchildren who should survive the daughter, the gift over must be intended to take effect upon the failure of the former gifts."

To what period survivorship referable.

III.—Words of Survivorship, to what Period referable.—(1) *Where the Gift is immediate.*—Mr. Jarman continues (*pp*): "Another question which arises under gifts to survivors is, whether they mean survivors indefinitely or survivors at some specific point of time. Where the objects are tenants in common, it was for a long period considered that indefinite survivorship being inconsistent with a tenancy in common, some period was to be found to which the words of survivorship could be referred. This reasoning, however, is obviously inconclusive; for although survivorship is not incident to a tenancy in common, yet there is no inconsistency between a tenancy in common and an *express* limitation to survivors (*q*). The testator's intention that the

(*pp*) First ed. Vol. II. p. 631.

(*q*) See judgment in *Doe* d. *Borwell* v. *Abey*, 1 M. & Sel. 428; *Taaffe* v. *Conmee*, 10 H. L. C. at p. 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.

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.

When the gift is *immediate*.

"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.

Survivorship referred to *death of testator*.

"Thus, in the case of *Lord Bindon* v. *Earl of Suffolk* (*r*), where a testator bequeathed £20,000 (due to him from the Crown) to his five grandchildren, share and share alike, equally to be divided between them, *and if any of them died, his share to go to the survivors and survivor of them*; Lord *Cowper* said, that by the first words it was very plain that the legatees were tenants in common, and by the subsequent words it must be intended, if any of them should die *in the lifetime of the testator*. This decree, however, was reversed in the House of Lords, on the ground that the words in question referred not to the death of the testator, but to the time of receiving the money, which was a debt due from the Crown of rather a desperate nature; but the principle of Lord *Cowper's* decision has since been repeatedly recognised (*s*).

"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, *and to the longest liver*, in fee simple; (there were some intervening words, which are immaterial to the point in question); and it was held, that one child who alone survived the testator took the whole."

Notwithstanding prior gifts of annuities.

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

(*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. See also *Forrester* v. *Smith*, 2 Ir. Ch. 70.

(*s*) See *Roebuck* v. *Dean*, 2 Ves. jun. at p. 267; *Russell* v. *Long*, 4 Ves. 551; *Bass* v. *Russell*, Taml. 18; *Clarke* 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, p. 2142; *Blisset* v. *Cranwell*, 1 Salk. 226; *Doe* d. *Borwell* v. *Abey*, 1 M. & Sel. 428, post, p. 2141.

CHAPTER LV.

the construction: i.e. the fund would vest in possession in such children as survived the testator, subject only to the particular charges (*u*).

Where gift *not immediate.*

(2) *Where Gift is not immediate; Rule in* Cripps *v.* Wolcott.—"Where, however," says Mr. Jarman (*uu*), "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 reasoning of this kind, survivorship was held, in cases of this sort, to refer to the period of the testator's decease."

Remarks upon the cases prior to *Cripps* v. *Wolcott.*

In the earlier editions of this work, after a statement of the cases of *Stringer* v. *Phillips* (*v*), *Rose* d. *Vere* v. *Hill* (*w*), *Wilson* v. *Bayly* (*x*), *Roebuck* v. *Dean* (*y*), *Perry* v. *Woods* (*z*), *Maberly* v. *Strode* (*a*), *Brown* v. *Bigg* (*b*), *Garland* v. *Thomas* (*c*), *Edwards* v. *Symons* (*d*), and *Doe* d. *Long* v. *Prigg* (*e*) (in all of which survivorship was referred to the death of the testator or testatrix), Mr. Jarman continues as follows (*ee*):—"This case (*f*) closes the long series of authorities in favour 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

(*u*) See *Lill* v. *Lill*, 23 Bea. 446, and an analogous point, ante, p. 1671.

(*uu*) First ed. Vol. II. p. 633.

(*v*) 1 Eq. Ca. Ab. 293; but see 1 Cox's P. W. 97, n. In Eq. Ca. Ab. the legacy is inaccurately stated as given to the five legatees. Note, however, that they all survived the testator's sisters.

(*w*) 3 Burr. 1881.

(*x*) 3 B. P. C. Toml. 195, reversing decree in the Irish Chancery; see the will more fully stated, ante, Vol. I. p. 614.

(*y*) 2 Ves. jun. 265. As to this case, see Sir W. Grant's judgment in *Hallifax* v. *Wilson*, 16 Ves. at p. 171; and Sir J. Leach's in *Cripps* v. *Wolcott*, 4 Mad. at p. 15, post, p. 2128.

(*z*) 3 Ves. 204.

(*a*) 3 Ves. 450. But see *Gibbs* v. *Tait*, 8 Sim. 132.

(*b*) 7 Ves. 279.

(*c*) 1 B. & P. N. R. 82.

(*d*) 6 Taunt. 213.

(*e*) 8 B. & Cr. 231.

(*ee*) First ed. Vol. II. p. 640.

(*f*) *Doe* v. *Prigg*, 8 B. & Cr. 231.

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*. This result, however, was not attained until after many gradations. In the first instance survivorship was held to relate to the period of distribution and not to the death of the testator, on the ground that the subject of gift (being the produce of lands devised to be sold) was not in esse until this period.

Survivorship referred to *period of distribution*.

"Thus, in the case of *Brograve* v. *Winder* (*g*), 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 (observed his lordship), the penning of which is very particular, when once you fix the intention that they shall take it as money, which is clearly the sense of this will, there is no gift till the distribution; the object of the distribution is pointed out to be among the persons named, "or the survivors or survivor;" that excludes the

Subject of gift being the produce of a future sale.

(*g*) 2 Ves. jun. 634.

possibility of taking in, as objects of the distribution, persons who are dead.'

Survivorship referred to the period of distribution.

"So, in *Newton* v. *Ayscough* (*h*), where a testator gave to A. £400 four per cent. Consolidated Annuities for her to receive the interest during her life, and after her decease the £400 to be sold and divided among his residuary legatees, *or the survivor of them, share and share alike;* and he appointed B., C., and D., residuary legatees of his will, share and share alike. On a question whether one of the legatees dying in the lifetime of A. was entitled, Sir *W. Grant* said, 'To what period survivorship is to relate, depends not upon any technical words, but upon the apparent intention of the testator, collected either from the particular disposition or the general context of the will.'—'Here is a direction to trustees at the death of the tenant for life to sell the fund, and divide the produce among his residuary legatees, "or the survivor of them, share and share alike." That naturally points to the period of sale as the period to ascertain who are the persons to take, and brings this case much nearer *Brograve* v. *Winder* (*i*) than *Perry* v. *Woods* (*j*). In *Brograve* v. *Winder*, Lord *Loughborough's* opinion was that the survivor at the time of the sale, not at the death of the testator, was intended. In *Perry* v. *Woods*, the testator had by his will furnished evidence of his own intention with regard to the meaning of the word "survivor." '—'The case of *Russell* v. *Long* (*k*), decided by Lord *Alvanley* soon afterwards, shews 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.'

Sir W. Grant's judgment in *Newton* v. *Ayscough*.

[There is an inconsistency between the expressions of Lord Alvanley in *Russell* v. *Long*, and his decisions in *Perry* v. *Woods* (*j*) and *Maberly* v. *Strode* (*l*).] "The latter shews 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* (*m*) stated this to be the result of the authorities; which opinion accords with his Honor's decision in *Brown* v. *Bigg*.

"It is a circumstance worthy of remark, that, down to this period, in all the cases where survivorship had been referred to the time

(*h*) 19 Ves. 534.
(*i*) Supra, p. 2123.
(*j*) 3 Ves. 204.
(*k*) 4 Ves. 551.
(*l*) 3 Ves. 450.
(*m*) 13 Ves. at p. 375.

of division, the expression was '*or* the survivor,' although no attempt was made to found a distinction on this particular phraseology.

Survivorship referred to the period of distribution on special grounds.

"Another instance, in which the case of *Brograve* v. *Winder* has been followed, is *Hoghton* v. *Whitgreave* (*n*), where a testator gave his real and the residue of his personal estate to his wife for life, and after her decease to trustees, upon trust to sell the real estate; and directed that the money arising from the sale, as also the rents from the death of his wife until the sale, as well as the residue of his personal estate, should be paid and equally divided among his nephews and nieces after mentioned, *and the survivors or survivor of them*, viz. A. M. &c.; and he thereby bequeathed the same to them, *and to the survivors or survivor of them*, after the decease of his wife, and in manner aforesaid. The question was, whether the nephews and nieces surviving the widow were entitled, to the exclusion of those who died in her lifetime. Sir *T. Plumer*, V.-C., held that the former *were* entitled, considering the case as not distinguishable from *Brograve* v. *Winder* (*o*). '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 persons 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 (*p*). 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 gift over [illegible] clause, that containing the gift, refers to the death of him [illegible] s the period when it is to operate.' And he afterwards adds [illegible] 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 distribution*.

"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.

(*n*) 1 J. & W. 146.
(*o*) Ante, p. 2123.
(*p*) This is a mistake; see ante, p. 1064.

CHAPTER LV.

"Thus, in *Daniell* v. *Daniell* (*q*), where the testator bequeathed certain stock in trust for his wife for life, and after her decease to his children, but in case his wife should have no child of his at her decease living, then, as to £1000, part thereof, to pay the interest to his sister J. D. during her life, and at her decease the £1000 to be paid equally between *her said two sons J. and F., or the whole to the survivor of them.* In the preceding part of the will another sum of £1000 was given to trustees, in trust, after the decease of his wife without issue by him, to pay his said sister the interest for life, and after her 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 £1000 as the survivor at the death of the last surviving tenant for life, which was resisted by the representatives of F., claiming as one of the survivors at the death of the testator. Sir *W. Grant* said, 'It is clear the testator meant the survivor at the time of the division. He did not conceive that would take place till both his wife and Mrs. D. (i.e. J. D.) were dead; he conceived the deaths would happen in the order of the limitation. *The mode in which he disposed of the other two sums confirms, instead of opposing, this construction,* shewing 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.'

Remarks upon *Daniell* v. *Daniell.*

"The reasoning of this case agrees with that of Lord *Hardwicke* in *Hawes* v. *Hawes* (*r*), and it would seem with Lord *Alvanley's* in *Perry* v. *Woods* (*s*); but stands singularly contrasted with Sir *W. Grant's* own observations upon the latter case in *Newton* v. *Ayscough* already noticed, where he considered that survivorship being expressly made referable to the death of the tenant for life in another bequest, raised an argument in favour of a *different* construction in the bequest in question, where such expressions were omitted (*t*). The only circumstance of distinction is, that in *Perry* v. *Woods* the other bequest was to different objects.

"The doctrine of the case of *Daniell* v. *Daniell* was referred to

(*q*) 6 Ves. 297.
(*r*) Ante, p. 2121, n. (*r*).
(*s*) 3 Ves. 204. See also *Sheppard* v. *Lessingham*, Amb. 122, ante, Vol. I. p. 582.
(*t*) See also *Campbell* v. *Campbell*, 4 B. C. C. 15.

Survivorship referred to period of distribution, there being another gift *expressly* to survivors at that period.

with approbation, and adopted in the recent case of *Wordsworth* v. *Wood* (*u*), where a testator gave certain real and personal property to his wife for life, and after her decease to his *then* surviving children, share and share alike, independently of the rental of his said estates, which he gave to *his surviving female children*. Lord *Langdale*, M.R., held, that a daughter who died in the lifetime of the widow was excluded from the rents, and one of the grounds of this construction he considered to be, that such a daughter was not an object of the immediately preceding devise of the estates, the testator's apparent intention being by the second gift merely to exclude the sons, and not to introduce a new class of daughters. His lordship, in the course of his judgment, said, 'The rule is, that where an interest is given to a person for life, and after his death to his surviving children, those only can take who are alive when the distribution takes place.' Upon appeal, Lord *Cottenham* also considered that, independently of the general rule, there was sufficient ground for holding the deceased daughters to be excluded, according to *Brograve* v. *Winder*, *Newton* v. *Ayscough*, *Hoghton* v. *Whitgreave*, and *Daniell* v. *Daniell*; his lordship more particularly expressing his concurrence in the line of argument pursued by Sir *W. Grant* in the last-mentioned case.

Remarks upon *Brograve* v. *Winder*, *Newton* v. *Ayscough*, *Hoghton* v. *Whitgreave*, and *Daniell* v. *Daniell*.

"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.

History of the present doctrine.

"It is curious to observe, in the history of this rule of construction, the steps by which an established doctrine is overturned. Lord *Loughborough*, we have seen, first departed from it, founding that departure upon a circumstance which furnished no real distinction, but at the same time with an anxious recognition of its authority (*v*). Sir *W. Grant* in *Daniell* v. *Daniell* (*w*), 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,

(*u*) 2 Beav. 25, 4 My. & Cr. 641, affirmed in D. P. on the same grounds 1 H. L. C. 129.

(*v*) See *Brograve* v. *Winder*, 2 Ves. jun. 634.

(*w*) 6 Ves. 297.

CHAPTER LV.

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* (*x*), however, the same learned Judge went a step further, and, while he applied Lord *Loughborough's* construction in *Brograve* v. *Winder* to an exactly similar case, boldly denied the existence of any contrary rule of interpretation. Its overthrow, we shall find, was completed in a subsequent case, remaining to be stated, in which another learned Judge not only disavowed the rule, the foundation of which had been thus gradually sapped, but confidently laid down an opposite doctrine.

Survivorship referred to the time of distribution.

Cripps v. *Wolcott*.

"The case here referred to is *Cripps* v. *Wolcott* (*y*), where the testatrix gave and appointed her real and personal estate, in trust for her husband for life, and after his decease directed that her personal estate should be equally divided between her two sons A. and B., and C. her daughter, *and the survivors or survivor of them, share and share alike.* A. died in the lifetime of the husband; B. and C., as the survivors at his death, claimed the whole. Sir *J. Leach* said, 'It would be difficult to reconcile every case upon this subject. I consider it, however, to be now settled, that if a legacy be given to two or more, equally to be divided between them, or to the survivors or survivor of them, and there be no special intent to be found in the will, *the survivorship is to be referred to the period of division.* If there is no previous interest given in the legacy, then the period of division is the death of the testator, and the survivors at his death will take the whole legacy. This was the case of *Stringer* v. *Phillips* (*z*). *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* (*a*), *Daniell* v. *Daniell* (*b*), and *Jenour* v. *Jenour* (*c*). In *Bindon* v. *Lord Suffolk* (*d*), the House of Lords found a special intent in the will, 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.

General rule as stated by Sir J. Leach.

(*x*) 19 Ves. 534.
(*y*) 4 Mad. 11. See also *Browne* v. *Lord Kenyon*, 3 Mad. 410.
(*z*) This is not correct; see ante, p. 2122.
(*a*) 4 Ves. 551.
(*b*) 6 Ves. 297.
(*c*) 10 Ves. 562.
(*d*) 1 P. W. 96.

Woods, before Lord *Rosslyn* (*e*), 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.'*

Remarks on *Cripps* v. *Wolcott*.

"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 (*f*)), 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 favourably disposed to its adoption," as will appear by the cases of *Blewitt* v. *Roberts* (*g*), *Neathway* v. *Reed* (*h*), which are stated in the last edition, and the other cases referred to in the footnotes (*i*).

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 (*j*). And where the gift is to A.

(*e*) *Perry* v. *Woods* was decided by Lord Alvanley.

(*f*) *Wilson* v. *Bayly*, 3 B. P. C. Toml. 195.

(*g*) 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, p. 2133. See also *Gibbs* v. *Tait*, 8 Sim. 132, which, however, was based on *Brograve* v. *Winder*, and that class of cases; *Wordsworth* v. *Wood*, ante, p. 2127.

(*h*) 3 D. M. & G. 18. See also *Williams* v. *Tartt*, 2 Coll. 85; *Eaton* v. *Barker*, ib. 124; *Buckle* v. *Fawcett*, 4 Hare, 536; *Hesketh* v. *Magennis*, 27 Bea. 395; *Young* v. *Davies*, 2 Dr. & Sm. 167; *Thompson* v. *Thompson*, 29 Bea. 654; *Whitton* v. *Field*, 9 Bea. 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.

(*i*) *Pope* v. *Whitcombe*, 3 Russ. 124; *Re Crawhall's Trust*, 8 D. M. & G. 480; *Young* v. *Davies*, 2 Dr. & Sm. pp. 167, 170, and more fully, 32 L. J. Ch. 372; *Salisbury* v. *Petty*, 3 Hare, pp. 86, 93; *M'Donald* v. *Bryce* 16 Bea. 581. 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; *Hearn* v. *Baker*, 2 K. & J. 383; *Vorley* v. *Richardson*, 8 D. M. & G. 126; *Naylor* v. *Robson*, 34 Bea. 571; *Wiley* v. *Chanteperdrix*, [1894] 1 Ir. 209; *Bowyer* v. *Currall*, 2 W. R. 328.

(*j*) *Stevenson* v. *Gullan*, 18 Bea. 590. See also per Wood, V.-C., *Re Hopkins' Trust*, 2 H. & M. at p. 414. *Gummoe* v. *Howes*, 23 Bea. pp. 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

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 (*k*).

Result of the cases as to personalty.

"In this state of the authorities," as Mr. Jarman observes (*kk*), "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 favour of those who survive the period of distribution, and of those only."

If tenant for life dies before testator, death of the latter is the period.

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 (*l*).

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 (*m*).

Distinction in regard to real estate rejected.

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 (*n*); and at length, in *Re Gregson's Trusts* (*o*), it was held by Knight 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

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.

(*k*) *Knight* v. *Poole*, 32 Bea. 548; *Re Fox's Will*, 35 Bea. 163; *Howard* v. *Collins*, L. R., 5 Eq. 349; *Re Coulden*, [1908] 1 Ch. 320 But see *Drakeford* v. *Drakeford*, 33 Bea. 43.

(*kk*) First ed. Vol. II. p. 651.

(*l*) *Spurrell* v. *Spurrell*, 11 Hare, 54.

(*m*) *Hodson* v. *Micklethwaite*, 2 Drew. 294. See also *Blewitt* v. *Roberts*, Cr. & Ph. pp. 274, 283 (as to the 100*l.* annuity); *Davies* v. *Thorns*, 3 De G. & S. 347.

(*n*) *Wordsworth* v. *Wood*, 1 H. L. C. 129; *Buckle* v. *Fawcett*, 4 Hare, 536.

(*o*) 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. at p. 499; *Re Belfast Town Council, Ex p. Sayers*, 13 L. R. Ir. 169. See also *Re Maunder*, [1902] 2 Ch. 875, [1903] 1 Ch. 451.

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.

Rule in *Cripps* v. *Wolcott* yields a contrary intention.

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 (*p*). Thus, in *Shailer* v. *Groves* (*q*), where a testator bequeathed 1000*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 (*r*) *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 who died in the lifetime of the tenant for life leaving issue will take the shares of the parents for whom they are substituted" (*s*).

To surviving brothers or (by substitution) to their issue.

So in *Rogers* v. *Towsey* (*t*), where a testator bequeathed to each of his two sisters the interest of 5000*l.* stock for her life, and as each died the said stock to be equally divided between the testator's

(*p*) See per Wood, V.-C., 2 H. & M. at p. 414.

(*q*) 6 Hare, 162.

(*r*) 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. at p. 951, second paragraph.

(*s*) See also *Re Hopkins' Trust*, 2 H. & M. 411; *Re Stannard*, 52 L. J. Ch. 355; *Evans* v. *Evans*, 25 Bea. 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, Chap. LVII.; and see and consider *Blackmore* v. *Snee*, 1 De G. & J. 455.

(*t*) 9 Jur. 575. Cf. *Bouverie* v. *Bouverie*, 2 Phil. 349.

nieces A., B., C., D. and E., *or the survivors of them*; he bequeath one moiety of the residue to A., and the other moiety equa between B. and C. "In case his niece C. should not *survive hi* her children" to stand in her place, "and the same of any other his nieces who might marry and leave children." The same Judg assuming the general rule to be as stated in *Cripps* v. *Wolcott*, he that the last clause showed a special intent on the testator's pa to refer the word "survivors" to his own death.

Rule where gift to survivors is contingent.

(3) *Gifts to Survivors upon a Contingency.*—"It is to be o served," says Mr. Jarman (*t*), "that where the gift to survivors is take effect *upon a contingency*, none of the reasoning (infirm as th reasoning is) upon which it was held to refer to survivors at the dea of the testator applies; for it cannot for an instant be contende that a tenancy in common is inconsistent with such a qualified su vivorship. The only question, therefore, in such a case is, wheth the gift was meant to extend to survivors indefinitely, (i.e. whe ever the contingency should happen), or is restricted to survivo ship within a given period after the testator's decease."

There is so much variety in the methods which testators adop for indicating their intention that it is difficult to deduce any gener rules. In *Jenour* v. *Jenour* (*u*), survivorship was confined to th death of the tenant for life, Sir W. Grant observing that he wa always indisposed to indefinite survivorship. In *Roe* d. *Sheers* v *Jeffery* (*v*), it seems to have been taken for granted that a executory limitation for life, to certain persons or the survivor was not confined to survivors at the happening of the contingency but as the devise had not at the death of the object fallen int possession, it does not appear whether survivorship was considere as indefinite, or as restricted to this period.

Executory devise to survivor referred to death of testator.

In *Doe* d. *Lifford* v. *Sparrow* (*w*), an executory limitation t survivors was held to refer to the death of the testator (the devis being to A. and B. in fee as tenants in common, and in case of th death of either without children to the survivor); but this con struction was aided by the context, particularly by a gift over o the entire property, in case *both* the devisees were dead *at the tim of the decease of the testator* without children, from which the Cour inferred, that in the clause in question, he contemplated death a the same period.

(*t*) First ed. Vol. II. p. 651.
(*u*) 10 Ves. 562. See also *Bird* v. *Smales*, 2 Jur. N. S. 273.
(*v*) 7 T. R. 589.
(*w*) 13 East, 359.

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 (*x*).

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 (*y*) 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 (*z*), 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 (*a*).

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 favour the latter position.

Thus, in *Crowder* v. *Stone* (*b*) 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* (*c*), 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

(*x*) *Carver* v. *Burgess*, 18 Bea. 541, 7 D. M. & G. 96.

(*y*) *O'Mahoney* v. *Burdett*, L. R., 7 H. L. 388.

(*z*) *Olivant* v. *Wright*, 1 Ch. D. 346. *Besant* v. *Cox*, 6 Ch. D. 604.

(*a*) This would seem to be the rule where the original gift is immediate: see per Lord Hatherley. *Bowers* v. *Bowers*, L. R., 5 Ch. pp. 244, 247. In *Clark* v. *Henry*, L. R., 11 Eq. 222, 6 Ch. 350, the prior legatees were "to have the control" of their shares at twenty-five, survivorship was therefore referred to that age.

(*b*) 3 Russ. 217, ante. *Marriott* v. *Abell*, L. R., 7 Eq. 478, is contra, sed qu.

(*c*) 3 My. & K. 316. See also *Ranelagh* v. *Ranelagh*, 2 My. & K. 441; *Fletcher* v. *Ashburner*, 1 B. C. C. 497 (where the point appears to have been assumed).

CHAPTER LV.

became payable, was entitled under the gift to "survivors" an interest in the share of the child who died in 1826.

And in *Ive* v. *King* (*d*), where a testator devised and bequeathe property to his wife for life, remainder to trustees in trust to se and gave one moiety of the proceeds to his wife's sister and brothe (naming them), as tenants in common; "and in case of the deat of any or either of them (which was held to mean death before th wife, as expressed in the gift of the other moiety), then their respe tive shares to their children, if any, and if not, then to the survivo of them, share and share alike." A., one of the brothers, died bachelor before the testator in the wife's lifetime; and it was hel by Sir J. Romilly, M.R., that another brother, who survived A and the testator, though he afterwards died in the wife's lifetim was entitled under the gift to survivors to participate in the shar of A.

Survivorship held to refer to the event.

It seems also that where the remainder is, not to several or th survivors (as in *Cripps* v. *Wolcott*), but to several, and *if any o them die* before the tenant for life, to the survivors, it will be hel to mean survivorship inter se and not at the death of the tenan for life. Thus in *White* v. *Baker* (*e*), a sum was given in trust for A for her life, and after her 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 life time 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 Knight 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

White v. *Baker*.

(*d*) 16 Bea. pp. 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. p. 491; but see *Willetts* v. *Willetts*, 7 Hare, 38.

(*e*) 2 D. F. & J. 55, reversing Romilly, M.R., 29 L. J. Ch. 577, 6 Jur. N. S. 289, whose previous decision in *Cambridge* v. *Rous*, 25 Bea. 409 ("the share of each who shall die to be divided among the survivors") appears to be discredited by this reversal.

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 pla[illegible] 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 testa[illegible] [illegible]tended 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 g[illegible] in favour of the survivor (*f*); in which he agreed with Lord Campbell. But he added that the case need[illegible] no such support, [illegible] "preferred deciding [illegible] upon the more [illegible]al ground."

Scurfield v. Howes.

Both Judges p[illegible]tedly approved [illegible] *[illegible] v. H[illegible]wes* (*g*), and trea[illegible] it as directly in favour of th[illegible] [illegible]. There the bequest was to A. for life, and after h[illegible] [illegible] two children share and share ali[illegible], but if eith[illegible] [illegible] die[illegible] before the decease of their mother, the whole [illegible] of t[illegible] (*h*). Both died in [illegible] lifeti[illegible], and it was held [illegible] legacy be[illegible] to the personal representative [illegible] the su[illegible]or. It seems, therefore, tha[illegible] *White* v. *[illegible]* cann[illegible] [illegible]rly be said to have turned on the part[illegible] lan[illegible] [illegible] the [illegible] (*i*).

Re Pickworth

But in *Re Pick[illegible]rth* (*j*), w[illegible] the testatrix gave residuary trust mon[illegible] upon trust to pay th[illegible] interest to her sister T. during her life, and after her death to pay and divide the said trust moneys

(*f*) [illegible] contra[illegible] (it may be [illegible]sumed) with [illegible] absence from [illegible] original g[illegible] to [illegible].

(*g*) 4 B. [illegible] C. 90. See also [illegible] well, V.-C., *Antrobus* v. *[illegible]*, 16 Sim. at p. 459. But this w[illegible] heard as a short cause, and the su[illegible] party being legal representat[illegible] both [illegible]hildren was en[illegible] qua[illegible] via.

[illegible] The words "of them" are sup[illegible] [illegible] R. L., 6 Jur. N. S. p. [illegible]92. But Lord Campbell [illegible] the case without them, and in other cases they appear [illegible] [illegible] in favour of sur[illegible] [illegible].

(*i*) See, however, per Wood, V.-C., [illegible] 298. [illegible] the question [illegible] the text [illegible] reference [illegible] to a Scotch [illegible] of *Young* v. *R[illegible]n*, 4 Macq. pp. 3[illegible] [illegible]r. N. S. [illegible], where the test[illegible] (or truster) gave the residue of his [illegible] in trust for his wife for life, and "to pay the [illegible]me after the death of the longest [illegible] of me and my said wife to and [illegible]ong" six persons (named); "declar[illegible] 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 [illegible] A., one of the six, died without [illegible]; afterwards B., another of them, d[illegible] leaving issue; then the wife 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.

Young v. Robertson.

(*j*) [1899] 1 Ch. 642. See also *Wiley* v. *Chanteperdrix*, [1894] 1 Ir. 209 (where the words were "with benefit of survivorship").

equally between the testatrix's two sisters F. and S., share and share alike, "and if either of my said sisters shall be then dead, . . . upon trust for the survivor of my said sisters absolutely," it was held that the period of distribution was the death of T., and as both S. and F. predeceased T. the original gift in favour of S. and F. was not divested in favour of F., who survived S. (*k*). Whether this case can stand with *Scurfield* v. *Howes* it is not easy to say, but *Scurfield* v. *Howes* was not expressly disapproved by the majority of the Court of Appeal. *Re Pickworth* can be distinguished from *White* v. *Baker* on the ground that the gift over was "if *either* of my sisters shall be then dead"; and the Court decided that "either" did not mean both, so that the contingency had not occurred, but in *Scurfield* v. *Howes* the words were "if either of them should die before the decease of their mother," so that here either was taken to mean one or both.

In this state of the authorities it is not easy to state which is the correct rule of construction; probably there is no rule. Rigby, L.J., pointed out in *Re Pickworth* that the construction adopted by the majority of the L.JJ. was one in which the word survivor in the same phrase included two meanings: "first the survivorship as between the sisters, and secondly a survivorship as between the object of the gift and the tenant for life"; it is certainly unfortunate that the L.JJ. did not expressly overrule *Scurfield* v. *Howes*, or expressly state that they approved it.

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 (*l*).

Distinction between gift over of "share" of deceased legatee, and gift over of whole fund.

There is perhaps some difference between a gift to survivors of the whole fund and a gift to survivors of the share of the 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 favourable 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

(*k*) Compare *Re Deacon's Trusts*, 95 L. T. 701, which followed *Jones* v. *Davies*, 28 W. R. 455.

(*l*) *Wilmot* v. *Flewitt*, 11 Jur. N. S. 820. Qu. whether *Cambridge* v. *Rous*, 25 Beav. 409, ante, p. 2134, n. (*e*), is not inconsistent with this case also.

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. In *Watson* v. *England* (*m*) a testatrix having a power to appoint a sum of 1500*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 1500*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.

What excludes the sense of survivorship inter se.

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 (*n*), or other future event (*o*). 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 survivorship among the remaindermen, but had reference to the death of the tenant for life (*p*). In this case the concluding words seem to point clearly to one fixed period. And a similar consideration may probably explain another case (*q*) 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 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,

(*m*) 15 Sim. 1.

(*n*) See *Essex* v. *Clement*, 30 Bea. 525.

(*o*) *Re Hunter's Trusts*, L. R., 1 Eq. 295.

(*p*) *Littlejohns* v. *Household*, 21 Bea. 29.

(*q*) *Page* v. *May*, 24 Bea. 323; but as the successful claimant was legal personal representative of all three, the point here considered did not require decision.

since the final gift over explains what is meant by the indefinite terms of survivorship previously used (*r*).

Maddison v. *Chapman.*

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* (*s*), 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 t'em 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 liver (*t*), for he did not know which it would be: there was 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* (*u*), before K. Bruce, V.-C. (one

(*r*) *Daniel* v. *Gosset*, 19 Bea. 478. Compare *Bouverie* v. *Bouverie*, 2 Phil. 349.

(*s*) 1 J. & H. at p. 478.

(*t*) But here it was "if either die leaving no issue."

(*u*) 2 Coll. 746, ante, p. 1369. The bequest was in the form first put by Sir C. Turner, viz. to several "and the survivors or survivor of them."

of the judges who decided *White* v. *Baker*), and *Page* v. *May* (*v*). 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 (*w*). 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," says Mr. Jarman (*ww*), "that a testator, after giving to several persons and the survivors generally, goes on to make an express gift to survivors, to take effect in a particular event, thereby explaining the sense in which he used the word in the former instance. As in the case of *Weedon* v. *Fell* (*x*), where A. bequeathed a sum of money in trust for his wife for life, and after her decease to divide the whole among his four children, share and share alike, *and the survivors*, but not before they should have respectively attained twenty-one or days of marriage; for his intent was that, *if any of his four children should die before twenty-one or days of marriage*, then his, her, or their share so dying should go and be equally divided *among the survivors*. It was held, that a child attaining twenty-one was entitled though she died in the lifetime of her mother."

Survivorship referred to majority in preference to another event.

(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 distribution is postponed until the youngest object attains that age), the Courts strongly incline to construe a gift to the survivors as referring to the former event exclusively in order to arrive at what is considered to be a more reasonable mode of disposition than that of rendering the interests of the legatees liable to be defeated by the event of their dying

(*v*) 24 Bea. 323, as to which vide supra, p. 2137, n. (*q*).

(*w*) But *White* v. *Baker* turned wholly on the "natural import" of the words used.

(*ww*) First ed. Vol. II. p. 653.

(*x*) 2 Atk. 123. See also *Rogers* v. *Towsey*, ante, p. 2131.

CHAPTER LV.

before the time to which, for some reason irrespective of the personal qualifications of the legatees, the distribution was postponed.

"Thus where (*y*) a testator devised certain leasehold property to his wife for life, then to his daughter for life, and at her death to her husband for life, and at his decease to a trustee upon trust to receive the rents for the benefit of all the children of the daughter. The testator then proceeded thus:—'And my further will is, that my said trustee shall from time to time, as the rents become due, pay unto such child or children a just proportion of such interest as they shall arrive at their age of twenty-one years, and to place the interest of the infants' shares in the three per cents. Consolidated Bank Annuities, for their own sole use and benefit, and so on alternately till the youngest child shall arrive at his or her age of twenty-one years, and then all the said children *or the survivors* of them to be let into full possession of all the said estates, share and share alike.' The question was, at what time the interest of the children vested. Sir *J. Leach*, M.R., observed that the Court would not, unless 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; but that such interest determined on their deaths (*z*)."

Survivorship referred to majority by force of gift over.

In cases of this class a gift over may determine the testator's meaning. For if there is a gift over on the death of all the class under twenty-one, it is almost inevitable to refer the period of survivorship to that age (*a*). 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

Contrary effect of gift over on death of all before tenant for life.

(*y*) *Crozier* v. *Fisher*, 4 Russ. 398.

(*z*) Other cases are, *Tribe* v. *Newland*, 5 De G. & S. 236; *Knight* v. *Knight*, 25 Bea. 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. See also *Reid* v. *Worsley*, 14 Jur. 325, and *Hodson* v. *Micklethwaite*, 2 Drew. 294.

(*a*) *Salisbury* v. *Lambe*, 1 Ed. 465, Amb. 383 (where the only reference to twenty-one was in the gift over); *Bouverie* v. *Bouverie*, 2 Phil. 349; *Ally* v. *Moss*, 34 L. T., N. S. 312.

the tenant for life, the death of the tenant for life is the period to which survivorship is to be referred (*b*).

Gift to survivors of a class, without previous gift to the class.

Again, in *Turing* v. *Turing* (*c*), 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 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.

Gift to A. for life, and at her decease to her surviving children at twenty-one.

Thus, in *Hufſam* v. *Hubbard* (*d*), 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.

To several as tenants in common *for life*, and to survivor, with gift over *after death of survivor*.

(5) *Words amounting to an Express Gift to the Survivor.*—Mr. Jarman continues (*dd*), "Where a gift is made to several persons as tenants in common for life, and the survivor, with a limitation over after the death of the survivor, indicating therefore unequivocally that the survivor is to take *at all events*, the testator is considered to refer to survivorship indefinitely, and not to survivorship at his own death.

"Thus, in *Doe* d. *Borwell* v. *Abey* (*e*), 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

(*b*) *Daniel* v. *Gosset*, 19 Bea. 478; *Fisher* v. *Moore*, 1 Jur. N. S. 1011.
(*c*) 15 Sim. 139.
(*d*) 16 Bea. 579. See also *Pope* v. *Whitcombe*, 3 Russ. 124; *Dorville* v. *Wolff*, 15 Sim. 510; *Hind* v. *Selby*, 22 Bea. 373.
(*dd*) First ed. Vol. II. p. 655.
(*e*) 1 M. & Sel. 428.

Survivorship held to be indefinite.

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' (*f*). 'I would (said his Lordship) preserve the words "to take as tenants in common." The words tenants in common are of a flexible meaning, and may be understood, that although they should take by survivorship as joint tenants, yet the enjoyment was to be regulated amongst them as tenants in common. The prevailing intention of the testator seems to have been, that the estate should not go over until the death of the survivor.' And Mr. Justice *Bayley*, observed with great truth, 'A tenancy in common, with benefit of survivorship, is a case which may exist without being a joint tenancy, because survivorship is not the only characteristic of a joint tenancy' (*g*).

Remarks on *Doe* v. *Abey*.

"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 (*h*). The principle, however, is the same.

Words of severance confined to the inheritance.

"It remains to be observed, that, in devises of estates of inheritance, for the avowed purpose of reconciling words of division or severance with a gift to the survivor, the devisees have been held to be joint tenants for life, and tenants in common of the inheritance in remainder.

"Thus, in *Barker* v. *Giles* (*i*), 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

(*f*) 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.

(*g*) See also *Foley* v. *Gallagher*, 2 L. R. Ir. 389, where a tenancy in common among the survivors was converted into a joint tenancy by 2 W. 4, c. 17, s. 9 (2); *Taaffe* v. *Conmee*, 10 H. L. C. 64, and other cases cited in Chap. XLIV.

(*h*) This case may therefore be added to those cited ante, Vol. I. p. 642.

(*i*) 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 Bea. 266.

assigns for ever, *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.

Limitation to survivor disregarded.

"But in *Blisset* v. *Cranwell* (*j*), 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.

"In *Stones* v. *Heurtly* (*k*) Lord *Hardwicke* recognised the authority of this case, and applied the same construction to a devise of the residue of the testator's estate 'to be equally divided among his three younger children, D., F., and M., *and the survivor of them*, and their heirs for ever.'

Observations on the two last cases.

"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* (*l*); at any rate in such a case as *Stones* v. *Heurtly*, 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* (*m*) is distinguishable, inasmuch as the words of severance were not, as in the other cases, *necessarily* applied to the estate for life. The authority of this case was recognised in the recent case of *Doe* d. *Littlewood* v. *Green* (*n*)."

This chapter may, like the first section of it, be concluded with a caution. "Certainly this word 'survivor,'" said Sir W. P. Wood, V.-C., "is 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" (*o*).

(*j*) 1 Salk. 226, 3 Lev. 373.
(*k*) 1 Ves. sen. 165.
(*l*) 7 Taunt. 129.
(*m*) Supra, p. 2142.
(*n*) 4 M. & Wels. 229.
(*o*) *Re Gregson's Trusts*, 33 L. J. Ch. at p. 532.

CHAPTER LVI

WORDS REFERRING TO DEATH SIMPLY, WHETHER THEY RELATE TO DEATH IN THE LIFETIME OF THE TESTATOR.

	PAGE		PAGE
I. *Rule where the Gift is immediate*	2144	III. *Effect where the Gift is of a limited Interest*	2151
II. *Rule where the Gift is future*	2148		

Scope of this chapter.

IN the cases treated of in this chapter, the difficulty of construction arises from death being referred to by testators as a contingent event. Such cases must be distinguished from those in which property is given to A., and "at" or "after" his death to some one else; there the question is whether A. takes absolutely or only a life interest (*a*). There are also cases in which a gift over in the event of a person's death, although apparently referring to death simply, implies some additional contingency (*b*). These cases are discussed in the next chapter.

"In case of the death," &c., to what period referred.

I.—Rule where the Gift is immediate.—The principle is thus stated by Mr. Jarman (*c*): "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 (*d*), or with a view to create a bequest in defeazance 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

(*a*) *Re Russell*, 52 L. T. 559; *Re Percy*, 24 Ch. D. 616, and other cases cited in Chap. XXXIV., ante, p. 1207.

(*b*) *Re Crofton's Trusts*, 7 L. R. Ir. 279, stated ante, p. 859.

(*c*) First ed. Vol. II. p. 659. Approved by Sir James Hannan in *Watson* v. *Watson*, 7 P. D. 10.

(*d*) This was clearly the intention of the testator in *Re Bourke's Trusts*, 27 L. R. Ir. 573, although effect was not given to it; see Chap. XXXIV. ante, p. 1207.

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.

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 (*e*).

"The case of *Trotter* v. *Williams* (*f*) appears to have carried this construction to a great length. J. S. bequeathed to A. £500, to B. £500, and in like manner gave £500 a piece to five others, and *if any died*, then her legacy, and also the residue of his personal estate, to go to such of them as should be *then* living, equally to be divided betwixt them all. The Court held, that these words referred to a dying before the testator, so that the death of any of the legatees after would not carry it to the survivors.

"*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" (*g*).

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 shew 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 (*h*).

"In case of the death of either before the other."

The rule has 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

(*e*) *Loufield* v. *Stoneham*, 2 Strs. 1261; *Northey* v. *Burbaye*, Prec. Ch. 471; *Hinckley* v. *Simmons*, 4 Ves. 160; *King* v. *Taylor*, 5 Ves. 806; *Turner* v. *Moor*, 6 Ves. 557; *Cambridge* v. *Rous*, 8 Ves. 12; *Webster* v. *Hale*, ib. 410; *Ommaney* v. *Bevan*, 18 Ves. 291; *Wright* v. *Stephens*, 4 B. & Ald. 574. *Re Bourke's Trusts*, 27 L. R. Ir. 573; *Re Neary's Estate*, 7 L. R. Ir. 311. But see *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 Chap. XXXVI.; also 1 Russ. 165.

(*f*) Prec. Ch. 78, 2 Eq. Ca. Ab. 344, pl. 2. See also *Taylor* v. *Stainton*, 2 Jur. N. S. 634.

(*g*) See the case of *Re Bourke's Trusts*, supra, stated in Chap. XXXIV. ante, p. 1207.

(*h*) *Elliott* v. *Smith*, 22 Ch. D. 236.

CHAPTER LVI.

that the additional words did not make the event of death mo contingent: it being a certainty that one must die in the lif time of the other (*i*).

Cases of contrary construction.

"There are, however," says Mr. Jarman (*j*) "a few cases immediate bequests in which the words under consideration ha been construed to refer to death at *any* time, and not to the conti gent event of death in the lifetime of the testator; but in each the seems to have been some circumstance evincing an intention to u the words in that rather than in the ordinary sense. Thus, t circumstance of the testator having bequeathed other property the same person, to be 'at her own disposal,' has been considere to indicate that the testator had a different intention in the instan in question.

"*In case of her demise*," construed *at her death.*

"In *Billings* v. *Sandom* (*k*) the testator, being at Gibralta bequeathed to his sister A. (who was in England) £1,000, and *case of her demise* he gave to B. £800, and to C. £200. And bequeathed unto A., whom he left executrix, whatever good chattels and money should be due to him at the time of his decea '*to be disposed of as she should think proper.*' Lord *Thurlow* sai the testator intended to give a share of his bounty to his sister, an also to the others. The word 'and' implied this; therefore sh should take it for life, and then they should take it. As to th residuary devise, he meant that she should take that unfettered, her own disposal, *but the other fettered by the gift over.* This case ha been referred to by Sir *W. Grant* (*l*) as decided upon the contra afforded by the residuary clause.

"In case of death happening," &c., not confined to death *in lifetime of the testator.*

"In *Nowlan* v. *Nelligan* (*m*) the bequest was in these words;— 'I give and devise unto my beloved wife H. N. all my real an personal estate: I make no provision expressly for my dear daughte knowing that it is my dear wife's happiness, as well as mine, to se her comfortably provided for; *but in case of death happening to m said wife*, in that case I hereby request my friends S. and H. to tak care of and manage to the best advantage for my daughter H. a and whatsoever I may die possessed of.' Lord *Thurlow* said it wa impossible to tell with precision what was the testator's meaning but he thought it too much to determine that 'in case of deat happening' meant dying in the husband's (i.e. the testator's) life

(*i*) *Howard* v. *Howard*, 21 Bea. 550. See *Underwood* v. *Wing*, 4 D. M. & G. at p. 659, 8 H. L. C. at p. 199 (*Wing* v. *Angrave*).

(*j*) First ed., Vol. II., p. 660.
(*k*) 1 B. C. C. 393.
(*l*) 8 Ves. at p. 22.
(*m*) 1 B. C. C. 489.

time; that therefore the meaning must be supposed to be in the event of her death *whenever it should happen*.

Sir W. Grant's remark on *Nowlan* v. *Nelligan*.

"Of this case Sir *W. Grant* (*n*) 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.'"

Remark on *Lord Douglas* v. *Chalmer*.

In *Lord Douglas* v. *Chalmer* (*o*), a testatrix gave her residue to D. and in case of her decease to her children: it was held that D. took only a life interest. Lord Loughborough's decision, which is, perhaps, difficult to reconcile with the other authorities, appears to have turned partly on a presumption that the testatrix intended to provide for D.'s children and partly on a specific bequest to D., which was inconsistent with the supposition that she took the whole interest in the residue. But, as Mr. Jarman remarks (*p*), "the reliance which was placed on these circumstances shews that Lord *Loughborough* did not intend to controvert the general rule, which is still more apparent from his subsequent decision in *Hinckley* v. *Simmons* (*q*), 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 (*r*).

No distinction in gifts to children.

"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" (*s*).

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 (*t*).

"In the event of the death of either," similarly construed.

Another case exemplifying the construction now under consideration is *Clarke* v. *Lubbock* (*u*), 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

(*n*) 8 Ves. at p. 22.
(*o*) 2 Ves. jun. 501.
(*p*) First ed. Vol. II. p. 663.
(*q*) 4 Ves. 160.
(*r*) See cases cited ante, p. 2145.
(*s*) *Webster* v. *Hale*, 8 Ves. at p. 411. *Slade* v. *Milner*, 4 Madd. 144; *Schenk* v. *Agnew*, 4 K. & J. 405.
(*t*) *Crigan* v. *Baines*, 7 Sim. 40.
(*u*) 1 Y. & C. C. C. 492. See also *Arthur* v. *Hughes*, 4 Bea. 506; *Duhamel* v. *Ardovin*, 2 Ves. sen. 162.

CHAPTER LVI.

no children, then over: Sir J. K. Bruce held that, both A. and having survived the testator and left children, each was entith to one moiety, the words in question being construed to refer death in the testator's lifetime.

Rule of construction strictly applied.

So firmly is the rule of construction established, that even whe the testator in one part of his will uses the words "in the event the death" as meaning "upon the death," this does not prevent th technical construction being placed upon the same words in anoth part of the will. Thus, if the testator gives property to A. for li "and in the event of his death" to B., and gives other property X. absolutely "and in the event of his death" to Y., although in th former gift the words "in the event of his death" must necessaril mean "upon the death of A.," yet in the latter gift they will l construed as referring to the death of X. in the lifetime of th testator (*v*).

Construction excluded by context.

Where, however, a testator left all his property to his son charge with an annuity to his widow; but should the hand of death fall o my *widow* and son, then over; Lord Cranworth held that the use the word "widow" shewed that the gift over could not have bee intended to take effect on an event which was to happen in th testator's own lifetime (*w*).

And where there was a bequest of residue to A. and B., and i case of the demise of either to the survivor for life, it was held tha A. and B. took life interests only (*x*).

Where bequest is *future*, the words are extended to the event of legatee dying between death of testator and period of vesting.

II.—Rule where the Gift is future.—Mr. Jarman continues (*y*) "But although in the case of an *immediate* gift it is generally tru that a bequest over, in the event of the death of the preceding legatee refers to that event occurring in the lifetime of the testator, yet thi 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 [*quære whether* confined?] (*z*), to the event of

(*v*) *Ingham* v. *Ingham*, Ir. R., 11 Eq. 101, following *Re Mears' Trust*, 10 Ha. 171.

(*w*) *Watson* v. *Watson*, 7 P. D. 10.

(*x*) *Randfield* v. *Randfield*, 2 De G. & J. 57. Compare *Taylor* v. *Stainton*, 2 Jur. N. S. pp. 634, 635.

(*y*) First ed. Vol. II. p. 604.

(*z*) These words and brackets are Mr. Jarman's.

the legatee dying in the interval between the testator's decease and the period of vesting in possession.

"Thus, in *Hervey* v. *M'Laughlin* (*a*), where a testatrix bequeathed two several sums of stock to a trustee, in trust to pay the dividends to T. for life, and after her death she gave the said two sums to G., E., and E., the three children of T., in equal shares, *and in case of the death of either of them*, the share of such as might die to go to and belong to the children, or child if but one, of the 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 parent, 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 (*b*).

"And here it may be observed, that those cases in which the word 'or' has been construed as introductory to a substitutional bequest (in which sense it seems to be tantamount to the words 'in case of the death') present a distinction between immediate and future gifts similar to that which has been just pointed out. Thus, a legacy to A. or to his children, or to A. or his heirs, is construed as letting in the children or next of kin ('heirs' being in reference to personal estate construed as synonymous with *next of kin*) in the event of A. dying in the lifetime of the testator; while, on the other hand, a bequest to A. for life, and after his decease to B. or his children, is held to create a substitutional gift in favour of the children of B., in the event of B. dying in the lifetime of A." (*c*).

"Or" used synonymously with *in case of*.

It will be noticed that in stating the general rule, Mr. Jarman seems to have had some doubt whether words referring to the

"In case of death" includes death in testator's lifetime.

(*a*) 1 Pri. 264. See also *Moore* d. *Fagge* v. *Heaseman*, Willes, 138; *Galland* v. *Leonard*, 1 Sw. 161; *Girdlestone* v. *Doe*, 2 Sim. 225, stated ante, p. 1317. *Bolitho* v. *Hillyar*, 34 Beav. 180; *Re Nott's Trusts*, W. N. 1875, 244; *Penny* v. *Commissioner for Railways*, [1900] A. C. 628.

(*b*) See *Home* v. *Pillans*, 2 My. & K. at p. 24, post, p. 2172.

(*c*) See cases cited ante, p. 1317.

CHAPTER LVI.

death of the legatee are confined to the event of death happening in the interval between the testator's decease and the period of vesting in possession, but it is settled that this is not so, and that they apply also to the case of death happening before the testator's decease, which is, indeed, within the literal meaning of the words. Thus, in *Le Jeune* v. *Le Jeune* (*d*), 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.

Construction of words "in case of death" influenced by reason assigned for prior bequest.

In *Green* v. *Barrow* (*e*), 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 P., 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.* or[illegible] 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 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.*

Gift vested but payment postponed.

The principle above stated applies where payment only, and not

(*d*) 2 Kee. 701; *Ive* v. *King*, 16 Bea. 46; *Cambridge* v. *Rous*, 25 Bea. pp. 417, 418; and see analogous cases (*Walker* v. *Main*, &c.), cited Chap. LVII. *Hodgen* v. *Neale*, L. R., 11 Eq. 48.

(*e*) 10 Hare, 459.

vesting, is postponed to a stated period: as in *James* v. *Baker* (*f*), where the children's "portions" were directed to be paid to them on attaining twenty-one, with a gift over "in case of the death" of any child: it was held that this referred to death under twenty-one whenever happening.

III.—Effect where Gift is of a limited interest.—Mr. Jarman continues (*g*): "It should be noticed, that the construction of the words,' in case of the death,' which makes them provide against the event of the legatee dying in the testator's lifetime, applies only when the prior gift is absolute and unrestricted, and not where such legatee takes a life interest only; for, if a testator 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 the case of *Smart* v. *Clark* (*h*), where a testator gave to his son E., who was then at sea, the interest of £500 stock in the five per cents. during his natural life, if he came to claim the same within five years after the testator's decease; but *if he should die*, or not come to claim the same within the time limited, then he gave the said stock to the children of his daughter A., with the interest that might be due thereon. E. claimed within the five years, and received the dividends until his death, when the children of A. filed a bill to obtain a transfer; and Sir *J. S. Copley*, M.R., on the authority of *Billings* v. *Sandom* (*i*), 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 it sspecial 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.

Remark 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

Where prior gift comprises the income only.

(*f*) 8 Jur. 750. And see *Monteith* v. *Nicholson*, 2 Kee. 719. post.
(*g*) First ed. Vol. II. p. 666.
(*h*) 3 Russ. 365.
(*i*) But as to which, vide ante, p. 2146.

CHAPTER LVI.

bequest, the same construction seems to prevail as where the pr gift is expressly for life (*j*).

Words following devise of estate tail.

"It seems that where a testator devises an estate *tail* to a pers and 'if he die,' then over to another, the words 'without issu are supplied to render it consistent with that estate" (*k*).

(*j*) *Tilson* v. *Jones*, 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. *Abbot*, Pollex. 479, T. Jones, 79; *Bowen* v. *Scowcroft*, 2 Y. & C. 640. (I Jarman's statement of these cases omitted.)

(*k*) *Anon.*, 1 And. 33, ante, Vol. p. 581.

CHAPTER LVII.

WORDS REFERRING TO DEATH COUPLED WITH A CONTINGENCY.

	PAGE
I. *Death of Object of prior Gift in Testator's Lifetime:*—	
(1) *General Rule*	2154
(2) *Gift over to Executors, &c., of deceased Legatee*	2157
(3) *Gift over to Next of Kin of a Married Woman*	2159
II. *Death of Object of prior Gift after Testator's Death:*—	
(1) *Where there is no previous Interest*	2159
(2) *Where there is a prior Life or other Interest*	2167
(3) *Death before Legacy is "payable"*	2175
(4) *Death before Legacy is "vested"*	2182
(5) *Death before "receiving" a Legacy*	2184
(6) *Death without "leaving" issue*	2194

"THE distinction between the cases, which form the subject of the present inquiry, and those discussed in the last chapter, is," as Mr. Jarman points out (*a*), "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.

(*a*) First ed. Vol. II., p. 670. The part of this chapter which in previous editions dealt with *Christopherson* v. *Naylor* and other cases of that class has been transferred to the new chapter on Alternative and Substitutional Gifts. Chap. XXXVI.

CHAPTER LVII.

Classification of the cases.

Cases of this kind, however, will be found to present many distinctions which require particular attention. The cases are divisible into two classes: 1st. Where the question is, whether the substituted gift takes effect in the event of the prior legatee dying under the circumstances described in the testator's lifetime. 2ndly. 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."

Ulterior gift takes effect on testator's death.

I.—Death of Object of prior Gift in Testator's Lifetime.—(1) *General Rule.*—Mr. Jarman continues (*b*): "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 (*c*), 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.

Ulterior legatees held to be entitled.

"In the early case of *Darrel v. Molesworth* (*d*), where a legacy of £50 was given to D. T. at twenty-one or marriage, and at the close of his will (which contained several pecuniary bequests), the testator added, that *if any legatee died before his legacy was payable*, the same should go to the brothers or sisters of such legatee. D. T. died in the lifetime of the testator (it is presumed under twenty-one (*e*), though the fact is not stated), and it was adjudged that it was no lapsed legacy, but went to the sister of the legatee."

So, in *Willing* v. *Baine* (*f*), 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 the same even where the gift over is of the

(*b*) First ed. Vol. II. p. 671.

(*c*) As to a bequest to A., with a gift over in case he dies *intestate*, see ante, p. 562.

(*d*) 2 Vern. 378. See also *Ledsome* v. *Hickman*, ib. 511; *Bretton* v. *Lethulier*, ib. 653; but see *Miller* v. *Warren*, ib. 207, n., Raithby's Ed.

(*e*) But see n. (*g*) infra.

(*f*) 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 Bea. 46; *Re Domvile's Trusts*, 22 L. J. Ch. 947; *Hues* v. *Jackson*, 23 L. J. Ch. 51; *Kellett* v. *Kellett*, Ir. R., 5 Eq. 298.

—— though gift over be of the "share" of the deceased.

"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 contra-distinction to those who, dying before him, could in point of fact have no "share" or "legacy" under the will.

Thus in *Walker* v. *Main* (*g*), 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.

And in *Varley* v. *Winn* (*h*), 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.

Mr. Jarman continues (*i*): "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 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

(*g*) 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. *Walker* v. *Main* was followed in *Re Gaitskell's Trust*, L. R., 15 Eq. 386. See also *Humphreys* v. *Howes*, 1 R. & My. 639; *Mackinnon* v. *Peach*, 2 Kee. 555; *Rheeder* v. *Ower*, 3 Br. C. C. 240; *Rackham* v. *De la Mare*, 2 D. J. & S. 74; *Ashling* v. *Knowles*, 3 Drew. 593; *Re Green's Estate*, 1 Dr. & Sm. 68. The cases of *Rider* v. *Wager*, 2 P. W. at p. 331; *Bastin* v. *Watts*, 3 Bea. 97, and *Smith* v. *Oliver*, 11 Bea. 494, are contrary to authority.

(*h*) 2 K. & J. 700.

(*i*) First ed. Vol. II. p. 673.

CHAPTER LVII.

as a clause of substitution. There are not wanting cases, however, in which, even under such circumstances the words have been held to apply to death in the testator's lifetime, though the language of the will seemed to afford a plausible argument in favour of the contrary construction" (*j*).

Construction where possession is immediate.

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* (*k*), 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 (*l*). One 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* (*m*), and other cases of that kind, which attribute this class-description to persons who represent the class at the time of the death."

Direction to settle "share."

Cases in which a testator after a gift to a class directs the settlement of some of the shares present great difficulty, since the word "share" may mean either an aliquot part of the estate or the part actually taken by a member of the class, which, in the event of

(*j*) The cases here referred to by Mr. Jarman are *Walker* v. *Main*, and the other cases cited ante, pp. 2154, 2155, in which the "plausible argument in favour of the contrary construction" was based on the reference to the "share" of the deceased object, as already noticed, this does not vary the construction. More recent cases following the principle above stated are *Jones* v. *Frewen*, 12 W. R. 369, 3 N. R. 415; *Re Hotchkiss's Trusts*, L. R., 8 Eq. at p. 649; *Habergham* v. *Ridehalgh*, L. R., 9 Eq. 395. See also *Smith* v. *Smith*, 8 Sim. 353, ante, p. 1326; *Re Haynes*, L. R. 19 Ch. D. 470.

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. *Ire* v. *King*, 16 Bea. at p. 53; *King* v. *Cleaveland*, 26 Bea. at p. 32. He never had occasion, however, to decide accordingly, and it is conceived that the weight of authority and opinion is against him.

(*k*) 1 Coll. 320.

(*l*) 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. 497, ante p. 1338.

(*m*) 2 Cox, 190; ante, p. 1664.

such member predeceasing the testator, is nothing. Which of these constructions is to prevail will depend upon the wording of the will under consideration; but the fact that it is or appears to be capricious (*n*) of the testator to make (in the most common case) the children of one of his daughters take nothing in the event of such daughter predeceasing him, has led the Court in recent years to be astute in distinguishing those authorities in which the word "share" was held to mean the part actually taken by a member of the class (*o*).

