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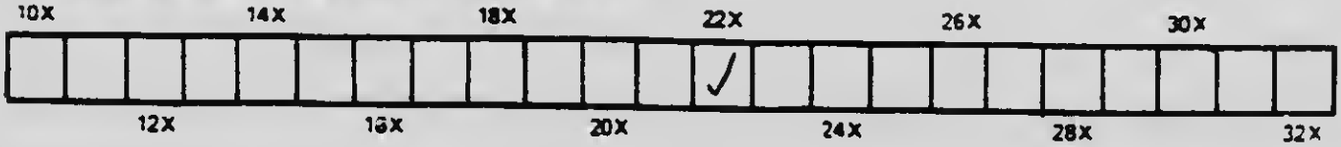

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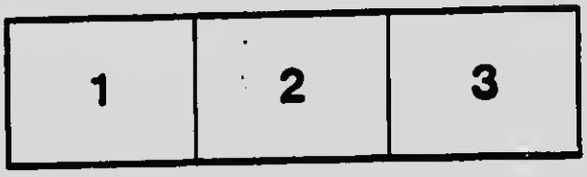

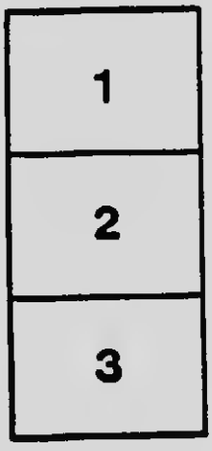

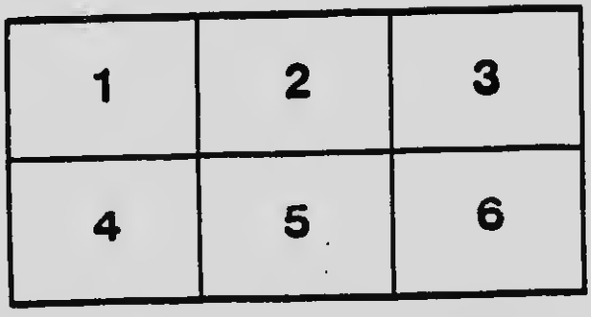

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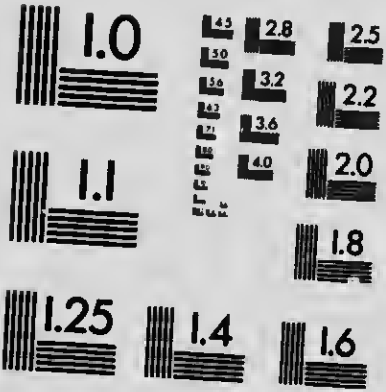

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THE LAW RELATING TO

WILLS

ADAPTED TO THE PROVINCES OF THE

DOMINION OF CANADA

BEING

JARMAN'S TREATISE ON WILLS

(SIXTH EDITION)

CONDENSED WITH CANADIAN CASES ADDED

BY

R. E. KINGSFORD, M.A., LL.B.

TORONTO:
THE CARSWELL COMPANY, LIMITED
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PREFACE

In his Preface to the First Edition of his work on Wills, dated December, 1843—seventy years ago—Mr. Jarman referred to his first effort published sixteen years before, as follows: "Six-"teen years have now elapsed since the writer diffidently presented "to the profession his first publication on Testamentary Law in "the form of an edition of Powell on Devises, with a supplementary "treatise on the Construction of Devises. The reception given to "this work was such as abundantly to compensate for the severe "labour which it exacted, and under which the health of its "Editor more than once sank." The Second Edition was issued in 1855, by Messrs. Wolstenholme & Vincent, who were responsible for further editions, until the Fifth, issued 1893, by L. G. G. Robbins, Esq. The Sixth Edition issued in 1910, is the work of Charles Sweet, Esq., assisted by Charles Percy Sanger, Esq. Thus in sixty-six years there were six editions required.

The Second Edition was not issued by Mr. Jarman himself, and the rather pathetic reference, above quoted, to his enfeebled health, caused by his labour on this treatise, seems to shew that the strain had been too great for the author. I have not been able to find out anything of his personal history. His name is not in the Dictionary of National Biography, and while his work has endured, the author himself has been lost sight of. He is another of England's Forgotten Worthies. No person can study his work without being impressed, by not only its learning, but also its style. It has deserved the place it has secured.

In this Canadian Edition, as far as possible Mr. Jarman's Text is used. References are given at the foot of each paragraph to the First Edition, and also to the Fifth and Sixth Editions. Canadian cases, with suitable headings in black type, are collected at the end of each chapter in considerable detail. This course was necessary, because in considering questions on Wills, so much depends on the wording of the document, for purposes of comparison

with other Wills on which judicial construction has been placed. At the best, it is difficult to draw any line, but the cases chosen will, I think, be found to cover a fair part of the ground.

A table gives the sections of the various Provincial Wills Acts corresponding to the sections of the Imperial Wills Act. The Profession in each Province which has adopted the Imperial Act, will thus be able to apply to the corresponding Provincial sections the references in the text to the Imperial Wills Act. The sections of the Ontario Wills Act being lately revised, are printed in full through the text where necessary.

A very full Index is supplied, which it is hoped will assist in the use of the book. A list of words and phrases construed is also supplied.

The work is now submitted to the Profession, not as being as complete or perfect as I could have wished, but with the hope that it may be of service.

R. E. KINGSFORD.

Toronto, 1st September, 1913.

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SECTIONS OF IMPERIAL WILLS ACT

SECTIONS OF IMPERIAL WILLS ACT AS IN THE WILLS ACTS OF BRITISH COLUMBIA, MANITOBA, NEW BRUNSWICK, NOVA SCOTIA, ONTARIO AND SASKATCHEWAN.

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BRITISH COLUMBIA.—R. S. B. C. (1911) c. 241.

Sec. 32. Proof of execution of will, codicil, deed or instrument by declaration of attesting witness (5-6 WM. IV. c. 62, s. 16).

As to wills of married women, sec. 18 of c. 152 embodies sec. 24 of the Wills Act and also sec. 3 of c. 63, 56-57 V. The execution of a general power makes appointed property liable as separate estate.

MANITOBA.—R. S. Man. (1902) c. 174.

Sec. 10. Holograph will subject to no particular form, requires no attesting witness.

Sec. 20. Devises from 1st July, 1885, not to take effect against personal representative until conveyance.

Sec. 32. Mortgage debt, how charged.

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Ch. 106—Married Woman—Sec. 3 and sec. 6.—"As freely as if she were unmarried."

NEW BRUNSWICK.—R. S. N. B. 1903, c. 160.

Sec. 28. Will of married woman "as if she were a *feme sole*."

Secs. 29, 30, 31, 32 and 33. Validity of wills of personalty made out of Province. (Imp. Act, 24-25 V. c. 114, secs. 1-4).

NOVA SCOTIA.—R. S. N. S. 1900, c. 139.

Sec. 5. Married woman may make a will appointing one executor or more to a will whereof she is executrix, or appointment in pursuance of a power.

Sec. 15. Requires will to be executed when husband not present, and must be accompanied by declaration that will not made under husband's compulsion.

Sec. 16. Execution of will without the Province.

Sec. 17. Will not revoked by change in domicil.

Sec. 33. Executors may carry out contract of testator.

Sec. 34. Penalty for suppressing will ($20 a month).

ONTARIO WILLS ACT, c. 57. Ontario Acts, 1910 (10 Edw. VII.)

Sec. 3. After-acquired lands may pass. (As to wills before 1st Jan., 1874).

Sec. 4. A devise of land taken to carry as large an estate as the testator had in the land. (Same period).

Sec. 10. Widow's right to dispose of crop. (20 H. 3).

Sec. 20. Wills executed out of Ontario, when to be valid (24-25 V. c. 114, extends to wills after 17th March, 1902).

Sec. 27, sub-sec. 2. Incorporates Imp. Act., 56-57 V. c. 63, s. 3.

Sec. 32. Meaning of "heir."—The person to whom real estate would descend under an Ontario intestacy.

Sec. 38. Mortgage debts to be primarily chargeable on the lands. Imp. Acts 17-18 V. c. 113 (1).

(2). Consequence of direction that testator's debts be paid out of personalty. Imp. Act, 30-31 V. c. 69, s. 1, and 40-41 V. c. 34, s. 1.

SASKATCHEWAN.—R. S. 1909, c. 44.

Sec. 15. Execution of will outside the Province.

Sec. 16. Will not revoked by change of domicil.

Sec. 22. A devise not to take effect as against personal representatives.

Sec. 29. Devise of real property with words of limitation.

Any devise which would have created estate tail passes the absolute ownership or the greatest estate.

Sec. 30. "Heir" means the person to whom real property descends under the Saskatchewan Law of Intestacy.
Sec. 36. Illegitimate child takes under will of mother.
Sec. 37. Real property charged with mortgage.
Sec. 38. General direction for payment of debts of testator.

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Section 13 (omitted in text) is as follows:—"And be it further enacted that every will executed in manner bereinbefore required shall be valid without any other publication thereof."

THE LAW OF WILLS

CHAPTER I.

BY WHAT LOCAL LAW WILLS ARE REGULATED.

Realty Ruled by Lex Loci Rei Sitæ.

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

1st ed. p. 1, 6th ed. p. 1: See *Doe d. Birtwhistle* v. *Vardill*, 5 B. & Cr. 438; *Murray* v. *Champernowne* (1901), 2 Ir. R. 232.

Devise Invalid by Lex Loci.

A disposition of immoveable property situate in England which is invalid by the law of England, is not made valid by the fact that it is permitted by the law of the testator's domicil. Thus, the invalidity of a devise of English realty under the Mortmain Acts is not affected by the testator's domicil.

6th ed., p. 2. *Duncan* v. *Lawson*, 41 Ch. D. 394.

Foreign Land.

Conversely, land situate abroad is subject to the local law, snd any disposition of it by the will of a domiciled Englishman is subject to that law.

Ibid p. 2. *Re Rea*, [1902] 1 Ir. R. 451.

Leaseholds Governed by Lex Loci.

Leaseholds for years are for many purposes included under the denomination of immoveable property, so as to be governed by the lex loci and not by the lex domicilii. Thus, if a testator,

domiciled abroad, disposes of leaseholds situate in England upon trusts which contravene the provisions of the Thellusson Act, these trusts are void. So if a person who owns leaseholds in England is domiciled abroad, the beneficial interest in them does not pass by his will unless it is executed in accordance with the requirements of the Wills Act. Conversely, if the will is executed in accordance with English law, but not in accordance with the law of the domicil, it is valid as to the testator's English leaseholds, although it may be invalid as to the remainder of his personal estate.

5th and 6th ed., p. 2. *Freke* v. *Lord Carbery*, L. R. 16 Eq. 461.

ESTATES PUR AUTER VIE.

Estates pur auter vie are realty, and are, therefore, presumably immoveable property within the meaning of the rule now under discussion.

6th ed., p. 3. *Chatfield* v. *Berchtoldt*, L. R. 7 Ch. 192.

CHOSES IN ACTION.

Choses in action are an anomalous description of property. For some purposes they have a locality and for others they have not. So far as the law of wills is concerned, questions with regard to choses in action arise chiefly in connection with gifts of property in a particular place, and with reference to the administration of assets. The rules with regard to appointments under powers also appear to be based on the principle that a trust fund has a locality, and that a testamentary appointment is therefore not necessarily governed by the law of the testator's domicil.

Ibid p. 4. *Re Queensland Mercantile Co.*, [1892] 1 Ch. 219; *Kelly* v. *Selwyn*, [1905] 2 Ch. 117. See further Chapter IV.

PERSONAL PROPERTY.

In regard to personal, or rather moveable property, the lex domicilii prevails. If, therefore, a foreigner dies domiciled in England, his personal property, in case he were intestate, will be distributed according to the English law of succession; and any will which he may have left, whether made in his native or in his adopted country, or elsewhere, must be construed according to the law of England.

Reynolds v. *Kortwright*, 18 Bea. 417.

EXTENT OF GENERAL RULE.

The general rule governs questions as to the validity of the will, with regard to the testamentary capacity of the testator, the bequeathable quality of the property bequeathed by it, and

tho formalities with which it was executed, as well as its construction.

6th ed. p. 6. *Price* v. *Dewhurst*, 4 My. & Cr. 76; *Kilpatrick* v. *Kilpatrick*, 6 Br. P. C. 584; *Croker* v. *M. of Hertford*, 4 Moo. P. C. C. 339.

FOREIGN DOMICIL.

The general principle above stated applies in tho case of a foreign domicil. If, therefore, any person, whether a British subject or a foreigner, dies while domiciled abroad, tho law of the place which at his death constituted his home will regulate the distribution of his moveable property in England, in case of intestacy, i.e., should he happen to have left no instrument which, according to the law of his adopted country, would amount to a testamentary disposition of such property; and if he left a will, tho same law will determine its validity with reference to the formalities of its execution, the personal competence of the testator and the efficacy of his testamentary dispositions, and will also regulate their construction.

5th ed., p. 4; 6th ed., p. 6. *Somerville* v. *Lord Somerville*, 5 Ves. 750; *Bremer* v. *Freeman*, 10 Moo. P. C. C. 306.

VALIDITY AND CONSTRUCTION NOT AFFECTED BY CHANGE OF DOMICIL.

By sec. 3 of Lord Kingsdewn's Act (Wills Act, 1861), it is provided that no will or other testamentary instrument shall be held to be revoked or have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicil of the person making the same. This section applies to foreigners as well as to British subjects.

6th ed., p. 9. *In bonis Reid* L. R. 1 P. & D. 74.

ADMINISTRATION.

The general rule that the law of the domicil applies to the moveable property of a deceased person, must be understood as meaning that it governs the devolution of the property. "For the purpose of succession and enjoyment, the law of the domicil governs the foreign personal assets. For the purpose of legal representation, of collection, and of administration, as distinguished from distribution among the successors, they [the assets] are governed not by the law of the owner's domicil, but by the law of their own locality." This question is referred to in a later chapter. (Chap. LIV.).

6th ed., p. 9. *Blackwood* v. *Reg.* 8 A. C. 93, followed in *Henty* v. *Reg.* (1896), A. C. 567; *Enohin* v. *Wylie*, 10 H. L. C. 1.

WILL EXERCISING POWER.

The general rule that a will, in order to be valid and operative with regard to the moveable property comprised in it, must comply with the law of the testator's domicil, is subject to

an exception in the case of a will exercising a power of appointment. The question of the testator's capacity to exercise a power of appointment seems to depend on the intention of the parties creating the power; if it was intended that the property or trust fund should be governed by English law, the lex domicilii is immaterial. So with regard to the formalities of execution, if the will is executed in the particular form required by the power, it will, as a general rule, be good without reference to the law of the testator's domicil, because the appointee takes, not under the instrument exercising, but under the instrument creating, the power.

6th ed., p. 10. See Chapter XXIII. *In bonis Alexander*, 29 L. J. Pr. 93.

EFFECT OF TREATY WITH FOREIGN COUNTRY.

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

5th ed., p. 12

EXPRESSION OF CONTRARY INTENTION.

The rule that a will is to be construed according to the law of the domicil, will yield to the expression of a contrary intention by the testator; but it seems that the use of the technical terms of the law of a foreign country, in the will of a testator having an English domicil, will not of itself be regarded as an indication of intention that the will is to be construed according to the foreign law.

6th ed., p. 10. *Bradford* v. *Young*, 29 Ch. D. 617.

WILLS ACT, 1861.

A will may have been made in England, be written in the English language, the testator may have described himself as an Englishman, and it may have been proved in an English Court; and yet, after all, it may turn out, from the extrinsic fact of the maker being domiciled abroad at his death, that the will is wholly withdrawn from the influence of English jurisprudence.

5th ed., p. 6.

To obviate such questions with regard to testators dying after August 6, 1861, it is enacted by the Wills Act, 1861 (24 & 25 Vict. c. 114), that (s. 1) every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicil of such person at the time

of making the same, or at the time of his death) shall as regards personal estate be held to be well executed for the purpose of being admitted to probate, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicil of origin; and (s. 2) that every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicil of such person at the time of making the same or at the time of his death) shall as regards personal estate be held to be well executed, and shall be admitted to probate, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made. By sect. 4 the act is not to invalidate any will or other testamentary instrument as regards personal estate which would have been valid if the act had not been passed, except as such will or instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by the act.

These sections appear as section 20 of the Ontario Wills Act.

Foreign Courts are not bound to recognise the act in determining whether a given instrument is a valid will of personal property within their own jurisdiction; and thus the personal property, British and foreign, of a British subject may be distributable according to two distinct laws. Therefore, the necessity of conforming in the testamentary act to the law of the domicil, is still an important doctrine to the numerous British residents in foreign countries; and it appears that the circumstance of the contents of the will indicating that the testator contemplated returning to England (but which intention he never executed), or even an express declaration that he intends to retain his domicil of origin, is insufficient to exclude the law of his domicil ascertained by the facts of the case.

5th ed., p. 9; 6th ed., p. 13. *Re Steer*, 3 H. & N. 594.

BY WHAT LAW DETERMINED.

The question of domicil is determined by English Courts according to the doctrines of English law, except (it seems) in those cases in which a person is resident in a country which does not recognise domicil as regulating questions of succession.

6th ed., p. 16. *Re Johnson* (1903), 1 Ch. 801.

DOMICIL OF CHILDREN.

The domicil of a legitimate child is that of the father, and the domicil of an illegitimate child is that of the mother.

The domicil of the child changes with the domicil of the father or mother.

5th ed., p. 13. *Munro* v. *Munro*, 7 Cl. & F. 842; *Dalhousie* v. *McDouell*, 7 Cl. & F. 817.

Exemplification of Letters Issued by English Court.—On appeal the clerk of the Surrogate Court at Moosomin directed to attach the seal of the Court to an exemplification of probate granted by the High Court of Justice of England. *Re Chesshire*, 11 W. L. R. 257.

Attack by Persons Claiming under Heirs-at-law.—A will purporting to convey all the testator's estate to his wife was attacked for uncertainty by persons claiming under alleged heirs-at-law of the testator and through conveyances from them to persons abroad:—Held, that as the evidence of the relationship of the alleged grantors to the deceased was only hearsay and the best evidence had not been adduced; that as the heirship at law was dependent upon the alleged heir having survived his father and it was not established and the Court would not presume that his father had died before him; and that as the persons claiming under the will had no information as to the identity of the parties in interest who were represented in the transactions by men of straw, one of whom was alleged to be a trustee, and there was no evidence as to the nature of his trust and there was strong suspicion of the existence of champerty or maintenance on the part of the persons attacking the will, the latter had failed to establish the title of the persons under whom they claimed, and the action should be dismissed. *May* v. *Logie*, 27 S. C. R. 443.

Illegal Charge.—The devise of an estate is not wholly void because the estate has been charged to some extent with an illegal trust. *Doe d. Vencott* v. *Read*, 3 U. C. R. 244.

Jurisdiction of Court of Chancery.—A bill impeaching a will of which probate had been granted to the plaintiff by the Surrogate Court, stated that after the probate had been granted the plaintiff had discovered a subsequent will of the testator, and that this subsequent will was the deceased's last will. The wills disposed of both real and personal estate:—Held, that whether the will had been proved in common form or in solemn form, the Court of Chancery had jurisdiction to try its validity. *Perrin* v. *Perrin*, 19 Chy. 259.

The Court has jurisdiction to set aside a will as having been executed under improper influence, or when the testator was not of sufficient capacity, without waiting for a revocation of probate. *Perrin* v. *Perrin*, 19 Gr. 259, on this point, approved of and followed. *Wilson* v. *Wilson*, 24 Chy. 377.

Jury.—Right to jury in actions to establish wills. See *Re Lewis, Jackson* v. *Scott*, 11 P. R. 107.

Setting up Alternative Will.—The defendant contested the validity of a will propounded by the plaintiff, and also propounded two earlier wills, under which, in the event of the last being invalidated, he claimed:—Held, that this was a proper subject of counterclaim. Held, also, that a general defence of fraud was admissible in such a case; but under that defence the defendant was required to give particulars immediately after the examination of the plaintiff. *Appleman* v. *Appleman*, 12 P. R. 138.

Law Applicable.—Held, upon the facts set out in the judgment in this case, that although a testator's original domicil was in Ontario, he had changed it to the United States, which was his domicil at the time of his death, and his will therefore must be construed according to the laws of Minnesota, U.S., so far as regards all his personal estate, and his real estate there; according to the laws of Manitoba as regards his lands there; and as to the Ontario lands they devolved on his executors. *McConnell* v. *McConnell*, 18 O. R. 36.

Intestates Domicil.—The law of England as to granting probate or committing letters of administration is the law to be administered by our Probate and Surrogate Courts. Where a person domiciled in the State of New York died suddenly *in itinere*, in the county of Wentworth in this Province, having trifling personal effects about him of less value than £5.—Held, that the Surrogate Court of Wentworth had jurisdiction to grant administration of his effects. Such administration should be granted by the Surrogate Court only to an inhabitant of the Province. *Grant* v. *Great Western Rw. Co.*, 7 U. C. C. P. 438.

Rights of Legatees Out of Province.—A will having directed the whole estate to be converted into personalty, the testator's grandchildren domiciled without the Province of Ontario could not be affected by any Act of the Legislature of this Province, the locality of all rights to personal or movable property being at the domicil of the person entitled to it; and therefore the contingent interest of the grandchildren was not "property or a civil right" within the Province. In *Re Goodhue*, 19 Chy. 366.

Origin.—The domicil of origin adheres until a new domicil is acquired, and the onus of proving a change of domicil is on the party who alleges it; the change must be *animo et facto*, and the *animus* to abandon must be clearly and unequivocally proved; although residence may be decisive as to the factum, it is equivocal as regards the animus; the question is one of fact, to be determined by the particular circumstances of each case. Where a deceased person (in respect of whose estate a question of his domicil at the time of his death arose in an action by his widow to obtain a share of it) had his domicil of origin in Ontario, but went to live in the province of Quebec upon a farm owned by his father:—Held, upon the evidence, that he had not so adopted the farm as his home as to effect a change of domicil. *Coyne* v. *Ryan*, 21 Occ. N. 498.

The Judicature Act, R. S. O. 1897, c. 51, provides, Sec. 38—The High Court shall have jurisdiction to try the validity of last wills and testaments, whether the same respect real or personal estate; and whether probate of the will has been granted or not, and to pronounce such wills and testaments to be void for fraud and undue influence or otherwise, in the same manner and to the same extent as the Court has jurisdiction to try the validity of deeds and other instruments.

No jurisdiction exists in the High Court of Justice nor has any been conferred upon it to revoke the grant by a Surrogate Court of letters of administration.

McPherson v. *Irvine*, 26 O. R. 438.

In re Ivory, Hawkin v. *Turner*, 10 Ch. D. 372.

CHAPTER II.

FORM AND CHARACTERISTICS OF THE INSTRUMENT.

"WILL," "CODICIL."

In a general and comprehensive sense, a will consists of the aggregate of all the papers through which it is dispersed; or, as it has also been put, a will is the aggregate of a man's testamentary intentions so far as they are manifested in writing, duly executed according to the statute. In this sense, therefore, it includes a codicil. But sometimes the term "will" is used as opposed to "codicil," the distinction between the two being that the will is the principal, and the codicil the accessory; a codicil is a supplement by which the testator alters or adds to his will. But these distinctions are to some extent questions of terminology, for a man may execute two or more instruments, each purporting to be a will, and together constituting one will. And on the other hand, if he leaves nothing but an instrument described as a codicil, it may take effect as a will. The distinction is of importance where a man revokes or revises his "will," for the question arises whether he thereby intends to revoke or revive a codicil to it. And where a will consists of two or more documents, a person who attests one of them does not forfeit a benefit given him by another, if the latter is separately executed and attested.

1st ed. p. 172.

AMBULATORY NATURE OF WILLS.

A will is an instrument by which a person makes a disposition of his property to take effect after his decease, and which is in its own nature ambulatory and revocable during his life. It is this ambulatory quality which forms the characteristic of wills; for, though a disposition by deed may postpone the possession or enjoyment, or even the vesting, until the death of the disposing party, yet the postponement is in such case produced by the express terms, and does not result from the nature, of the instrument. Thus, if a man, by deed, limit lands to the use of himself for life, with remainder to the use of A. in fee, the effect upon the usufructuary enjoyment is precisely the same as if he should, by his will, make an immediate devise of such lands to A. in fee; and yet the case fully illustrates the distinction in question; for, in the former instance, A., immediately on the execution of the deed, becomes entitled to a

remainder in fee, though it is not to take effect in possession until the decease of the settlor, while, in the latter, he would take no interest whatever until the decease of the testator should have called the instrument into operation.

1st ed., p. 11, 6th ed., p. 27. As to deeds and other dispositions which are not testamentary, although they only take effect after the donor's death, see *Fletcher* v. *Fletcher*, 4 Ha. 67; *Hughes* v. *Stubbs*, 1 Ha. 476. The effect of our Registry Acts must also be considered with regard to such deeds.

RELIGIOUS EDUCATION.

A testator may give directions as to the religion in which he wishes his children to be brought up.

6th ed., p. 28. *Re Scanlon*, 40 Ch. D. 200. Such a direction is not binding on the Court. *Andrews* v. *Salt*, L. R. 8 Ch. 622.

APPOINTMENT OF SOLICITOR, AGENT, &c.

Where a testator appoints a person to be solicitor or agent to his estate, or authorises an executor or trustee to make professional charges, this amounts to the bequest of a right to remuneration for services properly performed.

See Chapter IV.

ATTEMPTS TO MAKE WILL IRREVOCABLE.

As a will is of its own nature revocable, a declaration by a testator that his will is irrevocable is inoperative. A covenant not to revoke a will cannot be specifically enforced, but an action for damages will lie for the breach of it, unless the will was revoked by the marriage of the covenantor.

6th ed., p. 28. *Robinson* v. *Ommaney*, 23 Ch. D. 285.

CONTRACT TO LEAVE PROPERTY BY WILL.

As a general rule, a contract to bequeath a legacy or to leave property by will cannot be specifically enforced, and only gives rise to an action for damages, but in certain cases contracts of this kind have been given effect to specifically. Thus a covenant (or apparently any contract for valuable consideration) to devise land in a particular way can be specifically enforced against the testator's heir at law, or persons claiming under him as volunteers. And if during his lifetime the testator conveys the land to a third person, an immediate right of action to recover damages accrues to the promisee.

6th ed., p. 28. *Hammersley* v. *De Biel*, 12 Cl. & F. 45; *Coverdale* v. *Eastwood*, L. R. 15 Eq. 121; *Synge* v. *Synge* (1894), 1 Q. B. 467.

COVENANT TO LEAVE WHOLE OF TESTATOR'S PROPERTY—HOW ENFORCED.

As a general rule, a covenant by a man to leave by will all his property, or a share of all his property, in a certain way, only applies to such property as he dies possessed of, and does not prevent him from disposing during his lifetime of any part of his property.

6th ed., p. 29. *Fortescue* v. *Hennah*, 19 Ves. 67.

Grant, M.R., said that although a covenant of this kind did not prevent the testator from making bona fide dispositions of his property during his life, he could not defeat it by dispositions which were in effect testamentary though not such in point of form; and he held that the property of which the testator reserved the life interest was, for the purposes of the covenant, to be considered as part of the property which he possessed at the time of his death.

APPOINTMENT UNDER SPECIAL POWER.

A covenant to heqneath a certain sum is not satisfied by a testamentary appointment of that sum under a special power, although expressed to be made in satisfaction of the covenant.

6th ed., p. 29. *Graham* v. *Wickham*, 1 D. J. & S. 474.

EVIDENCE OF ANIMUS TESTANDI, WHEN REQUISITE.

It is essential to the validity of a will that at the time of its execution the testator should know and approve of its contents. And whenever any ground for suspicion exists, the hurden of proving that the will was the voluntary and conscious act of the testator lies on him who propounds the will. The degree of proof required may vary with the circumstances of the case. If a person writes or prepares a will under which he takes a henefit, that is a circumstance which ought generally to excite the suspicion of the Court, and it ought not to pronounce the will valid unless the suspicion is removed and it is judicially satisfied that the paper propounded expresses the true will of the deceased.

6th ed., p. 30. *Hastilow* v. *Stobie*, L. R. 1 P. & D. 64; *Tyrrell* v. *Painton* (1894), P. 151.

EFFECT OF MISTAKE.

A document which is in form a testamentary disposition hy a person competent to make a will, and executed with all due formalities, may nevertheless he proved not to he the will of the person who signed it, on the ground that the requisite animus testandi was wanting. Accordingly, if the execution of a will has heen induced by mistake, probate of it will be refused. So if words have been inserted in a will hy mistake of the person who prepared it, and the attention of the testator is not called to them, they will he omitted from the probate, although the right words cannot be inserted.

6th ed., p. 30. *In bonis Nosworthy*, 11 Jur. N. S. 570; *In bonis Schott* (1901), P. 190.

MISTAKEN REFERENCE TO REVOKED WILL.

Bnt where a testator makes two wills, the second of which revokes the first, and then makes a codicil referring to the first

will, parol evidence is not admissible to shew that this was a mistake, and that he meant to refer to the second will. By consent however, the Court of Probate can allow the mistaken reference to be omitted from the probate.

6th ed., p. 31. *In bonis Reade* (1902), P. 75.

GIFT INSERTED BY MISTAKE.

Nor is evidence admissible to shew that a legacy was inserted in the will by mistake, if there is a person in existence answering the description of the legatee. And as a general rule, a bequest which is induced by a mistake on the part of the testator is nevertheless valid.

6th ed., p. 31. *Re Nunn's Trusts*, L. R. 19 Eq. 331; *Re Dyke*, 44 L. T. 568.

SHAM WILL.

From the general principle that animus testandi is essential to the validity of a will, it follows that where a document purporting to be a will is deliberately executed with all due formalities, yet if it is intended by the person executing it not to have any testamentary operation, but is executed for some collateral object (e.g., to be shewn to another person to induce him to comply with the pretended testator's wish), it is a nullity, and probate will be refused.

6th ed., p. 31. *Lister* v. *Smith*, 33 L. J. Pr. 29.

FRAUD, UNDUE INFLUENCE, &C.

A will may also be invalid on the ground that its execution was induced by fraud, coercion, or undue influence. In many of these cases there is also present the element of physical or mental weakness. So if a portion of a will was inserted by fraud or undue influence, it may be omitted from the probate.

6th ed., p. 31. *Rhodes* v. *Rhodes*, 7 A. C. at p. 198; *Baudains* v. *Richardson* (1906), A. C. 169.

WILL PREPARED BY ANOTHER.

If a man requests another to draw up a will for him without saying what he desires it to contain, and executes it without knowing its contents, the will is bad; but a will prepared in good faith in pursuance of the testator's definite instructions is valid, if at the time of execution he believes it to have been so prepared, although he may then be mentally incapable of understanding it. And if in drawing up a will by the instructions of the testator, the draughtsman, without reason or special directions, but in good faith, introduces words the effect of which the testator does not intelligently appreciate when the will is read over to him, they must stand as part of the will; the rule is the same even if the testator asks to have them explained, and their

effect is, in good faith, misrepresented to him. But if they were inserted by mistake, and there is no clear evidence that they were really brought to the mind of the testator, they will be omitted from the probate.

6th ed., p. 32. *Hastilow* v. *Stobie*, L. R. 1 P. & D. 64; *Parker* v. *Felgate*, 8 P. D. 171; *Harter* v. *Harter*, L. R. 3 P. & D. 11; *Brisco* v. *Baillie Hamilton* (1902), P. 234.

FORM OF WILLS.

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

1st ed., p. 11, 6th ed. p. 33.

INSTRUMENTS IN THE FORM OF DEEDS, AGREEMENTS, &c., HELD TO BE TESTAMENTARY.

Thus, a deed-poll, and even an agreement or other instrument between parties, has repeatedly been held to have a testamentary operation.

In bonis Morgan, L. R. 1 P. & D. 214.

INSTRUMENTS IN THE FORM OF PRESENT OR PAST GIFTS HELD TESTAMENTARY.

Since the Wills Act, papers, duly signed and attested in accordance with the provisions of the Act, in these words, "I wish A. to have my bank book for her own use"; "I hereby make a free gift to A. of the sum deposited," &c.; "I have given all to A. and her sons; they are to pay" certain weekly sums to "X. and Y., and to divide the residue among themselves"; have been held testamentary, chiefly upon collateral evidence, which is always admissible, that they were executed with that intent.

5th ed., p. 23, 6th ed. p. 36. *In bonis Coles*, L. R. 2 P. & D. 362; *In bonis English*, 34 L. J. P. 5.

LIKEWISE DEEDS INTER PARTES.

Instruments in the form of deeds inter partes, and purporting to convey property to trustees, but providing that the trusts should not take effect until after the death of the donor, have been held testamentary in the Probate Court.

5th ed., p. 24, 6th ed. p. 36. *In bonis Morgan*, L. R. 1 P. & D. 214.

INSTRUCTIONS FOR A WILL.

A paper merely expressing an intention to instruct a solicitor to prepare a will making a particular disposition of pro-

perty, will not be admitted to probate in the absence of evidence of intention that such paper should have a testamentary operation. But instruments headed "Plan of a will" or "Heads of a will" or "Sketch of my will," or "Memorandum of my intended will," or "Notes of an intended settlement," have been held to operate as valid testamentary dispositions, if duly executed. But probate was refused of an instrument duly executed and attested as a will, but headed "This is not meant as a legal will, but as guide."

5th ed., p. 23, 6th ed. p. 37. *Coventry* v. *Williams*, 3 Curt. 787; *Re Hyslop* (1894), 3 Ch. 523.

INCORPORATED DOCUMENTS.

It will of course be remembered that a document not executed as a will may be incorporated in a duly executed will, so as to form part of it.

6th ed., p. 37. See Chapter VI.

CONCURRENT WILLS.

A testator sometimes makes two wills, one relating to his property in England, and the other relating to his property in some foreign country. In such a case, if the wills are wholly independent, probate may be granted of the English will alone; or in some cases both wills may be proved. But if the English will refers to and incorporates the foreign will, or conversely, both wills must be included in the probate.

5th ed., p. 27, 6th ed., p. 37. *In bonis Astor*, 1 P. D. 150; *In bonis Lockhart*, 69 L. T. 21.

TESTATOR CAN ONLY LEAVE ONE WILL.

However many testamentary documents a testator may leave, it is the aggregate or the net result that constitutes his will, or in other words, the expression of his testamentary wishes. The law, on a man's death, finds out what are the instruments which express his last will. If some extant writing be revoked, or is inconsistent with a later testamentary writing, it is discarded. But all that survive this scrutiny form part of the ultimate will or effective expression of his wishes about his estate. In this sense it is inaccurate to speak of a man leaving two wills; he does leave, and can leave, but one will.

6th ed., p. 38. *Douglas-Menzies* v. *Umphelby* (1908), A. C. at p. 233.

PAPER TESTAMENTARY IN FORM.

As mentioned above, evidence is admissible to shew that an instrument apparently testamentary was not executed with that intent.

See page 10.

PAPER NOT TESTAMENTARY IN FORM OR SUBSTANCE.

If an instrument is not testamentary either in form or in substance (none of the gifts in it being expressed in testamentary

language, or being in terms postponed to the death of the maker), and if no collateral evidence is adduced to shew that it was intended as a will, probate will not be granted of it as a testamentary document.

5th ed., p. 24, 6th ed., p. 38. *King's Proctor* v. *Daines*, 3 Hagg. 218.

INSTRUMENT NOT MADE TESTAMENTARY BY POSTPONING ENJOYMENT.

But, as already observed, an instrument is not testamentary merely because actual enjoyment under it is postponed until after the donor's death. If it has present effect in fixing the terms of that future enjoyment, and therefore does not require the death of the alleged testator for its consummation, it is not a will.

5th ed., p. 25, 6th ed., p. 39. *In bonis Robinson*, L. R. 1 P. & D. 384.

But the fact that the document is executed as a will, and that, either wholly or partially, it is to take effect after the donor's death, does not necessarily make it testamentary.

6th ed., p. 39. *Thorncroft* v. *Lashmar*, 31 L. J. P. 150.

CONTINGENT WILLS.

A will may be made so as to take effect only on a contingency, and if the contingency does not happen the will ought not to be admitted to probate. The contingency will generally attach to every part of the will, e.g., to a clause revoking former wills. But a codicil in other respects contingent will be admitted to probate, because it may operate as a republication of the will. A reference to some impending danger is common to most of these cases, and the question is whether the possible occurrence of the event is the reason for the particular disposition which the testator makes of his property, as where he says: "Should anything happen to me on my passage to W., I leave," &c.; or only the reason for making a will, as where he says, "In case of accident, being about to travel by railway, I bequeath," &c. A will may also be made contingent on the assent of another person.

5th ed., p. 26, 6th ed. p. 40. *In bonis Newns*, 7 Jur. N. S. 688; *Sinclair* v. *Hone*, 6 Ves. 607; *Townsend* v. *Moore* (1905), P. 66.

A will, intended to take effect as an exercise of a power, is not necessarily conditional on the existence of the power, if the testator has an interest independent of the power, or a power not expressly referred to, sufficient to support the disposition; for if an intention appears to dispose of the property, it matters not that the testator mistook the origin or nature of his dispositive power. And if the testator has no interest, still the will may raise a case of election.

Ibid. Sing v. *Leslie*, 2 H. & M. 68.

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

5th ed., p. 27, 6th ed., p. 41. *In bonis Winn*, 2 Sw. & Tr. 147. *In bonis Robinson*, L. R. 2 P. & D. 171.

JOINT WILL.

Two or more persons may make a joint will, which, if properly executed by each, is so far as his own property is concerned, as much his will, and is as well entitled to probate upon his death, as if he had made a separate will. But a joint will made by two persons, to take effect after the death of both, will not be admitted to probate during the life of either. Joint wills are revocable at any time by either of the testators during their joint lives, or, after the death of one of them, by the survivor.

Ibid. In bonis Piazzi-Smyth (1898), P. 7.

With us the term "mutual will" is generally applied to the case of two persons making a will by which each leaves all his property to the other. A mutual compact by two persons to make testamentary dispositions in each other's favour is apparently enforceable in equity in some cases, as where the survivor accepts the benefits under the dispositions of the deceased testator. But such a compact must be clear and fair in its terms to make it binding.

5th ed., p. 27, 6th ed., p. 41. *In bonis Lovegrove*, 2 Sw. and Tr. 453.

PROBATE HOW FAR CONCLUSIVE AS TO PERSONALTY.

The granting of probate is conclusive as to the testamentary character of the instrument in reference to personalty. Everything included in the probate copy, but no word besides, must be taken by the Court of Construction to be part of the will, and the original will cannot be appealed to for the purpose of shewing that such copy is erroneous.

1st ed., p. 22, 6th ed. p. 42. *Gann* v. *Gregory*, 3 D. M. & G. 777; *Barnaby* v. *Tassell*, L. R. 11 Eq. 368. See page 7 *ante*.

WILL OF REAL ESTATE, WHETHER ENTITLED TO PROBATE.

Under the old law, a will disposing of real estate only was not entitled to probate unless it appointed an executor, in which case it was entitled to probate; and if the executor renounced, a grant of administration with the will annexed would

be made. But in the case of a testator who makes a will disposing of real estate and dies since December 31, 1897, the real estate vests on his death in his personal representatives, and their assent is necessary to any devise contained in the will. In such a case, therefore, the will must be proved, and the Land Transfer Act, 1897, accordingly enacts that probate and administration may be granted in respect of real estate only, although there is no personal estate.

6th ed., p. 43. The Surrogate Courts Act (Chapter 31, Ontario Acts 1010) gives jurisdiction over the "property of persons dying intestate."

LIMITED EFFECT OF PROBATE.

Even with respect to personal estate, the granting of probate of any paper has no other effect than to establish generally its claim to be received as testamentary; and it remains for the Court of Construction to determine the meaning and effect of the instrument thus stamped with a testamentary character. The adjudication of this Court may, and often does, render the paper wholly nugatory. It may be found not to contain any intelligible disposition of the deceased's property, or to be in substance the same as or in substitution for another paper of which probate has been granted; or that its provisions are invalid according to the law of a foreign country, which constituted the domicil of the maker at the time of his decease; in all which cases the instrument so proved operates merely as an appointment of an executor, who distributes the property as under an intestacy.

5th ed., p. 29, 6th ed., p. 44. *In bonis Mundy*, 30 L. J. P. 85.

ORIGINAL WILL MAY BE EXAMINED BY COURT OF CONSTRUCTION.

And to determine the construction, the original will, both of real and personal property, may be looked at.

Ibid. *Sandford* v. *Raikes*, 1 Mer. 651.

But in recent times, the Courts have without hesitation adopted the practice of examining original wills "with a view to see whether anything there appearing,—as, for instance, the mode in which it was written, how 'dashed and stopped,'—could guide them in the true construction to be put upon it." And where a will is in a foreign language, and the probate copy is a translation, the Court may look at the original will, or a copy of it, in order to ascertain its meaning.

5th ed., p. 30, 6th ed., p. 45. *Re Harrison*, 30 Ch. D. 390; *Re Cliff's Trusts* (1892), 2 Ch. 229.

PROBATE OF WILLS OF MARRIED WOMEN.

Probate of the will of a married woman is now granted to her executor in the ordinary form without any exception or limitation.

5th ed., p. 31, 6th ed., p. 45. *In bonis Price*, 12 P. D. 137.

WILL OF MARRIED WOMAN DOMICILED ABROAD.

If a married woman domiciled abroad makes a will, appointing executors, which is invalid by the law of her domicil, but is operative under English law (e.g., as an appointment under a power), administration with the will annexed may be granted to the executors.

6th ed., p. 46. *In bonis Vannini* (1901), P. 330.

REVOCATION OF PROBATE.

If probate of an invalid will is granted in common form, the executor can sue for and give a good discharge for any debt due to the deceased. If probate is revoked, it is for some purposes treated as a nullity ad initio, but how far this doctrine extends does not seem to have been decided.

6th ed., p. 46.

Action by Cestui Que Trust for Declaration of Trust or Charge.—Action for a declaration that defendant holds lands subject to a charge in favour of plaintiff. A father executed a document giving all his property, real and personal, to two sons, subject to charges to five other children. This document was under seal, and was at once recorded:—Held, that it was a deed, not a will. Declaration made as prayed, other children to be added as plaintiffs if they consent, otherwise to be added as defendants. Application for sale to be made later. *Pratt* v. *Balcom*, 7 E. L. R. 236.

Deed Poll.—H., by deed poll, in consideration of natural love and affection, and of 5s., conveyed land to her daughter, R., in fee, adding after the habendum, "reserving, nevertheless, to my own use, benefit, and behoof, the occupation, rents, issues and profits of the said above granted premises for and during the term of my natural life;"—Held, a conveyance of the fee simple in the reversion, not a mere testamentary paper which the grantor could revoke by a subsequent deed. *Simpson* v. *Hartman*, 27 U. C. R. 460.

What Documents Constitute the Will—Question to be Determined by Surrogate Court.—A testator directed a sale of his chattel property, and that the proceeds thereof should form part of his residuary estate, as should also the proceeds of his notes and mortgages, and "the whole" (of the residuary estate) should be divided, etc.:—Held, that money on deposit in a bank, though not mentioned, formed a part of the residuary estate. Where two or more documents bearing same date, purport to make a disposition of an estate, the probate issued by the Surrogate Court conclusively determines what documents constitute the last will of the testator, and it is not open to a High Court Judge, upon a motion for construction, to go behind the letters probate to determine what documents constitute the last will. *Gann* v. *Gregory*, 3 D. M. & G. 777, and *Re Cuff*, [1892] 2 Ch. 229, followed. *Re Wm. Smith* (1910), 16 O. W. R. 224.

Letters probate granted in common form are only *prima facie* evidence of testamentary capacity of the testator as to real estate, notwithstanding the Devolution of Estates Act (Ontario), and in an action to recover land under such a will the defendant may give evidence of testamentary incapacity. *Sproule* v. *Watson*, 23 App. R. 692.

Undue Influence—Senile Dementia.—The testatrix died in her 90th year, leaving no near relatives. Defendant, a neighbour, had taken care of testatrix, and did much for her. The testatrix made several wills; each subsequent will defendant was given additional property until the last will gave her nearly all the estate of the testatrix. In an action to set the will aside it was held, that the evidence shewed no undue influ-

eace or fraud, hut oa the contrary, that the testatrix was a woman of strong will power and determination, who had viewed the defendant with ever-increasing favour duriug a jeagthy period of close intimscy. Actioa dismissed, hut without costs owiug to the fact thst no indepeadent person was called in during the preparation of the will, nor in the reading and explaining of it to testatrix. *Malcolm* v. *Ferguson* (1900), 14 O. W. R. 737, 1 O. W. N. 77.

Undue Influence.—Where defendaat had appeared oa an examiaation for discovery, hut oa advice of her couasel had declined to write certain names, held, that she should not be required to re-attend and writ as requested. *Cook* v. *Winegarden* (1900), 14 O. W. R. 733, 1 O. W. N. 75.

Proof in Solemn Form.—Upoa proof in solema form of the due execution of a will and the mentnl competeace of the testator, the will was admitted to probate, hy a decree ia an actioa brought to estahlish the will. Uader Order XXI., Rule 18, S. C. R. the defendant was held not liahle for costs, the trial Judge considering that there were grouads for opposiag tha will. *Forrest* v. *Spears* (1910), 13 W. L. R. 45.

Ambiguity.—Punctuation aot looked at if will perfectly clear. *Re Carmichael*, 12 O. W. R. 1268.

Punctuation—There is no rule that for the purpose of construing a will you may aot look at the original will itself. *Re Harrison*, 30 Ch. D. 393. If the words of a will are perfectly clear aad free from ambiguity the punctuation will not be looked at. *Sandford* v. *Raikes*, 1 Mer. 637; *Heron* v. *Stokes*, 2 Dr. & War. 98; *Gordon* v. *Gordon*, 5 H. L. 276. But Courts will examine wills to guide them in the true coastructioa. *Manning* v. *Purcell*, 24 L. J. Ch. 523 (n).

A clause hetweea semicolons, one provisioa. *Penny* v. *Eustace*, 4 M. & S. 58. *Re Carmichael*, 12 O. W. R. 1266.

Solicitor's Ambiguities.—Where a will, though prepared hy a solicitor, was so inconsisteatly worded thst hut little beaefit could he derived from his labours in construing it, the Court thought thst as liheral aa interpretstioa should he made of the language, ia order to ascertaia the iateatioas of the testator, as if he had been ia fact iaops consilii. *Hellem* v. *Severs*, 24 Chy. 320.

Solicitor's Duty—Drawing Will.—Where a solicitor, whea receiving instructioaa for the preparatioa of a persoa's will, is msde aware of the ohject the testator haa in view, hut the iaaguage used will not effectuate that ead, it is the duty of the solicitor to call the testator's atteation to the fact, aad to point out to him wherever the words used fail in carrying out the known iatentions of the testator. It is erroneous to suppose that ths solicitor properly discharges his duty hy simply taking down the directiona given hy the testator, without reference to their effect upon ths provisioas it was alleged the testator desired to maks with regard to his family aad estate. *Wilson* v. *Wilson*, 22 Chy. 39.

Undue Influence.—Iu a probate suit the defeadsat alleged that the will propounded hy the executors had been ohtsined hy the uadus influence of oae C., who died a few days hefore the execution. C'a estate was aot represeated in the suit:—Heid, thst evidence of a statement by C., not in the preseace of the testator, wss admissihle so far as it went to the plea of undue iaflueace. *Radford* v. *Risdon*, 56 S. J. 416; 28 T. L. R. 342.

Action To Establish Will.—In aa actioa to estahlish a will, it was heid, upoa evidence, that the testator wss not, at the time of the execution, of meatai competence to make a will; and the action was dismissed:—Heid, aiso, that, upoa the trial of the actioa, the plaintiffs propouadiag the will should have given, ia opeaing, all the testimony they had supportiag the will; and should have beea confined ia reply to evidence strictly ia rehuttal of that adduced hy the defendants opposing the admission of the will to probate. *Forman* v. *Ryan* (1911), 19 W. L. R. 212.

CHAPTER III.

PERSONAL DISABILITIES OF TESTATORS.

REMOVAL OF DISABILITY AFTER EXECUTION OF WILL.

A will made during any personal disability is not rendered valid by the fact of the disability having been removed during the life of the testator, unless its removal has been followed by some act of confirmation or adoption amounting in law to re-execution of the will.

5th ed., p. 34, 6th ed., p. 47.

ONUS PROBANDI.

The general rule is "that the onus probandi lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator." But if a will is rational on the face of it, and appears to be duly executed, it is presumed, in the absence of evidence to the contrary, to be valid.

6th ed., p. 48. *Fulton* v. *Andrew*, L. R. 7 H. L. 448.

INFANTS.

The Wills Act, section 7, enacts that no will made by any person under the age of twenty-one years shall be valid. And by the definition clause in the Act this provision is extended to appointments of testamentary guardians under the Infants Act. Section 11 of the Wills Act exempts from the operation of the Act wills of personal estate made by soldiers on actual service or by mariners at sea, but with this exception, every will made by an infant is invalid.

6th ed., p. 47.

INDIANS.

An Indian, male or female, may make a will, and may by such will dispose of real or personal property subject to the provisions of the Indian Act, R. S. C. c. 43.

MARRIED WOMEN.

Before 4th May, 1859, in Ontario, a married woman was generally incapable of making a valid testamentary disposition of real or personal property. By Statute 22 Victoria, c. 34, s. 16, a limited power was bestowed which appears in the Ontario Wills Act as section 6.

In the Ontario Wills Act 1873, by special enactment the words "person" and "testator" included married women. In 1887 this clause

6. After the fourth day of May, 1859, and before the first day of January, 1874, every married woman might, by devise or bequest executed in the presence of two or more witnesses, neither of whom was her husband, make any devise or bequest of her separate property, real or personal, or of any rights therein, whether such property was acquired before or after marriage, to or among her child or children issue of any marriage, and failing there being any issue, then to her husband, or as she might see fit, in the same manner as if she were sole and unmarried.

As to wills of married women on and after 1st January, 1874, s. 3 of R. S. O. 1897 c. 163, is as follows:—

3.—(1) A married woman shall be capable of acquiring, holding and disposing by will or otherwise, of any real or personal property, in the same manner as if she were a *feme sole*, without the intervention of any trustee.

WILLS OF IDIOTS.

The will of an idiot is of course void. Mental imbecility arising from advanced age, or produced permanently or temporarily by excessive drinking, or any other cause, may destroy testamentary power.

5th ed., p. 35, 6th ed., p. 48.

OF PERSONS DEAF AND DUMB.

A person who has been from his nativity blind, deaf and dumb, is intellectually incapable of making a will, as he wants those senses through which ideas are received into the mind. Blindness or deafness alone, however, produce no such incapacity. And it seems that a person born deaf and dumb, but not blind, though primâ facie incapable, may be shewn to have capacity, and to understand what is written down; and this of course applies more strongly to a person deaf and dumb from accident. Indeed, it has even been held that a will need not be read over to a blind testator previously to its execution, provided there be proof aliunde of a clear knowledge of the contents of the instrument; but it is almost superfluous to observe, that, in proportion as the infirmities of a testator expose him to deception, it becomes imperatively the duty, and should be anxiously the care, of all persons assisting in the testamentary transaction, to be prepared with the clearest proof that no imposition has been practised. This remark especially applies to wills executed by the inmates of lunatic asylums or any other persons habitually or occasionally afflicted with insanity.

5th ed., p. 35, 6th ed., p. 48. As to the evidence required. *In bonis Geale*, 33 L. J. P. 125; *Fincham* v. *Edwards*, 3 Curt. 63.

IN CASE OF WEAKNESS OF MIND, STRONG PROOF REQUIRED AS TO KNOWLEDGE OF CONTENTS OF WILL.

In cases of weakness of mind arising from the near approach of death, strong proof is required that the contents of the

was dropped but was restored in 1897. It does not appear in the Wills Act of 1910. It has been argued that from 1887 to 1897 there was no power given to a married woman by Statute to make a will except under R. S. O. 1887 c. 132, but does not this statement overlook the effect of the Interpretation Act R. S. O. 1887 c. 1 (24), which provides that words importing the masculine gender only include females as well as males?

will were known to the testator, and that it was his spontaneous act. It is not, however, essential that the testator should at the time he signs the will be mentally competent to understand it: if while he is mentally competent he gives instructions for his will, and it is prepared in accordance with them, and at the time of signing it he understands that he is executing the will for which he had given instructions, the will is valid, although at the time of signing it he may not be able to understand its provisions in detail. On the other hand, a suspicion is justly entertained of a will conferring large benefits on the person by whom or by whose agent it was prepared, or of a will in favour of a medical attendant in whose house the testator resided; and the rule requiring strict proof is not confined to these cases, but extends to all cases in which circumstances exist which excite the suspicion of the Court.

5th ed., p. 36, 6th ed., p. 49. *Mitchell* v. *Thomas*, 6 Moo. P. C. C. 137. 12 Jur. 967; *Archambault* v. *Archambault* (1902), A. C. 575.

Perera v. *Perera* (1901), A. C. 354; *Baker* v. *Batt*, 2 Moo. P. C. C. 317; *Jones* v. *Godrich*, 5 Moo. P. C. C. 16; *Tyrrell* v. *Painton* (1894), p. 151, supra.

PART OF A WILL MAY BE VOID AND THE REST VALID.

Where undue influence has been exercised in obtaining gifts by will, the whole will is not necessarily void, but it will be left to the jury to determine what gifts were obtained by undue influence, and such gifts only will be declared void.

5th ed., p. 37, 6th ed., p. 58. *Farrelly* v. *Carrgian* (1899), A. C. 563.

LUNATICS.

A mad or lunatic person cannot, during the insanity of his mind, make a testament of land or goods; but if, during a lucid interval, he make a testament, it will be good.

1st. ed., p. 30, 6th ed., p. 50.

INQUISITION PRIMA FACIE EVIDENCE OF TESTAMENTARY INCAPACITY.

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

Ibid.

IN WHAT UNSOUNDNESS OF MIND CONSISTS.

It has been laid down that the test of a person being of unsound mind in a legal sense is the existence of a delusion, or a belief in facts which an ordinary person would not credit, or a belief which one cannot understand how any person in his senses should hold; and that mere eccentricity of habits or perversion of feeling and conduct, forming what is termed moral insanity, do not constitute legal incapacity. General insanity must be distin-

guished from partial insanity or monomania. In case of the former, a lucid interval, a real absence at the time of making the will, of the disease itself, and not of its apparent delusions only, must be shewn.

5th ed., p. 38, 6th ed., p. 51. *Waring* v. *Waring*, 6 Moo. P. C. C. 341.

Monomania, which has not, and is not capable of having, any influence on the provisions of a will, does not destroy the capacity to make one; though the inquiry whether the monomania has or not had any such effect might be difficult, it is not impracticable; and thus if, in the result, the Court is convinced that it had, the conclusion must be against the will.

5th ed., p. 38, 6th ed., p. 52. *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549.

RELIGIOUS DELUSIONS.

Beliefs connected with religious subjects may amount to delusions which prove testamentary incapacity. But the fact that a person believes himself to be commanded by the Deity to carry out some particular work, does not of itself prove that he entertains delusions which incapacitate him from making a valid will.

6th ed., p. 52. *Smith* v. *Tebbitt*, L. R. 1 P. & D. 398.

ALIENS.

By the Naturalization Act, R. S. C. c. 77, secs. 4 to 7, real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien in the same manner in all respects as through, from, or in succession to a natural-born British subject. Provided that . . . this section shall not affect any estate or interest in real or personal property to which any person has or may become entitled either mediately or immediately in possession or expectancy in pursuance of any disposition made before the 4th July, 1883, or in pursuance of any devolution by law on the death of any person dying before that date.

FELONS.

By sec. 1033 of the Criminal Code, it is provided:—

1033. No confession, verdict, inquest or judgment of or for any treason or indictable offence or *felo de se* shall cause any attainder or corruption of blood or any forfeiture or escheat, provided that nothing in this section shall affect any penalty or fine imposed on any person by virtue of his sentence or any forfeitnre in reiation to which special provision is made by any Act of the Parliament of Canada.

DISSEISEE CROWN GRANTEE.

The effect of the exception in 4 Wm. IV. c. 1, s. 17 (now c. 34 Ont. Acts, 1910), in favour of a grantee of the

Crown, who has never taken possession, is, that while ignorant of the fact of his land being in the actual possession of some other, he is not to be regarded as disseised, and consequently can devise. *Doe D. McGillis* v. *McGillivray*, 9 U. C. R. 9.

Married Woman.—C. S. U. C. c. 73, did not authorize a married woman to devise her property otherwise than to or among her child or children, if any. Any disposition in favour either of her husband or other parties was void, and as to the portion attempted to be so disposed of there was an intestacy. *Mitchell* v. *Weir*, 19 Gr. 568.

Under R. S. O. 1877 c. 106, s. 6, a married woman could not devise or bequeath her property to one of several children to the exclusion of the others. *Munro* v. *Smart*, 26 Gr. 37, 310. See *S. C.*, 4 A. R. 449.

In a so-called will, executed a few days before her death, G., L.'s wife, assumed to devise the land in question to L. At the date of this will G. was only eighteen years of age:—Held, that the will was invalid. C. S. U. C. c. 73, s. 16 (R. S. O. 1877 c. 106, s. 6), only removed the disability of coverture in respect to wills, not of infancy. *Re Murray Canal, Lawson* v. *Powers*, 6 O. R. 685; *Smith* v. *Smith*, 5 O. R. 690.

A devise by a married woman of property which was her separate estate, but of which her husband had been in possession before the 4th of May, 1859, was held to be good. *Re Hillker*, 3 Ch. Ch. 72.

Testimony of Beneficiary. — A testator by his will among other annuities, gave one to K. of $600. By a codicil, executed in the following year, he increased the amount to $800. By a second codicil, executed some years later and shortly before his death, he increased the annuity to $1,000 and provided that, on the death of any of the annuitants, the amount should go to the survivor or survivors for life:—Held, that K. being the principal beneficiary under the codicil, and the principal witness in support of it, and having had knowledge of it, and been a party to promoting its execution, was required to reasonably satisfy the mind of the Court. *In re Archbold*, 34 N. S. R. 254.

Promoter.—Where the promoter of and a residuary legatee under a will, executed two days before the testator's death, and attacked by his widow and a residuary legatee under a former will, the devise to the latter of whom was revoked, failed to furnish evidence to corroborate his own testimony that the will was read over to the testator, who seemed to understand what he was doing, and there was a doubt under all the evidence of his testamentary capacity, the will was set aside. *British and Foreign Bible Society* v. *Tupper*, 37 S. C. R. 100.

Evidence—Onus—Beneficiary.—In proceedings for probate by the executors of a will, opposed on the ground that it was prepared by one of the executors, who was also a beneficiary, there was evidence, though contradictory, that before the will was executed it was read over to the testator, who seemed to understand its provisions:—Held, that such evidence and the fact that the testator lived for several years after it was executed, and on several occasions during that time spoke of having made his will, and never revoked nor altered it, satisfied the onus, if it existed, on the executor to satisfy the Court that the testator knew and approved of its provisions.—Held, also, that where the testator's estate was worth some $50,000, and he had no children, it was doubtful if a bequest to the propounder, his brother, of $1,000 was such a substantial benefit that it would give rise to the onus contended for by those opposing the will. *Connell* v. *Connell*, 26 C. L. T. 383, 37 S. C. R. 404.

A strong *prima facie case* in favour of a will is not displaced by mere proof of serious illness or antecedent intemperance, or by evidence that there were motive and opportunity for the defendants to exercise undue influence and that some of them benefited by the will to the exclusion of other relatives of equal or nearer degree. There must be clear evidence that the undue influence was in fact exercised, or that the testator's illness so affected his mental faculties as to make them unequal to the task of

disposing of his property. *Burr Singh* v. *Uttam Singh*, L. R. 38 Ind. App. 13 P. C.

Onus.—In order to set aside a will on the ground that its execution was obtained by undue influence on the mind of the testator it is not sufficient to show that the circumstances attending the execution are consistent with the hypothesis that it was so obtained. It must be shown that they are inconsistent with a contrary hypothesis. *Adams* v. *McBeath*, 27 S. C. R. 13.

Medical Testimony.—The court, in adjudicating upon the question of the mental capacity of a testator, will give effect to the evidence thereof given by the medical attendants rather than to that of others, particularly those benefited by the will. Some of the parties benefited by a will swore that at the time of signing it the testator was clear in his intellect and understood perfectly what he was about; whilst the medical attendants swore that at that date he was in an almost comatose state, and his mind was not in such state as to be capable of any continuous action. The court, under these circumstances, refused to allow the paper to stand as his will. *Wilson* v. *Wilson*, 22 Chy. 39, 24 Chy. 377.

Conflict of Evidence.—The validity of a will established; the evidence of the medical attendants and surrounding circumstances tending to show that testator was of sufficiently sound mind to understand the meaning and effect of the devises, though other witnesses swore differently. *Menzies* v. *White*, 9 Chy. 574.

Evidence—Onus.—When the burden of proof has been cast upon the party upholding a will, he should call and examine the attesting witnesses, if it be possible to procure their testimony. *Mudill* v. *McConnell*, 12 O. W. R. 124, 17 O. L. R. 209.

The promoter of a will by which he takes a benefit is obliged to produce evidence clearly showing that in making the will the testator acted without improper suggestion or undue influence in the revocation of a former will. *Mayrand* v. *Dussault*, 27 C. L. T. 315, 38 S. C. R. 460.

Suggestion.—A will made a person weakened in body and mind by illness to the point of not being able to understand the nature and bearing of the provisions which it contains, and which are proved to be contrary to the wish of the testatrix, expressed for more than thirty years and set forth in another will made two months and some days before, the new provisions being framed in confused and sometimes unintelligible language, and suggested by the person to benefit by them, and who, as spiritual director, has great influence with the testatrix, will be declared false and not the true expression of her last wishes, and therefore will be annulled and set aside. *Barbeau* v. *Feuiltault*, 17 Que. K. B. 337.

Illness Inducing Stupor.—A testator was suffering from a disease which had the effect of inducing drowsiness or stupor during the time he gave the instructions for drafting and when he executed his will, but as the evidence showed that he thoroughly understood and appreciated the instructions he was giving to the draftsman as to the form his will should take and the instrument itself when subsequently read over to him, it was held to be a valid will. *McLaughlin* v. *McLellan*, 26 S. C. R. 646.

Extreme Weakness.—A will was executed by the testator on his death-bed; he was *compos mentis* at the time, although so extremely weak in body and mind that his directions were given at intervals, and difficult to understand. No fraud, however, was pretended, and the court was satisfied that the will accorded with his wishes, and contained all that was understood of them, though probably not all he desired to express; and was understood by the testator at the time of executing it:—Held, that the will was valid. *Martin* v. *Martin*, 15 Chy. 586.

Physical Weakness.—Mere physical weakness, however great, without proof of mental incapacity, is not sufficient to render invalid an acknowledgment of debt by a testator. *Emes* v. *Emes*, 11 Chy. 325.

Son.—The plaintiff being old and infirm, was induced by his son, with whom he resided and who had great influence with him, to agree in writing to leave to the decision of two referees the terms of his will, and to execute a will in pursuance of their award. A lease to the son was executed at the same time. The son having failed to establish that his father had competent independent advice in the matter, or had entered into the transaction willingly, or without pressure from the son, the court decreed the lease void, and the will revocable at the pleasure of the plaintiff. *Donaldson* v. *Donaldson*, 12 Chy. 431.

Temporary Incapacity.—The court, though the weight of evidence seemed the other way, refused to set aside a verdict upholding a will made by a testator in his last illness, which was disputed on the ground that he was not competent at the time to exercise a disposing power, though his strength of mind when in health was not doubted. *Harwood* v. *Baker*, 3 Moo. P. C. 282, commented on. *Brown* v. *Bruce*, 19 U. C. R. 35.

Insanity of Testator.—A universal legatee under a prior will, plaintiff in an action to set aside a subsequent will upon the ground of insanity of the testator, will be allowed to prove facts occurring before both wills, in order to establish the intellectual condition of the testator at the period of the will which he attacks.—2. Incapacity to make a will by reason of insanity cannot be proven from facts establishing simply failures of memory, oddity or eccentricity of ideas, momentary lapses of thought, and weakening of the mind caused by old age.—3. Influence and suggestion are not grounds for setting aside a will unless they result from fraud and deceit, corrupt practices, or lying insinuations, which have deceived the mind and imposed upon the will of the testator. An inference of such practices cannot be drawn from means employed by a person benefited by the will to attract the good will of the testator as long as there is no practice which prejudices his moral liberty. *St. Andrew's Church* v. *Brodie*, 14 Que. K. B. 149.

Proof of Insanity.—In order to avoid a deed or will on the ground of insanity, it is necessary to look first at the instrument itself and its provisions in order to see the mental condition of the maker; and if these provisions are such as a wise and just man would make in the like case, the Judge, unless there is irrefutable proof of insanity, should treat the instrument as valid. 2. The testimony of witnesses who did not see the testator for a long time before his death, and knew nothing of his mental faculties at the time when he made his will, has no significance, and cannot be a part of the chain of facts which constitute the general proof of insanity, unless it is sufficient in itself to annul the will, especially if there is medical testimony expressly contradicting it. *Hotte* v. *Birabin*, 25 Que. S. C. 275.

Insanity.—Held, that the proper inference to be drawn from all the evidence as to the mental capacity of the testator was that the testator, at the date of the making of the will, was of unsound mind. *Russell* v. *Lefrancois*, 8 S. C. R. 335.

Partial Insanity.—The question as to what degree of unsoundness of mind will incapacitate a person from executing a will, considered. A person who had at one time been insane, afterwards made a will. It was shown that, though he continued to be eccentric in his habits, he had a clear appreciation of the value and extent of his property, as also of the objects of his bounty:—Held, that he was qualified to make a valid disposition of his estate, within the ruling in *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549. *Ingoldsby* v. *Ingoldsby*, 20 Chy. 131.

Insanity after Will Made.—See *Miller* v. *Miller*, 25 Chy. 224.

Great Age.—The testator when nearly eighty years of age executed a will devising the whole of his estate to a son and daughter by his first marriage to the exclusion of his wife and other children of the second marriage. The attorney and medical man in attendance were of opinion that he had sufficient mental capacity to make a will. The same attorney had some time before induced him to refrain from making a similar will:—Held, that the will was invalid, its execution under circumstances of the testator's condition, and the absence of any explanation to him of the effect

of his testamentary act, being a fraud on the part of those concerned in procuring its execution. *Freeman* v. *Freeman*, 19 O. R. 141.

Senile Insanity.—An old man of 78 years, suffering, as the result of a stroke of paralysis, from senile insanity and the symptoms whereof he shows to the time of his death, is incapable of making a will in the interval. Any sane answers he may have given on several occasions, even during a superficial medical examination are insufficient to destroy positive evidence of his incapacity resulting from a number of facts indicating his symptoms, whether they have occurred before or after the will was made, as well as from the testimony of medical experts. *Giroux* v. *Giroux* (1910), 38 Que. S. C. 179.

Drunkenness.—A will made at a time when the testator was drunk, leaving his property to trustees with an absolute discretion to pay or not to pay the testator's wife any part of the income, was set aside, where it appeared that the testator was affectionate to his wife when sober, but the reverse when drunk. *Campbell* v. *Campbell*, 5 W. L. R. 59, 6 Terr. L. R. 378.

Procurement by Importunity.—A testator had made a will on the 6th August, when he was very weak and ill. On the 9th August, when he was in the same condition, according to the medical evidence a condition in which he would do anything and give in in anything for the sake of peace and quiet, he executed another will, upon the loud importunity of his sister, who was strong in body and mind. He died on the 13th August: —Held, that the will so procured could not stand. *Roman Catholic Episcopal Corporation for the Diocese of Toronto* v. *O'Connor*, 10 O. W. R. 76, 14 O. L. R. 666.

Question and Answer.—The testator, a man of education and a minister of the Presbyterian church, had become so weakened by illness as to be confined to his bed for some time prior to his death, and a day or two before that occurred executed a will by affixing what was intended as his mark thereto, the instructions for which were entirely obtained by the person preparing it, by putting questions to the testator as to the disposition of his different properties, and suggesting also the objects of his bounty; such will, when drawn, having been read over clause by clause to the testator, who expressed his assent to some of the bequests, while as to others he made intelligent remarks, and some changes in the provisions thereof. The court, in a suit brought to impeach the will as having been obtained by fraudulent practices and undue influence of persons benefited thereunder, as well as by the persons concerned in the preparation of the will, refused the relief sought, and dismissed the bill. *Thompson* v. *Torrance*, 28 Chy. 253. An appeal was dismissed, the court being equally divided, 9 A. R. 1.

Wife.—The mere exercise of influence by a wife or other person over the mind of a testator is not sufficient to invalidate a will; such influence must amount to a control subjecting his mental will to the desire of another, so that the will is not in reality his will, but that of another; the question is, in what sense is the document the will of the testator. *Waterhouse* v. *Lee*, 10 Chy. 178.

Insane Delusions.—The best evidence of testamentary capacity is that which arises from rational acts, and where the testatrix herself, without assistance, drew up and executed a rational will, medical evidence that she was mentally incapable of so doing will be rejected. Where one who benefits by a will procures it to be prepared without the intervention of any faithworthy witness, or any one capable of giving independent evidence as to the testator's intention and instructions, it will be regarded with suspicion, and its invalidity presumed, and the onus is on the party propounding it to clearly establish it. Where a physician improperly gives a certificate as to testamentary incapacity of his patient, it should not on that ground alone be rejected as evidence, if otherwise admissible, but the circumstances will affect the weight that should be attached thereto. Observations upon delusions and undue influence:—Held, on the facts, that the will of the testatrix was valid, but that the codicil was obtained by undue influence, and probate thereof was refused. *McHugh* v. *Dooley*, 10 B. C. R. 537.

Delusions.—Granted or proved that insane delusions exist in a man's mind, the question is whether the general faculties of his mind have been so far affected as to render him incompetent to make a testamentary disposition of his property as a whole or of that part in respect of which a delusion exists.—A greater scope of general capacity is needed where the whole of a man's property is being dealt with (as e.g., by a will) than when he deals with a single and separate piece of it by way of contract (as in the leading case of *Jenkins* v. *Morris*, 14 Ch. D. 674 (1880)). *Thamer* v. *Jundt* (1912), 22 O. W. R. 200; 3 O. W. N. 1307.

Insane Delusion of the testator as to the illegitimacy of his youngest child. *Bell* v. *Lee*, 8 A. R. 185.

Insane Delusion.—Testatrix, a widow of about 85 years of age, made her will. An action for proof of said will was removed from Surrogate Court into the High Court. Objections were taken: (1) the want of testamentary capacity, and (2) undue influence:—Held, that any delusions such as were sworn to could not have influenced testatrix in making her will, and that even if testatrix had the delusions alleged, they were not capable of affecting the disposition of her property. Will declared valid and admitted to probate. *McIntee* v. *McIntee* (1910), 17 O. W. R. 302, 2 O. W. N. 202.

Insane Delusion.—F. in 1890 executed a will providing generally for his wife and making his son residuary legatee. In 1897 he revoked this will and executed another by which the provision for his wife was reduced, but still leaving sufficient for her support; the son was given half the residue, and the testator's daughter the other half; his wife was appointed executrix and guardian of the children. Prior to the execution of the last will F. had frequently accused his wife and son of an abominable crime, for which there was no foundation, had banished the son from his house, and treated his wife with violence. After its execution he was for a time placed in a lunatic asylum. On proceedings to set aside this will for want of testamentary capacity in F.:—Held, that the provision made by the will for the testator's wife and son, and the appointment of the former as executrix and guardian, were inconsistent with the belief that when it was executed testator was influenced by the insane delusion that they were guilty of the crime he had imputed to them, and the will was therefore valid. *Skinner* v. *Farquharson*, 22 C. L. T. 197, 32 S. C. R. 58.

Spiritual Adviser.—The influence of a person standing in a specially confidential relation to a testator (in the present case the spiritual adviser and confessor) may lawfully be exerted to obtain a will or legacy in his favour, so long as the testator thoroughly understands what he is doing and is a free agent, and the burden of proof of undue influence lies upon those who assert it; but, if the person who obtains the benefit takes part in the actual drawing of the will, the onus is cast upon him of showing the righteousness of the transaction. *Collins* v. *Kilroy*, 21 C. L. T. 230, 1 O. L. R. 503.

Solicitations.—Suggestion and influence are not grounds for setting aside a will unless they amount to fraudulent practices or unless the testator is prevailed upon to such a point that he may be said to be deprived of his liberty. The most urgent solicitations and the greatest pressure brought to bear upon a testator from motives of cupidity will not suffice in the absence of fraudulent and false representations as grounds for setting aside testamentary dispositions. *Dussault* v. *Morin*, 16 Que. K. B. 385.

Circumstances Attending Execution.—The testator during his last illness made his will, leaving all his property to the defendant, who was not his wife, but had lived with him as such for many years, thus cutting off his only child, the plaintiff, with whom he was on friendly terms. It sufficiently appeared that he was of sound mind at the time, and evidence showed the probability of his having been influenced to make the will in the way he did, by the action recently brought by his wife for alimony against him, and by a notion that the plaintiff had been assisting her mother in such action. The defendant was present in the room when the instructions for the will were taken by the solicitor; but, beyond the fact

that she had untruly stated to the deceased during his last illness that the plaintiff did not want to visit him, there was no direct evidence of any improper influence brought to bear upon him by the defendant, and the plaintiff was compelled to rely on the general suspicion to be drawn. It is not sufficient for a finding that the will had been obtained by the exercise of undue influence to show that the circumstances attending the execution of the will are consistent with the hypothesis of undue influence, but it must be clearly shown that they are inconsistent with a contrary hypothesis. *Boyse* v. *Rossborough*, 6 H. L. Cas. 49, *Waterhouse* v. *Lee*, 10 Gr. 190, and *Baudains* v. *Richardson*, [1906] A. C. 185, followed.—The facts in this case did not bring it within the principle laid down by the Court of Appeal in England in *Tyrell* v. *Painton*, [1894] P. 151, *Tellier* v. *Schiemann*, 7 W L. R. 229, 17 Man. L. R. 262.

Uncorroborated Evidence.—Held, that a second will could not be established on the uncorroborated evidence of the defendant, and the prior will was declared to be the testator's last will. *Hogg* v. *Maguire*, 11 A. R. 507.

Clause Inserted in Will.—E., the agent of a testatrix, introduced into her will a clause declaring that she had sold to one S. two properties therein described, and directing the plaintiff (to whom she devised all her real and personal estate beneficially), to convey these properties to S. The testatrix contracted with S. for the sale to him of one only of these lots; but E. alleged an oral bargain by the testatrix to sell the lot to him; there was no writing as to such a bargain, and no part performance. After the death of the testatrix, E. induced the plaintiff, who was not of age, to execute a conveyance to S. of the two lots:—Held, that the alleged bargain with E. was not binding on the plaintiff, and a release of the lot to her was directed, with costs to be paid by E. *Archer* v. *Scott*, 17 Chy. 247.

Succession to Estate of Alien.—In 1831, an alien could not devise by last will and testament. The succession of an alien then devolved to his grandchildren, natural born British subjects, to the exclusion of his own children who were aliens. Who is an alien? is a question to be decided by the law of England, but when alienage is established the consequences which result from it are to be determined by the law of Canada. If an alien dies, without issue, his lands belong to the Crown, but if he leaves children, some born in Canada, and others not, the former exclude the Crown, and then all the children inherit as if they were natural born subjects. Where an alien has a son who is also an alien, the children of the latter inherit from the grandfather to the exclusion of their father. *Donegani* v. *Donegani* (1835), C. R. 1 A. C. 50.

Foreign Testator.—A testator, domiciled in a foreign country, died in 1891, possessed of certain lands and personal estate in that country, and also of lands in Ontario. His personal estate was insufficient to pay his debts. By his will, after specific bequests and devises, he gave the residue of his estate, real, personal, and mixed, wherever situated, to his trustees, to promote, aid, and protect citizens of the United States of African descent in the enjoyment of their civil rights or, in case such trust becoming inoperative, to his heirs-at-law:—Held, that the devise of lands, so far as Ontario was concerned, was void and inoperative. (2) That the trustees held the lands to the use of the heir-at-law until satisfaction should be made thereout for the charges thereon of debts and testamentary expenses, and the heir-at-law was entitled to a conveyance thereafter. (3) That the Ontario lands were liable to contribute *pari passu* with the other lands for the payment of debts and testamentary expenses. (4) That the proportion chargeable on Ontario lands might be raised by sale of an adequate part, or the rents might be applied therefor. *Lewis* v. *Doerle*, 28 O. R. 412.

CHAPTER IV.

WHAT MAY BE DEVISED OR BEQUEATHED.

POWER OF TESTAMENTARY DISPOSITION.

Section 3 of the Wills Act enacts that "it shall he lawful for every person to devise, bequeath or dispose of by his will, executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed or disposed of, would devolve upon the heir at law or customary heir of him, or if he became entitled by descent, of his ancestor, or upon his executor or administrator," with other detailed provisions.

6th ed., p. 65.

The corresponding section of the Ontario Wills Act is section 9, which is as follows:

9. Subject to the provisions of The Devolution of Estates Act nnd of The Accumulations Act, every person may devise, hequeath, or dispose of hy will executed in manner hereinafter mentioned, all real estate nnd personal estate, to which he may he entitled at the time of his denth, and which, if not so devised, bequeathed, or disposed of, would devolve upon his heirs or upon his executor or ndministrator; and the power herehy given shall extend to estates *pur autre vie*, whether there is or is not any special occupant thereof, and whether the same nre corporeal or incorporeal hereditaments; and nlso to all contingent, executory, or other fntnre interests in any real estnte or personal estate, whether the testator is or is not ascertained as the person or one of the persons in whom the same may become vested, and whether he is entitled thereto under the instrument hy which the same were created, or under any disposition thereof by deed or will, and nlso to all rights of entry for conditions hroken and other rights of entry, and also to such of the same estates, interests and rights respectively, and other real estate nnd personnl estate, as the testntor may he entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

JOINT ESTATES AND INTERESTS.

Tried by the rule laid down by sec. 3 of the Wills Act, it is obvious that a devise or bequest by a joint tenant of real or personal estate is void, in the event of the testator dying in the lifetime of his co-proprietor, whose title by survivorship takes precedence of the claim of the devisee or legatee, as it would of that of the heir or administrator, of the predeceased joint tenant, in case he had died intestate. If, on the other hand, the testator survives his companion in the tenancy, it is now unnecessary to inquire whether the devising joint tenant had become solely seised by survivorship at the period of the execution

of his will; it is enough that he had acquired a devisable interest in the estate at the time of his decease. And the same rule applies now, as formerly, to bequests of leaseholds or other personal estate.

5th ed., p. 48, 6th ed., p. 66.

TENANTS IN COMMON AND COPARCENERS.

Where the several co-proprietors are tenants in common, or coparceners, each has an absolute power of testamentary disposition over his or her undivided share.

5th ed., p. 49, 6th ed. p. 66.

DEAD BODY.

It is obvious that a person cannot dispose by will of anything that is not the subject of ownership or property, such as his own body after death.

6th ed., p. 66. *Williams* v. *Williams*, 20 Ch. D. 659.

AFTER-ACQUIRED FREEHOLD INTERESTS FORMERLY NOT DEVISABLE.

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

1st ed., p. 43, 6th ed., p. 66.

EQUITABLE INTERESTS—CONTRACT OF PURCHASE.

Where a testator had an equitable interest in the devised lands when he made his will, and afterwards acquired the legal ownership, the equitable interest passed by the will, and the subsequently acquired legal estate descended to the heir, who, of course, became a trustee for the devisee. If, on the other hand, the testator was seised only of the legal estate at the time of the execution of his will, and afterwards acquired the equitable interest (being the converse case), as where, being a mortgagee

in fee at the date of the will, he subsequently purchased the equity of redemption, the devisee was a trustee of the legal estate which he derived through the will, for the heir at law to whom the equitable inheritance descended. Cases of the former description frequently occurred, where a man contracted to purchase a freehold estate, then devised it, and, subsequently to the execution of his will, took a conveyance of the property, and then died without republishing his will. The testator being equitable owner under the contract, his interest passed by the will to the devisee, whose equitable right the heir was bound to clothe with the legal title. In these and many other cases, great inconvenience occurred from the incompetency of a testator to dispose by will of his after-acquired real estate; and questions often arose as to the actual state of the rights and obligations of the parties under the contract, on which the validity of the devise depended, and also as to the effect of certain modes of conveyance, in producing a revocation of the devise of the equitable interest. The removal of this incapacity, therefore, is not the least of the advantages conferred by the recent statute [the Wills Act, 1837], which has expressly extended the testamentary power to such real and personal estate as the testator may be entitled to at the time of his death, notwithstanding he may become entitled to the same subsequently to the execution of his will. But it may, of course, be necessary, even under the present law, to go into the inquiry, whether the circumstances attending a contract for purchase or sale by a deceased person are such as to render the contract obligatory, for upon this fact would depend the question (which has lost none of its importance by the recent enactment) whether, as between the representatives of the deceased testator or intestate, it is to be regarded as real or personal estate. This question is discussed in the chapter on Conversion.

1st. ed., *ibid.* 6th ed., p. 67.—See Chapter XXII.

AFTER-ACQUIRED REAL ESTATE NOW DEVISABLE.

The Wills Act not only (by sec. 3) extends the power of testamentary disposition to all real estate which the testator is entitled to at the time of his death, but (by sec. 24) makes every will speak from the time of the testator's death, unless a contrary intention appears. The effect of these sections is discussed in Chapters XII. and XXVI.

CHATTELS REAL.

Bequests of chattel interests in land were always governed by principles wholly different from those which formerly regulated devises of freehold estates. Even under the old law

they did not pass directly to the legatee, as the alienee of the testator, but, forming part of his personal estate, they devolve to the executor or other general personal representative, who is bound, in subordination to the paramount claims of creditors, to give effect to any bequest in the will, specific or residuary, comprising the property in question; and, therefore, even under the old law, it was quite unnecessary, as regarded the testator's competency of disposition, to go into the inquiry, whether he was at the time of making the will, possessed of a term of years which formed part of his property at his decease; such an inquiry being no less irrelevant in the case of a bequest of leaseholds held by a chattel lease, than in that of a horse or a watch, or any other personal chattel.

1st ed., p. 53, 6th ed., p. 72.

FREEHOLDS PUR AUTER VIE.

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

Ibid.

By the Wills Act, s. 3, the previous enactments respecting estates pur auter vie were repealed, and the testamentary power is expressly extended to such estate, "whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament"; and by sec. 6 it was enacted, that "if no disposition shall be made of any estate pur auter vie of a freehold nature, it shall be assets in the hands of the heir, and that in case there shall be no special occupant of any estate pur auter vie, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it

shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator, either by reason of a special occupancy or by virtue of the act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate."

5th ed., p. 60, 6th ed., p. 73.

DEVISE BY QUASI TENANT IN TAIL OF ESTATES PUR AUTER VIE.

A question often agitated, but never entirely settled in regard to the devising power over estates of the description was whether, where they were limited to the tenant pur autre vie, and the heirs of his body, they could be disposed of without some act on his part to bar the entail.

1st ed., p. 55, 6th ed. p. 74.

The Wills Act does not in terms dispose of this debateable point, but has, it should seem, done so in effect, by the language of the general enabling clause, sec. 3, which extends the devising power to "all real estate and all personal estate which he (the testator) shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon the heir at law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator."

Ibid.

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

Ibid.

INCORPOREAL HEREDITAMENTS.

Existing rights of this nature, so far as they are alienable, can apparently be the subject of a devise. Thus a rentcharge can clearly be devised. Of course a right which is inseparable from a tenement (such as an easement or right of common for cattle levant and couchant) cannot be disposed of by will except with the tenement, or (in the case of an easement) by being devised to the owner of the servient tenement so as to be extinguished.

6th ed., p. 75.

CREATION DE NOVO.

It seems equally clear that a rentcharge, easement, profit a prendre or similar right, which can be created by grant, can be created by devise de novo.

6th ed., p. 75. *Booth* v. *Smith*, 14 Q. B. D. 318.

IMPLICATION.

A way of necessity may be impliedly created by a devise of land, and the doctrine as to the creation of implied easements by the contemporaneous grant of adjoining pieces of land applies to devises.

6th ed., p. 75. *Phillips* v. *Low* (1892), 1 Ch. 47.

LEGAL CHOSES IN ACTION.

Legal choses in action, such as debts, may be disposed of by will, and if they are given specifically, it is the duty of the executors to get them in and hand them over to the legatee. The Wills Act does not enable the legatee to sue for them in his own name.

5th ed., p. 50, 6th ed., p. 75. *Re Robson* (1891), 2 Ch. 559.

GOVERNMENT SECURITIES.

Money in the public funds, bonds of foreign governments, and other so-called government securities, are not choses in action in the strict sense, because no action lies to enforce them, but there is no doubt that they are personal property, and can therefore be disposed of by will.

6th ed., p. 76.

LIFE INSURANCE.

A person who effects a policy of insurance on his own life can prima facie dispose of it by his will. Whether a specific bequest of a policy confers such a "derivative title" as to enable the legatee to sue for the policy moneys in his own name under the Policies of Assurance Act, 1867, does not seem to have been decided.

6th ed., p. 76.

NON-BEQUEATHABLE POLICY.

A person effecting an insurance on his own life may by the terms of the contract restrict his right to dispose of the policy by will, or may debar himself altogether from the right of testamentary disposition.

6th ed., p. 76. *Re Davies* (1892), 3 Ch. 63.

TORTS.

As regards rights of action for tort, the general rule of the common law is that "actio personalis moritur cum persona." In a few cases at common law, and in several cases by statute, the personal representatives of a deceased person can sue for

injuries to his property, and, under Lord Campbell's Act, for a personal injury causing his death. In the latter case the damages recovered do not form part of the deceased's estate.

6th ed., p. 76. See *Mason* v. *Peterborough*, 20 A. R. 683, which decides that an action for injury to the person now survives to the executor.

EQUITABLE CHOSES IN ACTION.

In certain cases an equitable chose in action may be disposed of by will. Thus where a conveyance has been executed under circumstances which would give the grantor a right in equity to have it set aside, such a right is clearly devisable.

6th ed., p. 76.

CHOSES IN ACTION IN A HOUSE, &c.

How far a gift of "property" in a house, box, cabinet, &c., is effectual to pass choses in action, has been discussed in several cases. In Re Prater, a testator bequeathed "my property at R.'s bank"; at the time of his will and of his death he had at R.'s bank in Paris a cash balance and certificates of shares in French companies which apparently entitled any person holding them to the ownership of the shares: it was held that the cash balance and the shares passed by the bequest.

6th ed., p. 77. *Re Prater*, 37 Ch. D. 481.

This question is also discussed in the chapter on Legacies, with reference to bequests of personal property in a particular place.

CONTRACT TO PURCHASE LAND.

Where a person contracts to purchase land, this is an interest which he can devise by will.

5th ed., p. 51, 6th ed., p. 77. *Morgan* v. *Holford*, 1 Sm. & G. 101.

CONTRACT NOT BINDING.

But even under the old law, if from a defect of title or any other cause the contract was not obligatory on the purchaser at his death, his heir or devisee was never entitled to say he would take the estate with its defects, or have the purchase-money laid out in the purchase of another.

5th ed., p. 52, 6th ed., p. 78. *Broome* v. *Monck*, 10 Ves. 597.

CONTRACT FOR SALE OF LAND.

The converse case of a testator entering into a contract for the sale of land devised by his will, often gives rise to the question whether the contract operates as a revocation of the devise. This question is discussed in Chapter XXII.

6th ed., p. 78.

RIGHT OF RESIDENCE OR OCCUPATION.

A testator may give to A. the right of residing in or occupying a particular house or other property rent free, in terms which

shew that the right is personal to A. and cannot be assigned by him to another.

6th ed., p. 78. *Parker* v. *Parker*, 1 N. R. 508.

The cases in which a devise of the use and occupation of land gives the devisee an estate are considered elsewhere. (Chap. XXXV.).

6th ed., p. 79.

OPTION OF PURCHASE.

A testator may give a person the right of purchasing property forming part of the testator's estate, either at a price named by the testator, or at a price to be fixed by the executors, or by valuation or otherwise. If the price is to be fixed by the executors, they are bound to fix a reasonable price, but the Court will not interfere if they act in good faith. If any terms are imposed by the testator as to time, &c., they must be strictly complied with, otherwise the right will be lost; but if the offer is to be made by the executors, time is reckoned from the date when a complete offer is made.

6th ed., p. 79. *Radnor* v. *Shafto*, 11 Ves. 448; *Edmonds* v. *Millett*, 20 Bea. 54; *Lilford* v. *Keck*, 30 Bea. 295.

RIGHTS CONFERRED BY OPTION.

It is not clear to what extent the ordinary law of vendor and purchaser applies to a purchase under an option. It seems that the person exercising the option is not necessarily entitled to an abstract of title, and even if he is, the terms of the will may be such that failure on the part of the executors to deliver an abstract will not absolve him from complying with the requirements of the will as to time. On the other hand, it has been decided that, in the absence of a direction to the contrary, he is entitled to have the property free from incumbrances.

6th ed., p. 79. *Re Wilson* (1908), 1 Ch. 839.

WHETHER PERSONAL OR TRANSMISSIBLE.

An option of purchase given by will to A. B. is prima facie personal to him, and does not pass to his executors on his death, but the will may be so expressed as to confer a transmissible interest. It seems clear that if an option of purchase is not personal to the donee, its exercise must be confined to the period allowed by the Rule against perpetuities.

6th ed., p. 79. *Belshaw* v. *Rollins* (1904), 1 Ir. R. 284.

RIGHT OF SELECTION.

A gift to A. of such part of a certain property as shall be selected by him is valid. The right is a personal one, and therefore it would seem that if A. survives the testator and dies before selecting, the right is gone. But this would probably not be

so where the part to be selected is indefinite and unrestricted, for then the gift is equivalent to a gift of the whole property.

6th ed., p. 80. *Arthur* v. *Mackinnon*, 11 Ch. D. 385.

EXECUTORY AND CONTINGENT INTERESTS.

An executory or contingent interest in real or personal estate is disposable by will, if the nature of the contingency on which it is dependent be such that the interest does not cease with the life of the testator; in other words, if it be descendible or transmissible.

6th ed., p. 80. *Goodtitle* v. *Wood*, Willes. 211, s.c. cited 3 T. R. 94.

The converse of this proposition is equally true, namely, that an interest which is not transmissible cannot be devised. A contingent interest in personal property can be bequeathed by will if it is transmissible. As regards wills made since the year 1837, the statute of 1 Vict. c. 26, s. 3, has expressly provided that the testamentary power conferred by it "shall extend to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may have become vested."

6th ed., p. 80. *Re Cressicell*, 24 Ch. D. 102.

AS TO RIGHTS OF ACTION AND ENTRY.

Rights of action and entry were not, under the old law, devisable, but the Wills Act has expressly extended the testamentary power to "all rights of entry for conditions broken and other right of entry," so that a possibility of reverter is now devisable. And as to rights of action, the question cannot recur since the statute abolishing real actions.

6th ed., p. 81.

POSSESSION DE FACTO.

Possession without title confers a devisable interest, which may be defended and recovered by the devisee against all but the true owner.

6th ed., p. 81. *Asher* v. *Whitlock*, L. R. 1 Q. B. 1.

PROFIT COSTS.

When a testator appoints a solicitor to be executor or trustee of his will, he sometimes empowers him to charge for services rendered by him in performing the duties of his office. Whether the right to make such charges is confined strictly to professional services or extends to other matters, depends on the language of the will.

6th ed., p. 81. *Re Fish* (1893), 2 Ch. 413.

The right to charge profit costs is in the nature of a legacy and the solicitor forfeits it by attesting the will.

6th ed., p. 81. *Re Thorley* (1891), 2 Ch. 613.

WHERE WILL TAKES EFFECT EX POST FACTO.

In some cases (apart from the doctrine of powers) property passes under the will of a testator, although it never belonged to him. Thus where a gift of real or personal property by will to a child of the testator is preserved from lapse by the Wills Act, and the child has left a will containing a sufficient residuary gift, the property bequeathed or devised to the child by the father's will passes under the residuary gift in the child's will. A similar result follows when personal property is expressly given by will to A., and in the event of his predeceasing the testator, then to his executors as part of his personal estate, and A. predeceases the testator, leaving a will containing a sufficient residuary bequest.

6th ed., p. 81. *Johnson* v. *Johnson*, 3 Ha. 157; *Re Clay*, 54 L. J. Ch. 648.

So if land is limited, by virtue of a shifting clause, to A., and before it takes effect A. dies intestate, leaving B. his heir, and B. dies, having made a will containing a general devise of real estate, and then the shifting clause takes effect, the land passes by the devise.

6th ed., p. 82. *Ingilby* v. *Amcotts*, 21 Bea. 585.

REAL ESTATE.

The appropriate word for disposing of land and other real estate is "devise," but of course any word indicating that intention, such as "bequeath," although more properly applicable to personalty, is sufficient. A difficulty as to the intention in such cases arises where the gift is referential.

6th ed., p. 82. *Re Gibbs* (1907), 1 Ch. 465.

"I MAKE A. B. MY HEIR."

An appointment or acknowledgment of a person as the testator's heir may operate as a general devise of his real estate.

6th ed., p. 82.

PERSONALTY.

The appropriate word for disposing of personal property, including leaseholds, is "bequeath," but the word "devise" was formerly used as an operative word for bequeathing personalty, and of course may at the present time be so used, if the intention is clear.

6th ed., p. 83. *Re Lowman* (1895), 2 Ch. 348.

APPOINTMENT AS RESIDUARY LEGATEE.

It is clear that if a testator appoints a person to be his residuary legatee, that will give him all the testator's residuary personal estate. The contest in such cases generally is, whether

the words are sufficient, with the aid of the context, to pass the real estate.

6th ed., p. 83. *Re Gibbs* (1907), 1 Ch. 465.

Right to Purchase.—The testator gave his sons the option of purchasing the shares of his daughters in the real estate after marriage or death of the widow for the sum of £500 each:—Held, that the fact of the sons having, during the lifetime of the widow, joined in leases naming all the children, sons as well as daughters, as lessors—some of the sons being then infants—was not such an act as deprived the sons of the right of afterwards exercising the option of purchasing the interest of the daughters. *Laidlaw* v. *Jackes*, 25 Chy. 293.

A testator directed that "in case any one of the above named three legatees be able and willing to buy the farm, as aforesaid, at the price of $4,000, my executors hereafter named shall so sell said farm." Each of the three legatees claimed the right to purchase the farm:—Held, under these circumstances, that the executors were precluded from carrying out this direction of the will, and that they must sell the estate and divide the proceeds between the parties interested, according to another provision of the will. *Jeffrey* v. *Scott*, 27 Chy. 314.

The testator was seised of certain lands which were subject to incumbrances, and by his will directed the same to be sold if his sons in succession should not redeem. One of the sons, R., to whom the first privilege of redeeming was given, availed himself thereof, and redeemed the property, which was subject to certain charges imposed by the will, in addition to the incumbrances:—Held, that the right to redeem was in effect a right to purchase, as the mortgages and charges created by the will amounted to about as much as the land was worth: and that R. had acquired a good title free from any claim of his brothers: and, his brothers having instituted proceedings against him claiming an interest in the estate, that he was entitled to recover his costs, not out of the estate of the testator but from the plaintiffs personally. *Stevenson* v. *Stevenson*, 28 Chy. 232.

Rent—Payment to Trustee.—A testator devised land, subject to a lease, to J. H. in fee, and as to the rent directed half to be paid to J. H., and half to the executor in trust for J. H. The executor, assuming the devise to be valid, paid all the rent to J. H. The latter executed a deed of the land to C. H. to whom he afterwards paid the rent with the privity of the executor, as soon as he received it from him. C. H. went into possession of the land after the expiration of the lease, and had been so receiving rent or in possession for more than ten years before action commenced. J. H. was a witness to the will:—Held, that the devise of rent was void under 25 Geo. II. c. 6, s. 1, as J. H. was the beneficial devisee of the whole of it. *Hopkins* v. *Hopkins*, 3 O. R. 223.

CHAPTER V.

WHO MAY BE DEVISEES OR LEGATEES.

Disability of Corporations to Take by Devise. Mortmain Acts.

The statute of 34 Hen. 8, c. 5, expressly excepted out of its enabling clause devises to bodies politic and corporate; and, accordingly, it was held, that a devise to a corporation, whether aggregate or sole, either for its own benefit or as trustee, was void; and the lands so devised descended to the heir, either beneficially or charged with the trust, as the case might be. The recent statute contains no such prohibition, the legislature having contented itself with regulating and defining the powers and capacities of testators, without in any manner interfering with, or attempting to define, the capacities of persons to take under testamentary dispositions, which it has left to be ascertained and determined by the application of the general principles of law. If, therefore, the disability of corporations to acquire real estate by devise had been created by the statute of Henry, the Act of 7 Will. 4 & 1 Vict. c. 26 would, by repealing that statute without reviving the prohibition, have had the effect of giving validity to such devises; but this is not the case. The disability of corporations to hold real property was created by various antecedent statutes, which appear to have been founded on the principle that, by allowing lands to become vested in objects endued with perpetuity of duration, the lords were deprived of escheats and other feudal profits. Hence, the necessity of obtaining the King's licence, he being the ultimate lord of every fee in the kingdom; but this licence only remitted his own rights, and did not prevent the right of forfeiture accruing to intermediate lords. Doubts having arisen, however, at the Revolution how far such licence was valid, as being an exercise of the dispensing power formerly claimed by the Crown (but which, it is pretty evident, it was not, but merely a waiver of its own right of forfeiture), the statute 7 & 8 Will. 3, c. 37, was passed, which provides that the Crown for the future, at its own discretion, may grant licences to alien or take in mortmain, of whomsoever the tenements shall be holden. At this day, therefore, the licence from the Crown protects against forfeiture to any intermediate lord.

1st ed., p. 57, 8th ed., p. 84.

MODERN PRACTICE.

After the Act 7 & 8 Will. 3, c. 37 (see above), it became the practice in granting a licence in mortmain for the Crown to authorise the corporation to acquire and hold lands, and also to authorise all persons to convey lands to the corporation. In more modern times, however, it seems to have been considered that a licence to a corporation to acquire and hold lands in mortmain, implied a licence to other persons to convey them to the corporation, and the express licence to do so fell into disuse. The question whether, on the interpretation of this statute [7 & 8 Will. 3, c. 37], a person, not having a licence to alien in mortmain, can alien to a corporation having only a licence for themselves to hold in mortmain (without the clause enabling all persons to alien to them) so as to prevent the entry of the immediate lord or of the Crown for the escheat, seems never to have been settled, and perhaps is more curious than practically important.

6th ed., p. 85.

There is nothing which prevents a corporation empowered to acquire and hold lands in mortmain from taking by devise in the ordinary way.

6th ed., p. 87.

DEVISES TO CORPORATIONS IN TRUST.

Where, before the Wills Act, real estate was devised upon trust to a corporation not empowered to take lands by devise, although the devise, was, of course, void at law, under the statute of Henry, yet the estate descended to the heir charged with the trust (supposing that it was not illegal under the statute 9 Geo. 2, c. 36, as being in favour of charity), in the same manner as where a devise to a trustee fails by the death of the devisee in trust in the testator's lifetime. And since the Wills Act, the trust would equally be upheld; the only difference being that the corporation trustee is now capable (except in cases within the Mortmain Act of 1736 or 1888) of taking by devise, though not, without licence, of holding.

5th ed., p. 64, 6th ed., p. 87.

A corporation incorporated under The Ontario Companies Act has power to acquire by purchase, lease or *other title*, and to hold any real estate necessary for the carrying on of its undertaking, and when no longer required to sell, alienate and convey the same. (Ont. Statutes, 1912, c. 31, sec. 24.)

6th ed., p. 89.

CORPORATIONS SOLE.

Questions on gifts by will to corporations sole do not often arise. They seem to labour under the same general incapacity to hold land without a licence in mortmain as corporations aggregate. It seems that since the passing of the Mortmain, &c., Act, 1891, land can be validly devised to a corporation sole (such as a rector or vicar) upon charitable trusts, but it must be sold in accordance with the act.

6th ed., p. 89. *Re Scowcroft* (1898) 2 Ch. 638.

VOLUNTARY ASSOCIATION.

A gift by will to a voluntary society or association of persons, such as a club, for their own benefit is clearly good. But if it is upon trust for future members of the association, it is clearly bad.

6th ed., p. 89.

ALIENAGE.

The incapacity of alienage has been removed by the Naturalization Act.

See *ante* p. 25.

FOREIGNERS.

As regards disabilities imposed on aliens by the laws of their own countries, the general rule seems to be that the English courts disregard all personal disabilities and disqualifications unknown to English law.

6th ed., p. 92. *Re Selot's Trust* (1902) 1 Ch. 488.

GIFTS TO ATTESTING WITNESSES.

Under the Statute of Frauds, a devise of land was required to be attested by "credible" witnesses, a character which persons having a beneficial interest under the will were held not to sustain, and accordingly, a will of freehold estate attested by such persons was invalid; and that, too, not only as to the part which created the interest of the attesting witness, but in regard to the whole.

6th ed., p. 92.

STAT. 25 GEO. 2, C. 6.

It was soon found that the holding a will of freeholds to be invalid on account of the existence of an interest, however remote or minute, in any one of the attesting witnesses, was productive of much inconvenience; and it being apparent that to render the witness competent, by depriving him of the benefit which affected his disinterestedness, was far better than to sacrifice the entire will, the statute 25 Geo. 2, c. 6 was passed, which, after reciting the 29 Car. 2, c. 3, s. 5, provided, that beneficial devises, legacies, &c., to attesting witnesses, other than and

except charges on lands, &c., for payment of debts, should, so far only as concerned such attesting witnesses, or any person claiming under them, be null and void; and such person should be admitted as a witness to the execution of such will or codicil within the intent of the said Act, notwithstanding such devise, &c.; but it was enacted (sec. 2), that any creditor, whose debt should be charged on lands, &c., by will or codicil, and who should attest the execution of such will or codicil, should, notwithstanding such charge, be admitted as a witness to such execution.

5th ed., p. 70, 6th ed., p. 92.

By the Wills Act the legislature adopted the principle, and extended the operation of the enactments in the statute 25 Geo. 2, c. 6, which it repeals, except as to the colonies in America.

5th ed., p. 72, 6th ed., p. 93.

WILL NOT TO BE VOID ON ACCOUNT OF INCOMPETENCY OF ATTESTING WITNESSES.

Section 14 provides that if any person, who shall attest the execution of a will, shall at the time of the execution thereof, or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid. (Section 16 Ontario Act).

GIFT TO AN ATTESTING WITNESS OR WIFE OR HUSBAND OF WITNESS TO BE VOID.

Section 15 provides 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 effecting 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. (Ont. Act, sec. 17).

CREDITOR ATTESTING TO BE ADMITTED A WITNESS.

Section 16 provides that in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is

so charged, shall attest the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof. (Ont. Act, sec. 18).

EXECUTOR TO BE ADMITTED A WITNESS.

Section 17 provides that no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof. (Ont. Act, sec. 19).

REMARKS UPON NEW LAW AS TO INTERESTED WITNESSES.

These enactments preclude, as to wills coming within their provisions, all questions arising under the old law as to the effect of a gift to the husband or wife of an attesting witness, and they extend the disqualification of the witness to take beneficially to wills of every description; the act having, by assimilating the execution of wills of real and personal estate, destroyed all ground for distinguishing between them in regard to this point.

5th ed., p. 72. 6th ed., p. 93.

EVIDENCE ADMISSIBLE TO SHOW THAT LEGATEE DID NOT SIGN AS WITNESS.

Upon the construction of the 15th section, it has been decided that a legatee under a will does not lose his legacy by attesting a codicil which confirms the will; and further, that a residuary legatee by so doing, does not lose his share of the residue, although the codicil in fact increases that share by revoking some particular legacies. Each witness attests only the instrument to which he puts his name. Consequently, if a will consists of separate sheets of paper, executed by the testator on the same day, but separately attested, a legatee under one of them does not forfeit his legacy by reason of his having attested one or more of the other sheets. Again, where a will attested by a legatee is re-published by a codicil attested by other witnesses, the gift to the legatee is made good. And this benefit is not lost to the legatee by his subsequent attestation of a second codicil. But where by will a legacy was bequeathed in a contingency which failed, and by a codicil attested by the legatee, the legacy was made absolute, the legatee was held disqualified to take the absolute legacy. And, following the rule regarding wills of real estate under the pre-existing law, a witness is held to be disqualified to take as legatee although he is a supernumerary. But evidence is admissible to shew under what circumstances the supernumerary signed, and if it appears that he did not sign as a witness (e.g., if he did not sign at the request of

the testator, or contemporaneously with the attesting witnesses) ho will not lose his legacy. According to numerous cases, the rule is, that if a will contains the names of threo or more persons who appear to be attesting witnesses, some of them being legatees, all the names must be included in the probate, in order that the question whether the legatees did or did not sign as witnesses may be decided in a court of equity.

5th ed., p. 72, 6th ed., p. 94. *Re Marcus*, 57 L. T. 399; *Re Craven*, 99 L. T. 399; *Anderson* v. *Anderson*, L. R. 13 Eq. 381.

It is the function of the Court of Probate to decide the question in all cases, and that if the name of a person is included in the probate as an attesting witness, that is conclusive on the court of construction.

6th ed., p. 95. *Re Faux* (1888), W. N. 240; *Randfield* v. *Randfield*, *ut supra*.

It has been held that a person who attests the attestation of a marksman is himself an attesting witness to the will, and a legacy to him consequently fails.

6th ed., p. 95. *Wigan* v. *Rowland*, 11 Hare 157; *Randfield* v. *Randfield*, 30 L. J. Ch. 179.

ACCELERATION OF REMAINDERS WHERE LIFE INTEREST IS GIVEN TO ATTESTING WITNESS.

It has further been held, upon the construction of this section, that where there is a testamentary gift for life, which fails by reason of the attestation of the will by the donee, or by his or her wife or husband, with remainder to the children of the donee, and in default of children then over, the remainder

These clauses appear in the Ontario Wills Act of 1910, as follows:—

16. If any person who attests the execution of a will is, at the time of the execution thereof, or becomes at any time afterwards, incompetent to be admitted as a witness to prove the execution thereof, such will shall not on that account be invalid.

17. If any person attests 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 estate or personal estate, other than and except charges and directions for payment of any debt, is 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 such 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 the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift or appointment mentioned in such will.

18. In case by any will any real estate or personal estate is charged with any debt, and any creditor, or the wife or husband of any creditor whose debt is so charged attests the execution of such will, such creditor, notwithstanding such charge, shall be admitted as a witness to prove the execution of such will, or the validity or invalidity thereof.

19. No person shall, on account of his being an executor of a will, be incompetent to be admitted as a witness to prove the execution of such will or the validity or invalidity thereof.

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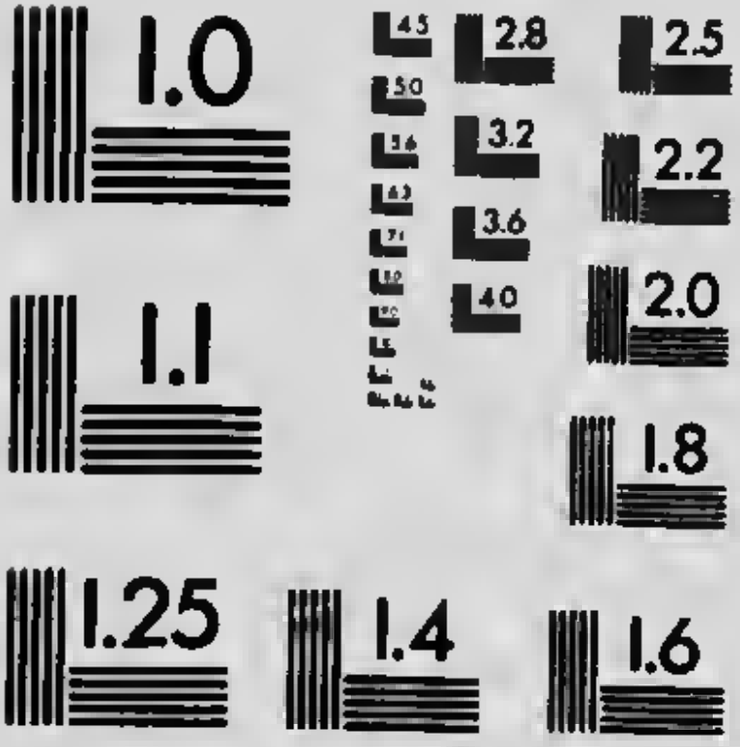

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to the children, if in existence at the testator's death, will not be defeated, but will be accelerated and become an immediate interest; but that, if there is then no child of the donee for life, the ultimate gift upon the determination of the life interest cannot be accelerated, but during the life of the donee, and until birth of issue, the income of real estate will belong to the testator's heir-at-law. In the case of personalty the interim income would, on the same principle, go to the testator's next of kin.

5th ed., p. 73, 6th ed., p. 95. *Re Clark*, 31 Ch. D. 72; *Re Townsend's Estate*, 34 Ch. D. 357.

The gift which fails by the operation of the section is not struck out of the will for all purposes; consequently if there is a gift to "A. or her children," and A.'s husband attests the will, the failure of the gift to A. does not make the substitutionary gift to her children take effect.

6th ed., p. 95. *Aplin* v. *Stone* (1904), 1 Ch. 543.

MARRIAGE OF DEVISEE OR LEGATEE AFTER ATTESTATION TO ATTESTING WITNESS.

The validity of a devise or bequest will not be destroyed, under sec. 15 of the Wills Act, if an attesting witness, who, at the time of the attesting act, takes no benefit under the will, subsequently marries the devisee or legatee.

Ibid. *Thorpe* v. *Bestwick*, 6 Q. B. D. 311.

POWER FOR SOLICITOR TRUSTEE TO MAKE PROFESSIONAL CHARGES.

A direction by will that a solicitor executor or trustee may make professional charges, creates a benefit under the will within the meaning of this section; and consequently if the solicitor attests the will, he is precluded from claiming the right to make the charges.

5th ed., p. 73, 6th ed., p. 96. *Re Trotter* (1899), 1 Ch. 764.

WHERE ATTESTING WITNESS IS TRUSTEE.

A gift to an attesting witness as trustee is not invalidated by sec. 15.

5th ed., p. 73n., 6th ed., p. 96. *Cresswell* v. *Cresswell*, L. R. 6 Eq. 69.

In Re Fleetwood, Hall, V.C., held that where a gift is made by will to a trustee upon a parol trust, a person who attests the will cannot take any benefit under the trust, but the point was not argued, and the decision has not been followed in Ireland.

6th ed., p. 96. *O'Brien* v. *Condon* (1905), 1 Ir. R. 51.

EXECUTOR NOW NOT ENTITLED TO UNDISPOSED-OF PERSONALTY.

In allowing an attesting witness to be appointed executor, whether he be or be not in terms made an executor in trust,

regard is evidently had to the statute of 1 Will. 4, c. 40, which precludes executors from claiming, by virtue of their office, the beneficial interest in the undisposed of personal estate of their testator, to which, by the pre-existing law, an executor was entitled, where the will did not afford any presumption of a contrary intention, a point which was often difficult of solution.

Ibid. See Post Chapter XV.

DEVISE TO HEIR; ITS EFFECT UNDER THE OLD LAW.

Another disability to take by devise formerly arose out of the doctrine, that where a title by descent and a title by devise concurred in the same individual, the former predominated, and the heir was in by descent and not by purchase. If however the quality of the estate which the heir took by the devise differed from that which would have descended upon him, he acquired the property as devisee.

5th ed., p. 74, 6th ed., p. 96.

STAT. 3 & 4 WILL. 4, C. 106, S. 3. MAKING A HEIR-DEVISEE A PURCHASER.

Whether the doctrine in question extended to testamentary appointments was a point of some nicety, and occasioned much discussion, into which, however, it is not now proposed to enter, as questions of this nature cannot arise under any will, future or recent; the statute of 3 & 4 Will. 4, c. 106, s. 3, having provided that, when any land shall have been devised by any testator who shall die after December 31, 1832, to the heir, or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent.

See R. S. O. 1897 chap. 127 (Devolution of Estates Act sec. 26,) where the date is fixed at 1st July 1834.

It has been decided that the word "heir" includes "heirs," and that the section operates to alter the quality of the estate taken by the heir, so that if a testator leaves co-heiresses, they take as joint tenants under a devise to them, and not as coparceners.

6th ed., p. 97. *Owen* v. *Gibbons* (1902), 1 Ch. 636.

DEVISES AND BEQUESTS TO BASTARDS.

A bastard in esse, whether born or unborn, is competent to be a devisee or legatee of real or personal estate; and the only question that now admits of discussion, in regard to gifts to such persons, is, whether they are sufficiently designated as the objects of them; and this depends on rules of construction of great practical importance in the preparation of wills, and which will hereafter receive examination. Whether a gift can be made to

bastards not procreated, is a vexata quæstio, which will be fully considered in a later part of this work.

5th ed., p. 74, 6th ed., p. 97. See Chapter XLIII.

INFANTS AND LUNATICS.

Infants (including infants en ventre sa mère and insane persons are not incapacitated from taking by devise or bequest, though they cannot manifest their acceptance; for acceptance will be presumed unless it would work injury to the devisee or legatee.

5th ed., p. 74, 6th ed., p. 97. *Mogg* v. *Mogg*, 1 Mer. 654.

A testator may, of course, expressly authorise payment of a legacy to an infant, or to a parent, guardian, or other person on his behalf, and the legacy may properly be paid accordingly.

6th ed., p. 98.

MARRIED WOMEN.

Property devised or bequeathed to a married woman, unless given to her separate use, was formerly subject to her husband's rights in respect of it. Accordingly if a legacy was given to a married woman, without more, the money could not be paid to her, for nothing but an actual payment to the husband, or a release by him, would be a discharge as against the wife surviving. But the executors might, in a proper case, decline to pay the legacy to the husband except upon the terms of his making a proper settlement on his wife.

6th ed., p. 98. In Ontario the date with regard to personalty is 4th May, 1859, with regard to realty 2nd March, 1872, and a woman is and has been since such dates entitled to receive such property as a *feme sole*.

DEVISE BY HUSBAND TO WIFE.

It may be mentioned that even at common law, although a man could not convey land to his wife during the coverture, he could devise it to her by will, "for that such devise taketh no effect till after the death of the devisor."

6th ed., p. 98.

SEPARATE USE.

Where property is acquired by a married woman as her separate property, either because it is expressly given to her separate use, or because she takes it under the Married Women's Property Act, 1882, she is entitled to receive it as if she were a feme sole.

6th ed., p. 99.

ABOLITION FOR FORFEITURE FOR TREASON AND FELONY.

By the Forfeiture Act, 1870, where any person has been sentenced to death or penal servitude upon any charge of treason or felony, the Crown may appoint an administrator of his pro-

perty, and all real and personal property to which the convict becomes entitled between the date of his conviction and the completion of his sentence, or his pardon, vests in the administrator for the purposes of the act. Before this act, all property, both real and personal, accruing to a felon or traitor during the term above referred to, was forfeited to the Crown by virtue of its prerogative. After completion of the sentence or pardon, his right to acquire and hold property was restored to him.

6th ed., p. 99.

A gift to a person who is not ascertained at the date of the will is not invalid for that reason, unless the result would be to enable the testator to make a testamentary disposition by a subsequent unattested instrument, or by an act which is testamentary in its nature.

6th ed., p. 99. *Stubbs* v. *Sargon*, 2 Keen. 255, 3 Myl. & Cr. 507.

ANIMALS.

It may be added that an animal cannot take by devise or bequest, as appears clearly from the doctrine of our law with regard to monsters. It is equally clear, on principle, that an animal cannot be a cestui que vie for the purpose of creating an estate pur auter vie, or a "life" within the meaning of the Rule against Perpetuities. The question whether a trust can be created for the benefit of an animal is discussed in Chapter XXIV. A trust for the benefit of animals may be good as a charity.

6th ed., p. 99.

Felony—Death of Testator Caused by Devisee.—No devisee can take under the will of a testator whose death has been caused by the criminal and felonious act of the devisee himself, and in applying this rule no distinction can be made between a death caused by murder and one caused by manslaughter. Judgment of Court of Appeal sub nom. *McKinnon* v. *Lundy*, 21 A. R. 560, reversed, and that at trial, 24 O. R. 132, restored. *Lundy* v. *Lundy*, 24 S. C. R. 650.

Foreign State — Trust — Accumulation.—A testator directed his executors to pay and deliver the residue of his estate to the Government and legislature of the State of Vermont, to be disposed of as to them should seem best, having regard to certain recommendations set forth in the will: —Held, affirming 27 Chy. 361, that the estate was sufficiently designated as the legatee to entitle it to take the bequest; and the fact that the bequest was for the benefit of, and to take effect in a foreign country, could not be urged as an objection to its validity; neither could the objection that the State could not be made amenable to the Courts of the State, and thus there would not be any supervision of the trusts, as it must be assumed that a sovereign state would not do anything to violate a trust; besides which it appeared that the legislature was not, in reality, to assume the trust, their duty being to appoint trustees who would be amenable to the courts. Held, also, that the direction for accumulation did not render the bequest invalid, it being for the courts in Vermont to say whether the direction should be carried out. *Parkhurst* v. *Roy*, 7 A. R. 614.

Solicitor's Advice.—A will is not invalid because it is executed in pursuance of a solicitor's opinion on a matter of law, which proves to be unsound. *Macdonell* v. *Purcell*, *Cleary* v. *Purcell*, 23 S. C. R. 101.

Supposed Wife.—Held, that, as it appeared that the only consideration for the testator's liberality to J. M. was that he supposed her to be "my beloved wife Julie Morin," while at that time J. M. was, in fact, the lawful wife of another man, the universal bequest to J. M. was void through error and false cause. *Russell* v. *Lefrancois*, 8 S. C. R. 335.

Taking as a Class.—Where a testator, after devising certain lands to "my trusty friends J. L. and R. M." on certain trusts for the maintenance and education of his son, J. E., and devising the residue, real and personal, to the said "J. L. and R. M., or the survivor of them," in trust to sell and distribute the proceeds in payment of certain legacies, therein specified, continued, "should there ultimately be any residue, I direct my said trustees, or the survivors of them, to divide and pay the same to and among my legatees hereinbefore named and my said trustees, or the survivor of them, in even and equal shares and proportions:"—Held, that the trustees took as a class, i.e., one share between them, equal to the shares taken respectively by the legatees; for looking at the whole will, it appeared that the testator was speaking of the trustees in their official capacity, and regarding them as one legal person. *Boys' Home* v. *Lewis*, 4 O. R. 18.

Attestation by Mistake.—A will having been attested by one of the legatees, the solicitor for the testator, being present at the time, and apprehensive that the legatee was incompetent, signed the will himself, and procured another also to do so, but the name of the legatee was not struck out of the attestation clause:—Held, that evidence was admissible to prove the actual fact of the case, and it thus appeared that the mistake of having the legatee as an attesting witness had been remedied, not by striking out her name, but by the parties proceeding to a new attestation and subscription of the will, and the legatee was therefore not incapacitated from taking under the will. *Re Sturgis*, *Webling* v. *Van Every*, 17 O. R. 342.

Election by Heir.—Where, by a will, land is devised to an attesting witness, there is an intestacy as to this devise by virtue of 26 Geo. II. c. 6, s. 1, and the heir is not bound to elect as between this land and a legacy bequeathed to him by the will. *Munsie* v. *Lindsay*, 1 O. R. 164.

Credible Witnesses—Interest.—In ejectment the plaintiff claimed under the heir-at-law of J. D., defendant under J. D.'s will, by which the land in question was devised to defendant, with a devise over to another son if he died before twenty-five, and similar devises over if that and other devisees named died before that age, his son John being the last named; but whoever got the property was to pay each of his children £5. There were the names of three attesting witnesses, John and M., who had married one of the testator's daughters, being two of them; and the will was registered on a memorial signed by John as one of the devisees. The jury, however, found that John was not in fact an attesting witness:—Held, that this finding was wrong, upon the evidence set out in the case; and that it should have been shown whether testator's title was registered, for otherwise registration of the will, under C. S. U. C. c. 89, would be unnecessary. A new trial was therefore ordered. If John was an attesting witness, then, under 25 Geo. II. c. 6, the devise to him was void, and the registry on a memorial signed by him as devisee was ineffectual. If he was not, then of the two remaining witnesses M. was disqualified, for the devise to his wife of a legacy was not avoided by 25 Geo. II., and it made him not a credible witness within the Statute of Frauds. C. S. U. C. c. 82. s. 13, which allows wills to be attested by two instead of three witnesses, changes the number only, not the character; they must still be credible witnesses. Semble, therefore, in either case, if the will required registration the plaintiff would be entitled to recover. *Ryan* v. *Devereux*, 26 U. C. R. 100.

Extent of the Rule.—Quære, whether since *Ryan* v. *Devereux*, 26 U. C. R. 100, a bequest to one of the witnesses to a will would be held to

be invalid. *In re Munsie*, 10 P. R. 98. But see *Munsie* v. *Lindsay*, 1 O. R. 164; S. C., 11 O. R. 520; *Morrison* v. *Morrison*, 9 O. R. at p. 225.

Husband of Devisee.—A devise by a testatrix, who died in 1860, to a married woman, whose husband was one of the two witnesses to the execution of the will:—Held, void, notwithstanding the provisions of the Evidence Act of 1852, 16 Vict. c. 19. *Crawford* v. *Boyd*, 22 Chy. 398.

Residuary Legatee.—Where one of several residuary legatees was also a witness to the will:—Held, the will must be read as if the gift to her had been blotted out by the testator and the residuary gift distributed rateably among the other residuary legatees as if she were non-existent. *Farewell* v. *Farewell*, 22 O. R. 573.

Unnecessary Attestation.—Where the devisee witnesses the will, the devisee to him is void, although there are two other witnesses; and the will would therefore have been sufficiently attested without him. *Little* v *Aikman*, 28 U. C. R. 337.

Validating by Codicil.—A legacy invalid because of the legatee's husband being a witness to the will was held validated by a revlving codicil witnessed by independent persons. *Purcell* v. *Bergin*, 20 A. R. 535.

Deleted Words.—By one of the clauses of his will, a testator gave to his nephew his mill, tannery, houses, lands, and all his real estate, effects, and property whatsoever, and of what nature and kind soever, at a named place, chargeable with certain legacies:—Held, that the clause, when taken by itself, would include personal as well as real property, yet when read with other clauses of the will, and the whole context taken into consideration, the gift was limited to the real estate:—Quære, whether in construing a will deleted words can be looked at. *Thorne* v. *Parsons*, 22 C. L. T. 379, 4 O. L. R. 682, 1 O. W. R. 608.

CHAPTER VI.

EXECUTION AND ATTESTATION OF WILLS.

Effect of Lex Domicilii and Lex Rei Sitæ.

The remarks in this chapter as to the formalities required for a valid will, apply only to wills intended to operate according to the law of England. If the will of an English testator is intended to dispose of land situate out of England, it must be borne in mind that testamentary dispositions of immoveable property are governed by the lex rei sitæ, and accordingly care must be taken to ascertain and comply with the formalities required for the validity of wills by the law of the country where the property is situate. Sometimes, also, a doubt may arise whether an Englisbman, who has been long resident abroad, has, at the time of making his will, an Englisb or a foreign domicil; in such a case it will be prudent tbat the will should be in such form and so attested and executed as tc be valid not only according to English law, but also according to the law of tbe foreign country by which it is apprehended tbat the disposition of his moveable property may possibly bc regulated.

6th ed., p. 100.

If the will of a person domiciled in a foreign country has been proved there, it will generally be accepted as valid by tbe Court of Probate here.

6th ed., p. 100.

Section 74 of tbe Surrogate Courts Act of Ontario (Ont. Statutes 1910, chapter 31) provides for giving effect to grants of probatc of British or Colonial Courts.

Wills Made by Soldiers and Sailors.

Thc only kind of privileged will now recognised by law is a will made by a soldier or sailor in certain circumstances. Section 14 of the Wills Act enacts that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before thc making of the act.

5th ed., p. 78, 6th ed., p. 101.

Merchant Shipping Act, 1894.

Tbe Merchant Shipping Act, 1894, provides that where a deceased seaman or apprentice has left a will, the Board of Trade may refuse to pay or deliver any property of his which

has come into the hands of the Board to any person claiming under the will, unless (if made on board ship) it is in writing and signed or acknowledged by the testator in the presence of and attested by the master or first or only mate of the ship; if the will was not made on board ship, the Board may refuse to pay or deliver the property to any person claiming under the will, and not related to the testator by blood or marriage, unless the will is in writing and signed or acknowledged by the testator in the presence of and attested by two witnesses, one of whom is a mercantile marine superintendent, or a minister of religion officiating in the place where the will is made, or where there are no such persons, a justice, British consular officer, or an officer of customs.

6th ed., p. 101.

The Canadian Merchant Shipping Act, R. S. C. c. 113, contains no similar clause.

Any soldier or sailor coming within the exception contained in sec. 14 of the Wills Act, if over the age of fourteen years, may dispose of his goods and chattels, either by a written or by a nuncupative will. A written will is one which is written by the testator or committed to writing by his direction. It may be of the most informal character, and it does not require to be signed or even seen by him, but strict proof is required of the history of every alleged will, even if written and signed by the testator. A nuncupative will "is when the testator without any writing doth declare his will before a sufficient number of witnesses."

6th ed., p. 102.

EVIDENCE REQUIRED TO PROVE NUNCUPATIVE WILL.

A nuncupative will, in the proper sense of the term, requires to be proved by very clear and satisfactory evidence. In most, if not all, of the cases in which a nuncupative will has been admitted to probate, the testator was in extremis at the time of making it. But the term "nuncupative will" is often applied to an informal written will made by a soldier on active service.

6th ed., p. 102.

ALTERATIONS.

Alterations in a soldier's will are presumed to have been made during military service.

6th ed., p. 103. *In bonis Tweedale*, L. R. 3 P. & D. 204.

STATUTORY ENACTMENTS.

The 5th section of the Statute of Frauds (29 Car. 2, s. 3) required that all devises and bequests of any lands or tenements, should be in writing and signed by the party so devising the same, or by some other person in his presence and by his express

direction, and should be attested and subscribed in the presence of the said devisor, by three or four credible witnesses.

5th ed., p. 76, 6th ed., p. 104.

PERSONAL ESTATE.

As regards personal estate, before the Statute of Wills, any person over the age of fourteen years could dispose of his goods and chattels by a written will. Nuncupative wills were not formally abolished by the Statute of Frauds, but were placed under such restrictions as practically abolished them, except in the case of wills made by soldiers and sailors. The statute did not interfere with written wills, for the validity of which, as already explained, neither the signature of the testator, nor any attestation, was necessary.

6th ed., p. 104.

WILLS ACT.

The statute 1 Vict. c. 26 (sec. 9), provides, "That no will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; (that is to say) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

5th ed., p. 77, 6th ed., p. 104.

This statute abolished all distinctions in regard to the mode of execution and attestation between the various species of property.

6th ed., p. 105.

DECISIONS ON THE STATUTE OF FRAUDS.

It will be observed, that though by the Statute 1 Vict. c. 26, the ceremonial of execution is somewhat varied, yet several of its details remain unaltered, so that the cases decided under the Statute of Frauds, bearing upon the interpretation of the words "signature," "presence," "direction," "other persons," "attested," "subscribed," which are common to both enactments, bear equally upon the interpretation of the same words in the statute of Victoria.

5th ed., p. 77, 6th ed., p. 105.

PRESUMPTION OF DUE EXECUTION.

It may here be mentioned that if a will appears on the face of it to have been executed and attested in accordance with the requirements of the act, the maxim "omnia præsumuntur ritè

esse acta" applies, unless it is clearly proved by the attesting witnesses that the will was not in fact duly executed. But if the evidence is clear probato will be refused. Even where the document is inform. l (as where thero is no attestation clause or the clause is incomplete) it may be assumed to havo been duly executed (especially if it is a holograph will), although no evidence of its due execution is forthcoming. *Glover* v. *Smith*, 57 L. T. 60.

LOST WILL.

Where a will has never been proved and has disappeared since the death of tho testator, tho maxim "omnia præsumuntur" may be applied.

6th ed. p. 105. *Harris* v. *Knight*, 15 P. D. 170.

In Ontario prior to the 6th of March, 1834, in order to be valid, a will had to comply with the requirements of the 5th section of the Statute of Frauds, above stated. By statute 4, Wm. IV., c. 1, s. 51, a change was made, the effect of which appears as section 5 of the Ontario Wills Act, 1910, as follows:—

Any will affecting land executed after the sixth day of March, 1834, and before the first day of January, 1874, in the presence of and attested by two or more witnesses, shall have the same validity and effect as if executed in the presence of and attested by three witnesses; and it shall be sufficient if the witnesses subscribe their names in presence of each other, although their names were not subscribed in presence of the testator.

The variance between the statutes of Charles and of William was this; that by the former, the will must be attested and subscribed in the presence of the testator by three or four credible witnesses, who need not subscribe or attest in presenec of each other, or at one and the same time; the latter statute was silent as to the credibility of the witnesses, and execution in the presence of and attested by two witnesses, was as valid as if in the presence of and attested by three witnesses; and it was sufficient if such witnesses subscribed ir presence of each other, without subscribing (as required by the statute of Charles), in the presence of the testator.

By the Wills Act of 1873, commencing from 1st January, 1874, the provisions of section 9 of the Imperial Wills Act, as amended by Imperial Act, 15 & 16 Vict. c. 24, s. 1, were introduced. These provisions now appear as section 12 of the Ontario Wills Act, 1910.

12. (1) No will shall be valid unless it is in writing, and executed in manner hereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses present

at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator; but no form of attestation shall be necessary.

(2) Every will, so far only as regards the position of the signature of the testator, or of the person so signing for him, shall be valid, within the meaning of this Act, if the signature is so placed, at, or after, or following, or under, or beside, or opposite to the end of the will, that it is apparent on the face of the will that the testator intended to give effect by such signature to the writing signed as his will; and no such will shall be affected by the circumstance that the signature does not follow or is not immediately after the foot or end of the will, or by the circumstance that a blank space intervenes between the concluding word of the will, and the signature, or by the circumstance that the signature is placed among the words of the testimonium clause, or of the clause of attestation, or follows or is after or under the clause of attestation either with or without a blank space intervening, or follows, or is after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature is on a side, or page, or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will is written above the signature, or by the circumstance that there appears to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature shall be operative to give effect to any disposition, or direction which is underneath, or which follows it, nor shall it give effect to any disposition or direction inserted after the signature was made.

WILLS MUST BE IN WRITING.

The first condition requisite under the Wills Act to render valid any testamentary disposition, is that such disposition shall be "in writing." No particular form is required. A printed or lithographed form of a will, with or without blanks for names of legatees, amounts of legacies, &c., to be filled up in ink, satisfies this requirement of the act. Such instruments are constantly admitted to probate without question. But where a will is written on a printed form, probate may be granted of the written portion only, if it appears that the testator did not intend the printed portion to form part of his will. And even where the whole is admitted to probate, the fact that a printed or lithographed form has been used may affect the construction of the will. A will is not invalid by reason of blank spaces being left in it, or a blank page. Any difficulty which may arise by reason of the blanks, or any similar error, must be determined by the court of construction.

5th ed., p. 78, 6th ed., p. 105. *In bonis Kirby*, 1 Rob. 709; *In bonis Hubbuck* (1905), P. 129.

WILL WRITTEN IN PENCIL.

And if blanks in a will (which is written in ink) are filled up in pencil before execution, the matter so inserted will be included in the probate.

Kell v. *Chormer*, 23 Bea. 195.

A will may be written in pencil. But where a printed form was filled up partly in ink and partly in pencil, and the writing

in ink made sense with the form without help from the writing in pencil, part of which was written over by the ink, the ink writing alone was held to be the will.

In bonis Adams, L. R. 2 P. & D. 367.

PAROL TRUST.

The statutory requirement that a will must be in writing has been disregarded by the courts, in cases where it has been proved that a person to whom property has been given by will, holds it upon a parol trust.

In bonis Marchant (1893), P. 254.

WILL AFFECTED EX POST FACTO.

There are also cases in which documents written by a testator after the execution of his will are allowed to affect its operation.

6th ed., p. 106. *Townsend* v. *Townsend*, 1 L. R. Ir. 180.

WILL MUST BE SIGNED.

The next condition prescribed for the validity of a will is that it should be signed which suggests the inquiry what amounts to a "signing" by the testator. It has been decided that a mark is sufficient, even if the testator is able to write, and though his name does not appear on the face of the will. A mark being sufficient, of course the initials of the testator's name would also suffice. And it would be immaterial that he signed by a wrong or assumed name (since that name would be taken as a mark), or that against the mark was written a wrong name, and that the testator was also wrongly named in the body of the will, or that his hand was guided in making the mark. But where an intending testator executes the wrong will by mistake, it has no testamentary effect.

5th ed., p. 79, 6th ed., p. 107. *Re Davy* (1907), W. N. 210; *Donelly* v. *Broughton* (1891), A. C. 435; *Wilson* v. *Beddard*, 12 Sim. 28.

SEALING, INSUFFICIENT.

Sealing alone will not as a general rule satisfy the statutory requirement that a will must be signed by the testator. But it is conceived that a distinctive seal, if shown to have been impressed by the testator with the design of authenticating the instrument, would be good as a signature by mark.

5th ed., p. 80, 6th ed., p. 107. *Wright* v. *Wakeford*, 17 Ves. 456.

SIGNATURE BY ANOTHER FOR TESTATOR.

Both statutes expressly permit the testator's signature to be made by some other person by his direction, provided that it is made in his presence. That other person may, it seems, be one of the witnesses, and it is immaterial that he signed his own name instead of the name of the testator. And where the testator directed a person to sign the will for him, which that

person did by writing at the foot, "this will was read and approved by C. F. B., by C. C. in the presence of, &c.," and then followed the signatures of the witnesses, the will was held good. And on the ground that whatever would be good as a signature, if made by the testator, must be equally good if made by his direction, an impression of his name stamped by his direction was held good, as a mark would also have been.

5th ed., p. 80. 6th ed., p. 108. *Smith* v. *Harris*, 1 Roh. 262; *In bonis Clark*, 2 Curt. 329.

ONE SIGNATURE OF SEVERAL SHEETS SUFFICIENT.

One signature, of course, is sufficient, though the will be contained in several sheets of paper; and it will generally be presumed that all the sheets were put together in the same order at the time of execution as at the testator's death; and that any apparent alteration in their order and paging was made before execution. This presumption may, of course, be rebutted.

Ibid. *Lewis* v. *Lewis* (1908), P. 1; *Rees* v. *Rees*, L. R. 3 P. & D. 84.

SHEETS NOT FASTENED TOGETHER.

It is not even necessary that the sheets of the will should be physically connected, or fastened or held together; if the evidence satisfies the Court that when the last sheet was signed and attested the other sheets were in the room, and that the testator treated them as together constituting his will, that is sufficient. In coming to this conclusion the Court may, if the evidence is conflicting or defective, draw inferences from the provisions of the will and other circumstances.

6th ed., p. 108. *In bonis McKey*, Ir. R. 11 Eq. 220.

SIGNATURE AND ATTESTATION ON SEPARATE SHEET.

But it seems that this rule does not apply unless a dispositive part of the will is contained on the sheet which bears the signature and attestation. The signature may indeed be on a separate piece of paper containing nothing but the signature and attestation, but in that case the piece of paper must be in some way "attached" to the will itself, and the fact of its having been so attached before execution must be proved. What degree of "attachment" is required does not seem to be satisfactorily settled.

6th ed., p. 109. *In bonis West*, 32 L. J. P. 182.

EXTRINSIC EVIDENCE.

In considering whether or not several pieces of paper constitute the will, declarations made by the testator both before and after execution are admissible to shew that it was his intention to make dispositions in conformity with those which are found upon the several sheets of paper.

6th ed., p. 109. *Gould* v. *Lakes*, 6 P. D. 1.

FURTHER SIGNATURE CONTEMPLATED.

In a case where the testimonium at the end referred to the preceding sides of the sheet of letter paper as being subscribed by the testator, the fact of those sides not being so signed was held not to affect the validity of the will, as the testator evidently intended the signing and sealing of the last side to apply to the whole. But the signature must have been made with the design of authenticating the instrument; for it should seem that if the testator contemplated a further signature which he never made, the will must be considered as unsigned.

5th ed., p. 80, 6th ed., p. 100. *Sweetland* v. *Sweetland*, 34 L. J. P. 42.

Conversely, if a testator has duly executed his will, and afterwards signs his name to it again, in the presence of two persons who also sign their names, it may appear from the circumstances that this was not intended as a re-execution of the will, but was done for some other purpose.

6th ed., p. 109. *Dunn* v. *Dunn*, L. R. 1 P. & D. 277.

Having regard to the necessity (referred to in the next section of this Chapter) that the signature should not be above or precede the dispositive part of the will, it seems advisable, when a testator is in extremis, that the first or only signature should be at the end; for it has sometimes happened that a testator who has begun to sign the several sheets has expired or become insensible before he had reached the last.

6th ed., p. 110.

POSITION OF TESTATOR'S SIGNATURE.
—REPEALED BY 15 & 16 VICT. c. 24.

The statute 1 Vict. c. 26, as amended, has introduced a condition in this respect not formerly essential to the validity of a will, namely, that the signature of the testator must be somewhere near the end of the instrument, and so as not to be immediately over, or preceding any of the dispositive parts of the instrument, but it need not immediately follow or be under any of the dispositive parts; whereas formerly the signature might be in any part of the instrument. The provision in the original enactment requiring the signature of the testator to be at the "foot or end" of the will (which was evidently intended only to do away with the former rule that the name of the testator written in the commencement thus:—"I, A. B., do make, &c.," was a sufficient signature), seems at first to have answered the purpose intended; subsequently however, the Courts came to the conclusion that the words "foot or end" were to be construed strictly, and that if the signature did not immediately follow under the dispositive part of the will, and in such a manner

that nothing could be written between the signature and the last words, the will was not properly executed. To obviate the inconveniences arising from these decisions, it was enacted by statute 15 & 16 Vict. c. 24: now contained in Wills Acts throughout the Provinces of the Dominion.

PROVISION REQUIRING THE SIGNATURE TO BE AT THE FOOT OR END.

That whereas by an act of 1 Vict. (c. 26), it is enacted that no will shall be valid unless it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction, every will shall so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this act, if the signature shall be so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect, by such his signature, to the writing signed as his will, and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstances that the signature shall be placed among the words of the testimonium clause, or of the clause of attestation, either with or without a blank space intervening, or shall follow, or be after, or under, or beside, the attestation clause, or the names, or one of the names, of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page, or other portion of the same paper, on which the will is written, to contain the signature, and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said act or this act shall be operative to give effect to any disposition or direction which is underneath, or which follows it: nor shall it give effect to any disposition or direction inserted after the signature shall be made.

5th ed., p. 81, 6th ed., p. 110.

Parol evidence is admissible to show *quo animo* the testator signed his name. *Dunn* v. *Dunn*, L. R. 1 P. & D. 277.

If at the time of execution the paper is so folded that no writing is visible, it must be proved that the will was written before the testator signed. *In bonis Hammond*, 32 L. J. P. 200.

ACKNOWLEDGMENT OF TESTATOR'S SIGNATURE.

The statute 1 Vict. c. 26, placed the law with regard to the acknowledgment of wills on a new footing. The signature of the testator is to be "made" or "acknowledged" (the "signature," and not, as formerly, the "will," being the subject of acknowledgment) in the simultaneous presence of the witnesses, whereas formerly the signature might be "made" before one, and the will acknowledged before the rest, or acknowledged before all the witnesses separately, without any of them having seen the signature.

5th ed., p. 83, 6th ed., p. 112.

As to this point, the following decisions have been made with regard to acknowledgment:—

(a) The signature to be acknowledged may be made by the testator, or by another for him.

In bonis Regan, 1 Curt. 908.

(b) A testator, whether speechless or not, may acknowledge his signature by gestures.

In bonis Dovies, 2 Rob. 337.

(c) There is no sufficient acknowledgment unless the witnesses either saw or might have seen the signature, not even though the testator should expressly declare that the paper to be attested by them is his will.

In bonis Peorn, 1 P. D. 70; *In bonis Gunstan, Blake* v. *Bloke*, 7 P. D. 102; *Beckett* v. *Howe*, L. R. 2 P. & D. 1, contra, must be regarded as overruled.

(d) When the witnesses either saw or might have seen the signature, an express acknowledgment of the signature itself is not necessary, a mere statement that the paper is his will, or a direction to them to put their names under his, or even a request by the testator, or by some person in his presence, to sign the paper, is sufficient.

In bonis Bishop, 30 W. R. 567.

(e) When the signature is seen or expressly acknowledged, it is not material that the witnesses are not told that the instrument is a will, or are deceived into thinking that it is a deed.

In bonis Moore (1901), P. 44.

(f) It is of course sufficient, on a re-execution, merely to acknowledge the signature made on a former execution.

5th ed. p. 84, 6th ed., p. 113. *In bonis Dewell*, 17 Jur. 1130.

ATTESTATION AND SUBSCRIPTION BY WITNESSES.

The next statutory requisition is, that the will be "attested and subscribed" by the witnesses.

5th ed., p. 85, 6th ed., p. 114.

SIMULTANEOUS PRESENCE OF WITNESSES.

It follows from what has been above stated that the will must be signed by or for the testator, and his signature must be acknowledged, before either of the witnesses signs. The signature must be made or acknowledged in the presence of the witnesses simultaneously, and not at different times, and they must themselves subscribe their names in the presence of the testator, though not necessarily in the presence of each other.

Ibid.

WHAT .. SUFFICIENT SUBSCRIPTION :—

A mark has been decided to be a sufficient subscription; but it is never advisable, where it can be avoided (and, now that the art of writing is so common, seldom necessary), to employ marksmen as witnesses. The initials of the witnesses also amount to a sufficient subscription, if placed for their signatures, as attesting the execution; but not if they are placed in the margin opposite to, and apparently for the purpose only of identifying, alterations. A witness need not sign his own name, if the name actually subscribed be intended to represent his name; or a description (without any name) is sufficient, if intended to identify him as witness. But if a wrong name be signed with the intention of making it appear that the will was attested by the person to whom that name belongs, instead of the actual witness, the subscription is insufficient. And if the witness signs part of his full name in such a way as to shew that he does not intend it as a complete signature, this is no attestation. Sealing is not sufficient. If the witness cannot write, his hand may be guided by another person, or another person may write the witness's name while the witness holds the top of the pen; in fact, there seems to be no distinction in these respects between the words "sign" and "subscribe;" any act, therefore, which, as before noticed, would be a good signature by a testator, would be a good signature by a witness,—with, however, these exceptions, that the subscription of the witness is required to be made in the presence of the testator, and must not, as in the case of a testator, be a signature made by some other person for the witness, or by the witness himself at some other time, and merely acknowledged by him in the presence of the testator.

Ibid. *Hindmarsh* v. *Charlton*, 8 H. L. C. 160; *In bonis Ashmore*, 3 Curt. 756; *In bonis Christian*, 2 Rob. 110; *In bonis Cunningham*, 29 L. J. P. 71; *In bonis Leverington*, 11 P. D. 80; *In bonis Lewis*, 31 L. J. P. 153.

MUST BE AN ACT APPARENT ON THE PAPER.
—AND DESCRIPTIVE OF THE WITNESS.

Where the will has been once attested by a witness, it is not sufficient for him, on a re-execution, to go over his name with

a dry pen; he must do some act apparent on the face of the paper; otherwise it is no more than an acknowledgment. And where a witness to a former execution, on attesting a will for the second time, did not again write her name, but after her name written on the first execution, wrote the name of her residence, "Bristol," Sir H. J. Fust considered that to be no proof of the attestation, and decided that the will was not properly re-executed. So where a witness to a former execution, on attesting a re-execution of a will, wrote the day of the month against his former signature, and crossed one of the letters in it, not intending that the mark made by crossing the letter should stand for his signature, but supposing that the addition of the date was equivalent to a repetition of the signature, it was held by Sir C. Cresswell that the will was not duly re-executed. In these cases the attestation was insufficient, because there was no proof that the word "Bristol" in the one case, and the mark across the letter in the other, were intended to represent the witness's signature. They were nothing more than acknowledgments of the former signatures. The signature must be such as is descriptive of the witness, whether by a mark, or by initials, or by his full name, or by a description without name; a view which necessarily denies efficacy as a signature to the writing of the date.

5th ed., p. 86, 6th ed., p. 115. *In bonis Trevanion*, 2 Rob. 311; *Hindmarsh* v. *Charlton*, *ut. sup.*; *Horne* v. *Featherstone*, 73 L. T. 32; *In bonis Sperling*, 33 L. J. P. 25.

POSITION OF WITNESS'S SIGNATURE.

The signature of the witnesses may be placed in any part of the will; for instance, the will ending on the first side of a sheet of letter paper, the witnesses may sign on the fourth ; and the will ending on the middle of the third side, and two of the witnesses signing at the end, and another signing in a vacant space on the second side opposite the other two, was held a sufficient attestation by three witnesses under the Statute of Frauds. And if the witnesses sign their names opposite alterations in the will, and not in the proper place, it may be proved by parol evidence that they intended to attest the testator's signature. So where they sign in a blank space in the body of the will. But it must of course be proved that any part of the will which follows the signatures of the witnesses was written before they signed. An attestation clause is not required.

5th ed., p. 87, 6th ed., p. 116. *In bonis Streatley* (1891), P. 172.

APPLICABILITY OF ATTESTATION TO SEVERAL DISTINCT PARTS OF A WILL.

A will may be composed of several clauses written at distinct intervals, and one memorandum of attestation subscribed to the

last part may apply to the whole, including as well what was long before written as what had been recently added, though the antecedent part bears a different date, and is complete in itself, independently of the latter. And the same general doctrine applies to a will whose contents are distributed through several sheets of paper, which would be adequately attested by a single memorandum, provided all the detached parts were present when the act of attestation took place; and which fact it seems would be presumed, unless the contrary were distinctly proved, as would also that of the attestation being intended to apply to the whole. The presumption would be somewhat less strong, of course, when each of the several papers has a distinct independent character, as where one is a will and the other a codicil, or where they consist of two separate codicils: and would fail altogether where the memorandum does not follow the whole. Thus where will and codicil were on different sheets found pinned together, the codicil being signed by the testatrix but not attested, an attestation clause written on the back of the will was not held to be applicable to the codicil without proof that it was so intended, and that the sheets were pinned together at the time of subscription. So where there is an evident intention that each paper or sheet shall be separately attested; as, where a testator signed five sheets, and the witnesses subscribed the first four, and the fifth sheet contained an attestation clause only, and there was no evidence to shew that the witnesses attested the last signature, the will was held not to have been properly executed; and where two instruments purporting to be a will and codicil were written on different pages of the same sheet of paper, and both were signed by the testatrix, but the first alone was attested, the codicil was rejected.

5th ed., p. 87, 6th ed., p. 116.

DUPLICATE WILL.

A will written in duplicate is not duly executed by the testator signing one copy, and the witnesses attesting and subscribing the other.

5th ed., p. 88, 6th ed., p. 117. *In bonis Cattrall*, 33 L. J. P. 106; *In bonis Braddock*, 1 P. D. 433; *In bonis Hatton*, 6 P. D. 204.

ANIMUS ATTESTANDI.

In every case the Court must be satisfied that the names were written animo attestandi; and their position may for this purpose be material; where for instance, on one page the will was written, signed by the testator and subscribed by one witness, and on the next page a memorandum or inventory of property was written, to which three names were subscribed, it was

held that these names could not be deemed to have been so placed animo attestandi: though it would not necessarily follow that a person did not sign as a witness because he also intended his signature to serve another purpose, e.g., his acceptance of the executorship.

Ibid. Dunn v. *Dunn*, L. R. 1 P. & D. 277, referred to ante.

Where an executed will was altered, and the witnesses put their initials in the margin opposite the alterations, it was held that the will was not properly re-executed. But this decision seems questionable, for the initials were intended to represent the signatures, and it was proved (extrinsic evidence being admissible on this question) that they were written with the intent to attest the will.

5th ed., p. 88, 6th ed., p. 118. *In bonis Martin*, 6 No. of C. 694.

Sometimes it is important to prove that a person who writes his name on a will does not do so as witness; for example, where he is a legatee under the will.

6th ed., p. 118. *Dunn* v. *Dunn*, L. R. 1 P. & D. 277.

"PRESENCE" OF TESTATOR.

The will, it will be observed, is required to be subscribed by the witnesses, in the "presence" of the testator. The design of the legislature, in making this requisition, evidently was, that the testator might have ocular evidence of the identity of the instrument subscribed by the witnesses; and this design has been kept in view by the Courts in fixing the signification of the word "presence." To constitute "presence," in the first place, it is essential that the testator should be mentally capable of recognising the act which is being performed before him; for, if this power be wanting, his mere corporal presence would not suffice. Thus, if a testator, after having signed and published his will, and before the witnesses subscribe their names, falls into a state of insensibility (whether permanent or temporary) the attestation is insufficient.

5th ed., p. 88, 6th ed., p. 118. *Right* v. *Price*, *Doug.* 241.

MENTAL CONSCIOUSNESS ESSENTIAL.

And the testator ought not merely to possess the mental power of recognising, but he actually conscious of, the transaction in which the witnesses are engaged; for if a will were attested in a secret and clandestine manner, without the knowledge of the testator, the fact of his being in the room in which it was done would not avail. Nor, on the other hand, would the

circumstance of the testator not being in the same room invalidate the attestation, if it took place within his view.

Ibid. Shires v. *Glascock*, 2 Salk. 688.

MERE CONTIGUITY NOT SUFFICIENT, IF THE TESTATOR'S VIEW BE INTERRUPTED.

Upon the same principle it is clear, that the mere contiguity of the places occupied by the testator and the witnesses respectively will not suffice, if the testator's view of the witnesses' proceedings is necessarily obstructed.

5th ed., p. 90, 6th ed., p. 119. *In bonis Colman*, 3 Curt. 118.

TESTATOR MUST BE CAPABLE OF SEEING IN HIS ACTUAL POSITION.

And it was not enough, that in another part of the same room the testator might have perceived the witnesses, if in his actual position he could not.

Ibid. Jenner v. *Finch*, 5 P. D. 106.

WHERE A TESTATOR IS UNABLE TO MOVE WITHOUT ASSISTANCE; —WHERE HE IS BLIND.

If the testator be unable to move without assistance, and have his face turned from the witnesses, so that it is out of his power to see them, if he so wished, the attestation will be insufficient. Where the testator is blind, it has been decided that the position of the witnesses must be such, that the testator, if he had had his eyesight, might have been able to see them sign.

5th ed., p. 90, 6th ed., p. 120.

Where the evidence fails to shew in what part of the room the subscription took place, it would be presumed that the most convenient was the actual spot, and the ordinary position of a table, likely to have been used, would be taken into consideration.

Ibid. Winchilsea v. *Wauchope*, 3 Russ. 444.

It is scarcely necessary to add, that the nature of the occasion of the witnesses' absence, whether for the ease or at the solicitation of the testator or otherwise, is wholly immaterial.

5th ed., p. 91, 6th ed., p. 120.

ATTESTATION CLAUSE UNNECESSARY.

A form of attestation is expressly dispensed with by the statute 1 Vict. c. 26. No particular form of words was essential even under the old law to constitute an attestation. And accordingly, probate has been granted of a will where both the witnesses deposed that the requirements of the act had not been complied with, the Court being satisfied by the circumstances that the evidence was mistaken; and in another case, where the witnesses so deposed, but not positively, their evidence was allowed to be rebutted by that of another person present at the execution, assisted by the attestation clause, whence it appeared

that the requirements of the statute had been complied with. And in a case where the attestation clause stated that the will was signed in the presence of the attesting witnesses, and it appeared from the evidence that it was only acknowledged in their presence, having been signed before they were called in, probate was granted. But where there was nothing but a formal attestation clause on one side, and the adverse testimony of both witnesses on the other, probate was refused.

Ibid. *In bonis Moore* (1901), P. 44.

PRESUMPTION OF DUE EXECUTION NOT ALWAYS MADE.

As a general rule, the presumption of compliance with the statutory requirements will not be made, unless the will appears on the face of it to have been duly executed. But if the will is found amo..g the testator's papers at his death, and there are no suspicious circumstances, due execution may be presumed, even if there is no attestation clause.

5th ed., p. 91, 6th ed., p. 121. See ante p. 54.

If the will is lost, due execution must be proved, and the testator's written declarations of the fact are insufficient, though accompanied by a document referred to by him as a copy of his will, and representing the will as duly executed. The presumption of due execution is clearly rebutted where it is sworn by competent persons that the names of the seeming witnesses are fictitious, and are in the testator's own handwriting.

5th ed., p. 92, 6th ed., p. 121. *Eckersley* v. *Platt*, L. R. 1 P. & D. 281.

The contents of the will and its existence at the testator's death must also be proved (post Chapter VII.).

The provision in the statute 1 Vict. c. 26, enacting that no form of attestation shall be necessary, has been much observed upon, but it seems to mean only that no clause need be appended to the will, stating that the requirements of the act have been complied with; and is not inconsistent with the provision that the witnesses are to "attest," as well as subscribe the will, the word "attest" meaning merely to act as a witness, which might in fact be done without subscription; although upon the construction of the act it may be that no attestation will satisfy its requirements, except through the outward mark of subscription. The "subscription," "attestation," and "form of attestation," thus refer to matters essentially different.

5th ed., p. 92, 6th ed., p. 122. *Burdett* v. *Spilsbury*, 10 Cl. & Fin. 340. Attestation clause no part of the Will. *In bonis Atkinson*, 8 P. D. 165.

SUGGESTION AS TO FRAMING ATTESTATION CLAUSES.

Still, it will be the duty of persons who superintend the execution of wills, not to be content with a bare subscription

of the witnesses' names, but to make them subscribe a memorandum of attestation, recording the observance of all the circumstances which the statute makes necessary to constitute a valid execution; (i.e., that the signature was made, or acknowledged, by the testator in the presence of the witnesses, both being present at the same time, and that they subscribed their names in his presence); for, though such statement in the memorandum of attestation is not conclusive, and does not preclude inquiry into the fact, it would afford a much stronger presumption that the statutory requisition had been complied with, than where it is wanting; and in the absence of such a memorandum, the witnesses are always called upon by the Court of Probate to make an affidavit that the statute was in fact complied with. It will not be advisable for a testator, except where absolutely necessary, to avail himself of the privilege, which the Wills Act expressly confers, of acknowledging the signature before the witnesses, instead of signing it in their presence, or of the permission to sign by the hand of another. The latter expedient, indeed, ought to be restricted in practice (though the legislature has not so limited it) to cases of extreme physical weakness, rendering it impossible or difficult for the testator to write his name; in such cases, even the exertion of making a mark might be oppressive. Where a testator is unable to write from ignorance, perhaps a mark is to be preferred to a signature by the hand of another, as being the more usual mode of execution by illiterate persons; for in regard to this and all other particulars the prudent course is to make the execution of the will conform as much as possible to the testator's ordinary mode of executing instruments. Where the will is signed by a third person on behalf of the testator, the signature, of course, should, though, as we have before seen, it need not necessarily, be in the name of the testator, rather than that of the amanuensis, who should merely be designated in the memorandum of attestation; where it would be proper (though not necessary) that the peculiar mode of execution should be stated.

5th ed., p. 92, 6th ed., p. 122.

SHOULD BE IDENTIFIED.

Owing to the general rule that alterations, interlineations, &c., made in a will, are presumed to have been made after execution, it is always advisable, when alterations are made in a will before execution, to identify them by the initials of the testator and witnesses, or by a reference to them in the attestation clause. This matter is considered in the next Chapter, in connection with the subject of alterations made after execution.

UNATTESTED ALTERATIONS.

Unattested alterations in a will may be incorporated by reference or implication in a codicil.

6th ed., p. 125. *In bonis Heath* (1892), P. 253.

AS TO INCOMPLETE PAPERS.

Cases sometimes occur under the old law, and may possibly arise under the present, in which something more than a mere compliance with legal requirements was made necessary to the efficacy of the will by the testator himself, he having chosen to prescribe to himself a special mode of execution; for in such case, if the testator afterwards neglects to comply with the prescribed formalities, the inference to be drawn from these circumstances is, that he had not fully and definitely resolved on adopting the paper as his will. The presumption is slight where the instrument is duly signed and attested, and perfect in all other respects, but must apparently be rebutted by some evidence before it can be admitted to probate.

Where, however, the testator's design of perfecting the paper is frustrated by sudden death, or insanity, or any other involuntary preventing cause, no inference of the absence of matured testamentary intention arises from the imperfect state of the document, which, therefore, notwithstanding its defect, will be accepted as the will of the deceased, provided it fully discloses his testamentary scheme.

5th ed., p. 96, 6th ed., p. 126. *Huntington v Huntington*, 2 Phillim. 213.

CONTENTS OF THE PAPER MUST BE COMPLETE.

But this doctrine in favour of imperfect papers obtains only where the defect is in regard to some formal act, which the testator has prescribed as necessary for the authentication of his will, and not where it applies to the contents of the instrument; for, if in its actual state the paper contains only a partial disclosure of the testamentary scheme of the deceased, it necessarily fails of effect, even though its completion was prevented by circumstances beyond his control.

5th ed., p. 97, 6th ed., p. 126. *Montefiore* v. *Montefiore*, 2 Add. 354.

PRESUMPTION AGAINST UNFINISHED PAPERS.

In short, the presumption is always against a paper which bears self-evident marks of being unfinished; and it behooves those who assert its testamentary character distinctly to show, either that the deceased intended the paper in its actual condition to operate as his will, or that he was prevented by involuntary accident from completing it. And probate will not be

granted of such defective papers, without the consent or citation of the next of kin.

Ibid. In bonis Adams, 3 Hagg. 258.

INFORMAL PAPER INTENDED AS A PRESENT WILL.

It ought to be observed, however, that we are not to rank among inchoate or unfinished testamentary papers, one which is shown to have been intended to perform the office of a present will (if the expression may be allowed), though executed for a temporary purpose, as appears by the testator having designated it a "memorandum of an intended will," or "head of instructions," or "sketch of an intended will which I intend to make when I get home," &c. And it has frequently occurred that a testator has ultimately adopted as his final will a paper so originally designed as instructions for, or in contemplation of, a more formal testament.

5th ed., p. 97, 6th ed., p 126. *Torre* v. *Castle*, 1 Curt. 303.

WHETHER ATTESTATION OF CODICIL APPLIES TO PREVIOUS WILL.

It remains to be considered in what cases a codicil, duly attested, communicates the efficacy of its attestation to an unattested will or previous codicil, so as to render effectual any devise or bequest which may be contained in such prior unattested instrument. It was repeatedly decided, in cases not affected by the Wills Act, where the several attested and unattested instruments were written on the same paper, that the latter were rendered valid. In these cases the attested codicil referred to the unattested document. Without a reference of some kind the mere fact that the two instruments are written on the same piece of paper, the attested one after the other, was not sufficient to incorporate them. But a very slight reference was sufficient.

The result would have been the same if the unattested will and the attested codicil had been detached; the only effect of their being united in the same paper being to render unnecessary any express reference to the unattested document for the purpose of identifying it.

5th ed., p. 104, 6th ed., p. 128.

WHERE THE UNATTESTED DOCUMENT IS NOT REFERRED TO.

It should seem, however, that where the attested codicil was detached from, and did not refer to, the unattested will or previous codicil, it would not have the effect of curing the defective execution of such prior testamentary document.

An unattested paper is not now, as it formerly was, admissible to probate, and cannot properly be regarded as part of the will.

5th ed., p. 104, 6th ed., p. 130.

UNATTESTED CODICIL NOT INCLUDED IN TERM "CODICIL";

If a testator makes several codicils, some of which are, but others are not, duly attested, a subsequent codicil confirming "his will and codicils" confirms only the duly attested codicils.

5th ed., p. 106, 6th ed., p. 130. *Croker* v. *Hertford*, 4 Moo. P. C. C. 339.

—NOR IN THE TERM "WILL";

Codicils not duly attested, though written on the same paper as the will, are not ratified by a codicil of subsequent date which refer only to the will.

Ibid. *Haynes* v. *Hill*, 13 Jur. 1058.

—UNLESS THERE IS NO DULY ATTESTED CODICIL.

Where there is nothing in the context of a will to make it apparent that a testator has used words in any other than their strict and primary sense, but his words, so interpreted, are insensible with reference to extrinsic circumstances, the Court may look into the extrinsic circumstances to see whether the meaning of the words be sensible in any popular or secondary sense, of which with reference to these circumstances they are capable.

5th ed., p. 107, 6th ed., p. 130. *Ingoldby* v. *Ingoldby*, 4 N. of C. 493.

TO SUPPLY DEFECT OF EXECUTION THE DEFECTIVE INSTRUMENT MUST BE INCORPORATED.

The question whether an imperfectly executed paper is made effectual by a later perfectly executed one, depends on the question whether the earlier paper is incorporated in the later: in other words, whether the reference be such as, with the assistance (if necessary) of parol evidence of the circumstances, to be sufficient to identify it.

Ibid. *Allen* v. *Maddock*, 11 Moo. P. C. C. 427.

A reference by a testator to his last will, or to a first or second codicil, is a reference in its own nature to one instrument to the exclusion of all others, and the description identifies the instrument, but a general reference to the codicils, of which there may be several, is different, and probably not easy to render effectual by extrinsic evidence. But where the parol evidence sufficiently proves that, in the existing circumstances, there is no doubt as to the instrument, it is no objection to the admission of the evidence that by possibility circumstances might have existed in which the instrument referred to could not have been identified. In short, any unattested paper which would have been incorporated in an attested will or codicil executed according to the Statute of Frauds, is now in the same manner incorporated if the will or codicil is executed according to the require-

ments of the Act of 1 Vict. c. 26, but with this important distinction, that since that act an unattested codicil is not part of the will for any purpose, and consequently is not incorporated or confirmed by a codicil of subsequent date referring only to the will.

5th ed., p. 107, 6th ed., p. 131. *Allen* v. *Maddock, ut. sup.*; *Eyre* v. *Eyre* (1903), P. 131.

The principle being thus the same under both statutes, it follows that, subject to the distinction just noted, the circumstance of the well-executed instrument being written on the same paper as the imperfectly executed one, must still be regarded as materially helping to identify the latter as the document referred to by the former. And a distinction may fairly be drawn between a case where the later and well-executed instrument contains a reference, more or less particular, to another document, and a case where the later and well-executed instrument contains no express reference to any other; in the latter case the mere circumstance of its being on the same paper with others may possibly furnish ground for implying a reference to all the others, so as to incorporate and set up all.

5th ed., p. 108, 6th., p. 132. *Guest* v. *Willasey*, 3 Bing. 614.

UNEXECUTED ALTERATIONS WHEN RENDERED VALID BY SUBSEQUENT CODICIL.

An unexecuted alteration in a will is not rendered valid by a codicil ratifying and confirming the will, unless in such codicil the alteration be specially referred to, or unless it be proved affirmatively by extrinsic evidence, that the alteration was made before the codicil; and even then, if it appear to be deliberative only, it will not be included in the probate.

5th ed., p. 109, 6th ed., p. 133. *Lushington* v. *Onslow*, 12 Jur. 465; *In bonis Wyatt*, 31 L. J. P. 197.

CONDITIONAL CODICIL.

A codicil which is only to take effect in an event which does not happen, may nevertheless have the effect of setting up an unattested will to which it refers.

6th ed., p. 133.

TESTATOR CANNOT BY HIS WILL EMPOWER HIMSELF TO DISPOSE BY AN UNATTESTED CODICIL.

Cases in which there is reference to an existing paper, it is obvious, stand upon quite a different footing from those in which a testator (as often occurred under the old law) attempts to create, by a will duly attested, a power to dispose by a future unattested codicil. To allow such a codicil to become supplementary to the contents of the will itself, would, it is obvious, tend to introduce all the evils against which the Statute of Frauds

was directed, and, indeed, give to the will an operation in the testator's lifetime, contrary to the fundamental law of the instrument.

The question is, therefore: Is the supplementary act testamentary? If it is, the devise is void; if it is not, then, although it is the sole act of the testator, the devise is good.

5th ed., p. 108, 6th ed., p. 133.

The point frequently arises where a testator by his will directs part of his property to be disposed of in such way as he shall by letter, memorandum, &c., or the like, direct; it is clear that no such document can have any testamentary operation, unless executed as a will, or incorporated by a subsequent will or codicil.

In bonis Mathias, 3 Sw. & Tr. 100; *In bonis MacGregor*, 60 L. T. 840.

The cases above referred to must be distinguished from those in which the Courts have given a testamentary operation to unattested documents under the doctrine of trusts.

See Chapter XXIV.

INCORPORATION OF NON-TESTAMENTARY DOCUMENTS.

The rule that a document may be incorporated in a will by reference, is not confined to unattested wills and other documents intended to have a testamentary operation, but extends to any document referred to by a testator in order to elucidate or to explain his intention. The document, if sufficiently identified, is then said to be incorporated in the will.

5th ed., p. 98, 6th ed., p. 135.

REQUISITES FOR INCORPORATION.

But whatever be the precise nature of the document referred to, it must be clearly identified as the instrument to which the will points. Two things are necessary: first, that the will should refer to some document as then in existence; secondly, proof that the document propounded for probate was, in fact, written before the will was made, and was identical with that referred to in the will.

5th ed., p. 99, 6th ed., p. 135. *Symes* v. *Applebe*, 57 L. T. 599.

1. WILL MUST REFER TO A DOCUMENT AS THEN EXISTING.

(i) As to the first point, a clause which "ratifies and confirms a deed, dated, &c., and made between, &c.," answers this requirement and incorporates the deed. But there should be no ambiguity. A reference to a document as "made or to be made" gives strong ground for concluding that the document had not already been made. So a reference to persons or things "here-

inafter named," or to "the annexed schedule," is not so clear a reference to any document as then existing as to incorporate writings that follow the signature of the testator and of the witnesses, although it be proved that, in fact, such writings were in existence before the will was executed; much less if the evidence on this last point is hesitating. Again, if a testator attempts to dispose of chattels by referring to them in his will as "articles of personal use, the destination or gift of which may by memoranda or labels thereon be indicated," this is nugatory. And if the will refers to a document as a future document, and the testator afterwards executes a codicil confirming the will, the document is not thereby incorporated, although it was in fact written before the date of the codicil. The will must be so worded that, speaking from the date of the codicil, it shall refer to the document as then existing.

Ibid. *Bizzey* v. *Flight*, 3 Ch. D. 269; *In bonis Dallow*, L. R. 1 P. & D. 189.

2. THE DOCUMENT REFERRED TO MUST BE PROVED TO HAVE EXISTED AT THE DATE OF THE WILL.

(ii.) With regard to the evidence necessary to prove that the document propounded for probate was in existence at the date of the will, and that it is the same as that which is referred to therein: if the reference is distinct (e.g., to date, heading, and other particulars), and if the document propounded agrees in these particulars with the description contained in the will, its previous existence and identity will, in the absence of circumstances or evidence tending to a contrary conclusion, be assumed. Where the reference is less distinct, yet if it be in terms sufficiently definite to render the document capable of identification, extrinsic evidence is admissible, together with such internal evidence as may be found in the document itself, to supply the necessary proof.

5th ed., p. 100, 6th ed., p. 135. *Swete* v. *Pidsley*, 6 N. of C. 190: *Allen* v. *Maddock*, 11 Moore P. C. C. 427.

It is a circumstance frequently relied on that the document propounded for probate was shown to some person before execution of the will, as the paper therein referred to.

5th ed., p. 101, 6th ed., p. 137. *In bonis Smartt*, 4 N. of C. 38.

REVOCATION.

An incorporated document may be revoked by destruction.

6th ed., p. 137. *Re Coyte*, 56 L. T. 510.

PROBATE OF INCORPORATED DOCUMENTS.

Although an incorporated document is entitled to probate —i.e., to be set out at length in the probate copy—there is no necessity for so proving it in order to bring it within the cogni-

zance of the Court of Construction; for if it is not included in the probate copy, the Court will look at the original document.

5th ed., p. 101, 6th ed., p. 138. *Bizzey* v. *Flight*, 3 Ch. D. 269.

TWO WILLS.

The question what documents should be included in the probate copy often arises where a testator has made distinct wills, one of property in England, another of property abroad. Generally the former only need be proved here. But if one refers to or confirms the other in such a way as to incorporate it, both will be included in the probate.

6th ed., p. 138. *In bonis Astor*, 1 P. D. 150; *In bonis Green*, 79 L. T. 738.

INCORPORATION OF COPY OF DESTROYED WILL.

Although a will which has been revoked by destruction cannot, strictly speaking, be revived by a subsequent codicil, practically the same effect can be produced by the doctrine of incorporation.

6th ed., p. 139. *In bonis Lindsay*, 8 T. L. R. 507.

Lunacy of Testator—Rents between Date of Will and Testator's Death.—The testator devised a lot of land to his son J., his heirs and assigns for ever:—Held, notwithstanding the subsequent lunacy of the testator, that the devisee was not entitled to the rents of the estate prior to the decease of the testator. *Miller* v. *Miller*, 35 Chy. 224.

The testator devised to another son another portion of his farm, with a direction that the rents thereof should be set apart from the date of the will until the son attained the age of 21 to enable him to erect suitable buildings thereon. The Court, in order to carry out the manifest intention of the testator, clearly expressed in his will, directed an allowance to be made to the son out of the surplus handed over by the committee to the executors, of a sum equal to the amount of such rents from the date of the will until the son attained 21; and directed a reference, if necessary, to ascertain the amount. *Ib.*

Statute of Frauds—Execution of Will—Working Farm.—C. C., the plaintiff, alleged that A. C., his father, being the owner of certain land, induced him to abstain from enforcing a certain claim, and also to work on the land, by representing that he would devise the land to him, which he afterwards represented that he had done; and A. C. being dead, C. C. now claimed the land as against one to whom A. C. had devised it by a later will, revoking the former one. The execution of the former will was proved as alleged:—Held, that this was not such part performance as to take the case out of the Statute of Frauds, for the execution of the former will was the act of the person whose estate it was sought to charge, and not of the person seeking to enforce the contract, and, moreover, did not import a contract but only indicated a benevolent intention displayed by the testator in the execution of an instrument essentially of a revocable nature. Quære, whether if it had been proved, which it had not, that A. C. had, by his representations that he had devised the land to C. C., induced him to forego his claim, and to work on the land as alleged, this would have entitled C. C. to succeed. *Campbell* v. *McKerricher*, 6 O. R. 85.

Absence of Witnesses.—A person insured his life and signed a document directed to the managers of the insurance company, in these words: "I give and bequeath to . . . the amount stated on the policy given on my life by the S—— Life Insurance Company. To be paid to none other unless at my request, dated later." After showing or reading the policy, which he retained, he handed the document to the plaintiff, re-

marking: "There, that is as good as a will:"—Held, that on account of its incompleteness, the transaction was not a gift or a declaration of trust, as the trust intended was not irrevocable, nor could the paper take effect as a will. *Kreh* v. *Moses*, 22 O. R. 307.

Held, the Court being left to draw inferences of fact, that upon the evidence set out in this case, it must be inferred that the devisee, whose name was subscribed as a witness, did see the testator sign, although he swore that he thought he did not, and that he subscribed in his presence. *Little* v. *Aikman*, 28 U. C. R. 337.

Signed Will Brought to Witnesses.—A testator brought his will which had been previously signed by him to two persons to sign as witnesses. The witnesses signed in the testator's presence, at his request, and in the presence of each other; and they either saw or had the opportunity of seeing the testator's signature:—Held, that the will was validly executed. *Scott* v. *Scott*, 13 O. R. 551.

Presumption of Due Execution.—C. S. U. C. c. 82, s. 13, does not repeal but merely extends the Statute of Frauds as to the execution of wills; and a will subscribed by the witnesses in accordance with either Act, is sufficiently attested:—Held, therefore, that a will subscribed by two witnesses, in the presence of the testator, though not of each other, was well executed. Held, also, that although there was no positive evidence that one of the witnesses, who was dead, had subscribed in presence of the testator, the circumstances attending the execution of the will, and the fact of possession having for sixteen years gone along with it, would warrant the inference that the witness had so signed. *Crawford* v. *Curragh*, 15 U. C. C. P. 55. See *Ryan* v. *Devereux*, 26 U. C. R. at p. 107.

Witnesses not Available.—Where the Surrogate Judge is satisfied of the inability to furnish proof of the execution of a will by the attesting witnesses, it may be proved by other sufficient evidence. A will in testator's handwriting and signed by him was found in a place where testator was accustomed to keep his papers, it being also signed in the presence of two persons, who signed as witnesses, the handwriting being apparently that of [illegible] persons, and distinct from that of the testator, and who, though due search was made for them, could not be found, this being attributable to their being strangers, testator being under the belief, from the misreading of a text book on wills, that strangers were the best witnesses. The Surrogate Judge being satisfied as to the inability to procure proof by the witnesses, and that the due execution of the will had been proved by other evidence, admitted it to probate. On appeal to the Divisional Court the judgment was affirmed. Where the will is itself in evidence with the testator's and witnesses' signatures thereon, post-testamentary letters of the testator are receivable in evidence to enable the Court to come to a right conclusion. *Re Young*, 27 O. R. 698.

Attestation—Subscription of Witnesses to Affidavit, Instead of to Attestation Clause—Validity.—At the execution of the last will of the deceased in Portland, Oregon, instead of the usual attestation clause, the attorney substituted a formal affidavit of execution commencing just below the signature of the testatrix and extending over part of another page. This affidavit was then signed by the witnesses in the presence of the testatrix and sworn to by them. Their evidence shewed that they intended to and did witness the will, and also intended to subscribe it as witnesses:—Held, that s. 5 of the Wills Act, R. S. M. 1902, c. 174, had been sufficiently complied with, and that the will had been validly executed. *Griffiths* v. *Griffiths*, L. R. 2 P. & D. 300, followed. *Re Harvie*, 7 W. L. R. 103, 17 Man. L. R. 259.

Acknowledgment—Evidence.—In proceedings for probate of a will the solicitor who drew it testified that it was signed by the testatrix when the subscribing witnesses were absent; that on their arrival he asked the testatrix if the signature to it was hers, and if she wished the two persons present to witness it, and she answered "yes." Each of the witnesses acknowledged his signature to the will, but swore that he had not heard such question asked and answered. Held, not properly executed. *In re Cullen*, 25 C. L. T. 54; *McNeil* v. *Cullen*, 35 S. C. R. 510.

Proof Necessary.—There must be some proof of execution to lead the Court to a conclusion. And so, where no proof as to the attestation was offered, nor could the witnesses to the will be found, nor their handwriting proved, the Court refused to establish the will, though all parties concerned consented. *Williamson* v. *Williamson*, 17 O. R. 734.

One Witness at a Time.—A testator may sign his name in the presence of one witness, and when another is called in may acknowledge his signature in the presence of both, and both witnesses then subscribing in the presence of the testator, the will is good. *O'Neill* v. *Owen*, 17 O. R. 525.

Testator's Statements.—Statements made by a testator as to the provisions of his will, which could not be found after his death, are admissible in evidence in an action to establish the will, and to corroborate the evidence of the chief beneficiary who had drawn it. *Stewart* v. *Walker*, 6 O. L. R. 495.

Proof of Execution—Acknowledgment—Witnesses.—The last will and testament of A. C. was contested on the ground that it was in the handwriting of the residuary legatee, that it did not express the true will of the deceased, that deceased did not know or approve of it, and that it was not properly executed, not having been "signed or acknowledged by deceased in the presence of two or more witnesses, present at the same time," etc. The evidence shewed that, at the time the will was executed, deceased was present, but was sitting about 15 feet away from the witnesses; that the words at the end of the will were read over in a low tone so that the witnesses were unable to say whether they were heard by deceased or not. Neither of the witnesses was able to say that the signature of deceased was affixed to the will when they signed, or that he saw it if it was there, and both agreed that, if the signature was there, deceased did not in their presence acknowledge it to be her signature; nor did they hear her ask the question whether it was her signature; nor was there evidence of any other act or conduct on her part which could be considered the equivalent of an acknowledgment. According to the evidence of the witnesses she said nothing, and appeared to be indifferent to what was going on. One of the witnesses was unable to say, after leaving, whether he had witnessed a will or not:—Held, that, assuming it to be true, as sworn by the witness in support of the will, that deceased was asked, in presence of the witnesses, whether this was her will, and whether she wished the witnesses to sign, the evidence did not go far enough, it being essential to shew that the witnesses heard both question and answer. *In re Cullen*, 24 C. L. T. 141, 36 N. S. R. 482.

Letter Modifying Will.—Testator by his will gave all his property, real and personal, to trustees, directing that his wife should receive all rents and interest during widowhood, and until his youngest child should come of age; that in case of her death or marriage before the youngest child came of age, his property should be divided equally among his children on their respectively coming of age, and in case all his children should die under age without issue, their portions should be divided equally among his brothers and sisters. A letter was found among his papers, addressed to his wife, saying that he had made two wills, "one before I was married, which is to be considered void but the other I wish to modify, as it was written in a hurry. I wish my dear wife and our children to have all my property, to be divided equally, my wife to have the use of the whole until the children are of age. In case of death of my children my wife to have the use of the property in her lifetime, and then to go to my brothers and sisters." The testator left two children, who both died under age unmarried, their mother surviving them:—Held, reversing 29 Gr. 274, that the will and letter must be read together, and that the will must stand except so far as "modified;" that the "death of my children" referred to their death under age without issue before his wife; and therefore that she took the personalty (which alone could be affected by the letter) for life, and after her death it would go to testator's brothers and sisters. *Dumble* v. *Dumble*, 8 A. R. 476.

CHAPTER VII.

REVOCATION AND ALTERATION OF WILLS.

EFFECT OF MARRIAGE ALONE UNDER OLD LAW—IN CASE OF A WOMAN;

Under the law which existed prior to the Act of 1 Vict. c. 26, the marriage of a woman absolutely revoked her will, and that, too, though her testamentary capacity was subsequently restored by the event of her surviving her husband. But a will made by a woman before marriage and operating as an appointment under a power, was not necessarily revoked by her marriage; nor was a will so operating and made during the coverture necessarily revoked by the death of the husband.

5th ed., p. 111, 6th ed., p. 140.

—IN CASE OF A MAN.

The marriage of a man, however, had no such revoking effect upon his previous testamentary dispositions, in regard to either real or personal estate, on the ground, probably, that the law had made for the wife a provision independently of the act of the husband, by means of dower; nor did the birth of a child alone revoke a will made after marriage, since a married testator must be supposed to contemplate such event; and the circumstance that the testator left his wife enceinte without knowing it, was held not to impart to the posthumous birth any revoking effect.

OLD RULE AS TO REVOCATION BY MARRIAGE AND BIRTH OF CHILDREN.

Marriage and the birth of a child conjointly, however, revoked a man's will, whether of real or personal estate; these circumstances producing such a total change in the testator's situation, as to lead to a presumption, that he could not intend a disposition of property previously made, to continue unchanged.

5th ed., p. 111, 6th ed., p. 141.

WILLS MADE SINCE 1837 ABSOLUTELY REVOKED BY MARRIAGE UNDER 1 VICT. C. 26.

No question of this nature can occur, under any will made since the year 1837, as the Act 1 Vict. c. 26, s. 18, has provided, "That every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor, or administrator, or the

person entitled as his or her next of kin under the Statute of Distributions)"; and (s. 19) that "no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances."

5th ed., p. 112, 6th ed., p. 142.

REMARKS UPON THE ENACTMENT.

1st. Unless in the expressly excepted cases, marriage alone will produce absolute and complete revocation, as to both real and personal estate; and no declaration, however explicit and earnest, of the testator's wish that the will should continue in force after marriage, still less any inference of intention drawn from the contents of the will, and, least of all, evidence collected aliunde, will prevent the revocation.

Re Martin (1900), P. 228.

2nd. Merely the birth of a child, whether provided for by the will or not, will not revoke it; the legislature, while it invested with a revoking efficacy one of the several circumstances formerly requisite to produce revocation, having wholly disregarded the other.

1st ed., p. 114, 6th ed., p. 142.

WILL IN CONTEMPLATION OF MARRIAGE.

It was held under the old law that the revocation of a will by a subsequent marriage and birth of issue took place in consequence of a rule of law, independently of intention of the testator, and consequently that no evidence of intention was admissible. And it is clear that the same rule applies under the present law so as to revoke by a subsequent marriage a will expressly made in contemplation of such marriage.

5th ed., p. 112, 6th ed., p. 142.

EXCEPTION AS TO TESTAMENTARY APPOINTMENTS.

The exception in the 18th section, of wills made in exercise of a power of appointment, where the property would not in default of appointment pass to the testator's heir, executor, &c., extends to the case of an appointment under a power, where the heirs, executor or administrator, or statutory next of kin, would not take as such.

5th ed., p. 113, 6th ed., p. 143.

And as the words "next of kin" alone have a different meaning to "next of kin under the Statute of Distribution," a will under a power is not revoked by subsequent marriage where the gift in default of appointment is to the testator's "next of kin."

Ibid. In bonis McVicar, L. R. 1 P. & D. 671.

The Ontario Wills Act, 1910, provides as follows:—

21. (1) Every will made by any person dying on or after the 13th day of April, 1897, shall be revoked by the marriage of the testator, except in the following cases:—(a) Where it is declared in the will that the same is made in contemplation of such marriage:

(b) Where the wife or husband of the testator elects to take under the will, by an instrument in writing signed by the wife or husband and filed within one year after the testator's death in the office of the Surrogate Clerk at Toronto:

(c) Where the will is made in the exercise of a power of appointment and the real estate or personal estate thereby appointed would not in default of such appointment pass to the testator's heirs, executor, or administrator, or the person entitled as the testator's next of kin under The Devolution of Estates Act.

(2) The will of any testator who died between the 31st day December, 1868, and the 13th day of April, 1897, shall be held to have been revoked by his subsequent marriage, unless such will was made under the circumstances set forth in clause (c).

22. No will shall be revoked by any presumption of an intention, on the ground of an alteration in circumstances.

23. No will or any part thereof shall be revoked otherwise than as aforesaid provided by section 21, or by another will executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by burning, tearing, or otherwise destroying the same, by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

By section 8 of the Act, sections 22 and 23 apply only to wills of persons who died subsequent to 31st December, 1868, or who die after the passing of the Act.

BY BURNING, TEARING OR DESTROYING.

The Statute of Frauds admitted of a will even of freehold estate, being revoked by burning, cancelling, tearing, or obliterating, by the testator himself, or in his presence and by his directions, and the transaction was not required to be attested by witnesses.

The Wills Act provides that a will or codicil may be revoked "by the burning, tearing or otherwise destroying the same by the testator or by some person in his presence and by his direction, with the intention of revoking the same."

Ibid.

TEARING INCLUDES CUTTING, &c.

Under the Act it has been decided that the word "tearing" includes "cutting"; for it would be absurd to say that a will torn into two pieces was revoked, but that if cut into twenty pieces it was not revoked. The tearing or cutting, to be effectual, need not be of the whole will; tearing or cutting out that part of the will which may be said to be the principal

part, or that part which gives effect to the whole, as the signature of the testator, or, probably, of the witnesses, will cause a revocation of the whole will, but the presumption of revocation thus arising may be rebutted. So also where the signatures of a testatrix and of the witnesses were scratched out as with a penknife, the will was held to have been effectually revoked. And where the will is written on several sheets, each signed and witnessed, tearing off the last signature will revoke the whole will, although the prior signatures are left. Tearing off, animo recovandi, the seal of a will (though no seal is necessary to the due execution of a will) constituted a revocation.

5th ed., p. 115, 6th ed., p. 144. *Hobbs* v. *Knight*, 1 Curt 768; *In bonis Wheeler*, 49 L. J. P. 29; *In bonis Taylor*, 63 L. T. 230; *Price* v. *Powell*, 3 H & N. 341.

Where a will is found torn after the death of the testator, and there is no direct evidence of intention, the question whether it was torn by him animo revocandi often depends on the appearance of the paper and other circumstances; the presumption seems to be that the tearing was done by him animo revocandi, but evidence is admissible to show that it is merely the effect of wear; for mere tearing or destruction, without intention to revoke, is no revocation, under the express terms of the act.

6th ed., p. 146. *In bonis Tozer*, 7 Jur. 134.

DECLARATIONS OF INTENTION.

Declarations made by the testator are admissible as evidence of his intention, those made at the time of the act of destruction being of course of greater weight than those made subsequently.

6th ed., p. 147. *Powell* v. *Powell*, L. R. 1 P. & D. 209.

INSANITY.

If a testator becomes insane after making his will, and it is subsequently found to have been torn or mutilated, the burden of proving that the injury was done by the testator while of sound mind rests upon the party setting up revocation.

5th ed., p. 119n, 6th ed., p. 147. *Harris* v. *Berrall*, 1 Sw. & Tr. 153.

EFFECT WHERE DESTRUCTION IS CONNECTED WITH A NEW DISPOSITION.

Where the act of destruction is connected with the making of another will, so as fairly to raise the inference, that the testator meant the revocation of the old to depend upon the efficacy of the new disposition intended to be substituted, such will be the legal effect of the transaction; and therefore, if the will intended to be substituted is inoperative from defect of attestation,

or any other cause, the revocation fails also, and the original will remains in force.

6th ed., p. 148.

WILL DESTROYED TO MAKE NEW WILL.

A fortiori, where it appears from the evidence that the will is destroyed for the purpose of substituting a fresh will, the old will is not revoked, if the new one be in fact not made.

5th ed., p. 120, 6th ed. p. 148. *In bonis Eeles*, 2 Sw. & Tr. 600.

INTENTION TO REVIVE REVOKED WILL.

The same rule generally applies where the later of two inconsistent wills is destroyed on the supposition that the earlier will is thereby revived; for if this snpposition be (as by the existing law we shall presently see it is) erroneous, the later will remains unrevoked. In this case the act of destruction is referable, not to any absolute intention to revoke, but to an intention to validate another paper; and as the assumption that the revocation will have that operation is erroneous, no true animus revocandi is considered to exist.

Ibid. *Powell* v. *Powell*, L. R. 1 P. & D. 209, overruling *Dickinson* v. *Swatmon*, 30 L. J. P. 84; *In bonis Mitcheson*, 32 L. J. P. 202.

MERE ATTEMPT TO DESTROY NOT NECESSARILY REVOCATION.

The mere intention, or even attempt, of a testator to burn, tear, or destroy his will, is not sufficient to prodnce revocation, within the meaning of the Statute of Frauds, or the Wills Act; for, the legislature having pointed out certain modes by which a will may be revoked, it is not in the power of the judicature, under any circumstances, to dispense with part of its requisitions, and accept the mere intention or endeavour to perform the prescribed act, as a substitute or equivalent for the act itself, though the intention or endeavour may have been frustrated by the improper behaviour of a third person.

5th ed., p. 121, 6th ed., p. 149. *Doe d. Reid* v. *Horris*, 6 Ad. & Ell. 209.

EFFECT WHERE A TESTATOR SUSPENDS THE DESTROYING ACT BEFORE ITS COMPLETION.

It is also clear, that if a testator is arrested in his design of destroying the will, by the remonstrance or interference of a third person, or by his own voluntary change of purpose, and thus leaves unfinished the work of destruction which he had commenced, the will is unrevoked; and the degree in which the attempt had been accomplished, would not, it should seem, be very closely scrutinised, if the testator himself had put his own construction upon his somewhat equivocal act, by subsequently treating the will as undestroyed.

5th ed., p. 122, 6th ed., p. 150. *Doe* v. *Perkes*, 3 B. & Ald. 489.

EFFECT OF DESTROYING ONE PART OF DUPLICATE WILL.

Sometimes a testator for greater security executes his will in duplicate, retaining one part and committing the other to the custody of another person (usually an executor or trustee); and questions have not unfrequently arisen as to the effect of his subsequently destroying one of such papers, leaving the duplicate entire. In these cases the presumption generally is, that the testator means by the destruction of one part to revoke the will, but the strength of the presumption depends much upon circumstances.

Thus, where he cancels that part which is in his own possession (the duplicate being in the custody of another), it is very strongly to be presumed, that he does not intend the duplicate to stand, he having destroyed all that was within his reach. So, if the testator have himself possession of both, the presumption of revocation holds, though weaker, and even if, having both in his possession, he alters one, and then destroys that which he had altered, there is also the presumption, but weaker still.

5th ed., p. 123, 6th ed., p. 151. *Rickards* v. *Mumford*, 2 Phillim. 23. *In bonis Haine*, 5 N. of C. 621; *Pemberton* v. *Pemberton*, 13 Ves. 310.

Declarations made by a testator after the date of his will are not admissible to prove that it was executed in duplicate.

Atkinson v. *Morris* (1897), P. 40.

PRESUMPTION AS TO DESTRUCTION OF WILLS.

If a will is traced into the testator's possession, and is not found at his death, the presumption is that he destroyed it for the purpose of revoking it; but the presumption may be rebutted, and it will be more or less strong according to the character of the custody which the testator had over the will. It is difficult to lay down any general rule as to the nature of the evidence which is required to rebut the presumption of destruction: it depends to a considerable extent on the testator's property and his relations towards his family. Where the will makes a careful and detailed disposition of the testator's property, and nothing happens to make it probable that he wishes to revoke it, the presumption raised by the disappearance of the will may be rebutted by slight evidence, especially if it is shewn that access to the box, or other place of deposit where the will was kept, could be obtained by persons whose interest it is to defeat the will. In fact, it may almost be said that in such a case the presumption is the other way, namely, that the testator did not intend to die intestate. Declarations made by the testator are admissible, not as evidence as to the fact of destruction,

but as evidence of intention either to revoke or to adhere to the will.

5th ed., p. 124, 6th ed., p. 152.
Allan v. *Morrison* (1900), A. C. 604; *Sugden* v. *Lord St. Leonards*, I P. D. pp. 214-5; *Finch* v. *Finch*, L. R. 1 P. & D. 371; *Re Sykes, Drake* v. *Sykes*, 23 T. L. R. 747; *In bonis Mitcheson*, 32 L. J. P. 202.

SUBSEQUENT INSANITY.

The ordinary presumption does not apply to the case of a testator who becomes insane after the execution of the will, and continues insane until his death: in such a case the burden of shewing that the will was destroyed while the testator was of sound mind lies on the party setting up the revocation.

5th ed., p. 119n., 6th ed., p. 153. *Harris* v. *Berral*, 1 Sw. & Tr. 153

SECONDARY EVIDENCE OF CONTENTS.

Where a will has been lost or destroyed, and the presumption of destruction animo revocandi is rebutted, or does not arise, the contents of the will may be proved by secondary evidence: such as a draft or copy, or oral testimony; and it seems that the oral testimony of a single witness who takes an interest under the alleged will is sufficient. Declarations, written or oral, made by the testator before the execution of the will, are admissible as secondary evidence of its contents. In some cases post-testamentary declarations by the testator as to his will have been admitted as evidence of its contents, but their admissibility seems doubtful.

5th ed., p. 124n., 6th ed., p. 153.
Sugden v. *Lord St. Leonards*, supra; *Johnson* v. *Lyford*, L. R. 1 P. & D. 546; *Gould* v. *Lakes*, 6 P. D. 1.

CONSENT OF PERSONS INTERESTED.

Where the property is small, the Court of Probate sometimes allows the contents of a lost will to be proved, without requiring the consent of all persons interested.

6th ed., p. 154. *In bonis Brassington* (1902), P. 1.

EFFECT OF TESTATOR DESTROYING WILL, AND LEAVING CODICIL UNDESTROYED.

Sometimes there is found, among the papers of a testator, a codicil without the will of which it professes to be part; in such cases the question arises, whether or not the destruction of the will (which it is to be presumed, in the absence of proof to the contrary, was the act of the testator) operates, impliedly, to revoke the codicil also. This question, of course, depends mainly upon the contents of the several testamentary documents. If the dispositions in the codicil are so complicated with, and dependent upon, those of the will, as to be incapable of a separate and independent existence, the destruction of the will necessarily revokes the codicil; and before the Wills Act, the general presumption in

the Ecclesiastical Courts was rather in favour of the intention to involve a codicil in the revocation of the will of which it was a part, where a contrary intention could not be collected either from the contents of the codicil itself or from extrinsic evidence. But if the codicil was capable, from the nature of its contents, of subsisting independently of the will, its validity was not affected by the destruction of the will.

5th ed., p. 124, 6th ed., p. 154. *Coppin* v. *Dillon*, 4 Hagg. 361, 369; *In bonis Coulthard*, 11 Jur. N. S. 184.

EFFECT UNDER WILLS ACT, WHERE WILL IS DESTROYED BUT NOT THE CODICIL.

The balance of authority seems to support the view that the statute 1 Vict. c. 26, has done away with the presumption, made by the old law, that the destruction of a will was an implied revocation of a codicil thereto.

5th ed., p. 125, 6th ed., p. 155. *In bonis Halliwell*, 9 Jur. 1042.

OBLITERATIONS, &C., IN A WILL TO BE SIGNED AND ATTESTED.

The Wills Act enacts (sect. 21) "that no obliteration, interlineation, or other alteration, made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, 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."

Ibid. As to what is an "Interlineation," see *In bonis Birt*, L. R. 2 P. & D. 214.

Section 21 of the Imperial Act is section 24 of the Ontario Wills Act, as follows:—

24. No obliteration, interlineation or other alteration made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration are not apparent, unless such alteration is executed in like manner as hereinbefore is required for the execution of such 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 are made in the margin or in 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 in some other part of the will.

PRESUMPTION WHEN ALTERATION IS MADE.

Where obliterations and interlineations appear on the face of a will, and there is no evidence to show when they were made, the

presumption is that they were made after the execution of the will; but it seems that slight evidence is sufficient to rebut the presumption, unless the alterations are of an important character.

5th ed., p. 117, 6th ed., p. 156. *Doe d. Shallcross* v. *Palmer*, 16 Q. B. 747; *Tyler* v. *Merchant Taylors' Co.*, 15 P. D 216.

INCORPORATION BY CODICIL.

If there be a codicil to the will, and the codicil refers to unattested alterations in the will, this incorporates them in the codicil. If the codicil takes no notice of them, the presumption is, that they were made after the date of the codicil. And the same presumptions hold regarding mutilation. But evidence is admissible to shew that the alterations in the will were made before the execution of the codicil, and this is generally sufficient to incorporate them, unless the circumstances shew that the testator did not treat them as effectual alterations.

5th ed., p. 118, 6th ed., p. 156. *In bonis Heath* (1892), P. 253; *Christmas* v. *Whinyates* 32 L. J. P. 73; See *Re Hay* (1904), 1 Ch. 317.

WHERE ALTERATIONS ARE NECESSARY TO SUPPLY BLANKS; OR TO MAKE SENSE.

Where a will has been drawn with blanks left for the names of the legatees and the amount of the legacies, or the like, which blanks are afterwards filled up, but there is no evidence to shew when, the presumption is that the blanks were filled in before execution. And although there may have been no blanks, but the names of the legatees are found interlined, yet if the interlineation only supplies a blank in the sense, and appears to have been written with the same ink and at the same time as the rest of the will, the Court will conclude that it was written before execution.

5th ed., p. 118, 6th ed., p. 157. *In bonis Cadge*, L. R. 1 P. & D. 543.

PENCIL ALTERATIONS.

Pencil alterations made before execution, if the body of the will is in ink, are generally disregarded, being primâ facie merely deliberative. But if a blank is filled up in pencil before execution, the matter so inserted will be included in the probate. And if a clause which is inconsistent with the rest of the will is struck out in pencil, it may be treated as cancelled.

6th ed., p. 157. *In bonis Adams*, L. R. 2 P. & D. 367; *Kell* v. *Charmer*, 23 Bea. 195; *In bonis Tonge*, 66 L. T. 60.

ALTERATIONS MADE AFTER EXECUTION.

Alterations may be made after the execution of the will, and are effectual under sect. 21 of the Wills Act, if properly identified by the signature of the testator and two witnesses. Thus interlineations made in a will after execution, opposite which the testator and the two original attesting witnesses have written their names in the margin, will be included in the probate. But the

signature of the witnesses alone is not sufficient, unless the will is re-executed. And where a testator made some alterations in his will, and he and the attesting witnesses traced over their former signatures with a dry pen, and the witnesses put their initials in the margin opposite to the several alterations, it was held that the alterations were not duly executed.

5th ed., 118, 6th ed., p. 158. *In bonis Wilkinson*, 6 P. D. 100; *In bonis Cunningham*, 29 L. J. P. 71.

MEMORANDUM AS TO ALTERATIONS.

Where two alterations are made in a will after execution, and at the end of the will there is written a memorandum (duly executed and attested) referring expressly to only one of the alterations, it may be inferred from the nature of the alterations that both were intended to be referred to.

6th ed., p. 158. *In bonis Treeby*, L. R. 3 P. & D. 242.

CONFIRMATION BY CODICIL.

As already mentioned, where a testator alters his will by unattested alterations, and afterwards makes a codicil to it, this confirms the alterations, unless it appears from the codicil or otherwise that the alterations were merely deliberative.

6th ed., p. 158. *Re Hay* (1904), 1 Ch. 317.

DEPENDENT RELATIVE REVOCATION.

The doctrine of dependent relative revocation applies to partial revocation by obliteration or cancellation. Thus, if a testator bequeaths "to A. B. a legacy of one hundred pounds," and erases the amount, leaving words of bequest and the name of the legatee, this is taken to shew an intention to substitute some other amount, and that intention having failed, the amount of the original bequest can be supplied by parol evidence. So if a testator erases the amount and writes some other amount over it. But if the bequest is "to A. B., one hundred and fifty pounds," and the testator erases the words "one hundred and," without substituting any other amount, it is inferred that the testator's intention was simply to revoke the bequest pro tanto, and the bequest of the one hundred pounds being illegible, the legacy stands at fifty pounds.

6th ed., p. 159. *In bonis Ibbetson*, 2 Curt. 337.

EFFECT OF OBLITERATION.

It follows from the terms of the statute that no cancellation or obliteration (unless attested in manner required by the act, or confirmed by a codicil, or unless it prevents the words, as originally written, from being apparent), can operate as a revocation of a testamentary disposition, however clearly the testator may have expressed his intention. In some cases the name of a legatee, which has been completely obliterated by the testator, has been

supplied by inference from the context. Even if the testator partially erases his own signature and those of the attesting witnesses, this is no revocation. Glasses, and special arrangements of light have been used for discovering what the words obliterated originally were; but parol evidence is inadmissible, except in those cases where the obliteration was made for the purpose merely of altering the amount of the gift and not of revoking it; in which case, there being no intention to revoke except for the purpose of substituting a gift of a different amount, if the latter cannot take place by reason of the substituted words not being properly attested, the former gift will now (as under the Statute of Frauds) remain good, and evidence must be admitted to show what the original words were. The same rule applies, where the necessary evidence is forthcoming, to an erasure of the name of a legatee; and to an erasure of the name of an executor.

5th ed., p. 116, 6th., p. 159. *Furniss* v. *Phear*, 36 W. R. 521; *Townley* v. *Watson*, 3 Curt. 761; *Brooke* v. *Kent*, 3 Moo. P. C. C. 334; *In bonis McCabe*, L. R. 3 P. & D. 94; *In bonis Greenwood* (1892), P. 7.

OBLITERATION BY PASTING PAPER OVER WORDS.

Where the obliteration has been effected by pasting a piece of paper over a complete clause in the will, the Court will not order it to be removed, but will endeavour to ascertain what the words of the clause are; if this can be done they are "apparent" within the meaning of the section. But where the testator has only covered up the amount of the legacy, leaving the legatee's name untouched, the Court will consider it a case of dependent relative revocation, and will endeavour to discover the amount of the legacy originally bequeathed by removing the piece of paper. And it seems that where the testator has written words on the back of a testamentary paper and afterwards pasted a piece of paper over them, the Court can direct the removal of it in order to ascertain whether the words amount to a revocation.

5th ed., p. 116, 6th ed., p. 160. *In bonis Horsford*, L. R. 3 P. & D. 211; *In bonis Gilbert* (1893), P. 183.

SATISFACTION PROVED BY OBLITERATION.

Striking a pen through the gift to a legatee, though not now a sufficient revocation of a legacy, and not to be noticed in the probate, may nevertheless not be altogether without use; for where the testator has paid a sum in his lifetime to the legatee, it seems that the fact of the gift being struck out in the original will, would be received as evidence that the payment was intended to be in satisfaction of the legacy; and the Court of Probate has sometimes granted fac-simile probate of a will showing interlineations, or parts of the will struck through.

5th ed., p. 117, 6th ed., p. 161. *Twining* v. *Powell*, 2 Coll. 262.

DEVISES NOT TO BE REVOKED AS TO TESTATOR'S DISPOSABLE INTEREST AT DECEASE, BY CONVEYANCE OR LIKE ACT.

The Statute 1 Vict. c. 26, provides (sect. 23), that no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate, as the testator shall have power to dispose of by will at the time of his death.

6th ed., p. 162.

Section 26 of the Ontario Wills Act, 1910, is as follows:—

26. No conveyance or other act made or done subsequently to the execution of a will, of or relating to any real estate or personal estate therein comprised, except an act by which such will is revoked, as aforesaid, shall prevent the operation of the will with respect to such estate, or interest in such real estate or personal estate, as the testator had power to dispose of by will at the time of his death.

This section applies only to the will of persons who died after the thirty-first day of December, 1868, or who die after the passing of this Act.

SALE OR CONVEYANCE OF DEVISED LAND.