Where gift is expressly to children, &c., living at testator's death.

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* (*p*), 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 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."

Gift over in case of death to executors or administrators, or personal representatives.

(2) *Gift over to Executors, &c., of deceased Legatee.*—Mr. Jarman continues (*q*): "It seems, however, that where the objects of gift in the clause in question are the executors or administrators, or personal representatives of the deceased legatee, such clause is considered as merely shewing that the legacy is to be vested immediately on the testator's decease, notwithstanding the subsequent death of the legatee before the period of distribution or payment, and not as indicating an intention to substitute as objects of gift the representatives of those who die in the testator's lifetime.

"Thus, in the case of *Bone* v. *Cook* (*r*), where a testator bequeathed the residue of his estate, at the death of his wife, equally between four

(*n*) *Re Whitmore*, [1902] 2 Ch. 66.

(*o*) *Re Whitmore* (supra); *Re Powell*, [1900] 2 Ch. 525; *Re Pinhorne*, [1894] 2 Ch. 276, in all of which *Re Roberts*, 30 Ch. D. 234, was distinguished. The earlier case of *Stewart* v. *Jones*, 3 De G. & J. 532, which had been disapproved by Sir R. Malins in *Re Speakman*, 4 Ch. D. 620, was also distinguished in *Re Pinhorne*. See also *Wordsworth* v. *Wood*, 4 My. & Cr. 641.

(*p*) 13 Ves. 370. See also *Crook* v. *Whitley*, 7 D. M. & G. 490 (distinct legacies "to each of the present nieces of A.").

(*q*) First ed., Vol. II. p. 875.

(*r*) M'Clel. 168, 13 Pri. 332. See *Re Devenish*, [1889] W. N. 204.

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.

Gift to personal representatives not substitutional.

"So, in the case of *Corbyn* v. *French* (*s*), 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.

"Again, in the case of *Tidwell* v. *Ariel* (*t*), where a testator, after bequeathing several legacies, directed that they should be paid 'in one whole year after his decease, *or to their several and respective heirs*,' Sir *J. Leach*, [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, and even the words 'executors or administrators,' have been held to be synonymous with *next of kin* (*u*); but perhaps this does not much weaken the special ground to which these cases have been referred."

Unless the prior gift be immediate.

Where, however, the gift to the primary legatee or his representatives 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 (*v*).

(*s*) 4 Ves. 418.

(*t*) 3 Mad. 403. And see *Tate* v. *Clarke*, 1 Bea. 100; *Thompson* v. *Whitelock*, 4 De G. & J. 490.

(*u*) Ante, pp. 1570, 1613. 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 Bea. pp. 26, 166, 4 De G. & J. 477; and Chap. XXXVI., ante, p. 1317.

(*v*) *Gittings* v. *M'Dermott*, 2 My. & K. 69. See ante, Chap. XXXVI., p. 1316, and Chap. XL., p. 1570.

Gift over of interest of married woman, in case of death, to her next of kin.

(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.

In such a case it now appears to be settled that the gift to the next of kin does not lapse (*w*); at any rate where there is not a direct gift to the married woman and a settlement in the way indicated (*x*).

Whether gift over takes effect on happening of event subsequent to death of testator.

II.—Death of Object of prior Gift after the Testator's Death.—(1) *Where there is no previous Interest.*—Mr. Jarman continues (*y*): "We now proceed to examine the second class of cases before referred to, namely, those in which the question has been—whether the substituted gift takes effect in the event of the prior legatee dying *subsequently to the testator's decease*, under the circumstances prescribed; and if so, then, whether at any time subsequently (*z*).

"It is somewhat hazardous, in the state of the authorities, to lay down any general rule on the subject (*zz*); but it will commonly be found, it is conceived, 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.

(*w*) *Hardwick* v. *Thurston*, 4 Russ. 380; *Edwards* v. *Salaway*, 2 De G. & S. 248, 2 Ph. 625; and see *Nichols* v. *Haviland*, 1 K. & J. 504; and *Kellett* v. *Kellett*, Ir. R., 5 Eq. 298.

(*x*) *Baker* v. *Hanbury*, 3 Russ. 340, might perhaps be supported on this ground, but it is in effect overruled by *Edwards* v. *Salaway* (supra). Notice that in all these cases the married woman had a power of appointment and the gift over was in default of appointment.

(*y*) First ed. Vol. II. p. 687.

(*z*) 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.

(*zz*) The rule is now well established: see post.

Allen v. *Farthing.*

"Thus, in the case of *Allen* v. *Farthing* (*a*), where a testator, af directing that a sum of £200, recently paid to his daughter, should dedncted from the amount of any monies, or any share of his perso estate thereinafter bequeathed to her, or to which she should entitled under and by virtue of that his will, proceeded to devise his real estate to trustees upon trust for sale, and to apply the moni to arise therefrom upon the trusts thereinafter declared concerni his personal estate. The testator then bequeathed his personalt to the same persons, upon trust to get in and recover the sam and to pay and divide the same monies, estate and effects unto an between his son, *John Allen*, and his daughter, *Ann Smith*, in equ moieties, share and share alike, the share of the daughter to be fo her separate use; *and in case of the death of either of them, the sa John Allen and Ann Smith leaving any child or children him or he surviving*, upon trust that the said trustees should stand possesse of the said moiety of the said estate so given to him or her the sai *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 meantime to apply the income for maintenance; and in case of the *deat of either of them the said John Allen and Ann Smith leaving no issu lawfully begotten*, then upon trust, as to the moiety of him or he 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 favour 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 the testator had directed the £200 to be deducted out of his daughter's share aided this construction. Sir *J. Leach*, V.-C., however, held, that the testator's children took life interests only. He observed, that where a testator refers to death simply, the words are necessarily held to mean death in his (the testator's) lifetime, the language expressing a contingency, and death generally being not a contingent event (though even then slight circumstances would vary the construction); but in the present instance it was not necessary to resort to such a construction, the event described being not death simply, but death *leaving children*, so that there was a clear contingency expressed, and nothing to prevent the words from having full scope. Although the trustees were directed to 'pay' and

The event of death, leaving children, held to apply to period after testator's death.

(*a*) "M.S., 12th Nov. 1816. This case and the decree thereon are stated 2 Mad. 310 [*s. n. Farthing* v. *Allen*]; but without the arguments and judgment, which are necessary to elucidate the principle of the decision; the author has, however, been favoured with a note of them by a friend." (Note by Mr. Jarman.)

'divide' the property between the son and daughter, yet these words were to be taken in connection with the subsequent limitations, which cut down and qualified them: and his Honor thought that the argument founded on the manner in which the advance of £200 was directed to be deducted out of the daughter's share was too weak and inconclusive to control the words.

"So, in the case of *Child* v. *Giblett* (*b*), 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,' said the learned Judge, '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, 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.'"

Gift over, on A. marrying and having children, extended to event *after* death of testator.

And in *Smith* v. *Stewart* (*c*), where a testator devised and bequeathed the residue of his real and personal estate in different

(*b*) 3 My. & K. 71.

(*c*) 4 De G. & S. 253. See also *Gawler* v. *Cadby*, Jac. 346; *Gosling* v. *Townshend*, 17 Bea. 245, affirmed on distinct grounds, 2 W. R. 23; *Varley* v. *Winn*, 2 K. & J. 700; *Cotton* v. *Cotton*, 23 L. J. Ch. 489; *Johnston* v. *Antrobus*, 21 Bea. 556 (as to the pecuniary legacy); *Randfield* v. *Randfield*, 8 H. L. C. pp. 225, 236 (real estate); *Bowers* v. *Bowers*, L. R., 5 Ch. 244; *Woodroffe* v. *Woodroffe*, [1894] 1 Ir. 299; *Duffill* v. *Duffill*, [1903] A. C. 491; *Re Richardson's Trusts*, [1896] 1 Ir. 295 ("dying leaving their children fatherless").

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.

Gifts over, comprising every possible event, confined to testator's lifetime.

Mr. Jarman continues (*d*): "Sometimes, however, it happens, that a devise in fee simple is followed by alternative limitations over, which collectively provide for the event of the death of the devisee, under all possible circumstances. In such a case, we are, it is said, compelled to read the words of contingency as applying exclusively to the happening of the event in the testator's lifetime, in order to avoid repugnancy, inasmuch as the alternative limitations, if not so qualified and restricted in construction, would reduce the prior devise in fee to an estate for life. This argument seems to have prevailed in *Clayton* v. *Lowe* (*e*), 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, *for ever; and if either of them should happen to die without child or children lawfully begotten*, then he directed that such part or share of the one so dying should be equally divided amongst the surviving brothers or sister; *but if any of his grandchildren should die and leave child or children lawfully begotten*, that such child or children should have their parent's share equally divided amongst them, share and share alike. All the grandchildren survived the testator, and it was held, by the Court of King's Bench, on a case from Chancery, that in the events which had happened, they took estates in fee simple as tenants in common.

Remarks on *Clayton* v. *Lowe*.

"The reasons for the conclusion at which the Court arrived do not appear, but we may presume them to be in consistency with the argument (already noticed) which was strongly urged by the very able counsel for the plaintiffs, namely, that the several alternative limitations would, unless confined to the happening of the event in the testator's lifetime, operate to cut down the fee previously devised to an estate for life; but the reasoning, when closely examined, is not so conclusive as at first sight it may appear. Why, it may be asked, may not a testator intend that the estate of his devisee, though determinable at all events on his decease, should comprise the inheritance in the meantime, which is certainly something

(*d*) First ed. Vol. II. p. 690. (*e*) 5 B. & Ald. 636.

different from an estate for life (*ee*). Besides, the devise over, in *Clayton* v. *Lowe*, of the shares of grandchildren who should die without children, in favour of the surviving grandchildren, would not apply to, and would therefore leave the fee in, the last survivor, who might die without children; and this, even, independently of the more general ground first suggested, makes a solid difference between such a devise and a mere estate for life (*f*). Whether the certificate of the Court of King's Bench was confirmed by the Vice-Chancellor does not appear. Under such circumstances it would be unsafe to rely on the case as a deliberate adjudication in support of so doubtful a principle."

In *Gee* v. *Town Council of Manchester* (*g*), the testator gave his freehold, leasehold and personal property among his children in manner following: he gave 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, "in case any of my sons and daughters die without issue, that their share returns to my sons and daughters, equally amongst them; and in case any of my sons and daughters die and leaving issue, that they take their deceased parent's share, share and share alike." Knight-Bruce, V.-C., said: "Am I warranted, under these circumstances, in introducing the words 'in my lifetime' in the latter part of the will? I think that I am not." The observations of Mr. Jarman on *Clayton* v. *Lowe* (*h*) were cited, and the V.-C. reiterated his opinion, but expressed the wish that the case should be taken to a court of law. This was done, and the Court of Queen's Bench, approving the decision in *Clayton* v. *Lowe*, held that each child who survived the testator took an indefeasible estate in fee in the real estate and an absolute interest in the leaseholds (*i*).

The decision seems to have rested on the ground that where property is given to A., with a gift over on his death, with or without issue, this is the same thing as if the gift over were on his death simply (*j*); in such a case, said the Court, by no possibility can A. take an absolute interest, and therefore the gift cannot be treated as a gift subject to an executory gift over. On the other hand,

(*ee*) "For instance, dower and curtesy would attach to the one, not to the other." (Note by Mr. Jarman.)

(*f*) See the same reasoning advanced by Lord Hatherley in *Bowers* v. *Bowers*, L. R. 5 Ch. at p. 250.

(*g*) 19 L. J. Ch. 151. The will was before the Wills Act.

(*h*) Supra.

(*i*) *Gee* v. *Mayor, &c., of Manchester*, 17 Q. B. 737.

(*j*) See per Lord Cairns in *O'Mahoney* v. *Burdett*, L. R., 7 H. L. at p. 397.

if the double gift over were given effect to by cutting down A.'s interest to a life estate, this would, said the Court, involve the rejection of the words "heirs, executors and administrators" in the original gift. The only way, they thought, of giving effect to all the words of the will was to hold that the double gift over was intended solely to provide for the case of lapse.

The principle of the decision was disapproved by Lord Cranworth, in *Gosling* v. *Townshend* (*k*), and by Lord Hatherley, in *Bowers* v. *Bowers*, where the L.-C. pointed out the absurdity of supposing "that where the testator mentions all the contingencies, so that the first taker must die under some one or other of the circumstances mentioned, you are to add them together so as to make a certainty—then treat the case as if the gift over were simply 'in case he shall happen to die,' and restrict the happening of that event to the testator's lifetime, in order to satisfy the words importing contingency" (*l*). But it was followed by Stuart, V.-C. (*m*).

It is somewhat singular that the judges who decided *Clayton* v. *Lowe* and *Gee* v. *Mayor, &c., of Manchester* do not seem to have noticed that in *Allen* v. *Farthing* (*n*), which is always treated as an unquestioned authority (*o*), there was a gift over in the alternative event of the testator's children dying with or without leaving children, and the M.R. held that they took life interests only.

Distinction where words of gifts are emphatic.

There is, however, a distinction between cases in which the primary gift is a simple gift, and those in which words are added shewing a clear intention to give the devisee or legatee a complete power of enjoyment and disposition. Thus, in *Cooper* v. *Cooper* (*p*), 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. On the ground that there were no words in the primary bequest expressly giving an absolute interest (as there were in *Clayton* v. *Lowe* and *Gee* v. *Mayor of Manchester*) and that there was therefore no danger of imputing two inconsistent intentions to the testator in refusing to hold the

(*k*) 2 W. R. 23.
(*l*) L. R., 5 Ch. at p. 248.
(*m*) *Woodburne* v. *Woodburne*, 23 L. J. Ch. 336.
(*n*) Supra, p. 2160.
(*o*) See per Lord Cairns, in *O'Mahoney* v. *Burdett*, L. R., 7 H. L. at p. 395.
(*p*) 1 K. & J. 658.

bequest absolute upon the testator's death, it was held by Sir W. P. Wood, V.-C., that the children took life interests only.

The same principle was followed in *Bowers* v. *Bowers* (*q*).

What words in a gift over, in the alternative event of death with or without leaving issue, are sufficient to prevent it from cutting down the primary gift to a life interest, is not satisfactorily settled. *Da Costa* v. *Keir* (*r*) was a clear case of this kind (*s*). Whether words which are often added as common form, and are therefore mere surplusage—such as words of limitation, or the words "for ever," or the like—can have this effect, is more doubtful (*t*). On principle there seems to be no distinction between a devise land "to A." and a devise to "A. and his heirs," or between a bequest of personalty "to A." and a bequest to "A., his executors, administrators and assigns."

Distinction where prior gift may be regarded as a mere life interest.

After stating and commenting on the decision in *Clayton* v. *Lowe* (*u*), Mr. Jarman continues (*v*): "At all events, where the gift, which precedes the alternative gifts over, is not (as in the last case) absolute and unqualified, but is so framed as to admit of its being, without inconsistency or violence, restricted to a life interest, the ground for the construction adopted in these cases failing, the gift in question is held to confer a life interest only, there being no reason why the fullest scope should not be given to the several alternative gifts over.

"As where (*w*) a testatrix bequeathed to A. the sum of £400, to be vested in the public funds, the interest whereof she should receive when she should attain twenty-one. *In the event of her decease at, before, or after the said period*, the sum so bequeathed to be divided between B. and C. Lord *Langdale*, M.R., said that the words 'at, before, or after,' involved all time present, past, and future, and that the only construction to be put on these words therefore was, 'in the event of her decease, whenever that event might happen.'"

(*q*) L. R., 5 Ch. 244; *Gosling* v. *Townsend*, 2 W. R. 23. The cases of *Rogers* v. *Waterhouse*, 4 Drew. 329, and *Rogers* v. *Rogers*, 7 W. R. 541, cannot be relied on contra.

(*r*) 3 Russ. 360, stated post, p. 2169.

(*s*) See *Cooper* v. *Cooper*, 1 K. & J. 658; *O'Mahoney* v. *Burdett*, L. R., 7 H. L. at p. 396.

(*t*) In *Cooper* v. *Cooper*, supra, Wood, V.-C., justified the decision in *Clayton* v. *Lowe* on the ground that the primary gift contained the words "for ever," while in *Bowers* v. *Bowers* he expressed strong disapproval of the decision. In *Apsey* v. *Apsey*, 36 L. T. 941, Malins, V.-C., decided that the devisees took absolute interests, on the ground that the devise was to them and their heirs for ever. *Woodburne* v. *Woodburne*, 23 L. J. Ch. 336, seems also referable to this ground.

(*u*) Supra, p. 2162.

(*v*) First ed. Vol. II. p. 692.

(*w*) *Miles* v. *Clark*, 1 Kee. 92; see *Tilson* v. *Jones*, 1 R. & My. 553, ante, p. 2152.

It was scarcely possible, indeed, to put any other construction on 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 event restricted to the testator's death by the context.

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 shews that the testator did not intend it so to operate. Thus, in *Re Anstice* (*x*), 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 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 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 would have taken *if living*; it was clear that the interest of the original legatees was not to be defeasible during their whole lives (*y*). 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 (*z*).

It has been held (*a*) that if the primary gift is in the form of a

(*x*) 23 Bea. 135.

(*y*) *Johnston* v. *Antrobus*, 21 Bea. 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. *Collart*, [1884] W. N., 123.

(*z*) *Brotherton* v. *Bury*, 18 Bea. 65. Other cases are *Clark* v. *Henry*, L. R., 11 Eq. 222, 6 Ch. 588; *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); *Money* v. *Money*, 44 L. T. 639, ante, p. 1402.

(*a*) *Re Smaling*, 26 W. R. 231.

direction to "pay" or "divide" a fund to or among the legatees, this shews an intention that their shares are to vest absolutely at the death of the testator, and thus to exclude the rule in *Farthing* v. *Allen*. But the better opinion is that such words are not sufficient, by themselves, to have this effect (*b*). On the other ha a direction that the shares are "to be paid, transferred and assigned" to the legatees "as soon as conveniently may be after my decease," would probably be sufficient without more, to shew that they were intended to vest absolutely on the testator's death (*c*).

"Pay" or "divide."

(2) *Where there is a prior Life or other Interest.*—Mr. Jarman continues (*d*): "In all the preceding cases it will be observed, that the gift to the person on whose death, under the circumstances described, the substituted gift was to arise, was immediate, i.e. to take effect in possession, so that the Court was placed in the alternative of construing the words either as applying exclusively to death in the lifetime of the testator, or as extending to death at any time, the will supplying no other period to which the words could be referred: but where the two concurrent or alternative gifts are preceded by a life or other partial interest, or the enjoyment, under them is otherwise postponed, the way is open to a third construction, namely, that of applying the words in question to the event of death occurring before the period of possession or distribution. In such case, the original legatee, surviving that period, becomes absolutely entitled."

Where prior life interest.

At one time it was supposed that there was a general rule to the effect that "where there is an absolute gift to vest in possession at a future time, and a gift over in case the legatee should die without issue living at his decease, this *primâ facie* is to be taken to mean if he should die without issue before he is entitled to call for delivery, as it would be very inconvenient that, after delivery, the subject of gift should be liable to go over" (*e*). This rule was known as the fourth rule in *Edwards* v. *Edwards* (*f*), but it has now been authoritatively settled by the House of Lords in the two cases of *O'Mahoney* v. *Burdett* (*g*) and *Ingram* v. *Soutten* (*h*), that where the original gift is deferred, as well as

(*b*) See per Leach, M.R., in *Farthing* v. *Allen*, ante, p. 2160: per Lord Cranworth, in *Gosling* v. *Townshend*, 2 W. R. 23; per Lord Hatherley, in *Bowers* v. *Bowers*, L. R., 5 Ch. 244; and see *Duffill* v. *Duffill*, [1903] A. C. 491.

(*c*) *Ware* v. *Watson*, 7 D. M. & G., 248.

(*d*) First ed. Vol. II. p. 693.

(*e*) See *R. Heathcote's Trusts*, L. R., 9 Ch. 45 at p. 51.

(*f*) 15 Bea. 357.

(*g*) L. R., 7 H. L. 388.

(*h*) L. R., 7 H. L. 408, reversing *Re Heathcote's Trusts*, L. R., 9 Ch. 45, and restoring decision of Malins, V.-C.,

where it is immediate, the substituted gift will primâ facie take effect whenever the death under the circumstances described occur.

Re Schnadhorst.

An illustration is afforded by the recent case of *Re Schnadhorst* (*i*), where the testator gave his residuary estate upon trust for his widow for life or widowhood, and after her decease or second marriage to apply the income for the maintenance and education of his children until the youngest who should be living being a son should attain twenty-one, or being a daughter should attain that age or marry; subject thereto he directed that the trust fund and the income thereof, and any accumulations not vested or applied under his will, should be held in trust for all his children who being sons should attain twenty-one or being daughters should attain that age or marry, to whom he gave his residuary estate in equal shares; and he directed that if any of his children should die leaving issue, such issue should take his or her deceased parent's share equally, as tenants in common. The Court of Appeal held that the children who survived the testator only took vested indefeasible interests if and when they should die—that is, die at any time—without leaving issue.

The cases in the footnote 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. (*j*). Further, *Edwards* v. *Edwards* (*k*) itself, though the decision was based upon the supposed general rule, may be justified on special grounds, as was pointed out by Lord Selborne, Lord Hatherley and Lord Cairns in *O'Mahoney* v. *Burdett* (*l*).

Contingency restricted by context.

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

ib. p. 47, n. See also *Benn* v. *Dixon*, 16 Sim. 21.

(*i*) [1902] 2 Ch. 234.

(*j*) *Dean* v. *Handley*, 2 H. & M. 635. See *O'Mahoney* v. *Burdett*, L. R., 7 H. L. at p. 403; *Re Allen's Estate*, 3 Drew. 380; *Johnson* v. *Cope*, 17 Bea. 561; *Beckton* v. *Barton*, 27 Bea. 99; *Slaney* v. *Slaney*, 33 Bea. 631; *Re Hill's Trusts*, L. R., 12 Eq. 302. On special grounds the contingency was held in *Milner* v. *Milner*, 34 Bea. 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 Bea. 216 (similar direction to settle), to be confined to the death of the testator.

(*k*) 15 Bea. 357.

(*l*) L. R., 7 H. L. at pp. 394, 400 and 405.

by *Da Costa* v. *Keir* (*m*), 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 widow, and was held to be entitled absolutely.

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, 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.

Contingency restricted to period of distribution.

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 monies 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 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" as Mr. Jarman remarks (*p*), "the frame and terms of the bequest shewed that the testator contemplated the death of the widow as the period of distribution, and any doubt

Remark on *Galland* v. *Leonard*.

(*m*) 3 Russ. 360. *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 Bea. 587. And see *Whiting* v. *Force*, 2 Bea. 571; *King* v. *Cullen*, 2 De G. & S. 252.

(*n*) 6 Bea. 82.

(*o*) 1 Sw. 161.

(*p*) First ed. Vol. II. p. 694.

CHAPTER LVII.

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."

Contingency restricted to period of distribution by express direction to distribute.

"It is manifest," said Lord Selborne (*q*), "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 until 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 resulting from any particular words indicative of a contrary intention) would seem to be in harmony with sound principle and with the general current of authority" (*r*).

Olivant v. *Wright*.

A question of the same kind afterwards arose in *Olivant* v. *Wright* (*s*), where a testatrix having separate real and personal estate gave it to 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 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,

(*q*) In *O'Mahoney* v. *Burdett*, L. R., 7 H. L. at p. 406. An express direction is here meant, not merely such a disposition of the property as involves distribution, ib. 407.

(*r*) This principle was followed in *Hordern* v. *Hordern*, [1909] A. C. 210.

(*s*) L. R., 20 Eq. 220. 1 Ch. D. 346; *Re Thompson to Curzon*, 52 L. T. 498.

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.

Contingency restricted to avoid inconsistency in gift over.

The difficulties here suggested do not appear to be very formidable (*t*). That they were considered to be so in *Olivant* v. *Wright*, 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 strong ground for adopting the latter construction, even although the will contains no express direction to distribute, and no trust (*u*).

Contingency restricted by express direction to convey.

The effect of an express direction to convey at a particular time is further shewn by *Wheable* v. *Withers* (*v*), where a 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 (*w*), 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

(*t*) See ante, p. 2163, and Lord Hatherley's judgment, *Bowers* v. *Bowers*, L. R., 5 Ch. at p. 250; also ante, p. 1328 seq.

(*u*) See *Besant* v. *Cox*, 6 Ch. D. 604. But the report does not 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.

(*v*) 16 Sim. 505. See also *Whiting* v. *Force*, 2 Bea. 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*, 25 Ch. D. 394; *Lewin* v. *Killey*, 13 A. C. (P. C.) 783.

(*w*) These last words were held to be merely tautologous.

nothing left in them to enable them to execute the last trust as it stood in the will.

Contingency restricted to minority of legatees rather than to lifetime of tenant for life.

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* (*x*), 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 provision 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 period of survivorship as to the accruing shares was to be the period of the vesting of original shares.

Contingency restricted to period of vesting.

The restricted construction prevailed, partly on the authority of *Galland* v. *Leonard*, in what Mr. Jarman describes (*y*) as "the more doubtful case of *Home* v. *Pillans* (*z*), where a testator bequeathed to his nieces, C. and M., the sum of £2,000 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

(*x*) 10 L. T., N. S. 455. See also *Re Hayne's Trust*, 18 L. T. 16.

(*y*) First ed. Vol. II. p. 695.

(*z*) 2 My. & K. 15.

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 irreconcileable 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 (*a*), and he adduced *Galland* v. *Leonard* as an authority precisely in point. His lordship also dwelt on the inconvenience of holding the absolute vesting to be suspended during the life of the legatee, which was a construction the Court could never adopt but from necessity; and he considered that, in the present instance, such a construction would have the effect of defeating the testator's intention, which evidently was, that at the age of twenty-one the legacies should become absolutely vested.

Remark on Lord Brougham's judgment in *Home* v. *Pillans*.

"It is observable that Lord *Brougham*, in his remarks on *Hervey* v. *M'Laughlin* (*b*) 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 connexion with a collateral event* (i.e. leaving children), which forms a most material distinction, and excludes from the latter case much of the reasoning adopted by his Lordship from the cited authorities. The point which he had to decide was certainly one of great difficulty."

Home v. *Pillans*, approved by Lord Kingsdown.

But the decision in *Home* v. *Pillans* has frequently been recognized as correct. Thus in *Randfield* v. *Randfield* (*c*), 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 while under the circumstances the words "when he attained twenty-one" were taken pro non scriptis, Lord Kingsdown said 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

(*a*) Vide ante, p. 2148.
(*b*) 1 Pri. 264.
(*c*) 8 H. L. C. pp. 225, 231, 240. See and consider the explanation of this case given by Lord Cairns in *O'Mahoney* v. *Burdett*, L. R., 7 H. L. at p. 397, and the remarks of Stirling, L.J., in *Re Schnadhorst*, [1902] 2 Ch. 234.

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* (*d*), 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 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 (*e*).

In *McCormick* v. *Simpson* (*f*) a testator gave his property to his wife for life and after her death to "become the property of" his son John to be held by him for the term of his life, and at the death of John to "become the absolute property of his eldest son, failing such son then the same to be and become the property of my son James or of his eldest son, and in case of the death of James without such male issue as aforesaid," then over; John died in the testator's lifetime without male issue; James and his son survived the widow; the son died before his father, and James died without leaving a son; it was held that on the death of the widow James took an absolute interest, and that this was not divested by his subsequent death without leaving male issue.

The restricted construction may however be excluded if, besides the gift over in question, there is another gift over of the same legacy expressly in case of death before the time of vesting (*g*). Nor has it been generally extended to cases of immediate gift, vested in

(*d*) 2 Kee. 719. See also *Re Dowling's Trusts*, L. R., 14 Eq. 463.

(*e*) *Andrews* v. *Lord*, 6 Jur. N. S. 865; *Re Sarjeant*, 11 W. R. 203. And see judgment in *Garey* v. *Whittingham*, 5 Bea. at p. 270.

(*f*) [1907] A. C. 494.

(*g*) *Martineau* v. *Rogers*, 8 D. M. & G. 328.

point of interest, but where possession is directed to be given or payment made at a specified time (*h*).

Word "payable" occurring in gift over, whether it refers to majority or the period of distribution.

(3) *Death before Legacy is "payable."* Mr. Jarman continues (*i*): "And here it will be convenient to notice the frequently occurring point of construction arising on the word 'payable,' in such a case as the following:—A money fund is given to a person for life, and, after his decease, to his children at majority or marriage, with a gift over in the event of any of the objects dying before their shares become *payable*. In such cases it becomes a question whether the word 'payable' is to be considered as 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, specially if the testator stood towards the legatees in the parental relation (*j*).

Rule in *Emperor* v. *Rolfe*.

"And where (as often happens) the question has arisen under marriage settlements (*k*), the leaning to this construction is strongly aided by the occasion and design of the instrument, whose primary object obviously is, to secure a provision for the issue of the

(*h*) *Smith* v. *Spencer*, 6 D. M. & G. 631, explained 2 H. & M. at p. 639; *Cotton* v. *Cotton*, 23 L. J. Ch. 489; *Else* v. *Else*, L. R., 13 Eq. 196.

(*i*) First ed. Vol. II. p. 696.

(*j*) 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*, 39 Ch. D. at p. 433.

(*k*) *Emperor* v. *Rolfe*, 1 Ves. sen. 208; *Woodcock* v. *Duke of Dorset*, 3 Br. C. C. 569; *Hope* v. *Lord Clifden*, 6 Ves. 499; *Schenck* v. *Legh* (which is a leading case), 9 Ves. 300; *Powis* v. *Burdett*, ib. 428; *Hougrave* v. *Cartier*, 3 V. & B. 79; *Perfect* v. *Lord Curzon*, 5 Mad. 442; *Evans* v. *Scott*, 1 H. L. C. 43, 11 Jur. 291; *Re Williams*, 12 Bea. 317; *Mount* v. *Mount*, 13 ib. 333; *Bailie* v. *Jackson*, 1 Sm. & Gif. 175; *Swallow* v. *Binns*, 1 K. & J. 417; *Walker* v. *Simpson*, ib. 713 (will); *Moor* v. *Abbott*, 26 L. J. Ch. 787, 3 Jur. N. S. 551; *Remnant* v. *Hood*, 27 Bea. 74, 2 D. F. & J. 396; *Currie* v. *Larkins*, 4 D. J. & S. 245; *Wakefield* v. *Maffet*, 10 A. C. 422. *Re Leader's Estate*, 17 L. R. Ir. 279. But see *Whatford* v. *Moore*, 7 Sim. 574, 3 My. & C. at p. 289; *Lloyd* v. *Cocker*, 19 Bea. 140; *Jeyes* v. *Savage*, L. R., 10 Ch. 555. *Willis* v. *Willis*, 3 Ves. 51; *Cholmondeley* v. *Meyrick*, 3 B. C. C. 253 n. (due and payable).

marriage. In wills, the point, like all others, depends solely upon the intention to be collected from the context; and the cases will be found to present instances of the vesting being held to take place at majority, or at majority or marriage (as the case may be), in the lifetime of the legatee for life, or to be further suspended until the period of actual distribution, according as the language of the will was deemed to admit or to exclude the more eligible and convenient construction."

But it has been expressly laid down (*l*) that the rule (which is sometimes referred to as the rule in *Howgrave* v. *Cartier* (*m*)) that a settlement is not to be read as making the provision for a child contingent on its surviving either or both of its parents, unless the intention to do so is perfectly unambiguous, is not confined to settlements, but extends to wills; and there are numerous cases on wills where the word "payable" is referred to majority and not to the period of distribution (*n*).

"Payable" referred to majority.

Word "payable" referred to period of distribution.

On the other hand, in *Bright* v. *Rowe* (*o*), the context clearly shewed that by "payable" the testatrix referred to the period of distribution, so that there was no ambiguity to justify the application of the liberal canon of construction stated above.

Distinction where the issue of the legatee are expressly provided for.

Sir L. Shadwell took no notice of the point which was pressed upon him in *Jones* v. *Jones* (*p*), and which was perhaps glanced at by Sir K. Bruce in *Woodburne* v. *Woodburne* (*q*), that as the will made express provision for the issue of children there was no reason for adopting a construction the chief or only object 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* (*r*), 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

(*l*) *Jackson* v. *Dover*, 2 H. & M. 209; *Re Knowles*, 21 Ch. D. 806.

(*m*) 3 V. & B. at p. 85. See Hawkins on Wills, p. 218.

(*n*) *Salisbury* v. *Lambe*, 1 Ed. 465 (twenty-one or marriage); *Hallifax* v. *Wilson*, 16 Ves. 168 (twenty-one); *Walker* v. *Main*, 1 J. & W. 1 (due and payable: twenty-one or marriage); *Jones* v. *Jones*, 13 Sim. 561 (payable: gift over on death under age); see also *Butterworth* v. *Harvey*, 9 Bea. 130; *Woodburne* v. *Woodburne*, 3 De G. & S. 643 (due and payable: twenty-one); *Partridge* v. *Baylis*, 17 Ch. D. 835.

(*o*) 3 My. & K. 316.

(*p*) 13 Sim. 561.

(*q*) 3 De G. & S. 643.

(*r*) 9 Sim. 56. See *Partridge* v. *Baylis*, 17 Ch. D. 835. See also *Wakefield* v. *Maffet*, 10 A. C. 422 (a settlement case).

Distinction where the issue of the legatee are expressly provided for.

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* (*s*), 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 (*t*); 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.

Re Wilmott's Trusts.

But, in *Re Wilmott's Trusts* (*u*), where by marriage settlement stock 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 stripes), equally to be divided amongst the children or their issue, to each being a son at his age of twenty-one, and to each being a daughter at her age of twenty-one or day of marriage; and in the meantime 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,

(*s*) 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.

(*t*) As to the effect of this clause on the vesting in such a case, see ante, p. 1408.

(*u*) L. R., 7 Eq. 532, discussed in *Re Leader's Estate*, 17 L. R. Ir. 279.

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 (*v*). "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."

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 construction 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 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.

The effect of an express provision for the issue of the legatee was again discussed in *Haydon* v. *Rose* (*w*), 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

(*v*) Qu. The interests of the children were clearly vested at birth. The question was (as in *Re Wilmott'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.

(*w*) L. R., 10 Eq. 224. The gift of income for maintenance appears to have made this an immediately vested interest.

Distinction where the issue of the legatee are expressly provided for.

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 Wilmott'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* (*x*), 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. "One remark" he said "which strongly tends to shew this to be the meaning is, that if you read 'payable' as 'vested,' . . . the provision in favour of issue can never take effect as regards daughters, for a daughter cannot have children until she is married, and if she marries her share becomes vested" (*y*).

Again, in *Chell* v. *Chell* (*z*), 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

(*x*) 3 Ch. D. 654. Cf. *Re Thompson's Trust*, 5 De G. & S. 667.

(*y*) See, however, *Mendham* v. *Williams*, L. R., 2 Eq. 396.

(*z*) 23 W. R. 252, [1875] W. N. 6.

CHAPTER LVII.

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 Wilmott'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 (*a*) and that was quite sufficient to distinguish it.

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 (*b*), 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.

Result of the cases.

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 shewn by the context to be intended by the testator: but that, according to the great preponderance of present judicial opinion, an intention in favour of the latter will be inferred where in the event of the legatee 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 (*c*): and similarly that an intention in favour 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 (*d*). 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

(*a*) But see ante, p. 2178, n. (*w*).

(*b*) 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.

(*c*) *Re Wilmott's Trusts*, L. R., 7 Eq. 532.

(*d*) *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., 23 W. R. at p. 253).

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 (*e*).

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 (*f*). 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 (*g*), 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.

Where no prior life estate and no time fixed for payment.

Where time fixed but legatee predeceases testator.

If an immediate legacy is given without specifying a time 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 (*h*). And even where 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 (*i*). The legatee must survive both events, the time appointed for payment (*j*) as well as the death of the testator.

(*e*) See *Williams* v. *Clark*, 4 De G. & S. at p. 475.

(*f*) *Creswick* v. *Gaskell*, 16 Bea. 577. See also *Crowder* v. *Stone*, 3 Russ. 217, ante, p. 2101, where the point seems to have been assumed.

(*g*) See per Shadwell, V.-C., *Bielefield* v. *Record*, 2 Sim. at p. 358. See also *Jeffery* v. *Jeffery*, 17 Sim. 26 (deed); *Hind* v. *Selby*, 22 Bea. 373. And see *Farrer* v. *Barker*, 9 Hare, 737.

(*h*) This is the view expressed by Messrs. Wolstenholme and Vincent, in the 3rd edition of this work, Vol. II., p. 744, and in support of it they cite *Cort* v. *Winder*, 1 Coll. 320. See also *Whitman* v. *Aitken*, L. R., 2 Eq. 414, and *Collins* v. *Macpherson*, 2 Sim. 87. Mr. Theobald, however, thinks that the gift over would take effect if the legatee died within the executors' year (Wills, 7th ed. p. 693). Compare *Re Arrowsmith's Trusts*, 29 L. J. Ch. 774, post, p. 2185.

(*i*) *Walker* v. *Main*, 1 J. & W. 1, as explained ante, p. 2155, n. (*g*); *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).

(*j*) *Jenkins* v. *Jenkins*, Belt, Supp. Ves. 264.

CHAPTER LVII.

"Entitled in possession," &c.

Although the very word "payable" is the most apt to conne itself with a previous direction to "pay," a similar constructio has obtained in cases where the gift over was on death befo becoming "entitled in possession" (*k*), or "entitled to the pa ment" (*l*), or "to the receipt" (*m*), or before the legacy "received"—read "receivable" (*n*).

Gift over on death before "vesting" of immediate legacy;

(4) *Death before Legacy is "vested."*—The proper legal meanin of the word "vested" is vested in point of interest (*o*). Bu its natural and etymological meaning is said to be vested i possession (*p*): and there are many cases of gifts over on the deat of the legatee before his legacy has become "vested," where upo the context the word has been held to bear the latter sense. Thu where an immediate legacy, vested at the testator's death, wit a direction for payment at twenty-one, was followed by a gif over in case the legatee should die before it became vested as afore said, this was held to mean die before twenty-one (*q*).

—— of legacy possession of which is deferred.

So where a vested remainder to children was followed—in on case by a gift over "if any die before or after me and before thei shares become vested interests" (*r*)—and in another by distinc gifts over, "if any die before me" leaving issue, and, if any di "before their shares become vested" leaving no issue (*s*) 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 leaving 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 (*t*): 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 (*u*).

The simple case, unaffected by context, of a gift, vested in

(*k*) *Re Yates's Trust*, 21 L. J. Ch. 281, 16 Jur. 78.

(*l*) *Re Williams*, 12 Bea. 317 (settlement).

(*m*) *Heyward* v. *James*, 28 Bea. 523.

(*n*) *West* v. *Miller*, L. R., 6 Eq. 59. As to reading "received" as "receivable," see post, p. 2184.

(*o*) *Richardson* v. *Power*, 19 C. B. N. S. 780; *Creeth* v. *Wilson*, 9 L. R. Ir. 216. The question as to the meaning of "vested" is also discussed in Chap. XXXVII., ante, p. 1352.

(*p*) *Young* v. *Robertson*, 4 Macq. 314, 8 Jur. N. S. 825.

(*q*) *Sillick* v. *Booth*, 1 Y. & C. C. C. at p. 121.

(*r*) *King* v. *Cullen*, 2 De G. & S. 252.

(*s*) *Re Morris*, 26 L. J. Ch. 688; 5 W. R. 423.

(*t*) *Young* v. *Robertson*, 4 Macq. 314, 8 Jur. N. S. 825. But see ante, p. 2135, note (*i*).

(*u*) *Greenhalgh* v. *Bates*, L. R., 2 P. & D. 47.

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" (*v*).

At any rate the ordinary meaning of the word vested is "vested in interest" and not "vested in possession," and the Court is reluctant to construe the word as meaning vested in possession unless the context fixes this meaning on the word (*w*).

"Entitled."

The word "entitled" may refer to the right or to the possession. It has no technical meaning and in most cases will depend on the context for its effect; in the absence of an explanatory context the word is construed as referring to the possession and not to the right (*x*).

Thus in *Re Maunder* (*y*) the testatrix directed her trustees to pay the income of her residue to her son's widow for life, and after the death of the widow to divide the residue amongst all the children of her said son; and in the event of either of her grandchildren "dying before becoming entitled to any share of my estate herein before in anyway disposed of" she directed that the child or children of such deceased grandchild should take the parent's share, or, if there should be no such child or children then that such share should vest equally in all her surviving grandchildren. It was held that "entitled" meant "entitled in 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 (*z*).

(*v*) See Lord Cranworth's remark on this circumlocution in *Young* v. *Robertson*, supra, p. 2135.

(*w*) *Re Arnold's Estate*, 33 Bea. 163; *Parkin* v. *Hodgkinson*, 15 Sim. 293; *Richardson* v. *Power*, 13 C. B. N. S. 780 in Exch.; and see Chap. XXXVII.

(*x*) *Turner* v. *Gosset*, 34 Bea. 593; *Re Noyce*, 31 Ch. D. 75; *Re Maunder* stated below; and see *Beale* v. *Connolly*, Ir. R. 8 Eq. 412 (settlement). *Re Crosland*, 74 L. T. 238 is a different type of case there being no preceeding life estate.

The case of *Commissioners of Charitable Donations* v. *Cotter*, 2 D. & Wal. 615, 1 D. & War. 498 which was reluctantly followed by Knight Bruce, V.-C., in *Henderson* v. *Kennicot*, 2 De G. & Sm. 492 is founded on *Doe* v. *Prigg*, 8 B. & C. 231 (which is no longer law, see *Re Gregson's Trust Estate*, 2 D. J. & S. 428 and *Re Maunder*, infra). *Fry* v. *Lord Sherborne*, 3 Sim. 243 was also cited in *Henderson* v. *Kennicot*.

(*y*) [1902] 2 Ch. 875, affd., [1903] 1 Ch. 451.

(*z*) 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.

Gift over on death before "receiving";

—— construed receivable when the will points out a time for payment.

(5) *Death before "receiving" a Legacy.*—Executory gifts ov in the event of legatees dying before "receiving" their legaci have given rise to much litigation. Actual receipt may be delaye by so many different causes that the Court is unwilling to impu to the testator an intention to make that a condition of the legac and thus indefinitely postpone the absolute vesting of it. I therefore, the will points out a definite time when the right to receiv the legacy accrues, either expressly, as by directing payment at particular age or time (*a*), or by implication from the disposition of the will, as upon the determination of a prior life estate (*b*), th gift over will be referred to that time. And if there is a directio to pay at a specified time, as well as a prior life estate, the case fall within the decisions already noticed respecting gifts over on deat before the legacy is "payable."

Thus in *Rammell* v. *Gillow* (*c*), where a testator bequeathed hi property to trustees in trust to sell, to invest the proceeds, and t pay an annuity of 200*l.* to his wife during widowhood; and as t the residue during her life, and after her decease as to the whole in trust 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 child . . . Three of the sons (the plaintiffs) had attained twenty-one at the date of the will. The widow was still living. Wigram, V.-C., said, "If the widow had taken a life interest in the whole of the property, and if the clause which relates to the case of some of the children who had already attained the age of twenty-one years 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 of the parent, the case ought to be dealt with as in the cases referred to

(*a*) *Whiting* v. *Force*, 2 Bea. at p. 573.

(*b*) *Re Dodgson's Trust*, 1 Drew. 440. See also *Wilks* v. *Bannister*, 30 Ch. D. 512; *Re Miles*, 61 L. T. 359. In *Girdlestone* v. *Creed*, 10 Hare, at p. 487, a gift of "what I have received from the estate of A." was held to pass property so derived though not received.

(*c*) 15 L. J. Ch. 35, 9 Jur. 704.

by the plaintiffs (*d*). 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 that 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, 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.

When referred to end of one year after testator's death.

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 Trusts* (*e*), 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 (*f*). The words could not be construed "die before the testator," because the original gift was expressly to persons living

(*d*) Viz. *Schenck* v. *Legh*, &c., ante, p. 2175 n. (*k*). See accordingly *West* v. *Miller*, L. R., 6 Eq. 59.

(*e*) 29 L. J. Ch. 774, 30 ib. 148, 6 Jur. N. S. at p. 1232, 7 ib. 9, 2 D. F. & J. 474. See also *Re Chaston*, 18 Ch. D. 218; *Re Wilkins*, ib. 634.

(*f*) 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.

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* (*g*), 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*, 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* (*h*) proceeded on the extreme difficulty of deciding whether a thing might or might not 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

Inquiry rejected.

(*g*) 12 Ch. D. 834.

(*h*) 1 Ves. jun. 366.

in *Minors* v. *Battison* (*i*) 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 shews the contrary. . . On that ground, independently o. any other, I should reject the presumption that the estate could have been divided at an earlier period."

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* (*j*) is both an illustration of the extreme reluctance of the Court to read a gift 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.

Hutcheon v. *Mannington.* Inquiry, what *might* have been received rejected as impracticable.

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 died within a year after the testator, there might then have been some ground for saying, that the testator alluded to the known practice of the Court to compute interest upon legacies from a year after the death of the testator. I rather believe, he had some such 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 meantime. But has he conceived that intention, and expressed

(*i*) 1 A. C. 428.

(*j*) 1 Ves. jun. 366, cit. 6 ib. p. 536, and see the judgment more shortly and in some respects differently stated, 4 B. C. C. 491 n.

CHAPTER LVII.

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 upon 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."

Lord Eldon's observations on *Hutcheon* v. *Mannington*.

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 of that will 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" (*k*). 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" (*l*).

As to the decision that it was impossible to inquire when the legacy might have been received, Lord Eldon said (*m*), "Whatever may be the difficulty of construing the expressions in *Hutcheon* v. *Mannington*, whenever a testator directs his executors to mortgage, sell, or convert his estate into money, and divide it among other persons, this principle is clear; that no fraudulent or

(*k*) 11 Ves. at p. 497.
(*l*) 6 Ves. at p. 536.
(*m*) *Gaskell* v. *Harman*, 11 Ves. at p. 507; and see the inquiry directed in that case.

unnecessary dilatory dealing by trustees shall affect third persons. The duty of the Court would require them to discuss as a fact that loose expression 'what they might have received.'"

And in *Law* v. *Thompson* (*n*), 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 labour involved.

Is a gift over, on death without actually receiving, valid?

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 (*o*), says "I admit the soundness of the proposition, . . . that, if a testator thinks proper, whether prudently or not, to say distinctly, shewing 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 be open to so much inconvenience and fraud, that the Court is not in the habit of making conjectures in favour of such an intention. In the case of *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 (*p*), that Lord Thurlow proceeded on the ground "that he was called upon to determine, not, whether any particular event had or had 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

Early opinions, pro.

(*n*) 4 Russ. 92.
(*o*) In *Gaskell* v. *Harman*, 11 Ves. at p. 497.
(*p*) 8 Ves. at p. 555.

hold them to mean something so inconvenient (because valid) as "die before he shall have received."

Martin v. *Martin*, contra.

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* (*q*), 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.'"

The gift over upheld in *Whitman* v. *Aitken*.

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" (*r*). And no doubt of the validity of a divesting clause depending on actual receipt was suggested in *Whitman* v. *Aitken* (*s*), 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.

Minors v. *Battison*.

However, in *Minors* v. *Battison* (*t*), 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 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

(*q*) L. R., 2 Eq. 404; see also *Re Kirkbride's Trusts*, ib. 400.

(*r*) And see the observations of Fry, J., on this case in *Re Chaston*, 18 Ch. D. at p. 227.

(*s*) L. R., 2 Eq. 414.

(*t*) 1 A. C. 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 collected at pp. 432, 436, 438, 446, 447, 453.

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 purposes 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 mean that, was not in question (*u*). But Lord Selborne made some observations on that question. Referring to the clause in that case, he said, "These words, in their *primâ facie* 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 those cases, that it would be contrary to common sense to make the divesting of a vested interest depend upon the caprice or upon the dilatoriness of the trustee to sell (*v*); that in some way the property *might* be sold

Lord Selborne's observations in *Minors* v. *Battison*.

(*u*) 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. 2186, 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.

(*v*) 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

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."

Effect where part has been received and part not.

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 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.

Gift over of the legacy, or of the unreceived part, upheld.

The general question of the validity of such a clause was fully discussed in *Johnson* v. *Crook* (*w*), 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 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

universally so: for the testator may have intended that those rights should depend on the actual sale, per Grant, M.R., 8 Ves. at p. 556.

(*w*) 12 Ch. D. 639. See *Re Potts*, [1884] W. N. 106.

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.

Johnson v. *Crook* (*x*) was not followed in *Bubb* v. *Padwick* (*y*), but it has been followed by Fry, J., in *Re Chaston* (*z*) and *Re Wilkins* (*a*), and by Eady, J., in *Re Goulder* (*b*); but the difficulty caused by the Order in *Minors* v. *Battison* was not dealt with.

In *Bubb* v. *Padwick*, the will was peculiar, the intention being express that the shares should be vested in interest, i.e. transmissible (*c*), 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.

Gift over of "the share" of a legatee dying "before the execution of the trusts."

In *Roberts* v. *Youle* (*d*), a testator gave his real and personal property to trustees for sale, with authority to postpone 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.

With regard to the distinction which depends on the words specially referring to an unreceived part—to hold that, unless

(*x*) 12 Ch. D. 639.
(*y*) 13 Ch. D. 517.
(*z*) 18 Ch. D. 218.
(*a*) 18 Ch. D. 634.
(*b*) [1905] 2 Ch. 100.
(*c*) 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.
(*d*) 49 L. J. Ch. 744, [1880] W. N. 136. See also *Re Teale*, 53 L. T. 936.

there are such words, the gift over will not carry such part, wher other part has been received, and still more, that unless ther are such words the gift over is void ab initio, would seem to pus to an extreme point the doctrine that a clear vested gift is not t be cut down by subsequent ambiguous expressions (*e*).

There is, however, another distinction between *Crook* v. *John son* and the other cases, viz. that the testator had shewn that h intended the legatee to take the risk of the non-receipt bein caused by the misconduct of the trustee. Where this is not shewn the further question, whether the Court can inquire into the poss bility of an earlier receipt—an inquiry which is needed to protec the legatee from misconduct in the trustee—must, it should see (having regard to Lord Eldon's opinion that such misconduc shall not affect third persons), enter largely into the consideratio of the main question, whether the clause is itself valid. In th way *Hutcheon* v. *Mannington* would have a material bearing o that question, and the Court would have to decide whether i ordinary cases it would follow that authority or the opinion Lord Eldon, Sir J. Leach and Sir G. Turner.

Gift over if A. dies without *leaving* children, object of prior vested gift, read without *having*.

(6) *Death without "leaving" Issue.*—It has been noticed in former chapter (*f*) that where property is given to one for lif and after his death to his children, with a gift over if he dies witho *leaving* children, the gift over is sometimes construed as meanin in default of objects of the prior gift, or, as it is commonly expresse "leaving" is construed "having." The same principle of co struction applies where the gift is to a person for life and after h death to his children (or issue), with a gift over in the event of h death without leaving issue (*g*). But it does not apply where the is no ambiguity in the testator's language (*h*), and, of course, it do not apply where there is no gift to the issue (*i*).

(*e*) As to the distributive construction of a clause of forfeiture, see per Jessel, M.R., *Re Roberts*, 19 Ch. D. at p. 528.

(*f*) Chap. XLII., ante, p. 1718.

(*g*) *Treharne* v. *Layton*, L. R., 10 Q. B. 459; *Re Brown's Trust*, L. R., 16 Eq. 239; *Barkworth* v. *Barkworth*, 75 L. J. Ch. 754; *Re Bradbury*, 90 L. T. 824. As to *Ex parte Hooper*, 1 Drew. 264, see p. 1975, n. (*j*).

(*h*) As in *Young* v. *Turner*, 1 B. S. 550 ("without leaving any iss at the time of her decease") an p. 1724.

(*i*) *White* v. *Hight*, 12 Ch. D. 7 which is contra, was overruled by *Ball*, 59 L. T. 800; ante, p. 1725 n. (

CHAPTER LVIII.

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.

MR. JARMAN remarks (*a*): "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* (*b*), 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 effect; and the Court of King's Bench (*c*),

Jones v. *Westcomb.*

(*a*) First ed. Vol. II. p. 702.

(*b*) Pre Ch. 316, 1 Eq. Ca. Ab. 245, pl. 10, Gilb. Rep. 74, following *Curius* and *Coponius*, Cicero de Oratore, lib. 1, c. 39; Pro Caecina c. 18; also stated 4 K. & J. p. 610, and see *Frogmorton* v. *Holyday*, 3 Burr. 1618.

(*c*) *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. C. 531 (*Evers* v. *Challis*); *Watson* v. *Young*, 28 Ch. D. 436.

on two several occasions (in opposition to a contrary determination of the Common Pleas (*d*)), came to a similar conclusion on the same will.

Failure of prior gift held to let in ulterior gift.

"So, in *Statham* v. *Bell* (*e*), where a testator, reciting that his wife was pregnant, devised that if she brought forth a son, then that he should inherit his estate; but if a daughter, then one moiety to his wife, and the other to his two daughters (he had one daughter then living) at twenty-one. If either died before that time, the survivor to have her sister's share; *if both died before that time*, then both shares to his wife and her heirs. The wife was not enceinte; and the other daughter dying under twenty-one, the wife was held to be entitled to the whole.

"It would be immaterial in such case whether the wife had or had not an after-born child subsequent in procreation as well as birth, as such child would not be an object of the gift to the child with which the wife was then enceinte (*f*).

"So, in the case of *Meadows* v. *Parry* (*g*), 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 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 the case of *Murray* v. *Jones* (*h*), where a testatrix, after bequeathing

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.

(*d*) See *Roe* d. *Fulham* v. *Wickett*, Willes, 303, 311.

(*e*) Cowp. 40.

(*f*) *Foster* v. *Cook*, 3 B. C. C. 347.

(*g*) 1 V. & B. 124. *Jones* v. *Westcomb* and *Meadows* v. *Parry* were followed in *Moore* v. *Beagley*, 33 L. T. 198. 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.

(*h*) 2 V. & B. 313. See also *Aiton* v. *Brooks*, 7 Sim. 204, ante, p. 2102; and *Wilkinson* v. *Thornhill*, 61 L. T. 362 (settlement).

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 no daughter or daughters living at the time of her decease, and all of them but one should depart this life under the age of twenty-one years, or in case she should have two or more daughters and no son or sons living at the time of her decease, and all of them but one should depart this life under twenty-one, and without having been married; or in case she should have both sons and daughters, and all but one, being a son, should die under twenty-one, or being a daughter 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*.

Gift over extended by implication to event not falling within terms of will.

"Again, in the case of *Mackinnon* v. *Sewell* (*i*), where the testatrix bequeathed her residue in trust for her daughter Caroline for life, and after her death for her daughter's daughter, if she should survive her mother and attain twenty-one; but in case she should not survive 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, 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.

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.

"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 (*j*) 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.

Death of prior devisee held to let in ulterior devisee.

"Thus, in the case of *Avelyn* v. *Ward* (*k*), 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

(*i*) 5 Sim. 78, affd. 2 My. & K. 202. See also *Wilson* v. *Mount*, 2 Bea. 397; *Tennant* v. *Heathfield*, 21 Bea. 255; *Brock* v. *Bradley*, 33 Bea. 670 (gift over contingently on legatee marrying); *Davies* v. *Davies*, 30 W. R. 918; and the recent case of *Re Mason*, 54 Sol. J. 425.

(*j*) See *Scatterwood* v. *Edge*, 1 Salk. 229.

(*k*) 1 Ves. sen. 420. See also *Doe* d. *Wells* v. *Scott*, 3 M. & Sel. 300, ante, Vol. I., p. 947, and p. 1361, n. (*b*); *Re Betts*, 30 L. J. Prob. 167.

to W., his heirs and assigns, for ever. A. died in the testator's lifetime. Lord *Hardwicke* held that the gift over took effect; observing that he knew of no case of a remainder or conditional limitation over of a real estate, whether by way of a particular estate, so as to leave a proper remainder, or to defeat an absolute fee before by a conditional limitation, *but if the precedent limitation by what means soever is out of the case, the subsequent limitation takes place.*"

Prior devise falling under the Mortmain Act.

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* (*l*), in opposition to *Att.-Gen.* v. *Hodgson* (*m*), and *Philpott* v. *St. George's Hospital* (*n*). "I cannot," he said, "see any substantial distinction between the cases to which I have referred of a devise over after a devise to a nonentity, if the nonentity should die under age, or again, of a devise 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. (*o*).

Remarks on *Avelyn* v. *Ward*.

Mr. Jarman goes on to point out (*p*) that Lord Hardwicke's observation in *Avelyn* v. *Ward*, quoted above, "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,

(*l*) 4 K. & J. 603, 9 H. L. C. 420 (*Hall* v. *Warren*).

(*m*) 15 Sim. 146.

(*n*) 21 Bea. 134.

(*o*) The V.-C. retained his opinion, see *Re Smith's Trusts*, L. R., 1 Eq. at p. 83. In *Re Stringer's Estate* (6 Ch. D. 1, ante, Vol. I. p. 564), 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.

(*p*) First ed. Vol. II. p. 707.

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 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* (*q*), where a legacy of £10,000 was given to trustees, in trust for Lady Gough for life; and, in case she should die in the lifetime of her husband, as she should appoint; and, in default of 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* (*r*), 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 testator, leaving children"; and Lord Thurlow was strongly inclined to decide in their favour 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 the case of *Williams* v. *Chitty* (*s*), 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,

(*q*) Cit. 3 B. C. C. 395.