In regard to wills which are within this section, a subsequent conveyance of the devised property will not produce revocation, except so far as it substantially alienates the estate, and withdraws it from the operation of the devise by vesting the property in another. If a testator, after devising an estate, sells and conveys it to a third person, of course the devise is still (as formerly) rendered inoperative, and the devisee can have no claim to the proceeds of the sale, even though the will should have directed the conversion of the property, and the proceeds can be traced into an investment. If the testator sells a specifically devised piece of land, and afterwards buys another piece of land answering the same description, the question whether that passes by the devise is governed, not by sect. 23, but by sect. 24, the effect of which is considered in Chapter XII.

5th ed., p. 129, 6th ed., p. 162. *Manton* v. *Tabois*, 30 Ch. D. 92.

DEVISE IS REVOKED BY CONTRACT TO SELL.

Where the testator contracts to sell the devised estate, and dies without having executed a conveyance to the purchaser, the devise remains in force as to the legal estate and no further, this being all the interest which the testator has power to dispose of at his decease, and the conversion, as between the real and personal representatives, being completely effected, and the estate of the vendor being in contemplation of equity, "disposed of" by the contract (supposing it to be a binding one), the devisee takes only the

legal estate, and the purchase-money constitutes part of the testator's personal estate.

Ibid.

As to the operation of a devise of trust estates, see *Lysaght* v. *Edwards*, 2 Ch. D. 499; *Farrar* v. *Earl of Winterton*, 5 Beav. 1. But the devisee is entitled to the rent until completion. *Watts* v. *Watts*, L. R. 17 Eq. 217.

EFFECT OF COMPULSORY CONVERSION.

A devise is also, as a general rule, revoked or adeemed if the land is converted, during the testator's lifetime, by some person other than the testator, or by operation of law; as, by act of parliament, or by an order for sale pronounced by a Court of competent jurisdiction, or by compulsory sale under the Lands Clauses Acts, or similar acts, or by sale under a power given by the testator to a mortgagee. And although the converting effect of a sale under an act of parliament or under an order of Court is neutralised, if the statute or order directs a re-investment in land to be settled to the same uses, yet is seems clear that this would not cause the will to operate on the substituted land.

5th ed., p. 129, 6th ed., p. 163. *Richards* v. *Att.-Gen.*, 6 Moo. P. C. C. 381; *Cadman* v. *Cadman*, L. R. 13 Eq. 470; *Bourne* v. *Bourne*, 2 Hare 35.

PERSONALTY.

Where personal property is specifically bequeathed and afterwards sold, the effect is generally to adeem the bequest. And a valid contract of sale will have the same effect. But an unauthorized sale of personal property (as by persons assuming to act for an insane person), does not affect the rights of legatees.

6th ed., p. 164. *Watts* v. *Watts*, L. R. 17 Eq. 217.

SURRENDER OF LEASE.

Where a testator disposes of a house which he holds on lease, and afterwards surrenders it and acquires another lease of the same house, the question whether the dispositions of the will apply to the new lease seems to be one of construction.

6th ed., p. 164. *Wedgwood* v. *Denton*, L. R. 12 Eq. 290.

PARTIAL REVOCATION BY ALIENATION.

A revocation by alienation, may be either partial or total. A simple case of partial revocation occurs where a testator, having devised lands in fee, demises the same lands to a lessee for lives or for years, either at a rent or not, in which case the lease revokes or subverts the devise pro tanto, by subtracting or withdrawing the demised interest from its operation, but the devise is no further disturbed; and, consequently, the devisee would, even under the old law, still take the inheritance, subject to the term, and, as incidental thereto, the rent, if any, reserved by the lease. So, if

a testator, after devising lands in fee, conveys them by deed to the use of himself for life, with remainder to the use of his wife for life, as a jointure, without disposing of or in any manner assuming to convey the inheritance, the conveyance would revoke the devise pro tanto, and the reversion in fee, expectant on the decease of the testator's wife, would pass under it to the devisee. In both the preceding examples, it will be perceived, that the conveyance is not only partial in its object, but in its operation; it does not for a moment disturb the testator's seisin of the inheritance, and, therefore, can have no revoking effect, beyond the estate which it substantially alienates and vests in another person. Consistently with this principle, it is clear, that where a testator by his will charges his lands with an annuity, and afterwards demises them for a term of years at rack rent, the devise is revoked so far as to deprive the devisee of his legal power of distress, while the tenancy lasts, but no further; and the annuitant would be entitled in equity, during the suspension of his power of distress, to have the rent, or an adequate portion of it, applied in satisfaction of the annuity.

1st ed., p. 130, 6th ed., p. 165.

RULE AS TO WILLS SINCE 1837.

Under the Wills Act, even an actual conveyance does not produce revocation, except so far as it may, by alienating the testator's interest, leave the devise nothing to operate upon, it is obvious that a void or attempted conveyance cannot, under any circumstances, have, as such, a revoking effect.

5th ed., p. 133, 6th ed., p. 166. *Ford* v. *De Pontès*, 30 Beav. 572.

QUESTION HOW AFFECTED BY WILLS ACT.

The statute 1 Vict. c. 26, s. 20, has placed a revoking will or writing upon precisely the same footing, in regard to the ceremonial of execution, as a disposing will; and when that ceremonial has been observed, it can never be said that the will is informal or unfinished.

6th ed., p. 167. *Toomer* v. *Sobinska* (1907), P. 106.

EXPRESS REVOCATION BY SUBSEQUENT WILL, CODICIL OR WRITING.

A will or codicil may operate as a revocation of a prior testamentary instrument, by the effect either of an express clause of revocation, or of an inconsistent disposition of the previously devised property.

5th ed., p. 134, 6th ed., p. 167.

DISTINCTION BETWEEN REVOCATION OF A GIFT AND OF SO MUCH OF WILL AS CONTAINS THE GIFT.

Express revocation may, it seems, be produced in two different modes, having different effects. Thus, if there be a bequest by

will to several persons as tenants in common, and by codicil the testator revoke the bequest to one of them, his share, as a general rule, will not accrue to the others. This is the ordinary mode. But if the testator revoke "so much of my will" as contains the gift to one of such persons, here, if the words that remain are sensible per se, and amount without further alteration to a gift of the whole subject to the others, these will take the whole, the will being read as if the revoked words had never been in it.

Ibid. *Ramsay* v. *Shelmerdine*, L. R. 1 Eq. 129.

If a codicil expressly revokes part of a will, its operation is not, it seems, restrained by a recital in the codicil shewing that the testator did not intend the revocation to be absolute.

6th ed., p. 167. *Viscount Holmesdale* v. *West*, L. R. 3 Eq. 486. 4 H. L. 543.

MERE INTENTION TO REVOKE BY A FUTURE ACT INOPERATIVE.

Of course, a mere intimation by a testator of his intention to make by a future act a new disposition, does not effect an actual present revocation.

5th ed., p. 135, 6th ed., p. 168. *Thomas* v. *Evans*, 2 East 488.

EXPRESS CLAUSE OF REVOCATION RESTRAINED BY CONSTRUCTION.

And even an express clause of absolute and present revocation of all former wills may be reduced to total or partial silence, by shewing that the clause was inserted by mistake.

Ibid. *Powell* v. *Mouchett*, 6 Madd. 216.

INTERMEDIATE CODICILS.

If a testator makes a will and one or more codicils, and then makes a codicil revoking the will, this does not necessarily revoke the intermediate codicils: the question is whether the testator distinguishes between the will and the codicils.

Farrer v. *St. Catharine's College*, L. R. 16 Eq. 19.

DEPENDENT RELATIVE REVOCATION.

Questions of dependent relative revocation arise most commonly in cases where a will is destroyed or revoked by some physical act, and although the question can arise where a will purports to be revoked by a subsequent testamentary instrument, it would seem that there is greater difficulty in applying the general principle to such cases, because revocation by a written instrument is more deliberate and unambiguous than revocation by destruction.

6th ed., p. 169.

DIFFERENCE BETWEEN DEVISING AND REVOKING CLAUSES OF STATUTE OF FRAUDS.

Though the Statute of Frauds required that a will which revoked a devise of freehold lands should be attested by the same number of witnesses, as a will devising such lands, yet, in some

particulars, the prescribed ceremonial differed in the respective instances. Thus, a devising will was required to be subscribed by the witnesses in the testator's presence, which a revoking will was not, and a revoking will was required to be signed by the testator in the presence of the witnesses, while a devising will needed not to be signed in their presence; each therefore had a circumstance not common to both.

1st ed., p. 153, 6th ed., p. 169.

This difference, however (which probably occurred without design), has been attended with little practical effect, for it seldom happens that a testamentary instrument is executed for the mere purpose of revoking a previous will, and if it contain a new disposition, any revoking clause therein will be a nullity, whether the substituted devise takes effect or not, though for widely different reasons in the respective cases. If the devise with which the clause in question is associated be effective, it reduces the latter to silence by rendering it unnecessary, the new devise itself producing the revocation, so that the efficacy of the will as a revoking instrument cannot, in such a case, become a subject of consideration. If, on the other hand, the new devise be ineffectual, on account of the attestation being insufficient for a devising, though sufficient for a revoking will, the revoking clause becomes inoperative on another principle, namely, that the revocation is conditional and dependent on the efficacy of the attempted new disposition, and that failing, the revocation also fails; the purpose to revoke being considered to be, not a distinct independent intention, but subservient to the purpose of making a new disposition of the property; the testator meaning to do the one so far only as he succeeds in effecting the same. But it seems that, if the second devise fails, not from the infirmity of the instrument, but from the incapacity of the devisee, the prior devise is revoked.

Ibid.

REVOCATION OF GIFT TO DECEASED LEGATEE.

Notwithstanding the general rule, that the revocation of a gift to one of several tenants in common does not enure for the benefit of the others, it may do so if that is the testator's intention.

6th ed., p. 171. *Re Radcliffe*, 51 W. R. 409.

WORDS OF REVOCATION INSERTED IN ATTESTATION CLAUSE.

An attestation clause is no part of a codicil, and consequently if words purporting to revoke an earlier testamentary instrument are inserted in the attestation clause of a codicil, they have no revoking effect.

6th ed., p. 171. *In bonis Atkinson*, 8 P. D. 165.

REVOCATION BY INCONSISTENCY OF DISPOSITION.

The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly or in effect revoke the former, or the two be incapable of standing together; for though it be a maxim that no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary) may be admitted to probate as together containing the last will of the deceased. And if a subsequent testamentary paper be partially inconsistent with one of an earlier date, then such latter instrument will revoke the former as to those parts only where they are inconsistent.

6th ed., p. 172.

This statement of the law, which is taken from Williams on Executors, 7th ed., i 162, has been judicially approved: *Lemage* v. *Goodban*, L. R. 1 P. & D. 57.

CONTENTS OF LATER WILL MUST BE PROVED.

It follows from the general principle above stated, that if a testator makes two wills, and the later one is lost or destroyed, and there is no evidence to shew that it expressly or impliedly revoked the earlier will, the earlier will is entitled to probate.

Dickinson v. *Stidolph*, 11 C. B. N. S. 341.

PAROL EVIDENCE.

If the second will is lost or destroyed, parol evidence is admissible to prove its contents.

5th ed., p. 136n., 6th ed., p. 172. *Brown* v. *Brown*, 8 Ell. & B. 876.

The most simple and obvious case of revocation by inconsistency of disposition is that of a testator having devised lands to a person in fee, and then, by a subsequent will, devising the same lands to another in fee; in such case the latter devise would operate as a complete revocation of the former.

1st ed., p. 157, 6th ed., p. 173. *In bonis Hodgkinson* (1893), P. 339.

GIFT OF RESIDUE BY WILL REVOKED BY SIMILAR GIFT IN CODICIL.

So if the residue of personal estate be given by will to A., and by codicil to B., the former gift is revoked.

5th ed., p. 136, 6th ed., p. 173. *Fownes-Luttrell* v. *Clarke* (1876), W. N. 168, 249.

AS TO CONTRADICTORY WILLS OF UNCERTAIN DATE.
INCONSISTENT WILLS ALWAYS TO BE RECONCILED IF POSSIBLE.

If from the absence of date and of every other kind of evidence, it is impossible to ascertain the relative chronological position of two conflicting wills, both are necessarily held to be void, and the heir as to the realty, and the next of kin as to the personalty, are let in; but this unsatisfactory expedient is never resorted to until all attempts to educe from the several papers a scheme of

disposition consistent with both, have been tried in vain. And even where the t' .es of the actual execution of the respective papers are known, so that if they are inconsistent, there can b no difficulty in determining which is to be preferred, the Courts will, if possible, adopt such a construction as will give effect to both, sacrificing the earlier so far only as it is clearly irreconcilable with the latter paper; supposing, of course, that such latter paper contains no express clause of revocation.

1st ed., p. 159, 6th ed., p. 174. *Simpson* v. *Foxon* (1907), P. 54.

WHERE IT IS NOT.

If the subsequent instrument does not profess to be a codicil and is adequate to the disposition of the entire property, there is no such a priori improbability that it was intended wholly to supplant the prior instrument. The case then rests on the true construction of the contents of the two instruments, and the complete disposition contained in the second must, unless controlled by the context, wholly revoke the first.

5th ed., p. 138, 6th ed., p. 176. *In bonis Turnour*, 56 L. T. 671; *In bonis Palmer*, 58 L. J. P. 44.

TENOR OF LATER WILL SHOWING INTENTION TO REVOKE.

And a will may revoke an earlier testamentary document, disposing of the whole of the testator's property, even although the latter will does not contain an express clause of revocation, and does not dispose of all the testator's property. It is a question of construction on the terms of the two documents.

If the intention remain in doubt on the face of the documents themselves, extrinsic evidence of the surrounding circumstances and of the testator's intention to revoke the earlier will is admissible.

6th ed., p. 176. *In Estate of Bryan* (1907), P. 125.

The questions are numerous which have arisen in regard to the extent to which a codicil affects the disposition of a will or antecedent codicil, and which are commonly occasioned by the person framing the codicil not having an accurate knowledge or recollection of the contents of the prior testamentary paper.

1st ed., p. 160, 6th ed., p. 177.

CODICIL NOT TO DISTURB WILL MORE THAN ABSOLUTELY NECESSARY.

In dealing with such cases it is an established rule not to disturb the dispositions of the will further than is absolutely necessary for the purpose of giving effect to t codicil.

Ibid. Farrer v. *St. Catherines College*, L. R. 3 Eq. 19. *Cookson* v. *Hancock*, 2 My. & C. 606.

CHARGE NOT REVOKED.

So, where a testator devises lands to A. subject to a charge in favour of B., and then by a codicil revokes the devise to A. of the land, which he gives to another, without noticing the charge, the land remains subject to the charge in the hands of the substituted devisee. Again, if a testator bequeaths a legacy payable out of two funds, and by codicil there is an absolute gift of one of the funds, but no express revocation of the legacy, it remains payable out of the other fund and this is so, even if the fund thus taken away is the general personal estate.

5th ed., p. 140, 6th ed., p. 178. *Norman* v. *Kynaston*, 29 Beav. 96; *Fry* v. *Fry*, 9 Jur. 894; *Kermode* v. *Macdonald*. L. R. 3 Ch. 584.

So the operation of a codicil which revokes a legacy or devise in favour of a certain person, may be restrained by a recital in the codicil.

6th ed., p. 179. *Hinchcliffe* v. *Hinchcliffe*, 2 Dr. & Sm. 96.

INTENTION OF TESTATOR.

The presumption against implied revocation is strengthened if the testator uses words showing an intention not to alter his testamentary dispositions except in certain specific respects.

6th ed.. p. 180. *Follett* v. *Pettman*, 23 Ch. D. 337.

REVOCATION OF PART OF GIFT MAY REVOKE WHOLE.

Sometimes the express revocation of one gift operates to revoke another, if the two are so closely connected as practically to constitute one gift. A testator gave an annuity of £300 to A., and after her death to her children as she should appoint, and in default of appointment among her children equally; by a codicil reciting that he had devised to A. an annuity of £300, he revoked the devise of the said annuity and "instead thereof" he devised to A. an annuity of £150, to be payable and charged in the same manner as the said annuity of £300: it was held that the annuity to the children of A. was also reduced to £150.

6th ed., p. 181. *Sanford* v. *Sanford*, 1 De G. & S. 67. *Re Freme's Contract* (1895), 2 Ch. 778.

LEGACY TO EXECUTOR.

Where a testator by his will appoints an executor, and bequeaths to him a legacy in such a way that it is annexed to the office, and by a codicil revokes the appointment of executor, the legacy is also revoked. But if the testator shews that the bequest of the legacy is independent of the office—as where he bequeaths it as a "mark of respect," or "as a remembrance," —the legacy is not revoked by the revocation of the office.

6th ed., p. 182. *Burgess* v. *Burgess*, 1 Coll. 367; *Budd* v. *Yelverton*, L. R. 13 Eq. 131.

APPOINTMENT OF EXECUTOR, WHEN REVOKED.

Where there are several testamentary papers not inconsistent with one another, each of which appoints different executors, probate will be granted to all, and this may be done even if the executor appointed by the last paper is described as "sole executor." And a reappointment by codicil of some of the executors appointed by the will together with new executors, does not revoke the appointment of executors contained in the will. But if a testator by his will appoints A. and B. his executors, and by a codicil to his "said will" appoints X. "sole executor of this my said will," it seems that this is an implied revocation of the appointment of A. and B.

6th ed., p. 182. *In bonis Morgan*, L. R. 1 P. & D. 323; *Geaves* v. *Price*, 32 L. J. P. 113; *In bonis Bailey*, L. R. 1 P. & D. 628.

REVOCATION AS TO ONE OFFICE DOES NOT EXTEND TO OTHER OFFICES.

Where a person is appointed to more than one of the offices of guardian, executor, and trustee, a revocation by codicil of his appointment to one of the offices is not a revocation of the appointment to any other office; unless the context shows, as by directing "trustees" to pay debts and legacies, that the several offices (of trustee and executor) are to be filled by the same persons.

5th ed., p. 142, 6th ed., p. 183. *Worley* v. *Worley*, 18 Beav. 58.

REVOCATION OF DEVISE BY REFERENCE.

It may be observed that where a testator, in order to avoid repetition, has by his will declared his intention respecting a property (say Whiteacre), then being devised by him, to be similar to what he had before expressed concerning another property (say Blackacre) antecedently given, and he afterwards by a codicil, or by obliteration, or otherwise, revokes the devise of Blackacre, such revocation does not affect the devise of Whiteacre.

1st ed., p. 162, 6th ed., p. 183.

CLEAR GIFT IN WILL NOT REVOKED BY DOUBTFUL EXPRESSIONS IN CODICIL.

Another principle of construction is, that where the will contains a clear and unambiguous disposition of property, real or personal, such a gift is not allowed to be revoked by doubtful expressions in a codicil. "The principle is perfectly clear, that where you have a distinct disposition made by a will, that disposition cannot be revoked by a codicil except through the medium and use of words equally distinct."

5th ed., p. 145, 6th ed., p. 186. *Kellett* v. *Kellett*, L. R. 3 H. L. p. 167.

ERRONEOUS RECITAL, &c., IN CODICIL.

An erroneous recital or unintelligible provision in a codicil does not, as a general rule, operate as a revocation of a clear

gift in the will. But an erroneous recital does not prevent a codicil from operating as a revocation wholly or partially, of an absolute gift in the will, if the substantive dispositions in the codicil show that intention.

Van Grutten v. *Foxwell* (1897), A. C. 658; *Re Margitson*, 31 W. R. 257.

6th ed., p. 188.

INTENTION TO REVOKE MAY BE INDICATED BY INFORMAL EXPRESSIONS.

An intention to revoke, though expressed in loose and untechnical language, or in terms capable per se of a limited interpretation, must nevertheless prevail, if it can be clearly collected from the whole will. On this principle, it is not necessary that the gift to be revoked should be accurately referred to, or that the legatee by the will should be actually named in the codicil.

5th ed., p. 147, 6th ed., p. 188. *Read* v. *Backhouse*, 2 R. & My. 546: *Carrington* v. *Payne*, 5 Ves. 423.

REVOCATION FOUNDED ON MISTAKE.

Where a testator by a codicil revokes a devise or bequest in his will, or in a previous codicil, expressly grounding such revocation on the assumption of a fact, which turns out to be false the revocation does not take effect; being, it is considered, conditional, and dependent on a contingency which fails.

The real question in all these cases is, whether the revocation is absolute or conditional. If it is absolute it takes effect, although founded on a mistake on the part of the testator.

1st ed., p. 165, 6th ed., p. 188. *Campbell* v. *French*, 3 Ves. 321.

IMPLIED REVOCATION BY THE EFFECT OF A CODICIL REVIVING AN EARLIER WILL.

Sometimes a codicil has the effect of impliedly revoking the later of two wills, by expressly referring to and recognising the prior one as the actual and subsisting will of the testator. The difficulty, in most of these cases, is to determine whether the codicil shews an intention to revive the earlier will; this question is discussed in the next chapter. If the earlier will is revived, and it is inconsistent with the later will, the result generally is that the later one is impliedly revoked. Cases have, however, occurred in which all three documents have been admitted to probate.

5th ed., p. 153, 6th ed., p. 190. *In bonis Reynolds*, L. R. 3 P. & D. 35; *In bonis Chilcott* (1897), P. 223.

Even if the earlier will has been destroyed, and therefore cannot be revived, the effect of the codicil may be to revoke the second will.

5th ed., p. 155, 6th ed., p. 190. *Hoke* v. *Tokelove*, 14 Jur. 817.

WHETHER CONFIRMATION OF WILL REVOKES INTERMEDIATE CODICIL.

Sometimes a testator makes a will and one or more codicils, and then makes a codicil expressly confirming the will, but not referring to the previous codicils: the question whether in such a case the previous codicils are revoked is considered in the next chapter.

WILLS ACT, S. 19.

Section 19 of the Wills Act enacts that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances. The Real Property Commissioners remarked that under the old law a will of real or personal estate could be revoked "by an alteration in the circumstances of the testator," but the only examples which they give are marriage, or marriage and the birth of a child. Having regard to the sweeping language of sec. 20, which enacts that no will shall be revoked except in certain specified ways, it is not easy to see the object of sec. 19.

Interlineation—Custody—Evidence.—D. Green, senior, who died in 1825, before the passing of the Will Act of 1843, devised 100 acres to his son, D. Green, junior, and "the heirs of his body forever," the words "heirs of his body forever" being interlined. The devisee died unmarried, and the plaintiffs claimed as co-heirs of D. Green, senior, against the trustees of Joseph Green, residuary devisee under the will of D. Green, senior. D. Green, junior, survived the testator over thirty years. The will was drawn by Samuel Green (no relation of any of the parties), and the interlineation was in his handwriting, and appeared to be in the same ink as the rest of the will, and he was a witness to the will. He survived D. Green, junior, several years, and he had had the custody of the will from the time of making it until the testator's death, and no question was raised during his lifetime. Ellis, another subscribing witness, swore that he believed the will was now in the same state as when he signed it. It was not disputed that if the words interlined were not to operate as part of the will the lessor of the plaintiff would be entitled to recover, and it was contended on their part that there was no sufficient evidence to shew the interlineation to have been made before the execution of the will. At the trial the Judge directed the jury that if they were satisfied from the evidence that the interlineation had been made before the will was executed to find for defendants, which they did. The lessors of the plaintiffs moved to set aside the verdict on the ground that the evidence did not warrant the finding:—Held, that the evidence warranted the finding and that the rule must be discharged. *Green* v. *Green* (1872), 1 P. E. I. R. 384.

Testamentary Writings of Different Dates Standing Together.—Testatrix died in 1908, leaving two properly executed wills, one dated 1875 and the other 1879. The two documents were found, after death, folded together. The first four paragraphs of each were in the same words. The fifth paragraph of each was the same, except that in the later document additional provision was made for paying off a mortgage on a certain cottage. The sixth paragraph of the first document provided for the division of the surplus of the estate (except articles therein specifically bequeathed) among three nieces of the testatrix. This paragraph was omitted from later document, which contained no direction as to the disposition of the residue of the estate nor any revocatory clause. The sixth and seventh paragraphs of later document disposed of the said cottage, and the subsequent paragraphs disposed of various articles of personal property, some to some persons to whom they were given by first document, while in other cases the destination was changed. No pecuniary legacy was given

by second document. The same executors were appointed in both. The later one was called "my last will." If the later one alone was admitted to probate, there would be an intestacy as to part of the estate as there was a considerable residue and no residuary gift:—Held, that the two documents together constituted the last will of the testatrix, and letters of administration with both documents annexed were properly granted. *In re Estate of Bryan*, [1907] P. 125, 76 L. J. P. 30, distinguished; *Re Molson*, *Ward* v. *Stevenson* (1910), 21 O. L. R. 289.

Revocation of Devise, Effect of on Legacy.— *Lockhart* v. *Hardy*, 9 Beav. 370; *Re Gilbert*, 2 O. W. R. 135.

Express Revocation by Subsequent Document.—A testatrix, by a holograph will, after directing her executors to pay her debts and funeral charges, gave to them the residue of her estate, in trust to pay certain legacies therein provided for, which included legacies to her sister E. A. R. and her nephew E. B. F. R., and to pay the residue, if any, to the said E. A. R. By holograph document written under the will, she revoked her will, and gave to E. A. R. all the money she possessed, save the legacy to E. B. F. R. This was witnessed by the husband of E. A. R. and the wife of E. B. F. R.:—Held, that, while the effect of the relationship of the witnesses to the beneficiaries was to nullify the bequests made to them, the document was, in other respects, valid as a will, and duly revoked the original will, including the appointment of executors. *Re Tuckett* (1907), 9 O. W. R. 979, overruled. The mode of revoking wills, the admissibility of parol evidence of intent, and the doctrine of dependent relative revocation, discussed. The Court directed the issue of letters of administration with the will annexed, and the division of the estate as upon an intestacy. *Freel* v. *Robinson* (1909), 18 O. L. R. 651, 13 O. W. R. 1164.

Lost Will — Evidence — Solicitor—Privilege—Declarations—Probate.—The doctrine of privileged communications as between solicitor and client exists for the benefit of the client and his representatives in interest, not for that of the solicitor, and in an action to establish the lost will of a testator, who was illegitimate and had died without issue, statements of the testator to his solicitor in reference to the making of and provisions in the will were held, against the objection of those who claimed under the lost will, to be admissible in evidence. Statements of a testator as to the provisions of his will are admissible in evidence in an action to establish it, and statements of this kind were in this case held to be sufficient corroboration of the evidence of the plaintiff, who had drawn, and was claiming large benefits under, the will in question, which it was alleged, had been lost or stolen. The facts that the testator was aware that unless he made a will his property would go to the Crown; that he was an experienced man of business possessed of a large estate; that he had, after the will had been made, several times spoken of it as in existence, and had mentioned some of its provisions; and that during his last illness, of some days' duration, he had expressed no wish to make a will; were held sufficient to rebut the presumption of destruction of the will by the testator. *Stewart* v. *Walker*, 23 C. L. T. 320, 6 O. L. R. 495, 1 O. W. R. 489, 2 O. W. R. 990.

Revocation.—There is an express unqualified and absolute bequest. There is not in the subsequent part of the will any distinct positive revocation of that, and there must be that to induce me to deprive the legatee to whom it is first given of the personal estate. *Kerr* v. *Clinton*, L. R. 8 Ex. 462; *Re Munroe*, 11 O. W. R. 427.

Acknowledgment of Signature—Subsequent Changes and Re-acknowledgment.—The plaintiffs were the devisees of the land in question in this action under the will of H. O'N.; the defendant A. O'N., the father of the plaintiffs, was one of the heirs-at-law, and had obtained conveyances of the land from the other heirs-at-law, of H. O'N.; and the defendant O. was the assignee of all the estate of A. O'N. and had besides a mortgage from A. O'N. on the land in question. On the 17th April, 1877, H. O'N. signed a will in the presence of one witness; another witness was then called in, before whom the testator acknowledged his signature, and then both witnesses signed in the presence of the testator and of each

other. On the 23rd April, 1877, the testator, desiring to have two changes made, caused two of the sheets of the will to be rewritten and read to him; the two new sheets were then put into the place of the old ones, the document pinned together, and on the last sheet, which was not one of of those rewritten, the date 17th was changed to 23rd; the same witnesses were then called in, and the testator then acknowledged his signature to the will, and each of the two witnesses his. The two sheets taken out of the will were afterwards destroyed by one H., by the direction of the testator, but not in his presence. The testator died a few days after this without having made any other will. The will of the 23rd April was offered for probate, but was refused by a surrogate court:—Held, that the will of the 17th April was duly executed; but that the will of the 23rd April was not duly executed, and probate was properly refused; and the will of the 17th April was not revoked by the destruction of the two sheets out of the presence of the testator, nor by the defective execution of the will of the 23rd April, the intention of the testator not being to cancel the whole of the earlier will, but only to make two changes in it, and he being under the belief that the later will was a valid one; and it was adjudged that the earlier will should be admitted to probate. *O'Neill* v. *Owen*, 17 O. R. 525.

Alteration.—In the will the number of the lot devised had been altered from 18 to 17, the former number having been struck out and the latter written over it. The alteration was in the same handwriting as the will, and at the foot of the will, before the attestation clause, was a note in the same hand, "the word seventeen being the true number of the said lot." It was proved that the testator owned lot 17:—Held, that the plaintiff was bound to shew that the alteration had been made before execution, but that the jury might infer it from these circumstances; and semble, that the note should be treated as part of the will. *Field* v. *Livingston*, 17 U. C. C. P. 15.

Attesting Alteration.—Any alteration or revocation made in or of the provisions of a will after 1st January, 1874, to be effectual, must be attested in the same manner as a will requires to be attested; and that notwithstanding the will was made anterior to that date. *Smith* v. *Meriam*, 25 Chy. 383.

A codicil to a will, executed shortly before the testator's death, increased the provision for a niece of his wife who had lived with him for nearly thirty years, a considerable portion of which she was his housekeeper, was attacked as having been executed on account of undue influence by the niece:—Held, that, as the testator was shewn to be capable of executing a will at the time he made the codicil, considering the relations between him and his niece, even if it had been proved that she urged him to make better provision for her than he had previously done, such would not have amounted to undue influence:—Held, also, following *Perera* v. *Perera*, [1891] A. C. 354, that, even if there was ground for saying that the testator was not at the time capable of making a will, the codicil would still have been valid. *Kaulbach* v. *Archbold*, 22 C. L. T. 9, 31 S. C. R. 387.

Specific Performance — Uncertainty — Implied Contract. — Where a contract on the part of a testator, founded upon a valuable and sufficient consideration, that he will leave by his will to the other contracting party a sum of money as a legacy, is clearly made out, the representatives of the testator may be compelled to make good his obligation. But where the testator, the grandfather of the plaintiff, promising to make the same provision for her by will as he should make for his own daughters, took her from the home of her parents at the age of twelve, adopted her, and maintained her, while she worked for him, for nine years, but although he made his daughters residuary devisees, left the plaintiff nothing by his will, and paid her nothing for her services, and she sued his executors for specific performance of the contract or promise and in the alternative for wages:—Held, that the case did not fall within the rule, the promise made and the consideration for it being both of too uncertain a character to enable the plaintiff to come to Court for specific performance; but that the circumstances gave rise to an implied contract for the payment of wages, and took the case out of the ordinary rule that children are not to look for wages from their parents, or those in loco parentis, in the absence of

special contract, whilst they form part of the household. *Walker* v. *Boughner*, 18 O. R. 448.

S., a girl of fourteen, lived with her grandfather, who promised her that if she would remain with him until he died, or until she was married, he would provide for her by his will as amply as for his daughters. She lived with him until she was twenty-five, when she married. The grandfather died shortly after, leaving her by his will a much smaller sum than his daughters received, and she brought an action against the executors for specific performance of the agreement to provide for her as amply as for his daughters, or, in the alternative, for payment for her services during the eleven years. On the trial of the action it was proved that S., while living with her grandfather, had performed such services as tending cattle, doing field work, managing a reaping machine, and breaking in and driving wild and ungovernable horses:—Held, that the alleged agreement to provide for S. by will was not one of which the Court could decree specific performance, but held, further, that S. was entitled to remuneration for her services, and $1,000 was not too much to allow her. *McGugan* v. *Smith*, 21 S. C. R. 263. See *S. C.*, sub nom. *Smith* v. *McGugan*, 21 A. R. 542.

M., on his father's death at the age of three years, went to live with his grandfather, W., who sent him to school until he was sixteen years old, and then took him into his store, where he continued as the sole clerk for eight or nine years, when W. died, and M. died a few days later. Both having died intestate the administratrix of M.'s estate brought an action against the representatives of W. for the value of such services rendered by M., and on the trial there was evidence of statements made by W. during the time of such service to the effect that if he (W.) died without having made a will, M. would have good wages, and if he made a will, he would leave the business and some other property to M.:—Held, that there was sufficient evidence of an agreement between W. and M., that the services of the latter were not to be gratuitous but were to be remunerated by payment of wages or a gift by will to overcome the presumption to the contrary arising from the fact that W. stood in loco parentis towards M. There having been no gift by will, the estate of W. was therefore liable for the value of the services as estimated by the jury. *McGugan* v. *Smith*, 21 S. C. R. 263, followed. *Murdoch* v. *West*, 24 S. C. R. 305.

Revocation of Bequest.—A testatrix by the third clause of her will bequeathed to S. the interest on the sum of $3,000 for life, and after his death directed the $3,000 to be divided among his children, and by a subsequent clause she directed her executors to deduct out of the $3,000 all payments made to S. after the date of the will. By a codicil she directed that the bequest number three, bequeathing to S. the interest on $3,000, be revoked, and in lieu thereof the sum of $500 be paid to him, or his heirs, and that the direction as to payments made after the date of the will should apply thereto:—Held, that the effect of the codicil was to revoke the whole of the third clause. *Edwards* v. *Findlay*, 25 O. R. 489.

Dealings with Property Devised.—A. devised to B., his son, a certain parcel of land not less than sixty acres, nor to exceed 100, bounded &c., giving a description not sufficiently precise to mark out any certain piece of land. By a deed some years afterwards, for a consideration of £50, he bargained and sold to B. eighty acres of the same lots of land under a description which would include at least sixty acres of that which had been devised to B.:—Held, that the deed revoked the devise to B., who could hold only what the deed covered. *Doe* d. *Marsh* v. *Scarborough*, 5 U. C. R. 499.

One S. died in 1867, leaving his next of kin, who, believing that S. died intestate, obtained administration. G. afterwards found an agreement and will under seal of S. in the same paper, in the possession of F., the only witness to the execution. By it S. agreed to convey part of a lot of land to G. on certain conditions. S. owned at the date of the paper the other half of the same lot, and also some personalty. By this paper, in case the conditions were performed, S. devised all his real and personal estate to G. and his heirs. Some years after the date of the paper, S. conveyed the other half of the lot to G., and took a mortgage for part of the

purchase money:—Held, that this paper was a will and not a deed, and therefore was revocable, but although the subsequent conveyance to G. and reconveyance by mortgage to S. might revoke pro tanto the will relating to the realty—yet it would not as to the personalty. Held, also, that it was a good will of the personalty, notwithstanding it devised real estate and there was only one witness to its execution. Held, also, that the letters of administration must be brought in and cancelled, and the paper admitted to probate. *In re Snider*, 5 C. L. J. 101.

A testator devised 200 acres to one of his sons, a minor, and the remainder (100 acres) to testator's wife. The husband and wife afterwards agreed to live apart; that her 100 acres should be given to her at once; and that, in consideration of this, she should release her dower in the rest of his land. To effect this object, both joined in a deed of the 300 acres to a trustee; the trustee conveyed to the wife her 100 acres, and declared that he held the rest in trust to convey as the grantor should appoint:—Held, that the deed operated as a revocation of the will in equity, as well as at law. *Lougheed* v. *Knott*, 15 Chy. 34.

A testator devised all his estate, real and personal, to his wife. He was the lessee, with a right of purchase, of certain lands on which he afterwards paid the balance of purchase money and obtained a conveyance thereof:—Held, that the subsequent acquisition of the fee was not a revocation of the devise, and that the widow was beneficially entitled to the land so purchased; but that the legal estate therein had passed to the heirs-at-law. *Sinclair* v. *Brown*, 17 Chy. 333.

A testator devised his real estate and personal property to two persons. Afterwards he contracted to sell a portion of the real estate, but the contract was never carried out, and, after his decease in October, 1862, the parties interested under the contract agreed to rescind the same, which was done accordingly:—Held, that the contract operated in equity as a revocation of the will as regarded the beneficial interest in the real estate; that the interest in the contract passed to the legatees under the residuary clause; that the devisees being also legatees of the personal estate were entitled to the land, and that it did not go to the heirs-at-law. *Ross* v. *Ross*, 20 Chy. 203.

Destruction—Birth of Child.—Held, under 32 Vict. c. 8, that a will is not revoked by destruction by the direction of the testator, unless the destruction takes place in his presence. (2) The birth of a child after the making of a will does not revoke the will. *Re Tobey*, 6 P. R. 272.

Bond not to Alter Will.—The defendant gave to the plaintiff a bond conditioned not to alter his will, by which, as recited in the bond, he had devised to the plaintiff certain land. He afterwards sold and conveyed the land to one C.:—Held, that the condition was broken. *McCormick* v. *McRae*, 11 U. C. R. 187.

Subsequent Invalid Will.—Section 5 of the Wills Act of 1868, which provides that no will shall be revoked otherwise than by "another will or codicil executed according to law, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is by law required to be executed," means a will, codicil or other writing executed with the same formalities as are required in the case of the will or codicil which it purports to revoke. See R. S. O. 1877 c. 106, s. 22. *In re Parker Trusts*, 20 Chy. 389.

Where a testatrix, having duly made and published her will, subsequently executed a testamentary paper, not, however, so as to pass real estate:—Held, that the disposition of personalty made thereby was substituted for the disposition made of it by the will, but the disposition made of the realty by the will was not affected. *Ib.*

Tearing off Name—Intention.—Where A., meaning to make a new will, and having the draft with him for that purpose, cancelled the first will, not by obliterations and alterations, but by tearing off his name and seal, and then died suddenly before executing the other will:—Held, that A. died intestate. Held, also, that the heir-at-law finding such old will cancelled, and the draft with it, was not called upon in the absence of any imputation of fraud, to account for the cancellation of the old will. Quære,

when the name and seal of a testator appear to have been struck out of a will, should the animus cancellandi be still left as a question for the jury. *Doe d. Crooks* v. *Cummings*, 6 U. C. R. 305.

Weight of Evidence.—In ejectment, where the jury found that a will had been revoked by burning it and the execution of a subsequent deed, upon very conflicting evidence, the weight of which in the opinion of the Judge who tried the cause was against the finding, the Court refused a new trial. *Doe d. Magher* v. *Chisholm*, Dra. 216.

Codicil—Appointing New Executor.—A. made his will in 1843, and in 1846 added a codicil, merely appointing a new executor "of his said will," as written above:—Held, that the codicil was a confirmation not a revocation of the will, which must be considered as made and executed in 1843. *Doe d. Baker* v. *Clark*, 7 U. C. R. 44.

Where by a codicil dated the 21st July, 1882, expressed to be a codicil to his will of the 17th July, 1880, the testator confirmed the said will, and it appeared that the said will consisted not merely of the document of the 17th July, 1880, but also of an intermediate codicil revoking a particular bequest therein:—Held, that, though a reference simply to the date of the earlier document was not sufficient in itself to restrict the confirmation to that particular document, yet other words and surrounding circumstances could and did convey such an intention with reasonable certainty, and accordingly the will of the 17th July, after confirmation, was no longer affected by the partial revocation made by the intermediate codicil. *McLeod* v. *McNab*, [1891] A. C. 471.

Will and Codicil.—"Where the will contains a clear and unambiguous disposition of property real and personal, such a gift is not allowed to be revoked by doubtful expressions in a codicil."

The life estate given to widow by will not enlarged by ambiguous codicil. *Re Armstrong*, 3 O. W. R. 798.

CHAPTER VIII.

REVIVAL AND REPUBLICATION OF WILLS.

Revival is where a testamentary instrument or disposition, which has been revoked or become invalid, is restored or set up by re-execution, or by incorporation in a valid testamentary instrument.

6th ed., p. 192. *Skinner* v. *Ogle*, 9 Jur. 432.

WILLS ACT.

The manner in which a revoked disposition can be revived under the present law is set forth in the Wills Act, which enacts (sec. 22): "That no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the reexecution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked and afterwards wholly revoked shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown."

Section 25 of the Ontario Wills Act, 1910, is as follows:—

25. No will or any part thereof, which has been in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and where any will which has been partly revoked, and afterwards wholly revoked, is revived, such revival shall not extend to so much thereof as was revoked before the revocation of the whole thereof, unless an intention to the contrary is shown.

The section applies not only where the prior will is revoked by an express clause of revocation, but also where it is revoked by inconsistent dispositions contained in the later will.

Boulcott v. *Boulcott*, 2 Drew. 25.

If the later will is lost, or has been destroyed, its contents may be proved by parol evidence.

5th ed., p. 136n, 6th ed., p. 192. *Cutto* v. *Gilbert*, 9 Moo. P. C. 131.

PAROL EVIDENCE INADMISSIBLE TO SHOW INTENTION TO REVIVE.

If a testator makes two wills, the second of which revokes the first, and then destroys the second will for the express purpose of setting up the first, he fails in his object; for parol evidence of his intention is not admissible in order to give effect to that object; though it is admissible to prove that the

destruction was effected for the sole purpose of reviving the first will; in that case the doctrine of dependent relative revocation (see above, p. 82) prevents the revocation of the destroyed will. Otherwise there is an intestacy.

5th ed., p. 120, 6th ed., p. 193. *Powell v. Powell*, L. R. 1 P. & D. 209; *In bonis Brown*, 4 Jur. N. S. 244.

REVIVAL OF PARTIALLY REVOKED WILL.

The same rule applies where the second will is only a partial revocation of the former, or where a codicil partly revokes a will. In such a case, if the testator revokes the second will or the codicil, this does not revive the revoked portion of the first will, and probate is limited to the portions of the first will which were unaffected by the second will or the codicil. The result may be a partial intestacy.

6th ed., p. 193. *In bonis Debac*, 77 L. T. 374.

WHAT IS RE-EXECUTION.

Where a will was found with the signature cut off, but gummed on again, it was held that it was not duly re-executed.

5th ed., p. 127, 6th ed., p. 193. *Bell* v. *Fothergill*, L. R. 2 P. & D. 148.

INTENTION TO REVIVE.

Where a testator makes two wills, by the second of which he revokes the first, and then makes a codicil which he describes as a codicil to the first will, without referring to the second will, this may have the effect of reviving the first will and revoking the second. But this result does not always follow. In the first place, if the first will was revoked by destruction, it is incapable of being revived, although a copy of it may be incorporated in the codicil. And in the second place, assuming that the first will is still in existence, the codicil must show an intention to revive it. According to some cases, it is sufficient that the codicil should be described as a codicil to the first will. And if there is no ambiguity, parol evidence is inadmissible to show that the reference to the first will was a mistake, and that the testator really meant to refer to the second will.

5th ed., p. 155, 6th ed., p. 194. *Rogers* v. *Goodenough*, 2 Sw. & Tr. 342; *Payne* v. *Trappes*, 1 Rob. 583.

MISTAKEN REFERENCE.

If a testator makes a codicil referring to a revoked will by date, but goes on to refer to testamentary dispositions which are not contained in it but in his later will, this is generally sufficient to show that the reference to the earlier will was a mistake, and that he had no intention of reviving it.

6th ed., p. 195. *In bonis Anderson*, 39 L. J. P. 55.

AMBIGUOUS REFERENCE.

In a case where a testator made two wills, the second of which revoked the first, and then executed a codicil which he declared to be a codicil to "my last will" and by which he confirmed "my said will in all respects," and went on to refer to certain provisions contained in the first will and not in the second, it was held that this revived the first will and revoked the second.

5th ed., p. 159, 6th ed., p. 195. *In bonis Van Cutsem*, 63 L. T. 252.

Where a codicil to a second will contains a recital referring to a previous codicil which was revoked by the second will, this is not sufficient to revive the revoked codicil.

In bonis Dennis (1891), P. 326.

EFFECT OF WORD "CONFIRM."

Where a codicil expressly confirms the first will, this is sufficient evidence of an intention to revive it.

6th ed., p. 195. *McLeod* v. *McNab* (1891), A. C. 471.

PHYSICAL ANNEXATION.

A codicil does not show an intention (within the meaning of the section) to revive the earlier of two wills by being physically annexed to it (e.g., by a piece of tape): the intention must appear from the contents of the codicil. But it seems that if a memorandum in the nature of a codicil is written upon the will and duly executed, it operates to revive the will, although it does not in direct terms refer to the will.

Ibid.

CODICIL PARTLY REVOKING REVIVED WILL.

The latter part of sect. 22 provides, that "when any will or codicil which shall be partly revoked and afterwards wholly revoked shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shewn." Now if partial revocation of a will—as of a devise of Blackacre to A. in fee—has been caused by a codicil devising Blackacre to B. in fee; and if this codicil has itself been afterwards included in the final revocation of the will, and the "will" is then revived, the devise of Blackacre remains revoked unless a contrary intention is shown. The will is restored as modified by the codicil, but by a short statutory method, without having recourse to the codicil, concerning which the statute is silent; and it may still be a question what becomes of the codicil.

5th ed., p. 156, 6th ed., p. 196. *Neate* v. *Pickard*, 2 N. of C. 406.

WHERE REVIVAL IS INEFFECTUAL.

If a testator makes two wills, the second of which revokes the first, and then destroys the first will, and subsequently executes a

codicil professing to revive the first will, this intention being incapable of being carried into effect, the question arises whether the second will is revoked by the codicil.

The matter seems to depend on whether the second will and the codicil are or are not too inconsistent with one another to stand together.

6th ed., p. 197. *In bonis Steele*, L. R. 1 P. & D. p. 577.

EXPRESS REPUBLICATION.

Republication is sometimes used in the same sense as "revival," but more frequently it is applied to those cases where a valid will or codicil is re-executed or confirmed in such a way as to acquire some force of efficacy which it did not previously possess.

6th ed., p. 197. *Skinner* v. *Ogle*, 9 Jur. 432.

Republication is of two kinds, express and constructive. Express republication (more properly called re-execution) occurs where a testator repeats those ceremonies which are essential to constitute a valid execution, with the avowed design of republishing the will.

5th ed., p. 157. 6th ed., p. 197.

WHAT IS NOT RE-EXECUTION.

It will be remembered that where a will has been properly executed, and the testator and witnesses trace over their former signatures with a dry pen, with the intention of re-executing the will, this is not a valid re-execution.

6th ed., p. 198. (See Chapter VI.) *In bonis Cunningham*, 29 L. J. P. 71.

In a case where a will had been properly executed, and some years afterwards the testator and the witnesses wrote their names on the will again, it was inferred from the circumstances that this was not done with the intention of re-executing it.

6th ed., p. 198. *Dunn* v. *Dunn*, L. R. 1 P. & D. 277. (See Chapter VI.)

CONSTRUCTIVE REPUBLICATION.

Republication in the ordinary sense of the term (sometimes called constructive republication) takes place where a testator makes a codicil to his will, or executes some testamentary instrument from which the inference can be drawn that he wishes it to be read as part of his will. Thus if the instrument is described as a "codicil to my will," or if it is written on the same piece of paper as the will, and contains a reference to "my executors above named" it operates as a republication of the will. A codicil has this effect even if it is expressed to be conditional on an event which does not happen. But if the testator, after making his will,

executes another testamentary instrument containing nothing from which the inference above referred to can be drawn (as where the instrument is not described as a codicil and does not refer to the will in any way), its execution will not effect a republication of the will.

6th ed., p. 198. *Re Taylor*, 57 L. J. Ch. 430: *In bonis Da Silva*, 30 L. J. P. 171; *Re Smith*, 45 Ch. D. 632.

WHEN REPUBLICATION OF WILL INCLUDES CODICIL.

Where a testator makes a will and alters it by one or more codicils, and then makes a codicil confirming the will but not referring to the previous codicils, the question arises whether he thereby confirms them also.

1st ed., p. 172, 6th ed., p. 198.

If a man ratifies and confirms his last will, he ratifies and confirms it with every codicil that has been added to it.

6th ed., p. 199. *Green* v. *Tribe*, 9 Ch. D. 231.

WHERE EVIDENCE OF ANIMUS ADMISSIBLE.

Where a testator makes a will and codicil, and afterwards re-executes the will without referring to the codicil, the question arises whether this revokes the codicil. It seems that in such a case parol evidence is admissible to show quo animo the will was republished, and thus to show that the testator could not have intended to revoke the codicil: as for example if his object in re-executing the will is to give effect to some alterations in it.

6th ed., p. 200. *Wade* v. *Nazer*, 1 Rob. 627; *In bonis Rawlins*, 48 L. J. P. 64.

The effect of republication, as a general rule, is to make the will bear the date of republication.

6th ed., p. 200. *Re Fraser* (1904) 1 Ch. 726.

EFFECT ON SPECIFIC DEVISE.

In regard to specific devises, the principle that the will speaks from the date of the republication, is to be received with more caution and reserve. It is clear, however, that the devise of a particular property republished by the re-execution of the will, or the execution of a codicil, will, even under the old law, comprise a new estate in that property intermediately-acquired by the testator, and falling within the terms of the republished devise.

1st ed., p. 180, 6th ed., p. 201.

According to some modern cases, however, there is little or no difference between a general and a specific devise, so far as the effect of republication is concerned.

6th ed., p. 202. *Re Champion* (1893), 1 Ch. 101.

WHEN SUBJECT OF GIFT IS CHANGED.

Republication by codicil or otherwise, however, did not under the old law extend a specific gift in the will to property which that

gift was not originally intended to embrace, though answering to the same description.

1st ed., p. 180, 6th ed., p. 202.

Whether the same rule applies since the Wills Act, does not seem to have been decided; the question as to the disposition of after-acquired property has generally arisen in connection with sect. 24 of the Wills Act.

6th ed., p. 202.

REVOKED OR ADEEMED LEGACY.

A legacy to a child, which has been adeemed or satisfied by a subsequent advancement to the legatee, is not revived by a constructive republication of the will by means of a codicil, such codicil not indicating an intention to revive the legacy, though containing an express confirmation of the will in the usual general terms.

1st ed., p. 181, 6th ed., p. 202. *Sidney* v. *Sidney*, L. R. 17 Eq. 65.

It is very true that a codicil republishing a will makes the will speak as from its own date for the purpose of passing after-purchased lands, but not for the purpose of reviving a legacy revoked, adeemed or satisfied. 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.

6th ed., p. 203. *Powys* v. *Mansfield*, 3 Myl. & Cr. p. 376.

OBJECT OF GIFT.

A codicil does not, by its republishing operation, revive a devise or bequest, the object of which has previously died in the testator's lifetime. Thus, if a testator devises lands to his nephew John, who dies in the testator's lifetime, and he afterwards has another nephew of the same name the republication of the will would be inoperative to carry the property to the second nephew John.

1st ed., p. [illegible], 6th ed., p. 203. *Doe* v. *Kett*, 4 T. R. 601.

REPUBLICATION DOES NOT CURE DEFECT OF EXPRESSION IN WILL.

The effect of republication can never extend further than to give the words of the will the same force and operation as they would have had if the will had been executed at the time of republication: it cannot invest with a devising efficacy expressions which originally had none.

Ibid. *Lane* v. *Wilkins*, 10 East 241.

If the testator, in making his will, obviously means its provisions to apply to a state of circumstances existing at its date, republication will not make its provisions apply to the state of circumstances existing at the date of the codicil.

6th ed., p. 203.

LAPSE OF RESIDUARY DEVISE OR BEQUEST.

If the residuary devise contained in a will has itself lapsed, of course the republication of the will is inoperative to impart new efficacy to the devise, as well where the lapse affects an aliquot share only of the residue, as where it embraces the entirety. Thus, a testator devises the residue of his lands to A., B., and C., as tenants in common in fee, and A. dies, and then the testator makes a codicil to his will, by the effect of which the will is republished, he would nevertheless die intestate as to one-third, since the subsisting devise, which originally embraced two-thirds only, could never, by the mere effect of the republication, be expanded into a gift of the entirety.

1st ed., p. 185, 6th ed., p. 204.

And the rule is the same in the case of a residuary bequest of personalty.

6th ed., p. 204. *Skrymsher* v. *Northcote*, 1 Sw. 566.

Where a will, made since the act, is so worded as to exclude after-acquired lands from a general devise, a codicil republishing the will has no more effect in altering the effect of the general devise, than it would have had if both instruments had been subject to the old law.

5th ed., p. 161, 6th ed., p. 204. *Re Farrer's Estate*, 8 Ir. C. L. 370.

WHERE EXCEPTION FROM RESIDUARY GIFT.

When property is excepted from a residuary bequest, and specifically disposed of, and the specific bequest fails by lapse or otherwise, the property, as a general rule, falls into the residue.

6th ed., p. 204. *Blight* v. *Hartnoll*, 23 Ch. D. 218.

But if the specific bequest fails by the death of the legatee, and the testator afterwards republishes the will, the effect of this is to exclude the doctrine, because the will is then read as if the testator had excepted the property from the residuary bequest without making any disposition of it.

6th ed., p. 204. *Re Fraser* (1904), 1 Ch. 726.

The application of the doctrine of republication to appointments under powers is considered elsewhere. (Chapter XXIII).

6th ed., p. 205.

REPUBLICATION, HOW FAR AFFECTED BY THE WILLS ACT.

The doctrine of republication has lost much of its interest under the statute 1 Vict. c. 26, not, indeed, by the effect of the provision which dispenses with publication as part of the ceremonial of execution (though this may seem to render the term republication scarcely appropriate), but by the operation of the enactment, which makes the will speak, in regard

to the subjects of disposition, from the death of the testator: and more especially of the provision, which extends a general or residuary devise to all the real estate to which the testator may happen to be entitled at his decease. . . . It is to be remembered, however, that with respect to the objects of gift, the statute leaves the pre-existing law untouched; though, considering how slight an effect is produced by a republishing codicil in this respect (for we have seen that it does not revive a lapsed gift), this forms no very large exception to the remark, as to the diminished practical interest of the doctrine of republication, in connection with the new law.

1st ed., p. 186, 6th ed., p. 205.

REPUBLICATION CANNOT INVALIDATE A VALID GIFT.

It would seem, on general principles, that if a testamentary gift is valid at the date of the will, it cannot be invalidated by mere republication of the will.

6th ed., p. 206. *Re Moore* (1907), 1 Ir. R. 315.

Intention to Revive — Reference to Date—A will which has been revoked cannot, since the passing of the Ontario Wills Act, R. S. O. 1887 c. 100, be revived by a codicil, unless the intention to revive it appears on the face of the codicil, either by express words referring to the will as revoked and importing such intention, or by a disposition of the testator's property inconsistent with any other intention, or by other expressions conveying to the mind of the Court, with reasonable certainty, the existence of the intention in question. A reference in the codicil to the date of the revoked will, and the removal of an executor named therein and substitution of another in his place, will not revive it. *Macdonell* v. *Purcell*, *Cleary* v. *Purcell*, 23 S. C. R. 101.

Confirmatory Codicils.—A testator made his will dated 2nd February, 1884, in which was contained the following devise: "To the congregation of Burns' Church . . I bequeath the sum of $2,000 to be used by the trustees of the said church towards the purpose of purchasing land for a glebe in any place that they may judge suitable, and for erecting thereon a manse, all for the use of the said congregation through their trustees forever." He added two codicils on 21st September, and 5th December, 1885, respectively, not varying the above bequest, but confirming his will, and died on the 27th December, following:—Held, that the fact of the codicils having been executed within six months of the testator's death did not, in the absence of anything in them revoking the charitable gift, render it void under R. S. O. 1877 c. 216, or 38 Vict. c. 75 (O.) *Holmes* v. *Murray*, 13 O. R. 756.

A will destroyed by another person than the testator, by his direction, but not in his presence, is not revoked. *Re Tobey*, 6 P. R. 272.

A codicil made within the six months limited by the Religious Institutions Act reviving a revoked will made before the six months, was held to bring the date of the revived will within the six months. *Purcell* v. *Bergin*, 20 A. R. 535; *Macdonell* v. *Purcell*, 23 S. C. R. 101.

CHAPTER IX.

GIFTS FOR ILLEGAL, SUPERSTITIOUS AND CHARITABLE PURPOSES.

ILLEGAL OBJECT.

A testator cannot, of course, devote any part of his property to an illegal object, either directly, or by means of a condition or a secret trust.

Nor can a testator direct that his property shall not be occupied or used for a certain period.

6th ed., p. 207. *Brown* v. *Burdett*, 21 Ch. D. 667.

SUPERSTITIOUS USES.

Superstitious uses are void, by the general policy of the law; and, in such cases, if charity be not the object, but the design of the bequest be to secure a benefit to the testator himself (as to say masses for his soul, &c.), the testator's own representative (who would be entitled if there was no such gift), and not the Crown, would be let in. And as this principle of English law applies to personal estate as well as to land, it will invalidate a bequest of personalty for masses or like purposes, made by a testator domiciled in England to persons resident in a foreign country in which the purposes are to be carried out, and where such gifts are allowed by law.

1st ed., p. 188, 6th ed., p. 208. *West* v. *Shuttleworth*, 2 My. & K. 684; *Re Elliott*, 39 W. R. 297.

SECRET TRUSTS.

It has been decided, that devisees may be compelled to disclose whether they take subject to a secret trust of this nature.

5th ed., p. 164, 6 ed., p. 208.

GIFTS TO CHARITIES NOT VOID FOR PERPETUITY.

Gifts of property for charitable purposes are in some respects favoured, and in others discouraged, by the law. Thus, while gifts of land by will for charitable purposes are subject to mortmain restrictions it is no objection to a gift of property for a charitable purpose that the purpose may last for ever, for gifts to charities are an exception to the general principle which forbids any disposition by which property is made inalienable for an indefinite period.

6th ed., p. 211. *Re Clarke* (1901), 2 Ch. 110.

BUT MAY BE VOID FOR REMOTENESS.

It must, however, be remembered that if a charitable gift is not immediate, but is made conditional upon a future and uncertain event, it is subject to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises: if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails ab initio. Conversely, if property is given upon trust for a charity, with a proviso than on the happening of an event which may not take place within the limits allowed by the Rule against Perpetuities, the property is to go over to private individuals, this gift over is void.

6th ed., p. 211. *Chomberlayne* v. *Brockett*, L. R. 8 Ch. 211; *Re Bowen* (1893), 2 Ch. 491.

RESULTING TRUST.

Charities are to some extent an exception to the doctrine of resulting trusts, for if the income of property is given for charitable purposes, and the income afterwards increases so that there is a surplus beyond what is required, this is also treated as devoted to charity.

6th ed., p. 212. *Wallis* v. *Sol.-Gen. for N.Z.* (1903), A. C. 173. See Chap. XXI.

WHAT IS A CHARITY?
STAT. 43 ELIZ. C. 4.

Charity has been defined to be a gift to a general public use. In order to ascertain what are charitable purposes, recourse is usually had to the preamble of the statute 43 Eliz. c. 4, which enumerates various kinds of charity: viz., the relief of aged, impotent, and poor people, maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; repair of bridges, ports, havens, causeways, churches, sea-banks and highways; education and preferment of orphans; the relief, stock, or maintenance for houses of correction; marriages of poor maids; supportation and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners or captives; and aid or ease of any poor inhabitants, concerning payment of fifteens, setting out of soldiers, and other taxes.

6th ed., p. 212.

"AGED."

Re Woll, 42 Ch. D. 510; *Re Good* (1905), 2 Ch. 60: "Poor" *Att.-Gen.* v. *D. of Northumberland*, 7 Ch. D. 745.

"SCHOOLS OF LEARNING."

Att.-Gen. v. *E. of Lonsdale*. 1 Sim. 217.

"CAUSEWAYS."

A. G. v. *Day* (1900), 1 Ch. 31.

"Paisoners or Captives.

Thrupp v. *Collett*, 26 Beav. 125.

Charity is not confined to the objects comprised in this enumeration; it extends to all cases within the spirit and intendment of the statute.

5th ed., p. 167, 6th ed., p. 213.

Religious Charities.

And in the case of charitable gifts for religious purposes the Court makes no distinction between one sort of religion, or one sect, and another. Their promotion or advancement are all equally "charitable," provided their doctrines are not subversive of all religion, or all morality. It seems that even a gift for religious purposes generally, is primâ facie valid.

5th ed., p. 169, 6th ed., p. 216. *West* v. *Shuttleworth*, 2 My. & K. 684; *Thornton* v. *Howe*, 31 Bea. 19, 20.

Foreign Charity.

A charity may be created for the benefit of persons resident in a foreign country, but the English Courts will not enforce its administration.

6th ed., p. 216. *Re Geck*, 69 L. T. 819.

Public Utility.

It is not every object of public utility that constitutes a good charity. Indeed, it is difficult to lay down any principle as to what constitutes a valid charitable trust for purposes of general public utility. It has been held that a charitable trust may be created for providing the inhabitants, or a particular class of the inhabitants of a place, with a privilege of fishing, pasture, or turbary, or even generally for their benefit. So gifts in aid of the public revenue or local rates and other burdens are charitable. On the other hand, a trust may be void because its benefits are so limited that it amounts to a private charity, or because it is too indefinite and vague.

6th ed., p. 217.

Charity Need Not be Eleemosynary.

To constitute a charity in the legal sense, the poor need not be (though they commonly are) its sole or especial objects; for example, a trust for the advancement of education or learning is a good charitable purpose, without being restricted to destitute persons. And obviously it would be no objection to a gift for a public purpose that it might incidentally benefit wealthy persons. But a gift, the main object of which is to add to the income or resources of persons who are, or may be, in possession of a competence, is not charitable. In the popular sense of the word, however, "charity" connotes the idea of poverty, and this sometimes affects the construction of gifts which are obviously intended to be

chsritable, so that a gift for the benefit of a certain class of the inhabitants of a place may be construed to mean poor persons belonging to that class; thus a legacy to "the widows and orphans" of a certain place wss held to mean the poor widows and orphans of that place.

6th ed., p. 217. *Re Dudgeon*, 74 L. T. 613.

CHARITIES FOR POOR PERSONS GENERALLY.

A gift for the benefit of poor persons generally is a good charitable gift. And a gift for the benefit of one or more poor persons belonging to a certain locality, or to a certain station in life or vocation, to be selected in manner directed by the testator, is also a good charitable gift.

6th ed., p. 218. *Baldwin* v. *Baldwin*, 22 Bea. 413.

SELECTION OF POOR RELATIONS BY COURT.

If there is no person designated by the testator to distribute the legacy, and the Court is therefore called upon to make the distribution, it will be confined to the statutory next-of-kin. If the estate is being administered by the Court, the person to whom the testator has given the power of selection, will be directed by the Court to prepare a scheme. In some cases, where there is no person appointed by the testator to make the distribution, the Court has directed the Master to prepare a scheme, while in other cases it has simply divided the legacy among the statutory next-of-kin.

6th ed., p. 221. *Mahon* v. *Savage*, 1 Sch. & Lef. 111.

PUBLIC POLICY.

A gift for a purpose which is contrary to pnblic policy is not a good charitable gift.

6th ed., p. 221. *Habershon* v. *Vardon*, 4 DeG. & S. 467.

WHAT ARE NOT CHARITABLE USES.

A gift to procure masses for the soul of the testator and others is not charitable; nor is a gift to a convent of nnns whose sole object is sanctifying their own souls, and not performing any external duty of a charitable natnre; nor a gift for the erection or repair of a monument, vault, or tomb, whether it he to the memory or for the interment of the donor alone, or of himself and his family and relations, unless it forms part of the fabric or ornament of the church. Again, bequests for purposes of hospitality, or benevolence, or benevolence and liberality, or general utility, or for pious purposes, or for public, or philanthropic purposes, or for "emigration uses," or for the encouragement of a sport or pastime, are not charitable beqnests.

5th ed., p. 169, 6th ed., p. 221.

BEQUEST NOT NECESSARILY CHARITABLE ON ACCOUNT OF PROFESSIONAL OR OFFICIAL CHARACTER OF LEGATEE.

A gift will not be deemed charitable merely from the nature of the professional character of the devisee, or on account of the testator having accompanied the gift with an expression of his expectation that the devisee would discharge the duties incidental to such character, however intimately those duties may concern the welfare of others, as this merely denotes the motive of the gift, and not that the devisee is to take otherwise than beneficially.

1st ed., p. 193, 6th ed., p. 223. *Doe d. Phillips* v. *Aldridge*, 4 T. R. 264; *Donnellan* v. *O'Neill*, Ir. R. 5 Eq. 523.

GIFT TO CHARITABLE SOCIETY.

But a gift to a society or institution having a charitable object is primâ facie a gift for the purposes of the society or institution, and is therefore a good charitable gift. Thus a gift to a religious institution or society is a charitable gift, unless it appears in the particular case that the institution or society is not charitable, in which case the gift is only good if it is intended for the benefit of the persons who are members of the institution or society at the testator's death. So a gift to the governors of a charitable institution is a good charitable gift. And a gift to the minister for the time being of a chapel, or to the minister and his successors, or to the vicar and churchwardens for the time being of a parish, is primâ facie a good charitable gift; and none the less so because the property is to be applied in such manner as the legatees think fit.

5th ed., p. 171, 6th ed., p. 224. *Re White* (1893), 2 Ch. 41; *Re Lea*, 34 Ch. D. 528, (legacy to the general superintendent of the Salvation Army), *Re Garrard* (1907), 1 Ch. 382.

CHARITABLE OBJECT NOT IMPLIED.

If money is bequeathed to a municipal corporation upon trusts or for purposes which the testator does not specify, it will not be assumed that they were meant to be charitable.

6th ed., p. 225. *Corporation of Gloucester* v. *Osborn*, 1 H. L. C. 272.

UNCERTAINTY IN THE OBJECT.

A charitable gift may fail by lapse, or because the purpose which the testator had in mind has become impossible, or because the subject-matter of the gift is uncertain, but a charitable gift is never void for uncertainty in the object. Consequently, a gift for charitable purposes is good, even if the testator leaves the selection of the specific purposes to the executor or some other person, or has left a blank in his will for the name or description of the specific charitable institution or purpose to which he intends it to be devoted, or has otherwise failed to

indicate definitely the exact way in which he wishes the money to be applied. Nor is a charitable bequest void for uncertainty merely because the body of persons for whose benefit it is given is large and fluctuating, or because it gives the testator's trustees a wide power of selection. So if a testator bequeathes a legacy to a charitable institution which has never existed, this is prima facie a good charitable bequest. And if a testator bequeaths a legacy to a charity by a name or description which is common to two or more institutions, and it cannot be ascertained which was the intended object, the legacy will be divided between them, or administered cy-pres in some other manner.

6th ed., p. 225.

WHERE TRUSTEES HAVE DISCRETION.

If, however, the executors or trustees of a will have an absolute discretion of selecting the charitable objects and purposes to which the testator's property is to be applied, the Court will not, it seems, in the absence of special circumstances, require a scheme, but will leave the application of the property to the trustees.

6th ed., p. 227. *Re Squire's Trust*, 17 T. L. R. 724.

INFERENCE OF CHARITABLE INTENTION.

Where a testator makes a bequest to a charitable society, and gives it a power of application sufficiently wide to cover non-charitable objects, the Court will not infer a general charitable intention from the mere fact that the society is a charitable one.

Ibid. *Re Freeman* (1908), 1 Ch. 720.

AMBIGUOUS DESCRIPTION.

If a testator gives a legacy to a charity by a particular name or description, and it is found that there is no institution exactly answering the description, and that there are two or more institutions to which the description partially applies, parol evidence is admissible to show the locality and nature of the rival institutions, and the connection between the testator and one or both of them; for example, it may be proved that the testator during his life subscribed to one of the institutions.

Ibid. *Wilson* v. *Squire*, 1 Y. & C. C. C. 654; *Re Kilvert's Trusts*, L. R. 7 Ch. 170.

GIFT PARTLY GOOD AND PARTLY BAD.

If a testator bequeaths a fund for two definite purposes, one of which is illegal and the other charitable, the question arises how far the latter purpose can be carried into effect. According to some of the authorities, it seems that if the illegal purpose is the primary purpose, the surplus only being given to charity, and the primary purpose is of such a nature that the amount required to

carry it out cannot be ascertained, the result is that the snrplus cannot be ascertained and the whole gift fails. But if the primary purpose is of such a definite nature that the testator must have intended the charity to take a substantial sum by way of surplus, then the effect of the failure of the primary pnrpose is that the charity takes the whole. A common instance of this kind of gift is where a testator gives a fund upon trust to apply the income in the first place in maintaining a tomb, and to apply the surplus to some charitable purpose.

6th ed., p. 228. *Hoare* v. *Osborne*, L. R. 1 Eq. 585.

If, however, the testator has given a fund for two purposes pari passu, one of them being illegal and the other charitahle, the Court will endeavour to ascertain what portion of the fund would be sufficient to satisfy the illegal purpose if it were legal; this part of the gift fails, and the charity only takes the balance of the fund. If it is impossible to make the calculation, the Court will divide the fund between the two purposes.

6th ed., p. 229. *Re Vaughan*, 33 Ch. D. 187.

BEQUESTS FOR CHARITABLE AND OTHER INDEFINITE PURPOSES VOID ALTOGETHER.

The Conrt does not take upon itself to frame schemes for the disposal of money for any other than charitahle pnrposes. All moneys, therefore, not beqneathed in charity must have some definite ohject, or must devolve as undisposed of, except in cases where it may be held that the trustee takes absolutely. The general consideration of such gifts will be reserved for a subseq nt chapter, as more properly falling nnder the head of gifts void for uncertainty; but it must be here noticed, that where the bequest is for charitable purposes, and also for purposes of an indefinite nature not charitable, and no apportionment of the bequest is made by the will, so that the whole might be applied for either purpose, the whole bequest is void. The Court will only recognise the validity of trusts which it can either itself exccute, or can control when in process of heing executed by trustees.

6th ed., p. 229. *James* v. *Allen*, 3 Mer. 17; *Blair* v. *Duncan* (1902), A. C. 37.

CHARITY HELD THE SOLE PURPOSE, NOTWITHSTANDING DOUBTFUL EXPRESSION.

Such being the rule, the terms of the trust will first be closely examined to see whether, though not the most correct or most appropriate for describing only a charitable object, tbey ongbt not in fair construction to he so confined.

6th ed., p. 231. *Dolan* v. *Macdermot*, L. R. 5 Eq. 60, 3 Ch. 676.

On the same principle, a bequest of a sum to "be given in charitable and deserving objects," or "for charitable and benevo-

lent institutions," or "for religious and benevolent societies or objects," is a good charitable gift. And a gift "for such missionary objects as M. shall select," if M. is known to the testator to be engaged in a particular kind of missionary work, is not void for uncertainty.

And if a testator makes a bequest to A. "for the charitable purposes agreed on between us," evidence is admissible to shew what those purposes were.

Ibid. Re Huxtable (1902), 2 Ch. 793.

DISTINCTION WHERE THE GIFT IS FOR CHARITABLE AND OTHER ASCERTAINED OBJECTS, THOUGH APPORTIONMENT LEFT TO TRUSTEES.

Where the bequest is for a charitable purpose, and for another ascertained object even though the amount to be devoted to each object be not specified, and the apportionment be left to the discretion of trustees, yet the trust is such that the Court can control the execution of it so far as to see that the trustees appropriate no part of the benefit to themselves.

5th ed., p. 175 6th ed., p. 232.

TRUSTEES DECLINING TO APPORTION, DONEES TAKE EQUALLY.

The objects among whom the trustees are to apportion the testator's bounty being sufficiently definite, are not to be disappointed by the trustees refusing to exercise their power or dying before doing so. In such event, the Court will divide the fund equally among the several objects, upon the principle that equality is equity.

Ibid. Salusbury v. *Denton*, 3 K. & J. 529.

BEQUEST OF PURE PERSONALTY TO CHARITABLE PURPOSES FAVOURED BY THE COURTS.

Except so far as the law restrains the dedication to charitable uses of leaseholds and money charged on or arising out of land, as explained in a subsequent part of this chapter, a man may dispose of his whole personal estate to charitable purposes capable of enduring forever, in despite of the claims of his nearest kindred; and dispositions so made are strongly favoured in point of construction; for by a rule peculiar to gifts of this nature, if the donor declare his intention in favour of charity indefinitely, without any specification of objects, or in favour of defined objects, which happen to fail, from whatever cause; although, in such cases, the particular mode of application contemplated by the testator is uncertain or impracticable, yet the general purpose being charity, such purpose will, notwithstanding the indefiniteness or failure of its immediate objects, be carried into effect. Thus, in the case of a gift to the poor in general, or to charitable uses generally, or for the advancement

of religion, expressed in the most vague and indefinite terms; or to such charitable uses as the testator's executor shall appoint, and the testator revokes the appointment of the executor; or the executor renounces probate (in which case he cannot claim to exercise his discretion); or to such charitable uses as A. shall appoint, and A. dies in the lifetime of the testator, or neglects or refuses to appoint; or to such charitable uses as the testator himself shall appoint or has appointed, and he dies without making an appointment, or the instrument of appointment cannot be found or where the testator makes a disposition in favour of an object which has no existence, or for a purpose which has became impossible; or unnecessary; or cannot legally be carried out in the manner directed by the testator; or bequeaths to the trustees of a charity who refuse to accept; or to a particular charity by a description equally applicable to more than one (and it is wholly uncertain which was intended) or having evinced his intention to give certain property in charity, only disposes of part of it in favour of certain named charitable purposes, or leaves blanks in his will for the names of the charities and the proportion to be allotted to each; in these and all such cases, though the bequest would, upon the ordinary principles which govern the construction of testamentary dispositions, be wholly or partly void for uncertainty, yet the purpose being charity, the Crown as parens patriæ, or the Court of Chancery, will execute it cy-près.

1st ed., p. 216, 6th ed., p. 233. *Lewis* v. *Allenby*, L. R. 10 Eq. 668; *Re Piercy*, 65 L. J. Ch. 364; *Re Pyne* (1903), 1 Ch. 83.

EXCEPTION IN THE CASE OF A FOREIGN CHARITY.

Foreign charities are an exception to the general rule, for as the Court has no jurisdiction to administer a foreign charity, it cannot execute the trust cy-près. Consequently if the persons who are appointed by the testator to administer the charity abroad, disclaim or refuse to accept the trusts, the gift fails.

6th ed., p. 235. See page 125 post.

ALTHOUGH THERE IS A RESIDUARY BEQUEST.

The rule is not displaced or superseded by a residuary bequest to other charitable uses contained in the same will. The legacy does not fall into the residue; for the doctrine is that it fails in the mode only and not in substance; and cy-près means the nearest to that which has so failed, not the nearest to the testator's other charitable purposes. But if the testator expressly provides that, in case the particular mode of application directed by him should fail, the legacy shall fall into the residue, it should seem that the rule is excluded. For however exceptional, it is a rule of construction, and must yield to a contrary intention.

Ibid. *Moggridge* v. *Thackwell*, 7 Ves. 68.

BUT NOT IF CONTRARY INTENTION APPEARS BY THE WILL.

Such contrary intention may be collected by construction from the very terms of the gift; which may so clearly define the particular object of gift as to render the testator's intention incapable of execution otherwise than in the mode pointed out by the will. The mode is then of the substance, and if it cannot be pursued the legacy will fail altogether.

6th ed., p. 236. *Re Randell, Randell* v. *Dixon*, 38 Ch. D. 213; *Att.-Gen.* v. *Oxford*, 4 Ves. 431.

WHERE LAND REQUIRED CANNOT BE OBTAINED, FUND MAY BE ADMINISTERED CY-PRÈS.

But if a testator bequeaths a sum of money to establish a charity, involving the future acquisition of land (the land to be provided from some other source), the Court will inquire whether the necessary land will be acquired within a reasonsble time, and, if not, the legacy will be administered cy-près, provided the testator shows a general intention in favonr of charity.

6th ed., p. 237. *Chamberlayne* v. *Brackett*, L. R. 8 Ch. 206.

CY-PRÈS DOES NOT IMPLY AN ABSOLUTE RESEMBLANCE.

Where the substantial intention is charity, but the particular mode cannot be carried into effect, the Court (or the Crown) supplies another mode: which other mode need not bear any absolute resemblance to that intended by the testator; only it must first be ascertained that none can be found nearer to it. Thns a trust for redemption of British slaves in Barbary having, after a long continuance, failed for want of objects, was executed by Lord Cottenham in favour of charity schools in England and Wales.

6th ed., p. 238. *Biscoe* v. *Jackson*, 35 Ch. D. 460.

The question sometimes arises as to the degree of failure or cesser of a charitable institution which will constitute a lapse.

6th ed., p. 240. A day school becoming a Sunday School. *Re Waring* (1907), 1 Ch. 166.

CASES WHERE DOCTRINE OF LAPSE IS INAPPLICABLE.

If the bequest is to a named institution merely as the instrument for executing the testator's charitable intent, which he fully describes, the failure of the institution will not involve ths failnre of the charitable trust.

5th ed., p. 210, 6th ed., p. 240. *Marsh* v. *Att.-Gen.*, 2 J. & H. 61.

It is also clear that, where the charitable object fails after the testator's death, and before the legacy has been paid, the gift will not lapse.

6th ed., p. 240. *Hayter* v. *Trego*, 5 Russ. 113; *Re Slevin* (1891), 2 Ch. 236.

A charitable bequest to an institution which ceases to exist after the testator's death, and before the legacy has been paid, does not lapse so as to let in the residuary legatee, but will be applied by the Crown for some analogous purpose of charity, irrespective of whether or not any general charitable intention that the fund shall be administered cy-près is indicated by the will, on the ground that, as the charity existed at the testator's death, the legacy became the property of that charity.

6th ed., p. 241.

WHERE INSTITUTION NEVER EXISTED.

If there is a gift to a charitable institution by name, and no such institution can be found to have existed, this does not necessarily prevent the legacy from being successfully claimed by another institution, similar in name or in object to the non-existent institution. If, however, there is no institution which can establish its claim, it will generally be presumed that the testator, in naming the institution, merely intended to indicate the purpose to which he wished the legacy applied, for it is clear he could not have intended to benefit a particular institution, and the legacy will be applied cy-près.

6th ed., p. 241.

WHERE THERE ARE SEVERAL CHARITIES EQUALLY ANSWERING THE DESCRIPTION.

It sometimes happens that a legacy is given to a particular institution by a description equally applicable to more than one. It cannot here be presumed that the testator did not intend to select one in particular; for he may have known, and, considering the terms of the bequest, probably did know, only one answering the description; yet, as it cannot be ascertained which, the particular purpose fails; nevertheless it is clear that the legacy will be applied cy-près, or divided between the two institutions.

6th ed., p. 242. *Re Alchin's Trusts*, L. R. 14 Eq. 230.

WHERE CHARITABLE PURPOSES DO NOT EXHAUST THE FUND. SURPLUS INCOME.

It has been already mentioned that where a testator shews an intention to devote certain property to charitable purposes, and fails to specify all or some of them, the property so undisposed of will be applied cy-près. It is also explained in a subsequent chapter that gifts to charity are an exception to the doctrine of resulting trusts in this respect, that where property is given to a charity and the income afterwards increases, so that there is a surplus after satisfying the purposes for which it was given, this surplus is also, as a general rule, applicable cy-près.

6th ed., p. 242. *Re Ashton's Charity*, 27 Bea. 115.

CASES WITHIN THE MORTMAIN ACTS.

It remains to he noticed, that the cy-près doctrine does not apply to bequests which are made void by the Mortmain Act, and therefore a bequest of money to be laid out in lsnd is not executed cy-près, i.e., applied to an allowed charitahle purpose. Bnt an express gift over, in case the charitable gift cannot by law take effect, is valid.

5th ed., p. 212, 6th ed., p. 242. *Robinson* v. *Robinson*, 19 Beav. 494.

ILLEGAL PURPOSES.

The reason preventing a gift which is void under the Mortmain Act from being applied cy-près, namely, that it is made void by the statute, also applies to other gifts for purposes which are expressly forbidden. And a similar rule applies to a bequest, if the purposes for which it is made are illegal because they are contrary to the policy of the law: such a gift cannot be applied cy-près, slthough the intention of the testator is to benefit (according to his ideas) a certain section of the pnblic. On this principle bequests for promoting doctrines inconsistent with Christianity, or morality, or with the fundamental doctrines of the British constitution, or for purchasing the discharge of persons imprisoned for poaching, have been held void. But where the reason why a beqnest cannot be applied in a particular way is that, although not expressly forbidden, it nevertheless contravenes the policy of a statute, then if the main object of the beqnest is charitable and is sufficiently general it will he applied cy-près.

6th ed., p. 243. *De Themmines* v. *De Bonneval*, 5 Russ. 288; *Re Huxtable* (1902), 2 Ch. 793; *Kane* v. *Cosgrave*, Ir. R. 10 Eq. 211.

Where the testator's ohject is sufficiently defined, and is capable of being carried into effect, it will not be departed from upon a notion of more extended utility.

5th ed., p. 210, 6th ed., p. 244. *Att.-Gen.* v. *Whiteley*, 11 Ves. 241.

WHERE THE COURT WILL PAY LEGACIES TO A CHARITY WITHOUT A SCHEME.

Where a pecuniary legacy is bequeathed ahsolutely to a person, to be applied for such charitahle purposes as he may in his discretion select, or is heqneathed absolutely to a corporation existing for only charitable purposes, the Court will direct payment, withont requiring that a scheme be settled by itself for its appropriation. And the same rule obtains where a legacy is given to the treasurer or other officer of a charitable institution, though not a corporation, to become part of the general funds of that institution. But where the legacy is to be applied, not as part of the general funds of the institution, but for certain permanent charitable trusts; which the testator has pointed ont, the Court will take

upon itself to insure the accomplishment of the testator's object by a scheme of its own.

5th ed., p. 211, 6th ed., p. 245. *Waldo* v. *Caley* 16 Ves. 206; *In bonis McAuliffe*, 44 W. R. 304; *Society for the Propagation of the Gospel in Foreign Parts* v. *Att.-Gen.*, 3 Russ. 142.

FOREIGN CHARITY.

Where a legacy is given to a foreign charity, the Court will direct it to be paid to the persons appointed by the testator to receive it, and will not take upon itself to administer the fund.

5th ed., p. 212, 6th ed., p. 246. *Emery* v. *Hill*, 1 Russ. 113.

The Court will not apply the cy-près doctrine to a foreign charity, unless the trustees are within the jurisdiction.

Ibid. New v. *Bonaker*, L. R. 4 Eq. 655.

POLICY OF EARLY TIMES IN REGARD TO CHARITY.

The policy of early times strongly favoured gifts, even of land, to charitable purposes. Thus, not only was no restraint imposed on such dispositions by the early statutes of wills, but the Act of 43 Eliz. c. 4, as construed by the Courts, tended greatly to facilitate gifts of this nature, such Act having been held to authorise testamentary appointments to corporations for charitable uses, and even to enlarge the devising capacity of testators, by rendering valid devises to those uses by a tenant in tail; and also by a copyholder, without a previous surrender to the use of the will, though it was admitted that the statute did not extend to the removal of personal disabilities, such as infancy, lunacy, and the like.

1st ed., p. 197, 6th ed., p. 246.

MORTMAIN ACT, 1736.

To the same policy we may ascribe that rule of construction presently considered, by the effect of which property once devoted to charity was never allowed to be diverted into any other channel, by the failure or uncertainty of the particular objects. At the commencement of the eighteenth century, however, the tide of public opinion appears to have flowed in an opposite direction, and the legislature deemed it necessary to impose further restrictions on gifts to charitable objects; from the nature of which it may be presumed that the practice of disposing by will of lands to charity had antecedently prevailed to such an extent as to threaten public inconvenience. It appears to have been considered that this disposition would be sufficiently counteracted by preventing persons from aliening more of their lands than they chose to part with in their own lifetime; the supposition evidently being, that men were in little danger of being perniciously generous at the sacrifice of their own personal enjoyment, and when uninflu-

enced by the near prospect of death. Accordingly, the stat. of 9 Geo. II. c. 36 (usually called the Statute of Mortmain), after referring in the preamble to the public mischief caused by improvident alienations or dispositions made by languishing or dying persons or by other persons to charitable uses to take place after their deaths, to the disherison of their lawful heirs, enacted, that from and after 24th June, 1736, no hereditaments, or personal estate to be laid out in the purchase of hereditaments, should be given, conveyed, or settled to or upon any persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered, in trust or for the benefit of any charitable uses whatsoever, unless such gift or settlement of hereditaments or personal estate (other than stocks in the public funds) be made by deed indented, sealed and delivered in the presence of two credible witnesses, twelve calendar months before the death of the donor, including the days of the execution and death, and enrolled in Chancery within six calendar months after the execution, and unless such stocks be transferred six calendar months before the death, and unless the same be made to take effect in possession for the charitable use, and be without any power of revocation, reservation, trust, &c., for the benefit of the donor, or of any persons claiming under him.

Ibid.

EXCEPTION.

The second section provided, that purchases for valuable consideration should not be avoided by the death of the grantor within the twelve months, leaving, however, such purchases subject to the other conditions imposed by the Act. The third section declared all gifts, conveyances, settlements, of any hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any hereditaments, &c., not perfected according to the Act, void.

Ibid. 6th ed., p. 248. *Milbank* v. *Lambert*, 28 Beav. 206.

SECRET TRUST FOR CHARITY INVALIDATES DEVISE.

The statute of the 9th Geo. II. cannot be evaded by a secret trust, and the heir may compel a devisee to disclose any promise which he may have made to the testator to devote the land to charity. And such promise, if denied by the devisee, may be proved by evidence aliunde. The trust, by whatever means established, invalidates the devise. This doctrine evidently assumes that the trust, if legal, would have been binding on the conscience of, and might have been enforced against, the devisee; and this ground failing, the rule does not apply. As where a testator, after devising lands by a will duly attested,

declares a trust in favour of charity by an unattested paper or by parol, the statute law, which affords to the devisee a valid defence against any claim on the part of the charity, of course equally defends him against the claim of the heir, founded on the charitable trust. The case would be different, however, if the devisee had induced the testator to give him the estate absolutely, under an assurance that the unattested paper was a sufficient declaration of the trust for a charity.

1st ed., p. 206, 6th ed., p. [illegible] *Spencer's Will*, 57 L. T. 519; *Springett* v. *Jennings* L. R. 10 [illegible] *Attorney-General* v. *Cox*, 3 Atk. 141.

And if the testator communicates to the devisee that the devise is made to him for charitable purposes which the testator means to specify, and the testator dies without doing so, it seems clear that the devisee will hold the land upon trust for the heir-at-law.

6th ed., p. 264. *Re Boyes*, 26 Ch. D. [illegible]

SECRET TRUST, WHEN VALID.

In cases where the statute does not apply, so that the testator could, if he pleased, have devised the land for certain charitable purposes, a devise to A. upon a secret trust for those charitable purposes is valid.

6th ed., p. 264. *O'Brien* v. *Tyssen*, 28 Ch. D. 372.

ASSETS NOT MARSHALLED IN FAVOUR OF CHARITY.

Marshalling assets is the adoption of this principle; that where there are two funds and two parties, one of whom has a claim exclusively upon one fund, and the other the liberty of resorting to either, the Court will send the latter party primarily to that fund from which the former is excluded; or, if he should have actually resorted to their common fund, will allow the other to stand in his place to that extent. The application of this principle has been denied to charities; and accordingly, where property which *cannot*, is combined, in the same gift, with funds which *can*, be bequeathed for charitable purposes, and the disposition embraces several objects or purposes, some charitable and others not, the Courts hold that the purposes not charitable cannot be thrown exclusively upon that part of the subject of disposition which is incapable by law of being devoted to charity, in order to let in the charitable purposes upon the remainder.

1st ed., p. 207, 6th ed., p. 264. *Williams* v. *Kershaw*, 5 Cl. & Fin. 111.

Thus, if a testator give his real and personal estate to trustees, upon trust to sell and pay his debts and legacies, and to apply the residue for charitable purposes, the Court will not throw

the debts and legacies exclusively on the proceeds of the real estate, and the mortgage securities and leaseholds, in order that the charitable bequest may take effect so far as possible; nor on the other hand, will it direct the debts and legacies to come out of the pure personalty for the purpose of defeating the charitable residuary bequest to the utmost possible extent. Steering a middle course, equity directs the debts and legacies to come out of the whole estate, real and personal, pro ratâ; for instance, supposing the real funds (including the leaseholds and mortgage securities) to constitute two-fifths of the entire property, then two-fifths of these charges would be satisfied out of such real funds, and the remaining three-fifths out of the pure personalty; and, after bearing the charges in these several proportions, the former would belong to the heir or next-of-kin (as the case might be), and the latter to the charity-residuary legatee. And, by parity of reasoning, it should seem that if a testator bequeath pecuniary legacies to charities, and leave a general residue to others, consisting partly of leaseholds or real securities, and partly of pure personalty, the legacies will be void pro tanto, i.e., in the proportion which the real funds bear to the entire property, though the pure personalty should be sufficient to pay all the legacies. The proper course, in such case, it is conceived, would be to pay the debts and funeral and testamentary expenses (being all the prior charges to which the general residue was liable), in the first instance, out of the whole property, pro ratâ, and then to provide for the pecuniary legacies in like manner; the effect of which would be that the charity-legacies, so far as this rateable apportionment threw them upon the leaseholds and real securities, would be void."

Ibid. *Atty.-Gen.* v. *Southgate*, 12 Sim. 77; *Cherry* v. *Mott*, 1 My. & Cr. 123; *Briggs* v. *Chamberlain*, 18 Jur. 56.

The same strict rule is applied where the testator directs a particular fund consisting partly of impure personalty, to be applied to several purposes, some charitable and some illegal, so that the portion applicable to the charitable purposes has to be ascertained by the Court: the amount so ascertained must abate according to the proportions which the pure and impure parts of the fund bear to one another.

6th ed., p. 266. *Champney* v. *Davy*, 11 Ch. D. 949.

TESTATOR MAY HIMSELF MARSHAL HIS ASSETS.

Where the testator has directed a charity legacy to be paid out of his pure personalty, the testator himself has marshalled (so to speak) his own assets, and the Court only prevents the arrangement made by him from being defeated by accidental circumstances.

5th ed., p. 197, 6th ed., p. 267. *Robinson* v. *Geldard*, 3 Mac. & G. 735.

In order to make charitable legacies effectual as far as possible, the debts, funeral and testamentary expenses should be expressly and exclusively charged on the personalty savouring of realty.

5th ed., p. 198, 6th ed., p. 267. *Wilkinson* v. *Barber*, L. R. 14 Eq. 98.

EXPRESS MARSHALLING WHERE THE CHARITABLE BEQUEST IS RESIDUARY.

And where the charitable legacies are themselves residuary, this is the most appropriate form of direction with regard also to the payment of other legacies. But of course it matters not what the form is if it sufficiently shows the testator's intention.

Ibid. *Wigg* v. *Nicholl*, L. R. 14 Eq. 92.

EFFECT WHERE LAND IS CHARGED AS AN AUXILIARY FUND.

With regard to legacies charged on real estate, where a charitable legacy is charged on real estate as an auxiliary fund in aid of the personalty (and such, it will be hereafter seen, is always the effect of a mere general charge), the legacy will be valid or not, and either wholly or in part, according to the event of the personalty proving sufficient for its complete liquidation, or not.

As the validity of a charity legacy depends on its not being to come out of a real fund, the point of construction whether the legacy is payable out of personal or real estate, is sometimes warmly contested on this account; and in the consideration of this question, it scarcely need be observed, no disposition has been manifested by the Courts to strain the rules of construction in favour of charity.

1st ed., p. 210, 6th ed., p. 269. *Leacroft* v. *Maynard*, 1 Ves. jun. 279.

JUDICIAL TREATMENT OF ACT OF 9 GEO. 2, C. 36.

Never, indeed, was the spirit of any legislative enactment more vigorously and zealously seconded by the judicature, than the statute of the 9th of George the 2nd. This is abundantly evident from the general tone of the adjudications; but the two points in which it is most strikingly displayed are, first, the holding a gift to charity of the proceeds of the sale of real estate to be absolutely void, instead of giving to the charity legatee the option to take it as money, according to the rule since adopted in the case of a similar gift to an alien; and, secondly, the refusal of equity to marshal assets in favour of a charity, in conformity to its general principle; that principle being evidently founded on an anxiety to carry out, as far as possible, the intention of testators. In this solitary case, the intention has been allowed to be subverted by a mere slip or omission of the testator, which the Court had the power of easily correcting by an arrangement of the funds.

Ibid.

FOREIGN LAND.

Land situate in foreign countries outside the British Empire is obviously not within the acts. Consequently a bequest of money, to be laid out in the erection of almshouses abroad, is valid so far as the law of England is concerned.

Re Geck, 69 L. T. 819.

Nor does either of the acts prevent money arising from the sale of land in a foreign country from being bequeathed to charities.

6th ed., p. 272. *Beaumont* v. *Oliveira*, L. R. 6 Eq. 4 Ch. 309.

The effect of the Statute of Mortmain and of the Act of 1888, was to render absolutely void every testamentary gift of land, or of any interest in land, or of money arising from, or charged on, or connected with land, and every bequest of personalty to be laid out in land for charitable purposes; with the effect that any such property so devised or bequeathed went to the heir or next-of-kin, or to the residuary devisee or legatee, as the case might be.

The course of legislation in Ontario is as follows: Chapter 20 of the Ontario Act of 1892 (subsequently c. 112, R. S. O., 1897), amended the law of Mortmain and Charitable Trusts. This Act was taken from Part 2 of the Imperial Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42). Section 4 of the Ontario Act was taken from sec. 4 of the Imperial Act, which was as follows:—

> Subject to the savings and exceptions contained in this Act every assurance of land to or for the benefit of any charitable uses and every assurance of personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses shall be made in accordance with the requirements of this Act and unless so made shall be void.

Section 4 of the Ontario Act is as follows:—

> Land may be devised by will to or for the benefit of any charitable use, but, except as hereinafter provided, such land shall, notwithstanding anything in the will contained to the contrary, be sold within two years from the death of the testator, or such extended period as may be determined by the High Court or a Judge thereof in Chambers.

Section 4 of the Imperial Act covered both land and personal property directed to be laid out in the purchase of land. Section 4 of the Ontario Act, covered land only. Section 6 of the Ontario Act related to personalty, and is as follows:—

> Any personal estate by will directed to be laid out in the purchase of land to or for the benefit of any charitable uses, shall, except as hereinafter provided, be held to or for the benefit of the charitable uses as though there had been no direction to lay it out in the purchase of land.

Section 8 of the Ontario Act, was not taken from any Imperial Act. It was as follows:—

Money charged or secured on land or other personal estate arising from or connected with land, shall not be deemed to be subject to the provisions of the Statutes known as the Statutes of Mortmain or of Charitable Uses as respects the will of a person dying on or after the 14th day of April, 1892, or as respects any other grant or gift made after the said date.

In 1902, a second Ontario Mortmain and Charitable Uses Act was passed. This Act was an adaptation of the Imperial Mortmain and Charitable Uses Acts, of 1888 and 1891 (54-55 Vict. c. 73).

The Ontario Act of 1902 (subsequently ch. 333, R. S. O., 1897—issued 1892), contained the clauses of the Imperial Act of 1888, which had been omitted in the Ontario Act of 1892, and added thereto the legislation of the Imperial Act of 1891. The result was a consolidation for Ontario of the two Imperial Acts of 1888 and 1891. There was a direction that the latter Act should be read as part of the former. This clause was retrospective legislation.

Wills prior to 15th April, 1892, in Ontario are subject to the provisions of the Mortmain Act alone. Wills between 15th April, 1892, and 13th April, 1909, are subject to R. S. O. 1897, cc. 112 and 333. Since the 13th April, 1909, they are subject to the Ontario Mortmain, and Charitable Uses Act of 1909 (ch. 58). This last Act is intended as a re-enactment of the Ontario Acts, R. S. O., cc. 112 and 333.

In comparing R. S. O., cc. 112 and 333 (as consolidated in 1909), with the Imperial Acts of 1888 and 1891, sec. 2, sub-sec. 2 of the Ontario Act, 1909, defines charitable uses as follows:—

(a) The relief of poverty;
(b) Education;
(c) The advancement of religion; and
(d) Any purpose beneficial to the community, not falling under the foregoing heads.

Neither Imperial Act has such a section. Section 13 (2) of the Imperial Act of 1888, only recites the preamble of the Act of Elizabeth, and states that references to charities within the purview of that Act shall be construed as references to the preamble.

The Ontario Act of 1902, also repeated (sec. 6), in part of the Act of Elizabeth. The Ontario Act of 1909, presumably summarizes the effect of the Statute of Elizabeth.

In the Ontario Act of 1909, and in the Imperial Act, 1891, "land" does not apply to money secured on land or other personal estate arising from or connected with land as the Imperial Act of 1888, sec. 2, did.

In the Ontario Act the Lieutenant-Governor in Council can grant licenses in Mortmain.

In the Imperial Act an assurance of land for the benefit of any charitable use and every assurance of personal estate to be laid out in the purchase of land to or for the benefit of any charitable use, must comply with the Act or otherwise it is void. In Ontario there is a similar provision. The provincial restrictions are as follows: The assurance must be made.

(a) To take effect in immediate possession for such charitable use,
(b) Without any power of revocation, reservation, condition or provision for the benefit of the assuror or of any person claiming under him, and
(c) At least six months before the death of the assuror, and if of stock in the public funds by transfer thereof in the public books kept for the transfer of stock at least six months before such death:

Provided that the assurance or any instrument forming part of the same transaction may contain all or any of the following conditions, so, however, that they reserve the same benefits to persons claiming under the assuror as to the assuror himself, namely;

(i) The grant or reservation of a peppercorn or other nominal rent,
(ii) The grant or reservation of mines or minerals,
(iii) The grant or reservation of any easement,
(iv) Covenants or provisions as to the erection, repair, position, or description of buildings, the formation or repair of streets or roads, or as to drainage or nuisances, and covenants or provisions of the like nature for the use and enjoyment as well of the land comprised in the assurance as of any other adjacent or neighboring land,
(v.) A right of entry on non-payment of any such rent or on breach of any such covenant or provision, or
(vi.) Any stipulations of the like nature for the benefit of the assuror or of any person claiming under him; and

Provided that nothing in this section contained shall apply to or affect any such assurance made for full and valuable consideration.

It is to be remembered that in the Ontario Act of 1892 (R. S. O., c. 333, s. 7), the same restrictions existed as those of 1909, except that requirement (c) above stated, as to the making of the assurance (in the case of wills), six months before the death of the testator did not appear. This requirement, therefore, applies only to wills made after 13th April, 1909.

As the interpretation of "charitable" is still required, the following decisions are still useful:—

Gifts for the erection of water-works for the use of the inhabitants of a town.
Mayor of Faversham v. *Ryder*, 5 D. M. & G. 350.

To be applied for the benefit of a place.
Att.-Gen. v. *Webster*, L. R. 20 Eq. 483.

Or for "charities and other public purposes in" a parish.
Re Allen, (1905) 2 Ch. 400.

Or for the general improvement of a town.
Howse v. *Chapman*, 4 Ves. 542.

Or for the establishment of a lifeboat.
Johnston v. *Swann*, 3 Mad. 457.

Or of a botanical garden.
Townley v. *Bedwell*, 6 Ves. 194.

Or museum.
Re Holburne, 53 L. T. 212.

To the trustees and for the benefit of the British Museum.
British Museum v. *White*, S. & St. 595.

To the Royal, the Geographical, and the Humane Societies.
Beaumont v. *Oliveira*, L. R. Eq. 534.

To the widows and orphans.
Thompson v. *Corby*, 27 Beav. 649.

Or the poor inhabitants of a parish ("poor" being construed those not receiving parochial relief).
Att.-Gen. v. *Clarke*, Amb. 422; see 14 Ves. 364.
Nash v. *Morley*, 5 Beav. 177.
Re Good, (1905) 2 Ch. 60.
Att.-Gen. v. *Duke of Northumberland*, 7 Ch. D. 745.

Or to trustees for the benefit of a parish.
Re Garrard, (1907) 1 Ch. 382.

Or to the churchwardens in aid of the poor's rate.
Or for providing a workhouse.
Webster v. *Southey*, 36 Ch. D. 9.

To the widows and children of seamen belonging to a port.
Powell v. *Att.-Gen.*, 3 Mer. 48.

To "poor, credible, industrious persons, residing at A., with two children or upwards, or above fifty years of age, maimed or otherwise unable to get a living."
Russell v. *Kellett*, 3 Sm. & Gif. 264.

For the benefit of poor and aged persons who have done service to the cause of science.
Weir v. *Crum-Brown*, (1908) A. C. 162.

For preaching a sermon, keeping the chimes of a church in repair, playing certain psalms, and paying the singers in church.
Turner v. *Ogden*, 1 Cox, 316.

For building an organ gallery in a church.
Adnam v. *Cole*, 6 Beav. 353.

Or repairing and ornamenting a chancel.
Hoare v. *Osborne*, L. R., 1 Eq. 585.

Or repairing a memorial window and mural monuments in a church.
Re Rigley's Trust, 36 L. J. Ch. 147.

Or repairing and keeping in repair a parish churchyard.
Re Pardoe, (1906) 2 Ch. 184.

Or the burial grounds used by a religious sect (including graves and headstones).
Re Manser, (1905) 1 Ch. 68.

For endowing or erecting or equipping a hospital.
Att.-Gen. v. Kell, 2 Bea. 575.

For the reclamation of fallen women.
Mahony v. *Duggan*, 11 L. R. Ir. 260.

To a society formed principally for teaching poor children and nursing the sick.
Cocks v. *Manners*, L. R., 12 Eq. 574.

To a friendly society having for its object the relief of poverty.
Re Lacy, (1899) 2 Ch. 149.

To found prizes for essays.
Farrer v. *St. Catherine's College*, L. R., 16 Eq. 19.

For deserving literary men who have been unsuccessful.
Thompson v. *Thompson*, 1 Coll. 395.

For letting out land to the poor at a low rent.
Crafton v. *Frith*, 20 L. J. Ch. 198.

For the increase and encouragement of good servants.
Loscombe v. *Wintringham*, 13 Beav. 87.

For the benefit of ministers of any denomination of Christians.
Milbank v. *Lambert*, 28 Beav. 206.

For the advancement of religion.
Re Manser, (1905) 1 Ch. 68.

For missionary objects.
Re Kenny, 97 L. T. 130.

For the benefit, advancement, and propagation of education and learning in every part of the world.
Whicker v. *Hume*, 7 H. L. Ca. 124.

For the benefit of a regimental mess.
Re Donald's Estate, (1909) W. N. 169.

Or a volunteer corps.
Re Lord Stratheden, (1894) 3 Ch. 265.

Or for a corps of Commissionaries.
Re Clarke, (1901) 2 Ch. 110.

For the advancement of education in economic and sanitary science.
Re Berridge, 63 L. T. 470.

Or in law.
Smith v. *Kerr*, (1902) 1 Ch. 774.

For establishing and upholding an institution for the investigation and cure of diseases of quadrupeds and birds useful to man, and for maintaining a lecturer thereon.
London University v. *Yarrow*, 23 Beav. 159.

Or for supporting societies having for their object the suppression and abolition of vivisection.
Re Foveaux, (1895) 2 Ch. 501.

Or otherwise for the benefit of animals generally.
Re Dean, 41 Ch. D. 552.

Or for the encouragement of the practice of vegetarianism.
Re Slatter, 21 T. L. R. 295.

And gifts in aid of the public revenue of the State.
Ashton v. *Lord Langdale*, 4 DeG. & S. 402.

And finally, gifts for any purpose which is either for the public or general benefit of a place.
Att.-Gen. v. *Aspinall*, 2 My. & Cr. 622, 623.

Or tends towards public religious instruction or edification.
Re White, (1893) 2 Ch. 41.

Although combined with other objects (such as a gift for the furtherance of conservative principles and religious and mental improvement.)
Re Darling, (1896) 1 Ch. 50.

Or for ringing church bells in commemoration of the restitution of the monarchy.
Re Pardoe, (1906) 2 Ch. 184.

Not "Charitable":—

A gift to procure Masses for the soul of the testator and others is not charitable.
Nor is a gift to a convent of nuns whose sole object is sanctifying their own souls, and not performing any external duty of a charitable nature.
Cocks v. *Manners*, L. R. 12 Eq. 574.

Nor a gift for the purchase of advowsons or presentations unless they are to be held on a charitable trust.
Hunter v. *Att.-Gen.*, (1899) A. C. 309.

Nor a gift for the erection or repair of a monument, vault, or tomb.
Honre v. *Osborne*, L. R. 1 Eq. 585.

Whether it be to the memory or for the interment of the donor alone.
Trimmer v. *Danby*, 25 L. J. Ch. 424.

Or of himself and his family and relations, unless it forms part of the fabric or ornament of the church.
Dawson v. *Small*, L. R. 18 Eq. 114.

Again, bequests for purposes of hospitality.
Re Barnett, 24 T. L. R. 788 (anniversary dinner).

Or benevolence.
Re Jarman's Estate, 8 Ch. D. 584.

Or benevolence and liberality.
Morice v. *Bishop of Durham*, 9 Ves. 399: 10 Ves. 532.

Or general utility.
Langham v. *Peterson*, 87 L. T. 744.

Or for pious purposes.
Heath v. *Chapman*, 2 Drew. 417.

Or for public or philanthropic purposes.
Re Macduff, (1896) 2 Ch. 451.

Or for "emigration uses."
Re Sidney, (1908) 1 Ch. 126.

Or for the encouragement of a sport or pastime.
Re Swain, 99 L. T. 604.

Legacy to Charitable Institution.—As to the residue there is no general trust for charity binding the whole fund and no general charitable intent expressed; the terms of the will are indefinite and there is no definite object of the trust. *Hunter* v. *Attorney-General* (1899), A. C. 309, *Re Young*, 9 O. W. R. 567, distinguished from *Re Huyck*, 5 O. W. R. 794.

As to Parks.—The Mortmain Act of 1902, does not disturb existing licenses, or statutes authorising holding lands in perpetuity, but extends the

power to hold to other cases (parks, museums and school houses) where the right does not exist independently of the Act of 1902.
Re Battenshall, 10 O. W. R. 933.

The bequest "for the increase and improvement of Christian knowledge and promoting religion" belongs to the class of "charitable gifts," and such gifts being for the public good are not subject to the rule against perpetuity. *Re Camera*. 7 O. W. R. 417.

Church Society. By the Act of Incorporation, 7 Vict. c. 68, the Church Society of Toronto is enabled to hold real estate without any license for that purpose. *Church Society of the Diocese of Toronto* v. *Crandell*, 8 Chy. 4.

Control by Minister.—A direction to trustees to dispose of an estate "as the ministers of (a certain church) may see fit," is good, not being necessarily a devise to charitable uses. *Doe d. Vancott* v. *Read*, 3 U. C. R. 244.

Conveyance—Church of England. — A will is a "conveyance." Under the terms therefore of s. 16 of 3 Vict. c. 74, viz., "by deed or conveyance," a person may devise, as well as grant by deed, lands to the Church of England for the purposes of that Act. *Doe d. Baker* v. *Clark*, 7 U. C. R. 44. Held, also, that a will as a conveyance is perfect at the time of its execution, though its effect could not be felt till the death of the testator, and that therefore the condition of s. 16, requiring "a deed or conveyance to be made and executed six months at least before the death of the person conveying the same," might be complied with in the case of a will. *Ib.* A devise under that statute to the bishop and the rector is good, notwithstanding the statute speaks of a conveyance to the bishop or rector, &c. *Ib.*

Direction to Sell Lands—Effect of Failure of Bequest.—Three weeks before the testator died he made his will whereby he directed his lands to be sold, and out of the proceeds gave $2,000 to his widow in lieu of dower and further directed that "all moneys then remaining in the hands of my executors shall be divided between the following funds," naming five different charities in connection with the Presbyterian Church in Canada—such "money to be divided in whichever way my executors may think best:" —Held, that the bequests to the charities were void under the Mortmain Acts; and there being no residuary clause the bequests so failing to take effect went to the heirs-at-law, not to the next of kin of the testator; costs of all parties to be paid out of the estate. *Re Trusts of John McDonald's Will*, 29 Chy. 241.

Education of Person from Time to Time Named — Algoma, Huron and Ontario Diocesan Missions.—A bequest to the Bishop of Algoma for the benefit and education of John Eskinah and others was intended to set apart a fund which was to have perpetual continuance and in which no individual was to have a personal right, and following *Gillam* v. *Taylor*, L. R. 16 Eq. 584, such bequest was void. Held, also, that a bequest to the treasurer for the Algoma missions was a charitable gift and must fail, because no person or body was empowered to hold it as against the Statute of Mortmain, 9 Geo. II. c. 36, inasmuch as there was no incorporation of Algoma for ecclesiastical or missionary purposes with such powers. Held, also, that bequests to the treasurers of the Huron and Ontario missions respectively were intended for the missions sustained by the incorporated synods of the dioceses of Huron and Ontario, and that by virtue of their Acts of incorporation both these dioceses were enabled to hold lands, &c., in mortmain, and that such bequests therefore did not fail either for uncertainty or because they could not be held by the defendants the synods respectively. *Labatt* v. *Campbell*, 7 O. R. 250.

Gifts to Religious Societies.—A will was executed on the 4th December, 1903; and the testatrix died on the 4th June, 1904. The testatrix gave and devised all her real and personal estate to her executors and trustees to sell, and, after payment of some small legacies and debts and expenses, to keep the residue of the

moneys realized and invest it and pay the interest to the trustees of the Regular Baptist Church at Port Rowan, upon certain conditions, and on failure of compliance with the conditions to pay one-half of the moneys to the Regular Baptist Home Missionary Society, and the other half to the Regular Baptist Foreign Missionary Society for their sole use. By 50 V. c. 91 (O.) these societies were authorized to receive gifts and devises of real and personal property, provided that no gift or devise of any real estate shall be valid unless made by deed or will executed at least 6 months before the death of the testator. There is a similar provision in s. 24 of the Religious Institutions Act, R. S. O. 1897 c. 307. Teetzel, J., held that the 6 months' limitation contained in these two Acts must be regarded as having been repealed by the later Mortmain and Charitable Uses Act, R. S. O. 1897 c. 112, passed on the 14th April, 1892, which removes every fetter upon testamentary power in favour of any charity, subject only to conditions therein mentioned. He was also of opinion that the gift was not of land, as interpreted by s. 3 of c. 112, but of personal estate arising from or connected with land" within the meaning of s. 8. It was argued, however, that, notwithstanding the provisions of c. 112, the power of a testator by will to give lands or personal estate was restricted by the Mortmain and Charitable Uses Act of 1902 to wills made at least 6 months before the testator's death by virtue of s. 7, s.-s. 6, of that Act. The statute which is now R. S. O. c. 112 was based upon the English Act of 1891, and our later Act of 1902 upon the earlier English Act of 1888, but by s. 1 of the Act of 1902 it was provided that the Act should be read as part of R. S. O. c. 112. The result of this is, as construed by Teetzel, J., to put our two Acts practically in the same position as the two English Acts, as determined by *In re Hume*, [1895] 1 Ch. 422, and therefore s. 7 of the Act of 1902 does not apply to wills, but only to assurances *inter vivos*: see *Re Kinney*, 6 O. L. R. 459, 2 O. W. R. 881. The nice question whether the full period of 6 months had elapsed between the making of the will and the death of the testatrix was not determined. *Re Barrett*, 25 C. L. T. 357, 5 O. W. R. 790, 10 O. L. R. 337.

Devise to Church of "Rents and Produce" of Lands in Perpetuity.—After the death of A. and B. the rents and produce of a farm were given in perpetuity to support the acting incumbent of a church:—Held, that the will is valid although made within less than six months before testator's death. The devise of the rents and profits passed the fee simple. A. and B. being dead the land vests in the accountant of Supreme Court of Judicature for Ontario. Lands directed to be sold. *Re Thomas* v. *McTear* (1909). 14 O. W. R. 396.

Presbyterian Church in Canada.—A residuary devise of realty to the Foreign Missionary Society of the Presbyterian Church in Canada is valid under the Mortmain and Charitable Uses Act, R. S. O. 1897 c. 112, s. 4, notwithstanding *ibid*, c. 333, s. 7, s.-s. 6, which requires "assurances" of land for charitable uses to be made six months before the donor's death, "assurances" in that section not including gifts by will; and also notwithstanding that the special Act relating to devises to the said church, 38 V. c. 75 (O.), requires wills of realty and impure personalty in favour of that church to be made six months before the testator's death. *Madill* v. *McConnell*, 16 O. L. R. 124.

Acquiescence by Person Entitled in Default.—A gift by will of property that failed to take effect by reason of the Mortmain Acts, cannot be aided or set up by the person entitled to the property by anything less than what would be required to constitute a good gift by such person of the same property to the person intended to be benefited by the gift in the will. *Becher* v. *Hoare*, 8 O. R. 328.

Agricultural Society — Freemasonry — Free Thought.—By his will the executors were directed to invest the residue of the estate and to apply the annual interest therefrom for the promotion of free thought and free speech in the Province of Ontario:—Held, that this bequest was void as opposed to Christianity. *Pringle* v. *Corporation of Napanee*, 43 U. C. R. 285, followed. *Kinsey* v. *Kinsey*, 26 O. R. 99.

Bequest to Charity. — Object "Diocesan institution" — Local or parochial institutions. *Re Gilmour*, 3 O. W. R. 541.

Bishop—Diocese.—A devise of real estate to a bishop in trust for the use of his diocese is not a devise "to or for the benefit of any charitable use," within the meaning of ss. 4 and 5 of the Mortmain and Charitable Uses Act, 1892, 55 Vict. c. 20 (O.). *Re McCauley*, 28 O. R. 610.

Charities "of" a Named Place. — A testator bequeathed to "the Benevolent Institutions and Charities of Owen Sound, $1,000, to be distributed as my executors shall deem meet:"—Held, that he intended a bequest to the Municipal Corporation of Owen Sound, to be distributed as the executors should direct. *Williams* v. *Roy*, 9 O. R. 534.

Church—Mixed Fund.—A testator by his will bequeathed a sum of money to the trustees of a church "to be . . used in the payment of any indebtedness on said church and for such other purposes as they may deem wise." At the time the will took effect there was no debt on the church:—Held, that the reference in the will meant outlay in connection with the church such as repair and maintenance or any obligation incurred for which the land was not liable, and that the bequest was valid. *Bunting* v. *Marriott*, 19 Beav. 163, followed. The will directed the bequest to be paid out of a mixed fund derived from the sale of land and personalty.—Held, as far as the real estate was concerned, that the gift failed. Directions as to the application of the fund. *Ostrom* v. *Alford*, 24 O. R. 305.

Minister's Residence—School Teacher's Residence. — Certain land was devised to the trustees of a named common school section, on which a teacher's residence might be erected, or that it might be rented for the benefit of the school funds, subject, however, to a condition of preserving and keeping in order an adjoining plot:—Held, a devise for charitable purposes within 9 Geo. II. c. 36, and so void. *Sills* v. *Warner*, 27 O. R. 266.

Missions.—A testator by his will bequeathed to his executors out of his pure personalty the sum of $10,500, to be paid by them as follows: "$3,500 to Wycliffe College, $3,500 to the bishop of the diocese of Algoma for the support of missions of the said diocese, and the balance, to wit, the sum of $3,500, towards the support of any mission or missions which may be undertaken or established by the Rev. Edward F. Wilson, the said Mr. Wilson having left the Shingwauk Home with the intention of establishing a new mission or missions elsewhere:"—Held, that the bequest of the sum for the support of missions to be undertaken was not a bequest to the Rev. Edward F. Wilson personally, but to the executors for the support of the missions. (2) That it was a good charitable bequest, and referred to missions connected with the spread of religious teaching in a field or locality of missionary work. *In re Jarman's Estate*, *Leavers* v. *Clayton*, 8 Ch. D. 584, and *In re Riland's Estate*, *Phillips* v. *Robinson*, W. N. 1881, p. 173, distinguished. *Toronto General Trusts Co.* v. *Wilson*, 26 O. R. 671.

Trust for Benefit of Citizens of the United States of African Descent.—A devise of lands in Ontario, by a testator dying in 1891, in trust "to promote, aid, and protect citizens of the United States of African descent in the enjoyment of their civil rights," is a charitable devise and void, and the fact that the trust is to be executed in a foreign country makes no difference. *Lewis* v. *Doerle*, 25 A. R. 206.

Erection of Parsonage.—Where a sum of money was bequeathed for the erection of a parsonage:—Held, that there was an implied authority to purchase land whereon to erect such parsonage; and that, in the absence of anything to shew that no portion of the fund was to be applied in the purchase of the land, the bequest was void under the Statutes of Mortmain. *Davidson* v. *Boomer*, 15 Chy. 1.

Masses.—A bequest by a member of the Roman Catholic Church of a sum of money for the purpose of paying for masses for his soul, is not void in this Province. *Elmsley* v. *Madden*, 18 Chy. 336.

Methodist Church in Canada. — A testator devised all his estate, real and personal, to a trustee upon trust to convert the same into money, to hold upon trust to pay "to the treasurer for the time being of the sup-

erannuation fund of the Methodist Church, $1,000;" and "to pay all the rest and residue unto the treasurer, for the time being, of the trustee board of the Brant Avenns Methodist Church, to be applied by them or their successors, in redeeming the debt existing against the church property:"—Held, that the legacy to the superannuation fund of the Methodist Church was valid, for by 14 & 15 Vict. c. 142, the corporation was empowered to take land devised in any manner whatsoever in its favour; and that all the benefits of the statute were extended to the Methodist Church, by the statutes of Union, 47 Vict. c. 106 (D.); and 47 Vict. c. 88 (O.), so far as the superannuated preachers' fund was concerned.— Held, however, that the residnary devise was invalid, for neither by 47 Vict. c. 88 (O.) nor by any other statute, was the new corporation "The Methodist Church," empowered to hold land for all purposes, including that for the endowment of particular churches, and the proper construction of s. 6 of 47 Vict. c. 88 (O.), as amended by 51 Vict. c. 83, s. 2, was that the corporation of the Methodist Church should have the rights, privileges, and franchises conferred upon the connexional society, but only for the purposes and objects of the said connexional society. Held, lastly, that the residuary benefit intended was invalid both as to realty and personalty, because the direction was, as to money, that it should be applied in payment of incumbrances on the church property. *Smith* v. *Methodist Church*, 16 O. R. 199.

Section 6 of 47 Vict. c. 88 (O.), does not confer upon the Methodist Church the powers of the connexional society of the Wesleyan Methodist Church in Canada to take by devise without reference to the restrictions of the Religious Institutions Act; and a bequest to the church payable out of realty, made by will executed within six months of the testator's death, was held void. *Smith* v. *Methodist Church*, 16 O. R. 199, approved. *Tyrell* v. *Senior*, 20 A. R. 156.

Toronto General Hospital—Canon of Construction.—The Act of incorporation of the Toronto General Hospital provides that the trustees shall have the powers and rights of bodies corporate, and shall be capable of taking from any person by grant, devise, or otherwise, any lands, or interest in lands, &c., for the support and use of the hospital: — Held, following *Smith* v. *Methodist Church*, 16 O. R. 199, that the plain meaning of this provision is to capacitate any person to devise land to the hospital, and to qualify the hospital to receive and hold beneficially land so devised. It is the duty of the court where it finds legislation intended to legalize the dedication of property to laudable public purposes, to construe the Act so as to enlarge rather than limit its operation. *Butland* v. *Gillespie*, 16 O. R. 486.

Mixed Residue — Church Debts — Incumbent's Salary. — A will dated the 1st April, 1880, contained this clause:—"I will and desire that the residue of my real and personal estate, being the sum of $2,800, more or less, shall be paid to the four churches of England, in the townships of Orford and Howard, in four equal parts to each such churches as follows: to Trinity Church, Howard; St. John's Church, Morpeth; St. —— Church, Highgate, and the proposed new church at Clearville, and to be applied by my executors in the payment of any debt or debts upon each of such churches respectively; and in case of no debt, or there being a balance or residue after the payment of such a debt or debts on each of such churches, respectively, then the residue (if any) is to be paid by my executors to the churchwardens of said church, to be held by them in trust; and said money is to be invested by such churchwardens, and the interest arising therefrom is to be paid to the incumbent of said church as a portion of his salary or stipend." The testator died on the 10th of the same month. Upon a special case stated for the opinion of the court, it was shewn that there was a large debt existing on the Morpeth church for money borrowed on mortgage wherewith to pay off the building debt. The church at Clearville was not built at the time of the testator's death, but some debts were existing in respect of materials and work on the foundation:—Held, that the mortgage debt on the Morpeth church could not be considered as a building debt; but if it could be so considered the bequest to pay the same would be void, under the Statutes of Mortmain. (2) That as to the Clearville church, which was in course of erection, the building debts would form a lien on the lands from the beginning of the work under the Mechanics' Lien Act, and the bequest to pay off those debts would therefore be void, unless the work was being

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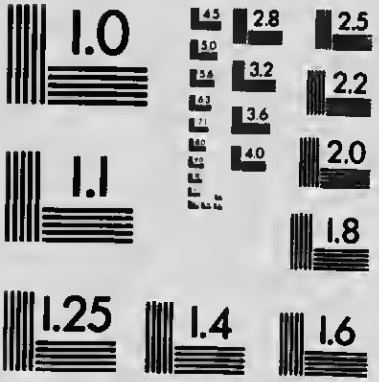

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performed in such n manner as excluded the creation of a lien on the land. (3) That the bequest for the benefit of the incumbent would have been void if the investment had been directed to be made upon realty: hut as the trust might he enrried out by investing iu personalty the bequest was valid if so invested. (4) That the nmount to which the incumhent would be entitled was the residue after deducting the void bequests for debts. *Stewart* v. *Gesner*, 29 Chy. 329.

Mortgages.—The residuary estate in this cnse consisted of mortgages, the bequest of which, under the Mortmain Act, was declared invalid, and the estate to belong to the next of kiu of the testntor. *Thompson* v. *Torrance*, 9 A. R. 1.

Poor of County.—The testatrix by her will gave the residue of her estate in trust for a certnin class of the poor of a county, "who must have been *bonâ fide* residents of the said county before becoming destitute or needy." A town in the county originally formed part thereof for all purposes, hut was in 1859, under the provisions of the Municipal Act then in force, detached from the county for municipal purposes only:—Held, in the absence of anything in the context of the will clearly to the contrary, that residents of the town coming within the class referred to iu the bequest were included therein. *Steele* v. *Grover*, 26 O. R. 92.

Poor House — Postponement of Realization.—A testator directed his farm to he sold at the expiration of four years and the proceeds paid over to the treasurer of the Bruce county poor house to he expended in luxuries for the inmates. It appeared that the house of refuge of the county was generally known as the county poor house:—Held, that the bequest wns a good charitnble use within R. S. O. 1897 c. 112. Held, also, that the provision postponing the sale for more than two years, contrary to s. 4 of said Act, was invalid, unless the period were extended by the court or Judge. *In re Brown*, *Brown* v. *Brown*, 32 O. R. 323.

"Proteatant Charitablo Institutions."—In an action for construction of n will:—Held, that the gift of the residue of a mixed fund to the executors to he distributed "among such Proteatant charitable institutions as my said executors and trustees may deem proper and advisable, and in such proportions as they . . . may deem proper," was a valid gift, having regard especially to s. 8 of 55 Vict. c. 20, R. S. O. 1897 c. 112, the provision in force at the time of the testator's death in 1895. Held, also, that the house of refuge for the poor of a county was not within the terms of the residuary gift. The word "Protestant," as used in the will, was referable as well to the objects of the charitable institutions as to their government; and "Protestant charitable institutions" were such charitable institutions as were managed and controlled exclusively by Protestants and were designed for the bestowal of charity upon Protestants nlone. *Manning* v. *Robinson*, 29 O. R. 483.

Public Library. — Held, affirming 22 Chy. 203, that the Statute of Mortmain, 9 Geo. II. c. 36, is in force in this Province; and that a bequest to the town of Whitby "for the purpose of establishing and maintaining, in the said town of Whitby, a public library and mechanics' institute, to be dedicated to and he under the control of the said corporation of the said town of Whitby," and which bequest could only be paid out of moneys arising from the sale of lands or mortages on lands, was void, under the Act, as a charitable bequest. *Corporation of Whitby* v. *Liscombe*, 23 Chy 1.

Queen's College.—A bequest issuing out of renlty to Queen's College for the founding of a hursary, is a charitable bequest within the Mortmain Acts, and therefore void. *Ferguson* v. *Gibson*, 22 Chy. 36.

Sisters of Charity—Impnting Corporate Capacity.—A testator devised land to K., in trust to sell and pay the proceeds "to the Sisters of Charity of Hamilton, to he their property absolutely." There were also bequests to K. of money, to pay the same to the St. Mary's Hospital, aa orphnn nsylum and a convent. No evidence was given to shew who the Sisters of Charity were. In an action to recover the land brought by the

heirs-at-law of the testator:—Held, that a corporate capacity could not be imputed to the Sisters of Charity, in order to destroy the gift to them under the Statutes of Mortmain, and that the devise might be supported as a gift to the individuals who, at the time of the testator's death, filled the character of Sisters of Charity. *Walker* v. *Murray*, 5 O. R. 638.

Temperance Legislation—Impure Personalty.—Where a testator bequeathed a sum of money to trustees, upon trust "to apply the same in such lawful ways as in their discretion they may deem best in order to promote the adoption by the parliament of the Dominion of Canada of legislation prohibiting totally the manufacture or sale in the Dominion of intoxicating liquor to be used as a beverage, and in order to give practical aid in the enforcement of such legislation when adopted, whether by educating and developing a strong public sentiment in its favour or by other and more direct means, or in such other ways as my trustees shall think best:"—Held, a good charitable legacy, being for a lawful public or general purpose, and not contrary to morality or to public policy. The testator merely sought to promote a desirable change in the law by constitutional means. Held, also, that a promissory note payable to the testator collaterally secured by mortgage on land was impure personalty. *Farewell* v. *Farewell*, 22 O. R. 573.

Unincorporated Associations.—A testator bequeathed £100 to the Society of St. Vincent de Paul, and directed the residue of his estate to be converted into cash, and paid to the House of Providence. These were voluntary unincorporated associations:—Held, that so far as they could be paid out of personalty these legacies were good; and should be paid over to the persons having the management of the pecuniary affairs of the institutions named. *Elmsley* v. *Madden*, 18 Chy. 386.

A testator domiciled in the State of Missouri, U.S., at the time of the execution of his will and at the time of his death, bequeathed personal property situate in this Province to a lodge of Oddfellows in the State of New York, U.S., which, although unincorporated at the time of the testator's death, was subsequently authorized by law to take and hold, in the names of trustees property devised to the lodge. In an action to test the validity of the bequest:—Held, that the parties having selected their forum in this Province, the action must be dealt with here according to the law of the testator's domicile, which, in the absence of evidence to the contrary, would be presumed to be the same as the law of this Province. Held, also, there being no prohibitory law of the legatees' domicile, the bequest to the lodge was a valid bequest to the members thereof, and that the trustees of the lodge could be added as parties defendants, on behalf of all the members. *Walker* v. *Murray*, 5 O. R. 638, followed. *Graham* v. *Canandaigua Lodge*, 24 O. R. 255.

Unincorporated Church—Erection of Buildings.—J. M. died on August 9th, 1884, having made his will three days before, in which, after giving certain legacies, he provided as follows: "I give and devise all my real and personal estate whatsoever and wheresoever, with the above exceptions, to the Lutheran Church, for the purpose of building a college in Canada, and not elsewhere, and in his name." The Lutheran Church was not incorporated and held no lands, but was composed of a number of congregations in different parts of the Province. The lands upon which the various churches belonging thereto were erected, were vested in trustees for the benefit of the congregations, and some of these lands were suitable as building sites for a college:—Held, that the devise of the realty and all personalty savouring of the realty was void. Held, also, following *Giblett* v. *Hobson*, 3 My. & K. 517, that the bequest of the pure personalty was also void; that a bequest of money or other personalty to any charitable institution to build or erect buildings, taken by itself, is within the Statute of Mortmain; and that the onus of shewing that the intention of a testator was restrained within lawful limits is upon the party seeking to take the bequest out of the statute; and that the intention must appear absolutely certain and clear; and that land already in mortmain must be indicated or the future acquisition of building land, otherwise than by means of the legacy, must plainly be contemplated, or the words of the will must expressly include the application of the money given in the acquisition of land, which was not done in this case. *Murray* v. *Malloy*, 10 O. R. 46. See *Davidson* v. *Boomer*, 15 Chy. 218.

General Charitable Devise.—A testator directed his real and personal estate to be sold, and after investing sufficient to secure an annuity for his sister, directed the trustees "to pay over the balance of the moneys so to be received from all these sources to the treasurer or other receiving officer of such religious or charitable societies as in their judgment and discretion require it," and after the death of his sister, the sum so invested for her benefit was to be disposed of by the trustees in like manner. On a bill filed to impeach this devise as within the Statutes of Mortmain, the court, as to the realty, directed an inquiry whether there were any, and what society or societies, of the nature contemplated by the will that could properly take real estate. *Anderson* v. *Dougall*, 13 Chy. 164.

Libic Society by 18 Victoria c. 229 (1855), taken out of Mortmain Act. Where legacy directed to accumulate or payment postponed legatee may require payment when competent to give discharge. (See *Saunders* v. *Vautier*, 14 Bea. 115). This rule applicable to charities. (See *Wharton* v. *Masterman* (1895) A. C. 186.

Re Youart, 10 O. W. R. 373 (1907).

Trust for sale.—A devise on trust for sale, and to pay $2,000 out of the proceeds to N. W. for the use of the Reformed Presbyterian Church. Held, a valid devise. *Re Johnson*, 50 O. L. R. 459.

A testator directed all his estate, real and personal, to be sold, and out of the proceeds gave $1,000 each to "The Rochester Theological Baptist Institution," and to "The American Baptist Missionary Union Society," and after the payment of these and other legacies, directed "all the remainder and residue of his estate to be distributed, at the discretion of his executors, to the support of Christianity throughout the world: such as bible, tract, missionary societies, and institutions of learning of the Baptist denomination:"—Held, a valid bequest, and one which could not be objected to on the grounds of indefiniteness. *Anderson* v. *Kilborn*, 22 Chy. 385.

Uncertainty. — A testator, a minister of the United Presbyterian Church of North America, after bequeathing $1,000 to the said church, proceeded as follows: "I give for a Jewish mission $1,000 to that church which is sound and evangelical in doctrine and pure in worship, using the songs of praise, the inspired book which can unite all nations," &c. The evidence shewed that this description applied to the said church:—Held, not void for uncertainty, for that the testator clearly intended the said church as the legatee. The testator then proceeded thus:—"To the pious poor converted Jews that meet together for the reading of the scriptures for their instruction and mental edification I leave $1,000:"—Held, a good charitable bequest and not void for uncertainty. *Ib.* Lastly, the testator gave "the balance" of his estate "to the poor and destitute, to supply their wants in food and raiment:"—Held, a valid bequest so far as the residue consisted of personalty, and an inquiry was directed to guide the court in the application of the fund. *Gillies* v. *McConochie*, 3 O. R. 203.

Uncertainty—Poor Relatives—Public Protestant Charities.—In 1865 J. G. R., a merchant, then and at the time of his death domiciled in the city of Quebec, while temporarily in the city of New York made the following will in accordance with the law relating to holograph wills in Lower Canada: "I hereby will and bequeath all my property, assets or means of any kind, to my brother Frank, who will use one-half of them for public Protestant charities in Quebec and Carluke, say the Protestant Hospital Home, French Canadian Mission, and amongst poor relatives as he may judge best, the other half to himself and for his own use, excepting £2,000, which he will send to Miss Mary Frame, Overton Farm." A. R. and others, heirs-at-law of the testator, brought action to have the will declared invalid:—Held, that the will was valid. In this action interventions were filed by Morrin College, an institution where youth are instructed in the higher branches of learning, and especially young men intended for the ministry of the Presbyterian Church in Canada, who are entitled to receive a free general and theological education, and are assisted by scholarships

and bursaries to complete their education; by the Fialay asylum, a corporate institute for the relief of the aged and infirm belonging to the communion of the Church of England; and by W. R. R., a first cousin of the testator, claiming as a poor relative:—Held, that Morria College did not come within the description of a charitable institution according to the ordinary meaning of the words, and had therefore no *locus standi* to intervene; but that Fiulay asylum came within the terms of the will as one of the charities which F. R. might select as a beneficiary, and this gave it a right to intervene to support the will. Held, further, that in the gift to "poor relatives" the word "poor" was too vague and uncertain to have any meaning attached to it, and must therefore be rejected, and the word "relatives" should be construed as excluding all except those whom the law, in the case of an intestacy, recognized as the proper class among whom to divide the property of a deceased person, and W. R. R. not coming within that class his intervention should be dismissed. *Ross* v. *Ross*, 25 S. C. R. 307.

Indefiniteness—Scheme. — A testator by his will devised to certain named persons, who were appointed the executors and trustees thereof, the remainder of his estate to be used to further "the cause of our Lord Jesus Christ:"—Held, that the legacy was not void for indefiniteness, and discretion having been given to the executors and trustees, it was not necessary that a scheme should be directed. *Phelps* v. *Lord*, 25 O. R. 259.

Charitable Bequest—Uncertainty.—A devise in a will that "all my property, real and personal, be retained in trust for the maintenance of a manual labor school for girls," is not valid for uncertainty. *Stevens* v. *Coleman*, 16 Que. K. B. 235.

Gift to Religious Society — "Charitable and Philanthropic Purposes"—Uncertainty in Objects of Gift. — A bequest "to the West Lake Monthly Meeting of Hickside Friends of West Bloomfield to be applied in charitable and philanthropic purposes" was upheld against the argument that it was void for vagueness and uncertainty in the objects to be benefited. Teetzel, J., saying that "charity was the dominant idea in the mind of the testator, and, while it is true that certain purposes may be philanthropic and not charitable in the ordinary sense, it is common knowledge that many subjects for benefaction are both charitable and philanthropic." If the words had been "charitable or philanthropic" the conclusion might have been different, as "or" would imply a discretion to select either "charitable" or "philanthropic" purposes. *Williams* v. *Kershaw*, 5 L. J. Ch. 86, 11 Cl. & Fin. 111 n., 42 R. R. 269, not followed. *Re Huyck*, 25 C. L. T. 358, 6 O. W. R. 112, 10 O. L. R. 480.

Designation of Beneficiaries—Perpetuities.—Testator bequeathed all his property "to that Presbyterian congregation where I belong to and had my first communion, Cookstown, . . . Ireland. The presiding clergyman, committee and elders shall have full control of all after me. They shall have power to sell or rent to the best advantage . . . The minister and committee and ruling elders shall give me a decent funeral monument not to exceed £100 sterling, and then the widows and the orphans and neglected children to be seen after by the minister, committee, and ruling elders, having succeeding authority to remember the poor of the church at Christmas every year, and to cheer the poor and broken-hearted with the joy of Christ's death and sufferings, together with the presents presented by the minister, committee, and ruling elders at the Christmas time every year." By a codicil he appointed two persons executors and trustees, and vested all his property in them as trustees for the purposes mentioned in the will. He died within six months of the making of the will and codicil, leaving both real and personal property:—Held, that the beneficiaries, namely, the widows and neglected children and the poor, were sufficiently well designated and came within the meaning of s. 6 of the Mortmain and Charitable Uses Act, 2 Edw. VII. c. 2, and, the gifts being charitable the rule against perpetuities did not apply to them. The minister, committee, and elders were the almoners named for the purpose of carrying the charitable design into effect. *In re Kinney*, 23 C. L. T. 332, 6 O. L. R. 459, 2 O. W. R. 881.

Validity of Bequest for Perpetual Care of Testator's Grave —Residue to Executors—Charitable Trust—Object Unspecified—Void for Uncertainty.—Clause 3 of testator's will directed his executors

to purchase a lot in St. Mary's Cemetery, Kingston, for testator's grave, and set aside a sufficient sum to provide for its perpetual care:—Held, that this direction was valid and that a sum reasonably sufficient for the purpose mentioned could be appropriated by the executors out of said estate, or if the governing body of the cemetery would undertake the perpetual care of graves within its limits, then the executors could pay to them such reasonable sum as might be required for such care of testator's grave. Clause 7 of the will gave the residue of the estate to the executors absolutely, to be used as they deemed best, trusting that they spend it upon some charitable object, but leaving their discretion absolutely unfettered as to that.—Held, that the testator did not intend to give the residue of his estate to the executors for their own use. Clause 7 construed so that the residue should be absolutely used upon and for some charitable object or objects. No trust being created in favour of any particular charity, the gift of residue was not a good charitable bequest, but void for uncertainty. *Re Cronin* (1910), 15 O. W. R. 819.

Charitable Bequest — Uncertainty — Intention of testatrix — Bequest to church—Bequest to I. O. O. F.—Bequest to St. Andrew's Society —Several other similar bequests—7 Edw. VII. c. 79, s. 2. *Jones* v. *St. Stephens Church* (N.B. 1910), 9 E. L. R. 23.

Blanks in Will—Charitable Gift—Trust for Benevolent Purposes—Uncertainty—Failure of Trust. — A testator by will provided for a bequest of money to the defendants, to be paid yearly or at such times as his executor should think advisable, but omitted to fill in the amount. In the same paragraph of the will it was then declared that, when "Home Missions" were considered more needy, an amount might be given to them, or to any such good and benevolent Christian objects as the executor should consider most deserving. The will then directed the executor to sell a part of the testator's real and personal estate, "and the proceeds to be placed, so as to be conveniently drawn to assist in aiding good and worthy objects:"—Held, that the gift of an unnamed amount of money to the defendants was void, and that the gift in the rest of the will was not a gift to charitable, but to benevolent, uses, and failed for uncertainty. *Brewster* v. *Foreign Mission Board of Baptist Convention of Maritime Provinces*, 21 C. L. T. 131, 2 N. B. Eq. R. 172.

Misnomer—*Cy-près* doctrine—Division among charities. *Re Graham*, 4 O. W. R. 90.

Charitable Bequest—Religious Order — Application of Bequest cy-pres. — A will contained a direction that the executors should apply a portion of the income "in the introduction and support of the Jesuit Fathers" in the city of H. The same clause of the will gave the executors a discretion, "notwithstanding anything in this clause hereinbefore expressed," to apply the income in the promotion and support in the city of H. "of such charitable institutions and religious orders in connection with the Roman Catholic Church as my said executors shall think proper." The testator died in 1881. The Archbishop of H. made unsuccessful efforts from 1883 to 1889 to induce the Jesuits to establish a college in H. A few years later another religious order was introduced. In 1897 the Jesuits were willing to come to H., but the Archbishop refused his assent:—Held, that the refusal of the Archbishop to give his assent to the introduction of the Jesuits rendered that mode of applying the residue impossible. As to matters within his ecclesiastical jurisdiction, he was the sole judge. The executors were ordered to formulate at once a scheme for the application of the income for the benefit of some charitable or religious order. In default of their doing so, the Court would take upon itself to formulate such a scheme as would best agree with the testator's wishes as expressed in the will. *Attorney-General* v. *Power*, 35 N. S. R. 526.

Judgment in *Attorney-General* v. *Power*, 35 N. S. R. 526, varied by declaring the direction in the will at present impracticable, and adjudging that the unapplied income of the residue should, from a date named, be applied semi-annually by the defendants to the promotion and support, in the city of Halifax or its vicinity, of such charitable institutions and religious orders in connection with the Roman Catholic Church, and in such manner and in such proportions as the executors, in their discretion, might think proper.

in accordance w the terms of the will and the powers thereby conferred upon them; rese g further directions, with leave to apply to the Court below, costs of all parties out of the estate. *Power* v. *Attorney-General for Nova Scotia*, 35 N. S. R. 182.

Application Cy-pres—Amount more than sufficient to answer specified purpose—Application of balance *cy-près*—Intestacy—Gift for maintenance of burial plot—Perpetuity—Charity. *Re Harding*, 4 O. W. R. 316.

Bequests upon trust for two schools on condition of their educating twelve poor children, the schools having subsequently been superseded by free schools supported by taxation, with gifts to an institution for the deaf and dumb to assist in educating the poor so afflicted, were applied to an Institution for the Deaf and Dumb and an Asylum for the Blind, as the gift was for the benefit of the poor, and to apply it to schools supported by taxation would be merely to relieve ratepayers of part of their burden. *Attorney-General* v. *Bullock*, R. E. D. 249.

Gift to Charitable Institution—No Institution by that Name—Claimed by an Institution in Same City—Application by Cy-pres Doctrine—Residuary Clause—Gift to Persons Hereinbefore Named—Only Person Actually Named Included. — Testator willed $500 to the "Methodist Children's Orphans' Home," at Kingston. There was no such institution. Held, that a clear charitable intention was expressed, and that the *cy-près* doctrine should apply. Legacy ordered to be paid to the Kingston's Orphans' Home and Widows' Friend Society. Held, also, that only persons actually named in the will should take under the residuary clause; certain institutions and the Methodist ministers referred to in the will by description were thus excluded. *Re Clapper* (1910), 17 O. W. R. 57, 2 O. W. N. 111.

Marshalling Assets.—The Court will not direct assets to be marshalled in favour of a charity unless the will says this is to be done. *Anderson* v. *Kilborn*, 22 Chy. 385.

There can be no marshalling of assets in favour of a charity. *Becher* v. *Hoare*, 8 O. R. 328.

There can be no marshalling in favour of charities; yet where charitable and other legacies are payable out of a mixed fund, the proceeds of realty, impure personalty, and personalty, the charitable legacies do not fall in toto, but must abate in the proportion which the sum of the realty and impure personalty charged with charitable gifts bears to the pure personalty. *In re Staebler, Staebler* v. *Zimmerman*, 21 A. R. 266.

But if the testator so directed, the direction would be carried out. *Farewell* v. *Farewell*, 22 O. R. at p. 577.

Application of Mortmain Act.—The Imperial statute 9 Geo. II. c. 36 (the Mortmain Act) is in force in the Province of Ontario. *Doe d. Anderson* v. *Todd*, 2 U. C. R. 82; *Corporation of Whitby* v. *Liscombe*, 23 Chy. 1; *Macdonell* v. *Purcell, Cleary* v. *Purcell*, 23 S. C. R. 101.

Mortmain Act—British Columbia.—The statute 9 Geo. II. c. 36, relating to charitable uses, and commonly known as the Mortmain Act, is not in force in British Columbia. *In re Pearse, In re Brabant, Sweetman* v. *Durien*, 24 C. L. T. 162, 10 B. C. R. 280.

Mortmain Act not in force in New Brunswick. *Ray* v. *Annual Conference*, 6 S. C. R. 308.

Gifts to Religious Bodies — Statutes of Mortmain — Legislation permitting societies to take gifts in mortmain—Validity of gifts—Provision for accumulation—Right of legatees to immediate payment—Application of rule to charities—Lapsed gifts—Division as upon intestacy. *Re Youart*, 10 O. W. R. 373. See page 142.

Charitable Gift — Mortmain — Testator Domiciled in England—Money Invested on Mortgage of Freehold Land in Colony—Impure Personalty—Invalid Gift—Charitable Uses Act, 1736 (9 Geo. II. c. 36).—A testator domiciled in England, died in 1888, pos-

sessed of money invested on five legal mortgages of freehold land in Ontario, by his will made in 1878 gave his residuary real and personal estate to his wife for life, and after her death he gave one-third part of it to charity. At the time of his death the Charitable Uses Act, 1736, was in force in England and in Ontario. The wife died in 1906. It was decided that the gift of one-third part of his residuary estate to the charity constituted a good charitable gift so far as such one-third part consisted of pure personalty; but, in answer to the enquiry directed as to how much of such one-third part consisted of pure personalty, it was certified that the testator's Ontario mortgage investments were impure personalty: — Held, the testator's Ontario mortgage investments were impure personalty, and that the gift to the charity was invalid as to the moneys invested therein. *Re Hoyles; Row* v. *Jagg* (1910), 103 L. T. 127; 30 C. L. T. 993.

Attorney-General. — To a bill either to establish or impeach the legality of charitable bequests, the attorney-general may be made a party. *Davidson* v. *Boomer*, 15 Chy. 1.

Codicil—Revocation of Legacy—Bequest to School and Poor —Validity.—The Statute of Mortmain, 9 Geo. II. c. 36, is in force in Manitoba, and the bequest to the school district of Acton, so far as it was directed to be paid out of land or the proceeds of land, was void, but that such proportion of the amount as the pure personalty of the estate bore to the whole estate should be paid, subject to abatement *pro rata* with other legacies if the estate should not be sufficient to pay all. *Re Staebler*, 21 A. R. 266, followed. *Brook* v. *Badley*, L. R. 3 Ch. 672, and *Re Watts*, 29 Ch. 947, distinguished. 3. That the gift of $300 to the three oldest and poorest people in the municipality was valid, being sufficiently certain to be carried out. *Law* v. *Acton*, 22 C. L. T. 410, 14 Man. L. R. 246.

Foreign Government.—A testator directed his executors to pay and deliver the residue of his estate to the Government and Legislature of the State of Vermont, to be disposed of as to them should seem best, having regard to certain recommendations set forth in the will. Held, that the State was sufficiently designated as the legatee to entitle it to take the bequest; held, also, that the direction for accumulation did not render the bequest invalid, it being for the Courts in Vermont to say whether the direction should be carried out. *Parkhurst* v. *Roy*, 7 A. R. 614.

Creation of Bishopric—Contingency—If happens—Valid transfer to another charity—After 25 years—Rule against perpetuities—Effect of will.—Testator left an estate of $90,000, of which $44,000 was in real estate and Hudson Bay Co. shares. This latter sum was left in trust to supply an income for the Bishop of Cornwall, or if such a Bishop was not elected within 25 years after the testator's death, the money was to go to the University of Bishop's College, at Lennoxville, for the endowment of a Professorship of Natural Science.—Boyd, C., held, 17 O. W. R. 448; 2 O. W. N. 246, that there was an immediate gift for charitable uses delayed as to the actual conveyance till the secured debts were paid, and therefore, vested at the death and effective in law, though the particular application of the gift might be in suspense for 25 years, or might never take effect at all, in which contingency there was a valid transfer to another charity at the end of 25 years; That the will did not offend against the rule concerning perpetuities.—Court of Appeal varied above judgment by declaring that if the executors were obliged to pay debts secured on the testator's real or personal estate otherwise than out of the income, the amount so paid should be restored to the estate out of subsequent accumulated income, otherwise judgment affirmed. *Re Mountain Will* (1912), 21 O. W. R. 855; 3 O. W. N. 1011.

CHAPTER X.

PERPETUITY AND REMOTENESS.

PRIMARY MEANING OF "PERPETUITY."

A perpetuity, in the primary sense of the word, is a disposition which makes property inalienable for an indefinite period.

6th ed., p. 278.

As a general rule, every such disposition is void. Accordingly, a devise of land or a bequest of personalty upon trust for a purpose or institution which may last for an indefinite period (not being charitable) is void as a perpetuity or as tending to a perpetuity. Thus, a trust for the maintenance of a private tomb, or a picture, or a private museum, library, society, or institution, or for the encouragement of sport, is invalid.

6th ed., p. 278. *Re Parry and Daggs*, 31 Ch. D. 130.

DOCTRINE OF COCKS V. MANNERS.

If property is so given to a society or institution that the members can immediately dispose of it, then the objection of perpetuity does not arise, and the gift is valid, even if the testator adds directions as to the mode of application. But if the intention of the testator is that the property, although given absolutely to the society, shall be held and administered for the benefit of the future as well as the present members, the gift is a perpetuity, and void.

6th ed., p. 279. *Cocks* v. *Manners*, L. R. 12 Eq. 574.

An unlimited gift of the income of property to a society does not amount to the gift of the corpus, but shews an intention that it is given for the benefit of future members; such a gift is therefore void.

6th ed., p. 279. *Re Swain*, 99 L. T. 604.

CHARITABLE GIFTS.

Charitable gifts are an exception to the rule which forbids the creation of perpetuities, in the original sense of the word. Consequently, if there is an absolute immediate gift for a charitable purpose which may last for ever, the gift is good. And this is so, even although the mode in which the property is to be applied depends on a future and uncertain event: as where a testator declares his intention of devoting a fund to charity and directs

Chapter X. in the 6th edition is founded on Part II. of Chapter IX. of the 5th edition, but the first three sections are new.

that when and so soon as land is available for building almshouses the money shall be employed for that purpose, this is a good charitable gift, although land may never be available for the purpose.

6th ed., p. 280. *Goodman* v. *Mayor of Saltash*, 7 App. Cas. at pp. 650, 662.

CONDITIONAL GIFT TO CHARITY.

The exemption of charitable gifts from the rule forbidding the creation of perpetuities makes it possible to create indirectly a perpetuity for non-charitable purposes. Thus, if a testator gives a fund to the trustees of charity A., subject to a condition that they shall keep his family vault in good repair, with a proviso that on failure to comply with the condition the fund is to go to charity B., the condition and gift over are good.

6th ed., p. 280. *Re Tyler* (1891), 3 Ch. 252.
Roche v. *McDermott* (1901), 1 Ir. R. 304.

An option of purchase in respect of land is invalid unless its exercise is restricted to the period allowed by the modern Rule against Perpetuities.

6th ed., p. 281. *London & S. W. R. W. Co.* v. *Gomm*, 20 Ch. D. 562.

TECHNICAL MEANING OF "PERPETUITY."

"A perpetuity is the settlement of an estate or an interest in tail, with such remainders expectant upon it as are in no sort in the power of the tenant in tail in possession to dock by any recovery or assignment." "A perpetuity is where an estate is so designed to be settled in tail, &c., that it cannot be undone or made void." "A perpetuity is the settlement of an interest descendable from heir to heir, so that it shall not be in the power of him in whom it is vested to dispose of it, or turn it out of the channel."

See 1st ed., p. 220, 6th ed., p. 283.

PARTIAL PERPETUITY.

An attempt to create an unbarrable entail is ineffectual, even if it is restricted to a certain number of generations.

6th ed., p. 283. *Seaward* v. *Willock*, 5 East 198.

PERPETUITY BY TERMS OF YEARS.

The law does not allow a "perpetuity" to be created by means of terms of years.

Idem. *Beard* v. *Wescott*, 5 B. & Ald. 801.

PERPETUITIES NOT ALLOWED IN EQUITY.

A "perpetuity" cannot be created by means of a trust. "If in equity you could come nearer to a perpetuity than the rules of common law would admit, all men, being desirous to continue their estates in their families, would settle their estates

by way of trust, which might indeed make well for the jurisdiction of Chancery, but would be destructive to the commonwealth."

6th ed., p. 284. *Duke of Norfolk* v. *Howard*, 1 Vern. 164.

EVERY ENTAIL IS BARRABLE.

If there is one thing that has been settled beyond all question in the real property law of this country, it is that no condition, no restriction, no prohibition, no limitation over, can prevent a tenant in tail from suffering a common recovery with all its consequences.

Idem. *Dawkins* v. *Lord Penrhys*, 4 App. Ca. 51.

WHITBY V. MITCHELL.

In Whitby v. Mitchell, land was limited to an unborn person for life, with remainder to the children of that unborn person: it was held that the remainder to the children was bad.

5th ed., p. 249. Idem, 2 Ch. D. 494, 44 Ch. D. 85.

RULE DOES NOT APPLY TO PERSONALTY.

It is hardly necessary to say that the rule in Whitby v. Mitchell, being a rule applying only to contingent remainders, does not apply to limitations of personal estate.

6th ed., p. 285. *Re Bowles* (1902), 2 Ch. 650.

MR. FEARNE'S STATEMENT OF THE RULE.

Any limitation in future, or by way of remainder, of lands of inheritance, which in its nature tends to a perpetuity, even although there be a preceding vested freehold, so as to take it out of the description of an executory devise, is by our Courts considered as void in its creation; as in the case of a limitation of lands in succession, first to a person in esse, and after his decease to his unborn children, and afterwards the children of such unborn children, this last remainder is absolutely void.

5th ed., p. 218, 6th ed., p. 285. The rule applies to equitable as well as legal estates. *Re Nash* (1910), 1 Ch. 1.

CY-PRES DOCTRINE.

Although the law does not allow a testator to devise land to successive unborn generations, as purchasers, the Courts have, in certain cases, endeavoured to carry out his intention by giving effect to the devise within the limits allowed by law. This is the doctrine of cy-pres, or approximation, under which the limitation to the unborn descendants is converted into an estate tail.

6th ed., p. 288.

DOCTRINE NOT RESTRICTED TO EXECUTORY TRUSTS.

The doctrine of cy-pres is based on the presumed intention of the testator. In the case of an executory trust, however, greater latitude is allowed in moulding the limitations in order

to carry out the intention of the testator, than where he has been his own conveyancer.

6th ed., p. 289. *Parfitt* v. *Hember*, L. R. 4 Eq. 443; *Re Mortimer* (1905), 2 Ch. 502.

DOCTRINE NOT TO BE EXTENDED.

Being an anomaly, the doctrine of cy-pres ought not to be extended.

6th ed., p. 289.

WHO TAKES ESTATE TAIL.

In all these cases where successive life estates are given to A. and his issue, A. takes a life estate; and his first descendant in the line of succession takes an estate tail.

6th ed., p. 289.

GIFT TO UNBORN PERSON FOR LIFE WITH REMAINDER TO ISSUE IN TAIL.

The case in which the question of the application of the doctrine most frequently arises is where an estate tail is expressly given. The doctrine of cy-pres applies where lands are limited to an unborn person for life, with remainder to his first and other sons successively in tail, in which case, as such limitations are clearly incapable of taking effect in the manner intended (the remainder to the issue being, as we have seen, absolutely void), the doctrine in question gives to the parent the estate tail that was designed for the issue; which estate tail (unless barred by the parent or his issue being tenant in tail for the time being) will comprise, in its devolution by descent, all the persons intended to have been made tenants in tail by purchase. The intention that the testator's bounty shall flow to the issue, is considered as the main and paramount design, to which the mere mode of their taking is subordinate, and the latter is therefore sacrificed.

1st ed., p. 260, 6th ed., p. 291. *Hampton* v. *Holman*, 5 Ch. D. 190.

DOCTRINE OF CY-PRÈS NOT CONFINED TO FIRST SET OF LIMITATIONS.

The doctrine in question is not confined to the first set of limitations requiring modification, but is extended to all that follow.

5th ed., p. 270, 6th ed., p. 294.

HOW FAR DOCTRINE APPLIES TO PERSONALTY.

It follows from the nature and history of the doctrine of cy-pres that it cannot be fully applied to limitations of personal estate. But the principle of carrying out the general intention of a testator is applied to such cases as far as possible.

Ibid. *Routledge* v. *Dorril*, 2 Ves. Jun. 365.

It is settled that the doctrine is not applicable where the limitation to the children of the unborn persons gives them an estate in fee simple.

5th ed., p. 271, 6th ed., p. 295. *Bristow* v. *Warde*, 2 Ves. Jun. 336.

EXECUTORY LIMITATIONS ON FAILURE OF ISSUE.

Under executory limitations of this kind land could formerly be tied up for a longer period than was possible by means of an ordinary entail. Thus, under a devise to A. in fee simple, and if he die without issue living at his death then to B. in fee simple, and if he die without issue living at his death, then to C. in fee simple, and so on, it was impossible for A. to dispose of the land without the concurrence of B., C., &c., although under an ordinary strict settlement in tail, A. and his eldest son could have barred the entail at any time after the son came of age.

6th ed., p. 295.

CONVEYANCING ACT, 1882.

In order to prevent this result, the Conveyancing Act, 1882, enacts (sect. 10) that where a person is entitled to land with an executory limitation over on default or failure of all or any of his issue, that executory limitation shall become void and incapable of taking effect as soon as there is living any issue who has attained twenty-one of the class, on default or failure of which the limitation over was to take effect.

6th ed., p. 295.

MODERN RULE AGAINST PERPETUITIES.

The rule now to be considered is of comparatively recent growth, for although the necessity of imposing some check on the creation of future interests in real and personal property of a kind unknown to the common law, began to be felt shortly after the modern modes of settling property by means of uses, trusts, and executory devises and bequests were introduced, it was not until 1833 that the terms of the rule were definitely settled, and even at the present day the precise limits of its scope and application are a matter of doubt.

6th ed., p. 295. *Cadell* v. *Palmer*, 1 Cl. & F. 372.

RULE STATED.

Subject to the exceptions to be presently mentioned, no contingent or executory interest in property can be validly created, unless it must necessarily vest within the maximum period of one or more lives in being and twenty-one years afterwards. Consequently, a devise or bequest not falling within one of these exceptions, is void if it is to take effect on the happening of an event at some indefinite future time, or within a fixed period exceeding twenty-one years; for it is not necessary that the period within which the interest is to vest should be limited with reference to a life.

6th ed., p. 296.

How Many Lives May be Taken.

Nor is it necessary that the life or lives specified in the limitations should be those of persons taking an interest in the property, and the number of lives which the testator is allowed to specify is only limited by the requirement that it must be possible to ascertain who they are, and obtain evidence of their death. It is true that in some of the cases it is laid down that an indefinite number of lives may be taken, but this must be understood to mean the lives of named persons.

6th ed., p. 297. *Robinson* v. *Hardcastle*, 2 Bro. C. C. 30.

The language of all the cases is, that property may be so limited as to make it inalienable during any number of lives, not exceeding that, to which testimony can be applied, to determine when the survivor of them drops.

6th ed., p. 297.

Commencement of Period.

Every person whose life is specified as forming part of the period allowed by the rule must be in existence at the death of the testator, a child en ventre sa mere being deemed to be in existence for the purposes of the rule. If no life is specified, then the period of twenty-one years is calculated from the death of the testator. In any case, the period of twenty-one years is to be taken as a term in gross, without reference to the infancy of any person. A period is allowed for gestation only in those cases where gestation actually exists.

6th ed., p. 298. *Long* v. *Blackall*, 7 T. R. 100; *Cadell* v. *Palmer*, 10 Bing. 140.

Period of Gestation.

A possible addition of the period of gestation to a life and twenty-one years, occurs in the ordinary case of a devise or bequest to A. (a person of the male sex) for life, and after his death to such of his children as shall attain the age of twenty-one years, or, indeed, in the case of a devise or bequest simply to the children of A. (a male) who shall attain majority, though not preceded by a life interest; in either case A. may die leaving a wife enceinte, and, as such child would not acquire a vested interest until his majority, the vesting would be postponed until the period of twenty-one years beyond a life in being, with the addition, it might be, of nine or ten months; and if, to either of these supposititious cases, we add the circumstance that A., the parent, were (as of course he might be) an infant en ventre sa mère at the testator's decease, there would be gained a double period for gestation (namely), one at the commencement, and another at an intermediate part of the period of postponement.

To treat the period of gestation, however, as an adjunct to the lives, is not, perhaps, quite correct. It seems more proper to say that the rule of law admits of the absolute ownership being suspended for a life or lives in being, and twenty-one years afterwards, and that, for the purposes of the rule, a child en ventre sa mère is considered as a life in being.

1st ed., p. 222, 6th ed., p. 298. *Re Wilmer's Trusts* (1903), 2 Ch. 411.

VESTING CANNOT BE POSTPONED FOR A GROSS TERM EXCEEDING TWENTY-ONE YEARS.

Where the vesting of a gift is postponed for a fixed term exceeding twenty-one years, the gift is unquestionably void, although not preceded by a life; for the fact of the testator not having availed himself of the allowance of a life does not enable him to take a larger number of years.

5th ed., p. 216, 6th ed., p. 298. *Polmer* v. *Holford*, 4 Russ. 403.

The principle of this case clearly would apply where any, the most inconsiderable, addition was made to the term of twenty-one years; therefore a devise to such of the grandchildren of the testator as should be living at the expiration of twenty-one years and one day from the testator's decease, would clearly be void.

1st ed., p. 231, 6th ed., p. 299.

POSSIBLE, NOT ACTUAL EVENTS TO BE CONSIDERED.

If vesting depends on an event which may possibly happen after the expiration of the period allowed by the Rule, the gift is void however improbable it may be that the event should happen after that period, and even if it does in fact happen within the period.

6th ed., p. 299. *Hodson* v. *Boll*, 14 Sim. 558.

STATE OF THINGS EXISTING AT TESTATOR'S DEATH TO BE REGARDED.

In deciding the question of remoteness, the state of circumstances at the date of the testator's death, and not their state at the date of the will, is to be regarded. Thus, if a testator bequeaths money in trust for A. for life, and after his death for such of his children as shall attain the age of twenty-five, the latter trust would be void if the testator were to die before A.; yet if A. should die before the testator leaving children, of whatever age, the trust will be good, since it must of necessity vest or fail within lives in being, viz., the lives of the children.

6th ed., p. 300. *Wilkinson* v. *Duncon*, 30 Beav. 111.

FUTURE INTEREST MAY EXTEND BEYOND THE PERIOD ALLOWED BY THE RULE.

A future interest is not obnoxious to the Rule if it begins within the proper period, although it may end beyond it; in

which case, if it is a limited interest, it may tie up the property for more than twenty-one years beyond a life in being. Thus, if property is given upon trust for the unborn children of A. until the youngest attains twenty-one, and then upon trust for all of them during their lives, this is good.

6th ed., p. 301. *Gooch* v. *Gooch*, 3 D. M. & G. 366.

CLAUSE OF CESSES OR FORFEITURE.

On the same principle, if a remainder or reversionary interest is vested, that is, if it is ready to take effect whenever and however the particular estate determines, it is immaterial that the particular estate is determinable by a contingency which may fall beyond a life or lives in being. Thus, if property is given to the eldest child of A., a bachelor for life, or until he or she shall become a Roman Catholic, and subject as aforesaid to the other children of A. absolutely, and A. has three children, X., Y., and Z., here Y. and Z. take vested interests and the gift in remainder to them is good.

6th ed., p. 301. *Wainwright* v. *Miller* (1897), 2 Ch. 255.

GIFT CONTINGENT IN FORM ONLY.

It sometimes happens that a gift which appears to transgress the Rule is valid, because the interests created, although in form contingent, are really vested. Thus, an immediate gift to the children of A. who attain the age of twenty-five is good if one of them has attained that age before the testator's death.

6th ed., p. 302. *Fox* v. *Fox*, L. R. 19 Eq. 286.

DISTINCTION AS TO CONTINGENT REMAINDERS.

Whether the modern rule against perpetuities does or does not apply to contingent remainders it is well settled that there is a distinction between executory devises and legal contingent remainders in this respect, that a limitation may be good as a contingent remainder, although it would have been void as an executory devise. Thus, if land is devised to A., a bachelor, for life, with remainder to such son of his as first attains twenty-five, this remainder is good, because it must vest, if at all, on A.'s death, that is, within the period allowed by the Rule. This apparent exception to the Rule is discussed in connection with gifts to classes.

6th ed., p. 302.

AS TO CONTINGENT LIMITATIONS BY WAY OF REMAINDER IN EQUITABLE INTERESTS.

Contingent remainders of trust or equitable estates are not governed by the same rule as contingent remainders of legal estates; for they do not necessarily vest or fail upon the determination of the previous estate, but await the happening of

the contingency on which they are limited, and are, therefore, invalid if that contingency be too remote. But, like executory devises, they are good after an estate, tail, if limited on an event which must necessarily happen at or before the determination of that estate, e.g., a trust for a class to be ascertained at or before such determination.

5th ed., p. 225, 6th ed., p. 303. *Re Brooke* (1894), 1 Ch. 43; *Moneypenny* v. *Dering*, 7 Ha. 568, 590; *Heaseman* v. *Pearse*, L. R. 7 Ch. 275.

ATTEMPT TO POSTPONE ENJOYMENT.

If a vested interest in property is given to a person with a direction that payment or possession shall be postponed for a period beyond the limits allowed by the Rule, this direction, being inoperative, does not affect the validity of the gift.

6th ed., p. 303. *Greet* v. *Greet*, 5 Beav. 123.

QUESTION WHETHER GIFT IS CONTINGENT OR VESTED SUBJECT TO BEING DIVESTED.

Where, however, there is a direction that payment or possession shall be postponed, it is often a matter of no inconsiderable difficulty from the ambiguity of the testator's language, to determine whether the postponement applies to the vesting or only to the enjoyment; and if the original gift is followed by a clause disposing of the shares of objects dying under the specified age, a further and still more perplexing question arises; namely, whether the vesting is originally deferred until the prescribed age, or the shares are immediately vested, with a liability to be divested; in other words, whether the specified age is the period of vesting or the period of the shares becoming absolute, in case of the objects dying before such age.

1st ed., p. 253, 6th ed., p. 304.

The question whether a gift is contingent on the happening of a remote event, and therefore void under the Rule, or whether it is vested subject to being divested, and therefore good, most frequently arises in the case of gifts to children and other classes.

6th ed., p. 304. See Chapter XLII.

WHERE VESTED INTEREST MAY NOT COME INTO POSSESSION UNTIL AFTER PERIOD ALLOWED BY RULE.

If a future interest is vested, it is immaterial that the particular interest which precedes it is determinable by a contingency which may happen beyond the limits allowed by the Rule. Thus, if property is given to an unborn person until he dies or changes his name, and then to B., a living person, B. has a vested interest.

6th ed., p. 305. *Re Roberts*, 19 Ch. D. 520.

INTERESTS MUST BE ASCERTAINED WITHIN PERIOD.

If the persons to whom a gift is made may not be ascertained within the required limits, the gift is too remote, although all the persons who can possibly claim under the gift must be determined within these limits, and a conveyance by them would, therefore, pass the entire interest.

6th ed., p. 305.

GIFT TO LIVING PERSON MAY BE TOO REMOTE.

A contingent gift of a transmissible interest to a living person is bad if it may not vest within the period allowed by the Rule. But a gift to a living person, if living at the end of forty-nine years, or to his issue if he be then dead leaving issue, must take effect, if at all, within the limits allowed by the Rule, and is therefore good.

6th ed., p. 305. *Re Brown and Sibly's Contract*, 3 Ch. D. 156; *Re Daveron* (1893), 3 Ch. 421.

RESTRICTIONS ON ALIENATION.

It has been decided that the Rule applies to restrictions on alienation, as, for example, where property is given to an unborn woman with a restraint on anticipation.

6th ed., p. 305. *Re Teague's Settlement*, L. R. 10 Eq. 565.

WHERE GIFTS DIVISIBLE.

Where property is given to a class, with a direction that the share of each member shall be subject to some restraint on alienation, the restraint may be good in the case of some members of the class, and bad in the case of the others.

6th ed., p. 306. *Cooper* v. *Laroche*, 17 Ch. D. 368.

DEFEASIBLE INTEREST MAY BE MADE ABSOLUTE BY OPERATION OF RULE.

If property is given to A., with a proviso that on the happening of an event which need not necessarily happen within the limits of the Rule, the property shall go over to B., the proviso is void, and A. takes absolutely.

6th ed., p. 306. *Harding* v. *Nott*, 7 E. & B. 650.

TRUSTS AND POWERS.

The operation of the Rule is not confined to beneficial interests, but extends also to trusts and powers. Thus, if lands are devised in strict settlement with a direction to the trustees in certain events to revoke the limitations and resettle the lands in favour of persons beyond the limits of the Rule, this direction is void. So a trust for sale is bad if it cannot (or may not) arise until after the period allowed by the Rule. But an immediate trust for sale (if the beneficiaries to take under it must be ascertained within due limit of time), is not void for remoteness.

although no limit is put to the time within which it may be exercised.

6th ed., p. 307. *Goodier* v. *Edmonds* (1803), 3 Ch. 455; *Re Douglas and Powell* (1902), 2 Ch. 296.

DISCRETIONARY TRUST.

A discretionary trust seems to be similar to a power of appointment; that is to say, if it can only be exercised within the limits of the Rule it is good, but if it can be exercised beyond those limits it is bad. Thus, a discretionary trust for the benefit of the unborn children of A. during their lives, with a trust to accumulate the unapplied income, is bad, because, until the discretion is exercised, no child has a vested right, and if the discretion were exercised beyond the limits of the Rule, an infringement would necessarily result.

6th ed., p. 308. *Re Blew* (1906), 1 Ch. 624.

TRUSTS FOR ACCUMULATION.

Trusts for accumulation of income are subject to special restrictions and exemptions. As a general rule, a trust for accumulation beyond the limits allowed by the Rule is bad, independently of the Thellusson Act. But trusts for accumulation to pay debts or mortgages are not within the mischief of the Rule. And where property is given to a person absolutely, with a superadded direction to accumulate the income beyond the limits allowed by the Rule, the direction may be disregarded, on the ground that it is an illegal restraint on ownership. But, of course, this principle does not apply where the vesting is postponed until the expiration of the period of accumulation.

6th ed., p. 308. *Scarisbrick* v. *Skelmersdale*, 17 Sim. 187.

EXECUTORY TRUSTS.

In executing an executory trust, the Court will mould the limitations in such a way as to avoid infringing the Rule against perpetuities, if possible.

6th ed., p. 309.

If an executory trust must be executed, if at all, within the required limits, and the trust, when executed, is such as would have been good if executed by the testator, it is valid. The possibility that it may not be capable of such execution does not render it wholly void.

6th ed., p. 309.

WHEN POWER IS TOO REMOTE.

With regard to powers, the general rule is that if a power can be exercised at a time beyond the limits of the Rule (which happens where the donee of the power and the occasion on which it can be exercised, may both be in existence beyond the

limits of the Rule) the power is bad. Thus, a power which is to take effect on a general failure of the issue of a marriage, or a power to appoint by will given to a person who may not be ascertained within the limits of the rule, is bad. On the other hand, a power which must be exercised, if at all, during the period allowed by the Rule, is not rendered bad by the fact that within its terms an appointment could be made which would be too remote; as, where a power is given to A. to appoint to the issue of himself or another person. The mere existence of such a power does not affect the validity of the subsequent limitations.

6th ed., p. 309. *Wollaston* v. *King*, L. R. 8 Eq. 165; *Stark* v. *Dakyns*, L. R. 10 Ch. 35.

WHERE DONEE IS A LIVING PERSON.

A power of appointment given to a living person cannot be void for remoteness, because it must be exercised, if at all, during his lifetime. But it may be inoperative if it is a special power, and if the objects are not ascertainable within due limits of time. Thus, a power given to A. to appoint to his first grandchild who shall be born five years after his death, and shall attain twenty-one, cannot be exercised at all, and is, therefore, ineffectual. And it seems that the efficacy of a power may depend on events which happen after its creation.

6th ed., p. 310. *Blight* v. *Hartnoll*, 19 Ch. D. 294.

DIVISIBLE POWERS.

A power may be divisible, as regards the donee, so as to be equivalent to two powers, and if one of them is good, it is not affected by the badness of the other. Thus, a power for A. or the trustees for the time being of the testator's will to raise a certain sum of money for purposes not necessarily within the proper limits, may be good as to A. and bad as to the trustees.

6th ed., p. 311. *Attenborough* v. *Attenborough*, 1 K. & J. 296.

Limitations in default of appointment under a power which is void for remoteness are good, unless they are themselves obnoxious to the Rule against perpetuities.

6th ed., p. 311. *Re Abbott* (1893), 1 Ch. 54.

AS TO VALIDITY OF INDEFINITE POWERS OF SALE.

At one period it was much doubted whether a power of sale introduced into a deed or will containing limitations in strict settlement, and which was not in terms restricted in its exercise to the period allowed by the law, was valid. The affirmative has now been decided in several instances.

1st ed., p. 250. 6th ed., p. 311. *Waring* v. *Coventry*, 1 My. & K. 249; *Lantsberry* v. *Collier*, 2 K. & J. 700.

An unlimited power of sale may be good if it is intended to be exercised (if at all) within a reasonable time after the testator's death: e.g., to pay debts and legacies.

6th ed., p. 312. *Re Dyson and Fowke* (1896), 2 Ch. 720.

TRUSTS AND POWERS DURING MINORITIES OF TENANTS IN TAIL.

In all cases where under a deed or will a strict settlement is created, and (as is usually done) power is given to the trustees during the minority of any person entitled under the settlement to manage and let the property and receive the rents and profits, or to cut timber and sell it, and invest the moneys arising thereby in the purchase of other lands to be settled to the same uses, the exercise of these powers must be carefully restricted to the period of the minorities of tenants in tail by purchase, else the powers will be altogether void.

Taken from 3rd ed.; 6th ed., p. 313.

It has been already explained that where a term vested in trustees is precedent to the estate tail, and is, therefore, not barrable, the trusts annexed to the term will be void for remoteness if they exceed the limits allowed by the Rule against perpetuities, and the same principle, of course, applies if the trusts are annexed to a fee simple estate vested in the trustees.

6th ed., p. 314. *Marshall* v. *Holloway*, 2 Swanst. 432.

As the payment of all the debts of a testator can now be enforced out of his real as well as his personal estate, there seems, on the principle above noticed, no reason at the present day to doubt the validity of a trust for the accumulation for any period, however long, of the income of all or any part of a testator's property, whether real or personal, for the purpose of paying his debts.

6th ed., p. 316.

APPOINTMENTS UNDER POWERS.

In the case of appointments, testamentary or otherwise, under powers of selection or distribution in favour of defined classes of objects, the appointees must be persons competent to have taken directly under the deed or will creating the power. The test, therefore, by which the validity of every such gift must be tried is, to read it as inserted in the deed or will creating the power, in the place of the power.

1st ed., p. 248, 6th ed., p. 316. *Robinson* v. *Hardcastle*, 2 T. R. 241, 380, 781.

EFFECT OF POWER AND APPOINTMENT, OR ONE OF THEM, EMBRACING TOO WIDE A RANGE OF OBJECTS.

Where a power does in terms authorise an appointment to issue only who are born within due limits, an appointment to a

more extensive range of issue would be totally void if made to the whole as a class to take as tenants in common, for the shares of the issue who are within the line could not be ascertained. But in the converse case, viz., that of the power embracing issue generally and the appointment being duly restricted to issue within the prescribed boundary, there can be no doubt that the appointment would be good. If the power and appointment both embrace too wide a range of objects, and the appointment is made to the children or issue as a class, it will, according to the general principle before adverted to, be void in toto, as well as to members of the class who are within, as to those who are not within, the line.

5th ed., p. 260, 6th ed., p. 318. *Attenborough* v. *Attenborough*, 1 K. & J. 296.

SEPARATE AND SEVERABLE APPOINTMENTS.

If, however, a separate sum is appointed to each member of the class independently of the others, the appointment is good as to those who come within the limits allowed by the Rule, and bad as to the others. And if the power and the appointment are so limited that the shares of all the appointees can be ascertained within the proper limits, no question of remoteness arises; the appointment is good as to the appointees who are objects of the power, and void as to the others.

6th ed., p. 319. *Wilkinson* v. *Duncan*, 7 Jur. N. S. 1182; *Re Hallinan's Trusts* (1904), 1 Ir. R. 452.

UNBORN CHILD.

Again, although under a special power to appoint to children, a life estate may (as we have seen) be limited to a child unborn at the time of the creation of the power, the limitation to such child of a power to appoint by will would be void, since it would tie up the property until the death of the unborn child. But such a power may be limited to a child born at the time of the creation of the power.

6th ed., p. 319. *Morgan* v. *Gronow*, L. R. 16 Eq. 1; *Phipson* v. *Turner*, 9 Sim. 227.

A determinable life interest, however, may be appointed to an unborn child. So, an appointment to a child (unborn at the creation of the power) for life, with remainder to his executors or administrators as part of his personal estate, is good.

6th ed., p. 320. *Re Gage* (1898), 1 Ch. 498; *Webb* v. *Sadler*, L. R. 8 Ch. 419.

APPOINTMENT BY REFERENCE.

An appointment may be made by reference. And accordingly, if under a special power a testator appoints to the uses or trusts of an existing deed, "or such of them as are capable

of taking effect," the phrase "capable of taking effect" may be construed as meaning what the law allows to take effect, so that if some of the uses or trusts fail by reason of the Rule against perpetuities being infringed, they may be treated as excluded from the appointment.

6th ed., p. 320. *Re Finch and Chew's Contract* (1903), 2 Ch. 486.

ABSOLUTE GIFT FOLLOWED BY QUALIFICATIONS VOID FOR REMOTENESS.

The doctrine that where a gift is absolute in the first instance, and is followed by qualifications or restrictions which are void for remoteness, the original gift prevails, applies to appointments under powers. In fact, many of the leading cases on the doctrine are cases of appointments.

6th ed., p. 320.

UNDER GENERAL POWERS TIME IS COMPUTED FROM THE APPOINTMENT.

The test of the validity of appointments under special powers above alluded to is, of course, not applicable to appointments under general powers, because such powers are, in point of alienation, equivalent to absolute ownership: the donee can dispose of the property as he pleases. It follows that the period for the commencement of limitations under such appointments in point of remoteness is the time of the execution of the power, and not of the creation of it.

5th ed., p. 261, 6th ed., p. 321. *Re Flower*, 55 L. J. Ch. 200.

LIMITATIONS AFTER FAILURE OF ISSUE.

An executory limitation to arise on an indefinite failure of issue of any person living or dead, is of course, void for remoteness.

6th ed., p. 321. *Carter* v. *Bentall*, 2 Beav. 551; *Webster* v. *Parr*, 26 Beav. 236.

EXCEPTION WHERE PREVIOUS GIFT FAILS.

This rule, however, does not apply if the original gift itself fails to take effect on the death of the testator. Thus, if leaseholds are bequeathed to A. for life, with remainder to his sons in tail, with remainder to B. in tail, and A. dies without issue during the lifetime of the testator, the gift to B. is good, and gives him an absolute interest in the leaseholds. If A. were to survive the testator, the gift over to B. would be absolutely bad.

6th ed., p. 321. *Williams* v. *Lewis*, 6 H. L. C. 1013.

EXCEPTION IN CASE OF EXECUTORY DEVISE ENGRAFTED ON AN ESTATE TAIL.

In the case of real estate, moreover, if an executory devise is so limited that it must necessarily take effect either during the continuance, or immediately after the determination, of an

estate tail, it will be good, because the power which resides in the owner of that estate to destroy all posterior limitations, executory as well as vested, takes the case out of the mischief which the Rule against perpetuities was designed to prevent.

6th ed., p. 321. *Att.-Gen.* v. *Milner*, 3 Atk. 112.

DISTINCTION AS TO LEGAL CONTINGENT REMAINDERS. DIFFERENCE BETWEEN AN EXECUTORY DEVISE AND A REMAINDER.

If, however, the event on which a limitation after an estate tail is to take effect may not happen until after the estate tail has determined, there is a difference between a legal contingent remainder on the one hand, and an equitable contingent remainder or an executory devise on the other. For if the limitation is equitable or executory, so that there may be an interval during which it is indestructible, it is void ab initio. If, on the other hand, the limitation after the estate tail is a legal contingent remainder, the remoteness of the event upon which it is to vest is immaterial, since it is always barrable as long as the estate tail continues; and if, being unbarred, it is not vested when the latter determines, it fails for want of a particular estate.

6th ed., p. 322. *Jack* v. *Fetherstone*, 2 Huds. & Br. 320. *Abbiss* v. *Burney*, 17 Ch. D. 211.

TERM OF YEARS, WHETHER ULTERIOR OR PRECEDENT TO ESTATE TAIL.

A term of years (like any other estate) may be made expectant by way of remainder on an estate tail; but sometimes it happens that the term is so limited as to render it hard to say whether it is ulterior or precedent to the estate tail. If the term is precedent to the estate tail, of course it cannot be defeated by the acts of the tenant in tail; and in such case, if the trusts of the term are not to arise until the failure of issue under the entail, those trusts are necessarily void.

6th ed., p. 323. *Eales* v. *Cone*, 4 Sim. 65.

A DEVISE OF A REVERSION MAY BE VOID WHEN A SIMILAR DEVISE OF A REMAINDER WOULD BE GOOD.

The devise of an estate in reversion may, it seems, be void, for remoteness when a devise of an estate in remainder would not. A reversion is, in fact, a present interest, since it carries the services and rent (if any) during the subsistence of the particular estate; and a devise of it, therefore, contingently on a future event is, like a similar devise of any other estate in possession, an executory limitation which need not vest eo instanti that the particular estate determines, and is void if the event be too remote.

6th ed., p. 325. *Bankes* v. *Holme*, 1 Russ. 394.

EQUITABLE CONTINGENT REMAINDERS.

Equitable contingent remainders (or, more properly, executory equitable interests) in land are not governed by the same rule as contingent remainders of legal estates; for they do not necessarily vest or fail upon the determination of the previous estate, but await the happening of the contingency on which they are limited, and are, therefore, invalid if that contingency be too remote. But, like executory devises, they are good after an estate tail, if limited on an event which must necessarily happen at or before the determination of that estate, as in the case of a trust for a class to be ascertained at or before such determination.

5th ed., p. 227, 6th ed., p. 326. *Heasman* v. *Pearce*, L. R. 7 Ch. 275.

PERSONAL PROPERTY.

A gift of personal property to a person in tail gives him, as is well known, an absolute interest. The result of this rule may be to make a gift valid which would otherwise be too remote.

6th ed., p. 326. *Re White* (1901), 1 Ch. 570.

GIFTS TO CLASSES—CLASS NOT TO BE ASCERTAINED WITHIN DUE LIMITS.

A gift to a class of persons is void if the time at which the class is to be ascertained is not within the period allowed by the Rule.

6th ed., p. 327. *Lett* v. *Randall*, 3 Sm. & G. 83.

GIFTS TO CLASSES OF UNBORN PERSONS.

The most frequent instances of the transgression of the Rule against Perpetuities occur in devises or bequests to classes comprising either individuals who may not come into existence at all during a life in being and twenty-one years afterwards, or persons who may not be in esse at the death of the testator, and the vesting of whose shares is postponed beyond majority. In the former case the Rule is fatally violated, even though the gift to the unborn objects is so framed as to confer on them vested interests immediately on their birth.

1st ed., p. 226, 6th ed., p. 327. *Dodd* v. *Wake*, 8 Sim. 616.

DISTINCTION IN REGARD TO REMAINDERS.

A limitation which would as an executory devise be void for remoteness, may be good as a contingent remainder, on account of the necessity, which the rules applicable to contingent remainders impose, of its vesting, if at all, at the instant of the determination of the preceding estate for life. Such an estate, therefore, if limited to a person who was in existence at the death of the testator, necessarily restricts the devise within proper bounds. Thus, if lands of which the testator had

the legal inheritance be devised to A. for life, with remainder in fee to the children of A. who shall attain the age of twenty-two, the devise in remainder will be good, because if at the death of A. no child has attained the vesting age, the remainder will fail under the doctrine in question; and if any child has attained that age, the devise will take effect in favour of such child, to the exclusion of any child or children afterwards attaining the prescribed age.

1st ed., p. 220, 6th ed., p. 328. *Alexander* v. *Alexander*, 10 C. B. 50.

WHERE INTERESTS ARE VESTED.

It has been already mentioned that a gift which is apparently contingent and void for remoteness, is valid because it confers an interest which is vested subject to being divested.

6th ed., p. 329.

POSTPONEMENT OF PAYMENT OF VESTED SHARES BEYOND AGE OF TWENTY-FIVE.

Again, if there is a gift to the children of A., followed by a direction to postpone payment of the respective shares until the children attain twenty-five, this direction is disregarded, and the children of A. living at the testator's death take vested interests.

6th ed., p. 329.

CLASS CAPABLE OF ENLARGEMENT OR DIMINUTION.

An apparent exception to the doctrine that vested interests are not open to the objection of remoteness, occurs in those cases where property is given to a class which is liable to fluctuation after the period allowed by the Rule. Thus, suppose property to be given to A., a bachelor, for life, with remainder to his eldest son for life, remainder to those children of B. who attain twenty-five: at the testator's death B. is living, and one of his children has attained twenty-five. Here C.'s interest is vested, and yet the gift to B.'s children is too remote, for although the maximum size of each child's share will be fixed at B.'s death, the minimum may not be determined until twenty-five years afterwards.

6th ed., p. 329.

CLASS ASCERTAINED AT TESTATOR'S DEATH.

A gift to a class may be good, because although it is, in form, a gift to a class which may not be ascertained within due limits, it is in fact (having regard to the state of things existing at the testator's death), a gift to a class which must be ascertained within due limits.

6th ed., p. 330. *Picken* v. *Matthews*, 10 Ch. D. 264.

GIFT OF PERSONAL ESTATE TO A CLASS WHICH MAY COMPRISE OBJECTS TOO REMOTE, VOID AS TO ALL.

Where a gift to a class extends to objects too remote, the fact that some of the objects eventually composing the class were actually born within the period allowed by the rule of law, will not render the gift valid, quoad those objects.

1st ed., p. 231, 6th ed., p. 331. *Leake* v. *Robinson*, 2 Mer. 363.

CLASS OF CHILDREN AND GRANDCHILDREN.

The question has been much discussed in cases where there is a gift to a class composed of the children and grandchildren of a person.

6th ed., p. 332.

But in applying the Rule against perpetuities, the effect of the Rule is not allowed to influence the construction of the will, and it is now established that if the gift is to a class it cannot be severed.

6th ed., p. 333. *Pearks* v. *Moseley*, 5 App. Ca. 714.

ORIGINAL AND SUBSTITUTIONAL GIFTS—SOME MAY BE VALID.

If, however, the gift to the children is really original, and the gift to the grandchildren substitutional, the gift to the children is good.

6th ed., p. 333. *Goodier* v. *Johnson*, 18 Ch. D. 441.

INDEPENDENT GIFTS.

Another difficult class of cases is where the question arises whether the testator has made an independent gift to each member of the class. Where he gives a fixed sum to each member of the class the gifts are separable, and will take effect or fail according to the event.

5th ed., p. 238, 6th ed., p. 334. *Boughton* v. *Boughton*, 1 H. L. C. 406.

SEPARABLE GIFTS.

And even where a fund is given among a number of unascertained persons, so that the share of each depends on the number of the class, yet if this number must be ascertained within the limits of the Rule against perpetuities the gifts are separable.

Ibid. *Griffith* v. *Pownall*, 13 Sim. 393.

GIFT TO A CLASS INCLUDING A NAMED PERSON.

Where the testator has combined with the remote class a living person in such a manner as to constitute him a member of the class, the gift to him cannot be distinguished from, and therefore shares the fate of, the gift to the other intended objects with which it stands blended and associated.

1st ed., p. 333, 6th ed., p. 330. *Re Mervin* (1891), 3 Ch. 197.

Leake v. Robinson shows that it is not the description of the legatees as children or grandchildren that constitutes them a class, but the mode and conditions of the gift.

6th ed., p. 340.

As to Provisions for Grandchildren.

A testator is in less danger of transgressing the perpetuity rule, whilst providing for his own children and grandchildren, than when the objects of his bounty are the children and grandchildren of another; since, in the former case, he has only to avoid protracting the vesting of the grandchildren's shares beyond their ages of twenty-one years, and then the fact of the gift extending to after-born grandchildren would not invalidate it, because all the children of the testator must be in esse at his decease, and their children must be born in their lifetime, so that they necessarily come into existence during a life in being. On the other hand, a gift embracing the whole range of the unborn grandchildren of another living person would be clearly void, though the shares should be made to vest at majority or even at birth, for the grandfather might have children born after the testator's decease, and as the gift would extend to the children of such after-born children, it would be absolutely void for remoteness, and that, too, according to the principle already laid down, without regard to the fact of there being any such child or not.

1st ed., p. 348, 6th ed., p. 340.

Rules of Construction Not to be Strained to Render Gift Valid.

It is clear that in order to render a gift to a class of persons valid the Court will not depart from the established rule of construction which fixes its range of objects; for though it is probable that the testator, if interrogated on the point, would have consented to restrict the class for the purpose of bringing it within due limits, yet, as the will intimates no such intention, its judicial expositor is not warranted in so dealing with its contents.

1st ed., p. 253, 6th ed., p. 341. *Jee* v. *Audley*, 1 Cox 324.

Gift to Unborn Person Answering a Particular Description.

The doctrine that the validity of a gift is to be tried by possible, not actual events, is, of course, applicable no less to gifts to individuals than to gifts to classes. If, therefore, the devise or bequest be in favour of an unborn person, who may not answer the required description within a life and twenty-one years, it will be void, although a person should happen to answer the description within such period. Thus, if a testator give real or personal estate to an unborn person, who shall thereafter happen to acquire some personal qualification, which is attainable at any period of life, and is not necessarily confined to minority, as in the case of a gift to the first son of A. who shall obtain a commission in the Army, take a degree at the university,

or marry, it is conceived that the gift would be void, even though A. should happen to have a son who should answer the required qualification before the age of twenty-one."

1st ed., p. 342, Jarman, p. 342. *Proctor* v. *Bishop of Bath and Wells*, 2 H. Bl. 358.

LIMITATION TO A SERIES.
TESTATOR MAY MOULD HIS DISPOSITION ACCORDING TO SUBSEQUENT EVENTS.

Questions of this kind frequently arise where property is attempted to be limited to a series of persons answering a certain description. In such cases there is no principle of law preventing a testator from so framing and moulding his disposition, as to make its validity depend on subsequent events; or, in other words, from availing himself of the course of circumstances posterior to the making of his will, in order to get as wide a range of postponement as possible; for instance, he may convert the intended estate tail of a person then unborn, into an estate for life, in case of his happening to come in esse in his (the testator's) lifetime. In all cases of failure under circumstances of this nature, the deficiency is one not of power but of expression; and the question in every instance is, whether the testator had clearly shown an intention to take the most ample range or period of postponement, which subsequent circumstances admit of.

1st ed., p. 234, 6th ed., p. 343.

RESULT OF THE AUTHORITIES.

Where there is a gift to a series of persons answering a certain description, it is good so far as concerns the first member of that series, if he must take on the death of a living person, although the gift may be bad as regards the second and all the later members of the series, because otherwise they might possibly take beyond the limits fixed by the Rule against Perpetuities.

6th ed., p. 345.

CHILD EN VENTRE.

It will, of course, be remembered that according to the doctrine settled by recent decisions, a child en ventre sa mere is considered a living person, and consequently if there is a devise upon trust for each son of A. successively for life, with remainder to his sons in tail, and a son of A. is en ventre sa mere at the testator's death, then if this son becomes tenant for life by the failure of the prior limitations, the limitations after his life estate are valid, although it may be in his interest to contend that they are void under the Rule against perpetuities.

6th ed., p. 345. *Re Wilmer's Trusts* (1903). 2 Ch. 411.

GIFT TO SURVIVOR OF CLASS.

It is clear that a gift to the survivor of a class of persons will be bad if he will not necessarily be ascertained within the period allowed by the rule, although a gift to the whole class might be good. Thus, if property is given upon trust for A. for life, and after his death upon trust for his children during their lives, and after the death of all the children, except one, upon trust for that one absolutely, this ultimate gift is bad for remoteness.

6th ed., p. 346. *Courtier* v. *Oram*, 21 Bea. 91.

A gift of property to persons answering a certain description at the testator's death is free from objection on the score of remoteness, and sometimes a gift which suggests an intention on the part of the testator to give property to persons in succession has been held to be a gift to individuals living at his death.

6th ed., p. 346. *Liley* v. *Hey*, 1 Ha. 580.

VESTING OF PERSONAL PROPERTY GIVEN IN STRICT SETTLEMENT MUST NOT BE DEFERRED TILL ANY TENANT IN TAIL ATTAINS TWENTY-ONE.

Where freehold lands are limited in strict settlement, and leasehold or other personal property is vested in trustees, upon corresponding trusts, but so as not to vest absolutely in any tenant in tail till he shall attain the age of twenty-one years, but on his death under age to devolve as the freebolds, this trust, so far as it is limited in favour of tenants in tail, is void, since by the death of successive tenants in tail under age and leaving issue the vesting of the leaseholds might be deferred beyond the period allowed by law. Care should therefore be taken that the vesting is only deferred till some tenant in tail by purchase attains the age of twenty-one years.

6th ed., p. 347.

GIFT TO UNBORN PERSON FOR LIFE VALID.

If the objects of a future gift are within the line prescribed by the Rule against Perpetuities, of course it is immaterial what is the nature of the interest which such gift confers. It would be very absurd that persons should be competent to take an estate in fee in land, or an absolute interest in personalty, and nevertheless be incapable of taking a temporary or terminable interest (for the larger includes the less).

1st ed., p. 239, 6th ed., p. 348. *Hayes* v. *Hayes*, 4 Russ. 311, see as to this case, 6 Hare, 250. 1 Coll. 37, 5 Ch. D. 188.

A limitation of land by way of remainder to the children or issue of an unborn person, following a gift for life to such unborn person, is bad.

6th ed., p. 348.

As to Gifts in Remainder Expectant on Estate for Life to Unborn Person, Generally.

As a gift for life to an unborn person is valid, so it is clear is a remainder expectant on such gift, provided it be made to take effect in favour of persons who are competent objects of gift.

5th ed., p. 251, 6th ed., p. 349. *Wainwright* v. *Miller* (1897), 2 Ch. 255.

And as a gift to an unborn person for life is good, so the gift of a life interest to an unborn person determinable on a certain event happening during his lifetime is good, although the event may not happen within the period of a life in being and twenty-one years afterwards.

6th ed., p. 349.

Successive or Cross Life Interests to Unborn Persons.

It is clear that successive life interests may be given to a number of unborn persons, provided they vest within the period allowed by the Rule: as in the case of a gift to A. for life and then to his children successively for their lives; here all the children living at A.'s death take vested interests, although the time of their enjoyment is uncertain. For the same reason, cross-remainders for life can be given to unborn persons.

6th ed., p. 349. *Re Hargreaves*, 43 Ch. D. 401.

Bnt if the ultimate gift is to a person or class of persons who cannot be ascertained within the period allowed by the Rule, it is void for remoteness.

6th ed., p. 350. *Re Gage* (1898), 1 Ch. 498.

Effect of Rule on Ulterior Limitations.
Limitations Dependent on a Remote Gift, Void.

Where a gift is void for remoteness, all limitations ulterior to and dependent on such remote gift are also void, though the object of the prior gift should never come into existence.

5th ed., p. 253, 6th ed., p. 350.

Other Instances.

On the same principle, if there is a gift of personal property upon trust for all the children of A., a living person, who are living at the expiration of twenty-eight years from the testator's death, and in default of such children to X., the gift over is void. So if there is a gift of personal property to A. for life, and after his death to his children who attain twenty-five, and in defanlt of such children to B., the gift over is void.

6th ed., p. 351. *Miles* v. *Harford*, 12 Ch. D. at p. 703.

Independent Limitations.

But a limitation following one which is too remote may be good if it can take effect independently of the void limitation.

For example, a gift over in default of appointment may be good, although the preceding power of appointment is bad for remoteness.

6th ed., p. 351. *Williamson* v. *Farwell*, 35 Ch. D. 128.

VESTED REMAINDER FOLLOWING CONTINGENT REMAINDERS WHICH FAIL.

It will be remembered that legal contingent remainders are subject to two special rules, one requiring that every remainder shall vest on or before the determination of the preceding estate, of freehold, and the other forbidding the limitation of remainders to two or more unborn generations in succession.

6th ed., p. 352. *Whitby* v. *Mitchell*, 44 Ch. D. 85.

As regards the former rule, it is clear that if land is devised to A. for life, with remainder to unborn persons for particular estates (such as estates for life or in tail), with remainder to B., a person in esse, B. takes a vested remainder, and if the intermediate contingent remainders fail, B.'s remainder takes effect.

6th ed., p. 352.

And the same rule, it seems, generally applies where the particular estates are void ab initio.

6th ed., p. 352.

EFFECT OF OLD RULE AGAINST PERPETUITIES.

If, however, there is a vested remainder following a series of limitations which are void because they tend to create a "perpetuity" (or unbarrable entail), within the meaning of the old Rule against perpetuities, then the vested remainder shares the fate of the contingent remainders which precede it.

6th ed., p. 353. *Re Mortimer* (1905), 2 Ch. 502.

ATTEMPT TO CREATE PERPETUITY BY TERMS OF YEARS, &C.

The same principle applies where the testator attempts to create a "perpetuity" or in the nature of an unbarrable entail by limiting successive terms of years.

6th ed., p. 353. *Beard* v. *Westcott*, 5 Taunt. 393.

ALTERNATIVE LIMITATIONS.

Care should be taken to distinguish beteween cases such as those referred to in the preceding section, and those in which the gift over is to arise on an alternative event, one branch of which is within, and the other beyond, the prescribed limits; so that the gift over will be valid, or not, according to the event.

5th ed., p. 255, 6th ed., p. 354. *Leake* v. *Robinson*, 2 Mer. 363.

DIVIDING OR "SPLITTING" A GIFT OVER.

It often happens that a testator frames a gift over to take effect on an event which really includes two contingencies, one within, the other beyond, the limits allowed by law, and that

the former happens. In such a case, the Courts refuse to divide or split the event, and the gift over consequently fails.

6th ed., p. 356. *Lord Dungannon* v. *Smith*, 12 Cl. & F. 546.

On a gift to A. for life, with a gift over in case he shall have no son who shall attain the age of twenty-five years, the gift over is void for remoteness. On a gift to A. for life, with a gift over if he shall have no son who shall take priest's orders in the Church of England, the gift over is void for remoteness; but a gift superadded, "or if he shall have no son" is valid, and takes effect if he has no son; yet both these events are included in the other event, because a man who has no son, certainly never has a son who attains twenty-five, or takes priest's orders in the Church of England; still, the alternative event will take effect, because that is the expression. The testator, in addition to his expression of a gift over, has also expressed another gift over on another event, although included in the first event, but the same judges who have held that the second gift over will take effect where it is expressed, have held that it will not take effect if it is not expressed. . . . That is what they mean by splitting: they will not split the expression by dividing the two events.

6th ed., p. 357.

DOCTRINE OF PELHAM V. GREGORY.

If personal property is given to A. for life, with remainder to his sons successively in tail male, and, in default of such issue, to B. for life, with remainder to his sons successively in tail male, and A. and B. both die, A. having no sons, the first son of B. will take.

6th ed., p. 358. *Pelham* v. *Gregory*, 3 Br. P. C. 204.

The principle that the Court will not divide the events on which a gift over is to take effect, does not apply where in the event which has happened the gift over can take effect as a contingent remainder, although if the other event had happened it would have been void as an executory devise.

5th ed., p. 257, 6th ed., p. 358. *Evers* v. *Challis*, 7 H. L. C. 531.

QUASI ENTAIL OF PERSONALTY.

When personal property is bequeathed to a series of persons not in esse, by words which would create successive estates tail if the subject of the gift were real estate, and the first person does not come in esse, the next will take.

6th ed., p. 361.

MODIFYING AND QUALIFYING CLAUSES.

Where a testator has by his will made an absolute bequest in favour of unborn persons, and has afterwards by a codicil

revoked such bequest, and in lieu thereof given to the same legatees life interests only, with remainder to their children (which substituted bequest, of course, would be void as to the children), the codicil may be rejected, and the legatees take the interests originally given them by the will.

1st ed., p. 256, 6th ed., p. 361.

And this rejection of qualifying clauses ineffectually attempted to be engrafted on a previous absolute gift, equally obtains where the whole is contained in the same testamentary paper, and in spite, too, of the principle hereafter discussed, which prefers the posterior of two inconsistent clauses; it being considered (for this is the ground upon which alone the construction can be defended) that the testator intends the prior absolute gift to prevail, except so far only as it is effectually superseded by the subsequent qualified one.

Idem. *Carver* v. *Bowles*, 2 R. & My. 306.

This principle, however, is only applicable where the restriction or modification can be separated from the original gift.

6th ed., p. 362. *Re Crawshay*, 43 Ch. D. 615.

VOID GIFT BY WAY OF SUBSTITUTION.

On the same principle, if there is a gift to a class of persons ascertainable within due limits, followed by a substitutional gift to take effect within a period exceeding that allowed by the Rule, the substitutional gift is void, and the original gift remains.

6th ed., p. 362. *Goodier* v. *Johnson*, 18 Ch. D. 441.

POSSESSION OF VESTED GIFT POSTPONED BEYOND AGE OF TWENTY-ONE.

Where there is an absolute gift followed by a direction postponing possession until the attainment of some age exceeding twenty-one, this direction is void, not because it transgresses the Rule, but because any direction postponing the enjoyment of a vested and indefeasible interest beyond the age of twenty-one is repugnant to the nature of an absolute interest.

6th ed., p. 363.

RESTRAINT ON ANTICIPATION.

It has been held in several modern cases, that where an interest in property is given to an unborn daughter of a living person, with a clause against anticipation, the restraint on anticipation is void, and that consequently, on the principle above stated, the gift of the interest is good, the restraint alone being rejected.

6th ed., p. 363. *Armitage* v. *Coates*, 35 Bea. 1.

SEPARABLE GIFTS.

When gifts are made to several persons by one description, but the gift to one is not affected by the existence or non-exist-

ence of the others, the gifts are separable, and if modifying clauses are not too remote when applied to the gifts to some of these persons, but are too remote when applied to the gifts to the others, they will be operative in the former cases, and disregarded in the latter.

6th ed., p. 363. *Wilson* v. *Wilson*, 28 L. J. Ch. 95.

ENTAILED PERSONALTY.

Where personal property is settled upon trust to follow entailed realty, with a proviso that it shall not vest absolutely in any tenant in tail who dies under twenty-one, this proviso will, if possible, be construed to apply only to tenants in tail by purchase.

6th ed., p. 364. *Christie* v. *Gosling*, L. R. 1 H. L. 279.

CONSTRUCTION OF WILL NOT AFFECTED BY RULE.

The principle that the Court will not depart from the established rules of construction in order to render a disposition valid under the Rule, has been already referred to in connection with gifts to classes. The principle is recognised in numerous cases.

6th ed., p. 364.

It is against the settled rules of construction to strike out any words from a will because they offend against the perpetuity rule. For all purposes of construction, the will must be read as if no such rule existed. Any dispositions which, so reading and construing it, are found to be the testator's wishes, must be taken to be his wishes, and if those wishes offend against the Rule, the gifts would fail, and must fail accordingly; but they are not the less part of his will, and to be resorted to as part of the context for all purposes of construction, as if no such rule had been established.

6th ed., p. 364. *Heasman* v. *Pearse*, L. R. 7 Ch. 283.

Accordingly, the Court refuses to strain the rules of construction in order to make a gift to a class valid, or to split a gift over if the testator has not done so.

6th ed., p. 365.

CONSTRUCTION OF AMBIGUOUS CLAUSE.

And if a particular clause in a will is capable of two constructions, one of which will make it void under the Rule against perpetuities, while the other will carry out the obvious intention of the testator, the latter construction is preferred.

6th ed., p. 365. *Re Turney* (1899), 2 Ch. p. 747.

"SO FAR AS THE LAW PERMITS."

A testator sometimes declares that the dispositions of his will shall take effect "as far as the rules of law and equity permit," or that he makes them "so far as he lawfully or equitably can or may"; words of this kind are most frequently used in

connection with gifts of personalty to go according to limitations of real estate. It was formerly supposed that such trusts were executory, but this doctrine has been long overruled, and it seems now settled that the presence of words of this kind does not justify the Court in putting a forced construction on the will in order to save the testator's provisions from the penalty of remoteness, unless the trust is really executory.

6th ed., p. 360. *Miles* v. *Harford*, 12 Ch. D. 691.

EXCEPTIONS TO THE RULE (1) CHARITABLE GIFTS.

It is sometimes said that charitable gifts are an exception to the Rule, but this is inaccurate.

6th ed., p. 366.

RESULTING TRUST AFTER GIFT TO CHARITY.

A charitable trust creates a perpetuity in the primary sense of the word, and it follows that charitable gifts are an exception to the general principle of law which forbids the creation of inalienable and indestructible interests in property. It has even been held that property may be given to one charity, subject to a gift over, in an event which may never happen, to another charity. But these cases have nothing to do with the modern Rule against perpetuities, which clearly applies to charitable gifts. Thus, a gift to a charity conditional upon a future and uncertain event which may not happen within the period allowed by the Rule, is void. So, if property is given to a private individual, with a limitation in a remote contingency to a charity, this limitation is void. Conversely, if property is given to a charity, with a gift over in a remote contingency in favour of private persons, the gift over is void. But a gift of a fund for a charity may be made defeasible or determinable on an event which must or may happen after the expiration of the period allowed by the Rule, so that when that event happens the fund reverts to the testator's estate: and an express direction by the testator that on the happening of the event the fund shall fall into his residue, does not offend against the Rule, because it is mere surplusage.

6th ed., p. 367.

(2) TRUSTS FOR ACCUMULATION FOR PAYMENT OF DEBTS.

The Rule against perpetuities does not apply to a trust for accumulation whereby a fund is to be created for payment of the testator's debts, or for the discharge of existing incumbrances on an estate, because such a provision only prescribes a particular mode of paying the debts, and it may at any time be put an end to, either by the owner of the property paying them off or by the creditors enforcing their claims. A trust to accumulate rents to pay a legacy to an exisitng person is also good.

5th ed., p. 264. 6th ed., p. 367. *Bateman* v. *Hotchkin*, 10 Ber. 426.

TRUSTS FOR ACCUMULATION FOR BENEFIT OF LEGATEE.

An apparent exception to the Rule against perpetuities occurs in the case of certain other trusts for accumulation. A trust to accumulate income for the benefit of a person who may not be ascertained within the period allowed by the Rule is, of course, void, but a trust to accumulate income for the benefit of some one, to be ascertained within due limits, who can put an end to it at any time after his interest has vested, is not within the Rule.

6th ed., p. 368.

(3) EQUITABLE CONTINGENT REMAINDERS.

There can be no doubt that the Rule applies to equitable contingent remainders.

6th ed., p. 368. *Abbiss* v. *Burney*, 17 Ch. D. 211.

APPARENT EXCEPTION IN THE CASE OF LEGAL REMAINDERS.

With regard to legal contingent remainders, there are cases in which they are clearly not within the modern Rule. Thus, if land is devised to A., a bachelor, for life, and on his death to the first son of his who attains twenty-five, this is a contingent remainder which will fail, unless at A.'s death there is a son who has attained twenty-five: if it vests at all, it must vest at A.'s death, and can, therefore, never be too remote. This case is, therefore, an apparent, and not a true, exception to the Rule.

6th ed., p. 368.

CAN A LEGAL CONTINGENT REMAINDER BE VOID FOR REMOTENESS?

Apart from this undisputed rule of law, the question whether a legal contingent remainder can be void for remoteness has been much discussed.

6th ed., p. 368.

DECISION IN WHITBY V. MITCHELL.

As it is now settled by the decision of the Court of Appeal in Whithy v. Mitchell, that contingent remainders are "subject to the old doctrine directed against remote possibilities," it follows that they are not subject to "the modern Rule against perpetuities." It is equally clear, from the judgments in that case, that the two rules are not identical.

6th ed., p. 371.

Trust—Conditional Devise.—A will provided as follows: "I give and bequeath to my beloved wife, Margaret McIsaac, all and singular the property of which I am at present possessed, whether real or personal or wherever situated, to be by her disposed of amongst my beloved children as she may judge most beneficial for herself and them, and also order that all my just and lawful debts be paid out of the same;" and appointed executors:—Held, that the widow took the real estate in fee, with power to dispose of it and the personalty whenever she deemed it was for the benefit of herself and her children to do so. *McIsaac* v. *Beaton*, 26 C. L. T. 188, 37 S. C. R. 143.

Perpetuities—Division after Sixty Years.—A testator directed his executors to lease and rent and invest his lands, money, and mortgages for the term of 60 years, after which the property was to be divided as in his will provided:—Held, that this infringed the rule against perpetuity, and 52 Vict. c. 10, s. 2 (O.), and was invalid. *Baker* v. *Stuart*, 28 O. R. 430.

Perpetuity—Determinable Fee—Wrongdoer—Doctrine of Cy-pres.—In 1810 Captain J. McDonald devised the Donaldson estate, of which the locus was part, to W. & A. McDonald in trust, to permit his daughter, Flora, to enter into possession and have the sole management of it, and, during her life, to receive the rents and profits free from the control of any husband she might marry, and after her death he directed the trustees to permit the rents and profits to be laid out by guardians appointed by her or (failing such appointment) by her brother, in bringing up the eldest and younger children of her first marriage, until the eldest son by her first marriage should arrive at the age of thirty years, and then to convey the estate to such eldest son and his heirs male. In 1821, after testator's death, Flora married plaintiff's father, and she and her husband continued in possession until his death, 1864, and she continued in possession until 1864, when she also died intestate. The lessor of the plaintiff was their eldest son, and was over thirty years of age. There was no conveyance from the trustees to him. D. McIsaac, brother of defendant, had been in possession of the locus and paid rent to plaintiff's mother and to plaintiff and then abandoned, when defendant entered. For defendant, it was contended that the legal estate was in trustees, and no demise being laid in their name plaintiff must be non-suited. The plaintiff argued that the trustees took no estate under the demise, or if they took any it was only an estate in fee during Flora's life:—Held, that the trust in favour of the eldest son was void for perpetuity.—That the other trusts having been executed, and no further trust existing, the objects of the trust ceased, and, therefore, the trustees' estate also ceased, and the plaintiff as one of the testator's heirs, had a right to recover.—That plaintiff was entitled by prior possession to maintain ejectment against the defendant, who was a wrongdoer.—That the doctrine of cy-près would probably apply, and if so Flora would take an equitable estate tail, and on her death plaintiff would become legal tenant in tail, and as such would be entitled to recover, *McDonald* v. *McIsaac* (1871), 1 P. E. I. R. 353.

Trust Infringing Rule Against Perpetuities.—A bequest to trustees to be used by them to maintain his family residence for two young ladies as long as they lived and for his son and his family and descendants or whomsoever said son might will or otherwise give said residence to, and that as to such residence it should until sold and disposed of, be kept up and maintained by said trustees, and those succeeding them in the trust, in the manner in which it had been kept up and maintained by him. Held void as infringing the Rule against perpetuities. *Kennedy* v. *Kennedy* (1912), 21 O. W. R. 501: 3 O. W. N. 924.

A clause, not being limited to the minority of tenants in tail by purchase, was void as infringing the rule against perpetuities. *Brown* v. *Haughton* (15 L. J. Ch. 361 and. Nom. *Browne* v. *Stoughton*, 14 Sim. 369) and *Turvin* v. *Newcome* (3 K. and J. 16; 3 Jur. N. S. 203) followed. *Stamford and Warrington (Earl), In re; Payne* v. *Grey* (No. 1), 80 L. J. Ch. 281; (1911) 1 Ch. 255; 104 L. T. 161; 55 S. J. 154.

A testator by his will devised certain lands to his son N.M., for life, and after his decease to his heirs and assigns forever, but subject to the payment within three years out of the rents and income of a sum of money charged upon the lands therein specified; after his death the land was to be sold provided N.M.'s youngest child then living was of the age of twenty-one years, the proceeds thereof to be equally divided between N.M.'s children at the time of the sale:—Held, that the executory devise in favour of N.M.'s children was void as a violation of the rule against perpetuities. *Meyers* v. *The Hamilton Provident and Loan Company*, 19 O. R. 358.

A devise by the testator to his first great grandson being void for remoteness, and there being no intention to give to P.F., junr., any estate or interest independent of, or unconnected with, the devise to the great grandson, there was no valid disposition to disinherit the heir-at-law, and therefore the plaintiff was not entitled to recover. *Ferguson* v. *Ferguson*, 2 S. C. R. 498.

CHAPTER XI.

ACCUMULATION OF INCOME.

OLD RULE FIXING EXTENT OF PROSPECTIVE ACCUMULATION OF INCOME. STAT. 39 & 40 GEO. 3, C. 93.

ACCUMULATION RESTRAINED, UNLESS FOR LIFE OF SETTLOR, OR FOR TWENTY-ONE YEARS, OR DURING MINORITY, &C.

Formerly the rule that fixed the period for which the vesting of property might be suspended, regulated also the power of deferring its enjoyment; it being then permitted to a settlor or testator to create an accumulating trust absorbing the entire income during the full period for which the vesting might be protracted, and whether it was or was not so protracted. And no inconvenience appears to have been felt in allowing so wide a range of accumulation, few persons having availed themselves of the permission to a mischievous extent, until Mr. Thellusson made the extraordinary and well-known disposition of his immense property by the operation of which, every child and more remote descendant born or rather procreated in his lifetime . . . were excluded from enjoyment, for the purpose of swelling to a princely magnitude, the fortune of some remote and unascertained scions of the stock. The necessity then became apparent, of preventing, by legislative enactment, the repetition of a scheme of disposition fraught with so much mischief and hardship. This led to the stat. 39 & 40 Geo. III., c. 98. The Accumulations Act, 1800, adopted in Ontario in 1889 (see R. S. O. 1897. cc. 111, 332). It is ch. 46 of Ontario Acts, 1910, and is as follows:—

2. (1) No person shall, by any deed, surrender, will, codicil or otherwise howsoever, settle or dispose of any real or personal property, so that the rents, issues, profits or produce thereof shall be wholly or partially accumulated, for any longer than one of the following terms:

(a) For the life of the grantor;

(b) For twenty-one years from the death of the grantor or testator;

(c) For the period of minority of any person living or en ventre sa mere at the death of the grantor or testator.

(d) For the period of minority of any person who, under the instrument directing the accumulation, would for the time being, if of full age, be entitled to the income or rents, and profits, directed to be accumulated.

(2) No accumulation for the purchase of land shall be directed for any longer period than that mentioned in the preceding sub-section.

(3) Where an accumulation is directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated, contrary to the provisions of this Act, go to and be received by such person as would have been entitled thereto, if such accumulation had not been directed.

3. Nothing in this Act shall extend to any provision for payment of debts of any grantor, settlor, or devisor, or other person, or to any provision for raising portions for any child or any person, grantor, settlor, or devisor, or for any child of any person taking any interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood, upon any lands or tenements, but all such provisions and directions shall and may be made and given as if this Act had not passed.

4. The restrictions in this Act shall take effect and be in force with respect to wills and testaments made and executed before the 4th day of March, 1837, only in cases where the devisor or testator was living and of sound and disposing mind after the expiration of twelve calendar months from that day.

1st ed., p. 264. 6th ed., p. 377.

WHAT CONSTITUTES A DIRECTION TO ACCUMULATE.
TRUSTS WHOSE EFFECT IS TO PRODUCE ACCUMULATION HELD TO BE WITHIN THE STATUTE.

To bring a case within the act, it is not necessary that the word "accumulate" should be used, or that there should be an express direction to accumulate; a direction to "invest" or "capitalise" income, or to form a reserve or guarantee fund, or the like, may be sufficient. Indeed, the act applies in cases where an obligation to accumulate arises from the nature of the gift, for in applying the statutory provision against accumulation regard is had to the substance and effect, and not to the form and mere language of an instrument; for, if property be disposed of in such manner as to produce an accumulation of income for a period exceeding what the statute authorises, it will not avail that there is an absence of any trust expressly and in terms directed to this object. Thus if a testator charges the income of his property with the raising of a gross sum which cannot be raised within the period allowed by the act, this is tantamount to a trust for accumulation, and is void so far as it exceeds the period.

5th ed., p. 283, 6th ed., p. 379. *Morgan* v. *Morgan*, 4 DeG. & S. 164: *Re Mason* (1891), 3 Ch. 467.

AS TO ACCUMULATION UNDER A RESIDUARY BEQUEST IN FAVOUR OF UNBORN PERSONS AT MAJORITY.

An obvious case of this nature is that of a bequest of a general residue to a class of persons (some of them unborn at the testator's decease), whose shares are not to vest until the age of twenty-one years; for it is to be observed, that as a residuary bequest, to take effect in future, carries not only the bulk or corpus of the property, but also the intermediate income, it follows that the statute is infringed whenever the vesting, or even the distribution, is postponed until a period or event which occurs more than twenty-one years after the testator's decease, without any express application of the income accruing in the interval. In such a case the income is accumulated for the statutory period, and after that goes as under an intestacy.

Ibid.

WHERE TRUST IS POSTPONED.

The Act also does not apply where property is directed to be dealt with in a manner which cannot immediately be carried into effect, and it consequently becomes necessary to accumulate the income.

5th ed., p. 379, 6th ed., p. 380. *Lombe* v. *Stoughton*, 12 Sim. 304; *Wentworth* v. *Wentworth* (1900), A. C. 163.

TRUSTS FOR IMPROVING OR MAINTAINING A PROPERTY.

Nor is a trust for the application of money in keeping buildings in repair within the act. But a trust for the erection of new buildings is within the act. The test seems to be whether the expenditure ought properly to be debited to capital or income.

6th ed., p. 380. *Drake* v. *Trefusis*, L. R. 10 Ch. 365.

TRUSTS EMBRACING TOO WIDE AN ACCUMULATION GOOD PRO TANTO.

It is well settled that a trust for accumulation exceeding the statutory limit, is good pro tanto.

1st ed., p. 269, 6th ed., p. 380.

So a trust to accumulate the income of property in order to raise a specified sum for the benefit of persons in esse, is stopped by the statute at the expiration of twenty-one years from the testator's death. If, however, the persons to benefit by any trust for accumulation are not necessarily ascertainable within the period allowed by the Rule against perpetuities, the trust is void ab initio.

6th ed., p. 381. *Williams* v. *Lewis*, 6 H. L. C. 1013; *Curtis* v. *Lukin*, 5 Bea. 147.

HOW THE PERIOD OF TWENTY-ONE YEARS IS TO BE CALCULATED.

The period of twenty-one years from the testator's death is to be calculated exclusively of the day of his death, and must be a period immediately following his death. Thus, if the accumulation be fixed to commence at a time subsequent to the testator's death, it will necessarily cease when twenty-one years from his death have elapsed, though it may have been in operation only one or two years.

5th ed., p. 273, 6th ed., p. 381. *Att.-Gen.* v. *Poulden*, 3 Hare 555.

TRUSTS VOID OR INOPERATIVE IRRESPECTIVELY OF ACT.

It should be borne in mind that a trust for accumulation may be void ab initio, or become inoperative before the expiration of the period prescribed by the testator, for reasons irre-

Harrison v. *Spencer*, 15 O. R. 692, was decided before the passing of the Ontario Act of 1889.

spective of the act. Thus a trust for accumulation which transgresses the limits allowed by the Rule against perpetuities is void ab initio, and a trust to accumulate the income of property to which a person is absolutely entitled may be stopped by him at any time.

Ibid. Wharton v. *Masterman* (1895), A. C. 186.

A testator or settlor is not at liberty to take more than one of the several periods of accumulation mentioned in the statute (for instance,. he cannot direct an accumulation for a term of twenty-one years, and also during the minority of a person entitled under the limitations): the language of the statute being disjunctive.

Ibid. Re Errington, 76 L. T. 616.

Accumulation cannot commence before the birth of the minor but may be directed during minority of unborn person.

Haley v. *Bannister*, 4 Madd. 275; *Re Cattell* (1907), 1 Ch. 567.

THE ACT DOES NOT IMPLIEDLY MAKE VALID TRUSTS FOR ACCUMULATION PREVIOUSLY BAD.

A trust for accumulation which not only exceeds the statutory limits, but also the period allowed by the Rule against perpetuities, is, like any other such limitation, void in toto, even though it be for a purpose excepted from the operation of the act; for the act does not by the exceptions contained in it impliedly make valid what was previously invalid. As before noticed, accumulation for payment of the debts of the testator does not contravene the Rule against perpetuities, and is therefore good, though its duration be unlimited. But an accumulation for the payment of debts of a stranger does not come within the reason of the rule which protects a similar provision for payment of the testator's own debts, and is therefore valid by the common law only for the period of a life in being and twenty-one years after. The act leaves this rule untouched (sec 2), excepting from the operation of the first section "all provisions for payment of debts of any grantor, settlor, or devisor, or other person or persons." And this has been held to include not only debts due at the testator's death, but future debts accruing within the period last mentioned. But the accumulation must be designed and intended bona fide as a provision for payment of debts.

5th ed., p. 276, 6th ed., p. 382. *Barrington* v. *Liddell*, 2 D. M. & G. 498; *Mathews* v. *Keble*, L. R. 3 Ch. 691; *Lord Southampton* v. *Marquis of Hertford*, 2 V. & B. 54; *Varlo* v. *Faden*, 27 Beav. 255.

CONSTRUCTION OF THE EXCEPTION AS TO ACCUMULATION FOR CHILDREN'S PORTIONS.

The exception in the act respecting accumulation for the purpose "of raising portions for any child or children of any grantor

settlor or devisor, or any child of any person taking any interest under such conveyance, settlement or devise," has created great difficulty. And first, what is a portion within this exception? A provision for raising or satisfying portions charged or created by a previous instrument is within the exception, *Barrington* v. *Liddell*, 2 D. M. & G. 480.

5th ed., p. 277, 6th ed., p. 383.

An accumulation of the whole of a testator's estate, or of the residue, comprising the bulk, of it, and a gift of the augmented fund, comprising both capital and accumulations, is not protected by the exception.

5th ed., p. 278, 6th ed., p. 384. *Edwards* v. *Tuck*, 3 D. M. & G. 58.

GIFT OF GENERAL ESTATE AUGMENTED BY ACCUMULATION IS NOT A PORTION.

A "portion" in this clause of the Act points to the raising of something out of something else for the benefit of some children or class of children.

6th ed., p. 385. *Ibid.*

WHAT INTEREST THE PARENT MUST TAKE UNDER THE DEVISE.

The next question is, what is the interest which a parent, not being the grantor, settlor, or devisor, must take under the conveyance, settlement, or devise in order to render valid an accumulation for portions for his children? May it be an interest of any kind, or must it be an interest in the identical property from which the income directed to be accumulated arises? and must it be a substantial interest, or will a merely nominal interest suffice? The interest need not be one in the very fund to be accumulated and any interest however minute is sufficient.

5th ed., p. 280, 6th ed., p. 387. *Barrington* v. *Liddell*, 2 D. M. & G. 480.

It would seem that, where accumulation is directed for the benefit of children of several parents, if any one parent takes no interest, the whole direction fails.

5th ed., p. 281, 6th ed., p. 387. *Eyer* v. *Marsden*, 2 Kee. 573; *Edwards* v. *Tuck*, 3 D. M. & G. 40.

Sub-section (2) of Section 2 of the Ontario Act does not contain the word "only" as the Imperial Act of 1892. The Imperial Act does not apply if the trust for accumulation authorises the application of the money in two or more ways although one of them is the purchase of land.

Re Danson, 13 R. 633.

DESTINATION OF THE INCOME RELEASED FROM ACCUMULATION.

The destination of the income which the Thellusson Act releases from accumulation has occasioned much debate. The

law on this point, however, may now it is conceived be stated as follows:—

1. Where there is a present gift in possession, and the direction to accumulate is engrafted upon that gift, the statute, by discharging the property from the superadded trust, has the effect of entitling the donee or successive donees to the immediate income, as if the prior gift had stood alone.

2. Where the vesting of a contingent interest, or the possession of a vested interest, is postponed till the expiration of the period of accumulation, the statute, by stopping the accumulation, does not accelerate the vesting in the one case, or the possession in the other, and the released income devolves as if the testator had made no disposition of it. Consequently:

(i) If the property is a legacy or a specific bequest or devise, the released income goes, in the case of personal property, to the residuary legatee; and in the case of real property, to the residuary devisee, or heir, according as the will does or does not come within the Wills Act. If it is in the nature of a charge on real estate, it sinks for the benefit of the estate. Where the residue is not given absolutely, but only for life or some other limited interest, the released income forms part of the capital of the residue, so that the person having such limited interest is only entitled to the income of the investments representing the released income.

(ii) Where it is residue that is directed to be accumulated, the income of such residue, when the accumulation is stopped, will, in obedience to a well-settled principle, devolve in the case of personal property to the next of kin, in the case of real property to the heir, and in the case of a mixed fund to the next of kin, and heir respectively.

Skrymsher v. *Northcote*, 1 Sw. 566.

3. The income of the accumulations follows the same rule; therefore if the accumulations arise from personal property, not being a residue, the income falls into the capital of the residue so that a tenant for life would only be entitled to the income of such income; and where residuary personalty is directed to be accumulated, the income of the accumulations, of course, goes to the next of kin. Where the accumulations arise from residuary real estate, the accumulations of rents and profits seem to preserve their character of realty, so that the heir is entitled to the income of such accumulations; and it would, of course, fol-

low that, where the accumulations arose from real estate other than residuary, the residuary devisee would, under the present law, be entitled.

5th ed., pp. 281, 6th ed., p. 389. *Eyre* v. *Marsden*, 2 Kee. 577.

NATURE OF INTEREST WHICH DEVOLVES TO THE HEIR.

The interest which, by the operation of the act, results to the heir is generally either an estate pur autre vie or a chattel interest, and consequently if he dies while the income is in suspense, his interest passes to his executor or administrator, and not to his heir.

6th ed., p. 391. *Sewell* v. *Denny*, 10 Bea. 315.

WHETHER INSURANCES ON LIVES FORM A MODE OF ACCUMULATION WITHIN THE ACT.

A direction in a will to apply a sufficient part of the income of the testator's property in keeping up certain policies which he had effected on the lives of his children in their names, and which in case of their marriage he directed to be settled on their wives and children, was not a trust for accumulation within the statute, and was therefore valid beyond the period of twenty-one years from his death.

5th ed., p. 284, 6th ed., p. 391. *Bassil* v. *Lister*, 9 Hare 17.; *Re Vaughan* (1883), W. N. 89.

A direction to expend surplus income in the improvement of a landed estate and in maintaining in good habitable repair houses and tenements on the property, is not affected by the Thellusson Act, but it does not authorise expenditure in building new houses, or for any purpose the expense of which ought to be defrayed out of capital. So a direction to apply income in keeping buildings insured and repaired, and in reinstating any building destroyed by fire, is good pro tanto and void as to the surplus. And in a will declaring trusts of leasehold property, a direction to keep up a policy of insurance to replace at the end of the term the capital which would be lost by the falling in of the lease is good. In all these cases the direction to apply and the application of the income must be made in good faith and not for the purpose of evading the act.

6th ed., p. 395. *Vine* v. *Raleigh* (1891), 2 Ch. 13; *Re Gardiner* (1901), 1 Ch. 697.

Thelluson Act.—Held, that the Act against accumulations, commonly called the Thelluson Act, 39 & 40 Geo. III. c. 9, which was passed after the statute 32 Geo. III. c. 1, by which English law was introduced into Canada and which did not extend in terms to the colonies, is not in force in this province, where the law appears to be as it was in England before that statute. *Harrison* v. *Spencer*, 15 O. R. 692. See *ante*, p. 177.

Direction to Accumulate—Contingent Interest—Acceleration—Cancellation of Legacy if Will Attacked.—The testatrix, who died on the 14th February, 1892, by her will devised certain moneys and lands to her executors and trustees, with directions to invest and keep in-

vested and re-invest (compounding interest) until the 17th March, 1915, when the whole accumulated fund was to be handed over to the plaintiff, if he was then alive; but if he died at an earlier date, leaving living issue, then to his children, and if he died without leaving any living issue, then to the other children of the testatrix:—Held, that the illegal part of the will was not that deferring payment of the corpus till 1915, but that directing the undue accumulation of income for over twenty-one years that the plaintiff's interest was merely contingent or subject to be divested if he did not live until 1915; that the Court will accelerate payment in cases which rest on the postponement of enjoyment of property absolutely bestowed on the beneficiaries, as it is against public policy to restrain a man in the use or disposition of property in which no one but himself has any interest, but that in this case there was no acceleration in the enjoyment of any interest under the will as an effect of R. S. O. 1897 c. 332, and no such absolute vested interest in the plaintiff as entitled him to stop the accumulation in order to claim a present payment; that the executors might proceed with the conversion of the lands and the combination and accumulation of the interest for twenty-one years; that for the following two years the accumulation must cease and the income be paid out to those entitled, personally to the next of kin and realty to the heirs-at-law if the plaintiff were then alive:—Held, also, that the plaintiff's action was to obtain a construction of the will and declaration of his rights rather than seeking a modification or changing of the will, and so did not operate a forfeiture of his share within the meaning of the prohibition in the will against action adverse to the testatrix's bounty. *Harrison* v. *Harrison*, 24 C. L. T. 222, 7 O. L. R. 297, 3 O. W. R. 247.

Testator's Children to Take Equal Shares in the Residue at Majority—Accumulations of Income During Minority of Donee.—The testator gave to each child an equal share of the income of the whole of his residuary estate subject to the provision "that until each child attains the age of twenty-five years what would have been his or her share is to accumulate and form part of my general estate:"—Held, that according to the true construction of this provision the accumulations of each share during conventional minority were intended to increase the general residuary estate of which each child was entitled to a share at twenty-five and not for the exclusive benefit of the sharer. *Fulford & Hardy*, [1909] A. C. 570.

Distribution of Estate—Income—Corpus. *Re Butler*, 1 O. W. R. 826.

Distribution of Estate—Shares—Income—Corpus—Survivorship—Period of Distribution. *Re Totten*, 7 O. W. R. 886, 8 O. W. R. 543.

Income of Estate—Direction for Accumulation of Part—Annuities out of surplus income. *Hardy* v. *Shireff*, 11 O. W. R. 1011.

Accumulation of Income During Minority.—A testator gave to each of his children, on attaining the age of twenty-five years, an equal share of the income of the whole of his residuary estate, but until each child had attained the age of twenty-five years what would have been his or her share of the income was to accumulate and form part of the testator's general estate:—Held, that the accumulations so directed were intended to be for the benefit of the general estate and not for the exclusive benefit of a particular child. *Fulford* v. *Hardy*, C. R., [1909] A. C. 255.

Accumulation of Revenues.—Where the trustees under a will, to whom the entire estate is bequeathed in trust, are directed by the testator to apply certain amounts for specified purposes until a division of the estate shall be made at a time prescribed by the will, it is their right and duty to retain and accumulate the surplus revenues of the estate although not specially instructed by the testator to do so. The fact that the estate is much larger at the date of the testator's death than it was when the will was made, is an extraneous circumstance which cannot be taken into account by the Court in the interpretation of a will, so as to change its

meaning from that fairly deducible from the contents of the entire instrument itself. *Ogilvie* v. *Ogilvie*, 21 Que. S. C. 130.

Devise — Minority of Devisee — Application of Rents — Accumulation—Allowance for Maintenance.—By his will testator bequeathed to his grandson D. his farm, implements, etc., but by a codicil provided that, until D. attained the age of 21 years, the executors should keep, control, and manage the farm, and expend the net revenue arising therefrom in the improvement and cultivation of the land, without accounting to D. or anyone else for such revenue. D. applied through his next friend, to have an annual allowance made to him for his support and education:—Held, that, the testator having directed the surplus revenue to be used in the improvement of the farm, that disposition could not be legally interfered with and the money diverted to another purpose. *Re Waddell, Lynch* v. *Waddell*, 35 N. S. R. 435.

A testator bequeathed his shares in a certain company to trustees upon trust out of the income to pay certain annual sums in augmentation of the income of his daughters and to pay his debts and the estate duty payable at his death, and declared that the trustees should hold one-fourth part of the shares upon trust out of the income, subject as aforesaid to pay to his son G. an annual sum not exceeding £3,000 "until he shall have attained the age of twenty-six years and when and so soon as he shall have attained the said age of twenty-six years my trustees shall hold such last-mentioned one-fourth part of my said shares and the accumulations of income arising therefrom but subject as aforesaid in trust for my said son G. absolutely." There was no gift over in the event of G. dying under twenty-six. He survived the testator, but died at the age of twenty-three:—Held, that there was no severance of the one-fourth part of the shares bequeathed from the rest of the estate, that the interest of G. therein was contingent upon his attaining twenty-six, and that as he died under that age it fell into the residuary estate. *Nunburnholme (Baron), In re; Wilson* v. *Nunburnholme* (1912), 1 Ch. 489.

Accumulation Vesting.—Where by a will a specific gift is made to trustees upon trust for A. when and so soon as he shall attain a named age and the gift is to be immediately separated from the rest of the property and the income is at once given to the beneficiary or the income is to be accumulated for the benefit of the beneficiary, and when and so soon as he attains the named age the corpus and the accumulations are given to him with no gift over, then the Court ceases to regard the gift as a contingent gift and holds it to be a vested gift.

Will—Leaseholds—Reserve Fund for Dilapidations—Validity.—Where there is a direction in a will that a certain portion of the rents of leasehold property should be invested every year so as to accumulate for the purpose of creating a fund to protect the trustees against uncertain claims for dilapidations under the leases, the trust to accumulate is valid and does not come within the Accumulation Act, 1800. *Varlo* v. *Faden* (29 L. J. Ch. 230, 27 Beav. 255) followed. *Hurlbatt, In re; Hurlbatt* v. *Hurlbatt*, 80 L. J. Ch. 29 (1910), 2 Ch. 553; 103 L. T. 585.

As the Thellusson Act strikes at accumulations, the directions of the trust, so far as they necessitated accumulations, were gone after twenty-one years, but that the Thellusson Act does not prevent savings out of income, and accordingly that the trustees might still continue to make savings out of income. *Lindsay's Trustees, In re.* (1911) S. C. 584 Ct. of Sess.

CHAPTER XII.

FROM WHAT PERIOD A WILL SPEAKS.

FROM WHAT PERIOD A WILL SPEAKS.

For some purposes a will is considered to speak from its date or execution, and for others from the death of the testator: the former being the period of the inception, and the latter that of the consummation of the instrument.

1st ed., p. 277, 6th ed., p. 396. *Randfield* v. *Randfield*, 8 H. L. C. 225.

CONSTRUCTION OF WORDS REFERRING TO AN EXISTING INDIVIDUAL.

As a general rule, words indicating an existing individual are considered to refer to the date of the will, and not to the testator's death. "Thus, if a testator give an estate or a sum of money to his son John, the gift will take effect in favour of his son of this name (if any) at the date of the will, and of him only. If, therefore, such son should die in the testator's lifetime, and he should afterwards have another son of the same name who should survive him, such after-born son would not be an object of the gift. And the same rule would seem to obtain if the devisee or legatee were described with reference to his filial character only, without any other designation, as in the case of a gift to 'my son' simply, which would apply, it is conceived, to the son (if any) living at the date of the will, to the exclusion of any after-born son, though such after-born son should, by reason of the decease of the then existing son, happen to be the only person answering the description at the death of the testator." Similarly, a gift to the child with which the testator's wife was pregnant, which child was still-born, was held not to take effect in favour of another child of which the testator's wife was pregnant at the time of his death, though the result was that all the testator's property was devised away, and the last-mentioned child left unprovided for. And a gift to "the eldest son" of A. is a gift to the person who answers the description at the date of the will, as persona designata, so that if he dies before the testator the gift lapses.

1st ed., p. 283, 6th ed., p. 397.

GIFTS TO WIFE, HOW CONSTRUED.

A question of this nature may arise on all wills containing a gift to the wife of another person, under which, on the principle just stated, the individual standing in the conjugal relation at the date of the will, would take, exclusively of any other person

who might happen to answer the description at the death of the testator.

5th ed., p. 303, 6th ed., p. 397. *Garratt* v. *Niblock*, 1 R. & My. 629.

GENERAL PROPOSITIONS.

The distinctions upon the subject deducible from general principles, and the authorities just referred to, appear to be the following: First, that a devise or bequest to the wife of A., who has a wife at the date of the will, relates to that person, notwithstanding any change of circumstances which may render the description inapplicable at a subsequent period, and, by parity of reasoning, is under all circumstances confined to her; but that, secondly, if A. have no wife at the date of the will, the gift embraces the individual sustaining that character at the death of the testator; and, thirdly, if there be no such person either at the date of the will, or at the death of the testator, it applies to the woman who shall first answer the description of wife, at any subsequent period.

1st ed., p. 285, 6th ed., p. 398. *Re Coley* (1903), 2 Ch. 102.

WHETHER GIFTS IN REMAINDER ARE DISTINGUISHABLE.

There seems to be no ground, upon principle, for varying the construction, where the gift to the wife is by way of remainder after the death of the husband; the rule being, that the devise of an estate in remainder, to a person in a certain character, and by reference simply and exclusively to that character, vests in the person sustaining it at the death of the testator. The consequence would be, that in case the person who was wife at the death of the testator, or who subsequently became such, die in the lifetime of her husband the tenant for life, no after-taken wife, surviving him, would be entitled under the devise; since it would be impossible, consistently with the principle in question, to hold that it remained contingent until the death of the husband, or that it shifted from time to time to the several persons upon whom the character of wife successively devolved.

Ibid. *Re Griffiths' Policy* (1903), 1 Ch. 739.

In all cases of executory trusts, it is purely a question of intention.

6th ed., p. 399. *Re Parrott*, 33 Ch. D. 274.

CONTRARY INTENTION.

Apart from the question of executory trusts, the presumption that a gift to the wife of a married person is confined to the wife living at the date of the will, may in any case be rebutted by the context.

6th ed., p. 400. *Re Drew* (1899), 1 Ch. 336.

REPUTED WIFE.

Difficult questions sometimes arise where the person who claims a legacy left to the "wife" of the testator or another per-

son is not really married to him. As a general rule, it seems sufficient that the legatee had at the date of the will acquired the reputation of a wife.

6th ed., p. 400. *In bonis Howe*, 33 W. R. 48.

On principle it would seem that the same rule applies to a gift to "the wife" of another person; that is to say, a woman not really his wife would be entitled, if the testator believed her to be, or treated her as, his wife. But the evidence would no doubt require to be strong, and in the absence of such evidence the testator would be presumed to refer to a person properly answering the description.

6th ed., p. 400. *Re Davenport's Trust*, 1 Sm. & G. 126.

In considering gifts to a person as "wife" or "widow," it is necessary to distinguish three classes of cases: where the gift is to "my wife" or "the wife" or "widow" of A. B.; where the gift is to "my wife A." or "A. the wife of B."; and where the gift is to a woman on condition of her being or remaining the widow of A. B. The subject is considered in Chapter XXXV.

GIFTS TO CLASSES AND OFFICIALS.

The general rule above referred to does not necessarily apply where the gift is to a person holding an official position, or to a class or fluctuating body of persons. Thus a gift to the superioresses of two convents means the persons who answer that description at the testator's death. And a simple gift to the children of A., comprises all such as are living at the testator's death, unless it is to children "now living."

6th ed., p. 401. *Re Laffan and Downes' Contract* (1897), 1 Ir. R. 469.

It is hardly necessary to say that if the gift is expressly confined to members of the class "now living," that will exclude any born after the date of the will. And the words "now living" have a similar restrictive effect, even where combined with a term which could not have full effect, according to its technical import, unless used prospectively; as in the case of a devise to the heir male of the body of A. "now living," under which the heir apparent of A. living at the date of the will has been held to be entitled; so that the word "heir" was made to surrender its primary and proper signification, in order to give effect to the word "now," with which it stood associated.

6th ed., p. 402.

VERBS IN PRESENT TENSE.

On the same principle, verbs in the present tense have a similar effect in restricting a devise or bequest to the objects exist-

ing at the date of the will, though in some of the cases considerable reluctance appears to have been manifested to carry out this principle, where its effect would be inconveniently to narrow the scope of the will, by excluding any who might be presumed to be intended objects of the testator's bounty.

5th ed., p. 289, 6th ed., p. 402. *Ringrose* v. *Bramham*, 2 Cox 384.

GIFTS TO CHILDREN.

In regard to gifts to children, indeed, an anxiety to include as wide a range of objects as possible has so powerfully influenced the construction, that such cases are to be regarded as sui generis. To this anxiety is also to be ascribed the rule, which constitutes another exception to the doctrine under consideration, that a gift to children "begotten" extends to children born after the date of the will; and a gift to children "to be begotten" includes those antecedently in existence.

1st ed., p. 279, 6th ed., p. 402.

WHERE CHILDREN TAKE AS PERSONÆ DESIGNATÆ.

If the testator refers to a number of children in such a way as to show that he has certain individuals in his mind, they take as personæ designatæ, and not as a class; as where he gives a sum "to be divided between the six children of A."

6th ed., p. 403. *Orford* v. *Orford* (1903), 1 Ir. R. 121.

LEGACIES TO CLERKS, SERVANTS, &c.

Legacies to clerks, servants, and the like, are also, as a rule, gifts to a class, and therefore those, and only those, who are in the testator's service at the time of his death, can take under such a bequest.

5th ed., p. 305, 6th ed., p. 403. *Re Marcus*, 56 L. J. Ch. 880.

Other points connected with legacies to servants (including the question of compliance with an express condition of being in the testator's service at the time of his death) are considered in another chapter.

6th ed., p. 404. See Chapter XXX.

WILLS ACT, SEC. 24.

Section 24 of the Wills Act, which makes a will speak from the death of the testator so far as regards his property, does not in any manner affect its construction with regard to the objects of gift.

6th ed., p. 404.

In considering this question, it is necessary to distinguish between wills which are subject to the old law, and those regulated by the Wills Act.

6th ed., p. 404.

OLD LAW

Under the old law, the general prineiple was that verbs in tho present tense restricted a bequest to the subjeets existing at the date of the will, though iu somo of the eases considerable reluctance to earry out this prineiple appears to have been manifested.

5th ed., p. 287, 6th ed., p. 404. *Wilde* v. *Holtzmeyer*, 5 Ves. 816.

AS TO GENERAL DEVISES AND BEQUESTS.

Under the old law, where a testator made a general gift of his real and personal estate, he was considered as meaning to dispose of these respeetive portions of property to the full extent of his capacity; and, uecordingly, such a gift, in regard to the real estate, was read as a gift of the property belonging to the testator at the time of the exeeution of his will (he being ineapable of devising any other), and us to the personalty, as a disposition of what he might happen to possess at the period of his decease. And the relnctance of the Courts to confine a general bequest of personalty to what the testator possessed at the date of the will sometimes, we have seen, prevailed against the force of words which might seem so to restriet it. The same prineiple also was applieable to a general bequest of any partieular species of personal property, as of "my furniture and effeets," which accordingly was held to embrace property of this deseription belonging to the testator at his death.

5th ed., p. 290, 6th ed., p. 406.

STAT. 1 VICT. C. 26, S. 24.

Wills made or republished since the year 1837 are regulated, with respect to the period from which they speak, by the Act 1 Viet. e. 26, which provides (s. 24): "That every will shall be eonstrued, with referenee 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."

6th ed., p. 406.

Section 27 of the Ontario Wills Aet is as follows:—

27. (1) Every will shall be construed, with reference to the real estate and personal estate comprised in it, to apeak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will.

(2) This section shall apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or re-published after the death of her husband. (See sec. 8 of this Act).

GENERAL DEVISE OF REAL ESTATE NOW EXTENDS TO PROPERTY AT DEATH.

This enaetment must be viewed in eonnection with sect. 3, which enables testators to dispose of all the real and personal

estate to which they may be entitled at the time of their death, which, if not so disposed of, would devolve to their general real and personal representatives. Had the latter clause stood alone, it might have been a question whether the legislature, by merely enabling testators to dispose of after-acquired real estate, had so far varied and enlarged the construction of a general devise, as to make it extend beyond the real estate belonging to the testator when he made his will, to which the established rules of construction, no less than the principle which forbad the devise of after-acquired real estate, previously restricted it. Any such question is, of course, now precluded; for by the combined effect of the 3rd and 24th sections of the statute, it is evident that a general devise of real estate will operate on all the property of that description, to which the testator may happen to be entitled at his decease; and though it seems to have become usual in practice, to extend the devise in express terms to the real estate belonging to the testator at his death, yet this must be considered as a measure of excessive caution, and not as springing from, or sanctioning, any serious doubt as to the construction. Indeed, to hold that a general devise is still confined to real estate belonging to the testator at the date of his will, would most inconveniently narrow, and go far towards rendering nugatory, the enactment which declares the will to speak, in regard to the estate (real as well as personal) comprised in it, from the death of the testator.

1st ed., p. 288, 6th ed., p. 406.

So a devise of the testator's real estate in a given county or parish, will prima facie include all the real estate in that place to which the testator is entitled at his decease. But a general devise of lands in a particular place will, of course, not include lands subsequently purchased, where the will expressly disposes of the latter; the contrary intention spoken of in the act is then clearly shown.

5th ed., p. 291, 6th ed., p. 407. *Doe d. York* v. *Walker*, 12 M. & Wels. 591; *Re Farrer's Estate*, 8 Ir. C. L. 370.

APPLICATION OF S. 24 TO SPECIFIC GIFTS.
RENEWED LEASE.

The application of the new principle of construction to specific bequests, however, is attended with more difficulty, and will, in all probability, give rise to much controversy and litigation, before its precise limits and effect are fully established. The case immediately in the contemplation of the legislature, probably, was that of a specific bequest of a renewed leasehold property, which, we have seen, under the old law, did not apply to the new estate acquired by a renewal of the lease subsequently to the will; and,

also, the case of a bequest of a specific sum of stock in the funds, which, upon the same principle, did not extend to substituted stock subsequently acquired by the testator, though of precisely similar amount. The applicability of the new enactment to such cases, of course, cannot be questioned, and there is as little doubt respecting its beneficial operation.

1st ed., p. 289, 6th ed., p. 407.

PURCHASE OF REVERSION OF LEASE.

The section applies not only to the case of a testator renewing the lease of leasehold property bequeathed by him, but also to cases where, after making his will disposing of the demised property, the lessee has bought the reversion in fee; the newly acquired interest passes by the will, notwithstanding a reference (commonly found in such cases) to the term for which the property is at the time held; this being considered only a mode of describing the property, and not as equivalent to saying: "I give my present interest and nothing else." The latter meaning would equally exclude a renewed term. But, of course, the language used by the testator may show that he does not intend to give anything except his present interest.

5th ed., p. 292, 6th ed., p. 408. *Saxton* v. *Saxton*, 13 Ch. D. 359.

BEQUEST OF STOCK.

With regard to bequests of stock, it is clear that if there is nothing to show a contrary intention, a bequest of the testator's stock of a given description will, under the present law, include any additional stock of the same description, purchased by the testator after the date of his will.

6th ed., p. 408. *Goodlad* v. *Burnett*, 1 K. & J. 341.

The same principle has been applied to a devise of land.

5th ed., p. 293, 6th ed., p. 409. *Strevens* v. *Bayley*, 8 Ir. C. L. R. 410.

But, as already mentioned, the testator may use language showing that he had specific property in his mind.

6th ed, p. 410. *Emuss* v. *Smith*, 2 DeG. & S. 722.

GIFT OF PROPERTY DERIVED FROM A SPECIFIED SOURCE.

The cases in which it has been held that property may pass under a generic description (e.g., "the property to which I am entitled under the will of X."), even if its state of investment is changed by the testator, are considered elsewhere.

6th ed., p. 410. See Chapter XXX.

BEQUEST OF SPECIFIED SUM OF STOCK, OR NUMBER OF SHARES, MAY BE GENERAL OR SPECIFIC.

Gifts of specific sums of stock, or of a particular number of shares in a certain company, give rise to more difficulty. As a

general rule, a bequest of a sum of stock without more (e.g., "I bequeath to A. 1,000*l.* 2½ per cent. Consols") is a general bequest. So a bequest of "20 shares in the A. company" is prima facie a general legacy. If, therefore, the testator has 20 shares of 50*l.* each at the date of his will, and they are afterwards converted into 100 shares of 10*l.* each, the legatee only gets 20 10*l.* shares. On the other hand, a bequest of "my 1000*l.* Consols" or "my 20 shares in the A. company," is specific. If a testator made a bequest of a specific sum of stock (by which he obviously meant a specific bequest of a certain sum of stock), and then sold the stock, and afterwards acquired a precisely similar amount, the latter stock would pass by the bequest. The point does not seem to have been decided.

6th ed., p. 410. *Re Gillins* (1909), 1 Ch. 345; *Re Gibson*, L. R. 2 Eq. 669.

The testator had distinctly referred to one thing in his will which was no longer in existence at the time of his death: that thing and that only could be considered as the subject of the bequest. The bequest was therefore adeemed. This in principle covers a case where the substituted stock is exactly equal to the original subject of bequest.

6th ed., p. 411. *Re Gibson*, L. R. 2 Eq. 669.

The new rule of construction, however, will, according to the general terms in which the enactment is framed, apply to many cases in which its effect will be less decidedly salutary, nay, where it will, in all probability, defeat the intention; for example, suppose that a testator, having a house in Grosvenor Square, bequeaths it by the description of his messuage in such square, and afterwards sells the property, and purchases another house in the same square, of which he is possessed at his decease, the bequest will, it should seem, comprise the new acquisition by force of the enactment which makes the will speak from the death. So (to put a stronger case), suppose that a testator, having a small farm in the parish of A., devises all that his estate in the parish of A., and that, subsequently to the will, he disposes of the farm in question, and purchases another in the same parish, but of ten times the value, which he continues to hold until his decease, or such larger farm may have devolved on the testator by descent or otherwise without any spontaneous act on his part, or even without his knowledge, or when incapable of altering his will; in either case the newly-acquired estate, it is conceived, be held to pass by the devise.

1st ed., p. 289, 6th ed., p. [illegible]

WHERE A CONTRARY INTENTION IS SHOWN BY NATURE OF SPECIFIC GIFT.

As regards the former of the two illustrations given, the exact case does not seem to have come before the Courts, and the dicta on the point are not consistent.

6th ed., p. 413. *Castle* v. *Fox*, L. R. 11 Eq., at p. 551; *Emuss* v. *Smith*, 2 DeG. & S. 722.

It is submitted that the true principle is that laid down by Jessel, M.R., in Sidney v. Sidney, namely, that the first question to be considered is, what does the will mean: and by Lindley, L.J., in Re Portal and Lamb: "It [sect. 24] does not say that we are to construe whatever a man says in his will as if it were made on the day of his death."

6th ed., p. 413.

It seems clear that if the description of the thing devised or bequeathed does not exactly cover the thing owned by the testator at the time of his death, the latter will not pass by the mere effect of sect. 24.

6th ed., p. 413. *Sydney* v. *Sydney*, L. R. 17 Eq. 65.

MIS-DESCRIPTION.

But if the description was inaccurate at the date of the will, no question arises as to the operation of sect. 24.

The object of this section was not to defeat, but to give effect to, the testator's intention.

6th ed., p. 414. *Goodlad* v. *Burnett*, 1 K. & J. 341; *Re Portal and Lamb*, 27 Ch. D. 600; 30 Ch. D. 50.

WHERE DESCRIPTION OF PROPERTY IS ALTERED AFTER DATE OF WILL.

The effect of a specific devise of property, by a clear and unambiguous description, was not cut down by an alteration in the property made after the date of the will.

6th ed., p. 414. *Re Evans* (1909), 1 Ch. 784.

RESULT OF MODERN DECISIONS.

These two decisions have, it is to be hoped, disposed of the notion that sect. 24 requires a will to be construed as if it were made on the day of the testator's death, and show that Mr. Jarman's apprehensions as to the effect of the section were not well founded, in cases where the description of the property is specific.

6th ed., p. 414. *Cave* v. *Harris*, 57 L. J. Ch. 62.

EFFECT, WHERE THERE IS MORE THAN ONE SUBJECT OF GIFT AT THE DEATH OF TESTATOR.

The decision in Re Portal and Lamb also seems to answer another difficulty felt by Mr. Jarman as to the effect of sect. 24. It may even happen, that by a strict application to specific gifts, of the principle which makes the will speak from the death, a gift of this nature might be invalidated for uncertainty. For instance,

if a testator, having a house in the Strand, devises it by the description of his house in the Strand, and afterwards acquires another in the same place, and holds both houses at the time of his decease, it is evident that the statutory provision would, in such a case, by bringing both the houses within the terms of the description, render the devise void for uncertainty; unless it could be ascertained by extrinsic evidence which of them was intended. To avoid such a consequence, probably it would be held that the fact of the testator's ownership of one house only at the date of the will was a sufficient indication of his meaning that house; and yet this is, pro tanto, a departure from the principle of the enactment under consideration; for had the devise been in terms of the house in the Strand which should belong to the testator at his decease, there would have been no ground for distinguishing between the house that belonged to him when he made his will, and that which he subsequently acquired: so that, if the extrinsic evidence failed to show which of the two houses was intended (if, indeed, evidence is admissible in such a case), the plurality would be fatal to the devise.

1st ed., p. 290, 6th ed., p. 415.

WHETHER S. 24 MAKES WORDS OF PRESENT TIME POINT TO TESTATOR'S DEATH.

Another question will be whether the enactment which makes the will speak from the death will have the effect of carrying forward to that period words pointing at present time. For instance, supposing a testator to bequeath "all that messuage in which I now reside," and that subsequently to the making of his will he changes his residence to another house belonging to him, which he continues to occupy until his death; does the act make the word "now" apply to the house occupied by the testator at his death? It is conceived that the principle will not be carried such a length, and that this would be considered as a case in which "a contrary intention appears by the will."

1st ed., p. 291, 6th ed., p. 416.

Effect was given to the word "now" in Re Edwards, where a testator bequeathed to A. "my leasehold house and premises . . . where I now reside." After the date of the will part of the building was cut off from the rest and let to a tenant: but it was held that the whole passed under the bequest. This case was the converse of those which usually arise under sect. 24.

6th ed., p. 416. *Re Edwards*, 63 L. T. 481.

Even where the words describing the subject of gift are general, yet if they expressly point to the present time, and are mani-

festly used with reference to the period when the will is made, the operation of the act is excluded.

5th ed., p. 298, 6th ed., p. 417. *Cole* v. *Scott*, 16 Sim. 259; 1 M. & Gord. 518.

There was no difference between the words "I possess" and "I now possess." As a matter of grammar, both, it is true, express the present time; but upon the question of indicating a contrary intention within the act, the introduction of the word "now" seems to go much further towards indicating an intention to give only what the testator has at the time. Something more than this single word, however, will generally be wanted for that purpose: some more pointed distinction must be drawn (at least in the case of a general gift) between what belongs to the testator at one time and what belongs to him at the other. And "now" has never been so construed since the act as to produce intestacy.

Ibid. Hepburn v. *Skirving*, 4 Jur. N. S. 651.

Verbs in Present Tense.

But it is clear that words which merely import but do not emphatically refer to time present, as a general devise or bequest of property, or of property of a particular genus, of which I "am seised" or "am possessed," will generally include all or all of that genus to which the testator is entitled at the time of his death, though acquired after the date of the will. And the effect of the statute ought not to be frittered away by catching at doubtful expressions for the purpose of taking a case out of its operation.

Ibid. Lady Langdale v. *Briggs*, 8 D. M. & G. 391; *Everett* v. *Everett*. 7 Ch. D. 428.

Practical Suggestion.

In order to avoid all such questions a testator should introduce into his description of property specifically disposed of, expressions incapable of being applied, or not likely to apply, to any other. He should give the "house No. 23 in Grosvenor Square," or "his farm in the parish of A. called B., now in the occupation of C." (all which particulars could hardly coincide in two instances), or all his lands in the county of C. to which he is entitled at the date of his will. The latter restriction seems in general the best, as it precludes the possibility of after-acquired property being let in.

1st ed., p. 291, 6th ed., p. 419.

Is s. 24 Applicable to Property Excepted from Devise?

It has hitherto been assumed, and the assumption pervades all the cases, that the words of the act: "every will shall be construed, with reference to the real and personal estate comprised therein, to speak and take effect as if," &c., are not to be taken in

their literal sense as meaning "real and personal estate then actually comprised therein," (i.e., devised thereby). It is plain that this sense was not intended, for the context shows that the enactment has reference to property not then actually comprised in the will. The true meaning appears to be "with reference to the question what estates are comprised in any disposition in the will." If this is so, it disposes of a point raised and left unsettled in Hughes v. Jones, namely, whether the enactment is applicable to exceptions from a devise?

5th ed., p. 300, 6th ed., p. 419. *Hughes* v. *Jones*, 1 H. & M. 765.

POWERS OF APPOINTMENT.

The effect of sect. 24 on appointments under powers is considered in another chapter.

6th ed., p. 420. See Chapter XXIII.

SECTION 24 DOES NOT SUPPLY TESTAMENTARY CAPACITY.

The 24th section of the Wills Act does not in any manner affect the question of testamentary capacity.

5th ed., p. 305, 6th ed., p. 420.

The statute does not make an instrument valid which through the personal disability of the testator was invalid in its inception.

6th ed., p. 421. *Re Price*, 28 Ch. D. 709.

WHERE THERE IS A CHANGE IN THE LAW BETWEEN WILL AND DEATH. DOES NOT AFFECT CONSTRUCTION.

If, after the execution of a will, a statute is passed which produces an alteration in the effect of the will, and the testator leaves the will unaltered, the question arises whether he intends that it shall take effect according to the altered law. It is clear that if the alteration of the law is one which merely affects the administration of the testator's estate (as in the case of the Apportionment Act, 1870), it applies to the estate of a testator whose will was made before the law was altered. But a statute does not, as a general rule, alter the construction of words contained in a will made before the act was passed: thus a bequest to A. of the dividends on a specific sum of stock, contained in a will made before 1870, gives the accrued and accruing dividends to A.

See 5th ed., p. 306, 6th ed., p. 421. *Re Bridger* (1894), 1 Ch. 297.

The Court considered that sect. 24 of the Wills Act took effect, and that the principle laid down in Jones v. Ogle and Re March does not apply to a general devise or bequest where the testator's testamentary power is increased between the date of his will and that of his death.

6th ed., p. 421. *Re Royer* (1903), 1 Ch. 685.

Subject of Devise—After-acquired Property.—Testator by his will devised to his daughter "the homestead farm on which I reside," and

the residue of his real estate to his wife for life. After the date of the will he acquired other real estate, including land known as lot A., upon which he resided at the time of his death. By. a. 19, of c. 77, C. S. N. B., "every will shall be construed with reference to the real and personal estate comprised therein, as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will:"—Held, that lot A. was not included in the devise to the daughter. *Ayer* v. *Estabrooks*, 22 C. L. T. 328, 2 N. B. Eq. R. 392.

In 1886 a testator by his will devised to his brother "All that real estate now owned by me, being No. 32 on the north side of A. street for and during his life," and afterwards over, and then made a general residuary devise of the rest of his land to his sisters. It appeared that in 1867 the testator purchased the land in question with a frontage of twenty-six feet on A. street by a depth of 200 feet to a lane twenty feet wide, which lane was in 1882 converted into P. street. At the time of purchase there was a house facing on A. street known as No. 32, and also one facing on the lane, afterwards known as No. 21 P. street, occupied as distinct tenements, and each with a fence in the rear, but with certain ground between the two fences used to some extent in common:—Held, that the specific devise was confined to No. 32 A. street, and the lands appertaining to it, to the exclusion of the house on P. street and the lands appertaining to it, which passed under the residuary devise. *Scanlon* v. *Scanlon*, 22 O. R. 91.

Speaking from Death—Stock in Trade—"Now"—Household Furniture—Book-Debts—Legacy—Incomplete Words.—A testator gave all his estate of which he might die possessed in manner following: "to my sister E., the house and lands with all household furniture and all stock and trade now in house and out of house, with all book accounts now due to me, wherever found, for her own use and benefit forever, and out of this she shall pay $100 to my brother W."At his death, and when he made the will, the testator was the keeper of a country village shop, and his possessions consisted of a house and lot, where he carried on his business, and lived, the capital employed in his business, his stock of goods, and what was owing to him by his customers, and his household and other effects, consisting of furniture, books, horses, harness, carriages, and sleighs. Shortly after he made his will he sold his house and lot and business and afterwards re-purchased them:—Held, that although the gifts of the household furniture, the stock in trade, and the book debts, were specific bequests, nevertheless, being specific gifts of that which is generic, of that which may be increased or diminished, the will carried the household furniture, the stock in trade, and the book debts, as they existed at the time of the testator's death; and the use of the word "now" did not limit the gift to them as they existed at the date of his will. This was confirmed by the words of general bequest at the commencement as also by certain other features of the will:—Held, also, that in the gift of the "stock in trade" the money of the testator on deposit in the bank and cash in hand and a quantity of cordwood for use in the shop and dwelling-house, two horses, harness, and vehicles, were embraced:—Held, also, that a number of books belonging to the testator passed as part of the household furniture. The incomplete words of the gift to one brother were insufficient. *In re Holden*, 23 C. L. T. 52, 5 O. L. R. 156, 2 O. W. R. 11.

Devise—After-acquired Property.—A testator devised "all my real estate . . . being composed of the south-east part of lot 10 . . ." Afterwards he acquired the northerly half of lot 10:—Held, that the after-acquired property passed under the devise. *In re Smith*, 10 O. L. R. 449, 6 O. W. R. 390.

Dower.—Where a testator makes a bequest to his wife which he expresses to be in lieu of dower, the presumption is that this applies only to lands he then owned; not to lands subsequently acquired by him. *Loidlaw* v. *Jackes*, 25 Chy. 293.

General Devise Followed by Specific Enumeration.—Held, affirming 22 Chy. 267, that although a will coming under 32 Vict. c. 8 (O.) speaks from the death of the testator and so would carry after-acquired lands, yet where a testator devised to his wife all the remainder of his real

estate, and then proceeded to enumerate the lands comprised in such remainder, after acquired lands did not pass as part of the residue. *Crombie* v. *Cooper*, 24 Chy. 470.

Old Law.—P., by his will, dated 29th March, 1847, after giving several legacies, devised in fee to the plaintiff, who was also one of his heirs-at-law, the rest and residue of his estate both real and personal:—Held, that land acquired after the date of P.'s will did not pass by the residuary devise to the plaintiff. *Plumb* v. *McGannon*, 32 U. C. R. 8.

Held, that a general devise made in 1859 of all the testator's real and personal estate, did not carry after-acquired real estate. *Whateley* v. *Whateley*, 14 Chy. 430.

Additions to Estate—"Now"—Power of Disposition—Unfinished House.—J. C. devised to J. B., G. E. S., and J. F. D. all his property and effects, real, personal, and mixed upon trust (after reciting that his intention was to make provision for his daughter E. M. C., and do it in such a way that the administration of the fund thereinafter provided should be controlled by the trustees of his will), to hold that part of "my property known as 'Walkerfield,' being the property I now reside upon, containing fifty acres more or less, until the same shall be sold by them as hereinafter provided for the use and behoof of my daughter E. M. C., so long as she may desire that the same should remain unsold, and should she desire the same to be sold, then to hold the proceeds of the same upon the same trusts and for the same purposes as hereinafter directed, with regard to the sum of $40,000 hereinafter directed to be set apart." He then directed his trustees to set apart the sum of $40,000 to be held by them upon certain trusts, and also a certain further sum to provide an annuity of $1,200 for his wife, and provided that after the said two funds should have been set apart, the residuary estate should be divided among his nephews and nieces; and lastly, he gave to his trustees "full and absolute power to sell and dispose of all his lands ('Walkerfield' if sold in my daughter's lifetime, to be sold with her consent only) at such time or times, and in such manner as to them may seem best." The will was made on 10th September, 1879, and J. C. died 18th December, 1885. After making the will, on 27th June, 1883, J. C. purchased five acres, and on 21st September, 1883, another five acres, forming a block of ten acres of which one corner nearly coincided with one extremity of a diagonal of "Walkerfield." On 22nd November, 1884, he sold a piece of about three and one-third acres of "Walkerfield." In his lifetime J. C. entered into a contract in writing for the erection of a dwelling house on "Walkerfield," which was not completed at his death, and since his death the executor had paid to the contractor and architect certain sums in respect of it:—Held, that the ten acres subsequently purchased passed under the devise of "Walkerfield." The word "now," in the devise of "Walkerfield," which "I now reside upon" should not be allowed to control the other parts of the will, and was not sufficient to oust the effect of the statute by virtue of which the will is to speak from the death. Held, also, that the daughter of E. M. C. was tenant for life of "Walkerfield," and after the death her children took the proceeds of sale as she might appoint, and in default of appointment equally, and in default of children, the residuary legatees took. Held, also, that the funds to build the house must come out of the residue. *Hatton* v. *Bertram*, 13 O. R. 766.

Specific Bequest of Mortgage—Purchase of Land with Mortgage Moneys—Residuary Clause.—A testatrix by her will, after giving to her two sons a certain mortgage, and after sundry other specific bequests, continued: "I further direct that the balance of personal property, consisting of notes and other securities for money, be given to my two sons aforesaid . . . also that if there be any effects possessed by me, at the time of my decease, that the same may be divided equally in value among my grandchildren share and share alike." The testatrix had no real estate at the date of the will, but she afterwards in her lifetime collected the money due on the mortgage, and invested it and other funds in the purchase of land of which she died seised:—Held, affirming 6 O. R. 681, that the grandchildren were entitled to the said lands, as well as to the personal

estate, of which the testatrix died seised and possessed, not specifically disposed of by the will. *Hammill* v. *Hammill*, 9 O. R. 530.

Specific Description—Residuary Clause.—A testator, by his will dated 19th May, 1873, devised to R. M. the "property on H. street," and proceeded, "I give all the rest and residue of my estate, real, personal, and mixed, which I shall be entitled to at the time of my decease, to A. M." At the date of the will he possessed only one property on H. street, but he subsequently acquired other property on that street:—Held, that, notwithstanding R. S. O. 1877 c. 106, s. 26, the after acquired property on H. street did not go to R. M., but fell into the residue. The testator having expressed his intention with reference to all land acquired by him after the date of his will by appropriate words in that will, it would be going contrary to that intention to declare that some after acquired property should be withdrawn from the residuary clause and held to pass under the prior specific devise. *Lord Lifford* v. *Powys Keck*, 30 Beav. 300 distinguished. *Morrison* v. *Morrison*, 9 O. R. 223, 10 O. R. 303.

Land Purchased after Date of Will.—A testator devised his "house and premises known as Ankerwyke in which I now reside" to his wife. Between the date of his will and his death he purchased additional land, part of which was adjacent to the house, and a part of which was on the opposite side of the road, and all of which was occupied together with the house by the testator until his death:—Held that all the additional land passed under the devise. *Willis, In re; Spencer* v. *Willis*, 81 L. J. Ch. 8; (1911) 2 Ch. 563; 105 L. T. 295; 55 S. J. 598.

Bequest of 100 One-Pound Shares—Subsequent Conversion into 1,000 Shares of 2 Shillings Each.—A testator bequeathed "my 100 shares in the Palatine Rubber Syndicate. There was no such company but there was a company called the Palating Rubber Syndicate, in which the testator held at the date of his will 100 one-pound shares, each of which was by special resolution of the company subsequently subdivided into ten shares of 2 shillings each:—Held, that the 1,000 shares of 2 shillings each passed under the bequest. *Greenberry, In re; Hope* v. *Daniell*, 55 S. J. 633.

Bequest "to My Wife During Her Widowhood"—Invalid Marriage.—The plaintiff, Elizabeth Burniston, whose husband disappeared in 1894 and was not heard of again until 1910, went through the ceremony of marriage in 1903 with the testator. The testator believed himself to be lawfully married to the plaintiff, but knew that there was a risk that her husband who had disappeared in 1894 might still be alive. The testator and the plaintiff lived together as husband and wife till the testator's death in 1909. By his will the testator bequeathed certain things "to my wife Elizabeth" and made other bequests to her "during her widowhood, and after her decease or second marriage" to his daughters; Held, that the plaintiff although not legally the testator's widow, was entitled to enjoy the property until she died or remarried. *Hammond In re, Burniston* v. *White*. (1911) 2 Ch. 342; 55 S. J. 649; 27 T. L. R. 522.

CHAPTER XIII.

DOCTRINE OF LAPSE.

GENERAL PRINCIPLE RESPECTING LAPSE.

The liability of a testamentary gift to failure, by reason of the decease of its object in the testator's lifetime, is a necessary consequence of the ambulatory nature of wills; which not taking effect until the death of the testator, can communicate no benefit to persons who previously die: in like manner as a deed cannot operate in favour of those who are dead at the time of its execution.

1st ed., p. 293, 6th ed., p. 423.

NO LAPSE WHERE GIFT IS MADE IN DISCHARGE OF MORAL OBLIGATION.

There is, indeed, an anomalous class of cases constituting an exception to the general rule of lapse: they are said to depend on the mixed principle of bounty and obligation, namely, that where the intention of a testator in giving a legacy is not merely bounty to the legatee, but the discharge of an obligation recognised by the testator, although not legally enforceable, the legacy does not lapse by the death of the legatee in the testator's lifetime. Thus, if the testator makes a bequest for the payment of a debt which is barred by the Statute of Limitations, or by the bankruptcy law, the bequest takes effect, notwithstanding the death of the creditor in the testator's lifetime. So if a married woman makes a bequest or appointment for the purpose of discharging a moral obligation, there is no lapse by the death of the legatee in her lifetime. It is different where the debt has been released.

6th ed., p. 423. *Williamson* v. *Naylor*, 3 Y. & C. 208; *Philips* v. *Philips*, 3 Ha. 281.

LAPSE NOT PREVENTED BY WORDS OF LIMITATION:—REAL ESTATE.

The doctrine applies indiscriminately to gifts with and gifts without words of limitation. Thus, if a devise be made to A. and his heirs, or (unless the will be regulated by the new law) to A. and the heirs of his body, and A. dies in the lifetime of the testator, the devise absolutely lapses, and the heir, special or general (as the case may be), of A. takes no interest in the property, he being included merely in the words of limitation, i.e., in the terms which are used to denote the quantity or duration of the estate to be taken by the devisee, through whom alone any interest can flow to such heir.

1st ed., p. 293, 6th ed., p. 424.

PERSONALTY.

Bequests of personal property, of course, are subject to the same rule; and it is observable that, in applying it to such bequests, a legacy to one and his executors or administrators is construed as a mere absolute gift; for the circumstance that, in regard to personalty, words of limitation are not requisite to carry the absolute interest, has been considered as insufficient to denote an intention to make the executors or administrators substituted and independent objects of gift. And where the devisee or legatee happens to be dead when the will is made, the words of limitation are equally inoperative to let in the representatives of the deceased person.

Ibid. *Toplis* v. *Baker*, 2 Cox. 118; *Hutcheson* v. *Hammond*, 3 Br. C. C. 127.

EFFECT OF DECLARATION THAT LEGACY SHALL NOT LAPSE.

And even a declaration that the devise or bequest shall not lapse, does not per se prevent it from failing by the death of the object in the testator's lifetime, since negative words do not amount to a gift; and the only mode of excluding the title of whomsoever the law, in the absence of disposition, constitutes the successor to the property, is to give it to some one else. A declaration to this effect, however, following a bequest to a person and his executors or administrators, would be considered as indicating an intention to substitute the executors or administrators, in the event of the gift to the original legatee failing by lapse.

5th ed., p. 308, 6th ed., p. 425. *Browne* v. *Hope*, L. R. 14 Eq. 343.

CASES OF SUBSTITUTION.

Where the bequest is to A., and, "in case of his death, to his executors or administrators," or "to his legal personal representatives," there can, of course, be no doubt that the gift does not fail; the only question then is, who are the persons to take beneficially, a point which will be treated of hereafter. But where there was a direction to pay legacies within six months, and a gift to the children of the legatee, in case of the legatee's death "not having received his legacy," it was held, nevertheless, that the legacy lapsed by his death in the testator's lifetime. And if property is given to A. for life and then to B., or in the event of his death to his executors or administrators, this is taken to mean death during A.'s life interest, so that if B. predeceases the testator the gift lapses.

Ibid. *Long* v. *Watkinson*, 17 Beav. 471.

LAPSE ON CONTINGENCY.

If property is bequeathed to A. for life and after his death to B. or his executors, administrators, or assigns, this merely means

that the gift is to vest in B. at the testator's death, so that if B. predeceases the testator the bequest lapses.

Ibid. *Leach* v. *Leach*, 35 Beav. 185.

The question whether a gift to "A. or his heirs," or to "A. or his issue," or the like, is a substitutional gift, or whether the word "or" should be construed "and," is discussed in another chapter.

6th ed., p. 426. See Chapter XXXVI.

BENEFICIAL GIFT BY WAY OF SUBSTITUTION.

If the gift is to A. for life and then to B. or in case of his death to his children, or next of kin, or the like, then the gift to the children, &c., takes effect, although B. dies in the lifetime of the testator.

6th ed., p. 426. *Re Porter's Trust*, 4 K. & J. 188.

SETTLED SHARES OF RESIDUE.

When a share of residue is settled upon a person for life with remainder to other persons, and the original legatee dies in the lifetime of the testator, the question often arises whether the bequest lapses, or whether it takes effect for the benefit of the remaindermen.

6th ed., p. 427. *Stewart* v. *Jones*, 3 De G. & J. 532.

CONTINGENT GIFTS.

If a legacy is given to A. with a gift over to B., on the death of A. in certain circumstances, and A. dies in those circumstances during the testator's lifetime, the legacy does not lapse: as where the legacy is to go over to B., on the death of A. under twenty-one, and A. dies under that age during the testator's lifetime. Nor does the fact that the legatee is a married woman, and that the gift over is to her next-of-kin, exclusive of her husband, afford any presumption that it was only intended to take effect in the event of her surviving the testator. But if it becomes impossible for the gift over to take effect, and then A. dies during the lifetime of the testator, the legacy lapses: as where a legacy is given to A. and if he dies before completing his apprenticeship, then to B., and A. dies during the lifetime of the testator after completing his apprenticeship, the legacy lapses.

See 5th ed., p. 309, 6th ed., p. 428. *Rackham* v. *De la Mare*, 2 D. J. & S. 74; *Williams* v. *Jones*, 1 Russ. 517.

ACCELERATION BY LAPSE OF PRIOR LIMITATIONS.

The effect of lapse in accelerating subsequent limitations is considered elsewhere.

6th ed., p. 428. Post page 217.

LAPSE OF POWER.

A power created by will lapses by the death of the donee before the donor.

5th ed., p. 300. *Jones* v. *Southall*, 32 Bea. 31.

GIFT OVER IN DEFAULT OF APPOINTMENT.
LAPSE OF APPOINTMENT.

The question whether, if a power of appointment among a number of named persons is created by will, and one of them predeceases the testator, the power is defeated pro tanto, is discussed elsewhere.

6th ed., p. 428. Chapter XLIV.

A gift over in default of appointment does not lapse by the death of the donee of the power in the testator's lifetime.

6th ed., p. 429. *Nichols* v. *Haviland*, 1 K. & J. 504.

The doctrine of lapse applies to testamentary appointments under powers, and consequently if the appointee is not living at the decease of the donee of the power, the appointment will not take effect. And if no appointment is made, and there is no gift over in default of appointment, only the objects who survive the donee will be capable of taking by implication. A testamentary appointment in pursuance of a covenant to settle contained in marriage articles is not exempt from the operation of the doctrine. Where the fund is insufficient for all the particular gifts, and one of them lapses, the lapsed gift goes to augment the gifts to the other appointees and to prevent abatement.

5th ed., p. 309, 6th ed., p. 429. *Re Brookman's Trust*, L. R. 5 Ch. 182.

LAPSE PREVENTED BY SURVIVORSHIP AMONG JOINT TENANTS.

Where there is a devise or bequest to a plurality of persons who take as joint tenants no lapse can occur unless all the objects die in the testator's lifetime; because as joint tenants take per my et per tout, or, as it has been expressed, "each is a taker of the whole but not wholly and solely," any one of them existing when the will takes effect will be entitled to the entire property. Thus, if real estate be devised to *A* and B., or personal property be bequeathed to A. and B., and A. die in the testator's lifetime, B., in the event of his surviving the testator, will take the whole. And the same consequence would ensue if the gift failed from any other cause.

Ibid. Morley v. *Bird*, 3 Ves. 628; *Ramsay* v. *Shelmerdine*, L. R. 1 Eq. 129; *Re Kerr's Trust*, 4 Ch. D. 600.

NOT IN THE CASE OF TENANTS IN COMMON.

It is equally clear that if the devisees or legatees in any of these cases had been made tenants in common, the failure of the

gift as to one object would not have entitled the other to the whole by the mere effect of survivorship.

Ibid.

GIFT TO PERSONS AS TENANTS IN COMMON, WITH BENEFIT OF SURVIVORSHIP—OR AS A CLASS.

But property may be given to several persons as tenants in common with benefit of survivorship, and then if the gift to one of them is revoked or otherwise fails, the whole goes to the others. Again, property can be given to a number of persons, nominatim, as tenants in common, subject to a condition that they shall be living at a given time, and if any of them are not living at that time, the others take the whole.

6th ed., p. 430. *Sanders* v. *Ashford*, 28 Bea. 600.

EVIDENCE OF DEATH.

To enable a person to take under a will it must be proved affirmatively that he survived the testator. Consequently if a testator and legatee perish by the same calamity, and there is no evidence that the legatee survived the testator, the bequest lapses. And if a legatee has not been heard of since the testator's death, so that it cannot be proved that he survived the testator, his representatives cannot claim the legacy.

6th ed., p. 430. *Re Walker*, L. R. 7 Ch. 120.

GIFTS TO CHARITY.

If a testator gives a legacy to a charitable institution which has ceased to exist before his death, the legacy lapses, unless the testator expresses an intention to give it to charitable purposes independently of the existence of the particular institution.

6th ed., p. 431. *Re Rymer* (1895), 1 Ch. 19.

DOCTRINE IN REFERENCE TO GIFTS TO CLASSES.

Where the devise or bequest embraces a fluctuating class of persons, who, by the rules of construction, are to be ascertained at the death of the testator, or at a subsequent period, the decease of any of such persons during the testator's life will occasion no lapse or hiatus in the disposition, even though the devisees or legatees are made tenants in common, since members of the class antecedently dying are not actual objects of gift. Thus, if property be given simply to the children, or to the brothers or sisters of A., equally to be divided between them, the entire subject of gift will vest in any one child, brother or sister, or any larger number of these objects surviving the testator, without regard to previous deaths; and the rule is the same where the gift is to the children of a person actually dead at the date of the will, or to the present born children of a person, in either of which cases, it is to be observed, there is this peculiarity, that the class is susceptible of

fluctuation only by diminution, and not by increase; the possibility of any addition by future births being in the former case precluded by the death of the parent, and in the latter by the express words. So if the gift is to such of the testator's children as shall be living at the death of A., and A. dies in the testator's lifetime, this is a gift to a class; consequently the share of a child who survives A. and dies in the testator's lifetime does not lapse, and the children who survive the testator take the whole. Again, if one who would otherwise be a member of the class is incapable of taking by reason of his being an attesting witness, or by reason of the gift to him being revoked, the whole property goes to those members who are capable of taking.

See 5th ed., p. 310, 6th ed., p. 431. *Shuttleworth* v. *Greaves*, 4 My. & Cr. 35; *Young* v. *Davies*, 2 Dr. & Sm. 167; *Re Coleman and Jarrom*, 4 Ch. D. 165.

MISTAKEN USE OF WORD "LAPSE" BY TESTATOR.

If, after a gift to children as a class, the testator directs that in case any child dies before him leaving issue, the share of that child shall not "lapse," but go to his executors, this does not cause the share of a child who dies before the testator, without issue, to lapse.

6th ed., p. 431. *Aspinall* v. *Duckworth*, 35 Bea. 307.

GIFT TO PERSONS DESIGNATED BY NAME OR NUMBER OR IN SEPARATE SHARES.

A gift to several named persons is not a gift to a class unless words of contingency are added; as where the gift is to A., B., C., and D., "if living." And a gift to several named persons, without more, is not a gift to a class, even if they stand in a common relationship to the testator, as where the gift is "to my sons A. and B., and my daughter C." And if a testator after a gift to "children," proceeds to name them, or if he specifies their number, as by giving "to the five children of A.," this is a designatio personarum, and is a bequest to those who are named, or to the five in existence at the date of the will, and the shares of any who die before the testator lapse. So, where the bequest was to the testator's brothers and sister and his wife's brothers and sister, the testator and his wife each having one sister at the date of the will, and in another case even where the bequest was to E., the eldest son of J. S. and the other children of J. S., he having three other children at the date of the will, it was held that the terms "children," "brothers," &c., were to be understood to mean those living at the date of the will as personæ designatæ.

6th ed., p. 432. *Re Spiller*, 18 Ch. D. 614; *Re Smith's Trusts*, 9 Ch. D. 117; *Ramsay* v. *Shelmerdine* (1909), 1 Ch. 103.

WHERE SOME MEMBERS OF CLASS ARE INCLUDED BY NAME.

But the fact that some of the children are mentioned by name does not prevent the gift from being a gift to a class. Thus a gift to "all my children, including B. and W." or a gift "to my son George, my daughter Lydia, &c., and such of my children hereafter to be born as shall attain twenty-one," is a gift to a class.

6th ed., p. 433. *Re Jackson*, 25 Ch. D. 162.

OR EXCEPTED BY NAME.

So a gift to "all my children born and to be born, except my son Thomas," is a gift to a class.

Ibid. *Re Jackson*, supra.

WHETHER DECEASED CHILD CAN BE INCLUDED IN CLASS GIFT.

If a testator gives property to all his children living at his decease and any children who may die in his lifetime leaving issue living at his death, this operates under the 33rd section of the Wills Act, so that the share of a child dying before the testator and leaving issue, forms part of that child's estate. But as the 33rd section only applies to gifts to the testator's own issue, a gift to the children of another person who die in the testator's lifetime leaving issue is nugatory; those children who survive the testator take as a class under the gift, and the issue of a deceased child take nothing by implication.

6th ed., p. 433. *Re Coleman and Jarrom*, 4 Ch. D. 165.

WHAT IS A CLASS.

A class is a number of persons "comprised under one general description, indefinite in number, and individually undistinguished by name or particular designation."

6th ed., p. 434. *Burrell* v. *Baskerfield*, 11 Bea. p. 534.

LORD DAVEY'S DESCRIPTION OF A CLASS GIFT.

Prima facie a class gift is a gift to a class consisting of persons who are included and comprehended under some general description, and bear a certain relation to the testator. . . . But it may be none the less a class because some of the individuals of the class are named.

6th ed., p. 434. *Kingsbury* v. *Walter* (1901), 1 A. C. 187.

COMPOSITE CLASS.

GIFT TO A. AND THE CHILDREN OF B. NOT A CLASS GIFT.

There may also be a composite class, such as, for instance, children of A. and children of B.; that would be a good class. On the other hand, a gift to A. and all the children of B. is, prima facie not a class gift.

6th ed., p. 434. *In re Chaplin's Trusts*, 33 L. J. Ch. 183.

IF SHARES VEST AT DIFFERENT TIMES, LEGATEES DO NOT TAKE AS A CLASS.

All the interests of members of the class must vest in interest at the same time. For instance, if there is a gift to A.

for life, and afterwards to B. and the children of C., the class must vest in interest at the death of the testator, although it is capable of enlargement by the birth of subsequent children of C. during the lifetime of the tenant for life.

6th ed., p. 435. *Drakeford* v. *Drakeford*, 33 Bea. 43.

CLASS COMPOUNDED OF PERSONS ANSWERING DIFFERENT DESCRIPTIONS.

In addition to the kind of composite class referred to above, there may be a class compounded of persons answering different descriptions, or belonging to different generations. Thus, a class may consist of the children of A., who attain twenty-one, and the issue of such of them as die under that age. Where a gift of this kind is unskilfully framed, the question may arise: "Are there two classes, or is there one class compounded of persons answering one or other of two alternative descriptions?" The question has been already discussed with reference to the Rule against perpetuities, and the distinction has been pointed out between original and substitutional gifts.

6th ed., p. 435. *Dimond* v. *Bostock*, L. R. 10 Ch. 358.

EXCLUSION OF MEMBERS.

Another way in which a testator can create a special class is by excluding certain named individuals who would otherwise belong to it.

6th ed., p. 436.

CLASS ASCERTAINED IN TESTATOR'S LIFETIME.

If the gift is to a class of persons who are ascertained during the testator's lifetime or even at the date of the will, this is in a sense equivalent to a gift to them as personæ designatæ, but it is not the less a class gift.

6th ed., p. 436. *Lee* v. *Pain*, 4 Hare 254.

DESCRIPTION BY REFERENCE.

Where a testator gives pecuniary legacies to a number of persons by name, and gives the residue to "all the before mentioned pecuniary legatees," with certain exceptions, in proportion to the amounts of their legacies, this is not a gift to them as a class, and if one of them dies in the testator's lifetime his share lapses. But a gift to persons by reference may be (or have the same effect as) a gift to them as a class, if that intention appears.

6th ed., p. 437. *Re Gibson's Trusts*, 2 J. & H. 656.

PERSONS LIVING AT A CERTAIN TIME.

It has been already mentioned, that a gift to such of a number of named persons, as are living at a particular time, or survive the testator, is equivalent to a gift to a class, so far as the question of lapse is concerned.

6th ed., p. 437. *Re Spiller*, 18 Ch. D. 614.

GIFT TO NEXT OF KIN OR RELATIONS.

It is not clear what would be the effect of a gift to certain other classes of persons, as to the next of kin or relations as tenants in common of A., a person who dies in the lifetime of the testator, in the event of any of the next of kin or relations dying in the interval between the decease of A. and of the testator; since, in every case where such a gift has occurred (and in which the entirety has been held to belong to the surviving next of kin at the death of the testator), the bequest seems to have contained no words which could operate to sever the joint tenancy.

1st ed., p. 298, 6th ed., p. 437. *Bridge* v. *Abbot*, 3 Br. C. C. 224.

GIFTS TO EXECUTORS BENEFICIALLY.

As a general rule, a gift to "my executors herein named," beneficially as tenants in common, is a gift to them as individuals, and not as a class, so that if one of them predeceases the testator, or renounces, his share lapses.

See 5th ed., p. 311, 6th ed., p. 438. *Hoare* v. *Osborne*, 33 L. J. Ch. 586.

DEVISES OF LEGAL OR BENEFICIAL OWNERSHIP ONLY.

Where the devise which lapses comprises the legal or beneficial ownership only, of course its failure creates a vacancy in the disposition merely to that extent. Thus, if a testator devise lands to the use of A. in fee, in trust for B. in fee, and A. die in the testator's lifetime, the legal estate comprised in the lapsed devise to A. devolves to the testator's heir, (or if the will has been made or republished since 1837, and contains a residuary devise, then to the residuary devisee), charged with a trust in favour of B., whose equitable interest under the devise is not affected by the death of his trustee.

1st ed., p. 299, 6th ed., p. 438. *Shelley* v. *Edlin* (1836), 4 Ad. & Ell. 582; *Oke* v. *Heath*, 1 Ves. Sen. 135.

LAPSE OF DEVISE OF CHARGED PROPERTY.

Where an estate is devised to one, charged with a sum of money, either annual or in gross, in favour of another, the charge is not affected by the lapse of the devise of the onerated property. Thus, if Blackacre be devised to A. and his heirs, charged with or on condition that he pay £50 a year, or the sum of £500, to B., and it happens that A. dies in the testator's lifetime, his (the testator's) heir at law (or his residuary devisee, if the will is subject to the new law), will take the estate charged with the annuity or legacy in question.

1st ed., p. 300, 6th ed., p. 439. *Oke* v. *Heath*, 1 Ves. Sen. 135.

DESTINATION OF A LAPSED SPECIFIC SUM CHARGED ON REAL ESTATE.

In the converse case, namely, where the person for whom the money is to be raised dies in the testator's lifetime, it is more difficult to determine the destination of the lapsed interest, the question being then embarrassed by the conflicting claims of the devisee of the lands charged, and of the heir of the testator: the former contending that the charge has become extinct for his benefit; and the latter, that the lapsed sum is to be regarded as real estate undisposed of by the will.

Ibid. 6th ed., p. 440.

RULE AS TO CONTINGENT CHARGES.

This, at least, is clear, that where land is charged with a sum of money upon a contingency, and the contingency does not happen, the charge sinks for the benefit of the devisee. As in the case of a devise of land to A., charged with a legacy to B., provided B. attain the age of twenty-one, as to which Lord Eldon has observed, "The devise is absolute as to A., unless B. attain the age of twenty-one: if he does, he is to have the legacy. But his attaining the age of twenty-one is a condition, upon which alone he is to have it; and, if he does not attain that age, then the will is to be read as if no such legacy had been given, and the heir at law does not come in because the whole is absolutely given to the devisee; but a gift which fails must clearly be intended, upon the failure of the condition, to be for the benefit of the devisee." It would of course, be immaterial, in such case, whether the death of the legatee during minority occurred in the testator's lifetime or afterwards.

Ibid. *Tregonwell* v. *Sydenham*, 3 Dow. 210.

WHERE LIABLE TO FAILURE BY DEATH, THOUGH NOT EXPRESSLY CONTINGENT.

Where a legacy, payable in futuro, though not expressly contingent, is bequeathed in such a manner as that it would fail by the death of the legatee before the time of payment, (and such is always the rule where the postponement is referable to the circumstances of the legatee, and is not made for the convenience of the estate), the case evidently falls within the principle of Lord Eldon's reasoning; and, consequently, if the legatee die before the vesting age, whether in the lifetime of the testator or not, the charge sinks in the estate.

Ibid.

CHARGES ABSOLUTE IN EVENT.

It is to be observed, also, that a legacy which, though originally made contingent, becomes absolute by the effect of events in the testator's lifetime (subject, of course, to a liability to failure by lapse), is to be regarded, in applying the doctrine in

question in precisely the same light as if it were originally absolute. Thus, if land be devised, charged with a specific sum to A., on condition of his attaining the age of twenty-one years, and A. do attain that age, and subsequently die in the testator's lifetime, the gift receives the same construction as if it had not originally been made conditional on his attaining the prescribed age.

5th ed., p. 316, 6th ed., p. 440.

DESTINATION OF SUMS PAYABLE OUT OF LAND.

With respect to the general question, as to the destination of sums charged on real estate which lapse by the death of the legatee in the testator's lifetime, or the gift of which is void ab initio, the older authorities are chiefly cases in which gifts of specific sums were void ab initio, and the decision in each case generally turned upon the question whether the gift was an exception from the residuary devise, or a mere charge upon the land. Owing to the limited operation of a residuary devise under the old law, if the gift was an exception, the heir took the benefit in the event of its failure; if the gift was a mere charge on the land, the specific devisee took the benefit of its failure.

5th ed., p. 316, 6th ed., p. 441. See Chapter XXV. *Cook* v. *Stationers' Co.*, 3 Myl. & K. 264.

MODERN DECISIONS.

Since the Wills Act many cases have been decided bearing on this question. In considering them the alteration made in the law by sec. 25 of the Wills Act must be borne in mind.

6th ed., p. 442. *Ridgway* v. *Woodhouse*, 7 Bea. 437.
Section 25—Section 28 Ontario Wills Act.

CHARGE IN FAVOUR OF EXECUTORS.

If a testator devises land subject to a condition or charge for securing the payment to his executors of a certain sum of money, and does not expressly dispose of this sum, it will become part of his personal estate, and will not in any event sink for the benefit of the devisee.

6th ed., p. 445. *Arnold* v. *Chapman*, 1 Ves. Sen. 108.

CHARGES ON PERSONAL PROPERTY.

Where personal property is specifically given to A. subject to a charge in favour of B., and the gift to B. lapses, A. takes the benefit of the lapse. The same rule applies where the charge is on a particular fund.

6th ed., p. 445. *Scott* v. *Salmond*, 1 My. & K. 363. *Tucker* v. *Kayess*, 4 K. & J. 342.

STAT. 1 VICT. CH. 26, SEC. 25. REAL ESTATE COMPRISED IN LAPSED OR VOID DEVISES INCLUDED IN RESIDUARY DEVISE.

The doctrine of lapse has been modified by the Wills Act in three important particulars. First, by sec. 25, which provides,

"That unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will."

5th ed., p. 321, 6th ed., p. 445. Ontario Wills Act, section 28, is to the same effect as section 25 above quoted.

28. Unless a contrary intention appears by the will, such real estate as is comprised or intended to be comprised in any devise in such will contained which fails or becomes 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.

It seems clear that the object of this enactment was to give to a residuary devise the same sweeping effect with regard to real estate as a residuary bequest has always had with regard to personalty. Consequently if, under a will made since 1837, a specific devise lapses, or fails as being contrary to law, the land so devised passes under the residuary devise, if the will contains one, and not to the heir.

6th ed., p. 445. *Carter* v. *Haswell*, 3 Jur. N. S. 788.

Under this enactment, the gift of a sum, forming an exception out of real estate, to a person who dies in the testator's lifetime, or the gift of which is void ab initio, will enure for the benefit of the residuary devisee. If, however, the will does not contain an operative residuary devise, or the sum excepted affects the property comprised in the residuary devise, such sum falls to the heir. Of course the act has no bearing on the question whether the sum be an exception or simply a charge; nor does it do away with the rule that the failure of a mere charge enures for the benefit of the specific devisee, and not of the residuary devisee; nor, again, does it apply to the class of cases first noticed, in which the gift of a sum of money charged upon land on a contingency, is defeated by the failure of the event (whether it be the decease of the object before a certain age, or otherwise), and not by lapse.

5th ed., p. 321. 6th ed., p. 446. *Sutcliffe* v. *Cole*, 3 Drew 135; 24 L. J. Ch. 486.

1 VICT. CH. 26 SEC. 32. DEVISES IN TAIL NOT TO LAPSE IF DEVISEE LEAVES ISSUE.

The next alteration in regard to lapse relates to devises in tail, to which sec. 32 provides, "That where any person to whom any real estate shall be devised for an estate tail, or an estate in quasi entail, shall die in the lifetime of the testator,

leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention should appear in the will."

5th ed., p. 322, 6th ed., p. 446. Section 36 of the Ontario Wills Act is to the same effect.

SECTION 33. GIFT TO TESTATOR'S CHILD OR OTHER DESCENDANT WHO LEAVES ISSUE NOT TO LAPSE.

The third and remaining alteration concerns gifts to the children or other issue of the testator, as to which sec. 33 declares, "That where any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed, for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

5th ed., *ibid.* 6th ed., p. 447. Section 37 of the Ontario Wills Act is to the same effect.

36. Where any person to whom real estate is devised for an estate tail or an estate in quasi entail, dies in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue are 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 appears by the will.

37. Where any person, being a child or other issue of the testator, to whom any real estate or personal estate is devised or bequeathed for any estate or interest not determinable at or before the death of such person, dies in the lifetime of the testator, leaving issue, and any of the issue of such person are 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 appears by the will.

WHETHER SAME ISSUE MUST BE LIVING AT DEATH OF DEVISEE AND OF TESTATOR.

It will be observed that the words "such issue," occurring in sec. 32, admit of application either to the issue inheritable under the entail, surviving the deceased devisee, or the issue inheritable under the entail generally, whether living at the death of the devisee or not. According to the latter construction, if there be issue living at the death of the devisee or legatee, and also issue living at the death of the testator, the requisition of the statute is satisfied, though the same issue should not exist at both periods. Thus if lands be devised to A. in tail, who dies in

the testator's lifetime, leaving an only child, and such child afterwards die in the testator's lifetime, leaving issue who, or any of whom, survive the testator, the devise would, it is conceived, be preserved from lapse. In the 33rd section, however, there is more difficulty in adopting a similar construction; for in this clause the words "such issue" would seem to apply exclusively to the issue living at the death of the devisee or legatee; and if so, the result would be that in the case of a gift to a child of the testator, if it should happen that such child dies in his lifetime leaving issue, and such issue also dies leaving issue who survives the testator (certainly rather a large assemblage of contingencies to be crowded into the testator's lifetime), the existence of the last mentioned issue would not prevent the lapse, the issue surviving the testator not being the same issue as existed at the death of the legatee. But here, also, possibly a liberal construction would be adopted by considering the word "issue" to be used as nomen collectivum, namely, as including every generation of issue, and not merely as designating the particular individual or individuals living at the death of the legatee; so that the existence of any person belonging to the same line of issue at the death of the testator would suffice to prevent the lapse; and in favour of this construction may be urged the desirableness of assimilating the effect of these two sections of the statute, from the penning and juxtaposition of which it is hardly to be supposed that any such difference was intended.

1st ed., p. 312, 6th ed., p. 447.

Lord St. Leonards was of a different opinion. He thought that there was intended to be a difference between secs. 32 and 33; and that sec. 33 "expresses what, looking at the object of the framer, it was no doubt intended to express, that some of the issue living at the death of the devisee or legatee must also be living at the testator's death." But in In bonis Parker Mr. Jarman's view prevailed. There the testatrix gave all her property to her daughter; the daughter died in her lifetime, leaving an only child who also died in the lifetime of the testatrix, leaving a child who survived the testatrix, and it was held by Sir C. Cresswell that the gift was saved from lapse by the 33rd section. Lord St. Leonards nevertheless maintained his view as to the operation of the section: "The decision is contrary to the express words of the statute, and equally contrary, it may be thought, to the intention of the legislature. The case is altogether distinguishable from the provision as to estates tail."

6th ed., p. 448. *In bonis Parker*, 1 Sw. & Tr. 523.

TIME OF LEGATEE'S DEATH IMMATERIAL.

Section 33 applies: (1) Where the will is made before 1838, if the death of the legatee and the republication of the will take place after the Wills Act came into operation; (2) where the testator makes a gift to a child who is dead at the date of the will.

6th ed., p. 448. *Winter* v. *Winter*, 5 Ha. 306; *Wisden* v. *Wisden*, 2 Sm. & G. 396.

WILLS ACT DOES NOT APPLY WHERE GIFT DOES NOT LAPSE, BUT PROPERTY PASSES OVER TO ANOTHER.

The application of both the enactments in question is excluded where the devise in tail or the gift to the testator's child or issue is expressly made contingent on the event of the devisee or legatee surviving the testator; for in such a case to let in the heir in tail under sec. 32 would be something more than substitution: it would be to give the property to the heir in tail in an event upon which the testator has not devised it to the ancestor; and in such a case to hold the child or other descendant of the testator to be entitled under sec. 33, would be in direct opposition to the language of the will.

5th ed., p. 323. 6th ed., p. 449.

JOINT TENANTS.

Nor, is it conceived, does the statute touch the case of a gift to one of several persons as joint tenants; for as the share of any object dying in the testator's lifetime would survive to the other or others, such event occasions no "lapse," to prevent which is the avowed object of both the clauses under consideration.

Ibid.

GIFT TO CLASS.

The same reasoning applies to a gift to a fluctuating class of objects who are not ascertainable until the death of the testator, though made tenants in common. Thus, suppose a testator to bequeath all his personal estate to his children simply in equal shares, it should seem that the entire property would, as before the statute, belong to the children who survive the testator, without regard to the fact of any child having, subsequently to the date of his will, died in the testator's lifetime leaving issue who survive him. As gifts to the testator's children as a class are of frequent occurrence, their exclusion from this provision of the statute will greatly narrow its practical operation. And the same reasoning applies where there is only one member of the class.

Ibid. *Re Harvey's Estate* (1893). 1 Ch. 567.

GIFT TO A SINGLE CHILD TO BE ASCERTAINED AT A FUTURE TIME.

If, however, the gift is to a single child, it seems that it may be saved from lapse by sec. 33, even although the child who is to take is not ascertained at the date of the will.

6th ed., p. 449.

UNDER SEC. 33, ISSUE OF CHILD DYING IN TESTATOR'S LIFETIME NOT SUBSTITUTED.

The reader will perceive that sec. 33 does not substitute the surviving issue for the original devisee or legatee; but makes the gift to the latter take effect, notwithstanding his death in the testator's lifetime, in the same manner as if his death had happened immediately after that of the testator. The subject of gift if, therefore, to all intents and purposes constituted the disposable property of the deceased devisee or legatee, and as such follows the dispositions of his will. Hence, occurs this rather novel result, that it cannot be predicated of any will of a deceased person, whose parent or any more remote ancestor is living, what may be the extent of property which it will eventually comprise, and no final distribution can be made pending this possibility of accession.

5th ed., p. 323, 6th ed., p. 449. *Johnson* v. *Johnson*, 3 Ha. 157.

OTHER EFFECTS OF SEC. 33.

The effect of the section is to prolong the life of the original devisee or legatee by a fiction for a particular purpose; that purpose is to give effect to the will in which the gift which would otherwise lapse occurs, and it only points out the mode in which that effect is to be given. Thus the subject of gift devolves with any obligation to which, under that will, it would have been subject in the hands of the deceased devisee or legatee if he had actually survived; as an obligation to compensate other legatees under the same will, disappointed by his assertion of rights that defeat their legacies; and if a devisee of land, being a feme coverte, dies without having made an effectual disposition of it by will, her husband will, if the devise is saved from lapse by sec. 33, be entitled to an estate by the curtesy.

5th ed., p. 324, 6th ed., p. 450. *Pickersgill* v. *Rodger*, 5 Ch. D. 163; *Eager* v. *Furnival*, 17 Ch. D. 115.

So if A. devises land to his son B., and B. dies in his lifetime leaving issue, and having devised all his property to A., this latter devise lapses, because A. is by sec. 33 deemed to have died in his son's lifetime, and the land goes to B.'s heir. If a testator gives a legacy to his daughter, a married woman, who dies intestate in his lifetime, leaving surviving her a husband, who dies before the testator, and two children, who survive him,

the effect of the fiction is that the daughter dies a widow, and the two children take the legacy.

6th ed., p. 450. *Re Allen's Trusts* (1900), W. N. 181.

EFFECT OF LAPSE.

It may be useful to state shortly the effect produced under the present law by the lapse of a testamentary gift.

6th ed., p. 451.

REAL ESTATE.

If an ordinary specific devise lapses, the property passes under the residuary devise. If there is no residuary devise, the beneficial interest passes to the heir. So if the whole or a part of the residuary devise lapses, the property passes to the heir.

6th ed., p. 451.

PERSONAL ESTATE.

If an ordinary specific, demonstrative or pecuniary legacy or annuity lapses, it falls into residue and passes under the residuary bequest. If there is no residuary bequest, lapsed legacies go to the next-of-kin. So if the whole or a part of the residuary bequest lapses, it goes to the next-of-kin.

6th ed., p. 451.

INTESTACY PRODUCED BY LAPSE.

Where by reason of lapse a testator's will is rendered wholly inoperative, he dies intestate, or if the lapse only affects a part of his property there is said to be a partial intestacy in respect of that part. As a general rule, the beneficial interest in the property undisposed of goes to the heir at law in the case of realty, and to the next of kin in the case of personalty, the devolution of it being governed by the Statutes of Distribution.

6th ed., p. 451. *Re Ford* (1902), 2 Ch. 605.

LAPSE OF CHARGE.

If real or personal property is given subject to a charge, and the charge lapses, the general rule is that the devisee or legatee of the property takes the benefit of the lapse.

6th ed., p. 452.

PARTICULAR ESTATE.

If real property is given by way of remainder to persons in succession, and the gift to one of them lapses, the subsequent remainders are accelerated, and the same rule seems to apply in the case of personalty. But where an executory interest is limited after a contingent interest, and the prior interest lapses, there is an intestacy until it is ascertained whether the contingent interest will take effect or not.

6th ed., p. 452. See Chapter XXI.

GIFT OVER MADE VALID BY LAPSE OF PRIOR ABSOLUTE GIFT.

Property may be devised or bequeathed to A., with a gift over to B. which would be void if A. survived the testator, yet if A. predeceases the testator the gift over is good, the result being that the lapse of the gift to A. validates the gift to B. Thus if personal property is bequeathed to A. and the heirs of his body, and in case of the failure of issue of A., then to B.: this is an absolute gift to A. if he survives the testator, and in that case the gift to B. is void; if, however, A. dies in the lifetime of the testator (apparently whether he leaves issue or not) the gift to B. takes effect. It has not been actually decided that the rule applies to land, but on principle it would appear that it does, and that the rule may be stated in general terms.

5th ed., p. 321, 6th ed., p. 452, *Re Lowman* (1895), 2 Ch. 348.

CONSUMABLE THINGS.

On the same principle, it would seem that a gift of consumable articles to A. for life, with remainder to B., would not lapse by the death of A. in the testator's lifetime, but would take effect in favour of B.

6th ed., p. 452. *Andrew* v. *Andrew*, 1 Coll. 690.

Lapsed Devise—Residuary Devise.—By one clause of his will a testator devised and bequeathed all his real and personal estate, etc.; by another clause he provided that a sister should have certain lands owned by him, which devise lapsed; and the last clause was as follows: "All the rest and residue of my estate, consisting of money, promissory note or notes, vehicles and implements, I give and bequeath to my brother:"—Held, that the will must be construed to prevent an intestacy as to the lapsed devise, and that the lands given to the sister passed to the brother under the residuary clause. *Re Farrell*, 12 O. L. R. 580, 8 O. W. R. 442.

Gifts of Issue—Lapse—Gifts to a Class—Executors—Shares in Company—Purchase by Executor.—Section 36 of the Wills Act, R. S. O. c. 128, which provides that gifts to issue who leave issue on the testator's death, shall not lapse, applies only to cases of strict lapse, and not to the case of a gift to a class, such as a residuary bequest "equally among my children share and share alike." A testator died possessed of shares in a company. Afterwards, upon a fresh allotment of stock being made, his executrix took up the additional shares, paying the premium out of her own money as to some of the shares, and selling her right to others:—Held, that she was entitled as against the estate to such new shares, but only to a lien thereon for the amount advanced by her to take them up. *In re Sinclair—Clark* v. *Sinclair*, 21 C. L. T. 501, 2 O. L. R. 349.

Legatee Predeceasing Testatrix—Rights of Husband and Children.—A testatrix by will dated 23rd March, 1901, directed her estate to be divided into four equal shares and one share to be paid to each of her four children. One of the four children predeceased her, intestate, leaving a husband and two infant children:—Held, that by virtue of s. 36 of the Wills Act, R. S. O. 1897 c. 128, the husband took one-third of a one-fourth share in the estate of the testatrix, the two infant children taking the rest. *In re Hannah Hunt*, 23 C. L. T. 95, 5 O. L. R. 197, 2 O. W. R. 94.

If a remainder is contingent it is not accelerated by a lapsed devise. *In re Townsend Estate*, 34 Ch. D. 357; *Re Wilson*, 3 O. W. R. 754.

Bequest to Two Sisters and their Children.—A testator bequeathed personal estate to his two sisters, M. and S., and to their children,

all to share alike if living. One of the sisters died before the testator:—Held, that her share lapsed. *Bradley* v. *Wilson*, 13 Chy. 642.

Lapsed Devise—Failure of Objects.—The will of a testatnr who devised and bequeathed all his real and personal estate to trustees to hold for the benefit of his wife for life and after her death to hold for his daughter, and after her death to divide among her children. The will then provided that, notwithstanding the directions thereinafter contained, if the testator's son returned to Toronto within 5 years from the date of the testator's death, the trustees were to hold in trust for him from the time of his return certain specified lands (being a part of those before devised), subject to the existing life estate of the testator's wife during the term of the son's natural life, and to pay over to him the rents and profits thereof, and after his death to divide the same among his children. The son returned and entered into the receipt of the rents and profits of the lands, but died without issue. The first clause of the will, containing the general devise and bequest to trustees was expressed to include all the testator's real estate, consisting of lots named and described, "and also all other real estate and the personal estate of which I may die seised or possessed." It was held that this was a residuary clause, and that the devise to the son and his children lapsed on his death without issue and was swept up by the residuary devise. *Walsh* v. *Fleming*, 25 C. L. T. 356, 5 O. W. R. 693, 10 O. L. R. 226.

Devise of Real and Personal Property to Husband and Daughter to Jointly Enjoy so Long as Husband Remained Unmarried—Jewelry Included in Contents of House.—Testatrix willed a house and contents to her husband and daughter to jointly enjoy the same so long as husband remained unmarried. Husband died. The contents of house were sold by order of Court. The will contained no provision for case of husband's death, and the question arose as to what interest had the daughter in the estate:—Held, that the daughter was entitled, for life, to the income on the sum derived from the sale of the contents; that daughter was entitled to a life estate in the house; that certain jewelry which was in the house at the time of testatrix's death was to be deemed part of the contents of the house and the daughter was entitled to the use of same during life; that daughter being life tenant of the house was under obligations to repair, etc.; that trustees could not sell the house without daughter's consent, and if she gave her consent the contract must be approved by official guardian. *In re Perrie* (1910), 16 O. W. R. 90, 21 O. L. R. 100.

Assignment—Payment before Period of Distribution.—Two devisees of full age having a vested interest absolute in a definite fund in Court, although not divisible by the terms of the will until a third devisee attained twenty-one, having assigned their interest in the fund to a purchaser, the Court, the estate having been otherwise wound up, made an order for payment out to the assignee, without waiting for the period of distribution. *Re Wartmen*, 22 O. R. 601.

Death of Named Person.—A testator devised his lands to his wife "to have and to hold the said premises with appurtenances unto the said J. S., for and during her natural life, and afterwards unto the surviving children of my cousin T. S. S., to be divided share and share alike:"—Held, that the period of distribution was after the death of the tenant for life—the wife; and that the children of T. S. S. who were living at that date, or their issue, were the only parties entitled to the estate. *Smith* v. *Coleman*, 22 Chy. 507.

Distribution per Capita.—A testator, in 1856, devised certain land to M., and in case of her death without issue, then to the heirs of C. and E., "to be equally divided between them." C. died after the testator, leaving five children. M. died after C. without issue. E. survived at the date of the hearing, having one child living:—Held, that the period of distribution was upon the death of the first taker, M., so that those were entitled who were then the heirs of C. and E., and that they took per capita and not per stirpes. *Sunter* v. *Johnson*, 22 Chy. 249.

Issue Coming into Existence.—A testator directed that, at the death of his wife, if she survived him, all his estate (with certain excep-

tions) should be sold, and the proceeds equally divided among his four daughters and three sons and their children, after paying $200 to each of the three children of his deceased daughter R. He left surviving him his widow, who was still living, three sons and four daughters and twenty-seven grandchildren, besides the children of R. Two of the grandchildren were born after the date of the will but before the testator's death, and one was born after his death:—Held, that all the children and grandchildren would take concurrently who were in existence at the death of the widow; but as other grandchildren might still come into being who would not be bound by the present proceedings, the Court declined to make any order upon the will. *Dryden* v. *Woods*, 29 Chy. 430.

S. P. by her will provided as follows: "Also, I will and ordain that my said (property) after the death of my before mentioned daughters E. O. W. and S. A. W., be sold . . . and the proceeds . . . be divided between the children of my daughters E. O. W., M. K., and S. A. W., one-third to the children of the said E. O. W., one-third to the children of the said M. K., and one-third to the children of the said S. A. W., share and share alike, and in case of the decease of one of the said families of children as aforesaid, then I will and ordain that the said proceeds . . . be equally divided between the two remaining families, the children of each family receiving share and share alike, of such half to each family." At the time of the making of the will M. K. was dead, leaving three children who survived the testatrix, S. A. W. survived E. O. W., and died many years after the testatrix. All three of the said children of M. K. predeceased S. A. W., two of them intestate and without issue, and one leaving two children who survived S. A. W. E. O. W. had three children, one of whom died childless before the testatrix, and the other two survived M. A. W. S. A. W. had several children, one of whom died during her lifetime leaving children, and the others all survived her:—Held, that the period of distribution was the time of the death of M. A. W., and that the children of E. O W. and M. A. W., then living, were entitled to the whole of the property, one moiety to each family, the members of each family sharing equally their moiety. *Jeakins* v. *Drummond*, 12 O. R. 696.

Devisee in Tail Predeceasing Testator.—In one clause of his will, a testator devised certain lands to his son A. S. M. "as soon as he attains the age of twenty-one years, for and during the term of his natural life," and after the determination of that estate to the sons of the body of A. S. M. in tail male, as they should be in point of birth, and for want of such issue, then to the daughters of the body of A. S. M. and the heirs of the body of such daughters, which daughters and their issue were to take as tenants in common, and for default of such issue, the lands were to be divided among the testator's two sons, or the heirs of their respective bodies, who at the death of A. S. M. should be entitled to any part of the lands devised in tail in the will to hold to his respective other sons, and in default of such sons and of their issue at the death of A. S. M. then to the right heirs of A. S. M. forever. A. S. M. predeceased the testator:—Held, that thereupon the devise to A. S. M. lapsed, the whole scope of the clause intending that A. S. M. should survive the testator. *Riddell* v. *McIntosh*, 9 O. R. 606.

Devise to Children and their Issue—Per Stirpes or per Capita.—Under the following provision of a will, "when my beloved wife shall have departed this life, and my daughters shall have married or departed this life, I direct and require my trustees and executors to convert the whole of my estate into money . . . and to divide the same equally among those of my said sons and daughters who may then be living, and the children of those of my said sons and daughters who may have departed this life previous thereto:"—Held, reversing 18 A. R. 25, sub nom. *Wright* v. *Bell*, that the distribution of the estate should be per capita and not per stirpes. *Houghton* v. *Bell*, 23 S. C. R. 498.

Devise of Rents and Interest—Payment of Debts.—A testator, after directing that his debts should be paid by his executors, gave to his wife during her life all the rents and interest of the property for her sole use; and then willed that his property should be divided into three equal portions, one to his wife, one to his daughter M., and one to his daughter

E., on condition that his wife should have power to bequeath her portion as she pleased; that M. should have her portion after her mother's death, and should invest it for the benefit of her children; that E. should have one-half of her portion in absolute control, and the other half to receive the interest as long as she should live, and that then this half should go to M.'s children; but, further, if E. had a child or children at her death, the remaining half should go to such child or children:—Held, that a sale and conversion of the real estate was not required or authorized during the lifetime of the wife, the tenant for life, even with her consent. Held, also, that the direction for payment of debts by the executors did not affect the devises of the real estate, for they were not charged on the land, and there was no implied power of sale. *Henry* v. *Simpson*, 19 Chy. [illegible].

Discretion as to Sale.—Where there is an absolute direction to sell, but a discretion is given to a trustee to sell or not, the [illegible] conversion; but the property remains of the character it possessed at the death of the testator until the trustee has seen fit in his discretion to change it by an execution of the power. *In re Parker Trusts*, 20 Chy. [illegible].

Discretionary Right to Increase Share of Devisee.—To a son gave to his son John £25, "with such other provision as my executors may deem proper,, and his own conduct may deserve." He then devised to his son R. certain lands in fee, "except and in so far as any reservation may be made by my executors in favour of my son John:"—Held, that the executors took no estate in the lands devised to R., but that under the reservation they had power to convey to John a life estate in part of them. Semble, that they could not have conveyed the whole of such lands to John for life, or any part in fee. *McKenzie* v. *Grant*, 13 U. C. R. 180.

Discretion.—A testator directed his residuary estate to be realized, and the proceeds to be divided equally between his three children on his daughter attaining twenty-one. As to one—his eldest son G.—the testator empowered his executors in their discretion to withhold his bequest, and pay him £10 within one year after the testator's death. And in case of the death of any of the legatees before the time for payment, the share or shares of the party so dying to go to the survivor or survivors; "but it is to be understood, however, that in case either of my children should die other than G., that it is not my will or desire that he should have any share of the deceased party's portion, unless my said executors should deem it expedient to give it to him; and that it is my will and desire that he should not receive any part of my property under any circumstances other than £10 before mentioned, unless my executors think it advisable to give it to him:"—Held, that the executors were not put to an election whether they would pay only the £10 in one year after the testator's death; but that they could at any time withhold any further payment to G., notwithstanding they had already paid him a larger sum than the £10. *Bain* v. *Mearns*, 25 Chy. 450.

The testator gave certain shares of his estate to two sons, the provision for payment being as follows:—"To each of my sons as they arrive at the age of twenty-three years, or so soon thereafter as my said trustees shall deem it prudent or advisable so to do, they shall paid over one moiety of his share of the corpus of said estate and the accumulated income on said moiety, if any, and the remaining moiety upon his attaining the age of twenty-seven years, or so soon thereafter as they shall deem it advisable so to do:"—Held, that this direction did not give the trustees an absolute discretion as to the time of payment, but that the general rule,, that every person of full age to whom a legacy is given is entitled to payment the moment it becomes vested, applied. *Lewis* v. *Moore*, 24 A. R. 393.

Division among Children and Grandchildren—Child Dead before Will Made.—A testator bequeathed to two of his grandchildren £500 each. By a subsequent clause he directed certain securities to be realized and invested to meet two annuities charged on his estate, and after these annuities should cease "to exist, then, and in that case, the money so to be invested to raise the sum to pay these annuities shall be divided equally among my children then living, share and share alike, or in case of any of their deaths, then to their children per stirpes, and not per capita."

At the time of making his will, his daughter, the mother of the two legatees, had heen dead for some time:—Held, that the chiidrea of such deceased daughter did not take any iaterest in the residuary estate. *Taylor* v. *Ridout*, 9 Chy. 356.

Division with all Convenient Speed.—A testator directed his executors, as soon ss provisioa was made for the payneat of the annuities glvea by his will,, and upon payneat of his dehts, fuaeral and testamentary expeases, to divide with all conveaieat speed the residue of his estate smoagst the persons mentioned ia the will; and the executors, after having iavested a sufficient sum to meet the annuities, and having paid the dehts, funeral aad testamentary expenses, divided a portioa of the residue of the estate amongst the persons entitled to receive the same; but before the halaace of the residue was divided one of the persoas entitled to share thereia died:—Held, that the share of the deceased vested at the time when under the will the distribution should have heen made, and that the executors could not postpone the period of distrihutioa; hut that it was a question of fact whether the executors could with all conveaient speed, after making the payments and provisions directed hy the will, have divided the residue of the estate before the death had occurred; and directed a refereace to sscertain tiis fact before it would determine to whom the halance of the shsre of the deceased persoa should go. *Jarvis* v. *Crawford*, 21 Chy. 1.

Eqnal Division among Heirs.—A testator disposed of the residue of his estate ns follows: "I give and bequeath the remalnder of my personsl and resl estate to my legni heirs including my dsughter Jemima Woodside, to he divided equally smoagst them." He left three children and four grandchildren, the issue of two other of his children, who predeceased him:—Held, that a divisioa per capita (not per stirpes) was proper. *Chadbourne* v. *Chadbourne*, 9 P. R. 317.

Eqnal Division of Proceeds of Real Estate.—A testator by his will directed his real estate to be sold and the proceeds to he equally divided hetween his wife aad his hrother aad sister:—Held, that the wife took a one-half share, and his hrother sad sister the other half share between them. *Hutchinson* v. *LaFortune*, 28 O. R. 329.

Devise to Son—Change in Law.—H. made his will oa 10th October, 1868, devising land to his son J., without words of limitation, and added a codicil on 23rd February, 1870, by which he confirmed the will save as changed hy the codicil. J., the devisee, died 17th February, 1874, and H., the testator, died 15th Decemher, 1879:—Held, that as the will was made and repuhlished by the codicil prior to 1st Jaauary, 1874, the sections suhsequent to s. 7 of R. S. O. 1877 c. 106, and among them s. 35, did not apply, and that under the former law the devise to J. lapsed. *Zumstein* v. *Hedrick*, 8 O. R. 338.

Heirs and Assigns—Legatee Predeceasing.—The testator bequeathed aa amount of personal estate to his hrother John, "to have and to hold to him, his heirs and asslgns forever." John predeceased the testator:—Held, thst the legacy lapsed, and thst the next of kin of the legatee were aot entitled. *Mealey* v. *Aitkins*, 27 Chy. 563.

Illegitimate Child.—R. B. hy his will devised his property to executors upon trust as follows: "Fifthly, in trust to pay to each of my two surviving children F. B. and M. A. B. the sum of $1,000," and the residue after the payment of his dehts, &c., and the said legacies and an allowance to his executors, to his four sisters. F. B. and M. A. B. were illegitimate children, and M. A. B. married and died during the lifetime of the testator leaviag children surviving. In a suit for administration aad construction of the will:—Held, that the words "child or other issue" in R. S. O. 1877 c. 106, s. 25, mean legitimate child or other legitimate issue and do not apply to an illegitimate child, and that the legacy to M. A. B. lapsed. *Hargraft* v. *Keegan*, 10 O. R. 272.

Legacies Payable at Specific Date—Division of Residue.—A testator gave two legacies to become due aad payahle in three and four years respectively from his decease, and instructed his executors to invest

tha same and pay the interest to the beneficiaries, nnd directed the investment of two separate sums for the benefit of two other devisees (one of whom was his sister) with a direction to pay them the interest for their lives, and proceeded, "and should there be a residue or surplus after paying out the foregoing bequests I will thnt the same be equally divided between my sisters and S. J. B., or the survivors of them at the time of winding-up the nffairs:"—Held, thnt the time for the division of the residue was, when sufficient funds were invested to produce the legacies nnd fulfil the directions of the will, and thst it was not postponed until the legacies were paid over or to any subsequent time. *Mncklin* v. *Daniel*, 18 O. R. 434.

Mistake—Direction to Divide in Impossible Fractions.—A testator by his will directed: "When my youngest son is of the age of eighteen years, my estate shnll be divided among my children then llving, i.e., to ench of my sons I leave two-thirds, and to each of my daughtera one-third, of all my estate and effects." When the youngest son nttnined eighteen, there were then twelve children living, seven dnughters snd five sons:—Held, that the most reasonnble nnd satisfactory construction of this clause, having regard to the words used, wns that each child should hnve a share, but that ench son's portion should be double thnt of n dnughter. The principle of construction in such cases of mistakes in wills is thnt the "words nre not corrected, but the intention, when clenrly ascertained, is carried out notwithstanding the nppsrent difficulty cnused by the partlcular words." *Lasby* v. *Crewson*, 21 O. R. 93.

Named Members of Class.—A testator, by his will, devlaed as follows: "All and aingular the rest, residue, nnd remainder of the estnte nnd effects, reai and personai, whlch I shall die possessed of, or to which at the time of my decense I shnll be eutitled, I do devise, bequeath, and order to be equally divided amongst my five sons sbove mentioned." One of the sona (A.) died during the lifetime of the father without issue:—Held, that the devise of the residue was not n devise to a class; and thnt by the decease of A., his share lapsed and descended to W., ns heir-nt-law of the anceator. *McIntosh* v. *Ontnrio Bank*, 19 Chy. 155.

Personalty to Legatees, "or their Heirs, Executors, or Assigns"—Death of Legatee in Lifetime of Testator.—A testator, by hls will, after n provision in fnvour of his wife for life, directed thnt "nt the death of my heloved wife . . . any money that **may** then be remaining . . . ahall be equally divided and paid to" certain nephews and nieces, naming them, "or their heirs, executors, or assigns." One of the nieces predeceaaed the testator, leaving a huaband and children:—Held, that the gift to the decensed niece did not lapse and that her heirs entitled to her share were those persons who would have taken her personal property under the Statute of Distributiona in esse of her dying inteatate posaeased of personai property. *Re Wrigley Estate*, 32 O. R. 108.

Prior Life Estate—Personalty to "Heirs-at-Law."—By a will of personal catate, after n life estate had been given to the teatator'a widow, it was provided by a residuary clause that the property should be aold and the proceeds equnlly distributed among the testator'a nephews and nieces, such bequests on the denth of any of them entitled to the same previously to the period of distribution to go to their "heirs-at-lsw." At the time of this action, the widow of the testntor was still alive, but some of the nephews and nieces had died:—Held, that the will gnve a vested inte:·st to such nephews and nieces as ahould be nlive at the time of the test:·tor's death, hut the period of distribution was the death of the widow; and the bequest to the nephewa and nieces wna subject to he divested ns to those of them who should die before the snid period of distribution, in favour of their represents tives, who were entitled to take in substitution for the original legatee, and, semble, for this resaon it was to be inferred that by "heirs-at-law" the teststor meant to express that the benefit was to go to the persona who would lnherlt the personni estate—that is to aay, the next of kin. *Hnrrison* v. *Spencer*, 15 O. R. 692.

Ratable Addition of Surplus to Legacies.—Among other bequests the testator declared as followa: "I beqneath to the worn-out preachers' and widows' fund in connection with the Wealeyan conference

here, the sum of £1,250, to be paid out of the moneys due me hy Robert Chestnut, of Fredericton. I bequeath to the bible society £150. I bequeath to the Wesleyan missionary society in connection with the conference the sum of £1,500." Then followed other and numerous bequests. The last clause of the will was:—"Should there be any surplus or deficiency, a pro rata nddition or deduction, as may be, to be mnde to the following bequests, nameiy, the worn-out prenchers' and widows' fund; Wesleyan missionary society: bible society." When the estate came to be wound up, it waa found that there was a very large surplus of personal estate, after pnying all annuities and bequests. This surplus was claimed, on the one hsnd, under the will, hy these charitable institutions, nnd on the other hand hy the heirs-at-inw and next of kin of the testator, as being residuary estate, undisposed of under his will:—Held, that the "surplus" had reference to the testator's personal estate out of which the nnuuities nnd legacies were payable; and therefore n pro rata nddition should be made to the three above-named bequests, Statutes of Mortmain not being in force in New Brunswick. *Ray* v. *Annual Conference of New Brunswick*, 6 S. C. R. 308.

Realization Directed.—Where a testator directed his real and personal estate to he converted into money; the proceeds to be invested; such investments to he continued until the whole of his property should be realized and from and out of the same, when so realized and invested in the whole, and thus avnilahle for division, and not before, to pay certain legacies:—Held, thnt mortgages properly secured, which the testntor held, should for the purposes of the will be deemed to be realized and invested immedlntely after the testntor's decense; that the period of pnyment was not to be extended beyond the time that the estate might, with due diligence, be realized, and that the trustee could not prolong the period hy selling the real estate on time. *Smith* v. *Scaton*, 17 Chy. 397.

Residue — Executory Devise — Event Happening in Part.—A testator hy his will gave his wife a life interest in his estate, and nt her death after giving some specific legacies the will provided: "The residue . . . I give, devise, and bequeath as follows, that is to say: it shall be equally divided hetween my . . . hrothers;" (two) "or in case of their dying before my . . . wife it shnll he eqnally divided between the helrs of my . . . hrothers." One of the brothers died in the lifetime of the widow and the other survived her:—Held, that, as the event provided for, viz., the death of both hrothers during the widow's lifetime, had not happened, the devise of the residue to them was not divested, and that the share of the hrother first deceased passed under his will. *Re Metcnlfe, Metcnlfe* v. *Metcnlfe*, 32 O. R. 103.

Canadian Society Presumed.—The testator, among other heqnestn of personalty, directed his executors, "on the death of my said wife, to pny over to the Wesleyan Methodist superannuated ministers' fund, out of the pure personnlty then in their hnnds, the sum of $800." There wns no such charitable institution as the one named in Canada, hut there was a society called "the connexional society of the Wesleyan Methodist church," one object of which was the maintenance of a fund called "the superannuated or worn-out preachers' fund:"—Held, that the testator having been resident in Canada, the presumption was, that it was a Canadian society he mennt; that "the connexional society" waa entitled to receive this bequest, as the one most nearly answering the description given in the will; that they were thus legatees, and as such, also entitled to shnre in the residue; such society heing entitled to hold hands to the annual valne of $5,000, and it was shown that the iands held hy the society did not exceed £1,000 a year; and therefore though the residue was composed of both realty and personalty, the Stntutes of Mortmain did not apnly to prevent the society shnring therein. *Edwards* v. *Smith*, 25 Chy. 159.

"Share and Share alike"—Period of Distribution—Overpayments.—The testator bequeathed his residuary estate, all other property, in lands, mortgages, nnd stocks to his grandchildren, "the children of J. C., and of my daughter A. J. B., wife of D. B. share and share alike, on their coming of the age of twenty-five years, to be finnily determined and paid to them on the youngest coming to the nge of twenty-five years. Provided, nevertheless, that each one on coming to the nge of twenty-five years

receive a portion of not more than half of what their share will be on the youngest coming of age." Then directions were given as to keeping books of account, and managing the estate. "And when the books so audited show the revenue of my estate after paying the before mentioned bequests, taxes and other charges on the same, amounts to $500, then half of such revenue or income be divided, share and share alike, between the family of my son J. C., and the family of my daughter A. J. B." (The other half going into the estate):—Held, (1) that the children referred to, the grandchildren of the testator, took per capita, and not per stirpes. (2) That when the eldest attained the age of twenty-five years he was entitled to receive one-half of his share, payment of which could not be delayed, and that date must be taken as a period at which those to take were to be ascertained and that any child born subsequent to the time the eldest child attained twenty-five was excluded and all born before that period were entitled to share in the estate. (3) That the children did not take vested interests, the gift to each being contingent on attaining twenty-five. (4) That twenty-five was the age at which the parties became entitled to an arrangement as to the amount of their shares. (5) That the trustees could charge the shares of any who had been underpaid with the excess of such payments. *Anderson* v. *Bell*, 29 Chy. 452, 8 A. R. 531.

Survivorship—Accruer.—A testator gave a legacy of $500 to each of three grandchildren, and directed "the said moneys so bequeathed to be kept invested by my executors and the same with accrued interest to be paid over to the said grandsons on their attaining their majority, and the said legacy to my said granddaughter to be paid to her with the interest accrued thereon on her attaining her majority or on her marriage, whichever event shall first happen. In case of the death of any one of my said grandchildren the bequests and legacies to them in this my will contained shall be divided among and go to the survivors of them, share and share alike." One of the grandsons died under age and unmarried, and then the granddaughter died under age and unmarried. The other grandson attained his majority and the executor paid him the whole amount of the legacies. In an action by the personal representative of the granddaughter seeking payment by the executor of half of the legacy given to the grandson who died first and the accumulations thereon:—Held, that the share of the deceased grandson's legacy which accrued to the granddaughter on his death passed on her death to the surviving grandson, and that the plaintiff was not entitled to it. *Clifton* v. *Crawford*, 27 A. R. 315.

Valuation and Division.—The will, amongst other things, directed as follows: "I will and order that the portion of my real estate and premises severally bequeathed to my two sons, and also the portion bequeathed to my four daughters, shall be severally and separately valued; and if either one shall be found to have a greater proportion or share thereof than the other, he or they shall pay back to the other in such manner such amount as will make each one of them equal sharer of my real estate." On a bill filed for a declaration of the rights of all parties under the will:—Held, that each child was entitled to an equal share of the estate devised. *Foster* v. *Emmerson*, 5 Chy. 135.

Vested Legacy—Payment at Majority.—Where a testator gives a legatee an absolute vested interest in a defined fund, the court will order payment on his attaining twenty-one, notwithstanding that by the terms of the will payment is postponed to a subsequent period. *Rocke* v. *Rocke*, 9 Beav. 66, followed. *Goff* v. *Strohm*, 28 O. R. 553.

Failure of Gift Lapse.—See *Taylor* v. *Lambert*, 2 Ch. D. 177; *Re Feeney*, 11 O. W. R. 440.

Lapsed Legacy.—"I give to my wife my household effects, including beds and bedding, also any other chattels or personal effects I may die possessed of." Residuary bequest—Lapsed legacy of all money in hand or in the bank and all other securities for money," held to pass under residuary bequest. *Re Way*, 6 O. L. R. 614, followed, and *Anderson* v. *Anderson* (1895), 1 Q. B. 749. *Re Dredge*, 1 O. W. N. 828.

Lapsed Devise—Effect of on Legacy Charged on Land Devised.—*Aplin* v. *Stone* (1904), 1 Ch. 543, decides that though the devise is avoided it is not struck out of will. As to a charge being implied by the testator's direction to the devisee to pay the legacy, see *Robson* v. *Jardine*, 22 Ch. 420; *Re Thomas*, 2 O. L. R. 660. *Re Wilson*, 3 O. W. R. 754.

Exception from Fund.—Where a testator disposes of a fund with an exception out of that fund which he gives to some one else, if that person dies in the lifetime of the testator so that a lapse occurs the exception is practically written out of the will. *Re Nevett*, 6 O. W. R. 971.

Partial Interest—Lapse of.—If the gift over be an executory devise, the fact that there was a lapse of a partial interest did not operate to prevent the whole estate devised from being divested upon the happening of the event on which the gift over was to take effect. In such cases as *Gatenby* v. *Morgan*, 1 Q. B. D. 685, the prior estate was a fee simple and the gift over a life estate, there the prior estate is divested only so far as is necessary to give effect to the gift over. *Re Keleher*, 8 O. W. R. 225.

Lapse as to Land Devised by Death of one of Devisees before Testator.—Effect is that undivided half becomes part of residue (section 27 of Wills Act). Real estate held in common personalty as joint tenancy. *Re Gamble*, 8 O. W. R. 799.

The testator, who at the time of making his will in 1891 had four children living in Barnstable, England, devised two houses to his "children at Barnstable, England, to be divided among them in equal shares." One of the four children died after the making of the will and before the testator, leaving children:—Held, applying the principle of *Re Williams* (1903), 5 O. L. R. 345, that section 36 of the Wills Act did not apply and that the children of the deceased child took no share. *In re Clark*, 8 O. L. R. 599.

The testator by his will directed that after the death of his wife his estate should "be divided amongst all my children." One daughter died, leaving issue, before the execution of the will:—Held, that the daughter's children did not take directly under the will, nor by virtue of sec. 36 of the Wills Act of Ontario, there having been no gift to their parent. *Re Williams*, 5 O. L. R. 345.

Children as a Class.—In the case of gifts to children as a class, as tenants in common, the shares of members of the class dying before the testator do not pass to the issue of those dying, as under sec. 36 of the Wills Act, R. S. O. 1897, ch. 128, but go to the other members of the class, and the fact that one of the class is named specially makes no difference. *Re Moir*, 14 O. L. R. 541.

CHAPTER XIV.

UNCERTAINTY.

INDULGENCE SHOWN TO TESTATORS IN THE CONSTRUCTION OF WILLS.

In the construction of wills the most unbounded indulgence has been shown to the ignorance, unskilfulness, and negligence of testators: no degree of technical informality, or of grammatical or orthographical error, nor the most perplexing confusion in the collocation of words or sentences, will deter the judicial expositor from diligently entering upon the task of eliciting from the contents of the instrument the intention of its author, the faintest traces of which will be sought out from every part of the will, and the whole carefully weighed together; but if, after every endeavour, he finds himself unable, in regard to any material fact, to penetrate through the obscurity in which the testator has involved his intention, the failure of the intended disposition is the inevitable consequence. Conjecture is not permitted to supply what the testator has failed to indicate; for as the law has provided a definite successor in the absence of disposition, it would be unjust to allow the right of this ascertained object to be superseded by the claim of any one not pointed out by the testator with equal distinctness. The principle of construction here referred to has found expression in the familiar phrase, that the heir is not to be disinherited unless by express words or necessary implication; which, however, must not be understood to imply that a greater degree of perspicuity or force of language is requisite to defeat the title of the heir to the real estate of a testator, than would suffice to exclude the claim of the next of kin as the successor to the personalty; for though undoubtedly, on some points, a difference of construction has obtained in regard to these several species of property, that difference is ascribable, rather to the diversity in their respective nature and qualities, than to any disparity of favour towards the claims of the heir and next of kin.

1st ed., p. 315, 6th ed., p. 453. *Baker* v. *Newton*, 2 Beav. 112. For misnomer and misdescription see Chapter XXXV., "Description of Persons and Things."

In modern times instances of testamentary gifts being rendered void for uncertainty are of less frequent occurrence than formerly; which is owing probably, in part, to the more matured state of the doctrines regulating the construction of wills, which

have now assigned a determinate meaning to many words and phrases once considered vague and insensible, and in part to the more practised skill of the courts in applying these doctrines. Hence the student should be cautioned against yielding implicit confidence to any early cases, in which a gift has been held to be void for uncertainty, the principle whereof has not been recognised in later times.

Ibid. p. 454.

To the validity of every disposition, as well of personal as of real estate, it is requisite that there be a definite subject and object; and uncertainty in either of these particulars is fatal.

Ibid.

UNCERTAIN CONDITION.

A condition may be void for uncertainty. (Chapter XXXIX.).

UNCERTAINTY AS TO OPERATION OF LIMITATION.

A gift may be void for uncertainty, not because there is any doubt as to the intention of the testator, but because it is uncertain when and how the gift will take effect.

6th ed., p. 454. *Re Visc. Exmouth*, 23 Ch. D. 158.

GIFT OF "ALL" HELD TOO INDEFINITE.

A simple example of a devise rendered void by uncertainty as to the intended subject-matter of disposition, is afforded by the early case of Bowman v. Milbanke, where the words, "I give all to my mother, all to my mother," were adjudged insufficient to carry the testator's land to his mother, as it was wholly doubtful and uncertain to what the word "all" referred.

1st ed., p. 317, 6th ed., p. 455.

REMARK AS TO TRANSPOSITION OF WORDS.

To authorize the transposition of words, it is clearly not enough (as hereafter shown) that they are inoperative in their actual position: they must be inconsistent with the context.

5th ed., p. 328. 6th ed., p. 456. (Chapter XVIII. s. 2).

"AFTER LEGACIES, &C., ARE PAID, I LEAVE TO A.," RESIDUE HELD TO PASS.

At the present day, however, the Court is always anxious to give effect to the testator's intention, even if vaguely expressed.

6th ed., p. 456. *Re Bassett's Estate*, L. R. 14 Eq. 54.

"THE SAID."

Sometimes uncertainty is caused by a testator disposing of various parts of his property and effects, and then referring to "the said property and effects" in such a way as to make it doubtful whether he means (1) the property and effects last disposed of, or (2) the share of all his property and effects previously given to

a certain person, or (3) all his property and effects. In such a case, the intention must be collected from the whole will. As a general rule, "the said" refers to the immediate antecedent.

6th ed., p. 456. *Re Willomier's Trusts*, 16 Ir. Ch. R. 389: *Healy* v. *Healy*, Ir. R. 9 Eq. 418.

UNCERTAINTY ARISING EX POSTFACTO.

Sometimes a gift may be void for uncertainty by reason of events which have happened during the testator's lifetime, since the execution of the will.

6th ed., p. 457. *Re Gray*, 36 Ch. D. 205.

EFFECT OF BLANK.

A blank does not necessarily make a bequest void for uncertainty; thus a bequest of " hundred pounds" is a good bequest of 100*l.*

6th ed., p. 457. *Makeown* v. *Ardagh*, Ir. R. 10 Eq. 445.

GIFT OF AN INDEFINITE PART VOID.

Where the intended subject-matter of disposition consists of an indefinite part or quantity, the gift necessarily fails for uncertainty. On this principle, a bequest of "some of my best linen," or "of a handsome gratuity to each of my executors," has been held void.

5th ed., p. 328. 6th ed., p. 457. *Jubber* v. *Jubber*, 9 Sim. 503.

EXCEPT WHERE THE WILL FURNISHES GROUNDS FOR ESTIMATING THE AMOUNT.

But a distinction seems to be taken where the will furnishes some ground on which to estimate the amount intended to be bequeathed.

Ibid. Jackson v. *Hamilton*, 3 J. & Lat. 702.

BEQUEST FOR MAINTENANCE, &C., OF AN INFANT OR ADULT, GOOD, THOUGH NO SUM SPECIFIED.
FOR FOUNDING A SCHOOL.

So, where the bequest is for the maintenance, support, and education of an infant, or for the maintenance and support of an adult person, or to set him up in business, although no amount be specified, the Court will determine the amount to be applied for that purpose, unless the amount is left to the discretion of a named person, in which case he can determine it, or unless the words used are too vague to furnish a basis of calculation. And a bequest of "3,000*l.* or thereabouts," to be raised by accumulating annual income, has been held good: the words "or thereabouts" being considered as used only to meet the difficulty which would arise in accumulating up to the exact limit, and to render any little excess, occasioned by the addition of an entire dividend, subject to the same disposition as the specified sum.

Ibid. Re Pedrotti's Will, 27 Beav. 583; *Abraham* v. *Alman*, 1 Russ. 509: *Oddie* v. *Brown*, 4 De G. & J. 179.

Where a testator creates a trust for the repair of a tomb, or the like (not forming part of a church), although this, as already noticed, is a void trust, the Court will determine what would have been required for it, if a determination on that point is needed in order to give practical effect to other parts of the will.

5th ed., p. 329, 6th ed., p. 458.

CHARITABLE PURPOSES AND OTHER PURPOSES.

Where there is a gift for charitable purposes and also for purposes of an indefinite nature not charitable, and no apportionment is made by the will, so that the whole might be applied for either purpose, the whole gift is void for uncertainty. But where there is a gift for a charitable purpose and for another ascertained object, it will either be apportioned between them, or equally divided. The cases have been already considered.

6th ed., p. 458. *Re Vaughan*, 33 Ch. D. 187.

WHERE THE AMOUNT IS DIFFERENTLY STATED.

A bequest of a sum "not exceeding" 100*l.* or of "50*l.* or 100*l.*," will be construed in a manner most beneficial to the legatee, and is, therefore, a good gift of the whole 100*l.*; and a bequest will not be void for uncertainty, merely because the amount is differently stated in different parts of the will, if the Court can collect that one statement was evidently a mistake, even though the mistake be contained in the very words of gift.

5th ed., p. 329, 6th ed., p. 458. *Philipps* v. *Chamberlaine*, 4 Ves. 51.

WHERE SUBJECT OF GIFT IS TO BE DETERMINED BY THIRD PERSON.

The maxim "id certum est quod certum reddi potest," applies to gifts which would otherwise be void for uncertainty in the subject. Thus if a testator gives A. a power of selecting one of the testator's houses, and devises the other houses to B., this is a good gift to B. if A. exercises his power of selection. On this principle it has been held that a gift of portions to daughters, to be determined by the testator's wife and executors, according to the value of their services to the family, and, in the case of the marriage of a daughter, according to the match she might make, is not void for uncertainty, as the discretion given to the wife and executors removes that objection.

6th ed., p. 459. As to the result of A. predeceasing the testator: see *Jerningham* v. *Herbert*, 4 Russ. 388; *Re Conn* (1898), 1 Ir. R. 337; *Salusbury* v. *Denton*, 3 K. & J. 529.

WHERE DEVISEE IS ENTITLED TO SELECT.

Where the gift comprises a definite portion of a larger quantity, it is not rendered nugatory by the omission of the testator to point out the specific part which is to form such portion, the devisee or legatee being in such case entitled to select; by which

means the subject of the gift is reducible to certainty; and "id certum est quod certum reddi potest" is a settled rule in the construction of wills. Thus, if a man devise two acres out of four acres that lie together, it is said that this is a good devise, and the devisee shall elect.

5th ed., p. 331, 6th ed., p. 460.

WHERE TESTATOR INTENDS TO SELECT.

So, if a testator devise a messuage, and ten acres of land surrounding it, part of a larger number of acres, the choice of such ten acres is in the devisee. And if a testator devise to his son John one freehold close of land in R. and to his son George one freehold close of land in R., the devisees must elect: apparently John has the first choice. On the same principle, where a testator, having three houses in A., devised "two houses in A.," the devisee was held entitled to elect which two he would take. But in cases of this kind "it is essential that the will should not show that the testator was bequeathing any particular one of the properties to the legatee who desires to select, for the selection by the testator is incompatible with the view that he intended the legatee to select. If a will shows that a testator intends to give a particular property to a legatee, and, owing to the testator having several properties answering the description in the will of the particular property given, you are unable to say, either from the will itself or from extrinsic evidence, which of the several properties the testator referred to, then on principle the gift must fail for uncertainty, and the Court cannot, in order to avoid an intestacy, change the will, or construe it as giving to the legatee the option of choosing any one of the properties."

See 5th ed., p. 332, 6th ed., p. 460. *Tapley* v. *Eagleton*, 12 Ch. D. 683.

EXTRINSIC EVIDENCE.

In such cases the Court strives to ascertain by extrinsic evidence what the testator's intention was.

6th ed., p. 461. *Blundell* v. *Gladstone*, 3 Mac. & G. 692.

DIFFERENT KINDS OF SHARES.

Where a testator bequeaths to A. a certain number of shares in a company, and it appears that at the date of his will he held shares in that company of two different classes, one of which is more valuable than the other, and either of which is sufficient to satisfy the bequest, then the legatee has, it seems, the right of selection. But if the shares of the more valuable class are not sufficient to satisfy the bequest, it is a question of construction out of which class the bequest ought to be satisfied.

6th ed., p. 461. *Re Cheadle* (1900), 2 Ch. 620.

MISTAKE IN DESCRIPTION.

No question of selection arises if it appears that the testator meant to give the legatee the whole of a certain kind of property belonging to him. Thus where a testator bequeathed all his property in the Austrian and Russian funds, "and also that vested in a Swedish mortgage," the testator having several Swedish mortgages, they were all held to pass. And where a testator having five leasehold messuages in L., comprised in four leases, bequeathed "his four leasehold messuages in L.," it was held that all five messuages passed upon a context somewhat favouring that construction.

5th ed., p. 333, 6th ed., p. 461. *Richards* v. *Patteson*, 15 Sim. 501.

INDEFINITE POWER OF SELECTION OR DISPOSITION.

Sometimes a testator gives a legatee an express power of selection or disposition, and the question may then arise how far the power extends.

6th ed., p. 461. *Edwardes* v. *Jones*, 35 Bea. 474.

GIFT OF WHAT SHALL REMAIN OR BE LEFT.

It may be observed that in numerous instances a devise or bequest of what shall remain or be left at the decease of the prior devisee or legatee, has been held to be void for uncertainty. Some of these cases certainly had special circumstances, and the indefiniteness seems not to have been invariably considered to be such as to invalidate the gift. At all events, the expression is susceptible of explanation, where the property, or part of it, consists of household furniture, or other articles of a perishable nature, by considering these words as referring to the expected diminution of the property by the use and wear of the first taker. Such, it is clear, would be the construction, if the property (whatever were its nature) were given to the first taker expressly for life.

1st ed., p. 321, 6th ed., p. 462. Except consumable articles. *Andrew* v. *Andrew*, 1 Coll. 690.

If a testator makes an absolute gift of property to A., any gift over of what may be left undisposed of by A. is repugnant and void.

6th ed., p. 463. *Henderson* v. *Cross*, 29 Bea. 216; *Perry* v. *Merritt*, L. R. 18 Eq. 152.

Even a gift to X. in trust for A., with a direction that any balance remaining in X.'s hands after the death of A. should go absolutely to B., operates as an absolute gift to A.

6th ed., p. 463. *Re Walker*, *Lloyd* v. *Tweedy* (1898). 1 Ir. R. 5.

GIFT OVER OF SO MUCH AS SHALL NOT HAVE BEEN PAID.

But a gift over of a legacy, or of so much thereof as shall not have been paid to the legatee, is not void for uncertainty.

6th ed., p. 463. See chap. LVII.

The question whether a life interest can be implied from a gift of "what shall remain on the death of X.," is considered elsewhere.
6th ed., p. 463. Chapter XIX.

UNCERTAIN WORDS WILL NOT CREATE PRECATORY TRUST.

Sometimes a testator gives property to A. absolutely, with a request or direction that he will at his death leave the "bulk" or "remainder" of the property to B.; this is void, being too uncertain to create a precatory trust.
6th ed., p. 463.

GIFT FOR LIFE FOLLOWED BY GIFT OVER OF UNEXPENDED CAPITAL.

Property may, of course, be given to a person for life, with power to appoint or expend the capital, followed by a valid gift over of the unappointed or unexpended part. But if a testator gives the income of property to his wife for life with a request that if it is more than she wants to live on, she will give the remainder to B., this request is too uncertain to create a trust in B.'s favour.

See 5th ed., p. 333, 6th ed., p. 464. *Hudson* v. *Bryant*, 1 Coll. 681.

A gift to A. for life "and whatever she can transfer to go to her daughters B. and C.," is void for uncertainty as to B. and C.; so is a gift of what a tenant for life "can save out of the income." *Ibid.* *Flint* v. *Hughes*, 6 Bea. 342; *Cowman* v. *Harrison*, 22 L. J. Ch. 903.

WHERE PRIOR GIFT LAPSES.

It will be remembered that if property is given absolutely to A. with a gift over which is void for repugnancy, and A. dies in the testator's lifetime, the gift over will, as a general rule, take effect.
6th ed., p. 465. *Re Stringer*, 6 Ch. D. 1.

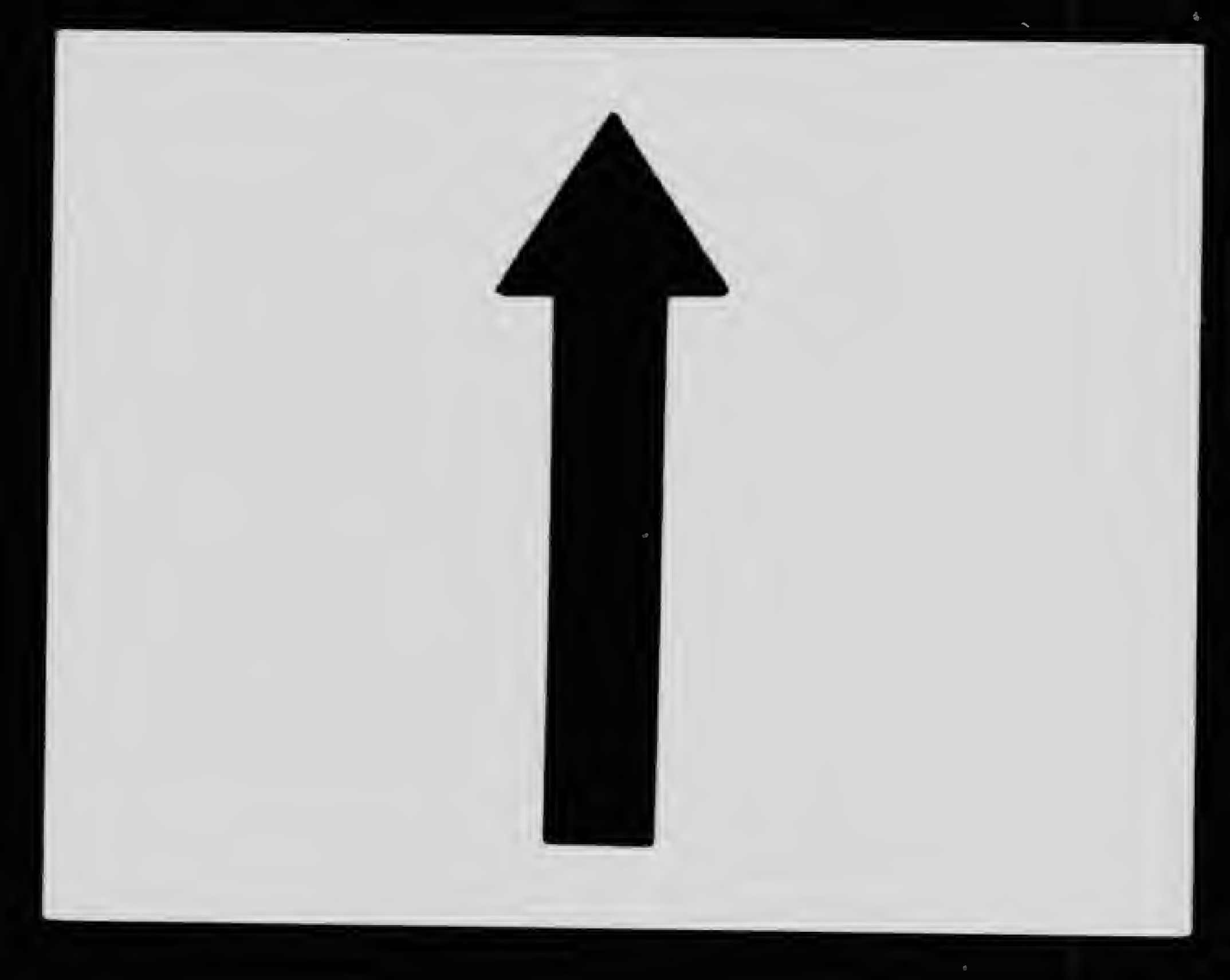
GIFT OF WHAT SHALL BE LEFT PRECEDED BY A SPECIAL POWER OF DISPOSITION.

If the gift of what shall be left is preceded by a power of disposition or appropriation reserved to the prior legatee in favour of particular objects, the expression evidently points at that portion of the property which shall be unappointed or unappropriated under the power.

1st ed., p. 322, 6th ed., p. 465. *Surman* v. *Surman*, 5 Mad. 123.

It is equally clear that if property is given to trustees with a discretionary power to appropriate it or any part of it for certain purposes or in a certain way, and any part of it not so appropriated is given to A., this operates as an absolute gift to A. subject to an exercise of the power.

5th ed., p. 335, 6th ed., p. 466. *Lancashire* v. *Lancashire*, 1 De G. & S. 288.



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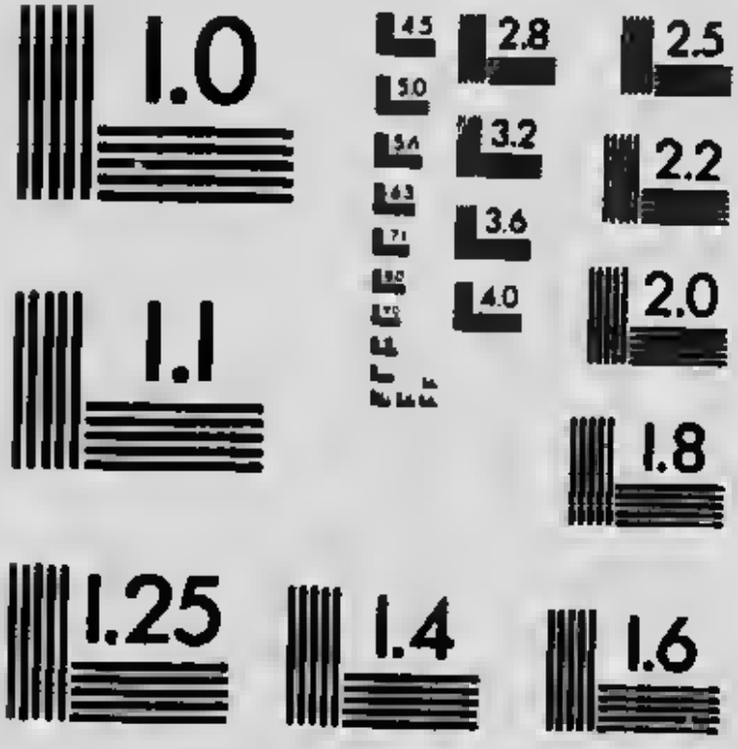

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DISTINCTION BETWEEN A GIFT OF THE WHOLE EXCEPT AN UNASCERTAINED PART AND A GIFT OF THE REMAINDER AFTER DEDUCTING AN UNASCERTAINED PART.

If the words are such as to point to a division into parts, and to amount to a gift of the individual parts, then, if one of the parts cannot be ascertained the legatee of the other part is necessarily disappointed, since his part is undetermined, and the words are not sufficient to carry the whole to him.

Ibid. Jerningham v. *Herbert*, 4 Russ. 388.

GIFT OF THE RESIDUE OF A FUND AFTER PROVIDING FOR AN ILLEGAL OBJECT IS VOID, IF THE AMOUNT REQUIRED FOR SUCH OBJECT IS UNASCERTAINABLE.

Where the bequest is of the residue or surplus of a specified fund remaining after providing for an object which is illegal or unattainable, and the exact amount to be laid out on which is not specified, the bequest is necessarily void for uncertainty, unless the purpose is such and so defined that the Court can determine what would have been the proper amount to be expended had the object been legal or attainable, or unless (according to some recent cases) the bequest of surplus carries with it all that is not otherwise effectually disposed of.

5th ed., p. 336. 6th ed., p. 467. *Chapman* v. *Brown*, 6 Ves. 404.

SECUS IF THE AMOUNT IS ASCERTAINABLE.

But if the testator has so defined his object as to furnish fair and reasonable data, the Court will determine the amount which ought to have been expended on it if it had been legal, and thus at the same time ascertain the amount of the surplus.

5th ed., p. 337, 6th ed., p. 468. *Mitford* v. *Reynolds*, 1 Phil. 185, 706.

WHERE RESIDUE IS SUBSTANTIAL.

But if the position of things is reversed, and the primary purpose is only intended to require a small part of the fund, so as to leave a substantial surplus for the secondary purpose, the gift of the surplus is good, and the only question is what it consists of. Formerly the principle was considered to be, that in such a case an estimate should be made of the amount required for the primary purpose, and that the balance should be applied to the secondary purpose. It is possible that this principle may still be applicable where the secondary purpose is not charitable, but where it is charitable the rule is now settled that if the primary purpose is illegal, the whole fund is given to the secondary purpose.

6th ed., p. 469. *Fisk* v. *Att.-Gen.* L. R. 4 Eq. 521.

CHARITABLE GIFTS, WHEN VOID FOR UNCERTAINTY.

Although the Courts always strive to give effect to charitable gifts, and never hold them void for uncertainty in the object, yet

a charitable gift may be void if it is impossible to ascertain the amount of the fund required to give effect to it.

6th ed., p 470. *Flint* v. *Warren*. 15 Sim. 626.

BLANK LEFT FOR NAMES.

Uncertainty in regard to the objects of gift arises either from the testator having described such objects by a term of vague and unascertained signification, or from his having specified a definite class or number of persons, but having shown that all are not to take, and then left it in doubt which of them he intended to select as the object or objects of his bounty. It has been often laid down that if a devise be to one of the sons of J. S. (he having several sons), the devise is void for uncertainty, and cannot be made good. And if a man devise to twenty of the poorest of his kindred, this is void for the uncertainty who may be adjudged the poorest. So where the devise was "to the testator's brother and sister's family," and the testator had two sisters, the devise was held void; and a bequest "to and amongst my nephews and nieces John and Nanny" (followed by a blank), or to such of them as should be living at the death of "the tenant for life," was held void for uncertainty, because although by using the plural number, "nephews and nieces," the testator showed he meant to include more than one of each sex, yet by his apparent intention to name those whom he intended for legatees, it was made doubtful whether he meant to include all.

1st ed., p. 322, 6th ed., p. 470. *Doe d. Hayter* v. *Joinville*, 3 East. 172; *Greig* v. *Martin*, 5 Jur. N. S. 329.

UNCERTAINTY CAUSED BY EXTRINSIC FACTS.

In the case above put of a gift to "one of the sons of J. S.," he having several sons, parol evidence is not admissible to remove the uncertainty, because the uncertainty is apparent on the face of the will, "the terms of which suppose the existence of more than one son, and moreover show that the testator had not determined which of them to make the object of his bounty." If, however, the gift is to "the son of my brother A.," and it appears that A. has two or more sons, extrinsic evidence is admissible in the first instance to show whether the testator had reasons for preferring one son, and if no such evidence is forthcoming, evidence is admissible to show which son the testator intended to benefit.

6th ed., p. 471. *Gregory* v. *Smith*, 9 Ha. 708. (See Chapter XV.).

LATENT AMBIGUITY.

The same rule applies where the gift is to "John Smith," or "the children of John Smith," and there are two John Smiths known to the testator. It is, of course, assumed that there is

nothing on the face of the will to show which John Smith was intended; if so there is no uncertainty.

6th ed., p. 471. *Re Stephenson* (1897), 1 Ch. 75.

GIFT TO CLASS EXCEPT A PERSON NOT NAMED.

Again, a gift to a class, with the exception of one person of the class, who is not named, or cannot be ascertained, is not void, but takes effect in favour of the whole class. And where a testator, after devising property to his daughter A. in fee, and if she die under twenty-five without leaving any children, then over, gave other property on trust to be conveyed equally amongst "such" children of A., the context not showing what limit was intended to be put on the class of children, it was held that all took. So a gift to the testator's "aforesaid nephews and nieces," none having been previously named, was held to include all; and a bequest to the children of A., "including who the illegitimate of" A., was held, on the same principle, to be a good bequest to the legitimate children of A., but to include no illegitimate child.

5th ed., p. 341, 6th ed., p. 472. *Illingworth* v. *Cooke*, 9 Hare, 37: *Campbell* v. *Bouskell*, 27 Beav. 325. The word "aforesaid" was thus rejected.

MISTAKE IN NUMBER OF CLASS.

Where a testator gives a legacy to each of the children of A., and describes them as consisting of a specified number, which is less than the actual number at the date of the will, this misstatement is disregarded. The same rule is sometimes applied to other classes or descriptions of persons.

Ibid.

The general principle is that "if the Court comes to the conclusion, from a study of the will, that the testator's real intention was to benefit the whole of a class, the Court should not, and will not, defeat that intention because the testator has made a mistake in the number he has attributed to that class. The Court rejects an inaccurate enumeration."

6th ed., p. 472. *Re Stephenson* (1897), 1 Ch. 83.

WHERE GIFT IS PARTLY CHARITABLE.

On the same principle, where property is given to trustees for purposes which are partly charitable and partly of an indefinite nature not charitable, so that the whole might be applied for either purpose, the gift is void.

6th ed., p. 474.

GIFT WHOLLY CHARITABLE.

A gift which is wholly charitable is never void for uncertainty in the object.

6th ed., p. 474.

WORDS OF REFERENCE.

Uncertainty is sometimes caused by the use of relative pronouns or words of reference: as where a testator gave property to his wife for life and after her death to M., "niece to my said wife. Item, I give the use of 500*l.* stock for and during her natural life": it was held on the context, that "her" referred to the wife.

6th ed., p. 474. *Castledon* v. *Turner*, 3 Atk. 257.

A gift "amongst my relations hereafter named," where none are subsequently named, is void for uncertainty.

6th ed., p. 474. *Crampton* v. *Wise*, 58 L. T. 718.

"THE SAID."

The phrase "the said" generally refers to the immediate antecedent, but it is a question of construction on the whole will, and therefore if there are separate gifts to two persons each named A. B., and a subsequent reference to "the said A. B.," this may mean the one first named, if the context so requires.

6th ed., p. 474.

GIFT TO SEVERAL ALTERNATIVELY.

Uncertainty is sometimes produced by the mention of several objects alternatively, as in the case of a gift to A. or B.

1st ed., p. 324, 6th ed., p. 475. *Longmore* v. *Broom*, 7 Ves. 124.

A bequest to A. or B. is void; but a bequest to A. or B. at the discretion of C. is good, for he may divide it between them.

Ibid.

SUBSTITUTIONAL GIFT CREATED BY WORD "OR."

There are, however, several cases in which "or" has had the effect of making the latter branch of a gift substitutional.

6th ed., p. 476. *Carey* v. *Carey*, 6 Ir. Ch. Rep. 255.

The question whether "or" imports substitution arises most frequently in cases where the latter part of the gift is in favour of a class of persons related to the original devisee or legatee, such as "issue," "children," "heirs"; as, for example, where the gift is "to A. or his issue," or "to A. or in case of his death to his issue." The tendency of the modern cases is to construe such a gift as intended to substitute the issue for the original devisee or legatee in the event of the latter dying in the estator's lifetime.

6th ed., p. 477. *Re Coley* (1901), 1 Ch. 40.

SYNONYMOUS CONSTRUCTION OF "OR."

Sometimes "or" is used by a testator to show that he uses two phrases to mean the same thing.

6th ed., p. 477. *Re Thompson's Trusts*, 9 Ch. D. 607.

REFERENCE TO USES OF OTHER ESTATES, THERE BEING MORE THAN ONE.

Uncertainty sometimes arises from property being devised to the same uses as the testator's "other" estates, of which there are several, that are devised to different uses. It may also be occasioned by the testator's apparent misapprehension of the law regulating the devolution of property.

5th ed., p. 343, 6th ed., p. 478. *Thomas* v. *Thomas*, 3 B. & Cr. 825.

NO OBJECTION THAT BENEFICIARY IS TO BE ASCERTAINED BY FUTURE ACT OF TESTATOR.

Id certum est quod certum reddi potest is a rule no less applicable to the objects than (as we have seen) it is to the subjects of disposition; and, therefore, it is no objection to a gift that it is so framed as to make the objects dependent upon some extrinsic circumstance, though it be an act performed, or even to be performed, by the testator himself in his lifetime.

1st ed., p. 326, 6th ed., p. 478. *Stubbs* v. *Sargon*, 3 My. & Cr. 507.

HOW FAR DISCRETION MAY BE GIVEN TO TRUSTEES.

Another illustration of the same principle is to be found in the case of a trust for a class of persons which is valid, although the shares and interests which they are to take are left to the discretion of the trustees. But the class must be limited or defined in some way, for if property is given to trustees to be distributed or disposed of in such manner as they think fit, this is a discretion which cannot be controlled by the Court, and there is a resulting trust for the persons entitled in default of disposition. The trustees cannot take beneficially, because the form of the gift implies that they are to exercise their discretion for the benefit of other persons.

6th ed., p. 478.

GIFT TO SEVERAL SUCCESSIVELY, NOT SAYING IN WHAT ORDER.

In many cases devises to several persons successively have been contended to be void on account of the uncertainty respecting the order in which the objects are to take. Where the devise is to several specified individuals in succession, the obvious rule is, to hold them to be entitled in the order in which their names occur. If it be to a class of persons, (constituted such in virtue of birth), as to children, sons, or brothers, then priority according to seniority of age may be presumed to be intended. And the circumstance of a condition being imposed on the devisees has been held not to vary the order in which they are successively entitled.

1st ed., p. 327, 6th ed., p. 479. *Young* v. *Sheppard*, 10 Beav. 207.

WHERE INTENDED OBJECT CANNOT BE IDENTIFIED, GIFT IS VOID FOR UNCERTAINTY.

It must be remembered that with respect to charities gifts may be good, which, with respect to individuals, would be void.

We have se. 'hat charitable bequests are not void for uncertainty in the ject; and where there are two charities of the same name, the legacy will be divided between them, or administered cy-pres, if it cannot be ascertained which was the intended object. In the case of individuals, the gift would be void f uncertainty. The rule has occasionally been disregarded.

5th ed., p. 346. 6th ed., p. 480. *Hare* v. *Cartridge*, 13 Sim. 167. Disapproved of *Re Stephenson* (1897), 1 Ch. 75.

PAROL EVIDENCE.

Where a testator gives property to a person by a particular name or description, and it is found that there were at the date the will two persons answering to that name or description, parol evidence is admissible to show which of them was intended.

6th ed., p. 480 (Chapter XV.).

TRUSTS AND POWERS.

With regard to trusts, the general rule is: Sometimes a testator distinctly shows an intention to create a trust, but does not go on to denote with sufficient clearness who are to be its objects; the effect of which obviously is, that the devisees or legatees in trust (whom we suppose to be distinctly pointed out) hold the property for the benefit of the person or persons on whom the law, in the absence of disposition, casts it: in other words, the gift takes effect with respect to the legal interest, but fails as to the beneficial ownership.

1st ed., p. 333. 6th ed., p. 481. *Stubbs* v. *Sargon*, 3 My. & Cr. 507: *Robinson* v. *Waddelow*, 8 Sim. 134.

WHERE GIFT IN TRUST THOUGH DISCRETIONAL.

So if the gift be expressly "in trust," though to be disposed of in such manner and for such purposes as the donees think fit, they are trustees, and the beneficial interest results to the heir or next of kin: and a gift "to be expended and appropriated in such manner as the donees, or a majority of them, shall in their discretion agree upon," without the words "in trust," would probably produce the same result.

5th ed., p. 355. *Fowler* v. *Garlike*, 1 R. & My. 232: *Buckle* v. *Bristow*, 10 Jur. N. S. 1095.

PRECATORY AND UNDEFINED TRUSTS.

The question of uncertainty often arises in connection with precatory trusts, and trusts without definite objects, both of which topics are considered in another chapter. It may however be useful to notice some distinctions which have been drawn.

See Chapter XXIV.

UNCERTAINTY IN SUBJECT.

1. A testator may express a clear intention to create a trust, and yet his intention may fail to take effect, because he has not defined the subject-matter of the trust with sufficient certainty.

Ex parte Payne, 2 Y. & C. 636.

UNCERTAINTY IN SUBJECT AND OBJECT.

2. Wherever the subject to be administered as trust-property, and the objects for whose benefit it is to be administered, are to be found in a will not expressly creating trust, the indefinite nature and quantum of the subject, and the indefinite nature of the objects, are always used by the Court as evidence that the mind of the testator was not to create a trust.

Re Diggles, 39 Ch. D. 257.

WHERE OBJECT ONLY IS UNCERTAIN.

3. A testator may show an intention, either by mandatory or precatory words, that a person to whom he has given property by his will is to hold it upon trust for objects who are not ascertained: in such a case, although the intention of the testator cannot be carried out, yet the trust is not without effect. "Suppose, for instance, that by the precatory words in the will, the donee is requested to apply property, the amount of which is ascertained, "for the benefit of——," . . . . there would be uncertainty enough as to the object, and yet such a trust would be created as would effectually exclude the donee from applying the property to his own use." The effect of such a trust is considered in another chapter.

6th ed., p. 482. See Chapter XXI.

POWERS.

With regard to powers, the question of uncertainty arises chiefly in those cases where a person is empowered to appoint property among the "family" or "relations" of a person: the decisions on this point are referred to in the chapter on Powers. A power may also be void for uncertainty because the objects are not defined at all.

6th ed., p. 483. *Williams* v. *Williams*, 1 Sim. N. S. 358; *Re Hetley* (1902), 2 Ch. 866. See Chapter XXIII.

"Family."—Held, in this case, to include the widow. See *Dawson* v. *Fraser*, 18 O. R. 496.

"Family Now at Home" — Death of Beneficiary. — Where a testator provided by his will: "that the farm he kept till the youngest surviving child comes of age, at which time I would desire the property to be sold and the proceeds to be divided equally between all my children and my wife. . . . My will is, that I would like the farm rented to some good tenant, on the best terms possible, the rent to be used in the support and maintenance of the family now at home." The farm referred to was the only real property possessed by the testator either at the time of making his will or at his death. One of the testator's children, though living on the farm at the time of the testator's death, afterwards left it, and went to reside elsewhere:—Held, that the words "family now at home" were designatio personarum, and that the child in question did not forfeit her vested right to share in the rents by afterwards leaving the home. She afterwards died intestate, before the testator's youngest surviving child came of age:—Held, that her share of the rents devolved on her personal representatives. *Dawson* v. *Fraser*, 18 O. R. 496.

Precatory Trusts.—A testator, by his will, made an absolute gift of all his property to his wife, subject to the payment of debts, legacies,

funeral and testamentary expenses, and by a subsequent clause provided as follows: "And it is my wish and desire, after my decease, that my said wife shall make a will dividing the real and personal estate and effects hereby devised and bequeathed to her among my said children in such manner as she shall deem just and equitable:"—Held, that this did not create a precatory trust, and that the wife took the property absolutely. If the entire interest in the subject of the gift is given with superadded words expressing the motive of the gift, or a confident expectation that the subject will be applied for the benefit of particular persons, but without in terms cutting down the interest before given, it will not now be held, without more, that a trust has been thereby created. In re Adams and Kensington Vestry, 27 Ch. D. 394, and In re Diggles, Gregory v. Edmondson, 39 Ch. D. 253, specially referred to and followed. *Bank of Montreal* v. *Boxer*, 18 O. R. 226.

General Intention of Testator.—Testatrix by her will gave an annuity to M. so long as she remained single. M., before the date of the will, had been married and divorced a vinculo to the knowledge of the testatrix:—Held, that M. was entitled to the annuity. The testatrl. also made provision for establishing a home for old ladies, B. to live at this home for her life. It turned out that the funds to establish this home were inadequate. B. was given under the special circumstances herein $300 until the home was established. *Morrison* v. *Bishop of Fredericton*, 7 E. L. R. 277.

Personal Estate—Life Interest with Power of Control.—The testator by his will provided: "If I predecease my wife, I give and bequeath to her the whole control of my real and personal estate as long as she lives." He then made disposition of his real estate to take effect after the death of his wife, and of the stock and implements appertaining thereto, but did not otherwise dispose of his personal estate. As a fact his personal estate included a mortgage. His widow survived him only a few days and made no disposition of the mortgage:—Held, that the widow had only a life interest in the mortgage, with power of control during her life; and, as she had made no disposition of it, whether entitled to do so or no (as to which, quære), it fell into the testator's undisposed of estate, and went according to the Statute of Distributions, the widow's next of kin taking the moiety to which she was entitled notwithstanding her life interest under the will. *In re Turnbull Estate*, 11 O. L. R. 334, 7 O. W. R. 358.

Devise—Repugnancy.—The testator gave his wife an interest for life, or until she should marry, in his dwelling-house and lot and the furniture, etc., therein, and after her death or re-marriage, whichever first happened, he gave them to his children, living when he made his will or living at his decease, or born after his decease, share and share alike, and their heirs and assigns forever:—Held, that the gift thus made to his children was the largest the law admits of and the endeavour, by subsequent clauses in his will, to take away the gift to his children, which he had bestowed by the above clause, was fruitless. The will plainly offended against the principle recognized in Holmes v. Godson, 8 DeG. M. & G. 152; Shaw v. Jones-Ford, 6 Ch. D. 1; Bowman v. Oram, 26 N. S. R. 318. *Corning* v. *Bent*, 23 C. L. T. 336.

"Or" read "and." — Bawtinheimer v. Miller, 2 O. W. R. 393. "Should any of my sons die before becoming of age or without having lawful children, in any of these cases the property bequeathed to such shall be equally divided between the surviving sons." Baxendale v. De Valmar, 57 L. T. N. S. 556. *Doe d. Forsythe* v. *Quackenbush*, 10 U. C. R. 148.

"Or" read "and."—Re Chandler & Holmes, 5 O. W. R. 667. It has long been settled that in a devise of real estate to A. and his heirs and in case of his death under 21 or without issue over the word "or" is construed "and" and consequently the estate does not go over to the ulterior devisee unless both the specified events happen.

"Surplusage" Omitted.—McDonald v. Goilan, 6 O. W. R. 605. "From my said estate," analogous to "my property," as in Hickey v.

Hickey, 20 O. R. 571; Young v. Purvis, 11 O. R. 597, Wright v. Collings, 16 O. R. 182; McFadyen v. McFadyen, 27 O. R. 508; Colvin v. Colvin, 22 O. R. 142; Gordon v. Gordon, L. R. 5 H. L. 254, 271; distinguishing Sommers v. Sommers, 5 O. R. 100; Re Stone, 6 O. R. 312; Hickey v. Stover, 20 O. R. 106; Re Bain & Leslie, 25 O. R. 216.

Misdescription of Devise.—A testator devised freehold property to John William H., the son of Israel H.:—Held, that John Robert H. was entitled. *Ely, In re, Tottenham* v. *Ely* (65 L. T. 452), not followed. *Halston, In re, Ewen* v. *Halston* (1912), 1 Ch. 435; 106 L. T. 182; 56 S. J. 311.

Intention to Release Debt—Evidence of Intention of Testator.—A direction by a testator in his will to his trustees to pay his son a sum of money, coupled with the evidence that at the time when the testator took security from his son for a debt still owing, he had said that he did not intend to enforce such security, does not amount to release of such debt, and the trustees can accordingly retain such legacy, and set it off against the debt which was of larger amount than the legacy. *Tinline, In re Elder* v. *Tinline*, 56 S. J. 310.

The Disinclination of Courts so to Construe a Will as to make a Testator Die Partly Intestate.—*Lett* v. *Randall*, 10 Sim. 112.

Environment.—Parol evidence allowed to show the occupation of the devised property by the testator and those under him to get his environment and to place the Court as far as possible in this place or in the position in which he stood and to get his mind when making his will. *Weber* v. *Stanley*, 16 C. B. N. S. 698; *Stanley* v. *Stanley*, 2 J. W. 401; *Thompson* v. *Jose*, 10 O. W. R. 174.

In lieu of dower.—A testator devised certain chattels, his town house and his Bethel farm to his wife "to have and to hold while she remains my widow—when her claim shall cease by death or marriage, then I will my said farm to W. and O." Held, that "to have and to hold" refers to the Bethel farm only. There is nothing shewing that the different devises go together, but the contrary. *Re Burk*, 12 O. W. R. 999.

CHAPTER XV.

PAROL EVIDENCE, HOW FAR ADMISSIBLE.

PAROL EVIDENCE INADMISSIBLE TO CONTROL WILL.

As the law requires wills both of real and personal estate (with an inconsiderable exception) to be in writing, it cannot, consistently with this doctrine, permit parol evidence to be adduced, either to contradict, add to, or explain the contents of such will; and the principle of this rule evidently demands an inflexible adherence to it, even where the consequence is the partial or total failure of the testator's intended disposition; for it would have been of little avail to require that a will ab origine should be in writing, or to fence a testator round with a guard of attesting witnesses, if, when the written instrument failed to make a full and explicit disclosure of his scheme of disposition, its deficiencies might be supplied, or its inaccuracies corrected, from extrinsic sources. No principle connected with the law of wills is more firmly established or more familiar in its application than this; and it seems to have been acted upon by the judges, as well of early as of later times, with a cordiality and steadiness which show how entirely it coincided with their own views. Indeed, it was rather to have been expected that judicial experience should have the effect of impressing a strong conviction of the evil of offering temptation to perjury.

1st ed., p. 346, 6th ed., p. 484.

There are numerous cases in which the Courts have refused to admit parol evidence to contradict the express terms of a will. But where a will contains an erroneous recital or statement of fact, parol evidence is sometimes admissible to contradict it.

6th ed., p. 484. *Re Aird's Estate*, 12 Ch. D. 291.

The fundamental distinction is between evidence simply explanatory of the words of the will themselves and evidence sought to be applied to prove intention as an independent fact.

6th ed., p. 485.

PAROL EVIDENCE OF MISTAKE.

It is explained elsewhere that if, by the mistake of the person who prepares or copies the will, a particular clause is inserted contrary to the intention of the testator, and his attention is not drawn to it, evidence of the fact is admissible, and if it is proved, the passage may be omitted from the probate. If, however, the

testator knows the contents of his will, and erroneously supposes that it will not have the effect which the law gives it, the general rule applies, and evidence of his real intention is not admissible.

6th ed., p. 480. *Reffell* v. *Reffell*, L. R. 1 P. & D. 139.

So if the will is wrongly dated the error may be corrected.

Reffell v. *Reffell*, L. R. 1 P. & D. 139.

DEVISE INADVERTENTLY OMITTED CANNOT BE SUPPLIED.

A fortiori, parol evidence is not admissible to supply any clause or word which may have been inadvertently omitted by the person drawing or copying the will.

1st ed., p. 353, 6th ed., p. 486. *The Earl of Newburgh* v. *Countess of Newburgh*, 5 Mad. 364.

CONSTRUCTION NOT TO BE INFLUENCED BY PAROL EVIDENCE OF ACTUAL INTENTION.

It is clear that parol evidence of the actual intention of a testator is inadmissible for the purpose of controlling or influencing the construction of the written will, the language of which must be interpreted according to its proper acceptation, or with as near an approach to that acceptation as the context of the instrument and the state of the circumstances existing at the time of its execution (which, as we shall presently see, forms a proper subject of inquiry), will admit of. No word or phrase in the will can be diverted from its appropriate subject or object by extrinsic evidence, showing that the testator commonly, or, on that particular occasion, used the words or phrase in a sense peculiar to himself, or even in any general or popular sense, as distinguished from its strict and primary import.

1st ed., p. 358, 6th ed., p. 488. *Shore* v. *Wilson*, 9 Cl. & Fin. 558; *Barrow* v. *Methold*, 1 Jur. N. S. 994.

The rule as thus stated, must, however, be taken subject to the qualification that it "supposes the existence of an appropriate subject or object; otherwise it should seem evidence would be admissible of the testator having commonly described the object (and why not the subject also?), by the terms used in the will." Thus if a testator bequeaths a legacy to Percy the son of A. B., and A. B. has a son named Percy, evidence is not admissible to show that the testator really intended the legacy for another son named Herbert; but if A. B. has no son named Percy, evidence is admissible to show that A. B. had a son Herbert, commonly known as "Bertie" and from that fact the Court may infer that he was the person intended by the testator.

Ibid. *Bernasconi* v. *Atkinson*, 10 Ha. 348; *Re Hooper*, 88 L. T. 160.

Evidence is also admissible in certain cases to explain words which have a peculiar, technical or local meaning.

6th ed., p. 489.

Subject to these qualifications the rule is of general application.

6th ed., p. 489.

EVIDENCE TO SHOW MEANING IN WHICH TESTATOR USED NAME.

But cases of this kind must be distinguished from those cases in which a testator uses a general name to designate a property made up of parts, some of which do not properly answer the description. Such are the cases of Doe v. Jersey, and Ricketts v. Turquand.

6th ed., p. 490. *Doe* v. *Jersey*, 3 B. & Cr. 870; *Ricketts* v. *Turquand*, 1 H. L. C. 472.

WORDS OF WILL ARE THOSE OF THE TESTATOR.

The Courts always assume that the language of a will is the language of the testator. Even where, as is generally the case, the language of the will is not that of the testator, but is proposed to him by his professional adviser, by executing the will he adopts its language, and the words must therefore be taken to be his. Parol evidence that a will was or was not drawn by a skilled person is not admissible, though any evidence on the point apparent on the face of the will may be considered in construing it. But if the will contain technical terms of law, the technical is the primary meaning.

6th ed., p. 490. *Richards* v. *Davies*, 13 C. B. N. S. 861; *Re Fraser* (1904), 1 Ch. 111.

WORDS MAY BE DIVERTED FROM THEIR PRIMARY ACCEPTATION BY INCONSISTENCY OF CONTEXT.

If, however, the context of the will presents an obstacle to the construing of the terms of description in their strict and most appropriate sense, a foundation is thereby laid for the admission of evidence showing that they are susceptible of some more popular interpretation, which will reconcile them with, and give full scope and effect to, such seemingly repugnant context.

1st ed., p. 361, 6th ed., p. 490. *Doe d. Beach* v. *Earl of Jersey*, 3 B. & Cr. 870.

CLAUSE IMPROPERLY INTRODUCED INTO WILL MAY BE REJECTED ON ISSUE DEVISAVIT VEL NON.

In cases of mistake the authorities seem to have established this distinction, "that though you cannot resort to parol evidence to control the effect of words or expressions which the testator has used, by showing that he used them under mistake or misapprehension, nor to supply words which he has not used, yet that you may, upon an issue devisavit vel non, prove that clauses or expressions have been inadvertently introduced into the will, contrary

to the testator's intention and instructions, or, in other words, that a part of the executed instrument is not his will."

1st ed., p. 355, 6th ed., p. 492. *Hippesley* v. *Homer*, T. & R. 48.

PROBATE PRACTICE.

Under the modern practice, the question whether words have been introduced into a will by mistake is often considered by the Court of Probate, and if it is found that they do not form part of the will, the Court directs them to be omitted from the probate. The right words, however, cannot be inserted, although a clear mistake as to the name or residence of an executor may be corrected in order to avoid difficulties with banks, companies, &c.

6th ed., p. 493. *In bonis Huddleston*, 63 L. T. 255; *In bonis Cooper* (1899), P. 193.

When a will has been proved, evidence is not admissible in a Court of Construction to show that certain words contained in the probate copy were inserted in the original will by mistake.

6th ed., p. 493. *Re Bywater*, 18 Ch. D. 17.

EXECUTION OF WRONG INSTRUMENT OF A PRETENDED WILL OR OF A DUPLICATE.

Parol evidence is admissible in the Court of Probate to show that a document duly executed as a will was never intended to operate as the will of the deceased; as, if two persons, intending to make their wills, each by mistake executes the document prepared for the other: or to show that a document was not intended to be testamentary, but only as a contrivance to effect some collateral object, e.g., to be shown to another person to induce him to comply with the pretended testator's wish. In both these cases the animus testandi is wanting. So extrinsic evidence is admissible to prove that an incomplete will was intended to revoke a complete will of earlier date, or to show what papers constitute the will, and for this purpose declarations made by the testator, whether before or after the execution of the will, are admissible. But if probate is granted of two documents which are identical, or nearly identical, parol evidence is not admissible in the Court of Construction to show that the later was intended to be a duplicate of the earlier one, and not a distinct instrument.

5th ed., p. 389, 6th ed., p. 494. *Wilson* v. *O'Leary*, L. R. 7 Ch. 448.

PRESUMPTIONS AS TO TESTATOR'S KNOWLEDGE OF CONTENTS OF HIS WILL.

The execution of a will by the testator is prima facie proof that he knew and approved its contents, and if a testator knows that certain words are contained in his will and executes is under a mistaken belief as to their effect, they stand as part of the will. If a testator reads over his will, or has it read over to him, he is

presumed to know its contents unless it can be shown that the will was not read over in a proper way.

6th ed., p. 494. *Collins* v. *Elstone* (1893), P. 1; *Fulton* v. *Andrew*, L. R. 7 H. L. 448.

MISTAKE CORRECTED BY COURT OF CONSTRUCTION.

Cases have occurred in which, after a will has been proved, the Court of Construction has arrived at the conclusion that a word forming part of the description of a person or thing has been inserted by mistake, and that a person or thing to which the description does not apply was intended to be referred to by the testator.

6th ed., p. 494.

RULE IN CASES OF FRAUD.

Parol evidence is also admissible for the purpose of counteracting fraud; for to reject it in such case would be to make a rule, whose main object is to prevent injustice, instrumental in producing it.

1st ed., p. 356, 6th ed., p. 495. *Doe d. Small* v. *Allen*, 8 T. R. 147.

And as a charge of fraud may be supported, so it may be rebutted by evidence of this nature.

5th ed., p. 390, 6th ed., p. 495. *Doe* v. *Hardy*, 1 Moo. & R. 525.

If A. fraudulently induces a testator to include in his will a legacy or other provision in A.'s favour, probate will be granted of the rest of the will.

6th ed., 495. *Farrelly* v. *Corrigan* (1899), A. C. 563.

WHETHER PERSON OBTAINING BY FRAUD IS A TRUSTEE FOR PERSONS DEFRAUDED.

If a testator is induced by the fraud of A., the residuary legatee, to omit from his will a provision in favour of B., it seems that the Court of Probate may declare A. to be a trustee for B. A Court of Equity has no jurisdiction.

6th ed., p. 495. *Allen* v. *McPherson*, 1 H. L. C. 191.

PROMISE BY HEIR OR DEVISEE TO TESTATOR ENFORCED.

Another illustration of the principle occurs in the case suggested by Lord Eldon in Stickland v. Aldridge, "of an estate suffered to descend, the owner being informed by the heir, that, if the estate is permitted to descend, he will make a provision for the mother, wife, or any other person, there is no doubt equity would compel the heir to discover whether he did make such promise. So, if a father devises to the youngest son, who promises that, if the estate is devised to him, he will pay 10,000*l.* to the eldest son, equity would compel the former to discover whether that passed in parol; and, if he acknowledged it, even praying the

benefit of the statute, he would be a trustee to the value of 10,000*l.*"

1st ed., p. 356, 6th, ed., p. 495.

And it is clear that, in such a case (and this, indeed, is the point which is chiefly material here), if the trust were denied by the heir or devisee, it might be proved aliunde.

Ibid. *McCormick* v. *Grogan*, L. R. 4 H. L. 82.

TRUST APPARENT ON WILL.

The principle applies also to those cases where the gift appears by its terms to be wholly or partially upon trust.

6th ed., p. 496. *Re Fleetwood*, 15 Ch. D. 594.

In re Fleetwood, a testatrix bequeathed to B. her personal estate "to be applied as I have requested him to do." Before the execution of the will, the testatrix communicated to B. her wishes with regard to the disposition of the property. Evidence of the parol trust thus communicated was held admissible, and the trust valid against the next of kin.

9 Ves. 519. See Chapter XXIV.

DOCTRINE DOES NOT APPLY TO POWERS.

The doctrine laid down in Re Fleetwood does not apply to powers.

Re Hetley [1902] 2 Ch. 867.

WHETHER PAROL EVIDENCE IS ADMISSIBLE TO REPEL A RESULTING TRUST.

Parol evidence is admissible for the purpose of rebutting a resulting trust; as in such case, it does not contradict the will, its effect being to support the legal title of the devisee against, not a trust expressed (for that would be to control the written will), but against a mere equity arising by implication of law. But the doctrine in question is anything but clear.

1st ed., p. 357, 6th ed., p. 497.

Parol evidence is not admissible to contradict a will, and if the will contain express declarations that the executor is to be a trustee, evidence cannot be received against the effect of that declaration; but if there be no express declaration of trust in the will, and only circumstances which afford inference or presumption of trust in the executor, there parol evidence is admissible to answer that inference or presumption.

6th ed., p. 497. *Gladding* v. *Yapp*, 5 Madd. 56.

IMPERFECT RELEASE OR GIFT TO EXECUTOR.

If a testator appoints his debtor as his executor, although this operates as a release of the debt at law, in equity the debt remains for the benefit of the testator's legatees. But this equity may be

rebutted by evidence that the testator during his lifetime forgave the debt, without legally releasing it.

6th ed., p. 497. *Strong* v. *Bird*, L. R. 18 Eq. 315.

On the same principle, if a testator makes an imperfect gift of personal property to A. in such a way as not to pass the property at law, but showing a complete intention to do so, and appoints A. his executor, this makes the gift effectual.

6th ed., p. 498. *Re Stewart* (1908), 2 Ch. 251.

It is immaterial whether the donee is sole executor, or one of several.

6th ed., p. 498.

PAROL EVIDENCE ADMISSIBLE TO SUPPORT CLAIM OF EXECUTOR TO RESIDUE AGAINST CROWN.

On the principle above stated, parol evidence was, under the old law, admissible to support the claim of an executor (in England, before the Executors Act, 1830), to the undisposed of residue of a testator's personal estate, against the presumption in favour of the next-of-kin created by a legacy to the executor, and is still admissible in cases where a testator leaves no next-of-kin, so that there is a contest between the executor and the Crown. In such cases, the general rule is that the executor shall have "the undisposed of residue" (that is, all personal estate which is not disposed of, or attempted to be disposed of, by the will), unless there is a strong presumption to the contrary. A legacy to him (specific or pecuniary), affords that presumption, but it is not so strong as to deprive him of the opportunity of proving, by parol evidence, that the testator intended him to take the residue beneficially. Where there are two or more executors, a similar presumption is raised by the fact that pecuniary legacies of equal amount are given to all of them, but not where the legacies are unequal; or where there are legacies to some and not to others; or where, although equal pecuniary legacies are given to all the executors, other interests in the personal estate are given them by the will, which result in their taking unequal beneficial interests. It seems that the presumption would arise if the executors took equal interests in the personalty, but unequal interests in the real estate.

5th ed., p. 391, 6th ed., p. 498. *Pratt* v. *Sladden*, 14 Ves. 193; *Att.-Gen.* v. *Jefferys* (1908), A. C. 411; *Seley* v. *Wood*, 10 Ves. 71.

INTENTION TO EXCLUDE EXECUTOR SHOWN IN OTHER WAYS.

It may appear from the general tenor of the will, or from the terms in which the executor is appointed, that he is "only named for the sake of executing the will, and to have the trouble and not any benefit." Again, if the testator "manifests an in-

choate intention to appoint a residuary legatee," but fails to do so, this raises a presumption that the executor was not intended to take the residue for his own benefit, which may be rebutted by parol evidence. But if the testator gives a legacy to the executor (or to one of several executors) "for his care" or "for his trouble," or gives the residue upon a trust which fails, or clearly intends to create a trust although he does not do so, then it appears on the face of the will that the executor was intended to take the office only, and parol evidence to show that he was intended to take the residue beneficially is not admissible. The executor's claim is also excluded, if the testator declares his intention of disposing of a part only of his personal estate, or directs that his residue shall go as if he were to die intestate, or if there is a secret trust which fails. In all these cases the executor is trustee for the next-of-kin, or if there are none, for the Crown.

6th ed., p. 490. *Mence* v. *Mence*, 18 Ves. 348; *Seley* v. *Wood*, 10 Ves. 71; *Re Hudson's Trusts*, 52 L. J. Ch. 789; *Urquhart* v. *King*, 7 Ves. 225; *Chester* v. *Chester*, L. R. 12 Eq. 444.

SPECIFIC TRUST.

But if the executor is only appointed trustee for a specific purpose, this does not exclude his claim.

6th ed., p. 500. *Griffiths* v. *Hamilton*, 12 Ves. 298.

TO REBUT PRESUMPTION AGAINST DOUBLE PORTIONS AND LEGACIES, SATISFACTION, &C.

Parol evidence may also be adduced to repel the presumption that two legacies given to the same person by the same instrument were intended to be substitutional; and the presumption against double portions; in other words, to show that a legacy by a parent to his child was intended not to be (as the general rule would make it) a satisfaction of a portion previously due to such child by the testator, or that a subsequent advancement to the child was not to be (as it would be, according to the general doctrine) a satisfaction or ademption, entire or partial, according to its amount, of a legacy to such child. It is hardly necessary to say that, where a will contains an express direction to bring advances into hotchpot, parol evidence is not admissible to show that the testator afterwards agreed to treat the advances as gifts. So evidence is admissible to rebut the presumption that a debt is satisfied by a legacy of greater amount, or that a legacy given for a purpose has been adeemed by a payment for the same purpose.

6th ed., p. 500. *Re Pollock*, 25 Ch. D. 552.

OTHER EXAMPLES.

It is clear, also, that parol evidence is admissible to prove the fact that the testator intended to place himself in loco parentis towards a legatee, who was not his child; or to prove

that gifts have been made to the legatee by the testator in his lifetime, and that they were of a nature to bring them within the equitable presumption, or within the terms of an express declaration contained in the will, that advancements should be in satisfaction of legacies. And for this purpose contemporaneous declarations of the testators' intentions are admissible; since the rule which would exclude them, if the intention had been committed to writing, does not apply.

6th ed., p. 501. *Whateley* v. *Spooner*, 3 K & J. 542.

COUNTER-EVIDENCE.

In all these cases, where parol evidence is admissible to repel the presumption, counter-evidence is also admissible in support of it; the evidence on either side being admissible, not for the purpose of proving, in the first instance, with what intent the writing was made, but simply with the view of ascertaining whether the presumption, which the law has raised, is well or ill-founded. But evidence in support of the presumption is not admissible, unless evidence to rebut it has been first admitted; still less is evidence admissible to create a presumption not raised by the law; in the former case it is unnecessary, and in both cases its effect would be to contradict the apparent meaning of the will.

5th ed., p. 391, 6th ed., p. 501. *Kirk* v. *Eddowes*, 3 Hare 520.

AS TO TRANSLATING OR DECIPHERING PECULIAR CHARACTERS, AND EXPLAINING LOCAL OR TECHNICAL TERMS.

If a testator make his will in a foreign language, or introduce therein certain terms or characters which are not understood by the Court, recourse may be had to persons conversant with the subject, for the purpose of translating the will, or deciphering the characters. And where the testator makes use of words which in their ordinary sense are intelligible, but which are used by a certain class of persons to which the testator belonged, or in a certain locality where he dwelt, in a peculiar sense, parol evidence may be given to show the fact of such usage, unless it also appears on the face of the will that the testator used the word in the ordinary sense. Generally speaking, for instance, evidence would be admissible to show that the word "close" meant the same thing as "farm" in the country where the property was situated; but if the testator has in another part of the will used the word "closes" (in the plural), it is manifest that he has used the word "close" in its ordinary sense as denoting an "inclosure"; and then such evidence is not admissible; for that would be to contradict the words of the will.

5th ed., p. 393, 6th ed., p. 503. *Goblet* v. *Beechey*, 3 Sim. 24; *Shore* v. *Wilson*, 9 Cl. & Fin. 525; *Re Rayner* (1904), 1 Ch. 176; *Re Glassington* (1906), 2 Ch. 305.

NICKNAMES.

Again, the testator may have habitually called certain persons by peculiar or nicknames, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence, to show the sense in which he used them, just as if his will were written in cypher or in a foreign language.

Ibid. *Lee* v. *Pain*, 4 Hare 251.

If there is no person strictly answering the description used by the testator, evidence is admissible to show that there is a person commonly known by the name used by the testator, although it is not his real name.

6th ed., p. 503.

GIFTS TO RELATIONS INACCURATELY DESCRIBED.

It frequently happens that a testator gives property to persons by some generic description—such as "children," "nephews," &c.—which has a well-defined meaning, but the extrinsic circumstances show that the testator used the description in an inaccurate sense. These cases are referred to in the next section.

6th ed., p. 503.

STATE OF FACTS AT THE DATE OF WILL PROPER TO BE REGARDED.

Though it is (as we have seen) the will itself (and not the intention, as elsewhere collected) which constitutes the real and only subject to be expounded, yet, in performing this office, a Court of Construction is not bound to shut its eyes to the state of facts under which the will was made; on the contrary, an investigation of such facts often materially aids in elucidating the scheme of disposition which occupied the mind of the testator. To this end, it is obviously essential that the judicial expositor should place himself as fully as possible in the situation of the person whose language he has to interpret; and guided by the light thus thrown on the testamentary scheme, he may find himself justified in departing from a strict construction of the testator's language, without (to borrow the words of an elegant writer) allowing "conjectural interpretation to usurp the place of judicial exposition." Thus, if it appears (and of course it can only appear by extrinsic evidence), that there is no subject or object answering to the description in the will, strictly and literally construed, but that there is a subject or object precisely answering to such description, interpreted according to the popular and less appropriate sense of the words, the conclusion that the testator employed them in the latter sense is irresistible. Examples of this principle of construction are widely scattered

through the present treatise. It may be discerned in those cases in which a disposition of property operates as an appointment under a special power, where it would otherwise be nugatory for want of property on which to operate. It is also exemplified in those cases in which a devise of lands at a given place has been extended to property not strictly answering to the description, because there is none which does precisely correspond to it, or in which an apparently specific bequest of stock in the public funds has been held to authorize payment of the legacy out of the general personal estate, the testator having no such stock when he penned the bequest. Again, we discover traces of the doctrine in the rule (hereafter discussed) which construes a gift to the children of a deceased person, or the children "now born" of a living persons, as comprising illegitimate children, there being no legitimate child to supply the gift with a more appropriate object; or a gift to the testator's nephews, as a gift to his wife's neprews, he having none, and there being, at the date of his will, no possibility of his ever having any, or a gift "to the children of A. and B." (living persons), as meaning "to B. and the children of A." in equal moieties, it appearing that for some years before the date of the will A. had not lived with his wife and family; and lastly, in the rule which reads a devise or bequest as applying to a person or thing imperfectly answering the name and description in the will, there being no person or thing more precisely answering to them. The application of this last rule is discussed elsewhere in connection with the question of misnomer and misdescription, and in connection with the question what passes by a bequest of "real estate," "stock," "shares," "debentures," &c. Extrinsic evidence is rarely admissible to explain the operation of a residuary bequest, but it was admitted in Re Cadogan, in order to assist the Court in determining whether a bequest of the testatrix's "money" passed the whole of her personal estate. In these instances, and many more which might be adduced, the application of the rules of construction evidently depends on and is governed by the state of extrinsic facts.

1st ed., p. 363, 6th ed., p. 503. *Blundell* v. *Gladstone*, 3 Mac. & G. 692; *Miller* v. *Travers*, 1 M. & Scott. 342; *Re Cadogan*, 25 Ch. D. 154.

If in another part of the will the testator correctly described the subject, the inference that he meant to include it in the incorrect description would be rebutted.

Waters v. *Wood*, 5 De G. & S. 717.

STATE OF FACTS AT DATE OF WILL, WHEN NOT TO INFLUENCE CONSTRUCTION.

It would be dangerous, however, to place this statement of the doctrine in the hands of the reader, unaccompanied by a

caution against the mistaken application of it to gifts comprising a subject or object, or a class of objects, which, by the rules of construction, is to be ascertained at the death of the testator, or at any other period posterior to the date of the will. In such cases, it would be manifestly improper to admit the state of facts existing when the will is made to have any influence upon the construction; for instance, since a residuary bequest comprehends all the personal property of which the testator is possessed at the time of his decease, the absence of any given species of property, or of any property whatever, at the date of the will, to satisfy such bequest, ought not, in the slightest degree, to affect its construction, by extending the bequest to property not strictly belonging to the testator, or over which he has not any power of disposition. On the same principle, if a testator bequeaths all the stock of a particular denomination, of which he may be possessed at the time of his decease, no argument is supplied for extending the bequest to stock of any other denomination by the circumstance that the testator had at the making of the will no stock answering to the description. Again, as a devise or bequest to the children of a living person as a class will comprise all who come in esse before the death of the testator, the fact of there being no child properly so called, i.e., no legitimate child, at the date of the will, raises no necessary inference that the testator had in his contemplation then existing illegitimate children. And in every case it must be remembered that, whatever the surrounding circumstances, it is still the will that is to be construed. In the words of an eminent Judge, "when the Court has possession of all the facts which it is entitled to know, they will only enable the Court to put a construction on the instrument consistent with the words; and the Judge is not at liberty, because he has acquired a knowledge of those facts, to put a construction on the words which they do not properly bear."

1st ed., p. 365, 6th ed., p. 505.

WHERE WILL IS UNAMBIGUOUS.

The reader will have gathered from the foregoing discussion of the general principle, that if the words of the will are definite and free from doubt, parol evidence is not admissible to show that they meant something different.

6th ed., p. 506. *Maybank* v. *Brooks*, 1 Br. C. C. 84.

Unless some such question arises, it is clear that evidence as to the amount or state of the testator's property is inadmissible to influence the construction of the will, whether the gift is

specific or residuary, and whether the property alleged to be disposed of or affected is the testator's own property, or property over which he has a power of appointment.

6th ed., p. 507. *Horwood* v. *Griffith*, 4 D. M. & G. 708; *Re Huddleston* (1894), 3 Ch. 595.

EVIDENCE INADMISSIBLE TO PROVE RECITAL, &C., TO BE ERRONEOUS.

For the same reason, extrinsic evidence is not admissible to show that a plain and unambiguous direction in a will is founded on a mistake on the part of the testator.

6th ed., p. 507. *Re Aird's Estate*, 12 Ch. D. 201.

INADMISSIBLE TO DEFINE WHAT IS INDEFINITE.

It also follows that if the language of the testator is vague and indefinite, parol evidence is not admissible to show that he had something definite in his mind. Thus, if he gives property to be held on trusts contained and specified in any memorandum amongst his papers, parol evidence is inadmissible to show that he had in his mind an existing document.

6th ed., p. 508. *University College of N. Wales* v. *Taylor* (1908). P. 140.

EFFECT OF THE WILLS ACT ON THE CASES UNDER CONSIDERATION.

And it is material to observe, that the recent enactment [stat. 1 Vict.] which (we have seen) makes the will speak as to both real and personal estate from the death of the testator, will tend greatly to narrow the practical range of the rule which authorizes the application of words to a less appropriate subject, on account of the non-existence of one, strictly and in all particulars answering to those words. If, therefore, a testator, by a will made or republished since 1837, should devise all his lands in the parish of A., the fact of his then not having lands in that parish will supply a much less forcible and conclusive argument than heretofore, for holding the words to apply to lands in a contiguous parish, seeing that a testator not only may extend his devise to after-acquired estates, but that a devise is to be construed as speaking at his death, unless the contrary appears; so that the testator may have contemplated, and is to be presumed to have contemplated, the future acquisition of lands in the parish in question, to satisfy the terms of the devise in their strict and proper acceptation.

1st ed., p. 366, 6th ed., p. 508.

PAROL EVIDENCE ADMISSIBLE TO SHOW WHAT IS COMPRISED WITHIN A GIVEN DESCRIPTION.

Of course, parol evidence is admissible, in order to ascertain what is comprehended in the terms of a given description, referring to an extrinsic fact.

1st ed., p. 367, 6th ed., p. 508. See *Doe* v. *Oxenden*, 3 Taunt. 147.

Thus, if a testator devise the house he lives in, or his farm called Blackacre, or the lands which he purchased of A., parol evidence must be adduced to show what house was occupied by the testator, what farm is called Blackacre, or what lands were purchased of A.; such evidence being essential for the purpose of ascertaining the actual subject of disposition. The distinction obviously is, that although evidence dehors the will is not admissible, to show that the testator used his terms of description in any peculiar or extraordinary sense, yet it may be adduced to ascertain what the description properly comprehends.

Jarman, p. 508. *Sandford* v. *Raikes*, 1 Mer. 646.

AFTER-ACQUIRED PROPERTY.

Difficulty is sometimes caused by the fact that the testator has, subsequently to the date of his will, added to property devised by it. In such cases, the question arises whether evidence is admissible to show that the testator treated the after-acquired portions as part of the property. It seems clear that if the description of the property is sufficiently wide, the after-acquired part will pass by the devise by virtue of sec. 24 of the Wills Act; as where the testator devises "all my land at Stour Wood" or "my dwelling-house in B., with the appurtenances thereto belonging." But if the description is ambiguous, the case is more difficult.

6th ed., p. 511. *Re Midland Railway Co.*, 34 Bea. 525; *Webb* v. *Byng*, 2 K. & J. 669.

SUFFICIENT IF TESTATOR PROVIDE MEANS OF ASCERTAINING THE OBJECT OF GIFT.