(*r*) 3 B. C. C. 393, 4 T. R. 706; and see *Lomas* v. *Wright*, 2 My. & K. at p. 775.

(*s*) 3 Ves. 545. See also *Miller* v. *Faure*, 1 Ves. sen. 85; *Humberstone* v. *Stanton*, 1 V. & B. 385; *Williams* v. *Jones*, 1 Russ. 517; *Underwood* v. *Wing*, 4 D. M. & G. at p. 661, 8 H. L. C. 183 (*Wing* v. *Angrave*); *Cox* v. *Parker*, 25 L. J. Ch. 873, the report of which 22 Bea. 168 omits the important statement that William Michael Parker attained twenty-one; also per Wood, V.-C., *Re Sanders' Trusts*, L. R., 1 Eq. at p. 681.

Effect where prior gift fails by lapse.

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 (*t*).

" In the three preceding cases, it will be observed, the devise or bequest which lapsed was in favour of a designated individual; but in the next case (*u*) we have an example of the application of the principle to a case of more doubtful complexion, the gift being in favour of *a class*.

" The devise, in substance, was to A. for life, remainder to his children in fee; and, if he should die without leaving issue, then over. A. died in the testator's lifetime, leaving a son, who also died in the testator's lifetime: and Sir *C. C. Pepys*, M.R., held, that under these circumstances the devise over failed; observing that it was clear that, if A.'s son had survived the testator, the devise over could not have taken effect; and it was, he thought, established by authority that the situation of the parties was not altered by the fact of the prior devisee having died before the testator.

Remark on *Tarbuck* v. *Tarbuck*.

" This is an important extension of the doctrine; for, as a devise to a fluctuating class, as children, operates in favour 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* (*v*), 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 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

(*t*) The case of *M'Carthy* v. *M'Carthy*, 1 L. R., Ir. 180, 3 ib. 317, seems to have been decided on the principle suggested by Mr. Jarman. In that case the prior gift failed because the devisee was an attesting witness.

(*u*) *Tarbuck* v. *Tarbuck*, 4 L. J. (N. S.) Ch. 129, stated more fully, ante, p. 1973.

(*v*) 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. 1723) " die without leaving children " means simply failure of the preceding gift. See *Doe* v. *Duesbury*, ante, p. 1973.

CHAP. LVIII.

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 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 (*w*).

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 four cases (*x*) with that which prevailed in *Jones* v. *Westcomb* and *Avelyn* v. *Ward*, was not adopted or recognized as the ground of decision in those cases. On the contrary, Lord *Thurlow*, in *Doo* v. *Brabant* treated *Calthorpe* v. *Gough* (on the authority of which he decided the former case) as inconsistent with and as overruling the line of cases in question. In support of the writer's suggested distinction, however, it is to be observed that the cases of *Calthorpe* v. *Gough* and *Doo* v. *Brabant* have been since followed as well in *Williams* v. *Chitty*, already stated, as in the subsequent case of *Humberstone* v. *Stanton* (*y*), without any denial of the authority of *Jones* v. *Westcomb* and *Avelyn* v. *Ward*, while, on the other hand, the principle of *Jones* v. *Westcomb*, and more especially that of *Avelyn* v. *Ward*, has been fully recognized in the case of *Doe* d. *Wells* v. *Scott* (*z*)," already stated, and other cases (*a*).

But it is necessary to find an intention on the part of the testator that the gift over is to take effect in a manner different from that pointed out by the mere grammatical meaning of the words. Thus, in *Re Tredwell* (*b*), a testator gave the income of a fund to his wife during life or widowhood, and on her marriage he gave an annuity of 2,000*l*. per annum to his wife, and directed the payment of various legacies after the death of his wife. It was contended that on the remarriage of the widow these legacies became immediately payable, but the Court of Appeal could find no grounds for supposing that the intention of the testator differed from the plain words of the will.

Re Tredwell.

(*w*) See *Shergold* v. *Boone*, 13 Ves. 370, ante, p. 2157.

(*x*) Namely, *Calthorpe* v. *Gough*, *Doo* v. *Brabant*, *Williams* v. *Chitty*, and *Tarbuck* v. *Tarbuck*.

(*y*) 1 V. & B. 385.

(*z*) 3 M. & Sel. 300, ante, p. 1361.

(*a*) See 4 K. & J. 603, 9 H. L. C. 420.

(*b*) [1891] 2 Ch. 640, see particularly Kay, L.J.'s judgment. That this case in no way infringes the principle of *Jones* v. *Westcomb* seems clear from *Re Akeroyd's Settlement*, [1893] 3 Ch. 363. See also *Re Shuckburgh's Settlement*, [1901] 2 Ch. 794.

Mr. Jarman continues (*c*): "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 opposite or alternative of that on which the substituted gift is dependent (*d*). 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.

Effect upon prior gift, of failure of executory gift.

"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 (*e*). 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

(*c*) First ed. Vol. II. p. 710.

(*d*) If the event on which the substituted gift depends actually happens in the testator's lifetime, the substituted gift takes effect, ante, p. 2154. There is a dictum in *Greated* v. *Greated*, 26 Bea. pp. 628, 629, apparently contra: sed. qu.

(*e*) See *O'Mahoney* v. *Burdett*, L. R., 7 H. L. pp. 388, 407 (legacy).

failed (not by lapse, as in the former case, but) by the failure of the event on which it was made dependent (*f*). 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* (*g*), have become assimilated, to the case first stated.

"The difference then, in short, is between a failure of the posterior gift by lapse, letting in the title of the heir or residuary devisee (as the case may be), and a failure in event, of which the prior devisee has the benefit."

(*f*) *Jackson* v. *Noble*, 2 Kee. 590. As to this case see p. 1436, n. (*q*).

(*g*) Ante, p. 2201.

CHAPTER LIX.

GENERAL RULES OF CONSTRUCTION.

General rules of construction.

"THERE are," as Mr. Jarman points out (*a*), "certain rules of construction common to both deeds and wills; but as, in the disposition of property by deed, an adherence to settled forms of expression is either rigidly exacted by the Courts, or maintained by the practice of the profession, the rules to which the construction of deeds has given rise are comparatively few and simple. But the peculiar indulgence extended to testators, who are regarded as *inopes consilii*, has exempted the language of wills from all technical restraint, and withdrawn them in some degree from professional influence. By throwing down these barriers, a wide field is laid open to the caprices of language; though, at certain points, we have seen, its limits are ascertained by rules sufficiently definite, and we are guided through its least beaten tracks by general principles.

"It has been a subject of regret with eminent judges (*b*), 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* (*c*) 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, standing unexplained, have obtained a definite meaning;

(*a*) First ed. Vol. II. p. 737.
(*b*) See Lord Kenyon's judgment in *Dennd. Moor* v. *Mellor*, 5 T. R. at p. 561; *Doe* v. *Allen*, 8 ib. at p. 502. See also Wilm. 398.
(*c*) 2 Bulst. 130.

CHAPTER LIX.

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 (*d*), and consequently to use expressions in their legal sense,—i.e. in the sense which has been affixed by adjudication to the same expressions occurring under analogous circumstances: a presumption which, though it may sometimes have disappointed the intention of testators, is fraught with great general convenience; for, without some acknowledged standard of interpretation, it would have been impossible to rely with confidence on the operation of any will not technically expressed, until it had received a judicial interpretation. And, indeed, dispositions conceived in the most appropriate forms of expression, must have been rendered precarious by a licence 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 the Courts, when they speak of the intention as the governing principle, sometimes calling it 'the law' of the instrument (*e*), sometimes the 'pole star' (*f*), sometimes the 'sovereign guide' (*g*), 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 endeavour, as we have seen, to collect the intention upon grounds of a judicial nature, as distinguished from arbitrary occasional conjecture (*h*).

(*d*) See *Doe* d. *Lyde* v. *Lyde*, 1 T. R. at p. 596; *Langham* v. *Sanford*, 2 Mer. at p. 22. But see Lord Thurlow's judgment in *Jones* v. *Morgan*, 1 B. C. C. at p. 221; and Lord Alvanley's observations in *Seale* v. *Barter*, 2 B. & P. at p. 494.

(*e*) Per Lord Hale, in *King* v. *Melling*, 1 Vent. at p. 231.

(*f*) Per Wilmot, C. J., in *Doe* d. *Long* v. *Laming*, 2 Burr. at p. 1112.

(*g*) Per Wilmot, C. J., in *Roe* d. *Dodson* v. *Grew*, 2 Wils. 322.

(*h*) "This intention must be discovered from the words of the will itself, and not from extrinsic circumstances; and the Court must proceed upon 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. at p. 43. "As regards our duty when wills come before us for construction, it is obvious to say that it is in each case to consider the words of the will. I say that, for the purpose of calling attention to the argument that in the absence of any rule of law laid down or established by cases, we are at liberty to construe wills as ordinary intelligent persons would do. There is a fallacy in this. We are bound to have regard to any rules of construction which have been established by

"The result, upon the whole, has been satisfactory; for, by the application of established rules of construction, with due attention to particular circumstances, a degree of certainty 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 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 preparation of wills; and partly to the maturity which the system of construction has gradually attained, and which enables persons conversant with the subject, in most cases, to predicate with a considerable approach to certainty, what would be the decision of a court of judicature in any given case;

the Courts, and subject to that we are bound to construe the will as trained legal minds would do. Even very intelligent persons whose minds are not so trained are accustomed to jump at a conclusion as to what a person means by considering what they, under similar circumstances, think they would have done. That is conjecture only, and conjecture on an imperfect knowledge of the circumstances of the case, because the facts known to the testator may not all be before them, and the testator's mind, as regards the attention to be paid to the claims of the different parties dependent upon him, may not have been constituted as their minds are constituted, so that it cannot be concluded that he would have acted in the same way as they. We therefore must construe the will as we should construe any other document, subject to this, that in wills, if the intention is shewn, it is not necessary that the technical words which are necessary in some instruments should be used for the purpose of giving effect to it." Per Cotton, L.J., 11 Ch. D. at p. 878. See 1 Ves. jun. p. 564; 10 H. L. C. p. 85; L. R., 6 Ch. p. 239; ante, Vol. I. p. 632. See also per Lord Blackburn, *Rhodes* v. *Rhodes*, L. R., 7 A. C. at p. 206, and per Cotton, L.J., *Re Bedson's Trusts*, L. R., 28 Ch. D. at p. 526; *Palmer* v. *Orpen*, [1894] 1 Ir. 32. But as to authority in mere verbal interpretation see 6 H. L. C. p. 108; L. R., 10 Ch. 396 n.; 4 Ch. D. p. 68; unless the words are precisely the same, 1 H. & M. p. 549; and even then authority has been said not to be absolutely binding, per Jessel, M.R., L. R., 23 Ch. D. p. 111.

CHAPTER LIX.

and, consequently, to render an appeal to its authority unnecessary.

"Some uncertainty, it will be admitted, is inseparable from the nature of the subject. Many of the rules of construction are such as necessarily involve uncertainty in the application of them to particular cases; and, in a few instances, the rules themselves are, we have seen, yet subjects of controversy. To discuss and illustrate these rules has been the design of the writer in the preceding pages.

Summary of the rules of construction.

"It may be useful, however, in conclusion, to present to the reader a summary of the several rules of construction which have already been the subject of detailed examination.

"I. That a will of real estate, wheresoever made, and in whatever language written, is construed according to the law 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 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*).

"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

(*i*) Pre. Ch. 577; ante, Vol. I. p. 1.

(*k*) Ante, Vol. I. p. 4.

(*l*) 3 T. R. 86; 11 East, 246; 16 ib. 222.

(*m*) 3 P. W. 259; 2 Ves. 74; 4 Jur. N. S. 625; 27 L. J. Ch. 726.

(*n*) 1 Ves. jun. 16; 2 ib. 417; 4 Ves. 329.

(*o*) See now as to contingent remainders, ante, p. 1444.

(*p*) Vide ante, Chap. XII.

(*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. 629. As mentioned above, Vol. I. p. 639, n. (*ii*) this maxim has little, if any, force at the present day. A more important maxim is that when a man makes a will professing to dispose of all his property, he does not wish to die intestate as to any part of it (31 Ch. D. at p. 319).

(*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 an 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, *Corydon* v. *Helyar*, 2 Cox, at p. 348.

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 irreconcileable, the latter must prevail (*t*).

"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 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*).

"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 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*).

(*s*) Ante, Vol. I. pp. 679, 768; 4 Bea. 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. XVII. But see Barnard, C. C. 261.

(*u*) See judgment in 16 Ves. 483; 5 Rep. 68; Cas. t. Talb. 240; 3 E. P. C. Toml. 607; 2 Ch. Cas. 231; 7 T. R. 138; ante, Chap. XV.

(*x*) Cas. t. Talb. 78; ante, Vol. I. p. 497.

(*y*) Ante, Vol. I. p. 512.

(*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. 489.

(*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. But extrinsic evidence of the state of the testator's property, &c. is not admissible to contradict a clear and unambiguous provision in the will: ante, Vol. I. p. 485.

(*e*) Dyer, 330 *b*; 8 Rep. 94; 2 Vern. 60; 1 P. W. 54; ante, Vol. I. p. 652.

(*f*) 16 Ves. 46; ante, Vol. I. p. 578.

(*g*) 2 Cl. & Fin. 22, 8 Bligh, N. S. 88; 4 De G. & J. 30; ante, Vol. I. p. 579.

(*h*) 1 Ves. jun. 268; 8 Ves. 42; Cowp. 99.

(*i*) Moore, 13, pl. 50; 1 And. 8; ante, Vol. I. pp. 579, 940.

(*k*) Ante, Vol. I. pp. 579, 627.

CHAPTER LIX.

"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, 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 favour or disfavour 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 presumed to be used always in the same sense (*y*), unless a contrary

(*l*) 1 Mer. 417; 2 S. & Stu. 295; 3 D. J. & S. 553, 554; [1902] 2 Ch. at p. 70.

(*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. C. 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; 2 Bea. 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. 710.

(*r*) 18 Ves. 466; 4 C. B. N. S. 790.

(*s*) 3 Ves. 450; 7 ib. 458; 7 East, 272; 2 B. & Ald. 441; ante, p. 1650. 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; 19 C. B. N. S. 780; In some cases it is difficult to say what is the "technical" meaning of a word: see the observations on the decision in *Leach* v. *Jay*, 6 Ch. D. 496, ante, Vol. I., p. 950.

(*x*) Doug. 341; 3 B. C. C. 68; 5 East, 51; 2 Bs. & Be. 204; 3 Dow, 71.

(*y*) 2 Ch. Cas. 169; Doug. 268; 3 Drew. 472.

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 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 mis-written, (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*).

(*z*) Ante, p. 1603.

(*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 has 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." (Note by Mr. Jarman.)

(*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. 595. 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. 581.

(*e*) 2 Ves. 277; 3 T. R. 87. n.; 3 ib. 484; 4 Ves. 51; 5 Ves. 243; 6 Ves. 129; 12 East, 515; 9 Ves. 566; and ante, Vol. I. p. 575.

(*f*) 18 Ves. 368; 19 ib. 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. jun. 475. But see Mr. Jarman's observations on the rule in *Wild's Case*, p. 1908.

(*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 ib. 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*, L. R., 26 Ch. D. at p. 545.

"XXIII. That where a testator's intention cannot operate to its full extent, it shall take effect as far as possible (*m*).

"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*).

(*m*) Finch. 139. See also 4 Ves. 325; 13 Ves. 486.

(*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. jun. 501; M'Clel. 168.

APPENDIX A.

SUGGESTIONS TO PERSONS TAKING INSTRUCTIONS FOR WILLS (a).

"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.

(a) These suggestions are reprinted verbatim from the original text (Vol. II. p. 747). Following the example of Messrs. Wolstenholme and Vincent, the present editor has not attempted to amplify Mr. Jarman's remarks. The fifth edition of this work (by Mr. Robbins) contained some additional "suggestions as to wills intended to operate abroad," with a summary of foreign laws relating to testamentary dispositions. These are not included in the present edition, as the editor has been unable to revise them. Some useful information will be found in a parliamentary paper issued in 1908, entitled "Reports respecting the Limitations imposed by Law upon Testamentary Bequests in France, Germany, Italy, Russia, and the United States,"

Description of lands.

"1. Where lands specifically devised are described by their local situation and occupancy (though a reference to occupancy is in general better omitted, unless it form a necessary discriminating feature in the description), 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.

Immediate profits.

"2. Where there is an immediate devise to a class of persons, who may not be in existence at the death of the testator, as to the children of A., who may then have no children, it should be ascertained, what, in this event, is to become of the intermediate profits. In the absence of any provision of this nature, they will go to the residuary devisee or heir-at-law.

Mortgaged lands.

"3. 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*)].

Payment of debts, legacies, &c.

"4. Another question which may be proper, under some circumstances, is, whether any specific fund, constituted of real or personal estate, is to be appropriated for payment of debts, funeral and testamentary expenses, and legacies; and it should always be stated, whether a fund so appropriated, is to exempt the general personal estate from being first applied, as is generally intended, though the intention frequently fails for want of an explicit expression of it.

Provision for wife and children.

"II. In relation to the *objects* of gift.—When a testator proposes to make a disposition of his property in favour 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 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. Where the children do not take absolutely vested interests until their majority or marriage, it is useful to confer a power on the trustees, with the consent of the widow, or other person taking the prior life interest, to advance some proportion (the maximum of which is usually fixed at half or one-third) of their presumptive shares, in order

(*b*) The alterations indicated by the brackets in this paragraph were made in the 3rd edition of this work, by Messrs. Wolstenholme and Vincent, to meet the alteration in the law made by Locke King's Act, ante, p. 2047.

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.

In regard to children, &c.

"1. The obvious inquiries (in addition to those immediately suggested by the preceding remarks) to be made of a testator, of whose bounty children are to be objects, are—at what ages their shares are to vest;—whether the income or any portion of it is to be applied for maintenance until the period of vesting, and if not *all* applied, what is to become of the excess? (*c*) 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.

Daughters' or other females' shares.

"2. If any of the objects of the gift (whether of real or personal property) be females, or the gift be made capable of comprehending them, as in the case of a general devise or bequest to children, it should be suggested, whether their shares are not to be placed out of the power of husbands; i.e. limited to trustees for their separate use for life (*d*), subject or not to a restriction on alienation, (which, however, is a necessary concomitant to give full effect to the intention of excluding marital influence,) with a power of disposition over the inheritance, or capital, as the case may be; and if it be intended to prevent that power of disposition from being exercised, under marital influence, without the possibility of 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.

Uses to prevent dower.

"3. If the devise be of the legal estate of lands of inheritance to a man, it should be inquired (though the affirmative may be presumed in the absence of instructions) whether they are to be limited to uses to bar the dower of any wife to whom he was married on or before the 1st of January, 1834.

Survivorship.

"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.

To what period referable.

"5. In all cases of limitations 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

(*c*) See now the Conveyancing, &c., Act, 1881, ss. 42, 43; ante, Vol. I. p. 923.

(*d*) See now the Married Women's Property Acts, ante, Vol. I. pp. 57 seq.

Suggestion as to clauses of survivorship.

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.

As to vesting.

"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.

Words of recommendation, &c.

"7. Where a testator proposes to recommend any person to the favourable 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 favour 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.

Making will conditional on testator's leaving no issue.

"*Lastly.* It may be suggested, that where a testator is married, and has no children, unless provision be made in his will for children coming in esse, or it be unreasonable to contemplate his having issue, the dispositions of his will should be made expressly contingent on his *leaving* no issue surviving him; for, as the birth of children alone is not a revocation, they may be excluded under a will made when their existence was not contemplated; and cases of great hardship of this kind have sometimes arisen from the neglect of testators to make a new disposition of their property at the birth of children; indeed, it has sometimes happened, that a testator has left a child *en ventre*, without being conscious of the fact; for the same reason provisions for the children of a married testator, who has children, should never be confined to children *in esse* at the making of the will. A gift to the testator's children generally will include all possible objects. Where, however, the gift is to the children of *another* person, and it is intended (as it generally is,) to include all the children *thereafter to be born*, terms to this effect should be used, unless a prior life interest is given to the parent of such children; in which case, as none can be born after the gift to them vests in possession, which is the period according to the established rule of ascertaining the objects, none can be excluded.

As to the persons through whom instructions are received.

"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 (*e*), Sir *J. Nicholl* 'admonished professional gentlemen generally, that

(*e*) *Rogers* v. *Pittis*, 1 Add. 46.

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.' "

APPENDIX B.

THE WILLS ACT, 1837.

1 Vict. cap. 26.

An Act for the Amendment of the Laws with respect to Wills.
[3rd July, 1837.]

EXPLANATION OF TERMS.

Meaning of certain words in this Act;

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows: (that is to say,) the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an Act passed in the twelfth year of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in Capite and by Knights Service, and Purveyance, and for settling a Revenue upon his Majesty in lieu thereof," or by virtue of an Act passed in the parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in Capite and by Knights Service," and to any other testamentary disposition; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant-right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to monies, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

"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 Attestations 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

GENERAL ENABLING CLAUSE.

All property may be disposed of by will;

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*).

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.

As to the fees and fines payable by devisees of customary and copyhold estates.

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 not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such

(*a*) pp. 65, 70.
(*b*) p. 65.
(*c*) pp. 70, 957.
(*d*) p. 70.
(*e*) Ib.
(*f*) p. 73.
(*g*) p. 80.
(*h*) p. 81.
(*i*) p. 63.
(*k*) See 4 & 5 Vict. c. 35, ss. 88, 89, 90.

will shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering, or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator: provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine, and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine, or sums of money due as aforesaid shall be paid in addition to the stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

COPYHOLD.

Wills, or extracts of wills of customary freeholds and copyholds to be entered on the court rolls;

V. And be it further enacted, That when any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this Act had not been made, the same fine, heriot, dues, duties, and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall as against the devisee of such estate have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent.

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.

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 come to him

(*l*) p. 73.

by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate pur autre vie, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

AGE OF TESTATOR.

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.

EXECUTION OF TESTAMENTARY APPOINTMENTS.

Appointments by will to be executed like other wills, and to be valid, although other required solemnities are not observed.

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 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. 47.
(*n*) p. 53.
(*o*) p. 420.
(*p*) p. 104.
(*q*) pp. 105, 107.
(*r*) pp. 105. 110
(*s*) pp. 105, 108, 123.
(*t*) pp. 112 et seq.
(*u*) p. 114.
(*x*) p. 114.
(*y*) pp. 118 et seq.
(*z*) p. 120.
(*a*) pp. 789.

WILLS OF SOLDIERS AND SEAMEN.

XI. Provided always, and be it further enacted, That any soldier being in actual military service, or any mariner or seamen being at sea, may dispose of his personal estate as he might have done before the making of this Act. Soldiers' and mariners' wills excepted.

PETTY OFFICERS, SEAMEN AND MARINES.

XII. And be it further enacted, That this Act shall not prejudice or affect any of the provisions contained in an Act passed in the eleventh year of the reign of his Majesty King George the Fourth and the first year of the reign of his late Majesty King William the Fourth, intituled "An Act to amend and consolidate the Laws relating to the Pay of the Royal Navy, respecting the wills of Petty Officers and Seamen in the Royal Navy, and Non-commissioned Officers of Marines, and Marines, so far as relates to their Wages, Pay, Prize Money, Bounty Money, and Allowances, or other Monies payable in respect of Services in Her Majesty's Navy." 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.

PUBLICATION.

XIII. And be it further enacted, That every will executed in manner hereinbefore required shall be valid without any other publication thereof. Publication not to be requisite.

ATTESTING WITNESSES' COMPETENCY.

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

GIFTS TO ATTESTING WITNESSES.

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 will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will. Gifts to an attesting witness to be void.

(*b*) pp. 93, 123. (*c*) p. 93.

CREDITOR ATTESTING WITNESS.

Creditor attesting to be admitted a witness.

XVI. (*d*) And be it further enacted, That in case by any will an real or personal estate shall be charged with any debt or debts, an any creditor, or the wife or husband of any creditor, whose debt is s charged, shall attest the execution of such will, such creditor no withstanding such charge shall be admitted a witness to prove th 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 accoun of his being an executor of a will, be incompetent to be admitted witness to prove the execution of such will, or a witness to prove th validity or invalidity thereof.

REVOCATION BY MARRIAGE.

Will to be revoked by marriage.

XVIII. (*f*) And be it further enacted, That every will made by man or woman shall be revoked by his or her marriage (except a wil made in exercise of a power of appointment, when the real or persona estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, o the person entitled as his or her next of kin, under the Statute o Distributions).

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 DESTRUCTION OF INSTRUMENT.

No will to be revoked but by another will or codicil, or writing, or by destruction.

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.

OBLITERATIONS AND INTERLINEATIONS.

XXI. (*m*) And be it further enacted, That no obliteration, interlineation, or other alteration made in any will after the execution

(*d*) p. 93.
(*e*) p. 93.
(*f*) pp. 142, 1780.
(*g*) p. 142.
(*h*) p. 167.
(*i*) p. 167.
(*j*) p. 143.
(*k*) p. 143.
(*l*) p. 145.
(*m*) pp. 155 et seq.

thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

No alteration except in certain cases, in a will, shall have any effect, unless executed as a 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 shewing 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 shewn.

No will revoked to be revived otherwise than by re-execution, or a codicil.

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.

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.

(*n*) pp. 192 et seq.
(*o*) p. 166.
(*p*) pp. 406 et seq., 949; *O'Toole* v. *Browne*, 3 Ell. & Bl. 572.
(*q*) pp. 445 et seq., 949 et seq.

GENERAL DEVISE—COPYHOLDS AND LEASEHOLDS.

A general devise of lands shall include copyhold and leasehold as well as freehold lands.

XXVI. (*r*) And be it further enacted, That a devise of the lan of the testator, or of the land of the testator in any place or in th occupation of any person mentioned in his will, or otherwise describe in a general manner, and any other general devise which would describ a customary, copyhold, or leasehold estate if the testator had no free hold estate which could be described by it, shall be construed to includ the customary, copyhold, and leasehold estates of the testator, o his customary, copyhold, and leasehold estates, or any of them, t which such description shall extend, as the case may be, as well as free hold estates, unless a contrary intention shall appear by the will.

GENERAL DEVISE—APPOINTMENT.

A general gift shall include estates over which the testator has a general power of appointment.

XXVII. (*s*) And be it further enacted, That a general devise of th 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 other wise 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.

FEE SIMPLE WITHOUT WORDS OF LIMITATION.

A devise without any words of limitation to pass the fee.

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.

WORDS IMPORTING FAILURE OF ISSUE.

Words importing failure of issue to mean issue living at the death.

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

(*r*) pp. 959 et seq.
(*s*) pp. 808 et seq.
(*t*) pp. 1806 et seq.
(*u*) pp. 1961 et seq.

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. Proviso.

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. 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

(*x*) p. 1842.
(*y*) Ibid.
(*z*) pp. 446, 1883.
(*a*) p. 447.

Gifts to children or other issue who leave issue living at the testator's death shall not lapse.

determinable at or before the death of such person shall die in the life time of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

WHEN ACT OPERATES.

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 or republished, or revived by any codicil, shall for the purposes of this Act be deemed to have been made at the time at which the same shall be so 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.

INDEX.

ABANDONMENT of domicil, 17

ABATEMENT
- annuities, estimation of, for purposes of, 1137
- appointments restricted to object to, 848
- of legacies, 2
- of rent charge, 54

ABROAD,
- assets, administration abroad, 2031
- land abroad, English [illegible] over, 2, n.
- probate of wills [illegible]

ABSOLUTE INTEREST,
- "assigns," use of word, implies, 612
- cut down by subsequent gift of life interest, 566, 1184, 1435
  - not by ambiguous expressions, 574, 1184
    - motive or purpose of gift expressed, 882
    - power of disposal superadded, 1184
  - pro tanto, only, if at all, 1435, 1458
- estate tail, words giving, create, when, 1193
  - *created by*—
    - bequest to A. and his issue simply, 1198
      - notwithstanding gift over, ib.
      - to be settled on A. and his issue, 1198,
        - unless A. and issue take concurrently
        - unless gift is substituted, 1319
          - issue take other bequests by substitution, 1322
      - to A. for life, and, in default of issue, over (under old law), 1201
    - gifts over on indefinite failure of issue are void, 1202
    - *Shelley's Case*, words importing estate tail under rule in, 1194
  - *not created by*—
    - bequest to A. *for life*, remainder to heirs of his body as tenants in common, 1195
      - to A. for life, remainder to heirs of his body, their executors, administrators, and assigns, 1195
      - to A. for life, remainder to his heirs, 1201, n., 1202, n.
      - to A. for life, and after his death to his issue, 1199
        - unless intention shown that only one shall take at a time, 1200
      - to f. c. for life, and if she dies before b., to her next of kin, 2159

Volume I. ends at p. 1040.

ABSOLUTE INTEREST—*continued.*
not created by—continued.
blending of personalty in same gift as realty given in tail, 1201
words "die without issue," 1204
words of distribution, 1194
gift over after limitations importing, void, when, 1202
implication of gifts of, 644, 1193 et seq. *See* IMPLICATION.
income, accumulation of, when donee of, may stop, 389
indefinite gift of, passes, 1297, n., 1185
life, gift for, enlarged into, 1187
followed by gift to executors, &c., 1187
general power of appointment, 1188
with power of disposal at death, whether passes, 1805, n., 1807, n.
perpetuities, rule against, rejection of modifying clauses infringing, 361 et seq.
vesting of interest, clauses postponing, void, 308, 363
restraint on alienation of, void, 1487, 1494
unless limited in point of time, 1490
subject to executory gift over, 1185

ABSOLUTE INTERESTS IN PERSONALTY, 1182

ACCELERATION,
accumulation, illegal, does not effect, of interests in remainder, 389
avoidance of particular estate, 718, 719
contingent remainder, effect of destruction of intermediate, 719
devises after trusts which fail, 722
future interests of, 718 et seq.
gift over accelerated by death of original donee during minority, 728
lapse of particular estate, 718
lapse of prior limitations, by, 428
life interest given to attesting witness, 95
particular estate followed by contingent interest, 719
personalty, quasi-remainders in, 720
powers of appointment, estates created under, 725
remoteness, prior estate void for, 350
repairing fund, where estate tail is barred, 720, n.
reversion on term during minority, whether accelerated by minor's death, 726
reversion, where term is satisfied, 723
is valid, but trusts are omitted, 724
is void ab initio, 723, 725
not where term is valid but trusts of money to be raised are void, 722
revocation of particular estate, 719
woman past child-bearing, 721

ACCEPTANCE of legacy makes annexed condition binding, 1477

ACCRETIONS, tenant for life entitled to, when, 1220, 1226

Volume I. ends at p. 1040.

ACCRUED SHARES,
accruer clause does not pass, without special words, 2115
class, general gift to survivors of, who included in, ib.
class taking, when ascertained, 2119
consolidation of original and accrued shares passes, 2118
effect of words "his or her share or shares," 2116
"share and interest," ib.
"share" or "portion" unexplained, 2115
"with benefit of survivorship," 2116
general accruer clause does not pass, if original share does not acrue, ib.
qualifications of original, not extended to, 2117 et seq.
secus, if given "in manner aforesaid," 2118
several clauses of accruer, this expression is one not extended to others, 2117
remoteness, effect where implication is necessary to prevent, 2119

ACCRUER CLAUSES, 2115

ACCUMULATION OF INCOME,
Accumulations Act, 1800..377
1892..387
accumulations, restrictions on, stated, 378
destination of released income, 388
direction for, till conversion, as between tenant for life, and remainderman, effect of, 1232
implied trusts, &c., for, void, 379
improvement and repair of land and buildings, 380, 388, 395
income released from, destination of, 388
rents, heir's interest in, nature of, 391
insurance policies, accumulation by means of, 391
interests in remainder, not accelerated, 389
legatee's right to stop, 389, n.
minority, accumulation during, 382
partial accumulations included, 378
payment of debts, accumulation for, 378, 382
bonâ fide provision for such payment necessary, 383
corpus, donees of, not recouped, if debts paid thereout, 383
future debts, whether included, 383
perpetuity rule applies to, how far, 367, 382
periods allowed for, 378 et seq.
computation of, excludes day of testator's death, 381
cumulative, for all the statutory periods not allowed, 381
excess beyond, only, is void, 380
minority of unborn person, whether may be taken, 382
policies of assurance, whether within, 391-395
trusts for, excessive, good pro tanto, 380
implied, are within the Act, 379
residuary gift to unborn persons at majority, 379
perpetuities, rule against, applies to, 381
e.g., during minorities of tenants in tail under strict settlement, 347
unless for payment of debts of testator, 367

Volume I. ends at p. 1040.

ACCUMULATION OF INCOME—*continued.*
portions of children, accumulation for, 378, 383
augmentation of general estate is not within the exception, 384
of pecuniary legacy, whether within the exception, 385
interest of parent, what, sufficient, 387
legacy to accumulate for A. for life, afterwards for his children, 386
legitimate children only favoured, 383, n.
provision charged by previous instrument, 384
purchase of land, accumulation for, 387
several families, provisions for, if any, parent takes no interest, all fail, 387
validity of, depends on purpose whereto in event it is applicable, 387
Scotland and Ireland, Act does not extend to, 378

ACKNOWLEDGMENT of signature by testator, 113. *See* EXECUTION.

ACREAGE,
Irish, evidence not admissible that testator intended, 502, n.
mistake in estimate as to, of land devised, 1272

ACT OF PARLIAMENT, conversion by sale under, 163, 733

ACTION,
chose in, cannot be bequeathed away from executor, 76, 77
conditions prohibiting, against trustees of will, 1550

ADDING WORDS. *See* SUPPLYING WORDS.

ADDITIONAL LEGACIES by codicil,
conditions, &c., attached to original gift, attach to, 1128
payable out of same funds, 1129
unless varied by context, ib.

ADDITIONS,
to gifts, owing to mistake as to fact, 189
to will after execution rejected, 125, 133
unless validated by reference in codicil, 158
See ALTERATIONS.

ADEMPTION,
conversion of stock, 415, 1256
debt, release of specific, subsequently paid off, 411
equity of redemption acquired by mortgagee-testator, 67, n.
of legacies by portions, 1158
of legacies given for a purpose, 1164
removal of goods by, 1100
revival of adeemed legacy, none, by republication, 202, 1161
two kinds of, 1157

"ADJOINING THERETO," what included by words, 1296

ADMINISTRATION,
Court of, lex rei sitæ determines, 9
feme coverte may appoint executor to carry on, 57
of assets. *See* ASSETS—CHARGE—EXONERATION—MARSHALLING.

Volume I. ends at p. 1040.

ADMINISTRATION—*continued.*
charitable gifts. *See* CHARITY—CY-PRÈS, 244
personalty, governed by domicile, 4, 9

ADMINISTRATORS, power of sale, under Lord St. Leonards' Act not implied in, 1397, n. *See* EXECUTORS.

ADMISSION of parol trust,
enforced against heir, next of kin, and trustees, 496

ADMITTANCE TO COPYHOLDS,
devise now valid notwithstanding none, 70
estate does not vest without, 70, n.
trustee's personal representatives now entitled to, when, 986

ADVANCEMENT,
amount of, stated in will, legatees bound by, 625, n.
appointee, to, 841
children, ascertainment of class of, how affected by, 1676, 1685
debts payable under power of, for "benefit" of c. q. t., 620
trust for, liberally construed, 930
word "and" read "or" ("benefit and advancement"), 620

'ADVISE," effect of, in creating trust, 870 et seq.

ADVOWSON,
charitable trust, may be the subject of, 216
"hereditaments," gift of, general, will pass, 1287
"situate at A.," will not pass, 1282
"rents and profits," devise of, includes, 1297
resulting trust of presentation, undisposed of, 1298
what passes under gift of, 1298

AFFECTION, EXPRESSIONS OF,
executors, gifts to, how affected by, 1624
resulting trust excluded by, 710

AFFINITY, "children" does include relations by, 1663

"AFORESAID," effect of word, 472, n.

"AFTER,"
death, effect of, on "die without issue," 1969
death of testator, how construed, 1472
prior interest, vesting not postponed by devise, 1372

AFTER-ACQUIRED LANDS,
devise of lands at C. passes, 409
republication, under old law, extended general devise to, 201
reversion in fee, passes by gift of leaseholds, 408

AGE,
advanced, testamentary incapacity from, 48
child-bearing, presumption as to woman being past, 1637, n.
illegitimate children not let in under, 1754
perpetuities, rule against not excluded by, *semb.*, 341

Volume I. ends at p. 1040.

AGE—*continued.*
computation of, day of birth included in, 48
condition against marriage before attaining specified, 1526
full, requisite for testamentary capacity, 47
specified, distribution postponed till, 1675
gifts on attaining, whether vested or contingent, 1371 et seq.
See VESTING.

AGENT,
direction to employ person as, obligatory, whether, 898
"money," gift of, passes money in hands of, 1300

AGREEMENT,
feme coverte, when competent to make will under, 54
revocation of will by, for sale, 162
testamentary operation of, 33
to make mutual wills, whether binding, 41

ALIEN,
devises by, at common law, 59
under Naturalization Act, 1870..59
to, 59, 90
naturalization and denization, 91
Naturalization Act, 1870, not retrospective, 90
rights of Crown before the Act, 90

ALIENATION,
absolute interest, legatee of, cannot be restrained from, 562, 1494
even if restraint limited in point of time, 562
annuity determinable on, 1496
conditions restraining, whether include bankruptcy, &c., 1500 et seq., *and see* CONDITIONS.
life interest determinable on, 562, 1496
realty, fee simple in, cannot be rendered inalienable, 1487
tenant in tail of, cannot be restrained from, 1491
restraint on, beyond limits of perpetuity, 305
by married woman, 1514
Shelley's Case, rule in, with reference to, 1939
void for remoteness, when, 305
revocation of devise by, 162 et seq.
See REVOCATION.

"ALL,"
gift of, held inoperative for uncertainty, 455
word, read "any," 599, n.

"ALSO," force of in assimilating gifts thereby connected, 593, 1790
See ITEM.

ALTERATION OF ESTATE,
revocation of will by, under old law, 161
under present law, 162 et seq.

ALTERATION OF LAW, subsequent to will, effect of, on testamentary dispositions, 205, 421

Volume I. ends at p. 1040.

ALTERATION IN A WILL,
effect of, in one copy of duplicate wills, 151
once only of expressions occurring several times, 151
in pencil, 106, 157, 158
must be signed and witnessed, 125, 158
obliterations, interlineations, cancellations, &c., 155
presumed to be after date of codicil unless noticed therein, 133
to be after execution of will, 42, n., 156
unexecuted, when validated by subsequent codicil, 158
See REVOCATION.

ALTERNATIVE CONTINGENCIES,
remoteness of one of, will not avoid gift, if the other happens, 354
whether limitations need be separately expressed, 356

ALTERNATIVE GIFTS,
bequests void as remainders may be good as, 1202
distinguished from substitutional, 1312
lapse in reference to, 426
original or substitutional, whether, 1335
to charitable or other purposes, 229
to several objects, void for uncertainty, when, 475

AMANUENSIS, signature of will by, for the testator, 123

AMBASSADOR,
domicile of origin retained by, 20
foreign law ascertained by reference to, 8, n.

AMBIGUITY,
alternative gifts, when void for, 475
charitable gifts administered cy-près in cases of, 234, 480 et seq.
class, gifts to, except one not named, 472
class, gifts to one member of, 471
clear gift not cut down by doubtful words, 574. *See* REPUGNANCY.
dates of contradictory wills, uncertainty as to, 174
description, absolute correctness of, not necessary, 511
evidence when admissible to explain. *See* EVIDENCE.
explained by clear words in another part of the will, 628
by clear words in codicil, 629
fee simple not cut down to estate tail by, 1853
general devise not restrained, 957
original will, producible, to remove, 44
patent and latent, rule as to, considered, 516
prior devise, words inconsistent with, rejected, 576
repugnancy. *See* REPUGNANCY.

AMBULATORY nature of wills, 27 et seq.

AMOUNT OF GIFT,
discrepancy in will as to, effect of, 457
omission to state, avoids gift for uncertainty when, 457

ANCESTOR,
gift to "family" may include, 1586
will of, heir not presumed to have notice of contents of, 1480

Volume I. ends at p. 1040.

"AND," word, read "or," 613 et seq. *See* CHANGING WORDS.

ANIMALS, gifts for support or benefit of, 99, 279, 901, 1140

ANIMUS ATTESTANDI, evidence admissible as to, 117

ANIMUS MANENDI, domicile of choice not constituted without, 18

ANIMUS REVOCANDI, evidence admissible as to, 145

ANIMUS TESTANDI,
evidence admissible as to, 30, 494
necessary to testamentary disposition, 30

ANNUITIES, 1135
abatement of, 1137
alienation of, restraints on, 1496
charged on corpus or income, 1147
date from which it commences, 1143
demise of lands charged by prior will with, effect of, 166
dower and free bench, barred by, 549
estate tail in, cannot be limited, 1915, n.
gift of, simply is for life only, 1915
to several for their joint lives and then over, 642
for their lives and the life of survivor, 643, 1795
gift to purchase, legatee entitled to sum given, 1145
governed by same rule as legacies, how far, 1135
heirs, limited to, 1135, 1142
implication of duration of, 643
inalienable, gift of sum to purchase, 1496
interest on, 1144
lapse of estate charged does not affect, 439
of gift of sum to purchase, 1496
"legacy" generally includes, 1061
legacy duty, what expressions exempt from, 1131
legatees' right to value of, directed to be purchased, 1145
life, 1138
perpetual, 1142
special purposes or periods for, 1140
"subject to," devisees of land given, take beneficially, 711
sum given to purchase, 1145
surplus income, accumulation of, whether legatee of fund can stop, 389, n.
direction to lay out in repairs, whether within Thellusson Act, 380, 395
survivorship between annuitants, implication of, 643
term to secure, advantage of limiting, 166, n.
trust estates excluded by charge of, 973
widowhood, gift of, during, good, 1526

ANTICIPATION, RESTRAINT UPON,
by married woman, valid, 1514
ceases with termination of coverture, 1514 et seq.
by unmarried woman, void, 1514
becomes operative on future marriage, 1514
election, how affected by, 553

Volume I. ends at p. 1040.

ANTICIPATION, RESTRAINT UPON—*continued.*
estate tail barrable notwithstanding, 1516
forfeiture on, 1515
income, arrears of, not protected, 1515
income-bearing fund and cash equally subject to, 1516
remoteness, when invalidates, 363
separate use not implied by, 1524
words, what, effectual to impose, 1523
See ALIENATION—SEPARATE USE—CONDITIONS.

"APPERTAINING," what will pass as things, 1295

APPOINTEES under special power deemed to take immediately from donor, 316

APPOINTMENT,
abatement, 848
acceleration of appointment, 845
acceleration of remainders created under, 725
ademption of, 839
assets for debts, property appointed under general power is, 2028
class to take in default of, 789
construction, rules as to, of wills generally applied to, 856, 1667, n.
deceased object cannot take under, though his share in default has vested, 1801
double, by will and deed, 839
election, doctrine of, applies to powers of, 850
invalid appointment may raise, 41, 850. *And see* ELECTION.
exclusion of objects, though power not exclusive, 1801
execution of testamentary, what is sufficient, 800
failure of, 819, 845
general devise or bequest operates as, when, 808, 831
hotchpot clause, 853
implied gift to A. *and* B. in default of, under power to appoint A. *or* B., 613
income, intermediate, of fund is carried by, 855
income, power to appoint, carries capital, 790
interest on appointed sum, 855
lapse by death of appointee, 429, 843
excessive appointment, 429, n.
of interests of persons taking in default of, 429
Wills Act, effect of, as regards general powers, 808
special powers, 831
objects and non-objects, to, 846
probate of, whether evidence of valid execution of power, 44, 800
remoteness, in reference to, 316. *See* PERPETUITIES, RULE AGAINST.
republication, whether, renders will good execution of a new power, 204, 205
revocation of, by invalid appointment in codicil, none, 187, 837
satisfaction of, 854
specific, demonstrative, and residuary, 858, 859
unappointed part of fund, who entitled to, 1801
uncertainty as to, 821
void for remoteness, 851
"writing," power exercisable by, not within Wills Act, 794

Volume I. ends at p. 1040.

APPORTIONMENT,
charitable and other purposes, gifts for, 232
charitable gift between realty and personalty, value when taken, 266, n.
increase of rent or income of, 713
See CONTRIBUTION.

APPORTIONMENT ACT, 1870..1104, 1219

APPROBATE AND REPROBATE, doctrine of, 541

APPURTENANCES,
gift of, what passes by, 1293
"lands appertaining to" and distinguished, 1295

ARMS, conditions requiring assumption of, 1542

ARREARS of income not within conditions restraining alienation, 1505, n.

"AS TO," disjunctive force of, where several clauses commence with words, 1393, n.

ASSENT of husband surviving to wife's testamentary disposition, 54

ASSETS,
administration of, abroad, 9, 2014
in Scotland, 14
appointment under general power makes, for debts, 2023
contribution to charges, 2031
equitable, applicable to payment of all creditors pari passu, 2020
unless creditor has a judgment, 1988, n., 2024
what are,
personal estate appointed under general power, 2025
real estate devised for, or charged with payment of debts, 2021
separate estate of married woman, 2098
legal, what are,
equitable interest in chattels, 2022
in freehold lands, ib.
equity of redemption in copyholds, 2023
in freeholds, 2023
in leaseholds, 2022
whatever executor recovers virtute officii, ib.
order of application of, in payment of debts, 2025
1. general personal estate, 2025
2. lands devised in trust for payment of debts, 2026
3. descended estates, 2026, 2029
including land subject to trust (2), or to charge (4), for debts,
but not beneficially devised, 2029
lapsed devises, 2029
but lapsed *share* is liable only pari passu with well-devised share, 2029
4. real estate and specific personalty subject to charge of debts, 2026
5. pecuniary legacies, 2026
6. specific legacies, and real estate devised in terms specific or residuary, 2027
7. property appointed under general power, 2028
order of liabilities, 2014

Volume I. ends at p. 1040.

ASSETS—*continued.*
order of payment of debts out of legal assets, 2019
rules regulating, do not affect creditors, 2025
several estates liable to same charge contribute pro rata, 2031
real estate is, for all creditors pari passu, 1388, 1987
sold for value, creditor cannot follow, 1988
See CHARGE—DEBTS—EXONERATION—MARSHALLING.

ASSIGNMENT held testamentary, 35

ASSIGNS,
absolute interest implied by use of word, 612
devise to A., his heirs *or* assigns, 612
and his assigns, gave life estate under old law, 1804
and his assigns *for ever*, gave fee, 1804
gift to executors, administrators *and assigns*, how construed, 1618
to heirs and assigns of A., held power of appointment in A., 1558
trust estates, devise of, where trusts to be executed by trustee and his, 989
See EXECUTORS.

ASSURANCE, policies of, whether within Thellusson Act, 391. *See* POLICY.

"AT DEATH," effect of, on "die without issue," 1969

"AT, IN OR NEAR," how construed, 1280, 1282

"AT OR WITHIN," how construed, 1282

ATTAINDER,
abolished, for treason or felony, 56, 60
convict formerly liable to, may devise, or bequeath, 60

"ATTEST," meaning of the word, 122

ATTESTATION. *See* EXECUTION OF WILL.

ATTESTING WITNESS,
creditor may be a witness, 93
executor may be a witness, 93, 96
gift to, void, 92 et seq.
solicitor trustee, 96
supernumerary, evidence admissible to disprove animus testandi, 94
tenant for life, 95
trustee, 96

ATTORNEY, power of, held testamentary, 39

AUDITOR, appointment of, by testator, is imperative, 899

AUTHORITIES, use of, in construing wills, 2205

AUTRE VIE, ESTATES PUR,
devise of freeholds, 72 et seq.
by quasi tenant in tail, 74
devolution of, 73
executory devise of, 1446
how created, 1211

AUTRE VIE, ESTATES PUR—*continued.*
included in Land Transfer Act, 1897..74
liability to duty of, not affected by domicile, 3
passed under old law, by general devise of "lands," 965
words of limitation necessary, if heir was special occupant, 1212
Shelley's Case, rule in, applies to, 1860

BANISHMENT of husband, effect of on testamentary power of wife, 56

BANKER,
cheque on, held testamentary, 36
"debts," bequest of, passes money with, 1302
money on deposit, 1302
money with particular, gift of, strictly construed, 1284
"money," gift of, passes balance or deposit account with, 1302
"property at bank" passes what, 1087
"ready money," gift of, passes money in hands of, 1302
"securities for money," gift of, does not pass deposit note, 1304

BANK NOTES, gift of "money," passes, 1300

BANKRUPTCY,
absolute interest cannot be excluded from operation of, 1500
life interest may be made to cease on, 1505 et seq.
"alienation," where includes, 1506
annulment of, before payment, 1513
chattels, life interest in, how affected by, 1455, n.
during life of testator, 1511
gift over on, takes effect on death of prior donee, 1364
subsisting at testator's death, 1511
maintenance trust in case of, 1501, 1503

BANK STOCK, "securities for money," gift of, will not pass, 1304
what will pass under gift of, 1305

BAPTIST MINISTER, bequest for benefit of, valid, 208

BARE TRUSTEE,
definition of term, 983
vendor under contract for sale, whether is a, 980, 981

"BELONGING THEREUNTO," gift of things, what passes by, 1295

BENEFIT,
advancement for, held to authorize payment of debts, 620
resulting trust excluded where motive of gift is, of devisee, 709 et seq. *See* RESULTING TRUST.

"BENEVOLENT" purposes are not charitable, 222

"BEQUEATH," realty not excluded from gift by use of word, 1009, n.

"BEQUEATHABLE," whatever passes to personal representatives is, 65. *See* DEVISABLE.

Volume I. ends at p. 1040.

BILL OF EXCHANGE,
held testamentary, 36
"money," gift of, whether passes, 1300
"securities for money," gift of, whether passes, 1304

BLANKS,
invalidate gift, for uncertainty, when, 470
will, whether, 106
number of children misstated, with space as if for names, 1707
parol evidence, how far admissible to supply, 514
presumption as to time when, filled up, 157

BLENDED FUND. *See* EXONERATION—CONVERSION.

BLIND, DEAF, AND DUMB, person so born cannot make a will, 48

BLIND TESTATOR,
capacity of, to make will, 48
"presence of," what constitutes, 120
will need not be read over to, 49

BONA VACANTIA, Crown entitled to what as, 91, n., 769, 2054

BOND,
assignment of, held testamentary, 35
charitable gift of, 252, n., 255
draft, held testamentary, 36
foreign, though not enforceable, is property, 76

BONUS, tenant for life entitled to, 1226

BOOK-DEBTS,
meaning of, 1311

BOOKS do not pass by gift of furniture, 1308

BORN,
gift to children, whether includes afterborn, 1694
in due time, meaning of, 1694, n.
"now," construction of, 504, 1701, 1753

BOROUGH ENGLISH,
devise to "heir" of lands in, effect of, 1569
heirs in, take common-law lands, how, 1567

BROTHERS AND SISTERS,
ascertainment of class, time for, 1640
gift to "my brother," there being several, 522
half brothers and sisters included in gift to, 1639

BUILDING charitable institutions, gifts for, 260

BURNING, revocation of wills by, 143 et seq. *See* REVOCATION.

BUSINESS,
direction to carry on, effect of, 920
goodwill and plant of, what included in gift of, 1311
profits of, what are, 1222, 1227
rents and profits of, what included in gift of, 1207
trusts to carry on, 920, 1227

Volume I. ends at p. 1040.

CALLS on shares due at testator's death, exoneration in respect of, 2036

CANCELLATION. *See* REVOCATION.

CAPACITY, testamentary, what is, 47 et seq.

CAPITA, PER,
persons so take under gift to—
A. and the children of B., 1711
children of several, 1711 et seq. *See* CHILDREN.
issue, 1590
next of kin, 1605
relations, *semb.*, 1620

CAPITAL, power to expend, by donee of life interest, 464

CASES. *See* AUTHORITIES.

"CASH," bequest of, what included in, 1302

CATHOLIC (ROMAN) RELIGION, what bequests connected with, are va
209

CELIBACY, gifts during, good, 1540, 1542

CESSER OR FORFEITURE CLAUSES, 1442, 1456

CHANGING WORDS,
context must clearly indicate right word to justify, 599
word "all" read "any," 599, n.
word "and" read "or,"—
in advancement clause ("benefit and advancement"), 620
in gift to class and such as should be living at a particular time, 6
in gift to grandchildren and their issue, 614
in gift over on death unmarried and without issue, 614
in gift over "without being married and having children," 615
in power to A. and his heirs and assigns, 614
to suit general context, 614
vesting favoured, not divesting, 613, 620
word "and" not read "or,"—
in limitation over after estate tail, 606
to divest a legacy, 620
word "are" read "shall be," 600, n.
word "fourth" read "fifth" to prevent subverting plan of will, 600
word "future" read "former," 600, n.
word "or" read "and,"—
in devise to A. or his heirs, 611
to A. or his heirs or assigns, 612
in gift on either of two events, with gift over if one or other fails, 609
to persons surviving specified event, or the children of such a
are then dead, 603
to several objects alternatively, 610
unless substitutionally construed, 610, 611
to take effect at testator's death or later, in event, 611, 2149

Volume I. ends at p. 3040.

CHANGING WORDS—*continued.*
word "or" read "and"—*continued.*
in gift over on death under twenty-one or without issue, 603
on death under twenty-one unmarried or without issue, 603
on death under twenty-one or without leaving a husband, 604
in power to appoint to A. or B., gift implied to A. and B. in default, 613
to suit general context, 609
word "or" not read "and,"—
in limitation over after estate tail, 604
word "several" read "respective," 601
words "son or any person" read "son of any person," 600
words "the L. K. estate" read "the C. estate," 600
word "unmarried" read not having been married, 619
not married at the time, 618
words "without issue" read "without leaving issue," 600
See SURVIVOR—UNMARRIED.

CHAPEL, bequest to found, void, 259

CHARGE,
generally,
charitable gift charged partly on land, void pro tanto, 251
now rendered valid by Mortmain Act, 1891..275
condition distinguished from, 1380
extinguishment of, by union of characters of mortgagor and mortgagee, 970
perpetuities, rule against, whether applies to, subsequent to estate tail, 322, n.
residue of particular fund, gift of, subject to unascertained, 1055
revocation of power, by devises of lands charged, 178
trust or gift for, or subject to a particular purpose, 709
of debts on realty:
(1) *what debts included:*
all creditors specialty and simple contract, entitled to payment pari passu under, 1987
all liabilities binding the personal estate are included, 1989
costs of administration suit included, 2016
damages accrued after the death, 1989
debts contracted after date of will, 1990
secured by mortgage, 2047, et seq.
statute barred, not included, 1989, n.
further running stayed, whether, 1990, n.
direction to deduct debt due from legatee, ib.
to pay debts of another, effect of, ib.
to pay debts subsisting at a particular time, 1990
dilapidations, 1989, n.
future debts, 1990
incumbrance on land descended cum onere not included, 2043
interest on debts charged not generally payable, 2021
direction to pay confined to interest-bearing debts, 2022
funeral expenses, extension of charge to, 2059
laches, benefit of charge lost by, 1990, n.

CHARGE—*continued.*

of debts on realty—*continued.*

(1) *what debts are included—continued.*
satisfaction of debt by legacy to creditor rebutted by, 1173
sum covenanted to be bequeathed, 1989, n.
testamentary expenses, extension of charge to, 2059
what are, 2014

(2) *what property is affected, and how—*
all testator's realty generally charged, 1989
appropriation of specific property, effect of, 1991 *et seq.*
confers an implied power of sale, 1989
estate charged cannot be followed after sale, 1988
specifically devised land, 2003
trust estates excluded by, 973

(3) *what words will create—*
devise after payment or deduction of debts, 1992
devise of lands and bequest of residuary personalty after payment of debts, 1997
direction, general, to pay debts, 1990
notwithstanding absence of devise or mention of realty, *semb.*, 1991
charge of all debts on particular estates 1992
on residuary personalty, 1992
of specific debts on all real estates ib.
on particular estates, ib.
direction to pay debts in the first place, 1993
direction to pay debts out of testator's estate, 1990
direction that executor shall pay, with devise to him, 1993
although he renounce probate, 1993, n.
although he be devisee on express trusts, 1994
for life only, *semb.*, 1995
in tail, ib.
direction to executors to pay and devise to one of them "subject as aforesaid," 1993
direction that produce of realty shall go as personalty and bequest of personalty after payment of debts, 1998
impracticable mode of payment directed avoids charge, 1990, n.

what words will not create—
authority, mere, to trustees to pay debts, 1991
charge on same lands, specific, to be executed by another person, 1992
direction, general, to pay, where specific estate charged, *see* 1992
direction to executors to pay, none being devisees, 1992
some only being devisees, 1995, 1997
though unequal beneficial interests are given to them, 1996
where devise in trust includes only part of lands devised, 1996

Volume I. ends at p. 1040.

CHARGE—*continued.*

of legacies on realty :—

annuities generally included, 2003
what property is affected and how—
confined to residuary realty, 2003
unless debts also are charged, 2004
lapse, with reference to, 439. *See* LAPSE.
trust estates excluded from, 973
what words will create—
generally, words creating charge of debts, 1998
gift of legacies followed by gift of residuary realty and personalty, 2000
notwithstanding previous gift of realty for limited estate, 2001
gift of residuary realty and personalty preceding bequest of legacies, 2001
what words will not create—
gift (after legacies) of all realty and residuary personalty, 2002
gift of sums "part of" personal estate and of residue of estate and effects, ib.
joining realty and personalty in one gift, 2002
See *Rents and Profits.*

CHARITY,

apportionment, ascertainment of, by court, 233
trustees, discretion given to make, 232
refusing to make, effect of, 232
bequests for, and other definite purposes, 232 et seq.
and other indefinite purposes, 229 et seq.
where cost of other purpose is ascertainable, 228
charge on land and pure personalty fails pro tanto, 251

charitable uses, what are, 212
what are not, 221
gifts for advancement of education and science, 215, 217
advowson, 216
aid of private charity, not, 217, 222
animals, benefit of, 99, 215
benevolent purposes, not, 222
church, repairs, &c., of, 214
families specified, not, 219
friendly society, whether, 214, 223, 241
hospital, 214
life-boat, 213
masses for souls, not, 210, 221
museums, 213
parish, benefit of, 213
pious purposes, not, 222
poor persons, 218
poor relations, 220, 221
preaching sermons, 214
public benefit of a place, 213, 215, 217
garden or museum, 213

CHARITY—*continued.*

charitable uses—*continued.*

gifts for public utility, 217
regimental mess, 215
religious purposes, 216
tomb erection or repair of, whether, 214, 221
individuals, legacy payable at once, may be, 220
condition to convey land to purposes of, void, 256
conditional gift to, 242, 280

cy-près, doctrine of, 233

absolute resemblance not implied by, 238
administration of charitable gifts by Crown or court, when, 244
not where gift is to corporation, 245
contra, where not to be applied as part general funds, 245
is to foreign charity, 235, 245
is void or not charitable, 236
applied where—
bequest not required, 241
object indefinite, 234
"poor relations," immediate gift to, 220
non-existent or impossible, 241
refuses to accept, 235
residuary bequest, effect of, 235
not applied where—
condition attached to gift is not fulfilled, 242
contrary intention appears by the will, 236
lapse of gift to particular institution, 238
particular institution alone intended, 236
superstitious uses executed, 208, n.
defined in Stat. 43 Eliz. c. 4..212
dissenters, charitable gifts to, 208

exceptions from statutory restraints, 270-274

gifts of land, &c., in colonies, 271
in Ireland or Scotland, 271
to English Universities, &c., 270
to particular charities under various statutes, 272-274
power to take and hold does not include power to take by devise, 270
gift to, exhausting income, subsequent increase does not result to heir, 212, 712, 718
favoured by policy of early times, 246

gifts to, what, valid,

arrears of rent, 255
bond charged on county rate, 252, 253
conditional gift, 280
debentures of public companies, 254
railway companies, 254
town improvement commissioners, 255
foreign charity, bequest to purchase land, 272

Volume I. ends at p. 1040.

CHARITY—*continued.*

gift to, what, valid—*continued.*

income of fund to establish school, &c., 258
land, or money to buy land, generally, now, subject to provisions of Mortmain, &c., Act, 1891..274
land or money to buy land for collegiate or academical purposes of certain universities, colleges, and public schools, 270
land or money to buy land in colonies, 271
in London, *qu.*, 272
in Ireland or Scotland, 271
mixed fund, 251
money to build on land already in Mortmain 261
reference to land in will necessary, 262
where purchase of land is forbidden, 261
to endow church, 259, 260
to establish institution not requiring land, 258
to support school, 258, 259
with option to buy land or invest otherwise, 257
where option results from rules of the charity, 257
pure personalty, 251
shares of joint-stock companies, 253
unless land held directly in trust for shareholders, 255
tenants' fixtures, 255

gifts to, what were formerly void (but *see* now 1692 *et seq.*)—
of growing crops, 255.
of judgment debts charging land, 250
land or money to be laid out in land, 249
leaseholds, 250
money arising from sale of land, 249, 256
charged on land but not yet raised, 250
partially on land, void pro tanto, 251
contra after lapse of time, 263
on condition that legatee provides land, 261
secured on mortgage of land, 250
on poor rates, 252
on turnpike tolls, 252
of money secured on vendor's lien on land, 250
to be invested on mortgage as trustees think fit, 257
laid out in land, 257
to erect a school or other building, 260
unless building to wait till land is provided aliunde, 261
or purchase of land forbidden, 261
to establish a hospital, 259
a school, 258, 259
a slaughter-house, 259
to found a chapel, 259
of money to pay off mortgage or charge on lands of, 262
to purchase land in England, 247, 256
with recommendation to buy land, 257
ultimate object of buying land, 258

Volume I. ends at p. 1040.

CHARITY—*continued*,

gifts to, what were formerly void —*continued*.

of right to lay mooring chains, 252
share in private partnership holding land, 254
void devise, legacy founded on, 262
gift over, if charitable gift be bad, is good, 280
immediate legacy may be charitable, 218, 220
Jews, charitable gifts for benefit of, 210
lapse, in reference to gifts to, 238, 431
legal estate vitiated by void trust for, 255
unless trust is secret, 255
marshalling assets for, none, 264
charge of land by auxiliary fund, effect of, 269
testator may marshal his own assets, 267
by directing payment of charity legacy out of pure personalty 267
which marshals as between legatees only, unless debts thrown on other property, 268
pure personalty to be reserved for charity, 268
by gift of residuo and direction that it shall comprise pure personalty only, 267
official character of legatee, does not necessarily make gift charitable, 223
perpetuities, rule against, does not apply to gifts to, 280, 366
nor to non-charitable gifts or conditions engrafted thereon, 280
pious purposes, gift for, not charitable, 222
poor not necessarily sole objects of, 217
poor-rate, gifts in aid of, 217
"poor relations," gift to, whether charitable, 220
Pope, supremacy of, bequest for teaching, 210
private charity, gifts for, bad, 217, 222
public revenue, gifts in aid of, 217
remoteness, gifts to, void for, 211
resulting trust after gift to, 367
Roman Catholics, gifts to, for charitable and religious purposes, good, 209
secret trusts for, avoids devise, 263
communication of, to devisee, 264
discovery compellable, 263
evidence aliunde admissible to prove, 263
legal estate not avoided by, 255
unattested papers declaring, effect of, 264
verbal promise to perform, avoids devise, 264
superstitious uses, gifts to, void, 207
secret trusts for, 208
trust for, avoids legal estate, 255
unless trust is secret, 255
trusts of void legacy, Court will not execute, 263
validation presumed after lapse of time, 263
trust-estates excluded by charitable gift, 974
uncertainty of object does not necessarily avoid charitable gift, 225 et seq.

Volume I. ends at p. 1040.

CHATTEL INTERESTS IN LAND,
bequests of, principles regulating, 72
devisees in trust take, when, 1839
resulting to heir devolves as personalty, 708

CHATTELS,
absolute interest in, given by words creating estate tail in realty, 692
devolution of, governed by *lex domicilii*, 4
joint tenancy in, 1787
"moneys," gift of, passes, *semb.*, 1033
personalty, general, passes by gift of, 1022 et seq. *See* GENERAL PERSONAL ESTATE.
successive interests in, how preserved, 1454
trusts of, executed, to go with realty, 692
proviso against absolute vesting in tenant in tail, till twenty-one, valid, 693
words "so far as law will permit," trust not made executory by, 695
not saved from remoteness by, 696
trusts of, executory, to go, &c., authorize postponement of absolute vesting, 695
to go along with a title, 700
to go as heirlooms, without reference to land, 700
who entitled to, in default of next of kin, 716, n.

CHATTELS, REAL. *See* CHATTEL INTERESTS IN LAND.

CHEQUE, held testamentary under old law, 36

CHILD, estate tail created in A. by devise to A. and if he die "not having a son," over, 1919
estate tail created in A. by devise to A. for life, remainder to son, "if he have one," and if not, over, 1919 et seq.
to A., and if he should leave no child, with context, 1923
to A. and his heirs, and if he die without leaving a child, over (afterwards referred to as "without leaving issue"). 1923
to A. and her heirs if she has any child, if not, over, 1925
to A. and his eldest son after him, by force of subsequent clear devise in tail "in like manner," 1928
in remainder, by devise to A. for life (remainder to his eldest son for life) and so on, the eldest son always to inherit, 1927
not created in A. by devise to A. for life, remainder to son (without more). 1918
words of limitation, when, 1918 et seq.

Volume I. ends at p. 1040.

"CHILDREN,"

as to personal estate,

Wild's Case, rule in does not apply, 1914
if children, they take jointly with parent, 1917
but slight context makes parent tenant for life, remainder to his children, 1915
if no children, parent takes absolutely, 1915
except annuities, which, without words of limitation, endure for life only, ib.
same rule applicable to devises to "sons" or "daughters," 1918

as to real estate,

If A. has children at the date of the will—
joint estates created by devise to A. and his children (without more), 1911
estate tail created in A. by such devise, if context shows intention to maintain family estate, 1913
by devise to A. and his children in succession, 1913
by devise to A. for life, remainder to his children, and so on for ever, and for want of such children, over, 1914, n.
by devise to A. *to her* and her children, 1913
If A. has no child at the date of the will—
estate tail created in A. by devise to A. and his children, 1907, 1908
unless context shews that children are to take in remainder, 1910
word of limitation, when, 1906 et seq.

CHILDREN, gifts to,

construction, general principles of,

affinity, relatives by, not included, 1663
construed, generally, to mean immediate offspring, 1656
to mean issue, 1602, 1660
date at which will speaks in regard to, 397, 401, 402
different marriages, children by, whether included, 1663
"family" gift to, held to mean, 1584 et seq.
grandchildren or remoter issue not included, 1656 et seq.
although no child at date of will, 1659
unless no child was possible at date of will, 1659
context may even then exclude remote issue, 1659
unless, on context, "children" means issue, 1660
implied from gift to posthumous children, whether, 677
not from gift over on death without leaving, 675
unless contrary intention appears, 676
lapse in reference to, 447
legitimate children primâ facie alone entitled, 1748. *See* ILLEGITIMATE CHILDREN.
"now living," gift to children, includes only those in esse at date of will, 401, 1701
objects of gifts take as class, 1664
unless contrary intention appears by naming them, 1665

Volume I. ends at p. 1040.

CHILDREN, gifts to—*continued.*

death without, reference to,

"die without" read without leaving, 1718
"die without having" read without having had, 1720
"die without leaving," after vested gift, read without having had, 1721
estate tail in parent when created by, 1722
refers to period of death, 1721
if two persons (husband and wife) "leave no children," how read, 1722
distinction where persons are not husband and wife, 1722

distribution per capita or per stirpes,

per capita, to A. and B. (or a class) and their children, 1711
A. and the children of B., 1711
children of A. and B., 1711
if A. has none, B.'s children take all, 1715
several as joint tenants for life, remainder to their children, 1714, 1716
as tenants in common, remainder to children of them or either of them, 1715
as tenants in common, remainder "to their children, i.e., the children of," &c., 1715
as tenants in common, remainder to the children of some of them, 1715
per stirpes, capital, where income given per stirpes, 1712, 1713
equally between A. and children of B., on context, 1712, 1716
original shares where accrued shares given per stirpes, 1713
per stirpes, to children in substitution for parents, 1713
to several as tenants in common, remainder "to their children," 1714
to A. and B.'s children, gift, how construed, 1716
to children of A. and B., 1717

mistake in number,

all take, though number understated, 1706
after-born child not entitled if number correct at date of will, 1711
blank space, as if for names, held immaterial, 1707
gift to seven, naming six out of eight, all take, 1711
knowledge by testator of real number immaterial, 1708
relative number of sons and daughters mis-stated, ib.
stated number only take if context shews such intention, 1709
where children are of different marriages, 1709

period for ascertaining class,

(1) *Where gift is immediate*, 1664
all living at testator's death, entitled, 1664
contingent gift over immaterial, 1666
distribution postponed for term of years or other collateral period, 1665
to given age or marriage, 1675, 1677
none living at testator's death, all afterwards born entitled, 1687
distribution postponed till 21 years of age, effect of, 1690

Volume I. ends at p. 1040.

CHILDREN, gifts to—*continued.*

period for ascertaining class—*continued.*

(1) *Where gift is immediate—continued.*
intermediate income before birth of a child, destination of, 1688
children for time being in esse take, 1689
children only contingently entitled, whether take, 1690
pecuniary legacies fail, 1680
"to be born" or "to be begotten" include all born after testator's death, 1694
pecuniary legacies not within this rule, ib.
vested interests divested pro tanto, 1667
(2) *Where gift is in futuro*, 1667
distribution postponed—at period which happens last, 1675
gift contingent till, none admitted till share of eldest has vested, 1677
advancement out of, or gift over of children's shares, effect of, 1676
rule applies where gift is to all the children, 1675, 1677
where gift over if parent dies without children or issue, 1681
not to gift when youngest child attains age, 1683
not where trustees have power to advance out of vested shares, 1685
in founded on convenience, 1680
pecuniary legacies confined to those living at testator's death, 1680
unless particular fund charged, 1680
remote, of vested gifts, directions for, rejected, 1679
executory gifts—all born before testator's death and all born before event entitled, 1668
appointments under powers, 1667, n.
gift subject to charge is immediate, 1670
gift of whole, subject to life interest in part, is immediate, 1670
secus, if general fund and fund to meet charge are treated as distinct, *semb.*, 1671
remainders—all living at testator's death and all born during prior interest, entitled, 1667
none living at testator's death nor when prior interest expires, legal remainder of lands fails, 1691
secus, equitable interest in land if child afterwards comes in esse, 1692
secus, executory gift of personalty, 1692
"to be born" or "to be begotten," &c., effect of words, 1694, 1696 et seq.
"begotten and to be begotten," effect of, 1694
"born" at a given time, need not survive the time, 1701

Volume I. ends at p. 1040.

CHILDREN, gifts to—*continued.*

period for ascertaining class—*continued.*

(2) *Where gift is in futuro*—*continued.*

"born" or "begotten" includes after-born children, 1700
children en ventre, whether, 1702. *See* CHILD EN VENTRE.

children "by present or any future husband" includes those born before, 1698
existing not generally excluded, ib.

"hereafter to be born" includes those born before, 1698

"living" at a given time, excludes any who die before, 1701

maintenance, larger class may be entitled to, than to fund, 1698, n.

"now living" excludes after-born children, 401, 1701

(3) *Gift to children "then living,"* 1672

(4) *Where distribution postponed,* 1675

(5) *Where no object exists when gift falls into possession,* 1687
immediate gift, 1687
gift in remainder, 1691

(6) *"Born" or "begotten" or "to be born," &c.,* 1694

(7) *En ventre, children,* 1701

(8) *Children taking in default of appointment,* 1705

CHILD-BEARING,
presumption as to woman being past, 1637, n.
illegitimate children not let in under, 1754
perpetuities, rule against, not excluded by, 341, 342

CHOSE IN ACTION,
cannot be bequeathed away from executor, 75
locality does not attach, to, 4, 77, 1087
may be disposed of by will, 76
policy of insurance, 76
securities, 76
torts, 76

CHURCH,
bequest for endowment of, 259
for repair, &c., of, 214
where amount is not stated, 458
devise of land for, 88

CIVIL LAW, how far observed as to bequests of personalty, 1525, 1531, 1548, 1606

CLASS,
ascertained at what period, 1664, 1675, 2155
"children," objects of gift to, when taken as a, 1664
composite class, 434
condition prohibiting alienation except to members of a specified, 562
contingent remainder to, operation of, 328, 1444, 1691
cy-près may be applied to some members, not to others, 293
definition of, 336, 433

CLASS—*continued.*
distribution per stirpes or per capita. *See* CHILDREN.
exclusion from, by implication, 680
gift to, contingency qualifying, introduction of, 327 et seq.
gift to, except one not named, includes all, 472
to one of a, void for uncertainty, 470
unless saved by context, 471
joint tenancy generally created by, 1787
words of severance, effect of, 1789
lapse in reference to, 431
s. 33 of Wills Act does not affect, 447, 449
persona designata may be included in, 339
remoteness in reference to, 327. *See* PERPETUITIES, RULE AGAINST.
gift to unascertained, trust estates excluded by, 974
gifts over on death of any, after gifts to, what is period regarded, 2150
increase, class may be incapable of, 431, 1664
period for ascertaining objects, 1664, 2155
what words constitute, 433, 1664
gifts to children, 1664
children and grandchildren, 332
to executors, *qu.*, 438
to relations (next of kin) of one who predeceases testator, 437, 982
See APPOINTMENT—CHILDREN—JOINT TENANCY—PERPETUITIES—REMAINDER.

"CLEAR SUM," gift of,
liability to legacy duty whether excluded by, 859

CODE NAPOLEON,
domicile, acquisition of foreign, 11, n.
of French, 5
testamentary dispositions, restrictions on, 5, 8, n.

CODICIL,
generally,
alterations in will, not noticed in, 157
ambiguous expressions in, do not cut down clear gift in will, 1002
annexation of, to earlier will revokes later will, whether, 190, 195
attestation of, by legatee under will, 94
conditional, effect of, 133
contingent, 40
destruction of will, whether affects validity of, 154, 169
discrepancy between, and will, 172 et seq.
disturbance of will to give effect to, 177 et seq.
charge not revoked by revocation of devise of lands charged, 178
explanation of expressions in will by, 629
general expressions, confined to their meaning in will, 179
gift in, "instead of" gift in will, 179
specific gift in will not revoked by general gift in, 180
trustee, change of, no revocation of trusts, 182, 183
erroneous recital in, does not revoke gift in will, 188
gifts by, additional or substitutional, whether, 1123 et seq.
lapse not prevented by, confirming will, 425, n.

Volume I. ends at p. 1040

CODICIL.—*continued.*

generally—*continued.*

legacy by, whether on same terms as legacy by will, 1123 et seq.
recital in, ambiguity in will may be explained by, 629
dispositions in will not disturbed by, 188, 628
reconciling effect of, on inconsistent dispositions, 175
republication by, 197 et seq. *See* REPUBLICATION, REVOCATION.
republication of will does not revoke intermediate, unless referred to, 196
residuary gift in will revoked by similar gift in, 173
revival of revoked will by reference in, 190, 195
revocatory effect of inconsistent, 173 et seq. *See* REVOCATION.

attested,

one attestation to will and, whether good, 117
reference in, to unattested will sets it up, 131
to "will and codicils" sets up only, 130
unless there is none, 130
written on same paper as unattested will, effect of, 127
See INCORPORATION.

unattested,

disposition by, will cannot reserve power of, 133
reference to "codicils" does not include, 130
unless no attested codicil, 130

CO-HEIRESS, election by, 534

CO-HEIRESSES take as joint tenants when, 1786

COLLEGES,
devises to, for collegiate or academical purposes, 270
excepted from Mortmain Acts, 88
statutory restraints on charitable gifts, 270

COLONIES, charitable devises of land in, 271

COMMON, TENANCY IN,
favoured rather than joint tenancy, 1792
lapse by death before testator of one tenant in common, 1799
power of appointment over whole remains notwithstanding, when, 1800
by revocation or invalidity as to one share, 1799
words, what will create,—
any, importing division, 1790
notwithstanding express direction of joint tenancy, 1791
gift implied from power of distribution or selection, 1799
gift to A. and B. with express survivorship on death of A., 1792
to class, 1793, 1794
to several as tenants in common with express survivorship, 1798
to several, each charged with a sum, 1792
in executory trust, by words generally importing joint tenancy, 1790
power of advancement, 1792
words creating, overruled by context, when, 1795

Volume I. ends at p. 1040.

COMMON, TENANCY IN—*continued.*
words, what will not create,—
gift to A. and B. and the survivor of them and their heirs equally (as to A. and B.), 1793
to children of several "respectively," 1794

COMMON, TENANTS IN,
election by each of several, 534
partition by, condition directing, 1491
revocation of gift to one of several, effect of, 167
shares of, devisable, 66

COMPENSATION, election referable to, not to forfeiture, 537. *See* ELECTION.

COMPLETION OF WILL,
presumption against unfinished papers, 125, 126
prevented by sudden death, insanity, &c., 126

COMPUTATION OF TIME for performing condition, 1478

CONCURRENT WILLS, 37

CONDITIONS,
GENERALLY,
acceptance of legacy makes annexed, binding, 1477
codicil, gifts by, whether subject to same, as those given by the will, 1128 et seq.
continuing, 1477
created by what words, 1461
distinguished from charge, 1380
consideration, 1463
election, 532, 552
limitation, 1463
trust, 1462
equitable relief on breach of, 1482
inconsistent conditions, 1466
illegal, 1464
ignorance of, 1480
injunction, enforced by, 1463
intention expressed will constitute, 1461
in terrorem, doctrine of, application of, 887 et seq., 1467
conditions in partial restraint of marriage, 1525
not to dispute will, 1549
gift over, effect of, 1468
residuary gift not equivalent to, 1532
real estate not affected by, 1468
lapse of devise conditional on payment of legacy, 439
legacy, additional or substituted, whether subject to same conditions as original gift, 1128
charged on land given on marriage with consent, 1470
forfeiture of, if not claimed within a given time, 1550
given on, 1467
lien on estate conveyed pursuant to condition, none, 1463
negative, 1463

CONDITIONS—*continued.*

GENERALLY—*continued.*

notice of, must be given to devisee, if heir, 1480
secus, if stranger, ib.
operating as gift or limitation, 1462, 1463
performance of, 1478
excused when, 1480
mode of, 1478
period allowed, 1478
relief against forfeiture, 1482
precedent and subsequent, distinguished, 1470
precedent, created by what words, 1471
time prescribed for performance, how computed, 1472
subsequent, created by what words, 1473
performance of, time allowed for, 1475
strictly construed, 1476
tenant in tail may bar, 1491
uncertainty as to, effect of, 1476, n.
various, 1548
void, 1464
waiver of, by testator, by parol, cannot be, 1527, 1535

INCAPABLE OF PERFORMANCE,

ab initio, as to personal estate,

whether precedent or subsequent, gift is absolute, 1469
exception where precedent, involves malum in se, ib.
is prevented by act of God, ib.
is sole motive of gift, ib.

ab initio, as to real estate,

if precedent, gift fails, 1469
if subsequent, gift is absolute, ib.

ab initio generally,

legacy charged on *real and personal* estate follows rule as to each pro tanto, 1470

becoming impossible,

if precedent, gift fails, 1482
if subsequent, gift is absolute, 1433
gift over on non-performance immaterial, 1484

REPUGNANT TO ESTATE,

annexed to absolute legacy,

general, void, 1494
e.g., directing disposal in lifetime, 1494
excluding liability to creditors, 1500
gift of sum to purchase annuity with gift over on alienation, 1508
postponing enjoyment after absolute vesting, 1679
prohibiting alienation, 1494
trust for maintenance with gift over of unapplied surplus, 1487

Volume I. ends at p. 1040.

CONDITIONS—*continued.*

REPUGNANT TO ESTATE—*continued.*

annexed to absolute legacy—*continued.*

partial, valid, ib.
e.g., prohibiting alienation before possession, 1495
but payment off of mortgage is no forfeiture, 1499

annexed to estate in fee,

general, are void, 1466 et seq.
e.g., declaring that estate shall not be subject to curtesy, dower, or other legal incidents, 1467
directing cultivation in certain manner, 1466
disposal of estate in lifetime, 562
testamentary, 562
lease at fixed rent, 1466
partition by tenants in common, 1491
preemption, right of, at fixed price, 1488
sale at undervalue to A., 1488
excluding claims of creditors, 1500
dower or curtesy, 1467
gift over if devisee dies intestate or without selling, 562
prohibiting alienation, mortgage, &c., 1488
during life of another, 1490, n.
except in exchange, 1488
except to particular person, 1489
use and occupation, 1466
partial, when valid, 1489
directing lease at fixed rent to existing tenant, 1466
limitation of restriction to stated period, 1490
prohibiting alienation before possession, 1491
except to a specified class, 1489
in mortmain, 1489
to a particular person, 1489
requiring alienation within a specified time, 1491

annexed to estate tail,

general, void, 1491 et seq.
e.g., declaring tenant in tail trustee to preserve remainders, 1492
limitation over as if tenant in tail were dead, 1492
limiting long term to trustees to raise money for barred remaindermen, 1492
prohibiting bar of entail, 1492
partial, valid,
e.g., prohibiting lease under 32 Hen. 8, c. 28..1491
tortious conveyance, 1491

annexed to life interest with clause of cesser,

valid, e.g., prohibiting alienation, 1496
bankruptcy, 1505
gift over immaterial, 1509

Volume I. ends at p. 1040.

CONDITIONS—*continued.*

REPUGNANT TO ESTATE—*continued.*

annexed to life interest without clause of cesser,

void, e.g., prohibiting alienation, 1495
bankruptcy, 1500

REQUIRING ASSUMPTION OF NAME OR ARMS,

assumption without licence, sufficient, whether, 1542
gift over attached to estate in fee simple, void, 1545
to estate tail, defeasible by barring entail, 1545

REQUIRING RESIDENCE,

inapplicable to infant, 1547
meaning of, 1546
non-residence, compulsory, effect of, 1547
personal residence, what is, 1546
Settled Land Act, 1882, effect of, 1548
time for residence, must be defined, 1546

RESTRAINING ALIENATION,

as to alienation generally,

bankruptcy, when included, 1498, 1506
breaches of, what acts amount to, 1497
forfeiture, what will cause a, 1497
income, arrears of, not generally within, 1511
marriage of women before M. W. P. Act, whether within, 1511
seizure under judicial process whether causes forfeiture, 1498
voluntary, include bankruptcy, &c., on debtor's petition, 1498

as to participation by women,

by *married* woman is valid, 1514
ceases with termination of coverture, 1514
by unmarried woman has no operation, 1514
becomes operative on future marriage, 1514
created by what words, 1523
extinguishment of restraint, 1517
forfeiture not incurred by ineffectual attempt to anticipate, 1515
future covertures whether within, 1515
income bearing fund, 1516

as to bankruptcy, &c.,

arrears of income, 1511
annuity determinable on, 1506
annulment of bankruptcy before payment, 1513
bankruptcy in lifetime of testator, 1511
before date of will, 1513
contingent or defeasible interest, 1502
discretion of trustees to apply fund, 1502
exclusion of operation of, void, 1500
"insolvency," meaning of, 1509
life interest till, may be given, 1505
maintenance trust in case of bankruptcy, 1501, 1505 et seq.

Volume I. ends at p. 1040.

CONDITIONS—*continued.*

RESTRAINING BECOMING A NUN,
effectual though no gift over, 1482

RESTRAINING DISPUTE OF WILL,
as to personalty in terrorem only, unless there is a gift over, 1548
as to realty, effectual without gift over, 1549
frivolous actions against trustees, 1550

RESTRAINING MARRIAGE,
absolute, are generally void, 1525, 1539
as to personalty, though with gift over, 1539
as to proceeds of sale of land, 1539
as to realty, and charges thereon, 1525, 1539
as to realty and personalty, legacy charged on, 1533
exception, where imposed on widow or widower, 1526, 1541
but gift over necessary as to personalty, 1533
limitation till marriage good as to personalty, in that form, 1542
as to realty in that form or in form of condition, 1539
partial, when valid, 1525
requiring marriage with consent, 1528 et seq.
precedent, generally in terrorem only, 1530
except where (1) alternative provision is made for legatee, 1530
(2) legacy is given on an alternative event, 1530
(3) legatee's majority puts an end to the condition, 1531
where realty or legacy charged thereon is given, 1527
marriage of legatee necessary before claiming legacy, 1532
subsequent, in terrorem, unless with gift over, 1529
requiring or prohibiting marriage to particular person, &c., 1526
particular rites, or place of marriage, 1526
requiring consent to marriage, 1228
death of party whose consent is required, 1530, 1538
equitable relief against neglect to consent, 1538
against refusal to consent or dissent, 1536
expressions of consent, construed liberally, 1536
general consent to marry at discretion, 1536
gift on marriage with consent held precedent, 1470
gift over necessary to render effectual, 1528
legatee marrying in testator's lifetime, 1534
minority, only during, 1531
of guardians, 1538
"parents" means parents if any, 1538
of testator, how far effectual, 1535, n.
trustees, whether all must concur, 1537
whether survivor of several can consent, 1537
presumption as to consent after lapse of time, 1535
real estate, 1528
retraction of consent once given, 1536

Volume I. ends at p. 1040.

CONDITIONS—*continued.*

RESTRAINING MARRIAGE—*continued.*

requiring consent to marriage—continued.

second marriage with consent, whether fulfils condition, 1533
subsequent approbation, whether sufficient, 1538
widowhood, at testator's death, of legatee married after date of will, 1534
written consent strictly necessary if prescribed, 1535
wrong name, consent to marriage in, 1536

CONDITIONAL FEE SIMPLE, created in non-entailable copyholds by words creative of estate tail in freeholds, 1809

CONDITIONAL REVOCATION,
destruction connected with new disposition, 148
evidence admissible in cases of, 160

"CONFIDING" creates a trust, 870

CONFIRMATION OF WILL,
by codicil, lapse not prevented by, 425, n.
re-execution necessary for, on removal of disability, 47

CONFLICT OF LAWS, 13–16, 24

CONFLICTING WILLS, date of execution of, evidence as to, admissible, 174

CONSENT,
conversion with, of tenant for life, 751
marriage with, conditions requiring, 1228 et seq., *and see* CONDITIONS.

CONSEQUENCES,
construction of will not effected by regard to, if terms clear, 341, 1385
secus, where ambiguity occurs, 365
where intestacy would result, 1421
perpetuity, how far Court will regard, with reference to, 365, 2119

CONSIDERATION distinguished from condition. 1463

CONSTRUCTION OF WILL,
general rules of, 2205–2212
language in which will is written does not affect, 1
money directed to be laid out in land treated as realty for purposes of. *See* CONVERSION.
original will of personalty may be looked at to assist, 44
punctuation, not affected by, 45
realty directed to be sold treated as money for purposes of. *See* CONVERSION.
uncertainty, wills indulgently construed to prevent invalidation by, 453 et seq.

CONSTRUCTIVE CONVERSION. *See* CONVERSION.

CONSTRUCTIVE TRUST, legal estate in lands subject to, passes by general devise, *semb.*, 980

CONSUL, domicile or origin retained notwithstanding service abroad as, 20

Volume I. ends at p. 1040.

CONSUMABLE ARTICLES,
bequest of "furniture" or "household goods," whether passes, 1308
gift by will of, for life, effect of, 1183, 1455
till marriage, lapse of, by marriage of legatee in testator's lifetime, 423, n.
successive interests in, cannot be given, 1455

CONTINGENCY,
apparent, words of, referred to determination of prior estate, 1371 et seq.
severance, immediate, of gift notwithstanding, 1418
vesting of devise, notwithstanding, 1364, 1371, 1405
vesting of gift by gift of intermediate income, 1405
"when," "from and after," &c., &c., how construed, 1372
clear expressions of, strictly construed, notwithstanding consequences, 1385
death coupled with, implication of gift over on. IMPLICATION.
death spoken of as a, how construed, 2144. *See* DEATH—VESTING.
gift to class, subject to, 327, 328
implication of, 1388
particular estate only on series of limitations affected by, 1390 et seq.
will to take effect only on, 40 et seq. *See* CONTINGENT WILL.
See DEATH—VESTING.

CONTINGENT GIFT,
general devise under old law passed, on failure of event, 947
income carried by, when, 953
lapse of, if event fails, though legatee survives, 428

CONTINGENT INTEREST,
condition against alienation, 1495
disposable by will, 80
election, doctrine of, applies to, 536
felony, not capital, did not occasion forfeiture, 61, n.
general devise, under old law, passed lapsed, &c., 947
transmissible, when, 1353

CONTINGENT REMAINDER,
equitable, 1437
executory devise and, distinguished, 1443
general devise under old law passed, on destruction of particular estate, 947
perpetuities, rule against, in reference to, 368. *See* PERPETUITIES, RULE AGAINST.
trustees to preserve, what estate taken by, 1840
See REMAINDER.

CONTINGENT WILL,
admission to probate of, 40
where event is in suspense, 41
appointment by will not necessarily conditional on existence of power, 40
assent of another person made condition, 40
distinction where event is the testamentary motive, 40
election may be raised by, 41
failure of contingency renders, inoperative, 41
re-execution necessary to set up, 41

Volume I. ends at p. 1040.

CONTRACT,
incomplete, for purchase or sale of land—
benefit of, devisable, 77
devise of lands contracted to be sold does not pass, 970
costs of completion, where heir or devisee incompetent, 975, n.
legal assets, purchase money due under, is, 2022, n.
legal estate, devolution of, in land sold, 77. 980
trust estates, devise of, by vendor, effect of, 979
liability of testator governs rights of devisees, 78
where title bad, 78
option to purchase exercised after testator's death, 79
purchase money, lands in hands of devisee or heir charged with, 78
revocation of devise by, 78, 162
specific devise of property comprised in, effect of, 77
trustee for purchaser, vendor is, 979
vendor's lien defined, 980
"securities," gift of whether passes, 1303
parol, by devisee to hold in trust enforced, 263, 495
to leave property by will, 28

CONTRADICTION IN WILL. *See* REPUGNANCY.

CONTRIBUTION,
creditors not affected by right to, 2025
to payment of debts as between legatees and devisees, 2031
where mixed fund created for payment, 2032
See ASSETS—EXONERATION—MARSHALLING.

CONVERSION,
EFFECTED, BY WHAT MEANS—
Act of Parliament, under, 163, 733, 734
actual conversion, 729
actual sale or purchase must be directed, expressly, 745
or impliedly, 749
devise, as realty of land directed to be sold, 753
realty and personalty, effect of, 771
contract, by, 738
cases where money has been held to be converted. 746
cases where money has been held not to be converted, 748
circumstances at testator's death as effecting conversion, 776
consent or request required to purchase or sale, effect of, 751
contract for sale or purchase, 77, 163
voidable, does not effect conversion, 734, n.
Court, order of, for sale, 163, 732
death duties, 756
declaration that proceeds of land shall be personalty, 771
dehors the well, 729
direction for purchase of land in place where none obtainable, 755, n.
mere, that land shall be deemed as money, or vice versâ, not sufficient, 745, 755
discretion as to parts of estate to be sold, 751
as to time of sale, 751
double conversion, 744

Volume I. ends at p. 1040.

CONVERSION—*continued.*

EFFECTED, BY WHAT MEANS—*continued.*

Interim investment, direction for, does not prevent conversion, 750
Lands Clauses Act, 163, 733
law, by operation of, 738
lunacy, rule in, as to conversion, 163, 737, 739
mortgagee, sale by, 731
option to convert, effect of, on rights of beneficiaries, 740
to invest in purchase of land or otherwise, effect of, 750
to sell at discretion may determine interim devolution, 740, 755
Partition Act, 3, 733
power of sale, mere, does not effect, 755
trust for sale at stated time effects, though sale delayed, 751
implied when, from declaration that realty shall be considered as personalty, 745, 771
from direction to invest realty in stock, 749
not from direction to divide, 749
unauthorised conversion, 739

ELECTION TO MAKE PROPERTY UNCONVERTED,

delegation of power to elect by beneficiary, 763
intention must be clearly expressed or implied, 758
parol election, whether good, 758

what amounts to election,

bequest, as personalty, of monies to be laid out in land, 760
changing securities, 758
deeds, taking possession of, 760
demising lands, 759
devise, as realty, of land directed to be sold, 760
levying a fine, 758
long possession of land, 759
specific devise of land to uses in strict settlement, 760

who may elect,

all persons interested must concur, 761
married women, 758, 764
partial owner, 762
persons absolutely entitled may elect, 758
persons contingently entitled may elect before event happens, 762
persons under disability, infants, lunatics, &c., cannot elect, 758
reversioners, 763, n.
tenant in common of land cannot elect, 762
of money may elect, 762
trustee for conversion of money into land becoming entitled to land, 760, n.

NATURE AND EFFECT OF CONVERSION,

generally,

land directed to be converted into money treated as personalty, 729
alien may take proceeds of, 91
charity formerly could not take, 250, 256
now can take, 276

Volume I. ends at p. 1040.

CONVERSION—*continued.*

NATURE AND EFFECT OF CONVERSION—*continued.*

generally—*continued.*

land directed to be converted into money—*continued.*
creditors, simple contract, not let in, 769
death duties, 756, 757
direction to convert must be imperative, 745
general bequest passes, 744, 769, 770
heir, right of, to undisposed-of proceeds, 764 et seq.
husband and wife may convey land directed to be sold for wife's benefit, 763
legacy duty, whether attached to, 757
option to purchase, effect of, 730, 750
personal representatives of donee entitled to, 729
postponement of conversion, devolution not affected by, 742
rents till conversion, application of, 765
specific devise of, passes the money, 763
succession duty now attaches to, 756
trustees entitled where no heir, 769
money directed to be laid out in land treated as realty, 734
curtesy attaches to, 744
escheat does not attach to, 749
general bequest of personalty will not pass, 744, 769
general devise of lands passes, 744
heir of donee entitled to, on intestacy, 744
"hereditament," comes within, 738
next of kin of testator, undisposed-of interest in the money results to, 765
specific gift of, passes the land, 763
operates for purposes of will only, 768
reconversion, direction for, neutralizes conversion, 732
vesting may be postponed till actual sale, 741
meanwhile enjoyment of property is as if converted, 742

as between claimants under heir or next of kin, 774
will and legal representatives, 764

as between tenant for life and remainderman of residue,

1. Where there is express trust for conversion—
conversion deemed as made within year after testator's death, 1232
tenant for life entitled to what income during first year, 1230
when accumulation till conversion is directed, 1232
when conversion is made within the year, 1233
when conversion can be but is not made within the year, 1233
when conversion cannot be made within the year, 1235
when property is reversionary, 1238

Volume I. ends at p. 1040.

CONVERSION—*continued.*

NATURE AND EFFECT OF CONVERSION—*continued.*

as between tenant for life and remainderman of residue—*continued.*

1. Where there is express trust for conversion—*continued.*
tenant for life not entitled to income of fund required for debts, &c., 1230
must keep down interest on debts, when, 1230
trustees investing improperly, how chargeable, 1234
2. Where there is no express trust for conversion—
conversion required by general rule, 1230
when property is out of jurisdiction, 1244, 1245, n.
is hazardous, 1248
is precarious, 1245
is reversionary, 1242, 1249
is wasting, 1244
enjoyment in specie deemed to be prescribed—
by direction to convert at specific period, 1247
to let, 1247
to renew leases, 1247
to repair, 1247
to sell at a specific period, 1247
not to sell during a specific period, 1247
except with consent, 1247
by direction to sell or not, 1247
by gift over of the very property, 1250
by power to sell generally, 1247
by special bequest of stocks, &c., 1246
enjoyment in specie deemed not to be prescribed—
by direction to convert for specific purpose, 1249
to convert specific part, 1249
not to sell under a certain sum, 1249
until sale advantageous, 1249
by enumeration of specific items, *semb.*, 1249
by gift of "income" of residue, 1251
whether prescribed by gift of "rents," "dividends," &c., 1251
where some of several items are clearly not to be converted, 1249
power to vary securities, effect of, 1249

as to undisposed-of interests under trust for conversion,

heir entitled to lapsed interest in proceeds of land, 765
to proceeds of realty not disposed of, 764
or not disposed of in event, 766
or illegally disposed of, 766
to proportion of undisposed-of mixed fund, 766
not excluded but by actual gift to another, 764, 768
takes share as personalty, 774
whole (if whole undisposed of) as realty, 775
though sale has been by mistake, 775
heir failing, trustee entitled against the Crown, 769

Volume I. ends at p. 1040.

CONVERSION—*continued.*

NATURE AND EFFECT OF CONVERSION—*continued.*

as to undisposed-of interests under trust for conversion—*continued.*

next of kin, or residuary legatee entitled to lapsed interest in land, 765, 776
to money not required for purchase of land, 765, 776
next of kin, or residuary legatee entitled to proportion of mixed fund, 766
to share of converted personalty, 766
takes as real estate, 776
residue, undisposed of, of moneys to arise from land not carried by residuary bequest, 769
unless blended with personalty, 771-74
unless directed to be considered as personalty, 771

destination of undisposed-of particular sums to arise from land,

heir entitled to excepted sum, 777, 781
to gift to incapable objects, 777
to void legacies, 783, 784
residuary donee of fund entitled to contingent gift which fails, 777
to lapsed gift, 778
to void gift of blended proceeds of realty and personalty, 780
residuary devise, effect of, as regards destination, 786

CONVEY, executory trust not necessarily created by trust or direction to, 1882, 1899

CONVEYANCE,

costs of, where heir or devisee of testator is incompetent, 975, n.
revocation of will by, for partial purpose, 165
right to set aside, is a devisable interest, 81
by subsequent, 162
by void, under old law, 166

COPARCENERS,

devise to, effect of, under old law, 96, n.
shares of, are devisable, 66

COPYHOLDS,

before 1 Vict. c. 26,

acquired after date of will did not pass, 68
unless surrendered to use of will, 68
devise of "manor" passed, 70
custom regulated devisability of, 68
customary freeholds devisable as, 69
freebench barred by devise of, 71, 552
not within stat. Hen. 8, as to wills, 68
Statute of Frauds as to execution of wills, 104

Volume I. ends at p. 1040.

COPYHOLDS—*continued.*

before 1 Vict. c. 26—*continued.*

surrender to use of will necessary except as to equitable interests, 69
supplied by 55 Geo. 3, c. 192..69
surrender and will barred freebench, 69
severed joint tenancy, 68
unadmitted devisee or surrenderee could not devise, 70
heir could devise, 70

under present law,

assets for payment of debts, pari passu with freeholds, 961
conditional fee simple created in non-entailable, when, 1809
devise of, after-acquired lands pass by, 71
attesting witness cannot take, 93
customary freeholds pass by, 1298
execution of will containing, 104
freebench barred by, 71, 552
freeholds not included in, on parol evidence, 489
good without custom, 70
without surrender, 70
entailed, cannot be, 71
general devise, effect of, upon, 959. *See* GENERAL DEVISE.
Land Transfer Act, not within, 71, 72
Shelley's Case, rule in, applies to, 1860
trust and mortgage estates in, devolution of, 985
See SURRENDER.

CORPORATIONS,
charitable, empowered by statute to "hold" lands cannot take by devise 87, 270
legacies paid to, by Court, without scheme, 245
devises to, under 1 Vict. c. 26..84
under Mortmain, &c., Act, 1888..86 et seq.
incomplete gifts to, 481
joint tenants, when, 1784
misdescription of, when avoids gift, 1256
municipal, holding property for benefit of freemen, 280
See CHARITY.

CORRECTION OF WORDS clearly erroneous, 599. *See* CHANGING WORDS.

COSTS of completion, where vendor's heir or devisee is incompetent, 975, n.

COTTAGE, meaning of, 1293

COUNTY, description by reference to wrong, 1268, 1281

COUSINS,
construed as meaning only first cousins, 1635
unless there are and can be none, 1637
descendants of, not entitled, ib.
first cousin once removed not entitled under gift to "second cousins," ib.
whether under gift to "first and second cousins," ib.
half-blood included, 1639

COVENANT,
not to revoke will, 28
to leave property by will, 29
to purchase land, discharged by covenantor becoming entitled to the land, 760
to settle, property preserved from lapse is not within, 451
voluntary, to leave money to charity, 249, n.

COVERTURE,
cesser of, determines restraint on anticipation, 1514 et seq.
does not set up will, 57, 420
disability of, 53 et seq. *See* FEME COVERTE—HUSBAND AND WIFE—MARRIED WOMEN.

CREDIBILITY OF WITNESSES,
under 29 Car. 2..92
under 1 Vict. c. 26, as affected by their personal qualifications, 123

CREDITORS,
attestation by, of debtor's will, good, 93
bequest for payment of, does not lapse, 423
to A. to enable him to pay debts creates no trust for, 896
conditions excluding liability to, 1500. *And see* CONDITIONS.
conversion of land into money does not let in, 769
election, doctrine of, does not affect, 541
See ASSETS—CHARGE—CONDITION—DEBTS.

CROPS,
charitable gifts of, 255
"farming stock," gift of, will pass, 1311

CROSS EXECUTORY LIMITATIONS, implication of, 669, 672

CROSS REMAINDERS, 660
expressions which raise, 661
implication of, not generally affected by Wills Act, 668, n.
implied among devisees for life, 663
devisees in common in tail, when, 660
several stirpes, devisees in tail, 666
by gift over in case all die without issue, 662
number of primary devisees immaterial, 662
where primary gift is to a class, 660
to several "respectively," 668
by gift over in default of issue at death, 662
of issue of any of them, Ib.
of such issue, 661
of remainders, 663
of reversion, *qu.*, ib.
by words "remainder" or "reversion," 663
express, exclude, in same event, 664
not in different event, 666
unless on context, 666
not where partial, 666
not where trust executory, 664, 667

CROWN,
charitable funds, administration of, by, 244
entitled in right of alien, formerly, when, 59, 90
traitors and felons formerly, 60
to what as against executor, 498
as bona vacantia, 91, n.
forfeiture to, under Mortmain Acts, 85
See CHARITY—ESCHEAT—FORFEITURE.

CULTIVATION,
condition directing mode of, annexed to estate in fee, void, 1466

CURTESY,
conditions that estate shall not be liable to, 1467
defeasible fee simple is liable to, when, 1452
devise saved from lapse, 450
election in reference to, 533
money to be laid out in land is liable to, 744

CUSTODY, last known, governs presumption as to revocation of lost will, 153

CUSTOM,
copyholds devisable notwithstanding contrary, 70
of trade, &c., evidence to explain, 501

CUSTOMARY FREEHOLDS,
devisable in same manner as copyholds, 69
devise of "copyholds" will pass, 1298
devise of freeholds does not pass, 1289
Statute of Frauds as to execution of wills did not apply to, 104

CUSTOMARY LANDS devised to "heir" go to common law heir, 1569
See BOROUGH ENGLISH—GAVELKIND.

CY-PRÈS,
charitable gifts, application of doctrine to, 233
absolute resemblance not implied by doctrine, 233
administration by Crown or Court when, 244
not where gift is to corporation, 245
contra where gift not to be applied as part of general funds, 245
condition attached to gift, non-fulfilment of, excludes, 242
contrary intention appearing by the will excludes, 236
foreign charity, not applied to, 235
gifts, void, not applied, 236
lapse of gift to particular institution, effect of, 238
object of gift, indefinite, non-existent or impossible, 241
refusing to accept, 235
residuary bequest, effect of, 235
poor relations, immediate gifts to, 220
superstitious uses executed, 208, n.
perpetuities, rule against, in reference to doctrine of, 288
applicable to appointments by will, 289, n., 292, n., 845
to change mode of provision intended by will, 288
to class, some members of, not to others, 293

Volume I. ends at p. 1040.

CY-PRÈS—*continued.*

perpetuities, rule against, in reference to doctrine of—*continued.*

applicable to give estate tail to unborn tenant for life, 291
though children intended to take concurrently, 293
to series of successive limitations, 291
not applicable to attempt to create successive life estates, 289–291
to introduce persons not intended to be provided for, 293
to limitations by deed, 295, n.
to personalty or mixed fund, 294
to terms of years, 291
where estates in fee are given to children, 295
where no general intent to create estate tail, 290
not confined to first set of limitations, 294
restricted to executory trusts, 289
to be extended, 289

DATE,

OF WILL, GENERALLY,

actual execution different from, construction of will where, 396, n.
evidence admissible to prove, 175
contradictory wills of uncertain date, 174
effect and operation of s. 24 of Wills Act, 415–420
incorporated document must be in existence at, 136
republication will carry down, 200
substitutional gift, where legatee dies before, 1336
wrong, may be corrected, 486, n.

WILL SPEAKS FROM WHAT, UNDER OLD LAW, 404

general devises and bequests, 406
personalty at date of death passed, 406
realty at date of will passed, 406
gifts to classes, applied to persons answering description at death of testator, 401
leaseholds, renewal of, effect of, on bequest, 405
specific subject of gift, reference to, 404
words of present time, effect of, 402, 404

WILL SPEAKS FROM WHAT, UNDER PRESENT LAW,

as to objects of gift,

date of testator's death is referred to by—
gift to children, as under old law, 401, 402
to classes and officials, 401
to wife, if none at date of will, 398
date of will is referred to by—
gift to "my son A.," 396
to "my son" simply, 397
to the child of which testator's wife is pregnant, 397
to servants unless contrary intention is expressed, 403
to the wife of testator, or of another, there being one then, 398, 400

Volume I. ends at p. 1040.

DATE—*continued.*

WILL SPEAKS FROM WHAT, UNDER PRESENT LAW—*continued.*

as to objects of gift—*continued.*

date of will is referred to by—*continued.*

gift to wife divorced, intended or reputed, 400, 401

whether gifts in remainder are distinguishable, 39

as to subjects of gift,

alterations in law subsequent to date of will, 421

date of testator's death is referred to, when—

as to estate, real and personal, comprised in the will, 406

meaning of words "comprised in," 419, 420

as to general powers of appointment, execution of, 420

by gift, general, of real estate, 407

of after-acquired property not answering description i will, 414

of lands, &c., in a particular parish or place, 407

of lands "of" or "called" C., 409

unless after-acquired lands are otherwise dispose of, 407

of leaseholds so as to include after-acquired fee, o renewed lease, 407, 408

of share in partnership so as to pass after-acquire interest, 410

of shares in unlimited company subsequently con verted, 415

of stock of undefined amount, 408

words mer ; importing present time, effect of, 416, 418

date of will is referred to, when—

as to general powers of appointment, 813

special powers of appointment, 833

by gift, general, of what "I am *now* possessed of," 418

specific as of then existing object, 412

bequest of stock of definite amount, 411

nature of gift as indicating such intention, 413

release of specific debt, 410, 411

words referring emphatically to present time, effect of, 418

as to testamentary capacity,

coverture, termination of, effect of, as to will of f. c., 57, 420

DAY,

accumulation, period of, is exclusive of, of testator's death, 381

age computed inclusive of, of birth, 48

portions of, not recognized, 48

DEAD BODY,

cannot be disposed of by will, 66

DEAD STOCK, meaning of, 1310

DEAF AND DUMB TESTATOR,

capable of making will, 48

may acknowledge will by gestures, 113

Volume I. ends at p. 1040.

DEATH,

GENERALLY,

approach of, execution of will on, suggestions as to, 49
weakness of mind from, may avoid will, 49
election prevented by, devolution of property where, 534, n.
lapse caused by, of donee, 423. *See* LAPSE.
of joint devisee, none, 429
marriage, consent to, rendered impossible by, 1484, 1530, n.
gift over on, of widow, takes effect at her death, 1361

GIFT OVER IN CASE OF, SIMPLY,

1. **After bequest to A. immediately,**

means generally death of A. in testator's lifetime, 2144
extended by context reducing A. to life interest, 2146
e.g. contract with gift to B. "at his own disposal," ib.
describing A. as "my *widow*," 2148
indication that legatee over is to take something at all events, 2146, 2147
not extended by gift over being to A.'s children, 2147
by gift over conferring life-interest with remainders, ib.
rule applies to gift to several, with gift over if any die before the others, 2147

2. **After bequest to A. where distribution deferred,**

means death before period of distribution, 2148
where deferred by life interest, 2149
by postponement of payment, 2150
of vesting, ib.
whether prior legatee die before or after testator, 2150
motive assigned for gift may restrict gift to death before testator, 2150
"or" (read "in case of"), how construed, 2149

3. **After estate tail,**

means death and failure of issue, 2152

4. **After gift of life interest,**

means death at any time, 1571, 2151
where income only is first given, ib.
where land (under o'd law) was devised indefinitely, 2152, n.
where life interest only is given over, no implication as to residue, 2148

GIFT OVER IN CASE OF, WITH CONTINGENCY,

gift over (after bequest to several) "if any die before the others," is not a contingency, but a certainty, 2147

after immediate or future legacy,

1. includes death in testator's lifetime,
although gift over is of deceased legatee's *share*, 2155
or, "which was invested for him," 2155

Volume I. ends at p. 1040.

DEATH—*continued.*

GIFT OVER IN CASE OF, WITH CONTINGENCY—*continued.*

after immediate or future legacy—*continued.*

1. includes death in testator's lifetime—*continued.*
although prior gift is to a *class*, 2155
legacy payable immediately, and gift over in case of de
" before the share is payable," 2156
although prior gift is to f. c., and gift over is, on death bef
b., to her next of kin, 2159
does not include death in testator's lifetime, if prior gift is
such of a class as survive him, 2157
if gift over is to personal representatives of prior legatee, 2
unless prior gift is immediate, 2158
does not include death before date of will where gift is to a *cl*
with gift over if any die before period of distribution, 1336
seq. *See* SUBSTITUTION.
2. includes death at any time after death of testator,
whether prior gift is immediate, 2159 et seq.
or deferred, 2167 et seq.
exceptions—confined to death before period of distribution,
(a) after immediate gift, in cases of—
absolute gift with alternative gifts over comprisi
every event, 2162
not when prior gift is for life or indefinite, 2163
actual payment directed immediately after testato
death, 2167
alternative gifts over, one of which is expressly
stricted, 2166
direction that prior legatee shall have absolu
control at a given age, 2166
gift over of what prior legatee would have be
entitled to *if living*, 2166
(b) after life estate, in cases of—
direction for distribution at death of tenant for li
2167 et seq.
for distribution at legatee's majority, 21
equal benefit intended for three, with gift over on
on death of one, 2169
gift over contradictory, if not restricted, 2171
gift over of what prior legatee would have be
entitled to *if living*, 2169
gift over, ultimate, on death of all before tena
for life, 2169
original gift contingent on same event as gift over, 21
restriction on executory limitations under Conv. Act, 188
s. 10. . 2159, n.

gift over on death,

before legacy is " payable," 2175
before legacy is vested, 2182
before legatee is entitled in possession (or to receipt), 2182
before legatee receives his legacy, 2184

Volume I. ends at p. 1040.

DEATH—*continued.*

GIFT OVER IN CASE OF, WITH CONTINGENCY—*continued.*

gift over on death—*continued.*

before legatee in remainder is entitled, 2183
See PAYABLE—RECEIVED—VESTED—ENTITLED.
on death without children, or without having children, 1718 et seq.
without leaving children, 1718. *See* CHILDREN—DIE WITHOUT LEAVING CHILDREN.
without issue. *See* DIE WITHOUT ISSUE.

DEATH DUTIES, 1131. *See* ESTATE DUTY—LEGACY DUTY.

DEBENTURES,
gift of, whether includes debenture stock, 412, 1306
railway, charitable gift of, 254
"shares," will not pass by gift of, 1306

DEBT,
lapse in reference to bequest of, to debtor, 424, n.
release of, date from which will speaks as to, 410, 411
effect of s. 24 of Wills Act, 412, n.

DEBTS,
accumulations for payment of, perpetuity rule as affecting, 357, 382
Thellusson Act does not apply to, 378, 382
adoption of. *See* EXONERATION.
advancement for "benefit" applicable to payment of, 620
assets for payment of, real estates are, 1987
bequest of, bank balance passes by, 1362
charge of, by what words effected, 1989
all liabilities of personal estate included, 1989, n.
interest not carried by, 2021
property affected by, 1991 et seq.
sale of property, whether authorized by, 2005
trust estates excluded from general devise by, 973
charge of, and legacies, purchaser exonerated by, 1988
conversion of money into land, effect of, as to liability to, 744
devise after payment of, gives vested interest subject to charge, 1384
direction to pay, general power executed by, 812
misstating amount due, effect of, 624
to pay interest on, effect of, 2022
legacy after payment of, is vested, 1401
See ASSETS—CHARGE—EXONERATION.

DECLARATION,
against lapse, inoperative, 425
revocation of will by marriage, inoperative, 142
revocability of will, inoperative, 28
dower barrable by, 551
evidence of contents of will, 153
evidence, of testator's, to explain ambiguities, 519
of revocatory intention as to torn and lost wills, 153
writing declaratory of, 147
without disposition does not alter devolution, 702

Volume I. ends at p. 1040.

DECREE,
for sale, converts property from its date, 163
revokes will, 163

DEDUCTIONS, fee from, effect of gift, 1131, 1133, n.

DEED, testamentary operation of, 33, 35

DEFAULT OF HEIRS,
devise in, to collateral heir, how construed, 1854
to person in line of descent, creates estate tail, 1854

DEFAULT OF ISSUE, GIFT OVER IN,
implication of estate to issue (taking no prior estate), none, 673 et se

as to personal estate,

following gift to limited class of issue (as children), *refers* to that class, 1
unless, after gift to limited class, gift over is in default of issue
parent's *death*, 196
or unless primary gift is contingent on attaining age, *semb.*, 1966
but the context controls the construction, 1966
statement of the doctrine by Lord *Cottenham*, 1966
by *Turner*, L.J., 1965

as to real estate,

estate tail in prior tenant for life raised, 1892, 1941
whether words are "without" or "without leaving" issue, 195
following devise to children in fee or tail refers to children, 1972
to first and other sons in tail male refers to sons, 197
exception where gift over is in default of iss
living at parent's death, 1975
to first, second, &c., sons, held not referential, 1978
to one son only for life or in tail, not referential, 197
to issue who attain certain age, not referential, 1976
unless contingency repeated in gift over, 1977
of class, following devise in fee to class, effect of, 1976
referential construction admissible since Wills Act, 1979
rejection of, effect of, ib.
reversionary devise in case of, whether refers to failure of prior su
sisting estates, 1981 et seq.
See DEFAULT OF SUCH ISSUE—DIE WITHOUT ISSUE—DIE WI
OUT LEAVING ISSUE—DIE WITHOUT SUCH ISSUE—FAILURE
IS UE.

DEFAULT OF SUCH ISSUE, gift over in,
or, default of issue as aforesaid, 1965

as to personal estate,

following gift to any class of issue refers to that class, 1964

as to real estate,

following devise to any class of issue *for life* or *in tail* refers to failu
of estates limited to that class, 1970
to A. for life, remainder to his first and other sons a
their heirs, referred to failure of heirs of their bodi
1971

Volume I. ends at p. 1040.