Upon the same principle, of course, it is not essential to the validity of the gift, either of real or personal estate, that the person who is the intended object of the testator's bounty should be actually pointed out on the face of the will; it is enough that the testator has provided the means of ascertaining it, according to the maxim, id certum est quod certum reddi potest. Nor is it material that the description makes the objects of gift to depend upon circumstances or acts of persons which are future and contingent, or even upon the future acts of the testator himself, though this is sometimes resisted as contravening the principle of the statutory requisition of attesting witnesses. There seems, however, to be no valid ground for the objection. Every description must more or less involve inquiry into extrinsic facts; and there is no reason why the ascertainment of the objects may not depend as well upon the facts or conduct, past or future, of the testator, as upon any other contingent circumstance. Hence it was recently decided, that a devise in

favour of the persons who might be partners of the testatrix, or to whom she might sell her business, was valid; Lord Langdale observing, that if the description be such as to distinguish the devisee from every other person, it is sufficient, without entering into the consideration of the question, whether the description was acquired by the devisee after the date of the will, or by the testator's own act in the course of his affairs, or in the ordinary management of his property.

1st ed., p. 369, 6th ed., p. 511.

LATENT AMBIGUITY.

Even where the intended object of the testator's bounty is described by name on the face of the will, uncertainty may be caused by extrinsic circumstances, as where the gift is to "John Smith," and it appears that there are two John Smiths known to the testator. In such a case evidence is admissible to show which John Smith was meant by the testator.

6th ed., p. 512.

MISNOMER AND MISDESCRIPTION

The rule admitting evidence of the nature now under consideration is frequently applied in those cases in which the subject or object of gift is erroneously described in the will. They are referred to in detail in another chapter, and it is unnecessary to repeat them here.

6th ed., p. 512. See *Re Feltham's Trusts*, 1 K. & J. 528; *Re Waller*, 68 L. J. Ch. 526; *Flood* v. *Flood* (1902), 1 Ir. R. 538. See Chapter XXXV.

NO PERSON ANSWERING DESCRIPTION.

Where there is a gift to A. B., without any addition or description by which he can be distinguished or identified, and it cannot be found that there is any person of that name known to the testator, it seems that evidence is admissible to show that there is a person of a somewhat similar name known to the testator, and thus to lead to the inference that he is the person intended by the gift.

6th ed., p. 513. *Masters* v. *Masters*, 1 P. W. 425.

TOTAL BLANKS FOR NAMES NOT TO BE SUPPLIED.

In no instance has a total blank for the name been filled up by parol evidence. In such cases, indeed, there is no certain intent on the face of the will to give to any person; the testator may not have definitely resolved in whose favour to bequeath the projected legacy.

1st ed., p. 383, 6th ed., p. 514. *Doe* v. *Needs*, 2 M. & Wels 139.

It is clear that blanks may be supplied by reference to the context of the will, and for this purpose the Court is entitled to look at the original will as well as at the probate copy.

6th ed., p. 515. *Re Harrison*, 30 Ch. D. 390.

RULE AS TO PATENT AND LATENT AMBIGUITIES, HOW FAR CONCLUSIVE IN DECIDING ON ADMISSIBILITY OF EVIDENCE.

The admission or rejection of parol evidence is commonly said to depend in all cases on the canon, which rejects it in the case of patent ambiguities, or those which appear upon the face of the will, and admits it in the case of latent ambiguities, or those which seem certain, for anything that appears upon the face of the will, but there is some collateral matter, out of the will, that breeds the ambiguity. And this ambiguity being raised by parol evidence, may, it is said, be fairly removed by the same means. But upon examination the maxim proves not to be an universal guide; for, on the one hand, there are many recognized authorities for the admission of parol evidence to explain ambiguities appearing on the face of the will, while, on the other hand, the existence of a latent ambiguity will certainly not, as appears sometimes to have been supposed, warrant the admission in all cases indiscriminately of parol evidence to show what the testator meant to have written as distinguished from what is the meaning of the words he has used. It is to the admissibility of this species of evidence that attention is now to be turned. To say that such evidence is admissible, because the ambiguity complained of has been raised by the extrinsic facts, is to lose sight of the essential difference between the nature and effect of the evidence which raises the ambiguity, and that by which it is to be removed; for the former is confined to a development of facts with reference to which the will was written, and to which the language of the will expressly or tacitly refers; and, therefore, it lies within the strict limits of exposition, which it cannot be denied that the latter transgresses. To render the ground tenable, it must be taken to support the proposition only so far as it asserts, that, if an ambiguity is introduced into an otherwise unambiguous will by parol evidence of the state of the testator's family, or other circumstances, that ambiguity may be removed by further evidence of the same nature. But in admitting this interpretation of the rule, all distinction between patent and latent ambiguities is lost, for in every case the Judge by whom a will is to be expounded is entitled to be placed, by a knowledge of all the material facts of the case, as nearly as possible in the situation of the testator when he wrote it. A patent ambiguity, it is true, may not be explained by any other kind of evidence, and so far the first branch of the canon is undoubtedly true. But by our hypothesis to this precise extent, and no further, is the latter branch true also. We come, therefore, to the conclusion either that the dis-

tinction taken by the canon between latent and patent ambiguities is an unsubstantial one, or that the proposition does, in its second branch, assert the admissibility of evidence to show the testator's intention (as distinguished from the meaning of his written words); and that, consequently, if true, its application must be confined to a special class of cases.

This paragraph and the next from 3rd ed., pp. 330 *et seq.*, 6th ed., p. 516. *Clayton* v. *Lord Nugent*, 13 M. & Wels. 200.

It remains for us to see in what cases, if any, such evidence is admissible. Suppose, then, that evidence has been given of all the material facts and circumstances of the case, and that these have ultimately raised an ambiguity by disclosing the existence of more than one object or subject to which the words are equally applicable. The uncertainty as to which of these was in the testator's contemplation would, if the investigation stopped here, necessarily be fatal to the gift. Under these peculiar circumstances, however, declarations of the testator or other direct evidence of his intention are admissible to clear up the ambiguity, by pointing out (if they can) the actual subject or object of gift, among the several properties or persons answering to the description. Of this nature are the examples given by Lord Bacon, in illustration of the maxim, "Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur"; and are styled by him cases of equivocation.

See reference end of last paragraph.

EFFECT WHERE THERE ARE TWO SUBJECTS OR OBJECTS ANSWERING TO DESCRIPTION.

Thus, where a testator devises his manor of Dale, and it is found that he had at the date of his will two manors, North Dale and South Dale, evidence may be adduced to show which of them was intended. Again, if a testator, having two closes in the occupation of A., devises all that his close in A.'s occupation, evidence is admissible to prove which of the two closes he meant to devise.

5th ed., p. 402, 6th ed., p. 518. *Miller* v. *Travers*, 1 M. & Sc. 346; *Asten* v. *Asten* (1894), 3 Ch. 260.

If no sufficient evidence is forthcoming, the gift is void for uncertainty.

6th ed., p. 518. *Richardson* v. *Watson*, 4 B. & Ad. 787.

OR BY SURROUNDING CIRCUMSTANCES.

And the result would doubtless be the same where the evidence of surrounding circumstances disclosed reasons for the testator preferring one person to another of the same name; for

there is properly no "ambiguity" until all the facts of the case have been given in evidence, and found insufficient for a definite decision.

5th ed., p. 404, 6th ed., p. 521. *Jefferies* v. *Michell*, 20 Beav. 15.

EVIDENCE OF INTENTION NOT ADMITTED AGAINST RULE OF CONSTRUCTION.

Again, if the person intended to be benefited can be ascertained by some definite rule of construction, evidence of intention is, it seems, inadmissible. For example, relative pronouns, which have no independent force or signification, but whose effect depends wholly upon the position which they occupy in the instrument, cannot, by means of parol evidence, be shifted, so as to relate to a different antecedent.

1st ed., p. 361, 6th ed., p. 521. *Castledon* v. *Turner*, 2 Ves. Sen. 216.

The rule that extrinsic evidence is admissible to prove that two legacies given by the same instrument to the same person were intended to be cumulative, but not to prove that two legacies given by different instruments to the same person were intended to be substitutional, rests on the same principle.

6th ed., p. 521. *Lee* v. *Pain*, 4 Ha. 201.

TO "MY BROTHER," &C., THE TESTATOR HAVING SEVERAL BROTHERS.

There seems to be no doubt, though it has never been distinctly decided, that the principle of the preceding cases applies to a devise to a person sustaining a given character, as "to my brother, son," &c., without specification of name; so that if the fact should happen to be, that there were more persons than one to whom the description applied, parol evidence would be admissible to show which of them was the intended object of gift; for, as the uncertainty does not appear until the parol evidence discloses the plurality of persons answering to the terms of the will, it seems to be an instance of the ambiguitas latens. In several reported cases, indeed, devises of this kind have failed, on account of the uncertainty of the object; but in none of them does parol evidence appear to have been offered to remove the ambiguity.

1st ed., p. 375, 6th ed., p. 522.

WHERE PART OF DESCRIPTION APPLIES TO ONE AND PART TO ANOTHER. EVIDENCE OF INTENTION IS ADMISSIBLE.

There is yet another class of cases in which it has been made a question, whether evidence of the nature now under consideration can be legally admitted, namely, where the description in the will, taken altogether, answers to no person or thing, but part of it applies to one, and part to another. Cases are to be met with, supporting the conclusion, that a testator's declarations are admissible to show which of the imperfectly-described

persons or things he intended to be the object or subject of the gift.

5th ed., p. 407. 6th ed., p. 524. *Bradshaw* v. *Bradshaw*, 2 Y. & C. 72.

THE RULE STATED.

The only cases in which evidence to prove intention is admissible, are those in which the description in the will is unambiguous in its application (i.e., equally applicable in all its parts) to each of several subjects.

Doe d. Hiscocks v. *Hiscocks*, 5 M. & W. 363.

DECLARATIONS NEED NOT BE CONTEMPORANEOUS WITH WILL.

Where evidence of intention is admissible, it is no objection to its reception that the declarations relied on were subsequent to the making of the will.

5th ed., p. 408, 6th ed., p. 526. *Doe* v. *Allen*, 12 Ad. & El. 455.

RULE WHERE THERE IS A PERSON ANSWERING TO THE DESCRIPTION.

It was stated in a former page that evidence of all the material facts of the case was admissible to assist in the exposition of the will. And this statement was necessarily qualified by the insertion of the word "material," because though the rules specially applicable to the subject now under consideration, may not raise any peculiar obstacle to the admission of evidence tendered in support of a given fact; yet if that fact, supposing it to be proved, ought not to influence the construction of the will, the evidence in support of it is immaterial, and therefore inadmissible. Thus it is a well-known rule, that words shall be interpreted in their primary sense, if the context and surrounding circumstances do not exclude such an interpretation, even though the most conclusive evidence of intention to use them in some popular or secondary sense be tendered. Therefore a person, to whom the terms of the description are imperfectly applicable, may not, by parol evidence of facts tending to prove an intention in his favour, support his claim against another person exactly or more nearly answering to all the particulars in the description.

5th ed., p. 409. 6th ed., p. 526. *Horwood* v. *Griffiths*, 4 D. M. & G. 708.

TWO CLAIMANTS, ONE LEGITIMATE, THE OTHER ILLEGITIMATE.

On the same principle, if a testator refers to "my nephew A. B.," and it appears that he has two nephews of that name, one legitimate and the other illegitimate, there is as a general rule no ambiguity, for prima facie "nephew" means a legitimate nephew, and therefore in such a case evidence is not admissible to show that the testator intended to refer to his illegitimate nephew. But it may appear from the language of the will that the testator applied the description of "nephew" to his

legitimate and illegitimate nephews indiscriminately, and in such a case evidence is admissible to show that in referring to "my nephew A. B." the testator intended to refer to his illegitimate nephew of that name.

6th ed., p. 529. *Re Fish* (1894), 2 Ch. 83; *In bonis Ashton* (1892), P. 83.

EVIDENCE OF INTENTION INADMISSIBLE TO SUPPORT CLAIM OF ONE TO WHOM NO PART OF DESCRIPTION APPLIES.

And even where no person actually answers to any part of the description in the will, it would seem, upon principle, to be impossible to admit parol evidence of intention in support of the claim of one to whom the description is in every respect inapplicable: for the will ought to be made in writing; and if the testator's intention cannot be made to appear by the writing, explained by the circumstances, there is no will.

5th ed., p. 412, 6th ed., p. 529. *Doe* v. *Hiscocks*, 5 M. & Wels. 369.

EVIDENCE OF STATE OF FACTS ADMISSIBLE IN SUCH A CASE.

But this rule does not prevent the admission of parol evidence to show that the description in the will was inserted by mistake, and that there is a persons answering a similar name or description who stood in such a relation of friendship or intimacy to the testator as to lead to the conclusion that he is the person whom the testator intended to benefit.

6th ed., p. 530. *Re Ofner* (1909), 1 Ch. 60.

Household Furniture—Residno.—The testator directed all his just debts, &c., to be paid; and devised and bequeatbed to his wife for life, bis real estate, and his "household furniture, plate, linen, and china." After ber decease, he gave the proceeds of the sale of the land, and also all and singular the residue of his personal estate that might be in her possession at the time of her decease, to otber parties:—Held, tbat there was an intestacy as to all the personalty not specifically bequeathed to the wife. *Holmes* v. *Wolfe*, 26 Chy. 228.

Plate, Books, Furniture, &c.—A testator, after making sundry devises and bequests, proceeded: "and I further leave to my son G., all my plate and plated goods, books, and pictures, together with all accounts, papers, and personal effects that may be in my possession at the time of my deatb, always excepting household furniture, beds, bedding, and linen and these I leave to my daugbters (naming tbem), to be divided, share and share alike; . . . and I further leave, give, and bequeath all my horses, cattle, cows, sheep, and farming implements to my two daughters," being those already named:—Held, tbat the bequests to the son and danghters were specific; and that the residue, if any, was not disposed of. *McKidd* v. *Brown*, 5 Chy. 633.

"Properties, Moneys, and Personal Effects"—Possession.—A testator by his will provided as follows: "I will and bequeath to . . . C. H. all properties, moneys, and personal effects now in my possession, for her own and sole nse, to be disposed of as she may see proper:"—Held, that tbe devise passed real estate.—Held, also, tbat real estate in the occupation of a tenant at the time of the testator's death, was in tbe possession of the testator. *Re Hargan and Fritzinger*, 16 O. R. 28.

"To R. O. K. I give my carpet, blankets, and whatever else I may have at his house:"—Held, that mortgages and a bank deposit receipt, which were in tbe bouse, did not pass. *Smith* v. *Knight*, 18 Chy. 492.

Mortgage.—An assignment under seal, annexed to a mortgage, stated that the assignor "bargained, sold, assigned, and transferred" unto the assignee, "his heirs and assigns, the annexed mortgage, and all the right, title, and interest therein," of the assignor, "to have and to hold the same unto the said, &c., his heirs and assigns, to his and their sole use forever:"—Held, that the land, which was the subject of the mortgage, did not pass by these words; but held, that had the instrument been a devise, instead of a deed operating inter vivos, the land would have passed under the term "mortgage." *Auston* v. *Boulton*, 16 U. C. C. P. 318.

Residue.—After a bequest by a mortgagee of several legacies, the will proceeded: "the above mentioned legacies to became due and payable in money or securities twelve months after my decease, and each legatee to be entitled to the interest and profits on their respective legacies from the time of my decease. Lastly, I give and bequeath to my two nephews A. and B. the residue and remainder of my property, real and personal, after paying the above named legacies, to be divided equally among them, share and share alike:"—Held, to vest the mortgage estate in the nephews, the devisees. *Doe d. Helliwell* v. *Hugill*, 6 O. S. 241.

Interest.—A testator bequeathed his personal estate to his executors, in trust for the purposes of his will, and gave to them, in the quality of trustees, for the use of his son for life, and after his death for the use of his son's children, "the sum of £1,500, due to me by C., and secured by a certain mortgage," &c.:—Held, that this passed the principal mortgage money (£1,500), but did not pass the interest then due or which would fall due before the testator's decease.—Held, also, that the legatee was entitled to claim more than six years' arrears of interest, the trust being express, and the Statute of Limitations therefore not applying to the case. *Loring* v. *Loring*, 12 Chy. 374.

Cancellation of Specific Mortgage.—J. S. directed his executors to cancel and entirely release the indebtedness of his son W. S. upon a mortgage made by him to the testator, such release to operate and take effect immediately on and from the testator's death. W. S. was also indebted to the testator on a promissory note and for goods, which, together with interest, amounted to upwards of $3,740. This amount the executors claimed they were entitled to demand payment of before they could be called upon to discharge the mortgage, but this contention was held untenable. *Archer* v. *Severn*, 12 O. R. 615, 14 A. R. 723.

Chattels — Pecuniary Bequests. — The bequest of a testator's chattels, when unrestricted either expressly or by the context of the will, covers all the personal estate; but where a testator, after directing his executors to pay all his just debts and funeral expenses out of his personal property, bequeathed all his chattel property to his son, and then made sundry pecuniary bequests payable out of his personal property, and it appeared that after deducting the chattels, i.e., furniture, farming implements, and movable goods of a like nature, paying all the debts, and satisfying the legacies, there still remained a balance of personal estate:—Held, that as to such balance there was an intestacy. *Peterson* v. *Kerr*, 25 Gr. 583.

Bequest of Specific Fund—Fund Larger than Amount Named.—A testatrix to whom a debt of £2,900 was owing by the E. estate, by her will bequeathed as follows: "The two hundred and ninety pounds due from the E. estate . . . and moneys in . . . to be used by my executors in payment of debts . . . the balance thereof to be equally divided among the daughters of . . . ."—Held, that only the sum of money mentioned in the will and not the whole amount due by the E. estate passed by the clause in question. *Re Sherlock*, 28 O. R. 638.

Special Share.—A testator directed that one of his sons, W. R., should be educated for a learned profession, medicine, law or the church, over and above a child's share, and if brought up to a trade he was to receive £250 over and above a child's share. W. R. did not receive a professional education, but entered into the employment of a bank as a clerk:—Held, that he was entitled to receive £250 over and above a child's share. *Travers* v. *Gustin*, 20 Chy. 107.

False Demonstratio—Mistake in Quantity.—Held, that "200 acres of land, the west half of lot No. 14," was falsa demonstratio of the west half, the testator having referred to the whole lot as being 200 acres in a subsequent part of the will. *Holtby* v. *Wilkinson*, 28 Chy. 550.

Lot Described by Wrong Concession.—A testator, owning lots 6 and 8 in the first concession, devised the same in his will in two separate devises as "my property known as lot . . . second concession," &c.:—Held, that his lots in the first concession passed. *Hickey* v. *Hickey*, 20 O. R. 371.

Testator by will, after leaving different lands to his wife and other children, devised to his daughter Maria, "all those certain lots of lands being Nos. 6, 7, and also No. 8, together with the half of No. 7, in the 4th concession in the township of Oxford." He then devised to his executors 800 acres for the purpose of educating his children, and accompilahing hullding as might be thought necessary; and the will proceeded thus: "I give and bequeath to my son J. C. all and singuiar residue and remainder to now or may have at my decease, together with that certain tracts of iand," &c., specifying 900 acres. No personal property had been previously mentioned. It was proved that the testator did not own a lot numbered 6 in any concession of Oxford; or lots 6, 7, or 8 in the fourth; but he did own 7 and 8 in the sixth, and 7 in the seventh and eighth concessions. The question was, whether lot 7 in the eighth concession was included in the devise to Maria, or passed under the residuary clause:—Held, that although it seemed most probahle that the testator intended to give to Maria lot 7 in the sixth, seventh, and eighth concessions, yet the will couid not be so read; and that the lot passed to J. under the residuary devise, whlch, notwithstanding its ohscurity, must he taken to apply to all landa not before disposed of. *Campbell* v. *Campbell*, 14 U. C. R. 17.

A testator hy his wiii devised to hia son G. "the property I may die posseased of in the village of M., also lot 28 in the tenth concession of B." In the eariy part of the wiii he had nsed the words "wishing to dispose of my worldly property." The testator dld not own iot 28, and the only iand he did own in the tenth concession of B. was a part of iot 29. The will contained no residuary devise:—Heid, that the part of lot 29 owned hy the testator did not pass hy the will to the son. *Re Bain and Leslie*, 25 O. R. 136.

Lot Described by Wrong Number.—A testator who was the owner of the south-west quarter of lot 12 in the fourth concession and of lot 12 in the fifth concession of a township and of no other real estate, after providing for payment of his dehts and funerai expenscs hy his execntors, declared that "the residue of my estate which shaii not be required for auch purposes I give, devise and hequeath as follows," and then devised "the south-westerly quarter of lot 11, concession four" and iot 12 in the fifth concession:—Heid, that the word "eleven" might be rejected as falsa demonstratio and the devise read as if it were "the residue of my real estate in the fourth concession." *Doe d. Lowry* v. *Grant*, 7 U. C. R. 125, applied and considered. *Doyle* v. *Nagle*, 24 A. R. 162.

A testator devised to certain parties "the 18 acres, more or less, that was deeded to me hy the late Henry Buchner, senior, reference heing had to the said deed for description." A deed conveying that quantity of land to the testator was proved, hut he had sold it iong hefore making his wiii. He held, however, at the date of his will, ahout twenty-one acres, under another deed from one Henry Buck, which he usnally calied eighteen acres, and which was the suhject of dispute in the action:—Held, that the devise was void for uncertainty. *Buchner* v. *Buchner*, 6 U. C. C. P. 314.

In 1845, K., who then resided in Toronto, went to reside in Buffalo, visiting Toronto once or twice every year. In 1862, he purchased lots 1 and 2 in the township of Mono, in the county of Simcoe. In 1863 Orangeville was incorporated as a village, and annexed to the county of Weilington, lot No. 1 heing detached from Mono, and included in Orangeville. In 1866 K. made his will, wherein, amongst other devises, he made a devise of "all my real estate situated in the township of Mono, in the county of Simcoe," &c.:—Held, that lot 2, which exactly filled the description of the devise, alone

passed thereunder; that parol evidence was inadmissible to show that the testator intended to include lot 1; and that even if such evidence were admissible, the evidence, set out in the case, was insufficient for the purpose. *Lawrence* v. *Ketchum*, 4 A. R. 92.

General Devise — Erroneous Specific Description. — Where a testator, after devising to his wife for life all his real estate, stated the lots of land of which it was composed, and, amongst others, the front half of a lot, of which only the rear half belonged to him:—Held, that the wife took the rear half. *Doe d. Taylor* v. *Paterson*, 3 O. S. 497.

Held, upon the following will: "Know ye, that I, A. B., do bequeath all and every part of my real property situated in the township of Huntley, viz., north half 26, sixth concession," &c.: that parol evidence was permissible to show that the testator did not own 26, but 22 in the sixth concession of Huntley, and that (it appearing upon such evidence that lot 26 had been inserted by mistake for lot 22), lot 22 would pass under the will. *Doe d. Lowry* v. *Grant*, 7 U. C. R. 125.

The will devised: "My farm being lot No. 15 in the first concession of the township of Sidney." This farm really consisted of this lot and the corresponding lot in the broken front concession:—Held, that the devise covered both lots. *Smith* v. *Bonnistcel*, 13 Chy. 29.

A testatrix by her will devised as follows: "I give, devise, and bequeath to my husband all my real estate, comprised of the north-west quarter of lot No. 10 in the sixth concession of the township of Mersen:" and it appeared that she had never owned the said lands, but had owned and lived upon the north-west quarter of lot 10 in the fifth concession of the said township. There was no residuary devise:—Held, that as the will, taken apart from the erroneous description, contained a gift or devise of all the real estate of the testatrix, which would, if taken alone, be a sufficient description for the purpose of passing the lands really owned by her, the part of the description referring to lot 10 in concession six, might be rejected as falsa demonstratio, and that the lands really owned by the testatrix passed to the devisee. *Hickey* v. *Stover*, 11 O. R. 106; *Re Shaver*, 6 O. R. 312; *Summers* v. *Summers*, 5 O. R. 110, distinguished. *Wright* v. *Collings*, 16 O. R. 182.

Homestead—Intention.—"My will is that J. B., my son, shall have the homestead," &c. The evidence showed that the property of which testator was seised in fee at the time of his death consisted of the north-easterly 50 acres of lot number 12 in the second concession of East Flamborough, and of 150 acres, part of lot 13 in the same concession. The testator lived on the last mentioned farm. Appurtenant to and used with his dwelling house there were a yard, garden, orchard, carriage house and lane, containing in all about four acres of land. There were other provisions tending to show that testator intended to treat all his sons equally:—Held, that the son J. B. was entitled to four acres only, not the 150 acres on which the dwelling house was situated. *Bigelow* v. *Bigelow*, 19 Chy. 549.

Imperfect Description—"Methodist Church."—A gift or devise will not fail for a misdescription or an imperfect or inaccurate description of a legatee or devisee, if the description is sufficient to designate with reasonable certainty the object of the testator's bounty. Therefore the Methodist Church may take under a gift to "The Missionary Society of the Methodist Church in Canada." *Tyrrell* v. *Senior*, 20 A. R. 156.

Incomplete Description.—The land claimed was in the township of East Flamborough, and the will through which plaintiff claimed devised all the testator's land in "Flamborough." There were two townships, called respectively East and West Flamborough, and none called Flamborough; but it was proved that testator owned this land, and not shown that he had any other land in either East or West Flamborough:—Held, that this land might pass by the devise. *Nicholson* v. *Burkholder*, 21 U. C. R. 108.

Ambiguous Description of Land—Erroneous Description of Legatee.—A testator by his will directed his executors, "hereinafter named," to pay his debts and funeral expenses; and then devised the residue as follows: To his son David, "lot 16, con. 7, N. H., real and personal property;" the said David to pay to each of his daughters $500, namely,

Janet, Mary, and Agnes, in two years after his death; Margaret and Ellen at twenty-five, and Christina to remain on the farm, the said sum to be given her when she became of age. No executors were named. Parol evidence was admitted to show that the land mentioned was in the township of Morris, that "N. H." meant the north half, and that it was the only land owned by the testator; parol evidence was also admitted to show that Christina, though spoken of as a minor, was twenty-three years old when the will was made, and that she was of delicate constitution and of weak mind:—Held, that there was an effectual disposition of the real and personal estate; that to a disposition of personal estate executors need not be expressly named, but may appear by implication, and that David was executor according to the tenor; that as to the land the parol evidence, which was properly admissible, cleared up any ambiguity as to the description; and the parol evidence also showed that as regarded the provision in favour of Christina, she must be treated as an adult; and that the provision for her would include maintenance. *Young* v. *Purvis*, 11 O. R. 597.

Arbitrary Description by Reference to Fence.—A. devised to defendant "that 100 acres which he now occupies, being No. 26 only, and that he is not to occupy or use that part or strip of said lot on the east side of the stone fence which is now a divisional line between his farm and mine, and that that stone fence is to be considered a boundary line, and to be continued all through between the two farms." The stone fence, it appeared, if continued, would cross the division line between 25 and 26, and cut off a triangular piece of 25 at the north-west corner of that lot:—Held, that defendant was entitled to that piece, being on the west side of the stone fence, although not part of 26. *McDonald* v. *McPhail*, 17 U. C. R. 299.

Devise of Dwelling—Structural Changes made after Date of Will.—Testator devised, to his adopted daughter, a Mrs. Anderson, "the dwelling on the south side of Banfield street in which we now reside in the town of Paris," subject to the life estate of his widow. During the interval between the date of the will, October, 1907, and his death, December, 1909, he added two rooms to the original house, and removed a barn, which had been on the rear of the lot, to the front and converted it into another dwelling house. The executors moved under Con. Rule 928 for an order construing the will as to the disposition of the testator's property. Boyd, C., held, that the structural changes did not affect the testator's intention to deal with all his property and that the devisee took the whole premises on Banfield street. *Re Stokes* (1910), 16 O. W. N. 982.

Surrounding Circumstances.—In the interpretation of a will, extrinsic evidence of surrounding circumstances, to show what a testator intended by his will, is admissible; but declarations by the testator of what he intended by his will, will not be received for that purpose. *Davidson* v. *Boomer*, 15 Chy. 218.

Where a testator bequeathed a sum of money for the erection of a parsonage, but did not refer to any land already in mortmain whereon it was to be built, extrinsic evidence was given to show that land for the site of a parsonage had already been given by a third person, and that the testator had on various occasions pointed it out as the site of a parsonage, and had avoided building a school house upon it lest doing so should interfere with its use for a parsonage; such evidence was received to rebut the presumption that would otherwise arise from the generality of the bequest, that the money bequeathed was to be applied in the purchase of land for a site, as well as for the erection of the building. Ib. See *Murray* v. *Malloy*, 10 O. R. 46.

Where a bequest was made to the sons and daughter of A., who had two daughters, one married and one unmarried, all known to the testatrix, evidence was received to show that the testatrix had always stated that she would not leave anything to the married daughter because her husband would waste it. *McIntosh* v. *Bessey*, 26 Chy. 496.

Rectification.—The Court has no power to rectify a will by correcting what appears to be a misdescription of property thereby devised, unless there be in the will itself the means of identifying the property in question as the subject of the devise. *Re Campbell* (1904), 7 Terr. L. R. 214.

Land not Owned by Testator—Application to Land Owned by Testator.—A testator purporting to devise "all his real and personal estate," gave to one son the south fifty acres of lot 21, and to another the north fifty acres of the same lot. The will contained no residuary devise and no other gift of land. The testator died seised of the east half of lot 21, 100 acres, but had no interest in the west half:—Held, that the one son took the south twenty-five acres of the east half of the lot and the other the north twenty-five acres, and they took together the central fifty acres as tenants in common. *McFadyen* v. *McFadyen*, 27 O. R. 598.

Lane.—A testator devised part of lot 17 to his son C., and part of lot 18, adjoining it to the east, to his son W., adding that, in order to give C. free access to and from the side road on the east side of lot 18, the lane or road "now running across" the land devised to W., "commencing at my gate on said side road," and in width half a chain, to the west limit of 18, should be kept open for the free use of his said sons, with a proviso that should the whole estate bequeathed to them come into the possession of any one person, this provision, "in reference to the continuance of said lane or road," should become void:—Held, that the testator evidently intended that the lane should be continued as then existing and used; and that the defendant, claiming under C., had no right to remove the gate on the side road. *Vansickle* v. *Kelly*, 42 U. C. R. 274.

Specific Descriptions—Portions Previously Sold.—A. McL. S. being the owner of a 200 acre lot, and having disposed of twelve acres at the north-east corner and five acres in the centre portion in his lifetime, by his will devised as follows: "First, I devise and bequeath unto W. A. S. the easterly part of lot No. 6, . . . being described as one-third part of the length and entire width, measuring westward from the easterly limit of the said lot No. 6, and containing sixty-six and two-third acres, more or less. Second, I devise and bequeath unto H. D. S. the middle part of my said lot No. 6, in . . . being described as one-third part of the length and the entire width, measuring westward from the land hereinbefore devised to W. A. S. of the said lot No. 6, and containing sixty-six and two-third acres more or less. Third, I devise and bequeath to my daughter A., the wife of J. B., of . . . the remaining one-third part of my said lot No. 6 in . . . being described as one-third of the length and the entire width of the said lot No. 6, measuring westward from the land hereinbefore devised to H. D. S., and extending to the westerly limit of said lot No. 6, containing by admeasurement sixty-six and two-third acres more or less. To have and to hold the said hereby devised land and premises, unto and for the use of my said daughter A., for and during the term of her natural life, with remainder thereof on her decease to the children of her body, and their heirs and assigns for ever." A codicil provided as follows: "I do hereby alter my said will, so that if my said daughter A., the wife of J. B., die without issue,, or should outlive her issue, the remainder thereof shall revert to my own heirs, share and share alike:"—Held, that each of the three devisees took under the will according to the measurements given, that is to say, one-third part of the length of the lot, and the whole width of it, and only such portion of his or her respective parcel thus described, as the testator had title to and power to give, and that it could not be held that what land the testator had was to be equally divided amongst his three children. *Saunders* v. *Breakie*, 5 O. R. 603.

Ages of Devisees.—By his will, dated 28th January, 1840, testator devised to his son C., certain land, to be by him peaceably possessed and enjoyed for his natural life, and after his decease the same land to be devise to the heirs of the said C., and to their heirs and assigns for ever; in consideration whereof it was directed that C. should pay yearly to his mother £25 during her widowhood, and to his sister M. £25 yearly, so long as she should remain single. Then followed a devise to his son J. B. of

certain lands in similar words, and then, after certain devises and bequests to others of his children, including a gift of £500 to his son R., there was this further provision, "and in the event of either of my sons, C., J. B., or R., or either of my daughters, S. or M., dying before they come of age, or without issue, then and in such case the legacies herein devised and bequeathed to them shall be equally divided among the surviving ones share and share alike:"—Held, that extrinsic evidence of the ages of testator's children was admissible for the purpose of aiding in the construction of the will. *Forsyth* v. *Galt*, 22 U. C. C. P. 115.

Misdescription of Land.—Where a testator devised lot 14, concession 10, in the township of A. to his two nephews, and, after certain pecuniary bequests, directed as follows: "The balance of my estate that may remain after paying the above bequests, to be paid to my relatives as my executors may think advisable;" and the evidence showed that the testator did not and never had owned that lot; but that he did own lot 21, con. 10, in the township of A., which was not specifically devised by the will:—Held, that the evidence of the testator's intention to devise lot 21 in con. 10 to his nephews was inadmissible. Held, further, that the Court would not authorize the executors to convey lot 21 in con. 10 to the nephews under the residuary clause in the will. *Summers* v. *Summers*, 5 O. R. 110.

A testator by his will devised as follows: "I devise the south-west quarter of lot 5, con. 2 of Westminster, containing fifty acres, more or less, to H. P. S., his heirs and assigns, in fee simple." The evidence showed that the testator did not own the south-west quarter of the lot, but did own the south-east; that he and the devisees had lived on it for many years, and that he did not own any other part of the lot, except the fifty acres of the south-east quarter:—Held, that evidence was admissible to explain the error, and cause the will to operate on the south-east quarter. *Re Shaver*, 6 O. R. 312.

The erroneous part of the description in a will may be rejected if there is enough left to identify the subject-matter devised. *Summers* v. *Summers*, 5 O. R. 110, distinguished. *Ib.*

A testatrix devised the south quarter of lot 20, concession 9, township of R., to T. L., and east quarter of said lot to her two daughters. It was sought to show that she had at the time of her death no other land than the south half of lot 20, concession 8, of R., and to make the will operate to pass this to T. L.:—Held, that the devise being in its terms free from ambiguity, the Judge below was right in rejecting evidence of extrinsic facts, and that even if it might have been shown that lot 20 in concession 8, was the only land which the testatrix owned, the will could not operate to pass it. *Hickey* v. *Stover*, 11 O. R. 106.

Provision in Lieu of Dower.—Where a testator by his will made provision for his widow, but did not express the same to be in lieu of dower, evidence for the purpose of showing that the testator intended such provision to be in lieu of dower, was held inadmissible. *Fairweather* v. *Archibald*, 15 Chy. 255.

Rebutting Presumption—Explaining Ambiguity—Members of Class Intended.—The rule as to the reception of parol or extrinsic evidence, to rebut a presumption raised, or explain an ambiguity created by a will, considered and acted on. A testator, by his will, bequeathed "the sum of $500 to each of the four children of my brother G. R., on their attaining their twenty-first year." At the date of this will G. R. had five children—one son and four daughters—which fact was known to the testator, who had been heard to say that he would provide for the daughters, but that G. himself must provide for the son. By a previous will the testator had bequeathed the sum of $500 to each of the four "daughters" of his brother G. R.; and the person who drew the will proved that the testator, in giving him instructions therefor, said that "he wished to leave $500 to each of G.'s four children, the same as in the old will:"—Held, that evidence of the instructions so given was properly admissible for the purpose of rebutting any presumption of a change of mind of the testator, and thus showing which four of G. R.'s children were intended to be benefited by the bequest. *Ruthven* v. *Ruthven*, 25 Chy. 534.

Agreement to Convey—Ambiguous Reference to Ownership.—B. owning the south half of lot two, agreed under seal in 1859 with defendant, his son, to let him have the east twenty acres, in consideration of work done, and to convey it so soon as defendant should get it surveyed. In 1860, he devised to his wife, for life, all that part of lot two, "now owned by me," and to defendant in fee "twenty acres of the east side of lot two, which I do now own." The remainder of his estate, at his wife's death, he devised to his daughters, the plaintiffs, on condition of their supporting their brother, E., who was not in his right mind. It appeared that two and a-half acres of the lot had been sold by B., but whether conveyed or not was not shown, and that after the agreement defendant and the others had continued to live upon the lot as one family. The mother having died, the daughters claimed the twenty acres west of the easterly twenty acres, while the defendant contended that this passed under the devise to him, not the east twenty acres, of which he was already entitled to a conveyance under the agreement:—Held, that parol evidence that the twenty acres intended to be devised to defendant was the land in dispute was inadmissible. (2) That the plaintiffs were entitled to such land, for defendant was wrong in his contention, and the devise to him was of the land which the testator had agreed to convey, but had not conveyed to him. *O'Day* v. *Black*, 31 U. C. R. 38.

Two Legatees Answering Description.—G. W. by his will bequeathed $1,000 to "The Protestant Orphans' Home for Boys in Toronto." The evidence showed that there were two institutions, either of which might have been intended by the testator:—Held, that the legacy should be divided between them. *Williams* v. *Roy*, 9 O. R. 534.

Unintentional Omission—Words Read into Will.—A testator, being possessed of personalty and realty, bequeathed pecuniary legacies to a much greater amount than the personalty left by him, and then bequeathed to his "executors . . . in trust to dispose thereof to best advantage, in trust to be divided and paid over to my children in the sums mentioned, and as soon as may be agreeable to the terms and conditions of certain mortgages and leases now standing against the property," without mentioning any property:—Held, that the words "my property," presumably unintentionally omitted, should be read into the will. *Colvin* v. *Colvin*, 22 O. R. 142.

Elliptical Sentence.—A testator, after declaring the will in question to be his last will and after revoking all previous wills, proceeded thus: "It is my will that as to all my estate both real and personal my wife Elizabeth, and I hereby appoint my said wife Elizabeth to be executrix of this my will."—Held, that the intention to devise the estate to the wife might fairly be gathered from this language. *May* v. *Logie*, 27 O. R. 501, 23 A. R. 785. See *S. C.*, in Supreme Court, 27 S. C. R. 443.

Estate.—Testator describing himself as "of the township of S., south half of lot 24, tenth concession," devised as follows: "all of my estate, goods and chattels, I give and bequeath to my dear and beloved wife, whom I appoint sole executrix," &c.:—Held, that the word "estate" clearly passed testator's land, notwithstanding its connection with the personalty. *McCabe* v. *McCabe*, 22 U. C. R. 378.

Intention to Dispose of Whole Estate—Specific Sums Named.—A testator commenced by saying that he disposed of the whole of his estate, and then gave $2,000 to one person and $500 to another person; his estate in fact being greatly in excess of these two amounts:—Held, that as to such excess there was an intestacy; the rule as to cases of imperfect enumeration not applying to cases where a sum of money is named in the will.

The testator left two unsigned and undated scraps of paper on one of which he had written, "I leave the whole of my personal property (on one line) to William Brown, Townhead, Arbuthnot, by Fordoun, Scotland, $2,000;" and on the second scrap of paper he had written, "I give Peter Cran $500 for himself," which were admitted to probate as the last will of the deceased:—Held, that there was an intestacy as to the residue of

the personalty over and above the $2,500 mentioned. *McLennan* v. *Wishart*. *In re Nelson*, 14 Chy. 109, 512.

Two Devisees Answering Description.—The testatrix devised and bequeathed all her real and personal estate (except her ready money) to one M. for life; and upon the death of M., she directed that all her real and personal estate should be sold; and the proceeds thereof together with all her other moneys, she bequeathed to (among others) the sons and daughter of her sister M. A. There were at the date of the will two daughters of M. A. living:—Held, that parol evidence was admissible to show that the testatrix intended to benefit only one of the daughters; and that the evidence showed that she intended to exclude the other. Held, also, that the division of the ready money was postponed until the death of M., the tenant for life. *McIntosh* v. *Bessey*, 20 Chy. 406.

Poor of County—Town Detached from County for Municipal Purposes only—Right of Residents of Town to Participate.—The testatrix by her will gave the residue of her estate in trust for a certain class of the poor of a county, "who must have been bona fide residents of the said county before becoming destitute or needy." A town in the county originally formed part thereof for all purposes, but was in 1850, under the provisions of the Municipal Act then in force, detached from the county for municipal purposes only:—Held, in the absence of anything in the context of the will clearly to the contrary, that residents of the town coming within the class referred to in the bequest were included therein. *Steele* v. *Grover*, 26 O. R. 92.

Mistake in Name of Donee.—A testator bequeathed a sum of money to his "sister Anastasia Cummings." He had only two sisters, Catharine Kelly, to whom he bequeathed a like sum, by her proper name, and Maria Cummins:—Held, that the gift took effect in favour of Maria Cummins. Held, also, that a declaration to that effect could properly be made upon an originating notice under rule 938. *In re Sherlock*, 18 P. R. 6, followed. *Re Whitty*, 30 O. R. 300.

Specific Quantity—General Location.—W. devised to his daughter T. six acres "off the north-west portion of lot 20 in the third concession of Haldimand," to be chosen by his executors, and "to extend twenty rods in width joining the northern line of said lot 20, and extending as far south as will comprise six acres aforesaid." One B. owned a strip of land at the north-west corner of the lot, extending twenty rods in width to the east, the whole lot being eighty rods wide; and this strip had for forty years been enclosed and occupied. The executors chose the six acres for T. adjoining this, and extending twenty rods east. Afterwards, on a survey made under C. S. U. C. c. 93, s. 11, the north-west angle of lot 20 was placed four rods further west; and defendants, who owned the remainder of lot 20, then contended that T. must lose that width off the east side of her strip, as the devise restricted her to the "north-west portion" of the lot, and she could not therefore come beyond the centre into the north-east part, although she could not otherwise get more than sixteen rods in width. B. having acquired a title by session, so that his eastern fence could not be moved:—Held, however, that the intention of the testator was to give six acres, twenty rods in width along the northern boundary of the lot, without reference to the strict meaning of the words "north-west portion;" that the executors had therefore chosen the land in accordance with the will; and that defendants, having trespassed thereon, were liable. *Tucker* v. *Phillips*, 24 U. C. R. 626.

Special Words.—A testator devised, "east half of lot number seven, together with the broken front of same, with forty acres of lot number eight, west side, situate in the first concession, township of Kingston," and to his daughter S. M., "east half of lot number eight, with the whole of the broken front of the same, as also sixty acres of the west half of said lot situate in the first concession of the township of Kingston:"—Held, that the whole broken front of lot eight passed to S. M., and not merely the broken front in front of the east half. *Hawley* v. *Miller*, 12 U. C. C. P. 70.

Rooms Projecting over Devised Land.—A testatrix, being the owner of certain lands and premises upon which a block of buildings was erected, devised the property in two parcels, describing the buildings thereon as being in the occupation of certain tenants. The description of one parcel included an alley-way running through the centre of the block, but the rooms built over the arch of the alley-way were structurally a part of, and were used with a store that formed part of the other parcel, to which a right of way over the alley-way was given:—Held, affirming 16 O. R. 152, that the presumption "cujus est solum ejus est usque ad coelum" is a rebuttable one, and that under the circumstances the rooms in question did not pass with the land. *Potts* v. *Boivine*, 16 A. R. 191.

Part of House on Devised Land.—In 1883, M. W. being seised of certain lands, conveyed half thereof to G. W. in fee, describing the same by metes and bounds, and afterwards died, having devised the other half to M. There was a house upon the lands in question so situate that half of it was on the portion granted to G. W., and half on the portion devised to M. No specific mention of the house was made either in the deed to G. W. or in the will. M. now commenced, in defiance of G. W.'s protests, to pull down the half of the house situate on the land devised to her, and G. W. applied in the present action for an injunction to restrain the same:—Held, that he was entitled to the relief claimed. *Wray* v. *Morrison*, 9 O. R. 180.

Compensation Payable on Expropriation.—The tenant for life conveyed to the railway in 1871. The person entitled to the reversion after the life estate died in 1871 intestate, and I. H. Y., his sole heiress-at-law, died in 1884, leaving a will, in which she devised to the plaintiff a specific parcel of land, including the part conveyed to the railway company:—Held, that this will did not pass to the plaintiff the right to receive the compensation money, and that as to it I. H. Y. died intestate and it descended to her heirs-at-law, of whom the plaintiff was one; and the plaintiff was allowed to amend by adding the other heirs-at-law as parties. *Young* v. *Midland R. W. Co.*, 16 O. R. 738.

Crops.—Growing crops on the land of a testator may or may not be assets according to the contents of the will, which was not in evidence. Under ordinary circumstances they go to the executor, and not to the heir, but if the land on which the crops were growing was devised by the will, that would in general make the crops go with the land. *Fisher* v. *Trueman*, 10 U. C. R. 617.

Ejusdem Generis.—A testator, after bequeathing an annuity to his wife, proceeded: "I also give and bequeath to my said wife all my household furniture, goods, and chattels, of what nature or kind soever, and wheresoever situate; to have and to hold to her, my said wife, her heirs and assigns, for ever;" and in subsequent clauses devised real property to different persons, and for different estates, and bequeathed annuities to different persons, charging them on his estate generally; and disposed of his residuary real and personal estate:—Held, that though the bequest to the wife was comprehensive enough to pass the whole of testator's personal estate, and not inconsistent with the gift to her of an annuity, yet the subsequent bequests restricted the application of the bequest to personalty ejusdem generis with the other property bequeathed to her; and the residuary bequest of personalty having failed through uncertainty as to the objects of testator's bounty:—Held, that the wife was not entitled to it under the words of the bequest to her. *Davidson* v. *Boomer*, 15 Chy. 1.

Absence of Designation of Source of Payment.—As between specific and demonstrative legacies. *Re Wildey*, 6 O. W. R. 599.

If there can be found what exactly fits the devise then that passes by the will and parol evidence is not admissible to show that the testator intended something else. *Lawrence* v. *Ketcheson*, 4 A. R. 406.

Ambiguity—Extrinsic Evidence—Instructions—Admissibilty.—A testatrix bequeathed part of her residuary estate to the "Royal Hospital for Women." There was no hospital of which that was the right designation, but there were several institutions whose title was more or

less similar thereto:—Held, that evidence of a conversation between the testatrix and her solicitor when he received instructions to prepare her will, in which the testatrix expressed an intention to benefit a particular institution, was not admissible to ascertain which hospital was entitled to the bequest. *Bateman, In re, Wallace* v. *Mawdsley*, 27 T. L. R. 313.

"The house and premises owned by me on Spring Garden Road." The testator had a long lease of land on Spring Garden Road, on which were a house and a cottage separated by a fence separately rented and separately assessed:—Held, that the house passed; and in any event the devisee might have elected which he would take. *Metzler* v. *Spike*, 20 N. S. R. 139.

Either of the words "property" or "estate" is sufficient to pass land. *Cameron* v. *Harper*, 21 S. C. R. 273.

A testator devised and bequeathed all the residue of his real and personal estate which he might "die seised or possessed of in reversion, remainder or contingency." By a codicil he disposed of land acquired after he had made his will "to the same person" to whom he had devised the residue. It was held that the codicil showed that the will was intended to pass lands in possession as well as lands in expectancy. *Doe dem Dickson* v. *Gross*, 9 U. C. R. 580.

So, a bequest of "all my household furniture, plate, linen and china" to the testator's wife, with a disposition after her death of all personal estate in her possession at that time, there being no other bequest of personal property, carries only such articles as are enumerated; the reference to personalty in the possession of the wife being referable only to such personalty (viz., furniture, plate, etc.), as would lawfully be in her possession under the will. Consequently, there was an intestacy as to all other personal property. *Holmes* v. *Walker*, 26 Chy. 228.

By one clause of his will the testator gave to his nephew his "mill tannery, houses, lands and all my real estate, effects and property whatsoever . . . . . at" a certain place. Other clauses dealt with personalty:—Held, that though the concluding words themselves were large enough to include personalty, the context shewed them to be restricted to realty. *Thorne* v. *Parsons*, 4 O. L. R. 682, 33 S. C. R. 309.

But a bequest of one-third of "my personal property being," followed by an enumeration of certain chattels, passes one-third of all the personalty under the general words, the wrong enumeration being rejected. *Ferguson* v. *Stewart*, 22 Chy. 364.

A testator bequeathed all his clothing, wearing apparel and personal effects to his brother; all his household furniture and other personal property to his sister; his real estate was devised to his elder for life; remainder in fee to his nephew. The residue of his estate real and personal was given to his nephew.—*Held*, that all the brother took was the wearing apparel and the watch and chain; that the sister took all the remainder of the personalty; the nephew taking none of it. The proper view of the residuary clause was that the testator having disposed specifically of all his estate, both real and personal, added the residuary clause for the sake of greater caution or as a usual form. *Re Pink*, 4 O. L. R. 718.

At the time of making his will a testator had sold portions of a lot devised to N. These lots were re-conveyed subsequently to the testator. The Court was divided as to whether the lots passed under the will or not. *Vansickle* v. *Vansickle*, 9 A. R. 352.

CHAPTER XVI.

ELECTION AND ESTOPPEL.

Extent of the General Doctrine.

The general doctrine of election, is applicable to a particular class of cases, namely, where a testator disposes of his own property, and also professes to dispose of property which does not belong to him. There are, however, other classes of cases to which the doctrine is applicable. Some of them are referred to in connection with appointments under powers. Questions with regard to election also arise where persons to whom benefits are given by will have claims on the testator arising out of a transaction entered into by him during his lifetime; as in the case where a father, on the marriage of one of his children, covenants to settle property on the child, and afterwards gives benefits to that child by his will. This subject is considered elsewhere.

6th ed., p. 531. *Wilkinson* v. *Dent*, L. R. 6 Ch. 339. See Chapter XXXII.

Condition.

Questions of election sometimes arise where a testator makes a bequest or devise to A. on condition that A. releases some right or transfers some property of his to B.; here A. must elect whether he will comply with the condition or forfeit the gift under the will.

6th ed., p. 532, *ibid.*

Right of Selection.

The cases in which one of several houses, pieces of land, chattels, or other kinds of property, is devised or bequeathed in such a way that the devisee or legatee has a right to elect which he will take, are discussed elsewhere.

6th ed., p. 532.

Doctrine of Election, What.

The doctrine of election may be thus stated: That he who accepts a benefit under a deed or will, must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing every right inconsistent with it. If, therefore, a testator has affected to dispose of property which is not his own, and has given a benefit to the person to whom that pro-

perty belongs, the devisee or legatee accepting the benefit so given to him must make good the testator's attempted disposition; but if, on the contrary, he choose to enforce his proprietary rights against the testator's disposition, equity will sequester the property given to him, for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights.

1st ed., p. 385, 6th ed., p. 532.

An anonymous case in Gilb. Cas. in Eq. furnishes a simple illustration of the principle. A. seised of two acres, one in fee, and the other in tail, and having two sons, by his will devised the fee simple acre to his eldest son, who was issue in tail, and the entailed acre to his youngest son, and died. The eldest son entered upon the entailed acre, whereupon the younger son brought his bill against his brother, that he might enjoy the entailed acre devised to him, or else have an equivalent out of the fee acre; because his father plainly designed something for him. Lord Cowper said, "The devise of the fee acre to the elder must be understood to be upon the tacit condition, that he shall suffer the younger son to enjoy quietly, or else that the younger son shall have an equivalent out of the fee acre." And he decreed the same accordingly. This case is the more remarkable, as showing the length to which the doctrine of election has been carried; because the elder son was actually entitled to both acres by his better title as general or special heir, and took nothing under the will. Yet the mere intention to give him property by the will was held sufficient to put him to his election.

5th ed., p. 416, 6th ed., p. 533.

Does not Extend to Derivative Claims.

But a devisee or legatee is not precluded from claiming derivatively, through another, property which such other person has taken in opposition to the will. Thus, a man may be tenant by the curtesy, in respect of an estate of inheritance taken by his wife in opposition to a will under which he has accepted benefits, without affecting his title to those benefits. For compensation having once been made by the wife cannot be exacted a second time. And a devisee or legatee who claims derivatively through another to whom the will gave nothing is equally free; for whether the true owner took subject to an obligation which he has discharged, or subject to no obligation whatever, can make no difference: thus one co-heiress electing to take under a will, may retain a share which since the testa-

tor's death has descended to her from a deceased co-heiress, although bound to give up her own original share.

Ibid.

It must however be understood that the obligation attaches on whoever at the testator's death is true owner of the property wrongfully disposed of, and to whom also a benefit is given by the will. This is the point of time to be regarded. And it matters not from whom, or by what previous acts or devolutions, such owner's title was derived.

5th ed., p. 416, 6th ed., p. 534.

INTENTION OF TESTATOR.

The doctrine does not depend on any supposed intention of the testator, but is based on a general principle of equity. Consequently the obligation of election extends to the whole of the benefits taken under the two instruments or titles.

6th ed., p. 534. *Cooper* v. *Cooper*, L. R. 7 H. L. 53.

ELECTION BY SEVERAL PERSONS.

If the property which the testator affects to dispose of belongs to several, as tenant for life and remainderman, each has a separate right of election. And if the person on whom the obligation to elect is cast dies without having elected, and his property devolves on several persons, each of them has a separate right of election. If A., the person who is bound to elect, elects to take against the will but dies before B., the disappointed legatee or devisee, asserts his rights, A.'s estate is liable to make compensation to B. to the extent of the benefits which A. was entitled to receive under the will.

6th ed., p. 534. *Pickersgill* v. *Rodger*, 5 Ch. D. 163.

Where several were disappointed, the sequestered property is divided among them in proportion to the value of the interest of which they are disappointed.

6th ed., p. 535. *Howells* v. *Jenkins*, 1 D. & J. S. 617.

WHEN COMPENSATION IS ASCERTAINED.

In all cases of election, the amount of compensation is ascertained as at the date of the testator's death.

6th ed., p. 535. *Re Hancock* (1905), 1 Ch. 16.

DOCTRINE APPLIES TO CONTINGENT AND REVERSIONARY INTERESTS.

The doctrine of election clearly applies as well to contingent as to vested rights; and to reversionary and remote as well as to immediate interests.

5th ed., p. 417, 6th ed., p. 536. *Re Hancock* (1905), 1 Ch. 16.

IMMATERIAL WHETHER TESTATOR IS ACQUAINTED WITH HIS WANT OF TITLE.

It is immaterial in regard to the doctrine of election, whether the testator, in disposing of that which is not his own,

is aware of his want of title, or proceeds on the erroneous supposition that he is exercising a power of disposition which belongs to him; in either case, whoever claims in opposition to the will, must relinquish what the will gives him. This seems to result from the impossibility of knowing with certainty that the testator would not have made the disposition, had he been accurately acquainted with the title; and (as a great judge has observed), "nothing can be more dangerous than to speculate upon what he would have done, if he had known one thing or another."

1st ed., p. 387, 6th ed., p. 536. *Re Brooksbank*, 34 Ch. D. 160.

PRINCIPLE OF DOCTRINE IS COMPENSATION, NOT FORFEITURE.

A question which has been much discussed is, whether the principle governing cases of election under a will is forfeiture or compensation; or, to speak more explicitly, whether a person claiming against a will is bound to relinquish the benefit thereby given to him in toto, or only to the extent of indemnifying the persons disappointed by his election. The strong current of the authorities, particularly those of a recent date, is in favour of the principle of compensation; interrupted, certainly, by some dicta, which seem to favour the doctrine of forfeiture.

It is now generally accepted as the settled doctrine of the Court.

5th ed., p. 418, 6th ed., p. 538. *Re Vardon's Trusts*, 28 Ch. D. 124; 31 Ch. D. 275.

NO COMPENSATION WHERE LEGATEE TAKES UNDER WILL.

If the person who is put to his election elects to take under the will, no question of compensation arises.

6th ed., p. 538. *Re Lord Chesham*, 31 Ch. D. 466.

PERSONAL COMPETENCY TO EXPRESS INTENTION REQUISITE. AS TO INFANTS AND FEMES COVERTES.

In order to raise a case of election, there must be a personal competency on the part of the author of the attempted disposition, as the doctrine is founded on intention, which supposes such competency. Thus, under the old law, where personalty was, and real estate was not, disposable by the will of a person under age, the heir of the infant testator was allowed to take his real estate in opposition to the will, without relinquishing a legacy bequeathed to him by the same will.

1st ed., p. 388, 6th ed., p. 538.

If a married woman attempts to dispose by will of property which belongs to her husband otherwise than jure mariti, and makes a valid disposition of other property in his favour, he is bound to elect.

6th ed., p. 539. *Coutts* v. *Acworth*, L. R. 9 Eq. 519.

As to Heir.
Effect of 1 Vict. ch. 26, on Doctrine.

Where under the old law, a testator, by a will sufficient in point of execution to pass personal estate, but not adequately attested for the devise of freehold estate, devised such estate away from the heir, to whom, by the same will, he bequeathed a legacy, no case of election arose against the heir, unless the legacy to him was bequeathed upon the express condition that he should confirm the devise. Of course this question cannot now arise under wills made or republished since the year 1837, which, if sufficiently executed for the bequest of a personal legacy, will also be effectual to dispose of freehold estate. Nor is this the only instance in which the Wills Act has tended to narrow the practical range of the doctrine under consideration; for now that the devising power extends to after-acquired real estate, it can no longer be a question (as formerly), whether the testator has, by attempting to dispose of the real estate to which he may be entitled at his decease, raised a case of election against the heir in respect of such property. Even before the Act, the heir was held not to be put to his election in cases of revocation by alteration of estate.

5th ed., p. 420, 6th ed., p. 539. *Tennant* v. *Tennant*, 2 Ll. & Go. 516.

Powers of Appointment.

The application of the doctrine of election to appointments under powers is discussed elsewhere.

See Chapter XXIII.

Not Applicable to Creditors.

The doctrine of election has been held not to apply to creditors; and, therefore, where a testator appropriated to the payment of debts property which was not liable thereto, and by the same will disposed of, in favour of other persons, property which was by law assets for the payment of debts, it was held that the creditors might take the latter in subversion of the testator's devise, without abandoning their claim to the former. And where a estator devised for payment of debts certain lands (including some which were not his own, but belonged to his son), the son was allowed to participate as a creditor in the provision for debts, out of the other property, without relinquishing his own estate to the creditors. But now real estates of every description are assets for the payment of debts.

5th ed., p. 423, 6th ed., p. 541. *Kidney* v. *Coussmaker*, 12 Ves. 136.

Whether Parol Evidence is Admissible.

At one period it was doubted whether evidence dehors the instrument was admissible for the purpose of showing that a

testator considered that to be his own which did not actually belong to him, or was not under his disposing power.

1st ed., p. 391, 6th ed., p. 541.

The intention to dispose must in all cases appear by the will itself; where there is no ambiguity in the expressions the testatrix had employed extrinsic evidence for the purpose of contradicting the intention is inadmissible.

6th ed., p. 543. *Clementson* v. *Gondy*, 1 Kee 309.

EXPRESSIONS MUST BE CLEAR IN ORDER TO RAISE A CASE OF ELECTION.

With respect to the intention, as manifested by the will itself, it is to be observed, that, in order to raise a case of election, it must be clear and decisive; for if the testator's expressions will admit of being restricted to property belonging to or disposable by him, the inference will be, that he did not mean them to apply to that over which he had no disposing power.

5th ed., p. 425, 6th ed., p. 543. *Seaman* v. *Woods*, 24 Beav. 381.

But if the will is so expressed as to show that the testator had in mind some specific property, the case is different.

6th ed., p. 544. *Re Harris* (1909), 2 Ch. 206.

GENERAL DEVISE RESTRICTED TO PROPERTY OF TESTATOR.

A general devise of the testator's real estate has always been held to show an intention to give what strictly and properly belonged to him, and nothing more, even if the testator had no real estate of his own upon which the devise could operate.

5th ed., p. 426, 6th ed., p. 544. *Timewell* v. *Perkins*, 2 Atk. 102.

GENERAL CLAUSE OF REVOCATION.

On the same principle, a clause in general terms revoking all settlements theretofore made by the testator, is not sufficient evidence of an intention to put the beneficiaries to their election.

6th ed., p. 544. *Re Booker*, 34 W. R. 346.

DEVISE OF LANDS ANSWERING TO CERTAIN LOCALITY.

With respect to wills subject to the old law, though a general devise was construed as comprising property belonging to the testator and that only, even when there was nothing properly and strictly his own on which it could operate, yet a devise of lands answering to a particular locality seems to stand upon a different footing. It is hardly to be supposed that a testator would make such a devise without having a particular property in view.

1st ed., p. 394, 6th ed., p. 544.

How Affected by 1 Vict. ch. 26.

Such a question, however, will present itself under a different aspect in regard to wills made since the year 1837, which (we have seen) speak, in reference to the property comprised in them, from the death; though even with regard to such wills, devising lands in a particular locality, it is difficult to say that no inference that the testator had some specific property in view arises from the fact of his having none of his own to satisfy the devise at the date of its execution; for it is a whimsical intention to impute to a testator, when he affects to dispose of all property of a particular character, of which he has now, or may hereafter have power to dispose, that he makes that disposition without the least suspicion that he has then any property of that description, and solely with the notion that he may thereafter buy some such property. Where the devise is specific in the sense of being a gift of a particular estate, as "my R. property," the wife alone and not the devisor being entitled to that property, she must undoubtedly elect.

5th ed., p. 427, 6th ed., p. 544. *Whitley* v. *Whitley*, 31 Beav. 173.

Question Whether Testator Intends to Include Interest of Co-proprietor.

But the most numerous as well as the most difficult class of cases with which the Courts have had to deal, consists of those in which the testator and the person against whom the election is sought to be raised, have each an undivided share, or some partial or limited interest, in the property; and in which, therefore, the question is not, as in the cases before discussed, simply whether the testator referred to particular tenements, but whether he intended the devise to comprise such property, inclusive of the interest of his co-owner.

5th ed., p. 427, 6th ed., p. 545. *Paubury* v. *Clark*, 2 Mac. & G. 298.

A specific devise as of the entire subject will generally suffice, without such assistance, to put the co-owner to his election.

5th ed., p. 428, 6th ed., p. 546. *Swan* v. *Holmes*, 19 Beav. 471.

Question Whether a Testator, Having Reversion Only, Intends to Include the Immediate Interest.

So, where the testator has a reversion only in the lands devised, it frequently becomes a question whether he intended to confine the will to that estate, or to include in it the immediate and absolute interest. Prima facie, the testator must, of course, be understood to refer only to what he had power to dispose of. But the context of the will must be examined, to see whether an intention to include also what he had no such power

to dispose of, be indicated; and for this purpose, notwithstanding some strong expressions tending to show the difficulty of applying the doctrine of election to such cases, the ordinary rules for collecting the testator's intention must be observed, the question being simply, what does the testator mean? If he has subjected the lands in question to limitations which, if the devise be limited to the reversion, cannot, or probably will not, ever take effect, or has conferred powers on the devisees which, on the same hypothesis, they can never exercise, the intention to include the immediate interest will be sufficiently established. But these indications of intention will not prevail against an express and unreserved confirmation of the settlement creating the estates which precede the testator's reversion. Express declaration overrides conjecture, however probable.

5th ed., p. 428, 6th ed., p. 546. *Usticke* v. *Peters*, 4 K. & J. 437; *Rancliffe* v. *Parkyns*, 6 Dow. 149.

SIMILAR QUESTION WHERE TESTATOR IS ENTITLED SUBJECT TO INCUMBRANCES.

Again, if a testator, having an estate subject to an incumbrance, simply devises the estate without saying more, he is to be taken to mean the estate in its actual condition; and the incumbrancer, to whom other benefits are given by the will, is not in such a case, put to his election; still less, if the beneficiary be entitled only to participate in the incumbrances with others to whom no benefit is given by the will. But the provisions of the will may show an intention that the incumbrancer shall give up his charge.

5th ed., p. 429, 6th ed., p. 547. *Stephens* v. *Stephens*, 1 De G. & J. 62.

ELECTION IN CASE OF DOWER.

In Ontario there is no statute similar to the Imperial Act, 3 & 4 Wm. IV., ch. 105. The law in Ontario is that unless the will shows a clear intention that the provision is to be in satisfaction of dower or the provision made therein is clearly inconsistent with the enjoyment of dower, the widow will not be put to her election. The cases are collected at the end of this chapter.

See text, 5th ed., p. 433, 6th ed., p. 551.

GIFT IN LIEU OF A SPECIFIED THING DOES NOT EXCLUDE FROM ANOTHER GIFT.

The ordinary doctrine of election may, doubtless, be excluded either wholly or partially, if the testator so desires. "The rule in Noys v. Mordaunt," said Lord Hardwicke, "of not claiming by one part of a will in contradiction to another, is a true rule, but has its exceptions. . . . Several cases have been, and several more may be, in which a man shall give a child or other person a legacy or portion in lieu or satisfaction of par-

ticular things expressed, which shall not exclude him from another benefit, though it may happen to be contrary to the will, for the Court will not construe it as meant in lieu of everything else, when he has said a particular thing."

5th ed., p. 434, 6th ed., p. 552.

The case put by Lord Hardwicke occurred in Brown v. Parry, where a testator gave his wife an annuity "to be accepted by her in lieu of her dower," and also bequeathed other benefits to her (without adding in lieu of her dower); the widow elected not to take the annuity, but to keep her dower; and it was held by Lord Thurlow that she was nevertheless entitled to take the rest of the testator's bounty, and that the case was too clear for argument. In truth, this it not properly a case of election at all; which arises only when something is taken against the will. There is here a legacy upon an express condition which is submitted to, and another legacy without express condition. Why should a condition be annexed by implication to the latter bequest, when by taking it the legatee disappoints no part of the will?

Ibid. 2 Dick. 685 (Romilly's No. Cas. 85).

But if the words of the will are sufficiently wide, the legatee may be put to election.

6th ed., p. 552. *Nottley* v. *Palmer*, 2 Dr. 93.

And the case is different where a gift is made in lieu of a particular thing expressed, and there is then a question—not whether the legatee, while rejecting the proposed exchange, can take another gift under the will unconditionally, but—whether, while accepting the exchange, he can insist on his right to another property against the will.

5th ed., p. 435, 6th ed., p. 552. *Williamson* v. *Dent*, L. R. 6 Ch. 339.

RESTRAINT ON ANTICIPATION.

Where a testator attempts to dispose of property in favour of A., and gives his own property to B., a married woman, with a restraint on anticipation, this shows that he intends to exclude the doctrine of election, so that if the property attempted to be given to A. devolves on B., she is not bound to make compensation to A. out of the property given to her by the testator's will. The doctrine of election does not apply, because the property, which if the doctrine applied would have to be sequestered, in order to compensate the disappointed legatee, has by the terms of the will itself been made inalienable. Where the restraint on anticipation, or inalienability, is created independently of the will, a different principle seems to apply.

6th ed., p. 553. *Haynes* v. *Foster* (1901), 1 Ch. 361.

INFANT.

An infant cannot elect, and in those cases in which an infant, if adult, would have to elect, the ordinary practice is to direct an inquiry whether it is to his advantage to take under or against the will. But in some cases the infant has been allowed to postpone his election until he comes of age.

6th ed., p. 554. *Cooper* v. *Cooper*, L. R. 7 H. L. 53.

LUNATIC.

The Court has power, in certain cases, to elect on behalf of a person of unsound mind not so found by inquisition.

6th ed., p. 554. *Re Marriott*, 2 *Moll.* 516.

SEPARATE ESTATE.

It seems clear on principle, though the point has not been decided, that a married woman can elect in respect of her separate estate.

6th ed., p. 555. *Re Davidson*, 11 Ch. D. 341.

It seems that a person does not lose his right to elect by mere lapse of time, unless it can be shown that injury would result to third persons by the delay.

6th ed., p. 555. *Spread* v. *Morgan*, 11 H. L. C. 588.

FULL KNOWLEDGE REQUIRED.

A person is not bound to elect until all the circumstances which may influence his election are known to him, and an election made in ignorance of material facts is not binding.

6th ed., p. 555. *Douglas* v. *Douglas*, L. R. 12 Eq. 617.

IMPLIED ELECTION.

Where there is no express election, it may be implied or inferred from acts. But to raise an inference of election, it should appear that the person knew of his right to elect, and not merely of the instrument giving it. Even the receipt of income for sixteen years in ignorance of a right to elect will not operate as an election, though an election may be presumed from possession or receipt of income where there is full knowledge.

5th ed., p. 435, 6th ed., p. 555. *Sopwith* v. *Maughan*, 30 Bea. 235.

Election is a question of intention, and in general may be inferred from a series of unequivocal acts. Receiving the income of, or dealing with, a fund or property is in general an election to take that fund or property, if the person was fully cognisant of his rights.

6th ed, p. 555. *Worthington* v. *Wigintor*, 20 Bea. 67; *Spread* v. *Morgan*, 11 H. L. C. 588; *Dewar* v. *Maitland*, L. R. 2 Eq. 834.

POSSESSION OF BOTH PROPERTIES.

The mere fact that a person enters into the receipt of the rents and profits of two properties, as it affords no proof of pre-

ference, cannot be held an election to take one and reject the other.

6th ed., p. 556. *Padbury* v *Clark*, 2 Mac. & G. 306.

WHEN COMPENSATION ASCERTAINED.

The amount of the compensation to be made to the disappointed legatees, where the party elects to take against the will, is ascertained as at the date of the testator's death.

6th ed., p. 556. *Re Hancock* (1905), 1 Ch. 16.

INFERRED FROM CONDUCT.

A gift of property by will is supposed, prima facie, to be beneficial to the devisee or legatee, and consequently it is also supposed, until the contrary is proved, that the gift is accepted by him. But he is at liberty to refuse or disclaim it, for the law will not compel a man to take property against his will. Disclaimer may be express or implied, but there can be no effectual disclaimer, after the party has once elected to accept the gift. And election, like disclaimer, may be inferred from the conduct of the party. Thus if a devisee retains possession for some years of property subject to charges which exceed its value, he may be deemed to have elected to accept the devise. This, however, does not make him personally liable for the charges.

6th ed., p. 556. *Bence* v. *Gilpin*, L. R. 3 Exch. 76; *Re Cowley*, 53 L. T. 494.

TWO GIFTS UNDER SAME WILL—ONE MAY BE TAKEN, THE OTHER REJECTED.

Where by the same will two properties are given to the same person, one beneficial and the other burdensome, he is generally at liberty to accept the former and reject the latter, although by so doing he throws a burden on the testator's general estate, which, if he accepted both, must be borne by himself; as where the repudiated gift comprises shares in a company which, after the testator's death, fails and is wound up, the shareholders being called on to contribute, or where the subject is leasehold property, in respect of which the testator was liable at his death under his covenant to repair. So where a testator devised a house, which was mortgaged beyond its value, upon trust to permit his two sisters to have the use and occupation of it and the furniture in it; the furniture was sold and the proceeds invested, and it was held that the sisters were entitled to receive the income of the investments without keeping down the interest on the mortgage debt.

6th ed., p. 556. *Andrew* v. *Trinity Hall*, 9 Ves. 525; *Warren* v. *Rudall*, 1 J. & H. 1; *Syer* v. *Gladstone*, 30 Ch. D. 614.

The cases are not easy to reconcile, but the test seems to be whether or not the gifts are separate and distinct. If onerous property and beneficial property are included in the same gift, as an aggregate, then, unless a contrary intention appears by the will, the donee cannot disclaim the onerous property and accept that which is beneficial; he must take the whole gift or nothing. But if two distinct gifts are made by the same will, one of them being onerous and the other beneficial, the donee may reject the former and take the latter.

6th ed., p. 557. *Re Hotchkys*, 32 Ch. D. 408.

ESTOPPEL*—POSSESSION UNDER TITLE.

The general principle that a person who takes possession of land under an instrument is estopped from denying its validity, applies to wills; consequently if a testator devises Blackacre, which really belongs to X., to A. for life with remainder to B., and A. enters and retains possession until X.'s title is extinguished by the Statute of Limitations, A. acquires only an estate for life with remainder to B. The fact that the testator devises the legal estate to trustees, and that adverse possession is taken by one of the beneficiaries, does not make any difference.

6th ed., p. 557. *Board* v. *Board*, L. R. 9 Q. B. 48; *Hawksbee* v. *Hawksbee*, 11 Ha. 230.

The same principle applies where a devisee takes possession of land which really belonged to the testator, the devisee being under the erroneous belief that it passed by the will. Thus if a testator, being entitled to land in the parishes of X. and Y., devises the land in X. to A. for life, with remainder over, and A. takes possession of the land both in X. and Y., under the belief that the land in Y. passed by the devise, and retains possession for the statutory period, he cannot, it seems, claim to be entitled to the land in Y. for his own benefit: "My impression is (if it were necessary to decide the point), that the Statute of Limitations can never be so construed that a person claiming a life estate under a will shall enter, and then say that such possession was unlawful, so as to give his heir a right against the remainder-man. I think that no Court would so construe it."

6th ed., p. 558. *Anstee* v. *Nelms*, 1 H. & N. p. 232. (Martin, B.).

LEGATEE BOUND BY ERRONEOUS STATEMENT IN WILL.

Somewhat analogous to the doctrine of estoppel is the rule that in certain cases a person claiming under a will is bound by an erroneous statement of fact contained in it. Thus in Re Wood, a testator gave his property upon trust for his children in equal

*New section added by 6th edition.

shares, and after reciting that he had advanced certain sums (specifying the amounts) to four of his sons on account of their respective shares, he directed that "the respective sums hereinbefore recited to have been advanced" should be brought into hotchpot; it was held that the sons were bound by the statement, and could not adduce evidence to show it was erroneous.

6th ed., p. 559. *Re Wood*, 32 Ch. D. 517.

Conversely, if the amount of the advance is understated, the legatee is entitled to the benefit of the error.

6th ed., p. 559. *Burrowes* v. *Clonbrock*, 27 L. R. Ir. 538.

UNLESS REAULT WOULD DEFEAT INTENTION.

But the limits of the doctrine are not satisfactorily settled, and it seems that it will only be applied where the statement of the testator is unequivocal.

6th ed., p. 559. *Re Taylor's Estate*, 22 Ch. D. 495.

ESTOPPEL BY LITIGATION.

A person who is cognizant of litigation relating to a will, and stands by and takes the benefit of a decision on its construction under which a particular fund is distributed, is estopped from re-opening the question by instituting fresh litigation relating to another fund under the same will.

6th ed., p. 560. *Re Lart* (1896), 2 Ch. 788.

A person who is cognizant of proceedings in a Court of Probate in which the validity of a will is questioned, is bound by the result, if he had a right to intervene.

6th ed., p. 560. *Young* v. *Holloway* (1895), P. 87.

WIDOW'S ELECTION.

Annuity—Separation Deed.—A husband in a separation deed covenanted to pay his wife an annuity of $200 in half-yearly payments, and charged it on certain land; the wife accepting it in full satisfaction for support, maintenance, and alimony during coverture, and of all dower in his lands then or thereafter possessed. The husband, by his will, subsequently executed, directed his executors to pay to his wife $400 annually, $200 on the 1st June and December in each year during his life, and added: "which provision in favour of my said wife is made in lieu of dower:"—Held, that the wife was not put to her election between the benefits under the deed and the will, but was entitled to both. *Carscallen* v. *Wallbridge*, 20 C. L. T. 383, 32 O. R. 114.

Evidence of Election—Ignorantia Juris.—Though there was no positive evidence that the widow knew she had a right to elect between the will and her dower, yet on the principle ignorantia juris neminem excusat, she must be held to have made her election in favour of the will. *Reynolds* v. *Palmer*, 21 C. L. T. 78, 32 O. R. 431.

Specific Bequest—Dower.—An estate consisting of realty and personalty amounting to over $10,000 was, after a direction to pay debts and funeral and testamentary expenses, and after a specific devise of certain land, devised by the testator to his executors in trust to sell and convert into money, and out of the proceeds to pay to his widow $3,000 for her own use absolutely, and to divide the remainder among certain nephews and nieces. *In re Schunk*, 19 C. L. T. 361, 31 O. R. 175.

Bequest to Wife—Election—Property of Wife—Mistake as to —Life Insurance.—A testator upon whose life there were two policies of insurance, one assigned to his wife "for the use and behoof" of his wife and children, and the other payable to his executors for the behoof of his wife and children, directed by his will that his whole estate, including insurance moneys, should be divided one-half to his wife and the other half to his children. By a codicil he directed that "in lieu of the house and premises (describing them) deeded to my beloved wife but since disposed of and the proceeds used in the business, I give, devise, and bequeath, and hereby direct, instruct, and empower my executors to pay over to my beloved wife the whole amount of my two life policies." The house and premises had not in fact been disposed of but were vested in the wife at the time of the testator's death:—Held, that the wife was entitled to the insurance moneys, and was not put to her election between the additional one-half given by the codicil and the house; the two elements essential to a case of election being wanting, viz., the disposition by the testator of something belonging to a person taking a benefit under the will—while in this case there was merely an erroneous statement of fact—and a gift to that person of something in the absolute control of the testator—while the insurance money was not. *Mutchmor* v. *Mutchmor*, 24 C. L. T. 314, 8 O. L. R. 271, 3 O. W. R. 931.

Bequest to Widow—"Dower of One-third of My Estate"—Non-technical Use of Word "Dower"—Absolute Gift of One-third.—A testator, after directing payment of his debts and funeral and testamentary expenses, directed the executors to sell the whole of his real and personal estate (excepting certain household goods reserved for his wife), turning the same into money, and after the payment of his debts, etc., and "my wife receives her dower of one-third of my estate," he gave to his wife the whole of the interest of his estate as long as she lived, "that is, the interest on the balance of my estate after she receives her dower;" and upon his wife's decease he gave two-thirds of the balance of his estate to his son, and the remaining one-third of the balance to his two brothers and a sister, to be equally divided among them:—Held, that the word "dower" was not used in its technical sense of a life interest in one-third of the testator's realty; but meant one-third absolutely of his whole estate; so that the wife took such one-third absolutely, and a life interest in the remainder. *Re Manuel*, 12 O. L. R. 286, 8 O. W. R. 70.

Dower—"Balance" of Estate.—By the word "balance" the testator meant the rest or residue of the whole of his property. There was no intestacy as to the furniture and chattels, after the expiration of the interest therein given to the widow; his property was included also in the "balance." *In re Newborn*, 22 C. L. T. 120, 1 O. W. R. 122.

Dower—Election—Specific Devise of Portion of Lot.—A testator by his will devised to his widow for life 17 acres on the west side of a lot, together with the use of a drive house on his lands for the storage of crops, taken off the 17 acres, and of two rooms, certain furniture and bedding, and all the fruit she wanted for her own use from that now grown thereon; and, subject to such life estate and a payment of $100 to his daughter, he devised the same to one of his sons. To another son he devised the remainder of the lot, containing 33 acres, together with all buildings and erections thereon, reserving such privileges as were theretofore given to his widow during her lifetime, and subject to a bequest of $150 to the said daughter, and the payment of the funeral and testamentary expenses:—Held, that the widow was not entitled to dower in the dwelling house, but was so entitled as to the 33 acres, but being put to her election by reason of the disposition made in her favour. *Re Hurst*, 11 O. L. R. 6, 6 O. W. R. 417, 721.

Bequest in Lieu of Dower—Election—Dower out of Land Sold Pursuant to Option.—The testator by his last will devised to his executors all his real and personal property, in trust to pay to his wife during her natural life, or so long as she remained his widow, one-third of the income arising from his real estate, and to divide the remaining two-thirds among the persons mentioned. The executors were empowered to sell or rent and convert into money said real and personal property, at such times

and for such sums as they deemed best in the interest of the estate. By another clause of the will the executors were directed to hand over absolutely to his wife all the household furniture situated in the part of the house occupied by him:—Held, that the bequest to the wife, being in excess of her legal rights, was intended in lieu of dower, and that she was compelled to elect, and that, having done so by accepting such bequest, she was barred from claiming dower:—Held, also, that the wife was entitled to receive from the executors, under the terms of the will, one-third of the proceeds of the sale of a piece of land upon which the testator had given an option during his lifetime, which option was exercised after his death. *McDonald* v. *Slater*, 2 N. S. R. 183, 4 E. L. R. 203.

Devise of Land of another Beneficiary—Election—Conduct—Compensation.—K. devised a certain lot to the plaintiff, which lot belonged to the defendant. The defendant, after the death of K., sold this lot to another person, and refused to convey or release it to the plaintiff. The defendant accepted certain benefits under K.'s will:—Held, that the defendant by this course elected to hold the lot devised to the plaintiff, and that the plaintiff was entitled to compensation. *Kirk* v. *Kirk*, 40 N. S. R. 147.

Bequest to Wife — Limited Power of Disposal — Summary Application—Rule 938—Scope of.—A will was as follows: "I bequeath to my wife all that I possess with full power to dispose of part or the whole as she and the children may think wisest and best at any time:"—Held, that the widow took the absolute ownership of the real and personal estate of the testator, and that the children took no interest under the will. The question whether the widow could sell without the consent of the children was not a question which could be determined upon a summary application under Rule 938. *In re McDougall*, 25 C. L. T. 18, 8 O. L. R. 640, 4 O. W. R. 428.

Bequest to Wife — Use during Lifetime — Power to Dispose of Moiety by Will.—The testator by his will gave to his wife all his real and personal property for her use during her lifetime, and directed that at her death his executors should sell the real and personal property and give one-half the proceeds to his cousin, and that his wife should make her will during her lifetime, instructing his executors "who she wishes to give her half to among her relations:"—Held, that the widow was entitled to one moiety absolutely and to a life enjoyment of the other moiety. *In re Bethune*, 22 C. L. T. 229, 7 O. L. R. 417, 3 O. W. R. 286.

Election.—On the general point the rule laid down in *Re Warren*, 26 Ch. D. 219, followed *In re Handcock*, 23 L. R. Ir. 34, is applicable. "The ordinary case of election is when a testator attempts to give by his will property which belongs to some one else. Such a gift is not ex facie void. Here it is the law which disappoints the appointee. The gift is void ex facie. *Griffith* v. *Howes*, 2 O. W. R. 293.

Widow Compelled to Elect.—*Re Hurst*, 6 O. W. R. 722. The test in *Parker* v. *Sowerby*, 1 Drew. 488, is said to be, was it the intention of the testator to dispose of his property in a manner inconsistent with his wife's right to dower? In *Gibson* v. *Gibson*, 1 Drew. 42, the test is said to be, do the provisions of the will show clearly and beyond reasonable doubt that it was the positive intention of the testator either clearly expressed or clearly to be implied to exclude his wife from dower?

In *Warburton* v. *Warburton*, 2 Sm. & Gif. 163, 165, the test is said to be, do the provisions of the will "raise a necessary implication that the gift is in substitution of dower?"

It is settled that in the case of separate devises, though the wife be barred of her dower in one, she is not therefore barred of her dower in the others. *Laidlaw* v. *Jones*, 26 Chy. 299, 300; *Cowan* v. *Besserer*, 5 O. R. 624; *Leys* v. *T. G. Co.*, 22 O. R. 603; *Re Schunk*, 31 O. R. 179. Where it is of the [illegible] the devise to the widow herself that it appears that the testator contemplated the personal occupation and enjoyment by her, the claim of the widow to elect is not excluded. *Miall* v. *Brain*, 4 Madd. 119; *Murphy* v. *Murphy*, 25 Ch. 81. *Ripley* v. *Ripley*, 28 Chy. 610, followed.

A Widow must Elect.—Whether she will take dower or an estate for life or widowhood under the will. *Westmacott* v. *Cockerline*, 13 Ch. 79, followed in *Re Smith*, 17 O. W. R. 989. Having elected she must abide by the election.

"I order that my wife shall be supported during her lifetime; providing she shall be completely restored to sound mind she shall receive $1,000 as her share. Widow declared bound to elect. *Parker* v. *Sowerby*, 4 DeG. M. & G. 325; *Rody* v. *Rody*, 29 Chy. 324; *Patrick* v. *Shaver*, 21 Chy. 123; *Dawson* v. *Fraser*, 18 O. R. 491; *Bending* v. *Bending*, 3 K. & J. 257.

Election—Taking under Will.—A testator devised his farm to a grandson, and directed the same to be rented during his minority; and that the testator's widow should be comfortably supported from the proceeds of the farm during his life. He also directed his chattels to be sold, and the proceeds placed at interest to support his widow and defray all necessary expenses. The widow after his death asserted a life interest in the property, and rented it:—Held, that the widow had elected to take under the will, and that she was not entitled to any benefit in the personalty other than the interest to accrue on the money produced by sale thereof; the corpus of the personalty being distributable amongst the next of kin. *Montgomery* v. *Douglas*, 14 Chy. 268.

Gift and Share of Insurance.—"It is my will that my son Robert" (the plaintiff) "is to get no benefit from my estate except as provided in this will, the provision herein made being in lieu of any share in the insurance on my life." *King* v. *Yorston*, 27 O. R. 1.

Period of Accounting — Interest.—Testator by his will left the income of his estate to his wife for life, and directed that after her death it should be disposed of as set out in a codicil, not to be opened until after her death. By the codicil he disposed of all his estate among his children, giving to two of them, after the death of his wife, a certain property which in reality belonged to her. His widow, without proving the will, received all the income of the estate for five years, after the lapse of which the will and codicil were proved. She then elected against the will:—Held, that her election related back to, and she was liable to account from, the date of the testator's death; but, as she was not called upon to elect until this action was brought, she should not be charged with interest in the meantime. *Davis* v. *Davis*, 27 O. R. 532.

"My will is, that I would like the farm rented to some good tenant, on the best terms possible, the rent to be used in the support and maintenance of the family now at home." Held, that the widow was put to her election. *Dawson* v. *Fraser*, 18 O. R. 496. *Rody* v. *Rody*, 29 Chy. 324, followed.

A testator devised his farm to his widow for life, determinable upon her marrying again, and gave her a certain portion of the dwelling house thereon; and subject to this the will showed an intention that the rest of the house and the farm should be kept in entirety, and be personally occupied by his sons until the youngest should attain twenty-one:—Held, that the widow must elect. Held, also, that a second marriage, after an election to take under the will, would not resuscitate the right to dower. *Coleman* v. *Glanville*, 18 Chy. 42.

A testator devised land to his children in tail, with cross-remainders, and in the event of their dying without issue, to his brother; and directed his widow to receive the whole of the rents, &c., during widowhood; and in the event of her marrying she was to receive one-half thereof for life:—Held, that the contingency of the widow surviving all the children was too remote to put her to elect. *Traves v. Gustin*, 20 Chy. 106.

A testator directed, first, that all his debts, funeral and testamentary expenses, should be paid; and then, that all his real and personal estate, of every nature and description, should be equally divided between his wife and mother, share and share alike:—Held, that the widow was not entitled to dower and to the provision made for her by the will; but that she was put to her election. *McGregor* v. *McGregor*, 20 Chy. 450.

Testator bequeathed to his widow the annual income from the real and personal estate during her widowhood and until the eldest son attained his

majority, for the support of herself and the maintenance, education and support of all the children during their minority; and after the eldest attained twenty-one, and as each reached that age, the income to be paid to them proportionately, after making ample provision for the support of the widow during her widowhood:—Held, not to indicate an intention on the part of the testator to give her this in lieu of dower. *Laidlaw* v. *Jackes*, 27 Chy. 101.

A testator, amongst other things, made certain bequests in favour of his widow, and directed that his farm, the only real estate he possessed, should be leased to two of his three brothers named as executors until such time as his nephew and son attained twenty-one:—Held, that, under these circumstances, the widow was bound to elect between her dower and the benefits given by the will. *Rody* v. *Rody*, 29 Chy. 324.

In the case of separate devises, though the wife may be barred of her dower in one, she is not therefore barred of her dower in the others. *Cowan* v. *Besserer*, 5 O. R. 624.

Where by a will, land is devised to an attesting witness, there is an intestacy as to this devise by virtue of the 26 Geo. II. ch. 6 sec. 1, and the heir is not bound to elect as between this land and a legacy bequeathed to him by the will. *Munsie* v. *Lindsay*, 1 O. R. 164.

When no provision in lieu of dower is made by the will expressly, the rule of construction as to whether the widow is obliged to elect, is to ascertain whether the will contains any disposition of property inconsistent with the assertion to demand a third of the lands to be set out by metes and bounds for her use during life. The principle acted on in *Westmacott* v. *Cockerline*, 13 Chy. 79, applies where a devise of all the lands to the widow durante viduitate puts her to elect. That devise gave her the freehold, and as tenant of the freehold she could not have dower assigned to her while she held that estate. *Marriott* v. *McKay*, 22 O. R. 328, 329.

A will provided for the payment of a large number of pecuniary legacies, including one to the testator's widow, and, except as to the household property, which was bequeathed to her, the residue of the estate, real and personal, after paying the debts and these legacies, was given to a charity, provision being made for the early conversion into money and distribution of the estate:—Held, that the widow was not put to her election, but was entitled both to her legacy and to dower. *Elliott* v. *Morris*, 27 O. R. 485.

There remains, however, the question as to whether or not the widow is put to her election between her dower and what is given to her by the will. The will does not say that the gifts to her are in lieu of dower, nor does it contain any clause or statement to this effect. The gifts to her are the dwelling house for her natural life, the household goods, and an annuity of three hundred dollars a year secured to her out of the estate. The widow is not put to her election and she is entitled to what is given her by the will and also to her dower. *In re Biggar*, 8 O. R. 379.

The testator is dealing not with his estate in the land, but with the property itself. He refers to it as the homestead where he lived, he deals with that place as one whole thing, the half of which he gives specifically to his wife for life, as co-tenant with his grandson. The grandson has the right under the will to the possession and enjoyment of one-half the homestead, and if any part of that is lessened by being allotted for dower, the scheme of the testator is frustrated. The widow must elect. *Card* v. *Cooley*, 6 O. R. 233, 234.

Provision in Lieu of Dower.—Where a testator by his will made provision for his widow, but did not express the same to be in lieu of dower, evidence for the purpose of showing that the testator intended such provision to be in lieu of dower, was held inadmissible. *Fairweather* v. *Archibald*, 15 Chy. 255.

A testator, by his will and codicils, devising his real estate, &c., to G. H. M. and B. M. trustees, and the survivor of them, and the heirs of such survivor, gave his widow an annuity, and provided that when his son should attain the age of twenty-one his trustees should convey to him one-

half of the estate and the residue when he should attain thirty, subject however to the annuity. He also provided that if his son should die before attaining the age of thirty, the said trustees or trustee should hold "the said real and personal estate, moneys, and securities, or so much thereof as shall remain in their hands, in trust to distribute the same according to the statute of distributions." The last codicil appointed G. E. T. and G. R. and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, new trustees and executors in place of G. H. M. and B. M., with the same powers. The son attained the age of twenty-one, received half of the estate, and died before attaining the age of thirty, unmarried and without issue. The widow was held entitled to an annuity as well as her share under the statute of distributions; but that the testator, having treated the real and personal estate as a blended fund to be distributed, she was not also entitled to dower, and that she must elect between the distributive share and the dower. *Re Quimby*, *Quimby* v. *Quimby*, 5 O. R. 738. Followed in *Amsden* v. *Kyle*, 9 O. R. 439. Judgment in *Amsden* v. *Kyle* corrected in *Leys* v. *Toronto General Trusts Co.*, 22 O. R. 603.

CHAPTER XVII.

EFFECT OF REPUGNANCY OR CONTRADICTION IN WILLS, AND AS TO REJECTING WORDS.

PROVISIONS INCONSISTENT WITH OWNERSHIP.

Before dealing with the question of ascertaining the intention of a testator where the dispositions of the will appear to be contradictory, it should be premised that a provisio.. in a will may be void for repugnancy, apart from the question of intention. Thus where property is given to an adult person absolutely, coupled with a direction that the income shall be applied for his benefit in a certain way, or accumulated, this direction is generally void, being inconsistent with the right of enjoyment which follows from ownership. So, where a testator bequeathed the residue of his personal estate to his son absolutely, with a direction that it should not be delivered to him till the completion of his twenty-fifth year, it was held that the son was entitled to payment on attaining twenty-one, the direction being rejected as repugnant to the enjoyment of a vested interest. And where an absolute vested interest is given to a person, an attempt to create a protected interest in the income by directing it to be paid to him by weekly instalments until he attains the age of thirty-five, is nugatory.

6th ed., p. 561. *Re Johnston* (1894), 3 Ch. 204; *Rocke* v. *Rocke*, 9 Bea. 66; *Re Williams* (1907), 1 Ch. 180.

In many cases the desired result may be attained by giving the property to trustees subject to a discretionary trust or gift over under which other persons have an interest in the property.

6th ed., p. 562.

RESTRAINT ON ALIENATION.

On the same principle, a person to whom the ownership of property is given cannot, as a general rule, be restrained from alienating it, either by express direction, or by condition, or by gift over to take effect in the event of his disposing, or attempting to dispose, of it; in such a case the gift over is void, and the beneficiary takes absolutely. So, if property is given to a person absolutely, followed by a gift over to take effect on involuntary alienation, such as bankruptcy, the gift over is void.

6th ed., p. 562. *Hood* v. *Oglander*, 34 Bea. 513; *Re Dugdale*, 38 Ch. D. 176; *Re Machu*, 21 Ch. D. 838.

And a restriction forbidding a particular mode of alienation, such as a mortgage or a charge by way of annuity, is void.

6th ed., p. 562. *Willis* v *Hiscox*, 4 My. & Cr. 197.

It seems now settled that a restraint on alienation is bad even if it is limited in point of time.

6th ed., p. 562.

LIMITS OF THE DOCTRINE INVALIDATING RESTRAINTS ON ALIENATION.

But a restraint on alienation may be good if it only prohibits alienation to a limited number or class of persons. Again, a gift over to take effect on the alienation of an interest in property, before it is absolutely vested, may be good. And a life interest may be made determinable on alienation. And a married woman may be restrained from anticipation.

6th ed., p. 562. *Re Wolstenholme*, 43 L. T. 752.

ABSOLUTE INTERESTS CANNOT BE GIVEN TO PERSONS IN SUCCESSION.

On the same principle, where there is an absolute gift of property to a person, followed by a gift over in the event of his dying intestate, or not disposing of it, the gift over is, as a general rule, repugnant and void. And a gift over in the event of the devisee or legatee dying intestate is void, even if the interest given to him is contingent.

6th ed., p. 562. *Perry* v. *Merritt*, L. R. 18 Eq. 152; *Barton* v. *Barton*, 3 K. & J. 512.

LIFE INTEREST.

In some cases effect has been given to a gift over of "what shall remain," or the like, following the gift of a life interest.

6th ed., p. 563.

ANNUITY.

On the same principle, where a life annuity was given payable by trustees half-yearly, with a gift over, on the death of the annuitant, of so much "as should remain unapplied as aforesaid," the gift over was held void.

6th ed., p. 563.

PROVISION AS TO USER OF PROPERTY MAY BE VOID FOR REPUGNANCY.

So a condition or provision requiring a person, to whom property is given, to use it, or not to use it, in a particular way, is invalid if it is inconsistent with "those rights of enjoyment which are inseparably incident to the absolute ownership."

6th ed., p. 563.

GIFT OVER CONTRARY TO LAW.

It may indeed be stated as a general principle that any limitation or gift over, which is not in accordance with the rules governing the devolution and disposition of property, is void. Thus personal property cannot be given to persons in succession, in such a way as to prevent the absolute interest from vesting in accordance with the rules of law. And if a testator gives personal property to A. in tail, with remainder to B. in tail, and A. survives

the testator, he takes absolutely, and the remainder to B. is void. But the death of A. in the testator's lifetime may have the effect of making the gift to B. valid.

6th ed., p. 563. *Byng* v. *Lord Strafford*, 5 Bea. 558; *Re Lowman* (1895), 2 Ch. 348.

A gift over on breach of a condition may be void if it does not fit in with the terms of the condition, or is inconsistent with the original gift.

6th ed., p. 563. *Musgrave* v. *Brooke*, 26 Ch. D. 792.

Where a testator devised real estate to his son and his heirs, and declared that in case his son should die without leaving lawful issue, then the estate should go over to the son's heir-at-law to whom he gave and devised the same accordingly: it was held by the Court of Appeal that the gift over was repugnant and void, and that the son took an absolute estate in fee simple.

6th ed., p. 563. *Re Parry and Daggs*, 31 Ch. D. 130.

ESTATE TAIL.

Conditions and gifts over intended to restrict alienation by a tenant in tail are, as a general rule, repugnant and void, as explained elsewhere.

6th ed., p. 564. *Re Sax*, 62 L. J. Ch. 688.

A gift over in the event of the original gift being held void at law or in equity, is valid.

6th ed., p. 564.

WHERE GIFT OVER BECOMES VALID EX POST-FACTO.

The general principle is that "where there are successive limitations of personal estate in favour of several persons absolutely, the first of them who survives the testator takes absolutely, although he would take nothing if any other legatee had survived and taken. . . . The doctrine of repugnance has no application to gifts which fail."

6th ed., p. 564. *Hughes* v. *Ellis*, 20 Bea. 193; *Re Stringer's Estate*, 6 Ch. D. 15.

RULE IN CASE OF CONTRADICTION OR REPUGNANCY.

Doubt is sometimes cast upon the intention of a testator by the repugnancy or contradiction between the several parts of his will, though each part, taken separately, is sufficiently definite and intelligible. In such cases the context (which is so often successfully resorted to for the purpose of throwing light on a doubtful passage) becomes itself the source of obscurity; and, unless some principle of construction can be found authorising the adoption of one, and the rejection of the other of the contariant parts, both are necessarily void, each having the effect of neutralising and frustrating the other. With a view to prevent this most undesir-

able result, it has become an established rule in the construction of wills, that where two clauses or gifts are irreconcilable, so that they cannot possibly stand together, the clause or gift which is posterior in local position shall prevail, the subsequent words being considered to denote a subsequent intention: Cum duo inter se pugnantia reperiuntur in testamento, ultimum ratum est. Hence it is obvious that a will can seldom be rendered absolutely void by mere repugnancy: for instance, if a testator in one part of his will gives to a person an estate of inheritance in lands, or an absolute interest in personalty, and in subsequent passages unequivocally shows that he means the devisee or legatee to take a life interest only, the prior gift is restricted accordingly.

1st ed., p. 411, 6th ed., p. 565. *Marks* v. *Solomon*, 18 L. J. Ch. 234; 19 L. J. Ch. 555.

CLEAR GIFT NOT CUT DOWN BY DOUBTFUL EXPRESSIONS.

It must be borne in mind, however, that the rule only applies where the later gift shows with reasonable certainty that the testator did not mean the prior gift to take effect according to its terms.

6th ed., p. 566.

ABSOLUTE GIFT CUT DOWN TO LIMITED INTEREST.

The simplest example of the general rule is where a gift to A., apparently absolute, is cut down to a life estate by a subsequent direction that on A.'s death the property is to go to B. There are numerous authorities to this effect. But the subsequent direction must be unambiguous.

6th ed., p. 566. *Bibbins* v. *Potter*, 10 Ch. D. 733; *Re Jones* (1898), 1 Ch. 438.

And where there is an absolute gift of property to A., with a gift over to B. in the event of A. dying without having disposed of it, or a gift to B. of "what remains" at A.'s death, the question of the effect of these words is often a difficult one, and the authorities, as might be expected, are not wholly consistent.

6th ed., p. 566.

GIFT OVER NOT "FITTING" CONDITION.

Where there is gift upon condition, followed by a clause of forfeiture or gift over, which does not "fit" the condition, the effect may be that the latter clause is ineffectual and the gift absolute.

6th ed., p. 566. *Re Cott's Trusts*, 2 H. & M. 46.

WHETHER ABSOLUTE INTEREST CUT DOWN IN ANY EVENT.

Where property is given to a person without limitation or qualification, followed by a direction that at his death it is to be divided among his children, the question arises whether he takes

nothing more than a life interest in any case, or whether the subsequent direction is only to take effect in the event of his leaving children, so that if he leaves none the absolute gift remains in force.

6th ed., p. 566. *Jaslin* v. *Hammond*, 3 My. & K. 110.

The question whether the original gift is an absolute gift, with a subsequent gift in derogation, or whether it is a mere life interest with subsequent limitations, may be affected by the interposition of trustees.

6th ed., p. 567. *Crozier* v. *Crozier*, L. R. 15 Eq. 282.

The general rule applies even where the apparently absolute nature of the prior gift is emphasised by the use of words of limitation.

6th ed., p. 568. *Odell* v. *Crone*, 3 Dow. 61.

BUT PRIOR DEVISE NOT UNNECESSARILY DISTURBED.

But in these cases it is a settled and invariable rule not to disturb the prior devise farther than is absolutely necessary for the purpose of giving effect to the posterior qualifying disposition.

1st ed., p. 414, 6th ed., p. 569.

THE WHOLE TO BE RECONCILED, IF POSSIBLE.

But the rule which sacrifices the former of several contradictory clauses is never applied but on the failure of every attempt to give to the whole such a construction as will render every part of it effective. In the attainment of this object the local order of the limitations is disregarded, if it be possible, by the transposition of them, to deduce a consistent disposition from the entire will. Thus, if a man, in the first instance, devise lands to A. in fee, and in a subsequent clause give the same lands to B. for life, both parts of the will shall stand; and, in the construction of law, the devise to B. shall be first, the will being read as if the lands had been devised to B. for life, with remainder to A. in fee.

1st ed., p. 415, 6th ed., p. 570. *Shipperdson* v. *Tower*, 1 Y. & C. C. C. 459.

So where a testator, after devising the whole of his estate to A., devises Blackacre to B., the latter devise will be read as an exception out of the first, as if he had said, "I give Blackacre to B., and subject thereto, all my estate, or the residue of my estate, to A."

1st ed., *ibid.*, 6th ed., p. 571.

DEVISE QUALIFIED BY SUBSEQUENT DISPOSITION.

By parity of reason, where a testator gives to B. a specific fund or property at the death of A., and in a subsequent clause disposes of the whole of his property to A., the combined effect of the

several clauses, as to such fund or property, is to vest it in A. for life, and, after his decease, in B.

Ibid. *Blamire* v. *Geldart*, 16 Ves. 314.

Again, where a testator gave his real and personal estate to A., his heirs, executors and administrators, and in a subsequent part of his will gave all his property to A. and B., upon trust for sale, and to pay the interest of the proceeds to A. for life, and at her decease, upon trust to pay certain legacies, leaving the residue undisposed of, A. was held to be entitled, under the first devise, to the beneficial interest in reversion, not exhausted by the trust for the payment of legacies created by the second.

5th ed., p. 440, 6th ed., p. 573. *Brine* v. *Ferrier*, 7 Sim. 549.

EFFECT OF SEPARATE CONTRARIANT DEVISES, EACH IN FEE. BOTH TAKE CONCURRENTLY.

Sometimes it happens that the testator has, in several parts of his will, given the same lands to different persons in fee. At first sight this seems to be a case of incurable repugnancy, and, as such, calling for the application of the rule, which sacrifices the prior of two irreconcilable clauses, as the only mode of escaping from the conclusion that both are void. Even here, however, a reconciling construction has been devised, the rule being in such cases, according to the better opinion, that the devisees take concurrently.

5th ed., p. 440, 6th ed., p. 573.

APPARENT INCONSISTENCY RECONCILED BY REFERENCE TO LAPSE.

Sometimes where an estate in fee is followed by apparently inconsistent limitations, the whole has been reconciled by reading the latter disposition as applying exclusively to the event of the prior devisee in fee dying in the testator's lifetime, the intention being, it is considered, to provide a substituted devisee in the case of lapse; or by understanding the latter devise to be dependent on a certain contingency mentioned in the will, though such contingency may not clearly appear to be attached to it.

5th ed., p. 442, 6th ed., p. 573. *Ley* v. *Ley*, 2 M. & Gr. 780.

CLEAR GIFT NOT CUT DOWN BY DOUBTFUL EXPRESSIONS.

Where there is a clear gift in a will it cannot be cut down by subsequent words which are not clear and decisive. They need not (as sometimes stated) be equally clear with the gift. "You are not to institute a comparison between the two clauses as to lucidity." But the clearly expressed gift naturally requires something unequivocal to show that it does not mean what it says. Thus if a testator gives all his property to A. and in a later part of the will appoints B. his residuary legatee, the general rule is that this does not affect the gift to A., and lapsed legacies go to A., not to B. So where a testator made a careful

and elaborate disposition of the residue of his property in favour of his sons and daughters and a grandchild in unequal shares with clauses of accruer, and then made a gift of his residue to the same persons in equal shares, it was held by Fry, J., that the first gift prevailed.

5th ed., p. 443, 6th ed., p. 574. *Kilvington* v. *Parker*, 21 W. R. 121: *Re Isaac* (1905), 1 Ch. 427; *Bristow* v. *Masefield*, 52 L. J. Ch. 27.

RULE AS TO THE REJECTION OF WORDS.

It is clear that words and passages in a will, which are irreconcilable with the general context, may be rejected, whatever may be the local position which they happen to occupy; for the rule which gives effect to the posterior of several inconsistent clauses must not be so applied as in any degree to clash or interfere with the doctrine which teaches us to look for the intention of a testator in the general tenor of the instrument, and to sacrifice to the scheme of disposition so disclosed, any incongruous words and phrases which have found a place therein.

1st ed., p. 420, 6th ed., p. 575.

AMBIGUOUS WORDS INCONSISTENT WITH PRIOR DEVISE REJECTED.

In several instances inconsistent words engrafted on a prior clear and express devise have been rejected.

5th ed., p. 445. 6th ed., p. 576.

Thus, where the devise was to A. and her heirs, for their lives, Lord Ellenborough rejected the latter words; which, he said, were merely the expression of a man ignorant of the manner of describing how the parties whom he meant to benefit would enjoy the property; for whatever estate of inheritance the heirs might take, they could in fact only enjoy the benefit of it for their own lives.

Ibid. *Doe d. Cotton* v. *Stenlake*, 12 East. 515.

Where there is a gift to a limited class of children or issue, with a gift over in default of "such children," or "such issue," it may appear that the word "such" was not used in its proper sense, and it may be rejected or modified accordingly.

6th ed., p. 577. See Chapters XX, LII.

THE "BLUNDERING ATTORNEY'S CLERK."

Where inappropriate words have apparently been inserted by mistake in a will showing signs of having been carefully and skilfully prepared, the Court sometimes assumes that they were inserted by some "blundering attorney's clerk," and rejects them.

6th ed., p. 577. *Re Dayrell* (1904), 2 Ch. 496.

WORDS NOT TO BE EXPUNGED, UNLESS INCONSISTENT.

But words are not to be expunged, upon mere conjecture, nor unless actually irreconcilable with the context of the will,

though the retention of them may produce rather an absurd consequence.

1st ed., p. 423, 6th ed., p. 578. *Chambers* v. *Brailsford*, 18 Ves. 368.

DEVISE NOT CONTROLLED BY REASON ASSIGNED.

And though repugnant expressions will yield to an intention and purpose expressed, or apparent upon the general context, yet it does not appear that a bequest actually made, or a power given, can be controlled merely by the reason assigned. The assigned reason may aid the construction of doubtful words, but cannot warrant the rejection of words that are clear.

Ibid.

DISTINCT GIFT NOT CUT DOWN BY VAGUE WORDS.

Again, it is a general rule, that a devise in general terms shall not, even though the result may be to render it inoperative, be held to control another devise made in distinct terms.

5th ed., p. 448, 6th ed., p. 579. *Cole* v. *Wade*, 16 Ves. 27; *Borrell* v. *Haigh*, 2 Jur. 229.

CLEAR DEVISE NOT CONTROLLED BY SUBSEQUENT INACCURATE WORDS OF REFERENCE.

A devise of lands, in clear and technical terms, will not be controlled by expressions in a subsequent part of the will, inaccurately referring to the devise, in terms which, had they been used in the devise itself, would have conferred a different estate, if the discordancy appear to have sprung merely from a negligent want of adherence to the language of the preceding devise.

1st ed., p. 425, 6th ed., p. 579.

Inconsistent Bequests — Reconciling — Formal Bequest of Residue.—The proper view of the residuary clause was that the testator, having disposed specifically of all his estate, both real and personal, added the residuary clause for the sake of greater caution or as a usual form. *In re Pink*, 23 C. L. T. 16, 4 O. L. R. 718, 1 O. W. R. 772.

Bequest of Use of Chattels for Limited Period — Sale — Interest — Executors.—A portion of a will was as follows: "I leave my stock and implements to my son M.; he to have the use of them for ten years, at the end of that time to replace them." The stock and implements were sold by the executors, at H.'s request and the proceeds were paid to him:—Held, that the bequest was merely of the use of the chattels for ten years, with the right of possession vested in H. for that period only; but the executors, with H.'s consent, having done what they should have done at the end of the period, all that he could have was the interest for ten years upon the proceeds of the sale; and therefore H. should repay the proceeds, for which the executors were bound to account. *In re McIntyre, McIntyre* v. *London and Western Trusts Co.*, 24 C. L. T. 268, 7 O. L. R. 548, 3 O. W. R. 258.

Bequest of Money — Life Interest — Gift — Deposit in Bank.—The mere fact that money has been deposited in a bank by a testator in the joint names of himself and his daughter, with power to either to withdraw, raises no presumption that a gift of the fund to the daughter was intended.—Testator bequeathed to his daughter any money which he might die possessed of "to hold and be enjoyed by her while she remains unmarried, and in case of her decease or marriage," then over:—Held, that

the daughter took only a life interest. *In re Daly*, 37 N. B. R. 483, 1 E. L. R. 487.

Bequest of Personalty — "Reversion" — Gift over — Life Interest — Absolute Interest.—The testator by his will gave, devised, and bequeathed to his father "one-half of my ready money, securities for money . . . and one-half of all other my real and personal estate whatsoever and wheresoever with reversion to my brother on the decease of my father," and gave, devised, and bequeathed, to his brother, his heirs and assigns forever, "the remaining one-half of all my ready money, securities for money . . . and the one-half of all other my real and personel estate whatsoever and wheresoever." At the time of the testator's death there was a sum of money on deposit to his credit in a bank:—Held, that the father was entitled for his life only to the use of one-half of the money, and that, subject to the life interest of the father, the brother took the same absolutely. *In re Percy, Percy* v. *Percy*, 24 Ch. D. 616; *In re Jones, Richards* v. *Jones*, [1898] 1 Ch. 438, and *In re Walker, Lloyd* v. *Tweedy*, [1898] 1 I. R. 5, distinguished. *Osterhout* v. *Osterhout*, 24 C. L. T. 219, 390, 7 O. L. R. 402, 8 O. L. R. 685, 2 O. W. R. 842, 3 O. W. R. 249, 4 O. W. R. 376.

Restraint upon Alienation.—Testator willed land to two grandchildren as tenents in common, without power to incumber the same during the lifetime of either, but with power of disposing of their interest to each other, but to no other person. One purchased the share of the other, and sought to quiet his title to the land:—Held, that the restraint as to mortgaging in the life of the devisees was valid, but the restraint as to disposal of the land except from the one to the other was invalid. *Re Buckley* (1919), 15 O. W. R. 329.

CHAPTER XVIII.

AS TO SUPPLYING, TRANSPOSING AND CHANGING WORDS.

SUPPLYING BLANKS

Tho question whether parol evidence is admissible to supply blanks left in a will has been already considered.

See Chapter XV.

WORDS MAY BE SUPPLIED, WHEN.

Where it is clear on the face of a will that tho testator has not accurately or completely expressed his meaning by the words he has used, and it is also clear what are the words which he has omitted, those words may be supplied in order to effectuate the intention, as collected from the context.

5th ed., p. 451, 6th ed., p. 581. *Key* v. *Key*, 4 D. M. & G. p. 84.

"WITHOUT ISSUE" SUPPLIED.

Of this we have a very simple example in an early case, where a devise to A. and the heirs of his body, and, if he should die, then over, was read "and if he should die without issue." So, where a man having three sons, John, Thomas, and William, devised lands to John, his eldest son, and the heirs of his body, after the death of Alice, the devisor's wife; and declared that if John died, living Alice, William should he his heir. And the testator devised other lands to Thomas, and the heirs of his body, and, if he died without issue, then that John should he his heir; and he devised other lands to William and the heirs of his body, and, if all his sons should die without heirs of their bodies, then that his lands should he to the children of his brother. John died in the lifetime of Alice, leaving a son; and the Court held, that, upon the whole context of the will, the construction should be "if John died without issue, living Alice"; and that this was the intent appeared, it was said, hy other parts of the will, the other sons having other lands to them and the heirs of their hodies; and that if they all died without issue, it should be to his brother' children, not meaning to disinherit any of his children. And it was declared not to be a contingent remainder or limitation to abridge the former express limitation.

Ibid. *Anon.* 1 And. 33. *Spalding* v. *Spalding*, Cro. Car. 185.

A clear gift was not to he devested hut by an unmistakahle provision to that effect.

5th ed., p. 453, 6th ed., p. 583. *Abbott* v. *Middleton*, 7 H. & L. Ca. 68.

ELLIPTICAL EXPRESSION SUPPLIED; BUT AN EVENT NOT CONTEMPLATED WILL NOT BE PROVIDED FOR.

In the foregoing cases the testator had used expressions that were, or were considered to be, plainly elliptical. Some contingency or state of circumstances that was present to his mind was imperfectly described. But the Court cannot provide for an event which appears to have been absent from the testator's mind, however strange the omission may be.

Ibid. *Eastwood* v. *Lockwood*, L. R. 3 Eq. 487.

WORDS SUPPLIED TO PRESERVE OTHERS.

Words are often supplied if, without them, other words would be inoperative. Thus, "if a man by his last will devise lands or tenements to a man and to his heires male, this by construction of law is an estate taile, the law supplying these words (of his bodie)."

6th ed., p. 586. *Langston* v. *Langston*, 2 Cl. & Fin. 194; *Re Blake*, 19 W. R. 765.

"TO BE BEGOTTEN" HELD ON CONTEXT OF WILL TO EXCLUDE ELDEST SON.

But althongh the general rule of construction as regards wills is to extend the words 'to be begotten" to issue begotten before the date of the will, yet the rule is not so absolute but that it will give way upon indication of a contrary intention appearing from other parts of the will.

5th ed., p. 457, 6th ed., p. 587. *Almack* v. *Horn*, 1 H. & M. 630; *Locke* v. *Dunlop*, 39 Ch. D. 387.

It may, indeed, be stated as a general rule, that mere conjecture or inference is not a sufficient gronnd for adding words to a will.

5th ed., p. 453, 6th ed., p. 588. *Eastwood* v. *Lockwood*, L. R. 3 Eq. 487.

WORDS SUPPLIED TO MAKE LIMITATIONS CONSISTENT WITH CONTEXT.

It is clear, however, that words and even clauses, may be supplied in a set or series of limitations or trusts, from which they have been omitted without apparent design, where those limitations or trusts as they stand are inconsistent with the context, and the context shows what must be added to remove the inconsistency.

5th ed., p. 457, 6th ed., p. 588. *Parker* v. *Tootal*, 11 H. L. C. 143.

"RESPECTIVE."

There are several cases in which the word "respective" or "respectively" has been added in order to carry out the testator's intention.

6th ed., p. 590. *Re Hutchinson's Trusts*, 21 Ch. D. 811.

WORDS OF LIMITATION USED IN ONE DEVISE, NOT TO BE APPLIED TO A DISTINCT DEVISE.

But it is not to be inferred from the preceding cases, that words may be inserted upon mere conjecture, in order to equalise

estates created by several distinct and independent devises, in favour of persons with respect to whom the testator has expressed no uniformity of purpose, though it may reasonably be conjectured that he had the same intention as to all.

1st ed., p. 432, 6th ed., p. 590.

REVOKED WORDS CANNOT BE RESTORED.

It is to be collected from the case of Holder v. Howell that where a testator in a codicil recites that an inconvenient consequence may result from a devise in his will, as that in a particular event the devisee or legatee would be unprovided for contrary to his intention, and then, instead of confining himself to simply effecting the declared purpose of the codicil, he proceeds to revoke the whole devise, giving the land again to the same trustees upon certain trusts which he particularizes, and which are the same as the former trusts, with the exception of the matter expressly intended for correction, and of one other of the trusts, which he wholly omits; this omission, though probably undesigned, cannot be supplied.

1st ed., p. 164, 6th ed., p. 593. *Holder* v. *Howell*, 8 Ves. 97.

Conversely, a codicil may have the effect of removing an ambiguity which appears on the face of the will.

Jarman, p. 593. *Re Venn* (1904), 2 Ch. 52.

HOW FAR OPERATION OF WORDS ENLARGING OR MODIFYING GIFTS EXTENDS.

This seems to be a convenient place to consider those cases in which the question has arisen whether words at the beginning or end of a clause apply to the whole clause or only to the part which immediately follows or precedes them.

5th ed., p. 463, 6th ed., p. 593. *Doe d. Ellam* v. *Westley*, 4 B. & Cr. 667.

EFFECT, WHERE CLAUSES OF WILL ARE NUMERICALLY ARRANGED.

Where a testator divides his will into sections, numerically arranged, and in some instances places the words of limitation at the end of each section, it seems that they will be considered as applicable to the several devises contained in that section, and not be confined to those in immediate juxtaposition.

5th ed., p. 464, 6th ed., p. 594. *Fenny d. Collings* v. *Ewestace*, 4 M. & Sel. 58.

GIFT TO "THE CHILDREN OF A. AND B."

In some cases a gift to the children of A. and B. has been held to mean the children of A. and the children of B., while in others it has been held to be a gift to B. and the children of A. These cases are considered in another place.

See Chapter XLII.

WORDS MAY BE TRANSPOSED, WHEN.

It is quite clear that, where a clause or expression, otherwise senseless and contradictory, can be rendered consistent with the context by being transposed, the Courts are warranted in making that transposition.

1st ed., p. 437, 6th ed., p. 595. *Marshall* v. *Hopkins*, 15 East. 309. *Doe d. Wolfe* v. *Allcock*, 1 B. & Ald. 137.

TRANSPOSITION OF THE SUBJECT OF DEVISE.

Another case of transposition sometimes occurs where a testator has devised lands at A. to B., and lands at C. to D., and it appears by the fact of the limitations of each devise being exactly applicable to the testator's estate in the lands comprised in the other, and other circumstances, that he has, in each instance, placed the devised estate in the position intended to have been occupied by the other.

1st ed., p. 440, 6th ed., p. 597. *Mosley* v. *Massey*, 8 East. 149.

TRANSPOSITION OF WORDS TO FIT THE GENERAL INTENT.

It seems therefore that, although the words as they stand are not absolutely senseless or contradictory, transposition will be made if it be required to effectuate an intention clearly expressed or indicated by the context.

5th ed., p. 468, 6th ed., p. 598. *Eden* v. *Wilson*, 4 H. L. Ca. 257.

TRANSPOSITION OF NAME.

The same principle, too, is applicable to the objects of a devise; for it has been held, that, where a testatrix, having two nieces, Mary who had never been married, and Ann who had been married and was dead leaving two children, bequeathed one moiety in a certain portion of her property to the children of her niece Mary, and the other moiety to her niece Ann; it being evident that the bequest to the children of Mary was intended for the children of Ann, and that to Ann for Mary, the Court corrected the mistake.

1st ed., p. 441, 6th ed., p. 599. *Bradwin* v. *Harpur*, Amh. 374.

AS TO CHANGING WORDS.

To alter the language of a testator is evidently a strong measure, and one which, in general, is to be justified only by a clear explanatory context. It often happens, however, that the misuse of some word or phrase is so palpable on the face of the will, as that no difficulty occurs in pronouncing the testator to have employed an expression which does not accurately convey his meaning. But this not not enough: it must be apparent, not only that he has used the wrong word or phrase, but also what is the right one; and, if this be clear, the alteration of language is warranted by the established principles of construction.

Ibid. *Taylor* v. *Richardson*, 2 Drew. 16.

REFERENTIAL GIFTS.

A somewhat similar principle is often applied in construing referential gifts, where a literal adherence to the original gift would defeat the manifest intention of the testator.

6th ed., p. 600.

EXAMPLES.

"OR" READ "OF."

In Re Dayrell the expression "son or any person" was read as "son of any person."

6th ed., p. 600. *Re Dayrell* (1904), 2 Ch. 496.

"ONE" READ "NO."

In Moore v. Beagley "one" was read "no."

6th ed., p. 600. *Moore* v. *Beagley*, 33 L. T. 198.

"SEVERAL" USED IN SENSE OF RESPECTIVE.

The changing of words, however, has most frequently occurred in regard to expressions, which, in common parlance, are often used inaccurately; as the word "severally" for "respectively."

1st ed., p. 442, 6th ed., p. 601. *Woodstock* v. *Shillito*, 6 Sim. 416.

"OR" CHANGED INTO "AND."

But by far the most numerons class of cases, exhibiting the change of a testator's words, are those in which the disjunctive "or" has been changed into the copulative "and" and vice versa. It is obvious that these words are often used orally without a due regard to their respective import; and it would not be difficult to addnce instances of the inaccuracy, even in written compositions of some note; it is not surprising, therefore, that this inaccuracy should have found its way into wills. Accordingly we find that the Courts have often been called upon to rectify blunders of this nature; so often, indeed, as to have swelled the cases on the subject into a mass requiring much attention and discriminative arrangement, in order to deduce from them any intelligible and consistent principles; and, in performing this task, the liberty must be taken of sometimes referring the cases to principles not distinctly recognised by the judges who decided them.

Ibid.

IN CASE OF DEVISE OVER, IN EVENT OF DEATH UNDER TWENTY-ONE OR WITHOUT ISSUE.

It has been long settled that a devise of real estate to A. and his heirs, or, which would be the same in effect, to A. indefinitely, and in case of his death nnder twenty-one, or without issue, over, the word "or" is construed "and," and, consequently, the estate does not go over to the ulterior devisee, unless both the specified events happen.

Ibid. *Morris* v. *Morris*, 17 Bea. 198.

PRINCIPLE OF THE RULE.

The ground for changing the testator's expression in these cases is, that as, by making the event of the devisee leaving issue a condition of his retaining the estate, he evidently intends that a benefit shall accrue to such issue through their parent, it is highly improbable that he should mean this benefit to depend upon the contingency of the devisee attaining majority; while, on the other hand, it is very probable that the testator should intend, in the event of the devisee dying under age leaving issue, to give him an estate which would devolve upon the issue; but that, if he attained twenty-one (the age at which he would acquire a disposing competency), he should take the estate absolutely, i.e., whether he afterwards died leaving issue or not. The change of "or" into "and," therefore, substitutes a reasonable for a most unreasonable scheme of disposition.

1st ed., p. 443, 6th ed., p. 602.

APPLICABLE TO BEQUESTS OF PERSONALTY.

And though it has generally happened that the subject to which this rule of construction has been applied is real estate, yet the rule is equally applicable (as the reason of it evidently is) to bequests of personalty; and, therefore, in the case of a legacy to A., and in case of his death under age or without issue, to B., it is not to be doubted that A. would retain the legacy, unless he died under age and without leaving issue at his decease.

Ibid. *Wright* v. *Marsom* ((1895), Week. N. 148.

And, of course, it would be immaterial that the original bequest was expressly made contingent on the legatee attaining majority.

Ibid. *Mytton* v. *Boodle*, 6 Sim. 457.

In this case the expression which raised the question in the will was repeated in the codicil—a circumstance which was considered (and it is conceived rightly) not to indicate that it was used advisedly.

Ibid.

GIFT OVER IN CASE OF DEATH DURING MINORITY UNMARRIED OR WITHOUT ISSUE.

And the same construction obtains where another event is associated with the dying under age and without issue, as in the case of a bequest to A., with a gift over in case of his dying during minority unmarried, or without issue; and that, too, though the copulative "and" is found in company with the disjunctive "or" in the same will, indeed, in this very sentence.

1st ed., p. 444, 6th ed., p. 603. *Miles* v. *Dyer*, 8 Sim. 330.

It is obvious that the ground for changing "or" into "and" exists a fortiori where children or issue are the express objects of the prior gift; as where there is a devise to a person when he attains twenty-one, for life, remainder to his children (the devise, in the case referred to, was to the sons successively and the daughters concurrently), in tail, with a devise over if he die under twenty-one or without children.

Ibid.

SUGGESTED EXTENSION OF THE RULE.

It would seem that the principle in question applies to every case where the gift over is to arise in the event of the preceding devisee or legatee dying under prescribed circumstances, or leaving an object who would, or, at least, who might take a benefit derivatively through the devisee or legatee, if his interest remained undivested, and to whom, therefore, it is probable the testator intended indirectly a benefit, not dependent upon the circumstance of the devisee or legatee dying under the prescribed circumstances or not. In this point of view it would seem to be immaterial whether the dying is confined to minority, or is associated with any other contingency, as in the case of a gift to A., and if he shall die in the lifetime of B. or without issue [or die without issue or intestate], then over; or whether the event is leaving issue or leaving any other object who would derive an interest or benefit through the legatee, if his or her interest was held to be absolute, as a husband or wife.

Ibid. *Wright* v. *Kemp*, 3 T. R. 470; *Beachcroft* v. *Broome*, 4 T. R. 441.

The cases under consideration, perhaps, may seem to form an exception to the rule that words, unambiguous in themselves, are not to be rejected or changed on account of their unreasonableness; but as this construction has obtained so long, is confined to a particular expression, and that expression one which is often used indiscriminately with the substituted word, there does not seem to be much danger in this seeming latitude of interpretation; but it should, if possible, be made to rest upon some solid principle, fixing definite limits to its application. The cases, it is conceived, in effect though not professedly, warrant us in stating that principle to be (as before suggested), that where the dying under twenty-one is associated with the event of the devisee leaving an object, who would, if the devisee retained the estate, take an interest derivatively through him, the copulative construction prevails; though it is by no means equally clear that the rule is confined to such cases.

1st ed., p. 445, 6th ed., p. 604. *Brownsword* v. *Edwards*, 2 Ves. Sen. 243.

GIFT IN EITHER OF TWO EVENTS, WITH GIFT OVER ON NON-HAPPENING OF ONE OR THE OTHER.

To return to the cases in which "or" has been construed "and." The argument for this construction is of course very strong where the effect of an adherence to the words of the will would be to deprive the legatee of what was previously given to him in either of two alternative events, unless both events should happen, as in the case of a bequest to A. on his attaining thirty-one or marrying; and in case he should die under thirty-one or unmarried, then over; in such a case "or" is necessarily construed and, in order to make the limitation over consistent with the terms of the prior gift.

1st ed., p. 450, 6th ed., p. 609. *Collett* v. *Collett*, 35 Beav. 312.

WHERE THERE IS NO PRIOR GIFT.

These decisions depended on the inconsistency which, upon a literal construction, would have existed between the prior gifts and the executory gifts over. Where there is no prior gift this ground fails: so that a bequest to A. after the death of testator's mother, or the second marriage, death, or forfeiture of his wife, although the testator had made life-provisions for both his mother and wife, upon whose death therefore a certain amount of the estate would be set free, was held to take effect immediately on the death of the mother without waiting for the second marriage, death, or forfeiture of the wife: in other words, the Court refused to read "or" as "and." And a similar observation must be made with reference to the opposite change of "and" into "or."

5th ed., p. 479, 6th ed., p. 609. *Hawksworth* v. *Hawksworth*, 27 Beav. 1; *Malden* v. *Maine*, 2 Jur. N. S. 206.

"OR" READ "AND" ON GENERAL CONTEXT.

Sometimes the general context or plan of the will calls for the conjunctive construction in cases not easily reducible to any specific head.

Ibid. *Long* v. *Dennis*, 4 Burr. 2052.

GIFT TO SEVERAL OBJECTS ALTERNATIVELY.

Where there is a gift to two objects or classes of objects alternatively, the ambiguous use of the disjunctive "or" occasions much perplexity. Sometimes, as we have seen, the gift has been held to be void for uncertainty; but more frequently, in such cases, the word has been changed into and.

1st ed., p. 451, 6th ed., p. 610. *Richardson* v. *Spragg*, 1 P. W. 434.

TO A. OR HIS HEIRS.
"OR" READ AS INTRODUCING A SUBSTITUTED GIFT.

"Or," too, has often been changed into and where interposed between the name of the devisee and words of limitation

introduced into the devise, as in the case of a devise of real estate to A. or his heirs, or to A. or the heirs of his body. Whether the same construction would be applied to bequests of personalty to A. or his executors or administrators is not quite clear, for in such a case, as the words of limitation are not necessary to confer the absolute interest (a difference, however, which the new law extinguishes), there may seem to be more reason for contending that they are inserted diverso intuitu. The strong tendency of the modern cases certainly is to consider the word "or" as introducing a substituted gift in the event of the first legatee dying in the testator's lifetime: in other words, as inserted, in prospect of, and with a view to guard against, the failure of the gift by lapse."

1st ed., p. 452, 6th ed., p. 611.

GIFT TO "ASSIGNS" IMPLIES AN ABSOLUTE INTEREST.

But if the gift be to the specified persons "or their heirs or assigns," it is clear that the words are words of limitation only; for the power of assigning implies an absolute and indefeasible interest.

5th ed., p. 482, 6th ed., p. 612. *Leach* v. *Leach*, 35 Bea. 185.

And where there was a gift to four persons in succession for their lives, with an ultimate gift on the death of the survivor to "the heirs and assigns" of the survivor, the Court refused to read "and" as "or," the plain construction of the ultimate gift being to the heir of the survivor as persona designata.

6th ed., p. 612. *Milman* v. *Lane* (1901), 2 K. B. 745.

"OR" INTRODUCING DIVESTING CLAUSE.

It sometimes happens that the word "or" has the effect of adding a divesting clause; as where the gift is to A. B., and C., "or such of them as shall be living" at a future time: this gives each of them a vested interest, subject to be divested in the event of his dying before the time, and of the others (or one of them) surviving that time.

Ibid. *Sturgess* v. *Pearson*, 4 Mad. 411.

GIFT TO "A. OR B."

The case of a simple gift in the alternative to two individuals (as a gift to "A. or B.") is more difficult, and if there is nothing in the will or in the surrounding circumstances to show what the testator meant. such a gift appears to be void for uncertainty.

See ante page 237.

POWER TO APPOINT TO A. OR B. IMPLIED GIFT TO A. AND B. IN DEFAULT.

Here we may distinguish those cases where, under a power to appoint in favour of A. "or" B. (A. and B. being either classes

or individuals), a gift in default of appointment is implied between A. and B. This is an apparent but not a real change of "or" into "and"; the true reason that A. and B. both take being that both are objects of the power, and no selection having been made by the person empowered to select, the Court divides the subject of gift equally between the objects of the power. Again, a gift to A. for life, and after his death to a class of persons "or the issue of such of them as shall then be dead," or to A. for life, and after his death to such of a class as shall be then living "or their next of kin" ("or heirs"), will generally be construed to mean such of the class as shall be living at the death of the tenant for life, and the issue or next of kin (or heirs) of such as shall then be dead.

5th ed., p. 483, 6th ed., p. 613. *Penny* v. *Turner*, 15 Sim. 368; *Shand* v. *Kidd*, 19 Beav. 310; *Wingfield* v. *Wingfield*, 9 Ch. D. 658.

AS TO TURNING "AND" INTO "OR."

The word "and," too, is sometimes construed "or." This change (being the converse of that which is exemplified by the preceding cases, but, like it, generally made to favour the vesting of a legacy, and not to divest it), may be called for by the general frame and context of the will.

Ibid. *Maddison* v. *Chapman*, 3 DeG. & J. 536.

And where a testator made a bequest after a specified period "to such of his grandchildren and their issue as should then stand to him in equal degree of consanguinity, and their heirs as tenants in common," the word "and" was read "or," it being impossible that grandchildren and their issue could be in equal degree of consanguinity to the testator.

5th ed., p. 484. *Maynard* v. *Wright*, 26 Beav. 285.

There are cases in which a gift to certain persons "and" their children, descendants, &c., has been read as a gift to them "or" their children, &c., so as to make the gift to the children substitutional.

6th ed., p. 614. *Burrell* v. *Baskerfield*, 11 Bea. 525.

The change of "and" into "or" may be called for, not only "by the general frame and context of the will," as in the cases above mentioned, but also "by the circumstance that a literal adherence to the testator's language occasions that one member of his apparently copulative sentence is included in, and, therefore, reduced to silence by another. In this ground, probably, the construction has prevailed in several cases where an ulterior gift was to take effect on the death of the first devisee unmarried 'and' without issue."

1st ed., p. 455, 6th ed., p. 614. *Wilson* v. *Bayly*, 3 Br. P. C. Toml. 195.

But though, by construing the contingency of dying unmarried and without issue copulatively, the latter member of the sentence is rendered inoperative (since the fact of being unmarried includes the not having or leaving issue, which always means lawful issue), yet, on the other hand, the disjunctive construction reduces to silence the word "unmarried"; for if the condition upon which the first taker retains the estate is his marrying and having issue, or, in other words, if the estate is to go over on the non-happening of either of these events, then, as the having issue includes the event of marriage, the result of the two events, placed disjunctively, is precisely the same as if the contingency of having issue stood alone.

1st ed., p. 458, 6th ed., p. 616. Consult *Grey* v. *Pearson*, 16 H. L. Ca. 61.

WHETHER "UNMARRIED" MEANS NOT HAVING BEEN MARRIED, OR NOT BEING MARRIED AT THE TIME.

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; and it was considered as so used in the [cases stated above], where, however, the effect of such construction was to render the word inoperative. But the sound rule in such cases would seem to be, to construe the expression as used in the latter, being its less accustomed sense, which has a twofold advantage, that it removes the necessity of changing the particle "and" to "or," and gives effect to all the testator's words.

1st ed., p. 457, 6th ed., p. 617. *Wilson* v. *Bayly, ut supra.*

A testator may by the context show that he did not use "unmarried" in the sense of "without leaving a widow"; as where he devises land subject to a gift over in the event of the original devisee dying unmarried and without issue, and gives him a power to charge a jointure in favour of his widow.

6th ed., p. 619. *Long* v. *Lane*, 17 L. R. Ir. 11.

If a gift over is to take effect in the event of the legatee "dying before marriage and leaving no issue," no question can arise. And if a testator expressly gives property to his two daughters, to be vested at the age of twenty-four or marriage, and if they both die under twenty-four and unmarried, then over, the Court will not alter "and" into "or," or give "unmarried" any other than its primary sense of "never having been married."

6th ed., p. 619. *Seccombe* v. *Edwards*, 28 Beav. 440; *Gonne* v. *Cook*, 15 W. R. 576.

"AND" NOT CONSTRUED "OR" WHERE A PREVIOUS GIFT WOULD BE THEREBY DIVESTED.

It has already been observed that in the majority of cases where "and" has been construed disjunctively, it has been in order to favour the vesting of a legacy, and not in order to defeat a previously vested gift; and generally it will not be so construed where the latter consequence would follow; as, where the bequest is to A. for life, remainder to his eldest son (or to his children), with a gift over if A. should die under twenty-one and without issue (or under twenty-one and without children).

6th ed., p. 620. *Malcolm* v. *Malcolm*, 21 Beav. 225; *Re Brittlebank*, 3 O. W. R. 99.

Residuary Clause—Power of Selection—Discretion of Trustees.—A devise in a will directing the distribution of the residue of the testator's estate among his brother and sisters or nephews and nieces who should be most in need of it, at the discretion of trustees therein named, is valid and confers absolute power upon the classes of persons mentioned. *McGibbon* v. *Abbott*, 10 App. Cas. 653, followed. *Ross* v. *Ross*, 25 S. C. R. 307, referred to. *Brosseau* v. *Doré*, 25 C. L. T. 2, 35 S. C. R. 205.

Roman Catholic Bishop—Corporation Sole—Devise of Personal and Ecclesiastical Property — Construction.—The will of the Roman Catholic Bishop of St. John, N.B., a corporation sole, contained the following general devise of his property:—"Although all the church and ecclesiastical and charitable properties in the diocese are and should be vested in the Roman Catholic Bishop of St. John, New Brunswick, for the benefit of religion, education, and charity, in trust according to the intention and purposes for which they are used and established—yet to meet any want or mistake, I give and devise and bequeath all my estate, real and personal, wherever situated, to the Roman Catholic Bishop of St. John, New Brunswick, in trust for the purposes and intentions for which they are used and established:"—Held, that the private property of the testator, as well as the ecclesiastical property vested in him as bishop, was devised by this clause, and the fact that there were specific devises of personal property for other purposes did not alter its construction. *Travers* v *Casey*, 24 C. L. T. 169, 34 S. C. R. 419.

Omission in Will — Giving Effect to Intention — Distribution of Estate.—P. K., who left a widow and five children by his last will, directed that his property should be sold in two years after his decease by his trustee, who, in the meantime, should pay the interest and rents to his wife and four of the children who were named. On the death of any one of the four children named, leaving a child or children, the share of such child was to be paid to the offspring. Whenever one of his children should die leaving children, the estate was to be divided equally among his children. Should his wife marry again, her share of the interest money was to be divided among his children, and, after her decease, not having remarried, the interest of her share was to be paid to his son W., and on his death to be equally divided among his children. Reading the will literally, no share was given to the widow, beyond a share of the interest payable to her, until the estate came to be divided, but it was obvious that it was the intention of the testator that the widow should share equally with the four children named, and that, on her death unmarried, such share should go to his son W., and on his death be equally divided among his children:—Held, that the Chambers Judge, on application under O. 55. r. 2, was right in disregarding the literal reading of the will and in so construing it as to give effect to the obvious intention of the testator:—Held, also, that the Judge was right in construing the direction made by testator in relation to the division of his property among his children, as referring to the four children named. *Eastern Trust Co.* v. *Rose*, 38 N. S. R. 546.

"**And**" **for** "**Or.**"—Testator devised certain lands to his son H. in fee, with a devise over, and "in case my son H. shall die intestate or without issue:" Held, that "or" must be read "and," and that the condition was inoperative. *Re Babcock*, 9 Chy. 427.

F., who died in 1861, by his will, made in 1861, gave to his wife all his lands for life; and after her decease he devised to each of his seven children, separate lands, adding "and in case any of the aforesaid legatees shonld die before he or she comes of age, or shonld die intestate, then and in snch case his or her portion shall be eqnally divided among the remaining snrvivors." J. F., the eldest son, and one of the devisees, died intestate in 1867, at the age of thirty, leaving a son, the testator's widow having died in 1864:—Held, that J. F. being twenty-one at his father's death, took an absolute vested interest in fee in remainder expectant on his mother's death: that the devise over was void as being repugnant to this gift preceding it; and that the land devised to J. F. went therefore to his son, not among the other snrviving devisees. Semble, that if necessary "or" in the devise over might have been read "nnd." *Farrell* v. *Farrell*, 26 U. C. R. 652. Refer to *Doe d. Forsythe* v. *Quackenbush*, 10 U. C. R. 148; *Forsythe* v. *Galt*, U. C. C. P. 408.

CHAPTER XIX.

GIFTS BY IMPLICATION.

Recitals, Whether They Create an Actual Gift.

Sometimes a testator shows by the recitals in his will, that he erroneously supposes a title to subsist in a third person to property which, in fact, belongs to himself. Such recitals do not in general amount to a devise; for, as the testator evidently conceives that the person referred to possesses a title independently of any act of his own, he does not intend to make an actual disposition in favour of such person; and though it may be probable, or even apparent, that the testator is influenced in the disposition of his property by this mistake, yet there is no necessary implication that, in the event of the failure of the supposed title, he would give to the person that benefit to which it is assumed he is entitled.

1st ed., p. 460, 6th ed., p. 621. *Wright* v. *Wyvell*, 2 Vent. 56.

Nor, it seems, will a mistaken belief by a testator as to the ownership of property enlarge the operation of an express gift.

6th ed., p. 623.

Reference by Testator to a Disposition Made in That His Will.

It seems, however, that if a testator unequivocally refer to a disposition as made in that his will, which, in fact, he has not made, the intention to make such a disposition, at all events, will be considered as sufficiently indicated. . In such cases "the Court has taken the recital as conclusive evidence of an intention to give by the will, and, fastening upon it, has given to the erroneous recital the effect of an actual gift," differing, in this respect, from the cases in which "the testator says that only which amounts to a declaration that he supposes that a party who is referred to has an interest independent of the will, and in which the recital is no evidence of an intention to give by the will, and cannot be treated as a gift by implication."

1st ed., p. 462, 6th ed., p. 623. *Adams* v. *Adams*, 1 Hare. 540.

Implication of Bounty From Direction to Pay Debt.

A mere direction to pay a debt which the testator supposes to be due from him, does not involve any intention of bounty, and therefore, if a testator directs his executors to pay "a debt of £300 due by me to A.," and he only owes A. £200, this is not

an implied legacy to A. of £100. But an intention of bounty may appear from the terms of the will.

6th ed., p. 624. *Re Rowe* (1898), 1 Ch. 153.

ASSUMPTION BY TESTATOR THAT HIS WILL CONTAINS A DEVISE.

"Implication may either arise from an elliptical form of expression, which involves and implies something else as contemplated by the person using the expression, or the implication may be founded upon the form of gift, or upon a direction to do something which cannot be carried into effect without of necessity involving something else in order to give effect to that direction, or something else which is a consequence necessarily resulting from that direction."

5th ed., p. 494, 6th ed., p. 624. *Parker* v. *Tootal*, 11 H. L. Ca. 143, 161.

Implication of the latter kind is seen when from a direction that certain persons shall deal with the rents of an estate in a particular manner, a devise of the estate to those persons has been implied; or when from a direction to invest real and personal estate is implied a trust to sell the real estate.

5th ed., p. 494, 6th ed., p. 625. *Affleck* v. *James*, 17 Sim. 121.

But a gift which is confined by unambiguous terms to a specific part of a testator's property, as a bequest of "all his capital in ready money and bank billets," will not be extended so as to include the entire personalty by a mere introductory clause declaring the testator's intention to dispose of all his property. It would be different if the testator himself referred to the bequest as including all his property.

Idem. *Wylie* v. *Wylie*, 1 D. F. & T. 410.

Though words may by implication effect an increase in the amount of the first gift, yet the rule that a clear gift is not to be cut down by subsequent words of doubtful import prevents them from having any operation where their effect would be by implication to diminish the first gift.

Idem. *Mann* v. *Fuller*, Kay. 624; *Re Segelcke* (1906), 2 Ch. 301.

INTENTION TO GIVE WHAT WILL MAKE UP A CERTAIN SUM.

And where a testator expresses an intention to make up a person's existing fortune, derived either under his own will or from other sources, to a certain sum, and for that purpose gives a legacy which proves to be insufficient, the legatee shall, nevertheless, have the sum specified and intended for him.

Idem. *Ouseley* v. *Anstruther*, 10 Beav. 453.

Even where the testator has evidently mistaken the law respecting the devolution of his property, yet, if he has by his will shown

very clearly an intention that it shall devolve according to such mistaken notion, the intention will prevail.

1st ed., p. 463, 6th ed., p. 626. *Tilly* v. *Collyer*, 5 Keb. 580.

An erroneous recital or statement as to the devolution of property will not operate to prevent it from being included in a residuary gift. These cases are considered elsewhere.

See Chapters XXV. and XXIX.

A clear bequest made in consequence of a mistake on the part of the testator is, nevertheless, as a general rule, effectual.

See Chapter XXX.

MISRECITAL OF WILL BY CODICIL.

The dispositions of a will may be modified by a codicil showing a clear indication of the testator's intention to make some disposition inconsistent with the dispositions of the will, even if the disposition in the codicil is preceded by an erroneous recital of the dispositions of the will.

6th ed., p. 627. *Re Margitson*, 48 L. T. 172.

But the disposition of a will will not be disturbed by an erroneous recital of its contents in a codicil, unless a design to revoke or modify the disposition in the will can be fairly collected from the whole instrument.

1st ed., p. 464, 6th ed., p. 628. *Skerratt* v. *Oakley*, 7 T. R. 492.

MISRECITAL OF DISPOSITION IN THE SAME INSTRUMENT.

But this principle of construction is not confined to the case of a will and codicil; it has also been applied to a misrecital occurring in the same instrument as the disposition sought to be disturbed.

5th ed., p. 497, 6th ed., p. 628. *Smith* v. *Fitzgerald*, 3 V. & B. 2.

Without denying that the recital of a gift as antecedently made may amount to a gift, the Court ought to see very clearly that there is nothing in the will to which the recital can refer, before it is turned into a distinct bequest.

5th ed., p. 498, 6th ed., p. 629.

AMBIGUITY IN WILL CONTROLLED BY RECITAL IN CODICIL.

Where, however, the terms of the prior disposition are themselves ambiguous, their construction may properly be guided by a recital, couched in more precise language, in a codicil.

Ibid. *Darley* v. *Martin*, 13 C. B. 683.

DOCTRINE OF IMPLICATION AS TO REAL ESTATE.

DEVISE TO THE HEIR AFTER THE DEATH OF A. GIVES A. AN ESTATE BY IMPLICATION.

It is a well-known maxim that an heir-at-law can only be disinherited by express devise or necessary implication, and that

implication has been defined to be such a strong probability that an intention to the contrary cannot be supposed. In the application of this principle one chief topic of controversy has been, how far a devise to any person, in the event of the non-existence or on the decease of another, indicates an intention to make the last-named person a prior object of the testator's bounty. In such cases it is probable that the person, whose non-existence is made the contingency on which the devise over is to fall into possession, is placed in this position for the purpose of taking the property in the first instance; and this probability is, of course, greatly strengthened, if the devisee is the person on whom the law, in the absence of disposition, would cast the property. Hence it has become a settled distinction, that a devise to the testator's heir after the death of A, will confer on A. an estate for life by implication; but that, under a devise to B., a stranger, after the death of A., no estate will arise to A. by implication. This is an exact illustration of the difference between necessary implication and conjecture. In the former case, the inference that the testator intends to give an estate for life to A. is irresistible, as he cannot, without the grossest absurdity, be supposed to mean to devise real estate to his heirs at the death of A., and yet that the heir should have it in the meantime, which would be to render the devise nugatory. On the contrary, where the devisee is not the heir, however plausible may be the conjecture, that by fixing the death of A. as the period when the devise to B. was to take effect in possession, the testator intended A. to be the prior tenant for life, yet it is possible to suppose that, intending the land to go to the heir during the life of A., he left it for that period undisposed of. In some cases, indeed, we find it laid down without any qualification, that a devise to B. upon the death of A., raises an implied estate in A.; but such dicta, even if accurately reported (which is often doubtful), cannot weigh against the current of authorities, grounded on acknowledged principles of law.

1st ed., p. 465, 6th ed., p. 629. *Gardner* v. *Sheldon*, Vaughan 259. Tudor. L. C. (4th ed.) p. 388.

DEVISEE NEED NOT BE DESCRIBED AS HEIR.
WHETHER DEVISEE MUST BE HEIR AT THE DEATH.

Of course, it is not essential to the doctrine that the will should describe the devisee as the heir apparent or heir presumptive of the testator. Thus, a devise "to my eldest son B. after the death of A.," would raise an implied estate for life in A., the fact being that B. is the heir apparent, though not designated as such. The authorities do not distinctly inform us, however, whether, in order to raise the implication, the devise must be to the person who,

according to the state of events at the making of the will, would be the testator's heir, or the person who eventually becomes such. The former seems to be the preferable doctrine; for to treat it as applying to the eventual heir, would be to construe the will according to subsequent events, in opposition to a fundamental principle of construction. If, therefore, a testator having two sons, A. and B., devise real esate to B. (the younger son) after the decease of his (the testator's) wife, this would not, it is conceived, give to the wife an estate for life by implication, though it should happen that, by the decease of A., the elder son, without issue in the testator's lifetime, the younger son (i.e., the devisee) had become his heir. On the other hand, if a testator, whose issue was an only daughter, devised real estate to such daughter after the death of his wife, and it happened that he had a son afterwards born, who survived him, the sound conclusion would seem to be, that the wife would take an implied estate for life, though the ulterior devisee was not in event the testator's heir; the result, in short, being that the implication occurs wherever the express devise is to the person who is the testator's heir apparent or presumptive at the date of the will, and not otherwise Perhaps, when the distinction between a devise to the heir and to a stranger was originally established, the difficulty attending the application of the doctrine to an heir or heiress presumptive, who is liable to be superseded by the birth of a son of the testator, was not sufficiently considered.

Ibid.

To One of Several Co-heirs.

It has been said that the implication arises in the case of a devise as well to one of several of co-beirs, as to a sole heir; and, therefore, that where a man devises to one of his two daughters (his co-heiress), after the death of his wife, she (the wife) takes an estate for life by implication. This, it must be admitted, is a considerable extension of the doctrine, and carries it beyond the principle on which it is founded, since there seems to be not the same absurdity in supposing a testator to give to one of his co-heiresses after the death of another person, intending it to descend to all in the meantime, as where the devisee is the same and the only individual upon whom the intermediate interest would have descended. The point, too, rests rather on dictum than decision, for the case in which Lord Cowper advanced this position was decided upon another point, and it is not to be found in the contemporary reports of the same case; but it was referred to arguendo as a settled rule of law in another case.

Ibid. See *Re Willatts* (1905), 1 Ch. 578.

DEVISE TO HEIR AND OTHERS AFTER THE DEATH OF A.

In cases which are the converse of the last, viz., where there is a devise to the heir and other persons after the decease of A., the implication does not arise, because there is no incongruity in the supposition that the testator intended the heir to take a share at the period in question, and the entirety in the meantime.

1st ed., p. 478, 6th ed., p. 632. *Ralph* v. *Carrick*, 5 Ch. D. 984.

DISTINCTION WHERE THERE IS AN EXPRESS ANTERIOR DEVISE OF PART TO THE PERSON ON WHOSE DEATH DEVISE IS TO TAKE EFFECT.

Where there is an anterior express devise for life of part of the lands to the person on whose decease the devise in question is to take effect, the implication has been sometimes avoided by having recourse to what may, for convenience of distinction, be called the distributive construction, by which the words after the death are applied exclusively to the lands devised expressly for life; and the words of devise, without these expressions of postponement, are applied to the rest of the property, which, therefore, passes immediately to the devisees: a construction which, doubtless, was adopted in the first instance on account of the improbability that a testator should intend a person to whom he had expressly given part, to take the rest by implication. But the rule seems not to have been restricted (as this reasoning would imply) to cases in which the devise over is to the heir, but has obtained where such devise was to a stranger, and in which, as the estate would, if the devise were postponed, devolve to the heir in the meantime, and not belong to the devisee for life by implication, there would seem to be no reason for denying to the words of postponement their full effect, in regard to all the subjects of devise.

1st ed., p. 469, 6th ed., p. 633. *Cook* v. *Gerrard*, 1 Saund. 183.

EFFECT OF RESIDUARY DEVISE IN EXCLUDING THE IMPLICATION ARISING FROM DEVISE TO HEIR.

The position that a devise to the heir after the death of A. creates in A. an implied estate for life, supposes that the will does not contain a residuary devise; for a clause of this nature would, by disposing of such intermediate estate, and thereby intercepting the descent to the heir, clearly exclude all ground for the implication. Thus, if a testator devises Whiteacre to his heir apparent or heir presumptive after the death of his wife, and in the same will devises the residue of his real estate to A. (a stranger), since the estate for life, not included in the devise to the heir, would, if no implied gift were raised, pass to A. as real estate not otherwise disposed of, which might possibly be intended, the residuary devisee, and not the wife, would, it is conceived, take the estate during her life.

1st ed., p. 474, 6th ed., p. 638. *Stevens* v. *Hale*, 2 Dr. & Sm. 22.

APPLICATION OF DOCTRINE TO RESIDUARY DEVISES.

Another remark is, that where the will contains a residuary disposition of real estate, a devise of particular lands to the residuary devisee, to take effect in possession on the decease of another person, supplies exactly the same argument for implying an estate for life in that person, as a similar devise, in the cases already discussed, to the heir; for to suppose that the testator intends lands, which he has specifically devised to the residuary devisee at the death of A., to go to him in the meantime under the residuary clause, involves precisely the same absurdity as to suppose that an heir is intended to take immediately what is expressly given to him at a future period; and therefore, in the case supposed, A. would, undoubtedly, have an estate for life by implication.

Ibid.

DOCTRINE OF IMPLICATION IN REGARD TO PERSONAL ESTATE.

The general principles before stated, as governing the doctrine of implication in regard to real estate, it is conceived, are applicable to bequests of personal estate, including terms for years; although certainly the reason on which the doctrine is professedly founded, namely, that the heir is not to be disinherited by any implication other than a necessary one, applies exclusively to real estate.

1st ed., p. 477. 6th ed., p. 638.

IMPLICATION MAY BE REBUTTED.

No implication of a life estate in the cases above referred to, arises where the gift after the death of the cestui que vie is to the testator's heir (or next of kin) and there is a residuary devise (or bequest) to some other person, or where the gift takes the form of an appointment under a power, and the instrument creating the power contains a gift over in default of appointment. In a clear case, such as that of a devise of land to the testator's heir after the death of A., the fact that the testator gives other property to A. does not prevent A. from taking an estate for life in the land by implication. But in a doubtful case, the fact that the will makes an express provision for the person on whose death the gift is to take effect tends to rebut any implication of a life interest. The implication does not arise if the will, after a direct gift to a class of persons, directs that no division shall take place until the death of A.

6th ed., p. 640. *Stevens* v. *Hale*, 2 Dr. & Sm. 22: *Henderson* v. *Constable*, 5 Bea. 297; *Barnet* v. *Barnet*, 29 Bea. 229.

AS TO DEVISES IN THE FIRST INSTANCE TO SURVIVORS.

As a devise to a stranger after the death of A. creates no estate in A. by implication in the meantime, it might seem to

follow that a devise to the survivor of several persons would not raise an estate by implication in the whole during their joint lives; but, in the actual state of the authorities, it would be hazardous to advance any such proposition, seeing that, in one instance at least, a different construction prevailed, though certainly not without some aid from the context.

1st ed., p. 475, 6th ed., p. 641. *Saunders* v. *Lowe*, 2 W. Bl. 1014.

AS TO IMPLICATION OF DEVISE TO SURVIVORS.

Cases the converse of the preceding have sometimes occurred, namely, where the income is expressly disposed of during the joint lives of several co-devisees or co-legatees only, with a gift over on the decease of the survivor, thus leaving unprovided for the destination of the intermediate interest accruing in the interval between the determination of the joint lives and the death of the survivor. In several such cases, the interest in question has been held to belong to the survivors, either under an implied gift to them, or in virtue of the right of survivorship incident to a joint tenancy; and the latter seems to have been the chosen ground of determination, though this result was only attainable by the rejection of words which, unless controlled by the context, would have had the effect of making the co-devisees or co-legatees tenants in common.

1st ed., *ibid.*, 6th ed., p. 642. *Townley* v. *Bolton*, 1 My. & K. 148.

IMPLICATION FROM EXPRESS GIFT ON DEATH COMBINED WITH SOME CONTINGENCY.

Hitherto the doctrine of implication has been viewed chiefly in its application to the simple case of devise or bequest on the decease of some person or persons; but it is obvious that the principle may come under consideration in a somewhat more complex form, as where the event, upon which the express devise is to take effect, is the death of a person, combined with some other contingency. For instance, in the case of a devise to B. in the event of A. dying under age; in which case, as there is no devise to A. in the alternative event of his attaining his majority, the question arises, whether he can take the fee by implication in such event. If B. were the testator's heir apparent or presumptive, there would be no difficulty in arriving at the affirmative conclusion; the case then being evidently analogous to that of a devise to the heir, to take effect in possession on A.'s decease, which, we have seen, raises an estate for life in A. By parity of reason, it would seem that a devise to a stranger, in the event of A. dying under age, supplies no more valid ground for holding A. to take an estate in fee by implication, than is afforded for the implication of an estate for life to a person on whose decease the

lands are devised to a stranger: for a testator may intend the fee to descend to the heir on the alternative contingency of A. attaining his majority. And, perhaps, the authorities rightly considered, do not militate against this hypothesis, for though an estate in fee was held, in one instance, to arise by implication under such a devise to a person who was not the testator's heir, yet the construction was founded on reasoning partly derived from the context.

1st ed., p. 489, 6th ed., p. 644. *Goodright d. Hoskins* v. *Hoskins*, 9 East. 306.

WHEN THIS IMPLICATION FAILS.

But, of course, the children will not take an absolute interest by implication, if in the same event there is an express gift to them of a less interest. And it has been held that the event upon which the gift over is to take effect must exactly correspond with that upon which the limited trust is to cease. If the gift over depends on a further collateral event, as on death under twenty-one and unmarried, the implication does not arise.

5th ed., p. 515, 6th ed., p. 647. *Savage* v. *Tyers*, L. R. 7 Ch. 356; *Re Blake's Trust*, L. R. 3 Eq. 799.

IMPLICATION OF LIFE ESTATE FROM SCHEME OF WHOLE WILL.

It is hardly necessary to say that if the scheme of a testator's will shows a clear intention to give A. a life estate in his property, effect will be given to that intention, even in the absence of express words.

6th ed., p. 648. *Cockshott* v. *Cockshott*, 2 Coll. 432.

NO IMPLICATION THAT EQUITABLE IS TO BE CO-EXTENSIVE WITH LEGAL DISPOSITION.

Where a testator gives several distinct subjects of disposition to trustees, and then proceeds to dispose of the equitable or beneficial interest in terms applicable to one of those subjects only, there is no necessary implication that he intended the legal and equitable disposition to be co-extensive, though it may be highly probable that he did so, and more especially when the omitted subject is convenient (though not essential) to the enjoyment of the other.

1st ed., p. 483, 6th ed., p. 649. *Stubbs* v. *Sargon*, 2 Kee. 255.

IMPLICATION FROM DISCRETIONARY TRUST.

In many cases where property is given to trustees with power to apply it for the benefit of A., in terms which imply that the exercise of the power is left to the discretion of the trustees, it has been held that a trust is created for the benefit of A., whether the trustees exercise the power or not. These cases are considered in another chapter.

See Chapter XXIV.

GIFTS IMPLIED FROM POWERS OF SELECTION OR DISTRIBUTION.

Implied gifts may be and often are created by powers of selection or distribution in favour of a defined class of objects; for, where property is given to a person for life, and after his or her decease to such children, relations, or other defined objects as he or she shall appoint, or among them in such shares as the donee shall appoint, and there is no express gift over to these objects in default of appointment, such a gift will be implied; the presumption being, that the testator could not have intended the objects of the power to be disappointed of his bounty, by the neglect of the donee to exercise such power in their favour.

1st ed., p. 485, 6th ed., p. 651.

POWER MUST BE IN THE NATURE OF A TRUST.

But the implication only arises where there is some indication that the testator intends the class (or some of the class) to take: in other words, where the power is in the nature of a trust; it does not arise from a mere power of appointment.

6th ed., p. 651. *Re Weekes' Settlement* (1897), 1 Ch. 289.

WHERE IMPLICATION DOES NOT ARISE.

It follows that the implication does not arise where the donee of the power has a discretion whether he shall exercise it or not. Nor does it arise where the objects of the power are vague and uncertain, or where the testator expressly says that he does not intend to provide for them by his will, or where the whole beneficial interest in the property is given to a person in the first instance, with a superadded power to appoint to certain objects. But the fact that the property is given to the donee of the power for her sole and separate use does not prevent the implication.

6th ed., p. 651. *Brown* v. *Higgs*, 8 Ves. 561; *Harding* v. *Glyn*, 1 Atk. 469.

IMPLIED GIFT IN ONE, NOT PRECLUDED BY EXPRESS GIFT IN ANOTHER EVENT.

And the implication, it seems, is not repelled by the circumstance that the testator has expressly given the property to the persons who are objects of the power, in the event of the donee dying before him; which event, it is to be observed, would have prevented the power from arising; so that the express gift and the implied one are alternative and not inconsistent.

1st ed., p. 485, 6th ed., p. 652. *Kennedy* v. *Kingston*, 2 J. & W. 431.

IMPLICATION PRECLUDED BY EXPRESS GIFT IN SAME EVENT.

An express gift over in default of appointment, in favour of either the objects of the power or any other person, of course precludes all implication, even if the gift over is void for remoteness. But a residuary gift is not a gift over for the purposes of

the foregoing proposition. And a gift over in default of objects of the power does not prevent an implication in their favour from arising.

5th ed., p. 518, 6th ed., *ibid.* *Butler* v. *Gray*, L. R. Ch. 26.

OBJECTS OF POWER AND IMPLIED GIFT MUST BE IDENTICAL.

A gift arising by implication from a power of selection or distribution applies to the persons who are objects of the power, and to them only; and consequently, if the appointment is to be testamentary, the gift takes effect in favour of the objects living at the decease of the donee, to the exclusion of any who may have died in his lifetime, and who of course could not have been made objects of an appointment by will. Consequently if all the objects die in the donee's lifetime, no gift at all can be implied. On the other hand, if the power is exercisable by any writing, the objects of the power will take even if they predecease the donee, unless upon the true construction of the instrument creating the power the objects of it are required to be living at a deferred period, in which case the implied gift in default will also be to those persons only.

1st ed., p. 486, 6th ed., p. 652. *Halfhead* v. *Shepherd*, 28 L. J. Q. B. 248; *Re Phene's Trusts*, L. R. 5 Eq. 346.

And it should seem that a gift arising by implication from a power of selection or distribution in favour of relations, will apply exclusively to the relations living at the death of the donee, even though the power is not in terms confined to an appointment by will. But whether this principle applies except where the donee of the power is also tenant for life, is not clear.

1st ed., p. 486, 6th ed., p. 653. *Wilson* v. *Duguid*, 24 Ch. D. 251.

MODE OF DIVISION.

The persons in whose favour a gift by implication takes effect take as tenants in common in equal shares. In the absence of a trust for conversion out and out, they take the property as they find it.

6th ed., p. 654. *Walter* v. *Maunde*, 19 Ves. 424.

Where a person has a power to direct part of a fund to be applied to charitable purposes and to divide the remainder among the testator's relatives, and the donee of the power dies without having exercised it, the bequest is not void for uncertainty, but the Court will divide the fund in equal moieties, and give half to charitable purposes and half to the testator's relatives.

6th ed., p. 654. *Salusbury* v. *Denton*, 3 K. & J. 529.

If the subject of the implied gift resulting from a power of selection or distribution be real estate of inheritance, the impli-

cation confers an estate in fee, if the power authorises the limitation of estates in fee.

5th ed., p. 520, 6th ed., p. 654. *Bradley* v. *Cartwright*, L. R. 2 C. P. 511.

LIFE INTEREST NOT IMPLIED IN DONEE FROM POWER OF DISTRIBUTION.

Although a power of selection or distribution is usually preceded by the reservation of a life interest to the donee, yet such a gift, where omitted, will not be implied. Thus, it was decided that where a testatrix, after bequeathing her property to her mother, requested her to leave £500 to each of her (the testatrix's) sister A.'s children (and some legacies to other persons), and the remainder to her sister B., "to dispose of among her children as she may think proper," B. herself took no interest.

Ibid. *Blakeney* v. *Blakeney*, 6 Sim. 52.

DISTINCTION WHERE THERE IS A DIRECT GIFT.

But a gift arising by implication must be distinguished from those cases where there is a direct gift to a class, coupled with a power of selection or distribution: in such a case the property vests in all the members of the class, subject to being divested by an exercise of the power, and therefore the gift is not restricted to those members who are living at the decease of the donee.

6th ed., p. 654. *Lambert* v. *Thwaites*, L. R. 2 Eq. 151.

DISCRETIONARY POWER.

A gift is sometimes implied from a power of transferring property to a certain person, or of settling or applying it for his benefit.

6th ed., p. 655. *Wheeler* v. *Warner*, 1 S. & S. 304.

POWER OF DISPOSITION.

But a mere power does not give rise to any gift by implication.

6th ed., p. 655. *Bull* v. *Vardy*, 1 Ves. Jun. 270.

ABSOLUTE INTEREST SUBJECT TO DISCRETIONARY POWER.

The distinction stated above with reference to powers of selection or distribution, applies also to the kind of powers now under consideration.

6th ed., p. 655. *Lancashire* v. *Lancashire*, 1 DeG. & Sm. 288.

IMPLICATION OF ESTATES TAIL.

It remains to consider the implication of estates tail. According to the doctrine which has been the subject of discussion in the second section, it is not to be doubted, that if lands were devised to the testator's heir apparent or heir presumptive in fee in case A. should die without issue, (which, if the will were made before 1838, would import a general failure of issue), this would

make A. tenant in tail, with reversion in fee to the testator's heir—the event described being precisely that which would involve the extinction of an estate tail; and it being impossible to suppose that the testator could intend to make a devise to take effect at a future period, to the very person who would in the absence of disposition take the property by act of law, without intending that it should in the meantime devolve to some other person. The reports, however, do not present exactly such a case.

1st ed., p. 487, 6th ed., p. 657.

WHERE AN EXPRESS ESTATE FOR LIFE CAN BE ENLARGED TO AN ESTATE TAIL BY IMPLICATION.

It has been long settled, however, that a devise in a will which is regulated by the old law, to a person indefinitely, or to a person and his heirs, with a limitation over in case he die without issue, confers an estate tail, on the ground that the testator has, by postponing the ulterior devise until the failure of the issue of the prior devisee, afforded an irresistible inference that he intended that the estate to be taken by the prior devisee under the indefinite devise, should be of such a measure and duration as to fill up the chasm in the disposition, and prevent the failure of the ulterior devise, which, as an executory devise to take effect on a general failure of issue, would, of course, be void for remoteness.

1st ed., p. 490, 6th ed., p. 657.

DEVISE TO A. AND HIS HEIRS, AND IF HE DIE WITHOUT ISSUE, OVER.

A devise, in a will which is governed by the old law, to a person and his heirs, followed by a limitation over in case of his dying without issue, confers an estate tail, on the ground that the testator has, by the words introducing the limitation over, explained himself to have used the word "heirs" in the preceding devise in the qualified and restricted sense of heirs of the body.

1st ed., p. 488, 6th ed., p. 657.

RULE WHERE PERSON WHOSE ISSUE IS REFERRED TO IS HEIR-AT-LAW OF TESTATOR.

And it is to be observed, that where the person, on whose general failure of issue a devise is expressly made expectant, is the heir-at-law of the testator, he becomes, by the application of the rule under consideration, tenant in tail by implication, in precisely the same manner as if there had been a prior devise to him and his heirs in the will.

Jarman, 1st ed., 489-496.

If, however, the person, in default of whose issue the estate is given over (or the person to whom it is so given), be not the

heir-at-law of the testator, and if the former take no prior estate under the will susceptible of enlargement or modification from these words, an estate will not accrue to him by implication; and consequently the devise, to take effect on the contingency in question, is void for remoteness, as an executory devise limited to arise after an indefinite failure of issue.

Jarman, 1st ed., *ibid.*

EFFECT OF STAT. 1 VICT. CH. 26, UPON THE IMPLICATION OF ESTATES TAIL.

No implication of an estate tail can arise from words importing a failure of issue, in a will made or republished since the year 1837, unless an intention to use the phrase as denoting an indefinite failure of issue be very distinctly marked, as the stat. 1 Vict. c. 26, s. 29, provides, that such words shall be held to mean a failure of issue in the lifetime or at the death of the person referred to, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise; and it is also provided, that the act shall not apply to cases where the words import, if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

Jarman, 1st ed., *ibid.*

DISTINCTION WHERE PRIOR DEVISE IS IN FEE OR INDEFINITE, AND WHERE EXPRESSLY FOR LIFE.

Under this clause, coupled with the preceding section, which makes a devise confer an estate in fee without words of inheritance, it will generally happen, in cases in which, according to the old law, the prior devisee would have been tenant in tail, by the effect of words devising over the property on the failure of his issue, that he will, under the new rule of construction, take an estate in fee simple, subject to an executory devise in the event of his dying without leaving issue at his death; and this, no doubt was the effect contemplated and designed by the legislature. A different and less desirable result, however, will occur where the prior devise being expressly for life, will not be enlarged by the statute to a fee simple; while, on the other hand, the words importing a failure of issue will nevertheless be restricted.

Jarman, 1st ed., *ibid.*

Thus, if by a will subsequent to 1837, real estate be devised to A. for life, and in case he should die without issue, to B., A.

will take an estate for life only, with a contingent remainder to B., to take effect in the event of A.'s dying without leaving issue at his decease; whether in such case the issue, if any, living at the decease of A., would take the fee by implication, will remain to be decided.

Jarman, 1st ed., p. 497, *et seq.*

EFFECT WHERE THERE IS NO PRIOR GIFT.

If, in a will which is subject to the new law, property, real or personal, is given in the event of the death without issue of a person to whom no preceding interest is given, the effect is simply to create a contingent gift to take effect on this event, leaving the property in the alternative event undisposed of; for, in such cases there is, of course, the same difficulty in raising an implied gift to the issue living at the death, as where the gift in question is preceded by a life interest in the person whose failure of issue is made the contingency on which such gift is to take effect.

Jarman, 1st ed., *ibid.*

If, however, the devisee on the contingency of the failure of issue of another, were the heir apparent or the heir presumptive of the testator, an argument would arise for implying a fee simple in the parent or ancestor of the issue, in order to avoid the supposition (so stultifying to a testator) that he intends to give to a person at a future time, that which will intermediately devolve to him by act of law, without providing for its destination in the meantime.

Jarman, 1st ed., *ibid.*

ADVANTAGES AND DISADVANTAGES OF THE NEW ENACTMENT.

The chief advantages attending the newly enacted mode of construing words importing a failure of issue are, 1st, that it brings all executory limitations depending on such a contingency within the limit prescribed by the rule against perpetuities (supposing, of course, that the person referred to is existing at or before the death of the testator, or necessarily comes in esse within twenty-one years afterwards), which limitations otherwise were, we have seen, void for remoteness; and this was the inevitable result whenever there was not sufficient ground for implying an estate tail in the first taker; in other words, when the person whose issue was referred to took no estate under the will, and neither he nor the express devisee was the heir-at-law of the testator; and, 2ndly, that by excluding the implication of an estate tail in the person whose issue is so referred to where he takes an estate under the will, or where he or the express

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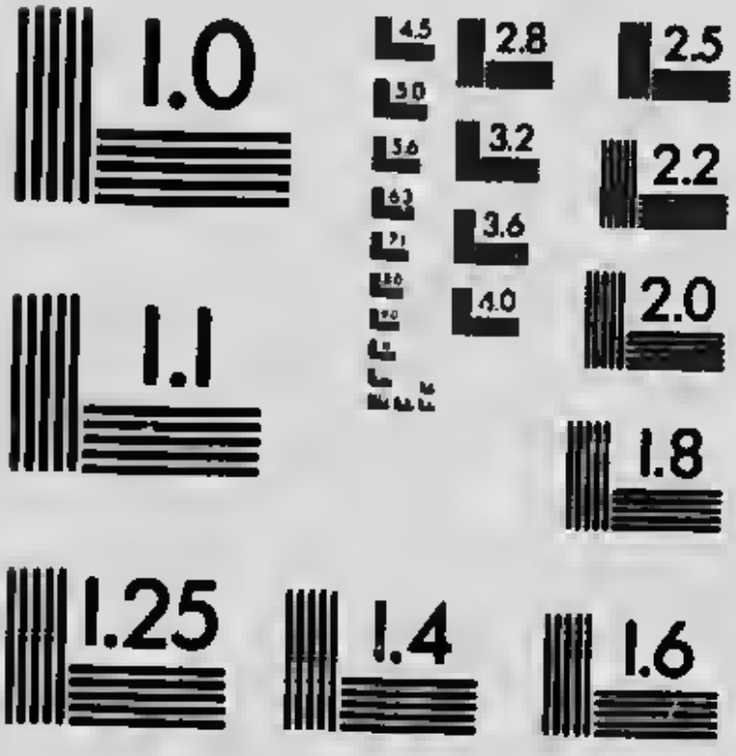

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devisee happens to be the heir-at-law of the testator, the new construction has the effect of exempting the interest of the ulterior devisee from its liability to be defeated or destroyed by the act of the prior devisee; the result being, that instead of the ulterior devisee having (as formerly) a remainder in fee expectant on an estate tail in such prior devisee (which of course the latter might have barred by a disentailing assurance), he takes by executory devise engrafted on a preceding fee simple, to arise on the event of the first devisee dying without leaving issue at his death, the estate of such prior devisee being absolute in the alternative event.

Jarman, 1st ed., *ibid.*

Against these advantages must be set the inconvenience which is consequent on the rejection of the implication of an estate tail in the first taker, where he takes an estate, expressly restricted to life, and therefore not capable of being enlarged by the recent act to a fee simple; in which case, the existence of issue at his death produces, as already shown, a vacancy in the disposition.

Jarman, 1st ed., *ibid.* See *Neville* v. *Thacker*, 23 L. R. Ir. 344.

IMPLICATION OF CROSS-REMAINDERS.

Where lands are devised to several persons as tenants in common in tail, with remainder over, the question arises, whether, upon the determination of the entail in each share, such share devolves upon the other co-devisees in tail, or immediately goes over to the remainderman of the entirety. Such reciprocal limitations to the tenants in common in tail, inter se, are, in professional language, denominated cross-remainders. It is settled that in wills, as distinguished from deeds, they need not be limited expressly (though in correctly drawn wills they are never omitted), but may be implied from the context. To show what expressions have been held, in judicial construction, sufficient to raise such implication, is the object of the present chapter.

1st ed., Vol. II. p. 457. 6th ed., p. 660. This section is Chapter XLII. in the 5th edition, pages 1339-1357.

GENERAL PRINCIPLE OF THE CASES.
WHAT EXPRESSIONS RAISE CROSS-REMAINDERS.

The principle has been long admitted, that wherever real estate is devised to several persons in tail as tenants in common, and it appears to be the testator's intention that not any part is to go over until the failure of the issue of all the tenants in common, they take cross-remainders in tail among themselves. The great struggle has been to determine when the words "in

default of such issue," or other expression, used to connect the devise in tail with the succeeding limitation, may be construed to demonstrate such an intention. In order to place this subject fully before the reader, it will be convenient briefly to trace the steps by which the rule has been gradually placed on, or rather restored to, its present enlarged and liberal footing; and then to state the general conclusions which the cases warrant.

Ibid.

If land is devised to two or more persons as tenants in common in tail, "and if they happen to die without issue," or "in default of such issue," then over, cross-remainders between them will be implied. The same authorities have also settled that the construction is not affected by the number of the devisees, or by the fact that the limitation is to the devisees and the heirs of their "respective" bodies.

Jarman, p. 661. *Hannaford* v. *Hannaford*. L. R. 7 Q. B. 116.

CROSS-REMAINDERS IMPLIED FROM GIFT OVER ON FAILURE OF ISSUE AT DEATH.

Cross-remainders have also been implied where the gift over was on failure of issue at a particular period.

5th ed., p. 1348, 6th ed., p. 662. *Maden* v. *Taylor*, 45 L. J. Ch. 569.

CROSS-REMAINDERS, RAISED BY THE WORDS "REMAINDER" OR "REVERSION."

Cross-remainders were implied from a devise to several persons as tenants in common in tail, "with remainder" over.

6th ed., p. 663. *Doe d. Burden* v. *Burville*, 2 East. 47n. See 1st ed., Vol. II. p. 477.

CROSS-REMAINDERS IMPLIED AMONG DEVISEES FOR LIFE.

Cross-remainders may also be implied among devisees for life.

5th ed., p. 1351, 6th ed., p. 663. *Ashley* v. *Ashley*, 6 Sim. 358.

EXECUTORY TRUSTS.

Cross-remainders are more readily implied in executory trusts than in direct devises.

6th ed., p. 664. *Horne* v. *Barton*, 19 Ves. 398.

WHETHER EXPRESS CROSS-LIMITATION EXCLUDES IMPLICATION.

Cross-remainders could not be implied where there were express cross-limitations among the devisees in tail in certain events.

6th ed., p. 664. *Clache's Case*, Dy. 330b.; *Atkinson* v. *Barton*, 3 D. F. & J. 339; 10 H. L. Ca. 313.

Cross-remainders are to be implied or not to be implied according to the intention. The circumstance of such remainders having been created between the same parties in particular events is a circumstance to be weighed in determining the intention, but is not decisive upon it.

5th ed., p. 1355, 6th ed., p. 666.

IN THE CASE OF EXECUTORY TRUSTS, EXPRESS LIMITATION NOT EXCLUSIVE OF IMPLICATION.

It has been long settled that, in regard to executory trusts, an express direction to insert cross-remainders among another class of objects, or even an express cross-limitation among the same objects, does not exclude the implication.

5th ed., p. 1355, 6th ed., p. 907. *Burnaby* v. *Griffin*, 3 Ves. 274.

CONCLUSIONS FROM THE CASES.

1. Under a devise to several persons in tail, being tenants in common, with a limitation over for want or in default of such issue, cross-remainders are to be implied among the devisees in tail.

2. This rule applies whether the devise be to two persons or a larger number, though it be made to them "respectively," and though in the devise over the testator have not used the words "the said premises," or "all the premises," or "the same," or any other expression denoting that the ulterior devise was to comprise the entire property, and not undivided shares.

3. The rule applies, in regard to executory trusts at least, though there be an express direction to insert cross-remainders among another class of objects, or a limitation over among some of the same objects; and even in direct devises an express limitation of cross-remainders among another class of objects has been held not to repel the implication.

4. The word "remainder," following a devise to several in tail will raise cross-remainders among them.

5. It is no objection to the implication of cross-remainders that there is an inequality among the devisees whose issue is referred to; some of them being tenants in tail, and others tenants for life, with remainder to their issue in tail.

6. A devise to the children of A. for life and for want and in default of such issue then over, creates cross-remainders by implication for life among such devisees.

These "conclusions" are taken from the first ed., vol. II. p. 479.

CROSS-EXECUTORY LIMITATIONS NOT TO BE IMPLIED.

The question whether cross-executory limitations can be implied among devisees in fee, arises when real estate is devised to several persons in fee, with a limitation over in case they all die under a given age, or under any other prescribed circumstances; in which case it is by no means to be taken as a necessary consequence of the doctrine respecting the implication of cross-remainders among devisees in tail, discussed in the last chapter, that re-

ciprocal executory limitations will be implied among such devisees in fee. The principal difference between the two cases seems to be this:—In the case of a devise to several persons in tail, assuming the intention to be clear that the estate is not to go over to the remainder man until all the devisees shall have died without issue, the effect of not implying cross-remainders among the tenants in tail would be to produce a chasm in the limitations, inasmuch as some of the estates tail might be spent, while the ulterior devise could not take effect until the failure of all. On the other hand, in the case of limitations in fee of the realty, and of absolute interests in personalty (both which are clearly governed by the same principle), as the primary gift includes the testator's whole estate or interest, and that interest remains in the objects in every event upon which it is not divested, a partial intestacy can never arise for want of a limitation over.

1st ed., Vol. II. p. 481. 6th ed., p. 669.

To introduce cross-limitations among the devisees in such a case would be to divest a clear absolute gift upon reasoning merely conjectural; for the argument, that the testator could not intend the retention of the property by the respective devisees to depend upon the prescribed event not happening to the whole, however plausible, scarcely amounts to more than conjecture. He may have such an intention; and if not, the wer is, voluit sed non dixit.

Ibid.

If, therefore, a gift is made to several persons in fee-simple as tenants in common, with a limitation over in case they all die under age, the share of one of the devisees dying during minority will devolve upon h' representatives, unless and until the whole die under age.

Ibid.

WHERE INTERESTS ARE VESTED.

The general principle therefore is, that if a testator gives the whole of his interest in land or personalty to several persons as tenants in common, in such a way that they take vested interests, with a gift over upon the death of all in certain events, cross-limitations will not be implied, because in no case can there be a partial intestacy.

6th ed., p. 670. *Edwards* v. *Tuck*, 23 Bea. 268.

CLASS GIFT.

So in the case of a contingent gift to a class—as where property is given to such of the children of A. as attain twenty-one,

with a gift over in the event of A. not having any child who attains twenty-one—the property either goes to those who acquire vested interests, or it passes under the gift over, and no question of implying cross-limitations can arise.

6th ed., p. 670. *Mair* v. *Quilter*, 2 Y. & C. C. C. 465.

CONTINGENT GIFT TO SEVERAL NOMINATIM.

But if the gift is to two or more named persons as tenants in common, and the interests given are contingent, with a gift over in the event of all dying before their interests become vested, the event of one dying before attaining a vested interest is not provided for, and this affords a ground for implying cross-limitations to supply the gap.

6th ed., p. 670. *Graves* v. *Waters*, 10 Ir. Eq. R. 234.

GIFT TO SEVERAL FOR LIFE, WITH REMAINDER TO ISSUE.

Again, where property is given to several named persons as tenants in common during their respective lives, with separate remainders to their issue, and if they all die without leaving issue, then over, cross-limitations will be implied between the primary legatees (or devisees) and their families.

6th ed., p. 670. *Re Ridge's Trusts*, L. R. 7 Ch. 665.

VESTED INTEREST NOT DIVESTED.

But cross-limitations will not be implied so as to divest a vested interest.

6th ed., p. 671. *Turner* v. *Frederick*, 5 Sim. 466.

RULES AS TO IMPLICATION OF CROSS-LIMITATIONS.

Cross executory limitations in the case of personal estate, like cross-remainders of real estate, are only implied to fill up a hiatus in the limitations, which seems from the context to have been unintentional.

They cannot be implied—as of course cross-remainders could not— to divest an interest given by the will.

The existence of other cross-limitations between different persons does not prevent the implication.

But where such express cross-limitations are in favour of the very persons to whom the implied cross-limitations would convey the property, that circumstance is of weight in determining the intention.

Instances in which such a gap occurs are:—

"(*a*) Where there is a gift to several named persons for their respective lives as tenants in common, and a gift over after the death of the survivor:

"(*b*) Where in a similar gift there are limitations over of the shares of the tenant for life to their respective children or issue for limited interests, as for life or in tail, and then a gift over on failure of issue of them all:

"(*c*) And generally where, there being such a gift over, the preceding limitations do not provide for every event except that contemplated by the gift over, but leave some gap which would occasion an intestacy as to part of the estate."

6th ed., p. 672. *Per Curiam. Re Hudson*, 20 Ch. D. 406.

ESTATE TAIL NOT IMPLIED FROM WORDS REFERRING TO ISSUE AT DEATH.

Even under the old law, where land was devised to a person for life, with a devise over to take effect in the event of his dying without issue living at his death, this had no effect in enlarging his estate for life into an estate tail, because the event described is not that by which an estate tail is necessarily extinguished, for such an estate determines on the failure of issue at any time. The only question, in such a case, would be, whether the words would raise an estate by implication in the issue living at the death.

1st ed., p. 490, 6th ed., p. 673. *Jenkins* v. *Hughes*, 8 H. L. C. 593.

AS TO IMPLYING AN ESTATE IN THE ISSUE.

The effect of sect. 29 of the Wills Act, as already mentioned is that if real estate is devised to A. for life and in case he should die without issue, to B., A. will take an estate for life only, with a contingent remainder to B., to take effect in the event of A.'s dying without leaving issue at his decease. Whether in such case the issue, if any, living at the decease of A. would take the fee by implication, will remain to be decided. Such a construction would certainly be convenient, as avoiding the palpable absurdity of making the estate of the ulterior devisee depend on the contingency of there not being issue; and yet, in the alternative event, given the property neither to A. himself, nor to such issue, but leaving it to devolve to the heir-at-law or residuary devisee (as the case may be) of the testator. There is, however, no authority for implying an estate in the issue living at the death, and the contrary conclusion seems rather more consistent with principle.

1st ed., p. 490, 6th ed., p. 674. *Moneypenny* v. *Dering*, 7 Hare 588. Section 29 (section 33 of the Ontario Wills Act) is referred to ante page 326.

PERSONAL ESTATE.

If a sum of money is bequeathed to A. B. for life, and if he dies leaving no issue, then to another, that does not raise any implication in favour of the issue of A. B.; though, if he dies leaving issue, the gift over does not take effect.

6th ed., p. 674. *Per Curiam Greene* v. *Ward*, 1 Russ. 262. *Ranelagh* v. *Ranelagh*, 12 Bea. 200.

The same rule applies where an absolute interest, and not merely an estate for life, is given.

6th ed., p. 674. *Dowling* v. *Dowling*, L. R. 1 Eq. 442.

LAPSE.

The rule also applies even where the testator obviously intends to guard against lapse.

6th ed., p. 675. *Cooper* v. *Pitcher*, 4 Ha. 485.

AS TO IMPLYING GIFTS TO CHILDREN FROM DEVISE OVER IN DEFAULT OF THEM.

As no implied estate [to the issue] arises (as we have seen) from a limitation over in case of the prior devisee or legatee dying without leaving issue at his decease, it should seem that there is the same absence of authorized ground for implying a gift to children from a similar limitation over in default of these objects.

1st ed., Vol. I. p. 499, 6th ed., p. 675.

Accordingly, in several cases, it has been considered that a bequest to a person, and if he shall die without having children, or without leaving children (which means without having had a child born, or without leaving a child living at his decease), does not raise an implied gift in the children; but the parent takes an absolute interest, defeasible on his dying without having had, or without leaving a child, as the case may be. The rejection of the implication in such a case is not (as already pointed out) productive of any absurdity; for it supposes the testator, by making the interest of the legatee indefeasible on his having or leaving a child, to intend that if there are children, he shall have the means of providing for them.

Ibid. *Doe d. Burnfield* v. *Wetton*, 2 B. & P. 324.

WHERE THE PRIOR GIFT TO THE PARENT IS EXPRESSLY FOR LIFE.

But it seems that where the language of the will necessarily confines the interest of the parent to his life, the Courts will lay hold of slight circumstances to raise a gift in the children, and thereby avoid imputing to the testator so extraordinary an intention as that the devisee or legatee over is to become entitled if the first taker have no child, but that the property is not to go to the child, if there be one, or its parent.

Ibid. *Ex parte Rogers*, 2 Mad. 449.

It follows from the general rule as above stated, that if a testator bequeaths property to A., "but if he shall die in my lifetime without leaving children," then to B., and A. dies in the testator's lifetime leaving children, they take nothing by implication.

6th ed., p. 677. *Cooper* v. *Pitcher*, 4 Ha. 485. *McClean* v. *Simpson*, 19 L. R. Ir. 528.

IMPLICATION ARISING FROM A SERIES OF LIMITATIONS.

Where a will contains a series of limitations, or trusts, in favour of a class of persons, such as the testator's own children, or the children of another person, or even in favour of persons who are strangers in blood to one another, from which it appears that the testator intended the limitations or trusts to be similar, words may be supplied to produce this result. The cases have been already considered.

6th ed., p. 678. *Mellor* v. *Daintree*, 33 Ch. D. 198.

BENEFICIAL GIFT TO EXECUTOR.

The cases in which executors take the residue of their testator's estate for their own benefit, without any gift to them, are considered elsewhere.

See Chapter XXI., and page 249.

DEVISE TO EXECUTORS IMPLIED FROM TRUST FOR SALE.

Before the Land Transfer Act, 1897, if a testator directed (expressly or impliedly) that his land should be sold, and appointed executors to act in carrying out the intentions of his will, this gave them the legal estate, and they could make a good title on the sale.

6th ed., p. 679. *Davies to Jones and Evans*, 24 Ch. D. 190.

TRUST FOR CONVERSION NOT EXECUTED.

Where a testator gives property upon trust for sale, and directs the proceeds of sale to be invested, and the proceeds to be paid to A. for life, with power to postpone conversion, the general rule is that, until conversion, A. is by implication entitled to the income of the unconverted property.

See Chapter XXII.

TRUST FOR SALE NOT IMPLIED.

A gift of property to A. absolutely, followed by a direction that on any sale of it A. shall pay B. 1,000*l.* out of the proceeds, does not create any implied trust or obligation to sell.

6th ed., p. 679. *Re Elliott*, 12 Times L. R. 497.

CONJECTURE NOT SUFFICIENT.

Except in those cases in which a definite rule of construction has been established, a gift will not be implied from mere conjecture, however probable it may be that if the contingency had been brought to the testator's mind he would have provided for it.

6th ed., p. 679. *Morrison* v. *Morrison*, 2 Y. & C. C. C. 652.

IMPLICATION OF GIFT TO NEXT-OF-KIN, &C.

If a testator declares that his heir-at-law shall not take any part of his real estate, or that none of his next-of-kin shall take any part of his personal estate, this is nugatory and void, and can-

not operate by implication so as to give the Crown a right to the real or personal estate.

6th ed., p. 679. *Pickering* v. *Lord Stamford*, 3 Ves. 492.

But a declaration excluding one or some only of the next-of-kin, if made in clear and appropriate language, is valid, and operates as a gift by implication to the rest of the share of those who are excluded. The question whether the widow of a testator is excluded from participation in undisposed-of personalty by a provision being made for her in satisfaction of all claims on the testator's estate, is discussed elsewhere.

6th ed., p. 679. *Bund* v. *Green*, 12 Ch. D. 819, Chapter XVI.

DEVISE OF EASEMENT BY IMPLICATION.

There may be an implied gift of an easement by a devise of land, corresponding to an implied grant by deed. Thus, if the owner of land devises part of it to A. and part to B., and B. can only reach his part by going over A.'s part, he is entitled, by implication, to use a way used by the testator for the purpose of access to the land during his lifetime.

6th ed., p. 680. *Pearson* v. *Spencer*, 3 B. & S. 761.

EXCLUSION BY IMPLICATION.

Where there is a gift to persons as a class, the question sometimes arises whether a particular person is excluded from the class, by implication from the context.

6th ed., p. 680. *Reay* v. *Rawlinson*, 29 Bea. 88.

Posthumous Child.—Only the children in existence or in gremio at the death of a testator take when the division is not to be postponed to a later date. But see *Cunningham* v. *Merry*, 1 Deg. & Sm. 372; *Re Byer*, 11 O. W. R. 885.

Trust Estate.—Where a testator held certain lands as a trustee, to secure a debt due him, and devised the residue of his property to his executors, except such parts thereof as might at his decease be vested in him upon any trusts or by way of mortgage, and then, by a subsequent devise, all the residue of his estate, real and personal, to J. M. (whom he also appointed one of his executors), and his heirs absolutely:—Held, that under the second devise the legal estate in the property held in trust passed to J. M. Held, also, that J. M. and the executors could by their deed pass all the legal and equitable interest in the trust estate sold. *Re Charles*, 4 Ch. Ch. 19.

A testator, by his will, provided as follows:—"I leave and bequeath to my lawful wedded wife, M.E., all my personal property, as also the sole control and management of my real estate. I leave and bequeath the aforesaid estate to my son J.C., after my wife's death, and the said estate is not to be sold or mortgaged by my son J. C., but is to belong to his heirs." Held, that J. C. took an estate in fee tail in remainder after an implied life estate in his mother, M.E., subject to certain charges. *Re Colliton and Landergan*, 15 O. R. 471.

The will contained a residuary bequest as follows: "Divide the proceeds among friends, relatives and labourers in the Lord's work according to the judgment of my executors:—Held, that the residuary bequest was void as too indefinite, and that the executors took the property in trust for the next of kin of the appointor and not beneficially. *Re Wilson*, 30 O. R. 553.

Will contained certain clauses by which testator gave his executors a general power of appointment. Clause 10 was as follows: "I also give my said executors power and desire them to dispose of any balance of my estate . . to the best of their judgment, where they may consider it will do the most good and deserving." Held, that it was an absolute power of appointment, which the executors might exercise in favour of themselves or any other person or persons; and the heirs or next of kin could not successfully, as upon an intestacy, make any claim upon the residue, unless in case of default of appointment. *Higginson* v. *Kerr*, 30 O. R. 62.

A testator devised to four nephews and a grand-nephew, their heirs, executors, administrators and assigns, all his real and personal property, share and share alike, upon trust that they, or the survivors or survivor of them, should, out of the same "suitable and well" support his wife during her natural life in as comfortable a position as she was then in with him. He appointed his said four nephews executors of his will. The plaintiff and the defendants, the said devisees and the other defendants were all nephews and nieces of the testator and would have been entitled to share in the estate in case of the testator dying intestate. The testator's wife died before him. Held, that the devisees took the beneficial interest in the estate, real and personal, share and share alike. *Ballard* v. *Storer*, 14 O. R. 133.

Beneficial Interest.—When property is bequeathed to executors on trusts which are too uncertain for execution, the executors are not beneficially entitled. *Davidson* v. *Boomer*, 15 Chy. 1.

Where a will does not dispose of the whole personalty, the executors are trustees for the next of kin, unless the will expressly shows that the testator intended they should take the residue beneficially. *Thorpe* v. *Shillington*, 15 Chy. 85.

Testator directed as to the residue of his property: "I give, devise, and dispose thereof as follows, that is to say: my will is, that my wife, S.W., shall have full power and control over all my freehold and personal property; that she, my executrix, her assigns forever, may have unlimited power to deed, bargain, alienate, or transfer, for ever, all or any part of my said property; and further, any deed, transfer, or conveyance, made by my said executrix for my said property, or any part thereof, shall be valid and sufficient to the purchaser or purchasers, his or their heirs and assigns, for ever," and nominated his wife sole executrix of his will:—Held, that the widow took the residue beneficially. *Lyon* v. *Blott*, 16 Chy. 368.

Section 57 of the Trustee Act, Ont. Acts 1911, chapter 26, is as follows:—

57 (1) When a person dies having by will appointed an executor, such executor, in respect of any residue not expressly disposed of, shall be deemed to be a trustee for the person (if any) who would be entitled to the estate under The Devolution of Estates Act in case of an intestacy, unless it appears by the will that the executor was intended to take such residue beneficially. Imp. Act, 11 Geo. IV. and 1 W. IV. c. 40, s. 1.

(2) Nothing in this section shall prejudice any right in respect of any residue not expressly disposed of, to which, if this Act had not been passed, an executor would have been entitled where there is not any person who would be entitled to the testator's estate under The Devolution of Estates Act in case of an intestacy. Imp. Act, 11 Geo. IV. and 1 W. IV. c. 40, s. 2.

CHAPTER XX.

GIFTS BY REFERENCE.*

Personal Estate Bequeathed so as to Follow Real Estate.

Leaseholds or chattels personal are sometimes bequeathed to or in trust for "such person or persons as shall be entitled to" certain real estate, either under the same will, or under some other settlement. The most important cases of this description occur where the real estate is limited by way of strict settlement, and in such cases the only question which usually arises is as to the time when and the person in whom the leaseholds or chattels absolutely vest This question is discussed later.

6th ed., p. 681. See post page 341.

Cases also happen where the real estate is not devised in strict settlement, but is subject to simpler limitations, as where it is settled on a person for life, with remainder to his children absolutely. In such cases the question arises how far the rules governing devises of land apply to the leaseholds or chattels.

6th ed., p. 681. *Holmes* v. *Prescott*, 33 L. J. Ch. 264.

Interim Income of Leaseholds Bequeathed so as to Follow Real Estate.

Where leaseholds are bequeathed to follow real estate, and there is a gap in the limitations, so that the vesting of the real estate is suspended, the interim income of the leaseholds in accordance with the general rule stated elsewhere falls into residue.

6th ed., p. 682. *Hodgson* v. *Bective*, 1 H. & M. 376.
See Chapters XXV., XXIX.

Exception from Gift of Person "Entitled" to Other Property.

Personal property is sometimes given to a class of persons, with the exception of any member who becomes entitled to certain specified property. It seems that as a general rule such a clause will be construed in the same way as if it were a shifting clause, or clause of forfeiture; that is to say, the words will be construed according to their primary and natural meaning.

6th ed., p. 683. *Law Union* v. *Hill* (1902), A. C. 263.

But a different principle of construction applies in the case of portions under a settlement, for if the portions are limited by a person in loco parentis, in favour of children, except an eldest

*This chapter is new in the 6th edition. It includes one section of Chapter XLIV. of the 5th edition.

son, becoming entitled to the estate under the settlement, the doctrine of Chadwick v. Doleman applies.

6th ed., p. 683. *Chadwick* v. *Doleman*, 2 Vern. 528.

MEANING OF "ENTITLED."

"Entitled" prima facie means "entitled in possession," but in a case where the personalty was reversionary the exception of a child "entitled on his father's decease" was held to exclude a son who became entitled in possession to the realty before the remainder fell in, although on his father's death he was only entitled in remainder.

5th ed., p. 1000 note, 6th ed., p. 683. *Re Gryll's Trusts*, L. R. 6 Eq. 580.

CONSTRUCTION OF GIFT BY REFERENCE.

As a general rule it seems that the Court must follow strictly the terms of a gift by reference, if they are explicit, although the result may be contrary to the testator's p bable intention; but if the gift is by way of executory trust, Court may vary the limitations.

6th ed., p.684. *Miles* v. *Harford*, 12 Ch. D. 691.

GIFT BY REFERENCE DOES NOT HAVE THE EFFECT OF DUPLICATING CHARGES.

Testators frequently devise real property to the uses upon the trusts and subject to the powers and limitations of an existing settlement. Such a devise, when carefully drawn, will contain the words "but not so as to increase or multiply charges or powers of charging"; but without these, or similar words, it is reasonably evident that this in the intention of the testator, and it may be laid down as a general rule (applicable not only to devises of realty, but also to gifts of personalty upon the trusts of an existing settlement) that such referential expressions will not in general be construed so as to give them the general effect of multiplying charges upon the trust estate or trusts in the nature of charges.

6th ed., p. 684. *Hindle* v. *Taylor*, 5 D. M. & G. 577.

But it is clear that this rule does not apply where the charge or power of charging is not limited to a fixed amount, but is limited to a certain proportion of the value of the capital or income of the property.

6th ed., p. 685. *Cooper* v. *Macdonald*, L. R. 16 Eq. 258.

"CAPABLE OF TAKING EFFECT."

Where a testator devises or appoints property upon the uses of an existing settlement, or such of them as are "capable of taking effect," and some of the uses or trusts of the existing settlement have failed by reason of their infringing the rule against perpetuities, or for some other reason founded in law and not in the actual

facts which have happened, it is seen that the phrase "capable of taking effect" is prima facie open to two constructions: (1) as meaning what the law allows to take effect, or (2) as referring to the trust which by reason of the deaths of parties and other intervening circumstances are still, in fact, existing, or capable of coming into existence.

On a literal and grammatical construction the phrase was read not merely to comprehend what is existing or possible in fact, but also to what is allowable in law.

6th ed., p. 686. *Re Finch and Chew's Contract* (1903), 2 Ch. 486.

POWER OF APPOINTMENT.

Where personalty is given upon such trusts as will best correspond with the trusts declared of certain real estate, and there is a power of appointment over the real estate exercisable by A., this does not operate to give A. two powers of appointment, one over the personalty and one over the realty, but upon A. making an appointment of the real estate the personalty goes to the person who gets the real estate.

6th ed., p. 686. *Liddell* v. *Liddell*, 74 L. T. 105.

MEANING OF "IN THE SAME MANNER," &C.

Where there is an absolute gift, coupled with referential expressions, such as "in the same manner," such expressions, in general, determine not who shall take a legacy, but how the legatee shall take. For instance, where a legacy is given to such of a class as are living at the death of the testator equally as tenants in common, and then follows a gift to the children of A. "in the same manner," all the children of A. take, whether living at that time or born afterwards; otherwise if the words be "at the same time and in the same manner."

5th ed., p. 701 note, 6th ed., p. 687. *Swift* v. *Swift*, 32 L. J. Ch. 479.

A gift of residue in trust for A. and B., "to be divided between them share and share alike, and to be paid and applied in like manner for their use and benefit as I have directed, the rents and profits of my leasehold premises hereinbefore settled upon them," was held not to settle the residue, but only to give the residue for the separate use of A. and B.

5th ed., same note, 6th ed., p. 688. *Shanley* v. *Baker*, 4 Ves. 732.

"AS AFORESAID," CONSTRUED.—*Sibley* v. *Perry*, 7 Ves. 522; *Meredith* v. *Meredith*, 10 East. 503; *Weddell* v. *Mundy*, 6 Ves. 341.

"AS STATED ABOVE."—*Re Kendall's Trusts*, 14 Bea. 608.

"SO."—*Dillon* v. *Harris*, 4 Bli. N. S. 321.

"SUCH."—*Stolworthy* v. *Sancroft*, 12 W. R. 635.

It frequently happens that the word "such" is inaccurately used, and must be either rejected or modified, in order to carry out the intention of the testator.

6th ed., p. 690. *Howgrave* v. *Cartier*, 3 V. & B. 79; *Re Hutchinson*, 55 L. J. Ch. 574. See Chapter XLVII.

Where a testator devises specific realty to the uses of an existing settlement which contains an ultimate limitation to the testator and his heirs, the specific devise does not include this ultimate limitation. If the uses of the settlement fail the real estate specifically devised by the testator reverts to him and passes under the residuary devise.

6th ed., p. 691. *Jacob* v. *Jacob*, 78 L. T. 451.

AS TO ANNEXING PERSONAL TO REAL ESTATE, DEVISED IN STRICT SETTLEMENT.

When it is intended that leasehold estates, or personal chattels in the nature of heirlooms, shall go with lands devised in strict settlement, they should not be simply subjected to the same limitations; the effect of that being to vest the personal property absolutely in the first tenant in tail, though he should happen to die within an hour after his birth; and, as the freehold lands in that event pass over to the next remainder man, a separation between them and the chattels takes place; but the personal property should be limited over, in case any such tenants in tail (being the sons of persons in esse) should die under twenty-one and without inheritable issue, to the person upon whom the freehold lands will devolve in that event; or, which is the more usual mode, the personalty should be subjected to the same limitations as the freeholds, with a declaration that it shall not vest absolutely in the tenant in tail until twenty-one, or death under that age, leaving issue inheritable under the entail.

1st ed., Vol. II. p. 507, 5th ed., p. 1382. *Scarsdale* v. *Curzon*, 1 J & H. 40.

MODERN FORM OF TRUST FOR ANNEXING CHATTELS TO SETTLED REALTY.