DEFAULT OF SUCH ISSUE—*continued.*
as to real estate—*continued.*
following devise to children for life implies estate tail, 1978
to daughters and their heirs, referred (on context) to heirs of their bodies, 1853
to single child, refers to failure of estate to that child, 1970
introducing gift over raises cross-remainders, 660
referential construction excluded by context, 1972

DEFEASANCE, child en ventre considered as living to prevent, 1703. *See* DIVESTING.

DELUSION,
effect of, on testamentary capacity, 51
religious, 52, 208, n.

DEMISE,
election to take land unconverted implied from, 759
revocation by, 165
specific enjoyment of land implied from direction to, 1247
subsequent, of lands charged by will with annuity, 166

DEMONSTRATIVE LEGACIES, 1063, 1069, 2097

DENIZATION, effect of, 91

DEPENDENT RELATIVE REVOCATION, doctrine of, 148, 169. 839

DEPOSIT NOTE, gift of "securities of money" will not pass, 1304

"DESCEND," 1588

DESCENDANTS,
children, construed to mean, 1590
collateral, whether included, 1588
"eldest male lineal descendant," how construed, 1562
"family" construed to mean, 823, 1585
gift to, construed to include issue of every degree, 1587
gifts to, equally, whether distributable per capita or per stirpes, 1588, 1589
"personal representatives" held to mean, 822, 1616
"relations by lineal descent," meaning of, 1588
take per capita, 1588
unless otherwise on context, 1589

DESCENT,
qualified only by entail, 1847, n.
"relations by lineal," gift to, how construed, 1588
to heir male, traced wholly through males, 1561
secus, gift to heir male by purchase, 1561

Volume I. ends at p. 1040.

DESCRIPTION,

of objects of gifts,

age, attainment of certain, vesting postponed, where made part of, et seq.
ambiguity, latent and patent, doctrine of, discussed, 516
blanks not supplied, 470, 514
character, gifts to persons filling a certain, 471, 472
charitable gifts not within rules as to, 225, 367. *See* CHARITY—CY-PRÈS.
christian name alone stated, 470
christian names, mistakes as to, 513, 1259, 1260
corporations, misnomer of, 1256
equivocation in, 518
evidence, how far admissible to explain, 508, 518. *See* EVIDENCE.
future act of testator, whether may determine who is to take under particular, 478, 511
initials or symbols, 502
misnomer and misdescription, 512
motive of gift supplied by, or by context, or by circumstances, 517, 521
name accurate, description inaccurate, 1262
inaccurate, description accurate, 512, 1260
and description evenly balanced, 1265
nephews and nieces, who included by term, 470, 472. *See* NEPHEWS
nicknames, 502
persons completely described, alone takes, 527
not excluded on evidence, 527
not answering to any part of, 513, 529
partly answering to, may take, when, 505, 1256
persons, two, both answering, 480, 518, 1261
both partly answering, 523, 524
one answering to name, the other to description, 1262
"second son," gift to, where donee named is first son, 1262, 1264
And see CHILDREN—EVIDENCE—ILLEGITIMATE CHILDREN—UNCERTAINTY.

of subjects of gift,

advowson not passed by devise of hereditaments "situate at" A., 12
bank, gift of moneys by reference to particular, not enlarged, 1284
contradiction, words not rejected if required to prevent, 1271
county, reference to particular, whether enlarged, 491, 1268, 1281
estate, devise of, by name, followed by terms applicable to part only, 1270
evidence admissible to shew parcel or no parcel, 510
falsa demonstratio non nocet, meaning of rule, 1265
farm, devise of, by name, followed by terms applicable to part only, 1271
"house," devise of, followed by terms applicable to part only, 1269
inconsistent, as to locality, reconciled, 573
lands at, in or near a place, devise of, 1280, 1282
leaseholds misdescribed as freeholds held to pass, 1288
mistake in description, 461

Volume I. ends at p. 1040.

DESCRIPTION—*continued.*

of subjects of gift—*continued.*

mortgage, reference to, held to restrict gift to mortgaged part, 1278
occupancy, effect of reference to, 1268, 1271, 1277
parish, erroneous reference to lands as in a particular, 491, 1282
property, all testator's, answering description at death passes, 406 et seq., 1276
of another answering, effect where there is, 1282
part of, completely described alone passes, 1276
quantity, erroneous estimate of, 1272
tenure, reference to where no part answers description, rejected, 1266
where part answers description, not rejected, 1278
title under which property is derived, reference to, 1271

DESTROYED WILL, contents of, evidence admissible as to, if not revoked, 145

DESTRUCTION OF WILL. *See* REVOCATION.

DEVISABLE INTERESTS,
all sole estates, 65, 66
which would descend to heir of testator, 65
to heir of testator's ancestor, 65
chattel interests in land, 72
contingent and future interests, 80
contracts for sale, &c., benefit of, 67, 77, 78. *See* CONTRACT.
copyholds, 68
acquired after date of will, 71
secus under old law, 69
but passed under devise of manor, 70, n.
custom to contrary notwithstanding, 70
equitable interests in, 72
freebench barred by devise of, 71
interest of unadmitted devisee or heir, 70
surrender not now necessary, 70
customary freeholds, 69
easements, 75
entry, right of, 81
estate in common, 66
in coparcenary, 66
in joint tenancy, not, 66
pur autre vie, 72
executory or contingent interests, 80
freeholds acquired after date of will, 68
secus under old law, 66
freeholds pur autre vie, 72
secus, if limited to heirs of body, 74
incorporeal hereditaments, 75
possession without title, 81
option to purchase, 79
right of residence or occupation, 78
rights of action and entry, 81
transmissible interests, 79

Volume I. ends at p. 1040.

DEVISE, who are competent to. *See* DISABILITY.

"DEVISE," effect of, in including real estate in informal words, 1009, n.

DEVISEES,
conditions imposed on, notice must be given of, if heir, 1480
who may be,
aliens, under Naturalization Act, 1870, 90
before the Act Crown might seize legal or equitable estate, 90
but not proceeds of sale of land, 91
club, society or association, 80
corporations, generally by licence, 84
heir of testator, 96
illegitimate children, 97
infant, 97
lunatic, 97
married women, 98
traitors and felons, 99
unascertained persons, 99
who may not be,
attesting witness, 93
though supernumerary, 94
but witness to codicil may take by will and vice versâ, 94
husband or wife of witness, 93
trade union, 89

DEVOLVE, stirpital force of the word, 1715

"DIE IN THE LIFETIME OF A. AND B." construed "in the joint lives," 620, n.

DIE WITHOUT CHILDREN, or a child, or a son. *See* CHILD—CHILDREN.

DIE WITHOUT LEAVING CHILDREN,
construed strictly, if prior gift is contingent on A. leaving a child, 1725
but if one child survives all take, 1725
unless confined by context to surviving children, 1726
if vested gift is to be divested in some event, 1725
construed, "without having had children," when, 1725

DIE WITHOUT HEIRS OF THE BODY. *See* DIE WITHOUT ISSUE.

DIE WITHOUT ISSUE,
cross remainders between devisees in tail raised by, 660 et seq.
See CROSS REMAINDERS.
FOLLOWING GIFT TO CHILDREN, SONS, &C.,
means on failure of that gift, 1964 et seq. *See* DEFAULT OF ISSUE.
IF NO GIFT TO CHILDREN, SONS, &C.,
rules under old law,
refers generally to indefinite failure of issue, 1958
exceptions—where phrase is *leaving* no issue, 1958
where testator, having no issue, devises on failure of issue of himself, 1960
restricted to mean die without issue living at death, when, 1960 et seq.

Volume I. ends at p. 1040.

DIE WITHOUT ISSUE—*continued.*

IF NO GIFT TO CHILDREN, SONS, &C.—*continued.*

rule under present law,

restricted, in all cases, to failure of issue at death, 1961
exceptions—(1) where words refer to prior gift to issue, 1962
or to prior estate tail, ib.
or to prior quasi estate tail in personalty, ib.
(2) where context shews indefinite failure is meant, 1962, 1964
whether referable to objects of prior gift, 1964
See DEFAULT OF ISSUE.

DISABILITIES OF DEVISEES, resulting trust may be rebutted on ground of, 712

DISABILITIES OF TESTATORS,
advanced age producing imbecility, 48
alienage, 59
blindness, deafness, and dumbness combined, 48
coverture, 53 et seq.
re-execution necessary to pass property acquired after husband's death, 57, 58
special statutory disabilities of f. c. not removed by M. W. P. Act, 58
drunkenness, 48
felony, 60
idiotcy, 48
infancy, 47
lunacy, 50 et seq.
treason, 60
weakness of intellect, 48–50
will made during, how set up, 47

DISCLAIMER, resulting to heir on, 704
mode of, 556, 934

DISCRETION,
absolute, as to amount to be applied, legatee only takes what trustees allow, 856
as to application of gift, objects not stated, avoids gift, 481
bankruptcy operates notwithstanding, to apply income, 1502
conversion, constructive, whether excluded by, 745, n., 751, 755
Court will not interfere with exercise of, by trustee, 931
creditors in bankruptcy defeated by, in trustees to exclude c. q. t., 1504
devisee of trustee, whether may exercise, 987
fee simple passed (before 1838) by devisee to A., to be at his, 1805
refusal to exercise, by trustees, 932

DISCRETIONARY TRUSTS AND POWERS, 931

DISPOSAL, trust rebutted by gift to be at legatee's, 481, 482

DISPOSITION,
absolute interest passes by gift for life with power of, at death, 1805, 1807, n.
inconsistency of, revocation of will by, 173
validity of, definite subject and object of gift, necessary to, 454

Volume I. ends at p. 1040.

DISPOSITIVE INTENTION necessary to will, 27

DISPUTE OF WILL, conditions prohibiting, 1548. *And see* CONDITIONS.

DISSEISIN. *See* SEISED.

DISSENTERS, charitable gifts to, good, 208

DISSENTING CHAPEL, bequest for benefit of, good, 209

DISTRESS, annuitant-devisee deprived of, by demise of lands charged, 166

DISTRIBUTION,
words of, effect of, added to *bequest* in remainder to heirs of body, 1195 et seq.
by purchase to heirs, 1571
to personal representatives, 1616
to devise in remainder to heirs of body, 1890, 1897
to A. for life, remainder to his issue, 1943, 1945
See ABSOLUTE INTEREST—ESTATE TAIL.

DISTRIBUTIONS, STATUTE OF,
reference to, effect of, 1606, 1628, 1649
regulates proportions as well as persons, whether, 1606, 1608

DIVESTING, 1364
absolute, gift defeasible by power becomes, by failure of power, 1365, 1460
vested gift becomes, by failure of event on which gift over depends, 1367
all events prescribed must happen to effect, 1366
ambiguous expressions will not effect, 573, 574
children en ventre considered as living to prevent, 1703
clauses, strictly construed, 1366
failure of contingent clause, 1367
implication of gift over divesting vested gift, 1380
pro tanto by gift over for life, 1435
remoteness of gift over will prevent, 1437
settlement of legacy, direction for, effect of, 1458
substitutional gifts to children, 1369
to survivors, 1367
three ways in which a gift may be divested, 1365
transmissible interest, contingent, protected from defeasance, 1369
See GIFT OVER.

DIVORCE,
effect of, on gift to husband and wife, 1258
wife surviving husband after, not his widow, 1286

DOMESTIC SERVANTS,
charitable gifts for benefit of, 215
legacies to, 403, 1119
meaning of, 1120

DOMICIL,
abandonment of, 17
administration not governed by, 9

DOMICIL—*continued.*
ambassador, residence as, 20
ancillary probate of will, valid according to foreign, 7
Anglo-Indian, 21
animus manendi necessary to support, 18
civil service, residence abroad in, 20, 21
conflict of laws as to, 24
construction of will of immoveables not regulated by, 1–4
of moveables regulated by, 4 et seq.
where probate granted in error, 8
consul, residence as, 20
devolution of immoveables not regulated by, 1
of moveables regulated by, 4
where probate is granted in error, 8
distribution is governed by, 9
divided residence, effect of, 19
evidence, extrinsic, admissible to prove, 18
execution of will of moveables must be according to law of, 6, 7
executors do not represent legatees so as to bind them on question of, 42, n.
extra-territorial, 21
foreign, law of, how ascertained, 8
will valid by, admitted to probate, 7
guardian can change, of infant, whether, 24
half-pay officer, residence abroad of, 22
how ascertained, 16 et seq.
domicil of choice, acquisition of, 17
length of residence material to support, ib. 17
of origin, abandonment of, 17, n.
how affected by residence as trader, &c., 22
for health's sake, 22
in hotels, &c., 18, 19
of necessity, 19
permanent, 21
intention to retain, of no effect against contrary facts, 22
question is of fact rather than of law, 18
not by mere declaration of intention to return, 22
leaseholds, devolution of, not affected by, 2
legacy duty, how affected by, 5, n.
legitimacy of children governed by, how far, 1746
Lord Kingsdown's Act, 3, 9, 11–13
affects British subjects only, 13
choice of modes of execution of wills given by, 12
previous will not revoked by change of domicil, 9
military service confers, of country served, 20, 21
nationality is distinct from, 16, n.
of bastard, 16, 23
of children, 23
of lunatics, 24
of married women, 23, 46
origin or birth, of, 16, 17
reverts when no other exists, 17
peer may acquire in a foreign country, 20

Volume I. ends at p. 1040.

DOMICIL — *continued.*
power, will under, not regulated by, 9, 10
prisoner, residence as, does not change, 20
probate not conclusive as to, 44, n.
of will of person having foreign, 7
pur autre vie, estates, not affected by, 3
refugee, residence as, does not change, 20
renvoi, doctrine of, 24
revocation of will not effected by change of, 9
trader, residence as, changes, 22
treaty, wills of English subjects abroad under, 10
validity of will of movables depends on, 4
wife's residence, how far material in determining, 19

DONATIO MORTIS CAUSÂ, unattested will, not good as, 35, n.

DOUBLE POSSIBILITIES, rule against, 285

DOWER,
attaches to defeasible fee, when, 1452
estate tail after failure of issue, 1453, n.
condition excluding liability to, void, 1467
election, doctrine of, in reference to, 547. *See* ELECTION.
rentcharge equal to, gift of, not implied by devise of lands not liable as "subject to dower," 623

DRAFT OF WILL,
inadmissible to vary construction, 486, n.
secondary evidence of contents of will, 153

DRUNKENNESS, imbecility through, may avoid will, 48

DUMB. *See* DEAF AND DUMB.

DUPLICATE WILLS,
alteration in one, effect of, 151
destruction of one, revokes both, 151
evidence to shew that instrument was intended as duplicate, 494
execution of, 117, 152

DUTY. *See* LEGACY DUTY—PROBATE DUTY—SUCCESSION DUTY.

EASEMENTS,
creation by devise de novo, 75
implied devise of, 680, 1293
occupation, gift by reference to, whether passes, 1293, n., 1808

ECCLESIASTICAL COURTS,
jurisdiction of as to legacies abolished, 1397, n.
practice of former, as to testamentary instruments, 35
rules of construction laid down by, still recognized as to bequests, 1397
as to conditions, 1525

EDUCATION,
gifts for, charitable, 215, 217. *See* CHARITY.
to parents for, of children, effect of, 924. *See* MAINTENANCE.

"EFFECTS,"
personalty, general, carried by, 1022
realty not carried by, 1018-1021
except on context as "real effects," 994, 1805
"said effects," 1018
"wheresoever situate," 1019

EJUSDEM GENERIS, doctrine of, 1023, 1084, 1309

ELDEST ISSUE, devise to A. and his, effect of, 1931, n.

ELDEST SON,
exception of, from gift to children, to what period referable, 1737
from gift to second, &c., sons excludes only son, 1730
meaning of, in shifting clause, 1441
words of limitation, whether, 1925

ELECTION,
TO TAKE PROPERTY, UNCONVERTED, 758 et seq. *See* CONVERSION.

TO TAKE UNDER OR AGAINST WILL,
abroad, property, 540, 541
acts, what, required to raise presumption of, 555
anticipation, restraint on, affects right of, whether, 553
appointment, invalid, may arise, 41, 850
special powers of, not within doctrine, 850, 852
claim dehors the will necessary to raise, 532
class, property of, given to some of the members and strangers, 535
co-heiress, by, 534
compensation not forfeiture is principle, of, 537
property of testator available for, necessary to raise, 852
competency, personal, requisite to raise, 538
condition, distinguished from, 532, 552
contingent interests are within doctrine of, 536
creditors not within doctrine of, 541
death before, effect of, 534, n.
derivative claims not within doctrine of, 534, n.
but obligation to compensate runs with estate, 534
disclaimer, mode of, 556
disposition, actual, of another's property necessary to raise, 533
doctrine stated, 532
dower and freebench, application of doctrine to, 547–552
effect before Dower Act of, 547
operation of Dower Act, 551
barred by declaration, disposition, &c., 551
evidence, parol, not admissible to raise, 541
expressions of intention must be clear to raise, 543
devise, general, not sufficient, 544
of ground rents not sufficient, 544
specific, of particular estate, 545

ELECTION—*continued.*

TO TAKE UNDER OR AGAINST WILL—*continued.*

exclusion of, express, by testator, 552
feme coverte, whether competent to elect, 538, 554, 555
gift in lieu of specified thing does not exclude from another gift, 552
but, if accepted, puts legatee to election as to his own property, 552
heir put to, by devise, when, under old law, 539
Scotch, when put to, by English will, and vice versâ, 540
implied election, 555
infant incompetent to elect, 538, 554, 555
intention of testator, doctrine does not depend on, 534
knowledge of rights essential to raise, 555
of want of title, on part of testator, immaterial, 536
lunatic, by, 554
mortgagor or mortgagee, devise of mortgaged property by, not sufficient to raise, as against the other, 547
mistake raises fresh right of, 553
mode of, 555
next of kin, doctrine applies to, 538
onerous gift, refusal of, whether precludes from acceptance of another gift in same will, 556
partial interest, devise of whole property by testator having only, 545
recital, without express gift, will not raise, by implication, 553
remainder after estate tail, doctrine applies to, 536
remote interests are within doctrine of, 536
restraint on anticipation, 553
reversion, devise by owner of, as of whole, sufficient to raise, 546
reversionary interests are within doctrine of, 536
selection, right of, 460, 532
several persons, by, 534
separate rights of, when several disappointed, 534
time of, 555
undivided share, devise by owner of, as of whole, sufficient to raise, 545
Wills Act, effect of, on doctrine, 539, 544

EMBLEMENTS, when devisee takes, 1660

EMPLOYMENT of particular persons, directions as to, whether imperative, 898

ENDOWMENT,
of churches and chapels, gift to, is charitable, 259, 260
schools, gift of income for, 212, 259

"ENFANTS," French word, construed immediate offspring, 1656, n.

ENJOYMENT,
postponement of, does not affect vesting, 1422
specific by tenant for life, 1230 et seq. *See* CONVERSION.
vested interest entitles legatee to, at twenty-one, 1422, n.

Volume I. ends at p. 1040.

ENTIRETIES. TENANCY BY, nature and effect of, 1785
See HUSBAND AND WIFE—ESTATE TAIL.

"ENTITLED,"
gift over on death before, how construed, 2183
gift over to class except one, to specified property, how construed, 1728, n.
word alone, whether means, "entitled in possession," 1731

ENTITLED IN POSSESSION,
gift over on death before becoming, 2182
meaning of, in strict settlement, 697
shifting clause, 1440

ENTRY, RIGHT OF, may be devised, 81

ENUMERATION OF PARTICULARS,
gift made specific by, 1249
restriction of general gifts by, 1023

EN VENTRE SA MÈRE, CHILD. 1701. *See* CHILDREN — ILLEGITIMATE CHILDREN—POSTHUMOUS CHILDREN.

EQUITABLE ASSETS,
distributable pari passu among all creditors, 2020
equitable interests, not, 2022
judgment creditors, distinction as to, 2024
real estate, when liable as, 2022
separate estate of f. c. is, 2098

EQUITABLE INTEREST,
devise of, in copyholds, under old law, 104
devise of, to use of A., in trust for B., gives no estate to A., 1839
in real estate, after-acquired, formerly did not pass by will, 66, 67
perpetuities, rule against, in reference to, 326
Shelley's Case, rule in, applies to, 1861

EQUITY OF REDEMPTION,
ademption by mortgagee-testator acquiring, 67, n., 981
barred at testator's death, whether general devise passes mortgage lands, 982
legal assets, is applicable as, 2022, 2023
remoteness, avoidance of, for, saved by outstanding legal estate, 326, n.

EQUIVOCATION, when it arises, 518

ERASURE,
of name of legatee or executor, 145, 160
of signature of testator or witnesses, 144
See OBLITERATION—REVOCATION.

ESCHEAT,
conversion, constructive, in reference to, 749
equitable interests in realty, formerly none of, 90, n.
Intestates' Estates Act now renders them liable, 90, n., 749, n.
for alienage, felony, or treason abolished, 59, 61
trust for sale, none of money to arise under, 91, 749, 769
See FORFEITURE.

Volume I. ends at p. 1040.

ESTATE,
fee passes by devise of, 1805. *See* FEE SIMPLE.
particular, devise of, by name, followed by restrictive words of description, 1268
realty passes by word, unless contrary intention appears, 990 et seq. *See* REAL ESTATE.

ESTATE DUTY,
legacy to pay, 897
on death of issue in testator's lifetime, 451
settlement estate duty, 1131
"testamentary expense," whether a, 2015

ESTATE FOR LIFE,
absolute interest cut down to, by subsequent gift of, 561, 566
conditions prohibiting alienation annexed to gift of, 1495, 1505
devise of lands, simply, created, under old law, 1802
enlarged to estate tail, when. *See* ESTATE TAIL—HEIR.
gift for the life of two persons, 642
implication of, 630 et seq. *See* IMPLICATION.
inheritance, estate of, cut down to, by subsequent gift of, 561, 566
in annuity what creates, 1915
consumable stores, 1455
rentcharge, 1808
unborn person may be object of gift, 348

ESTATE IN FEE. *See* FEE SIMPLE.

ESTATE PUR AUTRE VIE. *See* AUTRE VIE.

ESTATE TAIL,
acceleration of enjoyment of repairing fund by barring, 720, n.
alienation, power of, inseparable from, 1491
conditions repugnant to devise of, 1491 et seq. *And see* CONDITIONS.
devolution of, modes of, 1846
election, whether applies to remainder after, 536
estate for life enlarged to—
by gift over if A., devisee for life, die without issue, under old law, 656, 657
not by gift over if he die without issue living at death, 658, n.
not since 1 Vict. c. 26, s. 29..658
estate in fee cut down to—
by devise over if A., devisee in fee, die without heirs of his body, 1854
by devise over, if A. die without heirs, to person in line of descent, 1854
estate tail general what will cut down to estate tail special, 1857
implication of, from gift over on death without issue, 656 et seq. *See* IMPLICATION.
lapse of devise of, prevented by Wills Act, when, 446
perpetuities, rule against, in reference to gifts after, 322
personal annuities cannot be limited by way of, 1915, n.
vesting of remainders, &c., expectant on, 1358

Volume I. ends at p. 1040.

ESTATE TAIL—*continued.*

WORDS, WHAT, WILL CREATE—

created in A. by devise,

to A. and his *children*, where no child at time of devise, 1907 (*Wild's Case*)
i.e., at the date of the will, 1908
notwithstanding power to A., to select children, 1907
notwithstanding existence of children, on context, 1912 et seq.
to A., "*to her* and her children for ever," 1913
to A. for life, remainder to such son as he shall have, 1919
and should he have a child, to such child, 1920
and his eldest son to inherit, and so on for ever, 1927
and to his eldest son after his death, by force of subsequent gift in tail "in like manner," 1928
and to the heir male of his body and his heirs, 1850
to A. and her *heirs* if she have a child, if not, over, 1925
and his children in succession, 1913
and his heirs male for ever, 1846
and his heirs male attaining 21, ib.
and his heirs by particular wife, 1947
and his heirs lawfully begotten, ib.
and his heirs, and not to sell to third generation, ib.
and the heir (sing.) of his body, 1849
and such heir of his body as shall survive him, ib.
and his heir male attaining 21..1849
and the next heir of his body, ib.
and his seed, or his issue, or his offspring, or his family according to seniority, 1848, 1930
and his heirs, and if he die without heirs of his body or without issue, over, 1852
though gift over be to the right heirs of A., 1856
and his heirs, and if he die without heirs to a person in line of descent, 1854
or to several persons, some of whom are in the line, 1856
to A. for life, remainder to the heirs of his body, 1858
and B. as tenants in common for life, remainder to the heirs of the body of A.—as to one moiety, 1868
and B. as joint tenants for life, remainder to the heirs of their bodies, 1884. *See* SHELLEY'S CASE.
for life, remainder to the heir of his body for ever, 1849
remainder to his next (or first) heir male, ib.
remainder to the heirs of his body, and the heirs of their bodies, 1887
remainder to the heirs of his body, their heirs and assigns, 1888
notwithstanding direction that heirs of the body shall assume name, 1889
or limitation to trustees to preserve contingent remainders, ib.
remainder to the heirs of his body as tenants in common, 1891

Volume I. ends at p. 1040.

ESTATE TAIL—*continued.*

WORDS, WHAT, WILL CREATE—*continued.*

created in A. by devise—*continued.*

to A. for life, remainder to the heirs of his body in such shares
he shall appoint, and if but one child, &c., and fo
want of such issue, over (*Jesson* v. *Wright*), 1892
remainder to the heirs of his body as tenants i
common, and their heirs, 1897, 1898
remainder to the heirs of his body in strict settle
ment, 1905
See EXECUTORY TRUST—STRICT SETTLEMENT.
to A. and his *issue*, 1930
and his next or eldest issue, 1931, n.
and his issue living at his death, 1931
and his issue, and the heirs of such issue, and if A. die with
out issue, over, 1935
to A. for life, remainder to his issue, and in default of such issue
over, 1935
and if he die leaving issue, to such issue, 1936
remainder to his issue and the heirs of their bodies,
and in default of such issue, over, 1937, 1938
remainder to his issue and their heirs, and for want
of such issue, over, 1939
secus, if the superadded limitation narrows the
course of descent, 1942
the gift over is not essential, 1941
remainder to his issue with modification superadded
not giving issue the fee, and in default of issue,
over (before 1 Viet. c. 26), 1944
tho gift over is an aid, but not essential,
1950
since 1 Viet. c. 26, A. would not be tenant
in tail, ib.
remainder to his issue, and if he die without issue,
at his death, over, 1956
whether devise to male issue of A. gives estate tail to A.'s eldest
son, 1557
created by devise to a *class* and their issue, 1931
by devise to first and other sons and their heirs (importing
succession), and in default of such issue, over, 1971
created in A. and B., by devise to them jointly, for their lives, re-
mainder to the heirs of their bodies—
if A. and B. are husband and wife, they take by entireties,
1885
if persons who may lawfully marry, they take as joint tenants,
1885
if persons who may not lawfully marry, they take joint life
estates, and several inheritances, 1868, 1884

not created in A. by devise,

to A. and his lawful heirs, 1847

Volume I. ends at p. 1040.

ESTATE TAIL—*continued.*

WORDS, WHAT, WILL CREATE—*continued.*

not created in A. by devise—*continued.*

to A. and the next (or first) heir of his body and tho heirs of *his* body, 1849
and tho heir male of his body and his heirs, 1850
although superadded words of limitation do not change course of descent, 1851
to A. for life, remainder to the heir male of his body during his life, ib.
to A. and his heirs, or to A. simply, and if he dio without heirs of his body, or without issue, under 21, or in lifetime of B., over, 1852, n.
and his heirs, and if he dio without heirs, to a stranger in blood, 1855
and the heirs of tho bodies of A. and another, 1867
to A. and B. as tenants in common, for life, remainder to the heir of the body of A. (except as to one moiety), 1868
to A. for life, remainder to his heirs male and their heirs female (changing course of descent), 1889
remainder to his heirs male and the heirs of their bodies, *semb.*, 1942
remainder to "heirs of his body" *explained* to mean "sons," "children," &c., 1899 et seq.
e.g., explained,
to heirs of the body, that is to say, sons, 1899
to first and second sons of E. in tail, and so to all and every other the heirs male of E., 1900
to heirs male, tho elder of *such* sons to take before the younger, 1900
to heirs of the body, and if more children than one, &c., ib.
to heirs of the body in manner aforesaid, 1901
to heirs of the body in such parts as their *father* should appoint, 1902
not explained,
to heirs of the body successively according to seniority, 1903
the elder of such sons, &c. (with context), ib.
according to seniority, the elder son always preferred, &c., 1903
to A. for life, remainder to his first son severally and successively, 1925
remainder to his eldest son, and for want of such issue, over, 1926
remainder to his issue (sing.) and *his* (the issue's) heirs, and for and want of such issue, over, 1937, n., 1938
remainder to his issue female, and the heirs of their bodies (changing course of descent), 1943

Volume I. ends at p. 1040.

ESTATE TAIL—*continued.*

WORDS, WHAT, WILL CREATE—*continued.*

not created in A. by devise—*continued.*

to A. for life, remainder to his issue *in fee*, as tenants in common, or in any other modified manner, and howsoever the fee is created, 1945

remainder to his issue simply, as tenants in common, or in any other modified manner (since 1 Vict. c. 26), 1950

but not before, 1943 et seq.

remainder to his *issue*, if "issue" is *explained* to mean "children," "sons," &c., 1951 et seq.

e.g., *explained*,

to issue, the elder of such sons, &c., 1952

to issue, provided such children attain 21..1952

to issue child or children, ib.

to issue, and if more than one child, &c., 1953

"issue" in one gift explained by "children" in another, 1955

not explained,

to issue, and if only one child, &c., 1953

to A. for life, remainder to any class of issue, or a single child, for life or in fee, and for default of *such* issue, over, 1970

remainder to any class of issue in fee or tail, and for default of issue of A., over, 1973

same, with gift over on death without *leaving* issue, 1973

See IMPLICATION—DIE WITHOUT ISSUE—DEFAULT OF ISSUE—DIE WITHOUT LEAVING ISSUE.

ESTATE TAIL GENERAL, cut down to estate tail special by implication, 1857

ESTATE TAIL AFTER POSSIBILITU, &c., woman tenant in tail special may bar until nine months after husband's death, 1870

ESTOPPEL,

by conduct, 560

erroneous statements in will, 559

litigation, 560

possession under instrument, 557

ET CETERA, construction of, 1015, 1030

EVIDENCE, EXTRINSIC,

HOW FAR ADMISSIBLE,

to add to, subtract from, or vary will, 484

e.g., by showing intention different from words used, 488, 490

omission of words by mistake, 486

variation from instructions, 486

to construe words contrary to their primary sense, 490

e.g., description of donee, 489

relative pronouns, 521

words of locality, 490, 491

Volume I. ends at p. 1040.

EVIDENCE, EXTRINSIC—*continued.*

HOW FAR ADMISSIBLE—*continued.*

to construe—*co.* ..

words of tenure (copyholds), 480
" thereunto belonging," 492
unless primary construction is impossible or inconsistent, 490 et seq.
there is no appropriate object, 488
whether revoked will may be regarded, 489, n.

to contradict construction based on state of facts, 505, n.
statutory definitions of words, 501, n.

to exclude rule as to revocation by marriage, 142

to exonerate personal estate from debts, 2058

to explain ambiguous expressions, 516
description of objects who take under inaccurate, 512, 1253
where applicable equally to several persons, 518
contra, if context or circumstances afford grounds for preference, 520
where applicable partly to one, partly to another, 524
partly to several, partly to none, 523
wholly to one, partly to another, 527
where applicable in every respect to claimant, 526
where no part of description applies to claimant, 529
description of subject, what included in, 508
where applicable equally to several subjects, 518, 529
devise is of " my estate called " A., 510, 489
extrinsic document, re.. ..ce to, 509
foreign, local, or technical terms, 501
nicknames, 502
principles on which evidence is admitted in such cases :—
ascertainment of object, sufficient if testator provides means for, 510, 1253
declarations of testator in what cases admissible, 519
evidence must be material, how far, 526
need not be contemporaneous with will, 526
patent and latent ambiguities, rule as to, 516

to prove animus attestandi, 117
revocandi, 145
testandi, 30, 494
conflicting wills, chronological position of, 174, 175
contents of destroyed will not duly revoked, 145, 153
of lost will, 153
of revoked will not in existence, not admissible, 194
conversion of land contracted to be sold or purchased, 77
custom, 501
domicil, 18
duplicate, that instrument was intended as a, 494
execution of will, date of will not date of, 486, n.
during lucid interval, 50
pursuant to required formalities, 100, 125
of wrong instrument, 494

Volume I. ends at p. 1040.

EVIDENCE, EXTRINSIC—*continued.*

HOW FAR ADMISSIBLE—*continued.*

to prove—*continued.*

fraud in obtaining will, 492, 495
identity of subject or object of gift, 480, 508
incorporated document, existence of, at date of will, and identity of, 137
loco parentis, that testator intended to stand in, 500
misnomer or misdescription, 512
mistake, insertion of words by, 492
papers constituting will, 494
parcel or no parcel, 490, 492
parol trust or promise, 495
revival of prior will, 193
revocation of will by lunatic during lucid interval, 153
by mistake, 146, 153
satisfaction of legacy, 500
state of facts at date of will, 503
e.g., state of testator's property, 504
unless construction properly depends on state of facts at death, 505

to raise election, 541

to rebut executor's claim to residue as against the Crown, 498
presumption as to—
alterations in will, time when made, 156
attestation by supernumerary, 94
blanks, time when filled in, 157
double portions, 500
execution of will, 121
illegitimate children, exclusion of, 1748
knowledge of contents of will, 494
obliterations, time when made, 156
resulting trust, 497
revocation of lost or torn will, 153
testamentary capacity, 51
character of duly executed paper, 126

to reconcile inconsistencies in will, 490–492

to supply blanks, partial, 515
total, 514

EXCEPTION,

construction of gift aided by, of persons, 1646
of things, 1026 *et seq.*
date from which will speaks as to, from testamentary gifts, 420
inconsistent gifts reconciled by reading one as, out of other, 565
indefinite devise enlarged to fee by (under old law), 1806
lapsed gift by way of, out of lands, heir takes, 441
of child, eldest, construction of, 1738
youngest, applies to absolute youngest, 1738, n.
particular things excepted out of general gift, 1026

Volume I. ends at p. 1040.

EXECUTION OF WILL,

GENERALLY,

actual, not at date of will, construction of will, where, 396, n.
time of, evidence admissible to prove, 175
alterations in will must be signed and attested, 125
appointments by will, 800
defective, when supplied by reference, 127 et seq.
document must be incorporated, 131
defective, reference to will or codicil does not set up unexecuted codicils, 130
unless no executed codicil exists, 130
domicile, how far affects validity of, 1, 11, 100
Lord Kingsdown's Act, 3
due, may be presumed where will lost, 105
incomplete testamentary papers, 125
incorporation of extrinsic documents, 135. *See* INCORPORATION,
locality of immoveable property determines efficacy of, 1, 2, 100
omission of formalities as to, prescribed by testator, 125, 126
parol trust, 106
presumption of due, 105, 121
against doubtful evidence, 105
not against positive contrary evidence, 105
re-execution, 193
revocatory writing requires same formalities as to, as will, 167

STATUTORY REQUIREMENTS,

as to attestation and subscription by witnesses,

animus attestandi necessary, 117
attestation clause not essential, 116, 120
credibility of witnesses, 123
number of witnesses, 123
position of witnesses' signatures, 116
"presence" of testator necessary to valid, 118
testator must be conscious, 118
must be within view, 119
need not actually see, if he might have seen, 119
where testator is blind, 120
revocation of will by tearing off signatures of witnesses, 144
revocation in attestation clause of codicil, 171
what is sufficient, 114 et seq.
by address of residence, not, 115
description without name, 115
hand guided, 115
initials, 114
on re-execution of altered will, 118
mark, 114
mere acknowledgment of previous signature, not, 115
sealing, not, 115
in wrong name, 115
of duplicate will, 117

Volume I. ends at p. 1040.

EXECUTION OF WILL—*continued.*

STATUTORY REQUIREMENTS—*continued.*

as to attestation and subscription by witnesses—*continued.*

on re-execution of will, 115
separate paper attached to will, 109
where one, of several instruments or sheets, 117
to wills and codicils, 117
where will altered since execution, 118, 125
where will re-executed, 115

as to signature by testator,

acknowledgment of, 112–114
express words of, not necessary, 113
may be by another for testator, 113
by gestures, 113
must be before subscription by either witness, 114
in presence of witnesses, 105, 113
of former signature sufficient on re-execution, 114
witnesses must be present at same time, 113, 114
must see the signature, 113
need not know document is a will, 114
position of, 110
revocation of will by tearing off, 144
what is sufficient, 107–110
by another for testator, 108
initials, 107
mark, 107
one, of several sheets, 108
sealing, whether, 107
in wrong name, whether, 107
of wrong will, not, 107
on separate paper attached to will, 109

as to writing,

essential to validity of will, 105

EXECUTORS,

according to the tenor, 28, n.
annuity to, for their trouble, 1627
appointment of, revocation of, guardianship or other office not revoked by, 183
legacy to executor presumed to be revoked by, 174
attestation of will by, good, 93
legacy to, avoided by, 93, 96
charge of debts created by devise to, with direction to pay debts, 1993
power to sell whether created by, 1989. *See* CHARGE.
chose in action cannot be bequeathed away from, 76
construed as meaning next of kin, 1615
not if "assigns" is superadded, 1618
not under gift to "executors whom A. may appoint," 1620
as words of limitation, 1617

EXECUTORS—*continued.*
construed how, where gift to, is by substitution, 1618
where no prior interest is given, 1619
where property is given to, of testator himself, 1622
devise to A. and his, passed fee, under old law, 1805
gifts to, construed as for benefit of testator's estate, 1621
unless contrary intention expressed, ib.
if beneficial, when accrued to the office, 1622
affection, effect of expressions of, 1624
annuity given for trouble, cesser of, 1627
assumption of office, what is sufficient, 1626
incapacity to act, 1627
gifts to, of legacies to, by name, 1624, 1626
for trouble, amount not stated, void, 457
several, differing in amount, 1626
subject to prior life interest, 1625
with substitutional gift to next of kin, 1625
probate fraudulently obtained, 1627
relationship to testator, reference to, 1624
residuary, 1625
lapse in reference to, 425, 426
implied devise to, 679
parties to litigation represented by, where, 42, n.
surviving, powers of, 933
undisposed of personalty does not now pass to, 96, 498
except as against the Crown, 498
unless they are also trustees, 499

EXECUTORY BEQUEST, 1453
absolute gift defeated by ambiguous expressions, 1456
trusts, declaration of, qualifying, effect of, 1458
chattels, successive interests in, 1454
prior legatee compellable to give inventory, ib.
to give security, when, ib.
ulterior legatee may recover, ib.
vested in first taker, whether creditors can seize, *qu.*, 1455
in trustees, creditors cannot seize, 1454
consumable articles, none of, generally, 1455
exception as to stock in trade, ib.
where no enjoyment in species by first taker, ib.
failure of prior gift, how affects ulterior gift, 2195 et seq.
of ulterior gift, how affects prior gift, 2203
future gifts of personalty, every, is an, 1453
leaseholds, successive interests in, valid as, ib.

EXECUTORY DEVISE, 1432
definition of, 1432
distinction between, and contingent remainder, 1443 et seq.
change of, into contingent remainder and vice versâ, 1449, 1451
concurrent contingent remainders, effect where one of several is subject to an, 1450

EXECUTORY DEVISE—*continued.*
distinction between, and contingent remainder—*continued.*
change of, &c.—*continued.*
destruction of remainder, effect of, on executory limitation arising thereout, 1451
events in testator's lifetime may effect, 1449
subsequent where, effect, 1451
statute 40 & 41 Vict. c. 33, effect of, 1444
curtesy and dower attach to defeasible fee, 1452
freehold, antecedent, continuation of, not generally material to, 1444
devise executory for want of, 1433
devise executory notwithstanding, 1433
(1) derogating from preceding fee, 1434
e.g., cutting down fee to life estate, 1435
introducing life estate, 1435
(2) leaving gap after antecedent estate, 1433
interim income, 953, 1437
merger, none, by union of defeasible and executory fee, 1452
perpetuities, rule against in reference to, 302, 321, 1438
shifting clauses, 1438
trust to convey legal estate, 1446
See PERPETUITIES.

EXECUTORY INTERESTS,
acceleration of, 718 et seq. *See* ACCELERATION.
devisable, if transmissible, 80

EXECUTORY LIMITATIONS,
construction of, with reference to estate tail, 321
restriction, statutory on, 2159, n.
void, where remainder would be good, 302, 322

EXECUTORY TRUST,
cross-remainders, implication of, express limitation not exclusive of, 667
implied more readily than in direct devise, 664
definition of, 1870, 1879
direction that chattels shall go with realty as far as law will allow, does *not create*, 695
effect in creating, of direction for—
conveyance, 1881, 1899
dock the entail, not to, 1871
entail on male heirs of A., 1878
strict, 1881
limitation of life estate, without impeachment, 1877
to separate use, 1873
to trustees to preserve, 1871
parent to have power to charge, 1878
purchase and settlement on A. and his heirs in the male line, estate never to go out of family, 1873
distinction between marriage articles and wills, 1878
between informal words and technical terms, 1880
where estate by purchase to issue would be too remote, 1877

Volume I. ends at p. 1040.

EXECUTORY TRUST—*continued.*
effect in creating, or direction for—*continued.*
purchase distinction where land to be purchased is devised directly, 1875
where testator himself declares uses, 1874
whether settlement is directed on issue or heirs of body, 1877, 1880
purchase and settlement on A. and his issue, they taking interim dividends, 1872
sale of part, and to settle rest without power to bar entail, 1871
settlement as counsel should advise, 1872, 1877, 1880
on A. for life, remainder to first, &c., sons of particular marriage in tail, and in default of issue, over, 1978
on A. for life, remainder to heirs of his body, 1880
trust during minority of A. to continue till entail made, 1876
effect of direction (implied) that land shall go with other (settled) land, 1874
that land shall go with title, 1873
effect of request to legatee of chattels to give effect to testator's wishes, 696
settlement, direction for, authorises what limitations, &c., 1871, 1881
Shelley's Case, rule in, does not apply to, for heirs of body, 1870
vesting, rules as to, with reference to, 1377
See CHATTELS—CONVEY—CROSS-EXECUTORY LIMITATIONS.

EXEMPTION. *See* EXONERATION—SUBSTITUTED LEGACY.

EXILE, wife of, may dispose by will, 56

EXONERATION,
OF GENERAL PERSONAL ESTATE FROM PRIMARY LIABILITY TO DEBTS AND LEGACIES.

Generally—
amount, relative, of debts and personalty and of realty and personalty, immaterial, 2058
evidence, parol, to show intention, not admissible, ib.
express words not necessary to effect, 2056
failure of exoneration fund renders exempted funds liable, how far, 2079
fund not expressly exempted first applicable, 2082

as against real estate—
charge of debts simply, effect of, 2055, 2069
of debts on land, with express charge of legacies on personalty, 2061
of debts, &c., on estate A. "as a primary fund," and charge of estate B. with any deficiency, 2070
of debts, &c., on land and *general* bequest of personalty, 2063 et seq.
bequest of all the personal estate and of the residue only distinguished, 2063
where legatee is also executor, 2063
is not executor, 2065
of debts, &c., on land, with apportionment of charges, 2061
of funeral and testamentary expenses as well as debts, effect of, 2059
testamentary expenses, what are, 2014

EXONERATION—*continued.*

as against real estate—*continued.*

charge of legacies distinguished from trust to pay certain sums, 2071
of particular debt, 2075, 2076
of particular legacy, 1489, 1490, 2076
of specific sum towards payment of debts, 2077
devise imposing personal obligation to pay particular debt, 2076
on trust to sell and pay debts out of proceeds, 2056
and to add residue to personalty, 2070
to A., "he paying," 2056
direction that personalty shall come *clear* to legatee, 2070
realty be applied in *part* payment of debts, 2082
directions, cumulative force of sundry, 2070
mixed fund, creation of, 2033
what expressions will create, 2033
next of kin how far favoured on failure of exempted legacy, 2070
term for payment of debts, creation of, will not effect, 2056
trust to pay out of realty particular debts already charged, 2075

as against specific parts of personalty,

appropriated fund *is primarily* liable, 2077
unless residue is not disposed of, *qu.*, 2079
charge on specific fund, liability inter se of exempted funds not affected by, ib.

RIGHT TO, OF HEIR, out of funds generally liable to debts before descended estates, 2029, 2042. *See* ASSETS.

RIGHT TO, OF SPECIFIC DEVISEE OR LEGATEE,

as to leaseholds, in respect of—

arrears of head rent, 2037
covenant to build, 2038
dilapidations, 2037
fines for renewal due at testator's death, 2038

as to mortgage lands before Locke King's Act.

applies to chattels, 2035
lands generally, 2039
specific money fund, 2035
apportionment of mortgage debt does not negative, 2040
devise of property subject to specified mortgage debt, effect of, ib.
to A., "he paying," effect of, 2041
upon trust to sell and pay mortgages, 2040
exclusion of right where—
charge is provision by way of settlement notwithstanding covenant to pay, 2604
secus, where, after mortgaging, lands are settled, and settlor covenants to pay, 2047
lands came *cum onere* to testator by descent or devise, 2043
by purchase, 2045
unless *debt is adopted* by testator, 2043

Volume I. ends at p. 1040.

EXONERATION—*continued.*

RIGHT TO, OF SPECIFIC DEVISEE OR LEGATEE—*continued.*

as to mortgage lands before Locke King's Act—*continued.*

exclusion of right where lands, &c.—*continued.*

adoption of debt inferred from—

breaking up mortgage into two, and covenant to pay, 2044

covenant to pay with *mortgagee* on purchase, 2045

debt forms part of price, 2046

further advance and covenant to pay whole, 2046

transfer of mortgage with new covenant, ib.

adoption of debt *not* inferred from—

apportionment of mortgage debt, 2044

bond on covenant on transfer, 2043

charge of debts if testator's own debts, 2044

covenant to pay or indemnify vendor on purchase from mortgagor alone, 2045

equity of redemption, new, creation of, 2044

further advance to pay arrears of interest, 2044

mortgage to secure debts or legacies charged on land, 2045

rate of interest, raising, 2043

money raised by tenant for life under power to charge, 2046

failure of intermediate limitations, effect of, 2047

testator's personal estate received no benefit, 2043

converse proposition does not necessarily hold good, 2047

funds liable to meet—

1. general personal estate, 2041
2. lands devised in trust to pay debts, ib.
3. descended lands, ib.
4. lands generally charged with debts, ib.

funds not liable to meet—

pecuniary legacies, 2042

specific devises, ib.

legacies, 2041

heir entitled to, out of what [illegible] 2042

as to mortgage lands under Locke King's and amending Acts,

Acts cited (17 & 18 Vict. c. 113, as to deaths since 1854), 2047

(30 & 31 Vict. c. 69 „ „ „ 1867), 2049

(40 & 41 Vict. c. 34 „ „ „ 1877), 2051

not excluded by adoption of debt, *semb.*, 2043

by direction to pay debts out of mixed or real residue, 2050

to pay in exoneration of general real estate, 2050

unless mortgage debts are distinctly referred to, ib.

to pay mortgage debts if substituted fund fails, 2052

Volume I. ends at p. 1040.

EXONERATION—*continued.*

RIGHT TO, OF SPECIFIC DEVISEE OR LEGATEE—*continued.*

as to mortgage lands under Locke King's and amending Acts—*continued.*

Acts not excluded by limitations in strict settlement of mortgaged land, 2053
apportionment of mortgage between parts of land charged, 2053
where realty and personalty are mortgaged together, 2054
charge, general, of debts, &c., is not within the Acts, 2048
chattels, personal, not within the Acts, 2055
contrary intention, 2052
copyholds are within the Acts, 2048
Crown taking in default of next of kin is within the Acts, 2054
deposit, mortgages by, are within the Acts, 2048
devisee under will made before 1855 not within the Acts, 2054
equitable charges are within the Acts, 2048, 2051
heir, where mortgage made before 1855..2055
leaseholds (since 1877) are within the Acts, 2051
lien on lands purchased by testator, 2050
mortgage made before 1855..2055
option to purchase, 2051
residuary legatee where will made before 1855..2055
share of proceeds under trust for sale not within the Acts, 2048
substituted fund, whether Acts apply, on insufficiency of, 2052
will made before 1855, devisee under, not liable, 2054
residuary legatee, rights of, against heir, 2055

as to shares in company, in respect of calls due at testator's death, 2036
not in respect of subsequent calls, ib.
unless shares given in specie to one for life, and then over, ib.

EXPLANATORY WORDS,
ambiguous gift explained by subsequent, 1423
clear gift not varied by ambiguous, 574
words controlled by, how far, 1384
implication of gift, none, from general introductory, 621 et seq.

EXTINGUISHMENT OF CHARGE, by union of character of mortgagor and mortgagee, when presumed, 970

EXTRINSIC EVIDENCE. *See* EVIDENCE.

FAILURE OF GIFT,
gift over affected by, how far, 2195
failure of, original gift how far affected by, 2203
See GIFT OVER.

FAILURE OF ISSUE,
construed generally, how, since Wills Act, 1961
under old law, 1958

FAILURE OF ISSUE—*continued.*
construed referentially, when, 1964 et seq.
as to personalty, 1964
as to realty, 1969
default of "issue" simply, 1972
of "such issue," 1969
estate tail raised by implication, when, 1976
prior gift to contingent class of issue, 1976
reversion, devise of, 1981
See DEFAULT OF ISSUE—DIE WITHOUT ISSUE.

FALSA DEMONSTRATIO NON NOCET, meaning of the rule, 1265 et seq.

FAMILIES, bequest for specified, according to their need, not charitable, 219

FAMILY,
children alone primarily entitled under gift to, 1585, 1586
husband, wife, collaterals, remote issue excluded, 1585
construed to include ancestors, 1586
to mean children (primary meaning as to personalty), 1584 et seq.
descendants, 1585
heir, 1583
heir apparent, 1584
household including servants, &c., 1586
illegitimate children, 1585
next of kin, 1586
parents, 1585
relations, 1585
devise to, "successively according to seniority," construed heirs of the body, 1584
gift to A. and his, of personalty, A. and his children take concurrently, 1587
of realty, A. takes fee, 1805
gifts to, husband excluded from, 1585
when void for uncertainty, 1582, 1587
joint tenancy created by gift to, simpliciter, 1787, n.
nature of property, how far influences construction, 1583
"nearest family" construed to mean heir, 1584
several families, devise on trust to distribute rents among, good within limits of perpetuity, 219
gift to, distributable per capita, 1585
word, has no strict technical meaning, 1586
words of distribution, effect of, on construction, 1585
"younger branches of family," meaning of, 1587

FARM,
direction to widow to carry on, dower barred by, 548
gift of, includes houses, lands, &c., of every tenure, 1296
particular, by name, with inappropriate descriptive words, 1266

FARMING STOCK,
"furniture," gift of, will not pass, 1308
growing crops pass under gift of, 1311
successive interests in, 1455, n.

Volume I. ends at p. 1040.

FEE SIMPLE,

GENERALLY,

acquisition of, by termor, bequest how affected by, 164
conditions repugnant to, generally void, 1487 et seq. *And see* CONDITIONS.
contradictory devises of, effect of, 173
cut down to estate tail, when, 1853. *See* ESTATE TAIL.
not by ambiguous terms, 574, 669, 1853
"family," gift to A. and his, gives fee to A., 1805
implied in A. by devise to testator's heir if A. dies without issue, 656

WHAT WORDS CREATE,

before the Wills Act,

words of limitation necessary, 1802
but indefinite devise enlarged by—
charge, annual, to be paid by devisee, 1803
of gross sum on devisee, 1803
devise over, when, 1804
devise to trustees in fee for A. indefinitely, 1804
informal expressions, 1805
words of exception, 1806

since the Wills Act,

indefinite devise confers, 1806
contrary intention not shown by giving devisee special power of appointment, 1807
not generally by words of limitation in another gift, ib.
interests created de novo not within the rule, 1808
rents and profits, &c., gift of, confers, ib.
See CESTUI QUE TRUST—EQUITABLE INTEREST—ESTATE TAIL.

FEE SIMPLE, CONDITIONAL,

created in non-entailable land by words creative of estate tail in freeholds, 1809

FEE SIMPLE, DEFEASIBLE,

dower and curtesy in, 1452
merger of, none, by meeting in same person with estate limited in defeasance thereof, 1452

FELO DE SE,

competent to make will, always of realty, 61
now of personalty, 61

FELON,

attestation of will by, 123
competent to make will, whether, 60, 62
gifts to, 99
wife of, competent to make will, whether, 56

FEME COVERTE,
cesser of coverture does not set up will of, 57
competent to make will under old law,
of equitable interests under antenuptial contract, 54
of personalty by assent of husband, 54
of property acquired during husband's desertion, 56
of savings of maintenance money, 55
of pin money, *qu.*, 55
of separate estate in equity, 54
of separate property under Married Women's Property Act, 1882..57
under a power of appointment, 54
where husband is an exile or convict, 56
to revoke will by writing, 57
to take devises and bequests generally, 98
under husband's will, ib.
domicil of, 23, 46
election by, to take against or under will, 538, 554, 555
to take property unconverted, 758
executrix may appoint executor to carry on administration, 57
husband entitled to administration of effects of, 45
separate property of, not disposed of, 46, n.
incompetent to elect so as to get rid of restraint on anticipation, 553
to make will, how far, 53 et seq.
to pass legal estate except under a power, 53
under statute, 57
to raise election, by will, against husband, 538
to re-convert property constructively converted, 758
power of appointment executed by will of, 818
probate of will of, 45
protection order, 56
restraint on anticipation, 1514
revocation of will by, 57
special disabilities of, not removed by M. W. P. Act, 58
trading, what is separate, 55, n.
will of, not effectual to pass property acquired after cesser of coverture unless re-executed, 57
See HUSBAND AND WIFE—WIFE.

FIRST COUSIN, primary meaning of "cousin," 1635

FIRST HEIR MALE,
devise to A. for life, remainder to his, creates estate tail, 1849
to, without gift to ancestor, construction of, 1564

FIRST (OR SECOND, &c.) SON,
applies primarily to first (or second, &c.) son in order of birth, 1741
exclusion of rule by circumstances or context, ib.
gift to second, &c., and other sons (omitting first) includes first, 1744
to seventh child of A., or youngest in case he should not have a seventh living, how construed, 1743

Volume I. ends at p. 1040.

FIRST (OR SECOND, &c.) SON—*continued.*
person answering description at date of will takes as persona designata, 17
lapse of gift by his subsequent death, 1741
if no such person, first at testator's death or afterwards born takes, 17
son born after will and dying before testator, not reckoned, 1742

FIXED PROPERTY, lex loci governs, 1

FIXTURES,
tenant's, charitable gifts of, good, 255
gift of "furniture" will not pass, 1308
gift of "house" passes, ib.

FORECLOSURE after will, effect of, on devise by mortgagee, 981

FOREIGN BOND,
though not enforceable, is property, 76
what passes under gift of, 1306

FOREIGN CHARITY,
bequest to, for purchase of land therein, 272
charitable scheme for, court will not frame, 235, 245

FOREIGN COUNTRY,
law of, how ascertained, 8. *See* FOREIGN LAW.
masses to be said in, gifts for, 210
suggestions as to wills intended to operate in, 2213, n.

FOREIGN FUNDS, meaning of, 1306

FOREIGN LANGUAGE,
construction and formal validity of will not affected by being written in,
evidence admissible to translate or explain will written in, 501
original will may be inspected, 45

FOREIGN LAW,
how ascertained, 8
technical terms of, how construed, 1, n.
testamentary disposition in France, Belgium, &c., 5, n., 7, n.

FOREIGN PROBATE, effect of, 7

FOREIGNER, revocation of will by marriage, 143

"FOR EVER," estate tail given, notwithstanding words, 1846

FORFEITURE,
clauses of, 1442, 1456
election referable to compensation, not to, 537
for treason and felony, abolished, 60, 62
of legacy, if not claimed within given time, 1550
See ESCHEAT.

FORGERY OF WILL, evidence admissible to prove, 46, 495

FORM OF WILLS,
ambulatory nature of wills, 27
contingent wills, 40. *And see* CONTINGENT WILL.
evidence of testamentary intention admissible, 30, 38

Volume I. ends at p. 1040.

FORM OF WILLS—*continued.*
informal instruments, effect of words of present gift in negativing testamentary character, 36
instructions for will not testamentary, 37
joint wills, 41. *See* JOINT WILL.
may be in form of agreement, 33
assignment of bond, 35
bill of exchange, 36
cheque, 36
deed, 33, 34, 35
deed and will, 33
letter, 36, 38
list of articles, 36
marriage articles, 33, 36
power of attorney, 39
promissory note, 36
receipt, 36
but not if intended to operate immediately, 38
or if registered as a deed, 35
although actual enjoyment postponed, 39
in pencil, 106
with blanks, 106
mutual wills, 29, 41
no particular form necessary, 33
postponement of enjoyment not sufficient to make instrument testamentary, 39
separate wills of distinct properties, 37
testamentary appointment, where testator has an interest but not a power, 40

"FORTUNE," real estate may pass by gift of, 1014, 1924

"FOR WANT OF," objects of prior particular devise means remainder, 1359

FRANCE.
law of, as to acquiring foreign domicil, 5
French domicil, 11, n.
testamentary power in, 5, 8, n.