Notwithstanding the provisions recommended above, a separation of the chattels from the lands will nevertheless occur (whichever form is used) if the tenant in tail should die under twenty-one leaving inheritable issue; for in that case he would take the chattels absolutely, while the lands would descend to the issue. To prevent this separation, the declaration should be that the chattels shall not vest absolutely in any tenant in tail by purchase who may die under twenty-one, but shall at his death devolve as nearly as possible in the same manner as the lands. Under this (which is now the ordinary) declaration the issue will take the whole of the

chattels by purchase instead of such share or interest only as he may be entitled to as of kin to the ancestor.

6th ed., p. 693. *Re Walker* (1908), 2 Ch. 705. "By purchase" necessary, ante page 168. Chapter X.

How far Remoteness Obviated by Words "so Long as the Law Permits."

The words "so long as the rules of law will permit," though ineffectual to make the trust executory, or to correct a gift which in terms infringes the rule against perpetuity, may, it seems, fairly be referred to where the terms are ambiguous, in aid of a construction which will not be obnoxious to that rule.

5th ed., p. 1385, 6th ed., p. 696. *Harrington* v. *Harrington*, 5 H. L. 102, 107.

Reference to Actual Possession.

Where chattels are bequeathed to trustees upon trust to permit the same to be enjoyed by the person for the time being in the actual possession of real estates settled by the will, a tenant in tail who predeceases the tenant for life does not become entitled to the chattels; but unless the intention is plain that no person shall take the chattels absolutely who does not live to become entitled to the possession of the real estate, "the Court will not introduce in such cases the restrictions which conveyancers know how to introduce with apt words."

6th ed., p. 699. *Re Angerstein* (1895), 2 Ch. 883.

CHAPTER XXI.

PARTIAL INTESTACY AND RESULTING TRUSTS.

Intestacy, How Caused.

Total intestacy is generally the result of a person dying without leaving a valid will, but it may also occur if a person makes a will which is properly executed but becomes wholly inoperative; as where the sole legatee and executor predeceases the testator. If all the persons to whom beneficial interests are given by the will die in the testator's lifetime, but the executor survives and proves the will, there is no intestacy as to the legal estate, but there is a total intestacy as to the beneficial interest. Where a will effectually disposes of the beneficial interest in part of the testator's property, but contains no express or implied gift of the residue, or where the testator excepts certain property from the residuary gift, or the residuary gift fails to take effect, wholly or partially, by revocation, lapse, or otherwise, there is a partial intestacy.

6th ed., p. 701. *Re Ford* (1902), 2 Ch. 605; *Skrymsher* v. *Northcote*, 1 Sw. 566.

Intermediate Income.

As will be pointed out later, there is a difference between real and personal estate as regards the operation of a residuary gift, for if a residuary devise is contingent or future, the intermediate rents do not pass by the devise, but go to the heir. But a contingent or future gift of residuary personalty, or of a mixed residue of realty and personalty, carries the intermediate income.

6th ed., p. 701. *Brown* v. *Burdett*, 21 Ch. D. 667. See Chapter XXIX.

Effect of Declaration Without Disposition.

The general rule is that a testator cannot by a mere declaration alter the mode of devolution prescribed by law in case of intestacy: "You cannot exclude an heir at law or next of kin but by giving to somebody else."

6th ed., p. 702. *Johnson* v. *Johnson*, 4 Bea. 318. See 1st ed., p. 293 et seq. Ante page 202.

Exclusion of Individual.

A declaration by a testator that A. shall not take any share of the testator's property, may operate as a gift by implication of the share which A. would otherwise have taken, to the other

persons entitled to the testator's undisposed of property, if the intention is clear.

6th ed., p. 703.

EFFECT WHEN WILL LEAVES PROPERTY PARTIALLY UNDISPOSED OF. TRUST RESULTS TO THE HEIR, WHEN.

If a will fails to make an effectual and complete disposition of the whole of the testator's real and personal estate, of course the undisposed-of interest, whether legal or equitable, devolves to the person or persons on whom the law, in the absence of disposition, casts that species of property. It is clear, therefore, that where real estate is devised in fee, upon trust for a person incapable of taking, or who is not sufficiently defined, or who dies in the testator's lifetime, or who disclaims the estate, the beneficial interest in the estate so devised results to the heir at law.

1st ed., p. 502, 6th ed., p. 704.

If land is devised to A. subject to a charge or a term of years, and the charge or term fails, A. takes the benefit of the failure. But if land is devised to A., subject to an exception out of it of some interest in favour of B., and the gift to B. fails, then the excepted interest goes by way of resulting trust to the heir or residuary devisee. If it is a chattel interest, the heir takes it as personalty.

6th ed., p. 705. See page 345.

On the same principle, where lands are devised upon trust for particular purposes, as for payment of debts, or with a direction to pay the rents to A. for life, and no further trust is declared, all the unexhausted beneficial interest results to the heir, as real estate undisposed of.

1st ed., p. 502, 6th ed., p. 705. *Re Sanderson's Trusts*, 3 K. & J. 497. *Re Cameron*, 26 Ch. D. 19.

QUESTION WHETHER DEVISEES TAKE BENEFICIALLY OR NOT.

This doctrine is so well settled, that if the character of trustee be plainly and unequivocally affixed to the devisee, no question can at this day be raised respecting its application; but the difficulty in these cases generally is, to determine whether it is intended that the interest in the land, ultra the purpose to which it is devoted, shall belong to the devisees in a fiduciary character, or for their own benefit.

1st ed., *ibid.*, 6th ed., p. 706. *King* v. *Denison*, 1 V. & B. 272.

If I give to A. and his heirs all my real estate, charged with my debts, that is a devise for a particular purpose, but not for that purpose only; if the devise is upon trust to pay my debts, that is a devise for a particular purpose, and nothing more. And

the effect of these two modes admits just this difference: the former is a devise of an estate of inheritance, for the purpose of giving the devisee the beneficial interest, subject to a particular purpose; the latter is a devise for a particular purpose, with no intention to give him any beneficial interest. Where, therefore, the whole legal estate is given for the purpose of satisfying trusts expressed, and those trusts do not, in their execution, exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir. But where the whole legal interest is given for a particular purpose, with an intention to give to the devisee the beneficial interest, if the whole is not exhausted by that particular purpose, the surplus goes to the devisee, as it is intended to be given to him.

6th ed., p. 706. *Per Cur. King* v. *Denison*, 1 V. & B. 272; *Croome* v. *Croome*, 61 L. T. 814.

It is clear that where lands are devised upon trust for sale, the resulting trust in favour of the heir is not repelled by a mere bequest to him of a sum of money payable out of the proceeds.

1st ed., p. 505, 6th ed., p. 707.

As to Chattel Interest Devolving Upon the Heir.

And here it may be observed, that where the portion of real estate left undisposed of is a chattel interest, it devolves upon the heir as personalty, and is transmissible to his peronal representative.

1st ed., p. 506, 6th ed., p. 708. *Sewell* v. *Denny*, 10 Beav. 315; *Hill* v. *Bishop of London*, 1 Atk. 618.

Cases in Which a Trust Was Held Not to Result.

The general rule that, where lands are devised for a particular purpose, what remains after that purpose is satisfied, results, admits of several exceptions. If J. S. devise lands to H., to sell them to B. for the particular advantage of B., that advantage is the only purpose to be served, according to the intent of the testator, and to he satisfied by the mere act of selling, let the money go where it will; yet there is no precedent for a resulting trust in such a case. Nor is there any warrant, from the words or intent of the testator, to say that this devise severs the beneficial interest: it is only an injunction on the devisee to enjoy the thing devised in a particular manner. If A. devises lauds to J. S., to sell for the best price to B., or to lease for three years at such a fine, there is no resulting trust.

6th ed., p. 709. *Per Cur. Hill* v. *Bishop of London*, 1 Atk. 618.

Effect of Expressions Importing Benefit to the Devisee.

The resulting trust for the heir, in lands devised for a particular purpose, is excluded, where the devise contains expressions importing an intention to confer on the devisee a benefit.

1st ed., p. 508, 6th ed., p. 710.

No Trust, though Word "Trust" Used.

Where the gift to the devisee was in the first instance expressly upon trust, and the trust afterwards declared did not absorb the whole property, yet, on the whole, the testator having described the devisee as his most dutiful and respectful nephew, and having expressly declared that the heir should take nothing except a provision made for him by the will, it was held that the devisee took beneficially subject to the trusts declared.

6th ed., p. 711. See 1st ed., p. 500. *Hughes* v. *Evans*, 13 Sim. 496.

As to Resulting Trust in Lands Given to Charity.

It should be noticed that an exception to the doctrine of resulting trusts exists in regard to gifts to charity; the rule being, that where lands, or the rents of lands, are given to charitable purposes, which at the time exhaust, or are represented to exhaust, the whole rents, and those rents increase in amount, the excess arising from such augmentation shall be appropriated to charity, and not go, by way of resulting trust, to the heir-at-law.

1st ed., p. 512, 6th ed., p. 712. *Att.-Gen.* v. *Wax Chandler's Company*, L. R. 6 H. L. 1.

But, if a man give an estate to trustees, and take notice that the payments are less than the amount of the rents, no case has gone so far as to say that the cestui que trust, even in the case of a charity, is entitled to the surplus. There would either be a resulting trust, or it would belong to the person who takes the estate.

Ibid. Per Cur. Att.-Gen. v. *Mayor of Bristol*, 2 J. & W. 307.

And if a testator gives property to a corporation, as to a specific part of the income upon charitable trusts, and as to the residue of the income (specifying the amount) for the benefit of the corporation, and the income afterwards increases, the increase will be apportioned. But the gift may be so expressed that the corporation takes the whole income, subject to the payment thereout of certain definite sums for charity, and in that case any increase in the income goes to the corporation.

6th ed., p. 713. *Att.-Gen.* v. *Cordwainers' Co.*, 3 My. & K. 534.

Two Sets of Trustees.

Where there are two sets of trustees and all the beneficial trusts fail, the question may arise which set of trustees is entitled to the legal estate, and the advantages accruing from it.

6th ed., p. 714. *Onslow* v. *Wallis*, 1 Mac. & G. 506.

If a will fails to make an effectual and complete disposition of the whole of the testator's real and personal estate, of course the undisposed-of interest, whether legal or equitable, devolves to

the person or persons on whom the law, in the absence of disposition, casts that species of property. Thus where a testator gives his real and personal estate upon trust for conversion, and only partially disposes of the beneficial interest, there is a resulting trust for the next of kin of the undisposed of residue, so far as it arises from the personal estate. The same rule applies where there is a trust for the conversion of money into land, and the objects for which conversion is directed partly fail.

Ante page 344.

CHARGE ON REAL ESTATE.

Where a testator is entitled to a sum of money charged on real estate, and raisable for his benefit in any event, it is personal estate, and if part of it is undisposed of, it goes to his next of kin and does not sink for the benefit of the estate. But if the testator is entitled both to the estate and to the charge, and makes a disposition of the estate, it is a question of intention whether the charge merges in the estate, or is kept alive for the benefit of the testator's personal estate.

6th ed., p. 714. *Simmons* v. *Pitt*, L. R. 8 Ch. 978.

WHEN EXECUTOR TRUSTEE OF UNDISPOSED OF RESIDUE FOR NEXT OF KIN.

Before the passing of the Executors Act, 1830, the presumption was that if a testator appointed an executor, he meant him to take beneficially all personal property not disposed of by the will. Since the act, an executor is a trustee for the next of kin of any residue not expressly disposed of by the will, unless it appears by the will that he was intended to take the residue beneficially. If, however, there are no next of kin, the presumption in favour of the executor arises as under the old law, but it may be rebutted, in which case the executor is trustee for the Crown. Prima facie, therefore, an executor is not beneficially entitled to any property not expressly disposed of by the will, even if the terms of the will show that the testator considered that it disposed of all his property. But an intention that the executor shall take beneficially may appear from the general scheme of the will.

6th ed., p. 715. *Re Knowles*, 28 W. R. 975; *Travers* v. *Travers*, L. R. 14 Eq. 275; *Williams* v. *Arkle*, L. R. 7 H. L. 606. See page 249.

WHERE RESIDUE EXPRESSLY BEQUEATHED.

If a testator expressly bequeaths the residue of his personal estate, the question whether the residuary legatee is to take beneficially or not is a question of construction, to be decided on the language of the testator. The question generally arises where the residuary legatee is also appointed executor.

6th ed., p. 715. *Dawson* v. *Clarke*, 18 Ves. 247. See Chapter XLI.

PROVISIONS INCONSISTENT WITH EXECUTORS TAKING BENEFICIALLY.

Although the fact that a testator has bequeathed legacies to his executors is generally sufficient to prevent them from taking the residue beneficially by virtue of their office, this rule does not, it seems, apply where the residue is expressly bequeathed to them.

6th ed., p. 716. *Hillersdon* v. *Grove*, 21 Bea. 518.

If a testator gives the residue to his executors for such purposes as they think fit, they hold it as trustees for the next of kin.

6th ed., p. 717. *Fenton* v. *Nevin*, 31 L. R. Ir. 478.

WHERE RESIDUARY LEGATEE IS NOT EXECUTOR, OR NOT SOLE EXECUTOR.

Where a testator bequeaths his residuary personal estate to a person who is not an executor, or is only one of two or more executors, for specified purposes, which do not exhaust the beneficial interest, the question may arise whether the legatee is intended to take the surplus for his own benefit, or whether he holds it subject to a resulting trust for the next of kin. The principle above stated as applicable to devises of real estate, seems to apply to bequests of personalty.

6th ed., p. 717. *Fenton* v. *Hawkins*, 9 W. R. 300; *Irvine* v. *Sullivan*, L. R. 8 Eq. 673

CHARITY.

The general principle stated above with reference to real estate devised for charitable purposes, applies also to personalty. Accordingly, where a testator bequeathed a sum of money for charitable purposes to be applied in a manner which did not exhaust the whole fund, it was held that the surplus was nevertheless dedicated to the general purposes indicated by the testator.

6th ed., p. 718. *Bishop of Hereford* v. *Adams*, 7 Ves. 324. See page 346.

WHERE WHOLE TRUST IS INDEFINITE.

In addition to the cases above mentioned, reference may here be made to that class of cases in which the question arises whether the testator intends to create a trust at all; if he does, a further question may arise whether he has indicated the objects of the trust with sufficient clearness, or whether they are so indefinite that the trust fails to take effect, and there is a resulting trust for the residuary legatee or next of kin. These questions are discussed in Chapter XXIV., in connection with the doctrine of precatory trusts.

6th ed., p. 718.

ACCELERATION OF FUTURE INTERESTS.

Another question which has been agitated between the heir and devisee is, whether if, in a series of consecutive limitations, a particular estate be void in its creation from being limited to a

person incapable by law or refusing to take, the remainders immediately expectant on such estate are accelerated, or the interest in question descends to the testator's heir at law as real estate undisposed of.

1st ed., p. 513, 6th ed., p. 718.

WHERE DEVISE OF LIFE ESTATE IS VOID OR REVOKED.

And if land be devised to A. for life with remainder over, and the devise to A. is void under sect. 15 of the Wills Act, the remainder takes effect at once. The same rule applies if a devise of a life estate is revoked by the testator.

6th ed., p. 719. *Jull* v. *Jacobs*, 3 Ch. D. 703; *Re Johnson*, 68 L. T. 20.

FORFEITURE.

The doctrine evidently proceeds upon the supposition that, though the ulterior devise is in terms not to take effect in possession until the decease of the prior devisee, if tenant for life, or his decease without issue, if tenant in tail, yet that, in point of fact, it is to be read as a limitation of a remainder, to take effect in every event which removes the prior estate out of the way. Such a principle is familiar in its application to the case of an estate for life being determined by forfeiture.

1st ed., *ibid.*, 6th ed., p. 719. *Craven* v. *Brady*, L. R. 4 Eq. 209.

PARTICULAR ESTATE FOLLOWED BY CONTINGENT INTEREST.

Where, however, the particular estate which fails is followed by a contingent interest, and that by a vested interest, the ultimate interest will not be accelerated by the failure of the particular estate, but there will be an intestacy until it is ascertained whether the contingent interest will take effect or not.

6th ed., p. 719. *Re Townsend's Estate*, 34 Ch. D. 357.

Where the remainder is limited to a class, the effect of acceleration may be to alter the period at which the class is to be ascertained.

6th ed., p. 720. *Re Johnson*, 68 L. T. 20.

WHETHER SAME RULES APPLY TO PERSONALTY.

It seems to be now settled that the same principles are applicable to quasi-remainders of personalty.

6th ed., p. 720. *Re Clark*, 31 Ch. D. 72. (In 5th edition said to be undecided, p. 538).

There can of course be no acceleration if the persons to take in remainder are not in existence.

6th ed., p. 721. *Re Townsend's Estate*, 34 Ch. D. 357.

SUCCESSIVE ABSOLUTE INTERESTS IN PERSONALTY.

It may, apparently, be laid down as a general rule that where personal property is given to A. absolutely with remainder to B.

absolutely, and A. dies in the testator's lifetime, the gift to B. is accelerated, and takes effect.

6th ed., p. 721. *Re Lowman* (1895), 2 Ch. 348.

WOMAN PAST CHILD-BEARING.

It may here be noted that where a fund is given to A. contingently on a certain woman not having children, and the woman has passed the age of child-bearing without having had any children, the Court has jurisdiction to direct the fund to be paid over to A. But if B. is entitled to property contingently on a certain woman having a child, the Court will not enter into the question of her being past child-bearing for the purpose of depriving B. of the chance of becoming entitled to the property.

6th ed., p. 721. *Re White* (1901), 1 Ch. 570; *Re Hocking* (1898), 2 Ch. 567.

DEVISES AFTER TRUSTS WHICH FAIL.

The doctrine of acceleration underwent much discussion in Tregonwell v. Sydenham, where a testator devised certain estates at S. and D. in strict settlement, and devised certain estates at E. in like manner as the D. estates, except that there was interposed between the limitations of the E. estates a devise to trustees for a term of sixty years, upon trust to receive the rents until the trustees should have received certain sums which they were from time to time to lay out in the purchase of land, to be settled upon the persons for the time being, in the possession of the S. estates. The House of Lords, on appeal, declared first, that the trusts of the term were not void in their creation, but became so in event, the trusts for raising the money being valid; but that of settling the lands to uses being void as too remote, in consequence of its happening that the person then in possession, and to whom, therefore, an estate for life was to be limited with remainder to his issue, was one who was not in existence at the testator's death. Secondly (and this is the point material to the present discussion), that the trusts of the term resulted for the benefit of the heir at law of the testator.

6th ed., p. 722. 3 Dow. 194.

TERM FOR YEARS, TRUST BEING SATISFIED, OR NOT ARISING, ATTENDS INHERITANCE FOR THE BENEFIT OF DEVISEE.

It is clear, however, that where a term of years is created for particular purposes, and the land subject thereto is devised over, the term, after the purposes of its creation are satisfied, or immediately, if those purposes do not arise, attends the inheritance for the benefit of the devisee.

1st ed., p. 517, 6th ed., p. 723. *Davidson* v. *Foley*, 2 Br. C. C. 203.

REVERSION ACCELERATED WHERE TERM VOID.

If the limitation of the term itself is void, as where (under the old law) trusts are declared in favour of a charity, the devisee of the freehold is, of course, immediately entitled in possession.

5th ed., p. 543, 6th ed., p. 725. *Williams* v. *Goodtitle*, 3 M. & Ry. 757.

The doctrine of acceleration does not extend to estates limited under powers of appointment; where, if the particular estate fails, the remainder continues such, and the estate, during the life of the intended taker, goes as in default of appointment.

6th ed., p. 725. *Per Cur. Crozier* v. *Crozier*, 3 D. & War. 365.

If the reason of the rule is that where the donor of a power has designated persons to take in default of appointment, he means them to take whatever is not validly appointed, then there seems no reason why it should not apply to general powers.

In any case it is clear that whether the appointment is general or special, the testator may show an intention that if the particular interest fails, or is determined, the interests in remainder shall be accelerated.

6th ed., p. 725. *Re Finch and Chew's Contract* (1903), 2 Ch. 486.

WHETHER UNDER DEVISE TO A. DURING MINORITY OF B., A.'S ESTATE DETERMINES ON B.'S DECEASE DURING MINORITY.

Sometimes an estate is made to determine at the majority of a minor; and it happens that he dies under age: whence arises the question, whether the devisee is entitled to hold the estate until the minor would, if living, have attained the prescribed age; or whether the devise over (for it has generally, though not necessarily, happened that there is such a devise) is accelerated.

1st ed., p. 520, 6th ed., p. 726.

POSTPONEMENT DURING MINORITY, NOT EXTENDED TO DEVISEES OVER.

Sometimes it happens that real estate is devised to a minor contingently on his attaining twenty-one, with a devise over in the event of his dying under that age; in which case, though, under the original devise, if construed to be contingent, the property would, during the minority, have devolved to the heir-at-law of the testator as real estate undisposed of; yet, on the minor dying under age, the devise over, not being subject to the postponement affecting the original devise, takes effect in possession immediately.

1st ed., p. 522, 6th ed., p. 728. *Chambers* v. *Brailsford*, 18 Ves. 368.

Legacy — Revocation of Life Interest — Acceleration.—A testator directed a sum of money to be set apart by his trustees, and the income paid to A. for life, and that after his death the capital should be divided among A.'s children in certain shares. The testator further directed that in the event of A. dying while any of his children should be under the

age of 25 years, the income of the fund should be paid to their mother while such children respectively should be under that age "for the maintenance and education of such child or children respectively while he or she shall be under that age." By a codicil the testator revoked the "legacy and annuity" to A.:—Held, that the gift to the children was not revoked, but vested on the testator's death, and that the share of each child in the capital was payable on his attaining the age of 25 years. *Lewin* v. *Lewin*, [illegible] L. T. 207, 2 N. B. Eq. R. 477.

Void Devise of Life Estate — Acceleration of Remainder.—A testatrix bequeathed to her adopted daughter "the whole of my real and personal estate for her sole and only use absolutely, and in the event of her decease without heirs" she directed that "whatever may remain of my real and personal estate shall go to my nephew for his sole use and disposal." The adopted daughter was one of the witnesses to the will:—Held, following *Aplin* v. *Stone*, [1904] 1 Ch. 543, that the will must be construed before the effect of the devisee being a witness could be considered: that on the true construction of the will the decease of the adopted daughter before the testatrix was the event contemplated; that "without heirs" meant without children lawfully begotten; and that there was no direct gift to heirs or children:—Held, further, that the gift to the adopted daughter being void, the gift to the nephew took effect at once. *In re Maybee*, 24 C. L. T. 399, 15 O. L. R. 601, 4 O. W. R. 421.

Acceleration results in every case which removes the prior estate out of the way. In *Re Hughes*, 4 O. W. R. 462, there was no gift of a reversion or remainder. There was merely the postponement for a definite term of the time when the beneficiary should come into possession.

Acceleration.—If devisee refuses the disposition made of the land "after his decease" is accelerated and takes effect at once during his life and the duty of the executors to sell arises whether it be considered that they have the legal estate or only a power to sell with the legal estate vested elsewhere. In *Linnson* v. *Linnson*, 18 Beav. 1 (5 DeG. M. & G. 754), the words "from and after the decease" of the life tenant were held to mean from and after the determination of his estate by death or otherwise. In *Jull* v. *Jacobs*, 3 Ch. D. 703, the life tenant was an attesting witness and incapable of taking. Also in *Craven* v. *Brady*, L. R. 4 Eq. 209; *Re Clark*, 31 Ch. D. 172, where life tenant refused the devise. In *Re Johnson*, 68 L. T. 20, a trust for sale was accelerated by revocation of the devise of the previous life estate and it had the same effect on the period for ascertainment of the persons who were to benefit. *Re Bell*, 7 O. W. R. 201.

CHAPTER XXII.

CONVERSION (a).

Revocation or Ademption by Conversion.

It has been already pointed out, that if a testator devises land to A., and afterwards sells it, or contracts to sell it to B., this operates as a revocation or ademption of the devise and a conversion of the land into money. Consequently A. has no claim to the purchase money, which forms part of the testator's personal estate. In order that a contract of sale may have this effect, it seems that the contract must be enforceable by the testator: if it is not enforceable against the purchaser by reason of its not complying with the Statute of Frauds, or because the title shown is not in accordance with the contract, and has not been accepted by the purchaser, the contract does not operate as a conversion. If, however, there is a binding contract at the testator's death, and it is afterwards rescinded for non-payment of the purchase money, or for any cause other than a defect in the title, the land is still treated as having been converted.

6th ed., p. 729. *Watts* v. *Watts*, L. R. 17 Eq. 217; *Re Thomas*, 34 Ch. D. 166; *Lysaght* v. *Edwards*, 2 Ch. D. 506.

But A. is entitled to the rents between the testator's death and the completion of the purchase. *Watts* v. *Watts*, L. R. 17 Eq. 217.

Adoption of Verbal Contract by Devisee.

If a testator enters into a verbal contract of sale, which is not enforceable against him, and after his death the devisee sells the land to the same purchaser for the same price, this does not operate as a retrospective conversion, unless the devisee expressly adopts the testator's contract.

6th ed., p. 730. *Re Harrison*, 34 Ch. D. 214.

Option of Purchase.

An anomalous rule (known as the rule in Lawes v. Bennett) applies to cases where the testator has entered into a contract under which a person has an option of purchasing land belonging to the testator, and exercises the option after the testator's

(a) This chapter has been arranged and, to a considerable extent, re-written. A portion of the first section originally formed part of Chapter IV., while the sections dealing with the rights of tenant for life and remainderman have been transferred to Chapter XXXIV. (Note by editor of 6th edition).

death. In such a case, although constructive conversion only takes place as from the exercise of the option, yet the proceeds of sale devolve as part of the testator's personalty. The rule applies although the purchase money is payable to the testator "his heirs or assigns." It also applies where the option does not arise until after the testator's death.

6th ed., p. 730. 1 Cox 167; *Weeding* v. *Weeding*, 1 J. & H. 424; *Re Isaacs* (1894), 3 Ch. 506.

If the devise is general, it is immaterial whether the will is executed before or after the contract giving the option; and if the devise is specific, the rule applies in all cases where the contract giving the option is entered into after the date of the will, unless of course the testator has contemplated the possibility of his entering into such a contract and has provided for it by his will.

6th ed., p. 731. *Lawes* v. *Bennet*, 1 Cox. 167.

How Contrary Intention May Appear.

But a testator who has entered into a contract of sale, or given an option of purchase, in respect of land, and afterwards or simultaneously makes a will specifically devising it, may show that he wishes the devisee of the land to have the benefit of the sale.

6th ed., p. 731. *Knollys* v. *Shepherd*, 1 J. & W. 499.

But in the case of an option, a will made or re-published after the date of or simultaneously with the creation of the option, and specifically devising the property in strict settlement, has been held to take the case out of the rule in Lawes v. Bennett, and, upon the option being exercised after the testator's death, to carry the purchase-money to the devisees.

6th ed., p. 731. *Emuss* v. *Smith*, 2 De G. & S. 722.

Where a testator specifically bequeaths leaseholds, and after his death the term is put an end to under a condition contained in the lease, the legatee is entitled to the compensation payable under the condition.

6th ed., p. 731. *Coyne* v. *Coyne*, Ir. R. 10 Eq. 496.

Sale by Mortgagee.

If mortgaged land is sold by the mortgagee under his power of sale, the destination of the surplus proceeds of sale is, as a general rule, governed by the condition of the property at the mortgagor's death. Consequently if the sale takes place after the mortgagor's death, the surplus proceeds devolve as realty, while if it takes place during his lifetime, they devolve as personalty: and the fact that the mortgage deed provides that they

are to be paid to the mortgagor "his heirs or assigns" makes no difference, these words not being sufficient to effect a constructive re-conversion.

6th ed., p. 731. *Wright* v. *Rose*, 2 S. & S. 323.

SALE BY COURT.

Where land is sold under an absolute order, made within the jurisdiction of the Court, the proceeds are personalty; in fact the order itself operates as a conversion from its date, and before any sale has taken place. But where a conditional order is first made, and is afterwards made absolute, it only takes effect from the latter date.

6th ed., p. 732. *Hyett* v. *Mekin*, 25 Ch. D. 735.

WHETHER ORDER EFFECTS CONVERSION OUT AND OUT.

If the order for sale is made in an administration action, for payment of debts and legacies, it would seem, on principle that it operates as a conversion for all purposes, so that any surplus is personal estate.

6th ed., p. 732. See *Stece* v. *Preece*, L. R. 18 Eq. 197.

SALE IN PARTITION ACTION.

If land is sold in a partition action under the Partition Act, 1868, s. 8, the proceeds of sale are to be treated as realty, unless the person entitled is sui juris and elects to take them as personalty, or unless they are paid ont to trustees who had a power of sale. If the person entitled is a married woman, she may elect by examination in Court to take the fund as personal estate.

6th ed., p. 733. *Standering* v. *Hall*, 11 Ch. D. 652.

LAND CLAUSES ACT.

Where purchase money is paid into Court by a railway company the general rule is that it remains impressed with the character of real estate.

6th ed., p. 733. *Kelland* v. *Fulford*, 6 Ch. D. 491.

WHERE TRUSTEES CAN SELL.

In any case, however, where land is vested in trustees subject to a trust for sale, or a power of sale, and it is sold by order of the Court, this operates as a conversion.

6th ed., p. 733. *Re Smith*, 40 Ch. D. 386.

NOTICE TO TREAT.

A notice to treat under the Lands Clauses Act does not effect a conversion, even if it is followed by an offer by the landowner to accept a certain price for the land; but if the price is agreed upon this constitutes a valid contract, and operates as a conversion. An agreement as to the price per acre, without defining the land, does not effect a conversion.

6th ed., p. 734. *Harding* v. *Metropolitan Railway*, L. R. 7 Ch. 154. *Ex parte Walker*, 1 Dr. 508.

SALE IN LUNACY.

It has been already mentioned that a sale, by proper authority, of land belonging to a lunatic does not, as a general rule, affect the rights of his devisees, &c., in the proceeds of sale.

6th ed., p. 734. See page 90.

CONVERSION DIRECTLY BY STATUTE.

Conversion may also be produced by Act of Parliament: as where a statute abolishes a particular kind of real property, and substitutes for it a right to compensation, or other personal property.

6th ed., p. 734. *Cadman* v. *Cadman*, L. R. 13 Eq. 470.

CONTRACT OF PURCHASE BY TESTATOR.

In the case of a person entering into a contract for the purchase of land, the rule formerly was, that if the contract was binding on the purchaser at the time of his death, his heir or devisee was entitled to the benefit of it: in other words, was entitled to consider the contract as having converted the personal estate, quoad the purchase-money, into real estate.

6th ed., p. 734. *Garnett* v. *Acton*, 28 Bea. 333.

In such a case, therefore, all that the devisee or heir is entitled to is the land charged with the purchase-money.

6th ed., p. 735. *Re Cockroft*, 24 Ch. D. 94.

CONTRACT ENFORCEABLE AT DEATH, SUBSEQUENTLY RENDERED INCAPABLE OF COMPLETION.

In cases not within the act, the old rule above stated applies even if the contract is rescinded, by or at the suit of the vendor, after the testator's death, for the true principle is, that where the contract is such as could have been enforced against the purchaser at the time of his decease, the estate which is the subject matter of the contract, or, failing that, the purchase-money, belongs to his heir or devisee; but if, from a defect of title or any other cause, the contract was not obligatory on the purchaser at his death, his heir or devisee is not entitled to say he will take the estate with its defects, or have the purchase-money laid out in the purchase of another.

1st ed., p. 46, 6th ed., p. 735. *Broome* v. *Monck*, 10 Ves. 597.

VOIDABLE PURCHASE BY LUNATIC.

If a person of unsound mind enters into a contract to purchase real estate, and the purchase is afterwards completed by direction of the lunacy authorities, this operates as a conversion of the purchase moneys into realty.

6th ed., p. 737. *Baldwyn* v. *Smith* (1900), 1 Ch. 588.

If money is expended by leave of the judge in lunacy for the permanent improvement of the lunatic's real estate, in the

course of the ordinary management of the property, it will not, as a general rule, be ordered to be charged upon the real estate in favour of the personalty.

6th ed., p. 737. *Re Gist* (1904), 1 Ch. 398.

WHEN MONEY IS A "HEREDITAMENT."

Where land has been sold, and the proceeds are subject to a trust for re-investment in land, they will generally come within the description of "hereditamenta."

6th ed., p. 738. *Re Gosselin* (1906), 1 Ch. 120.

CONTRACT FOR BUILDING.

Conversion may also be effected by a testator entering into a contract with a builder for the erection of buildings on the testator's land, and dying before they are completed or paid for: in such a case the devisee is entitled to have the contract performed out of the personal estate.

6th ed., p. 738. *Cooper* v. *Jarman*, L. R. 3 Eq. 98: *Re Day* (1898), 2 Ch. 510.

But this rule does not apply where the contract relates to land not belonging to the testator.

6th ed., p. 738. *Re Day* (supra).

CONVERSION OF ONE KIND OF PERSONAL PROPERTY INTO ANOTHER.

In the case of personal property, the operation of a will may be affected by the nature of the property being changed by some act dehors the will. Where the testator himself sells property which he has specifically bequeathed, this operates as an ademption of the bequest.

See Chapter XXX.

CONVERSION OF STOCK, &C., BY ACT OF PARLIAMENT.

The question whether a bequest of stock or shares is adeemed by the property being converted by Act of Parliament, or under the powers of a company, is discussed elsewhere.

Chapter XXX.

Where trustees have a discretionary power to convert, they ought not to exercise it in such a way as unnecessarily to alter the rights of the parties. Thus, if wasting securities are bequeathed by a testator upon trust for A. for life, with a discretionary power of conversion, the trustees ought not to convert unless the investment become hazardous.

6th ed., p. 740. *Lord* v. *Godfrey*, 4 Madd. 455.

RESULT OF ACTUAL CONVERSION UNDER WILL.

Where property is given to trustees with power to convert it into realty or personalty at their option, the general rule is that it devolves according to the state of investment in which it happens to be.

6th ed., p. 740. *Rich* v. *Whitfield*, L. R. 2 Eq. 583.

An investment in personalty under a power of interim investment does not affect the devolution of the property.

6th ed., p. 740. *Re Bird* (1892), 1 Ch. 270.

TRUSTEES' OPTION TO SELL MAY AFFECT DESTINATION OF PROPERTY.

Where trustees have a power or discretion to convert land into money, or vice versa, it may happen, that the exercise of the trustees' option to convert, regulates not merely the devolution of property as between the real and personal representatives respectively of the beneficial objects, but also determines its destination under the will itself; i.e., until conversion, it belongs to one, and when actually converted, to another. Large and inconvenient as such a discretion is, yet, if the intention to confer it be clearly manifested, the construction must prevail, in spite of any suspicion that the testator misapprehended the effect of the terms he has employed.

1st ed., p. 538, 6th ed., p. 740. *Brown* v. *Bigg*, 7 Ves. 279.

VESTING OF FUND POSTPONED UNTIL ACTUAL SALE.

So, if the fund arising from the sale be disposed of in such terms as unequivocally and explicitly to make the vesting depend on the period of actual sale, the vesting will be postponed accordingly.

1st ed., *ibid.*, 6th ed., p. 741. *Elwin* v. *Elwin*, 8 Ves. 547.

DOCTRINE AS TO ENJOYMENT OF PROPERTY WHICH IS SUBJECT TO A TRUST FOR CONVERSION.

In all such cases, however, the Courts, ever anxious to avoid imputing to a testator a mode of disposition at variance with what is usual and convenient, will diligently seek in the context of the will for means of escape; and in one class of cases, of very frequent occurrence, the literal force of the language of the will has, even without any such aid from the context, been moulded into conformity with probable intention. The cases here alluded to are those in which a will, creating a trust for conversion, is so framed as that the enjoyment of the cestui que trust is apparently made to wait until actual conversion. The inconvenience of such a postponement is obvious; it seems hardly supposable that the testator could mean that the actual enjoyment by the object of his bounty should be liable to be deferred for an indefinite period, by difficulties attending the execution of the trust, or the want of activity in the trustees in effecting a conversion. To prevent such consequence, a liberal construction has prevailed in these cases, and the legatee, until the execution of the trust, takes an interest in the unconverted property, corresponding to that which he would have been entitled to in the proceeds, if the conversion had taken place.

1st ed., p. 539, 6th ed., p. 742. *Re Searle* (1900), 2 Ch. 829.

Where land is devised in trust for sale, and the proceeds of sale are to be held in trust for a person for life, with remainder over, the tenant for life is, as a general rule, entitled to the rents of the land until it is sold. And the same rule applies where the real and personal estates are devised and bequeathed together.

6th ed., p. 742. *Re Laing's Trusts*, L. R. 1 Eq. 416; *Re Searle* (1900), 2 Ch. 829.

RESIDUARY PERSONALTY.

The doctrine above stated must not, of course, be confused with the rules governing the rights of tenant for life and remainderman in respect of a residuary personal estate, whether there is a trust for conversion or not; these are discussed in Chapter XXXIV.

MONEY TO BE LAID OUT IN LAND CONSIDERED AS LAND AND VICE VERSA.

On the principle that equity considers that as done which ought to have been done, it is well established that "money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given: whether by will, by way of contract, marriage articles, settlement, or otherwise; and whether the money is actually deposited, or only covenanted to be paid; whether the land is actually conveyed, or only agreed to be conveyed. The owner of the fund, or the contracting parties, may make land money, or money land." It follows, therefore, that every person claiming property under a will or settlement directing its conversion, must take it in the character which such instrument has impressed upon it; and its subsequent devolution and disposition will be governed by the rules applicable to property of this character. This doctrine is founded in justice and good sense: since it would be obviously unreasonable that the condition of the property, as between the representatives of the parties beneficially interested, should depend on the acts of persons through whom, instrumentally, the conversion is to be effected, and in whom no such discretion is expressed to be reposed. The principle is, besides, too well supported by numerous authorities to be called in question at this day.

1st ed., p. 523, 6th ed., p. 743. *Wheldale* v. *Partridge*, 5 Ves. 396. As to Trusts for Conversion see Chapter XXIV.

CASES ILLUSTRATIVE OF THE DOCTRINE.

Thus, money directed to be laid out in land, and settled on A. in fee, is, though not actually laid out, descendible as real

estate to the heir: is subject to tenancy by the curtesy: is not liable (otherwise than real estate is liable) to simple contract debts: and will not pass under a general bequest purporting to include personal estate only, unless the testator had power to change its character, and showed an intention to do so.

5th ed., p. 548, 6th ed., p. 744; *Sweetapple* v. *Bindon*, 2 Vern. 536; *Re Pedder's Settlement*, 5 D. M. & G. 890. *Chandler* v. *Pocock*, 16 Ch. D. 648.

As a general rule, money so constructively converted into land passes under a devise of lands, tenements, and hereditaments. But if a testator devises all his lands in Staffordshire to A., this will not pass moneys arising from the sale of lands in Staffordshire, and subject to a trust for re-investment in lands in any part of England; being, however, in the nature of realty, they would pass under a residuary devise of real estate.

Ibid. *Hickman* v. *Bacon*, 4 B. C. C. 333.

So, in the case of real estate, whether freehold or copyhold, being directed to be sold, and the proceeds bequeathed to A., who, after surviving the testator, happens to die before the sale, the property devolves to his personal representative, with all the incidental qualities of personal estate, or passes by a residuary bequest contained in his will. The question whether it is subject to the lex loci is discussed in the next chapter.

Ibid. *Elliott* v. *Fisher*, 12 Sim. 505.

DOUBLE CONVERSION.

The doctrine, of course, applies where the ultimate destination of the property is to be reached by several gradations. Thus, land directed to be sold, and the proceeds to be invested in land, will, though neither conversion has been actually effected, be regarded as real estate. But where the first conversion is out and out, and the second qualified only, the property will be impressed with the character which the first conversion stamps upon it, namely, that of personalty.

5th ed., *ibid.*, 6th ed., p. 745.

WHERE TRUST FOR SALE IS INVALID.

It is hardly necessary to add that in order to effect a constructive conversion, the trust for sale must be valid; if it is void (e.g., by reason of its transgressing the Rule against perpetuities) no conversion is effected.

6th ed., p. 745. *Goodier* v. *Edmunds* (1893), 3 Ch. 455.

NO CONVERSION UNLESS A SALE DIRECTED.

In order to work a constructive conversion, "the new character must be decisively and absolutely fixed upon the property." In other words, an actual sale or purchase, either immediately

or in future, must be directed positively and absolutely, and not conditionally or contingently. The direction may be express or implied. It has been already mentioned that the direction must be free from objection on the score of remoteness.

1st ed., p. 526, 6th ed., p. 745. *Wall* v. *Colshead*, 2 De G. & J. 683.

EFFECT OF DIRECTION THAT MONEY SHALL DEVOLVE AS LAND, OR VICE VERSA.

A direction that real estate shall be considered as personal, or vice versa, is insufficient to effect a conversion, since the law does not allow property to be retained in one shape, and yet to devolve as if it were in another. But where a testator gives a power of investing money in the purchase of land and directs that until so invested it shall devolve as land, or, conversely, gives a power of selling land and directs that until sold it shall devolve as personalty, this is effective for the purposes of the trusts contained in the will; so that in the one case the money follows the trusts declared concerning land which is subject to the will, and in the other case the land follows the trusts declared concerning personalty which is subject to the will. In other words, the trusts are declared by reference. But the direction cannot affect the devolution of the property by the rules of law, so that if the trusts fail, the direction is inoperative, for there is no true conversion.

5th ed., p. 549, 6th ed., p. 745. *De Beauvoir* v. *De Beauvoir*, 3 H. L. Ca. 524; *Meure* v. *Meure*, 2 Atk. 265.

CASES WHERE MONEY HAS BEEN HELD CONVERTED.

And first as to the cases where money has been held to be converted.

6th ed., p. 746. *Earlom* v. *Saunders*, Amb. 241, *Cowley* v. *Hartstonge*, 1 Dow. 361.

CASES WHERE MONEY HAS BEEN HELD NOT CONVERTED.

Next, with respect to the cases in which it was held that there was no conversion.

6th ed., p. 748. See *Curling* v. *May*, cited 3 Atk. 255; *Van* v. *Barnett*, 19 Ves. 102; *Walker* v. *Denne*, 2 Ves. Jun. 170.

IMPLIED TRUST FOR CONVERSION.

Sometimes there is no express trust for conversion, but the accompanying directions are such as lead to an implication that conversion was intended; as, where real and personal estate was devised to trustees in trust to "invest" the same in the funds, and again, where leaseholds were given upon the same trusts and subject to the same powers as those declared of the moneys to arise by sale of property previously given in trust for sale. But the same inference is not necessarily to be drawn from a trust to divide into several shares, if the trustees have an

express power of sale; or though they are directed to "invest" some of the shares.

5th ed., p. 552, 6th ed., p. 740. *Affleck* v. *James*, 17 Sim. 121; *Lucas* v. *Brandreth*, 28 Beav. 273.

OPTION FOR TRUSTEES TO INVEST IN REALTY.

Where a will disposes of personalty only, the fact that the gift is framed with limitations appropriate to realty, some of which must fail of effect when applied to personalty, will not raise an implied trust to convert into realty.

5th ed., p. 554, 6th ed., p. 750. *Evans* v. *Ball*, 47 L. T. 165.

DIRECTION FOR TEMPORARY INVESTMENT DOES NOT PREVENT CONVERSION.

A provision that, until land be purchased, the money shall be placed out on security at interest, does not prevent its receiving the impression of the real estate instanter, this being a mere temporary arrangement; unless it appears, as of course it may, from other parts of the instrument, that the arrangement is not, in fact, intended to be merely temporary; for instance, if by a final disposition of the capital fund, in certain events, as money, it is shown that the conversion is to take place only in the alternative events.

Ibid. *Re Bird* (1892), 1 Ch. 279.

TRUST TO SELL AT A STATED TIME.

A trust to sell within a specified period converts the property though no sale be made within the period; the specification of time being directory only.

5th ed., *ibid.*, 6th ed., p. 751. *Pearce* v. *Gardner*, 10 Hare 287.

EFFECT OF SALE OR PURCHASE BEING ONLY WHEN TRUSTEES THINK FIT.

Again, if the trust is imperative, it is not generally material that the sale or purchase is to be made only when the trustees think fit.

5th ed., p. 555, 6th ed., p. 751. *Re Raw*, 26 Ch. D. 601.

But a discretionary trust for sale does not effect a conversion.

6th ed., p. 751.

EFFECT WHERE SALE OR PURCHASE TO BE MADE UPON REQUEST.

If the purchase is to be made with consent or approbation, or on or after request or direction, the question whether or not a conversion is intended, must be answered from a consideration of the whole instrument, and especially of the trusts to which the property is subjected, and the persons by whom the request is to be made.

5th ed., p. 555, 6th ed., p. 751. *Waddington* v. *Yates*, 15 L. J. Ch. 223.

EFFECT OF PROPERTY DIRECTED TO BE SOLD BEING DEVISED IN A CERTAIN CONTINGENCY AS LAND.

It seems that the converting effect of a trust for sale, in regard to a legatee to whom the proceeds are bequeathed, is not

prevented by the fact, that in an alternative event, the testator has devised the property in terms adapted to its original state; as he may have contemplated the possibility of the contingency happening before a sale could be effected; besides which, it seems to have been considered that the property might be real estate as to one legatee, and personalty as to another, to whom it was given in an alternative event.

1st ed., p. 527. Jarman, p. 753. *Ashby* v. *Palmer*, 1 Mer. 296. As noted by MS. correction per Mr. Jarman.

It is the settled rule of the Court, that land once impressed with the character of money retains that impression till some act is done, by a person competent to do that act, to restore it to its primary character.

6th ed., p. 754. *Per Cur. Ashby* v. *Palmer*, supra.

NATURE OF PROPERTY MADE TO DEPEND ON TRUSTEE'S OPTION TO SELL OR NOT.

But although, in general, the presumption is that a testator does not intend the nature of the property to depend upon the option of the person through whom the conversion is to be effected; yet, if upon the whole will it appears to have been the intention of the testator to give to such person an absolute discretion to sell or not, the property in the meantime will, as between the real and personal representatives of the persons beneficially entitled, devolve according to its actual state.

Ibid. Polley v. *Seymour*, 2 Y. & C. 708.

In short, a trust to sell which is so expressed as to give the trustees a discretion whether they shall sell or not, is equivalent to a power of sale, and therefore does not effect a conversion.

6th ed., p. 756. *Re Hotchkys*, 32 Ch. D. 408.

DEATH DUTY.

Where real estate is directed to be sold out and out, the duty attaches, though by reason of the legatee electing to take it as real estate the property is not actually sold.

See note page 561, 5th ed., 6th ed., p. 757. *Williamson* v. *Adv.-Gen.*, 10 Cl. & Fin. 1.

Where the trustees have an option to continue the property in its actual state or to sell for the purpose of distributing the proceeds according to the will, and in the exercise of this discretion they sell, the legacy duty attaches: but not if they do not sell. If the power of sale is given only for the purpose of reinvestment in land, or for the variation of securities, or (it seems) for the purpose of raising debts and legacies or other prior charges, the duty is not payable, whether the property

is sold or not, and although, after a sale, the beneficial owners have elected to take the property as money.

6th ed., p. 757. *Atty.-Gen.* v. *Simcox*, 1 Ex. 749; *Mules* v. *Jennings*, 8 Ex. 830.

Where a sale is directed by the Court in order to raise a charge, duty will attach on the amount necessary to satisfy the charge, if the will contains a power of sale which the donees of the power are compelled by the Court to exercise, but not if the Court acts upon its general jurisdiction in such cases.

6th ed., p. 757. *Harding* v. *Harding*, 2 Gif. 597.

MERE POWER OF SALE DOES NOT LET IN LEGACY DUTY.

And it is to be observed, that where trustees are authorised to sell or not, as they think proper, and in virtue of this option they leave the property unconverted, the legacy duty is not attracted by a mere declaration in the will that the property shall be deemed to be personal estate, as it is not in the power of a testator to alter or regulate the nature of the subject of disposition by any such declaration.

6th ed., p. 757. *Atty.-Gen.* v. *Mangles*, 5 M. & Wel. 120. As to legacies bequeathed free of duty, see chapter XXX.

ELECTION TO TAKE PROPERTY IN ITS ACTUAL STATE.

But although a new character may have been in plain and unequivocal terms impressed upon property by means of a trust for conversion; yet such constructive quality is liable to be determined by the act of the person or persons beneficially entitled, who may, at any time before its conversion de facto, elect to take the property in its actual state. And then comes the inquiry, who are personally competent to make, and what amounts to, such an election. It is clear that an infant, or lunatic, is incompetent, and the election may be made by parol.

1st ed., p. 533, 6th ed., p. 759. *Van* v. *Barnett*, 19 Ves. 102. *Chaloner* v. *Butcher*, 3 Atk. 685.

WHAT AMOUNTS TO AN ELECTION.

The expressions or acts declaratory of such an intention, however [though it is said they may be slight] must be unequivocal.

Ibid. *Re Pedder's Settlement*, 5 D. M. & G. 890.

DEVISING THE LAND DIRECTED TO BE SOLD, AS LAND.

A specific devise, to the ordinary uses of a strict settlement of real estate, of the land directed to be sold, is clear evidence of an intention to retain it unsold. Even a simple devise might apparently have this effect, if the property is described as land.

5th ed., p. 764. 6th ed., p. 760. *Meek* v. *Devenish*, 6 Ch. D. 566.

ALL PERSONS INTERESTED MUST CONCUR IN ACT OF ELECTION.

And here it may be observed that in order to amount to an election to take property in its actual, as distinguished from its eventual or destined, state, the act must be such as to absolutely determine and extinguish the converting trust; and hence it would seem to follow, that where two or more persons are interested in the property, it is not in the power of any one co-proprietor to change its character, in regard even to his own share; for, as the act of the whole would be requisite to put an end to the trust, nothing less will suffice to impress upon the property a transmissible quality, foreign to that which it had received from the testator. Thus, if lands be devised to trustees upon trust for sale, and to pay the proceeds to A., B., and C., in equal shares, and after the death of the testator, and before the sale is effected, A. grants a lease of his one-third, or does any other act unequivocally dealing with it as real estate, and then dies; his share will, nevertheless, it is conceived, devolve to his personal representatives, as it would still be the duty of the trustees to proceed to a sale, on account of the other shares, the converting trust having been created for the benefit of all.

1st ed., p. 536, 6th ed., p. 761. *Biggs v. Peacock*, 22 Ch. D. 284.

ELECTION BY CONTINGENT OWNER PENDING THE CONTINGENCY.
ELECTION BY ONE TENANT IN COMMON OF MONEY TO BE LAID OUT IN LAND.

But if the whole of the proceeds are given to A. on a contingency, and on failure of that contingency to others, the primary donee may, pending the contingency, declare his intention to keep the land unsold, so as upon the happening of the contingency to re-convert the land, if no sale has been (as, of course it may nevertheless have been) previously made. And, of course, if money be directed to be laid out in land for the benefit of A., B., and C. as tenants in common in fee, any one or more of them may take their shares of the money without the consent of the rest. "For," said Lord Cowper, "it is in vain to lay out this money in land for B. and C. when the next moment they may turn it into money, and equity, like nature, will do nothing in vain." But it would seem that this rule does not apply where the land is directed to be settled on persons in succession.

5th ed., p. 566, 6th ed., p. 762.

DISPOSITIONS BY PARTIAL OWNER BEFORE ACTUAL CONVERSION.

Although it is not in the power of the owner of an undivided share, or any other partial interest in property which is directed to be converted, by his single act, to change its character, and thereby impart to it a different transmissible quality, it does not

follow that every disposition by such partial owner adapted to the property in its actual state, is nugatory. On the contrary, it is clear that if a person entitled to a partial interest in money to be laid out in lands, shows an intention to dispose thereof by will, or otherwise, as personal estate, it will pass by such disposition; though, on the death of the donee [intestato], it would devolve to his real representative. So, if the legatee of the proceeds of real estate directed to be sold devise the land in its character of real estate, the devisee will be entitled to the fund in question, though it would, when acquired, be personal estate in the hands of such devisee.

1st ed., p. 537. 6th ed., p. 762. *Triquet* v. *Thornton*, 13 Ves. 345; *Re Lowman* (1895), 2 Ch. 348.

If a testator is entitled to a share of the proceeds of sale of land subject to a trust for sale, and is not entitled to any real estate in the proper sense of the term, a gift by him of "my real estate" will prima facie pass his interest in the proceeds of sale.

6th ed., p. 763. *Re Glassington* (1906), 2 Ch. 305.

HUSBAND AND WIFE MAY CONVEY LAND DIRECTED TO BE SOLD AS REAL ESTATE.

And here it may be observed that where real estate was devised upon trust for sale, and the proceeds were to be divided among several persons, one of whom was a married woman, who (the estate being unsold) joined with her husband in levying a fine of her share therein; it was held, that the wife was, by this means, barred of her equity to a settlement out of the fund. And the same effect, it is conceived, would now be produced by the husband and wife conveying the property by a deed acknowledged by her, according to the statute of 3 & 4 Will. 4, cap. 74, ss. 77, 79.

1st ed., p. 537, 6th ed., p. 763. *May* v. *Roper*, 4 Sim. 360.

ELECTION TO TAKE PERSONAL PROPERTY IN SPECIE.

The doctrine of election, in the ordinary sense of the term, cannot, from the nature of the case, apply to personal property which has been bequeathed upon trust for sale. But in such a case the beneficiaries, if absolutely entitled and sui juris, can elect to take the property in specie, so as to put an end to the trust for sale.

6th ed., p. 764. *Re Douglas and Powell's Contract* (1902), 2 Ch. 296.

DESTINATION OF UNDISPOSED OF INTERESTS IN PROPERTY DIRECTED TO BE CONVERTED.

It is clear that, where a testator directs real estate to be converted into money, for certain purposes, and the trusts of the will directing the application of the money, either as originally created, or as subsisting at the death of the testator, do not exhaust the

whole beneficial interest, such unexhausted interest, whether the estate be eventually sold or not, belongs to the heir as real estate undisposed of. The heir is excluded, not by the direction to convert, but by the disposition of the converted property, and so far only as that disposition extends.

1st ed., p. 553, 6th ed., p. 764. *Ackroyd* v. *Smithson*, 1 Br. C. C. 503. *Wilson* v. *Major*, 11 Ves. 205.

PRINCIPLE SAME, WHETHER LAND OR MONEY IS THE OBJECT OF CONVERSION.

And the same principle, it is now settled, applies in the converse case of money being directed to be laid out in land, which is then devised for a limited estate only; the fund ultra that interest, though eventually turned into land, goes as personal estate undisposed of to the residuary legatee or next of kin of the testator, on the ground that the will operates to convert the fund so far only as it disposes of it.

5th ed., p. 586. Jarman, p. 765. *Hereford* v. *Ravenhill*, 5 Beav. 51.

INTERIM INCOME OF PERSONALTY TO BE LAID OUT IN PURCHASE OF LAND.

It sometimes happens that a testator devises his lands by way of executory limitation, so that the vesting is in suspense, and bequeaths personalty upon trust to be invested in the purchase of land to be settled to the same uses. In such a case, so long as the vesting is in suspense, the rents of the devised lands belong to the testator's heir at law, and in the case supposed the income of the personalty follows the corpus.

6th ed., p. 765. *Bective* v. *Hodgson*, 10 H. L. C. 656.

LAPSED SHARE OF PROCEEDS OF REAL ESTATE DEVOLVES TO HEIR.

The general rule above stated also applies where the testator's disposition of the converted property, though originally complete, has partially failed in event by the decease of any one of the objects in the testator's lifetime; in which case the interest comprised in the lapsed gift devolves to the person who would have been entitled to the entire property, if the testator had died wholly intestate in regard thereto.

1st ed., p. 555, 6th ed., p. 765.

EFFECT OF FAILURE OF DEVISE BY CONTINGENCY OR ILLEGALITY.

So, if the produce of real estate directed to be sold be disposed of in a certain event which does not happen, or for a purpose which is illegal, the beneficial interest comprised in the contingent or illegal gift which thus fails devolves to the heir.

1st ed., *ibid.*, 6th ed., p. 766.

FAILURE OF DISPOSITION OF REAL AND PERSONAL ESTATE RESPECTIVELY.

And it is, of course, immaterial that the testator has combined his personal estate in the same gift with the proceeds of the real

estate; the effect in such case being that, by the failure of the intended disposition, the real estate descends to the heir, and the personalty devolves to the next of kin of the testator.

Ibid. Jessopp v. *Watson*, 1 My. & K. 665.

DISTINCTION BETWEEN CONVERSION TO ALL INTENTS AND CONVERSION FOR PURPOSES OF WILL.

The position that the heir is not excluded by any conversion, however absolute, may seem, indeed, to be indirectly encountered by those cases in which a distinction has been carefully drawn between absolute and qualified conversion.

6th ed., p. 767. *Wright* v. *Wright*, 16 Ves. 188.

WHAT CONSTITUTES CONVERSION FOR PURPOSES OF WILL.

Every conversion, however absolute in its terms, will be deemed to be a conversion for the purposes of the will only, unless the testator distinctly indicates an intention that it is, on the failure of those purposes, to prevail as between the persons on whom the law casts the real and personal property of an intestate, namely, the heir and next of kin.

1st ed., p. 557, 6th ed., p. 768.

EXAMPLES OF CONVERSION FOR PURPOSES OF WILL ONLY.

Accordingly, it is now settled, that neither a direction that the proceeds of the sale of land shall be deemed personal estate, nor such a direction joined with an express declaration that the heir at law shall not take in case of lapse, will exclude the claims of the heir at law as against the next of kin. If there is a residuary bequest, a direction that the proceeds of the real estate shall form part of the personalty, will make them pass by the residuary bequest. Even if the testator gives a share of his residue to A., who happens to be his heir at law, and by codicil revokes the gift, this does not prevent A. from claiming such part of the lapsed share of residue as consists of real estate.

5th ed., p. 589, 6th ed., p. 768. *Sykes* v. *Sykes*, L. R. 4 Eq. 200; *Gordon* v. *Atkinson*, 1 De G. & S. 478.

AS TO CONVERSION SUBJECTING FUND TO SIMPLE CONTRACT DEBTS.

Upon the principle that real estate directed to be sold is converted only for the purposes of the will, it was held by Sir W. Grant, that such a devise in trust to pay certain legacies did not throw open the fund to simple contract creditors, though he said that a substantive and independent intention to turn real estate into personalty, at all events, would have that effect. Such a conversion, however, as that referred to by his Honour, must be of a special kind. It must have no specified object, for a specification of the object, we see, will confine it; or it must contain some expressions showing that it is not so confined. In short, it must

be manifest that the property is to be considered as personalty quoad this purpose, or, in other words, that the fund is intended to be subjected to the claims of simple contract creditors.

1st ed., p. 561. 6th ed., p. 769. *Gibbs* v. *Ougier*, 12 Ves. 413.

AS TO PROCEEDS OF REAL ESTATE PASSING UNDER A RESIDUARY BEQUEST.

In further confirmation of the principle in question, it is now settled that the undisposed-of residue of money to arise from the sale of real estate will not pass under a general bequest of personalty in the same will, unless the testator expressly declares that it shall be considered as part of his personal estate, or unless such an intention can be collected from the force and meaning of the expressions used by the testator through the whole will.

5th ed., p. 590, 6th ed., p. 769. *Phillips* v. *Phillips*, 1 My. & K. 661.

CONVERSION TO ALL INTENTS EFFECTED BY DECLARATION THAT PROCEEDS OF REALTY SHALL BE PERSONALTY, OR BY BLENDING REAL AND PERSONAL ESTATES.

But it is clear that if there be a declaration that the money arising from the sale shall be considered as part of the testator's personal estate, it will pass under a general bequest of personalty in the same will.

1st ed., p. 566, 6th ed., p. 771. *Bright* v. *Larcher*, 3 De G. & J. 148.

And it seems, that where the testator has blended the proceeds of the real and personal estates in regard to one legatee taking a temporary interest, it is to be inferred that he does not intend them to be subsequently severed; and accordingly, in such a case, very slight circumstances will suffice to extend a bequest applicable in terms to the personalty only, to the produce of the real estate, in order to avoid such severance.

Ibid. *Byam* v. *Munton*, 1 R. & My. 503.

The blending of the proceeds of the two estates for any purpose not exhausting the whole, is always taken as rendering probable an intention that they shall be kept together throughout, and as inviting such a construction of subsequent words of gift as will carry that intention into effect.

5th ed., p. 593, 6th ed., p. 772. *Court* v. *Buckland*, 1 Ch. D. 605.

At the present day, the question must be treated as one purely of construction, unaffected by any special indulgence to the heir.

6th ed., p. 773. See *Singleton* v. *Tomlinson*, 3 Ap. Cas. 404.

CONVERSION AS BETWEEN PERSONS CLAIMING UNDER HEIR OR NEXT OF KIN.

It is observable that where a partial undisposed-of interest in real estate directed to be sold results to the heir at law of the testator, it becomes personalty in his hands.

1st ed., p. 568, 6th ed., p. 774. *Re Richerson* (1892), 1 Ch. p. 382.

And even where the land itself remains unsold, it results to the heir as personal estate.

Ante p. 365. *Re Richerson* (1892), 1 Ch. 379.

WHERE THE OBJECTS OF THE CONVERSION WHOLLY FAIL.

But if the purposes of the will wholly fail, as if all the legatees of the moneys to be produced by the sale die in the testator's lifetime, so that there is a total failure of the objects for which the conversion was to be made, the property will devolve upon the heir as real estate. And in such a case it is immaterial that a sale has by mistake taken place on the supposition that the trusts have not wholly failed: but the question whether the will causes a conversion or not is to be determined by the circumstances as they exist at the teststor's death, and therefore where it is uncertain at that period whether a conversion will be required for the purposes of the will, the heir will take the property as personalty, although those purposes may have failed before a sale takes place.

5th ed., p. 596, 6th ed., p. 775.

But this doctrine only applies where the real estate is devised separately: it does not apply where the testator creates a mixed fund of his real and personal estate.

6th ed., p. 776. *Atty.-Gen.* v. *Lomas*, L. R. 9 Ex. 29.

NEXT OF KIN TAKES AS REALTY, WHERE.

In the converse case, i.e., where personal estate is directed to be laid out in land, which is to be held on trusts which (either originally or by lapse) leaves part of the interest undisposed of, this partial interest results to the testator's next of kin or residuary legatee as real estate, in case of whose death it passes to his heir at law, or devisee.

5th ed., p. 597, 6th ed., p. 776. *Curteis* v. *Wormald*, 10 Ch. D. 172.

When land is devised charged with a sum of money, which is given on trusts which do not exhaust the entire beneficial interest in the money, so that after it has been raised the undisposed-of interest sinks for the benefit of the devisee, the devisee takes it as he finds it, viz., as personalty. This, of course, assumes him to be absolutely entitled to the land.

5th ed., p. 598, 6th ed., p. 776.

SPECIFIC SUMS PAYABLE OUT OF THE PRODUCE OF REAL ESTATE BELONG TO THE HEIR, WHEN.

Under the old law, in cases where real estate was devised to be sold, and a sum of money forming part of the proceeds was undisposed of, the question whether it went to the heir, or to the

residuary legatee of the fund, or to the general residuary legatee, was the subject of much difference of opinion.

6th ed., p. 777. See page 372 post, section 25 of the Wills Act (section 28 Ontario Act).

SUMS EXCEPTED BUT NOT DISPOSED OF.

It is clear, that a sum expressly excepted out of the produce of the sale, but not attempted to be disposed of, belonged to the heir.

6th ed., p. 777. *Watson* v. *Hayes*, 5 My. & Cr. 125.

SUMS GIVEN ON A CONTINGENCY.

Nor is it to be doubted, that where a legacy was payable out of a fund of this description upon a contingency which did not happen, the residuary devisee of the fund had the benefit of such failure, on the principle that, in the event which had happened, there was no actual disposition in favour of the legatee.

6th ed., p. 777. See page 210.

GIVEN TO OBJECTS INCAPABLE OF TAKING.

Where, however, a sum of money, part of the proceeds of real estate, was in terms given to an object incapable by law of taking, the authorities respecting its destination are conflicting, though here, also, there seems to be a preponderance in favour of the heir.

6th ed., p. 777. *Page* v. *Leapingwell*, 18 Ves. 463.

DESTINATION OF LAPSED SUMS SPECIFICALLY GIVEN OUT OF THE PRODUCE OF REAL ESTATE.

The principle seems to apply, with exactly the same force, to the case of lapse; and, undoubtedly, at one period, the established rule as to these cases also was, that the heir was entitled on failure of the devise; unless, according to the doctrine of some cases, the produce of the sale was blended with the personal estate in one general residuary disposition.

6th ed., p. 778.

PRINCIPLE GOVERNING THE CASES.

The ground upon which this rule was established (and the principle is equally applicable to every class of cases before noticed), is this: that where a testator devises real estate to be sold, and out of the produce gives a specific sum, say 1,000*l.*, to A., and the residue to B., the residue is to be considered as a gift of the specific sum which the purchase-money, after deducting 1,000*l.*, shall happen to amount to; the gift being the same in effect as if the testator had said, I give to B. the purchase-money minus 1,000*l.*, which I give to A. It is a mere distribution of the purchase-money among them, the one taking a certain and the other an uncertain share; and B. has no more right, in any event, to take the share of A., than A. has to take the share of B.

1st ed., p. 571, 6th ed., p. 778. *Hutcheson* v. *Hammond*, 3 Br. C. C. 128.

WHETHER BLENDING OF PROCEEDS OF REAL AND PERSONAL ESTATE EXCLUDES THE HEIR.

The unavoidable mention of Amphlett v. Park has rather anticipated the subject next to be considered, namely, whether the circumstance of the produce of the real estate being blended with the general personal estate constitutes a ground for excluding the heir, by applying to the mixed fund the rule applicable to the latter species of property; such rule being (as is well known) that the residuary legatee takes, even under the old law, whatever is not effectually disposed of to other persons. It seems difficult to discover any solid reason why the blending of the two funds should produce this consequence. The testator, intending the proceeds of the two species of property to go in the same manner, comprises them in the same disposition for mere convenience, and to avoid a needless repetition of language; and the effect ought, one should think, to be the same as if, in one part of his will, he had given the proceeds of the real estate to A., and in another part, the proceeds of the residuary personal estate to A.

1st ed., p. 575, 6th ed., p. 785.

GENERAL REMARKS ON THE CASES.

Here, then closes the long line of cases respecting the destination of pecuniary legacies, originally void or failing by lapse, so far as they are payable out of the proceeds of real estate, where such proceeds are blended with the general personal estate. The state of the authorities is certainly not such as to justify the hope of all litigation being at an end on this perplexing subject. An adjudication founded on a full examination of all the cases in still wanting.

1st ed., p. 586, 6th ed., p. 786.

RULE IN REGARD TO WILLS SINCE 1837.

The question, of course, will present itself under a different aspect in reference to wills made or republished since the year 1837, and containing a residuary devise, as such devise is made by the 25th section of the recent act of 1 Vict. c. 26, to extend to all interests in real estate comprised in any devise which fails by lapse or from being contrary to law, or otherwise incapable of taking effect; but the remarks occurring on this point have already found a place in connection with the subject of the failure of pecuniary charges on real estate, not directed to be converted, to which it will be sufficient to refer. The general principle in such cases is that when the sum is a charge, as distinguished from an exception, the failure still (as before the act) enures for the benefit of the specific devisee, not of the residuary devisee.

6th ed., p. 786. *Tucker* v. *Kayess*, 4 K. & J. 339; *Sutcliffe* v. *Cole*, 24 L. J. Ch. 486. In Ontario the date is 1 January, 1874. See page 212.

EXPRESS DIRECTION BY TESTATOR.

Sometimes a testator, after bequeathing a sum of money which he charges on his real estate, directs that in a certain event the sum shall sink into the residue of his personal estate: in such a case, if the sum is not actually raised, and there is no necessity to raise it, the general rule is that it sinks into the real estate, the testator being considered not to have shown any intention that it should be raised out of his real estate for the mere purpose of benefiting his personal estate.

6th ed., p. 787. *Johnson* v. *Webster*, 4 D. M. & G. 474.

Conversion.—Although there may be a trust for conversion, the beneficiaries may, if absolutely entitled, elect to take the property in its actual state. *Crawford* v. *Lundy*, 23 Chy. 244.

Absolute Direction to Sell—Division per Capita.—A testator by his will directed his executors to pay his debts, funeral expenses and legacies thereinafter given out of his estate, and proceeded: "My executors are hereby ordered to sell all my real estate, after the payment of all my just debts and funeral expenses, and all my property and personal effects, money or chattels, are to be equally divided between my children and their heirs, that is the heirs of my son G. and daughter E., now deceased, and my son J., Mary and Hannah, or their heirs. Should any of my said heirs not be of age at my death, my executors are to place their legacies in some of the banks of Ontario until the said heirs are of age:"—Held, that there was no intestacy either of the real or personal estate. It is to be presumed that the testator did not intend to die intestate, and the language showed that he did not intend his heirs to take his property as a real estate, as he peremptorily directed a sale, making an actual conversion of it into money, thus blending the real and personal property into a common fund, and then bequeathed it all to the legatees. (2) That the persons entitled to share under the will took per capita and not per stirpes upon the same principle as in the case of *Abrey* v. *Newman*, 16 Beav. 431. (3) That the grandchild of G. was not entitled to a share, the children of G. taking in their own right and not in a representative capacity. *Wood* v. *Armour*, 12 O. R. 146.

Sale of Devised Land by Testator Subsequent to Will — Bequest of "Cash, Negotiable Notes, and Mortgages"—Wills Act, s. 21—Lapsed Legacy.—1. Notwithstanding s. 21 of the Wills Act, R. S. M. 1902, c. 174, a devise of land specifically described fails when the testator has, after making the will, entered into an agreement to sell the land, although no part of the purchase money has been received during his lifetime, and the devisee takes no interest in either the land or the purchase money. *Ross* v. *Ross*, 20 Chy. 203, followed. 2. Unpaid purchase money of land sold by the testator in his lifetime will not pass under a bequest of "all cash, negotiable notes, and mortgages," if there were, at the time of his death, mortgages which would answer the description in the will. 3. A legacy lapses if the legatee dies before the testator, unless it can be regarded as a legacy to a class. *Re Ferguson Estate*, 18 Man. L. R. 532, 10 W. L. R. 637.

Devise — Sale of Land Devised — Mortgage for Purchase Money.—The testator bequeathed all his personal estate to his wife absolutely, and devised his land to his executors in trust for her benefit during life or widowhood, and then over. Between the date of the will and his death, the testator sold all his land, and took back a mortgage for part of the purchase money, which mortgage was an asset of his estate, at his decease:—Held, that s. 25 of the Wills Act, R. S. O. c. 128, had not the effect of making the devise applicable to the interest in the land which the testator had at the time of his death by virtue of the mortgage; the mortgage was part of the personal estate and fell under the absolute bequest to the wife. *In re Dods*, 21 C. L. T. 81, 1 O. L. R. 7.

Conversion by Sale.—Mortgage for purchase money included in residuary bequest. *Re Moore*, 1 O. W. R. 50.

Trust for Sale Operates as Conversion.—*Re Pellett*, 9 O. W. R. 587, following *Barrett* v. *Baskerville*, 11 Beav. 525; *Re Cooke's Contract*, 4 Ch. D. 454.

Conversion.—When a testator dies possessed of freehold and leasehold property, a gift by him to a tenant for life of the "rents, issues and profits" arising from the real and personal estate does not afford any sufficient indication of an intention that the leaseholds should be enjoyed by the tenant for life in specie; and they ought to be treated as converted at the expiration of a year from the testator's death in accordance with the rule in *Howe* v. *Dartmouth* (*Earl*) (7 Ves. 137a). *Wareham, In re*, *Wareham* v. *Brewin* (1912), 2 Ch. 312; *Craig* v. *Wheeler* (29 L. Ch. 374) and *Game, In re*, *Game* v. *Young* (66 L. J. Ch. 505; (1897) 1 Ch. 881), followed. *Crowe* v. *Crisford* (17 Beav. 507); *Wearing* v. *Wearing* (23 Beav. 9b). *Elmore's Will, In re* (9 W. R. 66), and *Vachell* v. *Roberts* (32 Beav. 140) overruled.

Discretionary Power.—A testator devised all his estate, real and personal, to trustees upon trust so soon after his death as might be expedient to convert into cash so much of his estate as might not then consist of money or first-class mortgage securities, and to invest the proceeds and apply the corpus and income in a specified manner. A later part of the will contained the following provision: "In the sale of my real estate or any portion thereof I also give my said trustees full discretionary power as to the mode, time, terms and conditions of sale, the amount of purchase money to be paid down, the security to be taken for the balance, and the rate of interest to be charged thereon, with full power to withdraw said property from sale and to offer the same for resale from time to time as they may deem best:"—Held, that the later clause merely gave a discretion as to the details and conditions of the sale, and did not qualify or override the specific direction to sell as soon after the testator's death as might be expedient. *Lewis* v. *Moore*, 24 A. R. 393.

Blended Fund.—A testator by his will directed that his trustees should, in certain events after the death of his wife and daughter, sell all his estate, real and personal, and divide the same equally amongst his "own right heirs," who might prove their relationship, etc.:—Held, that the conversion directed created a blended fund derived from realty and personalty to be distributed equally among the same class of persons. *Coatsworth* v. *Carson*, 24 O. R. 185.

Life Estate with Power to Sell.—Devise of land to widow for life for the support of herself and testator's children, with power to sell, etc., as she might think proper for the general benefit and purposes of his estate; and upon her death, devise of such part of land as might remain undisposed of to trustees to stand seized and possessed of for the benefit of testator's children, in equal shares, and to pay to each his share at majority; with a provision that upon the death of any child before majority without issue, the trustees were to pay or apply his share to and among the survivors:—Held, that the estates of the children became equitably vested upon the death of the testator, subject to the mere powers for sale contained in the will; and so vested as realty, for there was no trust which required, and the use of the words "pay" and "pay or apply" did not work a conversion of realty into personalty. *McDonell* v. *McDonell*, 24 O. R. 468.

A testator, after directing that his debts should be paid by his executors, gave to his wife during her life all the rents and interest of the property for her sole use. He then divided his property into three equal portions, one to his wife, one to his daughter M., and one to his daughter E. Held, that a sale and conversion of the real estate was not required or authorized during the lifetime of the wife, the tenant for life, even with her consent. *Henry* v. *Simpson*, 19 Chy. 522.

Majority Consent.—A devise to trustees upon trust to sell if directed by a majority of heirs. Held, that the land in question was vested

in the trustees on the express trust to sell at the end of twenty years from the testator's death, provided a majority of the heirs were in favor of a sale, which was proved, and that the jurisdiction to partition was ousted. *Re Dennis*, 14 O. R. 267.

No Legal Estate.—A will after giving several pecuniary legacies, contained this direction: "When my lands are sold and all the legacies paid, the money remaining is to be divided" in the manner therein stated. There was no other residuary clause. The testator named two executors, adding: "In them I repose full confidence that they will act fair and consistent:" Held, that all the lands were to be sold; and that the executors had power to sell them, although they had not the legal estate. *Woodside* v. *Logan*, 15 Chy. 145.

Mortgages.—Where a testator directed his real and personal estate to be converted into money; the proceeds to be invested; such investments to be continued until the whole of his property should be realized; and from and out of the same, when so realized and invested in the whole, and thus available for division, and not before, to pay certain legacies: —Held, that mortgages properly secured, which the testator held, should for the purposes of the will be deemed to be realized and invested immediately after the testator's decease; that the period of payment was not to be extended beyond the time that the estate might, with due diligence, be realized, and that the trustee could not prolong the period by selling the real estate on time. *Smith* v. *Seaton*, 17 Chy. 397.

Directory Limitation.—Held, that the trustees could make a good title, the limitation of the time being only directory. *Scott* v. *Scott*, 6 Chy. 366.

Discretion.—Where there is no absolute direction to sell, but a discretion is given to a trustee to sell or not, there is no conversion; but the property remains of the character it possessed at the death of the testator until the trustee has seen fit in his discretion to change it by an execution of the power. *In re Parker Trusts*, 20 Chy. 389. A power or trust was held to be discretionary. *Rowsell* v. *Winstanley*, 7 Chy. 141.

Payment of Debts.—A testator devised all his real and personal estate to trustees to sell the realty and get in the personalty, the proceeds of which, after payment of the debts, they were to invest in their names upon trust to pay the annual income to his two sons in equal moieties, they maintaining their mother during life. Held, that a complete conversion had been effected by the trust for sale in the will, so that the interests of the son should be ascertained as if the will consisted of personal estate only. *McGarry* v. *Thompson*, 29 Chy. 287.

Bequest to Wife.—As the testator directed his wife to have one-third of the value of his personal property, which could only be ascertained by a sale, it was the duty of the executors to make such conversion. *Ferguson* v. *Stewart*, 22 Chy. 364.

CHAPTER XXIII.

POWERS OF APPOINTMENT AND DISPOSITION.

Operation of a Power of Appointment.

A power of appointment is either a power of original disposition, or a power to revoke an existing disposition and make a new one; in the latter case, it is obvious that the existing interests are vested, and (after much discussion) it is now settled that where the power is one of original disposition, and is followed by a limitation in default of appointment, the interests so limited are vested, subject to be divested by an exercise of the power. The point is of importance when it is a question whether a person's interest in a trust fund passes to his trustee in bankruptcy, or is subject to his marriage settlement, or the like.

6th ed., p. 788. *Re Ware*, 45 Ch. D. 269.

Class Taking in Default, How Ascertained.

The rules for ascertaining the persons to take in default of appointment, where they constitute a class are stated elsewhere.

6th ed., p. 789. Chap. XLI., Chap. XLII.

Distinction Between Powers of Appointment and Powers of Disposition.

A power of appointment, as a general rule, requires for its exercise some more or less formal expression of intention, while a power of disposition, although it may be expressed so as to confer a mere power of appointment (as where a power to dispose of property by will is given), may be expressed so widely as to include the exercise of powers incident to ownership, such as a power of using, selling, or otherwise alienating the property, which may obviously be exercised without any formal expression of intention.

6th ed., p. 789. *Pennock* v. *Pennock*, L. R. 13 Eq. 144.

Appointment Operating as Direct Gift.

In some cases, where a person purports to charge or appoint property in exercise of a specific power, and of all other powers, and the charge or appointment cannot take effect under

This Chapter is new, except so far as it incorporates a few passages contained in Chap. XX. of previous editions of this work, on the "Operation of a General Devise of Real Estate" (Chap. XXV. in this edition). It does not profess to deal with those general principles which are common to powers of appointment, whether exercisable by deed or by will.—*Note by Editor of 6th Edition.*

the specific power, it takes effect out of the appointor's own interest in the property.

6th ed., p. 790. *Re James* (1910), 1 Ch. 157.

POWER EQUIVALENT TO ABSOLUTE INTEREST.

Tho cases in which a person to whom a power of disposition or appointment is given takes an absolute interest, are considered in Chapter XXXIII.

POWER TO APPOINT INCOME.

An absolute power of appointing the income of a fund carries the power to appoint the capital.

6th ed., p. 790. *Re L'Hernunier* (1894), 1 Ch. 675.

WHAT WORDS WILL CREATE A POWER.

If an absolute interest in property is given in the first instance, superadded words purporting to give a power of disposition are, as a rule, surplusage. Thus, a devise to a married woman to be her sole and separate property, and with power to her to appoint the same to her children and husband in such a way as she may think fit, gives her the absolute property.

6th ed., p. 790. *Howorth* v. *Dewell*, 29 Bea. 17; *Foxwell* v. *Van Grutten* (1900), W. N. 97.

ABSOLUTE GIFT CUT DOWN TO LIFE INTEREST WITH POWER OF DISPOSITION.

The doctrine applies even if the absolute interest is not given directly, but is implied from an indefinite gift of the income of the property.

6th ed., p. 791. *Weale* v. *Ollive*, 32 Bea. 421.

On the other hand, after an apparently absolute gift, the testator may go on to use words which show that he meant to give a life interest, with a power of appointment or disposition over the capital. Thus a gift to A., to be vested in her on her attaining twenty-one, and to be subject to her disposition thereof, followed by a gift over in the event of her dying under twenty-one or without disposing of the property by her will, gives her a life interest with a power of appointment by will.

6th ed., p. 791. *Borton* v. *Borton*, 16 Sim. 552.

PROVISION FOR DEATH OF LEGATEE WITHOUT HAVING DISPOSED OF PROPERTY.

Where a testator gives property to A., and then provides for the case of A.'s dying without having disposed of it, the question arises whether the original gift is an absolute one, in which case the gift over is repugnant and void; or whether A. takes an estate for life, with a general power of appointment, followed by a gift over in default of appointment.

6th ed., p. 792. *Re Jones* (1898), 1 Ch. 438; *Re Stringer's Estate*, 6 Ch. D. 1.

INFORMAL WORDS.

A power of appointment may be created by informal words, such as words giving a power of "settling" or "disposing" of property in a certain way. But vague words will not create a power if such a construction is inconsistent with the general scheme of the settlement containing them.

6th ed., p. 793. *Van Grutten* v. *Foxwell*, 84 L. T. 545.

As a general rule, a limitation to a person for life, and after his death to his heirs and assigns, does not give him a power of appointment.

6th ed., p. 793. *Milman* v. *Lane* (1901), 2 K. B. 745.

IMPLIED POWER TO APPOINT BY WILL.

A power to appoint, without saying in what manner, or a power to appoint "by writing," or "by deed or otherwise," authorises an appointment by will. And if the power is to appoint by a "writing" or "instrument" executed with certain prescribed formalities (e.g., sealing and delivery or attestation), it may be exercised by a will executed with those prescribed formalities, but it cannot be exercised by an ordinary will.

6th ed., p. 794. *Taylor* v. *Meads*, 4 D. J. & S. 597.

On the other hand, a gift of a life estate, followed by a power of disposition, may be so expressed as to confine the power to acts inter vivos to or give the donee an absolute interest.

6th ed., p. 795. *Re Jones* (1898), 1 Ch. 438.

WRITING IN THE NATURE OF A WILL.

If a power is exerciseable by any writing executed by the donee in the presence of two witnesses, and he executes a document of a testamentary character, this is "a writing in the nature of a will in exercise of a power" within the definition contained in sec. 1 of the Wills Act, and must, therefore, comply with the requirements of sec. 9.

6th ed., p. 795. *Bainbridge* v. *Smith*, 8 Sim. 86.

CONTINGENT POWER.

The general principle is that a power given to a designated person, to be exercised upon a contingency, can be well executed before the contingency happens. Thus if a woman has a power exerciseable by will in the event of her marriage, she can exercise it before the marriage.

6th ed., p. 796. *Logan* v. *Bell*, 1 C. B. 872.

A different rule seems to apply to special powers.

6th ed., p. 796. *Re Moir's Trusts*, 46 L. T. 723.

A power exercisable by persons answering a particular description at a certain time, cannot be exercised by persons who answer that description at a different time.

6th ed., p. 796.

If a power is limited to arise upon a contingent event which does not happen, the power is not exercisable.

6th ed., p. 796. *Price* v. *Parker*, 16 Sim. 198.

FUTURE EVENT.

A power limited to arise upon a future or contingent event must be distinguished from a power which takes effect upon a future event, but is presently exercisable. The former, not being exercisable before the event upon which it is limited to arise, happens, is, it seems, void for remoteness, unless the event is such that it must happen within the legal period.

6th ed., p. 797. *Blight* v. *Hartnoll*, 19 Ch. D. 294.

POWER TO BE EXERCISED WITHIN A CERTAIN PERIOD.

If a power is exercisable by will, and the donor requires that it shall be exercised within a certain period, the question arises whether he merely means that the will shall be made within the period, or whether he means that the will must become operative by the death of the donee within the period. As a general rule, it seems to be sufficient that the will should be made within the period, but it may appear from the context or general scheme of the instrument creating the power, that the donor requires the will to become operative by the death of the donee during the prescribed period.

6th ed., p. 797. *Re Illingworth* (1909), 2 Ch. 297.

WILLS ACT, S. 10.

In the case of powers which are expressly made exercisable by will, regard must be had to sec. 10 of the Wills Act, which enacts 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."

6th ed., p. 798. Section 13 Ontario Act is to the same effect.

This enactment does not prevent the donor of the power from imposing conditions or restrictions not relating to the formalities of execution.

6th ed., p. 798. *Cave* v. *Cave*, 8 D. M. & G. 131.

The Wills Act provides (sec. 1), that in the construction of the Act the word "will" shall extend to "an appointment by will or by writing in the nature of a will in exercise of a power."

6th ed., p. 798. *Re Broad* (1901), 2 Ch. 86. The Ontario Act, sec. 2 (a), contains the same interpretation.

AIDING DEFECTIVE EXECUTION.

Since the Wills Act, a power which requires to be exercised by will cannot be exercised by a will not complying with the statutory requirements, and the Court has no jurisdiction to aid an execution which is defective in this respect, unless the testator is domiciled abroad, and special formalities are prescribed.

6th ed., p. 799. *Re Kirwan's Trusts*, 25 Ch. D. 373.

OPERATION OF TESTAMENTARY APPOINTMENT.

There was formerly some question as to the proper functions of the Court of Probate and the Court of Construction with regard to the operation of a testamentary appointment, and it was at one time thought that the Judicature Acts would make a difference in the practice. This does not appear to have been the case, and the practice as now settled may be stated as follows:

6th ed., p. 799.

PROBATE, WHEN NECESSARY.

(1) A testamentary appointment in exercise of a power over personal estate is inoperative unless duly proved or recognised by the Court of Probate as a will.

6th ed., p. 800. *Ross* v. *Ewer*, 3 Atk. 160.

EFFECT OF PROBATE.

(2) Grant of probate is conclusive as to the testamentary character of the document proved. It only remains for the Court of Construction to determine whether the necessary formalities have been complied with, and whether in other respects the power has been duly exercised.

6th ed., p. 800. *Paglar* v. *Tongue*, L. R. 1 P. & D. 158.

ENGLISH DOMICIL.

(3) In the case of a will executed in accordance with English law, by a person domiciled in England, the probate is sufficient evidence of the due execution of the power, so far as formalities are concerned.

6th ed., p. 800. *Ward* v. *Ward*, 11 Bea. 377.

LORD KINGSDOWN'S ACT.

(4) A will admitted to probate under Lord Kingsdown's Act is not a good exercise of a testamentary power of appointment, unless executed in accordance with sec. 10 of the Wills Act.

6th ed., p. 800. *Re Price* (1900), 1 Ch. 442.

WILL IN ENGLISH FORM BY TESTATOR DOMICILED ABROAD.

(5) A testamentary document exercising a power of appointment, executed in accordance with the requirements of English law, by a person domiciled abroad, is recognised by the English Courts as a testamentary instrument, although not valid as a will according to the law of the appointor's domicil. The modern practice is not to grant probate, but letters of administration, with the will annexed. If the appointor is a married woman, the grant is limited to the appointed property, unless the husband consents to a general grant being made.

6th ed., p. 800. *Re Baker's Settlement Trusts* (1908), W. N. 161.

WILL IN FOREIGN FORM.

(6) Where a power is exercisable by will, and the donee is domiciled abroad, a will executed by him in accordance with the law of his domicil, and recognised as a valid will by the Court of Probate in England, although not executed in accordance with the formalities required by English law, will (unless special formalities are prescribed) operate as an exercise of power if an intention to exercise it appears by the will and if no special formalities are prescribed by the instrument creating the power.

6th ed., p. 801. *Re Price* (1900), 1 Ch. 442.

DEFECTIVE EXECUTION.

(7) In such a case as that last supposed, if special formalities are prescribed by the instrument creating the power, and they are not observed by the testator, the defective execution may be aided by the Court in accordance with its general principles.

6th ed., p. 801. *Re Walker* (1908), 1 Ch. 560.

TESTAMENTARY CAPACITY.

(8) In a case falling within (5) or (6), the appointment takes effect according to English law, and not according to the law of the appointor's domicil. From this follow two corollaries: first, the appointor may, by exercising the power, dispose of the property in a way not permitted by the law of his domicil; and secondly, a general devise or bequest contained in the will operates as an exercise of a general power under sec. 27 of the Wills Act, if the appointor shows an intention that his will should take effect according to English law, but not otherwise.

6th ed., p. 801. *Re Price, supra.*

WHERE SPECIAL FORMALITIES MUST BE OBSERVED.

(9) In a case where the provisions of the Wills Act do not apply, if special formalities are required by the instrument creating the power, and the donee is domiciled abroad, it is not sufficient that the instrument purporting to exercise the power

should be a will according to the law of the domicil; it must also comply with the terms of the power.

6th ed., p. 801. *Barretto* v. *Young* (1900). 2 Ch. 339.

LAND.
TRUST FOR SALE.

(10) A will made in exercise of a power to appoint land must be executed in accordance with the formalities required by the lex loci, and a will so executed is a valid appointment, although the will itself is invalid by the law of the testator's domicil. In the same case, it was held that where a person has a power of appointing the proceeds of sale of land subject to a trust for sale, but not sold, the power is to be treated as a power to appoint immovable property within this doctrine.

6th ed., p. 801. *Murray* v. *Chompernowne* (1901), 2 Ir. R. 232.

EXPRESS OR IMPLIED.

An intention to execute a general power may be express or implied.

6th ed., p. 802. *Thompson* v. *Simpson*, 50 L. J. Ch. 461.

IMPLIED EXERCISE OF POWER.

In the absence of an express exercise, as to which no question usually arises, an intention to exercise the power may be inferred from a reference to the power itself in a preceding part of the will.

6th ed., p. 802. *Cooper* v. *Martin*, L. R. 3 Ch. 47.

Again, an intention to exercise a general power of appointment may be inferred from a reference to the specific property subject to the power.

6th ed., p. 803. *Davies* v. *Thorns*, 3 De. G. & S. 347.

PAROL EVIDENCE.

Where the bequest is on the face of the will specific, and it is ascertained by parol (in that case legitimate) evidence that the testator has no other such fund, the power will (other things attended to) be well executed. Beyond this, of course, parol evidence cannot be adduced to influence the construction in any of these cases.

6th ed., p. 803. *Standen* v. *Standen*, 2 Ves. jun. 589.

But the mere bequest of a sum of money, corresponding in amount to that which is the subject of the power, raises no such inference, though the testator, when he made his will, was not possessed of any other property affording a fund for payment; as it is possible that he may have calculated on the future acquisition of property adequate to satisfy the legacy. For the same reason, the mention of "money in the funds" in a gen-

eral bequest of personal estate, and the fact of the testator having no stock of his own at the date of the will, did not, under the old law, cause the bequest to operate as an appointment of stock over which the testator had a general power of disposition.

6th ed., p. 803. *Davies* v. *Thorne*, 3 De. G. & S. 347; *Webb* v. *Honnor*, 1 J. & W. 352.

POWER OF REVOCATION.

The general principle above stated applies where the power is one of revocation as well as appointment. Thus, if a man settles land in Dale, reserving a power of revocation and new appointment by will, and devises all his lands in Dale to J. S., having no other lands in Dale, this is a good exercise of the power. So if he makes a will by which he disposes of the property upon trusts which vary in some respects from those declared by the settlement, this primâ facie operates as a revocation of the settlement pro tanto.

6th ed., p. 804.

WHERE WILL WOULD OTHERWISE BE INOPERATIVE.

Where a testator affects to deal with some property in general terms, not defining it, under such circumstances that the will cannot have effect except upon the property comprised in the power, this may show an intention to exercise the power.

6th ed., p. 804. *Broderick* v. *Brown*, 1 K. & J. 328.

INTEREST.

If a testator, having a general power over a fund, expressly appoints a particular sum out of that fund to A., this is a specific gift, and A. is entitled to interest on it from the death of the testator.

6th ed., p. 804. *Re Marten* (1901), 1 Ch. 370; *Re Bringloe*, 26 L. T. 58.

GENERAL REFERENCE TO POWERS.

Independently of sec. 27 of the Wills Act, it is clear that if a testator disposes of "all property over which I have any power of disposition by will," this operates as an exercise of a general power of appointment by will. It also operates as an exercise of a general power conferred on the testator after the date of the will.

6th ed., p. 805. *Patch* v. *Shore*, 2 Dr. & S. 589.

REALTY.

Before the Wills Act, a general devise or bequest did not operate as an execution of a general power of appointment over real estate, unless an intention to exercise the power could be inferred from the language of the will and the testator's circumstances.

6th ed., p. 805. *Jones* v. *Curry*, 1 Swanst. 66.

DISTINCTION WHERE THE TESTATRIX IS A MARRIED WOMAN.

The ground on which a general devise has been held to operate as an appointment of real estate, it is obvious, does not apply to personalty; for as a will of personal estate comprises whatever property of this description a testator dies possessed of, without regard to the period of its acquisition, it is not necessarily to be presumed, that the testator had any specific property in his view when he made it; and, therefore, even if it should happen that the testator had no other disposable property at the time of making his will or at his death, than the subject of the power, or that its exclusion from the will, will leave nothing for the residuary clause to operate upon, or will leave the personal estate inadequate to the payment of pecuniary legacies, still the will does not operate as an appointment under the power. And the circumstance that the donee, being a married woman, has no general testamentary capacity (but who, it is to be remembered, may have separate estate, disposable by will), has been held not to constitute a ground for varying the construction.

1st. ed., p. 630. 6th ed., p. 806. *Jones* v. *Curry*, 1 Sw. 66; *Lempriere* v. *Valpy*, 5 Sim. 108.

WHAT AMOUNTS TO AN APPOINTMENT IN WILLS MADE OR REPUBLISHED SINCE 1837.

The Wills Act provides that a general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will. (Section 27.)

6th ed., p. 808. Section 30 of the Ontario Act is to the same effect.

WHAT POWERS ARE GENERAL WITHIN S. 27.

A power is not the less general within the meaning of this section because it is to be executed by will only, and not by deed. But a power is not general within the meaning of this

section if the instrument creating the power prescribes conditions as to the exercise of the power (not being conditions as to the mode of execution), and in such case a general devise or bequest will not, under sec. 27, be a good execution of the power unless the conditions are complied with.

5th ed., p. 635. 6th ed., p. 809. *Re Phillips*, 41 Ch. D. 417.

SUM CHARGED ON LAND.

A general bequest will operate under sec. 27 as an exercise of a power to appoint a sum charged on land, even where the testator also has a power of appointing the land itself, which he exercises by the same will.

6th ed., p. 809. *Clifford* v. *Clifford*, 9 Ha. 675.

POWER TO DIRECT SUM TO BE RAISED.

If a testator has power by will to charge certain real estate with a maximum sum of money (say 10,000*l.*) for such purposes or for the benefit of such persons as he may direct, this power is not exercised by a will containing merely a general or residuary bequest. Such a power is really a double power, namely, a power to create a sum not exceeding 10,000*l.* and a power to appoint it; it "requires a distinct intention and a distinct act to bring the subject into existence before the general power of appointment can operate upon it," and this intention is not implied by sec. 27.

6th ed., p. 810. *Re Salvin* (1906), 2 Ch. 459.

POWER OF REVOCATION.

A general devise or bequest will not, under sec. 27, operate as an exercise of a power of revocation and new appointment, although a general devise or bequest may, it seems, have that operation on the ground of implied intention; for example, in a case where the gift would otherwise be wholly inoperative. The general rule applies to the case where the power of revocation is contained in the instrument originally creating it, as well as to the case where the power is reserved by an appointment made in exercise of the original power.

6th ed., p. 810. *Re Goulding's Settlement*, 48 W. R. 183.

CONVERSION.

Where a testator has a power of appointment over lands which have been sold, and the proceeds are liable to be applied in the purchase of other lands, the question whether the power is exercised by a residuary bequest of personalty seems to depend on two questions. One is, whether any person other than the testator has a right to require the money to be re-invested

in land, for if so, the residuary bequest will not operate as an appointment under sec. 27. But if no one other than the testator has that right, the further question arises whether he has shown an intention of treating the money as personalty; if he has, the money will pass under the bequest; if he has not, it will only pass as land, e.g., under a residuary devise.

6th ed., p. 811. *Blake* v. *Blake*, 15 Ch. D. 481.

PARTICULAR RESIDUE IS NOT WITHIN S. 27.

Although it is now settled that a devise may be residuary under sec. 25 of the Wills Act, notwithstanding that it is limited to a particular description of real estate, it is clear that a particular residue is not within either sec. 25 or sec. 27.

6th ed., p. 811. *Mason* v. *Ogden* (1903), A. C. 1.

PECUNIARY LEGACIES ARE APPOINTMENTS WITHIN S. 27 AND DIRECTIONS TO PAY DEBTS.

General pecuniary legacies are "bequests of personal property described in a general manner," and operate under this section as appointments, so far as the subject of the power is required in aid of the testator's own estate for payment of the legacies.

6th ed., p. 812. *Re Wilkinson*, L. R. 8 Eq. 487.

HOW A CONTRARY INTENTION MAY APPEAR.

The effect of sec. 27 is to reverse the old rule, and to throw on those who deny that a general devise or bequest executes a general power, the burden of proving by what appears on the face of the will the testator's intention that it shall not do so.

Re Hernando, 27 Ch. D. 284.

6th ed., p. 813. *Walker* v. *Banks*, 1 Jur. N. S. 606.

CONFIRMATION OF SETTLEMENT.

Where a testator has a general power of appointment under a settlement, followed by a limitation over in default of appointment, a residuary devise or bequest contained in his will operates as an exercise of the power, even if the will contains an express confirmation of the settlement; the confirmation is considered to apply to those parts of the settlement which the testator has no power to disturb.

6th ed., p. 816. *Hutchins* v. *Osborne*, 3 De. G. & J. 142.

USES DECLARED BY REFERENCE.

A residuary devise operates as an execution of a general power of appointing land, although it has been conveyed to uses similar to those of an existing settlement, and the testatrix has excepted the lands comprised in that settlement from the residuary devise.

6th ed., p. 816. *Hughes* v. *Jones*, 11 W. R. 898.

HOW A CONTRARY INTENTION MAY BE SHOWN.

But a "contrary intention" within the meaning of sec 27 may appear by implication.

6th ed., p. 816. *Thompson* v. *Simpson*, 50 L. J. Ch. 461.

LIABILITY TO DEBTS.

Where a general power is effectually exercised by will, the property, whether real or personal, becomes liable for the testator's debts, so far as his own property is insufficient to satisfy them. This liability is created by law, and the donee of the power cannot give any individual creditor a charge on the property, or priority over the other creditors, by making an appointment with that object, even if he has entered into a covenant to do so.

6th ed., p. 817. *Beyfus* v. *Lawley* (1903), A. C. 411.

A direction by a testator that his debts shall be paid, makes property over which he has a general power of appointment assets for the purpose, if his own property is insufficient, but it seems that the mere appointment of an executor will not have that effect.

6th ed., p. 817. *Re Davies*, L. R. 13 Eq. 163.

MARRIED W. P. ACT, 1882.

The Married Women's Property Act, 1882, enacts (sec. 4) that "the execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act."

6th ed., p. 818. This section is found in the Married Women's Property Act of Ontario, R. S. O. 1897, c. 163, s. 8.

"Debts and other liabilities" means engagements entered into by a married woman during coverture, for which her separate estate (if she had any) would be liable. Unless contracted since December 5, 1893, it is necessary that she should have had separate estate at the time she contracted them.

6th ed., p. 818. *Re Fieldwick* (1909), 1 Ch. 1.

PERSONALTY APPOINTED UNDER GENERAL POWER VESTS IN PERSONAL REPRESENTATIVE OF APPOINTOR.

Where a testator exercises a general power of appointment over personal estate, his executor, or his administrator with the will annexed, is the proper person to administer and give a discharge for the appointed fund, and the same result follows even if the testator appoints the fund to special trustees and directs them to distribute it.

6th ed., p. 819. *Re Peacock's Settlement* (1902), 1 Ch. 552.

FAILURE OF APPOINTMENT.

If an appointment under a general power fails to take effect, the question arises whether the property, or the part of it ineffectually appointed, devolves as in default of appointment, as part of the testator's estate. There is no difference in this respect between real and personal estate.

6th ed., p. 819. *Re Van Hagan*, 16 Ch. D. 18.

If the testator deals with the whole of the settled property as his own (e.g., by giving it to his executors or trustees), or if, without giving it to executors or trustees, he deals with the settled property and his own property as one mass, then he shows an intention to take the settled property out of the settlement for all purposes, so that if any of the dispositions of his will fail, the settled property, or so much of it as is undisposed of, devolves as part of his estate, and not to the persons entitled in default of appointment.

6th ed., p. 820. *Wilkinson* v. *Schneider*, L. R. 9 Eq. 423.

If, however, the testator merely shows an intention to appoint the settled property for a limited purpose, then any part of it which is undisposed of by the failure of the residuary gift goes as in default of appointment.

6th ed., p. 820. *Laing* v. *Cowan*, 24 Bea. 112.

If the donee of a power makes a will which deals only with the property which is the subject of the power, and appoints an executor, this alone is not sufficient to make the property his own for all purposes.

6th ed., p. 821. *Re Thurston*, 32 Ch. D. 508.

SEPARATE DISPOSITIONS.

If the donee of a general power expressly exercises the power by his will, and deals with his own property separately, then, if the residuary gift fails, the settled property will, as a rule, go as in default of appointment.

6th ed., p. 821.

UNCERTAINTY.

The doctrine of uncertainty applies to powers. Thus a power to dispose of the testator's property "in accordance with my wishes verbally expressed" is void for uncertainty. But although a simple gift to "A. or B." is, it would seem, void for uncertainty, a bequest to A. or B. at the discretion of C. is good, for he may divide it between them.

6th ed., p. 821. *Longmore* v. *Broom*, 7 Ves. 124.

As a general rule, the objects of a power are determined by the same rules of construction as those which apply to direct gifts in similar terms.

6th ed., p. 822.

WHETHER POWER EXCLUSIVE OR NON-EXCLUSIVE.

The question whether a power is exclusive or non-exclusive is one of intention, to be collected from the instrument creating the power: "no general rule can be laid down, except, perhaps, that the words "all and every" are mandatory, and make it necessary that each object should have a share (5 Ves. 857), and that 'such' authorizes exclusion, unless a contrary intention appear."

6th ed., p. 824. *Re Veale's Trusts*, 5 Ch. D. 622.

RANGE OF INVESTMENTS.

But the donee of a special power cannot, by a mere declaration, enlarge the range of investments authorised by the instrument creating the power.

6th ed., p. 825. *Re William Falconer's Trusts* (1908), 1 Ch. 410.

POWER TO APPOINT PORTIONS.

The donee of a power to charge money on land by way of portions has a right to fix the rate of interest; but where the sum is charged by the settlor, and the testator has merely a power of distributing it, he has no power to fix the rate of interest.

6th ed., p. 825. *Lewis* v. *Freke*, 2 Ves. jun. 507.

HOW INTENTION MAY BE SHOWN.

For the exercise of a special power there must be either (1) a reference to the power, or (2) a reference to the property subject to the power, or (3) an intention otherwise expressed in the will to exercise the power.

6th ed., p. 825. *Re Weston's Settlement* (1906), 2 Ch. 620.

INACCURATE REFERENCE TO POWER.

In exercising a special power by express reference, an inaccurate or incomplete description of the power is sufficient, if the intention is clear.

6th ed., p. 826. *Harvey v. Stracey*, 1 Drew. 73.

IMPLIED INTENTION.

Where a testator does not express an intention to exercise a special power, an intention to do so can only be inferred from the words of the will, and from the circumstances which at the time of executing it were known to the testator.

6th ed., p. 826. *Re Hayes* (1901), 2 Ch. 531.

If a person deals with property over which he has a special power of appointment in a way which does not of itself constitute an exercise of the power, he may show a sufficient intention to exercise it by referring to that transaction in his will. But the reference must be specific.

6th ed., p. 826. *Re Walsh*, 1 L. R. Ir. 320.

INDIRECT REFERENCE.

Sometimes an intention to exercise a power may be inferred from a reference to it in another part of the will, and where a testator refers to the instrument creating the power, and makes a disposition of a nature authorised by the powor, it will generally be presumed that he intended to exercise it: it is a question of intention to be collected from the whole will.

6th ed., p. 827. *Hunloke* v. *Gell*, 1 R. & Myl. 515.

An intention to exercise a special power may appear from the use of words referring to powers generally.

6th ed., p. 827. *Gainsford* v. *Dunn*, L. R. 17 Eq. 405.

And if the will contains indications that the testator either had not the power in his mind at all, or that he did not intend to exercise it, then such vague expressions as "property which I have power to dispose of," or "appoint," or the like, will not include property over which he has a special power of appointment.

6th ed., p. 828. *Cooke* v. *Cunliffe*, 17 Q. B. 245.

So if the trusts of the original settlement and of the will are inconsistent with one another, something more than a mere reference to powers generally is required to exercise the power.

6th ed., p. 829. *Re Cotton*, 40 Ch. D. 41.

The principle of construction *reddendo singula singulis*, was also applied by Malins, V.-C., in the case of Thornton v. Thornton, where a testator had two special powers, one to appoint among his children subject to a life interest in his wife, and the other to appoint a life interest to his wife in a fund which, subject to the power, was held in trust for his children at twenty-one, in equal shares.

6th ed., p. 830. *Thornton* v. *Thornton*, L. R. 20 Eq. 599.

POWER OF REVOCATION.

An appointment expressed to be made in exercise of every power enabling the appointor, does not extend to property which he cannot appoint without the exercise of a power of revocation, if there be other property to which the appointment can apply.

6th ed., p. 831. *Pomfret* v. *Perring*, 5 D. M. & G. 775.

SEC. 27 DOES NOT APPLY TO SPECIAL POWERS.

Special powers to appoint in favour of particular persons or classes, as children, or kindred, are not within sec. 27 of the Wills Act. (Section 30, Ontario Act.)

6th ed., p. 831. *Hawthorn* v. *Shedden*, 3 Sm. & Gif. 293.

If the question arises with regard to a special power over realty, then, inasmuch as, by sec. 24, a will now takes effect

with reference to the testator's own property as is made immediately before the death of the testator, no presumption can be raised in favour of the appointment by reason of the testator having no real estate of his own at the date of the will, however short may be the interval between the execution of the will and the testator's death.

6th ed., p. 831. *Harvey* v. *Harvey*, 32 L. T. 141. (See Section 27 Ontario Act).

REFERENCE TO SUBJECT OF POWER.

If a testator has a special power over certain property, and by his will, without referring to the power, disposes of that specific property in favour of the objects of the power, it will generally be inferred that he meant to exercise the power.

6th ed., p. 832. *Re Davids' Trusts*. John. 495.

WHAT DESCRIPTION REQUIRED.

To bring a case within this doctrine, however, the description of the property must be specific and unambiguous, so as to show beyond a doubt that the testator has in mind the property subject to the power.

6th ed., p. 833. *Re Rickman*, 80 L. T. 518.

EXERCISE OF FUTURE POWER.

How far a will can operate as an exercise of a special power created after the date of the will, is a question of some difficulty.

6th ed., p. 833.

In the absence of special circumstances, it is clear that sec. 24 of the Wills Act has not the same effect with regard to special powers as it has in the case of general powers, and the question is therefore one of intention.

Re Wells' Trusts, 42 Ch. D. 656. (See Section 27 Ontario Act).

FAILURE OF APPOINTMENT.

An intention to execute a special power may be ineffectual either for some reason applying to all testamentary gifts, or for some reason applying to special powers.

6th ed., p. 835. *Champney* v. *Davy*, 11 Ch. D. 958.

DEFECT IN POWER SUPPLIED BY TESTATOR'S INTEREST.

If a testator makes a will purporting to execute a power, and the power proves to be invalid, or to have been destroyed, or not to have arisen, or not to authorise the disposition which the testator desires to make, then if the testator has an interest in the property it will make good the defect in the appointment.

6th ed., p. 836. *Jones* v. *Southall*, 30 Beav. 187.

RELEASE OF GENERAL POWER.

A general testamentary power of appointment, like any other general power, may be released, or the donee may by covenant debar himself from exercising it.

6th ed., p. 836.

RELEASE OF SPECIAL POWER.

The donee of a special testamentary power may release it, unless it is a fiduciary power, or power coupled with a duty. The rule above stated as to the release of a power by a married woman applies also to special powers.

6th ed., p. 837. *Foakes* v. *Jackson* (1900), 1 Ch. 807.

REVOCATION OF APPOINTMENT.

A will exercising a power of appointment is only in certain cases revoked by the marriage of the testator, but with this exception the rules as to revocation of wills apply to such a will. Consequently, a general clause in a will, revoking all former wills, revokes a prior express testamentary appointment, whether the power under which it was made is general or special, and although the latter will does not execute the power.

6th ed., p. 837. *Harvey* v. *Harvey*, 23 W. R. 476.

IMPLIED REVOCATION.

The doctrine of implied revocation by a later inconsistent will or codicil also applies to appointments, so that if a testator, having a general power, made a will containing a residuary bequest operating as an execution of the power, and afterwards made another will containing a residuary bequest, this would, it seems, by virtue of sec. 27 of the Wills Act, operate as a revocation of the previous appointment.

6th ed., p. 837.

IMPLIED REVOCATION PRO TANTO.

If a testator exercises a special power of appointment in favour of some of the objects, and by a codicil, without expressly revoking the appointment, makes an appointment of part of the fund in favour of other objects, this only revokes the will to the extent to which it effectively interferes with the original appointment.

6th ed., p. 838. *Re Walker* (1908), 1 Ch. 560.

ADEMPTION.

A testamentary appointment has no operation until the death of the testator: there is no relation back to the date of the will. Consequently, an appointment under a testamentary power may be adeemed by subsequent dealings with the settled property. And there is no distinction, in this respect, between a general and a special power. Thus, if a testator in exercise of a power appoints Blackacre to A., and Blackacre is subsequently sold and the proceeds invested in the purchase of Whiteacre, the appointment is adeemed, and A. takes nothing under the appointment. So, if part of Blackacre is sold, the appointment is

adeemed pro tanto. In the case of personal property, such as stock, the same principle applies.

6th ed., p. 839. *Blake* v. *Blake*, 15 Ch. D. 481.

DESTRUCTION OF POWER AND CREATION OF NEW POWER.

An appointment may also be adeemed by the power under which it was expressed to be made being destroyed. And its efficacy will not, as a general rule, be restored by another equally extensive power being conferred on the testator, unless the power is a general one, and the will contains a residuary gift; this primâ facie operates as an exercise of the power.

6th ed., p. 841. *Thompson* v. *Simpson*, 50 L. J. Ch. 461.

Since the Wills Act, a general devise or bequest operates as an execution of a general power conferred on the testator since the date of the will, unless a contrary intention appears by the will, but the act does not seem to have made any further alteration in the law as to the execution of powers.

6th ed., p. 842. *Cofield* v. *Pollard*, 3 Jur. N. S. 1203.

Where a testator by his will expressly exercises a power, whether special or general, in favour of A., and the power is afterwards destroyed and a new power substituted, the mere tion of the power in favour of A. And even if the will is expressed to be made in exercise of all powers then vested in the testator, the republication of the will does not, apparently, make it operate as an exercise of an intermediately acquired special power. But if a testator disposes of property in exercise of all powers which may be vested in him at the time of his death, and republishes it after he has acquired a new power, this makes the will operate as an exercise of it, even if it is a special power, provided, of course, the dispositions of the will are in accordance with the terms of the power.

6th ed., p. 842. *Re Blackburn*, 43 Ch. D. 75.

LAPSE OF APPOINTMENT.

Appointments under powers are liable to failure by lapse if the beneficiary dies during the lifetime of the testator, but if an appointment is made to A. upon trust for B., or upon condition of his giving part of the benefit of the appointment to B., and A. dies in the lifetime of the testator, B.'s interest does not lapse.

6th ed., p. 843. *Oke* v. *Heath*, 1 Ves. sen. 135.

There are differences between general and special powers in respect of lapse. If a testator specifically executes a general power in favour of A., and A. predeceases him, the power will,

as a general rule, still be executed by a residuary gift in the will, if there is one.

6th ed., p. 844.

Again, if a testator executes a general power in favour of a child who predeceases him, leaving issue, the appointment is preserved from lapse by sec. 33 of the Wills Act.

6th ed., p. 844. *Eccles* v. *Cheyne*, 2 K. & J. 676.

Special powers stand on a different footing, for if an appointment under a special power lapses, it will only be executed by a residuary devise or bequest, if the residuary devise or bequest is within the scope of the power, and if an intention to exercise it in that way appears by the will, because, as already noticed, sec. 27 of the Wills Act does not apply to special powers.

6th ed., p. 844. *Re Hunt's Trusts*. 31 Ch. D. 308.

APPOINTMENT IN DISCHARGE OF OBLIGATION.

An appointment under a general power is like an ordinary legacy in this respect, that if it is made in discharge of a moral or legal obligation it does not necessarily lapse by the death of the appointee in the testator's lifetime.

6th ed., p. 845. *Stevens* v. *King* (1904), 2 Ch. 30.

FAILURE OF APPOINTMENT UNDER GENERAL POWER.

An appointment under a general power may fail in other cases besides that of lapse, as where it is made to take effect upon a contingency which does not happen. In such a case it will, as a general rule, be executed by a general devise or bequest.

6th ed., p. 845. *Re Elen*, 68 L. T. 816.

FAILURE OF APPOINTMENT UNDER SPECIAL POWER.

An appointment under a special power may also fail in other cases besides that of lapse, and the result is, it seems, the same as if it had lapsed: the property so appointed may pass under an appointment of the "residue" of the property subject to the power or under a residuary devise or bequest, or it may go as unappointed.

6th ed., p. 845. *Champney* v. *Davy*, 11 Ch. D. 958.

COMPOSITE FUND OR RESIDUE.

Where a testator has a special power of appointment over property, and also has property of his own, and disposes of both properties in one mass in favour of objects of the power, upon trusts which are good as regards his own property, and void for remoteness as regards the appointed property, the fund will be apportioned.

6th ed., p. 845. *Re Wright* (1906). 2 Ch. 288.

"SPECIFIC" APPOINTMENT.

Where a testator has property of his own, and also a power of appointment (whether general or special) over settled property, and bequeaths sums of money to various persons, the question whether they are ordinary legacies, or whether they are appointments of the settled fund, depends on the wording of the will.

6th ed., p. 846. *Davies* v. *Fowler*, L. R. 16 Eq. 308.

APPOINTMENT TO OBJECTS AND NON-OBJECTS IN SHARES.

If a testator who has a special power of appointment appoints the fund to six people as tenants in common, of whom only three are objects of the power, each of them takes one-sixth, and the rest of the fund goes as unappointed. It is immaterial that the appointment is in form an appointment to a class.

6th ed., p. 846. *Re Farncombe's Trusts*, 9 Ch. D. 652.

RULE IN LASSENCE V. TIERNEY.

If there is an absolute gift, followed by directions or conditions which are void, the absolute gift takes effect—applies to appointments under powers.

6th ed., p. 847. *Lassence* v. *Tierney*, 1 Mac. & G. 551.

MISTAKE OF TESTATOR AS TO AMOUNT OF FUND.

As a general rule, where a testator appoints a specific part of a fund to A. and makes no substitutional or residuary appointment which can apply to it, and the appointment fails to take effect in favour of A., the appointed sum goes to the persons entitled in default of appointment. To this rule there seems to be an exception in cases where the testator has made a mistake as to the amount of the fund.

6th ed., p. 847. *Eales* v. *Drake*, 1 Ch. D. 217.

ABATEMENT.

Appointments are subject to abatement. Thus, if a testator appoints 9900*l.* to A. and 10,000*l.* to B., having, in fact, only power to appoint 10,000*l.* in all, that sum is divided between A. and B. in the proportion of 99 to 100.

6th ed., p. 848. *Laurie* v. *Clutton*, 15 Bea. 65.

LIMITATION IN DEFAULT OF APPOINTMENT FOLLOWING INEFFECTIVE POWER.

Limitations in default of appointment following a power which is void for remoteness are not invalid, unless they themselves contravene the rule against perpetuities. So a limitation in default of appointment may be good, although the power itself cannot be exercised, or fails by reason of the death of the donee in the testator's lifetime.

6th ed., p. 848. *Re Abbott* (1893). 1 Ch. 54.

EFFECT OF SUBSEQUENT EVENTS.

In considering whether an appointment by will in exercise of a special power is good within the rule against perpetuities, the test is to place the appointment in the instrument creating the power, in lieu of the power itself, and it is, therefore, sometimes said that a will executing a special power is to be read into the instrument creating it. But this is not true for all purposes; in questions of lapse and ademption, for example, events subsequent to the execution of the will must be considered.

6th ed., p. 849. *Re Dowsett* (1901), 1 Ch. 398.

DOCTRINE OF ELECTION.

It is clear that the doctrine of election is applicable to cases of appointment under a power, so that if one having a special power by his will gives benefits out of his own property to the objects of the power, and appoints the subject of the power to strangers, or to an object of the power charged in favour of strangers, the former will be obliged to elect in favour of the latter.

6th ed., p. 850. *Whistler* v. *Webster*, 2 Ves. jun. 367.

The rule as to election is to be applied as between a gift under a will and a claim dehors the will and adverse to it, and is not to be applied as between one clause in a will and another clause in the same will.

6th ed., p. 851. *Wollaston* v. *King*, L. R. 8 Eq. 165.

THERE MUST BE AN ACTUAL DISPOSITION OF PROPERTY BELONGING TO THE PERSON WHO IS TO BE PUT TO HIS ELECTION.

Where a person having a testamentary power of appointment over a fund which in default of appointment belongs to A., makes his will and thereby expressly declares that he abstains from making any appointment, on the ground that the fund will devolve (as he supposes) to B., and gives A. certain benefits by his will; A. is not put to his election, since by taking both he disappoints no actual disposition of the testator: all that can be said is that the testator was mistaken.

6th ed., p. 852. *Langslow* v. *Langslow*, 21 Beav. 552.

THERE MUST ALSO BE PROPERTY OF THE TESTATOR TO COMPENSATE THE DISAPPOINTED DEVISEE.

A case of election arises where a testator, whether under a power or not, gives property which belongs to one person to another, and gives to the former property of his, the testator's: but there must be some "free disposable property" given to the person who is put to his election, which, if he elects to take against the will, may be laid hold of to compensate the disappointed devisees.

6th ed., p. 852.

OTHER CASES OF ELECTION.

Questions of election may also arise in cases where a testator having a power of appointment does not dispose of his own property in favour of the objects of the power.

6th ed., p. 853. *Re Wells' Trusts*, 42 Ch. D. 646.

HOTCHPOT.

Where there is a power to appoint to a class, and a gift to the class in default of appointment, and the will creating the power contains a provision directing that members of the class to whom the testator has made advances during his lifetime shall bring them into account, this operates only on such part of the fund, if any, as remains unappointed.

6th ed., p. 853. *Brocklehurst* v. *Flint*, 16 Bea. 100.

A hotchpot clause will not, as a general rule, be implied, either in the will creating the power or in the will by which it is exercised, the result being that if part of the fund is appointed to one of the class, and the rest of the fund is unappointed, the appointee is entitled to share in the unappointed part without bringing the appointed part into hotchpot, even if the appointor expressly says that he makes no appointment of the unappointed part in order that it may pass directly to the other members of the class.

6th ed., p. 853.

SATISFACTION.
DOUBLE PORTIONS.

Where a person has a power of appointment by deed or will, and he makes one appointment by deed and another by will to the same person, the question may arise whether either of the appointments revokes the other. Another question which also sometimes arises is whether the appointments are cumulative or substitutionary, or whether one operates as a satisfaction or ademption of the other. Where the testator is the father of, or stands in loco parentis towards the appointee, it seems that the rule against double portions applies: in other cases it is a question of intention.

6th ed., p. 854. *Re Tancred's Settlement* (1903), 1 Ch. 715.

INTEREST ON APPOINTED SUM.

A sum appointed by will out of a trust fund under a general power of appointment is looked upon as the same thing as an ordinary legacy, and only carries interest from the expiration of a year from the testator's death, unless it is payable at a time fixed by the will, in which case it carries interest from that time, or unless it is directed to be severed from the rest of the fund immediately after the death of the testator, it carries inter-

est from that time, or unless it is payable out of a reversionary fund, in which case it carries interest from the time when the fund falls into possession.

6th ed., p. 855. *Re Ludlam*, 63 L. T. 330.

CONTINGENT APPOINTMENT UNDER SPECIAL POWER DOES NOT CARRY INTEREST.

A contingent appointment of a sum of money under a special power does not, as a general rule, carry interest.

6th ed., p. 855. *Gotch* v. *Foster*, L. R. 5 Eq. 311.

SPECIAL POWER EXERCISED BY APPOINTMENT TO TRUSTEES.

Where a person having a special power over property vested in trustees appoints it to other trustees for the objects of the power, the question whether the original trustees ought to transfer the property to the trustees appointed by the donee of the power, depends to a great extent on the terms of the instrument creating the power: if it shews an intention that the original trustees should execute the trust, they are bound to do so.

6th ed., p. 856. *Scotney* v. *Lomer*, 31 Ch. D. 380.

GENERAL RULES OF CONSTRUCTION.

As a general rule the same canons of construction apply to an appointment under a power as if it were a direct gift, so that (for example) such questions as whether the property subject to the power is described with sufficient accuracy in the appointment, or whether an appointee takes a vested or a contingent interest, or whether a contingent remainder created by appointment is a legal limitation and, therefore, bad for want of an estate of freehold to support it, or how a class should be ascertained, or whether appointees take per capita or per stirpes, are governed by the ordinary rules of construction. And the question whether an appointment in fee is defeated by an executory limitation which fails to take effect, is decided in the same way as if the limitations were created by direct devise.

6th ed., p. 857. *Easum* v. *Appleford*, 5 My. & Cr. 56; *Doe* v. *Eyre*, 5 C. B. 713; *Craven* v. *Brady*, L. R. 4 Eq. 209.

WHETHER INTENTION TO APPOINT CAN BE IMPLIED.

There seems, however, to be a difference between an appointment and a direct gift in this respect, that where a testator has a power of appointment, with a gift over in default, an intention to exercise the power will not be implied in cases where a gift would be implied if the property were the testator's own.

6th ed., p. 858.

ALTERATION IN LAW.

A will exercising a special or general power of appointment must be construed according to the rules of law applicable to

wills at the time of its execution, although the power may have been created before, but exercised after, an alteration in the law as to the construction of wills.

6th ed., p. 859. *Freme* v. *Clement*, 18 Ch. D. 499.

SPECIFIC AND RESIDUARY APPOINTMENTS, &C.

If a testator has a power of appointment over three settled estates, A., B., and C., and appoints the A. estate to X., and "all other the hereditaments comprised in the settlement" to Y., the latter appointment is specific and not residuary, so that if the appointment of the A. estate to X. fails, it goes as unappointed. So if a testator has a power of appointing a specific fund, say 1000*l.*, and appoints 200*l.* to A. and 200*l.* to B., and the "residue," or "rest," or "remainder," or "balance," or "surplus" to C., this is primâ facie an appointment to C. of the specific sum of 600*l.* If, therefore, the appointment to A. fails, C. cannot claim the 200*l.*

6th ed., p. 859. *Baker* v. *Farmer*, L. R. 3 Ch. 540; *Easum* v. *Appleford*, 10 Sim. 274.

USE OF "RESIDUE," &C., IN TECHNICAL SENSE.

But it may appear from the context that the testator uses "residue" in the technical sense, so as to include specific appointments which fail, or he may appoint the residue of the fund "after payment of," or "subject to," the appointments of specific sums, and then any of these which fail will, as a general rule, pass to the residuary appointee, unless the Court can find some indication of a contrary intention.

6th ed., p. 860. *Re Jeaffreson's Trusts*, L. R. 2 Eq. 283.

EFFECT OF GIFT OF FUND OF UNASCERTAINED AMOUNT.

Again, the general rule of construction above stated does not apply if the fund is of unascertained amount, or is so treated by the testator.

6th ed., p. 861. *Falkner* v. *Butler*, Amb. 514. *Re Harries' Trust*, Johns, p. 206.

CHARGE OF DEBTS.

An express charge of debts on the fund shows that the testator does not mean the legatee of "residue" to take a definite proportion of the fund, the debts being of altogether uncertain amount.

6th ed., p. 861. *Baker* v. *Farmer*, L. R. 3 Ch. 537.

The rules above stated apply both to general and to special powers.

6th ed., p. 862.

POWER TO APPOINT AMONG NAMED PERSONS; DEFAULT OF APPOINTMENT; IMPLIED GIFT; DEATH OF REMAINDERMAN DURING LIFE INTEREST.

A bequest to A. for life "with remainder as he shall by deed or will and in his sole discretion appoint amongst" certain named persons, creates a trust by implication, in default of appointment, for such of those persons as survive the testator, whether they survive the life tenant or not. *Wilson* v. *Duguid* (53 L. J. Ch. 52; 24 Ch. D. 244) applied.

Walford, In re; Kenyon v. *Walford*, 55 S. J. 384.

Absolute Interest.—A testator by his will, after making sundry devises and bequests, directed the residue of the estate to be applied by his trustees, "unto and to the uses following: First, in case my dear mother survives me, and my nephew S. M. attains the age of twenty-three years, then all my residuary estate is to be valued by my executors, and divided into five equal shares, and one equal share is to be paid to my mother, or in case of her death before such division, then to be paid over or transferred to such person or persons or in such manner as she may by her last will and testament direct." The testator's mother survived him, but died before the estate had been divided or valued:—Held, that she took an absolute interest in the property so thereby given to her, and not a power of appointment merely; and that the same passed under the residuary clause in her will. *Becher* v. *Miller*, 25 Chy. 528.

Appointment by Deed Required.—A mortgage to secure $800 on certain lands was made by T. K. to his father. The proviso for payment was that the $800 was to be paid to the mortgagee's executors or administrators in eight annual instalments of $100 each, the first payment to be made one year after the mortgagee's decease, upon trust to pay the same to such person or persons as the mortgagees should, by deed endorsed on the mortgage, or otherwise by deed, direct and appoint; and in default of appointment to his children other than his son John, &c. No appointment was made by deed indorsed on the mortgage, or otherwise by deed. The mortgagee by his will directed that the $800 should be payable, as follows, $200 to each of his three daughters A., M., and B., and $100 each to his granddaughter K. and his widow, to be paid forthwith after his death: — Held, that the will constituted a valid appointment under the proviso in the mortgage, and that the legatees or appointees under it were entitled to the sums bequeathed to them; but that the time for the payment of the money must be in accordance with the terms of the mortgage. *McDermott* v. *Keenan*, 14 O. R. 687.

Attempt to Evade Restrictions.—The testator, under the provisions of his father's will, had the power of appointing his share of his father's estate among his children or to his brother or sister. By his will the testator gave portions, about one-fourth of his estate, to two of his children, and as to the residue he appointed the same to his brother C. T. B., desiring him to pay first his (testator's) indebtedness to his father's estate, and to release his policy of life insurance from such indebtedness, and then gave and bequeathed to a stranger the policy of assurance upon his life for $3,000, and all moneys arising therefrom:—Held, that, as to the portions of his estate given to his two children, the will was valid; but as to the appointment to his brother, the same was void as being a fraudulent exercise of the power of appointment; and therefore that as to the residue after payment of the amounts given to the two children the will was inoperative and void, and that as to so much there was an intestacy. *Bell* v. *Lee*, 8 A. R. 185.

Conditional Power of Appointment.—A testator devised all his property to his widow for life, remainder to his two daughters and niece, with a power of appointment. By a codicil he revoked that part giving these parties the power of disposing of their portions, and declared that they should "not have the power of willing the same, saving and excepting

they shall he married and have a child or children; and further should any or either of tha aforesaid parties depart this life previous to their obtaining their varions legacies, then and in such case the share or shares of the parties so departing this life shall go and devoive to the chlid or children of W. A. C. that shall be then aiive at auch decease: "—Heid, that tha daughters and niece took no interest untli the death of the tenant for life, hut that they had a power of appointment in the meantime, in tha event of their marrying and having children. *Christie* v. *Saunders*, 5 Chy. 464.

Delegation—Power of Revocation.—By a marriage settlement iands were conveyed to the use of the settlor, the mother of the intended husband, for iife, and after her death in trust to pay the rents to the intended wife and, in case of her death before her huaband, upon certain trusts in favour of the husband and the children of the marriage; hut if he should die in her ilfetime then in trust for such persona as he by any daed with power of revocation and new appointment, or by his wili, should direct and appoint, and in default of appointment in truat for his right heirs. Before tha 1st of January, 1874, the husband predeceased his wife, leaving no children. By his will he devised aa followa: "I give unto my wlfa ail my real and personai estate whatever and wheresoever to hold nnto her and her heirs, &c., absoluteiy for ever. I do aiso transfer unto her all the powers vested in me to hequeath, convey or execute by will or otharwise all or any of the properties conveyed to her under the settlement of Bathsheba Smith." The settior was then dead. The wlfe, assuming to execute the power contained in the settiement, by deed not containing a power of revocation appointed the lands to her own use absoiuteiy and then contracted to seli a part of them in fee:—Heid, suh nom. *Smith* v. *McLellan*, 11 O. R. 191, that the power was not executed hy the will. (2) That there was a valid delegation of the power to the wlfa hy the will. (3) That the deed executed by her was not a valid executlon of the power because not made with power of revocation and new appointment, and that the purchaser could not be compelled to accept the title because of the revocahle character of any vaiid appointment by deed. On appeai:—Heid, that the donee coiid not hy his will delegate the execution of the power to his wife, and therefore that ahe couid not under any circumstances, make a valid appointment thereunder. *Smith* v. *Chisholme*, 15 A. R. 738.

Devise to Heirs and Assigns of Living Persons.—A testator gave one-fifth of his residuary estate, real and personal, to the heirs and assigns of A. and his wife, who were both living:—Held, that A. took no interest or power of appointment, but that their children living at testator's death were entitled absoiutely. *Levitt* v. *Wood*, 17 Chy. 414.

Devise to Persons not within the Power.—The testatrix, under a power in her marriage aettiement, appointed to a daughter certain moneys "the interest thereof to be for her sole use during her life, and the principal to be left to all or any of her chiidren she may have at her death." By the aettlement the power of appointment was only among children, grandchildren not being objects of tha settlement:—Held, notwithstanding, that the appointment was not absolute in favonr of the appointee; that she took only the interest of the fund during her life, and that the principal went to the resiiduary appointee. *Deedes* v. *Graham*, 20 Chy. 258.

Indefinite Trust—Power of Appointment—Disposition by Will. —A wife having a power of appointment under her husband's wiil in the words "my said wife shali have full power to dispose of hy wlil or otherwise," by her wili devised ail her real and personal estate to executors "in truat to convert the same into cash" and pay iegacies, and as to the rest and residue to convert into cash and "divide the proceeds among friends, relatives and labourers in the Lord's work according to the judgment of my executors:"—Heid. that the disposition made clearly indicated an intention to take the property dealt with out of the instrnment containing the power for all purposes, and not only for the iimited purpose of giving effect to the particuiar disposition expressed; hut that the residuary be-

quest was void as too indefinite, and that the executors took the property in trust for the next of kin of the appointor and not beneficially. *Re Wilson, Reid*, v. *Jamieson*, 30 O. R. 553.

Intention to Exercise.—The donee of a power of appointment made a will, not referring to the power, disposing of "the moneys now or at my death invested in mortgages or otherwise." The settled estate was invested in mortgages, and the donee had no other mortgeges:—Held, that the intention of the testatrix to appoint the settled estate sufficiently appeared. *Deedee* v. *Graham*, 16 Chy. 167.

Limited Right of Disposal.—A testator devised to his wife all his property, real and personal, "as long as she, my said wife, shall exist; and at her decease the said property to be at her sole disposal unto any one or other of my descendants, so as the property and land shall be entailed in the family, from one generation to another:"—Held, that a devise by her in fee was an excessive execution of the power, and therefore void. *Scane* v. *Hartwick*, 11 U. C. R. 550.

Mode of Exercise.—A deed of trust provided that certain lands should go to the settlor's three children in default of appointment by deed. Afterwards he made his will, under seal, whereby he devised "all the rest of my estate, real and personal, to which I shall be entitled at the time of my decease," to one of the three children:—Held, that this residuary devise could not be regarded as an execution of the power of appointment, nor even as such a defective execution as equity would aid, at any rate at the suit of the plaintiff, who, as an illegitimate child of the testator, was only a stranger. *Shore* v. *Shore*, 21 O. R. 54.

A father conveyed lands to his daughter by deed with habendum "to have and to hold the same unto . . . and the heirs of her body lawfully begotten, to and for their sole and only use for ever . . . to and for the sole and separate use and benefit of (grantor) for and during the term of her natural life, and after her death then to the heirs of her body lawfully begotten for ever. Provided, always, however, that it shall and may be lawful for (grantor) to direct and appoint, either by deed or her last will and testament, which or in what manner her said heirs shall have the lands and premises hereby granted, should circumstances at any time render it necessary, of which circumstances she shall and may be sole judge." She died leaving her husband and several children surviving her, and by her will devised and appointed the lands to her eldest son, with instructions to dispose of the same between her husband and children in the proportions mentioned in her will:—Held, that the daughter took an estate in fee tail general, and that her husband was tenant by the curtesy. Held, also, that the provisions of the will were not a valid exercise of the power. *Archer* v. *Urquhart*, 23 O. R. 214.

Power to Appoint to Heirs.—A testator devised certain property to his son A., and to the heirs of his body lawfully to be begotten, with power to appoint any one or more of such heirs to take the same:—Held, that A. took an estate tail, and there was no trust in favour of his children. *Trust and Loan Co.* v. *Fraser*, 18 Chy. 19.

Restriction Against Appointment Except by Will.—Covenant not to Alter Will.—M. D. by her will devised certain land to trustees upon trust to hold one part to the use of her son C. S. C. for his life, and after his decease to convey the same to his children or to such of the testatrix's other three sons or their children as C. S. C. might by his last will appoint; and the other part to the use of her son W. D. in precisely the same way. C. S. C. and W. D. each appointed his parcel to the other by will duly executed, and each conveyed to the other his life interest, and covenanted in the conveyance not to revoke the appointment made by the will. They then contracted to sell both parcels to a purchaser:—Held, that C. S. C. and W. D. each took under the will a life estate with a power to appoint the inheritance in fee by will amongst the specified objects, and that such a power could not be executed except by will; the intention being that the donee of the power should not deprive himself until the time of his death of his right to select such of the objects of the power as he might deem

proper; and notwithstanding the covenants here given not to revoke the appointments, a subsequent appointment by will to one of the other objects of the power would be a good execution of it, and the covenants would not affect the title of the subsequent appointee, for he would take the estate under the original testatrix and not under the devisee for life. Held, also, that the position of C. S. C. and W. D. was not aided by s. 19 of R. S. O. 1887 c. 100, which gives to the donee of a power the right to release or to contract not to exercise it; by so doing they could not confer upon themselves the right to give the purchaser a good title. *Re Collard and Duckworth*, 16 O. R. 735.

Time of Exercise.—A testator devised certain lands to his wife, "to be held and enjoyed by her so long as she shall live and remain unmarried. After my decease and after her decease, or in the event of her marrying again, then from and after such second marriage, I will and devise the same unto my son, who shall be named by my said wife, by deed under her hand and seal, and to his heirs and assigns for ever." The widow married again, without having executed the power:—Held, that there being no specific limitation as to time, the whole period of the life of the donee was allowed for the execution of the power, and it did not cease upon her second marriage. Quære, whether she could exercise it till after her second marriage. *Cowan* v. *Besserer*, 5 O. R. 624.

Trust.—A will gave land to testator's heir-at-law for life, with power to appoint the same to one or more of his sons; and declared that the devisee (his heir) was not to alien or mortgage the lot; and that it was not to be attachable by his creditors:—Quære, whether this power was a naked power, or created a trust in favour of devisee's sons. *McMaster* v. *Morrison*, 14 Chy. 138.

Power of Appointment.—Restriction to class—Validity of restriction—Valid appointment with invalid conditions annexed. *Rogerson* v. *Compbell*, 6 O. W. R. 617, 10 O. L. R. 748.

Administration of Trusts.—Power of appointment in heir—Time for distribution—Implied power in trustees to sell property. — Bill for directions as to administration of the trusts declared in will of deceased:—Held, that trustees have power to sell and dispose of property in order to make payments to executors of one of the devisees. Second, that as to the unappointed two-thirds share of a device it should be equally divided now between surviving children of testator and heirs of D. Third, that the above devisee had a disposing power over one-third of her share of the residuary estate. As to the remainder, it should be distributed as declared in second answer. *Smith* v. *Robertson*, 6 E. L. R. 483.

Devise to One of Testator's Sons to be Selected by Widow.—Testator bequeathed his property to one of his sons his lawful heirs and assigns absolutely forever, his wife to appoint and choose the worthier. She failed to make a selection, one of the sons having predeceased his mother unmarried. A son and a daughter survived the mother:—Held, that the property vested in the sons on the death of the father as joint tenants. No partition. Administration ordered as children infants. *Hutchinson* v. *Hutchinson*, 7 E. L. R. 454.

Gift for Life.—Codicil—Bequest of life interest with power of appointment by will—Bequest of corpus of legatee in default.—A codicil gave Louis merely a life interest in an income, with a power of appointment by will in default of the exercise of which the testator would be intestate as to the disposition of the corpus after Louis's death. While an unlimited gift of income carried to its donee the corpus as well, no authority could be found for holding that a gift of income for life had this effect. Nor did that super-added power of appointment, which could never be exercised in his own favour, increase in any wise the interest of the donee of this power in the fund which was its subject. By clause (e) of his will the testator had devised the rest and residue of his property to Louis. The corpus of the $10,000, of which the income by the codicil was given to Louis, would not, under the scheme of the will as originally framed, have been residuary estate. By a preceding clause, (d), which the codicil revoked, Louis E.

Hanmer was given the entire principal of his father's estate, except a sum set aside to produce an annuity for his mother; the testator by this codicil revoked the gift to his son of the principal of his estate; by the same instrument he expressly confirmed, *inter alia*, the residuary bequest to him, which, the testator being otherwise intestate as to the corpus of the $10,000 (except that he gave his son a power of appointment by will over it), therefore, carried that corpus:—Held, the testator had in fact given the corpus of the fund to his son in default of his exercising the power of appointment. The authorities seem uniform that such provisions constitute an absolute gift entitling the legatee to have the fund paid over. *Re Hanmer*, 4 O. W. R. 474, 9 O. L. R. 348.

Use of Property for Life.—Power of disposition—Intentions of testator.—Testator by his will gave to his wife C. M. the use, rents, and proceeds of all his remaining real estate, personal property, mortgages, notes, etc., for her own use during her lifetime. At the death of his wife he devised the house and contents to A. M. for her own use and benefit during her lifetime, and at the death of A. M., he devised to his nephews and niece named, the said house and contents "as well as any money or securities which may remain after the death of my wife, C. M.:"—Held, that the disposal of any property which might remain over at the death of C. M. showed an intention to give C. M. the disposition of the property during her lifetime. *In re Thompson's Estate*, 14 Ch. D. 263, and *Constable* v. *Bull*, 3 DeG. & Sm. 411, followed. *Re McDonald*, 35 N. S. R. 500.

POWER OF APPOINTMENT.

Watson v. *Woods*, 14 O. R. 48, "to keep it for his heirs."

Heddleston v. *Heddleston*, 15 O. R. 280, "except by will to their lawful heirs," distinguished from.

Robson v. *Campbell*, 6 O. W. R. 619, 10 O. L. R. 748, "excepting to one or more of my children or grandchildren to whom she may dispose of it if it be her wish to do so," the class being of the testator not of the devisee.

The devisee takes free from conditions. *Rooke* v. *Rooke*, 2 Gr. & Sim. 38. *Secus*, if part of the property subject to the owner is validly appointed and the rest invalidly, as in *Bell* v. *Lee*, 8 A. R. 185, *Deedes* v. *Graham*, 20 Chy. 258. *Trustees*, 3 O L. R. 590, 6 O. L. R. 250, 7 O. L. R. 297.

RELEASE OF RIGHT TO EXERCISE.

The clause of the will in question was as follows: "The house I live in and eleven village lots in connection therewith I will to my wife during her lifetime, or so long as she remains my widow, and after her death or marriage my son John Jacob Drew to have the same during his lifetime with power to will the same as he may see fit."

It is competent for J. J. Drew to agree for a valuable consideration not to execute the power: *Hurst* v. *Hurst* (1852), 16 Beav. 372; *Isaac* v. *Hughes* (1870), L. R. 9 Eq. 191. *In re Drew and McGowan*, 1 O. L. R. 575.

CHAPTER XXIV.

TRUSTS AND TRUSTEES.

CONDITIONAL APPOINTMENT.

A person may be appointed trustee contingently, or subject to a condition; as, for example, "if and when" he (being abroad) "shall return to England": it was held in a case of this kind, that residence in England for six months fulfilled the condition.

6th ed., p. 864. *Re Arbib and Class* (1891), 1 Ch. 601.

UNCERTAINTY.

A trust, like any other testamentary disposition, may be void for uncertainty.

6th ed., p. 865. (See Chapter XIV.)

WHERE INTENDED TRUST SECONDARY PURPOSE OF GIFT.

On the other hand, the testator may so express himself as to show an intention to give property to a person beneficially, subject to any trust which the testator may hereafter impose, he not having made up his mind whether he will do so or not.

6th ed., p. 866. *Fenton* v. *Hawkins*, 9 W. R. 300.

RESULTING TRUST.

Where the gift is complete on the face of the will, and it appears from it that the testator intended the property to be held on trust, the effect in any case is to prevent the devisee or legatee from taking beneficially; if therefore the trust which the testator intended to create is void ab initio, or fails by reason of lapse or otherwise, there is a resulting trust.

6th ed., p. 866. (See Chapter XXI.)

The fact that property is given to a person "absolutely," or "in the most absolute manner," although it primâ facie imports a beneficial gift, does not necessarily prevent the inference, from the context, that he was intended to be a trustee.

6th ed., p. 866. *Bernard* v. *Minshull*, Johns 276.

DISPOSITION AT DISCRETION OF DONEE.

Where property is given to a person for such purposes as he thinks fit, or to be disposed of as he thinks right, or the like, this is primâ facie a beneficial gift. And even if the devisee or legatee holds a public or official position, such a gift does not necessarily give rise to the inference that he takes as a trustee.

6th ed., p. 866. *O'Brien* v. *Condon* (1905), 1 Ir. R. 51.

TECHNICAL WORDS NOT REQUIRED.

Technical language is not necessary to create a trust. It is enough that the intention is apparent. Thus, if a testator gives property to his executors, "in and for the consideration" of paying the rents and profits to his wife for life, this shows that it is given to them in trust and not beneficially. And if a testator devises land "for this intent and purpose and upon this condition," these words are sufficient to create a trust.

1st ed., p. 334. 6th ed., p. 867. *Merchant Taylors' Co.* v. *Att.-Gen.* L. R. 6 Ch. 512.

EFFECT OF WORD "TRUST."

And as a trust can be created without the use of the word "trust," so a trust will not he created hy the word "trust" if it appears from the whole will that the testator did not intend the word to have that effect.

6th ed., p. 867. *Hughes* v. *Evans*, 13 Sim. 496.

PRECATORY TRUSTS.

The doctrine of precatory trusts has undergone a gradual change since the early part of the eighteenth century. In former days the judges held that almost any expression of wish or expectation hy a testator, however vague, was sufficient to create a trust, provided the suhject and ohject were certain. At the present day the tendency is the other way; the Courts consider every will by itself, and do not allow vague and informal words to create a trust, if they think it improhable, taking the will as a whole, that the testator intended them to have that effect.

6th ed., p. 868.

DOCTRINE LAID DOWN IN THE OLDER CASES.

It has been long settled, that words of recommendation, request, entreaty, wish or expectation, addressed to a devisee or legatee will make him a trustee for the person or persons in whose favour such expressions are used; provided the testator has pointed out, with sufficient clearness and certainty, both the snbject-matter and the ohject or ohjects of the intended trust.

1st ed., p. 334. 6th ed., p. 868. *Re Hamilton* (1895), 2 Ch. 370.

OTHER CASES OF DOUBTFUL WORDS CREATING A TRUST.

Trusts, or powers in the nature of trusts, have also heen held to be created hy the following expressions: "I desire him to give"; "I herehy request"; "I heg"; "it is my dying request"; "empower and authorise her to settle and dispose of the estate to such persons as she shall think fit by her will, confiding in her not to alienate the estate from my nearest family"; "in the full belief"; "advise him to settle"; "this is my last wish";

"my dying wish"; "require and entreat"; "trusting"; "recommend"; "trusting that he will preserve the same, so that after his decease it may go and be equally divided, &c."; "well knowing"; "under the conviction that she will dispose, &c."; "to be at her disposal to apply the same"; and by a direction to trustees to convey to the eldest son at twenty-one, "but so that the settler's wish and desire may be observed, which is hereby declared, that the other children may be allowed to participate."

6th ed., p. 870.

MERE EXPRESSIONS OF KINDNESS NOT SUFFICIENT

If the testator's language amounts merely to a general expression of goodwill towards the objects in question, and does not intimate any definite disposing intention in their favour, as where he adds, "I have no doubt but A. B. (the legatee) will be kind to my children," such words are inoperative to qualify the legatee's interest.

6th ed., pp. 870-871. *Ellis* v. *Ellis*, 23 W. R. 382; *Salusbury* v. *Denton*, 3 K. & J. 529; *Shelley* v. *Shelley*, L. R. 6 Eq. 540; *Tewsdale* v. *Braithwaite*, 5 Ch. D. 630.

CERTAINTY IN THE OBJECT.

A precatory trust will not be created unless its objects are pointed out by the testator with sufficient certainty. "Vagueness in the object is regarded as evidence that no trust was intended to be created."

6th ed., p. 871. *Briggs* v. *Penny*, 3 Mac. & G. 555.

WISHES OF TESTATOR NOT CLEARLY EXPRESSED.

On the same principle, where a testator gives property to A. "having confidence" that he will dispose of it in accordance with his wishes, and the testator does not communicate any wishes of a definite nature, no trust is created.

6th ed., p. 872. *Reid* v. *Atkinson*, Ir. R. 5 Eq. 373.

There must also be a definite subject.

6th ed., p. 872. *Re Moore*, 55 L. J. Ch. 418.

DOUBTFUL EXPRESSIONS EXPLAINED BY CONTEXT.

Expressions sufficient per se to create a trust may be deprived of their effect by a context expressly declaring, or by implication showing that no trust was intended.

6th ed., p. 872. *Young* v. *Martin*, 2 Y. & C. C. C. 582.

Again, the idea of a trust may be excluded if the donee is given a wide discretion as to the disposition of the property.

6th ed., p. 873. *Eaton* v. *Watts*, L. R. 4 Eq. 151. ("To dispose of as he thinks fit.")

WHERE THE GIFT IS ABSOLUTE, PRECATORY WORDS DO NOT CREATE A TRUST.

And where the words of a gift expressly point to an absolute enjoyment and power of disposition by the donee himself, the

natural construction of subsequent precatory words is that they express the testator's belief or wish without imposing a trust.

6th ed., p. 873. *Re Bond*, 4 Ch. D. 238.

"Absoluto" property means not only unlimited in estate, but unfettered by trust or condition.

Irvine v. *Sullivan*, L. R. 8 Eq. 673.

Wherever any person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shows clearly that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it.

6th ed., p. 876. *Knight* v. *Boughton*, 11 Cl. & F. 513.

The later cases have established the reasonable rule that the Court is to consider in each particular case what was the testator's intention.

6th ed., p. 878. *Re Diggles*, 39 Ch. D. 253; *Re Williams* (1897), 2 Ch. 12.

Trusts—*i.e.*, equitable obligations to deal with property in a particular way—can be imposed by any language which is clear enough to show an intention to impose them.

6th ed., p. 879. Per Cur. *Re Williams* (1897), 2 Ch. 12.

WHERE NO TRUST CREATED DEVISEE TAKES ABSOLUTELY.

Whenever it is a question whether a trust has been created or not, the consequence of holding the expressions to be too vague for the creation of a trust is that the devisee or legatee retains the property for his own benefit; and in this respect such cases stand distinguished from those in which there is considered to be sufficient indication of the testator's intention to create a trust, though the objects of it are uncertain; a state of things which, of course, lets in the claim of the residuary devisee or legatee or of heir or next of kin to the beneficial ownership.

6th ed., p. 880. *Briggs* v. *Penny*, 3 De G. & S. 525. See Chapter XXI.

In ascertaining whether the precatory words import merely a recommendation, or whether they import a definite imperative direction to the donee as to his mode of dealing with the property, the Court will be guided by the consideration whether the amount he is requested to give is certain or uncertain, and whether the objects to be selected are certain or uncertain, and if there is a total absence of explicit direction as to the quantum to be given, or as to the objects to be selected by the donee of the property, then the Court will infer from the circumstance of the testator having used precatory words, expressive only of hope, desire or request, instead of the formal words usual for the creation of a

trust, that those words are used, not for the purpose of creating an imperative trust, but simply as suggestions on the part of the testator, for the guidance of the donee in the distribution of the property: the testator placing implicit reliance upon his discretion and leaving him the sole judge whether he will adopt those suggestions or not, and whether he will dispose of the property in the manner indicated by the testator, or in any other manner at his absolute discretion.

6th ed., p. 881. *Bernard* v. *Minshull* Jur. 276

GIFT FOR A SPECIFIED PURPOSE.

We are now to consider whether in cases where words are added expressing a purpose for which the gift is made, such purpose is to be considered obligatory.

6th ed., p. 882.

WHERE THE PURPOSE IS THE BENEFIT OF DONEE ALONE, THE GIFT IS ABSOLUTE.

Where the purpose of the gift is the benefit solely of the donee himself, he can claim the gift without applying it to the purpose, and that, it is conceived, whether the purpose be in terms obligatory or not. Thus, if a sum of money be bequeathed to purchase for any person a ring, or a life annuity, or a house, or to set him up in business, or towards the printing of a book, the profits on which are to be for his benefit, the legatee may claim the money without applying it or binding himself to apply it to the specified purpose; and even in spite of an express declaration by the testator, that he shall not be permitted to receive the money.

6th ed., p. 882. *Dawson* v. *Hearn*, 1 R. & My. 606; *Re Browne's Will*, 27 Beav. 324; *Stakes* v. *Cheek*, 28 Bea. 620.

But, if there be more than one donee interested in the gift, the deviation from the testator's directions cannot be made without the consent of all, as if the house when purchased is to be conveyed to or settled on two or more persons.

6th ed., p. 882. *Re Cameron*, 26 Ch. D. 19.

WHERE PURPOSE WOULD BENEFIT OTHERS.

Where a testator, in bequeathing a legacy, states the purpose for which he gives it, the mere fact that if the legacy were applied for that purpose it would benefit other persons besides the legatee, does not impose on him any trust in their favour.

6th ed., p. 882. *Mexborough* v. *Savile*, 88 L. T. 131.

But if the testator bequeaths a legacy to trustees to be applied for the benefit of a number of persons, they can, if they are all ascertained and sui juris, elect to have the money paid to them in lieu of having it applied in the manner directed by the

testator. Thus, a bequest of money to trustees to be laid out in planting trees on an estate of which the testator was tenant for life is a gift for the benefit of the persons entitled to the estate, and belongs to them absolutely.

6th ed., p. 883. *Re Bowes* (1896), 1 Ch. 507.

GIFT OVER.

As a general rule, a bequest of a capital sum for the maintenance and education of a person is equivalent to a bequest of it for his benefit, and entitles him to the whole, but if a legacy is directed to be applied by the testator's executors or trustees in a certain way for the benefit of A., with a gift over of any surplus remaining after the purpose is fulfilled, this only entitles A. to so much of the legacy as is necessary for the purpose.

6th ed., p. 883. *Re Unite* (1906), W. N. 26.

DEATH OF LEGATEE.

Where the principle applies and the gift is immediate, the legatee's interest vests on the death of the testator, and if he dies before the money is paid or laid out, his personal representatives are entitled to it.

6th ed., p. 883. *Palmer* v. *Craufurd*, 3 Swanst. 482.

FUTURE AND CONTINGENT GIFTS.

The rule is applied where the gift is to take effect at a future time. For example, if a testator directs a sum of money or share of residue to be laid out at a future time (e.g., on the death of a tenant for life), in the purchase of an annuity, and the annuitant dies before the time arrives, his representatives will be entitled to the money.

6th ed., p. 884. *Day* v. *Day*, 22 L. J. Ch. 878.

PROVISION AGAINST ALIENATION.

If an annuity is directed to be purchased in the name of the annuitant, a gift over in the event of his alienating it is inoperative, and he takes absolutely. But if the annuity is directed to be held by trustees for the annuitant, with a gift over in case he should alienate it or become bankrupt, his right to receive the fund is taken away.

6th ed., p. 884. *Hatton* v. *May*, 3 Ch. D. 148.

DIRECTION TO ACCUMULATE INCOME, WHEN VOID.

On the same principle, if a testator gives property to A. absolutely, but directs his trustees to retain possession and accumulate the income for a certain number of years and then transfer the property and accumulations to A., the trust for accumulation is nugatory, and A. is entitled to have the property transferred to him at once. Of course if the gift is contingent or defeasible or if

any other person may by possibility be interested in the trust, the principle does not apply.

6th ed., p. 884. *Wharton* v. *Masterman* (1895), A. C. 186.

TRUST, WHEN INEFFECTIVE.
TRUSTS FOR MAINTENANCE AND EDUCATION.

Again, if a testator gives property for the benefit of A. absolutely (that is, without settling it on him for life, or providing for a gift over, or the like), and gives his trustees a discretion, or specific directions, as to the manner in which the property shall be held and applied for A.'s benefit, A. takes it absolutely. And the same rule applies even where the testator shows that his object was to secure the property for the benefit of A.'s children. So if the whole of a certain fund or income is given for the maintenance, or the maintenance and education, of a person, he is absolutely entitled to the fund or income, as the case may be, and if he dies before it has been paid or expended, his personal representatives are entitled to it. But if the money is given for the maintenance of several persons in such manner as the trustees think proper, no one beneficiary is entitled to any specific share.

6th ed., p. 885. *Re Coleman*, 39 Ch. D. 443.

WHERE TIME IS LEFT TO DISCRETION OF TRUSTEES.

There are also cases in which a sum of money is directed to be applied for the benefit of a person in a certain way (as to bind him apprentice), but the time within which it is to be expended is left to the discretion of the testator's executors or trustees: here the beneficiary cannot, so long as the trustees exercise their discretion properly, demand payment of the money, but if he dies before it is applied, his personal representatives are entitled to the money.

6th ed., p. 885. *Barton* v. *Cooke*, 5 Ves. 461; *Chambers* v. *Smith*, 3 A. C. 795.

WHERE PERFORMANCE OF TRUST BECOMES UNNECESSARY.

On a somewhat similar principle, if a legacy is given to be applied for the benefit of a person in a particular way, and the prescribed mode of application becomes impossible or unnecessary the legatee is entitled to the legacy absolutely.

6th ed., p. 886. *Re Colson's Trusts*, Kay 133.

WHERE PART ONLY NEED BE APPLIED.

In the preceding cases the trust applied to the whole fund, but where the trust is to expend a sum "not exceeding" a certain amount, or such a sum as the trustees think fit, for a specific purpose, a different principle applies, and the true rule seems to be that the beneficiary is not entitled to the whole fund, or the maximum amount, unless it is required to satisfy the specified purpose.

6th ed., p. 886. *Rudland* v. *Crozier*, 2 De G. & J. 143.

If a gross sum be given, or if the whole income of the property be given, and a special purpose be assigned for that gift, this Court always regards the gift as absolute, and the purpose merely as the motive of the gift, and therefore holds that the gift takes effect as to the whole sum or the whole income, as the case may be. Thus, where there is a gift of a sum to apprentice a child or to buy a commission for a son, the Court gives effect to the entire gift: and whether the sum can or cannot be applied for the purpose of buying the commission or apprenticing the child, the Court holds that the child is entitled to the whole of it.

6th ed., p. 888. *Re Sanderson's Trusts*, 3 K. & J. 503.

If an entire fund is given for the maintenance of children or the like, they take the whole fund absolutely, and the maintenance is treated in effect as simply the motive in making the gift: while on the other hand, if a portion only of the fund is given for maintenance, then they are entitled to draw out so much only as may be necessary for the purpose specified.

6th ed., p. 888. *Hanson* v. *Graham*, 6 Ves. 239.

EXERCISE OF DISCRETION.

If trustees in the exercise of their discretion expend money in making a purchase for the object of their power, it seems that the thing purchased becomes his absolute property

6th ed., p. 889. *Lawrie* v. *Bankes*, 4 K. & J. 142.

DEATH OF OBJECT.

If the object of a discretionary trust dies before the fund is expended, his personal representatives have no claim to it.

6th ed., p. 889. *Messeena* v. *Carr*, L. R. 9 Eq. 260.

FAILURE OF TRUSTEE TO EXERCISE DISCRETION.

If a trustee in whom a discretion is vested dies without exercising it, or refuses to exercise it, the question may arise whether it can be exercised by other trustees, or by the Court. If the discretion is a mere power and it is not executed, the Court cannot execute it. But if property is given to trustees upon trust to apply it according to some principle indicated by the testator, the manner being left to the discretion of the trustees, then the Court will, as a general rule, exercise the discretion if the trustees fail to do so.

6th ed., p. 889. *Re Sanderson's Trusts*, 3 K. & J. 497.

WHERE THE PURPOSE NOT FOR BENEFIT OF DONEE ALONE; THREE CONSTRUCTIONS.

Where the motive or purpose of the gift is the benefit of other persons as well as the primary donee, three constructions may be arrived at according to the language used. The purpose may be

so peremptorily expressed as to constitute a perfect trust; or may be such as to leave entirely in the discretion of the primary donee the quantum of benefit to be communicated to the other persons, provided that such discretion is honestly exercised; or lastly, the expression of motive or purpose may be merely nugatory and not operative to abridge the previous absolute gift to the primary donee.

6th ed., p. 890.

(*a*) CASES OF COMPLETE TRUST.

As to the cases in which a complete trust is created. A gift to A., to dispose of among her children, or for bringing up his children, gives A. no interest, but creates a complete trust for the children.

6th ed., p. 891. *Pilcher* v. *Randall*, 9 W. R. 251.

A trust for the maintenance of children is prima facie for the benefit of adults as well as infants, and, if necessary, the Court will direct an inquiry what provision should be made.

6th ed., p. 892. *Re Booth* (1894), 2 Ch. 282.

(*b*) CASES IN WHICH THERE IS A DISCRETION LIABLE TO BE CONTROLLED. RESULT OF THE AUTHORITIES.

As to the cases in which the Court has considered the primary donee to have a discretion liable to be controlled, if not honestly exercised. Where the interest of the children's legacies is given to a parent to be applied for or towards their maintenance and education, there, in the absence of anything indicating a contrary intention, the parent takes the interest subject to no account, provided only that he discharges the duty imposed upon him of maintaining and educating the children; and that a contrary intention is not indicated by a direction, that in case of the parent's death, other trustees should make the application of the fund, in which case, however, such trustees would take nothing beneficially.

6th ed., pp. 892-893. *Re Roper's Trusts*, 11 Ch. D. 272; *Browne* v. *Paull*, 1 Sim. N. S. 105.

DISTINCTION WHERE GIVEN IN FISST INSTANCE ABSOLUTELY.

But here, as in the case of precatory trusts, if the property is given in the first instance for the absolute benefit, or to be at the disposal of the donee, especially if such donee be the parent, no trust will be created by subsequent words showing that the maintenance of the children was a motive of the gift.

6th ed., p. 894. *Lambe* v. *Eames*, L. R. 6 Ch. 597.

(*c*) WHERE PRIMARY DONEE HELD ABSOLUTELY ENTITLED.

Lastly, as to cases where the primary donee was held to be absolutely entitled.

6th ed., p. 895. *Brown* v. *Casamajor*, 4 Ves. 498.

The cases should be considered under two heads: first, those in which the Court has read the will as giving an absolute interest to the legatees, and as expressing also the testator's motive for the gift; and, secondly, those cases in which the Court has read the will as declaring a trust upon the fund or part of the fund in the hands of the legatee. A legacy to A., the better to enable him to pay his debts, expresses the motive for the testator's bounty, but certainly creates no trust which the creditors of A. could enforce in this Court; and again, a legacy to A., the better to enable him to maintain or educate and provide for his family, must, in the abstract, be subject to a like construction. It is a legacy to the individual, with the motive only pointed out.

6th ed., p. 896. *Per Cur. Thorp* v. *Owen*, 2 Hare, 607.

DIRECTIONS AS TO TENANCIES, EMPLOYMENT OF PARTICULAR PERSONS, &c. DIRECTION TO PERMIT TENANTS TO CONTINUE IN OCCUPATION.

Sometimes a testator's recommendation in favour of a third person is not of a nature to create a simple absolute trust for his benefit, but has for its object the placing or continuance of such person in some office or capacity connected with the property that is the subject of disposition, involving the performance of a certain duty. As where a testator directs that the tenants of the devised property shall be allowed to continue in its occupation, either with or without a condition or restriction as to rent, cultivation, &c.

6th ed., p. 898. *Tibbits* v. *Tibbits*, 19 Ves. 656.

A gift of an estate to one person is inconsistent with a direction that another should have the management of it.

6th ed., p. 899. *Shaw* v. *Lawless*, 5 Cl. & Fin. 129.

A direction in a will that a particular person "shall be the solicitor to my estate and to my said trustees in the management and carrying out the provisions of this my will" has been held not to impose any trust or duty on the trustees to continue such person as their solicitor.

6th ed., p. 900. *Foster* v. *Elsley*, 19 Ch. D. 518.

SOLICITOR-TRUSTEE.

A testator sometimes appoints a solicitor, surveyor, stockbroker, or other professional person to be one of the trustees of his will, and authorises him to charge for his professional services. Such a provision confers a beneficial interest under the will within sec. 15 of the Wills Act, which is forfeited if the person to whom it is given attests the execution of the will. It cannot be claimed as against creditors, and appears to be liable to legacy duty.

6th ed., p. 900. *Re Barber*, 31 Ch. D. 665; *Re White* (1898), 2 Ch. 217.

TRUST MUST HAVE OBJECT.

The general rule is that "every trust must have a definite object. There must be somebody in whose favour the Court can decree performance." Charitable gifts are no exception to the rule, because they can be enforced at the suit of the Attorney-General, representing the Crown, but in a charitable trust, as in any other trust, there must be a cestui que trust, namely, the public or a class of the public. But an intention to create a trust of a charitable nature must be expressed.

6th ed., p. 900. *Morice* v. *Bishop of Durham*, 9 Ves. 399.

DISCRETIONARY TRUSTS.

What appears to be an exception to the rule is where property is given to a person as a trustee, with power to apply it in a certain way at his discretion, the result being that he may apply it in that way if he likes: that no one can compel him to apply it in that way: and that if he does not apply it in that way it (or the unapplied part) belongs to the original donor or his representatives. This is called a discretionary trust. Whether it can properly be called a trust or not does not seem very material: perhaps it would be more accurate to call it a power in the nature of a trust. A common example is the ordinary power of applying income for the maintenance of infants. A discretionary trust for the benefit of an adult is another example.

6th ed., p. 900. *Gisborne* v. *Gisborne*, 2 App. Ca. 300.

ERECTION OF MONUMENT.

On the same principle a direction by a testator that a monument shall be erected to his memory is lawful. Such a direction is effectual to this extent, that the executors or trustees are justified in expending the money, but no one can compel them to do so: "it stands on the same footing as an expensive funeral."

6th ed., p. 901. *Trimmer* v. *Danby*, 25 L. J. Ch. 424.

A discretionary trust can be created for the benefit of animals as well as for the benefit of a spendthrift or lunatic.

6th ed., p. 902. *Pettingall* v. *Pettingall*, 11 L. J. Ch. 176.

DISCRETIONARY GIFT.

If the gift be expressly "in trust" or if the donees are described as trustees, though the property is to be disposed of in such manner and for such purposes as they think fit, "it being my will that the distribution thereof shall be left entirely to their discretion," they are trustees, and the beneficial interest results to the heir or the next of kin.

6th ed., p. 902. *Re Sinclair* (1903), W. N. 113.

But where a testator gives property to his executor or trustee, without words implying any discretion or power of selection, it

may appear from the general frame of the will, and the circumstances of the testator's family, that the gift was intended to be beneficial, as where he provides for his immediate relatives, and gives the residue of his estate to A. B., whom he has previously appointed executor and trustee.

6th ed., p. 903. *Williams* v. *Arkle*, L. R. 7 H. L. 606.

DIRECTION TO SETTLE.

The question whether words used by a testator in declaring a trust are complete in themselves, or whether they are intended to serve merely as an outline or minutes of the trust, the details of which are to be filled in by the trustees or some other person, arises chiefly in those cases where the testator directs property to be settled on a certain person and his or her issue. The nature of the estates and interests, which ought to be limited in pursuance of a direction to settle land, or money to be laid out in the purchase of land, is discussed in another chapter, in connection with the rule in Shelley's case.

6th ed., p. 903. *Egerton* v. *Brownlow*, 4 H. L. C. 210. (See Chapter XLVIII.

DOCTRINE OF CY-PRES.

The doctrine of cy-pres is sometimes applied to executory trusts for the settlement of land on a person's issue.

6th ed., p. 904. See page 149.

FORM OF SETTLEMENT OF LAND.

It may here be mentioned that where land is devised or agreed to be settled upon a person and his issue in tail, the established form of limitation, in the absence of express provision to the contrary, is to the first and other sons successively, according to seniority, in tail, remainder to the daughters as tenants in common in tail, with cross remainders between them. But if there are words importing division among the issue, it seems that they all take as tenants in common in tail, with cross remainders between them.

Hadwen v. *Hadwen*, 23 Bea. 551.

But if there are words importing division among the issue, it seems that they all take as tenants in common in tail, with cross remainders between them.

Ibid.

DIRECTION TO "ENTAIL" REALTY OR PERSONALTY.

If real or personal property is directed to be "entailed" on A. and his heirs, it seems that A. only takes a life interest, with remainder to his heirs in tail or absolutely, according to the nature of the property.

6th ed., p. 904. *Graves* v. *Hicks*, 11 Sim. 536.

WHERE RESTRAINED FROM ANTICIPATION.

But if a legacy is given to a woman with a direction to the effect that it shall be settled upon her for life, it will be settled for separate use, with a restraint on anticipation.

6th ed., p. 906. *Re Parrett*, 33 Ch. D. 274.

EFFECT OF GIFT OVER, OR CONTINGENT LEGACY.

If the testator gives a legacy to his daughter, with a direction to settle it on her marriage, and a gift over in the event of her not leaving issue, this is an effective direction, and will be carried into effect by giving her a life interest for her separate use, with remainder to her children as she shall appoint, and in default to her children who attain twenty-one or being daughters, marry. And if a legacy is given to a feme sole contingently on her marriage a direction to settle it is effective.

6th ed., p. 906. *Duckett* v. *Thompson*, 11 L. R. Ir. 424.

INTERESTS OF CHILDREN.

Where the testator directs a legacy to be settled on the legatee and his (or her) wife (or husband) and children, a power of appointment among the children will be given to the husband and wife, or the survivor, with the usual trust, in default of appointment for children who attain twenty-one or marry, and the usual hotchpot, maintenance and advancement clauses.

6th ed., p. 906. *Re Gowan*, 17 Ch. D. 778.

FUTURE WIFE OR HUSBAND.

Where a testator directs personalty to be settled on a person for life, with remainder to his (or her) children in such a way as to include children by any marriage, and provides for a life interest being given to the wife (or husband), this authorizes a life interest being given to a second wife (or husband).

6th ed., p. 907. *Nash* v. *Allen*, 42 Ch. D. 54.

UNDISCLOSED TRUSTS.

Notwithstanding the statutory requirements that every will must be in writing, there are cases in which property disposed of by will can be made subject to trusts the terms of which are not declared by the will or by any document incorporated in it.

6th ed., p. 907.

The cases fall under two classes, one consisting of those cases in which the existence of a trust appears on the face of the will, and the other of those cases where the trust is altogether secret.

6th ed., p. 908.

EXISTENCE OF TRUST DISCLOSED BY THE WILL.

It has been decided that if property is given to A., and the will shows that the testator intends him to hold it upon trust, but

does not either expressly or by reference to any existing document declare what the terms of the trust are, oral evidence is admissible to prove them, provided the trust was communicated to A. prior to, or simultaneously with, the execution of the will.

6th ed., p. 908. *Re Fleetwood*, 15 Ch. D. 594.

RULE NOT APPLICABLE TO POWERS.

With regard to the rule above stated, there is a difference between trusts and powers.

6th ed., p. 908. *Re Hetley* (1902), 2 Ch. 866.

TRUST NOT COMMUNICATED AT DATE OF WILL.

There is some conflict of judicial opinion on the question whether the general rule above stated applies where the trust is not communicated to A. until after the execution of the will.

6th ed., p. 908. *Balfe* v. *Halpenny* (1904), 1 Ir. R. 486.

TRUST NOT COMMUNICATED DURING TESTATOR'S LIFETIME.

It is equally clear that if the trust is not communicated to the legatee during the lifetime of the testator, it cannot be established by a paper not executed as a will.

6th ed., p. 909. *Re Boyes*, 26 Ch. D. 531.

WHERE TRUSTEE CANNOT TAKE BENEFICIALLY.

Where the fact that a gift to A. is made to him merely as trustee appears on the face of the will, he cannot in any case take beneficially, and if the trust is not established, or is illegal, or fails, he holds upon trust for the residuary legatee (or devisee) or the next of kin (or heir at law) as the case may be.

6th ed., p. 909. *Briggs* v. *Penny*, 3 De G. & S. 546.

WHERE TRUSTEE TAKES BENEFICIALLY SUBJECT TO TRUST.

But if the gift is to A. "absolutely," or "for his own use and benefit," followed by a reference to the testator's wishes with regard to the disposition of the property, A. takes beneficially subject only to his carrying out the testator's wishes if and so far as they create a trust.

6th ed., p. 910. *Irvine* v. *Sullivan*, L. R. 8 Eq. 673.

SECRET TRUST.

COMMUNICATION OF TRUST.

Where property is given by will to A. in terms which imply that he is to take it for his own benefit, but the testator informs A. of his intention that A is to hold the property upon trust, the terms of which he communicates to him, evidence of the trust is admissible, and it will, if legal, be enforced. The theory is that A. has induced the testator to leave the property to him, on his express or tacit promise to perform the trust, and that the Court ought not to allow him to commit a fraud by refusing to carry out the testator's wishes. The communication of the terms of the

trust may take place before or after the execution of the will.

6th ed., p. 910. *McCormick* v. *Grogan*, L. R. 4 H. L. 82.

WHERE NO TRUST CREATED BY EXPRESSION OF WISH.

The wishes of the testator may be expressed in such a way as to show that he did not intend to create a trust, as where he gives the devisee or legatee an absolute discretion in the disposition of the property.

6th ed., p. 911. *Re Pitt-Rivers* (1902), 1 Ch. 403.

COMMUNICATION TO ONE OF TWO JOINT TENANTS.

Where the gift is made to A. and B. as joint tenants, and the trust is communicated to A. before the execution of the will, B. is also bound by the trust, on the prineiple that no person can claim an interest under a fraud committed by another. But if the trust is not communicated to A. until after the execution of the will, B. is not bound.

6th ed., p. 911. *Burney* v. *Macdonald*, 15 Sim. 6.

TENANTS IN COMMON.
JOINT TENANTS.

If the gift is made to A. and B. as tenants in common, and the trust is communicated to A., whether before or after the execution of the will, but is not communicated to B., then B.'s share is not bound by the trust.

6th ed., p. 911.

TRUST NOT COMMUNICATED DURING LIFETIME.

If no communication on the subject of the trust is made to the legatee or devisee during the testator's lifetime, he takes the property for his own benefit; no declaration made by the testator (unless executed as a will) can affect him with a trust.

6th ed., p. 911. *Re Stead* (1900), 1 Ch. 237.

TRUST COMMUNICATED, BUT NOT DETAILS.

If, however, the testator during his lifetime informs A. of his intention to leave property to A. upon a trust, the terms of which are not communicated to A. during the testator's lifetime, A. takes as trustee, but the intended trust is ineffectual, and cannot be ascertained by a written declaration of the testator not executed as a will.

6th ed., p. 911. *Re Boyes*, 26 Ch. D. 531.

ILLEGAL TRUST.

If a secret trust is illegal, the devisees or legatees hold the property upon trust for the persons upon whom it would have devolved if the gift had not been contained in the will.

6th ed., p. 912. *Russell* v. *Jackson*, 10 Ha. 204.

PERSONAL NATURE OF SECRET TRUST.

A secret trust is a personal obligation binding the individual devisee or legatee. If he renounces and disclaims, or dies in the

lifetime of the testator, the persons intended to be benefited by the secret trust can claim nothing against the heir at law, next of kin, or residuary devisees or legatees.

6th ed., p. 912. *Per Cur. Re Maddock* (1902), 2 Ch. 220.

ADMINISTRATION.

For the purpose of administering the estate of the testator, a secret trust has the same effect as if it were contained in the will.

Ibid.

EVIDENCE.

Clear evidence is required to establish a secret trust.

6th ed., p. 912. *McCormick* v. *Grogan*, L. R. 4 H. L. 82.

CERTAINTY OF SUBJECT NOT REQUIRED.

The rule which applies in cases where a precatory trust is alleged to exist, namely, that in order to create such a trust, there must be a certainty of subject—does not apply to secret trust for if property is devised or bequeathed to a person upon a secret trust, the ons of showing to what part of the property the trust does not extend lies on him.

6th ed., p. 912. *Re Huxtable* (1902), 2 Ch. 793.

TRUSTS AND POWERS FREQUENTLY INSERTED IN WILLS.

In addition to the clauses which determine the beneficial interests devised or bequeathed by a testator, it is usual for wills to contain various trusts or powers directing or empowering the trustees to convert or manage the property in certain ways. Further, the trustees are often given power to vary or affect the beneficial interests within certain limits. The most common of the former class of trusts are those for conversion, investment, and of powers for sale, mortgaging or leasing. Of the latter, powers for maintenance and advancement are the most usual, but other discretions are frequently given to trustees.

6th ed., p. 912.

POWERS OF SALE OF LAND.

A power of sale will, in general, come to an end when by reason of the expiration or cessor of the limitations the absolute interests come into possession, but such a power may be exercised within a reasonable time after that period for the purpose of dividing the property, unless the beneficiaries have elected to take the property as it stands, or it may be exercisable for the purpose of raising money to pay debts and legacies so long as the rule against perpetuities is not infringed, the duration of a power of sale is one of intention.

6th ed., p. 913. *Re Cotton's Trustees*, 19 Ch. D. 624; *Re Jump* (1903), 1 Ch. 129.

DURATION OF TRUST FOR SALE.

An imperative trust for sale also does not come to an end when all the interests have vested in possession, unless the beneficiaries have elected to take the property as real estate.

6th ed., p. 913. *Re Douglas & Powell* (1902). 2 Ch. 296.

TIME LIMITED.

A direction to sell within five years, and apply the proceeds in paying debts and legacies, and then to invest, &c., does not prevent the trustees from selling after the expiration of the five years.

6th ed., p. 913. *Pearce* v. *Gardner*, 10 Ha. 287.

ADMINISTRATOR.

A power of sale given by a testator to his executor or administrator can be exercised by an administrator durante minore ætate.

6th ed., p. 914. *Monsell* v. *Armstrong*, L. R. 14 Eq. 423.

PERSON TO SELL NOT NAMED.

A power in a will to sell or mortgage without naming a donee will, if a contrary intention do not appear, vest in the executor if the fund is to be distributable by him, either for the payment of debts or legacies. And where there is a general direction to sell, but it is not stated by whom the sale is to he made, if the produce of the sale is to be applied by the executors in the execution of their office, a power to sell will be implied to the executors. But where the management of the fund produced by the sale is not given to the executors, a direction to sell does not give the executors power to sell real estate, even though it is devised to minors.

6th ed., p. 914. *Curtis* v. *Fulbrook*, 8 Hare. 278; *Forbes* v. *Peacock*, 11 M. & W. 630.

IMPLIED POWER OF SALE.

A power of sale may he created indirectly or hy implication. Thus, a direction by a testator that his executors shall sell his lands, gives them a common law power of sale, and on a sale the purchaser (under the old law) takes as if they had been devised to him.

6th ed., p. 915.

PROTECTION OF PURCHASER.

The general rule is that where executors or trustees sell for payment of debts, or of debts and legacies, the purchaser is not bound to see to the application of the purchase money, and the rule seems to be the same where real estate is devised to a person beneficially charged with debts generally or with debts and legacies. Bnt if it is devised subject only to legacies, or subject

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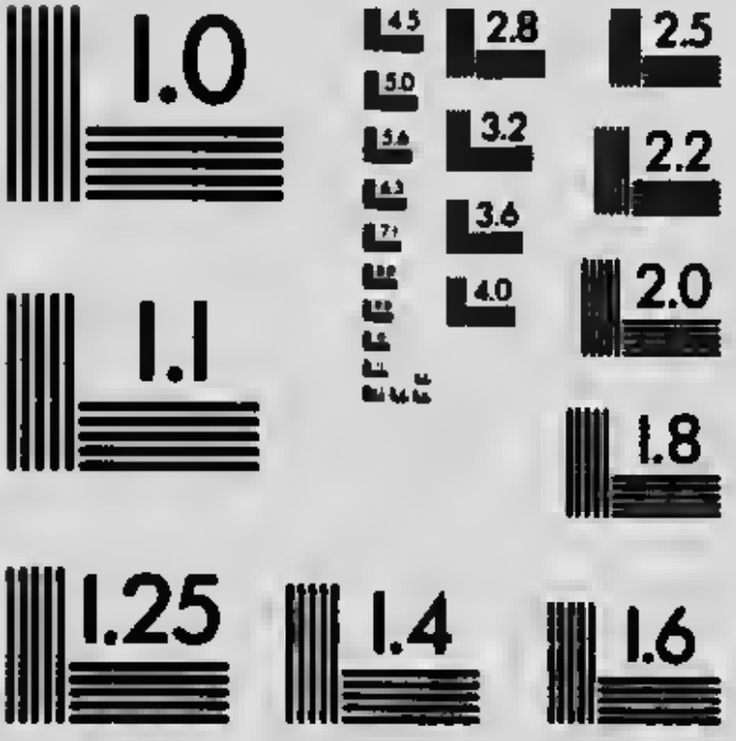

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to a particular debt or other sum of money, then the purchaser must see to the application of the purchase money.

6th ed., p. 916. *Colyer* v. *Finch*, 5 H. L. C. 905.

But apparently this rule would not apply where the testator has died since 1897.

Re Rebbeck, 71 L. T. 74.

NOT IMPLIED FROM POWER TO MORTGAGE.

It seems clear that a power to mortgage does not authorise a sale by the donee of the power, although it authorizes a mortgage giving the mortgagee a power of sale.

6th ed., p. 916. *Cook* v. *Dawson*, 29 Bea. 123.

PARTNERSHIP LAND.

An executor always had power to sell, or concur in selling, real estate belonging to a firm in which the testator was a partner.

6th ed., p. 916. *West of England, &c., Bank* v. *Murch*, 23 Ch. D. 138.

REVERSION.

Trustees having a power of sale over a reversion may exercise it before the reversion falls into possession, although (if the reversion is settled) by doing so they increase the interest of the tenant for life at the expense of the remainderman.

6th ed., 917. *Blackwood* v. *Borrowes*, 4 Dru. & War. 441.

A trust for conversion may be express or implied, for a testator may show an intention that his estate shall be converted without an express direction or trust to that effect.

6th ed., p. 918. *Mower* v. *Orr*. 7 Ha. 473.

POWER TO POSTPONE CONVERSION.

An express trust for conversion is often followed by a discretionary power given to the trustees to postpone conversion. The Court will not generally interfere with such a discretion as long as it is honestly exercised; nor are the trustees liable for loss.

6th ed., p. 918. *Re Hilton* (1909), 2 Ch. 548.

DISCRETIONARY TRUST FOR INVESTMENT.

Questions sometimes arise as to the effect of particular expressions used by testators. Where, for instance, a testator directs his trustees to invest the trust moneys in such modes of investment as they think fit, this does not, it seems, give them an absolute discretion although it is difficult to say how far their discretion is restricted.

6th ed., p. 919. *Stewart* v. *Sanderson*, L. R. 10 Eq. 26.

"SECURITIES."

In its proper sense, "security" implies a charge on property with or without a personal debt or obligation, but in popular language "security" is often used in the sense of "investment."

6th ed., p. 919. *Harris* v. *Harris*, 29 Bea. 107.

REAL SECURITIES.

A power to invest in "real securities" does not authorize an investment on contributory mortgage, or on long leaseholds, except in cases within the Trustee Acts, 1888 and 1893.

6th ed., p. 919. *Re Boyd's Settled Estates*, 14 Ch. D. 626.

A power to invest "upon" ground-rents does not mean "upon the security" of ground rents and authorizes the purchase of ground rents.

6th ed., p. 919. *Re Mordan* (1905), 1 Ch. 515.

TRUST TO CARRY ON BUSINESS.

It not infrequently happens that part of a testator's estate consists of a business carried on by him, and that he directs or empowers his trustees to carry it on, either for the purpose of winding it up or realising it to advantage, or in order that it may be kept on as a going concern until some beneficiary is old enough to take it over.

6th ed., p. 920.

RIGHTS AS AGAINST BENEFICIARIES.

The general principle is clear that trustees who carry on a business in this way are personally liable for all liabilities contracted in connection with the business after the death of the testator. If the testator has authorized his trustees to employ a part of the trust estate in the business, and they carry on the business properly, they are entitled, as against the beneficiaries under the will, to resort for their indemnity to that part of the trust estate. In such a case the trustees' creditors are entitled, by subrogation, to stand in the place of the trustees, and thus to obtain payment of their debts out of that part of the trust estate.

6th ed., p. 920. *McNeillie* v. *Acton*, 4 D. M. & G. 744; *Strickland* v. *Symons*, 26 Ch. D. 245.

A mere direction to carry on the business does not authorize the trustees to employ in it a greater part of the testator's estate than was employed in it by him.

6th ed., p. 920, note. *McNeillie* v. *Acton*, 4 D. M. & G. 744.

AS AGAINST TESTATOR'S CREDITORS.

This principle, however, does not affect the testator's creditors. They have a prior claim on all the assets of the testator, and any trustee or executor who uses the assets in carrying on the testator's business (except to such an extent as is necessary to enable him to wind it up or sell it as a going concern) does so at his own risk, so far as the testator's creditors are concerned.

6th ed., p. 921. *Dawse* v. *Gorton* (1891), A. C. 190.

EFFECT OF ASSENT BY TESTATOR'S CREDITORS.

If the business is carried on by the trustees with the assent of the testator's creditors, then the trustees are entitled to be indemnified out of the testator's estate (including any assets acquired by the trustees in carrying on the business) in priority to the testator's creditors; and the business creditors have, by subrogation, a corresponding right to resort to the testator's estate for payment of their debts.

6th ed., p. 921.

ORDER OF COURT.

The same rule applies if the business is carried on under an order of the Court.

6th ed., p. 921. *Re Brooke* (1894), 2 Ch. 600.

WHERE TRUSTEE CARRIES ON BUSINESS FOR HIS PERSONAL BENEFIT.

But the rule does not apply unless the trustee (or executor) has continued the business in good faith, either under an authority contained in the will or conferred by the Court, or for the purpose of winding up the estate.

6th ed., p. 921. *Re Millard*, 72 L. T. 823.

IMPLIED POWER.

A power to carry on a business may be inferred from the fact that it is included in a gift of the testator's residuary estate to trustees upon trust for conversion, with a power to postpone the conversion, and the usual provision as to interim income.

6th ed., p. 921. *Re Chancellor*, 26 Ch. D. 42: *Re Morrison* (1901), 1 Ch. 701.

POWERS OF MORTGAGE.

It has been held that a power to lease authorises a demise by way of mortgage. A power "to make arrangements" given to a trustee executor to whom the real estate is devised authorises a mortgage of the real estate, but a power to use real estate as capital in the testator's business does not enable the trustees to mortgage it so as to override an annuity charged by the will. A direction to carry on business authorizes a mortgage of the business land but not of other land.

6th ed., p. 921. *Mostyn* v. *Lancaster*, 23 Ch. D. 583.

A power of sale out and out for a purpose, or with an object beyond the raising of a particular charge, does not authorize a mortgage, but that where it is for raising a particular charge, and the estate itself is settled or devised, subject to that charge, there it may be proper under the circumstances to raise the money by mortgage and the Court will support it as a conditional sale, as something within the power and as a proper mode of raising the money.

6th ed., p. 922. *Per Cur. Stroughill* v. *Anstey*, 1 D. M. & G. 645.

TRUSTS FOR MAINTENANCE AND EDUCATION.

The question whether a trust for maintenance has been effectually created, generally arises in those cases where property or income is given to a person, coupled with an expression of desire or hope on the part of the testator that he will thereout maintain certain persons, or with a statement that the gift is made to him for the purpose of enabling him to maintain them.

6th ed., p. 922. See page 413.

LIABILITY TO ACCOUNT.

Where income is directed to be paid to a person for the maintenance and education of his children, he takes it subject to no account, provided he discharges the duty of maintaining and educating the children.

6th ed., p. 924. See page 413.

PARENT NOT SUBJECT TO ACCOUNT.

Where property, or the income of property, is directed to be paid to a person for the maintenance and education of his children, he is entitled to receive the whole of it, subject to the obligation of maintaining them. (See page 413.)

GIFT OF CAPITAL.

When a sum or the capital of a fund is given for the maintenance of A., this is considered as a simple legacy for his benefit, and he is entitled (if an adult) to have it paid to him; and a gift of residue to the testator's wife "for the support and maintenance of herself and children and for their education," has been held to be an absolute gift to the wife.

6th ed., p. 9[illegible] *Bond* v. *Dickinson*, 33 L. T. 221.

MAINTENANCE OUT OF CAPITAL OR INCOME.

A testator sometimes provides for the maintenance or education of an infant out of capital, and in that case a gift over of what is not expended, in the event of the infant dying under age, will have effect; but, as a general rule, maintenance is given out of the income of a fund, or by means of an annuity.

6th ed., p. 924. See page 411.

INTEREST ON LEGACY.

Where a testator bequeaths a legacy to an infant, and expressly or impliedly directs the interest to be applied in its maintenance, the interest runs from the death of the testator. But this rule does not apply in the case of a legacy to an adult.

6th ed., p. 924. *Re Richards*, L. R. 8 Eq. 119; *Raven* v. *Waite*, 1 Sw. 553.

GIFT TO PARENT.

Where money is given to a parent for the maintenance of his children, the general rule is that he is not bound to account for its application.

6th ed., p. 924. *Hadow* v. *Hadow*, 9 Sim. 438.

"MAINTENANCE" AND "EDUCATION."

A trust for the "maintenance and support" of children includes their education, but sometimes "maintenance" and "education" are distinguished.

6th ed., p. 924. *Wilkins* v. *Jodrell*, 13 Ch. D. 564.

JOINT TENANTS.

If income is given for the maintenance of several persons as joint tenants, they take it for their lives and for the lives and life of the survivors and survivor, unless the joint tenancy is severed.

6th ed., p. 925. *Williams* v. *Papworth* (1900), A. C. 563.

EFFECT OF BANKRUPTCY.

Where income is given to trustees upon trust to apply it for "the board, lodging, maintenance, support and benefit" of A. in such way as they think proper in their absolute discretion, and so that A. shall not have power to alienate or anticipate the income, they cannot apply it otherwise than for A.'s benefit, and if he becomes bankrupt it belongs to his creditors. But this result can be avoided by giving the trustees power to apply such part of the income as they think fit, or by giving them a power of selection among several objects.

6th ed., p. 925. *Re Coleman*, 39 Ch. D. 443.

TRUST FOR MAINTENANCE OF A. DURING LIFE OF B.

The rule that maintenance is not confined to minority applies where income is given for the maintenance, or maintenance and education, of A. during the life of B.; in the absence of words expressing a contrary intention, A. continues to be entitled to the income after attaining majority.

6th ed., p. 925. *Badham* v. *Mee*, 1 Russ & My. 631.

INCOME FOR MAINTENANCE PRIMA FACIE CONFINED TO LIFE OF BENEFICIARY.

Where the income of a fund, or an annuity, is given for a person's maintenance, it would naturally be supposed that the testator intended it for the personal benefit of that person, and that the gift would cease on his death.

6th ed., p. 926. *Wilkins* v. *Jodrell*, 13 Ch. D. 564.

DECISIONS TO THE CONTRARY.

However, there are some decisions to the effect that where an annuity is given for the maintenance of A. during the life of B., it does not cease on the death of A.

6th ed., p. 926. *Lewes* v. *Lewes*, 16 Sim. 266.

It is submitted that a gift of income, or an annuity expressly given for maintenance ought, in the absence of words showing a

contrary intention, to be construed as confined to the life of the beneficiary.

6th ed., p. 926. *Re Ord*, 12 Ch. D. 22.

MAINTENANCE CONTRARY TO TERMS OF WILL.

In some cases, where there is a trust for accumulation, and no provision is made for the maintenance of the person entitled, subject to the trust for accumulation, the Court will presume that the testator must intend that the person he wished ultimately to benefit should not starve, and should in the meantime receive such maintenance and education as would enable him to take the position intended for him, and consequently will allow maintenance contrary to the terms of the will.

6th ed., p. 927. *Re Collins*, 32 Ch. D. 229; *Re Walker* (1901), 1 Ch 879.

ABILITY OF FATHER.

The question sometimes arises whether the income of trust funds can be applied for maintenance where the father is of ability to maintain his children. If there is only a power of maintenance, the father, in such a case, is not necessarily entitled to receive the income and apply it for maintenance, but he is so entitled if there is a trust.

6th ed., 928. *Newton* v. *Curzon*, 16 L. T. 221.

TRUSTS FOR ADVANCEMENT.

Trusts of this nature usually receive a wide construction.

6th ed., p. 930. *Re Kershaw's Trusts*, L. R. 6 Eq. 322.

But prima facie an advancement "is a payment to persons who are presumably entitled to, or have a vested or contingent interest in an estate or legacy before the time fixed by the will for their obtaining the absolute interest in a portion or the whole of that to which they would be entitled," and a clause which merely says "I give a power of advancement to my trustees" does not authorize advances out of corpus to persons who only take a life interest.

6th ed., p. 930. *Re Aldridge*, 55 L. T. 554.

EFFECT OF ADVANCEMENT.

The proper exercise of a power of advancement takes the money expended out of settlement altogether, and the person advanced is not afterwards bound to account for it or bring it into hotchpot.

6th ed., p. 930. *Re Fox* (1904), 1 Ch. 480.

DISCRETIONARY TRUSTS AND POWERS.—SPENDTHRIFT TRUST.

The term "discretionary trust" is often used in the sense of a trust for the benefit of an improvident person. Under such a trust the trustees have a discretionary power, either to apply such

part of the fund (capital or income) as they think fit for the maintenance or benefit of the cestui que trust, or to apply the whole of the income for the maintenance or benefit of several named persons, including the spendthrift, in such manner as the trustees think fit. In either case the effect is that he has no right capable of voluntary or involuntary assignment.

6th ed., p. 930. *Re Coleman*, 39 Ch. D. 443.

WHEN ANNEXED TO OFFICE.

A discretionary power given to trustees of dealing with the trust property is prima facie given to them as an incident of their office, and passes to their successors in office.

6th ed., p. 931. *Re Smith* (1904), 1 Ch. 139.

As a general rule, the Court will not interfere with the exercise of a discretion so long as the trustees act honestly.

6th ed., p. 931. *Bethell* v. *Abraham* L. R. 17 Eq. 24.

A trustee paying money into Court incapacitates himself from exercising any of the discretions he may have had, but in some cases the Court will exercise the discretion. An administration action does not put an end to the exercise of a discretion by trustees, but it is proper for them to obtain the sanction of the Court to all important steps taken by them, and after an administration judgment the Court will supervise the exercise of their discretions and powers.

6th ed., p. 932. *Turner* v. *Turner*, 30 Bea. 414.

Where a legacy is given to a person and is expressed to be given for a particular purpose, e.g., to bind him apprentice, though the purpose may fail, the legatee in some cases is entitled to the legacy. But where a discretion is given to trustees to advance or pay money for a particular purpose, and the discretion is not exercised, there is no gift to the person for whose benefit the money was to be applied.

6th ed., p. 932. *Robinson* v. *Cleator*, 15 Ves. 526.

EXERCISE OF DISCRETION BY THE COURT.

Where trustees refuse to exercise a discretion, and thus affect the rights of beneficiaries, the Court will direct the necessary acts to be done.

6th ed., p. 932. *Prendergast* v. *Prendergast*, 3 H. L. C. 195.

DEVOLUTION OF TRUSTS AND POWERS.

If a testator gives a power of sale (but no estate) to "my executors hereunder named," a surviving executor can sell.

6th ed., p. 933.

As a general rule, a power given to "my executors," even if it involves the exercise of a discretion (such as the selection

of institutions to share in a charitable gift) is given to them in the character of executors, and can be exercised by the executors for the time being, but not by an renouncing executor. But if it is given to "my executors A. and B." or to "my executors herein named," then it is a question of construction of the particular will whether it is given to them personally, or in the character of executors.

6th ed., p. 933. *Keates* v. *Burton*, 14 Ves. 434.

SOLE EXECUTOR.

Where a discretionary power (such as the selection of charities) is given to "A. B., my executor," and A. B. renounces, the result of holding that the power is annexed to the office is that the power is gone.

6th ed., p. 933. *Att.-Gen.* v. *Fletcher*, 5 L. J. Ch. 75.

If a testator appoints persons to be trustees of his will, and gives to my "said trustees" various powers and discretions, they can be exercised by the trustees or trustee for the time being of the will.

6th ed., p. 933. *Re Smith* (1904), 1 Ch. 139.

DISCLAIMER.

If a testator devises to trustees upon trust for sale, and one of them disclaims, the other trustees or trustee can sell and give a receipt for the purchase money, and if one dies the survivors can sell.

6th ed., p. 934. *Brassey* v. *Chalmers*, 4 D. M. & G. 528.

SUCCESSION TO TRUSTEESHIP.

When the sole trustee of a will dies, it is not always necessary to obtain the appointment of new trustees, for the testator may have indicated an intention that the persons in whom the trust property vests on the death of a sole trustee shall exercise the trusts and powers contained in the will. The rules on this question depend partly on the language of the will, partly on the nature of the property, and partly on the date of the death of the sole trustee.

6th ed., p. 934. *Titley* v. *Wolstenholme*, 7 Bea. 425; *Re Waidanis*, 77 L. J. Ch. 12

POWER NOT CONNECTED WITH OFFICE.

A bare power given to two or more persons by name, or as a class, without reference to any office of trust or administration, cannot be exercised by the survivors or survivor.

6th ed., p. 936. *Jefferys* v. *Marshall*, 19 W. R. 94.

It seems that a power to A. and B. and their heirs is exercisable after the death of A. by his heir and B.

6th ed., p. 936. *Townsend* v. *Wilson*, 1 B. & Ald. 608.

FAILURE OF TRUST.

The question what becomes of a testator's residuary real or personal estate, when the trusts declared concerning it fail, wholly or in part, has been discussed in chapter XXI. The question also occurs, though more rarely, in the case of a specific devise, or a specific or pecuniary legacy.

6th ed., p. 936. *Shelley* v. *Shelley*, L. R. 6 Eq. 540.

Discretion of Trustees as to Advancing Portion of Income.—*Re Margaret Evans*, 1 O. W. R. 92.

"The trustees have not the discretion of saying 'we will withhold any part of this income merely upon our representation of what we think discreet.'" *Re Saunderson's Trust*, 3 K. & J. 507. See *Kilvington* v. *Gray*, 10 Sim. 293. The personal representatives of deceased legatee declared entitled to exercise of discretion by the executors or by the Court.

Power to Mortgage.—*In re Webb*, 2 O. W. R. 230, held no power given, following *Stroughill* v. *Anstey*, 1 DeG. M. & G. 635.

Power to Sell.—See *Re Crawford*, 4 O. L. R. 313; *Re Conf. Life & Clarkson*, 6 O. L. R. 603.

Power — Whether Legal Estate or Merely Power.—*Doe d. Hampton* v. *Shotter*, 8 A. & E. 205, followed in *Re Bell*, 7 O. W. R. 201.

Maintenance.—The question whether a person has placed himself in loco parentis to a child so as to carry the moral obligation of maintenance is one of intention. *Powys* v. *Mansfield*, 3 My. & Cr. 359. *Re Sweazey*, 2 O. W. R. 792.

Sale by Trustees.—16. 18, 20 R. S. C. c. 120, see *Re Eddie*, 22 O. R. 536. Construed in *Re Ross and Davies*, 3 O. W. R. 215, citing *Re Wilson Pennington* v. *Payne*, 54 L. T. N. S. 600.

Probate to One of Two Executors—Right to Sell Land.—A testatrix devised and bequeathed all her real and personal property to two executors in trust to carry out the provisions of her will, directing payment of her debts out of the estate, with full power in their discretion to sell all or any of her property, and to invest the proceeds, as they might deem best, and to pay the income thereof to the husband during his lifetime, and after his death to sell the property and divide the same equally between her children. One of the executors renounced probate, which was granted to her husband, the other executor, who, some years after, without having registered a caution, contracted to sell certain of the lands to pay debts:—Held, that he had power to make a valid sale, and that the devise being to the executors, s. 13 of the Devolution of Estates Act, which requires a caution to be registered, in no way interfered with such power. *In re Koch and Wideman*, 25 O. R. 262, followed. *In re Hewett and Jermyn*, 20 O. R. 383.

Receiving Payment.—Devisees in trust for sale of real estate must jointly receive or unite in receipts for the purchase money, unless the will provides otherwise and the case is not affected by the property being charged with debts and the power of sale being to the executors eo nomine. *Ewart* v. *Snyder*, 13 Chy. 55.

Sale on Credit.—Under a certain will the executors were directed to sell and dispose of a farm "either at public or private sale as to them may seem best for the price, and on the most advantageous terms that reasonably can be obtained for the same:"—Held, that the power to sell involved a power to secure part of the price by means of a mortgage on the property sold, the manner of sale being left to the discretion of the trustees. *Re Graham Contract*, 17 O. R. 570.

Unexercised Power of Sale.—J. by his will devised to H., his wife, all his real estate in L. "during her natural life, for the use and support of

herself and family, and "in case H. should at any time think proper to sell my said estate, it shall be the duty of my executors to sell the same with her consent, and the proceeds thereof to be distributed as follows," &c.: "But if H. should not think proper to sell my said estate, then the sums shall be divided amongst my children, their heirs or assigns, after the death of H., share and share alike." He then nominated P. executor of his will, "with full power and authority to act in the same." J. died in 1838, leaving H. and three children him surviving. P. took out probate. In 1846, H. by deed, conveyed her estate in the lands for £150 to P. Under this deed P. obtained possession, which he retained till his death in 1882, when he devised the land to K. in trust for the purposes of his will, of which he made K. executor. H. died in 1872, and this action was commenced in 1883, by one of J.'s children, claiming an account against K. of the profits of the lands, and to have the same sold, and the proceeds distributed according to J.'s will:—Held, that P. could not be said to have been an express trustee within R. S. O. 1877 c. 108, s. 30, and that being so, the plaintiff's action was barred by the Statute of Limitations. The proper construction to be placed on the will was, that a life estate was given to H. with a power of sale to P. during her lifetime with her consent, and the remainder in fee to the children in the event of non-execution of the power: that unless and until the consent of the widow was given, the power of sale did not exist, and the executor had no duty to perform in relation to the lands; and he did not take, nor was it necessary for him to take, the legal estate; that as he never was required to execute the power, he never became trustee. *Johnson* v. *Kramer*, 8 O. R. 193.

As to Right to Insure.—See *Ucrow* v. *Moffatt*, 22 Chy. 370, and *Re Bell*, 7 O. W. R. 201.

Powers of Executors—Promissory Note—Advancing Legatee's Share.—M. by his will gave a special direction for the winding-up of his business and the division of his estate among a number of his children as legatees, and gave to his executors, among other powers, the power "to make, sign, and indorse all notes that might be required to settle and liquidate the affairs of his succession." By a subsequent clause in his will he gave his executors "all necessary right and powers at any time to pay to any of his said children over the age of thirty years, the whole or any part of their share, in his said estate for their assistance, either in establishment, or, in case of need, the whole, according to the discretion, prudence, and wisdom of said executors," etc. In an action against the executors to recover the amount of promissory notes given by the executors, and discounted by them as such in order to secure a loan of money for the purpose of advancing the amount of his legacy to one of the children who was in need of funds to pay personal debts:—Held, that the two clauses of the will referred to were separate and distinct provisions which could not be construed together as giving power to the executors to raise the loan upon promissory notes for the purpose of advancing the share of one of the beneficiaries under the will. *Banque Jacques-Cartier* v. *Gratton*, 20 C. L. T. 271, 30 S. C. R. 317.

Power of Advancement—Exercise of, by Trustees—Division of Estate.—A testatrix by her will directed her trustees to pay an annuity to each of her three children, and empowered the trustees "from time to time to make such advances as they may deem proper out of the corpus or income or both of my estate for the benefit of or to my said children or any one or more of them either on their marriage or as an advancement in life or for any other purpose that may appear to them wise and reasonable." On the death of all the children of the testatrix the undisposed of residue was directed to be divided among their children then living, and in default of a grandchild living at the death of the last surviving child of the testatrix, then the undisposed of residue was to be divided among certain charities:—Held, that a division of the estate among the children made by the trustees in good faith two years after the death of the testatrix was a valid exercise of the power. *Hospital for Sick Children* v. *Chute*, 22 C. L. T. 173, 3 O. L. R. 590, 1 O. W. R. 321.

Trust—Next of Kin.—H., by his last will, after bequeathing certain legacies, made the following bequests:—"I give and bequeath seven hundred

dollars to A. of Charlottetown, in the province of Prince Edward Island, to pay any money that I may leave an order for, and also to pay my funeral expenses, also to pay himself for his time and trouble." There was no residuary clause in the will. He appointed B. and C. executors of his will; they renounced, and administration cum testamento annexo was granted to A. Testator left no order to pay any money, and A. claimed the balance of the $700 after payment of the funeral expenses:—Held, that A. was a trustee of the sum of $700, and after payment of debts, funeral and testamentary expenses, and of a reasonable sum for his trouble in carrying out the trusts of the will, he held the balance in trust for the next of kin. *Trainor* v. *Londrigan*, 21 C. L. T. 515.

Guardian and Manager.—A testator, after bequeathing to his wife his dwelling house and furniture and an annuity, continued as follows: "I give and bequeath unto G. B., and her children, the dwelling house they now occupy, . . . the wife of C. R. B., and his children, appointing C. R. B. and G. B. joint guardians for the children above mentioned, and $500, all transactions to be null and void unless sustained in writing by both guardians." And in the 10th clause of his will he said: "I will and bequeath unto each of my grandchildren living at my death $100." C. R. B. was a son of the testator, and had children living at the testator's death:—Held, that the children meant were those of C. R. B. and G. B., and there was a simple gift to G. B. and her children, who took concurrently; and C. R. B. and G. B. were, by the above clause, made trustees for their children, and could give a good acquittance and discharge for the $500, but they were not authorized to receive, and could not give a good acquittance for, the moneys bequeathed to their children in the 10th clause.

In another clause of his will, the testator willed and bequeathed "unto G. G. B.'s wife, E. B., $5,500. This bequest is under the joint management of G. G. B. and his wife for their heirs should there be none, then at their death to revert back to my heirs to be equally divided:"—Held, that there was a trust of the $5,500 reposed in G. G. B. and E. B.; that E. B. was entitled to the benefit of the trust during her life, and upon her death the benefit of it would go to any children there might be of G. G. and E. B., or any descendants there might be answering the description "their heirs," and if there were no such children or descendants, then to the heirs of the testator, to be equally divided amongst them. *In re Biggar, Biggar* v. *Stinson*, 8 O. R. 372.

Trust — Pecuniary Trust — Power — Execution of.—A testator whose mother owned an estate for life in a farm in which he had the remainder in fee, by his will devised to her his interest in the farm "to be disposed of as she may deem most fit and proper for the best interest of my brothers and sisters." The mother, after his death, conveyed the farm in fee simple to one of his sisters, the expressed consideration being one dollar and natural love and affection, and the deed containing no reference whatever to the will, or anything indicating on its face that it was executed in pursuance of a power or trust:—Held, that it was not necessary to determine whether the mother took absolutely, or whether, if she had not taken absolutely, a trust was created or a power, inasmuch as, even if a trust was created in the mother, the conveyance by her operated, and was intended to operate, as an execution of the trust, although the whole of the property was granted to one daughter only. *Pettypiece* v. *Turley*, 13 O. L. R. 1, 8 O. W. R. 617.

Ont. Rule 938—Direction Given to Executors.—Where a testator gave power to the majority of his executors to say whether one of his sons should participate in his estate and the majority of the executors decided to exclude the said son, it was held, that an assignee of said son had no claim upon the estate. *Boin* v. *Mearns* (1878), 25 Chy. 450, followed. *Re Virtue* (1909), 14 O. W. R. 607, 1 O. W. N. 23.

Bequest—Assigned Reason for, Ill-founded.—The reason assigned by the testator for a gift proving ill-founded will only affect the validity of the bequest in so far as the circumstances clearly shew that the desire of the testator was that the gift should depend on the truth of the reason assigned for it. *Blouin* v. *Royer*, 27 Que. S. C. 81.

Bequest—Church—Trust—Mixed Fund.—A testator, who died on 12th April, 1895, by his will made the 11th September, 1894, directed land to be sold and out of the proceeds thereof and some personalty directed $2,000 to be paid to N. W. for the use of the Reformed Presbyterian Church, such sum to be expended by N. W. in the manner best calculated by him to advance the principles of that church. N. W. assigned the whole fund to the trustees of the church:—Held, a good bequest. Held also, that the assignament by N. W. to the trustees of the church was a valid exercise of the discretion given by the will. *In re Johnson, Chambers* v. *Johnson*, 23 C. L. T. 189, 5 O. L. R. 459, 1 O. W. R. 898, 2 O. W. R. 289.

Trusts—Provisions for the Appointment of New Trustee.—A testator appointed his two brothers executors and trustees of his will, and provided that in the event of the death, liability, or refusal to act of either of them, "then my surviving brothers and sisters or a majority of them shall by an instrument in writing . . . apoint a new trustee," etc. The testator died in 1899, and probate was granted to the two brothers, one of whom died in the same year. In 1900, by an instrument in writing, a majority of the brothers and sisters of the testator then living (one other brother having also died in 1880, after the testator) appointed the plaintiff a trustee in place of the deceased executor:—Held that the appointment was valid. The power to appoint a new trustee became operative in case either of the events provided for happened, whether in the lifetime of the testator or after his death; and it was the survivors of the brothers and sisters at the time of exercising the power, or a majority of them, who had the power to appoint. *Saunders* v. *Bradley*, 23 C. L. T. 263, 6 O. L. R. 250, 2 O. W. R. 607.

Legacy—Sickness, Provision in Case of.—A testatrix by her will bequeathed a sum of money to a son, with a direction that her executors should invest the same and pay to the son half the interest, and in case of his sickness to advance to him such portion of the principal money as they should think necessary; and in case of his death, after paying funeral and other necessary expenses, to divide the amount equally amongst her other surviving children; and by a residuary clause, she gave the residue of her estate to her children in equal shares:—Held, that in case of sickness a trust was created, which must be exercised by the executors, when called upon to do so, though they had a discretionary power to determine the amount necessary to be so applied, and that such sum was payable to the son's personal representatives. 2. The son having taken ill and died, the trust arose; and the circumstance that the beneficiary died before the money was actually advanced or set apart did not operate to deprive his personal representatives of the right to receive it. 3. The son's creditors had no direct claim upon the executors or the fund. *In re Evans*, 22 C. L. T. 164, 3 O. L. R. 401, 1 O. W. N. 92.

Bequest to Executor—Forfeiture by Renunciation.—A testator devised his estate to W. P., a resident of Scotland, and to two others, residents of Canada, in trust to convert and divide the same; and appointed the same parties executors of his will. To W. P. he bequeathed $5,500, and to the two others $1,500 and $500 respectively over and above any expenses to be incurred in the nature of travelling expenses or expenses incident thereto, and generally in the management of his estate. For the convenience of the other executors, W. P. renounced probate of the will:—Held, that by such renunciation he had forfeited the bequest in his favour. *Paton* v. *Hickson*, 25 Chy. 102.

Incapacity.—Where lands are devised to A., B., and C., as trustees, and C. is incapable of taking, the estate may nevertheless vest in A. and B. *Doe d. Vancott* v. *Read*, 3 U. C. R. 244.

Power Coupled with an Interest. — A testator, J. C., by will "authorized and empowered" his executrix and executors, or a majority of them (naming five, of whom his wife, E. C., was one) to sell and convey certain lands, the lot in dispute among others, and to apply the proceeds to

a specific purpose; and left all the rest and residue of his estate to his wife E. C., to be disposed of by her as she should see fit. E. C. subsequently sold to one J. W. the land in question for a valuable consideration, which consideration was applied according to the terms of the will. The plaintiffs claimed title through the will of J. W. The other four executors of J. C. refused to act, except on one occasion, when it was proved that being sued they joined in a deed of conveyance (not of the lot in dispute in this action.) It was further proved that J. T. C., one of the defendants, had recovered a judgment in ejectment against N. and O., two of the plaintiffs. The defendant J. T. C. claimed title as heir-at-law of A. C., who was heir-at-law of J. C., and insisted that the conveyance of E. C. being void for want of power to convey, he was entitled to succeed as heir-at-law of J. C.: —Held, that E. C. having a power coupled with an interest, the conveyance was good, and the plaintiffs were entitled to prevail. *Wessels* v. *Carscallen*, 10 U. C. C. P. 215.

Survivor.—The testator devised lot A., with power "to the executors herein mentioned" to sell and invest the proceeds, the devisee to receive the interest during his life, and after his death the proceeds to be divided among the testator's family; and in the clause appointing two executors were added the words "to see my will carried into effect:"—Held, that this was not a bare power in the executors, but a power coupled with an interest, vested in them in the character of executors, and that the surviving executor could make a good title to the land." *Re Ford*, 7 P. R. 451.

Bequest—Trust of Absolute Gift.—Where a testator by his will said: "I . . . do give and bequeath unto my wife, Sarah A. McNeil, all the property which I possess at my death, to dispose of to the best advantage for the support of the family and to leave the residue as she sees fit and proper at her death:"—Held, that no trust for the family was created, and that the wife took absolutely. *Sinclair* v. *Maley*, 40 N. S. R. 181.

Trust to Pay Annuities—Power to Lease.—A testator bequeathed an annuity of £50 to his wife and another of £40 to his daughter, and after other bequests and devises he proceeded: "I give, devise, and bequeath to my executors hereinafter named, their heirs and assigns for ever, the (naming certain lands in Chinguacousy and a house and lot in Clinton), upon trust for the benefit of the several devisees hereinbefore and hereinafter mentioned. First, to sell and absolutely dispose of my said village lot and house in Clinton, and invest the proceeds for the benefit of my four grandchildren hereinafter named; also, to collect the balance due upon a certain mortgage made by one C. and wife, and invest the same for the benefit of my said grandchildren. Second, to lease the said lots or farms (in Chinguacousy) and to keep the same leased out for ever, and the said lands in no case to be sold or mortgaged; the rental of the said farms, after paying thereout the said annuities of £40 and £50 to my daughter and to my wife as hereinbefore provided, to be held in trust by my said executors for the benefit of my four grandchildren hereinafter named, and to be invested for the said grandchildren and allowed to accumulate for twelve years from the day of my decease, and then to be paid over to the devisees entitled thereto, and thereafter to become payable to said devisees annually. I give, devise and bequeath unto my grandchildren (naming them) the rentals issuing out of the said farms in Chinguacousy, the moneys arising out of the sale of my house and lot in Clinton, and the balance due or to grow due on the mortgage made by C. and his wife to me, in equal parts, share and share alike." The will contained a residuary clause, as follows: "I give, devise, and bequeath to my executors hereinafter named all the rest, residue, and remainder of my real and personal estate, to be by them turned into cash, and invested for the benefit of my said grandchildren hereinbefore named, subject, however, to the maintenance and support of my wife and daughter S. for one year from the day of my decease, without reference to and over and above and beyond any provision hereinbefore made for them or either of them:"—Held, that the widow and daughter were not entitled to any estate in the lands in Chinguacousy; and that the executors held the same as trustees, subject to the said annuities, for the benefit of the four grandchildren in fee, who had a right to call upon the trustees to convey in such manner as they saw fit. (2) That

tbe power given by the will "to keep the same lessed out for ever" must necessarily terminate when the cestuis que trust were in a positiou to call for a conveyance, otherwise it would be void. (3) Tbst tbe chsrge of the annuities on these lands did not necessarily imply a power to sell, nud in tbis case it was clear it did not, as tbe testator expressly prohibited selling or mortgaging, wbich prohibition was a qualification of tbe powers of tbe trustees only, nnd did not apply to the equitable estate in fee of the grandchildren, as in that cnse it would be repugnant and void. *Crawford* v *Lundy*, 23 Chy. 244.

Special Direotion as to Investments.—The testator, a resident of Ontario, but temporarily resident in New York, was possessed of real snd personal property in Ontario, and also of personal property invested in United Ststes securities. By his will he nnmed one resident of tbe United States (his brother-in-lnw) and two persons residents of Ontario, as bis executors, to whom be bequeathed nll his personal estate, upon trust as soon ss conveniently migbt be to sell, call in and convert into money such pnrt of his estate as should not consist of money, and thereout to make certain payments, and invest the bslance of such moneys in or upon any of tbe public stocks or funds of the Dominion of Canada, of the province of Ontario, or upon Canadian Government or real securities in the provlnce of Ontario, or in or upon the debentures of any municipality within tbe province of Ontario aforesaid, or in or upon tbe sbsres, stocks, or securities of any bsnk, incorporated by Act of Parliament of Canada, psying a dlvidend, witb power to vary the said stocks, funds, debentures, shares and securities: "And as respect my American securities, having tbe fullest confidence in the judgment and integrity of the said W. E. C., my brother-in-law and trustee, I direct my trustees to be guided entirely by his judgment as to the sale, disposal and reinvestment thereof or tbe permitting of tbe same to be and remain as they are, until maturity tbereof, and I dcclare that my said trustees or trustee shall not be responsible for any loss to be occasioned thereby:"—Held, that this did not autborize the reinvestment of moneys renlized on the sale or maturing of any of these securities in the United States, but that the executors were bound to bring tbem into this country, and invest them in one or otber of tbe securities enumernted by the testator. *Burritt* v. *Burritt*, 27 Chy. 143.

Investment of Trust Funds.—Motion for the determination of the rigbt of a son of the testator to the profit mnde by the trustees on tbe sale of land purcbased by tbem under powers conferred by the will:—Held, tbat the son was not entitled under tbe direction in parsgrnph 21 of tbe will to be paid as part of tbe "Interest," which the trustees were directed to pay to bim, the profits realized from the money invested by tbe trustees in the purchsse of land. *Re Watkins* (*1909*), 15 O. W. R. 123, 20 O. L. R. 262.

Executors—Power to Carry on Business of Testator—Sale of Business—Lease of Premises.—Wbere under a will no express power was given to carry on the deceased's business—a brewery business—an order sanctioning tbe carrying on of the ssme by tbe personal representatives was refused, but it was held tbst they bad a discretionary power either to sell tbe chattel property with a lease of the brewery, or to sell the bnsiness as a going concern with a lease of the premises until tbe date fixed for distribution, nnd an agreement for snle, is deemed advisnble, but subject to the approval of the beneficiaries, on an infant beneficiary attnining her majority. *In re Brain*, 25 C. L. T. 44, 9 O. L. R. 1, 4 O. W. R. 263.

Carrying on Testater's Business.—A testator's direction to his executors to continue to carry on business witb his surviving partners, for the benefit of his wife and family, does not authorize the executors to embark any new capital in the husiness. *Smith* v. *Smith*, 13 Chy. 81.

Cutting Timber.—A testator devised his farm ultimately to minor cbildren, and directed tbat his executors should rent tbe same for the benefit of his wife, who was an executrix, nnd children; and thst the timber from his farm sbould he used only for tbe use of the premises during his wife's widowhood; and that the executors should have full power to carry the will into effect:—Held, that it was tbe duty of the executors to

prevent the executrix from cutting the timber for other purposes. *Stewart* v. *Fletcher*, 18 Chy. 21.

Devise to Convey.—A devise to trustees to convey gives a fee simple in joint tenancy, without words of inheritance. *Doe* d. *Berringer* v. *Hiscott*, M. T. 3 Vict.

Trustees to Hold until Condition Fulfilled.—R. died in 1847, having devised to T., defendant's son, the land in question. He also devised to one B. another lot of land not quite paid for, declaring it as his wish that the land devised to T. should remain in the hands of his executors until a deed should be obtained for the lot left to B., and the executors were to make the necessary payments from the rents of his real and personal estate. It was proved that the land devised to B. had been paid for, but the deed had not been obtained, as there were rival claimants, and the vendor required indemnity:—Held, that the land devised to T. would vest on payment of the money for B.'s lot, though the deed had not been executed. *Beckett* v. *Foy*, 12 U. C. R. 361.

Power to Lease.—A testator devised his lands to trustees, to distribute and divide the same amongst his wife and children, so soon as the youngest surviving child attained twenty-one. The trustees, professing to act in pursuance of the powers given by the will, put up portions of the property at auction for an absolute term of twelve years, at the expiration of which the youngest child would attain twenty-one, with a privilege to the lessee of removing any buildings upon the premises at the expiration thereof; or if he declined purchasing stipulated that the improvements would be paid for by the lessors. On a bill filed by the trustees to enforce specific performance of this contract:—Held, that the agreement was ultra vires, and the bill was dismissed but without costs, the defendant having set up several grounds of defence which entirely failed. *Dalton* v. *McBride*, 7 Chy. 288.

Possession.—Where a will, which was treated by the parties as devising the testator's farm to his executors, gave his widow all the rents, issues, and profits thereof, after deducting all the necessary expenses thereout to be paid by his executors . . . to his widow by half-yearly payments during the residue of her natural life, but devised the dwelling house on the farm to herself directly and not to the trustees; gave them power to lease and keep under lease the farm with the exception of the dwelling house; directed them to sell the stock, crops, and farming implements, and to permit the widow to take firewood from the bush part of the farm for the use of the dwelling house; it was held that the widow was not entitled to the personal possession of the farm.

The rule is that when property is devised in trust to pay the rents and profits to the cestui que trust, the cestui que trust is entitled to possession.

This rule applies though there are charges on the property; proper terms being in that case imposed by the Court as the condition of giving possession. But the Court will not give possession to the cestui que trust where it sees that doing so would do violence to the intention of the testator. *Whiteside* v. *Miller*, 14 Chy. 393.

After Born Child.—A testator, by his will, gave to each of his children (naming them) $200 a year until twelve, and thereafter $400 a year until eighteen, in case of daughters, and twenty-one in case of sons. After his death his widow gave birth to a son, and on a petition being presented to the Court on his behalf, he was ordered to be allowed the same amount as the other sons out of his contingent share of the residue of the estate which the testator directed to be divided amongst all his children on the youngest attaining twenty-one; it appearing that the share of the infant in such would be ample to pay the allowance named. *Aldwell* v. *Aldwell*, 21 Chy. 627.

Amount More than Required.—A testator, amongst other things, devised certain lands to each of his two children, and directed that the rents should be and remain to his widow or executors for the education and upbringing of the devisees respectively until they were 21, &c.; and he also left all the dividends and profits of his bank stock, &c., to his widow

and executors for the same purpose. The residue of his estate was to be divided equally amongst all his children. The rents of the lands devised to one of the younger children were alone more than sufficient for his education and maintenance:—Held, notwithstanding, that he was entitled to a share of the dividends bequeathed; that the whole income derived from the stocks being given, the gift could not, in favour of the residuary legatees, be construed as conditional on being needed for the purpose specified. *Denison* v. *Denison*, 18 Chy. 41.

Charged on Land.—A testator devised land to his wife for life, "subject to the conditions of supporting and educating therefrom my children until they are of age respectively," and after her decease, and his youngest child having attained eighteen, he devised the same land to his son, J. L. The widow died, and J. L. also died before the youngest child attained eighteen:—Held, that J. L. did not take the estate charged with the support or education of the younger children, nor was it chargeable in the hands of J. L. with arrears therefor, which had accrued during the life estate of the widow. *Perry* v. *Walker*, 12 Chy. 370.

A testator, amongst other things, devised to his wife the proceeds of all his rentable property, after paying necessary outlays for the maintennce and support of herself and six infant children, and gave certain parts of his estate to his children to be conveyed to them on the death of their mother; and the will further provided that the widow should have the power, with the approval and consent of the executors and trustees, of whom she was one, to put any of the said children into possession of the real or personal property bequeathed to them after attaining the age of twenty-one:—Held, that the property was subject, as a first charge thereon, to make good any deficiency there might be in the amounts derived from other properties, to afford a proper sum for the maintenance of the infants; and a reference was directed to the Master to ascertain the proper sum to be allowed, also what had been received on account thereof; and as T., a purchaser of the property, had resisted the right of the plaintiffs to this account, although he shewed himself to be a purchaser for value without notice, the Court refused him costs also. *Collingwood* v. *Collingwood*, 21 Chy. 102.

Where lands are devised subject to the payment of annuities, such lands will be charged in the hands of a purchaser, but not where there is also a charge of debts. Where, therefore, a testator devised to his daughter all his "real and personal estate of every description, subject to the payment of my just debts, and on condition that my son M. be supported and taken care of as hitherto by her, to have and to hold the said real and personal property on the condition aforesaid to her, her heirs and assigns forever," and appointed her sole executrix:—Held, that the devisee could make a good title freed from the charge for the support of the son M. *McMillan* v. *McMillan*, 21 Chy. 594.

A testator made his will as follows: "I leave to M. the west half of lot 9 during her natural life. I leave to my son A." (an imbecile) "his board and lodging with £5 per year during his natural life, to be given as hereinafter mentioned. I leave to B." (certain other lands) "under the following restriction; i.e., he is to pay A. £3 every year during his natural life. I leave to R. the west half lot 9, after his mother's death, on the following condition: i.e., £2 in each year to be paid by him to A., and to keep A. in board and lodging during his natural life." The devise to R. failed, he being an attesting witness:—Held, that A.'s maintenance as from the death of the testator, and not as from the death of M., was a charge on the west half lot 9 in the hands of the heirs; and the land having, for some time after the testator's decease, been occupied under mistake of title by R. and his assigns, who had paid for A.'s maintenance, the heirs could not enjoy the land without making good the charge thereon to those who had thus exonerated them. *Munsie* v. *Lindsay*, 11 O. R. 520.

Charged on Shares.—Where a testator gave the residue of his real and personal property to his executors and trustees in trust to sell the same, and, after satisfying certain charges, to expend and apply, for the maintenance and education of his minor children, such sums as they thought necessary for this purpose, and in subsequent clauses of the will provided that such children were to draw, or be entitled to, equal shares of his estate,

and that each should receive his or her share of the proceeds of the real estate, on marrying or arriving at maturity; and that until then the shares of such children should be invested and paid out as they required the same as aforesaid:—Held, that their maintenance and education were a charge on their own shares only, and not on the whole residue. *Gibson* v. *Annis*, 11 Chy. 481.

Direction to Work Farm — Right to Proceeds. — A testator directed his son to work his farm of 100 acres, worth £50 or £100 a year, and pay one-third of the produce to his widow. The widow and son and an infirm daughter lived together on the place until the death of the son, all receiving their support from the farm, the widow for part of the time doing work equivalent to the support she received, but making no demand for her one-third of the produce, and there being no agreement between them on the subject. A bill by the widow against her son's representatives for an account of her share of the produce, was dismissed with costs. *Gilmore* v. *Gilmore*, 14 Chy. 57.

Surplus Proceeds.—A testator devised a portion of his real estate to his widow and his eldest son J., jointly, and his heirs, "my wife J. to have and to hold the aforesaid premises as long as she remains my widow for my wife J. C.'s support, and my small children's support, to be accepted by her in lieu of dower; and after her death my wife's part will belong to my son J. C., aforesaid. . . . My son J. C., aforesaid, will pay to my daughters (naming them) $200 each when they become of the age of twenty-one years, that is, each as she becomes of the age of twenty-one years." The testator then devised other real estate to his four younger sons, and proceeded to direct that his five sons should "remain on the old farm (the land devised to the widow and eldest son) and work together, and the proceeds of their work, except what is necessary for the maintenance of the family, that is, for food and clothing, is to pay for the land already purchased . . . and if any of my sons aforesaid does not conform to this proviso . . . then the property I have given and devised to him or them shall be sold by my executors hereinafter named, and the proceeds of the sale aforesaid shall be paid upon the land I have willed to those of my sons who fulfils this last provision:"—Held, that J. took an estate in fee in one moiety of the land devised to him and his mother; that the widow took an estate during widowhood in the other moiety, with remainder to J. in fee, the whole being charged with the maintenance of the testator's widow and such of the children as continued to live on it; and with the payment of the purchase money payable on the lands devised to the sons who remained on and worked the farm; both charges being on the annual profits, not on the corpus: J., however, being entitled to insist that the lands devised to any of the sons who abandoned the farm should be sold and the produce applied in payment of lands devised to those who remained, and that any surplus of the produce not required for maintenance, and to pay off purchase moneys, was divisible between J. and his mother in equal moieties. *Clark* v. *Clark*, 17 Chy. 17.

Discretion—Right to Account.—The testator devised certain lands to his widow, to have and to hold the same for the following uses: "To sell and dispose of the same as she should think proper and right, and the moneys thereupon coming and arising to use and apply for the payment of my just debts, and for the maintenance of herself and my minor children, and the education of such children as she may see to be fit and necessary," and he authorized his wife to convey the said lands in fee simple to the purchasers and directed that in the event of any of the said lands remaining unsold at the time when his youngest surviving child should attain twenty-one, then the above devises and powers should cease, and the lands be subject to the trusts of his will previously declared, under which the lands were ultimately to be divided among his children. The testator was twice married:—Held, that the children and grandchildren of the testator's first marriage had no right to demand an account of the lands sold under the above provisions, or investigate the amount used for maintenance. Semble, that the widow took absolutely the balance of the proceeds of sale not required for debts. In the case of separate devises,

though the wife may be barred of her dower in one, she is not therefore barred of her dower in the others. *Cowan* v. *Beaucrer*, 5 O. R. 624.

Discretion of Executors.—A discretion given to executors to apply the interest of a legacy to the maintenance and education of the legatees, nephews and niece of the testator, is not subject to the control of the Court, where there is no charge of fraud, or the like, against the executors. *Foreman* v. *McGill*, 19 Chy. 210.

Dower and Maintenance.—A testator devised all his real and personal estate to trustees to sell the realty and get in the personalty, the proceeds of which, after payment of the debts, they were to invest in their names upon trust to pay the annual income to his two sons in equal moieties, they maintaining their mother during life; and after the death of each of the sons the trustees to hold one moiety of the trust moneys upon trust to pay and divide and transfer the same equally between and amongst such of his children as should be living at his decease, and the issue then living of such children as should be then dead, as tenants in common in the course of distribution, according to the stocks, and not to the number of individual objects, and so that the issue of any deceased child should take by way of substitution, amongst them, the share or respective shares only, which the deceased parent or parents would, if living, have taken:—Held, that the widow was not put to her election, but was entitled to dower as well as the provision made for her by the will; and it being alleged that the sons had not provided for her maintenance, a declaration was made that she was entitled to such maintenance, and a reference was directed to find what would be a proper sum for that purpose; that a complete conversion had been effected by the trust for sale in the will, so that the interests of the son should be ascertained as if the will consisted of personal estate only; and that the sons took life estates therein only; and one of the sons having died without children that there was an intestacy as to his share, subject, however, to a proportion of the charge for the maintenance of the widow. *McGarry* v. *Thompson*, 29 Chy. 287.

Duration.—Every gift for maintenance, imports maintenance during minority. *Bigelow* v. *Bigelow*, 19 Chy. at p. 555.

A testator by his will, dated 31st May, 1872, after several specific bequests, gave the residue of his real and personal estate to his trustees upon trust to pay to each of his daughters, J. and L., for life, the annual allowance of $800 each, which they were then receiving, to be paid to them semi-annually, and to pay for the education, maintenance and ordinary requirements of his son G., and then proceeded: "And I direct my trustees in their discretion, if they find my son G. deserving of the same, to make such annual allowance to him as to them may seem warranted by the proceeds of the income of my estate, and if my said trustees are satisfied as to his steadiness they are to treat my said son G. in respect to the said allowance in the same manner as my said daughters, J. and L. . . . . It is my will that in the case of each of my said daughters the capital sum necessary to produce the allowance made to her be paid after her death to such person or persons as she may by will direct:"—Held, that George was only entitled to his maintenance and education during minority, for there was nothing in the will to indicate an intention to extend the trust for maintenance and education beyond that period. Held, also, that George was not entitled to any annual allowance in addition to his maintenance and education during his minority, and the amount which might be paid him after attaining majority, as an annual allowance, rested on what the trustees in their discretion might deem warranted by the estate. For by treating G. in the same manner as J. and L. the testator referred only to the mode of payment, and the power of disposing of the principal, not to the amount of the allowance. *Macdonald* v. *McLennan*, 8 O. R. 176.

When a testator has himself specified the time for the duration of maintenance, that will be observed; but the right to maintenance and support, when given in general terms, will cease with the marriage or forisfamiliation of a child. *Knapp* v. *Noyes*, Amb. 662; *Gardner* v. *Barber*, 18 Jur. 508; and *Wilkins* v. *Jodrell*, 12 Ch. D. 564, considered and commented on. *Cook* v. *Noble*, 12 O. R. 81.

Devise to Sell.—The will provided that all lands remaining unsold at testator's death should continue unsold in care of his executors until they should see fit to sell, and the proceeds of sale should be divided as directed. Then executors were appointed, "with full power to act beyond the day limited by law, and until such time as the same shall have been fully executed, hereby to the latent thereof divesting myself of all and singular my estate, debts and property, real and personal, to them in trust to and for the fulfilment, intent, and puposes of this my last will:"—Held, to operate as a devise of the land in fee in trust to sell, &c. *Patulo* v. *Boyington*, 4 U. C. C. P. 125.

A devised as follows: "I give and bequeath to my wife, after my decease, the proceeds of one-half of all my lands, cattle, and other effects of every kind whatsoever to me belonging at the time of my decease; and the other half of my said lands, cattle, and effects of every kind whatsoever, I leave in the hands of my executrix and executors, to pay all my just debts, &c.:"—Held, that the estate passed to the executors to sell, and not only a mere power to sell. *Dowling* v. *Power*, 5 U. C. C. P. 480.

"I give and bequeath to my wife after my decease the proceeds of one-half of all lands, cattle, and other effects of every kind whatsoever to me belonging at the time of my decease, and the other half of my said lands, cattle, and effects of every kind whatever, I leave in the hands of my executrix and executors, to pay all my just debts," &c.:—Held, that the executors took a power of sale, and not the fee. *Moore* v. *Power*, 8 U. C. C. P. 109.

Direction to Raise Money.—The powers of a trustee, who is directed to raise or to pay money out of rents and profits, to sell the trust estate, considered and acted on. *Sproatt* v. *Robertson*, 26 Chy. 333.

Implied Power to Sell.—A testator by his will devised as follows: "Also, it is my will, that when the aforesaid property be sold, that the interest be put to the clothing and schoollag of my children, and to the support of my wife, so long as she remains my widow;" and by a subsequent clause named certain persons executors of his will; "and of the aforesaid estate and effects, and to apply the same according to the directions in the said will:"—Held, that the executors had full power to sell and convey the lands in fee, and that a child of the testator, born after the making of the will, was not a necessary party to the conveyance. *Glover* v. *Wilson*, 17 Chy. 111.

A testator devised his lands, charged with payment of debts, to his wife for life, and in the event of her death or marriage, to his children, "to be held for them till they come of age by the executors hereinafter named, to be applied for their use and benefit in the way and manner as the said executors shall see best, and when the above children shall come of age the residue of the above property shall be given to the children in equal shares." The executors were not expressly authorized to sell, but the testator had directed that his wife should not have power to dispose of any part of the property without the consent of his executors:—Held, (1) that the necessary implication from these words was that she had power to sell with their assent; and the executors and executrix—the widow—having sold the real estate and applied a large portion of the proceeds in the support and maintenance of the children, held (2) that the sale was valid, and that the executors were entitled to be allowed the amount so expended for maintenance, which was moderate, in passing their accounts in the Masters office; and semble, that the fact of the debts having been charged on the lands, implied a power in the executors to sell. *Grummet* v. *Grummet*, 22 Chy. 400.

Estate with Direction to Sell.—Testator appointed his wife and two others, "trustees of my property, to be held in trust for the benefit of my said wife and children." He directed that they should hold one farm for the use of his daughters, notwithstanding they might marry, and two other farms for any child born after his decease—devised his homestead to his eldest son—and added, "I will and devise that the 500 acres of wild land," describing it, "to be sold, and the proceeds to be divided among my said sons and daughters in equal proportions, share and share alike, when the youngest

comes of age:"—Held, that the trustees took a fee in the wild land, not a mere power to sell. *Young* v. *Elliott*, 23 U. C. R. 420.

Direction to Sell.—A testator, in an inartificially drawn will, directed his debts to be paid, and bequeathed to his wife £125, to be paid her from the sale of his farm, which he required his executors to advertise and sell for the best price that could be obtained for it, and also to retain possession if she thought fit, in lieu of all dower and thirds, to have and to hold to her heirs and assigns for ever. After giving legacies to his children, adding to each "to have and to hold to him, his heirs, executors, administrators, and assigns, for ever"—the testator willed and devised, that, should any assets remain in the hands of his executors after paying the foregoing devisees, the same should be equally divided between his sons and daughters named, share and share alike:—Held, that the direction to sell was for the benefit of all the legatees, and not of the wife only. *Smith* v. *Bonnisteel*, 13 Chy. 29.

A testator devised all his estate, real and personal, to trustees upon trust so soon after his death as might be expedient to convert into cash so much of his estate as might not then consist of money or first-class mortgage securities, and to invest the proceeds and apply the corpus and income in a specified manner. A later part of the will contained the following provision: "In the sale of my real estate or any portion thereof I also give my said trustees full discretionary power as to the mode, time, terms, and conditions of sale, the amount of purchase money to be paid down, the security to be taken for the balance, and the rate of interest to be charged thereon, with full power to withdraw said property from sale and to offer the same for resale from time to time as they may deem best:"—Held, that the later clause merely gave a discretion as to the details and conditions of the sale, and did not qualify or override the specific direction to sell as soon after the testator's death as might be expedient. *Lewis* v. *Moore*, 24 A. R. 393.

Discretionary Power of Sale.—A testator devised all his real and personal estate to trustees, and declared that it should be lawful for them, or the survivor of them, or the heirs, executors, and administrators of such survivor to make sale and dispose of all or any part of the said farms, lands &c., either together or in parcels, and either by public auction or private contract, and for such price and prices as to them or him should seem fit and reasonable, and to lay out and invest the money to arise from such sale or sales in the purchase of stocks, government or real securities, in the province of Canada:—Held, that the power or trust was discretionary, not only as to the time of sale, but also as to whether there should be a sale at all or not, and that it operated no conversion of the land into personal estate until exercised. *Roussell* v. *Winstanley*, 7 Chy. 141.

If under a will a trustee has a discretion to sell or not to sell real estate, the Court will not interfere by its advice or direction, but will leave the trustee to exercise his discretion. *In re Parker Trusts*, 20 Chy. 389.

Repairs.—A tenant for life is bound to keep the premises in repair; and the Court will not apply the undisposed of personalty in effecting such repairs. The fact that the tenant for life (the widow) has not the means of making the repairs, and that the premises are deteriorating in consequence of non-repair, are proper matters for trustees with power of sale to take into consideration in determining whether or not they will sell. *Holmes* v. *Wolfe*, 26 Chy. 228.

Consent of Executors.—A testator devised to his wife for life a parcel of land "with the power of sale at any time during her life, subject to the consent of my executors." Three executors were appointed by the will, one of whom died. A contract for sale of part of the land having been entered into, it was objected by the purchaser that the consent of the two surviving executors was not sufficient:—Held, that in the conflicting state of the authorities upon the question, the title was not one which the Court would force upon a purchaser. Held, also, that under such a power the land could be sold in parcels. *Re MacNabb*, 1 O. R. 94.

Devise to Wife—Life Estate.—The testator gave and devised to his wife "all my personal estate of every description for her own use and that my landed property and the balance that may be coming due on the . . . mortgage shall be disposed of after the death of my wife and shall be made into fifteen parts of which fifteen parts each of my sons shall receive two fifteenth parts and each of my daughters one fifteenth part and that so long as my wife . . . lives she shall have the use of the landed property and either use it, rent it or sell it and use the money as she thinks best:—Held, that the interest of the wife in the landed property was a life interest only with a power to sell the land, if she so desired, and, in that event, a right to invest the proceeds as she should deem best, and enjoy the income derivable therefrom during her life. *Re Silverthorn*, 10 O. W. R. 798, 15 O. L. R. 112.

Executors—Power to Sell Lands—Power to Exchange—Vendor and Purchaser.—A testatrix devised her real estate to be equally divided between her children when the youngest of them attained twenty-one, with a power of the executor "to sell or dispose of any or all of the above real estate, should he think it in the interest of my children to do so, and should he pay off any debt or debts now standing against such real estate, the same to be deducted from such sale or sales:"—Held, that the executor had no authority to exchange the lands of the testatrix for other lands. *In re Confederation Life Association & Clarkson*, 23 C. L. T. 325, 6 O. L. R. 606.

Executors — Implied Power to Sell Land — Devolution of Estates Act—Vendor and Purchaser.—After giving the whole of her estate, real and personal, to her stepson and his wife and their three children, the testatrix proceeds, "It is my will that the personal effects shall be kept in the family, but the real estate shall be sold and equally divided, and I appoint my stepson, Harry Roberts, and his daughter, Annie Roberts, to execute this will. Teetzel, J., held that the executors had an express power of sale, not depending upon nor affected by the Devolution of Estates Act. *Re Roberts & Brooks*, 25 C. L. T. 400, 6 O. W. R. 49, 10 O. L. R. 395.

Power of Sale—Administrator with the Will Annexed.—Replevin for iron ore taken from land in the province of Quebec. It appeared that R., the patentee of the land, by his will, made in 1829, authorized his executors to sell and convey all his estate, real and personal, for such considerations, upon such terms, and in such manner as they might judge best, and bequeathed the proceeds to different persons. Four executors were named, of whom only two proved the will, and the last of these two died in 1861. Administration with the will annexed was granted on the 20th May, 1873, to E. S., who conveyed to the plaintiff on the 31st May:—Held, that under 36 Vict. c. 20, s. 40 (O.), E. S. clearly had power to sell to the plaintiff. Before the execution of this deed the ore in question had been severed from the land, but the deed purported to convey not only the land, but all iron and other ores which might have been at any time severed from the land:—Held, that the ores passed by this conveyance; for though a chattel, and the conveyance would not, except in equity, pass the legal title to it, yet the heir in whom it was vested would be a trustee for the administrator, the donee of the power, and it might be presumed that such donee, as cestui que trust, had authority from the heir as trustee to dispose of it. *Stuart* v. *Baldwin*, 41 U. C. R. 446.

Charge of Debts.—A testator directed his executors to pay all his "funeral charges and just debts." The residue of his estate and property not required for that purpose he disposed of as follows: To his wife all his household furniture, his pew in a named church, and all cash in hand at his decease, also to his wife the entire, exclusive and undivided use of his house, situate, &c., to hold the same during her natural life, then the proceeds to be equally divided, &c., he also gave and bequeathed the proceeds of the homestead to be equally divided, &c. There were other lands not mentioned in the will:—Held, that nevertheless the executors could give a good title to them to the purchaser, for the above words clearly imported an intention that the debts should be paid first out of the estate and property of the testator:

this created a charge of debts upon his lands; and the mere failure of the testator to enumerate all his lands in the subsequent part of the will, by which there was an intestacy as to the part in question in this action, did not detract from the conclusion that all the lands were so charged. The direction that his debts should be paid by his executors conferred an implied power of sale upon them for the purpose of paying the debts out of the proceeds. Held, also, that apart from the above R. S. O. 1877 c. 107, s. 19, covered the case. The testator had not indeed within the meaning of that section devised the real estate charged in such terms as that his whole estate and interest therein had become expressly vested in any trustee, but he had devised it to such an extent as to create a charge thereon which the Act in effect transmutes into a trust and thereupon clothes the executor with power to fully execute that trust by conveying the whole estate of the testator. *Yost* v. *Adams*, 8 O. R. 411, 13 A. R. 129.

Consent.—The testator devised lot B to his son T. on condition that he should support his mother during her life, and if the executors should think best, and his mother agree to it, they might sell the lot. The mother died, having been supported by T. during her life:—Held, that on her death, the power, which could only be executed with her consent, became extinct, and T. having the fee could make a good title to a purchaser. *Re Ford*, 7 P. R. 451.

J. C. died in 1867, having by will provided as follows: "And whereas trouble . . . may arise among my family with regard to the property . . . on account of its being out of the power of my trustees to sell or dispose of the property, I hereby order, direct, and fully authorize at and after twenty years after my death, my trustees . . . to absolutely sell and dispose of my said property in T. to the best advantage, provided only that it be the wish of a majority of my heirs who may then be living, to do so and not otherwise, &c." In 1887, a meeting of a large majority of those interested was held, and it was decided to sell by public auction. On an application by the plaintiffs, who were trustees for one of the heirs and represented only a one-sixth share of the property, for the usual order for partition and sale, which was resisted by a majority of the heirs:—Held, that the land in question was vested in the trustees on the express trust to sell at the end of twenty years from the testator's death, provided a majority of the heirs were in favour of a sale, which was proved, and that the jurisdiction to partition was ousted. *Re Dennis, Downey* v. *Dennis*, 14 O. R. 267.

Renunciation.—Testator directed "that no real estate be sold without the unanimous consent and direction of all my executors;" and also gave them power to buy and sell, give and take titles in fee simple in as full manner as if he were living, and appointed his widow executrix, and F. and H. executors. F. and H. renounced probate, and the widow alone proved the will:—Held, that the powers conferred by the will were personal, and could not be exercised by the widow alone: that being personal, they had become extinct; and that the division of the estate having been postponed only for the sake of the powers, its distribution was accelerated by their extinction. *Kerr* v. *Leishman*, 8 Chy. 435.

A testator directed his executors to get in all his outstanding estate, and after payment of debts and funeral expenses to expend the proceeds in building on his property, and also after two years, with the consent of his widow, authorized them to sell his homestead in village lots, and to invest the proceeds in land or government stock as his widow might desire; and the yearly income of all his estate, real as well as personal, he gave to his wife for her support and that of his children, for her natural life, provided she remained his widow, but no longer than during the minority of his children if she should marry again; nevertheless she was to be guardian of the children during their minority, and receive said income for their support until each became of age, and when the youngest became of age then the property was to go share and share alike, between his surviving children or their heirs:—Held, that the children took estates tail, with cross-remainders in the realty. (2) That the widow had the power of making the estate realty or personalty at her discretion. (3) That the power of sale having been given to the executors qua executors, and not by name, they could not,

after having once renounced, execute such power. *Travers* v. *Gustin*, 20 Chy. 106.

Specific Devise.—A testator by his will directed his executors to pay all his debts, &c., out of his estate. Then followed specific devises of his estate to his wife, children and nephews, and a direction to his executors to sell the chattels, excepting the household furniture bequeathed to his wife, and out of the proceeds to pay the debts and to invest the balance for the benefit of the wife and children. By a codicil he directed his executors, if necessary, to sell in the first place lot A, specifically devised as aforesaid, to pay off any debts or incumbrances against his estate; and in the event of such sale being insufficient to pay said debts, &c., then in the next place to sell and dispose of lot B, also so specifically devised. The executors before disposing of lots A and B, sold to defendant the growing timber on lot C, a lot specifically devised to the plaintiffs, the defendant purchasing in good faith and on his solicitor's advice that the executors had the right to sell to pay debts; and defendant entered and cut down and carried away the timber. Subsequently the defendant purchased the land from the mortgagees thereof, the land having been mortgaged by testator. The plaintiffs, at the testator's decease, were under age, and did not become of age until after the trespass complained of, when they brought trespass against defendant claiming as damages the value of the timber so cut. There was no entry or possession taken by plaintiffs before action commenced:—Held, (1) that the general language of the will was controlled by the codicil, and so the debts were not charged on the unappropriated estates; and therefore the executors had no power to sell the timber on the land in question. (2) That if a power of sale was given to the executors it could not be exercised until after the lands specifically appropriated had been sold. (3) That the purchaser, not shielded by s. 30 of 20 Vict. c. 20 (O.), was bound to see that the power was rightly exercised. *Baker* v. *Mills*, 11 O. R. 253.

Time.—A testator directed all his estate, real and personal, to be sold for the purpose of dividing the proceeds amongst his children, which sale was to take place in eighteen months from his death; but the will empowered the executors to withhold the sale of the estate, "real and personal, more than what is necessary to defray the above mentioned charges, if they should deem it for the benefit of my heirs, provided such sale shall not be delayed longer than five years from my decease." The real estate was not sold within the five years:—Held, notwithstanding, that the trustees could make a good title, the limitation of the time being only directory. *Scott* v. *Scott*, 6 Chy. 366.

Payment of Debts.—Lands were devised to trustees to carry out the will of testator, who reserved six lots, which he desired should be sold for payment of debts, not charged on lands; the residue to his grandchildren:—Held, that the trustees had a right to sell the whole of such property for payment of debts left unpaid by the personal estate and the lots specially appointed to be sold for that purpose: and that a purchaser who had not notice that all the debts not charged on lands were paid, would be justified in assuming that the trustees were properly proceeding to a sale. *Duff* v. *Mewburn*, 7 Chy. 73.

Implied Power of Sale.—B. bequeathed to his wife, A., the land in question, "to be at her disposal, if agreeable to the executors," of whom she was not one, "so long as she remains a widow," adding, "I wish and desire the aforementioned farm to be sold for the discharge of my lawful debts, and the residue accruing therefrom to be laid out in the payment or part payment of another for the support of my family." He then directed that his two eldest sons should have the property when they came of age, after his wife's death, if she should remain a widow, and if she should marry they were to come into possession when of age, and that these two sons were to pay to the other children a proportion equal to their part of the property, adding, "all the above to be done to the wishes of the aforementioned executors." None of the executors proved or acted, and in 1851 letters of administration, with the will annexed, were granted to the widow, who in the same year conveyed to defendant, describing herself in the deed as "sole devisee (with power of sale for purposes set forth) under the will

of," &c. She married again about 1853. This sale she swore was made in order to pay the testator's debts, and the purchase money so applied:—Held, the sale directed by the will being for the payment of debts, the power to sell was vested by implication in the executors: that she did not take it as administratrix; that on her marriage her own interest was at an end; and that the sons could, therefore, eject defendant without any notice to quit or demand of possession. *Hunting* v. *Cummerson*, 24 U. C. R. 287.

Delegated Power.—After devising all his real and personal estate to his executors in fee in trust for sale to pay debts, by a subsequent clause the testator directed that all his real estate, not specifically devised or required to pay debts, should be sold by his executors as they thought best, and the moneys arising from the sale and from other sources should after payment of debts be invested by them:—Quære, whether a mere power was created by this clause of the will, and if so, whether it was well executed by a delegated power; or whether a similar estate might not be deemed to be continued in the executors for the objects of the second as well as for those of the first clause. *Burke* v. *Battle*, 17 U. C. C. P. 478.

Lands Specifically Devised.—Testator devised land to his wife for life, remainder to his nephew T., in fee. He then devised specific land to be disposed of by his executors for the payment of his debts, and added "and I also do hereby acknowledge and authorize them to sell, grant and convey, in full and proper manner, any, all, or such of my real estate as may be necessary to the payment and liquidation of any and all such just debts as may be due by me and not otherwise provided for:"—Held, that the executors had power to sell the land in question. They conveyed to one P., a creditor, who was to pay the widow a certain sum for her dower, and the residue to other creditors. Held, that the legal estate passed, whether the sale could be impeached in equity or not. Executors in such a case are not bound to sign the deed in presence of each other, as arbitrators executing an award. *Little* v. *Aikman*, 28 U. C. R. 337.

A. McD., in 1864, describing himself as of the north half of lot twenty-seven, fifth concession of Nottawasaga, bequeathed "the above mentioned property in the following manner to my wife (the plaintiff) and family." The will then authorized the executors to cause the proceeds of the said property to be used for the support and keeping of his wife and family for a term of twenty years, and directed them to pay his debts, but did not devise the property to them. The will further directed that, after the said twenty years, his son Ronald (the defendant) was to have the south part of the above land, which he was to pay for, and the remainder was devised to another son, who was directed to pay legacies to his sisters. Subsequently Ronald obtained a patent from the Crown of the land devised to him, habendum, "subject nevertheless to the terms and conditions of the last will and testament" of the testator, A. McD.:—Held, that the words, "I bequeath," &c., "in the following manner," &c., "to my wife and family," carried the estate direct to them, notwithstanding the direction to the executors. Held, also, that the defendant holding the legal estate under the patent, and having a beneficial interest in his own right as one of the family, the plaintiff could not maintain ejectment against him. *McDonald* v. *McDonald*, 34 U. C. R. 369.

Personal Discretion.—A testator devised real estate to his granddaughter; and, in case of her dying without lawful issue, he directed the property to be sold by his executors; and from the proceeds of this and his other property he directed certain legacies to be paid, and the remainder to be applied at the discretion of his executors to missionary purposes:—Held, that these provisions showed a personal trust in the executors for the purposes specified, and that the contemplated "dying without issue" was a dying without issue living at the granddaughter's death. *Re Chisholm*, 18 Chy. 467.

G. E. F. died in 1899, and by his will left the greater part of his property to his executors and trustees upon various trusts. The will contained the following provisions:—"I give, devise and bequeath all my other property both real and personal whatsoever and wheresoever situated of which I may be seized or possessed or otherwise entitled, to my executors

and trustees herein named upon the trusts following, etc." The clause in the will which referred to the Linden Hall property was:—"Upon trust that my trustees will hold my residence known as Linden Hall and the grounds connected therewith (but not to include the property purchased by me and known as the Grammar School property) during the will and pleasure of my wife, and there she may live as long as she desires, free from rent, she paying one-half of the taxes, insurance, water rates and such like—also she paying in full the running expenses in keeping up the establishment, during her occupancy, it being my intention that she may live in her present home so long as she may so wish. If, however, the above property be leased or sold during my wife's lifetime, with her consent, then in such a case I desire, if leased, the rent derivable therefrom shall be used as rent for a house for her to live in and such house is to be as good as one of my present houses situate on College Road, Sunbury Street, Fredericton, and if after paying such rent with the money received from the rent of the said Linden Hall property there remains a balance from time to time, this balance shall be added to the principal sum already set aside for my wife's maintenance, the income in the meantime being paid to my said wife. Should, however, the said property be sold during my wife's lifetime, with her consent, the purchase money shall be used as follows: so much of it shall be invested as will yield enough interest to pay rent for as good a house as one of my College Road houses, and in such a house my wife may live, such interest being used to pay the rent therefor, and the balance of the said purchase money shall be divided equally among my children then living:"—Held, that while no express power of sale was contained in the will, there was an implied power in the executors and trustees to sell the Linden Hall property, to be drawn from the provisions contained in the will itself, and to enable them to carry out the trusts declared in the will; and that a conveyance executed by the surviving trustees and executors, in whom the title was vested, and the widow of the testator, gave a good title to the property in question, and that it was not necessary that the beneficiaries under the will, other than the widow, should join in the conveyance. *Venety* v. *Johnston* (1900), 4 N. B. Eq. 216.

Trust for Maintenance.—C. devised the residue of his real estate to his executors in trust for his four children (naming them) "until they or the survivor or survivors of them shall have attained the age of twenty-one years, said real estate to be divided amongst the said four children, share and share alike, and in case any of them shall have died leaving issue, the said issue shall take the share which otherwise would have gone to his, her, or their parent." He also directed that his executors should provide for the maintenance, support and education of the said four children during their minority out of the income to be derived from time to time out of his real and personal property not otherwise devised and bequeathed by his will:—Held, that J. P. C., one of the four children who had attained twenty-one, was not entitled to maintenance after that age. *Ryan* v. *Cooley*, 15 A. R. 379.

Where a provision is made for maintenance the duration of which is defined by the testator, it will go on for the prescribed period notwithstanding the death of the beneficiary, because to avoid an intestacy the Court will adjudge it to the representatives of the deceased. *Dawson* v. *Fraser*, 18 O. R. 496.

Equitable Title.—Under the following devise: "To my dearly beloved wife, C. C., it is my will and desire that of what property I possess she shall have her lawful support in food and clothing during her natural life, in such manner as she received while I was yet with her:"—Held, that lands of which the testator had only the equitable title were charged with her support and maintenance. *Campbell* v. *Campbell*, 6 Chy. 600.

Expenditure for Improvements.—The Court, under special circumstances, allowed money to be expended on improvements on a certain property of a testator who had directed by his will that the rents and profits of all his property should be expended in payment of debts, and in the support of his wife and children until the youngest child should come of age. *Re Bender*, 8 P. R. 390.

Interest during Minority.—A testator, after giving certain personal estate to his wife, and devising his lands to his two sons and his daughter (all minors), subject to a life estate to his wife, directed the residue of his personal estate to be equally divided between his two sons on their attaining twenty-one; and further, that if any of his children should die before attaining that age, then his or her share should be equally divided among the survivors; and if all should die, he gave the whole on his wife's death to her other relatives, whom he specified:—Held, that the two sons were entitled to the interest on the residuary personal estate for their maintenance during minority. *Spark* v. *Perrin*, 17 Chy. 519.

Medical and Funeral Expenses of Beneficiary.—A testator by his will provided as follows: "I will and devise that my said executors and trustees shall comfortably provide for and maintain and clothe my father and mother during their lifetime, and that the same shall be a charge upon my estate." The father and mother died, and during their last illness certain expenses were incurred for medical attendance, nurses, &c., and after their death for funeral expenses and English solicitor's fees in endeavouring to collect the several accounts for the same:—Held, that the expenses were covered by the provision for maintenance, and an order was made for their payment out of the testator's estate. *Howe* v. *Carlaw*, 15 O. R. 697.

Joint Benefit.—A testator made his will as follows: "I therefore will unto my beloved wife A. M., for the benefit of herself and children jointly, two life policies for each $1,000, and their premium dividends, to have and to hold for their joint and mutual benefit, and to be by her spent in the most judicious and beneficial manner for all; also whatever interest I may have in the business of E. & D., and, in the arranging of it, I trust much to my long and well tried partner, A. W., in giving a just return to my heirs, for long and faithful services rendered by me in the business, there being no written agreement of the partnership:"—Held, that the widow took no absolute interest; that she and the children took jointly both the policies and the testator's interest in the partnership, and shared the same equally; that the widow was entitled, during the minorities of the children, to receive the income of their shares, in trust, to apply the same as one fund, as she might think most beneficial for the maintenance and education of the whole family; and that each child on attaining twenty-one was entitled to receive his or her share. *Rose* v. *Edsall*, 19 Chy. 544.

Receiver against One Beneficiary.—Under a devise of land to a father "during his life for the support and maintenance of himself and his (three) children, with remainder to the heirs of his body or to such of his children as he may devise the same to," there is no trust in favour of the children so as to give them a beneficial interest apart from and independent of their father, but the children, being in needy circumstances, will be entitled as against the father's execution creditor who has been appointed receiver of his interest to have a share of the income set apart for their maintenance and support, and in arriving at the share it is reasonable to divide the income into aliquot parts, thus giving one-fourth to the receiver. *Allen* v. *Furness*, 20 A. R. 34.

A testator devised land to one in trust, first, to permit his nephew and his wife and children to use it for a home, and, second, to convey it to such child of the nephew as the latter should nominate in his will. The nephew and his family were living upon the land at the time of the making of the will and at the death of the testator, when there were two dwelling houses thereon. Afterwards the trustee and the nephew's father-in law, at their expense, improved and altered the property so that the number of houses was increased to seven. The nephew lived with his family in one and received the rents of the others. In an action by judgment creditors of the nephew and his wife, seeking the appointment of a receiver to receive the rents in satisfaction of the judgment:—Held, that the judgment debtors took no estate in the land under the will, and nothing more than the right to call upon the trustee to permit them to use the land for "a home," which expression, however, meant more than simply a house to live in; that they were entitled to the advantage of the increased value of the land; and that their right to the use of the land for a home could not be reached through

a receiver so as to make it available for the satisfaction of the plaintiffs' claim. *Allen* v. *Furness*, 20 A. R. 34, distinguished. *Cameron* v. *Adams*, 25 O. R. 229.

Trust for Joint Benefit — Corpus.—G. H. Z. in his will provided, with respect to a certain mortgage, "I give and bequeath out of the proceeds of said mortgage to each of my daughters" (naming them) "the sum of $200, to be paid to them respectively when the youngest reaches the age of twenty-one, and if any of them shall not have been married before that time the child or children being then unmarried shall not receive their shares until such times as she or they shall marry. Provided that my executors may pay such part or parts of said legacies to my married daughters before the youngest attains twenty-one if they can do so without interfering with the proper support of my wife and family. Provided if any of my daughters die without issue the legacy bequeathed to them shall be divided among their surviving sisters. The balance of the proceeds of said mortgage I give and bequeath to my said wife, to have and to hold the same for her use and benefit and for the use and benefit of the unmarried members of my family, during the natural life of my said wife, after which my will is, that the balance of the proceeds of said mortgage still remaining be equally divided among my daughters then surviving:"—Held, that the widow held in trust during her life for herself and her unmarried daughter, and that she was bound during her life to apply the proceeds of the mortgage for the proper support of herself and that daughter while unmarried, treating the principal and interest of the mortgage as a blended fund, and what remained was to be divided and that the widow had the right to draw bona fide from the proceeds of the mortgage even if it consumed the whole of the corpus. *Barclay* v. *Zavitz*, 8 O. R. 663.

Subrogation by Person Supporting Widow.—A testator left certain real estate, which he authorized his executors, with the assent of his widow, to sell, and apply the proceeds in her maintenance, and the balance to be distributed. H., an adopted son of the testator, supported the widow for several years, but no sale of the lands was effected during her life. In a suit to administer the estate of the testator:—Held, that H. was entitled as a first charge on the real estate (there being no personalty) to be paid the amount expended in the maintenance of the widow; or, in other words, that he was entitled to be subrogated to the rights of the widow, and thereby would have had the power of calling upon the executor to exercise the authority given him to sell the real estate for payment of his claim. *Re Howey, McCallum* v. *Pugsley*, 21 Chy. 485.

Trust for Daughter and her Children for Life.—Where a testator gave certain estates to trustees, in trust as to the income for the separate use of his daughter and her children for life, with directions to pay the same to her, and in trust as to the capital after her death, to divide the same equally amongst her children:—Held, that she was entitled during her life, for her separate use, to an equal share with each of her children; that the residue of the income was to be paid to her for their benefit; and that her own individual share was alone liable to her debts. *Crawford* v. *Calcutt*, 13 Chy. 71.

Construction; Precatory Trust.—The doctrine of precatory trusts as defined and limited by modern authority, considered and stated. *Atkinson, In re, Atkinson* v. *Atkinson*, 80 L. J. Ch. 370; 103 L. T. 860—C. A.

Widow's Support.—Under a will directing that testator's estate should be charged with the support of his wife during her life or widowhood, and devising it to his sons in fee, "subject to the devise hereinbefore contained in favour of my dear wife:"—Held, that the widow took no legal estate. *Gilchrist* v. *Ramsay*, 27 U. C. R. 500.

Widow and Children.—A testator willed as follows: "I give, devise, and bequeath to my executor and executrix" (of whom one was the plaintiff, the testator's widow), "all my real and personal property of every kind whatsoever, for the benefit of my children, share and share alike,

and to my wife while she continues my widow, and I give to my said executor and executrix power to sell any part or the whole of my real property for the support and maintenance of my children and my wife while she remains my widow:"—Held, in an action brought by the widow, that under the above will, she and the children took the real and personal property jointly, she during widowhood, and they share and share alike absolutely; that she did not take an immediate estate in the whole with reversion to her children. Held, also, that a reference might be directed similar to that in *Maberly* v. *Turton*, 14 Ves. 499, to ascertain whether it would have been reasonable and proper in the trustees to apply any or what part of the land, having regard to the situation and circumstances of the children, to their support and maintenance; and a declaration made that the sum which the Master should find to have been properly expended by the mother in past maintenance formed a charge upon the inheritance of the children respectively in the land, but as the directions of the will had not been observed, the inquiry must be at the expense of the mother. *Donald* v. *Donald*, 7 O. R. 669.

Mother and Children—Determination of Mother's Rights by Second Marriage.—The testator by his will devised the proceeds of certain real estate to his daughter-in-law, E. D., widow of his son, W. D., deceased, to her use and support of his son W. D.'s children during her natural life or so long as she remained his widow; and in the event of the death of his said daughter-in-law, then to his grandchildren so long as they remained minors. He then devised the land to his grandson P. D., in fee, but subject to the above devise. After the testator's death E. D. married again, and was still living:—Held, that the intent of the testator was, that in any event the minors were to have the support out of the land during minority, and therefore were so entitled during such minority, upon the determination of the mother's estate by marriage as well as by death. *Henry* v. *Gilleece*, 31 U. C. C. P. 243.

Right to Maintenance—Second Marriage of Widow—Discretion of Executors.—A testator directed that $40,000, part of his estate secured on mortgages, should, when his youngest son attained 21, be divided between his wife and his three children; and that his executors should manage his estate till his youngest son should attain 21, and out of the interest and out of the proceeds of his real estate, maintain his wife and children. The testator died in 1904, and in 1908, when the eldest child was only 16, the widow married again, but continued to reside in the same house as before, it being her property:—Held, that the widow did not, by reason of her second marriage, forfeit her right to maintenance down to the time when she would become entitled to a share of the principal secured by the mortgages. *Cook* v. *Noble* (1886), 12 O. R. 81, distinguished. *Carr* v. *Living* (1860), 28 Beav. 644, and *Bowden* v. *Laing* (1844), 14 Sim. 113, doubted. The law now seems to be that an annual sum or a provision for maintenance and education is not to be limited to unmarried children. The executors should determine what sum would be required out of the income to be applied for the maintenance of the mother and children, having regard to the competence of the second husband, but not laying overmuch stress on that, the income being ample, and the children not to be stinted, because all formed one household. *Re Miller* (1909), 14 O. W. R. 221, 19 O. L. R. 381.

Maintenance Clause—Limit.—Where a testator by his will gave his estate, consisting of a farm and dwelling-house and personal property, to his son upon condition that he would maintain the testator's widow and daughters, excepting in the event of their marrying or leaving home, and declared that they should have a home in the dwelling while unmarried, it was held that the estate was charged with their maintenance. *Cool* v. *Cool*, 25 C. L. T. 6, 3 N. B. Eq. 11.

Allowance to Guardian of Infants.—Additional to infants' allowances for maintenance — Income of estate — Direction for accumulation of part — Annuities out of surplus income — Costs — Action brought where summary application sufficient. *Hardy* v. *Sheriff*, 10 O. W. R. 1045.

Contingent Legacies — Infants — Interest as Maintenance.—The testator bequeathed to his two infant sons $4,000 each, contingent upon their attaining 25 years of age; the only other provision for them was a gift to each of one-tenth of the residuary estate:—Held, that interest as a means of maintenance is payable out of the general residence of an estate, upon a legacy which is merely contingent, when the legatee is an infant child of the testator, and no other maintenance is provided; and it was proper in this case that an allowance should be made for the maintenance of the infants until their majority out of the interest on sums set apart to answer the legacies; the gift of a share in the realdue was not intended as a provision for maintenance. The will was to be read as directing the executors to apply the income of each legacy for the benefit of the infant during minority, to the extent required for maintenance, and this involved the reserving and investing of an amount equal to the amount of each legacy, not as the legacy, but to secure the amount of it in case it should become payable. *In re McIntyre, McIntyre* v. *London and Western Trusts Co.*, 24 C. L. T. 268, 7 O. L. R. 548, 3 O. W. R. 258.

Interest as Maintenance.—Testator by his will dated 13th October, 1896, gave certain portions of his estate to each of his 7 children, naming them, who were all then living. Four of his children predeceased the testator, leaving personal representatives who are still living. In 1908 testator made a codicil to his will. He died in 1909. The residuary clause of his will directed the residue of his estate to be divided amongst all of his children, share and share alike. The question arose as to whether the realdue should be divided into seven shares, one to go to each of the three surviving children and one to the representatives of each of the four deceased children, or should it be divided amongst the three surviving children only:—Held, that the testator intended that the residue should be divided into seven shares. As to interest payable by one of the children in respect of lands devised to him it was held that the interest was to be paid annually upon the whole amount from time to time remaining unpaid:—Held, also, that the executors, while the residuary estate remained in their hands, could exercise their discretion as to payment of interest on another child's share. If, in their opinion, she needed the interest for her maintenance they could pay it to her, and if they paid the money to the children of said child (as permitted by the will) they would not be liable after such payment. *Wisden* v. *Wisden*, 2 Sm. & G. 396, followed; *Re Williams*, 5 O. L. R. 345, and *Re Clark*, 8 O. L. R. 599, distinguished. *Re Bauman* (1910), 15 O. W. R. 423, 1 O. W. N. 493.

Fund for Maintenance and Education.—B. G. F., the testator, died October 1st, 1895, leaving him surviving a widow and one child, a son, the present plaintiff. The will contains the following provision: "And I hereby will and bequeath all my estate, real and personal (of which I may die possessed) to my said executors and trustees for the following purposes—that they shall, in the first place, convert all property into cash within one year from the date of my death, and after the payment of my just debts shall invest the remainder in safe interest paying investments, and out of such investments I direct that one thousand pounds (£1,000) or the equivalent thereof be set apart and used by my executors and trustees for the purpose of educating and giving a profession to my son, Gordon Winslow Taylor, providing he has not already been educated and received a profession." The will also provides that the plaintiff is not to receive his share of the residue of the estate until he reaches the age of twenty-five years. G. W. T. became twenty-one years of age September 2nd, 1909:—Held, that as the plaintiff has reached the age of twenty-one years he is now entitled to have paid over to him the £1,000 fund with accumulations and interest, or to have transferred to him the securities in which this fund is invested. Trustees who refuse to pay over a legacy when they have no reasonable doubt but that it should be paid, will not be allowed any costs in an action to compel its payment. Quære, in such a case are not trustees personally liable for the costs of the proceedings? *Taylor* v. *McLeod* (1909), 4 N. B. Eq. 262, 7 E. L. R. 450.

Products and Services Charged on Land—Refusal to Accept —Compensation.—A testator by his will devised his farm to his grandson

charged with the supply of certain products and personal services in favour of a daughter and granddaughter. On a disagreement between the parties, a tender of the products and services was made and refused, and an action was brought to have them declared a charge on the land and for a money compensation:—Held, that the refusal of the products did not deprive the plaintiffs of the right to recover their value, but that they were not entitled to compensation for the personal services proffered and refused. *Murray* v. *Black*, 21 O. R. 372.

Residence with Named Persons.—A testator devised certain lands to his two sons, declaring that the legacies thereinafter mentioned should be a charge thereon. He then bequeathed certain pecuniary legacies to his daughters, adding, "I give and devise also unto "(his said daughters) "their support and maintenance so long as they or either of them, remain at home with" (his two sons), and he gave his personal property to his two sons in equal shares:—Held, that the support and maintenance of the plaintiffs was, by the will, made a charge upon the lands; and they might for sufficient reasons cease to live at home, and yet still be entitled to such support and maintenance. *Swainson* v. *Bentley*, 4 O. R. 572.

Resort to Corpus.—Where a testator bequeathed part of his residuary estate to two infant legatees, directing the interest to be applied to their support and education until twenty-one years of age, or such previous time as the trustees might see fit to pay over the same to the legatees; and that in case of death of either, the whole should be paid to the survivor: the will containing no gift over in case of the death of both:—Held, that the trustees and executors had a discretion to apply part of the principal to the support and education of the legatees. *In re McDougall*, 14 Chy. 609.

Right to "a Home."—A testator bequeathed to his daughter "a home as long as she may remain single" in his dwelling house:—Held, that though in the case of an infant "home" would probably include maintenance, yet that the legatee in this case being of age, and there being no express words giving her maintenance after majority, she was not entitled to maintenance under the above bequest. *Augustine* v. *Schrier*, 18 O. R. 192.

Right to Remain and Live on "Place" while Unmarried.—A testator by his will devised as follows: "I will, devise, and bequeath to my wife S. J. all my real and personal property during her natural life, and that my daughter S. J. shall remain and live on said place as long as she remains unmarried." The only real estate or "place" the testator owned was his farm, on which his widow remained with the daughter until the former's death:—Held, that the daughter had the right, after the mother's death, to live on the property so long as she remained unmarried, and that she had an estate in and was entitled to the use of it, as she might choose to use it for that period. *Judge* v. *Splann*, 22 O. R. 409.

Mortgage to Pay Debts.—The testatrix after a direction to him to pay her debts devised land to her executor and trustee, and his executors and administrators, upon trust to retain it for his own use for life, and directed that, after his decease, his executors or administrators should sell the land and divide the proceeds among her children:—Held, that this was a devise of the land out and out as to the legal estate—the words "and his executors and administrators" being equivalent to "heirs and assigns;" the executor had the right by virtue of s. 16 of the Trustee Act, R. S. O. 1897 c. 129, to mortgage the entire fee for debts; and the mortgagee in such a mortgage, made within eighteen months of the death, was exonerated from all inquiry by s. 19. *In re Bailey*, 12 Ch. D. 268, and *In re Tanqueray-Williams and Landau*, 20 Ch. D. at p. 476, followed. The Devolution of Estates Act, R. S. O. 1897 c. 127, does not apply to a case where the executor derives his title to the land from, and acts under the will and the provisions of the Trustee Act. *Mercer* v. *Neff*, 29 O. R. 680.

Mortgage to Pay Legacies.—A testator bequeathed to each of his children $100 on attaining majority, and the residue of his property to his widow for life, to be divided amongst his children according to her judg-

ment; or at any time to give such a portion to each or either as she thought proper. Letters of administration were granted to the widow, and she, for the purpose of raising money wherewith to pay legacies, created a mortgage on the real estate, the equity of redemption in which was subsequently sold under execution at sheriff's sale, and the purchaser obtained by conveyance from the appointee of the widow the fee simple in the land:—Held, that the will operated as a devise of some estate to the widow, and made her a trustee of the realty, which she took charged with the legacies; and that under the terms of the will and the provisions of the Property and Trusts Act, 29 Vict. c. 28, s. 12, the widow had power to create the mortgage, and that the purchaser at sheriff's sale took subject thereto, and was bound to redeem or be foreclosed. *Lundy* v. *Martin*, 21 Chy. 452.

Naked Power of Sale.—A testator desired that his executors should sell and dispose of his land, and then appointed them to execute any deeds that might be necessary to the purchaser:—Held, that the executors took no interest but a mere power, and consequently that they could not distrain for rent accruing in their own time, before the land was sold. *Nicholl* v. *Cotter*, 5 U. C. R. 564.

Where the testator directs his executors, as soon as convenient, to make sale to the best advantage of his estate, first for the payment of his debts, and then to divide the surplus proceeds among his children, the executor takes no estate, but merely a naked power to sell, the fee in the meantime descending to the children. *Gregory* v. *Conolly*, 7 U. C. R. 500.

In 1848 J. H., by her will, devised as follows:—"The charges of my declining days and my funeral first to be paid, after which I give and bequeath all my real estate, known as, &c., to be sold to the best advantage, and which is to be divided in manner and form as follows." Certain legacies were granted to children and grandchildren, and the remainder of the estate was directed to be equally divided between two daughters of the testatrix. The will concluded thus—"for the execution of this my last will and testament, and I hereby nominate and appoint A. B., S. H., and W. H., joint executors, hereby giving them full power to settle all business by me kept unsettled, hereby revoking all other and former wills by me at any time heretofore made:"—Held, that the executors took a power, not a legal estate. *Hopkins* v. *Brown*, 10 U. C. R. 125.

A. C., by his will, dated in 1803, directed that his debts should be paid by his executors out of his real and personal estate, and that as soon as necessary or convenient such of his executors as should prove should sell his real estate and invest one-half of the proceeds or amount of sale thereof, and apply the product interest for the support of his wife during her life. This one-half of the amount of sale he devised to her for life for that purpose, and after her death he bequeathed it equally among his four children. The "remaining half of the proceeds or amount" of his real and personal estates he devised to the said children, share and share alike. The widow and two sons were named as executors, but the widow alone proved in 1810. The land in question was never sold by her under the power in the will, and in 1817 she died, leaving all her real and personal estate by will to the two surviving children, J. C. and E. C.:—Held, that the widow took a power to sell only, not a fee in the land; that the legal estate passed by the devise to the legatees and devisees of the testator, and did not descend upon the heir. *Casselman* v. *Hersey*, 32 U. C. R. 333.

A will, after giving several pecuniary legacies, contained this direction: "When my lands are sold and all the legacies paid, the money remaining is to be divided" in the manner therein stated. There was no other residuary clause. The testator named two executors, adding: "In them I repose full confidence that they will act fair and consistent":—Held, that all the lands were to be sold; and that the executors had power to sell them, although they had not the legal estate. *Woodside* v. *Logan*, 15 Chy. 145.

Direction to Sell Lands—Residuary Gift.—Where there was no special devise of the testator's real estate, but only a direction to the executors to sell and pay legacies, it was held that the land and rents arising therefrom belonged to the widow, under the general residuary gift to her, and that the executor had no power to lease. *McMyler* v. *Lynch*, 24 O. R. 632.

Specific Devise for Life.—General residuary clause. Testator, after leaving his homestead to his wife for life, devised to his executors "the residue of my real estate of which I shall die seised or possessed," in trust to sell such portion as should be sufficient to pay his debts, giving them power, in order to effectuate his intention, "to dispose of said real estate in fee simple, or for a term of years, for the purpose aforesaid." And he directed that his executors after payment of the debts, should hold said real estate in trust to convey such portion thereof as might remain to his nephews in fee. It did not appear whether testator had any other land besides the homestead or not:—Held, that the reversion in the homestead passed to the executors, under the residuary devise. *Swart* v. *Gregory*, 15 U. C. R. 335.

Specifically Described Lands.—Although a will speaks from the death of the testator, and so would carry after acquired lands, yet where a testator devised all the remainder of his real estate to his wife, and then proceeded to enumerate the lands comprised in such remainder:—Held, that after acquired lands did not pass as part of the residne. *Crombie* v. *Cooper*, 22 Chy. 267, 24 Chy. 470.

The testator left two unsigned and undated scraps of paper, on one of which he had written, "I leave the whole of my personal property (on one line) to William Brown, Townhead, Arbuthnot, by Fordoun, Scotland, $2,000:" and on the second scrap of paper he had written, "I give Peter Cran $500 for himself." which were admitted to probate as the last will of the deceased:—Held, that there was an intestacy as to the residue of the personalty over and above the $2,500 mentioned. *McLennan v. Wishart, In re Nelson*, 14 Chy. 512.

By one clause of his will a testator devised and bequeathed all his real and personal estate, etc.; by another clause he provided that a sister should have certain lands owned by him, which devise lapsed; and the last clause was as follows: "All the rest and residue of my estate, consisting of money, promissory note or notes, vehicles and implements, I give and bequeath to my brother:"—Held, that the will might be construed to prevent an intestacy as to the lapsed devise, and that the lands given to the sister passed to the brother under the residuary clause. *Re Farrell*, 12 O. L. R. 580.

A testator who was the owner of the south-west quarter of lot twelve in the fourth concession and of lot twelve in the fifth concession of a township and of no other real estate, after providing for payment of his debts and funeral expenses by his executors, declared that "the residue of my estate which shall not be required for such purposes I give, devise and bequeath as follows," and then devised "the south-westerly quarter of lot eleven, concession four" and lot twelve in the fifth concession:—Held, that the word "eleven" might be rejected as *falsa demonstratio* and the devise read as if it were "the residue of my real estate in the fourth concession." *Doyle* v. *Nagle*, 24 A. R. 162.

Bequests to the Archbishop and Bishop named in the will being essentially different from their names in their corporate capacity, were intended for them individually, subject to the trust declared, the purpose of which was a charitable use, and that the money being derived from the sale of land, the legacies failed and the amount went to augment the residuary gift of the particular fund out of which it was directed to be paid, and not the general residue of the estate.

As the land was directed to be sold within three years from the testor's death, the legacies bore interest from the date when the lands should have been sold. *McMylor* v. *Lynch*, 24 O. R. 632.

Where the residue of an estate is directed to be divided *pro rata* among prior legatees they take such residue in proportion to the amount of their prior legacies. *Kennedy* v. *Protestant Orphans' Home*, 23 O. R. 235.

Will stated "and should there be a residue or surplus after paying out the foregoing bequests I will that the same be equally divided between my sisters and S. J. B. or the survivors of them at the time of winding up the affairs:—Held, that the time for the division of the residue was, when sufficient funds were invested to produce the legacies and fulfil the directions of the will, and that it was not postponed until the legacies were paid over to any subsequent time. *Macklin* v. *Daniel*, 18 O. R. 434.

The last clause of the will was:—"Should there be any surplus or deficiency, a *pro rata* addition or deduction, as may be, to be made to the following bequests, namely, the Worn-out Preachers' and Widows' fund; Wesleyan Missionary Society; Bible Society." When the estate came to be wound up, it was found that there was a very large surplus of personal estate, after paying all annuities and bequests. This surplus was claimed, on one hand, under the will, by these charitable institutions, and on the other hand by the heirs-at-law and next of kin of the testator, as being residuary estate, undisposed of under his will. Held, that the "surplus" had reference to the testator's personal estate out of which the annuities and legacies were payable; and therefore a pro rata addition should be made to the three above-named bequests, Statutes of Mortmain not being in force in New Brunswick. *Ray* v. *Annual Conference of New Brunswick*, 6 S. C. R. 308.

Implied Gift of Residue.—The testator, after devising a parcel of land to each of his three sons, directed his executors to collect the debts due to him, and thereout to pay his debts, funeral and testamntary expenses and legacies; and he charged the deficiency on two of the parcels which he had devised. By a subsequent part of his will, he gave his household furniture, and other personal chattels, to his wife, for her own use, except the piano, which he gave to one of his daughters; there was no other residuary clause in the will:—Held, that the whole of testator's residuary estate, except the debts due to him and the piano, went to his wife, exonerated from testator's debts. *Scott* v. *Scott*, 18 Chy. 66.

CHAPTER XXV.

SPECIFIC GENERAL AND RESIDUARY DEVISES.

What is a Specific Devise.

"Devise" is the technical term for a gift of real estate by will, and a specific devise is a gift by will of a particular part of the testator's real estate. Some of the rules for distinguishing specific bequests from general or residuary bequests (as to which see Chaps. XXIX. and XXX.), seem to apply to devises, so far as the physical differences between land and chattels will allow. In most cases no difficulty arises. A devise of "my house at X." or "my farm at X.," or a devise to A. "of such one of my houses at X. as he shall select," is clearly specific. So is a devise of "all my lands in the parish of A." But a devise of "all my freehold lands," or of "the residue of my freehold lands," is general or residuary, as the case may be.

6th ed., p. 938. *Springett* v. *Jennings*, L. R. 6 Ch. 333; *Mason* v. *Ogden* (1903), A. C. 1.

Devise of all Land in Particular Locality.

Although a devise of all the testator's land or real estate in a particular locality (such as "the county of A.") is specific, yet, being expressed in general terms, it resembles in some respects a general or residuary devise, for prima facie it will pass all the land or real estate in that locality which the testator acquires after the date of the will.

6th ed., p. 939.

Difference Between Specific and Residuary Devises.

It is often said that a general or residuary devise is specific, but this is a loose and inaccurate way of stating the law. Since the Wills Act, the essential characteristic of a residuary devise is that it includes all real estate not otherwise effectually disposed of by the will, unless a contrary intention appears; consequently lands acquired subsequently to the date of the will, or comprised in a devise which is revoked or fails or is void, will prima facie pass under a residuary devise. When it is said that a residuary devise is specific, all that is meant is that, for the purpose of the payment of the debts of a testator, his specific and residuary devisees rank pari passu.

6th ed., p. 939. *Lancefield* v. *Iggulden*, L. R. 10 Ch. 136.

Description.

The question what property will pass by a particular description, is discussed in Chap. XXXV., and the effect of changes in

the property between the date of the will and the testator's death in Chap. XII.

WHETHER LEASEHOLDS PASS AS "LAND," &c.

The question whether leaseholds will pass by a specific devise of "land," or "freehold land," or "real estate," either by a specific or general description, is discussed in connection with the operation of a residuary devise.

6th ed., p. 939.

WHAT PASSES BY A SPECIFIC DEVISE.
CHARGE ON LAND.

As a general rule, a devise of a specific property gives the devisee all the testator's interest in it. Accordingly, where the owner of land in fee simple becomes entitled to a charge on it, a devise of the land will pass the charge, unless there are circumstances showing that it was the intention, or to the interest, of the testator, to keep the charge alive.

6th ed., p. 939. *Mathews* v. *Mathews*, L. R. 4 Eq. 278.

BENEFIT OF CONTRACT OF SALE OF PURCHASE.

It is on this principle that where a testator who has entered into a contract by which he gives a person an option of purchasing his (the testator's) land, makes a will specifically devising the land, and the option is exercised after the testator's death, the devisee is entitled to the purchase price. But if a testator enters into a contract to purchase land, and specifically devises it, the devisee is only entitled to the property from the completion of the purchase.

6th ed., p. 939. *Puxley* v. *Puxley*, 1 N. R. 509.

BENEFIT OF CONTRACT FOR ERECTION OF BUILDINGS.

If a testator enters into a contract for the erection of buildings on land belonging to him, and devises the land to A., and dies before the buildings are completed, A. is entitled to have them completed at the cost of the testator's personal estate. But of course this principle does not apply if the contract is for the erection of buildings on land not belonging to the testator.

6th ed., p. 940. *Re Day* (1898), 2 Ch. 510.

BURDENS.

Conversely, a specific devisee takes the property subject to its burdens, even if they have been created by the testator himself, unless the testator's personal estate is primarily liable for them.

6th ed., p. 940.

FIXTURES.

A devise of a house by an owner in fee of course includes the fixtures, of whatever nature they may be, unless expressly

or impliedly excluded, for the rules which govern the rights in respect of fixtures as between landlord and tenant, or tenant for life and remainderman, or heir and executor, do not apply where the same person is absolutely entitled to both freehold and fixtures: the only question is whether the particular chattels are annexed to the freehold.

6th ed., p. 940.

DECORATIVE CHATTELS.

And where the owner of a house devises it, the devisee may be entitled not only to the fixtures strictly so called, but also to tapestry, pictures, and similar articles fitted to the house, as part of a general scheme of decoration, although not affixed to the freehold.

6th ed., p. 940. *Re Whaley* (1908), 1 Ch. 615.

RENTS AND PROFITS WHERE DEVISE IS IMMEDIATE.

An immediate devise of land in fee, whether specific or residuary, to a person in esse, carries the rents and profits from the death of the testator. If the devisee's interest is liable to be divested on the happening of a contingency (as on his death under twenty-one), he is entitled to the rents and profits until the contingency happens. The Apportionment Act, 1870, applies to rents, and consequently, in every case within the act, the first rents received after the testator's death must be apportioned in respect of time; that portion which accrued before the death forms part of the testator's general personal estate. The testator may of course, by apt words, give the devisee any rents accrued but not paid.

6th ed., p. 941. *Andrew* v. *Andrew*, 1 Ch. D. 410. As to rents payable in advance, see *Ellis* v. *Rowbotham* (1900), 1 Q. B. 740.

WHERE DEVISE IS FUTURE.
DEVISEE EN VENTRE.

The rule is different if the devise is to an unborn person, or to a person who may be in esse at a future time, or on the happening of a contingency; for, "where a specific devise is to take effect in futuro, so that, at the death of the testator, there is no person actually entitled to the immediate income, the rents and profits will, until the devise vests in possession, pass under the residuary clause, if any, and, should the will contain no such clause, will descend to the testator's heir-at-law: and it is immaterial whether the future devise in question be vested or contingent," or whether the devise be to the devisee directly or to trustees. The result is that if land is devised to the eldest son of A., and A.'s eldest son is en ventre at the testator's death,

the rents accruing before his birth go to the residuary devisee or the testator's heir.

6th ed., p. 941. *Duffield* v. *Duffield*, 3 Bl. N. S. 260; *Re Mowlem*, L. R. 18 Eq. 9.

It is also immaterial that the real estate is given to trustees upon trust for a class of persons contingently on their attaining twenty-one, or the like. In such a case the first child who attains twenty-one is entitled to all the rents until another child attains twenty-one, and so on.

6th ed., p. 942. *Re Averill* (1898), 1 Ch. 523.

But of course if the testator directs that the intermediate rents be applied in the maintenance of the contingent devisee, this prevents them from falling into residue or passing to the heir, unless the devisee is unborn at the death of the testator, in which case the heir or residuary devisee takes them until the birth of the devisee.

6th ed., p. 942. *Bullock* v. *Stones*, 2 Ves. Sen. 521.

DEVISE TO FLUCTUATING CLASS.

The rule applicable to cases where land is given to a class which is capable of increase, so that it fluctuates from time to time, is considered elsewhere.

See Chapter XLII.

AFTER-ACQUIRED PROPERTY MAY PASS BY A SPECIFIC DEVISE.

As a general rule, when a testator makes a specific devise, he has in his mind a particular property, and does not contemplate the possibility of his making additions to it after the date of the will. But if the words used by him are sufficient, the after-acquired property will pass: as where a testator devises "my cottage and all my land at S.," and afterwards buys an adjoining field and throws it into the land belonging to the cottage, it will pass under the devise, unless the circumstances are such as to negative this construction. It is a question which depends : the facts and the terms of the will in each case.

6th ed., p. 942. *Castle* v. *Fox*, L. R. 11 Eq. 542.

DEVISE OF SHARE IN PARTNERSHIP LAND.

Where a partner in a business, the assets of which include land, by his will specifically devises his share in that land, then if the other assets of the partnership are sufficient to pay the partnership debts, the devisee takes the testator's share in the land free from liability to contribute to the partnership debts. But if the debts exceed the other assets, the devisee is not entitled to have the excess paid out of the testator's general estate.

Farquhar v. *Hadden*, L. R. 7 Ch. 1.

PERPETUITIES, UNCERTAINTY, &c.

A specific devise may fail because it transgresses some rule of law, such as the rule in Whitby v. Mitchell, or the rule against perpetuities, or because it is uncertain.

See Chapter XIV.

MISTAKE.

As a general rule, an absolute devise takes effect although it is induced by a mistake on the part of the testator. But where the language of the will is ambiguous, a devise which is apparently made under a mistaken belief that a certain state of facts exists, will, if possible, be construed as intended to be conditional on that state of facts existing.

6th ed., p. 943. *Hounsell* v. *Dunning* (1902), 1 Ch. 512.

LAPSE.

A devise may fail by lapse.

Chapter XIII.

ADEMPTION BY SALE OR ALIENATION.
BY CONTRACT OR OPTION.

A specific devise necessarily fails if at the death of the testator the devised property does not belong to him, and therefore if he devises Blackacre and afterwards sells or aliens it, the devise fails. In the case of legacies, this result is called ademption; in the case of land it is sometimes called revocation by alteration of estate, apparently because in former times the doctrine was treated as a branch of the general principle that any alteration in the estate of the testator operated as a revocation of the devise, although the land was the property of the testator at the time of his death. The subject has accordingly been discussed in connection with revocation. The effect of a contract of sale or option of purchase has also been considered.

6th ed., p. 944. Chapter XXII.

EFFECT OF SEC. 24 OF WILLS ACT.

The case has been suggested of a testator devising specific realty, and afterwards selling it and purchasing other realty answering the same description: the question whether in such a case the after-acquired realty passes by the devise has been already considered.

Ante page 193.

INVOLUNTARY CONVERSION.

As a general rule, where conversion is caused by some act beyond the testator's control, the effect is the same as if it had been voluntarily caused by him; thus if a testator devises real property, and it is afterwards converted into money by act of parliament, during the testator's lifetime, the devisee has no

claim to the money. So it is clear that if a testator devised a house which he had insured against fire, and it were burnt down immediately before his death, the devisee could not claim the insurance moneys. Sales by the court, and purchases by companies under compulsory powers, are subject to special rules.

6th ed., p. 944. *Frewen v. Frewen*, L. R. 10 Ch. 610.

EXPRESS OR IMPLIED.

Limited interests in land may be created not only by express devise, but also by implication or inference.

6th ed., p. 945. See page 315.

DEVISES TO TRUSTEES FOR LIMITED PURPOSES.

The question what estate is taken by trustees where land is devised to them without words of limitation, for purposes which do not exhaust the fee, is considered elsewhere.

See Chapter XLVI.

DEVISE DURING MINORITY.

Where land is devised during the minority of a person, and he dies before attaining majority, the question arises whether the devisee is entitled to hold the land until the minor would, if living, have attained majority, or whether his interest ceases. This question is discussed in another chapter.

See Chapter XXI.

CREATION OF NEW RIGHT BY DEVISE.

A devise may take effect by the creation de novo of an easement, rent-charge, condition, or the like.

6th ed., p. 945. Chapter XXXIX.

EXTENT OF GENERAL DEVISE UNDER WILLS ACT.

The Act of 1 Vict. c. 26, s. 25, expressly provides, that, unless a contrary intention shall appear by the will, real estate, or the interest in real estate, comprised in any void or lapsed devise, shall be included in the residuary devise, if any; and as such act (sec. 3) extends generally the devising power of a testator to all the real estates to which he shall be entitled at his decease; and, moreover (sec. 24), makes the will, with reference to the real and personal estate comprised in it, speak from that period, the result of the whole is, that any testator who dies leaving a will made or republished since 1837, containing a general or residuary devise of real estate, which takes effect, must be completely testate in regard to every portion of his real estate to which he is entitled at his decease, whensoever acquired, and whether originally intended to have been otherwise specifically disposed of or not, if such intention should, for any reason whatever, fail of effect.

1st ed., p. 593, 6th ed., p. 948.

Suppose that a testator devises Blackacre to A., and his residuary estate to B., and that A. disclaims the devise: is Blackacre included in the residuary devise? The devise to A. is not, in itself, "incapable of taking effect": it fails by reason of the disclaimer. The obvious intention of the act was to give to residuary devises the same effect as residuary bequests have always had, and there seems no doubt that a residuary bequest includes disclaimed bequests. Moreover, the effect of disclaimer relates back to the death of the testator, so that the devise is, in the event, incapable of taking effect.

6th ed., p. 940.

ERRONEOUS RECITAL.

If a testator who is really the owner of Blackacre, erroneously recites in his will that it belongs to A. and makes a general devise of all his real estate to B., Blackacre passes by the devise to B.

6th ed., p. 940. *Re Bagot* (1893), 3 Ch. 348.

WHAT IS A RESIDUARY DEVISE.

A devise may of course be residuary, although it does not contain the word "residue," "remainder," or any similar word.

6th ed., p. 940. *Re Bawden* (1901), 1 Ch. 603.

And if a testator includes in one devise certain lands by their specific description and all the residue of his real estate, the specifically described lands form part of the residuary devise.

6th ed., p. 940. *Bray* v. *Stevens*, 12 Ch. D. 162.

LIMITED GENERAL DEVISE.

A testator may except certain property from a general devise, either expressly, or by limiting the devise to real estate answering a certain description.

6th ed., p. 940. *Simmons* v. *Rudall*, 1 Sim. N. S. 115.

EXCEPTED PROPERTY UNDISPOSED OF.

In such a case, and also where the testator expressly excepts certain property from a general devise, and makes no disposition of it, the property passes as on an intestacy. But if after excepting it he gives it to A., and the gift fails by lapse or otherwise, it will, as a general rule, be presumed that the object of the testator in making the exception was simply to give the property to A., and there is therefore no reason why upon the failure of the gift, it should not be held to be included in the general devise. It follows that if a testator devises all his real estate, except Blackacre, to A., and devises Blackacre to B., and B. dies in the testator's lifetime, then Blackacre passes under the general devise to A.; if, however, after B.'s death the testator makes a codicil referring to the fact, but not altering the devise of Blackacre, the presump-

tion above referred to does not arise, and there is an intestacy as to Blackacre.

6th ed., p. 950. *Blight* v. *Hartnoll*, 23 Ch. D. 218.

A declaration by a testator in his will, however emphatic, that a particular piece of land does not belong to him, will not prevent it from passing by a residuary devise.

6th ed., p. 951. *Re Maber*, 12 T. L. R. 267.

WHETHER EXCEPTION IS WITHIN SEC. 24 OF WILLS ACT. WHAT WILL NOT LIMIT A RESIDUARY DEVISE.

The question whether sec. 24 of the Wills Act applies to an exception from a general devise, has been already considered.

6th ed., p. 951. See page 196.

A gift of "all other land," or "all land not hereinbefore devised," is a mere gift of residue, and shows no intention, within the act, to exclude lapsed specific gifts. And this is so, even although the residuary devise gives an estate for life to the same person as is named specific devisee in fee.

5th ed., p. 612, 6th ed., p. 951. *Cogswell* v. *Armstrong*, 2 K. & J. 227; *Green* v. *Dunn*, 20 Beav. 6.

If a will contains a residuary devise to A., and the testator at the end of his will appoints B. his residuary devisee, it seems that the residuary devise to A. is not revoked.

6th ed., p. 951. *Johns* v. *Wilson* (1900), 1 Ir. R. 342.

LIMITED DEVISE MAY BE RESIDUARY.

In order that a devise should be a residuary devise within sec. 25, so as to include lapsed specific gifts, it is not necessary that it should be a devise of the residue of all the testator's real estate.

6th ed., p. 951.

PARTICULAR RESIDUE.

But a devise of a particular residue is not a residuary devise within sec. 25.

6th ed., p. 951. *Springett* v. *Jennings*, L. R. 6 Ch. 333.

VOID APPOINTMENT WILL FALL INTO RESIDUARY DEVISE.

The word "devise" in sec. 25 of the Wills Act, as generally throughout the act, includes a gift by will, in exercise of a general power of appointment of real estate; and consequently, where a testator, in exercise of such a power, makes a testamentary appointment of realty which fails or is void, the gift will fall into the residuary devise (if any), unless a contrary intention appears by the will.

5th ed., p. 613, 6th ed., p. 952. *Freme* v. *Clement*, 18 Ch. D. 499. Not to extend to special powers. *Holyland* v. *Lewin*, 26 Ch. D. 272.

EFFECT OF RESIDUARY DEVISE FALLING AS TO ALIQUOT SHARE.

If a general residuary devise itself fails to take complete effect, the property will, to that extent, be undisposed of. As where a testator devised land to several in certain shares, as tenants in common, and devised the residue of his real estates to the same persons in the same proportion: some of the specific devisees died in the testator's lifetime, whereupon their shares fell into the residue; but so much of the same shares as came back to them (so to speak), under the residuary devise lapsed to the heir. So if a testator devises his residuary real estate to several persons as tenants in common, and afterwards revokes the devise as to one of them, there is an intestacy as to his share.

6th ed., p. 952. *Greated* v. *Greated*, 26 Bea. 621.

SHARE DIRECTED TO FALL INTO RESIDUE.

If a testator devises his residuary real estate to several persons as tenants in common, and by codicil revokes the devise as to one of them and directs that his share shall fall into residue, it is divisible between the other residuary devisees.

6th ed., p. 953.

IN REGARD TO RENTS AND PROFITS.

An immediate residuary devise carries the rents and profits from the testator's death; they are, if necessary, apportioned, and those accruing before the death form part of the testator's personal estate.

6th ed., p. 953.

FUTURE RESIDUARY DEVISE DOES NOT CARRY INTERIM INCOME.

If the residuary devise be contingent or future, i.e., deferred in point of enjoyment, the income accruing in the interval from the residuary real estate does not pass by such devise, but is undisposed of and goes to the heir, a residuary devise differing in this respect from a residuary bequest of personalty, which, it is well known, does (though contingent in its terms) carry the prior income. The distinction between real and personal estate has been said to flow from the very nature (under the old law) of a residuary devise; for being confined to what the testator had when he made his will, it was as specific as if the property were particularly described. It is said to be still more clearly deducible from the rule of law that the freehold cannot be in abeyance. And the profits necessarily go with the estate. These reasons, however, are purely technical, and no good reason can be given for the rule. Nevertheless, it is clearly established. "It is impossible to contend that, in the absence of any words clearly leading to what the Court considers judicially to imply a gift of the intermediate rents and profits, any such gift can be introduced into the testator's will.

Neither the persons waiting until the executory devise shall take effect, nor the person who shall first come into esse when the executory devise has taken effect, nor all the persons who may be interested under the series of devises following that executory devise, by way of accumulation, can establish their claim." And the rule is the same with regard to trusts.

5th ed., p. 614, 6th ed., p. 953. *Hodgson* v. *Beetive*, 1 H. & M. 376.

OTHERWISE IF REAL AND PERSONAL ESTATE ARE BLENDED.

But if the real and personal estates are blended in one gift, it is considered to denote an intention that both species of property shall be subject to the rule applicable to personalty.

6th ed., p. 954. *Genery* v. *Fitzgerald*, Jac. 468.

The general principles are these. When personal estate is given to A. at twenty-one, that will carry the intermediate interest. If a testator gives his estate Blackacre at a future period, that will not carry the intermediate rents and profits. But when he mixes up real and personal estate in the same clause, the question must be, whether he does not show an intention that the same rule shall operate on both.

5th ed., p. 615, 6th ed., p. 954. *Per Cur. Genery* v. *Fitzgerald*, *supra*.

WHAT CONSTITUTES A BLENDING.

What amounts to such a mixing up of real and personal property in one mass as to bring a specific case within the rule, has been much discussed.

6th ed., p. 954. *Re Dumble*, 23 Ch. D. 360.

WHERE REMAINDERMAN IS EXCLUDED.

But a testator may make such a disposition of his real and personal estate during the period preceding the future or contingent interest, as to exclude the presumption that he meant it to carry the intermediate income.

6th ed., p. 955. *Re Townsend's Estate*, 34 Ch. D. 357.

OPERATION OF A GENERAL DEVISE ON REVERSIONS.

It remains to be considered whether reversions will pass under a general devise of lands. In regard to this question, an undisposed-of interest which, on his decease, would become a reversion left in the testator after other dispositions of his own will, is obviously distinguishable from a reversion of which he is the owner at the time of his will, but they have been generally treated as belonging to the same class, and approximate sufficiently in principle to warrant at least their juxtaposition.

1st ed., p. 599, 6th ed., p. 955.

Reversions in fee, then, will pass under a general devise of lands or hereditaments, although the testator be seized of real

estate in possession to satisfy the words of the devise (a fact however, which, in regard to wills made since 1837, would be immaterial); and although he may have been ignorant when he made his will of his having such a disposable interest; or it may have been unlikely, from its remoteness or liability to be defeated by the act of another, ever to fall into possession, as in the case of a reversion expectant on an estate tail.

Ibid.

"LANDS NOT BEFORE DEVISED."

On a principle not very dissimilar, it has been held, that a devise of lands "not before devised," or "not before disposed of," carries the reversion in lands which the testator had previously devised for life.

Jarman, p. 956. *Taafe* v. *Ferrall*, 10 Ir. Ch. Rep. 183.

REVERSION NOT EXCLUDED BY EQUIVOCAL EXPRESSIONS.

The inclination of the Courts at the present day is not to exclude a reversion from the general devise upon slight or equivocal grounds.

Jarman, p. 957. *Doe d. Howell* v. *Thomas*, 1 M. & Gr. 335.

But of course, a testator may refer to a particular reversion in such a way as to show that he does not intend it to pass by a general devise.

6th ed., p. 957. *Strong* v. *Teatte*, 2 Burr. 912.

The general principle is now well established, namely, that in construing a general devise, the words of the will should be taken to comprehend every subject which falls within their proper meaning, unless that meaning is excluded by the context or by the circumstances of the case; and that mere conjecture will not do.

6th ed., p. 958. *Per Cur. Ford* v. *Ford*, 6 HR. 486.

GENERAL CONCLUSION FROM THE CASES.

A general devise will in all cases operate on a reversion or remainder belonging to the testator, notwithstanding the remoteness of such reversion or remainder, as being expectant on an estate tail or otherwise (whether such estate tail be vested in the testator or another), and notwithstanding the inapplicability of some of the limitations or purposes of the devise to the interest in question; and, that, too, whether the testator had at the time of the making of the will any other real estate to which such inapplicable limitations or purposes can be applied or not.

1st ed., p. 610, 6th ed., p. 959. *Church* v. *Mundy*, 15 Ves. 396.

LEASEHOLDS FOR YEARS WHEN THEY PASS UNDER A GENERAL DEVISE.

The next inquiry is, whether property in which the testator is possessed of a term of years only, will pass by a general devise.

1st ed., p. 616, 6th ed., p. 961.

1 Vict. c. 26, section 26, provides, that a devise of the land of the testator, or of the land of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise, which would describe a customary, copyhold or leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold and leasehold estates of the testator, or his customary, copyhold and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

1st ed., p. 627, 6th ed., p. 962. Section 29 of Ontario Act to same effect.

UNLESS A CONTRARY INTENTION APPEARS BY THE WILL.

The burden of proof is thus shifted to those who assert that leaseholds do not pass by a devise of "land": and the proof must appear on the will itself.

6th ed., p. 963. *Wilson* v. *Eden*, 16 Beav. 153.

STRICT SETTLEMENT OF FREEHOLDS AND LEASEHOLDS.

But leaseholds will clearly not pass by a devise of "lands," if a contrary intention appears from the whole scheme of the will; as in the ordinary case of "lands" being devised in strict settlement, and "personal estate" being bequeathed on corresponding trusts.

6th ed., p. 963. *Prescott* v. *Barber*, L. R. 9 Ch. 174.

DEVISE OF "REAL ESTATE AT A."

But if the devise were of "real estate at A.," there can be little doubt that leaseholds at A. would have passed under the old law if the testator had had no freeholds there; and notwithstanding that the words appear rather to point to specific property, it seems to have been assumed, since the act, that this is a "general devise" within the meaning of sec. 26.

6th ed., p. 964. *Moase* v. *White*, 3 Ch. D. 763.

SPECIFIC DEVISE OF "FREEHOLD" WHERE NO FREEHOLD.

And leaseholds will still, as before the act, pass even as "freehold," if the devise is clearly specific in form, and the testator has at the date of his will no freehold property to answer the description. Thus, where a man devised all his "freehold houses in Aldersgate street," to A. and his heirs, and he had some leasehold but no freehold houses there, the leaseholds passed; it being the plain intention of the will to pass some houses, and the word "freehold" should rather be rejected than the will rendered void. And as such a gift points to a specific property as then belonging

to the testator, the construction of it is not affected by sec. 24 of the Wills Act.

5th ed., p. 628, 6th ed., p. 964. *Nelson* v. *Hopkins*, 21 L. J. Ch. 410.

LEASEHOLDS FOR LIVES NOT WITHIN THE RULE IN ROSE V. BARTLETT.

Even under the old law, leases for lives, being freehold interests, clearly passed under a general devise of "lands and hereditaments," or "real estate," with freeholds of inheritance, unless an intention to exclude them could be collected from the context.

6th ed., p. 965. *Weigall* v. *Brome*, 6 Sim. 99.

POWERS OF APPOINTMENT.

This subject has been already discussed.

Chapter XXIII.

Void Bequest—Intestacy.—Certain charitable bequests having been held void, it was further held that those that were good were not increased, but that the amount of the void bequests was distributable as in case of intestacy. *Purcell* v. *Bergin*, 20 A. R. 535.

Void Devise—Residuary Devise.—A will contained a void devise of lands to charitable purposes, and then a residuary devise of testator's lands not thereinbefore mentioned or disposed of:—Held, that the property in the void devise passed to the heirs-at-law. *Lewis* v. *Patterson*, 13 Chy. 223.

Void Legacy Charged on Specific Property.—Where land is specifically devised charged with a void bequest, the charge sinks for the benefit of the specific devisee. Therefore, where a testator devised his real estate, consisting of " . . . to A. F., eldest son of . . . to exercise ownership over said lots during his natural life; he shall not sell or alienate any or either of them, but they shall remain an inheritance unincumbered to his legal heir, whether male or female, for all time to come. I bequeath to A. F., the aforementioned heir, the shop on the church property, with all its goods and contents. . . . With respect to lot . . . and lot . . . they appear very rich in precious stones; they are a mine, and worth a great deal; they must therefore be assessed to the said A. F., with lot . . . along with the shop and its contents. $4,000 to be paid to the English Church of Cornwall:"—Held, that the $4,000 was charged on the devise and bequest to A. F.; that so far as this was charged on land—freehold or leasehold—the bequest was void; so far as charged on personalty it was valid, and would be apportioned pro rata between the realty and personalty; and that A. F. was entitled to hold the several properties absolutely, subject only to such proportion of the legacy as was properly applicable to the personalty. *Fulton* v. *Fulton*, 24 Chy. 422.

Void Bequest—Augmentation of Particular Fund or Residuary Estate.—A testator by his will provided as follows:—"I do order and direct that my executor sell the real estate owned by me, such sale to be made inside of three years from the date of my decease, and out of the proceeds of the said sale to pay to the Archbishop of the Diocese of Toronto $500; to the Bishop of the Diocese of Hamilton $500 to be applied for the education of young men for the priesthood; and the balance to be invested by my executor in the proportion of $15 for my wife and $8 for my mother. At my mother's death, I order that her proportion . . . be divided . . ." between five nieces, and that "on my wife's death, her proportion . . . be divided" between nephews and nieces. All the residue of my estate not hereinbefore disposed of, I give, devise, and bequeath unto my wife:"—Held, that the bequests to the Archbishop and Bishop named in the will being essentially different from their names in their corporate capacity, were intended for them individually, subject to the trust declared, the purpose of which was a charitable use, and that the

money being derived from the sale of land, the legacies failed, and the amount went to augment the residuary gift of the particular fund out of which it was directed to be paid, and not the general residue of the estate. That as there was no special devise of the real estate, but only a direction to the executors to sell and pay legacies, the land and rents arising therefrom belonged to the widow, under the general residuary gift to her, and that the executor had no power to lease. That the widow was not bound to elect between her dower and the will. *McMylor* v. *Lynch*, 24 O. R. 632.

Void Legacy—Distribution.—A testator gave, subject to the payment of his debts, etc., to his widow a life estate in all his real and personal estate, and, subject to bequests to a university and a mission board, gave the proceeds of his real estate (with power of sale to the executors) to certain residuary legatees. The personal property being insufficient to pay the debts, etc., sufficient of the real estate to pay these debts, etc., and the specific legacies was sold. The bequest to the Missionary Society was admittedly void under the Mortmain Act:—Held, that the amount of it fell into the residue and should go to the residuary legatees, not to the next of kin. *In re Smith's Will* (Carlton, C.), 7 O. L. R. 619, 3 O. W. R. 380.

Payment of Legacies out of Proceeds of Sale.—All gifts of real estate including a residue are necessarily specific. But here the land is given to the executors to be sold and it is only out of the proceeds that certain legacies are to be paid, &c. These gifts are not specific. *Page* v. *Leapingwell*, 18 Ves. 463, distinguished. The cases do not require that debts to be paid out of the residue should be payable out of the whole of the testator's real estate. *Bailey* v. *Bailey*, 12 Ch. D. 268; *In re Tanqueray Williams and Landau*, 20 Ch. D. 476. *Re Page*, 1 O. W. R. 849.

Lot Specifically Devised Dealt with as Part of Residue—Compensation.—A testator devised to his son a certain named lot; the residue of his estate, after other specific devises, he directed to be divided between his two brothers and sister. After his death the property was so divided, but in the division by mistake the lot devised to the son was included, and allotted to one of the residuary devisees as part of his share, who devised the same to his sons, and who, on discovering the mistake, applied to those interested in the residuary estate to have the mistake rectified, when it appeared that some of the other residuary devisees had sold portions of the shares allotted to them by reason of which a re-division was impossible; and a bill was thereupon filed praying for compensation for the loss sustained by reason of the mistake. The Court ordered a valuation to be made of the residuary estate, at its present value, one-third of which, with interest from the date the first division was made, to be contributed rateably by the other residuary devisees, or their representatives, or, if desired by either of the parties, with an account of rents and profits received. *Stinson* v. *Moore*, 10 Chy. 94.

Unqualified Gift of Income carries to beneficiary right of immediate payment of principal.

Where the absolute right to money is bequeathed to a legatee it is not competent to testator to postpone his enjoyment of the legacy until some period after he attains the age of twenty-one years. *Re Johnson*, 39 Ch. D. 204; see *Re Nelson*, 12 O. W. R. 760.

CHAPTER XXVI.

DEVISES BY MORTGAGEES AND TRUSTEES.

DEVISES BY MORTGAGEES.

As mortgages are of a complex nature, involving on the one hand a personal debt, with all the claims and obligations incident to the relation of creditor and debtor, and on the other an interest in real estate for the purpose of securing the debt, absolute at law after forfeiture, but redeemable in equity, it follows that the testamentary disposition of a mortgagee presents two distinct subjects for consideration.

1st ed., p. 633, 6th ed., p. 966.

WHETHER BENEFICIAL INTEREST IN MORTGAGE WILL PASS UNDER DEVISE OF LANDS.

With respect to the beneficial interest in the mortgage, it is clear that a general devise of lands will not commonly have the effect of including it.

Ibid.

EFFECT OF DEVISE OF MORTGAGED LANDS ON BENEFICIAL INTEREST.

Nor is it universally true that an express devise of the lands, or (which seems to be the same in effect) a devise of all the testator's lands in a particular place, he having no other than mortgaged lands there, will carry the beneficisl interest to the devisee, though the affirmative has been sometimes laid down in very unqualified terms.

Ibid.

But cases might be suggested in which an express devise of lands, even by a mortgagee in possession, would not carry the beneficial interest; for instance, if the will contained a specific bequest of the mortgage debt, which would show that the devisee of the land was intended to be a trustee for the legatee. But it is clear that a general bequest of mortgages or securities for money would not have such effect, for, as such a bequest would pass after-acquired property of this description, the testator is not necessarily presumed to have any specific subject in his contemplation when he makes his will.

Ibid. *Thompson* v. *Lawley*, 2 B. & P. 314.

An intention not to give the devisee any interest in the mortgage debt may also appear from other circumstances.

6th ed., p. 968. *Re Clowes* (1893), 1 Ch. 214.

DEVISE OF "ESTATE AND INTEREST."

If a testator expressly devises "all his estate and interest" in certain lands, this may be sufficient to pass his beneficial interest in a sum charged on the lands.

6th ed., p. 960. *Mackesy* v. *Mackesy* (1806), 1 Ir. R. 511.

DEVISES OF LAND CONTRACTED TO BE SOLD, HELD NOT TO PASS BENEFIT OF THE CONTRACT.

A devise by a testator to his wife of an estate which he had "lately contracted to sell to A." has been held to be a mere devise of the legal estate, to enable her to carry the contract into execution, and did not entitle the devisee to the purchase-money.

1st ed., p. 636, 6th ed., p. 960. See *Wall* v. *Bright*, 1 Jac. & W. 499.

Upon the whole, it is clear that the proposition which states that an express devise of mortgaged lands will carry the beneficial interest in the mortgage, must be received with some qualification.

Ibid. *Dicks* v. *Lambert*, 4 Ves. 725.

CHARGE WHEN EXTINGUISHED BY UNION OF CHARACTER OF MORTGAGOR AND MORTGAGEE.

Where a person having a mortgage or other charge upon lands, becomes himself entitled to the inheritance of the lands so charged, a question frequently arises between his representatives, whether the charge is to be considered as subsisting for the benefit of his personal representatives, or is merged for the benefit of the person taking the land. The rule in these cases is, that if it be indifferent to the party in whom this union of interest occurs, whether the charge be kept on foot or not, it will be extinguished in equity by force of the presumed intention, unless an act declaratory of a contrary intention, and consequently repelling such presumption, be done by him. But if a purpose beneficial to the owner can be answered by keeping the charge on foot, as if he be an infant, so that the charge would (under the old law allowing infants to bequeath personal estate) be disposable by him, though the land would not; or a beneficial use might have been made of it against a subsequent incumbrancer, or the other creditors of the person from whom the party derived the onerated estate; in these, and similar cases, equity will consider the charge as subsisting, although it may have become merged by mere operation of law. And the same rule obtains in favour of the creditors of the person in whom these interests centre. So, if mesne estates intervene between the charge and the estate of inheritance of the person entitled to it, the charge will subsist.

Ibid. *Johnson* v. *Webster*, 4 D. M. & G. 474.

OPERATION OF GENERAL DEVISE ON LEGAL ESTATE.

We now proceed to consider the question of a general devise on real estate vested in the testator as mortgagee or trustee.

5th ed., p. 647, 6th ed., p. 971.

The important changes in the law as to the devolution of trust and mortgage estates which have been successively introduced by the Vendor and Purchaser Act, 1874, and the Conveyancing and Law of Property Act, 1881, in cases of deaths of testators after the 6th August, 1874, and the 31st December, 1881, respectively, render it convenient to consider separately different classes of cases which may arise according to the date of the testator's death.

In Ontario no provisions similar to the Vendor and Purchaser Act, 1874, were enacted. The provisions of the Conveyancing and Law of Property Act, 1881, appear as sec. 8 of the Devolution of Estates Act (ch. 56, Ontario Acts, 1910). This last mentioned section applies to wills of testators dying after 19th March, 1910.

The law in England before the passing of the Vendor and Purchaser Act, 1874, was that real estate vested in the testator as mortgagee or trustee passed under a general devise of lands, unless a contrary intention could be collected from the testator's expressions or from the purposes or limitations to which he devoted the subject of disposition. The circumstance of there being other property to which the devise was applicable was no ground of exclusion.

5th ed., p. 647, 6th ed., p. 972. *Lord Braybrooke* v. *Inskip*, 8 Ves. 417.

RESERVATION OF POWER OF APPOINTMENT.

It is clear that the fact of the testator having reserved to the devisee a power of appointment, does not constitute a ground for excluding trust estates.

5th ed., p. 649, 6th ed., p. 973. *Ex parte Shaw*, 8 Sim. 159.

WHAT WILL EXCLUDE TRUST ESTATES FROM A GENERAL DEVISE. CHARGES OF DEBTS, EXECUTORY LIMITATIONS, &C., WILL EXCLUDE TRUST ESTATES.

The converse of the rule established by the preceding cases is equally clear; namely, that if the property comprised in the general devise be subjected to the payment of debts, legacies, annuities, or any other species of charge, or the will contain any limitations or provisions to which it cannot be supposed that the testator intended to subject property not beneficially his own, as uses in strict settlement, or executory limitations; or a trust for sale; or for a charity, or for the separate use of a married woman, or for an unascertained class; or words of severance making the devisees tenants in common with a clause of accruer amongst them, the mortgage or trust lands will not pass. And considering the inconvenience arising from the devolution

of a trust estate in shares, it would seem that the words of severance alone are sufficient to exclude it from a general devise.

5th ed., p. 640. 6th ed., p. 973. *Dimes* v. *Grand Junction Canal Company*, 3 H. L. Ca. 704. As to cases of mortgage, see *Duke of Leeds* v. *Munday*, 3 Ves. 348; *Re Packman and Moss*, 1 Ch. D. 214; *Martin* v. *Laverton*, L. R. 9 Eq. 568.

And it is wholly immaterial whether the testator has other lands to which the devise can be applied or not; for in these cases the Courts have not adopted the principle applicable to reversions, that where there are other lands, to which the inconsistent limitations can be referred, they apply exclusively to those lands, reddendo singula singulis.

5th ed., p. 650, 6th ed., p. 974.

The rule under consideration, of course, does not deny the power of a testator to limit estates vested in him as mortgagee or trustee to uses in strict settlement, or in any other manner equally inconsistent with a due regard to the testator's duty as mortgage creditor or trustee: it merely refuses to see an intention so to do in a general devise. Should a testator unequivocally devise an estate vested in him as mortgagee or trustee in the manner suggested, the intention must prevail; and it would be left to the persons who may become damnified by such a proceeding, to obtain satisfaction out of the estate of the deceased testator.

1st ed., p. 646. 6th ed., p. 974.

"MORTGAGES"—"SECURITIES FOR MONEY."

It is now settled that the words "mortgages," "securities for money," and similar expressions, will comprise the entire benefit of the mortgage security (including the inheritance in the lands), unless a contrary intention appears by the context; and that the fact of those words being found among terms descriptive exclusively of personal estate, and followed by a limitation to executors and administrators only, and not to heirs, or by a charge of debts and legacies, or a trust for sale, or for several as tenants in common, will not affect the construction. The broad principle is, that the testator meant to substitute the object of his bounty in his own place as mortgagee, and to enable him to enforce payment of the mortgage money by giving him the legal estate in the mortgaged lands.

Ibid. *Knight* v. *Robinson*, 2 K. & J. 503; *Rippen* v. *Priest*, 13 C. B. N. S. 308.

GIFT OF REAL AND PERSONAL ESTATES, IN TRUST TO SELL AND GET IN.

As already stated, a general devise of real estate on trust for sale will not include the legal estate in mortgaged property.

But where the real and personal estates are devised and bequeathed together, expressly in trust to sell and get in, the trustees cannot execute these trusts as regards the personalty without having dominion over the mortgaged estate; and, though it has never been so held, there is a strong inclination to say that the express trust to sell and get in the personalty, neutralizes the restrictive effect which the trust for sale would otherwise have upon the devise of real estate, and to hold that thus the latter devise carries the mortgaged estate.

5th ed., p. 652, 6th ed., p. 976. *Ex parte Harber*, 5 Sim. 455.

MORTGAGE TERMS, WHEN INCLUDED IN A GENERAL DEVISE.

With respect to mortgages for terms of years, it is conceived they fall under the principle established by Rose v. Bartlett, that leaseholds for years will not, under the old law, pass by a general devise of lands, unless the testator have no freeholds on which it might operate. If there be no such lands, or the will be subject to the new law, and if the devise contain nothing inconsistent, and there be no specific bequest which will carry the legal interest in the mortgage term, it is clear that such interest will pass under a general devise. The question, however, could hardly arise on the mere legal interest, since it would vest primarily in the executor, or the administrator cum testamento annexo, as part of the testator's personal estate, and it is unlikely that the legatee would claim his assent to the bequest, unless there was ground to contend, that the bequest included the beneficial interest.

1st ed., p. 650, 6th ed., p. 977. *Rose* v. *Bartlett*, Cro. Car. 292.

If a testator, after having contracted for the sale of an estate, devises it as, all that his estate called A., which he had contracted to sell, the effect is to vest in the devisee the legal estate only, for the purpose of enabling him to carry the contract into effect for the benefit of the executor, and does not entitle the devisee to the purchase-money.

1st ed., p. 652, 6th ed., p. 978. *Knollys* v. *Shepherd*, 1 J. & W. 499.

IF THE CONTRACT IS VALID AT THE VENDOR'S DEATH, HE IS A TRUSTEE.

If the contract is a valid one, binding on both parties, and continues such at the time of the vendor's death, no subsequent event can affect the question; the property is converted, and the vendor is a constructive trustee; not a bare trustee, for he has a beneficial interest left in him, viz., a lien or charge on the estate for the security of the purchase-money, but still a trustee.

6th ed., p. 979. *Lysaght* v. *Edwards*, 2 Ch. D. 507.

DISTINCTION WHERE PURCHASE-MONEY PAID AND POSSESSION GIVEN.

But where the purchase has been completed by payment of the purchase-money and delivery of possession, though the deed of conveyance has not passed the legal estate, the vendor is in the position of a bare trustee, and there is no difficulty in holding that a general devise of lands by the vendor in a manner inconsistent with his duties as trustee (charged, for instance, with the payment of his debts) will not include the legal estate.

6th ed., p. 981. *Dimes* v. *Grand Junction Canal Company*, 3 H. L. Ca. 794.

EFFECT ON DEVISE BY MORTGAGEE OF SUBSEQUENT FORECLOSURE.

Where a mortgage in fee is foreclosed subsequently to the making of a will, it is clear that the equity of redemption so acquired will not pass by a will made before and not republished on or since the 1st of January, 1838; and it has been determined, that the period of foreclosure is the date of the final order of the Court, following default of payment on the day appointed, and not the date of the decree. But though the equity of redemption subsequently acquired by foreclosure, will not pass by the will, it is clear that the devise of the legal estate takes effect, notwithstanding the mere acquisition of the equity of redemption, by this or any other means. Where, however, such equity is purchased by the mortgagee, and he and the mortgagor in the usual manner join in conveying the property to a releasee to uses, to prevent dower, for the benefit of the former, the devise, being in a will which is subject to the old law, will be revoked.

1st ed., p. 654, 6th ed., p. 981. *Dimes* v. *Grand Junction Canal Company*, 3 H. L. Ca. 794; *Le Gros* v. *Cockerell*, 5 Sim. 384.

A general bequest of chattels of a particular species, carries all the chattels of that kind, which the testator is possessed of at the time of his decease. And the same principle, of course, would apply even to mortgages in fee, if the will containing the devise in question were made or republished on or since the 1st of January, 1838.

1st ed., *ibid*, 6th ed., p. 982. *Atty.-Gen.* v. *Vigor*, 8 Ves. 256.

Secondly, as to trust or mortgage estates vested in persons who died between the 7th of August, 1874, and the 1st of January, 1882, when the Conveyancing and Law of Property Act, 1881, came into operation. By the Vendor and Purchaser Act, 1874, it is enacted (sec. 4) that the legal personal representative of a mortgagee of freeholds, or of copyholds to which the mortgagee has been admitted, may, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate, whether

the mortgage be in form an assurance subject to redemption or an assurance upon trust; and by sec. 5 (which applies to deaths occurring between the 7th of August, 1874, and the 1st of January, 1876), it is enacted that upon the death of a bare trustee of any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee.

Section 5 just referred to is sec. 7 of the Trustee Act of Ontario (R. S. O. 1897, ch. 129). This Act is superseded and repealed by ch. 26 Ontario Acts, 1911.

Section 5 of the Imperial Act of 1874 was repealed by the Land Transfer Act, 1875, sec. 48, and in lieu thereof it is enacted that, as from the 1st of January, 1876, upon the death of a bare trustee, intestate as to any corporeal or incorporeal hereditament of which he was seised in fee simple, such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee.

Section 4 of the Imperial Act was not adopted in Ontario.

The Ontario law is found in sec. 9 of the Mortgages Act, ch. 51 of the Ontario Statutes of 1910—originally passed in 1868, giving power to executors to release the mortgage debt and the legal estate in the lands.

The Ontario Trustee Act of 1911 omits the section in the former Trustee Act relating to bare trustees, and the devolution of trusts is governed by sec. 8 of the Devolution of Estates Act (ch. 56, Statutes 1910). This section is taken from Imperial Conveyancing Act of 1881 (44, 45 V. c. 41, s. 30), and is as follows:—

Where an estate or interest of inheritance in real property is vested on any trust or by way of mortgage in any person solely the same shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his executor or administrator in like manner, as if the same were personal estate vesting in him and, accordingly, all the like powers for one only of several joint executors or administrators, as well as for a single executor or administrator and for all the executors and administrators together, to dispose of and otherwise deal with the same shall belong to the deceased's executor or administrator with all the like incidents, but subject to all the like rights, equities and obligations as if the same were personal estate vesting in him,

and for the purposes of this section the executor or administrator of the deceased shall be deemed in law his heirs and assigns within the meaning of all trusts and powers.

WHO IS A "BARE" TRUSTEE?

"Bare trustee" is not a term of art, and its exact meaning in the sections above quoted has not been finally determined, but the better opinion seems to be that it is intended to exclude a trustee with active duties which have not been performed, and the performance of which has not been effectually dispensed with. It would therefore apply to a trustee who has no other duty than to convey the trust estate at the cestui que trust's direction.

5th ed., p. 659, 6th ed., p. 983. *Christie* v. *Ovington*, 1 Ch. D. 281.

WHERE TRUST IS ANNEXED TO ESTATE.

Every power given to trustees which enables them to deal with or affect the trust property is prima facie given them ex officio as an incident of their office, and passes with the office to the holders or holder thereof for the time being: whether a power is so given ex officio or not depends in each case on the construction of the document giving it, but the mere fact that the power is one requiring the exercise of a very wide personal discretion is not enough to exclude the prima facie presumption, and little regard is now paid to such minute differences as those between "my trustees," "my trustees A. and B.," and "A. and B. my trustees"; the testator's reliance on the individuals to the exclusion of the holders of the office for the time being must be expressed in clear and apt language.

6th ed., p. 988. *Per Cur. Re Smith* (1904), 1 Ch. 144.

CHAPTER XXVII.

WHAT GENERAL WORDS CARRY REAL ESTATE.

GENERAL WORDS.

If a testator gives all his "estate," or all his "property," these words will prima facie carry his real estate, for they are sufficient to include both real and personal estate.

6th ed., p. 990. *Hawksworth* v. *Hawksworth*, 27 Bea. 1.

"PROPERTY."

The same principle applies where the word "property" is used.

6th ed., p. 991. *Jones* v. *Skinner*, 5 L. J. Ch. 87.

"FORTUNE" AND OTHER INFORMAL EXPRESSIONS.

There are other expressions, such as "my fortune," "all I am worth," or the like, which will pass the whole of the testator's real and personal estate, unless the context shows that they are used in a restricted sense. So the appointment of a person as the testator's "heir" may operate as a general devise of real estate.

6th ed., p. 991. *Jones* v. *Skinner*, 5 L. J. Ch. 87; *Baring* v. *Ashburton*, 54 L. T. 463.

The question what will pass by a specific devise of "land," or of a "house," "farm," &c., or of the "rents and profits," or the "use and occupation" of land or house, &c., is discussed in Chapter XXXV.

WHEN RESTRAINED BY ASSOCIATION WITH PERSONALTY.

It is obvious that the question, whether real estate passes under a devise, cannot occur, unless the testator has either used terms not properly and technically descriptive of such property, or else, though using terms properly applicable thereto, has created doubt by their position, or their improper use in other parts of the will. General expressions, when collocated with words descriptive of personal estate, are sometimes restrained by that association to subjects of the same species, agreeably to the maxim noscitur a sociis; and accordingly we find many instances, especially among the early authorities, in which the word estate, and other such terms clearly capable, viribus suis, of comprehending real estate, have been restrained by the context to personalty.

1st ed., p. 657, 6th ed., p. 991. *Barnes* v. *Patch*, 8 Ves. 604.

CASES IN WHICH GENERAL WORDS HAVE BEEN HELD TO BE UNRESTRICTED.

To warrant the confining of the word "estate" and other such expressions to personal estate, there must be a clear indication of an intention in the will so to confine them, for where this indication has been wanting, or has been less clear than in the preceding cases, the words have been held to be used in their proper, i.e., their unrestricted sense.

1st ed., p. 663. 6th ed., p. 992.

It is clear, however, that the word "effects," without "real," would not, proprio vigore, comprehend land, though followed by the words "of what nature, kind or quality so ever."

6th ed., p. 994. *Doe d. Hick* v. *Dring*, 2 M. & Sel. 448.

CIRCUMSTANCE OF THERE BEING A PRIOR DEVISE OF LANDS.

In most of the cases, the will contained specific devises of land; a circumstance which, as before observed, always favours the extension of the subsequent general words to property of the same description; but the cases do not warrant the considering the absence of the circumstance as conclusively establishing the exclusion of real estate from such terms, though associated with words descriptive of personal property only. On the contrary, real estate has sometimes been held to pass in cases of this nature.

1st ed., 667. 6th ed., p. 996.

Many of the early authorities proceeded on the principle that the heir was not to be disinherited except by clear words; at the present day, however, more respect is paid to the intention of testators, and in seeking to ascertain in any particular case what the intention is, the Court proceeds on the theory that a man who makes a will does not, as a general rule, wish to die intestate as to any part of his property.

6th ed., p. 998. *Smyth* v. *Smyth*, 8 Ch. D. 561.

OPERATION OF WORD "ESTATE."

There are numerous other modern decisions to the effect that "estate" or "estates," used in conjunction with words descriptive of personalty, will pass real estate unless a clear intention to the contrary appears.

6th ed., p. 999. *Gyett* v. *Williams*, 2 J. & H. 429.

"PROPERTY."

"Property" is a word of almost, if not quite, as strong operation as the word "estate."

6th ed., p. 999. *Re Greenwich Hospital*, 20 Bea. 458.

RESTRICTED CONSTRUCTION OF "ESTATE," "PROPERTY," &C.

But a testator may show by the context that he uses the word "estate" or "property" in a restricted meaning. Thus

if he disposes of his "personal estate and property," or "personal property, estate and effects," the word "personal" will as a general rule override the whole.

6th ed., p. 999. *Jones* v. *Robinson*, 3 C. P. D. 344.

So if a testator gives a share of his real and personal property to A., and the remainder to other persons, and then provides that in the event of A. dying under twenty-one, "the said property and effects" shall go to B., this means the share given to A., and not all the testator's property.

6th ed., p. 1000. *Re Willomier's Trusts*, 16 Ir. Ch. R. 389.

"ESTATE" FOLLOWED BY AN ENUMERATION OF PARTICULARS EXPLANATORY AND RESTRICTIVE OF IT.

If a testator uses a general word, such as "estate" or "property," followed by an enumeration of particulars, the question arises whether the enumeration shows an intention to make the gift as sweeping as possible, or whether it should be held to be explanatory and restrictive of the prior general expression. The latter principle of construction was applied in several of the older cases.

6th ed., p. 1000. *Timewell* v. *Perkins*, 2 Atk. 102.

It may be doubted, however, whether this restricted construction would find favour with the courts at the present day. The three cases last referred to were all decided on the principle that clear words are required to disinherit the heir, a principle which has little, if any, force at the present day.

6th ed., p. 1001. *Mullally* v. *Walsh*, 3 L. R. Ir. 244.

"PROPERTY" USED IN LIMITED SENSE.

But "property" sometimes denotes merely the fact of ownership, and then it does not have the sweeping effect which it has when used in its more usual sense.

6th ed., p. 1001. *Doe d. Haw* v. *Earles*, 15 M. & Wels. 450.

CLEAR GIFT OF REALTY IN WILL NOT CUT DOWN BY GIFT OF "ESTATE, FURNITURE, &C." IN CODICIL.

And it has been elsewhere noticed as an established rule, that a gift once clearly expressed in a will, shall not be cut down by ambiguous expressions contained in a codicil.

6th ed., p. 1002. *Molyneux* v. *Rowe*, 8 D. M. & G. 368.

DEVISE ASSOCIATED WITH NOMINATION TO EXECUTORSHIP.

Sometimes words adequate to comprise land have been confined to personal estate, from their association with the legatee's nomination to the executorship, which has been considered as explanatory, and restrictive of the general expressions to that species of property which was connected with the character of executor.

1st ed., p. 671, 6th ed., p. 1003. *Shaw* v. *Bull*, 12 Mod. 593.

Although it is indisputably clear that the word "lands" will carry real estate, notwithstanding it be collocated with words descriptive of personal property only; yet in several early cases it has been decided, that where a testator appoints another executor of all his goods, lands, &c., he refers to such lands as the person may take as executor, namely, leaseholds; and accordingly real estate does not pass.

1st ed., p. 672. 6th ed., p. 1004. *Roe d. Walker* v. *Walker*, 3 B. & P. 375; *Doe d. Gillard* v. *Gillard*, 5 B. & Ald. 785; *Thomas* v. *Phelps*, 4 Russ. 348.

GENERAL REMARK ON PRECEDING CASES.

Little attention is now to be paid to the circumstance of the association of the devise with the appointment of the devisee to the executorship, as confining it to personal estate, if the words of the devise will fairly bear a wider construction.

1st ed., p. 673, 6th ed., p. 1006.

In the cases above cited the question was whether the executors took the real estate beneficially, but an appointment of a person as "executor" of the testator's property may of course operate to give him the land as trustee.

6th ed., p. 1006. See *Re Cameron*, 26 Ch. D. 19.

INAPPLICABILITY OF LIMITATIONS, WHERE RESTRICTIVE.

The introduction of limitations and expressions inapplicable to real estate has sometimes been made a ground for excluding such estate from words of general description, capable, ex vi terminorum, of comprehending property of that species.

1st ed., p. 675, 6th ed., p. 1006.

In considering gifts of residue whether of real or personal estate, it is not necessary to ascertain whether the testator had any particular property in contemplation at the moment. Indeed, such gifts may be introduced to guard against the testator having overlooked some property or interest in the gifts particularly described. If he meant to give the residue of his property, be it what it may, it is immaterial whether he did or did not know what would be included in it; and if so, it cannot make any difference that such ignorance is manifested upon the face of the will, unless the expressions manifesting it are sufficient to prove that the testator did not intend to use the words of gift in their ordinary, extended, and technical sense.

1st ed., p. 678, 6th ed., p. 1007. *Per Cur. Saumarez* v. *Saumarez*, 4 My. & C. 331.

RESULTING TRUST TO HEIR.

In some cases where the words of a devise to trustees have been sufficiently ample to include real estate, but the trusts have

applied to personalty only, the legal estate in the realty has been held to pass by the devise, with a resulting trust to the heir.

6th ed., p. 1009. *Dunnage* v. *White*, 1 J. & W. 583.

REAL ESTATE HELD TO PASS BY VAGUE AND INFORMAL WORDS. "WHATSOEVER ELSE I HAVE NOT BEFORE DISPOSED OF."

In some cases real estate has been held to pass under words, even more vague and informal than any which have yet been the subject of consideration.

1st ed., p. 680, 6th ed., p. 1011.

For example:—

"All I am worth," held to carry land.

Huxtop v. *Brooman*, 1 Br. C. C. 437.

"All that I shall die possessed of, real and personal," held to pass realty.

Pitman v. *Stevens*, 15 East. 505.

"Everything else I die possessed of."

Wilce v. *Wilce*, 7 Bing. 664.

"I appoint my wife executrix and residuary legatee to all other property I may possess at my decease."

Day v. *Daveron*, 12 Sim. 200.

"A. and B. to take as residuary legatees whatever I may die possessed of."

Davenport v. *Coleman*, 12 Sim. 58.

"All the rest."

Attree v. *Attree*, L. R. 11 Eq. 280.

"Et cetera."

Re Andrews' Estate, 50 W. R. 471.
6th ed., p. 1011.

"I MAKE A. MY HEIR."

There are several cases in which such words as "I make A. B. my heir," have been held to operate as a general devise of the testator's real estate.

6th ed., p. 1015. *Porker* v. *Nickson*, 1 D. J. & S. 177.

WORDS DESCRIPTIVE OF PERSONAL ESTATE ONLY, HELD TO CARRY LAND—WHEN.

It remains to be observed that words applicable exclusively to personal estate have sometimes, by force of the context, been held to include land. This frequently happens where an expression is evidently used as referential to and synonymous with an anterior word, clearly descriptive of real estate; in which case its extent of operation is measured, not by its own inherent strength, but by the import of its synonym.

1st ed., p. 684, 6th ed., p. 1015. *Hope* v. *Taylor*, 1 Burr. 268.

"RESIDUARY LEGATEE."

In several of the cases cited in the previous section, there was an appointment of a person to be the testator's residuary legatee of whatever property the testator might die possessed of, and although the words "residuary legatee" are properly applicable to personalty only, it was held in each of these cases that the appointment took effect as a devise of the testator's realty. And an appointment of a person to be "my residuary legatee" will have this effect if the testator shows an intention to dispose by his will of all his property, real as well as personal.

6th ed., p. 1016. *Hughes* v. *Pritchard*, 6 Ch. D. 24.

The mere appointment or nomination by a testator of a person as "my residuary legatee" will not operate as a devise to him of the testator's residuary real estate; and even where a testator throughout his will uses "bequeath" and "legacy duty" as applicable to real estate, this will not justify the Court in construing "residuary legatee" as equivalent to "residuary devisee," if the will specifically disposes of all the real estate which the testator was possessed of at the date of the will.

6th ed., p. 1017. *Re Gibbs* (1907), 1 Ch. 465.

"EFFECTS."

Upon the principle already stated, the word "effects" (though applicable strictly to personalty only), has been held to comprehend the several particulars before mentioned, consisting of both real and personal estate.

6th ed., p. 1017. *Henderson* v. *Farbridge*, 1 Russ. 479; *Doe d. Chilcott* v. *White*, 1 East. 33.

"WORLDLY GOODS" HELD ON THE CONTEXT TO PASS REAL ESTATE.

Again, the phrase "worldly goods," though properly applicable only to personal estate, will include the realty if aided by the context.

6th ed., p. 1019. *Wright* v. *Shelton*, 18 Jur. 445.

"PERSONAL ESTATES," HELD SUFFICIENT UPON THE CONTEXT TO PASS REALTY.

Even the expression "personal estates," or "personal estate and effects," will carry realty if the testator has clearly shown his intention that it shall do so.

6th ed., p. 1020. *Doe d. Tofield* v. *Tofield*, 11 East. 246.

The cases in which words, in themselves clearly inapplicable to real estate, have been held to extend thereto by force of the context, are the exact converse of those discussed in the first division of the present chapter.

1st ed., p. 689, 6th ed., p. 1020.

"**Bequeath**" — "**Devise.**"—Motion by vendor under the Vendors and Purchasers Act, to have it declared that the vendor acquired a title to

the land in question under the will of his wife, and could make a good title thereto. The words in the will were: "I hereby bequeath to my husband, George W. Booth, all my earthly goods and possessions:"—Held, that while the word "bequeath" in the language of wills is primarily applicable to a disposition of personal property, yet if the intention of the testator to be gathered from the whole will is to dispose of his real estate, the use of the word "bequeath" instead of the more appropriate word "devise" cannot defeat that intention, and that the language of above will disclosed an intention of the testatrix to give her real as well as her personal estate to her husband; therefore vendor had a good title so far as the will was concerned. *Re Booth & Merriam* (1910), 15 O. W. R. 759.

"Effects."—A testatrix by her will, after giving to her two sons a certain mortgage, and after sundry other specific bequests, continued: "I further direct that the balance of personal property, consisting of notes and other securities for money, be given to my two sons aforesaid . . . also that if there be any effects possessed by me at the time of my decease, that the same may be divided equally in value among my grandchildren share and share alike." The testatrix had no real estate at the date of the will, but she afterwards in her lifetime collected the money due on the mortgage, and invested it and the other funds in the purchase of land of which she died seized. Held, that the grandchildren were entitled to the said lands, as well as to the personal estate, of which the testatrix died seized and possessed, not specifically disposed of by the will. *Hammill* v. *Hammill*, 9 O. R. 530.

Estate.—Testator describing himself as "of the township of S., south half of lot 24, tenth concession," devised as follows: "all of my estate, goods and chattels, I give and bequeath to my dear and beloved wife, whom I appoint sole executrix." &c.:—Held, that the word "estate" clearly passed testator's land, notwithstanding its connection with the personalty. *McCabe* v. *McCabe*, 22 U. C. R. 378.

Property.—T. H. and his brother were partners in business and the latter having died T. H. became by will his executor and residuary legatee. A legacy was left by the will to E. H. Held, that the legacy of E. H. was a charge upon the realty of the testator, the residuary devise being of "the balance and remainder of the property and of any estate" of the testator, and either of the words "property" and "estate" being sufficient to pass realty. *Cameron* v. *Harper*, 21 S. C. R. 273.

Properties.—A testator by his will, provided as follows: "I will and bequeath to . . . C. H., all properties, moneys, and personal effects now in my possession, for her own and sole use, to be disposed of as she may see proper." Held, that the devise passed real estate. *Hargin* v. *Fritzinger*, 16 O. R. 28.

Worldly Estate.—The words "worldly estate" include, not only the corpus of the testator's property, but the whole of his interest therein. *Town* v. *Borden*, 1 O. R. 327.

Stock and Trade.—A testator provided as follows, "I give, devise and bequeath all my real and personal estate of which I may die possessed or interested in, in the manner following, that is to say, first, I give to my sister the house and land with all household furniture and all the stock and trade now in house and out of house with all book accounts now due me wherever found for her own use and benefit for ever, and out of this . . . she shall [sic] $100 lawful money of Canada to my brother for his own use and benefit for ever:"—Held, that money of the testator on deposit in the bank, cash in hand, and certain promissory notes given in settlement of book debts, and a quantity of cordwood for use in the shop and dwelling house, two horses, harness and vehicles, were embraced in the gift of the "stock and trade." *In re Holden*, 5 O. L. R. 156.

CHAPTER XXVIII.

WHAT WORDS WILL COMPRISE THE GENERAL PERSONAL ESTATE.

"ESTATE," "PROPERTY," &c.

When a testator makes use of such expressions as "all my estate," or "all my property," a question as to their effect can hardly arise, for these are words of the widest possible meaning. But if the testator adds some qualification or description—as where he bequeaths all his property in a particular locality to A. and all his property in another locality to B.; or where he disposes of "all my property, brewery, &c."—difficult questions may arise.

6th ed., p. 1022. *Waite* v. *Morland*, 12 Jur. N. S. 763; *Re Johnson*, 92 L. T. 357.

WORD "EFFECTS," "GOODS," OR "CHATTELS," WHETHER IT COMPRISES ENTIRE PERSONAL ESTATE.

The word effects, and even the word goods, or chattels, will, it seems, comprise the entire personal estate of a testator, unless restrained by the context within narrower limits. Where, however, such general expressions stand immediately associated with less comprehensive words, they have been sometimes restrained to articles ejusdem generis; the specified effects being considered as denoting the species of property, which the larger term was intended to comprise, and this upon a principle, evidently analogous to that on which (as we have seen) the words "estate" and "property" have been confined to personalty by their juxtaposition with words descriptive of that species of property.

1st ed., p. 692, 6th ed., p. 1022. *Campbell* v. *Prescott*, 15 Ves. 500; *Porter* v. *Tournay*, 3 Ves. 311.

The circumstance of a specific or pecuniary legacy being given to the same legatee, or of the general bequest being followed by dispositions of particular portions of the personal property to other persons, has commonly been considered to favour the supposition, that such bequest was not to comprise the general residue.

Ibid.

Though the residuary clause is usually, it need not necessarily be, the last in the will: and any particular bequest which follows that clause may, if made to different legatees, reasonably be read as an exception out of the property comprised in it.

6th ed., p. 1025. *Lysaght* v. *Edwards*, 2 Ch. D. 513.

SUBSEQUENT EXPLANATORY RESTRICTIVE EXPRESSIONS.

A more forcible argument in favour of the restricted construction, however, occurs where the testator has added to the

equivocal words in question terms descriptive of a particular species of property, which those words in their larger sense would comprehend. In such case, the adoption of the more comprehensive meaning would have the effect of rendering the superadded expression nugatory; and make the testator employ additional language, without any additional meaning.

1st ed., p. 694, 6th ed., p. 1025.

EXCEPTION WHERE EXPLANATORY OF DOUBTFUL WORDS.

A conclusive ground for giving to equivocal words their larger signification, occurs where the bequest contains an exception of certain things, which such bequest, according to its restricted construction, would not comprise; the testator having in such a case afforded a key or explanation to his own ambiguous language, by showing that he considered that the bequest would, without the exception, have included the excepted articles. This question has generally arisen under gifts of goods and chattels, restricted to a certain locality; but the principle, it is obvious, is equally applicable to bequests not so restricted.

1st ed., p. 695, 6th ed., p. 1026.

GENERAL REMARK ON PRECEDING CASES.

The disposition of the Judges of the present day is to adhere to the sound rule, which gives to words of a comprehensive import their full extent of operation, unless some very distinct ground can be collected from the context for considering them as used in a special and restricted sense.

1st ed., p. 698, 6th ed., p. 1029. *Kendall* v. *Kendall*, 4 Russ. 360.

OTHER CASES DECIDED ON SAME PRINCIPLE.

The general personal estate has been held to pass by such expressions as: "all my jewels, plate, linen, china, carriages, wines and other goods, chattels and effects"; "effects"; followed by a reference to various particular kinds of property; "the residue of my property hereinbefore mentioned," the property expressly mentioned being "household furniture and other effects"; "furniture, plate, books and other personalty"; "personal property, consisting of money and clothes" or other items; "household furniture, goods, ready money, and also all debts and securities belonging to me."

6th ed., p. 1029. *Re Lloyd's Estate*, 2 Jur. N. S. 539; *Dean* v. *Gibson*, L. R. 3 Eq. 713; *King* v. *George*, 5 Ch. D. 627.

A gift of household goods, furniture "and all other effects" is sufficient to pass the general personal estate, although it is followed by pecuniary and specific bequests, and even although specific bequests are given to the person who takes the residue under the general gift.

6th ed., p. 1029. *Fleming* v. *Burrows*. 1 Russ. 276.

The principle which underlies many of these decisions is that when a man makes a will, he is presumed not to intend to die intestate as to any part of his property.

6th ed., p. 1030. *Re Lloyd's Estate*, 2 Jur. N. S. 539.

If the testator gives his residue in general terms, and then enumerates various particulars, concluding with "et cætera," this does not restrict the meaning of the general words.

6th ed., p. 1030. *Gaver* v. *Davis*, 29 Bea. 222.

The application of the principle above stated is not necessarily affected by a direction that the property is to be sold; thus a bequest of "all my other effects to A., to be sold for his benefit," will pass the general personal estate, although it includes property which is not the subject of sale, such as money.

6th ed., p. 1031. *Hearne* v. *Wigginton*, 6 Madd. 119.

WHERE THERE IS A RESIDUARY BEQUEST.

It is to be observed, however, that in all the preceding cases, there was no other bequest capable of operating on the general residue of the testator's personal estate, if the clause in question did not. Where there is such a bequest, it supplies an argument of no inconsiderable weight in favour of the restricted construction, which is then recommended by the anxiety always felt to give to a will such a construction as will render every part of it sensible, consistent and effective.

1st ed., p. 700, 6th ed., p. 1032. *See Marks* v. *Solomon*, 19 L. J. Ch. 555.

It would also seem, that where a testator makes a specific bequest of property in general terms, but describes it as "consisting of" certain specific things, belonging to him at the date of the will, and bequeaths his residue, this shows that he intended to restrict the specific bequest to the enumerated things.

6th ed., p. 1033. *Drake* v. *Martin*, 23 Bea. 89.

RESTRICTIVE EFFECT OF CONTEXT.

Even where there is no residuary bequest, the testator may show by the context, or by a codicil, that general words used by him were intended to have a limited effect.

6th ed., p. 1033. *Atty.-Gen.* v. *Wiltshere*, 16 Sim. 36.

WORD "MONEY" HELD TO EXTEND TO GENERAL RESIDUE.

As words in themselves the most general and comprehensive may, we have seen, be narrowed by their juxtaposition with more limited expressions, so on the same principle, terms which, in their strict and proper acceptation, apply to a particular species of personalty only, have been held, by force of the context,

to embrace the general residue. In several instances, the word 'money' (which is often popularly used in a vague and inaccurate sense, as synonymous with property), has received this construction.

1st ed., p. 702. 6th ed., p. 1033. This rule of construction does not apply to a gift of "cash." *Nevinson* v. *Lady Lennard*, 34 Bea. 487, or of "ready money." *Re Powell*, Johns. 49.

The result has generally been due either, first, to the testator having directed his funeral expenses, debts or legacies (which ordinarily constitute a charge on the general residue) to be paid out of the "money"; or, secondly, to his having shown a clear intention to make a complete disposition of all his personalty, which intention can only be effected by adopting the enlarged interpretation of the word "money." For it is clear that if the word be used without any explanatory context, it will be construed in its strict sense; a fortiori, if the express purpose of the bequest be inconsistent with the notion that the testator could have intended so to apply the property alleged to be comprised in it. As where an officer on service, after bequeathing two small legacies, and directing his portmanteau and other articles to be sent home, desired that "the remainder of his money and effects should be expended in purchasing a suitable present for his godson," it was held that a reversionary interest in stock did not pass.

5th ed., p. 725, 6th ed., p. 1034.

WHERE THERE IS A BEQUEST OF LEGACIES, AND A GIFT OF THE RESIDUE OF TESTATOR'S MONEY.

It seems, indeed, that where a bequest of legacies, primarily payable out of the general estate, is followed by a gift of the residue or remainder of the testator's "money," the latter gift comprehends the general residue, although the testator has not expressly charged the legacies on his "money."

5th ed., p. 727, 6th ed., p. 1035. *Re Pringle*, 17 Ch. D. 819.

NOT IF THERE BE A DISTINCT RESIDUARY BEQUEST.

But the inference to be drawn from a charge of debts is not conclusive; since the testator may have intended so to charge the specific gift of "money": and therefore if the will contains a distinct residuary clause, or otherwise gives evidence that the word is used in its strict sense, the enlarged construction is inadmissible notwithstanding the charge.

5th ed., p. 727, 6th ed., p. 1036. *Willis* v. *Plaskett*, 4 Beav. 208.

Even a wrong description of the manner in which the testator's "money" is invested, will not prevent that word from comprising the residuary personal estate: as where a testatrix

bequeathed "the remainder of my money in the Spanish bonds" to her nephews and nieces, "my intention being to divide my property equally between my two sisters' children."

6th ed., p. 1036. *Patrick* v. *Yeatherd*, 33 L. J. Ch. 286. *Re Cadogan*, 25 Ch. D. 154.

WHERE "MONEY" MEANS GENERAL PERSONAL ESTATE EXCEPT PART.

It sometimes appears from the context that the testator means by "money," not the whole of his general personal estate, but all except a certain part of it.

5th ed., p. 729, 6th ed., p. 1038. *Re Townley*, 53 L. J. Ch. 516.

"MONEY" WHEN STRICTLY CONSTRUED.

But in cases which do not fall within any of the rules above referred to, the word "money" is strictly construed.

6th ed., p. 1038. *Love* v. *Thomas*, 5 D. M. & G. 315.

UNLESS FORBIDDEN BY THE CONTEXT.

And if the context shows that the word "money" is used in its strict sense, it will not receive the more extended construction, merely on the strength of even an expressed intention to dispose of all the estate.

5th ed., p. 729, 6th ed., p. 1038. *Ommanney* v. *Butcher*, T. & R. 260; *Enohin* v. *Wylie*, 10 H. L. C. 1.

APPOINTMENT OF "RESIDUARY LEGATEE."

As a general rule, an appointment of A. "to be my residuary legatee," operates as a bequest of the testator's residuary personal estate to A. But if there is a formal gift of the residue to another person, this may prevail.

6th ed., p. 1040. *Hughes* v. *Pritchard*, 6 Ch. D. 24.

General Provisions—Specific Enumeration.—A testator gave to his wife the house which he possessed, with all the appurtenances thereof, and the house and town lot in, &c., "and sixteen cords of good sound firewood yearly during her lifetime;" such houses and lot to go to his only brother after the decease of his wife. He also bequeathed to his wife the interest of all the money and securities for money that he might be possessed of at his death, after payment of debts and funeral expenses; and the value of one-third of his personal property, being composed of . . . , and all other implements and utensils of husbandry; and after his wife's death directed his money to be divided among his cousins, viz., the family of his uncle J. F., the family of J. S., &c. He then devised certain lands to his brother, being the only wooded lands he was possessed of; and by a codicil left $200 to his wife in addition to the legacy given by the will. On a bill filed to obtain a construction of the will:—Held, that the annual supply of firewood did not form a charge upon any of the lands of the testator, but was to be provided for the widow out of the personalty; that the widow took absolutely one-third share of all the personal property other than money and securities for money, and not one-third of the enumerated articles only; and that the income of the other two-thirds up to the period of division belonged to those who were or might become entitled to the property. *Ferguson* v. *Stewart*, 22 Chy. 364.

"**Effects.**"—See *Hammill* v. *Hammill*, 9 O. R. 530.

"**Chattels**"—**Mortgage for Purchase-money.**—A testator, after devising "all that I possess to be disposed of as follows," made two specific devises of land and then bequeathed to his two sisters "all my chattels and movables and all moneys on hand and moneys to be received by my notes, and in case any one of my said sisters should die before me, I will and bequeath the said chattels, moneys, and notes to" the survivor. Part of his estate consisting of a mortgage for unpaid purchase money on a sale of one of the pieces of land specifically devised, sold by him in his lifetime:—Held, that the mortgage passed as a chattel under the above bequest. *In re McMillan*, 4 O. L. R. 415, 1 O. W. R. 471.

Gift of Income for Life.—While an unlimited gift of income carries to its donee the corpus, a gift of income for life has not this effect. Nor does a superadded power of appointment increase the interest of the donee of the fund. *Re Henmer*, Theo. 5, 429. 4 O. W. R. 474.

Ejusdem Generis.—Rule applied. *Re Pink*, 1 O. W. R. 772.

CHAPTER XXIX.

OPERATION OF A GENERAL OR RESIDUARY BEQUEST.

What is a General Bequest.

A general bequest is a gift of the testator's personal property described in general terms, as of "all my personal estate." 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, this is nevertheless a specific and not a general bequest.

6th ed., p. 1041. *Roffey* v. *Early*, 42 L. J. Ch. 472.

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."

6th ed., p. 1042.

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; 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.

6th ed., p. 1042. *Robertson* v. *Broadbent*, 8 A. C. 812.

Residuary 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. 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."

6th ed., p. 1042. *Lysaght* v. *Edwards*, 2 Ch. D. 513.

(1) A gift of residue, including certain property (as "the residue of my estate, including a certain fund") does not make the gift of that property specific.

6th ed., p. 1042. *Re Tootal's Estate*, 2 Ch. D. 628.

(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.

6th ed., p. 1043. *Sargent* v. *Roberts*, 12 Jur. 429.

(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.

6th ed., p. 1043. *Hill* v. *Hill*, 11 Jur. N. S. 806.

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 residnary legatee, the beqnest to B. does not revoke the bequest to A., and if the gift to A. fails, B. takes the benefit.

6th ed., p. 1044. *Re Isaac* (1905), 1 Ch. 427.

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.

6th ed., p. 1045. *Hardwicke* v. *Douglas*, 7 Cl. & F. 795.

GENERAL RESIDUARY BEQUEST.

A general residuary bequest is a gift of all the personal property of the 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." So if a testator gives legacies, &c., and then says "I appoint D. my residuary legatee," this operates as a bequest of the residne to D. 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.

6th ed., p. 1045. *Blight* v. *Hartnoll*, 23 Ch. D. 222.

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.

6th ed., p. 1046.

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. And it makes no difference that the personalty is to be laid out in realty. 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.

6th ed., p. 1046. *Re Travis* (1900), 2 Ch. 541.

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.

6th ed., p. 1047. *Cambridge* v. *Rous*, 8 Ves. 25.

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.

6th ed., p. 1048.

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.

6th ed., p. 1048. *Re Bagot* (1893), 3 Ch. 348.

WHAT WILL SUFFICE TO EXCLUDE ANY PORTION OF THE PERSONALTY FROM A RESIDUARY GIFT.

If the words of the will show 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; the difficulty in these, as in most other cases, being not in discovering the principle but in applying it to particular wills.

6th ed., p. 1049.

The rule in all these cases as already stated 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.

6th ed., p. 1050. *Re Fraser* (1904), 1 Ch. 726.

CONSTRUCTION OF "RESIDUE," "REMAINDER," &c.

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 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.

6th ed., p. 1050. Compare *Crooke* v. *De Vandes*, 11 Ves. 330, and *Wilson* v. *Wilson*, 11 Jur. 703. *Jull* v. *Jacobs*, 3 Ch. D. 703.

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.

6th ed., p. 1052. *Bothamley* v. *Sherson*, L. R. 20 Eq. 304.

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 Consols, says "I give £100 to A., £100 to B., and the residue to C.," it is just as if he had said "I give £100 to A., £100 to B., and £100 to C.," and consequently if A. predeceases the testator the £100 does not go to C., but is either undisposed of or passes by the general residuary bequest. 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.

6th ed., p. 1053. *Page* v. *Leapingwell*, 18 Ves. 463.

Such cases very frequently arise when a testator is distributing a fund over which he has a power of appointment.

6th ed., p. 1053. *Re Jeaffreson's Trust*, L. R. 2 Eq. 276.

TRUE RESIDUE.

But the testator may by the context show 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.

6th ed., p. 1054. *De Trafford* v. *Tempest*, 21 Bea. 564.

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

6th ed., p. 1054. *Re Mason* (1901), 1 Ch. 626.

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.

6th ed., p. 1054. *Re Larking*, 37 Ch. D. 310.

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: in other words, B. takes the fund subject to what is given to A. 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.

6th ed., p. 1054. *Re Tunno*, 45 Ch. D. 66.

LEGACIES OUT OF INVESTED FUND.
CHARGE OF DEBTS.

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. So if the amount of the fund is rendered uncertain by the fact that it is subject to a charge of debts.

6th ed., p. 1055. *Baker* v. *Farmer*, L. R. 3 Ch. 537.

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.

6th ed., p. 1055. *Re Dunster* (1909), 1 Ch. 103.

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. So if the bequest to one of them is revoked by a codicil.

6th ed., p. 1056. *Trethewy* v. *Helyar*, 4 Ch. D. 53. *Sykes* v. *Sykes*, L. R. 3 Ch. 301.

A direction in a codicil that upon the death of a person to show 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.

6th ed., p. 1058. *Re Palmer* (1893), 3 Ch. 369; *Re Parker* (1901), 1 Ch. 408.

The cases in which a general bequest operates as an exercise of a power of appointment have been already discussed.

6th ed., pp. 1059. General Powers p. 383; Special Powers p. 390.

Specific Devise for Life—General Residuary Clause.—Testator, after leaving his homestead to his wife for life, devised to his executors "the residue of my real estate of which I shall die seised or possessed," in trust to sell such portion as should be sufficient to pay his debts, giving them power, in order to effectuate his intention, "to dispose of said real estate in fee simple, or for a term of years, for the purpose aforesaid." And he directed that his executors, after payment of the debts, should hold said real estate in trust to convey such portion thereof as might remain to his nephews in fee. It did not appear whether testator had any other land besides the homestead or not:—Held, that the reversion in the homestead passed to the executors, under the residuary devise. *Swart* v. *Gregory*, 15 U. C. R. 335.

Specifically Described Lands.—Although a will speaks from the death of the testator, and so would carry after acquired lands, yet where a testator devised all the remainder of his real estate to his wife, and then proceeded to enumerate the lands comprised in such remainder:—Held, that after acquired lands did not pass as part of the residue. *Crombie* v. *Cooper*, 24 Chy. 470.

Implied Gift of Residue.—The testator, after devising a parcel of land to each of his three sons, directed his executors to collect the debts due to him, and thereout to pay his debts, funeral and testamentary expenses and legacies and he charged the deficiency on two of the parcels which he had devised. By a subsequent part of his will, he gave his household furniture, and other personal chattels, to his wife, for her own use, except the piano, which he gave to one of his daughters; there was no other residuary clause in the will:—Held, that the whole of testator's residuary estate, except the debts due to him and the piano, went to the wife, exonerated from testator's debts. *Scott* v. *Scott*, 18 Chy. 66.

Pro Rata Distribution.—Where the residue of an estate is directed to be divided pro rata among prior legatees, they take such residue in proportion to the amount of their prior legacies. *Kennedy* v. *Protestant Orphans' Home*, 25 O. R. 235.

Residuary Devise—Vested Remainder—"Family."—A testator devised the residue of his property, both real and personal, to his son A. by a second marriage, and, in the event of the death of A. to the testator's widow for her lifetime, the remainder, on her death, to be equally divided among his first family or the survivors of them. A. predeceased his mother. There being no survivors at the period of distribution:—Held, that on the death of A. the remainder vested in the children of the first family, subject to being defeated in favour of the survivors at the period of distribution (the death of the life tenant), but, there being then no survivors, there was nothing to defeat it, and it remained the property of the representatives of the children. In the previous part of his will the testator referred to some of the children of the first family as having received in his lifetime all that they were then entitled to out of the estate:—Held, that the children mentioned were not thereby excluded from participation in the distribution of the remainder consequent upon the death of A. *Ward* v. *McKay*, 2 E. L. R. 353, 41 N. S. R. 282.

Residuary Bequest—"Parties Mentioned" in Will.—A testator by his will, after a number of bequests, directed the conversion into

cash of the residue of his real and personal estate, and, after the payment of the winding-up expenses, that it should be divided, share and share alike, among the "different parties mentioned in my will who shall be living at the time of the winding up of my estate" and by a subsequent clause he appointed executors and trustees of his will:—Held, that the testator intended by the words "parties mentioned" those named as beneficiaries, and not persons whose names were mentioned only for the purpose of identifying the objects of his gifts or for the purpose of dividing the estate, as the executors; and that the parties intended to be benefited were those mentioned in the will and not those in the codicils. *Re Miles*, 8 O. W. R. 817, 9 O. W. R. 555, 14 O. L. R. 241.

Residuary Estate — Income. — A testator gave to each of his children, on attaining the age of twenty-five years, an equal share of the income of the whole of his residuary estate, but until each child had attained the age of twenty-five years what would have been his or her share of the income was to accumulate and form part of the testator's general estate:—Held, that the accumulations so directed were intended to be for the benefit of the general estate and not for the exclusive benefit of a particular child. Judgment of the Court of Appeal for Ontario and Riddell, J., affirmed, with a variation. *Fullford* v. *Hordy*, C. R. [1909] A. C. 255, [1909] A. C. 570, 79 L. J. P. C. 8.

Residue — "Survivors" — "Child."—Testator, by his last will, after providing for his wife during her lifetime, and setting apart a sum of money to be invested after the wife's death for his two daughters, left his business and the residue of his estate to his two sons. In case of the death of either or both of the daughters without issue, it was provided that her or their share of the estate should become part of the residue thereof, and be divided equally among the survivors, and the issue of any child who should then be deceased. One of the daughters having died without leaving issue:—Held, that the use of the words "survivors" and "child" in the clause in question excluded the idea that the share of the deceased daughter was to go to the two sons as part of the residue of the estate, and indicated an intention, on the part of the testator, that this particular part of the residue was to be divided equally among the surviving children of the testator and the issue of any deceased child; and that it was only subject to this disposition that all the rest and residue of the estate was to go to the two sons exclusively. *In re Mackinlay*, 38 N. S. R. 254.

Enumeration of Properties—Absence of Specific Disposition. —The testator, by his will, first directed that all his just debts and funeral and testamentary expenses should be paid and satisfied by his executors. Then followed: "I give, devise and bequeath all my real and personal estate of which I may die possessed in manner following, that is to say;" and immediately thereafter an enumeration of six properties, followed by: "All the residue of my estate not hereinbefore disposed of, I give, devise, and bequeath unto" his son and daughter, naming them:—Held, that there was not an intestacy as to the enumerated properties, but that all the property of the testator, real and personal, was included in the residuary gift. *In re Fraser, Lowther* v. *Fraser*, [1904] 1 Ch. 726, distinguished. *Re Conger* (1909), 1 O. W. N. 57, 19 O. L. R. 499.

Residuary Bequest to Children as a Class — Death of one Child before Testator — Wills Act, s. 36.—The testator gave the residue of his estate in equal shares to all his children except J., and directed that J.'s shares or a double share should go to M. At the time of the making of the will the testator's eight children were all alive and all survived him except M., who predeceased him leaving issue:—Held, that in the case of gifts to children as a class, as tenants in common, the shares of members of the class dying before the testator do not pass to the issue of those dying, as under s. 36 of the Wills Act, R. S. O. 1897, c. 128, but go to the other members of the class, and the fact that one of the class is named specially makes no difference; and therefore the residue was divisible among the six surviving members of the class in equal shares. *Re Moir*, 9 O. W. R. 858, 14 O. L. R. 541.

Residuary Clause — Division of Income among Children — Nomination with Substitution of Grandchildren.—Testator devised income of residue of property to his children A. B. C. D. E., share and share alike, grandchildren to be substituted for a deceased child. *Corpus* to be divided equally between surviving two children. All the children survived. B. died a bachelor shortly after:—Held, that B.'s share of the income went to his next of kin. *Re Stephens*, 13 O. W. R. 998.

Residuary Clause—Gift Inter Vivos—Declaration of Trust.—Testator in the residuary clause of his will gave all the residue "excepting only such personal property found in his private cash box or in his box in certain bank vaults, and which he had already given to his daughter Hannah," to, etc.:—Held, that Hannah took nothing in these boxes except what was in her name, the testator not having perfected the gift in his lifetime. *Clark* v. *Clark*, 7 E. L. R. 318.

Residuary Bequest—"Personal Effects."—A will was in part as follows: "My will is first that all my just and lawful debts and funeral expenses be paid by my executors . . . and the residue of my estate real and personal which may not be required for the payment of my said just debts and funeral expenses and the expenses attending the execution of this my will and the administration of my estate I give, devise and bequeath as follows: I give, devise and bequeath absolutely to my beloved wife . . . all my furniture, books, plate and other personal effects and so long as she remains my widow but no longer I give, devise and bequeath to my said wife all my real property of which I may die possessed for her sole use and benefit so long as she may live"—and then to his children. The estate consisted of household furniture and chattels, a policy of life insurance, two parcels of real estate, and a mortgage on real estate:—Held, that the beneficial interest in the mortgage passed to the widow, under the words "other personal effects." These words occurring in a residuary gift were not to be read as restricted to things ejusdem generis with those described by the preceding words, the testator's intention being to dispose of the whole of his personal estate:—Held, also, following *Re Thomas*, 2 O. L. R. 660, that the testator's debts and funeral expenses and the expenses attending the execution of his will and the administration of his estate should be charged rateably upon his real estate and personal estate according to their respective values:—Devolution of Estates Act, R. S. O. 1897 c. 127, s. 7. *In re Way*, 24 C. L. T. 20, 6 O. L. R. 614, 2 O. W. R. 1072.

CHAPTER XXX.

LEGACIES.

DEFINITION OF LEGACY IS A GIFT OF PERSONALTY.

A legacy is a gift of personalty hy will or other testamentary instrument.

6th ed., p. 1060. *Re Gibbs* (1907), 1 Ch. 465.

There is, indeed, no magic in thc words "legacy" and "residuary legatee," and if they are so used by a testator they may no doubt be construed as referring to real estate.

PROCEEDS OF SALE OF LAND.

"Legacy" would prima facie not inclnde a bequest of the proceeds of land devised upon trust for sale. 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.

6th ed., p. 1060. *White* v. *Lake*, L. R. 6 Eq. 188; *Hodges* v. *Grant*, L. R. 4 Eq. 140.

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, thongh the person taking it is called a residuary legatee, and a direction by the testator as to his legacies prima facie applies only to legacies in the strict sense of the term, and not to shares of residue. 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.

6th ed., p. 1061. *Ward* v. *Grey*, 26 Bea. 485.

ANNUITIES ARE LEGACIES UNLESS THE TESTATOR MAKES A DISTINCTION.

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 prima facie apply to the annuities as well as to the legacies. Bnt not if the testator himself distinguished hetween them. For instance, when the testator nses 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 proportion to their several legacies, annuitants will not take under the latter bequest.

6th ed., p. 1061. *Nannock* v. *Horton*, 7 Ves. 391.

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. And the same general principles as to the construction of words showing 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. But in some respects annuities are subject to special rules.

6th ed., p. 1062. *Boughton* v. *Boughton*, 1 H. L. C. 406.

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.

6th ed., p. 1062. *Smith* v. *Pybus*, 9 Ves. 566.

No particular form of words is required for the gift of a legacy.

6th ed., p. 1062.

THREE KINDS OF LEGACIES.

Legacies are of three kinds: (1) general or pecuniary, (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.

6th ed., p. 1063.

GENERAL LEGACY.

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," or "£100 2½ per cent. Consols," or "a gold watch," these are general legacies.

6th ed., p. 1063.

SPECIFIC 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," or "my stock in the L. W. Company."

6th ed., p. 1063. *Re Ovey*, 51 L. J. Ch. 665; *Re Slater* (1907), 1 Ch. 665.

DEMONSTRATIVE 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 out of the Consols now standing in my name" is demonstrative.

6th ed., p. 1063.

PECUNIARY LEGACY.

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

6th ed., p. 1064.

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. 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.

6th ed., p. 1064. *Dickin* v. *Edwards*, 4 Ha. 273.

GENERAL LEGACY OPERATING AS APPOINTMENT.

The mere fact that a testator bequeaths a sum of money or stock to a person does not conclusively show 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.

6th ed., p. 1064. *Davies* v. *Fowler*, L. R. 16 Eq. 308.

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. But without such a direction a legacy given in lieu of a share of residue is payable out of the whole personal estate.

6th ed., p. 1064. *Sykes* v. *Sykes*, L. R. 3 Ch. 301.

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. 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.

6th ed., p. 1064.

GENERAL LEGACIES OF CHATTELS, STOCK, &c.

It has been already 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 Consols." In such a case, if the testator's estate at the time of his death does not include a chattel or sum of stock answering the description, the value must be made good out of the testator's personal estate, provided the value can be ascertained. If the value cannot be ascertained, it seems that the gift fails.

6th ed., p. 1064.

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 money or £100 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.

Jarman, p. 1006. *Bothamley* v. *Sherson*, L. R. 20 Eq. 304; *Re Ovey*, 51 L. J. Ch. 665.

DEFINITION IN ROBERTSON V. BROADBENT.

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."

6th ed., p. 1067, 8 A. C. 816.

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.

6th ed., p. 1067. *Innes* v. *Johnson*, 4 Ves. 568.

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.

6th ed., p. 1068. *Oliver* v. *Oliver*, L. R. 11 Eq. 506.

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. So a gift of property of a certain kind in a particular locality is specific. 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.

6th ed., p. 1068. *Fairer* v. *Pork*, 3 Ch. D. 309.

WHERE PERSONALTY IS EXONERATED FROM DEBTS AND LEGACIES.

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. These cases are considered in a subsequent chapter. That such a bequest is really general is shewn by the test suggested by Lord Selborne in *Robertson* v. *Broadbent*, namely, that it is subject to the rule in *Howe* v. *Lord Dartmouth*.

6th ed., p. 1069. *Robertson* v. *Broadbent*, 8 A. C. 816.

The question in 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 falls, the gift must fail with it. 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 . . . . 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.

6th ed., p. 1070. *Paget* v. *Hawk*, 1 H. & M. 663.

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.

6th ed., p. 1071.

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.

6th ed., p. 1071.

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, and on the other hand, being payable out of a specific fund, they are not liable for debts until after the general legacies have been exhausted. 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.

6th ed., p. 1071.

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.

6th ed., p. 1072.

BEQUESTS 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.

6th ed., p. 1072.

WHEN SPECIFIC.

But a legacy of money may be specific, as a bequest of the money in a certain chest, or in such a hand, or secured by certain documents. And a legacy of money out of specific money (for instance, a legacy of money out of the dividends of specific stock, or out of a mortgage or other debt) 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 to be paid out of the proceeds to A., this is a specific bequest. But if there is first a bequest of a 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. 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.

6th ed., p. 1072. *Davies* v. *Ashford*, 15 Sim. 42.

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 in the funds," or "£5000 invested in Consols," the question arises: does the testator mean the legatee to have £5000 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?

6th ed., p. 1073.

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.

6th ed., p. 1073. *Mullins* v. *Smith*, 1 Dr. & Sm. 204.

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.

6th ed., p. 1074.

If in such a case the fund realises more than the estimated amount, the surplus is undisposed of.

6th ed., p. 1074. *Smith* v. *Fitzgerald*, 3 V. & B. 2.

GIFT OF UNASCERTAINED SUM.
STATEMENT BY TESTATOR AS TO AMOUNT PAID TO LEGATEE.

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. So a testator may give a legacy equal to a sum of fluctuating amount: such as the amount of a servant's yearly wages: or a legacy of a certain amount subject to deduction: as where a testator bequeaths to A. B. a legacy of £5000, 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. 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 show that the sum paid or advanced was in fact of greater or less amount than that stated in the will. But a statement or entry made by the testator after the execution of the will, although admissible as prima facie evidence of the amount of the advances made by him, is not conclusive.

6th ed., p. 1074. *Re Taylor's Estate*, 22 Ch. D. 495.

The cases on erroneous recitals as to the amount of advances are divided by Swinfen Eady, J., in his judgment in Re Kelsey, 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 show 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 bronght into account the debt or balance thereof which is actually owing at the time of death or distribution."

(1905), 2 Ch. 465, 469.

BEQUESTS OF CHATTELS.

Legacies of chattels may be general or specific. They are the former when there is nothing to show 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. The importance of this distinction will appear when the subject of ademption is discussed.

6th ed., p. 1075.

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; and a bequest of a box will of course pass the key belonging to it; but not converso.

6th ed., p. 1076. *Re Robson* (1891), 2 Ch. 559.

LEGACY OF STOCK, SHARES, &C., PRIMA FACIE GENERAL.

A legacy of stock or of money in stock, or of bonds, or of shares is prima facie a general legacy, and it makes no difference that at the date of the will the testator had the precise amount of stock.

6th ed., p. 1076. *Robinson* v. *Addison*, 2 Bea. 515.

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.

6th ed., p. 1077. *Re Nottage* (1895), 2 Ch. 657.

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.

6th ed., p. 1077. *Ashburner* v. *Macguire*, 2 Br. C. C. 108.

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 "standing in my name."

6th ed., p. 1077.

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.

6th ed., p. 1078. *Trinder* v. *Trinder*, L. R. 1 Eq. 695.

GIFT OF "STOCK NOW STANDING IN MY NAME" SPECIFIC.

The testator's intention that the legacy shall be specific may also be shown 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.

6th ed., p. 1078. *Kermode* v. *Macdonald*, L. R. 3 Ch. 584; *Harrison* v. *Jackson*, 7 Ch. D. 339.

GIFT OF STOCK OUT OF SPECIFIC STOCK.

It should be noticed that a gift of stock out of specific stock is specific.

6th ed., p. 1078. *Morley* v. *Bird*, 3 Ves. 628.

"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, or otherwise refers to an existing investment in stock or shares.

6th ed., p. 1079. *Mullins* v. *Smith*, 1 Dr. & S. 204.

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.

6th ed., p. 1080. *Gordon* v. *Duff*, 3 D. F. & J. 662.

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.

For instance, where the company or stock has ceased to exist. In such a case the gift fails because it is impossible to determine its value.

6th ed., p. 1080. *Re Gray*, 36 Ch. D. 205.

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.

6th ed., p. 1081. *Re Gillins* (1909), 1 Ch. 345.

BEQUEST OF DEBTS, &c.

Legacies of debts, whether by simple contract or secured upon mortgages and bonds, frequently give rise to difficulties. When the gift of a legacy is so connected with a debt or security 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.

6th ed., p. 1081. *Sidebotham* v. *Watson*, 11 Ha. 170.

Legacies in their nature general given out of a debt are demonstrative, but a legacy of a part of a debt is specific.

6th ed., p. 1082.

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.

6th ed., p. 1082. *Ex parte Kirk, Re Bennett*, 5 Ch. D. 800.

BEQUESTS OF INTERESTS IN LAND.

A bequest of leaseholds is specific, 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. Similarly a gift of a rent charge or an annuity issuing out of land is an interest in the land itself and necessarily specific. But a legacy or annuity charged on land is demonstrative.

6th ed., p. 1082.

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. But it carries the right to compensation under a clause in the lease providing for its determination.

6th ed., p. 1083. *Ledger* v. *Stanton*, 2 J. & H. 687.

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.

6th ed., p. 1083.

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.

6th ed., p. 1083. *Hickling* v. *Boyer*, 3 M. & G. 635.

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.

6th ed., p. 1083. *Page* v. *Leapingwell*, 18 Ves. 463.

BEQUESTS OF PERSONAL PROPERTY IN A PARTICULAR PLACE.

It frequently happens that a testator makes a bequest of personal property which he describes with reference to its locality: for example, "the furniture in my house." In construing bequests of this kind the following general rules should be borne in mind:

6th ed., p. 1083.

EFFECT OF REMOVAL, &C.

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. The effect of such a gift with reference to changes and removals is discussed in a subsequent part of this chapter.

6th ed., p. 1084.

THINGS CONSTRUCTIVELY IN A HOUSE.

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.

6th ed., p. 1084. *Rawlinson* v. *Rawlinson*, 3 Ch. D. 302.

EJUSDEM GENERIS CONSTRUCTION.

"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.

So a bequest of goods and chattels in and about the testator's dwelling-house and outhouses at T. will pass running horses. 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, and consequently such a gift only passes things falling within the description of furniture and household goods: it therefore does not include money, or securities, or jewellery, unless the intention appears to have been to give the legatee the whole contents of the house.

6th ed., p. 1084. *Re Craven*, 100 L. T. 284; *Gibbs* v. *Lawrence*, 7 Jur. N. S. 137; *Re Miller*, 61 L. T. 365.

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.

6th ed., p. 1085. *Hare* v. *Pryce*, 11 L. T. 101; *Arnold* v. *Arnold*, 2 My. & K. 365.

CHOSES IN ACTION.

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 reference to locality.

6th ed., p. 1085. *Hertford* v. *Lowther*, 7 Bea. 1.

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) debts, (ii) where the documents representing the choses in action are described by reference to a place where they are ordinarily kept for security.

6th ed., p. 1086.

DEBTS DUE FROM PERSONS IN A PARTICULAR PLACE.

Debts due from persons resident in a particular locality will pass under a gift of property in that locality.

6th ed., p. 1086. *Nisbett* v. *Murray*, 5 Ves. 149.

Bonds of a corporation stand on the same footing as simple contract debts.

6th ed., p. 1087. *Re Clark* (1904), 1 Ch. 294.

CHOSES IN ACTION IN A PARTICULAR PLACE.

As a general rule a gift in a will of goods and chattels, or money, in a house or property in a particular locality does not pass choses in action, but if a testator gives "my property at R.'s bank," 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," 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.

6th ed., p. 1087. *Re Robson* (1891), 2 Ch. 559.

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.

6th ed., p. 1087. *Re Craven*, 100 L. T. 284.

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

6th ed., p. 1087. *Re Hunter*, 25 T. L. R. 19.

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. 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. The principle of these cases does not apply to a bequest of a specific sum of stock.

6th ed., p. 1088. *Morgan* v. *Thomas*, 6 Ch. D. 176; *Harrison* v. *Jackson*, 7 Ch. D. 339.

FAILURE OF LEGACIES.

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

6th ed., p. 1088.

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.

6th ed., p. 1088.

UNCERTAINTY.
VOID FROM ILLEGALITY.

Failure by lapse does not occur on account of anything connected with the subject of the gift, 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. Failure from uncertainty may arise either from the subject or the object of the gift being uncertain. Further, legacies may fail because the law makes them void, as, for instance, by infringing the rule against perpetuities.

6th ed., p. 1088.

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. 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.

6th ed., p. 1089. *Re Dyke*, 44 L. T. 568; *Thomas* v. *Howell*, L. R. 18 Eq. 198.

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, 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.

6th ed., p. 1089. Chap. XXIV.

INSUFFICIENCY OF ASSETS.

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

6th ed., p. 1089.

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," when I never at any time had one, fails, and a bequest of jewels in a box deposited in a certain place fails if no such box can be found. If I had one at the date of the will, and afterwards sold 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. Similarly, a general bequest of shares in a non-existent company will fail, on account of the non-existence of the subject matter.

6th ed., p. 1089.

ADEMPTION OF SPECIFIC LEGACY.

A specific legacy is adeemed 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, 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; and if part of the debt is paid or part of the stock is sold, there is ademption pro tanto. For this purpose a binding contract of sale has the same effect as an actual sale.

6th ed., p. 1090. *Durrant* v. *Friend*, 5 De G. & S. 343; *Manton* v. *Tabois*, 30 Ch. D. 92; *Watts* v. *Watts*, L. R. 17 Eq. 217.

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.

6th ed., p. 1090. *Cowper* v. *Mantell*, 22 Beav. 223.

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. 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, unless

the bequest is so expressed as to include the investments for the time being of a particular fund.

6th ed., p. 1091. *Harrison* v. *Jackson*, 7 Ch. D. 339.

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. It is obvious that in such a case no question of ademption arises.

6th ed., p. 1091. *Re Jameson* (1908), 2 Ch. 111.

SLIGHT CHANGES.

A mere nominal change in the subject of a specific gift does not cause ademption.

6th ed., p. 1091. *Oakes* v. *Oakes*, 9 Ha. 666.

SUBSTANTIAL CHANGE.

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

6th ed., p. 1091. *Re Lane*, 14 Ch. D. 856.

CONVERSION OF PROPERTY BELONGING TO A LUNATIC.

A wrongful conversion will not in general operate as an ademption. On this principle, if a person becomes insane after making his will, a conversion by his committee without the sanction of the Court, will not cause ademption.

6th ed., p. 1092. *Jenkins* v. *Jones*, L. R. 2 Eq. 323.

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.

6th ed., p. 1093. *Re Slater* (1907), 1 Ch. 665.

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 and 24 of the Wills Act, the former of which abolished the old rule that where a testator bequesthed 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. 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, or when he bequeaths his leasehold house and afterwards takes a new lease by way of renewal, 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.

6th ed., p. 1094. *Re Russell*, 10 Ch. D. 432; *Saston* v. *Saston*, 13 Ch. D. 259.

WHERE PROPERTY IS ASCERTAINED AT DEATH.
EFFECT OF SEC. 24 OF WILLS ACT.

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. This has already been discussed with reference to the effect of sec. 24 of the Wills Act on specific bequests: 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.

6th ed., p. 1095. *Re Knight*, 34 Ch. D. 518.

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, unless he keeps the term alive by having the reversion conveyed to a trustee.

6th ed., p. 1095. *Belaney* v. *Belaney*, L. R. 2 Ch. 138.

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 new investment.

6th ed., p. 1095. *Beddington* v. *Baumann* (1903), A. C. 13.

But if the property is actually made over to the testator during his lifetime, the question is more difficult. If it were

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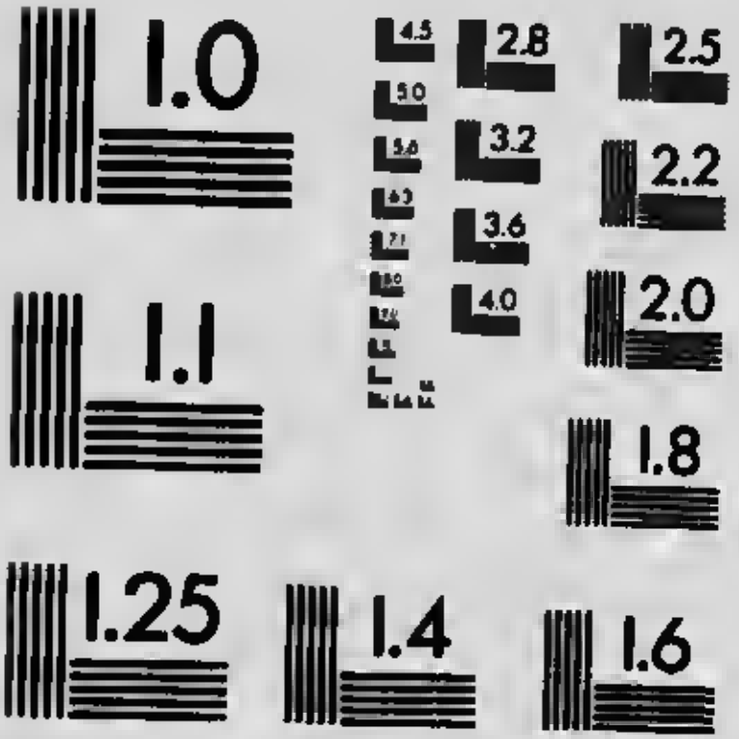

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converted into money and mixed by him with his own property, the bequest would fail, but this result does not necessarily follow if the property is preserved by him in specie, or can otherwise be traced and distinguished from his other property.

6th ed., p. 1096.

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.

6th ed., p. 1097. *Bothamley* v. *Sherson*, L. R. 20 Eq. 304.

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.

6th ed., p. 1098.

GIFT OF "FURNITURE NOW IN MY HOUSE AT A."

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.

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.

6th ed., p. 1098. *Norreys* v. *Franks*, Ir. R. 9 Eq. 18.

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. But again, the same question of falsa demonstratio arising from temporary removal may arise.

6th ed., p. 1099. *Brooke* v. *Warwick*, 2 De G. & S. 425: *Re Johnston*, 26 Ch. D. 538.

DIFFICULTIES OF CONSTRUCTION.

One difficulty lies in ascertaining to what chattels the description with reference to locality applies.

6th ed., p. 1099. *Domvile* v. *Taylor*, 32 Bea. 604.

WHETHER LOCALITY IS ESSENTIAL.

Another difficulty is that the testator frequently leaves it in doubt 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.

6th ed., p. 1099. *Colleton* v. *Garth*, 6 Sim. 19.

WHERE LOCALITY IS NOT CONTINUING 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.

6th ed., p. 1100. *Blogrove* v. *Coore*, 27 Bea. 138.

It is suggested that removal can never be a cause of ademption strictly so called.

6th ed., p. 1100.

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 apparently necessarily at the date of his will.

6th ed., p. 1102. *Re Johnston*, 26 Ch. D. 538.

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.

6th ed., p. 1102. *Selwood* v. *Mildmay*, 3 Ves. 306. (Stock in 4 P. C.)

IMMEDIATE SPECIFIC LEGACY CARRIES INCOME.

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, and also to all accretions which arise after the death. 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. Income and bonuses ascertained and made payable, but not actually paid during the testator's lifetime, belong to his estate, as capital. A similar principle seems to apply to private partnerships, except that profits derived from them are not liable to apportionment.

6th ed., p. 1103. *Barrington* v. *Tristram*, 6 Ves. 345; *Jacques* v. *Chambers*, 2 Coll. 435.

APPORTIONMENT.

Dividends and other periodical payments in the nature of income are apportionable under the Apportionment Act, 1870. 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. 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, or declares that the shares shall carry the dividend accruing thereon at his death.

6th ed., p. 1104. *Re Beaven*, 53 L. T. 245; *Re Lysaght* (1898), 1 Ch. 115.

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.

6th ed., p. 1105. *Long* v. *Gwenden*, 16 Ch. D. 691.

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. 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.

6th ed., p. 1105. *Harris* v. *Lloyd*, T. & R. 310.

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.

6th ed., p. 1106. *Watts* v. *Watts*, L. R. 17 Eq. 217.

WHERE TIME OF PAYMENT IS FIXED BY THE TESTATOR.

The general rule is that interest on legacies runs from the time when they are payable. Consequently, legacies payable at a time fixed by the testator generally carry interest from that time. The time may depend on an uncertain event, 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.

6th ed., p. 1106. *Lloyd* v. *Williams*, 2 Atk. 108; *Lord* v. *Lord*, L. R. 2 Ch. 782.

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.

6th ed., p. 1107.

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. The severance must be for some reason connected with the legacy itself, and not for mere reasons of administration.

6th ed., p. 1107. *Dundas* v. *Wolfe Murray*, 1 H. & M. 425.

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.

6th ed., p. 1107.

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, and carries interest from that date. A legacy under the will of a married woman made in exercise of a power of appointment is in the same position.

6th ed., p. 1107. *Benson* v. *Maude*, 6 Mad. 15; *Freeman* v. *Simpson*, 6 Sim. 75.

DEMONSTRATIVE LEGACY.

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

6th ed., p. 1108. *Mullins* v. *Smith*, 1 Dr. & Sm. 210.

RULE STATED BY SIR W. GRANT.

The general rule has thus been stated: "Whenever 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."

6th ed., p. 1108. *Wood* v. *Penoyre*, 13 Ves. 325.

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.

6th ed., p. 1108.

WHERE TESTATOR'S PROPERTY IS REVERSIONARY, OR LEGACY PAYABLE WHEN SPECIFIED PROPERTY HAS BEEN REALISED.

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. But it is, of course, otherwise if

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

6th ed., p. 1108. *Holmes* v. *Crispe*, 18 L. J. Ch. 439.

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.

6th ed., p. 1108.

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 of the legacy; and till the legacy is payable, there is no fund to produce interest.

6th ed., p. 1108. *Re Whittaker*, 21 Ch. D. 657.

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.

6th ed., p. 1109. *Webster* v. *Hale*, 8 Ves. 410.

LEGACIES CHARGED ON LAND.

In the case of legacies charged upon lands only, where no day of payment is fixed, interest begins to run from the death of the testator. 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, 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.

6th ed., p. 1109. *Shirt* v. *Westby*, 16 Ves. 393.

LEGACY DIRECTED TO BE PAID WITHIN 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. A 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.

6th ed., p. 1109. *Coventry* v. *Higgins*, 14 Sim. 30; *Rawlins* v. *Rawlins*, 2 Cox 425.

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.

6th ed., p. 1110. *Pickwick* v. *Gibbes*, 1 Bea. 271.

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. 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.

6th ed., p. 1110. *Re Olive*, 53 L. J. Ch. 525.

POWER TO POSTPONE PAYMENT.
LEGACY PAYABLE "WHEN REQUIRED."

Where an executor has express power to postpone the payment of legacies for a certain period, this is prima 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; 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. 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.

6th ed., p. 1111. *Varley* v. *Winn*, 2 K. & T. 700; *Fisher* v. *Brierley*, 30 Bea. 268.

INTEREST ON CONTINGENT LEGACIES.

A contingent legacy does not in general carry interest while it is in suspense. Thus a legacy to an unborn child does not

carry interest until his birth, and a legacy to a person on attaining twenty-one does not carry interest during his minority.

6th ed., p. 1111. *Re Dickson*, 29 Ch. D. 331.

GIFT TO 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.

6th ed., p. 1112. *Shawe* v. *Cunliffe*, 4 Br. C. C. 144.

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. 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. The severance must be for some reason connected with the legacy itself, and not for mere convenience of administration, or the like.

6th ed., p. 1112. *Re Judkin's Trusts*, 25 Ch. D. 743.

INCOME OF SETTLED LEGACY.

Legacies are not subject to the rule in Howe v. Earl of Dartmouth. 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.

6th ed., p. 1112. As to which see Chap. XXXIV. *Re Wilson* (1907), 1 Ch. 394.

EXCEPTIONS TO GENERAL RULES.

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, and need not be further mentioned here, but legacies to infants, to wives, to executors, to debtors, and to creditors, and to servants, all present certain special features.

6th ed., p. 1112. See Chapter IX.

INFANT'S LEGACY MAY BE PAID INTO COURT.

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. The executors cannot free the residue by setting apart investments to meet the legacy.

6th ed., p. 1113.

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, but apparently this will only be done in the case of legacies of trifling amount. An executor must not do this, 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, although the point does not seem to have been decided. It is clear that the Court can give effect to such a direction.

6th ed., p. 1113. *Walsh* v. *Walsh*, 1 Dr. 64; *Re Denekin*, 72 L. T. 220.

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.

6th ed., p. 1113. *Hearle* v. *Greenbank*, 3 Atk. 695, 716.

It is very clear that when a father gives a legacy to a child, whether it be a vested legacy or not, it will carry interest from the death of the testator as a maintenance for the child; but this will only be where no other fund is provided for such maintenance; for it is equally clear that where other funds are provided for the maintenance, then if the legacy be 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.

6th ed., p. 1113. *Inchedon* v. *Northcote*, 3 Atk. 430.

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; but a natural child is not entitled to interest from the death unless the testator has put himself in loco parentis, or unless he expressly directs that interest on the legacy shall be applied in the maintenance of the child.

6th ed., p. 1114. *Wilson* v. *Maddison*, 2 Y. & C. C. C. 372; *Lowndes* v. *Lowndes*, 15 Ves. 301.

CHILD EN VENTRE.

Where a testator bequeaths a legacy to a child of his which is en ventre sa mere at the testator's death, the child is

only entitled . interest from its birth. This would seem to follow from the fact that interest is given for maintenance.

6th ed., p. 1114. *Rawlins* v. *Rawlins*, 2 Cox 425.

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.

6th ed., p. 1114. *Re Crane* (1908), 1 Ch. 370.

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 or impliedly 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.

6th ed., p. 1114. *Re Churchill* (1909), 2 Ch. 431.

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.

6th ed., p. 1114. *Knight* v. *Knight*, 2 S. & St. 490.

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

6th ed., p. 1114. *Chambers* v. *Goldwin*, 11 Ves. 1.

ACCUMULATIONS OF SURPLUS INCOME OF CONTINGENT LEGACIES.

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. 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 accumu-

lations of the surplus income; they are added to the capital of the legacy, and he is entitled to the resulting income.

6th ed., p. 1115. *Re Bowlby* (1904), 2 Ch. 685.

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.

6th ed., p. 1116. *Martin* v. *Martin*, L. R. 1 Eq. 360.

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.

6th ed., p. 1116. *Barber* v. *Barber*, 3 My. & C. 688.

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: 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. 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.

6th ed., p. 1117.

A legacy to a wife, even if in lieu of dower or of jointure, is in the same position as any other legacy.

6th ed., p. 1117. *Re Percy*, 34 Ch. D. 616.

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

6th ed., p. 1117. *Heath* v. *Dendy*, 1 Russ. 543.

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.

6th ed., p. 1117. *Blower* v. *Morret*, 2 Ves. Sen. 420.

A legacy to an executor as such does not, as a general rule, carry interest before he proves the will or (to be quite accurate) before the time when he assumes the office and duties of an executor. From the fact that an infant cannot act as an executor, a legacy to an infant executor does not carry interest during his minority.

6th ed., p. 1118. *Hollingsworth* v. *Grasett*, 15 Sim. 52.

Legacies to executors for their trouble have no priority.

6th ed., p. 1118. *Duncan* v. *Watts*, 16 Bea. 204.

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, 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.

6th ed., p. 1118. *Clark* v. *Sewell*, 3 Atk. 96.

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, unless the bequest is so worded as to comprise arrears of interest on the debts.

6th ed., p. 1118. *Ar* v. *Gregory*, 6 Ves. 151.

LEGACY OF A DEBT.

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.

6th ed., p. 1119.

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.

6th ed., p. 1119. *Findlater* v. *Lowe* (1904), 1 Ir. R. 519.

APPOINTMENT OF DEBTOR EXECUTOR.

If a testator appoints his debtor to be his executor, this extinguishes the debt at law, and, although it does not extinguish the debt in equity, evidence is admissible to prove that the testator intended to forgive or release it.

6th ed., p. 1119. *Re Bourne* (1906), 1 Ch. 697; *Strong* v. *Bird*, L. R. 18 Eq. 315.

LEGACIES TO SERVANTS.

A gift by a testator to his servants without name 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, but a gift to servants who 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, and the testator may, of course, indicate that he means those in his service at the date of his death or the date of his will and his death.

6th ed., p. 1119. *Parker* v. *Marchant*, 1 Y. & C. C. C. 290; *Re Sharland* (1896), 1 Ch. 517.

Previous dismissal, though wrongful, or even voluntary retirement intercepts the gift. But a temporary absence from actual service at the time of the testator's death will not disentitle a servant from the benefit of a legacy.

6th ed., p. 1120. *Re Serre's Estate*, 31 L. J. Ch. 519; *Herbert* v. *Reid*, 16 Ves. 481.

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.

6th ed., p. 1120. *Blackwell* v. *Pennant*, 9 Hare. 551.

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.

6th ed., p. 1120.

DOUBLE LEGACIES.

It not infrequently occurs that more than one legacy is given to a legatee, 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.

6th ed., p. 1120. *Burkinshaw* v. *Hodge*, 22 W. R. 484.

HOOLEY v. HATTON. FOUR CASES OF DOUBLE LEGACIES.

In the leading case of Hooley v. Hatton, 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 totiden verbis, or only with a small difference; but where in different writings there is a bequest of equal, greater, or less sum it is an augmentation.

6th ed., p. 1121. *Hooley* v. *Hatton*, 1 Br. C. C. C. 390n.

WHETHER TESTAMENTARY WRITINGS FORM ONE INSTSUMENT 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 Prohate. Thus, where prohate of a will and testamentary papers as containing together the testator's will was granted, they must all he construed together. And conversely, if prohate is granted of a will and codicil, this proves that the writings are distinct instruments.

6th ed., p. 1121. *Fraser* v. *Byng*, 1 R. & M. 9.

DOUBLE GIFT OF A SPECIFIC OBJECT.

Evidently a gift of the same specific thing twice over to a legatee can only he one gift if 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. Leaving this case aside, we have to consider the cases where the legacies are or are not given by the same instrument.

6th ed., p. 1121.

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 (suhject 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 thcy 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.

6th ed., p. 1122. *Kirkpatrick* v. *Bedford*, 4 App. Css. 96.

LEGACIES OF THE SAME AMOUNT.

With regard to legacies of the same amount given hy 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 rehut the presumption afforded hy the rule.

6th ed., p. 1122. *Brine* v. *Ferrier*, 7 Sim. 549; *Early* v. *Benbow*, 2 Coll. 342.

Annuities are in the same position as legacies.

6th ed., p. 1123. *Holford* v. *Wood*, 4 Ves. 76.

LEGACIES OF DIFFERENT AMOUNTS.

The other part of the rule, that if the legacies given hy the same instrument are of unequal amount (whether the latter is greater or less than the former), they are cumulative, is also clearly estahlished hy authority.

6th ed., p. 1123.

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. The same rule applies to annuities. The rule yields to indications of the testator's intention.

6th ed., p. 1123. *Curry* v. *Pile*, 2 Br. C. C. 225; *Hartley* v. *Ostler*, 22 Bea. 449.

LEGACIES GIVEN BY DIFFERENT INSTRUMENTS ARE PRIMA FACIE CUMULATIVE.

Where the legacies are given by different instruments they are prima facie cumulative.

6th ed., p. 1123. *Hurst* v. *Beach*, 5 Madd. 358.

EXCEPTION WHERE THE SAME MOTIVE FOR THE GIFT IS EXPRESSED.

There is an exception to the general rule, namely, where the same gift is given and for the same expressed motive.

6th ed., p. 1124. *Suisse* v. *Lowther*, 2 Ha. 424.

DIFFERENT AMOUNTS.

If the amounts of the legacies are different, though the motive be the same, they are prima facie cumulative.

6th ed., p. 1125. *Hurst* v. *Beach*, 5 Madd. 351.

INDICATIONS OF THE TESTATOR'S INTENTION.

There are no limitations to the way in which the testator may show his intention that the legacies are to be substitutional, and slight indications are often taken hold of to show an intention against double legacies. Thus if each bequest is of £1000 and a particular picture, or if the original bequest is imperfectly expressed and the second bequest appears to be explanatory, the second bequest will be taken to be substitutional.

6th ed., p. 1125. *Currie* v. *Pye*, 17 Ves. 462; *Fraser* v. *Byng*, 1 R. & M. 90.

As a general rule a difference in the manner in which two legacies are given indicates an intention that they are to be cumulative.

6th ed., p. 1126. *Hodges* v. *Peacock*, 3 Ves. 735.

On the whole, however, the tendency of judicial opinion is to act on the general rule, that gifts by different instruments are prima facie cumulative, and to discourage attempts to fritter it away by a mere balance of probabilities.

6th ed., p. 1126. *Wilson* v. *O'Leary*, L. R. 7 Ch. 448.

PROBATE.

In strictness, an instrument for which another has been substituted should not be admitted to probate.

6th ed., p. 1126. *Chichester* v. *Quatrefages* (1895), P. 186.

SUBSTITUTION AND REVOCATION.

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. If the testator intends to completely 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.

6th ed., p. 1127. *Tuckey* v. *Henderson*, 33 Bea. 174.

The question whether extrinsic evidence is admissible to prove that two legacies are or are not intended to be cumulative, is discussed elsewhere.

6th ed., p. 1127. Chap. XV.

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; and the same construction prevails where the legacy by codicil is expressed to be in addition to, or in substitution for, 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.

6th ed., p. 1128. *Day* v. *Croft*, 4 Beav. 561; *Cooper* v. *Day*, 3 Mer. 154.

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.

6th ed., p. 1128.

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, 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.

6th ed., p. 1130. *Burrows* v. *Cottrell*, 3 Sim. 375.

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 persons.

6th ed., p. 1130. *Re Joseph* (1908), 2 Ch. 507.

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. Under sec. 21 of the Legacy Duty Act, legacy duty is not payable upon the bequest of the duty.

6th ed., p. 1131. *Farrer* v. *St. Catharine's College*, L. R. 16 Eq. 19.

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, to make payment of all the legacies without any deduction; or to pay the annuities and legacies clear of property tax and all expenses whatever attending the same; or free from any charge or liability in respect thereof, although in the same will there was a bequest free from any duty, or where the legacies were to be paid clear of all taxes and outgoings, free of all expense, or "free from duty."

6th ed., p. 1131.

PROCEEDS OF REALTY.

A direction to pay legacies free of duty will not generally include the proceeds of realty directed to be sold; but probably would include legacies payable out of such proceeds.

6th ed., p. 1131. *White* v. *Lake*, L. R. 6 Eq. 188.

And generally it would seem that a gift of a "clear" sum of annuity involves an exemption from duty. But a legacy of a "full" amount does not carry exemption from duty if the word "full" refers to other possible deductions.

6th ed., p. 1132. *Re Coxwell's Trusts* (1910), 1 Ch. 63; *Re Marcus*, 56 L. J. Ch. 830.

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 the codicil, even though the codicil is directed to be taken as part of the will; secus where legacies generally are given duty free.

6th ed., p. 1132. *Jauncey* v. *Atty.-Gen.*, 3 Giff. 308; *Re Sealy*, 85 L. T. 451.

Similarly, the following expressions have been held to exempt annuitants from the payment of legacy duty: "clear of all deductions whatsoever"; "without any deduction or abatement out of the same on any account or pretence whatsoever"; "clear of all taxes and deductions whatsoever."

6th ed., p. 1132.

SETTLEMENT ESTATE DUTY.

Under sec. 19 of the Finance Act, 1896, "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 or personalty is not a testamentary expense.

6th ed., p. 1133. *Re King* (1904), 1 Ch. 363.

INCOME TAX.

When an annuity is given without words showing that it is to be paid free of income tax, the annuitant must bear the tax, for the tax is a charge on the person, and such expressions as "to be paid without any deduction," or "free from legacy duty and other deductions," are not sufficient to exempt the annuitant from the tax unless the testator has shown elsewhere that he considers income tax to be a deduction.

6th ed., p. 1134. *Turner* v. *Mullineux*, 1 J. & H. 334.

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.

6th ed., p. 1134. *Gleadow* v. *Leatham*, 22 Ch. D. 269.

Legacy—Interest—Gift to Son on Attaining Twenty-five—Share of Residue—Interest by Way of Maintenance.—A testator bequeathed to his son a legacy on his attaining twenty-five and a further legacy on his attaining thirty, and also gave him a share of residue which was to be settled on the son for life with remainder to his children. Held, that the legacies did not carry interest even up to the age of twenty-one.

Abrahams, In re, Abrahams v. *Bendon*, 80 L. J. Ch. 83; (1911), 1 Ch. 108; 103 L. T. 532; 55 S. J. 46.

A bequest of a share of residue does not amount to such a provision for maintenance as will displace the general rule that a contingent legacy given by a parent to an infant child carries interest. *Moody, In re, Woodroffe* v. *Moody* (65 L. J. Ch. 174; (1895), 1 Ch. 101), followed. Ib.

A legacy to an infant legatee to whom the testator stands in loco parentis, where the legacy is contingent on events having no relation to his infancy, does not carry interest. Ib.

Shares—Ademption.—Where a testator bequeaths "twenty-three of the shares belonging to me" in a certain company, and such shares are between the dates of the will and the testator's death and on the occasion of the amalgamation of that company with another similar, subdivided into four shares each, the bequest will, in the absence of a contrary intention, pass ninety-two of such subdivided shares, provided it be possible to identify the ninety-two shares as the equivalent in all but name and form of the original twenty-three shares.