FRAUD,
avoidance of will obtained by, 50
evidence admissible to support will be obtained by, 495
probate conclusive as to, 43
protection order obtained by, set aside, 56
revocation of will, whether effected by conveyance, void for, 166

FREEBENCH,
barred by devise since Wills Act, 552
election, doctrine of, in reference to, 547

FREEHOLDS,
general devise of, passes leaseholds, 962 et seq.
pur autre vie, 72 et seq. *See* AUTRE VIE, ESTATES PUR.
specific devise of, where none, passes leaseholds, 1254, 1288
contra, where freeholds answering description, 1278

Volume I. ends at p. 1040.

FRIENDLY SOCIETY,
gift to, whether charitable, 223
nomination by member, 76
no particular form necessary, 33

"FRIENDS," gift to, 1654

FRIENDS AND RELATIONS, gift to, goes to statutory next of kin, 1628, n

"FROM AND AFTER,"
given day, in computing time, 1472
previous interest, vesting not postponed, 1372
suspe of, prevented, 1381

"FUNDS," meaning of, 1305

FUNERAL EXPENSES, 2014, 2039

"FURNITURE," what passes by gift of, 1307, 1309

FUTURE ESTATE, rents, &c., intermediate, do not generally pass by dev
of, 953

FUTURE EVENT,
past event, whether included by words importing, 1697
vesting postponed or possession deferred by words referring to, 1357 et s
See VESTING.

GARDEN,
"appurtenances" to a house, gift of, passes, 1294
bequest for establishment of a public, 213
mansion house, direction to erect, held to authorize formation of, 1293

GAVELKIND,
devise of common law lands to heirs in, effect of, 1567
of lands in, to "heir" simpliciter, effect of, 1569
Shelley's Case, rule in, applies to lands in, 1858, n.

GENERAL BEQUEST,
all personal estate of testator passes by, 945
constructive conversion, 743 et seq. *See* CONVERSION.
operation of, 1041
powers (under old law) not executed by, generally, 805
exception where bequest referred to subject of power, 827, 832
where testatrix was f. c., 806, 807
general legacy of amount equal to subject of power, effect of, ib.
powers (under present law) executed by, generally, 808 et seq.
contrary intention, what will indicate, 813, 816
direction to pay debts may operate as appointment, 812
executor, appointment of, whether sufficient to execute, 812
feme coverte, wi[illegible] within the rule, 812
legacy may operate as appointment, 812
reference to power or subject-matter, what, sufficient, 827, 832
revocation, power of, whether executed by, 810

Volume I. ends at p. 1040.

GENERAL BEQUEST—*continued.*
powers, &c.—*continued.*
settlement, effect where appointment derogates from testator's own, 814
special powers not within Wills Act, 831
specified amount, power to appoint sum not exceeding, 847
testamentary power may be general, 809
unappointed parts pass by, 814
See GENERAL DEVISE—RESIDUARY BEQUEST.

GENERAL DEVISE,
BEFORE 1 VICT. c. 26,
all general devises specific in their nature, 946
copyholds, 960
exceptions to the rule as regards—
contingent remainder failing, 946
executory and contingent devises in fee, 947
heirs, devise to testator's own, 947
partial interests, devises of, 946
leaseholds for lives, 961
for years, 965
powers of appointment, 805
reversion, destination of, during suspense of contingencies, 948
UNDER THE PRESENT LAW,
generally,
all realty of testator to which he is entitled at death passes by, 406, 948
appointment, void, falls into, 952
dower and freebench barred by, 551, 552
election not raised by, 544
failure of, as to aliquot share, effect of, 952
income, intermediate, not carried by future, 953
unless realty and personalty are blended, 954
money liable to be laid out in land passes by, 744
mortgage money will not pass by, 966
particular devise, in clear terms, not cut down by, 579
residue, devise of, does not include lapsed, &c., devises, 950, 951
specific devise, lapsed, what words will exclude from passing by, 951
as to copyholds,
equitable interests now pass by, 960, 961
limitations, inapt, will not exclude copyholds from, 960
surrender not now necessary to pass copyholds, 960, 961
reference to copyholds as surrendered, effect of, 961
as to leaseholds,
generally included in, 962, 965
intention to exclude, must appear on will itself, 962
"freeholds at A.," devise of, where only leaseholds there, effect of, 964
"real estate at A.," devise of, where no freeholds there, effect of, 964
"real estates," general devise of, will not pass leaseholds, 396, 964

Volume I. ends at p. 1040.

GENERAL DEVISE—*continued.*

UNDER THE PRESENT LAW—*continued.*

as to powers of appointment,

general power executed by, unless contrary intention appears, 808
contrary intention, what dispositions may show, 813, 816
direction to pay debts, 812
feme coverte, will of, is within the rule, 812
formalities as to exercise of power must be observed, 798
general legacies, by, 812
particular [illegible], gift of, 811
revocation [illegible] appointment, powers of, not executed, 810
settlement defeated by exercise of power, 814
testamentary powers may be general, 809
special powers depend on old law, 831
beneficial interest, reference to gift to testator's own, 830
residuary gift, effect of, 827
revocation of special power by codicil revoking bequests to donee, 837

as to rents and profits,

intermediate income not carried by future, when, 953, 954

as to reversions,

ambiguous expressions do not exclude reversions, 957
devise of lands "not before devised," carries reversion in lands devised for life, 956
of lands "not settled," carries reversionary fee in settled lands, 956
limitations, inapt, whether exclude reversion, 957, 959
remoteness no ground for excluding reversion, 955, 959

as to trust and mortgage estates. *See* MORTGAGEE—TRUSTEE.

GENERAL LEGACY,

interest on. *See* VESTING.
power executed by, when, 812

GENERAL PERSONAL ESTATE,

CONSTRUCTION OF GIFTS OF, GENERALLY,

ambiguous context will not restrict comprehensive words, 1029
arrangement of general and particular terms, order of, 1031
exception, force of to give words comprehensive sense, 1026
general words not restrained by defective enumeration, 1000
goods in a specific place, effect of gifts of, 1025, n., 1030
legacy to same person, effect of specific or pecuniary, 1023
"other effects," whether restricted to ejusdem generis, 1027 et seq.
particular bequest to others following general bequest, 1025
residuary, gift effect of distinct, 1036. *See* RESIDUE.

WHAT WORDS CARRY,

General personalty held to pass by words,

"chattels," "effects," "goods," 1022
"goods and chattels except plate and legacies," 1026

Volume I. ends at p. 1040.

GENERAL PERSONAL ESTATE—*continued.*

WHAT WORDS CARRY—*continued.*

General personalty held to pass by words—*continued.*

" money," 1033 et seq. *See* MONEY.
" moveables " (pure personalty), 1030
" other effects," 1027
" other effects, money excepted," 1027
" plate, &c., and effects that I shall die possessed of," 1028
" whatever else I may be possessed of," 1028
" wines and property," 1029, n.

General personalty held not to pass, on context, by words,

" and all things not before bequeathed," 1023
" effects " restrained by subsequent specific bequest to same person, 1023
" et cætera," 1030
" goods " restrained by subsequent bequest, 1024, 1026
" goods and wearing apparel, except watch," 1026
" whatever I have or shall have at my death," 1025
restrictive effect of context on informal words, illustrated, 1033

GENERAL POWERS, execution of, 805 et seq.
See GENERAL BEQUEST—GENERAL DEVISE—POWERS OF APPOINTMENT.

GENERAL WORDS,
cut down to mean ejusdem generis, when, 1023 et seq.
realty passes by what, 991 et seq. *See* REAL ESTATE.

GESTATION, rule against perpetuities allows period of, when, 298

GIFT OVER, 1343
as if prior devisee or legatee were dead, effect of, 1492
construction of, 1348
contrary to law is repugnant, 563
effect of, on construction, 1345
may cut down or divest a gift, 1346
determine vesting or a class, 1346
give validity to a condition, 1347
imply or enlarge a gift, 1345
failure of, leaves prior gift absolute, 1437, 1457
unless failure caused by lapse, 1457
in case of death before becoming entitled, 2183. *See* ENTITLED.
before legacy is " payable " or " vested," 2175, 2182. *See* PAYABLE—VESTED.
before " receiving " legacy, 2184. *See* RECEIVED.
without " leaving " children, 2194. *See* DIE WITHOUT LEAVING CHILDREN.
in case prior charitable gift is void, is valid, 280, 367
" in default of issue " after gift to children. *See* DEFAULT OF ISSUE.
in defeasance of a vested estate, strictly construed, 574, 1366
implication of, 1381

GIFT OVER—*continued.*
in defeasance of a vested estate—*continued.*
takes effect where gift over is on non-performance of condition b
primary devisee who predeceases testator, 2198
where preceding estate never arises, 1344
where prior devise fails under Mortmain Acts, 2199
where prior gift is to son erroneously supposed to be e
ventre with gift over on his dying under age, 219
though another child afterwards born, 2196
not where prior estate becomes indefeasible quoad event provided fo
but lapses, 1449
See DIVESTING.

GIFTS BY REFERENCE, 681
construction of, 681
duplicating charges, 684
effect of strict settlement on personal property, 692
failure of, by ademption, 687
meaning of "in the same manner," &c., 687
referential expressions, 687

"GOODS,"
bequest of, what will pass by, 1022 et seq. *See* GENERAL PERSONAL ESTATE
locality, gift of, by reference to, 1025, n., 1030
trade goods, gift of "furniture" will not pass, 1308

GOODWILL AND PLANT, what included in, 1311

GRANDCHILDREN,
"children" included in expression, whether and when, 1655. *See* CHILDREN
gift to all, amount not stated, void for uncertainty, 455, 456
great-grandchildren not entitled under gift to, 1657, 1660
time for ascertaining class of objects to take, 1664 et seq.
widow of grandson not entitled under gift to, 1663

GROUND RENTS,
election not raised by devise of, 544
reversion passes by gift of, 1297
See RENTS.

GROUNDS, formation of, held authorized by direction to erect mansion house
1293

GUARDIAN,
appointment of, by infant, 47, 1538
consent to marriage by surviving, 1537
domicil of infant, whether may be changed by, 24

GUARDIANSHIP, revocation of, no revocation of other offices, 183

HALF BLOOD,
brothers and sisters, gifts to, include, 1639
nephews and nieces, gifts to, include, ib.
next of kin, gifts to, include, 1632
relations, gifts to, include, 1632, 1639

Volume I. ends at p. 1040.

HALF-PAY OFFICER, domicil of choice may be acquired by, 22

HEIR,
accumulation, rents released from, devolve as personalty to, 389, 390
apparent, when construed as, 1564
children, when construed as, 1578
construction, of, as personalty, 476
of gifts to, 1552
of will, conjectural, not to oust, 453, 629
conversion, constructive in reference to, rights of, 729 et seq. *See* CONVERSION.
copyholds, devise of, before admittance by, 70
declaration that he shall not take, 425, n.
devise to, effect of, 96
notice of conditions annexed to, must be given, 1480
election by, 539. *See* ELECTION.
entitled, when, under gift to "family," 1583
"nearest family," 1584
"next of kin by way of heirship," 1611
estate of, pending contingent gift to minor, cesser of, where there is a gift over, 728
estopped from disputing will, 560
knowledge of contents of ancestor's will by, not presumed, 1480
lapsed gifts charged on land, when pass to, 441–444
parol promise by, to hold as trustee enforced, 495
proceeds of sale of realty undisposed of go to, 764. *See* CONVERSION.
reference, erroneous, to A. as "heir," implication of devise from, 627
resulting trust for, 704. *See* RESULTING TRUST.
Scotch, not excluded from personalty under English intestacy, 15
where put to election, 540
takes under will, 539
took formerly by descent, notwithstanding devise to him, ib.
"very heir" doctrine, 1559, 1561
words "I make A. my heir," held to pass fee, 82, 455, n.

"HEIR OF THE FAMILY," held sufficiently definite, 1574

HEIRLOOMS,
executory trust of chattels to go as, without reference to land, 700
of effects to be annexed as, 1309
of gift of, to peer, describing him by title, 397
rule of limiting, observations on, 692
perpetuities, rule against, in reference to gifts of, 344
revocation of gift of, by revocation of gift of estate, 184

HEIRS (OR HEIR),
USED AS WORDS OF PURCHASE,
as to personalty,
construed, generally, to mean heir or co-heirs at law, 1574
when, on context, to mean children, 1578
executors, 1573
issue, 1569, 1571
next of kin, 1570, 1573

Volume I. ends at p. 1040.

HEIRS (OR HEIR)—*continued.*

USED AS WORDS OF PURCHASE—*continued.*

as to personalty—continued.

distributive words favour claims of next of kin, 1571
" heirs " explained by reason assigned by bequest, 1573
" heirs or next of kin," gifts to, 1573
mixed fund, gift of, favours strict construction as to whole, 1574
next of kin taking, take in statutory proportions, 1573, 1629
widow included, but not husband, 1570, n., 1574
substitutional gift to, goes to next of kin, 1570
but realty in same gift goes to heir at law, 1571

as to realty,

apparent and presumptive, distinction between, 1565, n.
construed, generally, to mean heir or co-heirs at law, 1552
when, on context to mean children, 1579
devisee who is not the heir, 1567
heir apparent or presumptive, 1564
fee simple passes by devise to, 1553, 1554
gavelkind and borough English lands, gifts of, to, 1569
heirs male or female, gifts to, 1558 et seq.
" male issue," devise to, how construed, 1557
name, gifts to heirs of testator's, 1559
nemo est hæres viventis, 1564
" next heir " held to denote person who was not heir general, 1567
" next " or " first heir male," how construed, 914, 918, 1563, 1564
" right heirs male," how construed, 1558
" right heirs, my son excepted," gift to, held void, 1568
" right heirs of my name and posterity," how construed, 1559
special heir not incapacitated from taking by being general heir, 1568

At what period the object of gift is to be ascertained,

generally at ancestor's death—
notwithstanding previous gift to heir out of same property, 1580
where ancestor is testator, ib.
is a stranger, ib.
secus, where gift is to person who shall be " my heir of name of A." at a given time, 1581
where negatived by context, ib.
See ESTATE TAIL—IMPLICATION.

HEIRS AND ASSIGNS, 1558, 1571, 1578

HEIRS LAWFULLY BEGOTTEN, devise to A. and his, creates estate tail, 1847
See LAWFUL HEIRS.

HEIRS MALE,
devise to A. and his, creates estate tail, 1846
to testator's, effect of, 1559, n.

Volume I. ends at p. 1040.

HEIRS (OR HEIR) OF THE BODY,
gift to, after gift to ancestor,
(plur.) controlled by words of explanation, 1899 et seq.
not controlled by estate to preserve, &c., interposed, 1888
by expressed intention to create strict settlement, 1905
by words of limitation, 1887
unless course of descent is changed, 1889
by words of limitation and of modification inconsistent with estate tail, 1890 et seq.
(sing.) controlled by words of limitation, 1555, 1849, 1851
"die without," not restricted by s. 29 of Wills Act, 1963
gift to, without gift to ancestor,
(plur.) estate tail created by, 1553
descendible as if limited to ancestor, ib.
explained to mean "children," on context, 1575
(sing.) estate tail not created, *semb.*, 1555
several persons, co-heirs included, 1563
unless context shews one person intended, 1563
"male" (or "female") claiming by descent, claim wholly through male (or female) line, 1561
claiming by purchase entitled, though not heir general, 1561
need not claim wholly through males or females, 1562
See ESTATE TAIL—EXECUTORY TRUSTS—RULE IN SHELLEY'S CASE—STRICT SETTLEMENT.

HEREDITAMENTS,
devise of, simply, before 1838, gave life estate, 1802
realty, corporeal and incorporeal, included in term, 1287

"HEREIN," "HEREINAFTER," in will, do not include reference to codicil, 1129

"HEREINAFTER NAMED," does not imply that what is referred to was previously written, 135. *See* INCORPORATION.

HERITABLE BOND,
English will does not pass, 15, n.
payable primarily out of Scotch land, 15

HOPE, precatory trust created by expressions of, whether, 871, n.

HORSES,
buildings and their contents, gift of, passes, 1084
gift for support, &c., of, whether charitable, 215, n.
"goods and chattels," gift of, whether passes, 1084
"household effects," will pass, 1308
trust for benefit of, 901

HOSPITAL, bequest for erecting or endowing, 214

HOTCHPOT, 1175

Volume I. ends at p. 1040.

HOUSE,
devise of, how construed, 1266, 1269, 1292
devise to A. and his, gives fee, 1805
gift of things in, what passes by, 1027, n.
gift to, how construed, 1583. *And see* FAMILY.
"land," gift of, whether includes, 1292
messuage synonymous with, 1292
"rents and profits" of business, gift of, held to pass, 1297

HOUSEHOLD EFFECTS OR FURNITURE OR GOODS, how construed, 1307–1310

HOWE v. LORD DARTMOUTH, RULE IN, 1242

HUSBAND,
assent of, to wife's will, what is, 54
entitled to take, whether under gift to "family," 1585
to "heirs," 1570, n.
to relations, or next of kin, 1633
gift to, of witness to will, void, 93
supposed, not actually such, gift to, 1286
transfer by, of property into joint names of self and wife, 66, n.

HUSBAND AND WIFE,
GENERALLY,
conveyance by, of land constructively converted, 763
gift to, simply, formerly created tenancy by entireties, 1785
gift to, and third person, effect of, 1785
gift to class including, 1786
where two members intermarry, 1786
property transferred into joint names of, 66, n.
what estates pass by limitations to—
husband for life, remainder to heirs of body of wife by husband, 1688
husband and wife for life, remainder to heirs begotten on wife by husband, 1868
remainder to heirs of body of one, 1868
remainder to heirs of their bodies, 1869, 1885
wife for life, remainder to heirs of body of husband and wife, 1868
remainder to heirs of her body begotten by husband, ib.
See FEME COVERTE.

I. O. U., gift of "securities for money," whether passes, 1304

IDIOT,
incompetent to attest will, *semb.*, 123
to make will, 48

IGNORANCE of condition, no excuse, except in case of heir, 1480

ILLEGAL OBJECT,
avoids gift, 207
condition involving, effect of, on gift, 1464
residue, gift of, after providing for, void, unless cost ascertainable, 467

ILLEGITIMATE CHILDREN, 1746
accumulations for portions, unrestricted, not allowed in favour of, 383, n.
domicil of, is that of their mother, 16, 23
legitimacy, how far determined by, 1746
gifts to, how far valid, 97, 1748
"children" primarily includes only legitimate children, 1748
absence of other objects will not let in bastards, 1750, 1761
conjecture will not extend gift, 1748
division into shares of same number as children including bastards, 1748
"dictionary" principle of construction, 1758
express reference to, 1751, 1757
gift to children of two persons who cannot marry, 1753
to his children by unmarried testator, 1752
gift over on default of children is not within the rule, 1756, n.
gift to children of A., a single woman past child-bearing, 1754
to children of deceased person, 1752
identified by name, 1751
implication in favour of, 1752
recognition of children by testator, by conduct, 1751
by subsequent legitimation, abroad, 1747
by will or codicil, 1751 et seq.
en ventre, by a particular man, void, 1765
unless paternity can be assumed, 1765, 1767
can be established by reputation, 1768
reputation acquired in testator's lifetime, *semb.*, 1769
future, born after will, but before testator's death, valid, if reputation acquired in his lifetime, 1772
general conclusion from the cases, 1778
intention to benefit existing persons, 1754, 1762
number of, affects construction, 1751, 1755
parol evidence as to paternity, fact of, inadmissible, 1748, 1765, 1774
reputation of, admissible, 1748, 1768, 1776
summary of the law with respect to, 1778
testator's knowledge may be material, 1760
next of kin primarily means legitimate kindred, 1781

IMBECILITY, what degree of, invalidates will, 48

IMMEDIATE RENTS. *See* INTERMEDIATE RENTS.

IMMOVEABLE PROPERTY,
devolution of title to, in foreign country, 2, n.
estates pur autre vie, 3
leaseholds for years are, 2
lex loci governs, 1

IMPLICATION,
GENERALLY,
conjecture not sufficient, 679
necessary, what is, 630, n., 1752
series of limitations from, 678

Volume I. ends at p. 1040.

IMPLICATION—*continued.*

OF CROSS EXECUTORY LIMITATIONS. *See* CROSS REMAINDERS.

OF DEVISE OR BEQUEST BY RECITALS, REFERENCES, OR ASSUMPTIONS,

actual gift not generally created by, 621 et seq.
e.g., devise of lands not in fact liable to dower as "subject to dower," 623
misrecital of amount of debt directed to be paid, 624
of devolution of property, 626
of effect of gift in other will, 622
of settlement, 621
but misrecital of amount of gift, accompanied by additional gift, may increase first gift, 628
reference to disposition made in same will may operate as gift, 628
advances to children, misrecitals as to, 625, n.
ambiguity explained by recital in codicil, 629
assumption by testator that will contains a devise, 624
direction to apply rents, devise implied from, 625
direction to pay debt, 624
disposition not cut down by misrecital in codicil, 625, 628
by misrecital in same will, 628
elliptical expression, e.g., devise, "to first son of A., severally and successively in tail," read "to first and other sons," 624
heirship, erroneous reference to, devise implied from, 626
intention, expressed, to dispose of all property, specific gift not extended by, 625
to make up certain sum followed by insufficient gift, 625
revocation not implied by misrecital, 628

OF DEVISE OR BEQUEST, FROM POWERS,

general presumption in favour of objects, from powers of distribution and selection, 650
precluded by express gift over in same event, 652
not by express gift over in another event, 652
implied by power to appoint to A. "or" B., 613
implied from discretionary powers, 655
not implied by power to select one only of a class, 653
objects of power must be identical with objects of implied gift, 652
must survive donee if power is testamentary only, 652
qualifications of, not implied in express gift in default. 652
relations ascertained at death of donee, 653
take fee if power authorizes limitation in fee, 654

OF ESTATE IN FEE, OR ABSOLUTE INTEREST,

implied,

in A. by devise to him till 21, and, if he dies under 21, over, 646
unless there is express gift at 21 of his interest, 647
by devise to heir of testator, if A. dies under 21, *semb.*, 630
in A. (defeasible) by devise to heir, if A. dies without issue, *semb.*, 659

Volume I. ends at p. 1040.

IMPLICATION—*continued.*

OF ESTATE IN FEE, OR ABSOLUTE INTEREST—*continued.*

implied—continued.

in a class, by maintenance-trust during minorities, 646, n.
in all after-born children, by gift to child en ventre at testator's death, *semb.*, 677
in objects of power, by power to appoint, 613, 652

not implied,

in A. by appointing B. executor to settle testator's affairs and guardian of A., 645
in children of A., by gift over on death of A. without children, 673
in issue of A. by gift to A. for life, and if he die without issue, over, 658, 674

OF ESTATES TAIL,

none from words importing failure of issue, 658
effect of 1 Vict. c. 26, as regards—
devise of fee, and on failure of issue, over, 658
devise for life, and on failure of issue, over, 658, 1978
gift on death without issue of person to whom no prior interest is given, 658
under the old law, 656, 657

OF GIFTS TO CHILDREN AND ISSUE,

after-born children and posthumous children, 677
estate in the issue, 674
estate tail from words referring to issue at death, 673
from devise over in default of children, 675
personal estate, 674
prior gift to parent for life, 676

OF LIFE ESTATE IN REALTY,

implied,

in A., by devise to heir of testator after death of A., 630
meaning of word "heir," 631
residuary devise excludes implication, 638
by devise to residuary devisee after death of A., 638
in survivors, by gift to several for life and after death of survivor, over, *semb.*, 641, 642
by general intention appearing from context, 641

not implied,

in A., by devise to one of several co-heirs after death of A., 631
to stranger after death of A., 630
to stranger and the heir after death of A., 632
by devise of land to A. for life, and after his death of that and other land to the heir, 634–637
other land passes to heir immediately, ib.
by power to appoint by will given to A., 654
in several, by gift to survivor of them, *semb.*, 641
in survivors, by gift to several for their lives and the life of survivor, 641, 642

Volume I. ends at p. 1040.

IMPLICATION—*continued.*

OF LIFE INTEREST IN PERSONALTY,

implied,

In A., by bequest to next of kin of testator after death of A., 639
residuary bequest excludes implication, 641

not implied,

In A., by bequest to stranger alone or along with next of kin, 639
by power to appoint by will given to A., 654

OF TRUSTS,

implied, for sale, by direction to invest, 625, 679
implied from discretionary trust, 650
not implied by devise of legal estate, to cure omission to dispose of beneficial interest, 649, 650

IMPROBABILITY, clear gift not controlled by, of disposition, 578

IMPROVEMENTS, application of income in, not an accumulation within Thellusson Act, 380, 388, 395

INCOME,

accumulation of, till conversion, effect of direction for, 1232
arrears of, not within condition restraining alienation, 1505, n.
appointed fund carries intermediate, 855
contingent gift carries, when, 953
gift of, charitable, to endow or establish schools, 259
land passes by, 1297
residuary bequest, contingent, passes intermediate, 953
devise, contingent or future, does not pass intermediate, ib.
specific gift, contingent or future, does not pass intermediate, 941
See ACCUMULATION—CONVERSION—HEIR—INTERMEDIATE RENTS.

INCOME TAX,

exemption of legacy from, what expressions import, 1134
trustees must deduct, from annuities, 1135

INCOMPLETE WILLS,

contents of paper must be complete, 126
distinction between, and provisional wills, 126, 127
omission of formalities prescribed by testator, 125
presumption against, 126
probate of, 126

INCONSISTENCY,

between dispositions in one and same will, 573. *See* REPUGNANCY.
in will and codicil, 172 et seq. *See* REVOCATION.
in two wills of uncertain date, 174
evidence, how far admissible to reconcile, 490–492. *See* EVIDENCE.

INCORPORATION OF DOCUMENTS,

copy of destroyed will, 139
definition of, 135
devises to be ascertained by future act, 134
distinct wills of property here and abroad, 138

INCORPORATION OF DOCUMENTS—*continued.*
document must be in existence at date of will, 136
must be referred to as existing, 135
must be identified by the reference, 136
presumption as to existence and identity of, 136
probate of, is matter of right, not of necessity, 138
instructions for will, 137
probate of, 138
reference added where document on same paper as will, 127
requisites for, 135
revocation of, 137
two wills, 138
unattested codicil or paper, testator cannot empower himself to dispose by, 133
distinction where paper is signed by trustee, 133, n.
unexecuted will or codicil when set up by subsequent codicil, 136, 137

INCREASE in value,
of income of property given to charity, 718. *See* ACCRETIONS.

INCUMBRANCE, specific enjoyment of leaseholds implied from direction to discharge, 1247

INDEFINITE DEVISE,
formerly passed life estate only, 1802
now passes fee, 1806
"contrary intention," what amounts to indication of, 1807
See FEE SIMPLE.

INDEFINITE TRUST,
not void, if for charity, 211
void for uncertainty, 457
See UNCERTAINTY.

INDORSEMENT of bond, when testamentary, 35, 36

INDUSTRIAL AND PROVIDENT SOCIETIES ACT, 1893, nomination paper under, admitted to probate, 36

INFANT,
competent to take under will, 97
disabilities of, cannot be dispensed with, 47
domicil of, after death of father, 23
gifts by will to, good, 97
incompetent to appoint guardian by will, 47
to bequeath personalty, 47
to devise realty, 47
exception formerly under special custom, 47
to elect to take property unconverted, 758
under or against will, 538, 554, 555
maintenance of, express clauses for, in what cases necessary, 2215
mode of computing age of, 48

INFORMAL DOCUMENTS, admission of, to probate of, 126

Volume I. ends at p. 1040.

INHERIT, meaning of, 1927

INHERITANCE,
devise of, without words of limitation, carried fee under old law, 1805
estate of, cut down by subsequent gift of life estate, 566

INITIALS,
signature of testator by, 107
of witnesses by, 114

INJUNCTION, condition enforceable on tenant for life by, 1463

"IN LIKE MANNER," 687, 688

"IN MANNER AFORESAID," 687, 688

INQUISITION,
lucid interval may be proved, notwithstanding, 51
lunacy proved by, prima facie, 50

INSANITY, what amounts to, 48

INSTRUCTIONS FOR WILL,
admitted to identify legatee, 513, 530
incorporation in will of, 137
probate, whether granted of, 37, 127, 137
suggestions to persons taking, 2213
variation from, by draftsman, evidence of, not admissible, 485

INSTRUMENTS, what have been held testamentary, 26 et seq.

INSURANCE, Thellusson Act, whether applies to trusts for, 391 et seq.

INTENTION,
parol evidence of, not admissible, 488, 490
except where description ambiguous, 488, 490

INTEREST,
charge of debts on land does not give, 2021
direction to pay, on debts, effect of, 2022
gift of, vests otherwise contingent legacy, 1495. *See* VESTING.
legatee refunding legacy need not pay, 263, n.

INTEREST IN LAND,
charitable gifts of, formerly void, 250 et seq.
now valid, 274

INTERLINEATION. *See* ALTERATION.

INTERMEDIATE RENTS AND INCOME,
of lands devised *in futuro* descend to heir, 701
whether devise be specific or residuary, 702
unless joined in one gift with personalty, 702
of personal residue pass by contingent residuary bequest, 702
destination of, until vesting, of executory gift to children, 1688

Volume I. ends at p. 1040.

IN TERROREM,
conditions, what are, 1467
doctrine of, not applicable to real estate, 1468
See CONDITIONS.

INTESTACY,
construction of will so as not to [illegible] favoured, 1421, n.
Crown, rights of, to personalty [illegible]
devolution of land of British subject domiciled abroad, 1
of personalty of foreigner domiciled in England 5
gift over on, of devisee of fee, void, 1494
of legates 462, 502
half blood, relations by, 1632, 1634
husband, claim of, surviving 1633
inconsistent dispositions reconciled to avoid 175
legitimacy how determined as to personalty 746
as to realty 746
"next of kin" under the statutes, meaning of, 1633
partial, 701, 704
reference to, in bequest to next of kin, [illegible]
Scotch heir not excluded from taking personalty in England
trust and mortgage estates, devolution on personal representative of administration, 985
wife surviving, claim of, 1600

INTRODUCTORY WORDS IN WILL,
charge of debts by [illegible]ry, directing payment of debts, 1990, n.
effect of, on question whether realty passes, 1007
whether has passed under old law, 1806

INVENTORY, legatee for life of chattels must give, 1454

INVESTMENT,
conversion not excluded by direction for interim, 750
liability of trustees for [illegible]er, 1233
trust for, 919

IRELAND,
lands in, not within Wills, Cain, &c., Acts, 271
Thellusson Act does not extend to, 579

IRREVOCABLE, will cannot be made, 28

IRVINGITE MINISTER, bequest to, good, 209

ISSUE,
"children," gift to, extended so as to include remoter, 1655 et seq.
gifts to, as purchasers construed as including descendants of every degree, 1590
synonymous with "descendants," "offspring," 1590, and n.
gifts to, they take per capita, 1590
as joint tenants, 1590
as tenants in common if distribution words are added, 1592
but estate tail in realty may be created on context, 1592

ISSUE—*continued.*
gifts to, confined on context to mean "children," 1596
if gift is referred to in codicil as a gift to children, 1602
if issue of issue are mentioned, 1600
if "parents" are mentioned, 1597
unless with gift over on failure of issue, 1598
if words "children" and "issue" are used indiscriminately 1602, 1603
not, by words, "begotten by," unless on further context, 1601
realty and personalty, distinction between in this respect, 1956
implication of, none, by gift over on death without issue, 656 et seq.
in gift of realty, words of limitation, when, 1920. *See* FEE TAIL.
of purchase, when, 1948, 1951
"issue of children" or "children of issue," 1601
"issue of issue," 1600
power to appoint to, remoteness in reference to, 361, 362
See CHILDREN—DIE WITHOUT ISSUE—ESTATE TAIL—EXECUTORY TRUST.

ISSUE MALE, gift to, claim through males only necessary, whether, 1561 et seq.

"ITEM," disjunctive force of word, 1393

JEWS,
charitable gifts for, 210
children of, legitimacy of, how determined, 1747
condition as to marriage with, 1526

"JOINT LIVES," meaning of, 642

JOINT TENANCY,
created by gift to A. and his children, whether, 1786
to children in remainder vesting in each at birth, 1788
but not by conveyance at common law, ib.
by gift of remainder vesting at twenty-one, 1789
to class simply, 1783, 1787
to several, simply, of personalty, 1787
of realty, 1783
to several equally for life and after death of survivor, or of all, over, 1795
but not by gift over *at* their death, 1798
to several joined by word "also" to another gift creating tenancy in common, 1790
to two or more persons simply, 1783
by separate gifts of same lands to two persons in fee, 1787
by substitutional gift, though primary gift was in common, 1789
in accruing shares though original shares held in common, 1790
not by gift to first, second, and other sons in tail, 1784
to husband and wife, 1785
to two and the survivor and the heirs of such survivor, 1783, n.
to two (not being b. and f.) in tail, except as to life estate, 1783
to two or more as tenants in common, with express survivorship, 1798, 2141 et seq.

JOINT TENANCY—*continued.*
not in executing executory trusts, 1790
lapse, none, by death in testator's lifetime of one joint tenant, 429, 449, 1799
by revocation or invalidity as to one share, ib.
secus under appointment where part appointed to stranger, 1800
severance of, 66, n., 438

JOINT TENANTS,
devise of copyholds does not [illegible]r survivorship, 68
except with surrender, [illegible]
devise to alien and another as (before 1870), effect of, 90
lapse by failure of gift to one, none, 429, 449
will of, valid, if testator survives, 66
void against surviving co-tenant, 66
See SURVIVORSHIP.

JOINT WILLS, nature and operation of, 41

JUDGMENT CREDITOR, entitled to payment out of property over which debtor has general power, though not exercised, 2024

JUDGMENT DEBTS,
charitable gifts of, charging land forbidden, 250
"securities for money," gift of, passes, 1304

KIN. *See* NEXT OF KIN.

KINDNESS,
expressions of, trust not created by, 871
repelled by, when, 710

KINDRED,
degrees of, traced according to civil law, 1606
poorest of testator's, gift to twenty of, void for uncertainty, 470

KINGSDOWN'S (LORD) ACT, as to execution of wills of British subjects abroad, 3, 9, 11–13

LAND,
assets for debts,
charged by condition to pay legacy, 439
charitable gifts of, formerly forbidden, 249
now permitted subject to restrictions, 274
conversion of, into money. *See* CONVERSION.
devise of, includes houses thereon, generally, 1287
under Wills Act gives fee, 1135
includes leaseholds, 1288
meaning of "lands," 1287

LAND TAX, on land in mortmain, gift to redeem, 272, 273

LAND TRANSFER ACT, 1897,
appointment, 819
charge of debts, 1989
devise to executor, 1006
devolution of real estate, 64
heir, notice of condition to, 1480
legal assets, 819, 2023
legal estate, 1810, 1825
pur autre vie, estate, 74

LANDS CLAUSES ACT, land compulsorily taken—devise revoked or adeemed by, 163

LANGUAGE, construction and formal validity of will not affected by, 1

LAPSE,
acceleration of remainders by, 428, 452
alternative gifts by will, 425, 426
annuity, gift of sum to purchase, may be subject of, 424, n.
appointee's death causes, 429
appointment, interests of persons taking in default of, 429
beneficial interest not affected by, of legal estate, 438
charges on land, 439
charge, not affected by lapse of estate charged, 439
devise, whether affected by lapse of charge, 440, 452
contingent charges, rule as to, 440
absolute in event, 440
defeasible by death though not expressly contingent, 440
distinction of lapsed charges, 444
devisee of lands charged takes, when legacy given as mere charge, 444
heir takes, when legacy given by way of exception, 441–444
charges on personal property, 445, 452
charitable gift, 238, 431
legacy by cessor of object, 431
child or other issue of testator, gifts to, not to lapse, when, 447
appointments under *special* powers not within this rule, 451
class of children not within the rule, 449
issue of deceased child not substituted, 449
joint tenants not within the rule, 449
survival of donee, effect of expressly requiring, 448
whether same issue must be living at death of devisee and testator, 447
classes, gifts to, 431
death of one of a class does not cause, 431
though class ascertainable by event in testator's lifetime, 431
gifts to executors, when so construed, 438
to next of kin or relations, when so construed, 437
confirmation by codicil does not prevent, 425, n.
contingent gift, if event fails, though donee survives, 428
conversion, lapsed gift of part of proceeds, devolution of, 777 et seq.
covenant to settle does not include property preserved from, 451
creditors, gift of sum for payment of, 423
death of donee before date of will, 425, n.

Volume I. ends at p. 1040.

LAPSE—*continued.*
debt forgiven by will, 424, n.
declaration ag inst, inoperative, 425
unless words of substitution are superadded to gift, 425
declaration that legacy shall vest on execution of will, 425, n.
devises in tail, not to lapse if devisee leaves issue, 446
unless survival of donee is expressly required, 447
doctrine of, general principles stated, 423
general devise, operation of, 945 et seq. *See* GENERAL DEVISE.
gift over saved by lapse of prior gift, 465
gift saved from, devolution of, 451
implication of gift of lapsed share, 675
joint donee, death of, does not cause, 429, 449
failure of gift to, by attestation of will, 429, n.
by excessive appointment to, ib.
by revocation of gift as to, ib.
legal estate not affected by, of beneficial interest, 438
limitation, words of, do not prevent, 424
marriage in testator's lifetime causes, of absolute gifts till marriage, 423, n.
marshalling of assets, when legacy fails in respect of lands charged, 2097
peer, gift to, describing him by title, 397
personalty, doctrine stated generally as to, 424
gift of, to A. and the heirs of his body, remainder to B., lapses by death of A., 452
power, testamentary, death of donee causes, when, 428
of distribution, how affected by lapse of shares given in default, 429
real estate, doctrine stated generally as to, 424, 451
republication does not revive lapsed devises and bequests, 204
residuary bequest, effect of, 451
devise comprises lapsed or void devises, 451
resulting trust arises on, of devise of fee, 701
not on, of particular estate, 718
settled shares of residue, 427
substitutional gift to executors prevents, 425
survival of donee must be proved, 430
tenant in common, death of, in testator's lifetime, 430
lapse of share of, liability to debts in respect of, 2029
use, whether liable to, by death of seisin-trustee, 1812
uses of another's will, gift to, effect of, 428
Wills Act, doctrine modified by, 445

LAPSED LEGACY,
charitable, cy-près doctrine not applicable to, 238
residuary bequest, when passes, 451 et seq. *See* RESIDUE.

LAPSED SPECIFIC DEVISE, included in residuary devise since Wills Act, 951. See GENERAL DEVISE.

"LAST WILL,
description of instrument as, no revocation of prior will, 172
meaning of words, 172

Volume I. ends at p. 1040.

LATENT AMBIGUITIES, in wills, parol evidence admissible to explain 516

LAW, alterations in, subsequent to will, effect of, 205, 421

LAWFUL HEIRS, devise to A. and his, creates fee, 1847

"LAWFULLY BEGOTTEN," gift to A. and his heirs, gives estate tail, 1847

LEASE,
conditions directing, at fixed rent, annexed to estate in fee, void, 1466
mining, rents under, what included in, 165, n.
perpetuities, rule against, in reference to powers to, 313, 316
power to, in will, 922
renewal of, effect of, on bequest, 405, 407
republication extends gift to renewed, 202

LEASEHOLDS FOR LIVES, general devise, operation of, 965. *See* AUTRE VIE.

LEASEHOLDS FOR YEARS,
bequest of, to go along with freeholds, 347, 366, 682, 692. *See* CHATTELS.
charitable gifts of, formerly void, 250
now valid, 275
conversion of, rules as to, 1242 et seq.
domicil does not affect devolution, &c., of, 2
"freeholds," specific devise of, where none, passes, 1254, 1288
general devise passes, 961. *See* GENERAL DEVISE.
not if devise is of "real estate," 963
lex loci governs will of, 2
"money," gift of, held to pass, 1033, 1037
perpetuities, rule against, as affecting trusts of, to go with freeholds, 347, 366
specific bequest of, acquisition of fee, how affects, 164, 408
specific enjoyment of, implied from direction to discharge incumbrances on, 1247
specific legatee of, entitled to exoneration from—
arrears of ground rent, 2037
costs of performing building covenant, 2038
renewal fines due at testator's death, 2038
not costs of repairs, 2037
Statute of Uses does not extend to, 1837
tenant for life and remaindermen, 1216
trust and mortgage estates in, whether pass by gift of lands, 977
vesting of legacies charged on, 1393
words "all things not before bequeathed" held not to pass, 1023
"residue of my goods" held to pass, 1022, n.

LEASEHOLDS, RENEWABLE,
renewal, fines for, exoneration of specific legatee from, 2038
subsequent to will, effect of, on bequest, 405, 407

LEASING,
election to take property unconverted implied from, 759
power of, dowress put to election by, 548
legal estate vested in trustees by indefinite, 1826

Volume I. ends at p. 1040.

"LEAVING,"
supplied in gift over on death "without issue," 582, 1959, n.
See DIE WITHOUT LEAVING CHILDREN—DIE WITHOUT LEAVING ISSUE —ESTATE TAIL.

"LEFT," gift of what shall be, after absolute legacy, void, 462. 465, 466

LEGACIES, 1060,
abatement of, 2083
additional, construction of gift of, 1120
ademption of, 1090. *See* ADEMPTION.
appropriation of, 2090
assets for payment of debts, 2026
by codicil, whether, follow those given by will, 1128 et seq.
charge of, extends to lands specifically devised, whether, 2003
includes annuities generally, 2003
trust estates excluded by, 973
charged on realty, by what words, 1998 et seq. *See* CHARGE.
charitable. *See* CHARITY.
conditional, acceptance of, makes annexed condition binding, 1477
conditions of original, whether, attach to substituted, 1128
repugnant to, void, 1466 et seq. *See* CONDITIONS.
contingent, 1111
demonstrative, 1069
exemption of, from duty, what words import, 1131
exoneration, specific devisee or legatee may claim, out of, whether, 2041
failure and lapse of, 1088
forfeiture of, if not claimed within given time, 1550
general, 1063
interest and income of, 1103
interest on refunded, payable, whether, 263, n.
of money, chattels, shares, debts, &c., 1072
of interests in land, 1082
of personalty in a particular place, 1083
described with reference to its source, 1088
omission of, 32
power, general, exercised by pecuniary, 812
special, not exercised by pecuniary, 831
specific, 1065. *See* SPECIFIC BEQUEST.
substitutional, construction of gifts of, 1120 et seq.
to infant or wife, 1113, 1117
to executors, 1118
to creditors or debtors, 1118
to servants, 1119
See CHARGE—CODICIL—GENERAL BEQUEST.

"LEGACY,"
annuity generally included, 2003
realty may be included, on context, 1015

LEGACY DUTY, 1131
bequest discharging a moral obligation, 424, n.
exemption from, of legacy or annuity, by what expressions, 1131
fund to meet annuities, 1133

Volume I. ends at p. 1040.

LEGACY DUTY—*continued.*
gift of, is a pecuniary legacy, 2072, n.
on proceeds of sale of realty, 1131
on property settled by deed, 34
payable out of same fund as legacy given free of, when, 2072

LEGAL ASSETS, what are, 2020. *See* ASSETS.

LEGAL ESTATE,
charitable trust, void, vitiates, 255
lapse of, does not affect beneficial interest, and vice versâ, 438
outstanding, may save equity of redemption from remoteness, 326, n.
passes by "mortgages" and "securities for money," 975
vests in trustees as to copyholds, by what words, 1836
as to freeholds by devise to A. to use of, or in trust for B., 1811, 1812
as to leaseholds, 1831
See MORTGAGEE—TRUSTEES.

"LEGAL PERSONAL REPRESENTATIVES," gifts to, how construed. *See* LEGAL REPRESENTATIVES—PERSONAL REPRESENTATIVES.

"LEGAL REPRESENTATIVES,"
construed generally, how, 1612
to mean descendants, 1616
next of kin, 1612 et seq.
See PERSONAL REPRESENTATIVES.

LEGATEE,
accumulations of income, when may be stopped by, 399, n.
attestation of will by, avoids his legacy, 92
described by reference, 683
misnomer of, 512
residuary, when takes realty, 1016
trust for maintenance of, inalienable, void, 1501
who may be, ch. v., pp. 84 et seq. *See* DEVISEES.

LEGITIMACY,
determination of, as to personalty, 1746
as to realty, 1746
See ILLEGITIMATE CHILDREN.

LETTER,
held testamentary, 36, 38
not evidence to shew intention contrary to will, 485

LICENCE,
in mortmain, 89
to assume name and arms, whether necessary, 1542

LIEN,
charitable gift of money secured by vendor's, formerly void, 250
now valid, 275
on estate conveyed pursuant to condition, none, 1463
"securities," gift of will passes vendor's, *semb.*, 1303

LIFE-BOAT, bequest for establishment of, 213

LIFE ESTATE. *See* ESTATE FOR LIFE.

LIKEWISE, disjunctive force of word, 1393

LIMITATION,
condition distinguished from, 1463
legal remainders and executory interests distinguished, 1443 et seq.
words of, annexed to bequest, lapse prevented by, 424
to limitation to heir of body makes heir purchaser, 1849
to heirs of body inoperative, 1886
unless descent changed, 1889
to issue inoperative, 1937
unless descent changed, 1942
words of distribution added inconsistent with issue taking by descent, 1943 et seq.
See ESTATE TAIL.
words of, fee simple now passes without, 1806
except as to interests created de novo (rentcharges), 1808
Shelley's Case, rule in, excluded by, whether, 1886 et seq.

LINE, male or female, meaning of, 1610

"LINEAL,"
construction of gift to "eldest male lineal descendant," 1562
to "relations by lineal descent," 1588

LIVE AND DEAD STOCK, meaning of, 1310

"LIVING," to what period referable, 1701–1703

LIVING (ECCLESIASTICAL), advowson or next presentation passes by gift of, according to context, 1298

LOCAL LAW,
charitable gifts, validity of, determined by, 245, 272
terms or words, evidence to explain, 501
wills regulated generally by what, 1 et seq.

LOCALITY,
"at," "in," or "near" a place, devise of lands situate, how construed, 1280, 1282
chattels, bequest of, with reference to, 1083, 1383
includes things temporarily removed, 1084
chose in action has no, 1087
election raised, whether, by devise of lands in particular, 544
evidence of custom of, to explain ambiguity, 502
to construe words of, contrary to primary sense, not admissible, 489
immoveable property, devises, &c., of, regulated by law of, 1 et seq.
inconsistent description by reference to, reconciled, 573
misdescription as to, of property devised, 490, 491, 1254, 1280 et seq.
mistake in locality of land, 1254, 1267
reference to, must be definite as to limits, 1265

LOCKE KING'S ACT. *See* EXONERATION.

LOCO PARENTIS,
evidence that testator stood in, 500
gifts to "younger children" by persons in, how construed, 1730

LONDON,
custom of, charitable gifts of land, valid by, whether, 272
hospitals of, gifts to, how construed, 1265, n.

LOST WILL,
contents of, evidence of, how far admissible, 153
presumption as to revocation of, 152
presumption of due execution, 105
probate of, granted on proof of contents, 153
of due execution, 121
part, failing evidence of remainder, 126, n.

LUCID INTERVAL,
destruction of will during, presumption as to, 153
provable notwithstanding inquisition, 50
what constitutes, 51

LUNACY,
completion of will prevented by, 126
conversion by order in, 163
destruction of will by testator during, no revocation, 146
inquisition is primâ facie evidence of, 50
monomania and general insanity distinguished, 51
proceeds of sale of land in, devolve as realty, 163

LUNATIC,
domicil of, 24
gifts to, 97
incompetent to attest will, *semb.*, 124
elect to take property unconverted, 758
test of person being, 51
will of, invalid, 50
unless made during lucid interval, 50

MAINTENANCE,
amount of gift for, omission to state, effect of, 457
contrary to terms of will, 927
implied gift from trust for, 678
implied trust for, 923
includes education, 924
marriage of daughter, whether determines, 926
of children, when creates trust, 923
parent gift to, for, liable to no account, 924
trust for, of bankrupt, &c., 1505
of children, created by bequest to parent, when, 924
of legatee, inalienable, void, 1487
whether confined to minority, 924
wife's, accumulations of, are bequeathable by her, 55
See VESTING.

Volume I. ends at p. 1040.

MALE HEIRS. *See* ESTATE TAIL—HEIRS MALE.

MALE ISSUE, devise to, 1557

MALE LINE, next of kin in, meaning of, 1610

MANAGEMENT,
powers of, authorized by direction to settle, 904
conversion, whether excluded by, 1247
perpetuities, rule against, in reference to, 314

MANAGER, request to employ person as, 898 et seq.

MANDEVILLE'S CASE, rule in, considered, 1554 et seq.

MANOR, devise of, what passes under, 70, 1299. *See* COPYHOLDS.

MANSION,
devise of, to A. and her children, 1913
executory trust to build, includes laying out land, 1293

MARINER, will of, 101

MARITAL RIGHT, of felon-convict suspended, 56

MARK,
signature of testator, may be by, 107
of witness, may be by, 114

MARRIAGE,
children, gift to, whether confined to those by then present, 1663
consent to, conditions requiring, 1528 et seq. *See* CONDITIONS.
fraudulently obtained, 1536
survivor of several guardians may give, 1537
gifts over on, vested or contingent, 1361
in wrong name, 1536
lapse of gift to A. till, 423, n.
legacy invalidated by, of legatee to attesting witness, whether, 95
payable on, vests only on, 1402
unless intermediate interest is given, 1405
of widow, gift over on, takes effect at her death, 1361
restraint of, covenant not to revoke will, whether in, 28
testamentary conditions in, 1525 et seq., *and see* CONDITIONS.
revocation of will by, 140 et seq. *See* REVOCATION.
trust for maintenance, whether ceases on, 924
See HUSBAND AND WIFE—WIDOWHOOD.

MARRIAGE ARTICLES, held testamentary, 36

MARRIED WOMAN,
appointment by, 818
cesser of coverture does not set up will of, 57
domicil of, how ascertained, 23
election by, to take against or under will, 538, 554
to take property unconverted, 758
probate of will of, practice as to, 45
separate use of, created by what words, 1518

MARRIED WOMAN—*continued.*
testamentary capacity of, 53 et seq.
trading by, what is separate, 55, n.
will of, domiciled abroad, 46
See FEME COVERTE—SEPARATE USE.

MARSHALLING ASSETS.

Generally,

allowed only where proper at testator's death, 2097
heir named devisee may marshal as devisee, 96, n.

In favour of charity—

formerly, none, 264 et seq.
except so far as directed by will, 267
now, necessity for such directions done away with, 275
See CHARITY.

In favour of claimant having only one fund against claimant having several funds—

doctrine stated, 2095
as between creditors, 2096
creditors and legatees, ib.
legatees, 2096, 2097
exception where legacy lapses quoad land charged, 2097

In favour of legatees whose fund has been taken by creditors—

doctrine stated, 2093
against devisees of land charged with debts, 2094
of land in mortgage, ib.
of land subject to vendor's lien, ib.
heir generally, 2093
of land subject to vendor's lien, 2094
not against devisees, specific or residuary unless charged with debts, 2093

In favour of residuary legatees, &c., against heir or devisee of mortgaged land—

rule stated and considered, 2095
See EXONERATION.

MASSES,
gifts for, 210, 221
in foreign country, 210

MAXIMUM SUM, gift of, effect of, 458

MEDICAL ATTENDANT, will in favour of, when open to suspicion, 49

MERGER, none by union of defeasible fee and gift over, 1452. *See* EXTINGUISHMENT.

MESSUAGE,
garden, &c., included in gift of, 1290
"house" synonymous with, *semb.*, 1292

MILITARY SERVICE,
domicil, how far regulated by, 20, 21
wills of persons engaged in, 101

MINES, not within *Howe* v. *Dartmouth*, 1243

MINISTERS,
bequest to poor, good, 210
simpliciter, not necessarily charitable, 224

MINORITY,
accumulation during, 382
period denoted by, what, 1410
trust for child during, implication of absolute gift from, 646
for maintenance restricted to, whether, 924

MISDESCRIPTION,
gift good, notwithstanding, of object, 512, 1253, 1284
of subject, 414, 512, 1253, 1287
of reversion or remainder, 1981

MISNOMER,
of corporations, when avoids gift, 1256
individual donees, effect of, 512. *See* UNCERTAINTY.

MISTAKE,
as to execution of will, 30, 107, 494
locality of lands, 490, 491
number of children, 1706 et seq. *See* CHILDREN.
number of things given, 461
power, disposition not vitiated by, as to, 40
signature of mutual wills, 30
state of facts binds legatees, 559
contingent gift strictly construed notwithstanding, as to disposing power, 1386
destruction of will by, no revocation, 146, 153
election, fresh right of, raised by, 553
evidence of mistake by person who drew will, 485
implication of gift by, 621
in description of objects or subjects of gift, evidence to explain, how far admissible. *See* EVIDENCE.
in recital or reference, gift not implied from, 621 et seq. *See* IMPLICATION.
legatee bound by erroneous statement in will, 559
misdescription distinguished from, 1275
probate granted under, effect of, 8
revocation found on, inoperative, 188 et seq.
words inserted in will by, may be struck out, 486, 492
omitted from will by, cannot be supplied, 486

MIXED FUND. *See* ASSETS—CHARGE—CONVERSION—EXONERATION, &c.

MOIETY, gift of, under old law, passed fee, 1806

MONASTIC ORDERS,
condition prohibiting legatee from entering, 1482
gifts to, not charitable, 210, 211, 221

Volume I. ends at p. 1040.

MONEY,
" cash," how construed, 1302
conversion of, into land. *See* CONVERSION.
" funds " or " public funds," meaning of, 1305
" goods and chattels," gift of, whether passes, 1022
" money " construed strictly prima facie, 1300
extended so as to include bank notes, &c., 1300
fine unpaid for uncompleted grant, 1300
leaseholds, 1037
life policy, 1301
mortgage debt, 1300
stock, 1301, 1306
unless purpose of bequest is inconsistent, 1034
extended on context to include—
balance at bankers, 1302, 1303
general personal estate, 1033 et seq.
(1) if charged with debts, &c., 1035
(2) if gift of legacies and then of residue of " money," 1035
unless there is residuary bequest, 1036
(3) if intention to dispose of whole estate appears, 1036
unless restrained by further context, 1038
" money due to me," what passes by, 1301
" ready money," or " money in hand," 1302
" securities for money," meaning of, 1303
See CASH—READY MONEY—SECURITIES FOR MONEY.

" MONEY ON MORTGAGE,"
gift of, legal estate passed by, whether (before 1882), 976
what passes by, 1304

MONUMENT, bequest for, 221, 901

MORTGAGE,
condition prohibiting, of fee, void, 1488
gift of, passes legal inheritance in mortgaged lands, 975
mortgage debt, &c., 970
legal estate, devolution of. *See* MORTGAGEE AND TRUSTEE.
power to, implied, 921
reference to, held to restrict gift to mortgaged part of lands named, 1278
revocation of devise, how far effected by, under old law, 161, n.
See MORTGAGEE.

MORTGAGE DEBT,
charitable gift of, formerly forbidden, 250
exoneration of devisee from, 2047 et seq. *See* EXONERATION.
gift of " land " may pass, 1255
" money," gift of, held to pass, 1300
" mortgage," gift of, passes, 970

MORTGAGEE,
ademption by acquisition of equity of redemption by, 67, n.
election not raised by devise of mortgaged estate by, 547

Volume I. ends at p. 1040.

MORTGAGEES AND TRUSTEES, devise by,

As to Beneficial Interest in the Mortgage—

extinguishment of charge by union of character of mortgagor and mortgagee, 970
fiduciary character of mortgagee, 966
general devise of land will not include, 966, 968
bar of equity of redemption, effect of, 982
gift of "mortgage" will pass, 970
purchase-money not carried by devise of land contracted to be sold, 970
specific devise of mortgaged lands by mortgagee in possession, 965
vendor's lien, whether passes by gift of "securities," 980, n.

As to Legal Estate in Mortgage and Trust Lands—

where testator died before 7th August, 1874, general devise passes unless contrary intention appears, 971, 972
"assigns," whether devise must name, to pass trusteeship, 987
contrary intention, what expressions, &c., indicate, 973
charge of debts, legacies, &c., 973
devise in trust for charity, 974
sale, 974
separate use, 974
unascertained class, 974
subject to executory limitations over, 973, 974
to several as tenants in common, simply, 974
with accruer clause, 974
to uses in strict settlement, 973
trusts, inconsistent, &c., effect of, 973
equity of redemption, bar of, how far material, 982
fee must be devised to pass mortgage estate, when, 972, n.
foreclosed estate misdescribed as mortgage, 981
leaseholds, legal estate in, 978
legal estate passes by gift of "money" on mortgage, *qu.*, 976
of "mortgages," 975
of realty and personalty blended, on trust for sale, &c., 976
of "securities for money," 975
that donee may "receive money on mortgage," &c., 976
other lands, possession of, by testator, immaterial, 974
"own use," declaration that devise is for devisee's, effect of, 973
power of appointment, reservation of, immaterial, 973
vendor, under contract for sale, bare trustee, whether, 980, 981
costs of completion, where heir or devisee is incompetent to convey, 975, n.
devise by, of trust estates, 980
fiduciary position of, 979
lien of, for purchase-money, 980
where testator died between 7th August, 1874, *and 31st December*, 1881 (see V. & P. Act, 1874), legal representatives may convey mortgage and trust estates, 982

Volume I. ends at p. 1040.