Clifford, In re Mallam v. *McFie* (1912), 1 Ch. 29.

Shares—Ademption.—A specific bequest of ten shares in a company is not adeemed by the fact that, after the date of the will, the company has been wound up, reconstructed, and incorporated under the

same name, the ten shares being represented by a greater number of shares in the new company.

Leeming, In re, Turner v. *Leeming* (1912), 1 Ch. 828.

Legacies Payable Out of Personalty.—Where there is a direction that the executors shall pay the testator's debts, followed by a gift of all his real estate to them, either beneficially or on trust, all the debts will be payable out of all the estate so given to them. *Re Bailey*, 12 Ch. D. 268. *Totten* v. *Totten*, 20 O. R. at 509.

Implied Charge on Land.—A testator after devising certain pecuniary legacies and a home to two of his children until they came of age, provided as follows: "And I will and bequeath unto my daughter C.J., all my real estate and the remainder of my personal estate after the above legacies are paid:" Held, that the legacies were charged upon the real estate. *Johnston* v. *Denman*, 18 O. R. 66.

Direction to Devisee to Pay.—Where a testator gives real estate to one, whom he directs to pay a legatee named in the will a sum of money, and the devisee accepts the devise, he takes the premises on the condition that he pays the legatee; and the land is in his hands subject to this burden, and liable for the fulfilment of the obligation. In this manner the legatee obtains a charge on the realty claimed by the devisee, which the legatee can enforce in this Court. *Robson* v. *Jardine*, 22 Chy. 420. *Gray* v. *Richmond*, 22 O. R. 260.

The testator made provision for payment of the legacies out of the annual produce of the farm. The charge of the legacies is a direct and specific one on a particular part of the testator's property,—the annual proceeds of the farms devised to Margaret Doyle,—and although the devise and bequest to her is not in terms made subject to the charge, it is nevertheless subject to it, and the charge is to be treated as an exception out of it. *Callaghan* v. *Howell*, 29 O. R. 336, 337.

Mixed Fund.—The legacies are charged on the land. The mixed residue of real and personal estate is given to D. P. and he is directed to pay the legacies to the legatees, which is part of the disposal thereof in the first part of the will. It amounts to a direction to pay the legacies out of the mixed residue. *Young* v. *Purvis*, 11 O. R. 599.

If there is a general gift of legacies and then the testator gives the rest and residue of his property real and personal, the legacies are to come out of the realty. It is considered that the whole is one mass; that part of that mass is represented by legacies and that which is afterwards given is given minus what has been before given and therefore given subject to the prior gift. *Greville* v. *Browne* (1859), 7 H. L. C. 689.

There is no blended fund; there is a gift to the widow of the residuary personal estate, expressly after payment of legacies, thus pointing out the particular fund intended by the testator for their payment, followed, in a separate clause, by a direction that the undisposed of real estate, that is to say, the real estate not specifically devised, is to be sold and the proceeds divided amongst sons and daughters then living.

"I give to my wife all the moneys that remain after paying my former bequeaths, debts, and funeral expenses, and all that may accrue from the farm during her term of management, to dispose of as she pleases, but if she should die without disposing then I order that the undisposed part be divided among my sons and daughters then living. I order my executors to sell my undisposed real estate and divide it equally amongst my children then living." Held, there had not been created a blended fund so as to make applicable *Greville* v. *Browne*, supra. *Re Bailey*, 6 O. L. R. 688, 689.

Mixed Fund.—A testator after directing that his funeral charges and debts should be paid by his executor, disposed of his real and personal estate as follows: First, he gave and bequeathed certain legacies "to be paid out of my estate," and then he gave the residue and remainder of his estate, real and personal, to his son W, absolutely and he nominated W. sole executor. Held, that the legacies were, by the will, charged upon the estate, real and personal, and failing personal estate became a charge on the land. *Moore* v. *Mellish*, 3 O. R. 174.

Legacies Payable Firstly, Secondly, Etc.—The use of words directing a legacy to be paid "immediately," or "in the first place," or "out of the first moneys, etc." or within a brief specified time after the testator's decease, is no evidence of an intention to give priority. *Thwaites* v. *Foreman*, 1 *Coll*, 409. *Lindsay* v. *Waldbrook*, 24 A. R. 611.

Mere general words are insufficient to raise a case of election against a legatee or devisee: *Gibson* v. *Gibson*, 1 Drew. 42. *King* v. *Yorston*, 27 O. R. 4.

Demonstrative Legacy.—This expression directing that the legacies shall be paid by the executors from out of the two-thirds destined for Simpson appears to me to signify that the legacies were in effect a charge upon the two-thirds, to be paid thereout.

The use of the word "residue" is not necessarily decisive, for that may be explained by the context of the will. See *Baker* v. *Farmer*, L. R. 3 Ch. 537. *Re Dunn*, 7 O. L. R. 566.

Legacy and Maintenance.—The personal estate turned out insufficient to pay legacies. Held, that a $2,000 legacy and a legacy for maintenance must abate proportionately. *Cook* v. *Noble*, 12 O. R. 81.

Postponed Legacies.—A legacy payable at a future day carries interest only from the time fixed for its payment. On the other hand, where no time for payment is fixed, the legacy is payable at, and therefore bears interest from, the end of the year after the testator's death, even though it be expressly made payable out of a particular fund which is not got in until after a longer interval. *Lord* v. *Lord* (1867), L. R. 2 Ch. 782. *Re Scadding*, 4 O. L. R. 635.

Cumulative Legacies.—Where two legacies of quantity of equal amount are bequeathed to the same legatee in one instrument, there the second bequest is considered a repetition, and the legatee shall be entitled to only one legacy.

One legacy is a charge on the land, the other is not; one is payable during life or widowhood; the other during life. One is in lieu of dower, the other not. One is given as an entire sum of $150 per annum; the other in three sums of $50 each. The sons give no security for the one—they do for the other. The land is to be sold subject to the one; the other is to be payable by the legatees of a portion of the proceeds of the sale, and therefore after the one is provided for. One is to be paid as the legatee may need it quarterly or half-yearly. There is no such provision with regard to the other.

In all these respects there is so much difference between the legacies that the latter, if the last three are to be deemed one, cannot be considered a repetition of the former. *Edwards* v. *Pearson*, 4 O. R. 516, 517.

Substitutional.—Where the bequests or devises to the same individual are by different instruments, e.g., by will and codicil, the presumption is, that they are cumulative; and more especially where they are not ejusdem generis, as a gift of maintenance by will, and a town lot by codicil: *Baby* v. *Miller*, 1 Er. & Ap. 218; or as in this case money by will, for life, and land in fee by codicil.

But the rules observed in construing such gifts are only to be applied when the intention is doubtful; where the intention is plain the rules are discarded. There can be no doubt here as to the testator's intention. He gives to Emily and her heirs by the codicil the share or division of the estate, referred to in the will, in land, instead of in money as given by the will.

Additional and substitutional legacies on the same footing in regard to being subject to the same conditions as the previous gift, which he limits to conditions in respect to vesting, separate estate, the fund out of which it is payable, and freedom from legacy duty. He says it is not quite clear whether they will be subject to the same executory gifts over as the original gift; it seems, however, that they will not. *Scott* v. *Gohn*, 4 O. R. 460, 463.

Abatement.—An annuity not payable out of corpus, and a pecuniary legacy abate rateably. *Wilson* v. *Dalton*, 22 Chy. 160.

Direction to Sell.—A testatrix by her will directed that a legacy should be paid out of the proceeds of the sale of lands, and that the lands should be sold at any time within two years after her death:—Held, that interest upon the legacy should be allowed from the day when the two years expired; or, if the lands were sooner sold, from the date of sale. *Re Robinson, McDonell* v. *Robinson*, 22 O. R. 438.

Where land was directed to be sold within three years from the testator's death, it was held that legacies bore interest from the date when the lands should have been sold. *McMylor* v. *Lynch*, 24 O. R. 632.

Indemnity.—By an agreement entered into between the executors of an estate in Lower Canada, and the residuary legatees, the former agreed to settle a particular legacy, and indemnify the residuary legatees from it. According to the laws of that Province, interest is not recoverable upon legacy until suit brought therefor, without an express promise; and the legatee referred to sued there for the legacy, alleging an express promise by both executors and residuary legatees to pay such interest, in which action the executors denied such promise, and got a verdict, but the residuary legatees allowed judgment by default, and afterwards filed a bill in the Court of Chancery to compel the executors to indemnify them against the liability they had incurred. The Court, under the circumstances, dismissed the bill with costs. *Crooks* v. *Torrance*, 8 Chy. 220.

Maintenance.—A testator bequeathed $4.000 to his grandson, payable on his attaining twenty-one, and in case of his death before that period the amount was to revert to the residuary estate, and it had been decided, 25 Chy. 253, that in the events that had happened the grandson was absolutely entitled to one-half of the residuary estate, the income of which was amply sufficient for his maintenance:—Held, that although the testator had been in *loco parentis* to the infant, the infant was not entitled to claim interest on the legacy for his maintenance; but that being entitled to one-half of the residue as next of kin, and there being a quasi intestacy as to the interest on the legacy, one-half of it should be paid into Court to the credit of the infant; the legacy itself to be paid into Court upon the trusts of the will. *Rees* v. *Fraser*, 26 Chy. 233.

Recovery Back — Interest on Overpayments — Account. — Where a testator bequeathed a legacy to be paid by the devisee of certain lands, through the executor, in twenty semi-annual instalments, with interest at the rate of six per cent., payable at the time of each instalment on the amount of such payment, to be computed from the time of his decease; and, by mutual error, interest was paid with each instalment upon the whole amount of principal then remaining unpaid, which payments of interest were consumed by the legatee as income, while he invested the instalments of principal, and the legatee now brought this action against the executor and devisee claiming an instalment as still due, the defendants alleging that he had been overpaid, and asking an account:—Held, that the overpayments were made under a mistake of fact, and might be recovered or set off; but, that an account should be taken, and that all the payments made should be brought into account and applied, but without addition of interest, to the aggregate of the amounts properly due and payable under the will, and any balance due to the plaintiff ascertained. *Corham* v. *Kingston*, 17 O. R. 432, specially referred to. *Barber* v. *Clark*, 20 O. R. 522, 18 A. R. 435.

Mixed Fund——Interest.—A testator, after directing payment of his debts out of his personal property, or if that should prove insufficient, then, that so much of his real estate as would supply the deficiency might be sold for that purpose, went on to direct that his land should be sold, and the income of the capital arising from the sale be paid yearly to his

wife, for her maintenance during her natural life, after which he gave a number of charitable bequests and pecuniary legacies, but made no residuary gift:—Held, that the testator had created a mixed fund to answer the purposes of his will, and if the personalty was not sufficient for the payment of the debts, the legacies were payable out of the land if it was sufficient, they were payable out of the mixed fund; but so far as the charitable bequests were payable out of the land they were void.

Held, also, that interest was payable on the legacies from a year after the testator's death, in accordance with the general rule, in any event; and this, although as the whole interest of the proceeds of the land was given to the wife, for life, the capital had to be kept invested by the executors; and, consequently, there was no fund for the payment of legacies until her death. *Toomey* v. *Tracey*, 4 O. R. 708.

Death of Legatee.—Where no letters of administration had been taken out, and a legatee was entitled to a very small sum, an order was made for payment of the amount to the solicitor of the legatee, without letters of administration, he undertaking to apply it as intended. *Ross* v. *Ross*, 1 Ch. Ch. 27.

Deduction of Debt.—A testator bequeathed, "unto my sister M. J. such sum as will, together with what shall be at her credit in my books at Montreal, make $6,000." At the time of the making of the will there was $3,258.42 at M. J.'s credit, but subsequently the testator disposed of his business, and as part of the arrangement placed an additional sum of $2,000 to M. J.'s credit, making the whole sum at her credit $5,258.42; of this sum, $3,000 was placed on a special account at interest, $2,000 was agreed to be paid to her by the purchasers, and the balance $258.42, was paid in cash, and her account balanced in the books, leaving nothing at her credit:—Held, that M. J.'s legacy was to be reduced by the amount of testator's debt to her at the time of his death; that what had taken place amounted to payment of the debt; and that she was entitled to the legacy of $6,000. *Wilkes* v. *Wilkes*, 1 O. R. 131.

Legacy Paid under Invalid Will.—The plaintiff as executor of one W., having paid money to defendant as a legatee under the will, and the will with the probate having been afterwards set aside by a decree of the Court of Chancery, the plaintiff was held entitled to recover back the money. *Haldan* v. *Beatty*, 40 U. C. R. 110.

Overpayment.—Held, in this case that although the sums overpaid to some of the legatees had been so paid with the sanction of the Court, but in a suit in which infants now claiming were not properly represented, that did not relieve the parties to whom such payments were made from refunding the amount, but under the circumstances the order for payment should arrange the mode thereof so as to be as little burdensome as should appear to be consistent with justice to the parties entitled to receive the money. *Anderson* v. *Ball*, 8 A. R. 531.

Payment by Owner of Charged Land.—A testator, who died in 1820, devised his farm to trustees in trust to pay certain legacies, and divide the residue amongst his three sons. The trustees refused to act, and the eldest son, in consequence, on coming of age in 1823, sold portions of the land and applied the proceeds, or part of them, towards paying the legacies. After his death the surviving trustee executed a conveyance of the whole farm to the two surviving sons from misunderstanding the nature of the deed presented to him for execution. The two sons then sold what remained of the farm, and brought ejectment against the plaintiff, who had the parcels sold by the eldest son during his lifetime. The Court restrained this action, declared the plaintiff entitled, as far as might be necessary for his protection, to stand in the place of the eldest son in regard to his undivided third of the whole property, and to his charge, for two-thirds of the legacies he had paid, on his brothers' undivided two-thirds of the estate, and decreed a partition and other inquiries to give effect to such declaration. *Hiscott* v. *Berringer*, 4 Chy. 296.

Administration Action — Parties. — Legatees are not necessary parties defendant in an administration suit. *Harrison* v. *Shaw*, 2 Ch. Ch. 44.

In a suit by a residuary legatee for the administration of an estate, the plaintiff represents all the residuary legatees; and the other residuary legatees are not entitled, as of course, to charge the general estate with the costs of appearing by another solicitor in the Master's office. To entitle them to such costs, some sufficient reason must be shown for their being represented by a separate solicitor. *Gorham* v. *Gorham*, 17 Chy. 386.

Admission of Assets.—Payment of a legacy in full is a prima facie admission of assets to pay all the legacies in full, because, if the assets are not sufficient for this purpose, all the legacies must abate in proportion; but it is open to explanation.

When an executor pays some legacies, and makes provision for the others, he has not conclusively admitted assets, because the provision which was made for the unpaid legacies must abate in proportion, but it is open to explanation. *Coleman* v. *Whitehead*, 3 Chy. 227.

Assent of Executor.—The assent of an executor to a legacy may be by implication as well as by express words, and in this case it was held to be sufficiently shewn by his conduct. *Honsberger* v. *Honsberger*, 5 O. S. 479.

In ejectment it appeared that C. died in 1851 intestate, seised of an unexpired term of years in the land, and leaving an only son, M., who remained in possession, and on his death, in 1857, devised it to his uncle, J. D., for his life, and then to the plaintiff, the testator's child. M. D., another uncle of the testator, was appointed executor. He saw J. D. in possession after M.'s death, and was himself living on the place, but in 1858, he, as executor, conveyed the term to one F.; and afterwards, in 1860, J. D. administered to C.'s estate, and as such administrator assigned his interest also to F. under whom defendant claimed. The Court being left to draw the same inferences as a jury, and the defendant's claim appearing to be dishonest:—Held, that the plaintiff must succeed; that on the death of C., her only child, M., remaining in possession, became entitled, so that J. D.'s deed as administrator conveyed nothing; that there was sufficient evidence to infer an assent by M.'s executor to the bequest to J. D., which would extend to the subsequent devise to the plaintiff; and that his conveyance as executor was therefore inoperative. *Teahon* v. *Leamy*, 21 U. C. R. 216.

Release.—J. B. being the owner of certain land, by his will, gave his son, M. B., a legacy of $150 and charged it on the land, which he devised to his son W. B., an infant; with a provision that his son J. B. should occupy it during the minority of W. B. and pay the legacy. The land was so occupied and the legacy paid, and a receipt for its payment taken. W. B. subsequently sold the land to T. B., and T. B. sold it to J. C., who retained $150 of the purchase money because the legacy was not released; but by an agreement agreed to pay T. B. the $150 as soon as he should furnish a release duly executed by M. B. The right to receive the $150 under this agreement and any right he had to obtain this release was assigned by T. B. to M. K. M. K. having tendered a release for execution to T. B. who declined to execute it, brought a suit to compel him so to do:—Held, that, although the plaintiff was entitled to a judgment declaring that the legacy was paid, which might be registered, still as the defendant had done no wrong, and had given a receipt for the legacy when it was paid, he was not compellable to sign anything else, and should not be punished by being ordered to pay the costs for not doing that which he was not bound in law to do. The purchaser should not have objected to the title on account of the legacy if there was proof of its being paid. *Kaiser* v. *Boynton*, 7 O. R. 143.

Bequests by Instalments followed by provision that in case of death of legatee without issue surviving, the unpaid part of legacy should form part of residuary estate, but, in case of issue, issue to take. The effect is to prevent legatees from taking vested indefeasible interests in the instalments until due. *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 303; *In re Schnadhorst* (1902), 2 Ch. 234; *Saunders* v. *Vautier*, 4 Beav. 115; *Wharton* v. *Masterman* (1895), A. C. 186; *Re Shore*, 1 O. W. R. 586.

Demonstrative Legacy—Reversionary Fund—Interest.—A demonstrative legacy directed to be paid out of a reversionary fund affords no exception to the general rule that, where no time is fixed for payment, a legacy carries interest from the expiration of twelve months from the testator's death. *Walford, In re Kenyon* v. *Walford*, 81 L. J. Ch. 128, (1912), 1 Ch. 219, 105 L. T. 739. Affirmed, 56 S. J. 631, H. L.

Legacies — Accumulation. — Where a legacy is directed to accumulate for a certain period or where the payment is postponed the legatee if he has an absolute indefeasible interest in the legacy is not bound to wait until the expiration of that period but may require payment the moment he is competent to give a valid discharge. *Saunders* v. *Vautier*, 14 Beav. 115, extended to charities. *Wharton* v. *Masterman* (1895), A. C. 186; *Re Youart*, 10 O. W. R. 373.

Unpaid Legatee — Contribution by Other Legatees.—Legatees entitled to a share of the residue of an estate are not bound by the accounts and proceedings in an administration action, instituted by other residuary legatees, in which they have not been added as parties, and of which they have received no notice. The judgment for administration in such an action, however, enures to their benefit and makes a fresh starting point in their favour as against the defence of the Statute of Limitations. In the absence of reasonable efforts by the executors of an estate to discover the whereabouts of certain persons entitled to share in the residue, other persons who have received a share of the residue must refund, for the benefit of the persons whose claims have been ignored, the amount received in excess of the sum payable if the division had been properly made. *Uffner* v. *Lewis, Boys' Home* v. *Lewis* 27 A. R. 242.

As to Cumulative Legacies.—See *Re Church*, 8 O. W. R. 228.

"I am unable to find in the language of the testator any such internal evidence though I have not the slightest doubt that the construction which I am bound to place upon the words which he has used to express his intention is not in accordance with his real wishes."

Interest cannot be allowed before the time at which by direction of the testator there would be a fund out of which the legacies could be paid *Re Scadding*, 4 O. L. R. 632; *Re Sweazey*, 2 O. W. R. 359.

CHAPTER XXXI.*

ANNUITIES AND RENT CHARGES.

DEFINITION.

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; 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.

Bignold v. *Giles*, 4 Drew. 343.

INDIRECT BEQUEST OF ANNUITY.

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 (say) 100*l.* a year for the benefit of A., that is prima 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.

6th ed., p. 1135. *Baker* v. *Baker*, 6 H. L. C. 616.

ANNUITIES, HOW FAR LEGACIES.

For most purposes, annuities given by will are legacies; 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.

6th ed., p. 1136.

ANNUITIES USUALLY INCLUDED IN A CHARGE OF LEGACIES.

Under a charge of legacies, annuities will generally be included, unless the testator manifest an intention to distinguish them, as by sometimes using both words.

6th ed., p. 1136. *Heath* v. *Weston*, 3 D. M. & G. 601.

TENANT FOR LIFE AND REMAINDERMAN.

Where a testator gives his residnary estate upon trust for persons in succession, there is a practical difference between legacies and annuities, for the former, as between the tenant

* This chapter is new in the 6th edition.

for life and the remainder-man, are payable out of capital, and the latter out of income.

6th ed., p. 1136.

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.

6th ed., p. 1136.

Thus, two annuities of equal amount in the same will to the same person are prima facie not cumulative. But two annuities of equal amount to the same person, one given by will, the other by codicil, are prima facie cumulative. And where several annuities of different amounts are given to the same person by the same will, they are prima facie cumulative.

6th ed., p. 1136. *Hartley* v. *Ostler*, 22 Bea. 449.

ADEMPTION OF SPECIFIC ANNUITY.
RATEABLE ABATEMENT OF ANNUITIES AND LEGACIES.

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.

6th ed., p. 1137. *Butler* v. *Huddlestone*, 3 Mac. & G. 513.

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, 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.

6th ed., p. 1137. *Wroughton* v. *Colquhoun*, 1 De G. & Sm. 357.

WHERE ANNUITY DETERMINABLE.

Sometimes an annuity is given subject to a restraint on anticipation, or to a provision for cesser or forfeiture in certain contingencies.

6th ed., p. 1137.

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. But this seems contrary to principle, and is certainly contrary to precedent.

6th ed., p. 1137. *Re Ross* (1900), 1 Ch. 162.

How Value of an Annuity is Calculated.

Where annuities are given out of and charged on a fund which is insufficient, and in consequence of the deficiency the annuities have to abate, the question arises how the value of the annuities are to be calculated. The rules are laid down by Sir John Romilly, M.R., in Todd v. Bielby, as follows: (1) If all the annuitants are alive, the fund is divided in proportion to the actuarial or market value of the annuities. (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 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.

6th ed., pp. 1137-38. *Todd* v. *Bielby*, 27 Bea. 358.

Prima Facie for Life.

A gift of 100*l.* to A. is unambiguous, but a gift of an annuity of 10*l.* to A. is prima facie capable of two constructions: (1) that the annuity only endures during the life of A.; (2) that it is perpetual.

6th ed., p. 1138.

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. 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. 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.

Jarman, p. 1138. *Blight* v. *Hartnoll*, 19 Ch. D. 294.

But if the gift is expressly one of an annuity, the fact that it is secured by a fund, or payable out of the income of a fund or the rentals of land, does not make it perpetual, unless the testator shows an intention to dispose of the whole fund.

6th ed., p. 1138. *Re Morgan* (1893), 3 Ch. 222; *Re Taber*, 46 L. T 805.

SURVIVORSHIP.

It has been held (following apparently the analogy of gifts of life interests in personalty) that the gift of an annuity to A. and B. during their lives is a gift to them and the survivor of them; 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. And a gift of £30 each, yearly, so long as A. and B. should live, is a gift of separate annuities of £30 to each of A. and B. for their lives.

6th ed., p. 1139. *Alder* v. *Lawless*, 32 Bea. 72; *Lill* v. *Lill*, 23 Bea. 446.

ANNUITIES FOR MAINTENANCE.

If an annuity is given to several persons for their maintenance and education, it clearly will not extend beyond their lives; hut as maintenance and education are not necessarily confined to minority, an annuity given for such purposes is for life, and not limited to minority.

6th ed., p. 1140. *Wilkins* v. *Jodrell*, 13 Ch. D. 564.

ANIMALS.

If a testator hequeaths an annuity to a person for his life so long as certain animals helonging 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, and it would seem on principle that unless it were expended for that purpose, there would be a resulting trust for the testator's estate.

6th ed., p. 1140. *Hicks* v. *Ross*, L. R. 14 Eq. 141.

It has never been douhted 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.

Jarman, p. 1141. *Re Ord*, 12 Ch. D. 22.

DETERMINABLE ANNUITY.

An annuity may he determinable, as where it is given to a person for life until alienation, followed hy a gift over; or to a person so long as he has not an income exceeding a certain sum; or to a woman while unmarried or during widowhood, or so long as she and her son live together. So an annuity given out of the yearly rents of leaseholds comes to an end when the lease expires.

6th ed., p. 1141. *Re Hedges' Trust Estate*, L. R. 18 Eq. 419; *Re Howard* (1901), 1 Ch. 412; *Sutcliffe* v. *Richardson*, L. R. 13 Eq. 606.

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; in fact, such a gift seems equivalent to an annuity to trustees for their trouble, and the trustees do not lose their annuity in such a case by employing a person to collect the rents, and the annuity does not necessarily cease by reason of a suit for administration.

6th ed., p. 1142. *Hull* v. *Christian*, L. R. 17 Eq. 546.

ANNUITY MAY BE PERPETUAL.

The testator's intention that an annuity should be perpetual may be shown in many ways.

6th ed., p. 1142.

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, 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."

6th ed., p. 1142. *Yates* v. *Maddan*, 3 Mac. & G. 532.

ANNUITY TO A. AND HIS HEIRS.

An annuity given to A. and his heirs is personal property, 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.

6th ed., p. 1142. *Stafford* v. *Buckley*, 2 Ves. Sen. 179.

AT WHAT DATE ANNUITIES BEGIN TO BE PAYABLE.

The general rule is that an annuity given by will is to commence from the testator's death; 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.

6th ed., p. 1143. *Re Robbins* (1907), 2 Ch. 8; *Stamper* v. *Pickering*, 9 Sim. 176; *Re Bywater*, 18 Ch. D. 17.

NO INTEREST IS PAYABLE ON THE ARREARS OF AN ANNUITY.

The general rule of the Court is that arrears of an annuity do not carry interest.

6th ed., p. 1145. *Torre* v. *Browne*, 5 H. L. C. 555.

ANNUITANT ENTITLED TO LUMP SUM IN LIEU OF ANNUITY.

Where there is a bequest of a snm 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.

6th ed., p. 1145. *Yates* v. *Yates*, 28 Bea. 637.

If the annuitant dies before the money is laid out in the purchase 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 prima facie vested, or even if the annuity was given to a married woman for her separate use, with a restraint on anticipation. And there is no diffcrence in this respect between a gift of a certain snm to be laid out in the purchase of an annuity, and a direction to purchase an annuity of a certain amount. In the former case, however, interest on the bequest does not run until after a year from the testator's death, while in the latter case the value of the annuity is calculated at the date of the testator's death.

6th ed., p. 1145. *Re Robbins* (1907), 2 Ch. 8.

ANNUITY—WHETHER CHARGED ON CORPUS OR INCOME.

Questions often arise whether an annuity is charged upon the corpns or only npon the income of a fnnd. 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 beqnest is a bequest of an annuity for which the capital and income of the fnnd are liable, or whether it is a bequest of the income or part of the income of the fnnd which is directed to be set apart.

6th ed., p. 1147. *May* v. *Bennett*, 1 Rus. 370.

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, or to set aside a fund to produce the annuity. Sometimes the gift of residue is made subject to thc payment of the annuity, which puts the matter beyond all doubt.

6th ed., p. 1147. *Miner* v. *Baldwin*, 1 Sim. &. G. 522.

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.

6th ed., p. 1148. *Torre* v. *Browne*, 5 H. L. C. 555.

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.

6th ed., p. 1149. *Taylor* v. *Taylor*, L. R. 17 Eq. 324.

GIFT OVER SUBJECT TO ANNUITY.

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 in given intact, from and after the annuitant's death, to another, 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.

6th ed., p. 1149. *Birch* v. *Sherratt*, L. R. 2 Ch. 644.

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. 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.

6th ed., p. 1150. *Birch* v. *Sherratt*, L. R. 2 Ch. 644.

CONTINUING CHARGE ON INCOME.

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.

6th ed., p. 1150. *Booth* v. *Coulton*, L. R. 5 Ch. 684.

If the testator charges all his property with an annuity, the executors do not release the property by setting aside an invested fund to meet the annuity, but the Court has jurisdiction to set aside a sufficient sum to answer the annuity and pay the remainder of the residue to the residuary legatees.

6th ed., p. 1151. *Harbin* v. *Masterman* (1896), 1 Ch. 351.

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 estate, such a superadded direction does not of itself exonerate the personal estate of the testator.

6th ed., p. 1151. *Re Trenchard* (1905), 1 Ch. 82.

GENERAL RULES.

The general rules above stated with regard to annuities apply to rentcharges. Thus, where a rentcharge is devised by will by way of creation de novo, without words of limitation, the devisee is prima facie entitled only to a rentcharge during his life, and not to a perpetual rentcharge. But this is a question of intention, depending on the language of the will.

6th ed., p. 1152. *Blight* v. *Hartnoll*, 19 Ch. D. 294.

WHAT WORDS WILL CREATE A RENTCHARGE.

An annuity or yearly sum bequeathed by will may be made a rentcharge 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. And where a testator bequeaths an annuity, it is converted into a rentcharge if the testator goes on to charge it on land with a power of distress in such a way as to show that the personal estate is not to be liable.

6th ed., p. 1153. *Creed* v. *Creed*, 11 Cl. & F. 491; *Ion* v. *Ashton*, 28 Bea. 379.

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.

6th ed., p. 1153. *Re Spencer Cooper* (1908), 1 Ch. 130.

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.

6th ed., p. 1154. *Fenwick* v. *Potts*, 8 D. M. & G. 506.

PRIORITY OF RENTCHARGES.

Where several rentcharges are limited by the same will, they prima facie rank pari passu, in accordance with the general rule relating to annuities and rentcharges, and if the property is insufficient to pay them all in full, they abate rateably.

6th ed., p. 1154.

Abatement — Payment out of Corpus — Interest.—Where the income of an estate, which was made applicable to the payment of annuities, had for some years been insufficient to satisfy them, the Court held that the annuities did not bear interest, and that they were not payable out of the corpus of the estate. By a codicil to her will the testatrix stated that "it is my intention to build upon the two acres . . . and in case of my death before the completion of the house, I desire that it may be completed and furnished according to my present plans and intentions, which are known to my family. . . . My son W. I wish to have £500, to be paid to him by my executors. What is here is to stand prior to everything in my said will." By the same codicil the testatrix gave annuities to two daughters:—Held, that the payment of the amount needed for the furnishing of the house, the annuities to the daughters, and the legacy of £500 to the son, were first charges on the estate, after payment of debts; and that the parties entitled to these several charges would in the event of the estate ultimately proving deficient, be bound to abate rateably. *Wilson* v. *Dalton*, 22 Chy. 160.

Creation of Fund—Right to Resort to Corpus.—The testator by his will made certain specific bequests and devises, and then gave to his executors all the residue of his property, real and personal, in trust to provide means to pay the expenses of administration, to pay debts, and to pay the bequests thereinafter made, with power to the executors to sell lands, etc., "to deposit at interest, lend on security of mortgages, or invest in the Dominion funds, any balance that may be on hand at any time, to form a fund to keep up the yearly payments to my sisters . . . namely, to pay to each one of my sisters . . . $250 a year, or, if there be not so much available in any year, then to divide equally between them what may be available and make up the deficiency to them when there are funds to do it with, and to pay to any of them who may have greater need on account of ill-health or misfortune a greater sum than the others, and a greater sum than $250." The will then directed the executors, after sufficient funds had been invested to keep up the payments to the sisters, to pay certain specific sums to four named persons, or in like proportions to each of them, "if there be not enough to pay them in full," and "to pay to the children of my brother . . . whatever may remain of the estate:"—Held, that the sisters of the testator had the right to resort to the *corpus* of the fund provided for the payment of their annuities, if the income was insufficient. *Mason* v. *Robinson*, 8 Ch. D. 411, and *Illsley* v. *Randall*, 50 L. T. N. S. 717, followed. *In re McKenzie*, 23 C. L. T. 15, 4 O. L. R. 707, 1 O. W. R. 739, 2 O. W. R. 1076.

Ademption.—A testator gave by his will to each of two daughters an annuity for life of $6,000. After making the will he gave to one daughter absolutely bonds sufficient to produce an income of a little more than $1,200 a year, and by a codicil reduced her annuity by that amount. He subsequently also gave to the other daughter absolutely bonds sufficient to produce an income of a little more than $1,200 a year, and instructed his solicitor to alter his will so as to reduce her annuity by that amount. He died suddenly, and the will was not altered:—Held, that the doctrine of ademption applied, and that, notwithstanding the different natures of the two gifts, and even without the evidence of intention, the second daughter's annuity must be treated as reduced *pro tanto*:—Held, also, however, that the evidence of intention was admissible and was conclusive. Judgment of Ferguson, J., 1 O. L. R. 364, 21 C. L. T. 187, affirmed. *Tuckett-Lawry* v. *Lamoureaux*, 22 C. L. T. 174, 3 O. L. R. 577, 1 O. W. R. 295.

Payment out of Corpus.—Where the testator directed his executors to invest in good securities such a sum as would pay an annuity thereby

bequeathed, and the income of the fund was insufficient to pay the annuity:—Held, that the annuitant was entitled to be paid the deficiency out of the corpus or capital. *Anderson* v. *Dougall*, 15 Chy. 405.

A testator bequeathed the annual income of all his estate, real and personal, to his widow during widowhood, subject to the payment of $160 a year to his father and after the death of his father to his mother, and after the death of both his father and mother, the said annuity of $160 was given in equal shares to N. and J., a sister and niece of the testator, and he thereby made his annuity to this father and mother, and also the annuities to N. and J., a charge upon all his real estate; and directed his executors and trustees to pay or cause to be paid the net annual income of his estate ("after payment of the annuities as aforesaid") to his wife absolutely during widowhood:—Held, that in the event of the income of the estate proving insufficient to pay the annuities, the annuitants were entitled to have the same raised out of the corpus of the estate. *Jones* v. *Jones*, 27 Chy. 317.

Duration.—A testator gave to his wife $50 a year in lieu of dower, and directed that, if she should have a child to the testator, the annuity should be increased to $100, so long as both lived and as the annuitant remained the testator's widow. In a subsequent part of the will he directed that if such child should live till fourteen he should be put to trade "and pay stopped when of age, shall $100:"—Held, that the widow was entitled to the annuity of $100 absolutely until the child was twenty-one, provided the child lived so long and the widow remained unmarried; and that in case the child should die before twenty-one, or the widow should marry, the amount was thenceforward to be reduced to $50 a year for the remainder of her life. *Bateman* v. *Bateman*, 17 Chy. 227.

Devise of Rents to Wife, Subject to Annuity—Death of Annuitant.—A testator, after directing payment of his debts, bequeathed to his wife his household furniture, and the "balance of the rents arising or accruing" from his homestead farm, after payment thereout and therefrom of $200 per annum to a daughter during her lifetime. He then devised the farm to two grandsons, who "were not to receive or to be allowed the possession thereof" until after his wife's death. The testator owned another farm, which he devised to another daughter. The daughter died in the lifetime of the testator. The executor, for the payment of debts, was obliged to raise $200, while for the repairs of the homestead farm, a yearly expenditure of $30 would be required:—Held, that the widow was entitled to the whole of the rent of the homestead farm, subject to any expenditure for repairs, and that the annuity to the daughter did not fall into the residuary estate:—Held, also, that the amount raised for the payment of debts was chargeable on the whole of the testator's realty proportionately to the respective interests of the parties in the two farms. *Re Brown Estate*, 18 O. L. R. 245, 13 O. W. R. 597.

"Provided they are not lazy, spendthrifts, drunkards, worthless characters, or guilty of any act of immorality." These words do not prevent the vesting of the interests, as being matter of description to be answered by the person to receive shares of the gift, as was contended. This is not, I think, such a condition as is referred to in *Monkhouse* v. *Holme*, 1 B. C. C. 298, and *Leeming* v. *Sherratt*, 2 Ha. 14, *Woodhill* v. *Thomas*, 18 O. R. 285-6.

"Residue," Meaning of.—If a testator, after giving a pecuniary legacy without any indication of an intention to charge it on the realty so far as the language of the gift itself indicates, subsequently gives the residue of his real estate, the use of the word "residue," as applied to the real estate, is sufficient to charge the legacy by implication, and this is so, even though there have been previous specific devises of real estate. *Almon* v. *Lewin*, 5 S. C. R. 535.

Testator's Intentions — Annuity to Widow — "Shall Pass Unclouded" — "Condition of Title."—Testator willed lands to his son for life subject to an annuity to his widow:—Held, that after the death of said son the widow had no charge upon the lands for her annuity on the ground that the only interest charged with the annuity was that which the

son received. The charge could not extend to that which he did not receive, viz., the reversion which passed to his children, "unclouded by condition of title." See 1 O. W. R. 427. *Re Padget* (1900), 14 O. W. R. 1069.

Codicil — Annuity Payable out of Legacy — Revocation — Lapse of Legacy.—Testator by his will gave to his trustees $600 in trust to pay an annuity from the interest or *corpus* thereof of $300 to his son R. during his life, and upon his death to pay to R.'s children P., S. and M., one-half, one-quarter and one-quarter of said principal, respectively. In a subsequent clause it was provided that in case of the death of R. while any or either of the said children should be under the age of 25 years, the trustees should pay to their mother while such children should be under that age an annuity of $300 from said principal, "to which such child or children will be entitled on the decease of their father," for the maintenance of such child or children respectively, while he or she should be under that age. A codicil revoked the annuity to R. Testator was survived by R. and R.'s children, all being under the age of 25 years at testator's death, but S. was now of that age:—Held, that the codicil did not revoke the gift to R.'s children; that each child on attaining the age of 25 years was entitled to be paid his or her share; and that it was not the meaning of the will that the fund should be kept intact until the youngest of the children attained that age. *Lewin* v. *Lewin*, 23 C. L. T. 267.

Annuity—Amount left Blank—"College."—Testator by his will left a fund to be invested to provide an annuity for his widow, directing that she be paid quarterly as an allowance. A blank left as above in such a will as this is not fatal to the will or bequest. Parol evidence is not admissible to explain it, the reason being obvious that the interest is understood. Legacies were left to various children payable at thirty-five:—Held, that they became payable at twenty-one. Where money is provided for sending a child to college, "college" implies a university education. *Re Hamilton*, 12 O. W. R. 1177.

Annuitant's Right to Redeem Mortgage.—The owner of property mortgaged it, and then died, having devised one-half the property to one son and the other half to another, charging each half with an annuity to the testator's widow. One of the sons afterwards died intestate, and his widow paid off the mortgage and took an assignment to herself:—Held that the one annuity not being in arrear, and the assignee of the mortgage being willing to pay the arrears of the other annuity, the testator's widow could not insist on redeeming the mortgage. *Long* v. *Long*, 17 Ch. 251.

Apportionment — Shares in Proportion to Legacies and Annuity.—The surplus from the sale of testator's lands, after payment of legacies, was to be divided amongst the legatees in proportion to the other sums bequeathed to each. One legacy was of $200, and an annuity; and the legatee died within a year after the testator:—Held, that her personal representative was entitled to a proportionate part of the annuity; and that her share of the surplus was to be based on the $200, plus this sum. *Woodside* v. *Logan*, 15 Chy. 145.

Annuities — Income — Distribution of Estate—Hotch-pot.—Annuities under this will held to be payable out of income only. Income, not capital, received from testator's widow to be brought into hotch-pot. Surplus after providing for annuities and arrears to be distributed as on an intestacy. Other special questions on construction of will decided. *Re Sisson*, 13 O. W. R. 620.

Bond for Annuity—Legacy.—Where a testator had bound himself by bond to pay to his mother £12 10s. annually, and devised part of his lands to his brothers on condition that they should pay to his mother £12 10s. per annum, and pay all his just debts, and made them his executors:—Held, that at law the legacy could not be considered as a satisfaction of the annuity, and that the mother was entitled to both. *Cole* v. *Cole*, 5 O. S. 744.

Distributive Share and Annuity.—A testator by his will and codicils, devising his real estate, &c., to G. H. M. and B. M., trustees, and

the survivor of them, and the heirs of such survivor, gave his widow an annuity and provided that, when his son should attain the age of twenty-one his trustees should convey to him one-half of the estate and the residue when he should attain thirty, subject, however, to the annuity. He also provided that if his son should die before attaining the age of thirty, the said trustees or trustee should hold "the said real and personal estate, moneys, and securities, or so much thereof as shall remain in their hands, in trust to distribute the same according to the Statute of Distributions." The last codicil appointed G. E. T. and G. R. and the survivor of them, and the heirs, executors, administrators and assigns of such survivor, new trustees and executors in place of G. H. M. and B. M., with the same powers. The son attained the age of twenty-one, received half of the estate, and died before attaining the age of thirty unmarried and without issue:—Held, that the widow was entitled to her annuity as well as her share under the Statute of Distributions; but that the testator, having treated the real and personal estate as a blended fund to be distributed, she was not also entitled to dower, and that she must elect between the distributive share and the dower. *Re Quimby, Quimby* v. *Quimby*, 5 O. R. 738.

Interest on Arrears.—Held, that R. S. O. 1877 c. 50, ss. 266 and 267, under which the interest was allowed, is not applicable to cases where a recovery is sought not against a defendant personally, but against his estate, and following *Booth* v. *Coulton*, 2 Giff. 520, that except under extraordinary circumstances upon particular grounds suggested of hardship or peculiarity, interest is not to be allowed upon the arrears of an annuity. In this case, under any circumstances, the award of interest could not be upheld as against the assignee in insolvency. *Snarr* v. *Badenach*, 10 O. R. 131.

Interest on Fund—Resort to Corpus.—A testator by his will directed his executors "to take as much of my estate and moneys to be put to interest as will make $200 of interest per year, said amount of $200 to be paid to my beloved wife . . . each and every year of her life, said $200 to be paid by my executors to my beloved wife on the 1st day of January next after my decease, and every subsequent payment to be paid on the 1st day of January in each and every year thereafter . . . At the death of my said wife said principal to be equally divided between my brothers." There were specific devises of some real estate and chattels, and the residue was not sufficient to produce $200 a year:—Held, that the widow was entitled to $200 a year, and that the corpus of the estate should be resorted to if necessary for that purpose. *Kimball* v. *Cooney*, 27 A. R. 453.

Several Annuities.—A testator, after directing payment of his debts, and funeral and testamentary expenses, disposed of the residue as follows:—"Secondly, I give to my wife $150 annually, during her natural life, or so long as she may remain my widow, the said sum to be received and accepted by her in lieu of dower, the said yearly allowance to be a lien upon my real estate, and to be paid my said wife as she may need it either quarterly or half-yearly." He then directed his executors to sell his farm and all his personal property except that previously disposed of, and out of the proceeds: first to pay his debts, &c., as aforesaid; and to divide the balance then remaining between his sons, subject to each of them securing to their mother an annual payment of $50 during her natural life, the security to be satisfactory to her and his executors:—Held, that there were sufficient points of difference between the first annuity and the subsequent ones, to make it appear that the several annuities in favour of the widow were intended to be cumulative. *Edwards* v. *Pearson*, 4 O. R. 514.

Trust — Annuity — Request — Transfer of Fund.—The testator by his will conveyed property to trustees upon trust to pay to his daughter an annuity of $1,000 during her life, and on her death to invest the securities set apart to pay the annuity and to divide such investment among his daughter's children on the youngest coming of age. The will then provided that should the daughter

be alive on her youngest child coming of age, the daughter, if she should see fit, might have and receive from the trustees the fund set apart to yield the annuity, and the same should be absolutely assigned to her, free from all control of her husband. The youngest child came of age in the lifetime of the daughter, who died without making a request to have the fund transferred to her:—Held, that there was no absolute trust in favour of the children, which would not have been defeated had the request been made. *In re Fisher Trusts*, 3 E. L. R. 402, 3 N. B. Eq. 536.

Annuities — Shrinkage in Rate of Interest.—Loss made good to annuitants. *Re Crawford*, 5 O. W. R. 13, as in *May* v. *Bennett*, 1 Russ. 370; *Wright* v. *Calendar*, 2 De G. M. & G. 652; *Carmichael* v. *Gee*, 5 A. C. 588, and *Kimball* v. *Cooney*, 27 A. R. 453, not so *Baker* v. *Baker*, 6 H. L. Cas. 616; *Wilson* v. *Dalton*, 22 Chy. 160.

Charge on Land.—One W. devised his farm to his wife during widowhood, provided that she pay to his mother $20 a year during her life, and to his brother W. the same; and on the marriage or death of his wife, he willed that the property should be sold, and the proceeds be divided between the children of his brothers and sister:—Held, that the will created no charge upon the land, and that the annuitants had no power to distrain. *Clifton* v. *Ryan*, 26 U. C. R. 9.

Personal Liability of Devisees.—Where a devise of real estate is made subject to the payment of an annuity, and the devisee accepts the devise, he will be deemed to have assumed a personal liability to pay the amount, which will be enforced by the Court. *Carter* v. *Carter*, 26 Chy. 232.

Lunatic—Charge on Land—Arrears.—A testator who died in 1872, by his will devised land to two of his sons, their heirs and assigns for ever, subject to the payment of $200 per annum for the benefit of another son (a lunatic) for his life, payable to the person who might be his guardian. Payments were made to the mother for the support of the lunatic son from 1880 to 1889, the last of which was made in February, 1889. The plaintiffs were appointed committee for the son in December, 1898:—Held, that the annuity was charged on, and that the right to recover out of, the land was not barred as to future payments. *Hughes* v. *Coles*, 27 Ch. D. 231, followed.—Held, also, that the payments made were discharges pro tanto of the annuity.—Held, also, that as the son was under disability until the plaintiffs' appointment, and as the action was brought within twenty years, they were entitled to recover the annuity from February, 1890, and the annuity being an express charge on the land it might be sold to satisfy the arrears. *Trust and Guarantee Co.* v. *Trusts Corporation of Ontario*, 31 O. R. 504.

Unregistered Agreement Creating Charge on Land—Notice—Registry Act.—A testator by his will directed his executors to pay his widow an annuity for the support and maintenance of one of his sons until he became of age; and he also directed that if there were not sufficient funds therefor, it was to be a charge on separate parcels of land severally devised to three of his other sons. There were sufficient funds in the executors' hands for the payment of the annuity, but by an agreement, for valuable consideration, made between the widow and the devisees of the lands, it was agreed that the annuity should not be paid out of the moneys but should be a charge upon the lands, the intention being that the moneys should be kept in hand for the payment of a legacy payable to the first named son on his attaining his majority. A sale was subsequently made by one of the sons of the parcel of land devised to him, the purchaser being informed as to an agreement having been entered into with reference to the annuity, but being at the same time told that it in no way affected the land, merely creating a personal obligation to pay the annuity, and he made no further inquiry with regard to it:—Held, that the purchaser could not be deemed to have purchased the land with actual notice of the contents of the agreement so as to be affected thereby. *Coolidge* v. *Nelson*, 31 O. R. 646.

Charge on Land.—A legatee of money charged on land, whose legacy was to be paid six months after the death of the testator, was appointed administrator with the will annexed, but did not sell the land to pay herself the legacy, and held it till it could be sold advantageously at a greatly advanced price, to the benefit of all parties, some eight years after the death of the testator:—Held, that the hand to pay and the hand to receive being one and the same, the Statute of Limitations had no application, and the claim for the legacy was still a subsisting claim with interest as accessory for the period till the fund was in hand for payment. *In re Yates*, 22 C. L. T. 413, 4 O. f.. R. 590, 1 O. W. R. 630.

Absolute Bequest.—In construing a will it was held that certain legacies were not a charge upon lands; executors had power to sell lands to satisfy debts and legacies if personal estate was insufficient; widow must elect between dower and legacies; legacies to abate equally in full and widow should receive residue. *Re Petty* (1900), 14 O. W. R. 350, 487.

Occupancy—Caretaker.—S. M. had become entitled under T. C. S.'s will to certain property called "Clark Hill," of which T. C. S. was owner when he died, and also to an undivided interest in certain other property of which T. C. S. was tenant in common. He also became entitled to a legacy under the following clause of A. ff. S.'s will: "I will and direct that so soon as S. M. . . . can and does take actual possession of the real estate and property . . . under the will of T. C. S. . . . my executors . . . shall . . . so long as he remains the owner and actual occupant of the said real estate pay over to him . . . the annual sum of $2,000 to enable, &c.:—Held, that this clause, read in connection with the will of T. C. S., referred only to the land of which T. C. S. was absolute owner, and not to the land he owned as tenant in common.—Held, also, that actual possession and occupation of the land by S. M. was consonant with and satisfied by the possession of a servant or caretaker, or even a worker on shares, and that S. M.'s temporary absence from the mansion house on the property, which was kept furnished and in charge of a servant, did not create a forfeiture. *Macklem v. Macklem*, 19 O. R. 482.

Annuity During Widowhood.—A testator divided his real estate among his three sons, the portion of A. C., the eldest son, being charged with the payment of $1,000 to each of his brothers and its proportion of the widow's dower. The will also provided that "should any of my three sons die without lawful issue and leave a widow, she shall have the sum of fifty dollars per annum out of his estate so long as she remains unmarried, and the balance of the estate shall revert to his brothers with the said fifty dollars on her marriage." A. C. died after the testator, leaving a widow but no issue:—Held, reversing 23 A. R. 457, that the gift over in the last mentioned clause was intended by the testator to take effect on the death of the devisee without issue at any time and not during the lifetime of the testator only; that it was no ground for departing from this prima facie meaning of the terms of the gift that very burdensome conditions were imposed upon the devisee; and that no such conditions would be imposed on the devise to A. C. by this construction as the two sums of $1,000 each charged in favour of his brothers were charged upon the whole fee and if paid by him, his personal representatives on his death could enforce repayment to his estate.—Held, also, that the widow of A. C. was entitled to the dower out of the lands devised to him, notwithstanding the defeasible character of his estate; that she was also entitled to the annuity of $50 per annum given her by the will, it not being inconsistent with her right to dower, and she was therefore not put to her election; that the limitation of the annuity to widowhood was not invalid as being in undue restraint of marriage; and that she could not claim a distributive share of the devised lands under the Devolution of Estates Act, which applies only to the descent of inheritable lands. *Cowan v. Allen*, 26 S. C. R. 292.

Annuity.—Annuitant not entitled to ask for administration. *In re Hargreaves, Dicks v. Ware*, 44 Ch. D. 236; nor to require security, *In re*

Potter, Potter v. *Potter*, 50 L. T. 8. Both cases followed in *Patching* v. *Ruthven*, 11 O. W. R. 760.

Payment of annuity must be adjusted between tenant for life and remainderman. *Re Mitchell, Jones* v. *Mason*, 30 Ch. D. 534, followed. *Reece* v. *Whitesell*, 6 O. W. R. 506.

Death of annuitant after testator but before widow—Right of personal representatives.—The testator by his will gave all his estate to his executors in trust; first, to convert all his real and personal property into money; out of the proceeds to pay certain legacies, among others, to pay to two named sisters each $100 per annum during the lifetime of his wife; third, after payment of the legacies and debts, to invest the remainder of the estate and pay the interest and proceeds to his wife during her life; fourth, after the death of his wife, to pay to the two sisters before mentioned each $500, and to divide the remainder equally among all his brothers and sisters, including the two named, share and share alike. Then followed this clause: "Should any of my brothers or sisters die before the final division of my estate leaving lawful issue . . . the share to which such deceased brother or sister would have been entitled if living shall be divided equally amongst the children of such deceased brother or sister so that such child or children shall take the portion to which his, her or their parent would have been entitled if living." Court below held the annuity and the gift of $500 to one sister lapsed, she having died before the testator: sec. 37 of the Wills Act, 1 Geo. V., c. 57, applies only when the intended beneficiary is a "child or other issue of the testator." That, the other named sister having survived the testator, but having died before the wife, her personal representatives were entitled to the $100 a year given to her from her death till the death of the wife. That the legacy of $500 to this sister vested at the death of the testator, and the $500 was payable to her personal representatives, the wife having died. That the children of the sister who died before the testator were not entitled to a share, under the clause above quoted. The gift to children or brothers and sisters is substitutionary, not substantive—the children are beneficiaries out of that which the parent would have received if living: *Christopherson* v. *Naylor* (1816), 1 Mer. 320, and *Thornhill* v. *Thornhill* (1819), 4 Madd. 377, are still of authority. That "children" in the clause quoted did not include grandchildren, and the children of deceased children of deceased brothers and sisters did not take in competition with surviving children of deceased brothers and sisters. Divisional Court held, that the children of the deceased sister were entitled to share in the fund: *Ive* v. *King*, 16 Beav. 53, disapproved. If the meaning of the testator appears plain it must be given effect to, unless it is clear that there is some law compelling the Court to ignore it: Review of authorities. *Re Denton* (1912), 21 O. W. R. 954, 3 O. W. N. 1109.

CHAPTER XXXII.*

SATISFACTION—ADEMPTION—HOTCHPOT.

Definition of Satisfaction.

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.

Jarman, p. 1156. *Chichester* v. *Coventry*, L. R. 2 H. L. 95.

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. 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.

6th ed., p. 1156.

Satisfaction of Debts by Portion.

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.

6th ed., p. 1156.

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.

6th ed., p. 1157.

The words satisfaction and ademption have sometimes been confused: both cases may perhaps be included in the neutral

* This chapter is new in the 6th edition.

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.

6th ed., p. 1157.

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. 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.

6th ed., p. 1157.

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.

6th ed., p. 1157.

DISTINCTION BETWEEN ADEMPTION AND SATISFACTION.
ELECTION.

Lord Romilly, in Lord Chichester v. Coventry, 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 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 gives 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."

6th ed., p. 1157.

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, and a case of election must arise, and the objects of the covenant or creditors must be the legatees. 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 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.

6th ed., p. 1158.

ADEMPTION OF LEGACIES BY PORTIONS.

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 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 ademption of the legacy.

6th ed., p. 1158. *Ex parte Pye*, 18 Ves. 140.

WHAT IS A PORTION?

The doctrine, then, which is fully established, although some modern Judges dislike it, 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. 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. The circumstances may show 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 show that the payment to the son was not intended as a portion. 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; thus, a gift for a wedding outfit or trip, or to enable the donee to pay off a debt, 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 maybe a portion. It is 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. An annuity may be a portion.

6th ed., p. 1159. *Taylor* v. *Taylor*, 20 Eq. 155; *Stevenson* v. *Masson*, 17 Eq. 78.

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. 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, the rule does not extend to natural children or the grandchildren, brothers, nephews, or other relatives.

6th ed., p. 1160. *Powys* v. *Mansfield*, 3 My. & C. 359.

ADEMPTION PRO TANTO.

Evidence is admissible to prove that a person means to put himself in loco parentis.

6th ed., p. 1160. *Fowkes* v. *Pascoe*, L. R. 10 Ch. 343.

ADVANCE BEFORE WILL NO ADEMPTION.
ADEEMED LEGACY NOT REVIVED BY REPUBLICATION.

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, the advance cannot cause a legacy to be adeemed, for, in fact, there 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." 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." 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.

6th ed., p. 1160. *Taylor* v. *Cartwright*, L. R. 14 Eq. 176.

RULE APPLIED TO SHARE OF RESIDUE.

At one time it was doubted whether the rule applied to gifts of shares of residue, but it was settled in Montefiore v. Guedalla 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.

6th ed., p. 1161. *Montefiore* v. *Guedalla*, 1 D. F. & J. 93.

If a testator bequeaths his residuary estate, the value of which is 2,000*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 2,000*l* to A., the estate is divisible thus: 3,666*l*. 13*s*. 4*d*. to A., 5,666*l*. 13*s*. 4*d*. to each of B. and C., and 5,000*l*. to X.

6th ed., p. 1162. *Meinertzagen* v. *Walters*, L. R. 7 Ch. 670.

THE PRESUMPTION MAY BE REBUTTED BY EVIDENCE; BY DIFFERENCE BETWEEN THE ADVANCE AND THE PORTION.

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 substituton for the legacy. The rule is founded on a presumption which can be rebutted by evidence, for this evidence is not directed towards the construc-

tion of a written document—the will—but to show what are the circumstances of the subsequent act. 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 may be sufficient to rebut the presumption in case of satisfaction are not always sufficient to rebut it in cases of ademption. In fact, where both the gifts are established to be portion, that is, provision 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.

6th ed., p. 1162. *Kirk* v. *Eddowes*, 3 Ha. 509; *Platt* v. *Platt*, 3 Sim. 503.

NOR ARE DIFFERENT TIMES OF PAYMENT.

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.

6th ed., p. 1163. *Stevenson* v. *Masson*, L. R. 17 Eq. 78.

The presumption against double portions will not prevail where the testamentary portion and the subsequent advancement are not ejusdem generis.

6th ed., p. 1163.

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.

6th ed., p. 1163. *Re Lowes*, 20 Ch. D. 88.

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.

6th ed., p. 1164. *Hatfield* v. *Minet*, 8 Ch. D. 136.

THE PRESUMPTION MAY BE REBUTTED IF THE PORTION IS CONTINGENT.

If the portion is contingent it will not adeem a legacy, unless the contingency is very remote, though, a legacy limited over upon a contingency may be adeemed by a portion so as to defeat the limitation over.

6th ed., p. 1164. *Powys* v. *Mansfield*, 3 My. & C. 359.

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.

6th ed., p. 1164. *Nevin* v. *Drysdale*, L. R. 4 Eq. 517.

ADEMPTION OF LEGACIES GIVEN FOR A PURPOSE.

There is another case in which general legacies may be adeemed which may fitly be mentioned here.

6th ed., p. 1164.

If a testator, not being a parent 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.

6th ed., p. 1164. *Re Pollock*, 28 Ch. D. 552.

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 prima 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.

6th ed., p. 1165.

The law presumes a legacy to a creditor to be in satisfaction of a debt.

6th ed., p. 1165. *Re Fletcher*, 38 Ch. D. 373.

SATISFACTION OF PORTIONS BY LEGACIES.

The doctrine of the satisfaction of portions by legacies is another illustration of the general bearing 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. There need be no personal liability to pay the portions.

6th ed., p. 1166. *Re Battersby*, 19 L. R. Ir. 359.

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. Mr. Roper's statement appears to be a little too wide, for the rule probably does not extend to the case of a mother.

6th ed., p. 1166. *Roper*, p. 1071.

It is easier to presume an intention to adeem than an intention to give a legacy in lieu or in satisfaction of an existing obligation, 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.

6th ed., p. 1166. *Re Blundell* (1906), 2 Ch. 229.

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.

6th ed., p. 1167. *Re Blundell* (1906), 2 Ch. 222.

The presumption of satisfaction can be rebutted by extrinsic evidence, for the rule of presumption may be rebutted or 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.

6th ed., p. 1167.

THE PRESUMPTION MAY BE REBUTTED.

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 ademption. Hence, although the cases on ademption are not, for this purpose, authorities on cases of satisfaction, yet cases on satisfaction apply a 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, gift of residue is not considered to be in satisfaction of a debt other than a portion.

6th ed., p. 1168. *Thynne* v. *Glengall*, 2 H. L. C. 131.

DIFFERENCE IN THE NATURE OF THE PROPERTY.

Differences in the nature of the property may be sufficient to rebut the presumption. Thus, land will not be presumed to be in satisfaction for money, or money for land.

6th ed., p. 1168. *Bengough* v. *Walker*, 15 Ves. 507.

The fact that the portion is vested, and the legacy contingent, is sufficient to rebut the presumption; or that the legacy is in reversion.

6th ed., p. 1168. *Pierce* v. *Locke*, 2 Ir. Ch. 205.

DIFFERENCES WHICH ARE NOT SUFFICIENT TO REBUT THE PRESUMPTION.

But on the other hand, slight differences, as in the time of payment, or in the limitations, are not sufficient to rebut the presumption.

6th ed., p. 1168.

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 show this intention.

6th ed., p. 1170. *Burges* v. *Mawbey*, 10 Ves. 319

DIRECTION TO PAY DEBTS.

And a direction in the will to pay debts is not alone sufficient to rebut the presumption.

6th ed., p. 1170. *Bennett* v. *Houldsworth*, 6 Ch. D. 671.

CONSTRUCTION OF DECLARATION IN THE SETTLEMENT.

Although the testator's intention must be found in the will, or 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 or a share under an intestacy 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.

6th ed., p. 1170. *Papillon* v. *Papillon*, 11 Sim. 642.

There is a presumption that the satisfaction ensues for the benefit of the other children entitled under the settlement, but circumstances may show that this is not intended to be the case.

6th ed., p. 1171. *Lee* v. *Head*, 1 K. & J. 620.

SATISFACTION OF DEBTS BY LEGACIES.

The rule of the satisfaction of debts by legacies is 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."

6th ed., p. 1172. *Talbot* v. *Shrewsbury*, Pr. Ch. 394.

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.

6th ed., p. 1172. *Plunkett* v. *Lewis*, 3 Ha. 316.

EFFECT OF PAYMENT.

If the testator pays off the debt in his lifetime, the legacy is adeemed.

6th ed., p. 1172. *Re Fletcher*, 38 Ch. D. 373.

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.

6th ed., p. 1172.

BY ASSIGNING A MOTIVE FOR THE LEGACY.

The testator rebuts the presumption by assigning a motive for the gift, or by giving it in satisfaction of some right, e.g., dower.

6th ed., p. 1173.

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.

6th ed., p. 1174.

THE LEGACY MUST BE AT LEAST EQUAL TO THE DEBT.

The legacy must be at least equal to the debt: 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.

6th ed., p. 1174. *Gee* v. *Liddell*, 35 Bea. 621.

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.

6th ed., p. 1174.

IF THE LEGACY IS CONTINGENT OR UNCERTAIN.

If the legacy is contingent, there will be no satisfaction, 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.

6th ed., p. 1174. *Tolson* v. *Collins*, 4 Ves. 482.

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. 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.

6th ed., p. 1174. *Charlton* v. *West*, 30 Bea. 124; *Re Rattenberry* (1906), 1 Ch. 667.

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; 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.

6th ed., p. 1175. *Cole* v. *Willard*, 25 Bea. 568.

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.

6th ed., p. 1175. *Pinchin* v. *Simms*, 30 Bea. 119.

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; or he may direct that sums covenanted to be paid shall be brought into hotchpot instead of trusting to the law of satisfaction. 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. Sometimes, also, where a child is entitled in ita own right to property, the testator requires it to be brought into hotchpot in the division of his residuary estate.

6th ed., p. 1175. *Middleton* v. *Windross*, L. R. 16 Eq. 212.

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 prima facie, there is one hotchpot clause for all the funds together. 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.

6th ed., p. 1178. *Montague* v. *Montague*, 15 Bea. 565.

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. If the period of distribution is not the testator's death, interest is charged only from the period of distribution.

6th ed., p. 1179. *Stewart* v. *Stewart*, 15 Ch. D. 539.

Where the residue is settled, so that the interest on outstanding advances has to be brought into account, the general rule is that interest 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. 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.

6th ed., p. 1179. *Re Gilbert* (1908), W. N. 63.

ANNUITIES: HOW VALUED.

An annuity may be an advance which is to be brought into hotchpot. 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, but there is authority for the proposition that if the annuity has ceased the anuitant has the option of claiming that the value of the payment received is the amount to be brought into hotchpot.

6th ed., p. 1179. *Hatfield* v. *Minet*, 8 Ch. D. 136.

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 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."

6th ed., p. 1180.

RESIDUARY GIFT: HOTCHPOT: INTERESTS ON ADVANCEMENTS: POSITIONS.

Per Cozens-Hardy, M.R.:—The rules laid down in the authorities for working out the consequences of a common hotchpot clause are, first, that no interest is charged against an advanced child prior to the testator's death; secondly, that where the period of the distribution of the testator's property is at the testator's death, interest is charged against an advanced child from the death and not from the subsequent date at which, in fact, the distribution takes place; thirdly, that if the period of distribution is at the expiration of a period of accumulation or of a prior life estate, interest is charged not from the death, but from the period of distribution; and fourthly, that the effect of a charge upon the residue, such as a life annuity secured by a fund set apart to meet it, does not alter the period of distribution.

Willoughby, In re, Willoughby v. *Decies*, 80 L. J. Ch. 562, 104 L. T. 907.

Specific Legacy and Residue.—One S. by his will directed his estate, real and personal, to be sold, except certain stocks, lands, and securities thereinafter specifically devised, and that his debts and "testamentary expenses" should be paid out of the first moneys that should come into the hands of his executors; and after making certain pecuniary bequests, which he charged primarily on the fund to be produced by the sale of his real estate as aforesaid, and secondarily on the proceeds of his personal estate, he directed that "as to the residue of my personal estate which may be exclusively devoted by me to charitable purposes, I bequeath the same to the churchwardens of the A. church, to be invested by them for the purpose of forming an endowment for the support of the said church." Afterwards, by a codicil, S. bequeathed to three persons named by him $30,000 as an endowment for the A. church, to be invested by them in their own names as trustees for the said church, and to be disposed of for the benefit thereof as therein mentioned, but in certain contingencies to merge in his residuary estate, and be disposed of under the last clause of his will, by which he devised all the rest, residue, and remainder of his estate of which he should die possessed to A. and L., to be equally divided between them, share and share alike:—Held, that on a proper construction of the will and codicil, $30,000 of the pure personalty was to be held by trustees on the trusts as defined for the benefit of the A. church; and as to the residue of that fund, it was to be held generally by the churchwardens for the support and maintenance of that church. A legatee is entitled to take both a pecuniary gift and a residue, whether given in a

will or in a combined will and codicil, and the construction of a particular residuary gift is not affected by the presence or absence of a general residuary gift. *Bell* v. *Rector and Churchwardens of the Church of the Ascension*, 5 O. R. 386.

Substitution of Mortgages.—A testator bequeathed to W. L. £1,500, "due to me by R. C., and secured by mortgage." After the making of this will, and in testator's lifetime, R. C. sold to one H. the property mortgaged, and the testator, to facilitate the sale and secure the debt due him, took from H. a mortgage of this and other property, and a covenant to pay the amount; retaining the mortgage from R. C., under which he held the legal estate in the land, and the bond originally obtained from R. C. for the debt. The testator died without altering his will in regard to this legacy:—Held, that the legacy was not adeemed. *Loring* v. *Loring*, 12 Chy. 108.

Hotchpot—Advancement.—A child, who has been advanced, is bound to bring into hotchpot that wherewith he has been advanced only when it has been so expressed in writing, either by the parent or the child so advanced. *Filman* v. *Filmon*, 15 Chy. 643.

Devises in Common and Severalty.—A testator devised a property to three granddaughters, as tenants in common in equal shares, and then devised to one another property in severalty, adding, "providing alway . . . that the said last mentioned property so solely devised to my said granddaughter A., shall be valued by my executors hereinafter named, or the survivor of them, and shall be deducted from her one-third proportion of the said lands hereinbefore devised to my said three granddaughters, in proportion to the value which my said executors or the survivor of them shall put upon said first-mentioned land; and in case I shall sell any or all of said first-mentioned lands, or that after my decease, my said three grandchildren shall sell the same, then and in that case the value aforesaid of the said residence and premises, hereinbefore devised to my said granddaughter A., shall be deducted from her one-third proportion of the proceeds of the sales of the said first-mentioned land:"—Held, that the above clause did not constitute a hotchpot clause; that the rents of the lands devised in severalty were not to be accounted for by A., but that she was only entitled to the same proportion of the rents of the land held in common as she was entitled to of the land itself after deducting the value of the land specifically devised to her. *Phillips* v. *Yorwood*, 21 Chy. 622.

Compensation to Executor.—The testator bequeathed to M., one of his executors, the interest due on the amount in the savings bank or building society after the death of his daughter B., and the interest annually on the mortgages till twenty-one years from the testator's death was given to him, "to recompense him for the trouble and expense of attending to this my will." In a subsequent clause $100 was given to him "as compensation for his coming from Hamilton quarterly, to submit the statements and accounts, and receipts and expenditure, and deposit receipts to the solicitor as above mentioned:"—Held, that these were not inconsistent bequests, the one being for the care and management of the estate; the other for a specific item of expense—the coming from Hamilton—and might both well stand together. But as M.'s care of the estate was by the will only to arise after B.'s death, and therefore might never come into operation, he was not entitled to claim the $100 until he did enter on the management. *Hellem* v. *Severs*, 24 Chy. 320.

Farm Stock and Implements—Sale after Will.—A testator by his will dated 30th June, 1863, gave one-half of his farm to his widow during her widowhood for the maintenance of herself and children, "and with regard to the stock on the said lot at the time of the decease of my said wife, with any other personal effects or property in her possession, she is hereby empowered to make such distribution as to her shall seem best." In July of the following year the testator became insane, and a committee of his person and estate was appointed, who, under an order in lunacy, leased the lands and sold the farm stock and implements:—Held, that the order in lunacy and sale thereunder operated as an ademption of the

legacy to his wife, so far as the farming stock and implements were construed; but that under the power of distribution given by the will, she was empowered to make such distribution of the personal effects bequeathed to her as to her should seem best, not only as to the amounts to be distributed, but also as to the objects of the distribution. *Miller* v. *Miller*, 25 Chy. 224.

Sale by Mortgagee—Charged Land.—Where land devised subject to the payment of legacies and to a life estate therein is, after the death of the testator, sold at the instance of a mortgagee, the money remaining after payment of the mortgage debt will be treated in the same manner as if it were the land itself, and, if insufficient to pay all, the tenant for life and legatees will be paid ratably after the value of the life estate has been ascertained. *Armson* v. *Thompson*, 25 Chy. 138.

Legacy—Ademption—Evidence.—A testator bequeathed annuities of $6,000 each to his two daughters. Subsequently having transferred $1,200 a year, he, by codicil, reduced, for that expressed reason, her annuity to $4,800. A few months later he assigned securities of similar value to the plaintiff, the other daughter, and by private memorandum intimated that there was to be a corresponding deduction from her share of his estate. Evidence was adduced of his having instructed his solicitor to alter the will accordingly, but that he died almost immediately after so doing, before any alteration was made:—Held, that the evidence was admissible to show and did show that the assignment of the securities to the plaintiff was intended to operate as an ademption pro tanto of the legacy to her, as had been provided in regard to her sister. *Tuckett-Lawry* v. *Lamoureaux*, 21 C. L. T. 187, 1 O. L. R. 364, 3 O. L. R. 577.

Devise—Sale of Land Devised Pursuant to Statute.—Where a change has occurred in the nature of the property devised, even though effected by an Act of Parliament, ademption will follow unless the change is in name or form only, and is substantially the same thing:—Held, that 34 Vict. c. 100, s. 2, is a legislative declaration that the proceeds of the sale are to be treated as if they were still land. The above Act does not affect lands unsold at testator's death. 13 O. W. R. 741. *Re Sprague* (1909), 15 O. W. R. 49.

Advancement.—The evidence of acts or declarations of a father to rebut the presumption of advancement must be of those made antecedently to or contemporaneously with the transaction; or else immediately after it, so as in effect to form part of the transaction; but the subsequent acts and declarations of a son can be used against him and those claiming under him by the father, where there is nothing showing the intention of the father, at the time of the transaction, sufficient to counteract the effect of those declarations. *Birdsell* v. *Johnson*, 24 Chy. 202.

A testator devised to his grandson A., an infant, thirty acres, part of his farm, and the remainder thereof he devised to his eldest son, the father of A. By the evidence of the father it was shown that on A. coming of age, by agreement between them, his father conveyed to him fifty acres of equally valuable land in lieu of the portion devised to him, the father at the time saying that he would charge him with the difference in value as an advance; and that it was supposed by the parties that no conveyance from A. to his father was necessary, as he being the heir-at-law of the testator, all that was necessary was to destroy the will, which was done. Up to the time of his death A. never made any claim to the thirty acres; on the contrary, it was proved that on several occasions he admitted the fact of the exchange:—Held, under the circumstances stated, sufficient appeared to show that the conveyance to A. had been by way of an exchange of lands, and not as an advancement by the father to his son. Ib.

Where a will creates a life estate in chattels the executor is discharged when he hands over such chattels to the tenant for life. The tenant for life, and not the executor, then becomes liable for them to the person entitled in remainder. *Re Munsie*, 10 P. R. 98.

If a child who has received any advancement from his father shall die in his father's lifetime, leaving children, such children shall not be admitted to their father's distributive share unless they bring in his advancement, since as his representatives they can have no better claim than he would have had if living. *Re Lewis*, 29 O. R. 614.

CHAPTER XXXIII.*

ABSOLUTE INTERESTS IN PERSONALTY.

What Words Will Create 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" 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., unless the property is expressly given to A. for life, with a power of appointment, either general or special, or unless the context shows that A. is only intended to have a power of appointment or disposition, with or without a life interest. 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.

6th ed., p. 1182. *Kellett* v. *Kellett*, L. R. 3 H. L. 160.

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.

6th ed., p. 1183. *Re Panter*, 22 T. L. R. 431.

Qualification Void for Repugnancy.
Things Incapable of Limited Ownership.

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. 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. A gift of ordinary chattels to A. for life, and after his death to B., in theory vests the absolute ownership in A., but the rights of B. are enforced in equity. And executory bequests of terms of years are recognized at law. But it will of course be remembered that personal

*Chapter XXXIII. is new in the 6th edition.

property cannot be entailed, or settled on a number of persons in succession, beyond the limits allowed by law.

6th ed., p. 1183.

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.

6th ed., p. 1183. *Lassence* v. *Tierney*, 1 Mac. & G. 551.

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.

6th ed., p. 1183. *Hancock* v. *Watson* (1902), A. C. 14.

The difficulty in many cases is to say whether an absolute interest is given or not. With reference to this the following rules may be mentioned:

6th ed., p. 1184. *Lambe* v. *Eames*, L. R. 6 Ch. 597.

ABSOLUTE INTEREST MAY BE CUT DOWN BY CLEAR WORDS.

A bequest of personal property to A. without more, 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. As a general rule, an absolute interest cannot be cut down except by clear words. And even clear words will not cut down an absolute gift if the intended restriction or gift over is repugnant, or mere surplusage.

6th ed., p. 1184. *Taylor* v. *Beverley*, 1 Coll. 108.

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, although the objects of the power may take an interest by implication, or by way of trust.

6th ed., p. 1185. *Blakeney* v. *Blakeney*, 6 Sim. 52.

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.

6th ed., p. 1185. *Jenings* v. *Baily*, 17 Bea. 118.

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.

6th ed., p. 1186. *Coward* v. *Larkman*, 60 L. T. 1.

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.

6th ed., p. 1186.

EXPRESS GIFT FOR LIFE OR IN TAIL MAY CONFER AN 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. In other cases, the principal rules are as follows:

6th ed., p. 1187.

GIFT FOR LIFE WHEN ENLARGED.

An express gift for life will not, as a general rule, be enlarged into an absolute interest by implication, but it sometimes happens that a testator gives a life interest in express words, while the will, taken as a whole, shows 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 leavea the remainder at her disposal.

6th ed., p. 1187. *Scawin* v. *Watson*, 10 Bea. 200; *Re Maxwell's Will*, 24 Bea. 246.

THINGS QUAE IPSO USU CONSUMUNTUR.

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.

6th ed., p. 1187.

A. FOR LIFE, REMAINDER TO EXECUTORS.

A bequest to A. for life, with remainder to his executors and administrators or to his personal representatives, is a gift of an absolute interest.

6th ed., p. 1187. *Webb* v. *Sadler*, L. R. 8 Ch. 419; *Alger* v. *Parrott*, L. R. 3 Eq. 328.

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 Chapter XLI. (Gifts to Personal Representatives, Executors, &c.)

6th ed., p. 1188.

LIFE INTEREST AND POWER OF APPOINTMENT OR DISPOSITION.

There are same 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.

6th ed., p. 1188.

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.

6th ed., p. 1188.

So if the power is one of disposition.

6th ed., p. 1188. *Re Richards* (1902), 1 Ch. 76.

QUESTION OF INTENTION.

If the testator draws a clear distinction between power and property, 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.

6th ed., p. 1189. *Bradly* v. *Wescott*, 13 Ves. 453.

EFFECT OF GIFT OVER TO EXECUTORS AND ADMINISTRATORS.

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.

6th ed., p. 1189. *London Ch. Bk. of A.* v. *Lempriere*, L. R. 4 P. C. 595.

If the power of appointment is by will only, a formal release of the power, or something equivalent, is required.

6th ed., p. 1190. *Re Davenport* (1895), 1 Ch. 361.

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.

6th ed., p. 1191. *Irwin* v. *Farrer*, 19 Ves. 86.

The result of these authorities would appear to be as follows:

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.

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.

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.

6th ed., p. 1192.

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, 1900. 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.

6th ed., p. 1192.

WHAT IS AN EXERCISE OF A GENERAL POWER.

An actual dealing with the fund by the tenant for life, for instance, by selling out Consols and investing in Long Annuities, is not an exercise of a power of appointment "by will or otherwise."

6th ed., p. 1192.

The principal rules are as follows.

6th ed., p. 1193.

WORDS WHICH CREATE AN ESTATE TAIL IN REALTY CONFER THE ABSOLUTE INTEREST IN PERSONALTY.

It has been established by a long series of cases that where personal estate (including of course terms of years of whatever duration) is bequeathed in language which, if applied to real estate, would create an estate tail, it vests absolutely in 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.

1st ed., Vol. II., p. 489 *seq.* 6th ed., p. 1193. *Elton* v. *Eason*, 19 Ves. 73; *Williams* v. *Lewis*, 6 H. L. C. 1013.

RULE APPLIES TO ESTATES TAIL BY IMPLICATION.

This rule is not confined, as has been sometimes affirmed, 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. 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.

Ibid.

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, the terms of the bequest would, in reference to real estate, create an estate tail.

Ibid., and 6th ed., p. 1194. *Garth* v. *Baldwin*, 2 Ves. Sen. 646.

THOUGH THE BEQUEST BE REFERENTIAL TO THE DEVISE.

It is immaterial in such a case whether the bequest itself contain the words of limitation, or refer to a devise of realty creating an estate tail.

Ibid. *Brouncker* v. *Bagot*, 19 Ves. 574.

WORDS OF DISTRIBUTION, &C., ANNEXED TO THE LIMITATION TO THE HEIRS OF THE BODY, &C.

The next question is, whether words of distribution or other expressions marking a course of enjoyment inconsistent with the devolution of an estate tail, annexed to the limitation to the heirs of the body, are in these cases inoperative to vary the construction, as we have seen they are now held to be in devises of real estate. The affirmative would seem to follow.

Ibid. *Re Jeaffreson's Trusts*, L. R. 2 Eq. 276; *Re Barker's Trusts*, 52 L. J. Ch. 5[illegible].

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.

1st ed., Vol. II., p. 493. 6th ed., p. 1198.

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, confers on him the absolute ownership in personalty.

Ibid. *Lyon* v. *Mitchell*, 1 Mad. 467.

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 tho 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.

Ibid., and 6th ed., p. 1199. *Ex parte Wynch*, 5 D. M. & G. 188.

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 numher of persons and their issue, the words "and their issue," would he 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 schcme of the will.

Ibid., and 6th ed., p. 1199. *Tate* v. *Clarke*, 8 L. J. 60.

A. FOR LIFE AND AFTER HIS DEATH TO HIS ISSUE.

Our next inquiry is, whether a bequest to A. for life, and after his death to his issue, operates, hy force of the same rule of construction, to vest the ahsolute interest in A.

1st ed., Vol. II., p. 494. 6th ed., p. 1199.

Now as such a devise would clearly create an estate tail in A., and as it has been shown that the rule which mskes 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, where heirs of the body are the words of limitation, as well as to those in which an implied gift is raised in the issue; and as, lastly, as we have just seen, the rule applies where the gift to the ancestor and issue is in one clause (the issue heing 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.

Ibid., and 6th ed., p. 1200.

It seems, however, now to be settled by a series of cases, beginning with Knight v. Ellis, that in such a case A. will take for life only.

6th ed., p. 1200. *Knight* v. *Ellis*, 2 Br. C. C. 570; *Ex parte Wynch*, 5 D. M. & G. 225.

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; the effect of such construction, by entitling the first taker absolutely, being in general to defeat the intention of the testator.

6th ed., p. 1202.

BEQUESTS OVER AFTER GIFTS IN QUESTION. WHEN VOID.

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; but this principle does not apply to cases in which personal estate is limited in such terms to several persons not in esse successively; in which case the successive limitations, though having the form of remainders, operate simply as substitutional or alternative bequests, each gift in the series being dependent upon the event of the preceding gift or gifts not taking effect.

1st ed., Vol. II., p. 504. 6th ed., p. 1203. *Re Percy*, 24 Ch. D. 616.

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.

See reference last paragraph.

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 (Chapter XXXVI. in this Edition).

Note by Editor of 6th Edition.

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.

Ibid. *Lamb* v. *Archer*, 1 Salk. 225.

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.

Ibid.

Where the bequest is to A. expressly for life, and in case of his dying without issue to B. 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.

Ibid.

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, and A. will, it should seem, be absolutely entitled as before.

6th ed., p. 1205. *Re Sallery*, 11 Ir. Ch. 236.

Maintenance.—Testator by his will, after devising a farm to defendant, his son, in fee, directed that he should support his mother, "and that she shall have one horse, and my buggy, cutter, and harness, to be kept on the place," &c., "and the house and one acre of ground with the orchard all round the house her lifetime:"—Held, that she took the goods mentioned absolutely, not for life only. *McCrary* v. *McCrary*, 22 U. C. R. 520.

Money, Mortgages and Notes. — Where money, mortgages and promissory notes, were bequeathed to a legatee, for life, it was held that she was not entitled to the possession and disposition of the same, but to the income only; though of farming stock and implements given for life by the same clause she was to have the use in specie. *Thorpe* v. *Shillington*, 15 Chy. 85.

Power to Dispose of Personalty—Gift over if not Disposed of—Furniture Unaccounted for.—A testator by his will, as construed by the Court, gave to his widow his real and personal estate for life, with power to dispose of the personal estate at her own discretion during her life; and whatever of it remained at her death not so disposed of went to a residuary legatee. The testator also authorized his widow and co-

executors to lay out such sums as might be deemed necessary for the carrying on of his business as a distiller:—Held, that the widow was not bound to convert the personalty into money; that her estate was not liable for debts due the testator, which she had neglected to collect, and was not accountable for the testator's furniture, which was not forthcoming at her death; nor for hay, grain, fuel, cart, and horses, left by the testator and used by the widow in continuing the business. The widow improved the property:—Held, that she was entitled to credit for so much only as was expended in completing work commenced by the testator. *McLaren* v. *Coombs*, 16 Chy. 602.

Premium on New Stock.—A will directed an executor to pay A. for life "the interest, dividends, and profits of certain stock, and of the moneys into which the said stock might be changed." Subsequently new stock was issued at par and eighteen shares allotted to the executor. Not being accepted, these new shares were sold and produced a premium, which was credited to the executor:—Held, that the premium was principal, and that A. was entitled only to the interest on it during her life. *Re Smith*, 8 P. R. 384.

Use of Furniture for Life—Attempted Sale.—A devise of the use, possession, and occupation of a dwelling house and premises, with land attached, together with furniture, plate, linen, china, library and other effects therein at the time of the death of the testator, to occupy, possess, and enjoy the said house, land, furniture, and premises, during the natural life of the devisee, does not enable the devisee to dispose absolutely by will of the personal property so devised; and the executor of the testator, giving notice to the executors of the devisee, may, at a sale of such property (by the executors of the devisee), purchase, and subsequently on an action brought, resist payment. *Dickson* v. *Street*, 1 U. C. R. 180.

Words of Limitation in Tail.—A testator bequeathed personal estate to his wife, "to have and to hold unto her and the heirs of her body through her marriage with me, their, and each of their sole and only use for ever:"—Held, that the wife was entitled to the personalty absolutely, there being nothing to show that the testator meant the words, "heirs of her body through her marriage with me," should import anything different from their ordinary, natural meaning. *Crawford* v. *Trotter*, 4 Madd. 361, distinguished. *Fuller* v. *Anderson*, 20 O. R. 424.

"Freely to be Possessed and Enjoyed." — See *Iler* v. *Elliott*, 32 U. C. R. 434.

Gift "During Natural Life"—Absolute Interest.—A testator gave $500 to A. S., but limited the disposition of it so that she got for her own use absolutely, only the interest upon it. He provided that at her death this $500 was to be given to her eldest son, E. C. S., and that he could use this sum "for his benefit during his natural life." Then the testator purported to give to his wife all that remainder after the $500 was taken out, but he limited her for her own use absolutely, to the interest only, and when the capital should be no longer needed to earn interest for his wife, he gave it to certain persons named, and in all cases "for their benefit during their natural lives:"—Held, that the testator intended to dispose of all his real estate, and had carried out his intention by a payment over of the $500 after the death of A. S., and by a division of the rest after the death of his wife; and that the sum of $500 was an absolute gift to E. C. S., and upon the death of his mother he was to be entitled to it absolutely; and the testator did not die intestate as to any portion of his estate. *In re Chapman*, 22 C. L. T. 259, 4 O. L. R. 130, 1 O. W. R. 434.

Bequest of Interest on Named Amount.—The will of a testator contained the following clause: "To my daughters Elienor and Mary Maria I give, devise, and bequeath the interest of three thousand dollars each per annum, to be paid to each of them half yearly:"—Held, that the devisees took an absolute interest in the $3,000 given to each of them.

Elton v. *Sheppard*, 1 Bro. C. C. 532, followed. *Morrow* v. *Jenkins*, 6 O. R. 698.

Farm Stock and Implements.—A testator who died in February, 1869, by his will, amongst other things, gave legacies payable in eight and thirteen years, and devised lot 8 to his son R., and lot 9 to his son D., subject to charges, the devisees to get possession thereof when his youngest child attained twenty-one. At that time D. and R. were to get one-half of the stock and implements which would then be on the said lots, the other half to be divided amongst other legatees. The youngest child had not yet attained twenty-one. The Master at Hamilton directed an account to be brought in of the stock and implements at the time of the reference on said lots, being the proceeds of the old stock left thereon by the testator, and also those subsequently produced from the produce of the said lots; and also an account of the stock or implements left by the testator which still remained on the land. The defendants appealed on the ground that if any further account was to be furnished, it should be only of stock and implements purchased with the proceeds of the sale, or obtained by the exchange of the stock or implements left by the testator; which appeal was dismissed with costs. *Davidson* v. *Oliver*, 29 Chy. 433.

Law Applicable.—The will in this case having directed the whole estate to be converted into personalty, the testator's grandchildren domiciled without the province of Ontario, could not be affected by any Act of the legislature of this Province—the locality of all rights to personal or movable property being at the domicile of the person entitled to it; and that, therefore, the contingent interest of the grandchildren was not "property or a civil right" within the Province. *Re Goodhue, Tovey* v. *Goodhue, Goodhue* v. *Tovey*, 19 Chy. 366.

Legacy in Common.—A testator bequeathed personal estate to his two sisters, M. and S., and to their children, all to share alike if living:—Held, that the sisters and their children took as tenants in common, sharing per capita and not per stirpes. *Bradley* v. *Wilson*, 13 Ch.. 642.

Life Estate with Power of Disposition.—A testator by his will devised the real estate of which he should die possessed to his wife, "to hold the same for ever, and to dispose of it in any manner she may think proper," and further "the residue of my estate both real and personal I give to my beloved wife, to have and to hold the same for her sole use and benefit, during the term of her natural life, and that she may dispose of the whole or any part of the said personal estate, as she may think proper, and at her death the residue of my real estate or personal estate, if any," he gave to other parties:—*Held*, that the widow took an estate for life in the residue of the personal estate, with an absolute power of disposition; but that the deposit in a bank to her own credit of the proceeds of notes and mortgages which the widow had collected was not such a disposition thereof as to withdraw them from the residue of the estate and give her an absolute title thereto; but that the same remained to be administered as part of the testator's estate. *Green* v. *Carley*, 20 Chy. 234.

Life Estate.—A testator bequeathed to his two daughters (both of whom were married and had children at the time of his will) the sum of $1,000 each, charged upon his realty, which he devised, such sums to be invested in bank stock, and the interest accruing thereon to be paid to his daughters during their natural lives, and after their decease directed these sums to be equally divided amongst their heirs. By a codicil, the testator directed that, should his real estate be sold, the $2,000 might remain on mortgage at interest, payable half-yearly to the daughters, and when the mortgage should be paid, his executors were to have full power to invest that sum in homesteads for his daughters, should they desire to do so:—Held, that the daughters took a life estate, with remainders to their heirs as purchasers. *Rogers* v. *Lowthian*, 27 Chy. 559.

Absolute Interest.—A gift of income to A. for life and then to B. indefinitely, gives B. the absolute interest. *Clough* v. *Wynne*, 2 Mad. 188, followed in *Re Chapman*, 1 O. W. R. 434.

The direction is to pay to A. for life, and after A.'s death, to be paid to A.'s personal representatives. The primary meaning of personal representatives is "executors and administrators." *Stockdale* v. *Nicholson*, L. R. 4 Eq. 359, referred to. *Kerr* v. *Smith*, 27 O. R. 411.

But in no case shall any creditor of either of my children, or any husband of either of my children, daughters have any claim or demand upon the said executrices, &c., but their respective shares shall be kept and the interest, rents, and profits thereof shall be paid ar i allowed to them annually during their respective lives. Held, that it was clearly the intention of the testator that the daughters should only receive the income from the shares during their lives. *Foot* v. *Foot*, 15 S. C. R. 690.

While an unlimited gift of income carries to its donee the corpus as well, no authority can be found holding that a gift of income for life has this effect. *Re Hanmer*, 9 O. L. R. 349.

The real property while my wife remains my widow. Held, that the absolute devise to the wife was not cut down by subsequent words, which were applicable only to the case of the widow's marriage, and that the real estate passed under her will. *Re Mumby*, 8 O. L. R. 283.

CHAPTER XXXIV.*

LIFE ESTATES AND INTERESTS.

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," 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 subjects of absolute ownership. Courts of Equity, however, protect the rights of executory legatees in remainder. Terms of years can be the subject of executory bequests.

6th ed., p. 1206.

EXPRESS WORDS NOT REQUIRED.

Although a gift of personal property to A. without more prima 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. For example, a gift to A. followed by a gift to B. contingently on A.'s death is in the absence of any controlling context a gift to B. in the event of A.'s death in the lifetime of the testator. But if the gift is to A., and "after" or "on" or "at" his death to B, the prima facie construction is that the testator intends a life interest to A., with remainder to B. 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., 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.

6th ed., p. 1207. *Crozier* v. *Crozier*, L. R. 15 Eq. 282.

LIFE ESTATE IN LAND. CREATION OF, BEFORE THE WILLS ACT.

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.

6th ed., p. 1209.

*This chapter is new in the 6th Edition.

Since the Wills Act the presumption is the other way, and prima 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 the sec. 28 of the Act is only to raise a presumption and the intention that A. should take only a life estate may be shown in various ways. 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.

6th ed., p. 1200. *Gravenor* v. *Watkins*, L. R. 6 C. P. 500.

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, but its operation is interfered with by some special rules applying to gifts of real estate. Thus the effect of the rule in Shelley's Case may be to enlarge an express gift for life into an estate of inheritance, and under the doctrine of cy-pres an estate for life may be enlarged into an estate tail. 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. 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.

6th ed., p. 1209. *Forsbrook* v. *Forsbrook*, L. R. 1 Ch. 93.

A gift of the "use and occupation" of property has never been held to mean an unlimited gift.

6th ed., p. 1210.

GIFT TO A. AND B. 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," continuous only during their joint lives. 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.

6th ed., p. 1210. *Grant* v. *Winbolt*, 23 L. J. Ch. 282; *Alder* v. *Lawless*, 32 Bea. 72.

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.

6th ed., p. 1211.

ESTATES PUR AUTRE VIE.

Estates or interests pur autre vie may be created by will by a devise or bequest to A. during the life of some other person or persons.

6th ed., p. 1211.

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; and there can be no general occupancy during the interval before administration is granted.

6th ed., p. 1212. *Mountcashell* v. *More-Smyth* (1896), A. C. 158.

The general law of tenant for life and remainder-man is ontside the scope of this treatise, and the reader is referred to recognized text books for the discussion of the law relating to waste, timber, mines, 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.

6th ed., p. 1214.

TENANT FOR LIFE MUST PAY OUTGOINGS.

In the absence of specific directions by the testator, the tenant for life must pay the usnal outgoings, such as any 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. The cost of surveys and notices requiring tensnts 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.

6th ed., p. 1214. *Re McClure*, 95 L. T. 704.

COST OF IMPROVEMENTS. SALVAGE.

A tenant for life cannot charge the expenses of improvements upon the property, except under the Settled Land Acts, but the Conrt has a jurisdiction to permit him to charge moneys expended for salvage, or in some cases for the benefit of the trust estate.

6th ed., p. 1214. *Re Leigh's Estate*, L. R. 6 Ch. 887; *Dent* v. *Dent*, 30 Bea. 363.

Bnt 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 honses if they are accidentally destroyed by fire.

6th ed., p. 1215. *Re Skingley*, 3 Mac. & G. 221.

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, paying his 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.

6th ed., p. 1215. *Re Bradbrook*, 56 L. T. 106.

CHARGES DIRECTED TO BE PAID OUT OF INCOME.

A testator may, of course, direct the income of property to be 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.

6th ed., p. 1215. *Tewart* v. *Lawson*, L. R. 18 Eq. 490.

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.

6th ed., p. 1216.

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, 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.

6th ed., p. 1216. *Allen* v. *Embleton*, 4 Dr. 226.

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.

6th ed., p. 1216.

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 continning 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. Where expenses are incurred to meet the requirements of a local authority, it is necessary to consider the terms of the statute and the terms of the lease.

6th ed., p. 1216. *Re Betty* (1899), 1 Ch. 821.

If wasting property (as leaseholds) beqneathed 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.

6th ed., p. 1217. *Phillips* v. *Sarjent*, 7 Hare. 33.

RENEWAL OF LEASEHOLDS.

Where renewable leaseholds are settled, a tenant for life is not bound to renew except from the terms of the will or the nature and formation of the gift to him you can imply an intention that he should be bound to renew; if he does renew he renews for the benefit of the estate, and this doctrine spplies also to the purchase of the reversion by the tenant for life, if the lease is renewable by contract or custom. The testator may, of course, throw the cost of renewal on the tenant for life or the estate.

6th ed., p. 1217. *Capel* v. *Wood*, 4 Russ. 500.

Where land snbject 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 mnch only of the income of the invested purchase moneys as is equal to the rent under the lease: the rest of the income is accnmulated and added to corpns.

6th ed., p. 1218. *Cottrell* v. *Cottrell*, 28 Ch. D. 628.

By sec. 2 of the Apportionment Act, 1870, rents, annuities, dividends, and other periodical payments in the nature of income 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 divisable 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, but uot

to all kinds of property yielding income, and the testator may indicate that the Apportionment Act is not to apply.

6th ed., p. 1219. *Hasluck* v. *Pedley*, L. R. 19 Eq. 271.

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, but if the life interest is contingent, they belong to capital, and the legatee, on attaining majority, is only entitled to the incomc of the investments representing them.

6th ed., p. 1220.

CASUAL PROFITS IN THE CASE OF REALTY.

With regard to the casual profits, the question as between tenant for life and remainder-man of real estate may to somc extent depend upon whether or no the tenant for life is impeachable for waste.

6th ed., 1220. *Re Medows* (1898), 1 Ch. 300.

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 trustecs 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 capitalising 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 it has been settled that, apart from special circumstances, and, of course, in the absence of any mala fides on the part of the trustees, that the tenant for life takes the dividends, even though in this way purchased out of capital, or loses the income invested in capital.

6th ed., p. 1221. *Scholefield* v. *Redfern*, 2 Dr. & Sm. 173.

SHARES IN 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, or (if he die after the dividend is declared, and before it is paid) to his personal representative.

6th ed., p. 1222. *Price* v. *Anderson*, 15 Sim. 473.

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.

6th ed., p. 1223.

RULE (*a*).

The decision of the company as to what is capital and what is income is binding on the tenant for life and remainder-man.

6th ed., p. 1223. *Re Bouch*, 29 Ch. D. 653.

RULE (*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.

6th ed., p. 1224. *Bouch* v. *Sproule*, 12 A. C. 398.

RULE (*c*).

But, conversely, if a company applies part of its earnings to increasing its capital, and issues new shares to represent the money so applied, the new shares are capital. Re Barton's Trust is a case of this kind.

6th ed., p. 1224. *Re Barton's Trust*, L. R. 5 Eq. 238.

RULE (*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.

6th ed., p. 1224. *Barclay* v. *Wainewright*, 14 Ves., at p. 78.

RULE (*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, but whether a reserve fund of undivided profits is to be treated as income seems to depend upon the regulations of the company.

6th ed., p. 1225. *Birch* v. *Cropper*, 14 A. C. 525.

RULE (*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 of the dividend, the value of the dividend is income and the value of the option is capital.

6th ed., p. 1225. *Re Northage*, 64 L. T. 625.

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. 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.

6th ed., p. 1226. *Re Armitage* (1893), 3 Ch. 337.

PROFITS OF A PRIVATE PARTNERSHIP.

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.

6th ed., p. 1227.

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.

6th ed., p. 1227. *Straker* v. *Wilson*, L. R. 6 Ch. 503.

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. It is submitted that the expense of auditing the accounts to ascertain the amount of profits in any year would be an outgoing payable out of income.

6th ed., p. 1228. *Re Bennett* (1896), 1 Ch. 778.

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.

6th ed., p. 1229. *Re Chancellor*, 26 Ch. D. 42.

A power to postpone the conversion of a business authorizes the trustees to carry on the business.

6th ed., p. 1229. *Re Crowther* (1895), 2 Ch. 56.

EFFECT OF A TRUST FOR CONVERSION.

The rights of a legatee for life and 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.

6th ed., p. 1229. *Waddington* v. *Yates*, 15 L. J. Ch. 223.

AS TO INCOME OF PROPERTY DULY INVESTED.

(1) 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, 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.

6th ed., p. 1230. *Hume* v. *Richardson*. 4 D. F. & J. 29.

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; 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.

6th ed., p. 1231. *Crawley v. Crawley*, 7 Sim. 427.

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 attributed that part of the payment to capital, and the remaining part to income.

6th ed., p. 1231.

In Re Dawson, it was held 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.

6th ed., p. 1231. *Re Dawson* (1906), 2 Ch. 211.

AS TO INCOME OF PROPERTY NOT DULY INVESTED.

(2) 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 legatee for life gets 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.

6th ed., p. 1231. *Douglas* v. *Congreve*, 1 Kee. 410.

EFFECT OF DIRECTION TO ACCUMULATE UNTIL CONVERSION.

(3) The rule that a 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; and it is immaterial, in such case, that the clause directing the accumulation of the income goes on to provide for its investment.

6th ed., p. 1232. *Sitwell* v. *Bernard*, 6 Ves. 520.

AS TO INCOME OF PROPERTY CONVERTED WITHIN THE YEAR.

(4) With respect to such portion of the property as is, in point of fact, converted before the end of the year following the

testator's decease, the legatee for life takes the actual income of the fund constituted of the proceeds from the time of its actual investment; and that too, of course, without regard to the fact of there being an express direction to accumulate the profits until conversion or not.

6th ed., p. 1233. *La Terriere* v. *Bulmer*, 2 Sim. 18.

As to Income of Property Which Can be But Is Not Converted Within the Year.

(5) If the property can be, but is not, actually converted at the end of a year from the testator's decease, it must be computed what would have been the result if the conversion had taken place at such year's end, and the proceeds had been then invested in the public stocks.

6th ed., p. 1233. *Dimes* v. *Scott*, 4 Russ. 195.

As to Income of Property which Cannot be Converted.

(6) Where property ought to be, but from its nature cannot be, immediately converted, at least without great loss to the estate, the authorities are not quite uniform.

6th ed., p. 1235. *Meyer* v. *Simonsen*, 5 De G. & S. 723.

It has been 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 remainderman, such a case is one of partial conversion, and the proceeds of the part converted must be laid out on the permanent securities approved of by the Court, of which the tenant for life will take the interest, and the remainder-man the corpus. The third class is where the property is so laid out as to be secure and to produce a large annual income, but is not capable of immediate conversion without loss and damage to the estate, as in Gibson v. Bott, and Caldecott v. Caldecott. 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.

6th ed., p. 1235. *Gibson* v. *Bott*, 7 Ves. 89, *Caldecott* v. *Caldecott*, 1 Y. & C. C. 312.

Power to Postpone Conversion.

(7) 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.

6th ed., p. 1236. *Re Norrington*, 13 Ch. D. 654.

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.

6th ed., p. 1236. *Re Crowther* (1895), 2 Ch. 56.

REVERSIONARY AND OTHER INTERESTS NOT PRODUCING INCOME. NO POWER TO POSTPONE.

(8) 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; and this is so even in the case of a reversionary interest expectant on the death of the tenant for life.

6th ed., p. 1238.

NO POWER TO POSTPONE.

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, but if he requests the trustees to delay conversion it would seem that he impliedly waives this right.

6th ed., p. 1238. *Walker* v. *Shore*, 19 Ves. 387.

POWER TO POSTPONE.

In most cases, however, the testator gives the trustees a discretionary power of sale, or power to postpone conversion.

6th ed., p. 1238. *Rowlls* v. *Bebb* (1900), 2 Ch. 107.

If 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.

6th ed., p. 1238.

It was held that they ought to be divided between capital and income on the principle laid down in Re Chesterfield's Trusts, 24 Ch. D. 643. But where an investment is made hy the trustees of a will on mortgage, under the powers contained in the will, and the sum realised hy 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.

6th ed., p. 1240.

PROPERTY NOT ACTUALLY PRODUCING INCOME.

Where a will gives the trnstees 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, hnt that no property not actually producing income shall be treated as producing income, the object, of course, heing to exclude the two rules (5) and (8) above stated.

6th ed., p. 1240. *Re Godden* (1893), 1 Ch. 292.

REAL ESTATE.

(9) 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 snccession. As ordinary land is not prima facie a wasting or hazardous form of property, it would seem clear that the general principle stated above under rule (1) 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.

6th ed., p. 1241. *Hope* v. *D'Hedouville* (1893), 2 Ch. 361.

THE RULE IN *Howe* v. *Lord Dartmouth*.

(10) 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 residne of his personal estate in trust for A. for life, and after his decease to B. ahsolutely. 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 ohtain 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 intcntion of the testator, requires thc wasting property to be converted and invested in trust investments. If the property had heen not wasting, but reversionary, the con-

verse 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.

6th ed., p. 1242.

This rule is called the rule in Howe v. The Earl of Dartmouth, 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, foreign bonds, shares in trading companies, a business carried on by the testator, 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.

6th ed., p. 1242. *Howe* v. *Earl of Dartmouth*, 7 Ves. 137; *Kirkman* v. *Booth*, 11 Bea. 273; *Wightwick* v. *Lord*, 6 H. L. C. 217.

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.

6th ed., p. 1243. *Yates* v. *Yates*, 28 Bea. 637.

FOREIGN LEASEHOLDS.

The rule does not apply to leaseholds situate abroad.

6th ed., p. 1244.

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.

6th ed., p. 1245.

CONTRARY INTENTION.

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."

6th ed., p. 1245.

INTENTION TO GIVE ENJOYMENT IN SPECIE.

What amounts to an indication of intention that the legatee for life shall, in exclusion of the general doctrine, enjoy in specie the property which is the subject of disposition? This, of course, like all others, is a question of construction, to be elicited from the whole will; and on which a right conclusion can be formed only by an attentive examination of the cases, some of which will be found to turn upon rather nice distinctions.

6th ed., p. 1245.

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 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.

6th ed., p. 1245.

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.

6th ed., p. 1246. *James* v. *Gammon*, 15 L. J. Ch. 217.

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; but it must be done by a fair construction of the will, the burden being always on those who would exclude the rule.

6th ed., p. 1246. *Macdonald* v. *Irvine*, 8 Ch. D. 101.

EXPRESSIONS WHICH IMPLY ENJOYMENT IN SPECIE.

A direction to renew or keep in repair, or to demise or discharge incumbrances on 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; so where there is a power to convert generally, and a fortiori where there is a direction not to convert without consent, or for a definite term of seven years, or a discretion is given either to convert or not.

6th ed., p. 1247. *Thursby* v. *Thursby*, L. R. 19 Eq. 395; *Skirving* v. *Williams*, 24 Bea. 275.

DISTINCTION BETWEEN HAZARDOUS AND WASTING INVESTMENTS.

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.

6th ed.. p. 1248.

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 shows 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.

6th ed., p. 1248.

It may now be regarded as settled that if a testator bequeaths his residue upon trust for A. for life, and gives the trustees a discretionary power to retain any of his investments, A. is entitled to the whole of the income arising from unauthorized investments of a permanent nature, so long as they are retained unconverted, but not to that arising from wasting investments: these latter ought to be converted, or treated as having been converted.

6th ed., p. 1248.

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.

6th ed., p. 1248. *Re Nicholson* (1900), 2 Ch. 111.

REVERSIONARY INTEREST.
EXPRESSIONS INSUFFICIENT TO CONFER ENJOYMENT IN SPECIE.

Conversely, if the trustees have a discretionary power of conversion, and in the exercise of it 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.

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, 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—a sale upon the first good opportunity being in each case evidently contemplated—shows no intention to alter equities between successive takers, but only to regulate the discretion of the trustees in conducting the sale, and does not give the tenant for life the actual profits made before sale.

6th ed., p. 1249. *Re Chancellor*, 26 Ch. D. 42.

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; an argument, however, which requires other corroborative circumstances to render it conclusive.

6th ed., p. 1249. *Booth* v. *Coulton*, 7 Jur. N. S. 207.

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.

6th ed., p. 1250. *Collins* v. *Collins*, 2 My. & K. 703.

A gift of the income of "my estate" to a person for life, does not entitle him to the enjoyment of it in specie.

6th ed., p. 1252. *Macdonald* v. *Irvine*, 8 Ch. D. 101.

Repairs.—As to repairs, tenant for life not bound to put the premises in better condition than he finds them and is not liable for mere permissive waste. *Re Bell*, 7 O. W. R. 201; *Re Cartwright*, 41 Ch. D. 532; *Patterson* v. *Central Savings Co.*, 29 O. R. 134; *Holmes* v. *Wolfe*, 26 Chy. 228.

As to whether repairs be beneficial to remainderman: see *Re Tucker* (1895), 2 Ch. 468; *Re Willis* (1902), 1 Ch. 15.

Words sufficient to pass fee followed by words indicating a contrary intention cut down the gift to a life estate. *Cravener* v. *Watkins*, L. R. 6 C. P. 500; *Re Cotterill*, 18 O. W. R. 560.

Life Estate.—Invest fund and pay interest to life tenant. *Howe* v. *Lord Dartmouth*, 7 Ves. 137a; *Re McVicar*, 5 O. W. R. 479.

Tenant for Life.—Unless I hold that the power given to the executors to dispose of the land carried with it a prohibition to dispose of it to the life tenant, I cannot hold the quit claim by the executors to be ineffectual. See Lewin on Trusts, 10th ed. pp. 551, 552. Instead of the position of a tenant for life in this regard being altered for the worst, the tendency seems the other way, e.g., it is now held that trustees having a power, with the consent of the tenant for life, to lend trust funds on security, may lend them on personal security to tenant for life. *In re Lang's Settlement* (1899), 1 Ch. 593. Lewin, 10th ed., p. 335 (*Keays* v. *Lane*, L. R. 3 Eq. 1), contra, not followed.

Life interest in a fund does not carry with it right to corpus of fund from which interest is to arise. *Re Hanmer*, 9 O. L. R. 348, 4 O. W. R. 474, followed. *In re Nelson*, 12 O. L. R. 761.

Direction that after death of life tenant estate be divided indicates enjoyment by life tenant in specie. *Collins* v. *Collins*, 2 My. & K. 703.

Tenant for life allowed to conduct business. *Re Wythes* (1893), 2 Ch. 369; *Re Bagot* (1894), 1 Ch. 177; *Re Sibbett*, 7 O. W. R. 176.

Expenditure under Void Will.—M. H. (the executrix under a will which was subsequently set aside), having expended $536.35 in repairs to the real estate, and the testator's will having given her a life estate in all the real estate, and having also given her "the income of all investments of which I may be possessed for her own use, and also the principal of such investments as she may require to use for her own benefit:"—Held, that the $536.35 was properly allowed her. *Hill* v. *Hill*, 6 O. R. 244.

See *Tyrone* v. *Waterford*, 1 De G. F. & T. 613; *Roper* v. *Roper*, L. R. 3 C. P. 32.

Not to be cut down to a life estate. *Crawford* v. *Boddy*, 26 S. C. R. 345; *Cowan* v. *Allen*, ib. 292; *Vanluven* v. *Ellison*, 2 O. L. R. 198.

Absolute Gift of Life Interest.—*Re Burk*, 12 O. W. R. 527. Where there is a clear gift in one part of a will, it is not to be cut down except by clear expressions referring to such gift. *Greenwood* v. *Sutcliffe*, 14 C. B. 226; *Ashead* v. *Willetts*, 29 Beav. 358.

Rule as to conversion of wasting residuary personalty in which successive interests are bequeathed, when a power of sale is conferred upon executors, is an evidence that the immediate conversion required

by tha ruls must not take place without executors' approval. *Re Pitcairn* (1896), 2 Ch. 199; *Burton* v. *Mount*, 2 Def. & Sm. 383.

Estate not to be Transferable.—After directing a sale and division of the proceeds of an estate, the will as to one of the legatees, M. S., "provided that the said M. S.'s intereet in my estate shall not be transferable or transferred to any other person whatsoever, but may be inherited by her children, legitimate; and in case the said M. S. die without legitimate issue, then her interest in my estate shall revert back to the other legatees." &c.:—Held, that M. S. took only a life estate. *Jeffrey* v. *Scott*, 27 Chy. 314.

Restraint against Mortgaging or Selling—Gift to Children.—A testator, by his will, dated 25th June, 1866, devised to the plaintiff "and his heirs and executors for ever," a parcel of land subject to the following proviso: "That he neither mortgage nor sell the place, but that it shall be to his children after his decease." The plaintiff had children living at the date of the will. The testator died in 1867:—Held, that the plaintiff could not, by his own conveyance, confer an indefensible title upon an intending purchaser, and that the preferable construction of the devise was to give the plaintiff an estate for life, remainder to his surviving children for their lives, remainder to the plaintiff in fee. *Dickson* v. *Dickson*, 6 O. R. 278.

Restriction against Disposal and Intention to Benefit Children.—By her will the testatrix devised as follows: "I give and devise to my beloved children, A. P. (her son) and M. P. (his wife) and to their children and children's children for ever, all and singular lot 15. . . . Provided always that the aforesaid A. P. or M. P. shall not be at liberty at any time or for any purpose to convey or dispose of (said lot) as it is my will that the same be entailed for the benefit of their children." The residue of her estate the testatrix devised to her daughter-in-law the said M. P.:—Held, that upon the true construction of the will A. P. and M. P. took only an estate by entireties for their lives and the life of the survivor of them. Held, also, that they did not take an ultimate remainder in fee, expectant on any estate tail given to tha children, and that under 48 Vict. c. 13, s. 5. R. S. O. 1887, c. 44, s. 52, s.-s. 5, it was the duty of the Court to make a declaratory decree as to this in order to answer as to the whole estate taken by the parents. Held, also, that a mortgage by A. P. and M. P. was valid and bound their life estate in the land notwithstanding the attempted restraint on alienation. Semble, that the children took an estate tail but the special case which was stated for the opinion of the Court did not require this to be declared. *Peterborough Real Estate Co.* v. *Patterson*, 15 A. R. 751.

Devise of Proceeds for Life.—A devisee "of all the proceeds" issuing from a farm, for life, gives an estate for life in the farm by implication, especially where the devisee over in fee is entitled to the cattle and effects on the farm, by the express words of the devise, only on the death of the devisee for life. *Brennan* v. *Munro*, 6 O. S. 92.

Disposal During Life.—Held, that a devise to testator's wife of land, "to be at her will and disposal during her life," with a subsequent direction as to what should become of the estate after her decease, clearly gave her only an estate for life, not in fee. *Doe d. Keller* v. *Collins*, 7 U. C. R. 519.

Devise—Life Estate—Restriction on Alienation.—A testator devised to his widow for life, and then to D. for life, with the power to D. to devise in fee:—Held, that the widow and D. and the heirs of the testator, ascertained at the time of his death, could make a good title in fee simple to a purchaser, who should be assured against exercise of the power by D.'s covenant:—Held, also, that subsequent words in the will, referring to "that part I have directed not to be sold," did not import a restriction on the sale, no direction not to sell being found in the will. *In re Drew and McGowan*, 21 C. L. T. 186, 1 O. L. R. 575.

Life Estate with Power of Disposal.—A testator devised his property to his wife for life, provided she remained unmarried; but if she married it was at once to be equally divided among his children; if, however, she should continue his widow, and be guilty of no misconduct, then it was to be at her disposal, without the hindrance or molestation of any person whomsoever, with a final declaration that it was not to be disposed of or rented during the devisee's life. The widow remained unmarried and died:—*Held*, that the widow took either a fee simple estate, or an estate for life, with power to dispose of the fee if she should not marry again, in which event both estatee would be divested. *Burgess* v. *Burrows*, 21 U. C. C. P. 426.

No Words of Limitation.—Under the following will (the testator dying before 4 Wm. IV. c. 1, came into force), "And touching my worldly estate, I give and dispose of the same, &c.," then followed various devises to several children; then "all other property of which I shall die possessed and not herein mentioned, I wish to be divided among the five children above named." The testator then added, "to A. B. of K., I give and bequeath lot No. 9 in the 7th concession of the township of Nelson, and county of Halton, and I appoint the said A. B. one of my executors:"—Held, that A. B. took only an estate for life in lot 9, and that the revision therein passed to the residuery devisees, not to the heir-at-law. *Doe d. Ford* v. *Bell*, 6 U. C. R. 527.

"Owned for Life."—A testator devised certain real estate "to be owned, possessed, and inherited by my wife during her natural life subject to the further provisions of my will," followed by a devise to "W. G. when he is of the age of twenty-three years, 200 acres, or if sold before he arrives at the years mentioned, that some other lot of land or money amounting in value to the above-mentioned lot be given him in lieu thereof:"—Held, that the wife took a life estate with a vested remainder over to W. G., and the testator having shortly before the date of his will contracted for the sale of the land so devised, that the estate of W. G., who died during the life of the widow, and before he had attained twenty-three, was entitled to the proceeds of such sale. *Holtby* v. *Wilkinson*, 28 Chy. 550.

Devisee—Use of House and Allowance—Care in Institution in the Alternative—Exercise of Judgment by Executor—Reasonableness.—A testator by his will gave the defendant all his estate on condition that he should pay the plaintiff $50 a month, and that she should have the use of the testator's house and furniture for her life, and by a codicil provided that if "in his (the executor's) own absolute judgment he is of opinion" that it would be best for her to be cared for in some institution, he should have the right and authority to place her there (with her consent in a specially mentioned case), and that the charges for caring for her there should take the place of the use of the house and furniture and the monthly allowance. The defendant chose an institution where the plaintiff would be a paying inmate and be cared for (not the specially mentioned case), but the plaintiff refused to leave the house, and the defendant ceased paying the monthly allowance, and the plaintiff brought this action for the arrears of the allowance and for the construction of the will:—Held, that the will, executed in 1896, indicated that the condition of the plaintiff was one that needed care and oversight; that in 1901 the defendant came to the conclusion and made it known to the plaintiff that it would be for her welfare to give up housekeeping, and take the benefit left to be brought into effect by his absolute judgment; that he had the right and authority to place her in a sufficiently adequate home (other than the specially mentioned case), without her consent, and that the choice he had made was such a one, and he was entitled to possession of the house, and to cease paying the monthly allowance. *Leduc* v. *Booth*, 23 C. L. T. 46, 5 O. L. R. 68, 1 O. W. R. 800.

Devise of Family Residence on Trust—Use and Occupation "While Unmarried"—Tenants in Common—Residuary Devise—Right to Possession.—Testatrix devised her family residence to trustees to hold upon trust for her son John during his natural life while unmarried,

on condition that he should not alienate it, and that he would permit his sisters and nephew, while unmarried, to also reside therein. On the death of John, the daughters were to occupy the residence while unmarried, and on the death of John, the nephew was to become absolute owner, subject to his aunts' right to reside therein while unmarried. The residuary clause gave residue to the two daughters, son John and the grandson equally. One daughter died, John married, and nephew came of age.—Middleton, J., held, that John's estate came to an end at his marriage. Nephew only took estate on death of John. The estate, during remaining years of John's life, passed to those mentioned in residuary clause, the representatives of deceased daughter taking her share. *Re Ryan* (1910), 16 O. W. R. 1001, 2 O. W. N. 32.

Right to Live on Property.—J. F., by will dated 8th October, 1871, devised all his real property to his son, the plaintiff; he next devised his personal property, with slight exceptions, to his wife E. F.; and the fourth clause was: "My will is that my wife shall be allowed to live on the said property during the term of her natural life." The last clause gave $50 to his daughter, to be paid by plaintiff. On ejectment by plaintiff against E. F. and another:—Held, that the fourth clause gave the wife a life estate in the land. *Fulton* v. *Cummings*, 34 U. C. R. 331.

A testator devised all his real and personal estate to his beloved sons E. and J. in fee, "subject, however, to the following conditions: First. That my beloved daughters" (six in number, naming them) "shall have at all times a privilege of living on the homestead and maintained out of the proceeds of the said estate during their natural lives:"—Held, that the daughters took a life estate in the homestead, and that the death of some of them did not diminish the right of the survivors. *Bartels* v. *Bartels*, 42 U. C. R. 22.

Rooms in a House—"Life in a Lot."—The testator by his will made a provision for his wife as follows: "I give and devise to my beloved, &c., 'all household goods,' &c., 'for the term of her natural life;' and I give and devise to her one bedroom, and one parlour of her own choice in the dwelling house wherein I now dwell,' &c., 'also the use of the kitchen, yard, garden; also, I give and devise to my said wife her life in the said lot theretofore mentioned; also an annuity of $20 yearly.'" He then subject to the above and to the payment of $1,000 to his eldest son D., and other legacies, devised the lot to his second son J. After the testator's death the plaintiff, the widow, and J., lived on the lot arranging between them as to her maintenance. In order to raise money to pay D.'s legacy, the plaintiff and J. mortgaged the lot to a loan company, and on default, proceedings were taken under the power of sale to compel payment. The plaintiff set about making arrangements to pay off the mortgage, but the company refused to accept payment unless the amount of two other mortgages made by J., alone, was also paid. No tender was made by plaintiff, nor was any demand made by her for arrears of annuity or dower. An action was brought by plaintiff to establish the will, and to have the rights of the loan company declared:—Held, that the proper construction of the will was, that the widow was to have a life estate in the bedroom and parlour she should select, and also in the kitchen, yard, garden, and also the annuity of $20; and that the loan company could not claim to have the mortgages consolidated, and that as the plaintiff had not made any tender to the loan company she could not claim her costs, but it was directed in lieu of her paying costs that the arrears of annuity and dower should be wiped out. *Smith* v. *Smith*, 18 O. R. 205.

Life Tenant—Lease.—A testator gave all his estate, real and personal, to trustees upon trust to allow and give the use thereof to his wife during her life for her support and maintenance, and after her death to sell and divide the proceeds among his children equally:—Held, that the wife had the right to lease the farm and deal herself directly with the tenant during her life. *Hefferman* v. *Taylor*, 15 O. R. 670.

Renewal of Lease—Profits—Account.—A widow was entitled under her husband's will to the use and enjoyment of all his property during her life. It was conceded that she was entitled to the enjoyment in

specie of the personal estate. The testator owned a brick-field on leasehold land, and carried on there a brickmaking business at the time of his death. This and the plant in connection therewith the tenant for life took possession of, and went on with the working of it. She put other assets of the estate into this business and extended it, and when she died it was still a going concern. At the expiration of the term of her husband's lease, she obtained a new one, covering a larger area of land:—Held, that the widow, having elected to carry on the business on these premises, did so for the ultimate benefit of the estate. She was entitled to all the income, earnings, and profits derivable therefrom each year, in so far as she applied them to the maintenance of the family, or in the acquisition of other property, or in the paying off of mortgages; but whatever profits went into the business to increase it, and whatever plant, stock, and belongings of the business remained on the premises or elsewhere at her death, became the property of her husband's estate. An account against her executor was directed, and the scope of the inquiry defined. *Wakefield* v. *Wakefield*, 32 O. R. 36.

Devise — Life Estates — Remainder in Fee — Estate Tail — Period of Distribution — Surviving Wife — Title — Vendor and Purchaser.—A testator devised to one of his sons, G., fifty acres of land, "to have and to hold to him, etc., as aforesaid and not otherwise." In the earlier part of the will he had devised lands to his other sons, "to have and to hold to each of them for and during their natural life respectively, and if they should marry, after their and such of their decease to have and to hold to their surviving wife respectively, and on the demise of their and each of their wives to have and to hold to their children respectively and their heirs forever." G. was unmarried at the date of the will and of the testator's death:—Held, that G. took an estate for life, and his widow (if he left one) an estate for life after his death, and his children the remainder in fee after her death, or if no widow, after G.'s death.—G. was not entitled to an estate tail under the rule in Wild's Case, for that rule applies only where the gift to both parent and children is immediate, nor under the rule in Shelley's Case.—*Grant* v. *Fuller*, 33 S. C. R. 34, and *Chandler* v. *Gibson*, 2 O. L. R. 442, followed.—Held, also, that the devise to the children of G. was a gift to a class, which would comprise all children coming into existence before the period of distribution.—G. had married and had children living, and his wife had died at the time of an application under the Vendors and Purchasers Act, he having contracted to sell the land:—Held, that if he married again his second or any future wife who survived him would be entitled to a life estate.—Title could not be made without the order of the Court. *Re Sharon and Stuart*, 12 O. L. R. 605, 8 O. W. R. 625.

Offspring—Power of Appointment.—J. P. by his will provided as follows: "I give and devise to my brother D. P. the . . . on which he resides . . . to hold the same to the said D. P. for and during his natural life, and after the death of the said D. P., I give and devise the said . . . to H. P., second son of said D. P., to be held by the said H. P. for and during his natural life, and if the said H. P. shall leave offspring him surviving, then I give and devise the same to such of his offspring as the said H. P. shall appoint, and in case of no appointment being made by the said H. P. in his lifetime, then I devise the same equally to the children of the said H. P. in fee, and in case the said H. P. shall die without lawful offspring or during his father's lifetime, then I give and devise the same to . . ."—Held, that only a life estate was given to H. P., and not an estate in fee tail. If "offspring" is read as "children," or construed as meaning "issue," the devise falls within the rule that when words of distribution, together with words which would carry an estate in fee, are attached to the gift to the issue, their ancestor takes for life only. Here to the children or issue, in default of appointment, is given expressly an estate "in fee," and it is distributed to them "equally."—Held, also, that untrue representations were made which induced the execution of the power of appointment and the transfer of the estate thereunder without consideration; and that the instrument subsequent to the deed of appointment, did not affect the fee simple of the land and that the opera-

tion of the mortgages should be limited to the life estate of H. P. in the land. *Sweet* v. *Platt*, 12 O. R. 229.

Estate to Devolve on Children to be Selected.—One J. McP. lived upon lot 26, of which his father A. McP. was owner from 1826 to 1878, when he died, leaving twelve children him surviving. A. McP. died in 1841, having by will devised lot 26 to J. McP., but adding: "He is not to sell or dispose of the said lands, nor any timber or wood now growing on the said lot; on the contrary, the land is to devolve on the most deserving of his children according to the discretion of my executors, that is to say after his own death." In 1869 J. McP. conveyed the north half of lot 26 in fee to the defendant. The executrix of A. McP. made no selection as to who was the most deserving of his children on whom the land should devolve. Nevertheless the plaintiff, a son of A. McP., now laid claim under the above devise to seven-twelfths of the lot, being his own share and six other shares which he had acquired:—Held, that he was entitled to judgment in respect of seven-twelfths of the land, for that J. McP. only took a life estate under the said will, under which he must be held to have taken, as he did not disclaim the benefit of it, and had not acquired title by possession at the time of his father's death; and though no selection had been made among the children of A. McP., the Court would carry out the general intention in favour of the class by holding that the estate descended on the twelve children of J. McP. There was no estate tail given to J. McP. under the will, for (1) "children" in it had its primary meaning of descendants of the first generation only; and (2) the children were not to take as a class, in the first instance, but only those out of that class to be indicated by the executors as the most deserving. *McPhail* v. *McIntosh*, 14 O. R. 312.

Devise for Life—Remainder to Devisee's Children — Estate Tail.—Land was devised to D. for life "and to her children, if any, at her death," if no children to testator's son and daughter. D. had no children when the will was made:—Held, that the devise to D. was not of an estate in tail, but on her death her children took the fee. *Grant* v. *Fuller*, 23 C. L. T. 81, 33 S. C. R. 34.

Devise for Life—Remainder to Issue—Estate Tail.—Testator devised land to W. for life and after her death to her issue, providing that in case W. died without issue, and without making a will, the land should be divided among certain named persons.—Latchford, J. (17 O. W. R. 92, 2 O. W. N. 120), held, that W. was not given an estate tail, but took only a life estate.—Divisional Court held, that W. took an estate tail. *Watson* v. *Phillips* (1910), 17 O. W. R. 489, 2 O. W. N.

Life Estate to Widow—Remainder to "first family or the survivors"—Costs. *Ward* v. *McKay*, 1 E. L. R. 427.

Devise — Estate Tail — Estate of Life — Mistake of Title — Improvements.—A will made in 1877, by a testator who died in 1882, contained the following provision: "To my son Moses I give and bequeath fifty acres during his lifetime and then to go to his children, if he has any, but should he have no issue then to be equally divided among all my grandchildren." Moses married after his father's death, and left children surviving him at the time of his own death:—Held, that Moses took an estate for life with a remainder in fee to the children and not an estate tail. *Chandler* v. *Gibson*, 21 C. L. T. 558, 2 O. L. R. 442.

Issue to Take in Fee Simple.—A testator by the third clause of his will devised certain lands "to my son James for the full term of his natural life, and from and after his decease, to the lawful issue of my said son James, to hold in fee simple; but in default of such issue him surviving, then to my daughter Sarah Jane, for the term of her natural life; and upon the death of my daughter Sarah Jane, then to the lawful issue of my said daughter Sarah Jane, to hold in fee simple; but in default of such issue of my said daughter Sarah Jane, then to my brothers and sisters and their heirs in equal shares." By a later clause, the testator added: "It is my intention that upon the decease of either of my said

children without issue, if my other child be then dead, the issue of such latter child, if any, shall at once take the fee simple of the devise mentioned in the third clause of my will:"—Held, reversing 23 O. R. 404, that the clauses must be read together, and that, having regard to the latter clause, and to the direction that the issue of James were to take in fee simple, there was a sufficiently clear expression of intention to give James a life estate only to prevent the application of the rule in Shelley's Case. *Evans* v. *King*, 21 A. R. 519, 24 S. C. R. 356.

Life Estate—Gift Over—Residue "as Left Unused" by Life Tenant.—Testator by his will gave his estate to his wife for life, and the residue "as left unused" to his children. The wife was given power to sell and convey the real estate, but none was left:—Held, that "as left unused" equals "whatever remains of" or "what shall be left." The widow gets a life estate, the corpus goes to the children. *In re Elliott*, 7 E. L. R. 308.

Joint Estate with Survivorship.—A testator devised his property, real and personal, to S., his grandson, but upon certain conditions (which were proved to have been performed), and further ordered that the said S.'s mother and testator's youngest daughter, C., should have a lien upon said lands as a home during either of their natural lives, then after their decease the same should revert to the said S. and his heirs for ever:—Held, that a joint estate for life passed to testator's two daughters, remainder to the survivor for her life, with a remainder in fee to the grandson. *Scouler* v. *Scouler*, 8 U. C. C. P. 9.

Devise for Life and that of Wife or Survivor — Special Occupant.—A testator by his will devised his farm to his son, Abner Butler, "for and during his natural life, and, in the event of his marriage during the life of his wife, or the survivor; and at his or their decease to his children, if any, but if the said Abner Butler should die, without issue, the said land to descend to my then living children." The son married twice, having children by his first wife, but none by his second, who was left a widow:—Held, that the widow was not entitled to a life estate by implication, and that there being no special limitation to the heirs of Abner, they could not take as special occupants during her life, and the result was, that the estate for the residue of her life went to the executors of Abner, and were assets in their hands. *Wilson* v. *Butler*, 21 C. L. T. 564, 2 O. L. R. 576.

Direction to Set Sum Apart and Pay Income of Life Tenant.—A testator directed his executors to set apart and invest $50,000 out of his estate and pay the income semi-annually to his wife during her lifetime, with power to appoint, and in default of appointment, over. He then gave the residue equally amongst his children. The estate consisted of income producing securities to the value of $30,000, and a large amount of unproductive land:—Held, that the executors were bound to reserve sufficient productive assets for the preservation of the lands and payment of necessary expenses; and that the widow was entitled to the income of the balance from the expiration of a year from the testator's death, and to have such balance set apart towards the fund of $50,000, ultimately to be made up to that sum as the lands were sold according to the following rule:—As lands or other assets were sold the proceeds should be apportioned between capital and income by ascertaining the sum which, put out at interest at the date of the expiration of one year from the testator's death, and accumulated at compound interest with half-yearly rests, would, with the accumulations of interest, have produced, at the day of receipt, the amount actually received from the sale of the lands or other assets; the sum so ascertained to be treated as capital and added to the sum theretofore set apart towards the $50,000, and the residue to be treated as income and paid over to the widow. *In re Morley*, [1895] 2 Ch. 738, applied. *In re Cameron*, 21 C. L. T. 593, 2 O. L. R. 756.

Contingent Life Estate.—In his will testator directed that at the decease of the survivor of A. and B. certain lands were to go to C. for life, and within one year after the death of these three the lands were to be sold,

and proceeds divided among C.'s children, but if she had no surviving children then to go to testator's brothers and sisters per stirpes. The latter were all dead but A., some dying childless, others leaving children. C. is now 38, and has five children ranging from two to twelve:—Held, that as there is a possible contingency that C.'s children may all predecease her, that she has only a life estate contingent on her surviving A. and B. *Re Millington Estate*, 13 O. W. R. 366.

Devise to Son "for his Children."—A testator by his will, made in 1832, gave certain lands to his son J. D., "for his children," adding, in a concluding paragraph, "any other lands I may now or hereafter have I may add:"—Held, that the devise carried only a life estate; and that the concluding words had no effect. *Hamilton* v. *Dennis*, 12 Chy. 325.

Direction to Convey to Heirs.—A. devised land to his executors, "to hold the same in trust for the use and benefit of my son W. during his lifetime, and after the death of my son W. in trust for his heirs, issue of his body, until the youngest of said heirs shall become of age, and then to convey it to said heirs, the children of my said son W. taking equal shares, and the child or children of any deceased child of my said son to take their parent's share in equal proportion:"—Held, that W. took only an estate for life, and that the legal estate in remainder vested in the trustees for the benefit of his heirs. *In re Romanes and Smith*, 8 P. R. 323.

Direction for Equal Division among Heirs.—J. S. by his will devised as follows: "I will and bequeath to my son J. S., for the term of his natural life, the farm I purchased . . . but if my said son J. should leave lawful heir or heirs, then said lands shall be equally divided among them on the death of their father, but if my said son J. S. shall die without leaving lawful heirs, then in that case I direct the said lands shall be sold and the proceeds thereof to be equally divided among my remaining children or their heirs." The son J. S. had been married for some years at the date of the will, and had a daughter after that date, who, with her father, was living at the time of the testator's death:—Held, that the devisee J. S. took a life estate with remainder to his child or children; and not an estate in fee, under the rule in Shelley's Case. *Smith* v. *Smith*, 8 O. R. 677.

Direction to Divide among Children.—A. by his will devised as follows: "I give and bequeath to my nephew B., and C. his wife (describing the land), to their use for the term of their natural life, and at their decease to be divided among their children as they may see fit." C., the wife, died, and after her death B. conveyed to one of his children, D. B. and D. then mortgaged to a company, and the company sold to E. under the power of sale in the mortgage, but E. refused to take the company's title:—Held, that B. and C. took an estate for life only; that the appointment in favour of one child to the exclusion of the rest was not a valid appointment, and that the title offered was not one that the purchaser could be compelled to accept. Semble, had a similar appointment been made by both husband and wife, it would have been invalid. *Re Ontario L. and S. Co. and Powers*, 12 O. R. 582.

Division at Devisee's Death.—A will contained the following clause: "To my son G. W. I give and bequeath during his lifetime, the north-east quarter of said lot 4 before mentioned, and at his death to go to and be vested in his son W. C., or in case other sons should be born to my son G. W., then to be equally divided between all the boys:"—Held, that G. W. took a life estate only, and that there was a vested remainder in fee in his sons, as a class, which would let in all born before his death. *Re Chandler*, 18 O. R. 105.

Failure of Issue.—By his will the testator devised to his son the use during his lifetime of certain land, but if he died without issue, then it was to be equally divided between two named grandsons. and by a subsequent clause, on the death of the testator's widow, he directed that the said land and all other property not bequeathed by his will should be equally divided amongst all his children. The son died, leaving issue, his mother predeceasing him:—Held, that under R. S. O. 1887, c. 109, s. 32,

the failure of issue referred to was a failure during the son's lifetime or at his death and not an indefinite failure, and that by virtue of the subsequent clause he took a life estate and not an estate tail by implication, and that on the termination of the life estate the lands fell in and formed part of the residue. *Re Bird and Barnard's Contract*, 59 L. T. N. S. 166, and *Stobbart* v. *Guardhouse*, 7 O. R. 239, distinguished. *Martin* v. *Chandler*, 28 O. R. 81.

General Devise with Direction for Division at Devisee's Decease.—A testator made his will as follows: "I bequeath to my wife E. K. all the real and personal property that I die possessed of . . . My wish and desire is, that she shall divide the said real estate or personal property, £50 to my daughter S., £50 to my daughter E., the balance to my son W. (providing any more) (if a daughter) £50, and if a son then the balance after £50 to each of my daughters to be equally divided betwixt them at her decease:"—Held, that the widow E. K. took a life estate in the whole real and personal property, excepting what was necessary to pay the legacies. *Wilson* v. *Graham*, 12 O. R. 469.

Issue to Hold in Fee Simple.—A testator devised lands to his daughter: "to her own use for the full term of her natural life, and from and after her decease to the lawful issue of my said daughter to hold in fee simple," and in default of such issue over:—Semble, that the issue should hold the property in fee simple appeared incompatible with an estate tail in the mother, and that "issue" must be construed "children," and the mother took an estate for life only. *Re Hamilton*, 18 O. R. 195.

Shares to be Held and Proceeds Paid during Life.—A testator directed his real estate to be sold and the proceeds, after payment of the debts and certain legacies, to be divided into twelve equal parts, "five of which I give and devise to my beloved daughter C. M., four of which I give and devise to A. E. F. (daughter), and three of which subject to the conditions and provisions hereinafter set forth, I reserve for my son C. W. M. But in no case shall any creditor of either of my children, or any husband of either of my children, daughters, have any claim or demand upon the said executrices, &c., but their respective shares shall be kept and the interest, rents, and profits thereof shall be paid and allowed to them annually . . . during their respective lives." In an action by the daughters to have their shares paid over to them untrammelled by any trust:—Held, that it was clearly the intention of the testator that the daughters should only receive the income from the shares during their lives. *Foot* v. *Foot*, 15 S. C. R. 699.

Specific Devise and General Clause.—A testator devised certain lands as follows: "I will, devise, and bequeath unto my wife for and during her natural life all that parcel of land (describing it) . . . I also will and bequeath unto her, my beloved wife, everything, real and personal, within and without; and it is hereby understood that the property above described shall be under the control of my said beloved wife. After the demise of my wife it is my will and pleasure that the aforesaid real estate shall descend to my nephew and his heirs." The testator had no other real estate than the said lands, and there was nothing else to which his language, importing that his wife was to have control of everything, real and personal, could be referred:—Held, nevertheless, that the intermediate clause had no effect on the life estate expressly given to the wife, and there was nothing to change or enlarge the usual character of such life estate, so as to render her punishable for waste. *White* v. *Briggs*, 15 Sim. 17; S. C. in appeal, 2 Phil. 583, distinguished. *Clow* v. *Clow*, 4 O. R. 355.

Gift to Several Persons Equally for Life—Gift Over on Death of Survivor.—The principle that where there is a gift equally between A., B. and C. for their respective lives, with a gift over of the whole property on the death of the survivor, an intention will be implied on the part of the testator that the survivor or survivors of A., B. and C. shall, after the death of one or more of them, be entitled to all the income till the period of distribution, cannot be applied where there is a provision, during the lives of some of the first takers, for parties entitled under the gift over. *Hobson, In re*; *Barwick* v. *Holt* (1912), 1 Ch. 626.

"Residue" to be Divided.—A testator gave to his wife, so long as she remained his widow, "all my real and personal estate whatsoever absolutely," and at her death, or on her re-marriage, the "residue" thereof was to be divided between his brothers and sisters:—Held, that the wife took only a life estate. *Dixon, In re; Dixon* v *Dixon*, 56 S. J. 445.

Executors Nursing Doubtful Assets—Loss of Income to Life Tenant.—When the executors delay realizing so as to nurse a doubtful asset and this operates to deprive the life tenant of his income in the meantime, the whole loss cannot be thrown either upon capital or income, but must be distributed between capital and income. *Re Atkinson* (1904), 2 Ch. 160; *Hibbert* v. *Cooke*, 1 Sm. & St. 552, and *Re Bird* (1901), 1 Ch. 916, followed. *Re Leys' Estate* (1911), 20 O. W. R. 814; 3 O. W. N. 464.

Bequest of "Arrears of Rent"—Apportionment—Gross or Net Rents.—Bequest of all arrears of rents due to testatrix at the time of her death held to include the proportion of rents for the current quarter, as apportioned under the Apportionment Act, 1870, up to March 4th, the date of death, and to mean gross rents without any deduction for outgoings or otherwise. Dictum of Jessel, M.R., in *Hasluck* v. *Pedley* (44 L. J. Ch. 143, 144; L. R. 19 Eq. 271, 273), followed on the first point. *Ford, In re; Myers* v. *Molesworth*, 80 L. J. Ch. 353; (1911) 1 Ch. 455; 104 L. T. 245.

Widow's Power to Devise.—The testator by his will gave to his wife all his real and personal property for her use during her lifetime, and directed that at her death his executors should sell the real and personal property and give one-half the proceeds to his cousin, and that his wife should make her will during her lifetime instructing his executors "who she wishes to give her half to among her relations:"—Held, that the widow was entitled to one moiety absolutely and to a life enjoyment of the other moiety. *Re Bethune*, 7 O. L. R. 417.

A will was as follows: "I bequeath to my wife all that I possess with full power to dispose of part or the whole as she and the children may think wisest and best at any time:"—Held, that the widow took the absolute ownership of the real and personal estate, and that the children took no interest under the will. *Re McDougall*, 8 O. L. R. 640.

Power to Control.—The testator by his will provided: "If I predecease my wife I give and bequeath to her the whole control of my real and personal estate as long as she lives:"—Held, that the widow had only a life interest with power of control during her life. *In re Turnbull Estate*, 11 O. L. R. 334.

A testator by his will gave, devised and bequeathed to his father "one-half of my ready money, securities for money . . . and one-half of all other my real and personal estates whatsoever and wheresoever with reversion to my brother on the decease of my father;" and gave, devised and bequeathed to his brother, his heirs and assigns forever, "the remaining one-half of all my ready money, securities for money . . . and the one-half of all other my real and personal estate whatsoever and wheresoever:"—Held, that the father took a life estate and subject thereto the brother took absolutely. *Osterhout* v. *Osterhout*, 8 O. L. R. 685.

A testator by his will devised as follows:—I will, devise and bequeath to my wife S. J. all my real and personal property during her natural life, and that my daughter S. F. shall remain and live on said place as long as she remains unmarried:"—Held, that the daughter had the right, after her mother's death, to live on the property so long as she remained unmarried, and that she had an estate in, and was entitled to the use of it, as she might choose to use it for that period. *Judge* v. *Splann*, 22 O. R. 400.

Power and Interest.—If a man has both a power and an interest, and does an act generally as owner of the land without reference to the power, the land shall pass by virtue of his ownership, not of his power. *Countess Dowager of Roscommon* v. *Fowke* (1745), 6 Br. P. C. 158.

On the same principle, where a man has both a power and an interest, and he creates an estate which will not have an effectual continuance in point of time if it be fed out of his interest, it shall take effect by force of the power. *Pettypiece* v. *Turley*, 13 O. L. R. 4.

CHAPTER XXXV.

DESCRIPTION OF PERSONS AND THINGS.*

OBJECT OR SUBJECT OF GIFT NOT IDENTIFIED.
PAROL EVIDENCE.

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., or makes a gift of property, and leaves the name of the devisee or legatee blank. 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.

6th ed., p. 1253. *Webb* v. *Byng*, 1 K. & J. 580; *Morrice* v. *Aylmer*, L. R. 7 H. L. 717.

RIGHT OF SELECTION OR PURCHASE.

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. 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.

Ibid. See Chapters XIV and XXX.

ALL PARTICULARS IN DESCRIPTION OF SUBJECT-MATTER OF DISPOSITION NEED NOT BE CORRECT.

The general rule is thus laid down: 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. 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. 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

*Chapter XXXV. in the 6th edition contains matter which in previous editions was found in several chapters besides new matters.

by the testator as the occupant, the whole nevertheless would pass.

1st ed., p. 329. Chapter XII. "Gifts void for uncertainty." *Stephens v. Powys*, 1 De G. & J. 24.

MISTAKE IN LOCALITY OF LANDS.

A reference to occupancy often comes in aid of a defect or error in the locality, and vice versa.

6th ed., p. 1254. *Doe d. Dunning v. Lord Cranstoun*, 7 M. & Wels. 1.

MISDESCRIPTION IN CASE OF PERSONALTY.

The same principle applies to gifts of personal property.

6th ed., p. 1255. *Re Nottage* (No. 2) (1895), 2 Ch. 657.

DEVISE OF CERTAIN LAND MAY PASS SHARE OF PROCEEDS OF SALE. GIFT OF LAND MAY PASS MORTGAGE DEBT.

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.

Ibid. Re Lowman (1895), 2 Ch. 348.

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 devise to A. is adeemed.

Ibid. Re Clowes (1893), 1 Ch. 214. See Chapter XXX.

IN DESCRIPTION OF OBJECTS ALL PARTICULARS NEED NOT BE CORRECT.

The same principles of construction, of course, apply to objects of gift. It is sufficient, therefore, 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.

1st ed., p. 330, 6th ed., p. 1256. *Atty.-Gen. v. Corporation of Rye*, 7 Taunt 546.

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 showing which of them was known to the testator, and (if a charitable institution) to which of them he subscribed. If this evidence fails to indicate which the testator

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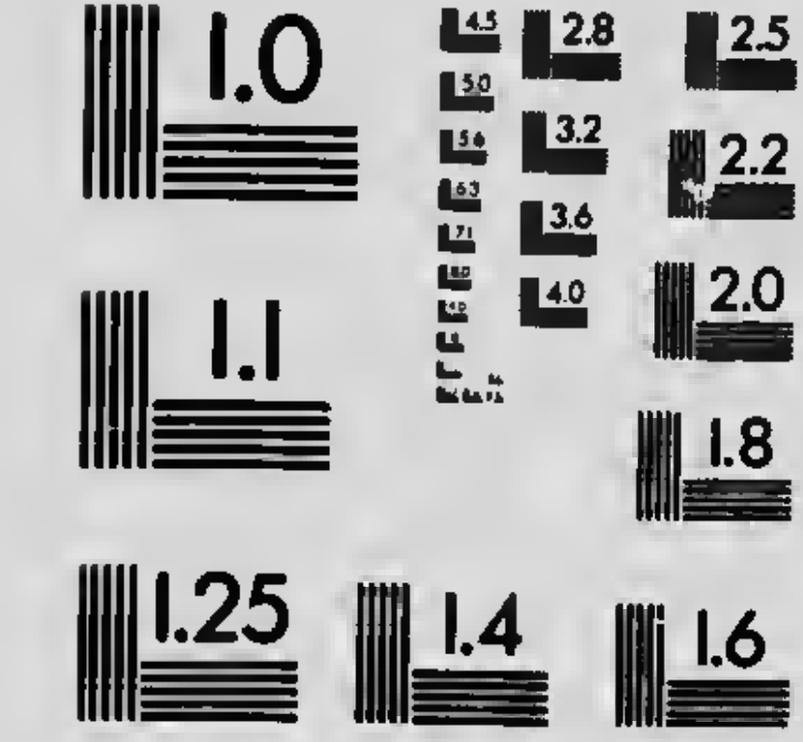

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meant, the bequest fails, unless, as already noticed, it is charitable and applicable cy-pres.

6th ed., p. 1257. *King's College Hospital* v. *Wheildon*, 18 Bea. 30; *Re Clergy Society*, 2 K. & J. 615.

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.

Ibid. Pratt v. *Mathew*, 22 Bea. 328; *Stringer* v. *Gardiner*, 27 Bea. 35.

GIFT TO PERSON DESCRIBED AS "WIFE" OR "HUSBAND," &C.

It is on this principle that a gift to A. B. by name, described as 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.

Ibid. Penfold v. *Giles*, 6 L. J. Ch. 4.

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: if she did the Court of Probate will refuse to allow her to take advantage of it.

6th ed., p. 1258. *Re Petts*, 27 Bea. 576.

The same rule applies where a testatrix makes a gift to A. B., describing him as "my husband."

Ibid. Kennell v. *Abbott*, 4 Ves. 802.

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 recognised by the testator as his wife: and the fact that he has a lawful wife living makes no difference.

Ibid. Lepine v. *Bean*, L. R. 10 Eq. 160. See ante p. 188

MISNOMER OF INDIVIDUALS.

Another maxim is, that nihil facit error nominis cum de corpore constat; 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.

6th ed., p. 1259. *Smith* v. *Coney*, 6 Ves. 42.

Under the present practice the name inserted by mistake in such a case may be omitted from the probate copy.

6th ed., p. 1260. *In bonis Boehm* (1891), P. 247. See ante pp. 10, 246.

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.

6th ed., p. 1261. *Re Nunn's Trust*, L. R. 19 Eq. 331.

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, 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, and although it has been said that the description has generally prevailed over the name, yet numerous instances will be found on both sides.

6th ed., p. 1261. *Ryall* v. *Hannam*, 10 Bea. 536. See Chap. XV.

AMBIGUOUS DESCRIPTION OF CHARITY.

The same kind of question frequently arises in the case of gifts to charitable institutions.

6th ed., p. 1263. *Re Kilvert's Trusts*, L. R. 7 Ch. 170; *Charter* v. *Charter*, L. R. 7 H. L. 364. See ante p. 118.

NO NAME EXCEPT AS PART OF THE DESCRIPTION.

The same principles are applicable for the construction of wills where the devisee is not mentioned by name, but the description is composed wholly of "demonstration," as, where the gift is to the first or second son, or to the children, of some named person.

6th ed., p. 1264. *Carnoys* v. *Blundell*, 14 L. C. 778. "My wife." *Schloss* v. *Stiebel*, 6 Sim. 1.

COMPLETE MISNOMER.

Sometimes cases of complete misnomer occur.

6th ed., p. 1264. *Doe d. Hiscocks* v. *Hiscocks*, 5 M. & W. 363; *Doe d. Thomas* v. *Beynon*, 12 A. & E. 431; *Grant* v. *Grant*, L. R. 5 C. P. 380, 727. See Chap. XV.

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.

6th ed., p. 1265.

CASE OF INDEFINITE REFERENCE TO LOCALITY.

Where the objects of gift are described by reference to locality, there must be some definite local limit.

Ibid.

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 cum de corpore constat," the other by the maxim "Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram."

Ibid.

MEANING OF THE RULE.

The first rule means that where the description is made up of more than one part, and one part is true, but the other false, there, if the part which is true describe the subject with sufficient legal certainty, the untrue part will be rejected and will not vitiate the devise. "The characteristic of cases within the rule is, that the description, so far as it is false, applies to no subject at all, and, so far as it is true, applies to one only."

Ibid. Taken from 3rd ed. *Nelson* v. *Hopkins*, 21 L. J. Ch. 410; *Cowan* v. *Truefitt* (1899), 2 Ch. 309.

EXTENSION OF THE RULE.
QUESTION WHERE PARTS OF THE DESCRIPTION ARE NOT CO-EXTENSIVE.

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.

6th ed., p. 1267.

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.

Ibid. Roe d. Conolly v. *Vernon*, 5 East, 80; *Gauntlett* v. *Carter*, 17 Bea. 586; *Re Bright-Smith*, 31 Ch. D. 314.

DISTINCTION WHERE THE REFERENCE TO THE OCCUPANCY PRECEDES THAT TO THE NAME.

But though a devise of "my farm called A. in the occupation of B." is not, under these circumstances, limited to that part of the farm which is in the occupation of B., yet perhaps it does not follow that the same construction would be given to a devise of "all my farm in the occupation of B. called A." In this case, the reference to the occupancy forms the primary substantive part of the description, and the name is merely an addition.

1st ed., p. 716.

SUBSEQUENT REFERENCE TO OCCUPANCY DOES NOT EXTEND DEVISE.

As a subsequent reference to the occupancy does not limit a devise of a farm by name to the lands so occupied, it is clear that it would not, under such circumstances, enlarge a devise in which the occupancy extended to lands not included in the name. Consequently, under a devise of "my Trogues Farm, in the occupation of A.," lands of another fa[illegible]n the occupation of A. would unquestionably not pass; and this hypothesis agrees with the principle of a class of decisions stated in the sequel.

1st ed., p. 716. *Doe d. Renow* v. *Ashley*, 10 Q. B. 663.

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 [illegible] 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.

6th ed., p. 1271. *Press* v. *Porker*, 2 Bing. 456.

GENERAL, FOLLOWED BY SPECIFIC, DESCRIPTION.

When property is devised by a general description, and this is followed by a specific description or enumeration of particulars, the latter will as a rule prevail.

6th ed., p. 1272. *Re Brocket* (1908), 1 Ch. 185.

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.

6th ed., p. 1273. *Cooper* v. *Martin*, L. R. 3 Ch. 47.

Otherwise it seems clear that the proceeds of sale would not pass by a general devise of real estate.

6th ed., p. 1273. *Gould* v. *Teague*, 5 Jur. N. S. 116.

PERSONAL PROPERTY.

The doctrine of falsa demonstratio also applies to gifts of personal property.

Ibid. *Trinder* v. *Trinder*, L. R. 1 Eq. 695.

In all these cases, however, it must be remembered that if the testator has property answering the description, that is prima facie sufficient to satisfy the gift.

6th ed., p. 1274.

If a testator bequeaths shares in a company and he has shares of different classes, this may give the legatee a right of selection.

Ibid. See ante p. 231.

"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.

Ibid. *Quennell* v. *Turner*, 13 Bea. 240.

CONTRACT TO PURCHASE STOCK.

In Collison v. Girling, 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.

Ibid. *Collison* v. *Girling*, 4 M. & Cr. 63.

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 to defeat the intention of the testator, there being no debt which answered the description.

Ibid. *Ex parte Kirk*, 5 Ch. D. 800.

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.

6th ed., p. 1275. *Waters* v. *Wood*, 5 De G. & S. 717.

Nor is it possible that any question of falsa 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.

Ibid. *Evans* v. *Tripp*, 6 Mad. 91.

DEVISE OF PROPERTY NOT DESCRIBED AS A WHOLE IS CONFINED TO WHAT EXACTLY ANSWERS IT.

The second maxim above referred to is non accipi debent verba in falsam demonstrationem quæ competunt in limitationem veram, and accordingly it is a well-settled canon of construction that where a given subject is devised, and there are found two species of property, the one technically and precisely corresponding to the description in the devise, and the other not so completely answering thereto, the latter will be excluded; though, had there been no other property on which the devise could have operated, it might have been held to comprise the less appropriate subject.

1st ed., p. 720.

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. And in the absence of special circumstances, a devise of freeholds at X. will not pass leaseholds at X., nor will a gift of leaseholds at D. pass freeholds at D.

6th ed., p. 1278. *Corballis* v. *Corballis*, 9 L. R. Ir. 309.

The principle in question has most frequently been applied to terms of local description. Thus, if a testator have property in, the 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.

6th ed., p. 1279. *Lister* v. *Pickford*, 34 Bea. 576; *Webber* v. *Stanley*, 16 C. B. (N. S.) 698.

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.

6th ed., p. 1280. *Goodright d. Lamb* v. *Pears*, 11 East. 58.

DEVISE OF LANDS IN ONE COUNTY NOT APPLIED TO LANDS IN ANOTHER COUNTY.

It is clear, however, that where a testator having lands in a certain county, devises all his estates in another county, in which he has actually no property, the lands in the former county will not pass.

1st ed., p. 723.

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.

6th ed., p. 1281. *Homer* v. *Homer*, 8 Ch. D. 758.

EFFECT WHERE THERE IS PROPERTY OF ANOTHER ANSWERING TO THE DESCRIPTION.

Sometimes the application of the principle in question is embarrassed by the circumstance, that the terms of description, though not applicable to any property of the testator, precisely answer to the property of some other person. For instance, a testator having a manor, called North Dale, in A., devises his manor, called South Dale, in A. Now, supposing that there was in A. no manor of South Dale, the authorities would authorize the application of the devise to the manor of North Dale; but if it should turn ont 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.

1st ed., p. 724.

The rule above discussed is also applicable to gifts of personalty.

6th ed., p. 1283. *Slingsby* v. *Grainger*, 7 H. L. C. 273.

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 beqnest 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.

Ibid. *Quennell* v. *Turner*, 13 Bea. 240.

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. Thus a bequest of a sum described as invested on the deposit receipt of a bank may pass shares in that bank.

Ibid.

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.

Ibid. *Gilliat* v. *Gilliat*, 28 Bea. 481.

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.

6th ed., p. 1284. *Maybery* v. *Brooking*, 7 D. M. & G. 673.

CLASSES OF RELATIONS, &c.

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, nephews and other classes of relations, and to heirs, issue, descendants, family, next of kin, representatives, executors, &c.

Ibid. Chapters XL. XLI. XLII.

"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. But it is a word of flexible meaning, to be construed with reference to the context.

1st ed., p. 457. *Re Sanders' Trusts*, L. R. 1 Eq. 675. See ante p. 310.

CLASS OF UNMARRIED PERSONS.

Where there is a gift to a class of unmarried persons (as to "my unmarried sisters") the class is prima facie to be ascertained at the testator's death.

6th ed., p. 1285. *Blagrove* v. *Coore*, 27 Bea. 138.

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."

6th ed., p. 1286.

"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.

Ibid. Hardwick v. *Thurston*, 4 Russ. 380.

"MARRIED."

The phrase "married," as applied to a woman, prima facie means a woman who has a husband at the time.

Ibid. Rudoll v. *Nichols* (1900), W. N. 133. See ante p. 186. (Gift to wife or husband of A.)

DIVORCE.

A woman whose marriage has been dissolved is not the widow of her divorced husband if she survives him.

Ibid. Re Boddington, 25 Ch. D. 685.

"TENEMENTS AND HEREDITAMENTS," INCLUDE WHAT.

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.

1st ed., p. 706. See also Chapters XXV and XXVII.

"LANDS."

The word "lands" is not equally extensive; for though, generally, it includes as well the surface of the ground as everything that is on and under it, as houses and other buildings, mines, &c., yet it seems that the term will not, proprio vigore, comprehend incorporeal hereditaments, as advowsons, tithes, &c., unless there is no other real estate to satisfy the words of the devise: a circumstance, however, which in regard to wills made or republished since 1837, would be immaterial. Thus it seems that if a man devise all his lands in A., and he has no other real estate there than tithes, they will pass. So, if he devise a certain manor, and has only a fee farm rent issuing out of it, such rent will pass.

6th ed., p. 1287.

WHETHER IT INCLUDES HOUSES.

But though a devise of "lands" will, unaided by the context, carry "houses," 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."

Ibid.

As where 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.

Ibid.

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.

Ibid.

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.

6th ed., p. 1288. *Doe d. Gillard* v. *Gillard*, 5 B. & Ald. 785.

"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.

Ibid. See Chap. XXV. ante p. 466.

WHETHER "FREEHOLDS" WILL PASS LEASEHOLDS AND VICE VERSA.

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. And it seems clear that if a testator devises "my freehold farm called Blackacre, now in the occupation of X," and it appears that part of the farm is leasehold (the whole being in the occupation of X.), the leasehold portion will pass.

Ibid. Re Bright-Smith, 31 Ch. D. 314. Where the question was as to copyholds.

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 if it may be invested in land situate anywhere in Ontario, it will not pass under a devise of "all my lands in the county of S."

6th ed., p. 1289. *Basset* v. *St. Levan*, 71 L. T. 718.

LAND SUBJECT TO A TRUST FOR CONVERSION.

Where a testator is entitled to property which is constructively personalty, being land subject to a trust for sale but not

sold, it will pass under a gift of the testator's "real estate" or of his "lands, tenements and 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.

Ibid. *Re Glassington* (1906), 2 Ch. 305.

MORTGAGE DEBT.

It is noticed elsewhere that a devise of lands does not, as a general rule, pass the beneficial interest in a mortgage.

Ibid. Ante p. 000.

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. If it 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, or the testator may direct it to merge.

Ibid. *Wilkes* v. *Collin*, L. R. 8 Eq. 338.

"PREMISES."

The word "premises" properly denotes that which is before mentioned, and in this view, its comprehensiveness is of course measured by that of the expression to which it refers.

6th ed., p. 1289. *Doe d. Hemming* v. *Willetts*, 7 C. B. 709.

"MESSUAGE" INCLUDES CURTILAGE, GARDEN AND ORCHARD.

The word "messuage" has been variously construed; sometimes a greater and sometimes a less degree of comprehensiveness having been attributed to it.

1st ed., p. 708. "Messuage" includes curtilage, garden and orchard, but not meadow or arable land. *Gulliver d. Jefferies* v. *Poyntz*, 2 W. Bl. 726.

It has accordingly been laid down 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.

6th ed., p. 1293. *Steele* v. *Midland Railway Co.*, L. R. 1 Ch. 275.

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.

Ibid. *Phillips* v. *Low* (1892), 1 Ch. 47.

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"; a 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.

1st ed., p. 711. *Smith* v. *Ridgway*, L. R. 1 Ex. 46, 331.

"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.

6th ed., p. 1295.

"THEREUNTO BELONGING."

The construction of the words "thereunto belonging," which are not words of art, has often been under discussion.

6th ed., p. 1295. *Maitland* v. *Mackinnon* 1 H. & C. 607; *Downe* v. *Sheffield*, 71 L. T. 292.

"FARM."

The word "farm" is construed according to its obvious meaning. It may include houses, lands and tenements of every tenure.

6th ed., p. 1296. *Re Bright-Smith*, 31 Ch. D. 314. See ante p. 466, as to effect of sec. 26 of Wills Act.

DEVISE OF "RENTS AND PROFITS" PASSES THE LAND.

A devise of the rents and profits or of the income 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. And since the Act, such a devise carries the fee simple; but before that Act it carried no more than an estate for life unless words of inheritance were added.

6th ed., p 1297. *Mannox* v. *Greener*, L. R. 14 Eq. 456. See Chap. XXV.

LEASEHOLDS MAY PASS BY GIFTS OF "RENTS."

So a gift of the rents of leaseholds may pass the absolute interest in them.

6th ed., p. 1297. *Watkins* v. *Weston*, 3 D. J. & S. 434.

ARREARS OF RENTS.

A gift of arrears of rents may give rise to questions as to its effect.

Ibid. Re Lucas, 55 L. J. Ch. 101.

DEVISE OF "USE AND OCCUPATION."

A devise of the "free use," or of the "use and occupation" 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, or where the house is devised to trustees, with a direction that A. may reside in it rent free.

6th ed., p. 1298. *Fillingham* v. *Bromley*, T. & R. 536; *Maclaren* v. *Stainton*, 27 L. J. Ch. 442.

"MOIETY."

A testator may use "moiety" in the sense of a part or share.

6th ed., p. 1299. *Morrow* v. *McConville*, 11 L. R. Ir. 236.

LOCALITY AND SOURCE.

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.

6th ed., p. 1299. Chapter XXX.

"ESTATE" AND "PROPERTY."

It has already been pointed out that "estate" and "property" are words of wide meaning, and prima facie include both real and personal property, although their meaning may be restricted by the context.

Ibid. See ante p. 478.

"EFFECTS," "GOODS," "CHATTELS," "MONEY," &c.

It has also been pointed out that the entire personal estate of a testator may pass by the word "effects," or "goods," or "chattels," and even by the word "money" and other informal words.

Ibid.

It is here proposed to discuss the meaning of words descriptive of personal property not comprised in a residuary bequest.

6th ed., p. 1300.

"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, or by being employed in conjunction with words of a narrower meaning, thus leading to the ejusdem generis construction.

Ibid.

"MOVABLES,"

The word "movables," it has been said, may, if not restrained by the context, pass the whole purely personal estate

of the testator, by which appears to be meant choses in action as well as choses in possession, but not leaseholds.

Ibid. *Steignes* v. *Steignes*, Mos. 296.

"MONEY."

With regard to the word "money," in its strict acceptation, "money" will, it seems, extend to bank notes; and no doubt to Exchequer bills and other documents payable to bearer; probably also to bills of exchange indorsed in blank. It will extend to money in the hands of an agent, or on deposit with a banker. 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."

1st ed., p. 702. *Ogle* v. *Knipe*, L. R. 8 Eq. 434.

"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; otherwise if the estate has not been so got in. 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 "Money due (or owing) to me" will also include money at a bank, money on deposit at a bank, moneys under a policy on the testator's own life, and damages to which he was entitled, though the amount was unascertained at his death. But not money to be paid for a service not completed at the testator's death.

6th ed., p. 1301. *Martin* v. *Hobson*, L. R. 8 Ch. 401; *Bide* v. *Harrison*, L. R. 17 Eq. 76.

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 1,000*l.*, and the testator bequeaths to A. "all debts due to me by A.," this bequest does not include the 1,000*l.*

Ibid. *Ex parte Kirk*, 5 Ch. D. 800.

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.

Ibid. *Ekins* v. *Morris*, 8 W. R. 301.

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 the surrounding circumstances to give it this extended meaning. Thus "my money in the Bank of England"

may mean stock in the Funds, if the testator never had any cash in the Bank. And of course "moneys in the Funds" is equivalent to "moneys invested in English Government securities."

Ibid. *Hotham* v. *Sutton*, 15 Ves. 310.

WHAT WORDS WILL PASS MONEY AT A BANKER'S.
WHAT WILL NOT PASS UNDER A BEQUEST OF "READY MONEY" OR "MONEY IN HAND."

Although money at a banker's is, in fact, a debt due from the banker, and will pass under a bequest of a debt, yet the term "ready money" or "money in hand" does also sufficiently describe such money and generally will pass it. 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," but not if notice is required. Money on deposit at a bank, whether notice of withdrawal is required or not, will pass under a bequest of "moneys owing to me," or "property at interest." Stock is not "ready money," nor are notes of hand, or money in the hands of an agent, or unreceived dividends on stock, the warrants for which have neither been received nor demanded; or rent or the interest on a mortgage; or apportioned parts of pensions or dividends.

6th ed., p. 1302. *Parker* v. *Marchant*, 1 Y. & C. C. C. 290; *Stein* v. *Ritherdon*, 37 L. J. Ch 369.

"Cash" is a stricter term than "money."

6th ed., p. 1302. *Beales* v. *Crisford*, 13 Sim. 592.

"Cash at my banker's" means money on current drawing account, and such money on deposit as is withdrawable without notice.

6th ed., p. 1303. *Re Boorer* (1908), W. N. 189.

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, and in the absence of any context, 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"; but the context may show that the testator used the word in the sense of "investments." Thus "securities for money standing invested in my name" will pass mortgage bonds, India stock, debenture stocks, preference stocks and shares.

Ibid. *Re Rayner* (1904), 1 Ch. 176

SECURITIES FOR MONEY.

The words "securities for money" will include stocks in the Funds even without the aid of the context, so also unpaid purchase money in respect of which the testator had a vendor's lien, but not bank stock, nor shares in an insurance or canal or banking company; nor an I O U given for goods sold, nor a banker's deposit note, nor a balance at a bank bearing interest, nor a legacy due from another testator's estate. 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. 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. A bill of exchange or promissory note is a "security for money" in the legal and proper sense of the word, and so is a bond and a judgment. A policy of assurance on the life of a debtor is a "security."

6th ed., p. 1303. *Callow* v. *Callow*, 42 Ch. D. 550: *Hopkins* v. *Abbott*, L. R. 19 Eq. 222: *Re Mason's Will*, 34 Bea. 494: *Phillips* v. *Eastwood*, 1 Ll. & G. 291.

"STOCK" MAY MEAN STOCK IN TRADE OR FARMING STOCK.

"Stock" is an ambiguous word, and may mean stock in trade, or farming stock, or stock in a company.

6th ed., p. 1306. *Elliott* v. *Elliott*, 9 M. & W. 23; *Randall* v. *Russell*, 3 Mer. 190.

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.

Ibid.

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.

Ibid. See ante p. 231.

SHARES AND STOCK.

A bequest of a testator's shares in an incorporated company passes all the rights and benefits attached to the shares.

Ibid.

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.

Ibid. *Re Bodman* (1891), 3 Ch. 136.

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, and this is clearly so if the gift is contrasted with an absolute gift of other chattels. But if the nature of the property requires, such a gift will pass the absolute interest.

"HOUSEHOLD GOODS" OR "FURNITURE."

The words "household goods" or "furniture" will include pictures hung up, plate and house linen, unless these words are used elsewhere in the will in contradistinction thereto; they will also include prize medals, coins, and trinkets if framed and hung or otherwise disposed for ornament, but not books (unless an intention to include them appears by the context), nor wines, or other consumable articles.

6th ed., p. 1307. *Coward* v. *Larkman*, 60 L. T. 1; *Terry* v. *Terry*, 33 Bea. 232: *Cremorne* v. *Antrobus*, 5 Russ. 312: *Manning* v. *Purcell*, 7 D., M. & G. 55. *Re Whaley* (1908), 1 Ch. 615.

A gift of "household furniture" will not pass goods belonging to the testator in the way of or used in carrying on trade, nor farming stock; nor, in general, tenants' fixtures, i.e., they will generally pass with the testator's interest in the house. 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.

6th ed., p. 1308.

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."

Ibid.

"HOUSEHOLD EFFECTS." "EFFECTS" EJUSDEM GENERIS.

The words "household furniture and other household effects" are very wide, 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; nor watches, jewellery or other personal ornaments. Horses and carriages are household effects, and so are motor cars, if the testator's intention is that the legatee shall have everything required for the enjoyment of a certain house. 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, for although "effects" by itself is large enough to pass any kind of personal estate, its use in a gift of a particular part of the testator's property, shows that it is confined to effects ejusdem generis. 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.

6th ed., p. 1308. *Re Howe* (1908), W. N. 223; *Trafford* v. *Berrige*, 1 Eq. Ca. Abr. 201.

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.

6th ed., p. 1309.

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.

Ibid. *Hare* v. *Pryce*, 11 L. T. 101.

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 principal test seems to be the actual state of things at the death, but other considerations may arise.

Ibid. *Bruce* v. *Howe*, 19 W. R. 116.

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: but apparently a bust would not pass by a bequest of "household goods and furniture," or of "watches and personal ornaments." An altar stone and relics are not passed by a bequest of "furniture" or "articles of household use or ornament." And jewellery does not pass under a gift of furniture and effects in a house. 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."

6th ed., p. 1310. *Re Owen*, 78 L. T. 643.

PICTURES.

Pictures prima facie pass by a gift of furniture 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.

Ibid. *Re Whaley* (1908), 1 Ch. 615.

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.

Ibid.

JEWELS, BOOKS, PLATE, &C.

A bequest of family diamonds and other jewels passes masonic orders and silver filagree ornaments.

Ibid. *Brooke* v. *Warwick*, 2 De G. & S. 425.

Manuscript notes bound up in volume will pass as books.

Ibid. *Willis* v. *Curtois*, 1 Bea. 189.

"Plate" does not include plated articles.

Ibid.

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 at A." seems to depend partly on the object of the removal.

Ibid. *Re Stomford*, 22 T. L. R. 632.

LIVE AND DEAD STOCK.

The words "live and dead stock" have been held to include books and wine when the bequest was of "furniture, linen, plate, pictures, carriages, horses, and other live and dead stock"; 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.

Ibid. *Porter* v. *Tournoy*, 3 Ves. 311: *Rudge* v. *Winnall*, 12 Bea. 357.

Live and dead stock may pass by a gift of "movable goods."

6th ed., p. 1311. *Swinfen* v. *Swinfen*, 29 Bea. 207.

STOCK OF A FARM.

Growing crops, it seems, will pass under a bequest of stock of a farm or stock upon a farm.

Ibid. *Cox* v. *Godsalve*, 6 East. 604n.

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. Appar-

ently it would not pass a debt due to the testator from the partnership. But it will pass a share in the business which the testator has contracted to purchase.

Ibid. Re Beard, 57 L. J. Ch. 887.

"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.

Ibid. Chick v. *Blackmore*, 2 Sm. & G. 274.

"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.

Ibid. Bevan v. *Atty.-Gen.*, 4 Giff. 361.

Gift of Whole Estate—Incomplete Enumeration—"Appurtenances"—Farm Stock and Implements—"Household Goods"—Money—Intestacy.—A testator by his will after directing payment of debts, etc., proceeded: "I give, devise, and bequeath all my real and personal estate, which I may die possessed of or interested in, in the manner following, that is to say: I give, devise, and bequeath to my son W. my farm . . . which is my present residence, and all appurtenances connected therewith, with all my household goods of which I may die possessed;" and appointed an executor:—Held, that all the testator's estate, including money, farm stock, and farm implements, passed by the will to the son named. *Re Hudson*, 16 O. L. R. 165, 11 O. W. R. 912.

Devise—Life Interest—"Premises"—Election.—The testator devised and bequeathed all his real and personal estate to his wife and children in the manner set out in his will, in which were the following provisions: "To my wife, Marie Martin, in lieu of dower and at her own option, the sum of two hundred dollars yearly, or the use of the premises she now lives in and furniture therein during her natural life." "To my son Joseph Martin the south-west half of the north-west half of lot 10 . . . containing 50 acres . . . also the south-west quarter of lot 10 . . . fifty acres . . . subject to the following conditions . . . that he will have to pay the allowance due to his mother in lieu of dower, also to pay," &c. "My said son Joseph Martin to have the whole above mentioned property at his age of majority, but is not to sell, bargain, or mortgage . . . before he attains his thirty-fifth birthday." "Marie Martin to have the full and whole sole control of my property real and personal till my sons are full age of majority." The testator and his wife lived on the 100 acres devised to Joseph. After the testator's death and before the majority of Joseph, the widow leased the 100 acres, reserving the dwelling-house and outbuildings and four acres for herself:—Held, Meredith, J., dissenting, that "premises" meant the whole 100 acres, and the devise to Joseph must be read as subject to the interest of his mother for life:—Held, also, upon the evidence, that the widow had not elected to take $200 a year in lieu of the use of the premises." *Martin* v. *Martin*, 24 C. L. T. 367, 8 O. L. R. 462, 3 O. W. R. 930.

Devise of Land not Owned by Testator—Mistake in Description—Intention of Testator to Devise Land he did own—General Words of Devise—Sufficiency of to Pass Estate.—Testator made a mistake in his will, in the description of the location of 50 acres of land which he bequeathed to an heir. He willed 50 acres which he did not own:—Held, that the testator had used general words in his will which were sufficient to pass the 50 acres which he did own and had

intended to devise. *Re Clement* (1910), 17 O. W. R. 110, 2 O. W. N. 127, explained. *Smith* v. *Smith* (1910), 17 O. W. R. 251, 2 O. W. N. 170, 22 O. L. R. 127.

Bequest to Putative Wife—False Demonstratio—Solicitor's Undertaking—Failure to Fulfil—Costs.—A testator left certain property to "my wife, J. R.," who had gone through a form of marriage with him in 1902, and had lived with him as his wife till his death in 1906, but who was in fact still the wife of another man, a supposed divorce from the latter being invalid:—Held, that the bequest was good, and J. R. entitled to the property. *Reeves* v. *Reeves*, 12 O. W. R. 124, 16 O. L. R. 588.

"To . . . R. C. I leave 5 cows and other chattels belonging to me in her possession at this date:"—Held, that the legatee was entitled to 5 cows only from the number in her possession at the date of the will.—Held, also, that, under 17 & 18 Vict. c. 113, and 30 & 31 Vict. c. 69, the devisees took the land subject to the payment of the mortgages thereon. The testator directed that the residue of his estate should be converted into money and the money applied in payment of debts and bequests, and that the balance should be distributed "among my heirs at the discretion of my executors:"—Held, that "heirs" meant those who would take real estate upon intestacy, the meaning not being affected by the provision of the Land Titles Act that real estate shall be distributed as personal estate. *Coatsworth* v. *Carson*, 24 O. R. 185, approved.—Held, also, that the "discretion" of the executors was to be exercised as to the share or proportion of the residue which each heir should receive, and did not extend to the power to deprive any one of a share. In making a devise the testator described the land as "the south-west quarter of section 6." It was admitted that he never owned the south-west quarter, but that he did own the east half:—Semble, that evidence might be admissible to show that the south-east quarter was intended, but not the north-east quarter. *Re Cust* (1910), 13 W. L. R. 102.

"**Benefit.**"—Widow was given the "benefit" of all the real and personal property, particularly all moules, as long as she remained the widow of the testator:—Held, that the word "benefit" is not a word of art, but a technical legal expression, to which a certain fixed interpretation must be given; that the will should be construed as if it had read: "I also will my wife all my real and personal property as long as she remains my widow," and that the widow should receive the instalments of a mortgage as they were paid. *In re Story Estate* (1909), 14 O. W. R. 904, 1 O. W. N. 141.

Restraint on Widow's Marrying Again valid. *Re Deller*, 2 O. W. R. 1150, referring to *Allen* v. *Jackson*, 1 Ch. D. 399, and *Cowan* v. *Allen*, 26 S. C. R. 292. A reduction, in interest of widow in case of re-marriage, requires executor to hold corpus. *McCulloch* v. *McCulloch*, 3 Giff. 606.

Gift During Widowhood.—A testator devised all his real and personal estate to his wife for her sole and absolute use, and then added: "The real property while the said (wife) remains my widow. But in case my wife should again marry, I request my executors to sell all my real and personal estate when the youngest child shall come of age, and that they, my executors, shall divide the proceeds between my 6 younger children." The widow did not marry again and left a will devising all her real and personal estate:—Held, that the absolute devise to the wife was not cut down by the subsequent words, which were applicable only to the widow's marriage, and that the real estate passed under her will. *In re Mumby*, 24 C. L. T. 315, 8 O. L. R. 283, 4 O. W. R. 10.

Devise—Absolute Gift—Conditional Gift Over — Validity—Disposition of Corpus—Income—Executor.—A testator by his will bequeathed a small sum for a religious object, and proceeded: "My wife shall have the whole of my estate which remains at my decease, however with the observation that should she marry again then

she shall receive only the third part, and the residue shall be equally divided between my five children." The estate consisted of realty:—Held, that the words were sufficient to create a condition; that the condition was a valid one; that there was an absolute gift of the whole residue to the widow, followed by a gift over as to two-thirds if she married again; and that the executor should retain in his hands two-thirds of the estate, paying the widow the income till her death or marriage, when it would fall to be disposed of, in the latter case under the testator's will, and in the former by her own will or otherwise in due course of law. *In re Deller*, 24 C. L. T. 22, 6 O. L. R. 711, 2 O. W. R. 1150.

Devise to Wife During Widowhood—Devise Over in Case of Widow Re-marrying—Vested Remainder.—Testator devised to his wife, Elizabeth, lots Nos. 6 and 7 on Davenport Road, "to have and to hold for her personal benefit so long as the said Elizabeth Brunton shall remain my widow, and in the event of the said Elizabeth Branton re-marrying, the said lots, houses and appurtenances with all the privileges thereof to become the property of my children, Fanny Lydia Brunton and Mary Johnson Branton, to have and to hold as theirs without let or hindrance." Elizabeth Brant n died in 1880 without having married again. Mary J. Branton died in 1904 intestate:—Held, that there must be a declaration that the two daughters took under the will a vested remainder in the land, to take effect in possession upon the marriage or death of the wife. Upon the death of the daughter, M. E. Branton, intestate and without issue, her undivided one-half of the land became under the provisions of the Devolution of Estates Act distributable in like manner as personal property, and the applicant, though but a half brother, was entitled as one of her next of kin to share equally with the other next of kin, the surviving sister. *Re Brunton* (1910), 15 O. W. R. 783, 20 O. L. R. 642.

Stock, Bequest of.—*Re Gilbert*, 2 O. W. R. 135. See *Brondbent* v. *Barrow*, 6 App. Cas. 812.

False Demonstratio in Ontario.—If by a will a testator devise land by a description which exactly fits land which he owned, no evidence can be given that he meant to devise some other or greater amount of land. *Lawrence* v. *Ketchum* (1878), 28 U. C. C. P. 406, (1879), 4 A. R. 92.

The law is not quite so plain in cases in which the testator has no land exactly corresponding in description, but has land whose description corresponds in part to the description in the devise.

In one line of cases it has been held, in Ontario, that no extrinsic evidence can be given to explain or modify the devise in the other, such evidence has been received.

NOT RECEIVED.—*Summers* v. *Summers* (1882), 5 O. R. 110; *Hickey* v. *Stover* (1885), 11 O. R. 106; *Re Bain & Leslie* (1894), 25 O. R. 196; *McFayden* v. *McFayden*, 27 O. R. 598.

RECEIVED.—*Lowry* v. *Grant* (1849), 7 U. C. R. 125; *Re Shaner*, 6 O. R. 312; *Hickey* v. *Hickey* (1891), 20 O. R. 371; *Doyle* v. *Nagle* (1897), 24 A. R. 162; *Re Harkin* (1906), 7 O. W. R. 840.

In re Clement, 22 O. L. R. 121, the Rule is thus given.

If the testator has devised land which he did not own, with nothing more in the will to assist, although there is little (or no) doubt that thereby he intended to devise some land he did own, the latter land will not pass, and there is a clear and well defined rule of law which stands inexorably in the way of receiving evidence that that lot was intended.

But if there are any words in the will which would be effective to dispose of the land actually owned by the testator, if the wrong description were entirely omitted, the land passes, and the wrong description is but false demonstratio, which may be removed by evidence as a false demonstratio.

There is no distinction, whether followed by a residuary clause or not. *Smith* v. *Smith*, 22 O. L. R. 127.

Misdescription of Lots — Reference to Buildings. — *Re Vun and Winters*, 5 O. W. R. 337. *Roe* v. *Lidwell*, 11 Ir. L. L. R., deals with a conveyance, and is not applicable to wills.

"**Moiety**" not necessarily one-half, may mean a share or part. *Morrow* v. *McConville*, L. R. 11 Ir. Ch. 236, followed. *Jorden* v. *Frogley*, 5 O. W. R 704.

"**Curtilage and Outbuildings Thereof**," distinct from and means more than "dwelling" or "residence" or "house."—Held, to include an enclosure and barn in dispute. *Thompson* v. *Jose*, 10 O. W. R. 173.

Home, Right to.—*Augustine* v. *Schrier*, 18 O. R. 192, followed; *In re McMillon*, 3 O. W. R. 419; *Judge* v. *Splann*, 22 O. R. 409; *Cameron* v. *Adams*, 25 O. R. 229; *Mannox* v. *Greener*, L. R. 14 Eq. 456, referred to.

Meaning of "Money" — Legacy of "10 per cent. of My Money."—A testator gave 10 per cent. of his money in charity, and bequeathed the rest of his property to his children, share and share alike; held, that "money" included, besides money at the testator's call, consols, stocks that could be immediately turned into cash, and arrears of rent of real and personal estate belonging to the testator, but not capital sums secured by mortgages.

O'Connor v. *O'Connor* (1911), 1 Ir. R. 263—C. A.

CHAPTER XXXVI.*

ALTERNATIVE AND SUBSTITUTIONAL GIFT AND GIFTS OVER.

The terms "alternative" and "substitutional" are sometimes used as synonymous, and sometimes as opposed to one another.

6th ed., p. 1312. See ante p. 170 as to alternative limitations of real estate.

DIFFERENCE BETWEEN ALTERNATIVE AND SUBSTITUTIONAL GIFTS.

In simple gifts "alternative" has the same meaning as "substitutional": 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": 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.

1st ed. Vol. II., p. 504. *Re Sibley's Trusts*, 5 Ch. D. 499.

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; 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. So if the gift is to X. for life and after his death to A. or his children, the prima 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.

6th ed., p. 1313. *Re Roberts* (1903), 2 Ch. 200.

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. This question is discussed later.

Ibid. Post p. 643.

IMPERFECT SUBSTITUTIONAL GIFTS.

A complete substitutional gift, indicating the primary legatee, the substituted legatee, and the event in which substitution

*This chapter is new in the 6th edition.

is to take place, seldom gives rise to questions. In most substitutional gifts, however, one or more of these details are omitted.

6th ed., p. 1314.

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. Thus a gift to "my surviving brothers and sisters" is ambiguous.

Ibid. *Shailer* v. *Groves*, 11 Jur. 485.

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, heir at law, or issue.

Ibid. *Speakman* v. *Speakman*, 18 Ha. 180.

"Legal representatives" is also an ambiguous expression, and where the class of substitutional legatees is directed to consist of persons "then living" difficult questions may arise.

Ibid. *Heasman* v. *Pearse*, L. R. 7 Ch. 680.

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.

Ibid.

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, 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. 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.

Ibid. *Re Jones's Estate*, 47 L. J. Ch. 775.

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.

6th ed., p. 1315. *Re Green's Estate*, 1 Dr. & Sm. 68.

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.

Ibid. *Atkinson* v. *Bartrum*, 28 Bea. 219.

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.

Ibid.

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, etc., or to a person "and" his issue, children, etc.

Ibid.

"OR" READ AS INTRODUCING A SUBSTITUTED GIFT.

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.

1st ed., p. 453. Transferred from Chap. XVIII. *Gittings* v. *McDermott*, 2 My. & K. 69.

DEATH OF ORIGINAL LEGATEE AT ANY TIME.

In certain cases, however, where the prior legatee is an individual, 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.

6th ed., p. 1317. *Re Porter's Trust*, 4 K. & J. 188.

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," or "descendants," or where personal property is given to a person "or his heirs." But where 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. So it appears to be doubtful whether in a gift of per-

sonal property to "A. or his executors" or "personal representatives," the word "or" has a substitutional effect.

6th ed., p. 1317. *Read* v. *Snell*, 2 Atk. 642.

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. So if the gift is to A. for life and then to B. "or his personal representatives," and the context shows that by these words the testator meant "next of kin," it seems clear that the bequest would not lapse by the death of B. in the testator's lifetime.

6th ed., p. 1318. *King* v. *Cleaveland*, 4 De G. & J. 477.

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 leaving issue, the gift to him is not divested and his representatives are entitled to it.

Ibid. *Salisbury* v. *Petty*, 3 Ha. 86.

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.

6th ed., p. 1319. *Re Sanders' Trusts*, L. R. 1 Eq. 675.

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. 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.

Ibid. *Fenny* v. *Turner*, 2 Ph. 493.

SUBSTITUTIONAL EFFECT OF "AND."

The word "and" may also have the effect of a clause of substitution.

In a gift of personalty to "A. and his issue," the primâ facie effect is to give A. the absolute interest. 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.

1st ed., Vol. II., p. 500. *Pearson* v. *Stephen*, 5 Bli. N. S. 203. Originally part of Chap. XLIV. Remainder of chapter incorporated in Chap. XXXIII.

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.

1st ed., Vol. II., p. 502. *Butler* v. *Ommaney*, 4 Russ. 70.

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.

6th ed., p. 1323. *Prentice* v. *Brooke*. 5 L. R. Ir. 435.

GENERAL RULE.

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 to predicate substitution with respect to him. The difficulty in most of the cases is to ascertain what persons the original class is composed of.

Ibid. *Re Porter's Trust*, 4 K. & J. 191.

WHERE WILL DEFINES THE CLASS.

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.. 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.

But if there is an ambiguity on the face of the will, advantage may be taken of this to correct the testator's language.

6th ed., p. 1324. *Giles* v. *Giles*, 8 Sim. 360.

IMMEDIATE GIFT TO CLASS WITH CLAUSE OF SUBSTITUTION.

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.

Ibid. *Christopherson* v. *Naylor*, 1 Mer. 320.

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.

6th ed., p. 1325. *Re Webster's Estate*, 23 Ch. D. 739.

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.

1st ed. Vol. II., p. 681. See *Thornhill* v. *Thornhill*, 4 Madd. 377.

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, and by three modern decisions. The argument on which these decisions are based 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."

6th ed., p. 1326. *Neilson* v. *Monro*, 27 W. R. 936; *Re Hannam* (1897), 2 Ch. 39; *Re Ibbetson*, 88 L. T. 461.

If a testator, in making a bequest "to my brothers and sisters," has in view living persons, and adds a clause of substi-

tution, 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 is clearly binding on all Courts of first instance.

6th ed., p. 1328.

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.

Ibid. ***Lanphier*** v. ***Buck***, 2 Dr. & S. 484.

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. But if he dies during A.'s lifetime, leaving issue, they take his share by substitution.

6th ed., p. 1329. ***Bolitho*** v. ***Hillyar***, 34 Bea. 180.

It follows from this rule that the issue of a child who dies in A.'s lifetime cannot take unless they survive their parent.

Ibid. ***Re Turner***, 2 Dr. & Sm. 501.

The two preceding rules do not apply to cases where the gift to the issue is original or substantive.

Ibid.

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.

Ibid. ***Re Flower***, 62 L. T. 677.

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.

Ibid. ***Martin*** v. ***Holgate***, L. R. 1 H. L. 175.

WHETHER GIFT IS ORIGINAL OR SUBSTITUTIONAL.

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 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. 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."

6th ed., p. 1330. *Lanphier* v. *Buck*, 34 L. J. Ch. 656.

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.

6th ed., p. 1331.

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.

Ibid. *Giles* v. *Giles*, 8 Sim. 360.

"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. 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. 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.

Ibid. *Attwood* v. *Alford*, L. R. 2 Eq. 479.

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.

Ibid. *Re Parsons*, 8 R. 430.

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. 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.

6th ed., p. 1332.

EFFECT OF PRIMARY LEGATEE LIVING 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; 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.

Ibid.

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.

Ibid. *Lanphier* v. *Buck*, 34 L. J. Ch. 650; *Martin* v. *Holgate*, L. R. 1 H. L. 175.

WHERE GIFT TO ISSUE IS ORIGINAL THEY NEED NOT SURVIVE THEIR PARENT.

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. 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.

6th ed., p. 1333. *Re Smith's Trusts*, 7 Ch. D. 665.

"LEAVING ISSUE."

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."

Ibid. *Re Smith's Trusts*, 7 Ch. D. 665.

GIFT TO ISSUE OF LEGATEE PREDECEASING TENANT FOR LIFE.

Where the gift is to a class of children living at the death of the 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. But if a

child survives the tenant for life and they both predecease the testator, the issue of the child cannot take.

Ibid. *Ashling* v. *Knowles*, 3 Dr. 593.

WHETHER OBJECTS OF PRIMARY AND SECONDARY GIFTS CAN COMPETE.

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.

6th ed., p. 1334. *Penley* v. *Penley*, 12 Bea. 547.

The same rule applies where the secondary gift is original.

6th ed., p. 1334. *Re Rawlinson* (1909), 2 Ch. 36.

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.

Ibid. *Price* v. *Lockley*, 6 Bea. 180.

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. If members of both classes are in existence at the period of distribution the following rules seem to express the result of the authorities.

Ibid.

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 and 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.

6th ed., p. 1335. *Finlason* v. *Tatlock*, L. R. 9 Eq. 258.

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.

Ibid. *Re Roberts* (1903), 2 Ch. 200.

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.

Ibid. *Re Coley* (1901), 1 Ch. 40.

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 one or more deceased persons, 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.

6th ed., p. 1336. *Ive* v. *King*, 16 Bea. 46.

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.

Ibid. *Re Webster's Estate*, 23 Ch. D. 737.

PRESUMPTION REBUTTED BY STATE OF FACTS.

But this presumption is rebutted if the state of facts at the date of the will shows that the testator meant to include deceased persons in the original class.

6th ed., p. 1337. *Gowling* v. *Thompson*, L. R. 11 Eq. 366n.

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, refers to the original class in order to show how he wishes his property to be divided.

Ibid.

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.

6th ed., p. 1338. *Loring* v. *Thomas*, 1 Dr. & Sm. 497.

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." The rule as so explained is a definite rule of construction, and its authority has been recognized by the Court of Appeal and the House of Lords. The recent case of Re Lambert was decided in accordance with it.

6th ed., p. 1339. *Barraclough* v. *Cooper* (1908), 2 Ch. 121. *Re Lambert* (1908), 2 Ch. 117.

The primary meaning of "my brothers and sisters" is "my brothers and sisters now living," 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.

6th ed., p. 1340. *Re Offler*, 83 L. T. 758.

The language of the learned Judges, however, shows 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.

Ibid. *Re Cope* (1908), 2 Ch. 1. (C.A.)

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.

Ibid. *Gorringe* v. *Mahlstedt* (1907), A. C. 225.

WHERE SECONDARY CLASS TAKE BY INDEPENDENT GIFT.
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.

6th ed., p. 1341. *Heasman* v. *Pearse*, L. R. 7 Ch. 275.

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.

6th ed., p. 1342. *Re Philps' Will*, L. R. 7 Eq. 151.

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, prima 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.

Ibid. *Christopherson* v. *Naylor*, 1 Mer. 320.

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.

6th ed., p. 1343. *Jarvis* v. *Pond*, 9 Sim. 549; *Wingfield* v. *Wingfield*, 9 Ch. D. 658.

MEANING OF GIFT 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: (1) that it is a gift to arise upon a future contingency; (2) 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.

6th ed., p. 1344. *Re Banks' Trust* (2 K. & J. 387).

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 or because it is repugnant to the original gift, or because it is con-

trary to the provisions of the settled Land Acts. In such a case the original gift takes effect absolutely.

Ibid. See Chapters X and XVII.

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:—

6th ed., p. 1345.

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.

Ibid.

IMPLICATION OF ESTATE TAIL.

Whether an estate be given in fee or for life, or generally without any particular limit as to its duration, if it be followed by a devise over in case of the devisee dying without issue the devisee will take an estate tail. This illustrates (2) or (1) according as the prior devise is in fee or for life.

Ibid. Machell v. *Weeding*, 8 Sim. 4. See Chap. XIX. ante p. 325.

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. A similar implication occurs in the case of personal estate.

Ibid. Cropton v. *Davies*, L. R. 4 C. P. 150.

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. But cross limitations are not implied so as to divest vested interests; secus as to contingent interests.

Ibid. Doe d. Gorges v *Webb*, 1 Taunt. 234.

DURATION OF ANNUITY.

The duration of an annuity may sometimes be inferred from a gift over; this is not always strictly a case of implication

of estates or interests, but may be an illustration of words creating a tenancy in common being rejected by force of the context.

Ibid. *Armstrong* v. *Eldridge*, 3 B. C. C. 215. See post, Chap XLIV.

FEE CUT DOWN TO ESTATE TAIL.

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.

6th ed., p. 1346.

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.

Ibid. See post, Chap. XLVII.

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.

Ibid. *Forrest* v. *Whiteway*, 3 Ex. 367.

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., but the words which cut down the absolute estate must be clear, and if the gift over is a gift of a life estate only, A. will take the fee subject only to the life interest.

Ibid. *Gatenby* v. *Morgan*, 1 Q. B. D. 685.

EFFECT ON 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.

Ibid. *Re Edmondson's Estate*, L. R. 5 Eq. 389.

Where a legacy is charged upon land, a gift over in one event favours vesting in all other events.

6th ed., p. 1347. *Murkin* v. *Phillipson*, 3 My. & K. 257.

A gift over is an argument for the immediate vesting of a residuary bequest.

Ibid.

A gift over in the event of a devisee dying under twenty-one shows 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 intermediate interest, subject only to the chance of its being divested on a future contingency.

Ibid. *Phipps* v. *Ackers*, 9 Cl. & Fin. 583

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.

Ibid. Re Knowles, 21 Ch. D. 806.

CONDITIONS IN TERROREM.

Certain conditions annexed to gifts of personalty, though valid, are held to be ineffectual and in terrorem merely, unless there is a gift over. Conditions in partial restraint of marriage, or a condition not to contest the will are instances; in the case of realty, however, they are effectual though there is no gift over.

6th ed., p. 1347. Chap. XXXIX.

FORFEITURE ON ALIENATION OR BANKRUPTCY.

Restraints upon alienation, except where attached to the separate use of a married woman, are likewise bad, 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, but in the case of a life estate, a gift over upon bankruptcy or alienation is not necessary to make the condition effective.

Ibid.

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, or to the event of the death of the prior legatee in some contingency: gifts to take effect in default of the issue of a certain person: gifts to survivors: 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.

6th ed., p. 1348. Chapters LV, LVI, LVII.

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. So if there is a gift to A., and in the event of his predeceasing the testator to B., and A. and the testator die at the same instant, the gift over does not take effect.

Ibid. Elliott v. *Smith*, 22 Ch. D. 236.

In the case of a conditional limitation it is not necessary that every particular fact shall take place, but the limitation 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.

Ibid. *Avelyn* v. *Ward*, 1 Ves. Sen. 420.

This liberal canon of construction is frequently applied.

6th ed., p. 1349.

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.

6th ed., p. 1349.

In some cases the gift over is read strictly.

Ibid. *Re Edwards* (1906), 1 Ch. 570.

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.

Ibid. *Treharne* v. *Layton*, L. R. 10 Q. B. 459.

ALTERATION OF "OR" INTO "AND;" AND CONVERSELY. "CHILDREN" READ "ISSUE."

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. 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."

6th ed., p. 1350. *Parker* v. *Birks*, 1 K. & J. 156.

DOUBLE EVENT.

Where the original gift is subject to two contingencies a gift over to take effect on one of them is inoperative.

6th ed., p. 1351. See Chap. XXXVII.

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.

Ibid. *Musgrave* v. *Brooke*, 26 Ch. D. 792.

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.

Ibid. *McCormick* v. *Simpson* (1907), A. C. 494.

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. 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.

Ibid. *Nichols* v. *Haviland*, 1 K. & J. 504. See ante p. 376.

Gift to Members of a Class—Substitution—Ascertainment.—The testator directed that the residue of his estate should be divided equally among the children of his named brothers and sisters, share and share alike, "so that each nephew and niece shall receive the same amount; and in the event of any of my said nephews or nieces predeceasing me or dying before the time for distribution arrives, leaving children, . . . that the share which would have gone to such nephew or niece, if alive, shall be distributed equally among his or her children." The will was dated the 5th May, 1902, and the testator died on the 9th February, 1903. One of the testator's sisters named in his will, and who survived him, had a daughter who died in 1886, leaving a son:—Held, that this son was not entitled to a share of the residue. *Christopherson* v. *Naylor*, 1 Mer. 320, followed. *In re Potter's Trust*, L. R. 8 Eq. 52, not followed. A nephew of the testator, a son of one of the named brothers, was living at the date of the will, but died before the testator, leaving a daughter, who was held entitled to a share. *In re Fleming*, 24 C. L. T. 323, 7 O. L. R. 651, 3 O. W. R. 622.

Alternative Disposition—Death of Testator and Wife "at Same Time."—H. by his will provided for disposal of his property in case his wife survived him, but not in case of her death first. The will also contained this provision: "In case both my wife and myself should, by accident or otherwise, be deprived of life at the same time, I request the following disposition to be made of my property." . . . H. died sixteen days after his wife, but made no change in his will:—Held, affirming the decision of the Court of Appeal, 4 O. L. R. 666, 22 C. L. T. 405, which affirmed the judgment of a Divisional Court, 2 O. L. R. 169, 21 C. L. T. 434, that H. and his wife were not deprived of life at the same time, and he therefore died intestate. *Henning* v. *Maclean*, 23 C. L. T. 180, 33 S. C. R. 305, 1 O. W. R. 657.

Alternative Absolute Gifts.—A testator gave to his widow his real estate for life, and at her death to his eldest son John for life, and thereafter to "become the absolute property" of John's eldest son, alternatively "to become the property of my son James or of his eldest son," and failing either of them to the appellant. John died in the testator's lifetime without male issue; James and his son, who predeceased him, survived the widow:—Held, that the gift to John's eldest son being an absolute interest, it must, in the absence of words importing a different intention, and having regard to the context, be deemed to have been the inten-

tion of the will that the alternative gift to James should also be absolute. The gift over to the appellant in case of the death of James without male issue was defeated if either James or his son lived to take absolutely.—Judgment of the King's Bench, Quebec, 15 Que. K. B. 515, affirmed. See also 29 Que. S. C. 368. *McCormick* v. *Simpson*, [1907] A. C. 494.

Alternative Devise.—The plaintiffs claimed title under a will, by which the testator devised to his widow "1,000 acres of land in Walsingham; and if he had less than 1,000 acres there, then that quantity to be made up to her out of his Zorra lands." The defendants showed no title, but contended that to succeed, the plaintiffs must prove that the testator died seised of 1,000 acres more than the land in question in Walsingham, and that the plaintiffs should be nonsulted. Upon a motion made on leave reserved:—Held, that the nonsult should be entered. *Miller* v. *Anger*, 8 U. C. C. P. 80.

Farm Stock—Substitution.—The claimant was widow of one Teal, deceased, who died over twelve years before action, having devised his real and personal estate to his widow, as executrix in trust for his mother, widow and children. She never obtained probate. Two years after the death of the testator she married the judgment debtor, R., who lived upon and worked the farm and took care of the property, sometimes treating it as his own, and sometimes as the property of the devisees. He kept up the quantity of the stock to its original quantity and value, and sold horses, cattle, &c., no account being kept of the estate, nor of the farm. When he married the widow he had real and personal estate worth about $600, which he disposed of for the general benefit of the family and himself. He became embarrassed, and having arranged with testator's mother to pay her a stated annuity, was obliged to incur a liability with the judgment creditors, merchants, who supplied her with goods in lieu of the annuity, at his request. The plaintiffs sued him in the Division Court, and caused the bailiff to seize the goods and cattle found upon the farm. His wife claimed all the property seized, as executrix and trustee under the will of T. He owned some property in his own right. Nearly all the property of the estate had been sold, or died, or was killed, but had been replaced by R. No proper evidence was offered to trace it as distinctly belonging to the judgment debtor or to the estate:—Held, that the claimant ought to have obtained and produced probate of the will, not the will itself, in proof of the trust. (2) That property of the estate might (if bona fide) be kept up at its original value. (3) That evidence should be given distinctly showing what property was that of the estate and what that of the judgment debtor; and in the absence of an account being kept and shown, each article must be traced as having its source in the property of the estate, or as the proceeds of the labour of the judgment debtor. *Paton* v. *Ramsay*, 10 L. J. 277.

Substitution—Will Giving Share of Residue—Codicil Giving Specific Land.—A testator gave the residue of his real and personal property to his daughter, the lands to be held by her in fee tail; and in a subsequent part of the will added: "I wish and desire that my daughter shall make a competent provision for my niece, Mrs. B., at Hamilton." By a codicil on the same day as the will, after making alterations in his will, he added: "And I do hereby devise to my niece, Mrs. B., of Hamilton, the lot containing one-fifth of an acre fronting on School street, in the town of Kingston: —Held, that the words "I wish and desire" were not precatory merely, but directory, and formed a charge upon the residuary estate, and that the devise in the codicil was cumulative, and not substitutional. *Baby* v. *Miller*, 1 E. & A. 218.

A testator, after making certain bequests to his wife, directed that after her death, his executors should sell all his estate, real and personal, and after providing for certain pecuniary legacies, should give the legal interest on one-fourth of the remaining proceeds of his estate to his daughter E., to be paid to her yearly during her life, and after her death to be divided among her surviving children. By a codicil he willed to "E. and her heirs that share or division of my estate, as referred to in a former

will, in land composed of the north-east part of lot 7, concession 3, Markham." It appeared that the testator had put E. in possession of the said fifty acres some time before his death and that the said fifty acres were about equal to one-fourth of the whole residue of his estate:—Held, that the devise to E. in the codicil was substitutional to her for the bequest to her in the will.—Held, also, that under the codicil E. took an estate in fee, and not one subject to the incidents of the original gift in the will. In no case of substitutional gifts has it been held that the subsequent gift is to go to the parties entitled under the subsequent limitation of the former gift. The word "heirs" may sometimes mean "children," both in regard to personal and real estate, but that meaning will only be given to it when it is clear that the property was intended to go to the children. *Scott* v. *Gohn*, 4 O. R. 457.

CHAPTER XXXVII.

DEVISES AND BEQUESTS, WHETHER VESTED OR CONTINGENT.

MEANING OF "VESTED" AND "CONTINGENT."

The word "vested" has several meanings which are liable to be confused. 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: 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 estate, 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.

6th ed., p. 1352. *Whitby* v. *Von Luedecke* (1906), 1 Ch. 783.

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.

6th ed., p. 1353.

CONTINGENT INTEREST WHEN TRANSMISSIBLE.

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. 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.

Ibid.

Thus, where 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).

Ibid. Re Cresswell, 24 Ch. D. 102.

EFFECT OF AN EXPRESS DIRECTION WHEN GIFT IS TO "VEST."
IN WHAT CASES "VESTED" MEANS "INDEFEASIBLE."
IN WHAT CASES LITERALLY CONSTRUED.