MORTGAGEES AND TRUSTEES—*continued.*

As to Legal Estate in Mortgage and Trust Lands—*continued.*

where testator died since 1st January, 1882 (*see* Conv. Act, 188
mortgage and trust estates vest in personal representatives, 9
annuities limited to a man and his heirs, 1142
contracts for sale, completion of, after vendor's death, 986
copyholds, repeal of enactment as regards, effect of, 985, 986
executors, conveyance by, before probate, 984
devise of mortgage, &c., estates, nugatory, 989
intestacy, legal estate where vested, pending grant of admini
tration, 985

MORTGAGOR, election not raised by devise of mortgaged estate by, 547

MORTMAIN,
bequest to evade, Act, 1464
condition prohibiting alienation in, annexed to devise of fee, good, 1489
gifts to corporations in, 84 et seq.
licence in, 85
See CHARITY—LONDON.

MORTMAIN ACT, 1891..274

MOTIVE,
description supplying, prevails, 1262
trust raised by words expressing, whether, 382 et seq.

MOURNING RINGS, bequest for providing, legatees right to money value of, 882

MOVEABLE PROPERTY,
gift of includes all pure personalty, 1300
lex domicilii governs construction of will as to, 5
devolution on intestacy of, 5
execution of, 6, 100

MULTIPLICATION OF CHARGES, devise by reference does not produce, 684

MUSEUMS,
devises for, 88
gifts for establishing, whether charitable, 213

MUTUAL WILLS,
mistake as to signature of, effect of, 30
validity, of, 30, 41

NAME,
assumption of, conditions requiring, 1542 et seq.
original name not lost by licence for, 1653
gift to children, &c., by, is a designatio personarum, 1661, 1729
to persons bearing a specified, how construed, 1650
addition of new name by licence or Act, does not exclude, 1653
assumption of specified name, effect of, 1652

Volume I. ends at p. 1040.

NAME—*continued.*
gift to persons, &c.—*continued.*
construed strictly, when, 1650
to mean "family," when, 1651
married woman having lost original, not entitled, 1652
"next of kin," &c., of specified name, how construed, 1650
time at which donee must answer the description, 1653
illegitimate children may take by, 1748
marriage by assumed, valid, 1536, n.
by false, consent to, fraudulently obtained, 1536
invalid, when, 1536, n.
misnomer of corporations, 1256
of individual donees, 512. *See* UNCERTAINTY.
next of kin of particular, who entitled under gift to, 1609
omission of, of devisee or legatee, 1707
revocation of legacy by cutting out, of legatee, 145, 160
surname of C., gift to next of kin of, 1650
testator's, gift to persons of, 1650
"younger children," gift to, naming them, effect of, 1729

NAME AND ARMS,
assumption of, conditions requiring, 1542 et seq.
gift over on breach of, good, if annexed to estate tail, 346
shifting clause as to, 1441

NATIONALITY, domicil and, distinguished, 16, n.

NATURALIZATION,
by Act, effect of, 91
superseded by Act of 1870..59, 90

NEAR RELATIONS, gift to, means statutory next of kin, 1632

NEAREST FAMILY, construed to mean "heir," 1584

NEAREST RELATIONS, gift to, how construed, 1632, 1651

NECESSARY IMPLICATION, what is, 630, n., 1752

NEGATIVE WORDS,
not sufficient to exclude heir, or next of kin, 425
rule in *Shelley's Case*, 1865

"NEPHEWS AND NIECES,"
affinity, relatives by, not included, except on context, 1635
unless object of gift strictly construed is impossible, 1637
grand nephews, &c., not included except on context, 1635, 1636
half-blood included, 1639

NEXT HEIR,
means person who is not "heir general," when, 1567
several co-heirs may take as, when, 1563

NEXT HEIR MALE,
devise to A. and his, creates estate tail, 1849
how construed as between sons of several daughters, 1563

"NEXT LEGAL REPRESENTATIVES," construed statutory next of kin 1615

NEXT OF KIN, 1604
affinity, relations by, not included in, 1633
"by way of heirship," as to land, means heir, 1611
conjectural construction not to oust, 453, 638, n.
declaration that they shall not take will not exclude, 207, 702
but some of them may be so excluded, 703
election by, 538
exclusion by implication, 1609
"executors" construed to mean, 1615
"family" construed to mean, 1586
gift to, construed to mean to nearest blood relations, 1605
creates joint tenancy in donees, ib.
ex parte paternâ or maternâ, 1609
exclusive of A., 1610
half blood entitled, 1639
husband, wife or relations by marriage not included, 1633. *See* RELATIONS.
"heirs or next of kin," gift of personalty to, 1573, 1611
implied gift to, 679
"in the male line in preference to the female line," how construed, 1610
lapse, in reference to gifts to, 437
"legal representatives" construed to mean, 1612
name, gift to, of particular, 1609
"nearest of kin by way of heirship," how construed, 1611
"next male kin," how construed, 1610
"next of kin and nearest heir," 1606
next of kin except A., bequest to, 1609
ex parte maternâ, 1610
in male line, ib.
parents and children, being of equal degree, take as, 1606
"personal representatives" construed to mean, 1612
resulting trust for, 714
Statutes of Distribution, effect of references to, 1606
time at which objects are to be ascertained, 1641
n. of k. of testator, are ascertained at his death, ib.
whether the gift is immediate, ib.
or in remainder, ib.
or executory, 1644
although prior taker is one of next of kin at testator's death, 1644
or is sole next of kin at testator's death, 1644
of a person who dies before testator, ascertained at testator's death, 1642
but gift vests in them as a class, *semb.*, ib.
although distribution is postponed, 1648
reference to the statute prevents their taking as a class, 1643
n. of k. of a person who outlives testator, ascertained at such person's death, 1643
although distribution be postponed, 1643

Volume I. ends at p. 1040.

NEXT OF KIN—*continued.*
time at which objects are to be ascertained—*continued.*
n. of k. of A. living at a specified time, gift to, vests in next of kin at A.'s death who survive the period, 1643
rule excluded by gift in specified event to those who will *then be* next of kin, 1643, 1648
gift by implication from testamentary power, objects ascertained at death of donee, 1644
rule not excluded by gift in specified event to those who will "then be entitled" as statutory next of kin, 1649
nor by remainder to "next of kin except A.," he (excluding tenant for life) being one of next of kin, 1646
"then" is primâ facie a word of inference, not of time, where the statute is referred to, 1649
undisposed of part of interest in money directed to be laid out in land passes to, as realty, 776

NEXT PERSONAL REPRESENTATIVE construed nearest of kin, 1615

NEXT PRESENTATION, what passes, 1298

NEXT SURVIVING SON, meaning of, 1743

NICKNAME, evidence of meaning of, admissible, 502

NIECES,
gifts to, whether extended to grand nieces, 1635
to relations by affinity, 1636. *And see* ADDENDA.

NOTICE. *See* CONDITIONS.

"NOW," construction of, 418

"NOW BORN," construction of, 504, 1702

"NOW LIVING," illegitimate children take, if no legitimate children are living, 1753

NUGATORY DISPOSITION, 207

NUMBER, mis-statement as to, of objects of gift, 1706. *See* CHILDREN.

NUMERICAL ARRANGEMENT of clauses, effect of, 594

NUNS,
conditions prohibiting legatees from becoming, 1482
gift to convent of, not charitable, 221

NUNCUPATIVE WILLS, 102

OBJECTS OF GIFT, will speaks at its date as to, 396 et seq.

OBLITERATION,
ineffectual to revoke will, 155
probate with facsimile of, effect of, 161
presumed to be made after execution, 156
also after execution of codicil, unless noticed, 157
satisfaction may be indicated by, 161

Volume I. ends at p. 1040.

OCCUPANCY, reference to, when restrictive of description, 1268, 1271, 1277

OCCUPATION,
condition prohibiting, annexed to devise of fee, void, 1466
description by reference to, whether passes easement, 1293, n.
devise of land passes easement, 1293
direction to permit, by tenants, whether obligatory, 898
use and, devise of, effect of, 1298, 1808

OFFICE,
charitable nature of gift, not dependent on, of legatee, 223
revocation of one, does not revoke others, 183

"OFFSPRING," gifts to, how construed. 1590, n.

OMISSION, cannot be supplied by parol evidence, 486. *See* SUPPLYING WORDS.

ON DEATH, added to "die without issue," effect of, 1969

ONE of a class, gift to, 470

ONEROUS GIFT, rejection of, whether precludes acceptance of another gift, 556

ONLY SON,
excluded by exception of "eldest son," 1730
takes under gift to "youngest child," ib.

OPERATIVE WORDS, 82

OPTION,
charitable gift with, to invest in land or otherwise, 257
conversion, constructive, when excluded by, given to trustees, 745. *And see* CONVERSION.
to purchase, effect of, as between devisee and executor, 79
at fixed price, annexed to choice of fee to another, void, 1488
legatee may exercise after compulsory, under Lands Clauses Act, 80
perpetuity, when, 79, 281. *See* PRE-EMPTION.

"OR,"
"and" read, 613 et seq.
read "and," 476, 601, 609
read "of," 600
as indicating substitution, 612, 2149
period, to what, then referable, 2149
read "namely," 477
See CHANGING WORDS.

ORIGINAL WILL Court of Construction may inspect, 44

"OTHERS,"
construed "additional to," not "exclusive of," objects before mentioned, 1743
of a specified kind, restrictive effect of. *See* OTHER REAL ESTATE.
"survivors," when construed. *See* SURVIVORS.

Volume I. ends at p. 1040.

"OTHER" CHILDREN OR SONS, gift to, 1743

"OTHER EFFECTS," when confined to effects *ejusdem generis*, 1027

"OTHER REAL ESTATE," leaseholds, whether excluded from prior gift of land, 963

OTTOMAN EMPIRE,
English subjects in, may make wills by treaty, 10, 21
land in, devise of, 541

OUTGOINGS,
gift clear of, effect of, as exempting from legacy duty, 1131
tenant for life, liable for, 1214

OUTLAWRY abolished, 61, n.

PARAGRAPHS,
division of will into, 594
"residue" confined to particular fund by, 1052

PARCELS, evidence as to, included in gift, 510 et seq.

PARENT AND CHILDREN,
gift to, concurrent or successive, 1745
gift to parent in trust for self and children, 1917
what words create trust in such cases, 874, 895 et seq.
See CHILDREN—TRUST.

PARENTHESES, effect of, on construction, 44

PARISH,
gift for benefit of, 213
of lands in a particular, 407, 409, 1282

PAROL,
conditions annexed to testamentary gifts, testator cannot waive by, 1527, 1535
election to reconvert by, whether effectual, 758

PAROL EVIDENCE. *See* EVIDENCE.

PAROL TRUST,
charitable, effect of, 23
evidence admissible to prove, 495
gift of property to person holding it on, 106

PART,
gift of, any, donee may take all, 462
definite, of larger quantity, donee may select, 460
indefinite, void, unless amount required is measureable, 457
such as donee may select, effect of, 460
of instrument, held testamentary, 39
of will, probate granted of, 39
upheld (undue influence), 50

Volume I. ends at p. 1040.

"PART," devise of, gave fee, under old law, 1806

PARTIAL INTEREST, general devise under old law passed lapsed, &c., 947

PARTIAL INTESTACY AND RESULTING TRUSTS, 701 et seq.

PARTICULAR ESTATES,
void in creation, remainder is accelerated, 718
unless prior estate is void for remoteness, 350
See ACCELERATION.

PARTICULAR RESIDUE, what is, 1050 et seq.

PARTITION,
condition directing, by tenants in common, 1491
conversion on sale under Partition Act, 3
revocation of devise by, none, 162, n.

PARTNERSHIP,
shares in, after-acquiring interests when pass by gift of, 410
owning land, charitable gifts of, 253
tenant for life of, not entitled to increase of capital, 1228

PATENT AMBIGUITY. *See* EVIDENCE.

"PAYABLE,"
to what period it refers, 2175 et seq.
whether to majority or period of distribution, 2175
cases, result of cases, 2180
distinction where issue expressly provided for, 2176
tenant for life dying before majority of legatee, 2180
where no time fixed for payment, 2181
"entitled in possession," "entitled to the receipt," and "received" (meaning receivable), similarly construed, 2182
See ENTITLED—RECEIVED.

PECUNIARY LEGACIES, includes annuities, 1061

PEER,
domicil of, choice may be acquired by, 20
lapse of gift of heirloom to, describing him by title, 397
uncertainty of gift of heirlooms to go with title, 454

PENCIL,
alterations in, 157, 158
will may be written in, 106
written in, whether revoked by rubbing out signature, 144, n.
See REVOCATION.

PER CAPITA AND *PER STIRPES*. *See* CAPITA—STIRPES.

PERFORMANCE,
of conditions, generally, 1478
to marry with consent, 1528
See CONDITIONS.

PERIOD,
for ascertaining exception of eldest son, 1737
objects of devise to "children," 1664 et seq. *See* CHILDREN.
to "first," "second," &c., sons, 1741
to "heir," 1579
to "next of kin," "relations," 1641 et seq. *See* NEXT OF KIN.
to persons of particular "name," 1653
to "survivors," 2120 et seq. *See* SURVIVORS.
to "younger children," 1731
value of distinct properties charged pro ratâ, 266
for performing conditions, 1478
from which will operates, not before testator's death, 406
from which will speaks. *See* DATE.
perpetuities, rule against, allows, of gestation, when, 298
remoteness judged by facts at testator's death, 300
words "in case of death" relate to what, 2144
when coupled with a contingency, 2153
See DEATH.

PERISHABLE. *See* WASTING.

PERPETUITIES, RULE AGAINST,
absolute gift, clauses illegally modifying, rejected, 308, 361, et seq.
absolute ownership, directions to trustees to postpone, void, 308, 363
acceleration of remainders where prior estate void under, 350
accumulations for payment of debts, whether within, 316, 367
alienation, restraint on, beyond legal limits, 305
alternative limitations, 354
double contingency, good or not in event, 354
separate expression of, essential, 356
anticipation by unborn f. c., restraint on, 363, 364
Cadell v. *Palmer*, rule in, 296, 317
charitable gifts, within, 211, 367
gifts over in defeasance of, good, 280, 367
classes, gifts to, 327–342
ascertainment of class, 329, 330, 336
child-bearing, presumption that woman is past, not admitted to exclude rule, 341, 342
children and grandchildren, class of, 332
constitution of, depends on mode of gift, 336
construction of will not strained to render gift valid, 341, 364
contingent remainders, distinction as to, 328
enlargement or diminution of class, 329
grandchildren, provision for testator's own, 340
original and substitutional gifts, 333
remote objects, inclusion of some, in class, avoids gift as to all, 331
though named person included in class, 339
unless each share is ascertainable within legal limit, 334
separable gifts, 334, 363
substitutional gift, too remote, alone fails, 333, 362

Volume I. ends at p. 1040.

PERPETUITIES, RULE AGAINST—*continued.*
classes, gifts to—*continued.*
survivor of, gift to, 346
unborn class, gift to, to vest after majority, 327
vested, where interests are, 329
common law conditions and interests, 373
construction of will not affected by, 364
contingent gift in form only, 302
persons, gifts to, 342
remainders, how affected by, 368 et seq.
apparent exception of legal remainders, 368
conflict of opinion on the subject, 369–373
destructibility of remainder does not exclude rule, 350
executory devise and, distinguished as regards remoteness of event on
which it vests, 302
as regards vesting of gifts to classes, 328
of equitable estates, 286, 303, 322
of equity of redemption saved by outstanding legal estate, 326, n.
reversion and, distinguished as regards avoidance of devises for remoto
ness, 325
cy-près, doctrine of, as affecting, 288. *See* CY-PRÈS.
defeasible interest made absolute by, 306
divisible gifts and powers, 306, 311
effect of rule not allowed to influence construction, 333
estates contrary to, not implied, 366
events, possible, not actual, regarded, 299
testator may frame disposition according to subsequent, 343
exceptions to, 366
executory devise and remainder distinguished, 302, 328, 368
on indefinite failure of issue void, 321
unless grafted on an estate tail, 321
precedent or subsequent to estate tail, 324
family, devise on trust to distribute rents among, good within, 219
future interest may extend beyond period, 301
future of the rule, 375
gestation, period of, when allowed, 298
heirlooms, limitation of, to go with title, 344
infancy, reference to, excluded, 298
leaseholds settled with freeholds, frame of trusts of, 347, 366
life interest after interests void for remoteness, 352
lives, what may be taken, 297
living person, gift to, may be too remote, 305
management, trusts for, during minorities, how to be restricted, 314
modifying and qualifying clauses, 361
name and arms clause, 346
origin and history of rule, 278
possession only too remote, 303, 363
powers of appointment, 316
special powers, 316
absolute appointment followed by qualification, 320
appointee must be able to take from donor, 316
limits of the principle, 318

Volume I. ends at p. 1040.

PERPETUITIES, RULE AGAINST—*continued.*
powers of appointment—*continued.*
special, &c.—*continued.*
reference, appointment by, 320
separate and severable appointments, 319
too wide, power or appointment, 318
unborn child, to, 319
unknown class, to, 320
general powers, 321
powers too remote, 309
powers of revocation and re-appointment to evade rule, void, 307
powers of sale, validity of unlimited, 307, 311
remainders contingent, whether within, 368
destructible, whether within, 350
estates tail, barrable nature of, saves from remoteness, 322
executory limitations precedent or subsequent to, 324
terms of years precedent or subsequent to, 323
equitable, whether within, 326
shifting clause on breach of condition, 346
splitting of, a gift over, so as to exclude rule, 356
terms of years, postponement of vesting beyond excessive, void, 283, 353
precedent or subsequent to estate tail, 323
trusts, severable, may be good or bad as within or without the legal limits, 308
ulterior limitations after remote gift, void, 350
remainders not accelerated, 350
unborn persons and their issue, gifts to, 348
absolute interest not vesting within prescribed period void, 305
alienability of interest does not exclude the rule, 350
double possibilities, so-called doctrine of, discussed, 285
gift to unborn person for life, good, 348
remainder as he shall appoint by *deed* or will, good, 321
remainder to children of such person, held absolutely void, 348
remainder to competent objects of gift, good, 349
successive or cross, life, interests to, 349
vesting period for suspension of, what allowed, 296
life or lives in living and 21 years, 296
of strictly settled personalty to be deferred only till tenant in tail *by purchase* attains 21 years, 347, 364
period computed generally from testator's death, 298
but from date of instrument creating special power, 316
execution of general testamentary power, 321
postponement of, for term exceeding 21 years, void, 298
addition of a single day avoids gift, 299
postponement of possession only, effect of, 363
Whitby v. *Mitchell*, the rule in, 284

PERSONÆ DESIGNATÆ, gifts to. *See* DESCRIPTION.

PERSONAL INHERITANCE, not entailable, 1809

Volume I. ends at p. 1040.

PERSONAL PROPERTY,
absolute interests in, 1182 et seq.
bequeathed so as to follow real estate, 681
description of, by reference to locality, 1025, n.
gift of, confined to personalty, whether, 1020
dower not barred by, 551
land converted into money is, as regards conditions restraining marria
1525, n.
as regards vesting, 1394
lapse, doctrine of, in reference to, 424. *See* LAPSE.
Shelley's Case, principle of rule in, applied to, 1860
widow barred of share in, when, 551
will of, what is a good, 104
See ABSOLUTE INTEREST—CONVERSION—GENERAL PERSONAL EST.

PERSONAL (OR LEGAL) REPRESENTATIVES,
mean (primarily) executors or administrators, 1612
à fortiori if elsewhere used strictly, 1614, n.
gift vests as part of personal estate of testator or intestate, 1621 et se
though subject be real estate, 1621
e.g. In gift to p. r. by way of substitution for legatee in remainde
1619
to p. r. of A. simplicliter, 1621
whether A. is dead at date of will or survives te
tator, ib.
to p. r. of testator himself, 1622
unless gift is "to their proper use," ib.
when used as words of limitation in gift—
to A. and his personal representatives, 1617
to A. for life, remainder to his p. r., ib.
with power of appointment or contingent gift interposed
ib.
mean statutory next of kin in gift to them—
in substitution for immediate legatee to prevent lapse, 1613
with words "for their own use," 1622
"in course of administration," 1614
"in equal shares," 1613
similar construction favoured by—
limitation of other property to "executors," 1614
word "next" prefixed, 1615
next of kin take in statutory manner and proportions, 1628
unless directed to take in equal shares, 1631
wife is included, but *not* husband, 1612
on context held to mean "descendants," "issue," &c., 1616
"residuary legatee," 1613, n.
See EXECUTORS.

PICTURES, gifts of "effects," "furniture," &c., whether pass, 1310

PIN MONEY, wife cannot bequeath savings of, 55

PIOUS PURPOSES, gift for, not charitable, 221, 222

PLACE, gift of lands in a particular, 407, 409

PLANT AND GOODWILL, what included in, 1311

PLATE,
gift of "furniture" passes, when, 1307
passes what, 1310

POLICY OF ASSURANCE,
"debentures," gift of, passes, 1304, n.
"money," gift of, held to pass, 1301
on testator's own life, restrictions on right to dispose by will of, 76
securities, gift of, passes, 1304
Thellusson Act in reference to, 391

POOR, gift may be charitable, though not for benefit of, 217

POOR-RATE, charitable gifts in aid of, 217

POOR RELATIONS,
gifts to, charitable, whether, 220, 1634
to specified number of poorest, void for uncertainty, 470
See CHARITY.

POPE, gift for teaching supremacy of, 210

PORTIONS,
accrued share not included in gift of, 2115
accumulations for, not within Thellusson Act, 378, 383
satisfaction of, by legacies, 500

"POSSESSED OF,"
gift of all that testator has, includes realty, whether, 1011 et seq.
gift over before becoming, how construed, 2184

POSSESSION,
condition prohibiting alienation until, 1490
election to take land unconverted, implied from retainer of, 760
entitled in, meaning of, in strict settlement, 697
gift of personalty to person for time being entitled to real estate in, 697
gift over on death before becoming entitled in, 2182
mortgagee in, devise of mortgaged lands by, 967
without title is devisable, 81

POSSIBILITY ON A POSSIBILITY, 285

POSTHUMOUS CHILDREN, implication of gift to existing children from gift to, 677

POWERS,
aiding defective execution of, 799
appointments by will under, probate of, 44
whether dependent on existence of, 40
bare, 934, 936
contingent, exercisable only on happening of event, 796

Volume I. ends at p. 1040.

POWERS—*continued.*
covenant to exercise, 836
date from which will speaks as to exercise of, 812 et seq.
defect in, rectified, 836
delegation of, 763
destruction of, 841
devisee of trustee whether may exercise, 987 et seq. *See* TRUSTEE.
future power, exercise of, 833
exclusive or non-exclusive, 824
general devise or bequest executes general, 805. *See* GENERAL BEQUEST—GENERAL DEVISE.
powers created after date of will, 813
secus as to special powers, 831
as to wills under old law, 805
implied exercise of, 826, 858
lapse of, 843
leasing, of, 922
mistake as to amount of fund, 847
of mortgaging, 921
of revocation, by unattested codicil, void, 133
general reference does not execute, 837
in deed does not render instrument testamentary, 35
of sale, conversion not caused by mere, 755
inserted in wills, 913
perpetuities, rule against, in reference to, 307, 311
of selection of testamentary donees, rule against perpetuities in reference to, 316 et seq.
operation of, 788, 799
reference to, of disposition, general, executes, 827
although power exceeded, 828
not if contrary intention appears by the will, 828
if power is of revocation, 831
if power is special, 831
release of, 836
revocation of, 804, 837
remainder limited under, acceleration of, by failure of particular estate, 725
special, appointment under, lapse of, by death of object before donor, 1800
none by death of object before donee, ib.
if objects take in default jointly or as class, 1801
appointment under, followed by gift over in default, lapse of, 429
appointment under, remoteness of, how measured, 316
rule as to general testamentary powers, 321
special, reference to "what I can beneficially dispose of" held not to refer to, 831
to appoint by "will" must be executed as a will, 799
by "writing" in the nature of a will, 795
to "issue," remoteness in reference to, 317
to expend capital, 464
trust to settle property authorizes insertion of what, 904

Volume I. ends at p. 1040.

POWERS—*continued.*
uncertainty with regard to, 483, 795, 821
will under, revocation of, 141, 142
will under, of woman, whether revoked by death of husband, 57, 141
by marriage, 142
will purporting to exercise supposed power may operate on estate, 40
will, whether valid exercise of, domicil does not determine, 9, 10
probate how far conclusive as to, 800
words, property or, given by, 1558, 1807, n.

POWERS OF APPOINTMENT AND DISPOSITION,
aiding defective execution, 799, 801
construction of appointments, 856
creation of, by what words, 790–796
exerciseable, when and by whom, 796
formalities to be observed, 798
general powers of appointment, 802
execution by general devise or bequest, 805
old law, 805
under Wills Act, 808
conversion, 811
defeating intention, 814, 816
contrary intention, 813, 816
general powers within, s. 27..809
operation of, s. 27..812
particular residue, 811
settlement defeated by exercise of power, 814
execution by specific disposition, 802
destruction of power, 802, 841
general reference to powers, 805
implied exercise, 802
interest as well as power, 804
misdescription of property, 802
parol evidence, 803
exercise makes property part of testator's estate, 817
failure of appointment, 819
foreign property, 817
married woman, 818
separate dispositions, 821
vests in personal representative, 819
miscellaneous questions, 836. *See* APPOINTMENT, POWERS.
operation of, 788
probate when necessary, 800
revocation, power of, 804
special powers of appointment, 821
ineffectual execution, 835
intention to exercise, 825
"appoint," use of word, 828
future power, exercise of, 833
implied exercise of, 826, 858
indirect appointment, 826
reference, 827

Volume I. ends at p. 1040.

POWERS OF APPOINTMENT AND DISPOSITION—*continued.*
special powers of appointment—*continued.*
intentions, &c.—*continued.*
reference to powers generally, 827
subject of power, 832
residuary gift, effect of, 827
section 27 does not apply to, 831
two or more powers, testator having, 829
objects of,
children issue relations, &c., 822
exclusive or non-exclusive, 824
married women, 825
portions, 825
trustees, 825
uncertainty, 821

POWERS OF ATTORNEY, may be testamentary, 39

PRECARIOUS SECURITIES, when to be converted, 1245. *See* CONVERSION.

PRECATORY TRUSTS, 868. *See* EMPLOYMENT—TRUST.

PRECATORY WORDS,
gift to A. "for his own use," not cut down by, 873 et seq.
trust created by, when, 482, 868
uncertain words will not create precatory trust, 463

PRE-EMPTION, right of,
at fixed price, annexed to devise of fee to another, void, 1488
legatee may exercise, after compulsory sale, 80
effect of, as between devisee and executor, 79
vendor's will, how affected by subsequent exercise of, 79

PREMISES, meaning of, 1289

PRESENCE,
of testator, how far presumed, 120
what amounts to, 118 et seq.
of witnesses, must be simultaneous, 114
See EXECUTION OF WILL.

PRESENT TENSE, verbs in, how construed, 402, 418

PRESUMPTION,
as to acceptance by infant of devise or bequest, 97
alterations in law, intention that will shall operate according to subsequent, 421
alterations in will, when made, 42, n., 156, 157
assent of husband to wife's will, 54
attestation in testator's presence, 118, 121
blanks, when filled up, 157
charitable gifts, validity of, after lapse of time, 263
consent to marriage, 1535
execution of will, 105, 121
election, 555, 556
implication of gifts in default of appointment under power, 650. *See* IMPLICATION.

Volume I. ends at p. 1040.

PRESUMPTION—*continued.*
as to acceptance by infant of devise or bequest—*continued.*
incomplete testamentary papers, 125
insanity, presumption as to destruction of will during, 153
knowledge of testator as to contents of will, 49. 494
as to state of families of relations, &c., 1657, 1708, 1753
legacy to sole executor, 498
original order of sheets of will, 108
reading over will to testator, 32
resulting trust, 497
revocation of codicil by destruction of duplicate, 151
of will by destruction of will, 154
loss of will, 152
testamentary capacity, 48
parol evidence admissible to rebut. *See* EVIDENCE.

PRICE, condition that devised estate shall be offered at fixed, 1488

PRIMARY SENSE, evidence not admissible to construe words contrary to, 490

PRINTED FORM, construction whether influenced by will being on, 106, 575, n.

PRIOR GIFT, failure of. *See* GIFT OVER.

PRISONER,
domicil of origin not lost by residence abroad as, 20
relief of, bequests for, 213

PRIVATE CHARITY, trust for, void, 217, 222

PROBATE,
ancillary, of wills proved abroad, 7
appointments under powers, 44
blanks in will do not prevent admission to, 106
conclusive, how far, as to personalty, 8, 42
domicil, 44, n.
formal validity of will, 42
title of executor, 8
realty, 43
conveyance not as to domicil, 44, n.
by executors before, 984
effect of, 42
foreign, conclusive as to will of domiciled foreigner, 7
general, of will of foreigner, 7
mistake in grant of, effect of, 8
of contingent will, 40
incomplete will, 126
incorporated documents, 138
joint will, 41
lost will, on proof of execution and contents, 121, 153
where part only of will is lost, 126, n.
part of an instrument, 39
will of feme coverte, 45

Volume I. ends at p. 1040.

PROBATE—*continued.*
original will may be examined by Court of Construction, 42, n., 44
realty, will of, admissible to, 43
revocation of, 46
revocatory writing, unless testamentary, not admitted to, 167, n.
scurrilous imputations omitted from, 42, n.
where British testator is domiciled abroad, 7

PROBATE DUTY. *See* ESTATE DUTY.

PRODUCTION of original will to explain ambiguities, 44

PROFESSION,
or trade, condition against marriage with man of a particular, 1526
religious, condition against, valid, 1482

PROFITS,
of company or business, what are, 1222, 1227

PROFIT COSTS, 81

PROMISE,
to make testamentary disposition in favour of persons, 28
to perform charitable trust, 263
to testator, enforced on parol evidence, 495

PROMISSORY NOTE,
held testamentary, 36
"securities for money," gift of, passes, 1304

PRONOUNS,
evidence to vary position of, not admissible, 521
uncertainty caused by use of, 474

PROPERTY,
bequest of, at bankers, what included in, 1284, 1302
copyholds excluded from gift of, 1002
distinction between immoveable and moveable, 1
foreign bond, though not enforceable, is, 76
power and, distinguished, 1558, 1807, n.
realty passes by word, unless contrary intention appears, 997 et seq. *See* REAL ESTATE.
passed in fee simple, under old law, 1805. *See* FEE SIMPLE.

PROPERTY TAX. *See* INCOME TAX.

PROTECTOR OF SETTLEMENT, Court will not appoint, in executing strict settlement, 1882

PROTESTANT DISSENTER,
gift to propagate tenets of, valid, 208
Unitarian is included in term, 209, n.

"PUBLIC FUNDS," meaning of, 1283, 1305

PUBLIC PARKS, devises of land for, 88

Volume I. ends at p. 1040.

PUBLIC POLICY,
bastards, gifts to, not in esse, prohibited, 1771 et seq.
conditions contrary to, 1464
criminals, gifts for relief of, 213, n.
immoral or irreligious teaching, gifts for, 213, n., 221, 243
superstitious uses void, 207

PUNCTUATION, construction of wills not affected by, 45

PUR AUTRE VIE. *See* AUTRE VIE.

PURCHASE, option of, not carried out at testator's death, 79

PURCHASE MONEY,
of estate contracted to be sold by testator—
devise of estate generally does not pass, 162
of "the estate which I have contracted to sell," held not to pass, 970
devisee when entitled to, 68
"securities," gift of, whether passes lien for, 1303
See OPTION—REVOCATION.

PURCHASER FOR VALUE,
not bound to see to payment of debts charged, 1988
of legacies, &c., charged, 1988, n.

PURPOSE, gift for particular, when laying out obligatory, 882 et seq.

QUAKERS, condition requiring marriage rites of, valid, 1526, n.

QUASI TENANT IN TAIL, demise by, 74, 361, 1213

QUEEN ANNE'S BOUNTY, devises to governors of, 88.

RAILWAY SHARES, include stock, 1306

"READY MONEY," meaning of, 1302. *See* MONEY.

REAL EFFECTS, realty passes by devise of, 994, 1805

REAL ESTATE,
GENERALLY,
assets for payment of debts, statutes making, 1987
conversion, constructive, of. *See* CONVERSION.
lapse, doctrine of, in reference to, 423 et seq. *See* LAPSE.
leaseholds do not pass by general devise of, 963
WHAT WORDS CARRY,
Effect of general words—
"estate," "property," &c. pass, unless contrary intention appears, 990, 997
codicil, ambiguous expression in, will not cut down clear expression in will, 1002

Volume I. ends at p. 1040.

REAL ESTATE—*continued.*

WHAT WORDS CARRY—*continued.*

Effect of general words—*continued.*

"estate," "property," &c.—*continued.*
comprehension favoured by exception of particular land, 1005, n.
by intimation of intention to dispose of all property, 995, 996, 1007, 1012
by other words sufficient to pass entire personalty, 990, 993, 1012
by prior devise of land, 996
contrary intention favoured by absence of other mention of realty, 996
by subsequent enumeration of particulars, 1000
restriction not favoured by modern decisions, 997

Effect of particular words in passing—

construction of "appurtenances," 1293
"at," "in," "near," 1280, 1282
"at or within," 1282
"copyholds" to pass customary freeholds, 1298
"cottage," 1293
"easements," 1293
"farm," 1296
"freeholds at A.," where none, to pass leaseholds, 1288
"ground rent" to pass reversion, 1297
"hereditaments," 1287
"house," 1292, 1293
"house I live in, and garden," 1292
"income" of land, 1300
"lands," 1287
"lands adjoining to," 1296
appertaining to," 1295
belonging to," 1295
of which I am seised," strictly construed, 950
which I purchased" to pass exchanged lands, 1277, n.
"manor," 1299
"messuage," 1290
"part and portion" to pass testator's interests in the whole, 1299
"premises," 1289
"rents and profits," 1297. *See* RENTS, 1297
"tenements," 1287
"use" or "use and occupation" of land, 1298
restrictive terms, not essential to description, rejected, 1266 et seq.

Volume I. ends at p. 1040

REAL ESTATE—*continued.*

WHAT WORDS CARRY—*continued.*

Effect of vague and informal words—

1. *Real estate held to pass—*
   - "all I am worth," 1011
   - "all that I shall die possessed of, real and personal," 1012
   - "all the rest," 1014
   - "everything else that I shall die possessed of," 1012
   - "executrix and residuary legatee of all other property I may possess at my death," (after gift of a freehold house), 1012
   - "residuary legatee of whatever I may die possessed of," except a freehold interest, 1013
   - "whatever I have not disposed of," 1011
2. *Real estate held not to pass—*
   - "all," 455
   - "all I may die possessed of," 1013
   - "all my effects," 1014, n.
   - "my fortune," 1014
   - "what little I have to call my own," 1014

Effect of added words descriptive of personalty—

1. *Real estate held to pass by expressions—*
   - "all money and other estate," 993
   - "estate," notwithstanding context, 995, 998
   - "estate, goods, chattels," without prior devise of land, 996
   - "estates" used elsewhere so as not to include land, 995
   - "goods and chattels, real and personal, as houses," &c., 995
   - "goods, chattels, personal and testamentary estate," 996
   - "goods, estates, bonds, debts," 994
   - "money, goods, chattels, and other estate," 993
   - "property and effects," 997
   - "property, goods, chattels," 997
   - "residue of effects, real and personal," 994
   - "residue of money, goods, chattels, and estate," 993
   - "residue of money, stock, and property," 996
   - "wearing apparel, &c., with all my other estate," 993
2. *Real estate held to pass by force of context—*
   - by "effects," 1018, 1019, 1021
     - "effects wheresoever situate," devise of, 1019
     - "personal estates," 1020
     - "residuary legatee," after specific devise, 1016
     - "said effects," 1018
     - "said legacy," 1015
     - "worldly goods," 1019
   - not by ambiguous context, 1019
     - "said goods and chattels," omitting "lands" before used, 1020
3. *Real estate held not to pass by expressions—*
   - "estate consisting of money, mortgages," &c., 1000
   - "estate goods and chattels," 997
   - "estate," unless other words to carry personal estate, 990 *sed qu.*

Volume I. ends at p. 1040.

REAL ESTATE—*continued.*

WHAT WORDS CARRY—*continued.*

Effect of added words descriptive of personalty—*continued.*

Real estate held not to pass by expressions—*continued.*

"estate followed by enumeration," 1000
"my residuary legatee," 1016
"property," followed by enumeration, 1000
"property," held not to include copyholds, where copyholds devised, 1002
"rest and residue" followed direction to sell lease and furniture, 1014

4. *Where donee is executor*—

"all I possess," except certain chattels, restricted, 1005
"all property I may die possessed of," not restricted, 1005
direction to executors to pay legacies "out of my estate," held restrictive, 1006
"executor of all my houses and lands," not restricted, 1005
"executor of all my lands for ever and leasehold," not restricted, 1004
"executors of my entire property," 1017
"executrix of my goods and lands," restricted, 1004
"overplus of my estate," restricted, 1003

5. *Where limitations are inapplicable to Realty*—

"bequeath," not necessarily restrictive, 1009, n.
"devise," not necessarily comprehensive, 1009, n.
"estate" restricted by nature of the trusts, 1006
"estate or effects" held to include land, but trusts confined to personalty, 1009
may be applied distributively, 1008

REASON,

assigned for devise, ambiguity may be explained by, 1570
clear words not controlled by, 578
for particular disposition renders will contingent, when, 40
for revocation, does not limit general revocation, 592

RECEIPT, held testamentary, 36

"RECEIVED," gift over on death before legacy has been—

construed "receivable" if period of payment indicated by will, 2184
at date expressly appointed, ib.
death of tenant for life, ib.
expiration of executor's year, 2185
or sooner if assets in hand, *semb.*, 2186
See PAYABLE.
received actually, gift over if legacy is not, whether valid, 2189 et seq.
construction not favoured, 2190
equitable relief against non-receipt, 2189
inquiry when legacy might have been received, 2186
gift over of unreceived part upheld, 2192

RECEIVER, direction to employ specified person as, 898

Volume I. ends at p. 1040.

RECITAL,
ambiguity in will may be explained by, in codicil, 629
election not impliedly raised by, 553
evidence to prove, erroneous, 485, 507
exclusion of property from residue by, 949
implication of gifts by, 621 et seq. *See* IMPLICATION.
mistaken, of fact, binds legatee, 559
revocation, absolute, not controlled by, 168, 188

RECOMMENDATION, effect of words of in creating a trust, 869

RE-EXECUTION
of will made during disability, 47
what is, 193

REFERENCE,
defective execution supplied by, 127
erroneous, in codicil to disposition in will, effect of, 580
gifts by, to uses of other estates, 478. *See* MULTIPLICATION.
to intrinsic documents, 135 et seq. *See* INCORPORATION.
uncertain, to other uses, may avoid gift, 478
what is a sufficient, to a power, 808 et seq.
See GIFTS BY REFERENCE.

REFERENTIAL EXPRESSIONS,
effect of, in importing provisions from gift referred to, 687
extent of operation, 681
instances of, 692, n.

REGISTRATION OF INSTRUMENT, testamentary character excluded by, as deed, 35

REJECTION,
of clause, on issue devisavit vel non, 492
of immaterial part of description, 1266
of words, 575. *See* REPUGNANCY.

RELATIONS, gift to—
applies primarily to statutory next-of-kin, 1627
when realty is only subject of gift, ib.
half-blood included, 1632, 1639
husband not included, 1633
although with words "as if I had died intestate," ib.
illegitimate, 1632, 1781
relatives by marriage not included, 1633
unless with context as "by marriage," ib.
"on both sides," 1635, n.
wife not included generally, 1633
although with words "as if I had died intestate," ib.
wife included in gift to "persons entitled under the statute," 1606
to "personal representatives," 1612
"family" gift to, construed to mean, 1585
lapse with reference to, 437. *See* LAPSE.

Volume I. ends at p. 1040.

RELATIONS—*continued.*
objects of, ascertained at what period, 1641 et seq. *See* NEXT OF KIN.
of power, at death of donee, 1647
objects of, extended by description—
"relations, viz. the As," 1628
not extended by description—
"friends and relations," 1628, n.
"poor relations," 1634
unless gift is charitable, 220. *See* CHARITY.
"relations except A.," 1628
objects of, restricted by description—
"nearest relations" to nearest blood relations, 1632
unless on context, "as sisters, nephews," &c., lb.
"poor relations," *semb.*, 1634
not restricted by description—
"near relations," 1632
"relation" (sing.), 1629
"relation by lineal descent," not saying from whom, 1588
"relations on my side," 1628
take as a class, 1640
take per capita, 1629
especially with word "equally," 1631
if statute referred to, in statutory manner, 1631
particular class (e.g., brothers, nephews, &c.) generally subject to same rules as children. *See* CHILDREN.
power to appoint to, 1633, 1647
precatory trusts for, 868 et seq.

RELATIONSHIP,
executor, legacy to, presumption as to, rebutted by reference to, 1624
resulting trust rebutted by reference to, of devisee, 710

RELEASE,
condition requiring, construction of, 1462
of specific debt, date from which will speaks as to, 410, 411

RELIGIOUS DELUSIONS, causing testamentary incapacity, 52

RELIGIOUS EDUCATION OF CHILDREN, directions as to, 28

RELIGIOUS PURPOSES, 216

RELIGIOUS SECTS, charitable gifts for any, valid, 216

"REMAIN," gift of what shall, when valid, 462

REMAINDER,
contingent, devises seemingly, construed as vested, 1371
distinction between the executory devises, 1443 et seq.
equitable resembles legal in what, 1437
general devise under old law passed, on destruction of particular estate, 947
remainders in default of object of prior estate, not, 1352
trustees to preserve, what estate taken by, 1840
whether within rule against perpetuities, 368 et seq.
See PERPETUITIES, RULE AGAINST.

Volume I. ends at p. 1040.

REMAINDER— *continued.*
conversion, in reference to rights of persons entitled for life and in. *See* CONVERSION.
cross remainders, implication of, 660 *et seq.* *See* CROSS-REMAINDERS.
devise of, under old law carried fee, 1805
election, whether applies to, after estate tail, 536
equitable, within rule against perpetuities, 286, 303, 322
executory devise cannot take effect as, 1432
general devise, whether passes, 957 *et seq.*
inconsistent gifts reconciled by reading one as, on another, 570
legal, in personalty, cannot be created, 1453
limitation capable of taking effect as, not held executory devise, 1432
persons entitled to, have separate election, 534
vesting of devises in, 1358 *et seq.* *See* VESTING.
what is a, 1432
See ACCELERATION—EXECUTORY DEVISE—REVERSION.

REMOTENESS. *See* PERPETUITY, RULE OF.

RENEWABLE LEASEHOLDS,
fines for renewal, exoneration of specific legatee from, 2038
to be raised out of rents and profits, 2011

RENEWED LEASEHOLDS, pass by previous will, whether for years or lives, 405, 407

RENTCHARGE, 1152
charged on real and personal estate, 1153
conditional devise of, on lease of claims, 1470
dower and freebench barred by, 549
gift of lands not liable to, as "subject to dower" will not give rent-charge by implication, 623
legal, what words create, 1153
life estate only given by gift of, de novo, without words of limitation, 1152
remedies for, 1154
resulting trust of, raisable for purpose which . , 706
See DOWER.

RENTS OR RENTS AND PROFITS,
accumulations of, illegal, heir's interest in, 389
application of, devise modified by direction as to, 625
conversion, whether excluded by devise of, 1251
devise of, passes advowson, 1297
land, 1297
in fee, 1297
devise of, passes next presentation, 1297
specific enjoyment under, tenant for life when entitled to, 1251
direction to raise money out of, 2005
authorizes sale or mortgage for payment of debts and legacies, 2006
of gross sum, 2007
of portions, 2006
of renewal fines, 2011
where definite time is fixed for payment, 2006
ambiguous contrary expressions notwithstanding, 2009

RENTS OR RENTS AND PROFITS—*continued.*
directions to raise money out of—*continued.*
not, sale or mortgage—
for payment of all charges, because sale would be authorized for some, *semb.*, 2009
where estate treated as remainder entire after raising debts 2008
where legacies made payable as soon as estates can "advance" them, 2007
where possession by devisee postponed till money is raised and trustees have interim power to lease, 2008
where "residue" of rents and profits after answering charge, is given to one for life, 2009
where term is to be created, for raising, at old rent, 2011
direction to raise several charges out of, *or* by sale or mortgage read distributively, 2010
gift of, of business, what included in, 1297
mining, what included in, 165, n.

REPAIRS,
application of income in, not within Thellusson Act, 380, 388, 395
specific enjoyment implied from direction for, 1247

REPRESENTATIVES. *See* PERSONAL REPRESENTATIVES.

REPUBLICATION, 197
actual and constructive, distinction between, 198
adeemed legacy not revived by, 202
after-acquired lands included in general devise under old law by, 201
when expressly excluded from general devise, 204
appointments under powers, how affected by, 204, 205
by codicil, constructive, 198
date of will carried down by, 200
defect of expression in will not cured by, 203
intention to revive must be shewn, 194
intermediate codicils, whether set up by, 200
lapsed devises and bequests not revived by, 204
scope of will not enlarged by, 204
constructive, 198
effect of, 200
express, 197
invalidate a valid gift, cannot, 206
lapse of residuary devise or bequest, 204
new estate intermediately acquired passes by, 201
of will made under the old law by codicil made since 1837..200
re-execution is, 197
revoked will may be revived by, 192, 197
satisfy legacy not revived by, 202
specific devises, how affected by, 201
statutory alteration after execution of will, 205
Wills Act, effect of, 205

REPUGNANCY,
construction of contradictory provisions,
condition repugnant to estate devised, rejected, 1466 et seq. *See* CONDITIONS.
distinct gifts of same land in fee, devises take concurrently as joint tenants, 571, 572
of indivisible chattel, effect of, 573
inconsistent clauses in gifts, posterior of, preferred, 565
absolute interest in personalty, cut down to life interest, 566
annulment of gift by subsequent gift in same will, 570
inheritance, estate of, cut down to life estate, 566
prior gift not disturbed unnecessarily, 569
qualification of gift by subsequent gift, 571
whole will to be reconciled if possible, 570
e.g., gift held exception from or remainder on another, 571
lapse, apparent inconsistency reconciled by reference to, 573
locality and occupation, inconsistent description by reference to, reconciled, 573
part of subject only held to be included, to reconcile inconsistency, 573
distinct gift not controlled by gift in general terms, 579
particular devise not controlled by general devise, 579
reference, inaccurate words of reference, inoperative, 579
provisions wholly void for, 561
rejection of words and clauses, 575
ambiguous words will not cut down clear gift, 574
descriptive words not rejected if required to prevent, 1271
improbability not sufficient grounds for rejection, 578
gift to A. and his heirs "for their lives," 576
to A. and B. as tenants in common "in order now mentioned," 577
to children "if there should be no child," 576
to use of A. "for 99 years," and after his death to uses in remainder, 576
gift, general, followed by residuary gift, 574, 575
gifts, residuary, inconsistent, 574
motion or reason assigned will not control gift, 578. *See* REASON.

REPUTATION of parentage of illegitimate child, 1768

REQUEST,
effect of, in creating trust, 869. *See* TRUST.
sale directed upon, whether conversion, 751

RESIDENCE,
conditions as to, 1546 et seq. *And see* CONDITIONS.
domicil how ascertained in case of divided, 19

RESIDUARY BEQUEST,
all personalty not effectually disposed of passes by, 1045
exclusion of part of personalty from, 1047
failure of, partial, effect of, 1056
lapse prevented by, 945
"money," enlarged construction of, where debts, &c., charged thereon excluded by, 1036
operation of, 1041

RESIDUARY DEVISE. *See* GENERAL DEVISE.
lapse prevented by, 451
operation of, 945
resulting trust excluded by, 705, n.
what is a, 949

RESIDUARY LEGATEE.
appointment of person as, passes residuary estate, 83, 1040
real estate held on context to pass to, 1016

RESIDUE.
conversion of. *See* CONVERSION.
exclusion of property from by indicated contrary intention, 1049
by recital, 1048
executor's claim to, as against Crown, evidence admissible to support, 49
general bequest of, effect of, 1041 et seq. *And see* GENERAL PERSONAL ESTATE.
gift of, after providing for illegal object void, when, 467
failure of, as to aliquot part, effect of, 1056
revocation of, by similar gift in codicil, 173
what passes by, of general personalty, 1045 et seq.
all personalty not effectually disposed of, 1047
e.g., accumulations released by statute, 389, 390
excepted items of which particular gift fails, 1047
income, intermediate, though gift contingent, 953, 1046
lapsed legacies, 1047
lapsed portion of residue directed in event to go as other portions, 1058
power of appointment, invalid, 1055
not excepted terms of which no particular gift, 1047
where specific reason for exception, 1048
lapsed portion of residue, though directed in event to fall into residue, 1058
what passed by, of particular fund, 1050 et seq.
ascertained fund, "residue of," explained by context, 1053
subject to unascertained charges, 1055
increase, subsequent, in value of fund, 1052
lapsed portions of the fund, 1054
unascertained fund, "residue" of, comprises every part eventually undisposed of, 1054
value of stock is, until sale, *semb.*, 1055
gifts of, inconsistent, in same will, 1044
informal words held to pass, 1033 et seq. *See* GENERAL PERSONAL ESTATE.
limited, 1049
particular, 1050
subdivision of, 1058
true, 1054
vesting of, favoured, 1421

"RESPECTIVE"—"RESPECTIVELY."
cross-remainders implied from, 662, 668
tenancy in common created by, 1791, 1794

"REST," gift of, realty held to pass by, 1014

RESULTING TRUST,
arises in respect of—
devise for life to A. and after his death with other lands to B., 634 et seq.
devise in trust, where trust fails, 704, 705, 1009
where trust does not exhaust whole interest, 705
disclaimer of gift by devisee, 704
gift to charity, after, 367
lapse of devise in fee, 704
presentation, right of, undisposed of, 704
rent-charge to be applied to purpose which fails, 706
trust for conversion, surplus proceeds of, 707
void, where money well raised, 441, 722
does not arise where—
benefit of devisee is motive of gift, 709 et seq.
affection or relationship, expression of, 710
disability of devisee, 712
heir expressly excluded, 711
sale to certain persons, direction for, 708
"trust," use of word, immaterial in such cases, 709, 711
charitable gift increases subsequently in value, 212, 712, 718
devise is "subject to," not "for" a particular purpose, 709
particular estate lapses or is void, or revoked, 718, 719
trusts of term are omitted, 724
are satisfied, 723
chattel interest resulting devolves to heir's personal representatives, 798
conversion, legacy out of proceeds of, does not exclude, 707
evidence to rebut, admissible, 497
for heir, 704
for next of kin, 714
in default of heir, trustees of will preferred to trustees of outstanding legal estate, 714
residuary devise excludes, 705, n.
See ACCELERATION—CONVERSION—HEIR—NEGATIVE.

REVERSION,
acceleration of, on term of years, 723 et seq. *See* ACCELERATION.
after acquired, passes by specific gift of leaseholds, 408
devise of, in default of issue, 1981
devise of, under old law carried fee, 1805
election, doctrine applies to, 536
raised by devise of entire estate by owner of, 546
separate right of person entitled in, 534
general devise under old law passed, whether, 955
under present law, operation of, 955. *See* GENERAL DEVISE
legacy charged on, when raisable, 1397
remoteness in reference to devise of, 325
tenant for life, rights of, where r. is part of personal residue, 1233
vesting of devises in, after determination of prior subsisting estate, 1358
after general failure of issue, 1359
during suspense of alternative contingencies (under old law), 948
See REMAINDER—VESTING.

Volume I. ends at p. 1040.

REVIVAL,
annexation of codicil to will, not, 195
by codicil expressly reviving, 190, 192
recognizing revoked will, 190
unless will destroyed animo revocandi, 194
by re-executing prior will, 192
refixing of signature not, 193
revocation of subsequent will, not, 193
secus, under old law, 192
conditional, 193
evidence how far admissible to shew intention to revive, 193, 194
intention to revive, 194
intermediate will, 195
part of will revoked by first codicil not affected by confirmation of will by second codicil, 193
See CODICIL—REVOCATION.

REVOCATION,
GENERALLY,
accceleration of remainders by, of particular estate, 718
ambiguous expressions will not revoke clear gift, 186
blanks, alterations to supply, 157
covenant against, whether in restraint of marriage, 28
date from which will speaks with reference to exercise of powers of, 813, 833
declaration that will is irrevocable is inoperative, 28
domicil, change of, does not affect, 9
implication of gift from, 679
implication of, from mis-recital, none, 628
power of, by unattested codicil, testator cannot reserve, 133
general devise will not execute, 835
reserved in deed does not render it testamentary, 35
BY ALTERATION IN CIRCUMSTANCES, 190
BY ALTERATION OF ESTATE,
before 1 *Vict.* c. 26,
acquisition of new estate, 161
alteration of contingent into vested remainder, 161, n.
conveyance for partial purpose, 161, n.
by way of mortgage, 162, n.
partition, 162, n.
equitable interests, 161
mortgagee subsequently purchasing equity of redemption, 67, n.
since 1 *Vict. c.* 26,
by compulsory conversion, 163
contract to sell, 162
decree for sale, 163
effect of conversion by order in lunacy, 163
sale in lunacy, 163
under Act of Parliament, 163
under Lands Clauses Act, &c., 163
under power, 163
unless re-investment in land is required, 163

REVOCATION—*continued.*

BY ALTERATION OF ESTATE—*continued.*

since 1 *Vict. c.* 26—*continued.*

not by acquisition of fee by termor, 164
conveyance, except so far as it is an alienation, 162
surrender of lease, 164
unauthorized sale, though subsequently confirmed, 163, n.
partial alienation, nature and effect of, 165

BY BURNING, TEARING, OR OTHERWISE DESTROYING,

before 1 *Vict. c.* 26..143
cancellation or obliteration sufficient, 143

since 1 *Vict. c.* 26..143
act of destruction must be in presence and by direction of testator, 145
e.g., after death, by testator's direction, ineffectual, 146
contents provable by parol, 153
suspension of, before completion, effect of, 150
alteration by cancelling, &c., now inoperative, 159, 160
unless effacement is complete, 160
signed and attested, 160
glasses used to decipher cancelled words, 160
parol evidence not generally admissible, 160
presumption as to time when made, 156
satisfaction may be shewn by, 161
animus revocandi, evidence admissible as to, 145
destruction by another without authority, 145, 146
by mistake or during insanity, 146, 153
burden of proof, 146, n., 147
by wear and tear, 146
revived will held not revoked by, of reviving codicil, 146
with intention of making fair copy, 147
ineffectual without actual destruction, 149
lost or torn will, presumption as to, 146, 152
attempt to destroy not necessarily revocatory, 149
burning, what, sufficient to revoke will, 150
codicil, whether revoked by destruction of will, 154, 169
conditional revocation, parol evidence, 160
dependent relative revocation, 148, 169
act of destruction dependent on efficacy of new disposition 148
with purpose of substituting new will, 148
of reviving revoked will, 148
destroyed will not duly revoked, contents of, proveable, 145
duplicate wills, effect of destroying one copy, 151
erasure of name of legatee or executor, 145, 160
of signature of testator or witnesses, 144
incomplete destruction 149
interlineations must be signed, 155

Volume I. ends at p. 1040.

REVOCATION—*continued.*

BY BURNING, TEARING, OR OTHERWISE DESTROYING—*continued.*

since 1 *Vict. c.* 26—*continued.*

lost will, contents of, proveable, when, 152, 153
presumption as to destruction animo revocandi, 152
what evidence admissible to rebut or support, 152, 153
obliteration ineffectual to revoke will, 155
but may prove satisfaction, 161
"otherwise destroying," meaning of, 145
partial destruction, effect of, 145, 149
pasting paper over words, 145, 160
revival of former will not affected by, 193
evidence of intention to revive not admissible, 19
by re-execution of revoked will, 192
by subsequent codicil, 192
evidence of extent of, how far admissible, 194, 195
secondary evidence of lost or destroyed will, 153
"tearing" includes cutting, 144
tearing when merely the effect of wear, 146
tearing off of essential part of will sufficient, 144
of particular clause or name of legatee, effect of, 145
of seal (though not necessary to execution), 144
of signatures of testator of witnesses, 144
unauthorized destruction by another person, 145
refusal to make fresh will no ratification of act, 146. n.
where evidence admissible as to, animus revocandi, 145

BY MARRIAGE—

before 1 *Vict. c.* 26..140
will of man not revoked by marriage alone, 141
nor by birth of children alone, 141
revoked by marriage and birth of children, 141
exception where children provided for by the wil
or a previous settlement, 141
of woman revoked by marriage alone, 140
exception as to testamentary appointments, 141

since 1 *Vict. c.* 26..142
every will revoked by marriage alone, 142
evidence of intention not admissible, 142
exception as to testamentary appointments, 143
foreigner, will of, 143
marriage must be legally valid, 142, n.

BY OBLITERATIONS, INTERLINEATIONS, CANCELLATIONS, &c., 155

BY SUBSEQUENT WILL, CODICIL, OR WRITING,

before 1 *Vict. c.* 26,
revoking operation of informal papers, &c., 166

since 1 *Vict. c.* 26,
express, clause of, must indicate present intention to revoke. 168
informal expressions may indicate, 188
intention to revoke by future act inoperative, 168

Volume I. ends at p. 1040.

REVOCATION—*continued.*

BY SUBSEQUENT WILL, CODICIL, OR WRITING—*continued.*

since 1 *Vict. c.* 26—*continued.*

express, context may restrain or render inoperative, 168
declaratory writing must be executed as a will, 167
need not be testamentary, 167, n.
what amounts to declaration of intention to revoke, 168
distinction between revocation of gift, and of so much of will as contains gift, 167
founded on belief of assumed fact, takes effect, 189
on express false assumption fails, 188
general clause of, may be partial in effect, 171
intention to revoke, present or future, 168
mistake, inserted by, 168
new disposition fails, where, 170
recital in codicil will not control, 168, 188
implied by inconsistent will or codicil, 172
ambiguous expressions will not revoke clear gift, 172
appointment, invalid, by codicil, no revocation of valid, by will, 187
as to one estate, does not affect referential devise of another, 183
except where personalty is given as incident to real estate, 184
distinction where first devise modified only, 185
as to one office does not extend to others, 183
charge not revoked by revocation of devise of land charged, 178
combined effect of will and several codicils, cases on, 169, 173
contradictory wills of uncertain date, 174
difference in revoking and revoked will essential, 172
disturbance of will not further than necessary, 177
change of trustee no revocation of trusts, 218
charge not revoked by revocation of devise of lands charged, 178
devise of several estates to same uses revoked as to one, 183
heirlooms, rule as to, 184
general expressions in codicil, how construed, 179
gift in codicil "instead of" gift in will, 179
modification of devise distinguished from revocation, 185
office, revocation as to one, does not extend to others, 183
specific gift in will not revoked by general gift in codicil, 180
gift of residue, general, revoked by similar gift in codicil, 173
particular, not revoked by general gift in codicil, 174
inconsistent dispositions in same will, and in distinct instruments, distinction as to effect of, 173
"last will," description of instrument as, revocatory, whether, 172

Volume I. ends at p. 1040.

REVOCATION—*continued.*

BY SUBSEQUENT WILL, CODICIL, OR WRITING—*continued.*

since 1 *Vict. c.* 26—*continued.*

implied legacies by codicil, additional or substitutional, wheth
1120 et seq.
whether exempt from legacy duty, 1130
payable out of same fund, 1129
subject to same conditions, 1128
as legacies given by the will, ib.
recital will not control clear gift, 168, 188
reconciliation of inconsistent documents, 175
where subsequent document is a "codicil," 175
or leaves property undisposed of, 175
revival by codicil of earlier wills, &c., 192
alterations in revived will held to be validated, 196
intermediate codicil, unless referred to, not revoke
169, 173, 190, 200
mistake as to date of will referred to, 195
ratification of will and specified codicil, effect of, 173
will to be revived must be in existence, 194
will or codicil partially and afterwards wholly revoke
196

BY VOID CONVEYANCES UNDER OLD LAW,

attempt to convey revoked devise, when, 166

"RIGHT HEIRS" MALE, devise to, 1558

ROMAN CATHOLICS,
charitable gifts to, 209
conditions against marriage with, 1526

ROMAN-DUTCH LAW, mutual wills recognized by, 41

RULE IN ARCHER'S CASE, 1849

RULE IN SHELLEY'S CASE, 1858.

RULE IN WILD'S CASE, 1906.

SAILORS,
domicil of, 20
nuncupative wills of, 101–103

SALE,
by underlease, 917
charge of debts authorized, 915
condition directing, at fixed price, to A., annexed to devise in fee, void, 148
conversion as to surplus worked by decree for, 163
by sale under Act, 163
by sale under power, 163
not by merely giving power of, 755

SALE—*continued.*
gift over on death before, effect of, 1494
power of, conversion not effected by mere, 755
devisee of trustee may exercise, whether, 987. *See* TRUSTEE.
powers of perpetuities (rule against), in reference to, 307, 311
power or trust for, duration of, 913
implied from direction to invest, 916
trust estates excluded by, 973
resulting trust rebutted by direction for, to specified person, 708
shares in a company, for, 917
stock, value of, is unascertained until, *semb.*, 1055
See CONVERSION—RENTS AND PROFITS—REVOCATION.

SANITY, not presumed, 51

SATISFACTION,
definition of, 1156
obliterations in will may indicate, 161
of debts by legacies, 1172
of portions by legacies, 1166
presumption of, may be rebutted, 500
republication of will does not revive satisfied legacy, 202

SCANDALOUS PASSAGES, when omitted from probate, 42, n.

SCHEME, charitable legacy, Court will pay, without, when, 245

SCHOOLS,
bequest for purposes of, 212 et seq.
Roman Catholics now on same footing as Protestants, 209
to found, like H., for 100 boys, amount not stated, 458
exception from Mortmain, &c., Acts in favour of certain, 270

SCOTLAND,
administration of assets of testator in, 14
charitable gifts of land, or money to buy land, in, 271
domicil, power of infant to choose, by law of, 24, n.
heir of land in, election when raised against, by English will, 539
exoneration of, from debts out of English personalty, 15
not excluded from personalty under English intestacy, 14
heritable bond, whether passes by English will, 15, n.
inalienable trust for maintenance, 1487
Mortmain Acts in reference to, 271
testamentary power in, 14
Thellusson Act does not extend to, 378
vesting favoured by law of, 1357
wills by persons domiciled in, 14

SCURRILOUS IMPUTATIONS omitted from probate, 42, n.

SEAL,
affixing, not equivalent to signature, by testator, 107
by witness, 115
tearing off, nevertheless, may affect revocation, 144

SECOND COUSINS, meaning of, 1635

SECOND SON, gift to, how construed, 1741. *See* FIRST SON.

SECRET TRUSTS,
enforceable against heir or devisee, 263, 495
for charity, discovery of, may be compelled, 263
for superstitious uses, 221

SECURITIES FOR MONEY,
Bank stock is not, 1304
bills of exchange are, 1304
bonds are, 1304
deposit note is not, 1304
election to take property unconverted implied from change of, 758
"goods and chattels" will not pass, 1084
I. O. U. is not, 1304
judgment is, 1304
legacy due from another's estate is not, 1304
legal estate, whether passes by gift of, 975
life policies are, 1304
promissory note is, 1304
shares are not, 1303
stock in funds is, 1303
vendor's lien, whether passes by gift of, 1303

SECURITY, specific legatee for life, &c., not required to give, 1454

SEISED, meaning of, 950

SELECTION,
implication of absolute interest from power of, 613, 655
gift of part of larger quantity, donee may select, 460
of so much as donee may select, effect of, 461
See COMMON, TENANCY IN—IMPLICATION—UNCERTAINTY.

SEPARATE USE,
created by what words, 1518
enables t. .. to dispose by will, 54
effect of M. W. P. Act, 1882..57
extrinsic circumstances disregarded, 1522
future covertures, whether within trust for, 1518
implication, not created by, 1518
implied from husband's acts, 55, n.
income and corpus, 1518, 1520
intention to exclude husband, 1521
restraint on anticipation not implied by trust for, 1524
remoteness in reference to, 363, 364
"sole," effect of word, 1519
trust estates excluded by trust for, 974
trust for maintenance, 1522
what words will not create, 1522
See ALIENATION—ASSENT—FEME COVERTE.

SEPARATE WILLS, of distinct properties, 37

SERVANTS,
charitable bequests for benefit of, 215
condition against marriage with, 1527
"domestic servants," who are, 1120
gift to, means servants at date of will, 403, 1119
to those in testator's service at his death, dismissal though wrongful excludes, 403, 1120

SETTLE,
direction to, how construed, as to personalty, 692 et seq.
realty, 1871
powers what may be inserted in settlement under, 1882
See EXECUTORY TRUST—STRICT SETTLEMENT.

SETTLED LAND ACTS, condition or gift over preventing exercise of powers, 1491

"SEVERAL," read "respective," 601

SEVERAL SHEETS,
will on, one attestation sufficient, 117
one signature sufficient, 108
presumption as to original order of, 108

SEVERANCE,
of joint tenancy, 66, n., 438
trust estates excluded by words of, 974
vesting, effect of words of, in regard to, 1418

"SHALL," not restricted to future events, 1339

SHARE,
charitable gifts of, in joint-stock companies, 253
date from which will speaks with reference to gifts of, 415
devise of, passed fee (under old law), when, 1806
election raised by devise of whole by owner of, 546
not by owner of one, 762
gift over of, accrued share not included in, 2115. *See* ACCRUED SHARES.
unless on context, 2115
applies to which of several preceding subjects of gift, 1016, n.
in joint stock company, charitable gift of, good, 253
in partnership holding land, charitable gift of, formerly void, 253
now valid, 274
in unlimited company afterwards converted into limited company, gift of, 415
owner of one, cannot elect against scale, 762
uncertainty as to what, donee is to take, avoids gift, 457

SHARES,
calls upon. *See* EXONERATION.
"money" gift of, held to pass, 1301
"securities for money" gift of, will not pass, 1303
stock included in gift of, 1306

SHELLEY'S CASE, RULE IN, 1858
autre vie, estates pur, are within, 1860
contingent remainders are within, 1867
intermediate, not destroyed by, 1884
trust to preserve, interposed, will not exclude, 1865
contrary intention, declarations of, will not exclude, 1865, 1866
but "heirs" may have been used in restricted sense, 1860
copyholds are within, 1860
determinable life estate, 1862
remainders, 1867
distribution, superadded words of, will not exclude, 1890 et seq.
dower and curtesy, effect of rule as to, 1883
equitable interests are within, 1861
estate of freehold in ancestor, what is sufficient, 1862
estates must be both legal or both equitable, ib.
executors, gift to A. for life, remainder to his, 1860
executory trusts, 1870 et seq.
gavelkind lands are within, 1858, n.
implied life estate is within, 1862
remainders are within, 1866
instrument, limitations must be created by the same, 1860
intervening estates, how affected by rule, 1884
legal estate clothed with a trust, 1861
limitation, superadded words of, will not exclude, 1886 et seq.
limitations relating to several persons, 1867
to the heirs what are sufficient, 1865
life estate in ancestor, what is sufficient, 1862 et seq.
rule not excluded by expressions of contrary intention, 1865, 1866
life estates, joint, remainder to heir of both, 1868, 1884
to heirs of one of them, 1869
in common, ib.
nature of rule stated, 1858
is rule of law not of construction, ib.
personalty, analogous rule as to, 1860
powers, instruments creating and exercising, 1861
of charging, &c., effect of giving, 1865, 1878
purchase and conveyance of lands, directions for, 1871
remainder, limitations by way of, are alone within, 1858
remainder to heirs may be by any words, as issue, son, &c., 1866
by implication, ib.
contingent, 1867
must be to heirs of body of devisee of freehold only, 1868
rule not excluded by contrary expressions, 1866
resulting trust, life estate arising by, 1862
separate use of f. c., limitation of life estate to, 1862
settlement of lands, directions for, 1871 et seq.
several persons, effect when limitations relate to, 1867
tail, estate in, after possibility of issue extinct, 1870
directions to entail, 1876 et seq.
disentailing assurances, operation of, 1884
waste, devise of life estate without impeachment of, 1865

Volume I. ends at p. 1040.

SHELLEY'S CASE, RULE IN—*continued.*
See ABSOLUTE INTEREST—ESTATE TAIL—EXECUTORY TRUST—HUSBAND AND WIFE.

SHIFTING CLAUSES, 1430

SIGNATURE,
cutting off, of testator or witnesses revokes will, 144
See REVOCATION OF WILL.

"SMALL BALANCE," gift of, what it passes, 1052

SOLDIERS,
domicil of, 20, 22
nuncupative wills of, 101

SOLICITOR,
direction to employ particular, obligatory, whether, 900
profit costs, 81, 96
will in favour of, how far open to suspicion, 49

SON,
gift to, date from which will speaks, with reference to, 396, 397
testator having several, 518, 522
to eldest, 1741
first, ib.
second, 1742
younger, 1726 et seq. *See* YOUNGER CHILDREN.
when used as a word of limitation, 1920 et seq.

SPAIN, LAW OF,
as to testamentary dispositions, 7, n.

SPECIFIC BEQUEST,
assets for payment of debts, 2027. *See* ASSETS.
date from which will speaks as to, 410, 411. *See* DATE.
construction of gift depends on state of property at that date, 503 et seq.
gift of shares, legatee entitled to be exonerated from calls, when, 2036
of stock, if none, payable out of general personalty, 504
income, intermediate does not pass by contingent or future, 1105
lapsed or void, included in residuary bequest, 1047
legacy, what is, 1068
legatee for life to sign inventory, &c., 1454
practical effect of the rule, 1882
republication, effect of, on, 202
revocation of, none, by general gift in codicil, 180
trust to pay, out of land, payable thereout primarily, 2072
See CONTRIBUTION—EXONERATION—MARSHALLING—LEGACIES.

SPECIFIC DEVISE,
ademption of, 944
after acquired property may pass by, 942
assets for payment of debts, 2027. *See* ASSETS.
conversion of, 944

Volume I. ends at p. 1040.

SPECIFIC DEVISE—*continued.*
date from which will speaks as to, 409. *See* DATE.
construction of gift depends on state of property at that date, 503 et seq.
election raised by, 545
to take land unconverted, implied from, 760
failure of, 943
lasped or void, when excluded from passing by residuary devise, 951
of close W., there being two of that name, 460, 518
freeholds, where none, passes leaseholds, 939
operation of, 939
rents and profits of, 941
republication, effect of, on, 201
what is a, 938

SPECIFIC ENJOYMENT,
tenant for life of, entitled to, when, 1247 et seq.
See CONVERSION.

SPES SUCCESSIONIS, 80

STEP-CHILDREN when included in "children," 1663

STEWARD, direction to employ particular, imperative, whether, 898

STIRPES (PER),
gifts to children, 1711 et seq. *See* CHILDREN.
to descendants of A. and B., who are the "stirpes"?, 1589
to personal representatives (construed next of kin), 1613
mode of distribution, 1588
substitutional gift, legatees under take, or per capita, whether, 1713
See CAPITA (PER)—CHILDREN.

STOCK,
ademption of, 1307
gifts of, date from which will speaks with reference to, 408, 411
of particular, which testator possessed at death, not extended, 506
what passes by, 1303, 1306
excluded by context from gift of "other articles," 1024, n.
in trade, gift of, for life, 1455
is moveable property, 5
live and dead, meaning of, 1310
"money," gift of, held not to pass, 728, 730, 1301
"securities," whether passes by, 1303
"shares," gift of, held to pass, 1306
"standing in my name," 1274
specific bequest of, if none, payable out of general personalty, when, 504
value of, is unascertained until sale, *semb.*, 1055

"STOCK," devise to A. and his, gave to A. the fee (under old law), 1805

STRICT SETTLEMENT,
executory trust requiring, what limitations inserted, 1871 et seq.
powers of management inserted, 904
protector not usually appointed, 1882

Volume I. ends at p. 1040.

STRICT SETTLEMENT—*continued.*
expression of intention to make, does not control direct devise to A. for life, remainder to the heirs of his body, 1905
mode of limiting chattels to go along with freeholds in, 692
of personal property, 692. *See* CHATTELS.

SUBSCRIPTION. *See* EXECUTION OF WILL—SIGNATURE.

SUBSTITUTIONAL GIFT,
alternative gift distinguished from, 1312
children or issue, to, 1328
class of objects of, ascertained, at what time, 1314
concurrent gift to parent and issue or,—which ? 1202
contingency attaching to original gift extends to objects of, whether, 1332
as to original shares, 1333
as to substitutional shares, ib.
See CHILDREN.
created by what words, 1315
created by word "or," 476, 1316
failure of original gift affects, how, 2199. *See* FAILURE.
gift to person *and* his issue, children, heirs, &c., 1319
or his issue, children, heirs, &c. 1315
issue of legatee dead at date of will take, whether, 1336 et seq.
where issue, if *any* legatee die, is to take share parent would have taken, 1338
distinction where words are, "if any of the *said*" legatees die, 1338
issue where original gift is to a class, 1336
to a class living at a stated time "or" (="and") their issue, 1342
distinction where gift is to legatees living at one time, and issue of legatees living at another time, 1342
to legatees and issue of deceased legatees concurrently, 1341
to named persons, 1336
where state of family renders intention probable that issue should take, 1337
lapse, gift to A. or his executors fails by, whether, 425
legatee dead at date of will, 1336
original legatee, substituted legatees must point out, 1336
original or substantive gift distinguished from, 1330
primary and secondary legatees taking concurrently, 1334
primary gift to a class, 1323
per stirpes or per capita, substituted legatees take, whether, 1714
quasi-substitutional gift, 1342
severance, words of, attached to original gift not extended to, 1790
what words will create a, 1315

SUCCESSION DUTY,
wrongly described, 1133

SUCCESSIVELY,
devise to first and other sons and their heirs creates successive estates tail, 1784, 1971
gift to parent and children, how construed, 1913
several, in what order they take, 479, 1744

" SUCCESSORS," gift to A. and his, gave fee (under old law), 1805

" SUCH,"
construction of, prospective or retrospective, 1557, n.
how much of what precedes is imported by word, 1342

" SUCH ISSUE,"
after limitation to class of issue and their heirs refers to class, 1964
to first and other sons and their heirs refers to heirs, 1971

SUPERSTITIOUS USES,
gifts for, void as against public policy, 207
secret trusts for, disclosure of, compellable, 208
what are, 207
See CHARITY.

SUPPLYING WORDS,
alternative event, words supplied to provide for, 584
conjecture or inference not sufficient for, 588, 590
elliptical expression supplied, but not event not contemplated, 584
evidence, extrinsic, of omission, not admissible, 486
intention as collected from context effectuated by, 581 et seq.
event not contemplated, not provided for, 584
object supplied by reference to prior devise, 585
" on marriage " read " at twenty-one or marriage," 582
" respective " or " respectively " supplied, 590
" under twenty-one " supplied, 582
" without issue " read " without leaving issue " to produce uniformity, 582. *See* DIE WITHOUT ISSUE.
supplied after devise in tail, 581
" without leaving a child " supplied after word " dying," 583
limitation to second and other sons " to be begotten " includes eldest son, whether, 586, 587
limitations rendered consistent with context by, 588
e.g., gift to first (and every other) son successively, 588, 1925
trust for every child who being a son, &c. (or who being a daughter, &c.), 589
trust for wife for life (and after her death) in trust for children, 588
limitations used in one devise not extended to other devises, 590
arrangement of clauses numerically, effect of, 594
preserve others, to, 586
qualifying clauses attached to one devise whether extended to other devises, 590–592
as to object of gift, name of legatee not supplied, 592
as to subject of gift, words enlarging, modifying, or diminishing, not supplied, 593
revoked words cannot be restored, 592

Volume I. ends at p. 1040.

SURNAME, gift to person of particular, how construed, 1650

SURRENDER,
of copyholds to use of will,
by joint tenant, when a severance, 68
custom not to, bad, *semb.*, 69, n.
formerly necessary to testamentary disposition, 68
omission of, supplied by, 55 Geo. 3, c. 129..69
unnecessary since 1 Vict. c. 26..70
of lease,
power in trustees to accept, preserves legal estate to them, 1829
See COPYHOLDS—GENERAL DEVISE.

SURVIVOR,
construed to mean "all the survivors," 473
gift to, for life, estate implied to all during joint lives, whether, 641
gift over on death of, after estate for joint lives, life estate implied to survivor, whether, 641
joint will revocable by, 41

SURVIVORS,
GENERALLY,
accruing shares, clauses of accruer whether extend to, 2115
qualifications affecting original shares whether extend to, 2117
See ACCRUED SHARES.
gift invalidated for uncertainty by vague use of word, 473
implication of life interests in, 641

"SURVIVORS," WORD HOW CONSTRUED,
construed "others" only on context, 2100 et seq.
confined to persons in existence, 2101
although associated elsewhere with "others," 2102
gift over combined with collateral event, 2102
not so construed if gift thereby becomes too remote, 2113
construed "others" by force of general gift over, 2105
in gift to several at twenty-one, if any die under age, to survivors, and if all die under age, over. 2104
in gift to several in common for life; if any die childless, to survivors for life, then to their children; if all die childless, over, 2104
secus, if gift to survivors is absolute, 2106
gift over essential to this construction, 2107
except after devise in tail, *qu.*, 2110
sufficient if to last survivor (i.e., longest liver), 2105
residuary gift insufficient, 2106
construed "others" to effectuate intention that children shall take share which parent would have taken, 2112
construed "others" where literal sense is impossible, 2112
where words in another gift refer thereto, 2113
construed "other surviving," 2106, n.

Volume I. ends at p. 1040.

SURVIVORS—*continued.*

TO WHAT PERIOD GIFT TO, FOLLOWING A PREVIOUS ABSOLUTE GIFT, IS TO BE REFERRED,

1. **Where gift is not expressly contingent,**

(*a*) *where gift is immediate,*
to testator's death, 2121
charge of annuities notwithstanding, ib.

(*b*) *where gift is not immediate,*
Formerly to testator's death—
as to classes (*Doe* v. *Prigg*), 2122
except where period of distribution elsewhere referred to, 2123
where subject of gift was produce of future sale, ib.
as to individuals, 2122
Now to period of distribution—
as to personalty (*Cripps* v. *Wolcott*), 2122, 2130
as to realty, 2130
exception where alternative gift to issue of any who die before testator, 2131
where general gift to, explained by special gift, 2139
where "issue" of, is substituted for deceased parents, 2131

2. **Where gift is on express contingency,**

"survivors" means those living when contingency happens—
where gift is immediate, 2133, n.
where gift is not immediate, 2133
whenever contingency happens—
after death of tenant for life, 2133
unless restricted by context to definite period, 2132
before death of tenant for life, i.e. survivor need not be living at his death, 2133
gift to A. and B. and if either die before tenant for life, to the survivor, 2134, 2138
alternative gift, effect of in confirming this construction, 2136
gift to several, and if any die under age to the survivors, 2139
secus, if context points to fixed period, 2137
if original gift contingent on surviving t. for l., ib.
if ultimate gift over is on death of all before t. for l., 2137
"survivors" referred to event personal to legatee rather than to event fixing distribution, 2139
especially where primary gift contingent on personal event, 2140
where ultimate gift over is on death of all, or non-happening of event, ib.

Volume I. ends at p. 1040.

SURVIVORS—*continued.*

TO WHAT PERIOD GIFT TO, FOLLOWING A PREVIOUS ABSOLUTE GIFT, IS TO BE REFERRED—*continued.*

Where gift is on express contingency—*continued.*

"survivors" referred to event personal to legatee—*continued.*

secus, where no gift except to survivors, 2141

where ultimate gift over is on death of all, before period of distribution, 2140

3. **Where prior gift is for life only,**

period of survivorship is indefinite, 2142

especially where final gift over on death of last survivor, 2141

See ACCRUED SHARE—ACCRUER CLAUSES—DEATH—SURVIVORSHIP.

SURVIVORSHIP,

construed with reference to period of, how, 2129, n.

implication of, between annuitants, 643

of legatee, must be proved, 423

tenancy in common not inconsistent with, 2142

limitation to survivor disregarded, ib.

words of severance confined to inheritance, ib.

"with benefit of," accrued shares carried by gift, 2116

referred to death of testator, 2129, n.

SYMBOLS, evidence to explain, 501

TAIL. *See* ESTATE TAIL.

TAXES,

gift clear of, effect of, as exempting from income tax, 1134

from legacy duty, 1131

TEARING,

includes cutting, 144

revocation by, 143 et seq.

See REVOCATION.

TECHNICAL WORDS,

construed strictly. *See* HEIRS OF THE BODY.

evidence to explain, admissible, 501

expression of will, in, may influence construction, 490

revocation may be effected without using, 188

terms of law, 490

"TEMPORAL ESTATE," meaning of, 1000

TEMPORARY WILL treated as last will, 126, 127

TENANCY IN COMMON,

created by what expressions, 1790 et seq.

specific interest must be defined, 459

devise of shares held by, 66

husband and wife regarded as one person, 1785

Volume I. ends at p. 1040.

TENANCY IN COMMON—*continued.*
lapse in reference to, 430, 1799
survivorship not inconsistent with, 1798
trust estates excluded by, 973
See COMMON (TENANTS IN)—ESTATE TAIL.

TENANT, direction to permit occupation by, whether obligatory, 898

TENANT FOR LIFE,
conditions imposed on, enforceable by injunction, 1463
specific enjoyment, rights as to, of, 1245 et seq. *See* CONVERSION.

TENANT IN TAIL,
after possibility of issue extinct, 1870
conditions imposed on, defeasible by barring entail, 1491
quasi, devise by, of estate pur autre vie, 74

"TENEMENTS," meaning of, 1287

TENURE,
misdescription as to, effect of, 1254, 1266, 1298
words of, not diverted from primary sense, 489

TERM OF YEARS,
attendant where no trusts declared, 724
where trusts fail or are satisfied, 723
And see LEASEHOLDS.

TESTAMENTARY,
capacity, 47 et seq.
expenses charged on land, 2059
expenses, what are, 2014
present gift, instrument with words of, generally not, 38
what instruments are, 27 et seq.

TESTATOR, who may be, 47 et seq.

THELLUSSON ACT. *See* ACCUMULATION OF INCOME.

"THEN,"
construed as word of addition merely, 1993, n.
of inference = "in that case," 1649
of time, to what period referable, 1649, 1672
"living," 1672

"THINGS," personal estate passes by, 1023

TIME,
alienation within specified, condition requiring, 562
at which a will operates, 27
at which a will speaks generally, 396 et seq. *See* DATE.
as regards the rule in *Rose* v. *Bartlett*, 962
in *Wild's Case*, 1908
the rule of perpetuity, 298
charitable devises validated by lapse of, 263
for performance of conditions, 1478
"then" to what period referable, 1649
See ACCUMULATION—AGE—DATE—PERIOD.

TITLE,
by possession is devisable, 81
description by reference to, from which property is derived, 1270, 1276
erroneous reference to testator's title, 1271
to immoveable property abroad, disputes concerning, not entertained, 2, n.

TITLE-DEEDS, election to take land unconverted inferred from taking possession of, 760
gift of "house and contents" does not pass, 77, n.

TOMB,
gift to build or repair, amount not stated, 458
charitable, whether, 214, 221

TORTS, damages for, whether can be bequeathed, 76

TRADE,
evidence of custom of, to explain ambiguity, 502
goods belonging to, gift of "furniture" will not pass, 1308
separate, by married woman, 55, n.

TRADER, domicil changed by residence abroad as, 22

TRAITORS,
attainder of, abolished, 61
gifts to, 99
wills by, formerly void, 60
now good, subject to statutory charges, *semb.*, 62

TRANSMISSIBLE,
interest may be, though contingent, 1353
clause in defeazance of, strictly construed, 1369

TRANSPOSITION OF WORDS AND CLAUSES, 595
of names of devisees, 599
of two estates to suit context, 597
of subjects of devise, 597
of words generally to effectuate intention, 456, 595-599
to give sense to senseless clauses, 595

TREATY, wills of English subjects abroad under, 10

TRUST,
definite object, without a, 900
devolution of, 933
discretion may exclude, 866, 873, 876
discretionary, not stating objects, avoids gift for uncertainty, 478, 482
distinguished from condition, 1462
executory, 903
failure of, 936
implication of, from devise of legal estate, 649, 650
improvident person, for, 931
maintenance of bankrupt, &c., 1501, 1503
of legatee, inalienable, void, 562
parol, evidence admissible to prove, 495

Volume I. ends at p. 1040.

TRUST—*continued.*
powers and trusts frequently inserted in wills, 912
advancement, 930
carry on business, to, 920
conversion, for, 918
investment, for, 919
leasing, of, 922
maintenance and education, 923
mortgage, to, 921
sale, for, 913
precatory, created, by words of request, recommendation, &c., 868-
provided object and subject are definite, 871, 87
unless gift is absolute, 873
doctrine of, not to be extended, 876
doubtful expressions which do not create, 872, 876
through uncertainty of object, 871
through uncertainty of subject, 872
"uncertainty of object" and "subject" ex
881
present state of the law, 879
trust failing, donee holds for his own benefit, 880
purpose or motive of gift, if for donee alone, donee holds absolutely
unless the gift is conditional, 883
if for others besides donee, three constructions—
1. Complete trust, as, legacy to A. for the benefit of him
his children, 891
2. Discretion, subject to control of Court, as, gift of inc
parent for maintenance of children, 892
3. No trust, as, gift to A., to enable him, or that he may,
his children, 895
resulting, where trust fails, 866. *See* RESULTING TRUST.
revocation of, change of trustee does not affect, 182
secret, enforced when legal, 910
for charity. *See* CHARITY.
for superstitious uses, 208
technical words not required to create, 867
uncertainty in, 865
undisclosed, 907
word "trust" not conclusive to prove trust, 867
not necessary to create trust, 867
words, what, sufficient to create trust, 865 et seq.
direction to employ person as agent, &c., 898
to invest, trust for sale implied from, 625, 679
to permit tenants to remain in occupation, 898
to sell to a certain person, 7[illegible]
trust or charge? distinction between gift for and gift subject
particular purpose, 709
trust repelled, how far, by describing donee by relationship, 7
by donee being infant or f. c., 712
by expressions of kindness towards d
871
See EXECUTORY TRUST—HEIR—RESULTING TRUST.

Volume I. ends at p. 1040.

TRUST ESTATES,
devise of, of copyholds, 985
devolution of, 65, n.
general devise, whether passes, 971
See MORTGAGEE—TRUSTEE.

TRUST PAROL,
enforced against devisee or heir, 263, 495
next of kin, 496
evidence, extrinsic, admissible to prove, 263, 495

TRUSTEES,

GENERALLY,

actions against, conditions prohibiting, 1548
annuity, duration of gift of, to, 1832
appointment of, 864
attesting witness, 96
change of, no revocation of trusts, 182
gift to, of charity, whether charitable, 223
judicial trustee, 864
legacy to, as mark of respect, not annexed to office, 182
legacy to, for trouble, a reasonable sum, 457
mortgagees are, for their mortgagors, 966
performance of trust, by devisee of, 987
public trustee, 865
vendors under contract of sale are, 979

DEVISES BY,

formerly usually inserted in wills, 989
devisees capable of executing trust for sale given by trustees, their heirs and assigns, ib.
incapable of executing discretionary trusts given to trustees and their heirs, ib.
now unnecessary and ineffectual, 989
except as to copyholds, 989
See MORTGAGEES AND TRUSTEES.

DEVISES TO,

1. **Legal estate vests in them by—**

appointment of trustees "as also their heirs and assigns," 1830
of trustees "of inheritance," ib.
of trustees "so far as necessary to perform the trusts," ib.
of trustees "to see justice done," 1831
devise to them in fee charged with debts with direction to trustees to pay them, 1823
in fee with power to lease for indefinite term, 1826
but for definite term, *qu.*, 1829
to receive surrenders of leases, ib.
devise to them in trust for A., with direction to apply rents for maintenance, 1817
to convey in one event, 1821

Volume I. ends at p. 1040.

TRUSTEES—*continued.*

DEVISES TO—*continued.*

Legal estate vests in them by—*continued.*

devise to them in trust for A. with direction to pay taxes and repa
1817
to permit A. to rece
net profits, 1820
to permit f. c. to rece
rents for separate u
1819
to permit widow to
ceive rents "with a
probation of trustee
ib.
to sell or convey, 18
et seq.
to support continge
remainders and p
mit A. to receive rent
1818

devise to them in trust to raise money for debts—
where devise is in case personalty deficient, if in pa
deficient, 1823
where trust is only in case personalty deficient, ib.
deficiency or otherwise of personalty immaterial, 1823
devise to use of them in trust for A., 1813
direction to executors to pay sums out of estate, 1830

2. Legal estate does not vest in them by—

devise to them in trust for A., subject to debts and legacies, 1822
for A., with power to lease for 21 years, *semb.*,
1828
in trust to pay to, or permit A. to receive rents, 1818
to permit A. (not being f. c.) to receive rents,
1819
to raise money for debts, where devise itself
is only in case personalty deficient, if in
fact no deficiency, 1823
to transfer to A., 1821
devise to them to use of, or in trust for A., where they have no duty
to perform, 1813, 1818
except in case of appointment of use, 1836
in case of copyholds or leaseholds,
1836 et seq.
to uses in strict settlement with power to convey in
exchange or partition, 1821

3. Quantity of estate taken by trustees—

under old law,

contingent remainders, effect of creation of, 1840
equitable interest devised to them, in trust, effect of, 1838

Volume I. ends at p. 1040.

TRUSTEES—*continued.*
DEVISES TO—*continued.*
Quantity of estate taken by trustees—*continued.*
under old law—continued.
estate measured by requirements of trust, 1836
fee passed to them, when, 1840
limited interest only passed to them, when, 1839
under Wills Act,
they take estate pur autre vie, 1842, *or*
they take fee simple, 1842
by trust to apply rents during minority and to convey, 1844
by trust for separate use of f. c., with power to lease for limited term, 1844, *or*
undefined chattel interest, never, 1842

TRUSTEES, BARE, who are, 983

TRUSTEES TO PRESERVE CONTINGENT REMAINDERS,
heir takes by descent notwithstanding limitations to, 1865
See REMAINDER.

ULTERIOR ESTATES. *See* ACCELERATION.

ULTERIOR GIFT.
after remote limitation, void, 350
unless upon alternative contingency, 354

UNASCERTAINED PERSONS, gifts to, 99

UNATTESTED CODICIL,
not part of the will generally, 130
validated by subsequent attested codicil, when, 131

UNBORN CHILDREN,
en ventre at date of will, effect of gifts to, 397
considered as born or living, but only for their benefit, 1703, 1764
implication of gift to existing children from gift to, 677
life interest to, gift of, valid, 348

UNBORN PERSONS,
gifts of life interests to, good, 348
to children of, void, 348
when cy-près doctrine applies to, 291
See CHILDREN—CLASS—PERPETUITY—POSTHUMOUS CHILDREN.

UNCERTAINTY,
GENERALLY,
definite subject and object requisite to validity of gifts, 454
general devise not restrained by ambiguous expressions, 957
heir or next of kin not to be ousted on conjecture, 453
indulgent construction of wills, 453
stricter rules in early cases not to be relied on, 454
transposition of words to clear up, 456

Volume I. ends at p. 1040.

UNCERTAINTY—*continued.*

AS TO OBJECT OF GIFT,

"aforesaid," rejection of word, when no objects previously named
alternative gifts, e.g., to A. *or* B., 475, 477
ascertainment of donee made dependent on future act of testator
511
blanks left for names, 470
charitable gifts not within rules as to, 470, 474, 480. *See* CHARI
CY-PRÈS.
class, gift to, except person not named, 472
description failing to distinguish among several, 470
gift to "family" may be void for, 471, 1582, 1587
to heir *or* next of kin of personalty, "or" construed, viz., 476
to one of a class, void, 470
unless saved by context, 471
to poorest of testator's kindred, specified number of, 470
latent ambiguity, 471
mistake in number of class, 472
"or" construction of, 476, 477
parol evidence, 471, 480
power of disposition, void for, 474
successive gifts to several, not saying in what order, 479
"survivor" construed all the survivors, 473
"survivors," vague use of word, 473
uses of other estates, reference to, there being more than one, 478

AS TO SUBJECT OF GIFT,

gift of "all" held not to pass land, 455
of amount variously stated, 459
of any part, donee may take all, 462
of blank pounds, 457
of "bulk" of property, 463
of certain sum "or thereabouts" raisable by accumulating incon
457
valid, though to embrace further uncertain su
464
of "close W.," there being two, void, 460, 518
of definite part of larger quantity, donee may select, 460
of indefinite part or sum, void, 457
unless for a measureable purpose, e.g.—
to build or repair tomb, 458
to executors for their trouble, 457
to found school like H. for 100 boys, 458
to maintain infant or adult, 457
to repair church, 458
of maximum sum, 458
of residue of fund after providing for illegal object, void, 467
unless cost is ascertainable, 468
void gift, when falls into the residue, 468
of share equal to property of man whom legatee shall marry, 45
of shares to be determined by person not named, 459
of such part or articles as donee may select, effect of, 460

Volume I. ends at p. 1040.

UNCERTAINTY—*continued.*

AS TO SUBJECT OF GIFT—*continued.*

gift over of what legatee shall not dispose of, void, 463
unless legatee takes life interest only, 463
preceded by power of appointment, 464
of what shall remain or be left, 462
to A. "after legacies, &c., are paid," held to pass residue, 456
to "all my grandchildren," not specifying what property, void, 455
tenancy in common not created, unless specific interest is stated, 459

IN DESCRIPTION OF SUBJECT OR OBJECT,

all particulars need not be correct, 1254, 1256
corporations, misnomer of, 1256
improbability of gift does not override correct name and description, 1263
individuals, misnomer of, 1259
correct name overrides description generally, 1257
unless contrary intention is irresistibly to be inferred, 1259
distinction where more than one claimant, 1261
cases where description prevailed, 1262
where name prevailed, 1262
name and description evenly balanced, 1265
none given, except as part of description, 1264
position of, in will, may prevent uncertainty, 475
locality, mistake as to, 1254, 1267
reference to, must be definite as to limits, 1265
tenure of lands, mistake as to, 1254, 1266, 1298. *And see* DESCRIPTION.

OF INTERESTS CREATED,

discretion, absolute, as to application of gift, 478, 482
trust created but object uncertain, 481
by purpose or motive of gift, 882 et seq. *See* TRUST.
precatory, by what words, 463, 482, 868. *See* TRUST.

TRUSTS AND POWERS, 481
See HEIR—RESULTING TRUST—TRUST.

UNDER-VALUE, condition that devised estate shall be offered at, 1488

UNDISPOSED INTEREST,
destination of, 764 et seq.
operation of residuary bequest on, 769
of residuary devise on, 777 et seq.
See CONVERSION.

UNDUE INFLUENCE,
particular gifts obtained by, void, 50
will obtained by, void, 31, 50

UNFINISHED PAPERS,
testamentary operation of, 126

UNITARIAN,
chapel, bequest to, good, 209
"protestant dissenter" includes, 209, n.

UNIVERSITIES, exception from Mortmain, &c., Acts in favour of, 88, 270

UNMARRIED,
"and without issue," 614
subsequent marriage of donee once entitled as, gift not divested by, 620
"without being married and having children," 915

"UNSETTLED LANDS,"
devise of, includes unsettled interest in settled land, 956

USE. *See* LEGAL ESTATE—TRUSTEES.

"USE AND OCCUPATION,"
condition prohibiting, annexed to devise of fee, void, 1466
construed according to context, 618
as not being married at the time, 618
not having been married, 619
devise of, gives life estate, 1808
devise of, what passes by, 1298
See OCCUPATION.

USER OF PROPERTY,
provisions as to, void for repugnancy, 563

USES, STATUTE OF, devise to A. to use of B. operates under, whether, 181

VALIDITY, what necessary to, of will. *See* EXECUTION.

VENDOR,
after contract, is trustee for purchaser, 979
legal estate passed formerly by devise of trust estates, 978
passes now to personal representatives, 984
lien of, gift of "securities" passes, whether, 1303

VENTRE SA MÈRE.
children, deemed living if for its benefit, 1703, 1764
See CHILDREN—ILLEGITIMATE CHILDREN—POSTHUMOUS CHILDREN.

"VEST,"
construed, primâ facie, vest in interest, 2182
effect of declaration that devise of bequest shall "vest" at a particular time, 1354, 1379
means "shall become payable" or "indefeasible," when, 1355
gift over before legacy vests, means before testator's death, 2182
although legacy be in remainder, *semb.*, ib.
unless referred by context to time of possession, 2182

VESTING,
GENERALLY,
ambiguous expressions will not prevent, 573, 574
"and" read "or," in favour of, 613
contingency, expressions of seeming, effect of, 1371 et seq.
futurity, words of, whether postpone, 1357 et seq.
perpetuities, rule against, in reference to, 296 et seq. *See* PERPETUITIES.
remainders and reversions, 1358
widowhood, devise during, with gift over on marriage, 1361 et seq.

Volume I. ends at p. 1040.

VESTING—*continued.*

AS TO BEQUESTS OF PERSONALTY,

Legacies charged on land,

gift over in one event, favours, in other events, 1395
land, rules as to, generally extend to, 1393
leaseholds are not land for this purpose, 1393, 1394
proceeds of sale of, are not land for this purpose, 1394
payment at future time, direction for, suspends, 1394
gift of intermediate interest notwithstanding, ib.
unless contrary intention appears, 1394
no time fixed for, effect where, 1396
postponement of, for convenience of estate, 1394
by charge on reversion, 1397
none, by direction to pay within certain time, 1397
reversions, charges on, 1397
time, future, annexed to gift itself, suspends, 1394

Legacies payable out of personalty,

at testator's death, where legacy given simpliciter, 1397
converted realty is within rules as to, 1397, n.
leaseholds, are within rules as to, ib.
postponement of payment, distribution, &c., effect of, 1399 et seq.
direction to pay, &c. (superadded to gift), at future time does not suspend, 1400
immaterial whether direction precedes or follows gift, 1401
unless contrary intention appears by context, 1401
words superadded, of distribution, effect of, 1400
direction to pay in event which may never happen, as marriage, suspends, 1402
gift, or direction to pay, &c. (without gift), at future time is contingent, 1402
exception where postponement is for convenience of fund, 1404
notwithstanding gift over, 1405
new words of gift, ib.
subsequent erroneous reference, ib.
severance of legacy from general estate favours, 1418
time annexed to gift itself or to payment, distinction as to, 1399
time of, express direction as to, ousts implication, 1354
"vested" means "indefeasible," when, 1355
uncertain event, legacy in, is contingent, 1402

Gift of intermediate interest,

vesting favoured by, 1406
vests legacy given in futuro, 1405
legacy payable in event which may never happen, 1406
rule applies where—
interest directed to be applied for maintenance, 1408
until specified age, 1409
immaterial whether gift of interest precedes or follows gift of principal, 1408

Volume I. ends at p. 1040.

VESTING—*continued.*

AS TO BEQUESTS OF PERSONALTY—*continued.*

Gift of intermediate interest—*continued.*

rule applies where—*continued.*
legatees are a class, when, 1409
trust is to apply for maintenance all or so much as truste
shall think fit, 1410
secus, if surplus is to be accumulated and blended wi
principal, 1412
rule does not apply where—
allowance out of interest is given, 1408
annual sum equal to interest is given, 1409
contrary intention is declared, 1416
interest is given during part of interval, 1416
interest, gift of, as well as of principal, is postponed, 1417
but clearly vested legacy not divested, 1417
gift of intermediate interest to another person vests legacy, 1418

Residuary bequests, 1420

actual and possible events to be regarded, 1421
age, specified attainment of, made part of description of donee
whether, 1424
gift at, where maintenance given, with gift over on death
under that age, 1427
gift to objects "if" or "when" they shall attain, 1425
to such of class as shall attain, 1424
gift over favours, 1426
on event different from that mentioned in primary
gift, 1431
expressions of intention, ambiguous, vesting of clear gift not
postponed by, 1422
clear, may postpone vesting of equivocal
gift, 1423
contingency imported into gift to class
by, to suspend vesting, if only one
object, 1423
contingency imported into gift to the
one object by conditional gift to class,
1423
immediate vesting of gifts by similar, 1424
realty and personalty included in same gift, rule as to, 1429, n.

Transmissibility of contingent gifts,

contingent interest devolves on donee's representatives, when,
1353 et seq.
legacy to A. in event which happens after A.'s death,
1354
to class when youngest attains 21 years, ib.

AS TO DEVISES OF REALTY,

age, specified, gift to A., "if" or "when" he attains simpliciter, 1371
with gift over, 1376

Volume I. ends at p. 1040.

VESTING—*continued.*

AS TO DEVISES OF REALTY—*continued.*

age, specified, gift to A. until B. attains and "if" or "when" B. attains or "from and after" his attaining to B., 1372
to A. when he attains, and performs condition precedent, and, if he die before attaining, over, 1380
to A. with express direction as to vesting, 1379
to children "who attain," or "on attaining," 1382
to class "if" or "when" they attain, 1376
bankruptcy, gift to A. till, and if he becomes bankrupt, to B., 1364
contingency, apparent, words of, do not suspend, 1371 et seq.
clearly expressed suspends, 1385
absurd consequences notwithstanding, 1385 et seq.
mistake as to extent of disposing power notwithstanding, 1386
unless express intention defeated, 1386
not confined to particular estate generally, 1391
unless following limitations are not consecutive, 1392
owing to intention expressed as to particular estate, 1391
paragraphs or words "item," &c., disconnect the limitations, 1393
death, gifts to A. for life and after his, to B., vest instanter, 1352
and in case of his, without issue, to B., 1353
debts, gift to A., after payment of, 1384
declarations excluding, or postponing, 1379
event essential to determination of prior estate, gift on, is vested, 1373, 1375
not essential to determination of prior estate, gift on, is contingent, 1375
executory trusts, 1377
future period of, declaration fixing, 1379
futurity, words of, do not suspend, 1357
immediate, at death of testator or birth of donee, when, 1357
liable to be divested when, 1376
subject only to preceding estates, when, 1359
name, gift over on refusal of donee to assume, 1361
remainders and reversions, 1358
surviving, determination of particular estate, gifts depending on, 1377
gift over, how far material to construction, 1380
unborn son of A., gift to for life or in tail, and for want of such son to B., 1360
widow, gift to, for life, and if she marries, to A., 1361 et seq.
express provision for her on marriage, effect of, 1363
(or spinster) gift to, until she marries, and if she marries, to A., 1361–1364

VICAR AND CHURCHWARDENS, gift to, 224

"VILL,"
devise of land in X., where X. is name common to, and to one of several hamlets therein, 1281

VOID,
gift of real estate, residuary gift includes, 952
secus, under old law, 946
out of proceeds of conversion, destination of, 777 et seq.
effect of s. 25 of Wills Act, 786
part of will may be, and part not, 50
See ACCELERATION—LAPSE—UNCERTAINTY.

WAIVER of conditions by testator, 1527, 1535

WASTING INTERESTS,
conversion of, rules as to, 1242
enjoyment in specie, tenant for life entitled to, whether, 1245
See CONVERSION.

"WHEN,"
gift to children "*who* attain 21" and "*when* they attain 21" distinguished, 1382, 1424
gift "when" event happens is contingent, 1372, 1405

WIDOW,
domicil of, how far regulates that of infant children, 23
condition restraining second marriage of, lawful, 1286
dower and freebench barred by devise, 71, 551
election in respect of dower, 547
in respect of share of personalty, 550
gift during widowhood, 1286
gift over on marriage of married woman, 1286
gift over on marriage of, takes effect at her death, 1361
gift to "heirs" (construed statutory next of kin) entitles, to share, 1570, n.
See FEME COVERTE—DOWER—FREEBENCH—ELECTION—HUSBAND AND WIFE—WIFE.

WIDOWER, condition restraining second marriage of, lawful, 1541

WIDOWHOOD,
gift of annuity during, good, 1526, 1541
gift over after devise during, how construed, 1361
See VESTING.

WIFE,
domicil of husband determined by residence of, how far, 19
gift to, refers to wife at date of will, 398, 400
if none, then to wife at testator's death, 398
if none, then to person first afterwards answering description, 398
including in gift to "heirs" (construed statutory next of kin), 1570, n.
to "personal representatives" (so construed), 1612
to persons entitled under Stat. Dist., 1606
not in gift to "family," 1585
to "relations," 1633

WIFE—*continued.*
husband entitled to undisposed property of, 46, n.
transfer of property into joint names of self and, 66, n.
legacy to testator's wife, 1117
misdescription of legatee as, not fatal to gift, 397, 400
witness to will, gift to wife of, void, 93
See FEME COVERTE—HUSBAND AND WIFE—SEPARATE USE—WIDOW.

WILD'S CASE, RULE IN,
nature and effect of, stated, 1906
contrary intention will exclude, 1910
personal estate, bequests of, not within, 1914
See CHILDREN.

WILL,
condition not to dispute, valid, whether, 1548
contingent. *See* CONTINGENT WILL.
forged, 46
forms of. *See* FORM OF WILL.
governed by lex domicilii as to personalty, 4 et seq.
by lex loci as to realty, 1–4
inoperative till testator's death, 27, 33
mutual, 29, 30
original may be referred to for purposes of construction, 44
part of will void, 50
reference to will generally includes codicils, 26, 129, 198
unless excluded by context, 129
to "will" or "codicil" applies to unexecuted papers, when, 131, 132
to "will dated," &c., does not include codicils, 129
requires probate, 42, 44
sham, 31
what may be disposed of by. *See* DEVISABLE.
what papers constitute, 26 et seq.
who may make, 47 et seq. *See* DISABILITY.
writing, must be in, 105

WINES, gift of, for life, 1456

WISH, trust when created by words expressing, 869

"WITHOUT ISSUE," words, read "without leaving issue," 582

WITNESSES TO WILLS,
acceleration of remainders where life interest given to, 95
acknowledgment by, not sufficient, 115
creditors may be, 93
evidence to show that legatee did not sign as witness, 94
executors may be, 93
gift to attesting, void, 92
or to husband or wife of, 93
upon trust, good, 96
supernumerary, 94
to person attesting marksman's attestation, 95.

Volume I. ends at p. 1040.

WITNESSES TO WILLS—*continued.*
gift to solicitor-trustee empowered to make professional charges, 96
to trustee on parol, trust for, void, 96
incompetency of attesting, whether avoids will, 93
marriage of legatee or devisee to, 95
may take as executor or trustee, 96
may take beneficially under codicil and vice versa, 94
may take beneficially under will republished with other witnesses, 94
selection of witnesses, 124
testator must sign in presence of, 114
See CREDIBILITY—EXECUTION OF WILL—PRESENCE—SIGNATURE.

WORDS,
"adjoining thereto," what included by, 1296
"advise," trust created by, whether, 870
"aforesaid," rejected where no objects previously named, 472
"alienation," 1506, 1508
"after death," 1472
"all," read "any," 599, n.
"all for mother," 174, n.
"also," assimilating force of, 593, 1790
"and" read "or," when, 613 et seq.
"appertaining," what passes by, 1295
"appurtenances," what passed by, 1293
"articles," 1024, n.
"as aforesaid," 689
"as before," 692, n.
"as to," disjunctive force of, 1393, n.
"at death," effect of on "die without issue," 1969
"at, in, or near," 1280, 1284
"at or within," 1282
"belonging thereto," what passes by, 1295
"benevolent purposes," not charitable, 222
"bequeath," realty included by, 1009, n.
"born" or "begotten," 504, 1701, 1753
"bulk" of property, gift of, void, 463
"by present or any future husband," gift to children, 1698
"capable of taking effect," 686
"cash," 1302
"chattels," 1022
"child," word of limitation, when. *See* CHILD.
"children," word of limitation, when. *See* CHILDREN.
"clear sum," 859
"codicil," 26
"confiding" creates trust, 870
"containing" read "inclusive of," 176
"copyhold" not extended to freeholds by parol evidence, 489
"cottage," 1293
"cousins," 1635
"dead stock," 1310
"debenture," 1306
"debts," gift of, 1302

Volume I ends at p. 1040.

WORDS—*continued.*
"deductions," gift clear of, 1131, 1132
"descend," 1588
"descendants," 822 et seq. *See* DESCENDANTS.
"descendible," 80, n.
"devise," 1009
"devolve," 1714, 1715
"die in lifetime of A. and B.," 620, n.
"die without children." *See* CHILD—CHILDREN.
"die without heirs of the body." *See* DIE WITHOUT ISSUE.
"die without issue." *See* DIE WITHOUT ISSUE.
"disposal," trust rebutted by, 481
"effects," 1018-1022. *See* EFFECTS.
"enfans" (Fr.), 1656
"entitled," 683, 1440, 1731, 2183
"entitled in possession," 697, 1449, 2182
"erase," 194
"estate," 990 et seq.
"et cetera," 1015, 1030
"family," 471, n., 822, 1582, 1805, n.
"farm," 1296
"farming stock," 1311
"first," or "in the first place," 1993
"for ever," not inconsistent with estate tail, 1846
"fortune," 1014, 1924
"for want of," objects of prior gift, 1359
"friends," 1654
"from and after" a given day, 1472
"funds," 1305
"furniture," 1307, 1309
"future" read "former," 600, n.
"goods," 1022 et seq.
"goodwill and plant," 1311
"ground rent," 1297
"he paying" debt, gift to A., 2041, 2056
"heirs lawfully begotten," 1847
"heirs male," 1559, n., 1846
"heirs of body" meaning "sons," "children," &c., 1899 et seq.
"hereafter to be born," 1698
"hereditaments," 738, 1287
"herein," "hereinafter," codicil whether included, 1129
"house," 1266, 1269, 1292. *And see* HOUSE.
"household furniture," or "household goods," 1307 et seq.
"I make A. my heir," 82, 455, n.
"in case of death." *See* DEATH.
"inherit," 1927
"inheritance," devise of, 1805
"in like manner" or "in manner aforesaid," 687, 688, 692, n., 1928
"insolvency," 1709
"item," disjunctive force of, 1393
"joint lives," 642
"land" includes house thereon, 1287

WORDS—*continued.*
"lands not before devised," 956
"lands not settled," 956
"last will," 172
"lawful heirs," 1847
"lawfully begotten," ib.
"left," gift of what shall be, 462, 465
"legacy," may include realty on context, 82, n., 1015
"legal representatives," 1612
"likewise," 1393
"line," male or female, 1610
"lineal" descendants, &c., 1262, 1288
"live and dead stock," 1310
"living" at a given time, 1701–1703
"living" (Eccl.), 1298
"male issue," 1557
"married," 1286
"messuage," 1290, 1292
"minority," 1410
"money," 1300 et seq.
"money on mortgage," 976
"moveables," 1300
"mortgage," 970, 975
"near relations," 1632
"nearest family," 1584
"nearest relations," 1632
"nephews" and "nieces," 1635
"next heir," 1567
"next heir male," 1563
"next legal representatives," 1615
"next of kin." *See* NEXT OF KIN.
"not hereinbefore disposed of," 956, 2063
"now," 418
"now born," 504, 1702
"now seised" or "now possessed," 417
"occupation" (use and), 1298
"offspring," 1588, n., 1590, r
"one of my sons," a void gif. for uncertainty, 470
"or" construed "and," 476, 601, 609. *And see* CHANGING WORDS
construed "namely," 477
"or thereabouts" added to gift of certain sum. 458
"other effects," ejusdem generis, when, 1027
"other real estate," 963
"other sons," gift to second and, 1743
"overplus of my estate," 1003
"payable." *See* PAYABLE.
"pecuniary legacies," includes annuities, 2003
"personal representatives," 1612
"plant and goodwill," 1311
"poor relations," 220, 1034
"portion," to pass testator's interest in whole, 1299
"possessed of," 2184

Volume I. ends at p. 1040.

WORDS—*continued.*
"possession," 697
"premises," 1289
"primary fund" for payment of debts, 2070
"property" passes realty, 997 et seq.
"public funds," 1283, 1305
"ready money," 1302
"real effects," 994, 1805
"received," 2184 et seq.
"relations," 823
"remain," gift of what shall, 462
"rents" or "rents and profits," 1297
"representatives," 1612
"residence," 1546
"residue." *See* RESIDUE.
"respective," 662, 1791, 1794
"rest," the, 1014
"right heirs male," 1558
"right heirs of my name and posterity," 1559
"said," 474, 1033, n.
"second cousins," 1635
"securities for money," 1303
"several" read "respective," 601
"shall," not restricted to future events, 1339
"shares," includes stock, 1306
"small balance," 1052
"stock" devise to A. and his, gives fee to A., 1805
"subject to" charge, devise of land, 711
"such," 690, 1342, 1557
"such issue," 691, 1964
"survivors," 473. *See* SURVIVORS.
"temporal estate," 1000
"tenements," 1287
"then," 1649
"thereunto adjoining," 1296
"thereunto belonging," 492, 1295
"things," 1023
"to be born" or "begotten," 1694
"unmarried," 618, 619, 1285
"unsettled lands," 956
"use and occupation," 1298
"vest," 2182
"whatever else I may be possessed of," 1028
"when" referred to determination of prior estate, 1372, 1405. *See* VESTING.
"widow," 1286
"will," 26, 129
"without issue" read "without leaving issue," 582
"worldly goods," 1019
"younger branches," of a family, 1587
"youngest child," 1730

WORLDLY GOODS, meaning of, 1019

Volume I. ends at p. 1040.

WRITING,
printing included in expression in all Acts of Parliament, 106
revocatory, married woman competent to make, 57
must be executed as will, 107
will must be in, 105

"YOUNGER BRANCHES" of a family, meaning of, 1587

YOUNGER CHILDREN, 1726

GIFTS TO HOW CONSTRUED, 1726

in dispositions by parents—

means children not taking the settled estate, 1727
eldest daughter may take under gift to, 1727
eldest son, unprovided for, may take portion, 1727
secus, if, on disentail, he retains estate in substan
1728
though estate insufficient to meet portions,
secus, if will itself makes no reference to provision
him, 1729
younger child, provided for, excluded from portions, 1727
unless he takes under a new title, 1728
unless portions are raisable for children generally, ib.
rule applies to devises of real estate, 1728
yields to contrary intention indicated by the will, 1729
in dispositions by strangers, strictly construed, unless contrary inte
tion appears, 1730

PERIOD FOR ASCERTAINING CLASS, 1731

generally—

except the eldest son, gift to, how construed, 1736–1741
future executory gift transmissible, how, 1734 et seq.
immediate gift vests in those living at testator's death, 1731
remainder vests in those living at testator's death and coming i
esse during the particular estate, ib.
though defeasible by contingent gift over, 1739

in parental provisions—

at the time when portion is payable, 1732
gift over in one event does not exclude the rule, 1734

"YOUNGEST CHILD,"
absolute youngest meant in gift to children when youngest attains age,
1683
exception of, from gift to children means youngest at period of distribution,
1738, n.
only child is within gift to, 1730

Volume I. ends at p. 1040.

THE END.

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6

1727
e in substance,

t portions, ib.
o provision for

tions, 1727

enerally, ib.

l, 1729
ontrary inten-

741

, 1731
nd coming in

34

attains age,

distribution,