The strict and ordinary meaning of "vested" is "vested in interest," and consequently if in a divise of 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 at two different periods. 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, 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, 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. An accruer clause, 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, tends strongly to the same conclusion. 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 or in some probable event 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. So, if the will gives the issue the chance of taking through their parent, as if the property is directed to vest in the devisee or legatee on his attaining a specified age, or dying leaving issue. A gift of the interest until the arrival of the time named, also favours the less strict construction, upon principles already

explained. But if the interest is to be accumulated and paid at the same time as the principal fund; or if by the context a distinction is drawn between the terms "vested" and "payable," the word "vest" must have its proper meaning.

6th ed., p. 1354. *Re Baxter's Trusts*, 10 Jur. N. S. 847; *Re Edmondson's Estate*, L. R. 5 Eq. 389; *Best* v. *Williams* (1890), W. N. 189; *Rowland* v. *Tawney*, 26 Bea. 67; *Re Thatcher's Trusts*, 26 Bea. 365; *Simpson* v. *Peach*, L. R. 16 Eq. 208.

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. 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. 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.

6th ed., p. 1356. *Re Parr's Trusts*, 41 L. J. Ch. 170.

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. But a direction deferring possession may throw light on the meaning of the word "vested."

6th ed., p. 1357. *McLachlan* v. *Taitt*, 28 Bea. 407.

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.

Ibid.

GENERAL RULE AS TO VESTING.

The law is said to favour the vesting of estates; the effect of which principle seems to be, that property which is the sub-

ject 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.

Ibid.

If words of futurity are introduced into the gift, the question arises whether the expressions are inserted for the purpose of protracting the vesting, or point merely to the deferred possession or enjoyment.

Ibid.

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.

6th ed., p. 1358. *Farmer* v. *Francis*, 2 Bing. 151.

ESTATES IN POSSESSION AND REMAINDER.

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.

Ibid.

DEVISES OF REVERSIONS AND REMAINDERS.

On the same principle, where a person who is entitled to a reversion or remainder in fee, expectant on an estate tail in himself, or in any other person, by his will devises the property in question, in the event of the person who is tenant in tail dying without issue, this is construed as an immediate disposition of the testator's reversion or remainder; though, upon the

face of the will, the devise presents the aspect of an executory gift, to arise on a general failure of issue, which would clearly be void 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.

6th ed., p. 1359. Mr. Jarman wrote in 1844.

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. The ulterior estate, therefore, is a vested remainder, absolutely expectant on the failure or determination of the prior estate.

Ibid. *White* v. *Summers* (1908), 2 Ch. 256.

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.

6th ed., p. 1361.

GENERAL CONCLUSION FROM THE CASES.

On the whole, then, the distinction would seem to be, that where the circumstance of not marrying again is interwoven into the original gift, the testator, having thus, in the first instance, created an estate durante viduitate, must generally be considered, when he subsequently refers to the marriage, to describe the determination by any means of that estate, and, consequently, the gift over is a vested remainder expectant thereon. 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.

6th ed., p. 1362. *Underhill* v. *Roden*, 2 Ch. D. 494; see *Re Cabburn*, 46 L. T. 848.

The construction in the former class of cases being that the limitations over take effect, at all events, on the determina-

tion 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.

6th ed., p. 1363.

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.

Ibid. *Stanford* v. *Stanford*, 34 Ch. D. 362.

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. It also applies where the prior gift is to a spinster until marriage, or to a person until he becomes bankrupt, 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.

6th ed., p. 1364. *Re Cane*, 60 L. J. Ch. 36.

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.

Ibid. *McCulloch* v. *McCulloch*, 3 Giff. 606.

Nor does it apply where there is no express gift over.

Ibid. *Re Tredwell* (1891), 2 Ch. 640.

VESTED SUBJECT TO BE DIVESTED.

The inclination of the Courts to hold interests to be vested is shown 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 an some event happening or not happening, and the third case is 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. 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.
Ibid.

A gift may be liable to be divested in one of three ways.
6th ed., p. 1365.

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.
6th ed., p. 1365. *Doe d. Blomfield* v. *Eyre*, 5 C. B. 713; *Hurst* v. *Hurst*, 21 Ch. D. 278.

PARTIAL GIFT OVER.

Secondly, property may be given to A. subject to a proviso of defeasance or cessor 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.
Ibid. *Gatenby* v. *Morgan*, 1 Q. B. D. 685.

PRIOR GIFT NOT DIVESTED UNLESS GIFT OVER TAKES EFFECT.

Thirdly, property may be given to A. subject to a proviso showing 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.
Ibid.

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, and in the case of gifts to survivors.
Ibid. See *Salisbury* v. *Petty*, 3 Ha. 86.

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.
Ibid.

DIVESTING CLAUSES STRICTLY CONSTRUED.
VESTED GIFT NOT DIVESTED, UNLESS ALL THE EVENTS HAPPEN.

As a general rule, divesting clauses are strictly construed. As a devise expressly made to take effect on a contingency will

not arise unless such contingency happen, it follows a 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. 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 object of the substituted gift come in esse, and answer the qualification which the testator has annexed thereto.

6th ed., p. 1366. *Vulliamy* v. *Huskisson*, 3 Y. & C. 80. See *Doe* v. *Eyre*, last page.

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.

6th ed., p. 1368.

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.

Ibid. White v. *Baker*, 2 D. F. & J. 55.

GIFT OVER OF ANNUITY FUND.

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.

6th ed., p. 1369. *Re Sanders' Trusts*, L. R. 1 Eq. 675.

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.

Ibid. Treharne v. *Layton*, L. R. 10 Q. B. 459.

It seems that the principle laid down in the foregoing authorities does not apply to the case of trustees being directed to buy an 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.

Ibid. Re Draper, 57 L. J. Ch. 942; *Day* v. *Day*, 22 L. J. Ch. 878.

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.

6th ed., p. 1370.

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. 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.

1st ed., p. 752, note. *Graves* v. *Bainbrigge*, 1 Ves. Jun. 562; *Selby* v. *Whittaker*, 6 Ch. D. 239.

DEVISES VESTED, NOTWITHSTANDING EXPRESSIONS OF SEEMING CONTINGENCY.

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.

6th ed., p. 1371. *Andrew* v. *Andrew*, 1 Ch. D. 417; *Phipps* v. *Ackers*, 9 Cl. & F. 583.

WORDS OF APPARENT CONTINGENCY REFERRED TO THE POSSESSION MERELY.

Another exemplification of the principle in question occurs in those cases where a testator, after giving an estate or interest

for life, proceeds to dispose of the ulterior interest in terms which, literally construed, would seem to make such ulterior interest depend on the fact of the prior 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.

6th ed., p. 1373.

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, than that the person to take under the limitation over is to take subject to the interests so previously limited.

6th ed., p. 1374. *Tuer* v. *Turner*, 18 Bea. 185; *Maddison* v. *Chapman*, 4 K. & J. 709.

DEVISE, IF A. SHALL ATTAIN TWENTY-ONE, CONTINGENT.
OTHERWISE, IF A LIMITATION OVER IN ALTERNATIVE EVENT.

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.

1st ed., p. 738.

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.

6th ed., p. 1376.

DEVISE TO A CLASS.

The rule applies where the devise is to a class.

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.

Ibid. *Doe d. Dolley* v. *Ward*, 9 Ad. & El. 582; *Bromfield* v. *Crowder*, 14 East. 601.

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.

6th ed., p. 1377. *Phipps* v. *Ackers*, 9 Cl. & F. 583.

PERSONAL PROPERTY.

The rule applies to personal property and to residuary gifts.

Ibid. *Whitter* v. *Bremridge*, L. R. 2 Eq. 736.

It is impossible to hold the devise to vest immediately, by the application of the doctrine in question, in opposition to an express declaration that the devisees shall not take vested interests until a certain age, especially if even the devise over, which supplies the argument for neutralising this clause, is itself not without expressions which favour the suspension of the vesting.

6th ed., p. 1379. *Russel* v. *Buchanan*, 2 Cr. & Mee. 561.

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 fntnre period, as snch a declaration obviously carries with it an implied negation of an earlier period of vesting.

Ibid. *Glanville* v. *Glanville*, 2 Mer. 38.

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 show little of the indisposition to extend the doctrine of Doe v. Moore which has sometimes been professed, and which had in the meantime led to the establishment of a very material distinction between a devisee to an individual or to a class, if or when he or they attain twenty-one, with a gift over on death nnder that age, and a devise to "snch of the children of A. as shall attain twenty-one," or "to the first son of A. who shsll attain twenty-one," or the like with a corresponding gift over.

6th ed., p. 1382. *Doe d. Hunt* v. *Moore*, 14 East. 601; *Phipps* v. *Ackers*, 9 Cl. & Fin. 592.

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 psid; bnt 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.

6th ed., p. 1384.

GENERAL REMARK ON PRECEDING CASES.

The several preceding classes of cases clearly demonstrate that the Courts will not construe a remainder to be contingent, merely on account of the inaccurate and inartificial use of expressions importing contingency, if the nature of the limitations affords ground for concluding that they were not used with a view to suspend the vesting. Such cases may be considered, however, as exceptions to the general rule; and, agreeably to the maxim, exceptio probat regulum, 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.

1st ed., p. 743.

ESTATES LIMITED IN CLEAR TERMS OF CONTINGENCY.

The first remark suggested by this class of cases is, that an estate will he 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 he conjectured would have heen the testator's actual meaning, if his attention had heen drawn to those consequences.

1st ed., p. 744.

WHERE HOLDING THE DEVISE TO BE CONTINGENT, WILL DEFEAT THE DECLARED OBJECT OF THE TESTATOR.

Still, however, where the construing of the devise to be contingent, in accordance with the letter of the will, would have the effect of rendering nugatory a purpose clearly expressed by the testator, the Court will struggle to avoid such a construction.

1st ed., p. 748. *Bradford* v. *Foley*, Doug. 63.

GIFT TO A CLASS.

The question whether a contingency can be implied arises most frequently in gifts to classes. The implication will of course not he made where the language is clear, but it will be made if it appears necessary in order to give effect to the testator's intention.

6th ed., p. 1388. *Leeming v. Sherratt*, 2 Ha. 14.

But the implication does not arise where the testator has expressly made all the children the objects of his hounty; or (it seems) where the gift is to named individuals, and the testator shows that each is intended to have a share. 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. 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.

Ibid. *Cooper* v. *Cooper*, 29 Bea. 229; *Re Hunter's Trusts*, L. R. 1 Eq. 295.

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.

6th ed., p. 1389. *Judd* v. *Judd*, 3 Sim. 525.

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 shall go to that child, this may have the effect of making the gift to all the children contingent on their surviving A.

Ibid. *Lewis* v. *Templer*, 33 Bea. 625.

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.

6th ed., p. 1390. *Hickling* v. *Fair* (1899), A. C. 15.

QUESTION, WHETHER CONTINGENCY CONFINED TO PARTICULAR ESTATE, OR EXTENDS TO A SERIES OF LIMITATIONS.

When a contingent particular estate is followed by other limitations, a question frequently arises, whether the contingency affects such estate only, or extends to the whole series. The rule in these cases seems to be, that if the ulterior limitations be immediately consecutive on the particular contingent estate in unbroken continuity, and no intention or purpose is

expressed with reference to that estate, in contradistinction to the others, the whole will be considered to hinge on the same contingency; and that, too, although the contingency relate personally to the object of the particular estate, and therefore appear not reasonably applied to the ulterior limitations.

Ibid.

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.

6th ed., p. 1391. *Toldervy* v. *Colt*, 1 M. & Wels. 250.

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.

Ibid. *Darby* v. *Darby*, 18 Bea. 412.

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.

6th ed., p. 1392. *Doe* v. *Wilkinson*, 2 T. R. 209.

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 prima facie case for the disconnection, which the context of the will may either maintain or rebut.

6th ed., p. 1393. *Rhodes* v. *Rhodes*, 7 A. C., at pp. 208, 209.

On the other hand, a limitation may be construed as a separate and independent gift, although not introduced by any special word of severance.

Ibid.

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. But if

payment is postponed, there are differences between ordinary legacies and legacies charged on land. 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 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. Money to arise from the sale of land is also not land for the purposes of the rule.

1st ed., p. 756.

FAILURE OF LEGACIES CHARGED ON LAND.

DISTINCTION WHERE PAYMENT IS POSTPONED WITH REFERENCE TO CIRCUMSTANCES PERSONAL TO DEVISEE, AND WHERE FOR CONVENIENCE OF THE ESTATE.

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; but this doctrine has undergone some modification; and the established distinction now is, that, if the payment be postponed with reference to the circumstances of the devisee of the money, as in the case of a legacy to A., to be paid to him at his age of twenty-one years, the charge fails, as formerly, unless the devisee lives to the time of payment; and so at too, though interest in the meantime be given for maintenance. 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 bnrthen. But either of these rules of construction, of course, will yield to an expression of a contrary intention. Thus, even where the payment is made to depend on a contingency, 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. And if such intention, though not expressly intimated, can be collected from the context, the exclusion of either rule will be no less complete.

1st ed., p. 756. *Parker* v. *Hodgson*, 1 Dr. & Sm. 568; *Remnant* v. *Hood*, 2 D. F. & J. 411.

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.

6th ed., p. 1395. *Murkin* v. *Phillipson*, 3 My. & K. 257.

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 absolntely, or, in other words, that he should take a vested interest in case he does survive the testator.

6th ed., p. 1396.

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.

5th ed., p. 793. *Goodman* v. *Drury*, 21 L. J. Ch. 680; *Taylor* v. *Lambert*, 2 Ch. D. 177.

WHEN PAYABLE, NO TIME OF PAYMENT BEING FIXED.

Sometimes a difficnlty 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 reconcilable, but it seems that, generally, in such a case, the devisee would be entitled to have the money raised immediately.

1st ed., p. 758.

CHARGES ON REVERSIONS.

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 nntil the reversion fell into possession. This principle has prevailed in several cases in regard to annuities.

6th ed., p. 1397.

LEGACY CHARGED ON BOTH REAL AND PERSONAL ESTATE.

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.

Ibid. *Re Hudsons*, Dru. 6.

VESTING OF BEQUESTS OF PERSONAL ESTATE.

The same general principles which regulate the vesting of devises of real estate apply, to a considerable extent, to gifts of personalty. Whatever difference exists between them, has arisen from the application to the latter of certain doctrines borrowed from the civil law, which have not obtained in regard to real estate, having been introduced by the Ecclesiastical Courts, who possessed, and still possess, in common with Courts of Equity, a jurisdiction for the recovery of legacies and distributive shares of personal estate.

1st ed., p. 755. Since Mr. Jarman wrote, this jurisdiction has been abolished: Stat. 20 & 21 Vict. c. 77, s. 23.

VESTING FAVOURED BY LAW.

It has been already mentioned 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 legacies), 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. But the principle is at best a vague one, and, as in devises of realty, 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. 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." 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. 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.

6th ed., p. 1397. *Re Hamlet*, 39 Ch. D. 426; *Re Edwards* (1906), 1 Ch. 570.

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. And if the gift to A. fails to take effect, by lapse or otherwise, or is determined during his lifetime, B.'s interest is accelerated. This construction is not necessarily affected by the addition of words which, taken literally, make the bequest to B. contingent on his surviving A.

6th ed., p. 1398. *Blamire* v. *Geldart*, 16 Ves. 314: *Bradley* v. *Barlow*, 5 Ha. 589.

VESTING OF PERSONAL LEGACIES.

DISTINCTION WHERE TIME IS ANNEXED TO SUBSTANCE OF GIFT, AND WHERE TO TIME OF PAYMENT ONLY.

With regard to the vesting of personal legacies, the payment of which is postponed to a period subsequent to the death of the testator, a leading distinction is, that if futurity is annexed to the substance of the gift, the vesting is suspended; but if it appears to relate to the time of payment only, the legacy vests instanter. Thus, where a sum of money is bequeathed to a person at the age of twenty-one years, or at the expiration of a definite period (say ten years) from the decease of the testator, the vesting, not the payment merely, is deferred; and, consequently, if the legatee dies before the period in question, the legacy fails. But if the legacy is, in the first instance, given to the legatee, and is then directed to be paid at the age of twenty-one years, or at the end of ten years after the testator's decease, the legacy vests immediately, so that, in the event of the legatee dying before the time of payment, it devolves to his representative.

1st ed., p. 759. *Bramley* v. *Wright*, 7 Hare, 334.

SUPERADDED WORDS OF DIVISION OR DISTRIBUTION.

Words directing division or distribution between two or more objects at a future time, fall under the same consideration as a direction to pay; and, therefore, where they are engrafted on a gift, which would, without these superadded expressions, confer an immediate interest, they do not postpone the vesting. Thus, a bequest to A. and B. of 3,000*l.*, Navy 5*l.* per 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.

6th ed., p. 1400.

The principle prevails where payment is in terms postponed until the testator's debts are satisfied, or his assets realized, or an outstanding security is got in, or until certain real estate is sold, or money directed by the will to be laid out in the purchase of land is so laid out, or until the death of another person. And an immediate gift to several is not made contingent hy a superadded direction for distrihution 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.

6th ed., p. 1401. *Wood* v. *Penoyre*, 13 Ves. 325; *Maddison* v. *Chapman*, 4 K. & J. 715.

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 hequeathed 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 hequeath the same accordingly," Lord Cottenham held the legacy vested in the children on their birth.

Ibid. *King* v. *Isaacson*, 1 Sim. & G. 371.

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 and not otherwise, is contingent upon A.'s attaining that age. Again, the original gift may be so connected with the direction to pay that the legacy must be held to he contingent. So, where a testator clearly expressed his intention that the benefits given hy his will should not vest till his debts were paid, or until a sale directed therehy should he completed, or until assets in a foreign country should be actually remitted to the legatee, the intention was carried into execution, and the vesting as well as payment was held to be postponed.

5th ed., p. 796. *Elwin* v. *Elwin*, 8 Ves. 547; *Law* v. *Thompson*, 4 Russ. 92.

LEGACY IN UNCERTAIN EVENT.

Moreover, 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, hut until an event

which may or may not happen, the effect, it should seem, is to render the legacy itself contingent.

1st ed., p. 761.

RULE WHERE THE ONLY GIFT IS IN THE DIRECTION TO PAY, ETC.

It should seem, too, that, where the only gift is in the direction to pay or distribute at a future age, the case is not to be ranked with those in which the payment or distribution only is deferred, but is one in which time is of the essence of the gift.

6th ed., p. 1402. *Leake* v. *Robinson*, 2 Mer. 363.

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.

6th ed., p. 1404. *Packham* v. *Gregory*, 4 Ha. 396.

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.

Ibid. *Re Duke*, 16 Ch. D. 112.

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.

5th ed., p. 800.

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 show that that is the period at which it will take effect in possession.

6th ed., p. 1405. *Oppenheim* v. *Henry*, 10 Hare 441.

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. On the other hand, the gift to the class may be contingent, while the gift to the sole object may be vested.

Ibid. Johnson v. *Foulds*, L. R. 5 Eq. 268.

GIFT SEEMINGLY CONTINGENT VESTED BY GIFT OF INTERMEDIATE INTEREST.

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), he attains the age of twenty-one years, or marries, though such legacy standing alone and unexplained would clearly be contingent, i.e., would be liable to failure in case of the legatee dying before the prescribed age or event; yet if the interest accruing in the interval between the death of the testator and the future period in question is appropriated to the benefit of the legatee, it is held 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.

1st ed., p. 764. *Hanson* v. *Graham*, 6 Ves. 243; *Lane* v. *Goudge*, 9 Ves. 225.

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.

6th ed., p. 1406. *Re Williams* (1907), 1 Ch. 180.

GIFT OF MAINTENANCE DOES NOT NECESSARILY CAUSE VESTING.

A gift of interest, e[illegible] nomine, obviously is difficult to be reconciled with the suspe[illegible]on 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.

1st ed., p. 766.

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.

6th ed., p. 1408. *Re Hart's Trusts*, 3 De G. & J. 195; *Fox* v. *Fox*, L. R. 19 Eq. 286.

So if the whole income is given, subject to an annuity or the like.

6th ed. p. 1409.

But an annual allowance for maintenance, although equal in amount to the interest, will not, unless given as interest, have the same effect.

Ibid. Watson v. *Hayes*, 5 My. & Cr. 133.

GIFT OF INCOME OPERATES TO VEST LEGACY TO A CLASS.

Where the legacy is to a class, 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.

Ibid. Re Mervin (1891), 3 Ch. 197.

UNLESS GIVEN AS A COMMON FUND.

But where the interest is given as a common fund for the maintenance of all the members of the class, it does not vest the legacy.

Ibid. Lloyd v. *Lloyd*, 3 K. & J. 20.

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, and it might therefore be supposed that the case would fall within the rule above stated.

6th ed., p. 1410. *Re Sanderson's Trusts*, 3 K. & J. 507; *Fox* v. *Fox*, L. R. 19 Eq. 286.

RESULT OF THE AUTHORITIES.

The following rules may be deduced from the foregoing authorities:

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.

Leake v. *Robinson*, 2 Mer. 363.

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. 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.

Re Parker, 16 Ch. D. 44.

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. Assuming that the answer is in the affirmative, it does not follow that a mere discretionary power of maintenance has the same effect; the statutory power of maintenance of course has not.

6th ed., p. 1415. *Fox* v. *Fox*, L. R. 10 Eq. 286; *Re Jobson*, 44 Ch. D. 154.

It seems, although this is a point which can scarcely be considered settled, that the direction to apply the intermediate income for the maintenance of the legatee, need not extend to the whole time which must elapse before the period appointed for payment arrives.

Ibid. *Davies* v. *Fisher*, 5 Bea. 201.

GIFT OF INTEREST WILL NOT VEST THE LEGACY WHERE A CONTRARY INTENTION APPEARS.

It is 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.

5th ed., p. 805. *Re Bulley's Estate*, 11 Jur. N. S. 847.

EFFECT WHERE PRINCIPAL AND INTEREST ARE BLENDED.

Where 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.

1st ed., p. 706.

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.

6th ed., p. 1417. *Breedon* v. *Tugman*, 3 My. & K. 289.

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.

5th ed., p. 807. *Lane* v. *Goudge*, 9 Ves. 225. See page 692.

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.

6th ed., p. 1418. *Bell* v. *Cade*, 2 J. & H. 122.

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 show an intention that the children are to take vested interests on the death of A., whether they attain twenty-one or not.

6th ed., p. 1419. *Re Bevan's Trusts*, 34 Ch. D. 716.

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.

6th ed., p. 1420. Post page 678. See also page 664.

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.

Ibid. *Perfect* v. *Lord Curzon*, 5 Madd. 442.

On the same principle, the Court sometimes disregards the express words of a gift over, which, if taken literally, would defeat an interest vested in a child by previous words of gift.

Ibid.

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.

Ibid, *ante* page 664.

CLEAR GIFT NOT AFFECTED BY GIFT OVER.

Where an interest is clearly contingent, a gift over will not make it vested.

Ibid.

VESTING OF RESIDUARY BEQUESTS.

Most of the rules above stated with regard to the vesting of bequests of personalty, apply to residuary bequests.

Ibid.

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.

1st ed., p. 767.

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.

6th ed., p. 1422. *Pearman* v. *Pearman*, 33 Bea. 394.

IN GIFT TO A CLASS SUBSEQUENT WORDS MAY BE EXPLANATORY WHERE THE PRECEDING ARE AMBIGUOUS.

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.

1st ed., p. 770. *Merry* v. *Hill*, L. R. 8 Eq. 619.

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.

6th ed., p. 1424. *Hatfield* v. *Pryme*, 2 Coll. 204.

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 prima facie contingent, yet a contrary intention may appear from the context. And first as to the effect of a gift of the intermediate income.

6th ed., p. 1425.

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 marry-

ing, &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. See page 674.

Ibid.

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.

Ibid. *Re Parker*, 16 Ch. D. 44; *Fox* v. *Fox*, L. R. 19 Eq. 286.

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.

6th ed., p. 1426.

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. And it seems now settled that the same rule applies to gifts to classes, although the authorities are not altogether consistent.

1st ed., p. 774. *Whitter* v. *Bremridge*, L. R. 2 Eq. 736. See *Vawdry* v. *Geddes*, 1 R. & My. 203.

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.

6th ed., p. 1431. *Walker* v. *Mower*, 16 Bea. 365; *Re Edwards* (1906), 1 Ch. 570.

Time for Distribution—Vested Estates.—A testator gave a certain farm to his son to be delivered to him on attaining the age of 25 years. He also directed that certain properties should be equally divided amongst his children, the children of a deceased child to take the parent's share, but no child to take until he or she attained the age of 25 years. He further directed that another property should be held as a home for his widow, and on her death or marriage it should be sold and the proceeds divided amongst his children then living, the children of a deceased child to take the parent's share. The said son and a daughter, both unmarried, predeceased the widow, each leaving a will:—Held, that the two deceased children were qualified to receive a share of the testator's estate, except the homestead property, and that their shares were vested and passed under their respective wills; that the homestead property should go to the children living at the time of the death of the widow. Costs out of the estate. *Re John Knox* (1910), 16 O. W. R. 44.

"Time for Distribution Hereinafter Mentioned"—"Distribute" and "Pay."—The questions submitted were: (1) Should the widow, L. Gurney, receive the interest upon the share of N. Gurney until he attains the age of 20 years? (2) What is meant by the words "the time for distribution hereinafter mentioned?":—Held, that A. Gurney was entitled, May 8th, 1909, to receive a part of the principal, that made it the duty of the trustees to lay aside $10,000 and pay her the remainder. The other half should not then be distributed, but should remain in the hands of the trustees. Whether it is vested in the son, the time has not come for the payment; that testator made the words "distribute" and "pay" synonymous in respect of principal by the second paragraph of this clause, and there is no reason why the "time for distribution" may not be the two times for distribution or payment. Until the death of the son, or until he attains the age of 20 years; that there was no reason why the widow should not receive the income unless and until after the son is 25 years, the executors should see fit to pay some part of the son's share to him under the provisions of the last paragraph of the clause. This answered both questions. Costs out of the estate. *Re Gurney* (1910), 15 O. W. R. 876.

Time Fixed for Distribution.—Testator devised all the rents and profits of her estate to C., an unmarried daughter, so long as she remained unmarried, and upon her marriage the whole to be divided between her and her four sisters; but if she died unmarried the division was to be amongst her four sisters; and in case of either of these four dying before the marriage or death of C. the share of the one so dying was to go to the children. Then followed a provision that in case of the death of any of her said daughters, without leaving child or children, the share of such daughter was to be divided among the surviving daughters and the children of deceased daughters:—Held, reversing 26 Chy. 310, that it was the intention of the testatrix that there should be a distribution of the estate upon the marriage of C., and that on the event happening each of the daughters took an immediate absolute interest. *Munro* v. *Smart*, 4 A. R. 449.

Sale at Named Period.—A testator, after sundry bequests and devises, amongst others an estate for life in all his lands to his widow, devised the same lands to trustees upon trust, within two years after the death of his widow, to sell and dispose thereof; to execute deeds, and to give receipts, &c., and "after the sale of my said real estate I give and bequeath the proceeds of such sale or sales to my nephew G. B., son of my brother Joseph, and to the following children of my brother George (naming them), equally share and share alike, male and female, without exception, when they respectively attain the age of twenty-one, to them, their heirs and assigns; and in the event of any of my legatees dying before getting their share or portion as aforesaid leaving child or children, in such case the child or children of any so dying shall inherit the share of the deceased parent." One of the nephews died during the lifetime of the widow without issue:—Held, that there was no bequest of anything until the sale had taken place; that the bequest was one of personalty, not of realty; that no interest vested in such deceased nephew, as he did not live till the time of sale; that the gift was not a gift to a class; and there being no residuary clause in the will, that the share of such deceased nephew lapsed and passed to the next of kin of the testator, and not to the legatee of the nephew. *Bolton* v. *Bailey*, 26 Chy. 361.

Payment at Named Periods.—A testator devised as follows: "My will is, that J. B., my son, shall have the homestead, and that the property be divided in the following manner: First, that all my just debts be paid out of the personal property, and then two-thirds of the whole to be given equally among my six boys as they come of age, and the other third to be equally divided among my seven girls as they come of age or marry, or as it can be raised from the estate; that the property be appraised after my death. My will is, that my wife, E. B., so long as she remains my widow, shall have two cows kept for her maintain, with meat and flour, and wood, and every other necessary for her age and maintenance, and a girl, should her have one left her, and doctor if necessary. The family to be maintained on the place with every necessary thing for their use. That the

younger branch of the family receive a common education equal with the rest of the family:"—Held, that the testator's children took vested interests in the real estate on the death of the father. *Bigelow* v. *Bigelow*, 19 Chy. 549.

A testator devised his estate to trustees to invest for the benefit of his wife and children, and to give to each child on attaining 21 years a sum of $1,000; and further directed that when his youngest child should attain the age of 21 years the trustees were to invest a sufficient sum to yield to his widow $400 a year; and all the rest and residue of his real and personal estate remaining, after investing such sum, to be equally divided among his children share and share alike:—Held, that each child on attaining 21 years took a vested interest in the residue of the estate. *Murphy* v. *Murphy*, 20 Chy. 575.

The testator bequeathed his money in the Bank of Commerce to "H. F., son of C. and A. F., when he becomes of age, to receive it in full with the interest. Should he not survive them, his next heir shall become inheriter:"—Held, a specific bequest of the money and interest, which vested presently. *Fulton* v. *Fulton*, 24 Chy. 422.

Partially Divested to let in Others of Class.—A testator gave to his wife certain real estate, and the interest of all his moneys and securities, and the value of one-third of his personal property, and after her death directed his money to be divided among his cousins, viz., the family of his uncle, J. F., the family of J. S., the family of A. M., and the daughter of his aunt S.:—Held, that the gift of his money was to the cousins as a class, and that those living at his death took vested interests liable to be divested to the extent required to let in other cousins, of the families named, coming into existence before the death of the widow, the period of distribution; and that as the testator directed his wife to have one-third of the value of his personal property, which could only be ascertained by a sale, it was the duty of the executors to make such conversion; and as the gift was not to take effect till the death of the wife, the money the testator thereby meant to dispose of was not merely the money he possessed at the time of his death, but the money belonging to his estate at the time of his wife's death, when all the personal estate would be, or ought to be, in the shape of money. *Ferguson* v. *Stewart*, 22 Chy. 364.

A testator in a will containing inconsistent provisions devised certain real estate, after the death of his daughter, to his grandsons J. and F., "to hold as joint tenants, and not as tenants in common. To have and to hold the same to them during their joint lives, and to the survivor of them, and to their male heirs after their or either of their decease, and to their heirs and assigns for ever," and in case of the death of F. without leaving lawful issue, then the portion that would have belonged to him if living the testator gave to another grandson, H., for his life, and after his death to his heirs and assigns for ever. The will contained the following devise: "My will is, that after the decease of my daughter B. and after the decease of all my sons-in-law, James Esmond, John Emery, and John Severs, and not before they are all deceased, then my will is, that the money and mortgages belonging to my estate is to be divided into equal parts and paid to my grandchildren, equally amongst all my grandchildren; but in case of the death of any of my grandchildren before the death of my daughter B, and before the death of all my sons-in-law leaving lawful issue, then the share that would have belonged to my grandchild if living shall go and belong to the lawful issue of such deceased grandchild:"—Held, that the estate was not to be divided till twenty-one years from the death of the testator, and not then unless his daughter and three sons-in-law were dead; and that all the grandchildren living at his death took an immediately vested interest, subject to be divested pro tanto as the number of grandchildren should be increased by future births before the period of distribution. *Hellem* v. *Severs*, 24 Chy. 320.

A testator devised certain land to E. T. "during his and M. A.'s natural life, then and after that to be given to M. A.'s children to them, their heirs and assigns for ever:"—Held, that the children of M. A. in existence at the testator's death forthwith took vested interests, subject to be partially divested in favour of children of M. A. subsequently coming into existence during the life of M. A., and that the representatives of any

child dying before the period of distribution were entitled to claim the share of that child. *Paradis* v. *Campbell*, 6 O. R. 632, distinguished. *Lotte* v. *Lowry*, 11 O. R. 517.

Gift to Son at Twenty-six—Accumulation—Vesting.—Where a testator bequeaths property severed from the rest of his estate and the accumulation of income thereof, to a legatee, "when and so soon as he shall attain the age of twenty-six years," and directs his trustees, until that age is attained, to pay to the legatee part of the income thereof and to accumulate the balance, then, if there be no gift over of either capital or income, the legacy is a vested legacy, and the legatee becomes absolutely entitled on the death of the testator. *Nunburnholme, In re, Wilson* v. *Nunburnholme*, 81 L. J. Ch. 85; (1911), 2 Ch. 510; 105 L. T. 666; 56 S. J. 34; (1912), 1 Ch. 489; 56 S. J. 343.

Devise to Wife for Life and for Maintenance of Children—Remainder to Children and Issue of Children Dying before Testator and his Wife—Sale of Land by Wife—Vendors and Purchasers Act.—A testator devised all his real and personal estate to his wife in trust for her support during her lifetime, and for the maintenance and education of his children, and on the wife's death to be equally divided amongst them. By a codicil he directed that if M., a married daughter, should die before her parents, leaving a child or children, they should receive her portion, with a like provision in case of his two other children, then unmarried. On the testator's death, his wife and children surviving him, they sold a portion of the lands, joining in a conveyance to the purchaser S., who agreed to sell to N. On a petition under the Vendors and Purchasers Act:—Held, that the conveyance to S. was effective to pass the fee in the land to him. *Re Street & Nelson*, 12 O. W. R. 339, 17 O. L. R. 50.

Gift to Daughter to Take Effect at Death of Wife—Death of one Daughter before Death of Wife.—Testator devised his estate existing at the death of his wife in trust to his executors to divide same equally among his four daughters. One of the daughters who survived the testator, predeceased her mother:—Held, that this daughter had a vested interest at the time of her father's death, as the distribution was not delayed for any reason personal to the legatee, nor was there any intention to provide for survivorship. *Re Abell Estate* (1909), 14 O. W. R. 369.

Vested Estate, Subject to be Divested.—Testator devised a farm to his grandson "when he arrives at twenty-one years of age, the said farm to be kept in repair by my executors, to expend at least $50 each year in improvements," with a devise over in case of death "before receiving the share," and a residuary devise to a son and daughter:—Held, that the land vested in the grandson by the will, subject to be divested should he die before attaining twenty-one, and he was entitled to the benefit of the surplus of rents over and above what should be properly expended for repairs, which was to be not less than $50 each year, but more if necessity should, in the opinion of the executors, arise. *In re Dennis*, 23 C. L. T. 50, 5 O. L. R. 46, 2 C. W. R. 15.

Legacies Charged against Farm Devised to Son—Money Secured by Mortgage—Mortgage Paid off During Lifetime of Testator—Residuary Estate.—A testator gave his son a farm. He then charged the farm with $5,000, directing that this sum, together with $1,500 from a mortgage which he held, should be divided into legacies for his daughters. The residue to go to said son. The mortgage was paid off during testator's lifetime:—Held, that the daughters were entitled to receive their legacies in full and that the said son was entitled to have the $5,000 charged on the farm resorted to before the residuary estate to meet these legacies. *Re Michael Schellenberger Estate* (1910), 16 O. W. R. 268.

A Gift in the Form of a Direction to Pay or Pay and Divide at a Future Time vests in interest immediately if the payment be postponed for the benefit of the estate. *Kirby* v. *Bangs*, 27 O. R. 17. The

present is a much stronger case when the gift is not a mere direction to trustees to pay or to pay and divide at a future period, but is a residuary devise direct to the remainderman, postponed for the sole purpose of letting in the life tenancy. *Re O'Donnell*, 12 O. W. R. 607.

Contingent or Vested Interest—Legacy. — A testator devised certain property to trustees to hold it in trust for twenty years after his decease; during that time to pay the income to his widow and children, naming them, in certain shares; and after the expiration of twenty years to sell and to divide the proceeds among his "said children" in certain shares. He also devised certain other property to the trustees upon trust to sell from time to time as they in the exercise of "full discretion" should think fit, and to pay the income to his widow for life, and upon her decease to divide the corpus among his children, naming them, in certain shares:—Held, that the children took vested interests. *Kirby* v. *Bangs*, 20 C. L. T. 61, 27 A. R. 17.

Period of Vesting.—Legacies payable at discretion of executors followed by right to pay and wind up estate. Legacies declared vested. *Re Wartmen*, 22 O. R. 601; *Curtis* v. *Lukin*, 5 Beav. 155; *Re Burch*, 10 W. R. 436.

Period of Ascertainment of Remainderman.—Rules are set out in notes to *Harding* v. *Glyn*, 2 W. & T. L. C. 361.

As to will speaking from date of death. "The enactment relates only to subject matter of the disposition." See *Re Gallagher*, 6 O. W. R. 28.

"Legal Personal Representatives."—Devise of land to executors and trustees upon trust to allow the testator's wife to use and occupy it during her life, and after her death to sell and pay, among other legacies, a moiety of the purchase money to his son, with a provision that if any of the legatees died before their shares should be paid over, the share of the person so dying should be paid to his "legal personal representative." The son assigned his share to the plaintiff, and died before his mother and before payment:—Held, that the legacy vested in the son, by being given in the event of his death "as his share" to his executor and administrator as "legal personal representative," and that the plaintiff was entitled. *Kerr* v. *Smith*, 27 O. R. 409.

Mode of Payment.—S. by his will gave four legacies to his daughters in four different clauses, each worded as follows: "I bequeath to my daughter —— the sum of five hundred dollars." By a subsequent clause he provided: "I also order that should any of my daughters die, the portion to be equally divided among the remaining ones." The legacies were charged on his lands. Directions were also given that after a certain farm which he had purchased but not paid for in his lifetime was paid for, and all his debts paid, his two sons E. and A. "shall each pay my daughter M. A. S., the sum of $50, which she shall receive together with the rent of lot 126 (from the executors), to apply on her legacy. The other three daughters to be paid in the same manner. E. in one year after M. A., &c." A direction was also given, that in case of any of the daughters dying their funeral expenses were to be paid out of their legacies, and in case of sickness their physician's bill to be paid from the same source:—Held, that these provisions and all others of a like kind in the will, had reference at most to the mode and time of payment of the legacies, and not to the substance of the gift, and that as the testator had not clearly and with certainty expressed the intention that the legacies should not vest until times of payment, the legacies were given in the ordinary way to vest upon the death of the testator. *Re Stevens*, *Stevens* v. *Stevens*, 14 O. R. 707.

Period of Vesting—"My Heirs-at-law."—The testator bequeathed the sum of £10,000 to trustees in trust to pay the income thereof to his wife for life, on her death to his only son for life, and on his death, without issue, to pay one-third of the £10,000 to his heirs-at-law. The son survived the widow and disposed of his estate by will. The plaintiffs,

nephews of the testator, claimed as heirs-at-law of the testator:—Held, that the expression "my helrs-at-law" must be constrned to mean the helrs-at-law of the testator at the time of hls death, and conseqnentiy the gift over of one-third of the corpus passed under the will of the son. *Jost* v. *McNutt*, 40 N. S. R. 41. *In re Jost, Crowe* v. *Bell*, ih. 121.

Vested Subject to Being Divested.—Ths testator expressed a desire "to have retained for my children my property on Yonge street: and for this purpose I desire that the proceeds of my life insurance he applied in the purchase for my daughters' benefit of the incnmbrauces of that property. Under any circumstances, I deeire that all my other lands be sold. . . . I desire that the proceeds of my estats and rents of my Yonge Street property be applied . . . in the support, maintenance, and education of my two daughters, and in paying the incnmbrances on the Yonge street property. After paying the necessary charges, my wish is, that the intereet of my estate he applied hy my truetees in the support of my chiidren. Shouid one of my said two daughters die, or become a Roman Cntholic, her share to go to the other, and shonid both die without issue, or become Roman Catholics, then my estate is to go to my sister L. and her heirs . . . I direct that my trusteee ehail divide the proceeds of my eetate equally between my two daughters, aiiowing each, during their minority, or untll the marriage of one or other of them, a sum snfficient to maintain and educate them, and after they come of age an equal ahare of ail proceeds to be secured and paid them, free from all control of any husband or any other person." There were oniy these two daughters, children of the teetator, and both attained the age of twenty-one years without either having become a Roman Catholic:—Held, that the interests taken hy the daughters were vested, though suhject to be divested upon the happening of the events mentioned before twenty-one; and that at that time the ehares vested ahsoiuteiy in them; so that L. took nothing nnder the wiii. *Griffith* v. *Griffith*, 29 Chy. 145.

The testator made a residuary devise of real estate to his execntors, in trnst for his fonr children, "untii they, or ths survivor or survivors of them, ahall have attained the age of twenty-one years, said real estate to be divided among the said four children, share and share alike, and in case any of them shall have died, leaving issue, the said issue shali take the share which otherwise would have gone to his, her or their parents." The will further directed that the four children of the testator should he maintained and edncated ont of the income of such property during their minority, and the enrplue invested dnring snch minority, and upon the youngest, or the snrvivor or survivors of them, attaining twenty-one the personal estate divided share and share alike. And npon any of the children attaining twenty-one, the execntors were directed to advance such snm as might he necessary to estahlish such child in hnsiness, &c. And all the reeidue of his personal estate was to be held hy his executors and divided at the same time as the iands:—Heid, that one of the sons, who had attained twenty-one, was not entitled to maintenance ont of the estate.—Heid, aiso, that the four chiidren took vested and not contingent interests in the residnary, real and personai estates, the interest in the real estate being iiahie to be defeated as to any one or more of them, npon the condition suhsequent of death before partition leaving issue, in which event the ehare of the deceased wouid go over to the issue. *Ryan* v. *Cooley*, 15 A. R. 379.

Condition—Vested Estate Subject to be Divested.—The testatrix devised certain iand to her grandson "when he arrives at the age of twenty-five years. Should he not survive tiii the age of twenty-five years, I give" (the same land) "to my son Andrew, and ehonld he die without heirs of his naturai hody, I give" (the same land) "to my son Robert, his heirs and assigns forever:"—Heid, that the land was vested in the grandeon, euhject to he divested in the event of hie not attaining the age of twenty-five years. *Doe dem. Hunt* v. *Moore*, 14 East. 601; *Phipps* v. *Ackers*, 8 Cl. & Fin. 583. *In ra Young*, 22 C. L. T. 31.

"Or in tha Lifetime of my Husband"—Devisee — Vested Estate — Contingency — Subsequent Divesting.—Testatrix gave life

estate to husband with power of appointment to her husband's son. On default of appointment being made in favour of her step-son, then Janet Gibson should receive the estate upon attaining the age of 21 years:—Held, that Janet Gibson took a vested interest in the estate, and not being divested by the contingency provided for happening, it was further held that neither the heirs-in-law of the testatrix nor the said step-son had any interest in the estate. *McNeil* v. *Stewart* (1909), 14 O. W. R. 651, 1 O. W. N. 19.

Devise to Son of Residue on Attaining Age of 25 Years—Devise Over in Case Son Died Before 25—Income—Gift of to Son an Infant—Motion for Allowance for Increase of Maintenance as Provided in Will—Vested Estate Subject to be Divested.—Motion by Homer Carr, an infant, and Catherine Carr, his mother, for the opinion, advice and direction of the Court as to the construction of the will of the late Alexander C. Carr, father of Homer and husband of Catherine, and as to whether Homer Carr took under the will a vested estate in the property given to him; and also a motion by Catherine Carr for a larger allowance for the support and maintenance of Homer Carr:—Held, that Homer Carr took a vested estate subject to be divested upon certain events. Order granted for maintenance as asked. *Re Carr* (1910), 16 O. W. R. 869, 1 O. W. N. 1142.

The gift is to daughter for life, remainder to brothers and sisters. Brothers and sisters living at testator's death took vested interests together with other brothers or sisters (if any) born before the period of distribution. The estate of any who have died since testator is entitled to deceased's share. *Stanley* v. *Wise*, 2 Camp. 482; *Baldwin* v. *Rogers*, 3 De G. M. & G. 649; *Re McNichol*, 2 O. W. R. 105.

Period of vesting and distribution the same. *McDowell* v. *McDowell*, 24 O. R. 468; *Kirby* v. *Bangs*, 27 A. R. 61; *Smith* v. *Mason*, 1 O. W. R. 478.

Vested Estates in Remainder—"Family"—Distribution Per Capita.—Plaintiff was one of the beneficiaries under the will of deceased. Defendant George Harkness was a son of deceased, and was the sole surviving executor under the will. The testator died on 25th June, 1872, having made his last will, dated 16th June, 1870, as follows:—"I will that my son Archibald and my daughter Mary have (after the death of my wife if she survives me) the life use of all my real and personal property to hold to them jointly during their natural lives if they survive me, and to the longest liver of them. "4. I will that, after the death of my wife and my son Archibald and my daughter Mary, all real property belonging to me shall be divided into three equal portions and distributed as follows; one portion to my son James's family, one portion to my son George's family, and one portion to my daughter Margaret's family. Testator's widow died on 24th July, 1884, the son Archibald on 7th July, 1894, and Mary on 2nd February, 1902. Probate was granted to defendant George Harkness on 20th June, 1902:—Held, the word "family" in the fourth clause of the will meant the children of the testator's sons James and George and daughter Margaret. It was clear that the estates of the children of the testator's sons James and George and of his daughter Margaret became on the death of the testator vested estates in remainder, subject to the respective life estates of the widow and of Archibald and Mary. *Harkness* v. *Harkness*, 6 O. W. R. 122, 9 O. L. R. 705.

Vested Estate—Distribution on Youngest Child Attaining Majority.—A testator by his will gave all his property, real and personal to his wife for life, and after her death, and on the arrival of the youngest child at the age of 21 years, the property was to be equally divided amongst all his children, the children of any deceased child to take her parent's share. A daughter died during her mother's lifetime, but after the youngest child had attained her majority, leaving a husband surviving her, but no issue:—Held, that the children being referred to as a class and not nominatively, as each respectively attained majority, their respective shares became vested; but that any child who died short of that age took nothing,

and that the deceased dnnghter's share wns eqnally divisible between her husband and next of kin. *Re Stainsby*, 9 O. W. R. 839, 14 O. L. R. 468.

Vested Estate—Trust—Condition—Intestacy.—Ths testator hy his wlil bequeathed all his property to his executors npon certain trusts. One bequest was a sum of $20,000, "in trust that the trustees, etc., do pay the income and interest thereof" unto his daughter, H. M., wife of E. C. M., half-yearly, "during her natural life," and it was further provided as follows: "And from and after the decease of my said danghter, H. M., I will and declnre that the said trustees, or the survivors of them, etc., do, and ehnli pay and distrihuta said principal snm of $20,000 above mentioned to, between, and nmong the children of my said daughter H. M., and their legal representatives, respectively, eqnally, share and share nlike, to their own use and uses forever." H. M.'s son, S. K. M., was living at the death of the testator, hut died soon nfterwards, intestnte and unmarried. H. M.'s other children died before the testator:—Held, that the share, or estate in remainder, vested in S. K. M. nt the testator's death; that the trust existed and was declared, and the other words were n mere direction to pay from and nfter the life tenant's death.—The Court is alwzys slow to construe the words of a testator as importing a condition, if a different menning can fnirly be given to them. In construing a will the Court will prevent an intestacy if the lnnguage will rensonably admit of thnt being done. So, the Court always favours a vesting. *Cole* v. *Moulton*, 40 N. S. R. 308.

Residence.—Land was devised to the devisee after the death of her mother, the testator having directed in the event of the devisee not coming to live thereon that it should he rented, and the rent paid to the devisea, the land to come to her heirs afterwards:—Held, that these words did not operate to make the devise contingent, or to interfere with her estate in fee; nnd that under any circumstances the language was too indefinite, if the clanse was nc. invalid, to create a forfeiture. *Hamilton* v. *McKellar*, 26 Chy. 110.

Devise of Estate in Fee Subject to be Divested if Re-marriage.—*Re Rooney*, 5 O. W. R. 323; *Re Deller*, 6 O. L. R. 718; *Re Mumby*, 8 O. L. R. 283; *Re Howard* (1901), 1 Ch. 418.

Vesting of Share.—*Latta* v. *Lowry*, 11 O. R. 517; *Woodhill* v. *Thomas*, 18 O. R. 277; *Macdonell* v. *Macdonell*, 24 O. R. 468. See 5th J. 789.

Attainment of Majority.—The devise was: "I give, devise, and beqneath unto my grandson, W., npon his attaining the full age of twenty-one years, and his heirs for ever, all and singulnr, &c., (naming certain lands); and my executors nre hereby required to make whatever use or benefit they can or may for the advantage of my said grandson dnring his minority, and to pay him, npon his reaching the age of twenty-one years, whatever the said iots may have produced of clear profit dnring the said term of his minority, from the dny of the death of my said wife, S." W. survived the testator, hnt died during his minority:—Held, that he took a vested interest, descendible to his heirs. *Marcon* v. *Alling*, 5 U. C. R. 562.

The will of P. M., dated 23rd October, 1838, devised to his third son, W. M. "when he comes of age," part of the homestead farm, describing it, and some personal property. It also devised to the eldest son, P., "when he comes of age," the remainder of the homestead fnrm; and proceeded, "out of which said homestead farm, I will and bequeath that my said wife shall have her maintenance and support for the term of her natural life, and also when my son W. ehall come of age to have for her own use and benefit the new part of house lately erected. . . . I moreover will that my said wife ehali dwell in my said house, . . . and receive the rents and profits of the said farm, to bring up nnd support my said children, . . . while she remains my widow," The will also provided that the stock on the said farm should be kept for the benefit of the farm under the direction of the trustees until P. should come of age.—Semble, that W. M. took a vested interest in the land, subject to be divested on his death

before coming of age:—Held, that if not he took at least a contingent and future interest, which might be disposed of by deed under C. S. U. C. c. 9, s. 5. *McCoppin* v. *McGuire*, 34 U. C. R. 157.

The testator having devised certain lands to trustees for his sons, directed these lands to be conveyed to his sons on their coming of age, but omitted to make any provision for the application of the rents and profits in the meanwhile:—Held, that the sons had vested estates from the death of their father, and were entitled to the rents and profits during their minority. *Dobbie* v. *McPherson*, 19 Chy. 202.

A bequest of £500 "to each of the four children of my brother, G. R., on their attaining their 21st year," with a gift over after the payment of all debts, charges and bequests:—Held, to be contingent upon the legatees respectively attaining their majority. *Ruthven* v. *Ruthven*, 25 Chy. 534.

Devise to Children of Life Tenant.—Testator, after devising certain land to his son G. and his wife, and to the survivor of them, added, "after the decease of the said G. and his wife, I give, devise, and bequeath the said lands (so devised to them) to the children of the said G. and his wife, including E., son of the said G. by his first wife, to have and to hold the same to the said children of the said G. or the survivors of them for ever, share and share alike." G. and his wife left two children surviving them. E. died before the father:—Held, that the remainder in fee vested upon the death of the last tenant for life, and that E. therefore took nothing. *Keating* v. *Cassels*, 24 U. C. R. 314.

Devise "if Living."—A will contained a devise in trust for the support and maintenance of the testator's widow during her life or widowhood, with a direction that she should have the full right to possess, occupy and direct the management of the property: and at her death or second marriage, "my son Thomas, if he be then living, shall have and take lot one, which I hereby devise to him, his heirs and assigns." The testator then gave to his other sons and to his daughters other real estate in fee. He directed that all the said devises "in this section of my will mentioned and devised" should take effect upon and from the death or marriage of his wife, and not sooner. He gave all his other lands in trust for sale, the rents and proceeds to be at his wife's disposal while unmarried, and after her death or marriage to be equally divided among his said children. At such death or marriage all his personal property and estate remaining was to be divided equally among his children: Provided always, that in the event of any of his children dying without issue before coming into possession of his or her share "of the property or money hereby devised or bequeathed," the share of such child should go equally among the survivors and their issue; and in the event of such death leaving issue, such issue to take the share which would have belonged to the parent if then living: and lastly, he directed that in the event of his wife dying before him his property should be disposed of at his death, as thereinbefore directed at her death or second marriage, in the event of her surviving him, so far as practicable. Thomas died unmarried before his mother:—Held, that the interest devised to Thomas was contingent upon his surviving his mother. *Merchants Bank of Canada* v. *Keefer*, 13 S. C. R. 515.

Division at Death of Widow.—A testator devised his real and personal estate to his wife for life, for the benefit of herself and their children, and directed that upon her death his property should be equally divided among the children:—Held, that only such of the children as survived the widow were entitled to participate in such partition of the estate; and one of the sons, as personal representative of the testator, having purchased land with the moneys of the estate, and executed a declaration that he held the lands so purchased (except as to his own interest) in trust only for the other parties interested under the will, and afterwards died during the life of his mother:—Held, that his children were not entitled to any share in such land, the only persons entitled being such of his brothers and sisters as should survive their mother. *Baird* v. *Baird*, 26 Chy. 367.

Division at Decease of Life Tenant.—A testator, by his will, "as touching his worldly estate," gave to his wife the use of

all his personal property and of his farm and buildings for her support and the bringing up of his children,—"and at her decease the whole of the personal and real property to be equally divided between my six children:"—Held, that the shares of the children vested on the death of the testator. *Baird* v. *Baird*, 26 Chy. 367, explained and reconciled.—Held, also, "worldly estate" includes not only the corpus of the testator's property, but the whole of his interest therein. *Town* v. *Borden*, 1 O. R. 327.

Life Estate—Remainder—Trust—Conversion into Personalty—"Pay or Apply."—Devise of land to widow for life for the support of herself and testator's children, with power to sell, &c., as she might think proper for the general benefit and purposes of his estate; and upon her death, devise of such part of land as might remain undisposed of to trustees to stand seised and possessed of for the benefit of testator's children, in equal shares, and to pay to each his share at majority; with a provision that upon the death of any child before majority without issue, the trustees were to pay or apply his share to and among the survivors:—Held, that the estates of the children became equitably vested upon the death of the testator, subject to the mere powers for sale contained in the will; and so vested as realty, for there was no trust which required, and the use of the words "pay" and "pay or apply" did not work a conversion of realty into personalty. *McDonell* v. *McDonell*, 24 O. R. 468.

Payment after Life Estate.—The testator gave £1,500 by will to his widow, and in the event of her marrying again or dying intestate, this sum was at her death to be divided share and share alike among "my heirs (my brothers' children)." The widow did marry again, and a daughter of W., a brother of the testator, died after marriage but before the death of the widow, and so before the time for distribution:—Held, that the rule is in such a case, that a bequest in the form of a direction to pay, or to pay and divide at a future period, vests immediately if the payment be postponed for the convenience of the estate, or to let in some other interest; that the intention here was to let in the life estate of the widow, and that this was a share vested in the deceased child of W., which passed to her representatives. *Webster* v. *Leys*, 28 Chy. 475.

"In the event of A. dying and leaving no children then . . . to be equally divided."—The interest which was to go to the legatees contingent. J. 5, 707. *Adams* v. *Hickok*, 1 Atk. 494. Therefore their representatives are not entitled to the legacy. *Re Solmes*, 11 O. W. R. 985.

Division at Named Period.—A testator, after making specific devises of certain lands, added, "at which time" (i.e., after his youngest son should have arrived at the age of 21 years), "it is my will that the whole of my lands be divided in four equal parts; one part of which I give and bequeath to my two daughters, A. and B., the other three parts to be divided among my three sons, C., D., and E." Semble that under this devise of the residuary estate the devisees took not a vested estate, but a contingent and future estate, and that for life only; the estate in the meantime vesting in the heir-at-law. Semble, also, that the heir-at-law would then have an estate which would not entitle his widow to dower, the estate not being a beneficial estate of inheritance, but a mere temporary interest of uncertain duration, contingent upon a distribution being made in pursuance of the will. *McClellon* v. *Meggatt*, 7 U. C. R. 554.

A testator devised certain property to trustees, to hold it in trust for twenty years after his decease; during that time to pay the income to his widow and children, naming them, in certain shares; and after the expiration of twenty years to sell and to divide the proceeds among his "said children" in certain shares. He also devised certain other property to the trustees upon trust to sell from time to time as they in the exercise of "full discretion" should think fit, and to pay the income to his widow for life, and upon her decease, to divide the corpus among his children, naming them, in certain shares:—Held, that the children took vested interests. *Kirby* v. *Bangs*, 27 A. R. 17.

Where a testator devised his estate, real and personal, upon trust, amongst other things, for the support, &c., of his children until they should attain 21 or marry, and so soon as the youngest attained 21 or married, then to convey in equal proportions to the children, with a devise over to his brothers and sisters in the event of the death of all his children under the age of 21 and unmarried; a petition presented by the widow and infant children of the testator, praying for a sale of a portion of the corpus of the personal estate, for the purpose of maintaining the family and keeping houses in repair, was refused with costs, the interests of the children being contingent only. *McIntosh* v. *Elliott*, 1 Chy. 440.

A testator devised all his residuary estate, real and personal, to trustees to convert into money, and to accumulate during the lifetime of his widow; and, after the payment of certain anticipated claims thereon, in trust for all the testator's children who should be living at the decease of the widow in equal shares, and for the child and children of such of the testator's children as might then be dead, in equal shares; such grandchild or grandchildren to be entitled to the share which his, her, or their father or mother would have been entitled to if living:—Held, that the children of the testator took only contingent not vested interests. *Re Goodhue, Tovey* v. *Goodhue, Goodhue* v. *Tovey*, 19 Chy. 366.

Gift Contained in Direction to Pay—Postponement of Enjoyment.—A testator by his will directed that his estate should be divided upon his youngest child attaining the age of twenty-one years, the income of the estate in the meantime to be paid to the wife, for the benefit of herself and the children. The only gift was contained in the direction to pay and divide upon the arrival of the period of distribution:—Held, that the gift vested prior to the enjoyment of the corpus of the estate, which was only postponed in order to provide for the maintenance of the family.—Held, also, that the gift vested in each child upon attaining the age of twenty-one and that no child who did not attain that age was intended to take a share of the corpus. *Re Douglas, Kinsey* v. *Douglas*, 22 O. R. 553.

"Principal of this Money"—Application for Payment out of Court—Per Capita or Per Stirpes.—A testator gave one-third interest on certain monies to one legatee and two-thirds of the interest to another, and further directed that at their death or the death of either of them "the principal of this money" should be divided between the members of the Marr family who would be his natural heirs:—Held, that the testator gave to each of the two legatees not an aliquot part of the interest upon the whole of the residuary estate, but the whole of the interest upon an aliquot part of the estate, and that the death of one of the legatees released only one-third of the residue, the other two-thirds going on to earn interest for the other legatee. On another question, as to whether the division should be per capita or per stirpes, it was held that it should be per stirpes. *In re Estate of Bint* (1909), 14 O. W. R. 1270, 1 O. W. N. 285.

Legacies Charged on Remainder.—A testator devised all his estate ("lands and chattels") to his mother for life, and after her death to her sister P. H. absolutely, charged with legacies to several persons. One of the legatees died after the testator, but before his mother, the tenant for life:—Held, that the legacy did not lapse, but was a vested interest in the legatee, and as such went to his personal representative. *Pollard* v. *Hodgson*, 22 Chy. 287.

Remainder Charged with Legacies.—Testator devised land to his wife for life or widowhood, and after her death to her son J. M., on condition that he should pay certain sums to his other children, within three years from testator's death. Plaintiff in ejectment claimed title by sheriff's deed under an execution against J. M.:—Held, that the conditions of the will were conditions subsequent, and it was for defendant to show that the estate had been divested by nonfulfilment thereof, not for the plaintiff to show performance. (2) That J. M.'s estate was a vested remainder, and saleable under execution. *Lundy* v. *Moloney*, 11 U. C. C. P. 143.

Income to One Devisee for Life—Corpus to Two Others.—A testator directed his real estate to be sold, and the proceeds to be divided among his children; but the share of one of them (J.) he directed to be placed at interest for his benefit, and the interest to be paid by the executors to J. every six months; and he directed that at the death of J. his share should be equally divided between A. and S., two of testator's other children:—Held, that the gift to A. and S. was vested, and not contingent; and that A. having assigned his interest, and died before J., the interest of A. went to his assignee. *Martin* v. *Leys*, 15 Chy. 114.

Gift Over upon Death before Named Period.—The testator, in the event of there being issue of the marriage of himself and his wife, devised half of his estate to such issue; if a son, on his attaining the age of twenty-five years; if a daughter, on her attaining the age of twenty-one years or marriage, "and in the event of there being no such issue . . . born or if born not living within one year from my decease," then over. A few weeks after the testator's death his wife had a son, who lived only a few days:—Held, that the gift over must take effect, as there was no child living at the end of the year. *Wilson* v. *Beatty*, 2 A. R. 417.

Protection of Contingent Right.—D. was entitled to a legacy under a will provided he survived the testator's wife, and during her lifetime he brought a suit to protect his legacy against dissipation of the estate by the widow:—Held, that D. had more than a possibility or expectation of a future interest: he had an existing contingent interest in the estate and was entitled to have the estate preserved that the legacy might be paid in case of the happening of the contingency on which it depended. *Duggan* v. *Duggan*, 17 S. C. R. 343.

Trust Pending Minority—Condition Subsequent.—A testator left all his estate to his executors "in trust for the benefit of G. H. till he arrives at the full age of twenty-one, at which time I direct my said executors to give to G. H. all the said property," subject to the condition that "should the said G. H. at any time before coming of age go to live with his father, W. H., he is to be disinherited of the whole or any portion of my estate. And the said estate so forfeited is to be then given to my son J. D., his heirs and assigns." The testator died in 1875. In 1876, while G. H. was still a minor, being only eleven years old, J. D. and W. H. entered into an agreement under seal, whereby it was agreed that J. D. should support the widow of the testator, who was his mother and the mother-in-law of W. H., during her life, and should convert into money the estate of the testator, to which he was or should be entitled under the will, and pay a moiety of the proceeds to W. H. in trust for the support of G. H. till he should attain twenty-one, the residue to be then paid by W. H. to G. H. Pursuant to this agreement G. H. forthwith resided with W. H. till he was seventeen years of age, when this action was brought by the executors for a declaration of the rights of G. H., J. D., and W. H., under the will:—Held, that G. H. took a vested interest in the property under the will; that the condition was a condition subsequent, and was void as being "against law;" and G. H. was entitled to all the estate given to him by the will, notwithstanding the agreement of 1875, which could not be regarded as a family compromise, or for the benefit of the infant. *Clarke* v. *Darraugh*, 5 O. R. 140.

Payment Postponed.—A. died leaving two sons and two daughters, and by her will directed that her property should be invested until C., her eldest son, should attain twenty-one; when it was to be divided into four equal shares, and he was to get the income of one share until he attained thirty, when he was to get his share out and out. The other three shares were to be invested, and the income arising from each share was to be accumulated until the remaining three children respectively attained twenty-one, when they were each to receive the annual income thereof, until the youngest (son), F., attained the age of thirty, when he was to get his share out and out, and thereafter the income of the remaining two shares was to be paid equally to the two daughters, C. and J., until one of them should die, and then one share was to be paid to the person or persons who would be entitled thereto under the Statute of Distributions in case such share was the property of the daughter so dying. C. attained twenty-one, married, and died before F. attained twenty-

one, having made her will and left all her property to her husband for her children:—Held, that the proper effect of the will of A. was to vest in C.'s husband and children the one-fourth share that she was to draw the income of for life, and they were the persons entitled under the Statute of Distributions pertaining to the personal estate of married women who die intestate: R. S. O. 1877, c. 125, s. 25. *Arkell* v. *Roach*, 5 O. R. 600.

Survivorship—Youngest Surviving Child Attaining Majority—Period of Distribution—Vesting of Shares.—A testator by his will gave his residuary estate to his executors upon trust to make provision for the support and maintenance of his family and for their education until his youngest surviving child should attain twenty-one years of age, when it was to be divided by the executors, by their setting apart one-third thereof for his widow, during her widowhood or until she remarried, and the remaining two-thirds to his surviving children in the proportion of four parts to the sons and the [illegible] the daughters; and after the death or marriage of his widow the said one-third was to be divided between his surviving children in the above proportions. The widow survived the testator, but died before the youngest surviving child attained the age of twenty-one years:—Held, that the words of survivorship referred to the period of distribution, namely, when the youngest surviving child attained twenty-one years of age, and therefore only the children then living were entitled to share in the residue, and this applied as well to the shares to be taken by the children as the share to be set apart for the widow. *Re Soules*, 30 O. R. 140.

Gift to Children on Attaining 30 Years of Age—Child Dying Prior Thereto—Period of Vesting.—A testator, out of certain insurance moneys, amounting to $70,000, by his will gave to his wife, during her widowhood, $10,000, and the balance equally amongst his children. He also, out of the rest of his estate, gave to his wife during widowhood a further sum of $10,000, and of the rest and residue thereof, he gave one-third to his daughters and two-thirds to his sons. In case his wife should marry, $15,000 of the $20,000 was to be equally divided amongst his children, and the remaining $5,000 was to be hers for life. The children's shares were not to be paid until they attained 30 years of age, but they were to have the interest thereon, on attaining 21 years of age, his executors, however, being empowered to expend on them before attaining such latter age, such part of the interest as they might deem advisable; on attaining 30 years of age, the executors might still, if they deemed it advisable, continue to pay the interest only. All moneys invested in his partnership business with his brother were to remain therein so long as his brother desired, and out of the annual profits thereof, if amounting to 10 per cent. or less, one-half of the profits on one-third of his interest therein was to be added to the daughters' shares and the balance to the sons; but, if the profits should exceed 10 per cent., 5 per cent. thereof on such one-third interest was to be added to the daughters' shares, and the balance to the sons'; and upon the dissolution or winding-up of the partnership, the amount so added to the said shares was to be paid to those entitled, in the manner and subject to the same terms and conditions, and the executors' discretion, heretofore expressed. The sons could, of their own accord, purchase the daughters' interest in the partnership, and were to have the first right to do so, should the daughters desire to sell the same. One of the daughters, who survived the testator, died before attaining the age of 30 years:—Held, that she had a vested interest in her share. *Re Livingston*, 9 O. W. R. 333, 14 O. L. R. 161.

Legacies—Date of Vesting.—By his will the testator gave to his wife a life interest in all his property, and upon her death he bequeathed to an adopted daughter K. a sum of money to be invested in the name of A., her son, or any more issue of hers there might be; the interest to be hers for life; and in case of her death or her said son "leaving more issue, the remainder to be equally divided among them; and in case of her death, and her said son leaving no other issue, then the (said) sum to revert back to C." On the death of K. she was survived by her said son A. and two other children:—Held, that the fund vested absolutely on the death of K. in her three children, and that it was not the meaning of the will that the fund vested in C. in event of

A. dying, leaving no brother or sister aarviving him. *Kerrison* v. *Kaye*, 23 C. L. T. 158, 2 N. B. Eq. R. 455.

Charitable Bsqnest—Gift of Incsme—Vesting of Corpus—General Rule—Centrary Intention.—The rule that a gift of income without iimitation of time operates as a gift of the corpns, in ths absence of other disposition thereof, does not appiy to a case in which the testator has expressed an intention that the corpus shonid not be vested in ths donee.—Therefore, where a testator directed hy his wiii that a sum of money should be invested hy his executors upon trust to pay the interest to the A. W. hospitai in the city of S., for the henefit of poor patients, so long as said A. W. hospitai shouid be used for hospitai purposes, and that, in the event of said hoepital ceasing at any time to be so nsed for one year, the interest should be devoted to other cheritahie pnrposes:—Heid, that the testator's intention that the corpus should not be veated in or paid to the hospitai was sufficiently expressed and precinded the application of the general ruie. *Re Chambers, Chambers* v. *Wood*, 16 O. L. R. 62, 10 O. W. R. 1089.

When the Only Gift is to be Feund in the Direction to Pay or Divide, where the payment is deferred for reasons personai to the legatee, the gift will not vest until the appointed time. But if the interest upon a iegacy is given to the legatee in the meantime tiii the time of payment arrives, the gift is veeted.

A dietinction mnst be drawn between the gift of a sum to each member of a class at 21 with a gift of the interest upon the severai shares in ths meantime, and a gift of an aggregate fund to a class as they respectively attain 21, with a direction that the whole interest ia to he applied for their maintenance in the meantime. In the latter case, as the fund is to he kept together and the whole interest applied for maintenance, nothing wiii vest before 21. *Re Gossling* (1902), 1 Ch. 945; *Re Sandison*, 5 W. L. R. 316.

Vesting.—Rule in Boraston's case. If real estate be devised to A. when he shall attain a given age, and until A. attains thet age the property is devised to B., A. takes an immediate vested estate, not defeasihle on his death under the specified age; the gift being read as a devise to B. for a term of yesrs, with remeinder to A. *Boraston's Case*, 3 Co. 21 a., h.; *Goodtitle* v. *Whitby*, 1 Burr, 228; *Doe* v. *Lea*, 3 T. R. 41; *Doe d. Cadogan* v. *Ewart*, 7 Ad. & Eli. 636; E. C. L. R., vol. 34.

The rule is the same if the devise be to A. "at," "upon," or "from and after" attaining a given age, with a deviae in the meantime to B.

Vested Estate.—If resi estate he devieed to A. when he shall attain a given age, and until A. attaine that age the property is devised to B., A takes an immediate vested estate, not defeasihle on his death nnder the specified age; the gift being read as a devise to B. for a term of years, with remainder to A. The rule is the same if the devise is to A. "at," "npon," or "from and after" attaining a given ege, with the devise in the meantime to B. See *Phipps* v. *Acker*, 9 Ci. & F.

So, *In re Francis* (1905), 2 Ch. 295, "when ehe shall attain the age of 25 years." J. 5, 762. *McNeil* v. *Stewort*, 11 O. W. R. 868, 14 O. W. R. 651.

Gift to Class Attaining 21—Vesting.—Where a fund ie ieft to a ciass contingently on their ettaining 21, the eldest of the class on attaining twenty-one takee a vested interest in posseesioa of his share aud a contingent interest in the ehares of the other members of the class who are still under twenty-one. *Holford In re*; *Holford* v. *Hoiford*, 63 L. J. Ch. 637 (1894) 3 Ch. 30, followed.

Williams' Settiement, In re: *Williams* v. *Williams*, 80 L. J. Ch. 249; (1911) 1 Ch. 441: 104 L. T. 310; 55 S. J. 236.

Court Aids Vesting Rather than Divesting—Pewer of the Court to Read Words into Will.—The Court could not supply words in a will. particularly to prevent vesting, and that s daughter of Esther who died an infant had taken a vested intereet. *Litchfield, In re*; *Harton* v. *Jones*, 104 L. T. 631.

CHAPTER XXXVIII.

EXECUTORY DEVISES AND BEQUESTS.

LIMITATION CAPABLE OF TAKING EFFECT AS A REMAINDER CANNOT TAKE EFFECT AS AN EXECUTORY DEVISE.

EXECUTORY DEVISE—WHAT.

An executory devise is a limitation by will of a future estate or interest in land, which cannot, consistently with the rules of law, take effect as a remainder; 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. 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. It follows that every devise of a future interest, which is not preceded by an estate of freehold, created by the same will (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.

1st ed., p. 778. *Brackenbury* v. *Gibbons*, 2 Ch. D. 419. *Doe* v. *Earl of Scarborough*, 3 Ad. & El. 2, 897

DEVISE EXECUTORY FOR WANT OF A PRECEDING FREEHOLD.

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 children of A., who happens to have no child at the death of the testator, or to the heirs of the body of A., a person then living, is executory, 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. 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 dur-

ing the life of A., at whose decease an estate tail vests in the heir of his body by executory devise. So, a devise to a person or persons, whether in esse or not, to take effect at a given period after the death of the testator, as to A. at the death of B. (a stranger), or at six months from the testator's decease, obviously belongs to the class of limitations under consideration.

6th ed., p. 1432.

DEVISE EXECUTORY, NOTWITHSTANDING PRIOR FREEHOLD.

With respect to the cases in which the devise is executory, notwithstanding the creation of a prior estate of freehold, it is to be observed, that to constitute the ulterior limitation an executory devise in such a case, the precedent estate must not be merely liable to be determined before the ulterior limitation takes effect (as such liability only renders the remainder contingent), but it must be necessarily determinable before the taking effect of the ulterior devise. Thus, a devise to A. for life, and, after his decease, to the unborn children of B., is a contingent remainder in such children, because as A. may live until B. has a child, there is not necessarily any interval between the two estates; but, under a devise to A. for life, and after his decease, and one day, to the children of B., the children would take by executory devise, and the interval of a day, which would be undisposed of, would belong to the residuary devisee, if any, or if not, to the heir.

6th ed., p. 1433.

It is an obvious consequence of the general principle before laid down, that where the event which gives birth to the ulterior limitation, abruptly determines and breaks off the preceding estate, the limitation is executory, inasmuch as it is essential to the constitution of a 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.

Ibid. *Stanley* v. *Stanley*, 16 Ves. 491.

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; 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.

6th ed., p. 1434.

Two classes of cases 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.

6th ed., p. 1435.

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 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.

Ibid.

ESTATE PARTIALLY DEFEATED BY EXECUTORY LIMITATION.

Secondly, where an estate is limited in derogation of a preceding estate, and in partial exclusion of the same. As where a testator devised certain lands to his son B. in fee, and other lands to his son C. in fee, subject to a proviso, that if either of his sons should die before marriage, or before twenty-one, and without issue of their bodies, then he gave all the lands of such of his sons as should so die, &c., unto such of his said two sons as 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.

Ibid.

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.

6th ed., p. 1436. *Doe d. Blomfield* v. *Eyre*, 5 C. B. 713.

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.

6th ed., p. 1437.

EQUITABLE CONTINGENT REMAINDERS.

It has been already mentioned 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.

Ibid.

And an equitable contingent remainder resembles a legal contingent remainder in two respects: (1) it is subject to the rule in Whitby v. Mitchell; 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.

Ibid. *Re Nash* (1910), 1 Ch. 1; *Re Averill* (1898), 1 Ch. 523. See Chapter XIV.

SHIFTING CLAUSES.

An important kind of executory devise, already shortly referred to, 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.

6th ed., p. 1438. *Milbank* v. *Vane* (1893), 3 Ch. 79.

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. A shifting clause may, of course, be alternative or divisible, so as to be good in one event, and bad in the other.

Ibid.

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.

Ibid.

OR SOLD.

Nor will the clause take effect, it seems, if the estate has been converted into personalty.

Ibid. Law Union, &c., Co. v. *Hill* (1902), A. C. 263.

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; the clause is construed according to its primary and natural meaning.

Ibid.

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. 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.

Ibid. Wilbraham v. *Scarisbrick*, 1 H. L. C. 167.

Where a shifting clause is expressed in clear language, its 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.

Ibid. Turton v. *Lambarde*, 1 D. F. & J. 495.

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: or that the estate shall devolve as if A. had died without issue. 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.

6th ed., p. 1439. *Jellicoe* v. *Gardiner*, 11 H. L. C. 323.

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.

Ibid. Milbank v. *Vane* (1893), 3 Ch. 79.

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., or whether they follow the limitations of the settlement, according to the opinion of Turner, L.J.

Ibid.

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 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. But if the disentailing deed is followed by a resettlement 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. 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.

Ibid. *Moneypenny* v. *Dering*, 2 D. M. & G. 188.

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 prima facie this means "beneficially entitled in possession."

6th ed., p. 1440.

"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. On the other hand, 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.

6th ed., p. 1440. *Re Varley*, 62 L. J. Ch. 652; *Leslie* v. *Earl of Rothes* (1894), 2 Ch. 499.

OTHER EVENTS.

NAME AND ARMS CLAUSE.

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." 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.

6th ed., p. 1441. *Biddulph* v. *Lees*, 28 L. J. Q. B. 211. *Trevor* v. *Trevor*, 13 Sim. 108.

REPEATED OPERATION OF SHIFTING CLAUSE.

A shifting clause may be made to take effect more than once; 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 shown.

6th ed., p. 1441.

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.

6th ed., p. 1442. *Milbank* v. *Vane* (1893), 3 Ch. 79.

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. 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. So if there is a gift over, the clause of cesser or forfeiture may take effect even if the gift over fails.

Ibid.

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.

Ibid. Re Catt's Trusts, 2 H. & M. 46.

EXECUTORY INTERESTS NOT AFFECTED BY ACTS OF OWNER OF PRECEDENT ESTATE.

DESTRUCTIBILITY OF CONTINGENT REMAINDERS.

CURED BY REAL PROPERTY ACT, 1845.

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: while, on the other hand, as the rule was that a contingent remainder must take effect, if at all, at the instant of the determination of the preceding estate, it followed that any act by the owner of the prior estate of freehold, which amounted to a forfeiture of it, produced the destruction of the dependent contingent remainders, the effect being to place them in the same situation as if the preceding estate had regularly expired before the period of vesting. But their destructibility by such an act is now a doctrine of little practical importance, since, by 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."

6th ed., p. 1443.

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.

6th ed., p. 1444. *Holmes* v. *Prescott*, 33 L. J. Ch. 264.

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.

6th ed., p. 1446.

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.

Ibid. *Re Freme* (1891), 3 Ch. 167.

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.

Ibid. Re Finch, 17 Ch. D. 211.

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 section 10 of the Conveyancing Act, 1882. The provisions of this section have been already considered, as has also the question whether contingent remainders, like executory devises, are subject to the rule against remoteness.

Ibid.

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.

Ibid. Re Michell (1892), 2 Ch. 87.

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. Chap. XLII. It may, however, be convenient to state shortly the principal rules as regards real estate:—

An immediate devise to the children of A. prima facie means children in existence at the testator's death: but if there are no children then in existence, or if the testator clearly shows 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.

Mogg v. *Mogg*, 1 Mer. 654.

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. Such a devise is therefore a contingent remainder, unless the context shows an intention to give vested interests subject to be divested.

Festing v. *Allen*, 12 M. & W. 279.

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.

Re Lechmere and Lloyd, 18 Ch. D. 524.

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.

Miles v. *Jarvis*, 24 Ch. D. 633.

From the general rule above stated, 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.

6th ed., p. 1447-8. *Blackman* v. *Fysh* (1892), 3 Ch. 200.

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, 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.

6th ed., p. 1448.

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 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. 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.

1st ed., p. 788.

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 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.

6th ed., p. 1449. *Doe d. Fonnereau* v. *Fonnereau*, Doug. 487.

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.

6th ed., p. 1450. *Doe d. Herbert* v. *Selby*, 2 B. & Cr. 926.

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.

1st ed., p. 700. *Doe* v. *Selby*, 2 Prest. Abst. 172.

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.

6th ed., p. 1452. *Goodtitle d. Vincent* v. *White*, 15 East. 174.

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, 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.

Ibid.

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

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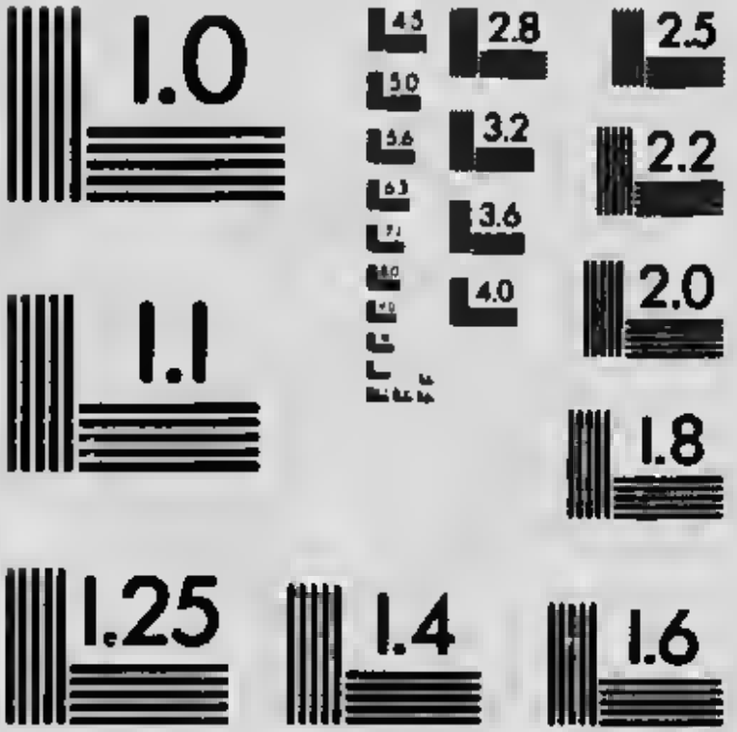

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children who, but for such devise over, would have inherited the parent's estate: and the circumstance of the executory devise being in favour of the children themselves does not alter the case, since they would not, nor ever could, take by inheritance, but by purchase.

5th ed., p. 837. *Barker* v. *Barker*, 2 Sim. 249.

SAME RULE AS TO DOWER.

The general right to dower in similar cases is equally well established, 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.

5th ed., p. 837.

EXECUTORY BEQUESTS.

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. 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.

1st ed., p. 793.

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. 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.

6th ed., p. 1454. *Lowther* v. *Lowther*, 13 Ves. 95.

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 entitled for life.

Ibid. *Cadogan* v. *Kennet*, Cowp. 432.

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.

6th ed., p. 1455.

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 gift of such things to A. for life or other limited interests, A. takes the absolute property. This rule, however, is not generally applicable to such things where they are the testator's stock-in-trade, or where personal use by the tenant for life is not contemplated. 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.

5th ed., p. 839. *Twining* v. *Powell*, 2 Coll. 262; *Myers* v. *Washbrook* (1901), 1 K. B. 360; *Re Colyer*, 55 L. T. 344.

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. 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, applies to personalty as well as realty.

6th ed., p. 1456. *Bird* v. *Johnson*, 18 Jur. 976.

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. On the same principle, 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.

1st ed., p. 783.

ALTHOUGH EXECUTORY GIFT NEVER TAKES EFFECT.

But it would appear to be clearly settled that the principle of Doe v. Eyre 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.

6th ed., p. 1457. *Doe* v. *Eyre*, 5 C. B. 713.

GIFT OVER VOID FOR REMOTENESS.

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.

Ibid. *Courtier* v. *Oram*, 21 Bea. 91.

EFFECT WHERE CHILDREN SUBSTITUTED ON DEATH OF ORIGINAL LEGATEES.

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. 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.

Ibid.

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.

6th ed., p. 1458. *Whittell* v. *Dudin*, 2 J. & W. 279.

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.

6th ed., p. 1459. *Churchill* v. *Churchill*, L. R. 5 Eq. 44.

LASSENCE V. TIERNEY.

The rule (which applies to shares of males as well as to shares of females) 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."

Lassence v. *Tierney*, 1 Mac. & G. 561.

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.

6th ed., p. 1460. *Keates* v. *Burton*, 14 Ves. 434.

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.

Ibid. Ante page 217.

Devise—Estate—Defeasible Fee—Executory Devise Over.—A testator dying in 1833 devised land "to his loving son Alexander, during his natural life, after the demise of his mother, and after his death, then he did bequeath the same to his heir-at-law should he have any (sic); if not, he did bequeath the same to his brother John Grant:"—Held, that the devise to Alexander gave, by the operation of the rule in Shelley's Case, a fee simple or tail to him. Heir is nomen collectivum and carries the fee. But the last clause of the devise imported a defeasible estate in Alexander, should he die and have or leave no child, and, as he left no "lawful heir," or "heir-at-law," his fee tail or simple was defeated by the executory devise in fee simple in favour of John. *Grant* v. *Squire*, 21 C. L. T. 379, 2 O. L. R. 131.

Devise of Residue—Executory Devise—Event Happening in Part.—A testator by his will gave his wife a life interest in his estate, directed payment at her death of some specific legacies, and then provided: "The residue . . . I give, devise, and bequeath as follows, that is to say, it shall be equally divided between my brothers R. M. and M. M., or in case of their dying before my . . . wife L. M., it shall be equally divided between the heirs of my brothers R. M. and M. M." R. M. died in the lifetime of the widow, and M. M. survived her:—Held, that, as the event provided for, viz., the death of both R. M. and M. M. during the widow's lifetime, had not happened, the devise of the residue to R. M. and M. M. was not divested, and R. M.'s widow took his share under his will. *In re Metcalfe*, *Metcalfe* v. *Metcalfe*, 20 C. L. T. 381, 32 O. R. 103.

Devise—Vested Estate Liable to be Divested—Gift Over to Church—Statutes of Mortmain—Failure of Gift—63 V. c. 135 (O.)—Construction of—Lapsed Devise—Absence of Residuary Clause—Intestacy.—The testator made his will on the 17th December, 1885, and died on the 25th December, 1885. He bequeathed to his wife all the rents and profits arising or accruing from his real or personal estate, during her lifetime, and at her decease the rents and profits of his real estate to Jane McA. during her lifetime, and at her decease he devised his real estate (describing it), to her son William, his heirs and assigns, but if William should die without issue before his mother, she was to have one-half of the real estate to dispose of as she might think fit, and the other half was to go to the Presbyterian Church in Canada. There was no residuary clause. The widow died on the 26th March, 1886, and William on the 3rd November, 1889, under the age of 7 years, his mother surviving him:—Held that William took a vested estate, liable to be divested upon his death in the

lifetime of his mother; that one moiety had been divested beyond dispute, and as to the other, that a provision for divesting is not rendered of no avail by the fact that the gift over is void by the Statutes of Mortmain. *Robinson* v. *Wood*, 6 W. R. 728, 27 L. J. Ch. 726, followed.—Held, also, that the gift over to the church, if effective, vested in the church not later than the death of the infant, in 1889; and, therefore, the statute 63 Vict. c. 135 (O.), was not applicable; moreover, that Act, when it provides that "all gifts, devises, . . . which have been or shall hereafter be made to or intended for the Presbyterian Church in Canada . . . shall vest in the said board of trustees," must refer to valid and effective gifts, not to such as are void by the statutes or otherwise; and therefore, the gift over to the church was void by the Statutes of Mortmain.—Held, lastly, that, there being no residuary devise, there was an intestacy as to the moiety intended for the church. *Re Archer*, 9 O. W. R. 652, 14 O. L. R. 374.

Devise—Estate in Fee—Divesting—Executory Devise Over—Contrary Intention—Vendor and Purchaser.—A testator gave his widow a life estate in land and then devised it to his son P., his heirs and assigns. After devising other land to another son, he directed that, should any of his sons die leaving no children, the property given to such son should be equally divided between all his children, and should any of the children be disposed to sell, they should give the refusal to one of the family. At the time of the testator's death (1878) P. was married and had two children, and he and they were alive at the time of this action, the widow having died in 1898, and seven children of the testator having survived him:—Held, that the estate in fee in Philip was subject to being divested by his dying "leaving no children," which might still happen, and in which event the executory devise over would take effect. *Olivant* v. *Wright* 1 Ch. D. 346, followed:—Held, also, that the provision in the will as to any of the children of the testator being "disposed to sell" did not show a "contrary intention:"—Held, also, that a "contrary intention" was not indicated by a devise in the same will to another son subject to the same limitation and conditions, but subject also to the payment of legacies of $2,000 at the expiration of two years from the testator's death —which appeared to be inconsistent with anything short of an absolute estate in fee. *Cowan* v. *Allen*, 26 S. C. R. 292, followed:—Held, therefore, that the plaintiff's title was not one that could be forced upon an unwilling purchaser, and a decree for specific performance should be refused. *Vanluven* v. *Allison*, 21 C. L. T. 468, 2 O. L. R. 198.

Executory Devise Over Defeated.—The farm is not to go over from the son if he has issue or makes a will devising the land. That would go to show that an absolute vesting of the fee in the son is provided for and the operation of an executory devise under the will of the testator is excluded. *Burgess* v. *Burgess*, 21 C. P. 427; *Re Dixon* (1903), 2 Ch. 459; *Re Moore*, 18 O. W. R. 832. (*Martin* v. *Chandler*, 26 Chy. 81, not correctly reported.)

Inconsistent Clauses—Executory Devise—Failure of Issue.—A testator, by the third clause of his will, devised a lot of land to a son, "his heirs and assigns for ever," and in the fourth clause stated it to be "my will and desire, provided my (said) son shall have no lawful heir or children, that the above mentioned tract of land, after his death, that (the plaintiff) shall have it with all the right and title that my (said) son had to it heretofore." By the fifth clause he gave to his wife "the use" of half the lot, "during life; after her decease my will is that the same shall belong to my (said) son, his heirs and assigns for ever." The son died after the testator without having had any children:—Held, that the fifth clause removed from the operation of the third and fourth clauses one-half of the lot which vested in the son subject to the mother's life estate, while as to the other half the son had under the third clause an estate in fee simple subject under the fourth clause to an executory devise over in favour of the plaintiff, which, in the events which had happened, had taken effect. *McMillan* v. *McMillan*, 27 A. R. 209.

CHAPTER XXXIX.

CONDITIONS AND RESTRICTIONS.

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. So a bequest "in consideration" of the legatee paying certain debts and legacies, creates a condition. But the intention must be definitely expressed.

6th ed., p. 1461. *Messenger* v. *Andrews*, 4 Russ. 478; *Re Welstead*, 25 Bea. 612.

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. 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. And, as Lord St. Leonards points out, "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."

Wright v. *Wilkin*, 31 L. J. Q. B. 196.

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.

6th ed., p. 1462. *Rees* v. *Engelback*, L. R. 12 Eq. 225.

And a gift "subject to" certain payments creates a charge and not a trust.

Ibid.

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.

6th ed., p. 1463. *Barker* v. *Barker*, L. R. 10 Eq. 438.

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.

Ibid. *Blagrave* v. *Blagrave*, 1 De G. & S. 252.

But of course such a condition must be consistent with the rights of property.

Ibid.

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. 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 showing an intention to provide for her while she is unmarried, and not as a condition in restraint of marriage. 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. The construction of gifts over in the event of the original devisee or legatee marrying has been already considered.

Ibid. *Doe* v. *Lakeman*, 2 B. & Ad. 30; *Re Moore*, 39 Ch. D. 116.

Chapter XXXVII.

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. But a gift to a person at a future time, if he shall then answer a certain description, is prima facie contingent on his answering that description.

6th ed., p. 1464. *Bartleman* v. *Murchison*, 2 R. & My. 136.

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 prima facie constitute a bequest upon condition, but is a good charitable bequest, to be applied cy-près if necessary.

Ibid. *Re Gyde*, 79 L. T. 261.

ILLEGAL CONDITIONS.

A condition which requires the performance of an unlawful act, as to kill a man, is void. And although a gift to a married

woman, in the event of her separation from her husband, or in case she should not be living with her husband at the testator's death, is good, yet a condition that a woman shall cease to reside with her husband is bad, being contrary to public policy. And a condition which is not legally enforceable seems to be illusory and of no effect.

Ibid. *Wilkinson* v. *Wilkinson*, L. R. 12 Eq. 604. *Brown* v. *Burdett*. 21 Ch. D. 667.

INSTANCES OF CONDITIONS NOT VOID ON THIS GROUND.

A condition that a person shall not marry a Christian or become a Christian, or become a nun, or a member of the Roman Catholic Church, or of any sisterhood, is not void on the ground of public policy. But a condition not to enter the military or naval service is void.

Ibid. *Re Beard* (1908), 1 Ch. 383.

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. So a condition in the nature of a clause of defeasance is void if its operation is uncertain.

6th ed., p. 1465. *Ridgway* v. *Woodhouse*, 7 Bea. 437.

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.

Ibid. *Re Moore's Trusts*, 96 L. T. 44.

RULE AGAINST PERPETUITIES.

The question whether a common law condition can be void for remoteness under the modern Rule against Perpetuities is discussed elsewhere.

Ibid. Ante page 177. Chapter XI.

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: 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.

Ibid. See *Re Tyler* (1891), 3 Chy. 252, ante page 148. *Re Swain* (1905), 1 Ch. 669.

IMPOSSIBLE CONDITION.

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.

6th ed., p. 1465.

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.

6th ed., p. 1466. *Ormerod* v. *Riley*, 12 Jur. N. S. 112.

REPUGNANT CONDITIONS.

Conditions that are repugnant to the estate to which they are annexed, are 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, or be cultivated in a certain manner; this being an attempt to control and abridge the exercise of those rights of enjoyment which are inseparably incident to the absolute ownership. But, of course, a direction that the rents of the existing tenants should not be raised, or that certain persons should be continued in the occupation, would be valid; as this merely creates a reservation or exception out of the devise in favour of those individuals.

1st ed., p. 809. *Tibbits* v. *Tibbits*, 19 Ves. 656.

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, from which it would appear that the condition is considered to be valid. 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.

6th ed., p. 1467. *Fawkes* v. *Gray*, 18 Ves. 130. As in *Lloyd* v. *Branton*, 3 Mer. 108.

CONDITIONS IN TERROREM.

PERSONAL ESTATE.

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.

Ibid.

REAL ESTATE.

The doctrine does not apply to real estate.

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.

6th ed., p. 1468. *Re Dickson's Trust*, 1 Sim. N. S. 37.

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.

6th ed., p. 1469. *Adams* v. *Adams* (1892), 1 Ch. 369.

RESULT IF CONDITION 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.

Ibid.

LAND.

Where land is devised upon a void condition, and the condition is precedent, the devise is itself void; if the condition is subsequent, the devise is absolute.

Ibid.

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. 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; the rule of the civil law being that where a condition precedent is originally impossible, or is illegal as involving malum prohibitum, 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, or its impossibility was unknown to the testator, or the condition which was possible in its creation has since become impossible by the act of God, 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.

6th ed., p. 1469. *Poor* v. *Mist*, 6 Mad. 32; *Lowther* v. *Cavendish*, 1 Ed. p. 116; *Re Moore*, 39 Ch. D. 116; *Pasching* v. *Barnett*, 51 L. J. Ch. 74.

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.

5th ed., p. 853. *Reynish* v. *Martin*, 3 Atk. 335.

CONDITIONS PRECEDENT AND SUBSEQUENT.

Conditions are either precedent or subsequent; in other words, either the performance of them is made to precede the vesting of an estate, or the non-performance to determine an estate antecedently vested. 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.

1st ed., p. 796.

CONCLUSIONS FROM THE CASES.

It would seem, 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, than where it is a devise of the land itself; where a pecuniary legacy is given, than a residue; 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; where the condition is capable of being performed instanter, than where time is requisite for the performance; 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.

1st ed., p. 804.

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 and provisoes requiring a devisee or legatee to execute a release. In the absence of clear words, the inclination of the Courts is to treat a name and arms clause as imposing a condition subsequent.

6th ed., p. 1476. *Re Greenwood* (1903) 1 Ch. 749.

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 the precise contingency intended to be provided for.

5th ed., p. 853. *Langdale* v. *Briggs*, 8 D. M. & G. pp. 420, 430.

PECUNIARY LEGACY SUBJECT TO CONDITION SUBSEQUENT.

Most of the cases involving conditions subsequent relate to land or (in the case of personalty) to property held upon trust, so that in either case there is no difficulty in giving effect to the condition. But in some cases a pecuniary legacy has been given subject to a condition subsequent, and then the question arises how effect is to be given to it. 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.

6th ed., p. 1476. *Colston* v. *Morris*, 6 Mad. 89.

WHEN ACCEPTANCE OF GIFT MAKES THE ANNEXED CONDITION BINDING.

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, or from declining a duty which he is thereby required to perform.

6th ed., p. 1477. *Egg* v. *Devey*, 10 Bea. 444; *Simpson* v. *Vickers*, 14 Ves. 341

PERIOD ALLOWED FOR PERFORMANCE OF CONDITION.

It is often difficult, from the absence of declared intention on the point, or from the ambiguity of the testator's language, 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.

6th ed., p. 1478.

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. In other cases it seems that the condition must be performed within a reasonable time.

Ibid. *Davies* v. *Lowndes*, 2 Scott 71.

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.

Ibid. *Re Finch*, 17 Ch. D. 211.

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.

Ibid. See page 737.

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. Again, a condition precedent 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. 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. A condition requiring a release within a given time must be complied with within that time.

6th ed., p. 1478. *Priestley* v. *Holgate*, 3 K. & J. 286. *Caldwell* v. *Cresswell*, L. R. 6 Ch. 278.

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.

6th ed., p. 1479. *Woods* v. *Townley*, 11 Ha. 314.

"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 "refusing" to reside.

6th ed., p. 1479. *Dunne* v. *Dunne*, 7 D. M. & G. 207; *Partridge* v. *Partridge* (1894), 1 Ch. 351.

IGNORANCE OF CONDITION.

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.

6th ed., p. 1480.

DEVISEE, IF HEIR OF THE TESTATOR, MUST HAVE NOTICE OF THE CONDITION.

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; and the fact of notice must be proved; it will not be inferred.

1st ed., p. 809.

INFANCY.

Infancy is a ground for excusing a devisee or legatee from performance of a condition requiring residence, but not from performance of a condition requiring him to assume a name or arms.

6th ed., p. 1480. *Partridge* v. *Partridge* (1894), 1 Ch. 351.

LUNACY.

The Court can enable a lunatic to perform a condition.

6th ed., p. 1481. *Re Earl of Seftan* (1898), 2 Ch. 378.

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.

Ibid.

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, or by the act of the Court.

Ibid. *Gath* v. *Burton*, 1 Bea. 478.

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.

Ibid.

COLLUSION.

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.

6th ed., p. 1482.

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 pay-

ment of money within a certain time, or for the execution of a release.

Ibid. *Hollinrake* v. *Lister*, 1 Russ. 500.

But this rule does not apply to conditions not admitting of after-satisfaction, such as a condition requiring marriage with consent, or forbidding the legatee to become a nun.

Ibid. *Re Dickson's Trust*, 1 Sim. N. S. 37.

CONDITIONS BECOMING INCAPABLE OF PERFORMANCE.
IF CONDITION BE PRECEDENT, ESTATE NEVER ARISES.

It is clear 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.

1st ed., p. 805. *Robinson* v. *Wheelwright*, 6 D. M. & G. 535.

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.

6th ed., p. 1483. *Walker* v. *Walker*, 29 L. J. Ch. 856.

DISTINCTION SUGGESTED WHERE THERE IS A GIFT OVER.

It is far from clear, however, that this principle applies even to conditions subsequent, if the property be given over on non-performance.

1st ed., p. 807.

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.

6th ed., p. 1486. *Doe d. Davies* v. *Davies*, 16 Q. B. 951.

EFFECT OF GIFT OVER.

The general rule 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.

Ibid. *Simpson* v. *Vickers*, 14 Ves. 341.

EFFECT OF RESIDUARY GIFT.

A direction that on non-compliance with the condition the property shall fall into residue, is a gift over, for the purposes of this doctrine, but a mere residuary gift, is seems, is not.

Ibid.

GIFT OVER NOT IMPLIED.

A gift over will not be implied.

6th ed., p. 1487.

INEFFECTUAL GIFT OVER.

If a gift over is so framed as not to fit the condition, the clause of cessor or defeasance is ineffectual and tho 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.

Ibid. ***Musgrave*** v. ***Brooke***, 26 Ch. D. 792.

GENERAL PRINCIPLE.

EXCEPTION IN THE CASE OF MARRIED WOMEN.

An attempt to vest in a person an interest which shall adhere to him, in spite of his own voluntary acts of alienation, is no less nugatory and unavailing than is, we have seen, the endeavour to create an interest which shall be unaffected by bankruptcy or insolvency, as the law of England does not (like that of Scotland) admit of the creation of personal inalienable trusts, for the purpose of maintenance, or otherwise, except in the case of women under coverture, who it is well known may be restrained from anticipation. 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. And when a married woman becomes discovert by the death of her husband, the restraint on anticipation is suspended until she marries again; or she may, while discovert, so deal with the property as to extinguish the restraint.

1st ed., p. 830. ***Re Wheeler's Settlement Trusts*** (1899), 2 Ch. 717.

The general rule that a restriction on alienation is void rests on the principle of repugnancy which has been already considered.

6th ed., p. 1487. Ante page 712.

GENERAL RESTRAINT ON ALIENATION BY DEVISEE IN FEE IS VOID.

A power of alienation is necessarily and inseparably incidental to an estate in fee. If, therefore, lands be devised to A. and his heirs, upon condition that he shall not alien, the condition is void.

1st ed., p. 811. ***Re Dugdale***, 38 Ch. D. 176.

SO OF ALIENATION IN SPECIFIED MODE.

And a condition restraining the devisee from aliening by any particular mode of assurance is bad. Thus, where 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, or forbidding the devisee to charge the land with an annuity, is equally bad.

6th ed., p. 1488. *Willis* v. *Hiscox*, 4 My. & Cr. 197.

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.

Ibid. Chapter XVII.

EQUITABLE INTERESTS.

The general principle applies to equitable as well as to legal interests.

Ibid.

An option of purchase, or right of pre-emption, at a fixed price may be given by will.

6th ed., p. 1489. Ante p. 36. *Re Elliott* (1896) 2 Ch. 353. See ante p. 293.

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.

Ibid.

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.

Ibid. *Doe d. Gill* v. *Pearson*, 6 East 173.

RESTRAINTS ON ALIENATION LIMITED TO A STATED PERIOD, WHETHER VALID.

On the principle that a restraint is good which does not substantially take away all power of alienation, it has been thought on the authority of some early decisions that a condition might be supported which prohibits alienation until after a defined and not too remote period of time, that is to say, a reasonable time not trenching on the Rule against Perpetuities.

5th ed., p. 860. *Large's Case*, 2 Leon 82, 3 Leon 182.

CONDITION REQUIRING ALIENATION WITHIN A GIVEN TIME.

It has been already mentioned that if land is given to a person in fee, with a gift over if he does not alienate in his life-time, 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.

6th ed., p. 1491.

CONTINGENT INTEREST.

An exception to the general rule that a condition against alienation following a devise in fee is repugnant and void, occnrs 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.

Ibid. Re Rosher, 26 Ch. D. 801.

RESTRAINTS ON ALIENATION BY TENANT IN TAIL INVALID.

Conditions restraining alienation by a tenant in tail are also void, as repugnant to his estate, 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; bnt it was held, that a tenant in tail might bc 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 nnder the statute 32 Hen. VIII., c. 28. The invalidity of any restraint on the power of a tenant in tail to enlarge his estate into a fee simple, however, being once established, it is of little avail to fetter him even with such conditions as are consistent with his estate, since he may at any time, by barring the entail, emancipate himself from all restrictions annexed to it. At one period, the attempts to restrain the aliening power of a tenant in tail were nnmerous; 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 dcclare the estate to be determined, on the tenant in tail taking any preparatory steps for the purpose, as agreeing or assenting to, or going abont, any act, &c., but which, of conrse, was eqnally void on the principle already stated.

1st ed., p. 813.

AS TO RESTRAINING ALIENATION BY LESSEE OF PERSONALTY.

The principle which precludes the imposition of restrictions on the aliening powers of persons entitled to the inheritance of lands, applies to the entire or absolute interest in personalty. 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 thc preceding absolute gift.

6th ed., p. 1494.

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 disposing of the whole of it, is void for repugnancy, has been already considered, 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.

Ibid. Ante p. 293. *Re Stringer*, 6 Ch. D. 1.

CONTINGENT OR REVERSIONARY INTEREST.

An interest which is not absolutely vested in possession may, however, be made subject to a condition against alienation.

6th ed., p. 1495. *Re Porter* (1892), 3 Ch. 481.

WORDS REQUIRED TO CREATE FORFEITURE.

No particular form of words is required to create a condition restrictive of voluntary alienation. But the intention must be expressed with reasonable clearness.

Ibid. *Re Amherst's Trusts*, L. R. 13 Eq. 464.

LIFE INTEREST CANNOT BE MADE INALIENABLE.
EXCEPT IN THE CASE OF A MARRIED WOMAN.

Conditions restraining alienation by a tenant for life of real or personal property are also void, for a power of alienation is as much incident to that kind of interest as it is to an absolute interest. The law of England does not 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.

1st ed., p. 830.

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 either by being limited until alienation or by an express gift over or clause of forfeitnre on alienation. If, however, a life interest is given to a person, followed by limitations or trnsts which in effect give him an absolute interest (snch as a general power of appointment), then the ordinary rule applies, and any restriction on alienation is void for repugnancy.

6th ed., p. 1496. *Rochford* v. *Hackman*, 9 Ha. 475.

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.

Ibid.

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. If, however, there is no gift over, but simply a declaration that in the event of the annuitant aliening his annuity, it shall cease as if he were dead, this, it seems, is merely in terrorem, and has no operation. 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 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, and has no operation.

Ibid. Re Mabbett (1891), 1 Ch. 707; *Hunt-Foulston* v. *Furber*, 3 Ch. D. 285. See ante p. 293.

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.

6th ed., p. 1497. Chapter XXXI.

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.

Re Baker (1904) 1 Ch. 157.

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.

Samuel v. *Samuel*, 12 Ch. D. 152.

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.

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.

No particular form of words is required to effect an alienation within the meaning of a clause of forfeiture.

6th ed., p. 1407.

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. 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. 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.

6th ed., p. 1408. *Re Tancred's Settlement* (1903), 1 Ch. 715. *Graham* v. *Lee*, 23 Bea. 388.

WHAT IS AN ATTEMPT TO ALIENATE.

Negotiations for an assignment or charge do not produce a forfeiture under a clause prohibiting "attempts" to alienate. To constitute an "attempt" there must be some act which, but for the clause of forfeiture, or some rule of law, would operate as an alienation.

Ibid.

ACCRUED INCOME.

The general rule seems to be that a provision against alienation only applies to future income.

6th ed., p. 1409. *Re Sampson* (1896), 1 Ch. 636.

Accordingly an assignment of accrued income does not operate as a forfeiture under the ordinary form of provision against alienation. 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.

Ibid. *Durran* v. *Durran*, 91 L. T. 187.

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. If this is not done, it is not always easy to say what operates as a forfeiture.

Ibid. *Hurst* v. *Hurst*, 21 Ch. D. 278. *Re Loftus-Otway* (1895), 2 Ch. 235.

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. This result, however, can of course only follow where the interest is a life interest.

6th ed., p. 1500. *Re Baker* (1904), 1 Ch. 157.

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.

Ibid.

PROPERTY CANNOT BE GIVEN TO A MAN EXEMPT FROM THE OPERATION OF BANKRUPTCY.

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.

1st ed., p. 815.

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.

6th ed., p. 1501. *Re Carew* (1896), 2 Ch. 311.

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.

6th ed., p. 1502. *Pearson* v. *Dolman*, L. R. 3 Eq. 315.

WHERE TRUSTEES HAVE A DISCRETION AS TO MODE OF APPLICATION.

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.

1st ed., p. 821.

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.

6th ed., p. 1503. *Re Bullock*, 60 L. J. Ch. 341.

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: they must not pay money, or deliver goods, or pay for goods to be delivered to him.

6th ed., p. 1504. *Re Coleman*, 39 Ch. D. 443.

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.

Ibid.

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.

Ibid. Lord v. *Bunn*, 2 Y. & C. C. C. 98.

LIFE INTEREST MAY BE MADE TO CEASE ON BANKRUPTCY.

But though a testator is not allowed to vest in the object of his bounty, an inalienable interest exempt from the operation of bankruptcy; yet there is no principle of law which forbids his giving a life 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, 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.

1st ed., p. 823. *Ex parte Mackay*, L. R. 8 Ch. 643.

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.

6th ed., p. 1507. *Rex* v. *Robinson*, Wightw. 386.

CLAUSE RESTRAINING SHOULD EXTEND TO INVOLUNTARY ALIENATION.

These cases show that when it is intended to take away a benefit as soon as it cannot be personally enjoyed by the devisee, it should be made to cease on alienation, not only by his own acts, but by operation of law.

6th ed., p. 1508.

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.

Ibid.

FOREIGN BANKRUPTCY.

It seems that "bankruptcy" in a will prima 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.

6th ed., p. 1509. *Re Hayward* (1897), 1 Ch. 905. See *Re Sartoris* (1892), 1 Ch. 11.

COMPOSITION WITH CREDITORS.

Sometimes a life interest is made determinable on the legatee entering into a composition with his creditors, or becoming insolvent.

Ibid.

"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.

5th ed., p. 877. *Re Muggeridge's Trusts*, Joh. 625.

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.

6th ed., p. 1510. *Re Dash*, 57 L. T. 219.

ACCRUED INCOME.

A clause of forfeiture on bankruptcy or other involuntary alienation dies 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 alienee 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.

6th ed., p. 1511.

GARNISHEE ORDER.

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.

Ibid. Re Greenwood (1901), 1 Ch. 887.

EFFECT OF BANKRUPTCY IN LIFETIME OF TESTATOR.

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

1st ed., p. 828. *Yarnold* v. *Moorehouse*, 1 R. & My. 364.

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 person. 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.

6th ed., p. 1512. *Trappes* v. *Meredith*, L. R. 7 Ch. 248; *Ancona* v. *Waddell*, 10 Ch. D. 157.

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.

6th ed., p. 1513. *Trappes* v. *Meredith*, L. R. 9 Eq. 220.

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.

6th ed., p. 1514. *Sharp* v. *Cosserat*, 20 Bea. 470.

RESTRAINT ON ANTICIPATION.

When property is given to a woman for her separate use (whether the separate use be created by express words or by the effect of the Married Women's Property Act (1882), a restraint upon alienation or anticipation may be annexed to the separate use, 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 cannot be considered distinctly from the separate estate of which it is only a modification."

Ibid. *Tullett* v. *Armstrong*, 4 My. & C. 377.

FORFEITURE ON ALIENATION.

Where a married women is restreined from anticipation, an assignment by her of her interest is wholly inoperative, and therefore does not cause e forfeiture under a clause containing a gift over on alienation. If, however, the clause prohibits not only alienation, but attempted alienation, an assignment, although inoperative, causes a forfeiture.

6th ed., p. 1515. *Re Porter* (1892), 1 Ch. 481.

RIGHT TO RECEIVE VALUE OF ANNUITY, OR STOP 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, 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. These rules, however, do not

apply in the case of a married woman restrained from anticipation.

Ibid. Chapter XXXI.

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.

Ibid.

CORPUS AND INCOME.

A restraint on anticipation may apply to both corpus and income or to income only.

Ibid. *Cooper* v. *Macdonald*, 7 Ch. D. 288.

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, but the restraint does not apply to income actually received by the trustees, or to arrears of income, such as overdue rents or interest.

Ibid. *Hood Barrs* v. *Heriot* (1896), A. C. 174.

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.

6th ed., p. 1516.

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.

Ibid. *Re Chisholm* (1901), 2 Ch. 82.

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.

Ibid.

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.

Ibid. *Peillon* v. *Brooking*, 25 Bea. 218.

No Distinction as to Income Bearing or not Income Bearing Fund.

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. 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.

6th ed., p. 1517. *Re Bankes* (1902), 2 Ch. 333 (settlement); *Re Holmes*, 67 L. T. 335.

Anticipation and Alienation.

There is no distinction between a restraint on anticipation and a restraint upon alienation.

Ibid.

Extinguishment of Restraint.

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.

Ibid.

The Court may Bind the Interest of a Married Woman Restrained from Anticipation.

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."

Ibid.

Under the Married Women's Property Act, 1893, section 2, where proceedings are brought by or on behalf of a married woman, 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.

Ibid.

Future Coverture.

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.

6th ed., p. 1518. *Re Gaffee*, 1 Mac & G. 541.

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.

Ibid. *Cooper* v. *Macdonald*, 7 Ch. D. 288.

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, therefore, inoperative unless the property is made separate estate by statute.

Ibid.

"SEPARATE."

"Separate" is an accepted technical word for excluding the marital right; 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 not seem to be any reported case in which the word "separate" in a will has not received its proper technical signification.

6th ed., p. 1519. *Massy* v. *Rowen*, L. R. 4 H. L. 288.

EQUIVALENT EXPRESSIONS.

But any words clearly intended to exclude marital control are sufficient. 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.

Ibid. *Stanton* v. *Hall*, 2 R. & M. 180.

"SOLE."

WOMAN ABOUT TO MARRY.

At one time the view was put forward that the word "sole" had a fixed technical meaning equivalent to separate, 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." If then there is a gift to an unmarried woman for her sole use, and there is nothing more to show 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. 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.

6th ed., p. 1519. *Lewis* v. *Mathews*, L. R. 2 Eq. 177; *Re Tarsey's Trust*, L. R. 1 Eq. 561.

DISTINCTION BETWEEN INCOME AND CORPUS AS REGARDS THE WORD "SOLE."

Income being more commonly devoted to separate use than corpus, "sole" may more readily he understood as intended to annex such a nse to income than to corpus. But if a testator, after directing that the income bequeathed to females shall he "under their sole control" (words which, standing alone, would clearly exclude the marital right), shows by thc 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.

6th ed., p. 1520. *Massy* v. *Rowen*, L. R. 4 H. L. 301; *Tyler* v. *Lake*, 2 R. & My. 183.

POWER TO WOMAN TO GIVE RECEIPT.

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 nse during a future covcrture.

6th ed., p. 1521. *Cooper* v. *Wells*, 11 Jur. N. S. 923.

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.

6th ed., p. 1522. *Massey* v. *Parker*, 2 My. & K. 174.

No technical form of words is necessary to create a restraint npon anticipation, but the intention must he clear.

6th ed., p. 1523.

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.

Ibid. *Goulder* v. *Camm*, 1 D. F. & J. 146.

PRECATORY WORDS.

But if a testator gives property to a woman absolutely, and adds that it is his "wish and requcst" that she should not sell

or dispose of it, these words do not create a restraint on anticipation.

Ibid.

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. 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, or even upon her personal appearance and receipt, will not take away the power of anticipation.

6th ed., p. 1524. *Baker* v. *Bradley*, 7 De G. M. & G. 597.

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 trust should he carried into execution, with a restraint upon anticipation.

6th ed., p. 1525.

IMPLICATION.

Where two separate provisions are made hy will in favour of a woman, and a restraint on anticipation is expressly attached to one of them, it may hy implication he extended to the other.

Ibid. Re Lawrenson (1891), W. N. 28.

CONDITIONS IN PARTIAL RESTRAINT OF MARRIAGE.
DISTINCTION IN REGARD TO REAL AND PERSONAL ESTATE.

It is now proposed to treat of conditions in restraint of marriage. The numerous and refined distinctions on this subject, however, do not apply to devises of, or pecuniary charges upon, real estate, hut 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, horrowed many of their rules from the civil law.

1st ed., p. 836.

RULE OF THE CIVIL LAW.

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; 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; but this doctrine did not apply to widows.

6th ed., p. 1525.

WHAT ARE VALID RESTRAINTS ON MARRIAGE BY THE LAW OF ENGLAND. OTHER CONDITIONS IN PARTIAL RESTRAINT OF MARRIAGE.

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. A condition that a widow shall not marry, is not unlawful. An annuity during widowhood, a condition to marry or not to marry T., is good. A condition prescribing due ceremonies and place of marriage is good; still more is the condition good which only limits the time to twenty-one, or any other reasonable age, provided it be not used as a cover to restrain marriage generally." Conditions not to marry a Paptist; or a Scotchman; or any person within certain near degrees of kindred; or not to marry any but a Jew, have also been held good.

Ibid. *Lloyd* v. *Lloyd*, 2 Sim. N. S. 255.

CONDITION APPARENTLY PARTIAL MAY BE TOO GENERAL IN EFFECT.

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.

6th ed., p. 1526.

PROFESSIONS AND CALLINGS.

In an old collection of cases there is a note by the compiler 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 Paptist, 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.

Ibid. *Jenner* v. *Turner*, 16 Ch. D. 188.

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. 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.

6th ed., p. 1527. *Davis* v. *Angel*, 4 D. F. & J. 524.

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.

Ibid. *Randal* v. *Payne*, 1 B. C. C. 55.

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.

Ibid.

CONDITION REQUIRING MARRIAGE WITH CONSENT.
REAL ESTATE.

In the case of conditions requiring marriage with consent, or prohibiting marriage without consent, 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; 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. 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.

6th ed., p. 1528.

CONDITION TO ASK CONSENT WHEN IN TERROREM.

With regard to gifts of personalty, including money arising from the sale of lands, to make a condition to ask consent effectual, there must be a bequest over in default, otherwise the condition will be regarded as in terrorem only.

1st ed., p. 837. *Bellairs* v. *Bellairs*, L. R. 18 Eq. 510.

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.

6th ed., p. 1529. *Lloyd* v. *Branton*, 3 Mer. 108.

CONDITIONS PRECEDENT WHEN NOT IN TERROREM.

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.

6th ed., p. 1530.

WHERE THE LEGATEE TAKES AN ALTERNATIVE PROVISION.

First, Where the legatee takes a provision or legacy in the alternative of marrying without the consent.

WHERE LEGACY IS GIVEN UPON AN ALTERNATIVE EVENT.

Secondly, Where marriage with consent is only one of two events, on either of which the legatee will be entitled to the legacy; as where it is given on marriage with consent, or attaining a particular age.

WHERE MARRIAGE WITH CONSENT IS RESTRICTED TO MINORITY.

Thirdly, Where marriage with consent is confined to minority.

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.

6th ed., p. 1530-1.

MARRIAGE NECESSARY, WHEN.

But it should be remembered that no question exists as to the applicability of the in terrorem doctrine to conditions subsequent; 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.

6th ed., p. 1532. *Re Whiting's Settlement* (1905), 1 Ch. 96.

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, unless there is an express direction that the forfeited legacy shall fall into the residue.

6th ed., p. 1533. *Lloyd* v. *Branton*, 3 Mer. 108.

EFFECT WHERE LEGACY IS CHARGEABLE ON REAL AND PERSONAL ESTATE.

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, 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.

1st ed., p. 842.

LEGATEE MARRYING IN TESTATOR'S LIFETIME.

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.

1st ed., p. 843. *Crommelin* v. *Crommelin*, 3 Ves. 227.

And in such a case, it seems, if the legatee marry with her father's consent, or even his subsequent approbation, she will be entitled to all the benefit attached by him to marrying with the consent required.

6th ed., p. 1534.

A condition not to marry before a given age, or requiring marriage with A., or not to marry again, 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).

6th ed., p. 1534. *Younge* v. *Furze*, 8 D. M. & G. 756. *Davis* v. *Angel*, 4 D. F. & J. 524. *Bullock* v. *Bennett*, 7 D. M. & G. 283.

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.

6th ed, p. 1535. *Lowry* v. *Patterson*, Ir. R. 8 Eq. 372.

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. Assent may also be presumed from other circumstances, for, 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; 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.

1st ed., p. 843.

EXPRESSIONS OF CONSENT, HOW CONSTRUED.

The Courts are disposed to construe liberally the expressions of persons whose consent is required, especially if they have

sanctioned, by their acquiescence, the growth of an attachment between the parties.

6th ed., p. 1536. *D'Aguilar* v. *Drinkwater*, 2 V. & B. 225.

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. (supposing the marriage, under such circumstances, to be lawful).

Ibid.

Trustees Withholding Consent.

It seems, that if trustees withhold their consent from a vicious, corrupt, or unreasonable cause, the Court of Chancery will interfere; 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, 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.

Ibid. *Clarke* v. *Parker*, 19 Ves. 18; *Goldsmid* v. *Goldsmid*, 19 Ves. 368.

Retracting Consent.

It seems that consent once given, with a knowledge of the circumstances, and where there is no fraud, cannot be retracted without an adequate reason, unless it be given upon a condition, (as that of the intended husband making a settlement), 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.

Ibid. *Dashwood* v. *Lord Bulkeley*, 10 Ves. 230.

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.

6th ed., p. 1537. *Clarke* v. *Parker*, 19 Ves. 1.

Whether Survivors can Give Consent.

A consent, required to be given by several persons nominatim, of course, cannot be exercised by survivors.

Ibid.

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. 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.

6th ed., p. 1538. *Booth* v. *Meyer*, 38 L. T. 125.

SUBSEQUENT APPROBATION.

It seems to be clear that approbation subsequent to a marriage, is not in general a sufficient compliance with a condition requiring consent.

1st ed., p. 847. *Clarke* v. *Parker*, 19 Ves. 21.

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 bad 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.

6th ed., p. 1538. *O'Calloghan* v. *Cooper*, 5 Ves. 117.

It would appear from the authorities above cited to be douhtful 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, or shall not marry a person of a particular rank in life or occupation.

6th ed., p. 1539. *Jenner* v. *Turner*, 16 Ch. D. 188.

VOID AS REGARDS PERSONAL ESTATE, AND, SEMBLE, AS TO REAL ESTATE.

With regard to personal estate (including money arising from the sale of land, and, of course, a mixed fund), there is no doubt that, subject to the exceptions to be presently mentioned, a condition in total restraint of marriage is void, and, even in regard to devises of real estate, it seems to be generally admitted (though the point rests rather on principle than deci-

sion), that unqualified restrictions on marriage are void, on grounds of public policy.

1st ed., p. 842.

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.

6th ed., p. 1539. *Cooke* v. *Turner*, 15 Mee & W. 727; *Allen* v. *Jackson*, 1 Ch. D. 399.

CONDITION PRECEDENT.

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. 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, or where the condition requires the legatee to contract an impossible marriage, such as marriage with the consent of a person who the testator knows is certain not to give it.

6th ed., p. 1540. *Keily* v. *Monck*, 3 Ridg. P. C. 205.

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.

Ibid.

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, and the doctrine has been extended to a gift to a married woman by a testator who is not her husband. 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. But this doctrine does not apply to a devise of real estate.

6th ed., p. 1541. *Lloyd* v. *Lloyd*, 2 Sim. N. S. 255; *Newton* v. *Marsden*, 2 J. & H. 356; *Marples* v. *Bainbridge*, 1 Madd. 590.

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." "This is not a subtlety of our law only; the civil law made the same distinc-

tion." It is a question of construction in each case whether the testator has created a condition or a limitation.

6th ed., p. 1542. *Jones* v. *Jones*, 1 Q. B. D. 279.

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 falls, even if the marriage takes place with the knowledge and approval of the testator.

Ibid.

GIFT DURING WIDOWHOOD.

A gift during widowhood is equivalent to a gift for life or until the legatee marries again. 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, 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.

Ibid. *Re Boddington*, 25 Ch. D. 685. Chapter XXXIII, ante page 658.

CONDITION TO ASSUME NAME OR ARMS.

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

1st ed., p. 848.

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 license, the devisee or legatee must comply with the requirement, and no other mode falling short of the specified mode can be substituted for it.

6th ed., p. 1544. *Leigh* v. *Leigh*, 15 Ves. 100.

CONDITION OF "USING" A NAME.

Questions sometimes arise how a condition requiring a person to "use" a name must be complied with.

Ibid. *Re Drax*, 75 L. J. Ch. 317.

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, and there-

fore 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). 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. 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 improperly and without authority.

Ibid.

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.

6th ed., p. 1545.

NAME AND 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.

Ibid. *Re Michell* (1892), 2 Ch. 87.

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. 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. And the gift over, to be effectual, must be so framed that the proviso for cesser and the limitation over fit one another. 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."

Ibid. *Musgrave* v. *Brooke*, 26 Ch. D. 792.

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.

Ibid.

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.

Ibid. Ante p. 716.

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; 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.

5th ed., p. 900. *Fillingham* v. *Bromley*, T. & R. 530.

Even should the devisee be required to reside in the house during a defined period, or to make it his principal or usual place of abode, the condition may still be frustrated, for personal presence in the specified place for any part of a day is sufficient residence for that day; and it is not necessary to pass the night of that day there. 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. Or, if the devisee were to let the house, or the greater part of it, this would probably cause a forfeiture. 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, 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. A condition of residence is, as a general rule, inapplicable to an infant.

6th ed., p. 1546. *Stone* v. *Parker*, 29 L. J. Ch. 874.

CONDITION THAT A LEGATEE SHOULD NOT DISPUTE THE WILL.

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, unless, it seems, the legacy be given over upon breach of the condition. This doctrine has never been applied to devises of real estate.

6th ed., p. 1548. *Phillips* v. *Phillips* (1877). W. N. 260: *Stevenson* v. *Abingdon*, 11 W. R. 935.

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.

6th ed., p. 1550. *Rhodes* v. *Muxwell Hill Land Co.*, 29 Bea. 560.

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, although he was in ignorance of the condition.

Ibid. *Powell* v. *Rawle*, L. R. 18 Eq. 243.

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. But this rule does not apply to an order for limited administration made on summons.

Ibid. *Tollner* v. *Marriott*, 4 Sim. 19.

CONDITION OF RETURN.

A legacy may be given upon condition that the legatee returns to England within a certain time. Such a condition is prima facie precedent.

Ibid.

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.

6th ed., p. 1551. *Re Kettlewell*, 98 L. T. 23.

Various other examples of conditions have been incidentally referred to in earlier parts of this chapter.

Ibid. See page 717.

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.

Ibid. Re Blunt's Trusts (1904), 2 Ch. 767.

Partial Restriction—"Mortgaging or Selling"—Vendor and Purchaser.—A testator by his will, after directing payment of his debts, funeral and testamentary expenses, devised to his son W. M. certain lands, "subject to the following conditions, reservations, limitations, therein," (directing the payment of two sums of money), "to have and to hold the same unto the said W. M., his heirs, executors, administrators, and assigns forever:" and, after making four other devises of other lands to four other sons, provided as follows: "None of my sons will have the privilege of mortgaging or selling their lot or farm aforesaid described, but if one or more of these lots have to be sold on account of mismanagement, the executors will see that the same will remain in the Martin estate." W. M. was one of the executors named in the will. The sons became indebted, and neither they, nor the daughters, nor the widow, nor the executors, were in a position to purchase the land, and W. M. agreed to sell the land devised to him:—Held, that the restraint on alienation was valid, and that he could not make title.—Review of the cases here and in England. *In re Mncleay*, L. R. 20 Eq. 186, followed. *In re Rosher, Rosher v. Rosher*, 26 Ch. D. 801, not followed. *Re Martin & Dugnenu*, 11 O. L. R. 349, 7 O. W. R. 191.

Devise — Restrictions against Incumbering — Mortgage by Devisee—Breach of Condition—Vendor and Purchaser.—A will providing for the division in specific halves of a certain farm lot, between the testator's two sons, contained restrictions against the devisees selling or mortgaging their respective halves until after the expiration of twenty-five years from the testator's death, and also against incumbering it for a like period:—Held, on a petition under the Vendors and Purchasers Act, that the later restriction was void; but, following *Chisholm* v. *London and Western Trusts Co.*, 17 C. L. T. 172, 28 O. R. 347, that the former restriction was good, so that the giving of a mortgage by one of the devisees on his half constituted a breach of condition for which the heir might enter and divest the devisee; and therefore the title was not such a one as a purchaser could be compelled to take. *In re Chisholm—In re Lot Three in the Eighth Concession of the Township of Mosa*, 21 C. L. T. 525.

Restraint against Alienation — "The Property that shall Remain."—Teatator directed his estate to be divided between his two daughters, Cecilia and Mary Ann, after providing an annual income for his widow. The widow died in 1906. He further directed that in case either daughter should die without leaving issue, then her share should go to her sister, and in case both daughters died without leaving issue then the whole estate should go to the Roman Catholic Episcopal Corporation. Cecilia married one Brown and is now a widow. Mary Ann married one Tobin and died in 1906, leaving a daughter Cecilia Matilda. Before Cecilia married, the executors of the estate conveyed to her certain lands in question. Cecilia conveyed these lands to one J. Hamilton Burgar. The Roman C. E. Cor. and Cecilia Matilda Tobin both filed adverse claims and claimed to be contingently interested in the event of Cecilia Brown dying leaving no issue:—Held, that neither the Roman C. E. Cor. nor Cecilia Matilda Tobin had any interest in the lands in question, as the devisees were intended by the testator to have power of disposition over their property during their lives, subject only to the limited restriction above mentioned, and as Cecilia having exercised that power, it could not be part of "the property that shall remain" at her decease. *Re Burgar* (1909), 14 O. W. R. 772.

Construction—Exercise of Power.—A testator devised land to his daughter subject to the following conditions: "My said daughter shall not sell or will or dispose of this 100-acre lot to any person or persons except to one or more of my children or my grandchildren, to whom she may dis-

pose of it if it is her will to do so." By her will, the daughter assumed to charge upon the land two legacies, and directed that her husband might occupy the land for one year after her death, and, subject to these charges and her debts and testamentary expenses, devised the land to her executors upon trust for the plaintiff, one of the testator's grandchildren, as beneficial owner. There were several other children and grandchildren of the testator surviving:—Held, that the restraint on alienation in the testator's will was valid, and that, inasmuch as the daughter's will must be held to have been made by her in pursuance of the power of disposition given her by him, though she intended to defeat the restraint against alienation by indirect means, the legacies in her will failed, as also her devise of the right of occupation in favour of her husband, and the plaintiff took the whole property free from any condition. *Rogerson* v. *Campbell*, 10 O. L. R. 748, 6 O. W. R. 617.

Devise — Restraint upon Alienation — Validity — Summary Application to Determine—Rule 938—Scope of.—A testator devised lands to his sons, subject to a restraint upon alienation. The sons, desiring to mortgage the lands devised, applied under Rule 938 for a determination of the question whether the restraint was valid:—Held, that Rule 938 gives no authority to determine such a question. *In re Martin*, 25 C. L. T. 18, 8 O. L. R. 638, 4 O. W. R. 429.

Devise Subject to Restraint on Alienation—Limited Restriction—Validity.—A testator by his will devised certain land to his "son H. P., his heirs and assigns, to have and to hold to said H. P., his heirs and assigns, for his and their sole and only use forever, subject to the condition that the said H. P. shall not during his lifetime either mortgage or sell (the land) thus devised to him:"—Held, that the restraint on alienation, being limited, was good. *Re Porter*, 9 O. W. R. 197, 13 O. L. R. 399.

Motion under Vendors and Purchasers Act—Restraint upon Alienation — Invalid — Object to Title Fails.—Held, that the words, "Directing that my said son not to sell or dispose of the said lands during his life," do not constitute a valid restraint upon alienation. *Blackburn* v. *McCallum*, 33 S. C. R. 65, followed. Headnote is misleading. *Re Baldwin & Hunter* (1910), 17 O. W. R. 294, 2 O. W. N. 199.

Life Estate—Estate Tail—Survivorship—Disentailing Deed—Condition of Devise—Bearing Testator's Name — Vendor and Purchaser.—A testator devised the lands "whereon I now reside" to his son "during his natural life, and at his decease to the second male heir of him and his present wife, and his heirs male for ever, and in default of a second male heir to their second surviving female heir or child, and her male heirs for ever, provided she continues to bear my name during her life." The testator's son had by the wife mentioned in the will four children, one son and three daughters, of whom one son and one daughter survived the testator's son and his wife. One of the daughters who predeceased the testator's son had previously joined with him in a disentailing deed in which it was recited that she was the tenant in tail in remainder expectant upon the decease of her father:—Held, that the testator's son took a life estate only, and the surviving daughter an estate tail male; and that the disentailing deed did not stand in the way of that daughter making a conveyance of the lands in fee.—Held, also, that the condition as to continuing to bear the testator's name did not prevent the daughter, being unmarried, from conveying in fee. *In re Brown & Slater*, 23 C. L. T. 172, 5 O. L. R. 386, 2 O. W. R. 101.

Assuming Name and Arms.—The devise was to one C., subject to a condition that he should, within two years, take the name and arms of testator, in default of which, or in case of his death before testator, there was a devise over to one D., through whom the plaintiff claimed. The evidence of facts necessary to show the effect of this devise not being clear, a new trial was granted, with costs to abide the event, on condition that both parties should admit the seisin of the testator. *Nicholson* v. *Burkholder*, 21 U. C. R. 108.

Personal Property—Restraint on Alienation—Invalidity.—A testator directed that his estate should be invested and the income paid to his two sons equally until they reached the age of thirty-five, when they were to receive the principal, and he further declared that "none of my children shall have power to anticipate or alienate, either voluntarily or otherwise, any portion of my estate to which they may be entitled previous to the time at which the same may become payable to them as herein declared." Notwithstanding the above, one of the sons assigned his interest under the will to various creditors:—Held, that the assignments were valid, and the restriction on alienation which the testator had sought to impose invalid. The reasons for the rule of equity which enables a restraint against alienation and anticipation to be imposed on the separate estate of a married woman do not apply to such a case. *McFarlane* v. *Henderson*, 16 O. L. R. 172, 11 O. W. R. 218.

As to marriage settlement or deed of separation in which satisfaction for dower has been provided for, see *Eves* v. *Booth*, 27 A. R. 420.

Occupation—Maintenance.—A testator devised all his real and personal estate to his wife for life; and upon her decease his real estate to his daughter for life, remainder to her son in fee; with liberty to the daughter and her husband to occupy the land, provided they supplied his widow with a comfortable support and maintenance out of the same during her life, and if they did not do so to her satisfaction, the executors should have power to sell or lease the land:—Held, that the duty of supplying the widow with maintenance was conditional upon the parties occupying the land; and a sale effected by the executors in default of their supplying the widow with such support, although not occupying the land, was declared void. *Dougherty* v. *Carson*, 7 Chy. 31.

Temporary Interruption.—A testator, amongst others, made the following bequest, in favour of his housekeeper, "And further, for her, the said H. P., to have her own free will to stay on the premises I now at this time enjoy and possess, and for her to have a quiet home and maintenance as long as she may think good to hold to the said privilege:"—Held, that H. P. had not forfeited her right to the provision by merely ceasing for a time to avail herself of her intended benefit. *Hesp* v. *Bell*, 16 Chy. 412.

Residence with Named Person.—A father devised to trustees for the benefit of his daughter, an only child, real estate on her attaining twenty-one years or marrying, and until that period he directed that she should reside with and be brought up under the care of his mother, or in the event of the death of his mother, then that she should in like manner reside with his sister and in the event of the death of his sister before the period named, he directed the trustees of his will to place his daughter in some respectable family other than that of the child's mother, and in case the daughter failed to comply with these conditions, he devised the estate to other parties. On a bill filed to obtain the construction of the will, the Court was of opinion that although the provisions seemed harsh and cruel, the father had the power in disposing of his property to clog it with the condition he had; that a Court of Equity could afford no relief; and that the estate devised to the daughter unless the conditions were complied with would be forfeited. *Davis* v. *McCaffrey*, 21 Chy. 554.

Bequest of Partnership Business to Partner.—J. and his brother carried on business in partnership for over thirty years and the brother having died his will contained the following bequest: "I will and bequeath unto my brother J. all my interest in the business of J. & Co. in the said city of St. Catharines, together with all sums of money advanced by me to the said business at any time, for his own use absolutely for ever, and I advise my said brother to wind up the said business with as little delay as possible:"—Held, that J. on accepting the legacy was under no obligation to indemnify the testator's estate against liability for debts of the firm in case the assets should be insufficient for the purpose and did not lose his right to have the accounts taken in order to make the estate of the testator pay its share of such deficiency. *Robertson* v. *Junkin*, 26 S. C. R. 192.

Acceptance of Devise.—Where one to whom a devise prima facie beneficial to him is made, neither accepts nor rejects the same, but remains passive, he will be presumed to accept. *Re Dafoe*, 2 O. R. 623.

Devise—Gift to Church—Refusal to Accept.—A testator by his will appointed executors, and directed that his body should be buried by them in a designated spot on his farm, and that the greater part of his estate should be applied to the erection on his grave, of a monument to his memory. He further directed that his executors should donate a piece of his farm comprising the grave lot to a designated church congregation, which had a cemetery then existing, adjacent to the testator's proposed burial place. The church refused to accept the donation. The executors buried the body of the testator in the place indicated in the will, and took the necessary proceedings to have the same legally constituted as a cemetery. In actions by relatives of the testator to have the bequest declared lapsed, and to set aside the transfer of the land in question to a cemetery company:—Held, that the fact that the land in question did not form a portion of any cemetery lawfully established at the time of the testator's death, did not destroy the validity of the will, nor prevent the execution of the testator's instructions as regards his burial.—2. The principal and controlling condition and requirement of the will was that the testator's body should be buried in a certain place on his farm, and that a monument should be erected over his grave. The provision that certain land comprising the burial lot should be donated to a particular church, as a cemetery, was only a detail in the mode of executing the testator's principal bequest, and not an essential and controlling condition which must be exactly complied with, and, therefore, the refusal of the church to accept the land did not invalidate the bequest. *Wright* v. *Bennie*, 13 Que. K. B. 379.

Trust — Charitable — Creation of Bishopric — Contingency.—Testator left an estate of $99,000, of which $44,000 was in real estate and Hudson Bay Co. shares. This latter sum was left in trust to supply an income for a Bishop of Cornwall, or if such a Bishop was not elected within 25 years after the testator's death, the money was to go to the University of Bishop's College, at Lennoxville, for the endowment of a Professorship of Natural Science.—Boyd, C., held, that there was an immediate gift for charitable uses delayed as to the actual conveyance till the secured debts were paid, and, therefore, vested at the death and effective in law, though the particular application of the gift might be in suspense for 25 years, or might never take effect at all, in which contingency there was a valid transfer to another charity at the end of 25 years; that the will did not offend against the rule concerning perpetuities. *Re Mountain* (1910), 17 O. W. R. 448, 2 O. W. N. 246.

Conditional Gift—Charitable Bequest—Fulfilment of Condition—"Or Otherwise"—Ejusdem Generis—Exception.—The testator directed his executors to pay over to a town corporation $20,000 for the purposes of a hospital "so soon as a like sum of $20,000 should be procured by the corporation by a tax on the citizens, or from private donations, or otherwise, to be added to said bequest. The legacy was to lapse if the additional amount was not procured. The sum of $6,000 was raised by private subscription. The Government of the province supplemented the amount by a grant of $14,000. It was contended on behalf of the residuary legatee that the grant from the Government was not a compliance with the terms of the will:—Held, that the words "or otherwise" in the will meant "from any source," and that the testator did not intend to place any restriction upon the executors as to the source from which the additional $20,000 should come. *In re Payzant*, 24 C. L. T. 140; *S. C. sub nom. Paulin* v. *Town of Windsor*, 36 N. S. R. 441.

Bequest—Condition—Marriage.—A provision in a will by which a testator directs his wife, whom he appoints the usufructuary of all his immovable property, "provided his son does not marry," "to give and deed him" (the son) certain property, should that event take place, is to be construed as a legacy of the property to the son in the event of his marriage. *Farmer* v. *Smith*, 29 Que. S. C. 406.

Marriage with Approbation.—A testator devised his property in trust amongst other things, to pay his son an annuity of £100, and in case of his marrying with the approbation of the trustees, then they were to hold certain specified property, or to convey the same for the separate use of the wife during her life, subject, if the trustees thought best, to the payment of such annuity to the son, and after the death of the wife then to the use of the children of the marriage or their issue, with a proviso "that the trusts in favour of such wife and children shall not arise, nor shall the approbation of my said trustees of such marriage be presumed or provable unless my said trustees shall by deed declare the said trusts in favour of such wife and children." The son married, but no declaration of trust in accordance with this proviso was made:—Held, that a declaration by deed was necessary to give the wife or children a locus standi in Court, and that evidence of conduct on the part of the trustees tending to show their approbation of the marriage was insufficient. *Foster* v. *Patterson*, 15 Chy. 426.

Marriage.—A testator devised all his real estate to his two daughters and a granddaughter "during their lives or the lives of any one of them, for their support; and in case of the marriage of any of them then to those above named remaining unmarried," and after their decease the property was to be sold for the benefit of all his grandchildren. At the time of his death all were living and unmarried; subsequently one of the daughters married, but became a widow, the other daughter died unmarried and intestate, and the granddaughter afterwards married (in 1864):—Held, that on the marriage of the granddaughter, the property was to be sold and distributed among the grandchildren. *Wright* v. *Church*, 16 Chy. 192.

Gift to Child—Condition—Marriage—Consent of Executors—Invalidity—Mixed Fund.—Testator died on the 1st May, 1900, leaving a will dated 14th March, 1898, in which he gave to his son out of and from the annual income and profits of the investment and rents of his real and personal estate $300 per year while unmarried, "but, if he marries to the satisfaction of and with the consent of the executors, then he is to receive the whole annual income of the estate during his life." There was no bequest over in case the son married without consent, nor any subsequent disposal of the estate affecting these assets. The son married without consent:—Held, nevertheless, that he was entitled to the whole income. With regard to personalty, the Court of Chancery long ago adopted the rule of the civil and ecclesiastical law by which such a condition is void or regarded as merely in terrorem; and according to modern rules a mixed or massed fund is to be treated in the same way as personalty. Review of English authorities. *In re Hamilton*, 21 C. L. T. 126, 1 O. L. R. 10.

The condition that if an infant defendant at any time before coming of age went to live with his father he should be "disinherited," (to use the words of the will) "of the whole or any part of the estate," is clearly a condition subsequent: and after having examined the cases referred to on the argument and many more, I am of the opinion that this condition is void. *Clarke* v. *Darraugh*, 5 O. R. 148-9.

Marriage of Widow.—A testator appointed his wife executrix, and gave her certain legacies, provided she remained single, and in the event of her marrying again made other disposition of his estate, and appointed another person his executor. An assignment of a mortgage made by her and her husband after her second marriage was held to pass no interest. *Conron* v. *Clarkson*, 3 Ch. Ch. 368.

L. devised lands to his widow, "provided she does not marry or misbehave," and to his son after his wife's death:—Held, that the widow's estate was not absolutely determined by her again marrying; the party next entitled not having claimed the estate. *Leech* v. *Leech*, 11 Chy. 572.

Bequests—Conditions—Validity.—A testator by his will directed his executors to give his son T. $15,000, on the condition of his personally appearing before them at a named place before receiving any part thereof;

and that he was not to engage in malt or spirituous liquor traffic, or in any form of gambling or games of chance, directly or indirectly, personally or through an agent or partner, and should furnish the executors with a reasonable proof of his strict observance of the condition. The testator also directed his executors to give another son W. $5,000, as follows: $500 five years after his decease and $500 each year thereafter for 9 years, and that before receiving any part he should appear personally before the executors at the said place:—Held, that T. had not an estate vested in him: that the restriction against being engaged in the liquor traffic or gambling was with the object that he should, if physically able, be engaged in some honourable calling, exclusive of the liquor traffic or gambling, as a means of livelihood, and had no reference to merely playing games by way of amusement or diversion: and as to the appearance before the executors, this would be complied with by appearing once before them. *Re Quay*, 9 O. W. R. 823, 14 O. L. R. 471.

Abstaining from Intoxicants and Cards — Obedience to Mother—Industry.—Testator, after granting to his wife a life estate in certain land, devised the same to his son, subject to the following conditions: "First, that he abstain totally from intoxicating liquors and card-playing. Second, that he be kind and obedient to his mother. Third, that he be known among his friends as an industrious man ten years after the death of his mother. Should he fulfil these above mentioned conditions I give and devise to him to hold to his heirs and assigns for ever, the said lot. Should my son Michael not fill to the letter these conditions, then he shall have no right or title to the use of the said property during or after his mother's lifetime. But I will and bequeath said half lot to my grandson J., to hold to his heirs and assigns for ever:"—Held (1) that the three conditions were conditions precedent up to the time of the mother's death, and that conditions one and three were conditions subsequent for ten years after the mother's death. (2) That either the use of intoxicating liquors or the playing of cards would be a breach of the first condition. (3) That the first condition was valid and was not too vague or indefinite for trial or adjudication by the Court; and having been broken the son's title failed in so far as the condition was precedent, and was forfeited in so far as the condition was subsequent.—Semble, that conditions two and three were valid, and not too vague or indefinite for trial or adjudication by the Court.—Held, also, that although the son was one of the heirs-at-law it was not necessary to show that he had notice of the will or the conditions in it, for he had possession of the land as devisee under the will from his mother's death until his own. *Jordan* v. *Dunn*, 15 A. R. 744.

Sober, Steady, and Industrious.—The petitioner in a quieting title application claimed title as devisee under a will which contained the following provisions: "Secondly, I devise to my son J. F. (the land in question) but he is to be known as a sober, steady, and industrious man. Thirdly, if at any time during the period of five years after my death, it appears to my executors, hereinafter named, that my said son J. does not remain sober, I give them power to sell and dispose of the said property for such charitable purposes as to them shall seem meet:"—Held, that the power of sale in the will was not void for uncertainty, and that the certificate of title could only issue subject to such power. *Re Fox*, 8 O. R. 489.

Steadiness and Respectability.—A bequest was made to the son of testatrix payable on his attaining twenty-one, provided he continued a steady boy and remained in some respectable family until that time, with a bequest over if he did not do so. Without any reason being assigned therefor, the legatee enlisted and served as a private soldier in the army of the United States, against the then Confederate States:—Held, that the son had not performed the condition, and was not entitled to the legacy. *Pew* v. *Lefferty*, 16 Chy. 408.

Devise—Direction to Keep and Maintain.—A testator directed his two sons to keep their two sisters until they married, in a suitable manner free of expense, and that so long as the sisters, or either of them, kept house for their brothers, they or she were to have control of the poultry, eggs, butter, etc., and all moneys thence derived, for their own

use and benefit. He devised his farm on which he was residing at his death, to his sons, who were compelled to sell it, as it was heavily incumbered:—Held, that all the sons were bound to do, was to offer to support and maintain their sisters, free of expense, in a suitable manner, either on the farm devised, or in the home of either of them, but that they were not bound to allow the sisters to reside wherever the latter wished, and to pay the cost of their maintenance. *In re O'Shea*, 23 C. L. T. 113, 283, 6 O. L. R. 315, 2 O. W. R. 224, 749.

Maintenance.—A testator, seised in fee of land, devised it to his son on condition that he supported the plaintiff during her life, and that she should be mistress and have control in the dwelling house on the land:—Held, that the son took the land conditioned for the maintenance of the plaintiff during her life, but that no title was conferred upon her under which she could bring ejectment, the control intended being merely the domestic management, not the ownership of the house. *Grant* v. *McLennan*, 16 U. C. C. P. 305.

Maintenance of Child—Subsequent Impossibility.—A testator bequeathed his chattels and $1,500 to his widow. His estate he directed to be sold and the $1,500 to be paid out of the proceeds. After providing for the investment of the estate, he proceeded: "The yearly interest accruing from the same to be paid over to my said wife yearly for the term of six years, or until my son shall become twenty-one; 5th. It is my will that the above mentioned gifts and bequests to my wife shall be given to her in lieu of dower, and on the further condition that she will clothe, maintain, and suitably provide for my said son until he shall become twenty-one; 6th. It is further my will that on the coming of age of my said son, my executors shall pay over to him the whole of the principal sum of money remaining in their hands after satisfying the above expenses and legacies; 7th. In case my said son should die before coming of age, then the money so remaining as above, and to which he would then be entitled, shall be paid over to my two eldest brothers." The son died under twenty-one:—Held, that all the gifts to the widow were upon the condition of maintaining the son; but the condition having become impossible of performance by the son's death, the gifts were denuded of the condition.—Held, also, that the testator's brothers were not entitled to payment of the capital until the time at which the son would have attained the age of twenty-one if he had lived; and in the meantime the widow was entitled to the income. *Graham* v. *Boulton*, 9 O. R. 481.

Bequest—Restrictive Condition—Validity—Religious Faith—Marriage.—In a universal bequest to the children of the testator, with substitution to his grandchildren, the condition imposed that the latter should be born of a marriage contracted according to the rites of the Roman Catholic faith, and be brought up and instructed in that faith, is valid in regard to grandchildren born before the death of the testator, and is not open to attack by them as contrary to liberty of conscience or as restrictive of marriage. *Lamothe* v. *Renaud*, 15 Que. K. B. 400.

Legatees to Work on Charged Land.—W. O. by the third clause of his will devised and bequeathed the residue of his estate to his wife, four sons, and two daughters, the devise and bequest being subject to the condition that they should all unite in paying to the executors before the 1st January, 1877, the sum of $1,600, and the same sum before the 1st January, 1882, said sums to pay the shares of two of the sons, Alexander and Duncan. By the fourth clause he gave the sum of $1,600, without condition, to each of his sons, Alexander and Duncan. By the fifth clause he devised to his sons Douglas and Robert Oliver two lots, and after giving several legacies to his daughters, he proceeded: "and further, that Alexander and Duncan work on the farm until their legacies become due." Alexander left the farm in 1871, and entered into mercantile pursuits:—Held, reversing 6 A. R. 595, that the direction that Alexander should work on the farm was a condition precedent to his right to the legacy of $1,600. *Oliver* v. *Davidson*, 11 S. C. R. 166.

Formation of Partnership—Predecease of Intended Partner.—A testator by his will directed that "as soon as conveniently may be after my decease, a partnership be formed by my two sons . . . in which partnership and firm my two sons shall be equal partners in every particular, and sharing equally in the profits of the same. To the said firm so to be formed I give and bequeath as partnership assets, the building," &c. The testator then proceeded to give and bequeath to the said firm certain specific lands and personal property, and ultimately the whole of his residuary real and personal estate. After the death of one of his said sons, who predeceased him, he made some codicils to his will, in which he referred to the above portion of his will and revoked some of the bequests to the said firm, but otherwise ratified his will:—Held, that the formation of the partnership as directed was a condition precedent to the vesting of the gifts and bequests above mentioned, and that, as one of the two sons predeceased the testator, there was an intestacy as to them. *McCallum* v. *Riddell*, 23 O. R. 537.

Payment of Mortgage.—Where land is devised upon condition that a mortgage thereon be paid by the devisee, and the devisor pays off the mortgage, the devise is good, such a condition being a condition subsequent. *McKinnon* v. *Lundy*, 21 A. R. 560.

Payment of Legacy.—A testator devised 100 acres to his son R., for which he was to pay the executors, by instalments, a sum which was to be invested for the benefit of another son, T., on his attaining twenty-one. The testator further declared that should R., "neglect or refuse to pay the aforementioned sums in the manner specified, then it should be in the power of the executors to dispose of fifty acres of the said land for the benefit of T., or to give him, T., a deed for fifty acres of said lot; which fifty acres shall be such part of the said lot as the executors shall see fit." The legacy was not paid, and the executors conveyed fifty acres to T.:—Held, notwithstanding such default in payment, that upon R. paying the amount due for principal and interest on the footing of the legacy he was entitled to a reconveyance of the fifty acres. *Carson* v. *Carson*, 6 Chy. 368.

A testator devised land to his eldest son, J., for life, and after his decease without issue to his grandson, the plaintiff, in fee. By a codicil he declared that if J. should "after three months after my decease" deposit in the hands of any person to be chosen by plaintiff's parents £100, to be invested for plaintiff's benefit, then the land should go to J. in fee:—Held, that payment of the £100 within a reasonable time after three months from testator's decease was sufficient; and that "after" should not be read as "within."—Quære, whether under the codicil the parents could have directed payment of the £100 to themselves. *Hyland* v. *Throckmorton*, 29 U. C. R. 560.

Claim to be Made.—Testator devised lands to his brother's two eldest sons "in case of their coming to Canada and claiming the same:"—Held, that, though the devisees took as joint tenants, yet that either of them by coming to Canada could entitle himself to his moiety. *Doe d. McGillis* v. *McGillvray*, 9 U. C. R. 9.

Vested Estate in Interest — Restraint upon Alienation—Invalid—Repugnant to Gift in Fee.—Court of Appeal held, that a provision in a will imposing upon the devisee a condition, which, in substance, prevented him from selling the land to any one but the plaintiff during his lifetime, or disposing of it by will to anyone unless he survived the plaintiff, was void as repugnant to the gift in fee. *Re Rosher*, 26 Ch. D. 801, and *Blackburn* v. *McCallum*, 33 S. C. R. 65, followed. *Hutt* v. *Hutt* (1911), 20 O. W. R. 185; 3 O. W. N. 131.

Devise Over—Condition—Estate.—A testator devised all her real and personal estate to her son in fee and provided in case the son should die without issue previous to the death of her brother and sister, that they should take certain interests. The sister died in the lifetime of the

son:—Held, that, as the event, the death of the son previous to the death of both the brother and sister, could not happen, the son took an estate in fee simple. *Lillie* v. *Willis*, 20 C. L. T. 14, 31 O. R. 108.

Devise to Wife—Condition—Children.—A testator devised his estate to his wife absolutely for herself, her heirs and assigns forever, in lieu of dower, but upon the express condition that she make a will providing for two of his children, "and if she should fail or neglect to make the will, it's my will that instead of my said estate being so devised and bequeathed to her, the same shall be equally divided, share and share alike, between my said two children, their heirs and assigns forever. All the residue of my estate not hereinbefore disposed of I give and devise and bequeath unto my said wife:"—Held, that under the above devise the widow, who had complied with the condition by making the will in favour of the two children, took an estate in fee simple in lands forming part of the said residuary estate, but that she could not revoke the will, and the judgment should so declare. *In re Turner, Turner* v. *Turner*, 22 C. L. T. 389, 4 O. L. R. 578.

Devise—Condition Subsequent—Uncertainty.—Devise in fee provided devisee "comes to live and reside on the land devised during the term of his natural life;" with gift over "provided devisee does not come to reside on the said land so devised to him within one year after my decease:"—Held, that the condition as to residence of the devisee was void for uncertainty; and that it was a condition subsequent, and not a condition precedent to the acquisition of the land devised, but a condition of its retention. *In re Ross*, 24 C. L. T. 231, 7 O. L. R. 493, 3 O. W. R. 405.

Valid and Invalid Conditions.—Where a devise is made upon two conditions, one of which is void, the other, though good by itself, being coupled with the void one, will also be rejected. *Re Babcock*, 9 Chy. 427.

Held, that a "condition of re-entry," or condition strictly so called, as distinguished from a "conditional limitation," is a means by which an estate or interest is to be prematurely defeated and determined, and no other estate created in its room; and that the condition in this case was, therefore, perfectly valid. The devisees and not the heirs of J. Le B. were consequently held entitled to the land or the money representing it. *In re Melville*, 11 O. R. 626.

Selling or Incumbering.—Devise of real estate to two grandchildren in fee, with a condition as follows: "And I further will and direct, and it is an express condition of this my will and testament that none of the devisees herein . . . that is to say neither my said grandchildren . . shall either sell or mortgage the lands hereby devised to them:"—Held, an absolute and unqualified restraint on alienation, and so invalid.—Semble, had the condition been valid, the grandchildren, being the testator's heirs-at-law, could have made title as such. *Re Shanacy and Quinlan*, 28 O. R. 372.

Sons to Sell only to Each Other.—G. devised property to his three sons, M., H., and G., in fee simple and in joint tenancy, adding that they "shall not be at liberty to sell any part of my homestead farm herein willed, except to each other, and so descend to their heirs to the third generation:"—Held, that the condition in restraint of alienation was void. *Gallinger* v. *Farlinger*, 6 U. C. C. P. 512.

Conditional Devise.—The Court is never astute to construe a testator's words as importing a condition if a different meaning can be fairly given to them. Thus, a devise upon condition that the devisee makes certain payments within a given time, will, as a rule, be construed as a trust and not as a condition.

Rule applied *In re Chapman, McEwen* v. *Patterson*, 12 O. W. R. 97. The inability of devisee on trust to perform through no fault of her own, held, not to debar from benefitting by devise.

Absolute Restraint.—By his will P. T., after giving a life estate to his widow, devised lands to his son as follows: "That T. T. do inherit the same as his property on the conditions that he never will or shall make away with it by any means but keep it for his heirs:"—Held, that the condition attached to the devise was invalid, being so absolute and unqualified restraint on alienation. *Re Watson and Woods*, 14 O. R. 48.

Alienation by Will only.—E. R. W. was a devisee under the will of her father, R. R., of certain real estate in Toronto, the material parts of which will were as follows: "After the death of my wife I direct the said freehold and leasehold property to be for the benefit of my son R. and my daughters M. and E., their heirs and assigns, to be divided in the manner following." He then gave a part to the son R. and proceeded thus: "The freehold property I hold at present on Jarvis street in this city, to be divided in two lots from Jarvis street (to?) Mutual street, the lot with the house to be given to M. L. to hold for her benefit during her natural life, and to dispose of the same by will and testament only, the remaining lot thirty-five feet wide on Jarvis street, running through to Mutual street, I bequeath to my daughter E. R. and that she shall not dispose of the same only by will and testament, and if either of my said daughters shall depart this life without leaving issue, then and in such case the survivor shall be possessed of the share of the deceased sister." E. R. W. contracted to sell the property devised to her when the purchaser objected to complete the purchase on the ground that she had only a life estate in it:—Held, that E. R. W. took an estate in fee simple, which was, however, restricted by a condition against alienation in any manner, except by a testamentary instrument, and that such restraint was valid. *Re Winstanley*, 6 O. R. 315.

Testator devised as follows: "I also will that that portion of the within-mentioned lands which I have hereby bequeathed to my son William, to my son Robert, and to my son James, shall not be disposed of by them, either by sale, by mortgage, or otherwise, except by will to their lawful heirs:"—Held, that the condition imposed by the will was invalid, and that the plaintiff, one of the devisees, was entitled to hold the land freed from the restrictions above mentioned. *Heddlestone* v. *Heddlestone*, 15 O. R. 280.

After a devise to his son C., his heirs and assigns for ever, of certain lands, a testator added that his devise to C., was subject to this express condition, that he should not sell or mortgage the land during his life, but with power to devise the same to his children as he might think fit in such way as he might desire:—Held, that the case was governed by *Re Winstanley*, 6 O. R. 315, and that the property was not clothed with a trust in favour of the children, but the devisee took it in fee simple with, however, a valid prohibition against selling and mortgaging it during his life. *Re Northcote*, 18 O. R. 107.

A testator devised land to his three sons, in equal shares, in fee simple, adding, "without power to them, or any of them, to charge or alien the same, or any part thereof except by . . . will:"—Held, following *Re Winstanley*, 6 O. R. 315, a valid restraint on alienation. The three sons were the sole heirs-at-law of the testator. After becoming entitled to the possession of the land under the devise, they joined in a mortgage of it in fee to a stranger. One of the three then contracted to sell his share to the other two:—Held, that each of the devisees, by making the mortgage, had forfeited his estate under the will, and each had become entitled as heir-at-law to an undivided third of the whole, and therefore the vendor could make a good title in fee simple to his undivided share to his brothers, the purchasers. *Re Bell*, 30 O. R. 318.

Attachment by Creditors.—A testator, after devising all his real estate to his daughter, and in the event of her death without issue to trustees for his sister's children, proceeded: "Sixthly—I will and bequeath to Mrs. M., in consideration of her long services to my late brother M. and myself, as follows, viz., £20 per annum during her life, to be a charge upon the VanEvery or Mackenzie tract hereinbefore mentioned; (2) the whole of my household furniture, bedding, linen, and kitchen utensils; (3) during the minority of my aforesaid daughter the use of my present dwelling house and grounds contiguous, &c. But as these several bequests are intended for her aliment and support and not attachable by her . . . ors,

I declare that should any creditor succeed in attaching any or all of them, that they shall immediately revert to the general fund of my estate to be appropriated to the use of my said daughter:"—Held, that the reversion over of the chattels was invalid, and that the devisee under the will was entitled. *Barker* v. *Davis*, 12 U. C. C. P. 344.

Consent of Named Person.—Devise of real estate to a son with a condition as follows: "But I direct that before my said son . . . shall sell, mortgage, trade or dispose of, or encumber the said property or any part thereof, or any farm produce or timber, that he shall first obtain the consent of my sister . . . :"—Held, that the restriction being against all kinds of alienation, and in that regard absolute and unlimited, as the required consent was a condition precedent to any kind of alienation and unlimited as to time, the restraint was void. *McRae* v. *McRae*, 30 O. R. 54.

Married Woman—Limited Restraint—Anticipation.—Certain lands were devised to a married woman with the proviso that she should not alienate or incumber them until her sister should arrive at the age of forty years; and also that the devise should be for her separate use, independent of her husband's control. She applied under R. S. O. 1887, c. 132, s. 8, for an order to bind her interest, for her own benefit, in these lands:—Held, that the restraint against alienation was valid, and would have been so even if the applicant had been a feme sole. *Earls* v. *McAlpine*, 27 Chy. 164, 6 A. R. 145; *Pennyman* v. *McGregor*, 18 C. P. 132; *Smith* v. *Faught*, 45 U. C. R. 484; *Re Winstanley*, 6 O. R. 315, followed in preference to *Re Rosher*, *Rosher* v. *Rosher*, 26 Ch. D. 801.—Held, also, that the restraint on alienation was not a restraint on anticipation, within the meaning of the statute. *Re Weller*, 16 O. R. 318.

Purchasers to be Members of Testator's Family.—A testator by his will devised certain real estate to two of his nephews subject to the following condition: "But neither of my said nephews is to be at liberty to sell his half of the said property to any one except to persons of the name of O'S., in my own family; this condition is to attach to every purchaser of the said property:"—Held, that the condition was valid. *Re Watson and Woods*, 14 O. R. 48, distinguished. *O'Sullivan* v. *Phelan*, 17 O. R. 730.

Repugnancy — Invalidity — Contingent Executory Interest —Remoteness—Perpetuities.—In the early part of a will, lands were devised to the vendor, a son of the testator, in fee, and other lands were devised to other children, but in the latter part of the will there was this clause: "It is fully understood that my children have no power to make sale or mortgage any of the lands mentioned, but to go to their heirs and successors. . . . Should any of my children die childless leaving husband or wife, said husband or wife to have a third during the term of their natural life:"—Held, that the first part of this clause amounted to a total restriction upon alienation, and was repugnant to the nature of the estate given by the devise, and was therefore void. Held, that the words "die childless" in the last part of the clause should be taken to mean "die not having children or a child living at the time of such death," and this part of the clause created a contingent executory interest or estate of freehold, which, from its legal nature, would, upon the contingency happening in its favour, spring up into existence.—Held, also, that although many children of the vendor were living, none of whom was born till many years after the testator's death, and all of whom must die before the executory interest could take effect, yet the gift was not too remote, and did not infringe upon the rule against perpetuities. *Re Thomas and Shannon*, 30 O. R. 49.

Restraint against Sale—Power to Grant to Children.—A direction in a devise in fee simple that the devisee should "not sell, or cause to be sold, the above named lot, or any part thereof during her natural life, but she shall be at liberty to grant it to any of her children whom she shall think proper:"—Held, a valid restraint upon alienation.—Held, also, that the giving of a mortgage by the devisee was not a violation of the restraint. *Smith* v. *Faught*, 45 U. C. R. 484.

Restraint against Sale without Consent—Charge on Land.—Testator, after devising the use and control of all his property, real and personal, to his wife until his two sons, W. and H., were twenty-one, divided his farm between W. and H., to be possessed by them when respectively of the full age of twenty-one, subject to certain legacies to his daughters. The will then proceeded, "also my two sons H. and W. above named, give my beloved wife a comfortable support, or the sum of ten pounds annually during her natural life, said support or annuity to commence at the time my said younger son H. shall possess his share of said property. I also will that my above named sons W. and H. do not sell or transfer the said property without the written consent of my said wife, during her life." The will was registered. Some years after attaining his majority, H. mortgaged to defendant McC. without his mother's consent, and having made default in payment the land was advertised for sale. Upon a bill filed by the mother, a decree was made, declaring that according to the true construction of the will H. had no power to sell, transfer, or mortgage the land in question without her consent in writing, and McC. was restrained from selling:—Held (without deciding whether such a restraint upon alienation without a gift over was effectual, because the plaintiff had no right to require its determination, and if adverse to her contention such an opinion would not bind the heirs), that she was not entitled to reside upon the land, and thereby prevent its alienation, since there was the option of paying her in money, and the mortgage did not interfere with her right to this payment as a charge upon the land. *Armstrong* v. *McAlpine*, 4 A. R. 250.

Sale Restrained for Twenty Years.—A testator who died in 1854, devised land to his two sons in fee, "but not to be assigned to any person, except a son of his, for the term of twenty years from the day of his decease:"—Held, that the condition was not void, as in general restraint of alienation; and that the plaintiff, who claimed, in ejectment, under a title derived from the sons, in violation of this condition, could only recover such portion of the land as they were entitled to as heirs of their father. *Pennyman* v. *McGregan*, 18 U. C. C. P. 132.

Selling or Incumbering for Twenty-five Years.—A testator, after devising two parcels of land respectively to his two sons, provided as follows: "I will that the aforesaid parcels of land shall not be at their disposal at any time until the end of twenty-five years from the date of my decease. And, further, I will that the same parcels of land shall remain free from all incumbrances, and that no debts contracted by my sons W. C. and H. C. shall by any means incumber the same during twenty-five years from the date of my decease." One of the sons died about two years after his father, having devised his lot to his brother, the plaintiff, who, within the period limited by his father's will, sought to mortgage it:—Held, a valid restriction, so far as it was a restriction against the plaintiff selling and conveying the lands or incumbering them by way of mortgage within the period mentioned. *Chisholm* v. *London and Western Trusts Company*, 28 O. R. 347.

Trust—Obligation — Restraint against Mortgaging—Trusts.—Testator willed property to applicant "with the wish that he may keep the same free from mortgage as a summer residence for himself and children." — Held, that the above words created no obligation or trust upon applicant; that he was owner in fee and could sell it. The question as to the validity of the provision against mortgaging was not considered as applicant desired to sell the property. *Re Williams*, [1897] 2 Ch. 12, specially referred to, *Re Bolster* (1910), 16 O. W. R. 986, 2 O. W. N. 54.

Continuing to Bear Testator's Name.—Such a condition cannot be attached to an estate in fee simple, and a tenant in tail by barring the entail and enlarging his estate into a fee simple, defeats a condition for taking and using the testator's name. *Re Cornwallis*, 32 C. D. 388. From one point of view there appears to be a restriction on the power of alienation quite antagonistic to the quality of an estate in fee simple. The devisee cannot sell, mortgage, lease, or otherwise dispose of the land

effectually, because, up to the last moment of her life, her name may be changed. See *Bird* v. *Johnston*, 16 Jur. 976. *Re Brown and Slater*, 2 O. W. R. 101.

Conditional Limitation Over. — Held, upon the following will, devising certain lands to testator's wife for life, "and after her decease then unto her son W. his heirs and assigns for ever, provided that the said W. will pay all demands that may be against the (testator), by his having signed any promissory notes with his said son W., or any other sum or sums that he might be owing on account of his said son W., and if his said son W. should make default in paying all demands as aforesaid, or if any part thereof should be collected from any devisee in the said will mentioned, then, and in that case, he devised the said land to his daughter Margaret, her heirs and assigns for ever:" that W., the son, took a vested estate in remainder, with a conditional limitation over to his sister, in case of a certain event happening; and that his estate could be sold under 5 Geo. II., c. 7, during the lifetime of his mother. *Doe* d. *Jarvis* v. *Cumming*, 4 U. C. R. 390.

The bequest to the female legatees providing for the payment of interest to them on their shares of the fund only, so long as they were unmarried or widows, and that during the coverture of any, the interest shall accumulate, is a valid limitation as distinguished from a condition. *Heath* v. *Lewis*, 3 De G. M. & G. 956.

Legatee marrying and becoming widow not entitled to accumulations during suspense period. *White* v. *McLagan*, 10 W. R. 59.

CHAPTER XL.

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

GIFTS TO "HEIR," HOW CONSTRUED.

Gifts to the heir, whether of the testator himself, or of another, are so frequently found in wills, and where these instruments are the production of persons unskilled in technical language, the term "heir" is so often used in a vague and inaccurate sense, that to ascertain and fix its signification in regard to real and personal estate respectively, whether alone or in conjunction with other phrases which most usually accompany it, is a point of no inconsiderable importance. Like all other legal terms, the word "heir," when unexplained and uncontrolled by the context, must be interpreted according to its strict and technical import; in which sense it obviously designates the person or persons appointed by law to succeed to the real estate in question in case of intestacy. 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 the law of inheritance, 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; and which persons, if more than one, would, if there were no words to sever the tenancy, be entitled as joint tenants.

1st ed., Vol. II., p. 1.

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."

6th ed., p. 1553. *Re Waugh* (1903), 1 Ch. 744.

HEIRS OF THE BODY AS PURCHASERS.

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

1st ed., Vol. II., p. 2. *Manderville's Case*, Co. Litt. 26b; *Vernon* v. *Wright*, 7 H. L. C. 35.

"HEIR" WITH SUPERADDED QUALIFICATION.

Where a testator has thrown into the description of heir an additional ingredient or qualification, the devisee must answer the description in both particulars. Thus a devise to the right heirs male of the testator, or to the right heirs of his name, is, according to the early cases, to be read as a devise to the heir, provided he be a male, or provided he be of the 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.

1st ed., Vol. II., p. 5.

DOCTRINE EXCLUDED.

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." 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.

6th ed., p. 1559. *Doe d. Angell* v. *Angell*, 9 Q. B. 328.

WHETHER DEVISE TO HEIRS OF THE BODY, MALE OR FEMALE, APPLIES TO A PERSON NOT HEIR GENERAL.

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

1st ed., Vol. II., p. 7.

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.

6th ed., p. 1561. *Wrightson* v. *Macaulay*, 14 M. & W. 231.

HEIR MALE OF THE BODY CLAIMING BY DESCENT, MUST CLAIM THROUGH HEIRS MALE.

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

1st ed., Vol. II., p. 9.

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 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), but being also of the prescribed sex.

6th ed., p. 1561.

TECHNICAL SENSE OF "HEIR MALE" NOT ALWAYS ADOPTED.

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.

6th ed., p. 1563. *Doe d. Winter* v. *Perratt*, 9 Cl. & Fin. 606.

NEMO EST HAERES VIVENTIS.

It is clear, that no person can sustain the character of heir, properly so called, in the lifetime of the ancestor, according to the familiar maxim, nemo est hæres viventis.

1st ed., Vol. II., p. 12.

Therefore, where 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.

6th ed., p. 1565.

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.

6th ed., p. 1565.

HEIR WHEN CONSTRUED TO MEAN HEIR APPARENT OR HEIR PRESUMPTIVE.

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

Ibid.

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.

6th ed., p. 1566.

"HEIR," EXPLAINED BY CONTEXT TO DENOTE A PERSON NOT HEIR-GENERAL.

Where a testator shows by the context of his will, that he intends by the term heir to denote an individual who is not heir general, such intention, of course, must prevail, and the devise will take effect in 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.

1st ed., Vol. II., p. 18.

CAPACITY OF SPECIAL HEIR NOT AFFECTED BY HIS BEING GENERAL HEIR ALSO.

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. It scarcely requires notice that wherever the heir general is a descendant, or the brother or sister, or descendant of a brother or sister of the testator, he will be heir ex part maternâ as well as ex parte paternâ.

5th ed., p. 922. *Rawlinson* v. *Wass*, 9 Hare 673.

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.

1st ed., Vol. II., p. 21.

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 comman 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.

5th ed., p. 923. *Davis* v. *Kirk*, 2 K. & J. 301.

IN REFERENCE TO PERSONAL ESTATE, HOW CONSTRUED.

With respect to the personalty, too, it is often doubtful whether the testator employs the term "heir" in its strict and proper acceptation, or in a more lax sense, as descriptive of the person or persons appointed by law to succeed to property of this description. Where the gift to the heirs is by way of substitution, the latter construction has sometimes prevailed.

1st ed., Vol. II., p. 22.

"HEIRS OF THE BODY" CONSTRUED "ISSUE."

Where the substituted 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.

5th ed., p. 925. *Price* v. *Lockley*, 6 Bea. 180.

"HEIRS" CONSTRUED "ISSUE."

"Heirs" will also be held to mean issue, if the context equires that construction.

6th ed., p. 1571.

"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, (which under one person will, with rare exceptions, be entitled to the whole); but which will generally be satisfied by construing "heirs" to mean next of kin.

Ibid. *Re Steevens' Trusts*, L. R. 15 Eq. 110.

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. And a gift to "heirs," where that expression is construed to mean statutory next of kin, is brought by the implied refer-

ence to the statute under the same rule, except that in the latter case a widow is included as a person entitled under the statute in cases of intestacy. 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.

6th ed., p. 1573. *Low* v. *Smith*, 25 L. J. Ch. 503.

A FORTIORI WHERE REALTY AND PERSONALTY COMBINED.

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, 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.

1st ed., Vol. II., p. 22. *Wright* v. *Atkyns*, Coop. pp. 111, 123.

"HEIR" UNEXPLAINED STRICTLY CONSTRUED IN BEQUESTS OF PERSONAL ESTATE.

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, 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.

1st ed., Vol. II., p. 23.

Nor will the construction be varied by the circumstance that the gift is to the heir in the singular, and there is a plurality of persons conjointly answering to the description of heir.

1st ed., Vol. II., p. 23. *Mounsey* v. *Blamire*, 4 Russ. 384.

"HEIRS," IN THE PLURAL, SIMILARLY CONSTRUED.

And although the word used, in a gift of personal estate only, is "heirs," in the plural, it will, unless explained by the context, retain its proper sense.

5th ed., p. 929.

The construction of "heirs," "right heirs," &c., in an executory trust is treated elsewhere.

6th ed., p. 1577. Chap. XLVIII.

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. 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.

6th ed., p. 1578.

"HEIRS OR ASSIONS."

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 show that the testator used the words "or their heirs or assigns" as words of limitation, so that the legatees take absolutely.

Ibid. *Re Walton's Estate*, 8 D. M. & G. 173.

"HEIRS AND ASSIONS."

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 beir-at-law.

Ibid.

"HEIRS" HELO TO MEAN "CHILOREN" IN REGARD TO PERSONALTY.

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.

1st ed., Vol. 2, p. 23.

SAME CONSTRUCTION APPLIED IN THE CASE OF REAL ESTATE.

This construction is equally applicable to a devise of real estate.

6th ed., p. 1579. *Milroy* v. *Milroy*, 14 Sim. 48.

HEIRS OF THE BODY.

The expression "heirs of the body" will also be held to mean children, where the context requires that construction.

Ibid. *Fowler* v. *Cohn*, 21 Bea. 360.

AT WHAT PERIOO THE HEIR IS TO BE ASCERTAINED. GIFT TO TESTATOR'S HEIR.

What is the period at which the object of a devise to the heir is to be ascertained, is a question of frequent occurrence, in the determination of which, the rule that estates shall be construed to vest at the earliest possible period consistent with the will, bears a principal part. An immediate devise to the testator's own heir vests, of course, at his death, and the inter-

position of a previous limited estate to a third person does not alter the case.

6th ed., p. 1580. *Re Baker*, 79 L. T. 343. ("Right heirs").

GIFT TO THE HEIRS 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.

Ibid. *Danvers* v. *Earl of Clarendon*, 1 Vern. 35.

SAME RULE AS TO REAL AND PERSONAL ESTATE.

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

Ibid.

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.

Ibid. *Rawlinson* v. *Wass*, 9 Hare 673.

DEVISE TO THE PERSON WHO SHALL BE HEIR AT FUTURE TIME.

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 the will unless he bears the name at that time.

6th ed., p. 1581. *Thorpe* v. *Thorpe*, 1 H. & C. 326.

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; 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.

Ibid.

Fund for Heirs—Time for Distribution — Determination of Class—Discretion of Trustees.—L. died in 1899, having made a will in 1898, by which he left all his property to two trustees, to hold in trust for the benefit of the infant children of two nephews. The trustees were to use the income, according to their discretion, for the support, maintenance, and education of these children, until each reached the age of twenty-one years. The words in the will were: "And on each child attaining the age of twenty-five years, to pay to such child what they consider would be his or her share in my estate, dividing the same equally between such children living, and the children of any deceased child when such payment shall be made, such payment to be per stirpes, and not per capita," etc.—In 1904 one of the children died without issue, and in 1906 another child was born to one of the nephews. The oldest child had now reached the age of twenty-five years:—Held, that the child who had reached the age of twenty-five years was entitled to be paid her share of the corpus of the estate, which share was to be ascertained by dividing the corpus equally among the children then in esse, they being the only ones entitled to rank, as the class was then determined.—Held, that the child born after the death of the testator, but before the time for payment to the oldest child, was entitled to rank equally with the other children, as the class was not determined until then.—Held, that, as the testator had given the trustees full discretion to use the income as they might see fit, for the purposes mentioned in the will, the Court would not, in the absence of fraud or wrongdoing, interfere or direct them in this respect. *Earle* v. *Lawton*, 4 N. B. Eq. 86, 5 E. L. R. 472.

Distribution of Estate — "Heirs" — "Next in Heirship"—Period of Ascertainment.—Following a gift to the testator's widow of his real and personal estate for her life, there was this clause in a will: "My whole estate (after the death of my wife) be equally divided between my brothers Luke Gardner, Joseph Gardner, Mrs. Catharine Watkins, and my deceased sister, Mrs. Sarah A. Hutchison's children, or their heirs. Should no heirs of any of the above be alive, that it go to the next in heirship:"—Held, that the persons entitled in the first place were all the children of Luke, Joseph, Catharine, and Sarah, living at the testator's death or born afterwards during the life of the widow, per capita, and not per stirpes. The words "children or their heirs" meant "children or their issue," and gave the shares of a child dying in the lifetime of the widow to the issue of the child so dying, in substitution for, and not by descent from, the child so dying. The shares of the children entitled to share became vested at once; but if any child died in the lifetime of the widow leaving issue, the share of that child was diverted and went to such issue, and vested at once and finally in the issue, who then became the stock of descent. The words "next in heirship" meant the heirs at law to the realty and the statutory next of kin to the personalty. The heirs or next of kin are to be ascertained at the death of the person whose vested share they took. *In re Gardner*, 22 C. L. T. 119, 3 O. L. R. 343, 1 O. W. R. 157.

General Scheme of Will.—R. died in 1876, leaving a will by which he devised practically all his property to trustees, upon trust for the benefit of his children and their heirs. D. D. R., a son of the testator, died after his father, leaving him surviving a widow and five children:—Held, that the word "heirs" in the will should be construed in its strict legal and technical sense, and was intended to mean the heirs of law and not the statutory next of kin; and that the widow of the deceased son was not entitled to any part of the testator's property under his will. *Smith* v. *Robertson* (1909), 4 N. B. Eq. 252.

Devolution of Estates.—*Re Sibbett*, 7 O. W. R. 175. Under the Devolution of Estates Act, the realty vests, on the testator's death, in the personal representatives, and, unless they convey to the devisees or heirs, remains vested in them for 3 years; when, unless the personal representatives register a caution that it is still required by them, it vests in the devisees or heirs, but still remains liable for the debts.

It does not become personal property, but both the realty and personalty are assets in the hands of the personal representatives for payment

of debts, though the personalty is still the primary fund. (*Re Hopkins*, 32 O. R. 315.) Where there is a residuary gift of both, then the two classes share ratably, unless a contrary intention appears by the will.

The effect of an executor's assent in giving a legatee a right to recover personalty bequeathed to him can, perhaps, hardly be extended to the real property so as to entitle the devisee to a conveyance or possession. But, as all devises, even general ones of land, are deemed specific ever since the Wills Act, until the lands vest in the devisee, the executors are trustees for him, even during the three year period, subject to the rights of creditors and to charges under the will. See, also, *Re Ferguson*, *Bennett* v. *Clarkson*, 25 O. R. 501. *Re Read*, 12 O. W. R. 1000.

"**Heirs and Next of Kin.**"—Construed in *Rees* v. *Fraser*, 25 Chy. 253—give to both. The meaning is "my heirs who would be entitled if I died intestate. The lives must be ascertained as of the death of the testator.

The heirs are not only the living brothers and sisters, but also the descendants of those who were dead, including grandnephews and grandnieces. If the "next of kin" were alone to be considered, they could not compete with their uncles and aunts. *Crowther* v. *Cawthra*, 1 O. R. 128. But that is not the case where heirs at law are under consideration.

"To be paid in equal proportions to my heirs and personal representatives who would be entitled to the same." A gift of this kind is prima facie a gift per capita to the persons who are named either by nomination or by reference. *Capes* v. *Dalton*, 88 L. T. 129.

"**Heirs.**"—Testator devised his farm to G., directed that if G. should die without heirs the land should be sold and legacy paid, and that if testator's widow should die or marry before G. should have paid $2,000, the balance should be equally divided among the testator's heirs:—Held, that the word "heirs" in the bequest of the balance, did not include the widow; and the same construction was put upon the word "heirs" in a residuary clause contained in the subsequent part of the will. *Bateman* v. *Bateman*, 17 Chy. 227.

Change in Law.—A testator, who owned lands in England and Ontario in fee simple, devised the same to his wife for life, and after her decease gave and devised them unto his "right heirs for ever:"—Held, that 14 & 15 Vict. c. 6, C. S. U. C. c. 82, under which defendants claimed to share in the property, did not apply, and, therefore, the eldest son took the estates here as in England. *Tylee* v. *Deal*, 19 Chy. 601.

A testator, by his will, made on the 14th August, 1850, devised certain land to his widow for life, and after her death, to two nephews, and in the case of the death of them, or either of them, in his own lifetime, he devised the shares of such deceased to the heir-at-law or heirs-at-law of each deceased, his, her or their heirs and assigns. The Act commonly known as the Act abolishing primogeniture, 14 & 15 Vict. c. 6, was passed on the 2nd August, 1851, and came into force on the 1st January, 1852. One nephew of the testator died in 1858, leaving him surviving two sons and two daughters. The testator died in 1866, and his widow in 1870:—Held, that the Act abolishing primogeniture did not apply: (1) because the will was made before it was passed or took effect; and (2) because the land had been lawfully devised by the person who had died seised, and, therefore that the eldest son of the deceased nephew, as his common law heir, was entitled to the remainder in fee expectant upon the death of the widow. *Tylee* v. *Deal*, 19 Chy. 601, approved. *Baldwin* v. *Kingstone*, 18 A. R. 63.

A testator, who died on the 8th November, 1867, by his will, made on the 15th October, 1867, devised lands in Ontario to his wife until her death or marriage, and upon her death or marriage to his son, "should he be living at the happening of either of said contingencies," and if not then living "unto the heirs of the said (son)." The son died in July, 1885, intestate and unmarried, and the widow died in February, 1887:—Held, that the Act abolishing heirship by primogeniture, 14 & 15 Vict. c. 6, applied, and that all the brothers and sisters of the son were his "heirs" and entitled to take under this devise. *Tylee* v. *Deal*, 19 Chy.

601, and *Baldwin* v. *Kingstone*, 18 A. R. 63, distinguished. *Sparks* v. *Wolf*, 25 A. R. 326, 29 S. C. R. 585.

"**Heirs-at-Law.**"—The father of the plaintiff's deceased husband, by his will, left all his property to trustees, of whom the defendant was the survivor, in trust to convey and transfer it, after the death of his wife, unto all his surviving children, share and share alike, and their heirs for ever; and, by a codicil, directed that the share of the plaintiff's husband should not be paid over or conveyed to him, but kept invested by the trustees, and the income paid to him during his life for his sole benefit, and after his death that such share should be paid over or conveyed to those "who may then be the heirs-at-law of my said son," share and share alike. The property in the hands of the defendant, as surviving trustee, at the time of the death of this son, was all real estate:—Held, that the words above quoted signified those who would take real estate as upon an intestacy. *Coatsworth* v. *Carson*, 24 O. R. 185, followed. *Stephens* v. *Beatty*, 27 O. R. 75.

"**Heirs and Next of Kin.**"—A testator by the residuary clause in his will gave and bequeathed "all the remainder of my real and personal estate whatsoever of which I may die possessed or be in any way entitled to, to my dear wife A., and on her decease the same to go [to] my heirs and next of kin:"—Held, that the son of a deceased daughter, who had predeceased the testator, was entitled to a share in such residue (personal as well as real), notwithstanding the fact that under the will such grandson was entitled to a legacy of $4,000. *Rees* v. *Fraser*, 26 Chy. 233.

"**My Own Right Heirs.**"—A testator by his will directed that his trustees should, in certain events, after the death of his wife and daughter, sell all his estate, real and personal, and divide the same equally amongst him "own right heirs" who might prove their relationship, &c.:—Held, that the conversion directed created a blended fund derived from realty and personalty, to be distributed equally among the same class of persons, and that the words "my own right heirs" signified those who would take real estate as upon an intestacy, and not next of kin, and that children of any deceased heirs-at-law were entitled to share per stirpes. *Coatsworth* v. *Carson*, 24 O. R. 185.

Upon appeal from the Master's report on a reference for the administration of the estate of the testator whose will was construed in *Coatsworth* v. *Carson*, 24 O. R. 185:—Held, having regard to the judgment in that case, that the "right heirs" were to be ascertained at the date of the death of the testator's daughter, and among them the whole of the estate was to be divided equally, share and share alike. The expression "per stirpes" in the former judgment was improvidently used, due weight not having been given to the word "equally." *In re Ferguson, Bennett* v. *Coatsworth*, 25 O. R. 591.

Condition Precedent.—A testator, who left him surviving, his widow and one daughter, devised specifically described property to his daughter, and the residue of his estate to his executors upon trust for his widow and daughter in certain events with limited power to the daughter to dispose thereof by will. He then directed that "in case my daughter shall have died without leaving issue her surviving and without having made a will as aforesaid, my trustees shall (after the death of my wife if she survive my said daughter) sell all my estate, real and personal, and divide the same equally amongst my own right heirs, who may prove to the satisfaction of my said trustees their relationship within six months from the death of my said wife or daughter, whichever may last take place." The daughter died unmarried in her mother's lifetime, having made a will assuming to dispose of the residue:—Held, that the daughter was entitled to take as the "right heir" of the testator. *Bullock* v. *Downes*, 9 H. L. C. 1; *Re Ford, Patten* v. *Sparks*, 72 L. T. N. S. 5; *Brabant* v. *Lalonde*, 26 O. R. 379; and *Thompson* v. *Smith*, 23 A. R. 29, referred to. Judgments in *Coatsworth* v. *Carson*, 24 O. R. 185, and *In re Ferguson, Bennett* v. *Coatsworth*, 25 O. R. 591, reversed. *In re Ferguson, Bennett* v. *Coatsworth*, 24 A. R. 61.

Under a devise to the testator's "own right heirs" the beneficiaries would be those who would have taken in the case of intestacy unless a contrary intention appears, and where there was a devise to the only daughter of the testator conditionally upon events which did not occur, and, under the circumstances, could never happen, the fact of such a devise was not evidence of such contrary intention and the daughter inherited as the right heir of the testator. *In re Ferguson, Turner* v. *Bennett, Carson* v. *Coatsworth*, 28 S. C. R. 38.

"My Lawful Heirs"—Period of Ascertainment.—The general rule that where a testator devises property to his "heirs" the heirs are to be ascertained at the time of his death, is not affected by the fact that the person answering that description is the taker of a preceding particular interest under the will. Where, therefore, a testator after a gift to his wife and only child for their joint lives and to the survivor for life directed that "at the decease of both, the residue of my real and personal property shall be enjoyed by and go to the benefit of my lawful heirs," the child was held entitled to the residue. *Re Ford, Patten* v. *Sparke*, 72 L. T. N. S. 5, applied. *Thompson* v. *Smith*, 23 A. R. 20, 27 S. C. R. 628.

Gift to Niece or Heirs—Predecease of Niece.—A testator, by his will, after a provision in favour of his wife for life, directed that at the death of his wife any money that might then be remaining should be equally divided and paid to two nephews and two nieces, naming them, or their heirs, executors, or assigns. One of the nieces predeceased the testator, having a husband and children:—Held, that the gift to the deceased niece did not lapse, and that her heirs were entitled to her share, and that her heirs were those who would have taken her personal property under the Statute of Distributions in case of her dying intestate possessed of personal property. *In re Wrigley*, 20 C. L. T. 387, 32 O. R. 108.

CHAPTER XLI.

GIFTS TO FAMILY—DESCENDANTS—ISSUE—ETC.

CONSTRUCTION OF THE WORD "FAMILY."

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

1st ed., Vol. II, p. 25. *Harland* v. *Trigg*, 1 Br. C. C. 142.

"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."

6th ed., p. 1583.

If land be devised to a stock, or family, or house, it shall be understood of the heir principal of the house.

6th ed., p. 1584.

And this construction has been adopted in other cases, where the gift was one of real estate by itself.

Ibid. *Wright* v. *Atkyns*, 17 Ves. 255, 19 Ves. 299.

"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.

Ibid. *Burt* v. *Hellyar*, L. R. 14 Eq. 160.

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), or a mixed gift of realty and personalty, the primary meaning of "family" is children. 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. 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. 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.

Ibid. *Gregory* v. *Smith*, 9 Ha. 708.

"FAMILY" DOES NOT INCLUDE PARENTS.

Where the gift is to the families of named persons, the parents are excluded. It may also he laid down, as a general rule, that a gift to the "family" of a particular person does not include a husband, a wife, or collateral relations, or descendants of children, whether living or dead.

6th ed., p. 1585.

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.

Ibid.

WHERE "FAMILY" CONSTRUED "RELATIONS."

The word "family" has also been construed as synonymous with "relations."

Ibid. *Cruwys* v. *Colman*, 9 Ves. 319.

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, 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. It may mean ancestors. "In one sense it means the whole household, including servants and perhaps lodgers. 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. In the sense I have just mentioned the family of A. includes A. himself; A. must be a member of his own family. In a third sense the word includes children only; thus when a man speaks of his wife and family he means his wife and children. Now every word which has more than one meaning, has a primary meaning; and if it has a primary meaning, you want a context to find another. What then is the primary meaning of "family"? It is "children": that is clear upon the authorities which have been cited; and independently of them I should have come to the same conclusion."

5th ed., p. 941. Per Cur. *Pigg* v. *Clarke*, 3 Ch. D., at p. 674. *Re Hutchinson and Tenant*, 8 Ch. D. 540. *Barnes* v. *Patch*, 8 Ves. 604.

GENERAL REMARK ON PRECEDING CASES.
"TO A. AND HIS FAMILY."

It should seem, then, that a gift to the "family" either of the testator himself, or of another person, will not be held to be void for uncertainty, unless there is something special creating that uncertainty. The subject-matter and the context of the will are to be taken into consideration, and generally where personal estate is given to A. and his family, the word "family" will not be rejected as surplusage, or (which amounts to the same thing) treated as a word of limitation, but will give a substantive interest to the children or other persons indicated.

5th ed., p. 942. *Beales* v. *Crisford*, 13 Sim. 592.

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.

5th ed., p. 943.

WORD "DESCENDANTS," HOW CONSTRUED.

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

6th ed., p. 1587. *Ralph* v. *Carrick*, 11 Ch. D. 873.

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.

5th ed., p. 944. *Best* v. *Stonehewer*, 2 D. J. & S. 537.

GIFT TO DESCENDANTS; THEY TAKE PER CAPITA.

Under a gift to descendants equally, it is clear that the issue of every degree are entitled per capita, i.e., each individual of the stock takes an equal share concurrently with, not in the place of, his or her parent. And even where the gift is to descendants simply, it seems that the same mode of distribution prevails; unless the context indicates that the testator had a distribution per stirpes in his view.

1st ed., Vol. II., p. 32.

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.

5th ed., p. 945. *Smith* v. *Pepper*, 27 Bea. 86.

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.

6th ed., p. 1589. *Ralph* v. *Carrick*, 11 Ch. D. 873.

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.

5th ed., p. 945.

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." But "descendants" is less flexible than "issue."

6th ed., p. 1590.

BEQUEST TO "ISSUE," HOW CONSTRUED.

The word "issue," when not restrained by the context, is co-extensive and synonymous with descendants, comprehending objects of every degree. And here the distribution is per capita, not per stirpes.

1st ed., Vol. II., p. 33.

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; if A. survives the testator other considerations may arise. Different rules apply according to whether the gift is of real estate only, or of personal estate only, or of real and personal estate together.

6th ed., p. 1591.

DEVISE OF REAL ESTATE TO ISSUE.

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.

1st ed., Vol. II., p. 34.

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.

6th ed., p. 1592.

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.

5th ed., p. 948.

DISTRIBUTION PER CAPITA OR PER STIRPES.

To return to gifts of personal estate. It has been already mentioned 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. And a gift to the issue of two or more persons follows the same rule. 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, in which case children are not allowed to take concurrently with their parent. The manner in which the stocks are to be ascertained has also been discussed.

6th ed., p. 1592. *Surridge* v. *Clarkson*, 14 W. R. 979. See p. 773.

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. 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 show that such was not his intention, that construction must of course prevail."

6th ed., p. 1593. *Cancellor* v. *Cancellor*, 2 Dr. & S. 198.

But a contrary intention may appear.

Ibid. Davis v. *Bennett*, 4 D. F. & J. 327.

SUBSTITUTIONAL GIFTS.

Again, where the gift to the issue is substitutional, or quasi-substitutional, 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, the issue of each of the deceased persons taking per capita between themselves.

Ibid. Gowling v. *Thompson*, L. R. 11 Eq. 366 n.

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.

Ibid. *Southam* v. *Blake*, 2 W. R. 446.

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.

Ibid.

According to the principle laid down in Ross v. Ross and Ralph v. Carrick, 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.

6th ed., p. 1595. *Ross* v. *Ross*, 20 Bea. 645. *Ralph* v. *Carrick*, 11 Ch. D. 873.

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. 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 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. 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.

6th ed., p. 1595. *Surridge* v. *Clarkson*, 14 W. R. 979. *Lee* v. *Lee*, 1 Dr. & Sm. 87.

SUBSTITUTIONAL GIFT.

Where the gift to the issue is substitutional a somewhat different rule prevails.

Ibid.

"ISSUE" EXPLAINED TO MEAN CHILDREN.

The word "issue," however, may be, and frequently is, explained by the context to bear the restricted sense of "children."

6th ed., p. 1596. *Ralph* v. *Carrick*, 11 Ch. D. 883.

REFERENCE TO "FATHER" OR "MOTHER."

Where a will declares that in the event of the deaths of original devisees or legatees before a specified time, their issue shall take the shares which the father or mother of such issue

would have taken if then living, it is obvious that issue must be construed to mean children.

5th ed., p. 949.

OR TO "PARENT."

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.

6th ed., p. 1597. *Sibley* v. *Perry*, 7 Ves. 522.

EFFECT OF GIFT OVER ON FAILURE OF ISSUE.

Whether the so-called rule in Sihley 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.

6th ed., p. 1598. *Ross* v. *Ross*, 20 Bea. 645.

"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." Even without the latter circumstance it is difficult to see how, if restricted at all, the term can mean anything hut children, unless it means issue living at a particular period.

5th ed., p. 951. *Pope* v. *Pope*, 14 Bea. 591.

GIFT TO ISSUE REFERRED TO AS GIFT TO CHILDREN.

A gift to issue may also he restricted to children by a codicil, or another clause of the will, referring to it as a gift to "children," or hy declaring the trusts by reference to trusts for children.

5th ed., p. 952.

EFFECT WHERE WORDS "ISSUE" AND "CHILDREN" ARE USED INDIFFERENTLY.

Difficulty, however, often arises from the testator having used the words issue and children synonymously, rendering it necessary therefore, in order to avoid the failure of the gift for uncertainty, that the prevalency of one of these respective terms should he 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 distrihution —viz., to each, or their respective children one-fourth, followed hy a gift to survivors, in case any of them should he dead without issue, the word "children" was not restrictive of "issue" previously mentioned, the videlicet heing 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.

1st ed., Vol. II., p. 37.
Wyth v *Blackman*, 1 Ves. sen. 196. *Harley* v. *Mitford*, 21 Bea. 280.

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.

6th ed., p. 1602.

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 the will.

Ibid.

THE RULE IN RIDGEWAY V. MUNKITTRICK.

The well-known dictum of Lord St. Leonards in the case of Ridgeway v. Munkittrick 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."

1st ed., Vol. II., p. 356 n. *Ridgeway* v. *Munkittrick*, 1 Dr. & W. 84.

A sounder, or at any rate a safer, rule is to be found in the observations of 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, '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.'"

Head v. *Randall*, 2 Y. & C. C. C. p. 235.

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.

6th ed., p. 1604. *Re Corrie's Will*, 32 Bea. 426.

"ELDEST ISSUE MALE."

A gift to the "eldest issue male" of a person primâ facie means his eldest son.

Ibid.

ILLEGITIMATE CHILDREN.

A gift to the "issue" of a person may include his illegitimate children, if the context of the will allows that construction.

Ibid.

GIFT TO NEXT OF KIN, HOW CONSTRUED.

A devise of land or bequest of 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.

Ibid. *Withy* v. *Mangles*, 4 Bea. 358, 10 Cl. & Fin. 215.

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.

6th ed., p. 1605. *Elmsley* v. *Young*, 2 My. & K. 780.

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.

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.

6th ed., p. 1606. *Withy* v. *Mangles*, 10 Cl. & Fin. 215.

The degrees are reckoned according to the civil law, so that kindred of the half-blood stand on equal ground with those of the whole blood.

Ibid. *Grieves* v. *Rawley*, 10 Hare, 63.

SECUS, WHERE STATUTE OF DISTRIBUTION IS REFERRED TO.

A reference to the statute, whether express, or implied from a mention of intestacy, 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.

Ibid. *Re Gray's Settlement* (1896), 2 Ch. 802.

"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. 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 a share. But a husband cannot take even under a gift of this nature.

Ibid.

Lee v. *Lee*, 29 L. J. Ch. 788; *Starr* v. *Newberry*, 23 Bea. 436; *Watt* v. *Watt*, 3 Ves. 244.

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." 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, or a different 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.

6th ed., p. 1607. *Re Gratton's Trusts*, 26 L. J. Ch. 648.

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.

Ibid. *Day* v. *Barnard*, 1 Dr. & Sm. 351.

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, 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.

Ibid. *Re Watson's Trusts*, 55 L. T. 316.

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. This mode of distribution would be excluded by an express direction to divide in equal shares, but not by a mere direction to take as tenants in common, without specifying the shares, nor by the circumstance that the description excludes a person, (viz. the widow) who would have taken a share

in case of actnal intestacy, the whole fund heing divided among the othcrs as if they alone had been entitled under the statute.

6th ed., p. 1608.

The refcrence to the statute must, however, bc unamhiguous. Thus a gift to thc "ncxt of kin" of a marricd woman "as if she had died unmarried" has heen held too doubtful a reference to the statute to let in any but the nearest relations. 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.

6th ed., p. 1609.

CONSTRUCTION OF GIFT TO NEXT OF KIN, EXCLUSIVE OF A.

Where the personal property is bequeathed to the persons, exclusive of A., who under the statuto 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 he the testator's next of kin.

Ibid. *Re Taylor*, 52 L. T. 839.

EXCLUSION BY IMPLICATION.

If a testator bcqueaths 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 "otfier." 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.

Ibid. *Cooper* v. *Denison*, 13 Sim. 290.

ASSUMPTION OF NAME.

CHANGE OF NAME BY MARRIAGE.

Where there is a devise of land to the "first and nearest of my kindred heing 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 hy an assumption of it hy royal license. According to some of the older cases, a woman 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, or even before the devise takes effect.

Ibid. *Leigh* v. *Leigh*, 15 Ves. 92.

GIFT TO NEXT OF KIN EX PARTE MATERNA.

Under a bequest to the next of kin, ex parte maternâ, a person who happens to be next of kin on thc father's, as well as on the mother's side, will he entitled, unless the testator has expressly excluded the former.

6th ed., p. 1610. *Gundry* v. *Pinniger*, 14 Bea. 94.

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.

6th ed., p. 1611. *Pycroft* v. *Gregory*, 4 Russ. 526.

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.

Ibid. *Re Fergusson's Will* (1902), 1 Ch. 483.

ILLEGITIMATE NEXT OF KIN.

The principle recognized in Seale-Hayne v. Jodrell, namely, that if a testator in one part of his will treats named illegitimate relations as legitimate, he may fairly be presumed to include them in a gift to legitimate relations as a class, applies to gifts to next of kin.

6th ed., p. 1611. *Seale-Hayne* v. *Jodrell* (1891), A. C. 304. *Re Wood* (1902), 2 Ch. 542.

"LEGAL REPRESENTATIVES" OR "PERSONAL REPRESENTATIVES," HOW CONSTRUED.

The construction of the words "legal representatives," 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; but as these persons sustain a fiduciary character, it is improbable that the testator should intend to make them beneficial objects of gift; and almost equally so, that he should mean them to take the property as part of the general personal estate of their testator or intestate, which is, in effect, to make him the legatee. Accordingly, in numerous cases, the term "legal representative," or "personal representative," has been construed as synonymous with next of kin, or rather as descriptive of the person or persons taking the personal estate under the Statutes of Distribution, who may be said, in a loose and popular sense, to "represent" the deceased. Consequently, if the deceased left a widow, she will be included. But a husband is not entitled under such a gift.

1st ed., Vol. II., p. 39. *Doody* v. *Higgins*, 2 K. & J., 729.

In order, however, that "representatives" (with or without 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.

6th ed., p. 1612. *Cotton* v. *Cotton*, 2 Bea. 67.

In these two cases the gift to the person named was immediate; a circumstance which will be observed upon in the sequel.

6th ed., p. 1613. See p. 785.

"REPRESENTATIVES."

The same principle of construction applies where the gift is to "the representatives," without the addition of "legal" or "personal." 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.

6th ed., p. 1614. *Re Crowford's Trusts*, 2 Dr. 230.

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.

Ibid. *Wolter* v. *Mokin*, 6 Sim. 148.

GIFT TO "EXECUTORS OR ADMINISTRATORS."

A gift to "executors" or "administrators" 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.

6th ed., p. 1615. *Re Clay*, 54 L. J. Ch. 648.

EFFECT OF ADDED WORDS.

A testator may also show 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."

Ibid. *Stockdale* v. *Nicholson*, L. R. 4 Eq. 359.

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. 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 not the statutory next of kin, are meant, and they take as joint tenants. 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."

6th ed., p. 1615. *Long* v. *Blackall*, 3 Ves. 486, *Re Morgan's Trust*, 2 W. R. 439.

Where "representatives" means the statutory next of kin the manner and proportions in which they take are regulated by the statute, unless they are expressly directed to take equally.

6th ed., p. 1616.

Where "representatives" means the true next of kin, they take as joint tenants.

Ibid. *Stockdale* v. *Nicholson*, L. R. 4 Eq. 359.

"PERSONAL REPRESENTATIVES" HELD TO MEAN "DESCENDANTS."

In some cases, however, "personal representatives" has been held to mean "descendants."

Ibid. *Atherton* v. *Crowther*, 19 Bea. 448.

"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.

6th ed., p. 1617. *Appleton* v. *Rowley*, L. R. 8 Eq. 139.

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 or personal representatives. 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. And a trust for children which fails, or a clause of forfeiture on alienation or bankruptcy, which is not called into action, interposed between 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.

6th ed., p. 1617. *Devall* v. *Dickens*, 9 Jur. 550. *Re Hall* (1903), W. N. 24.

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.

Ibid. *Spence* v. *Handford*, 27 L. J. Ch. 767.

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 her in case of his death.

6th ed., p. 962. *Chapman* v. *Chapman*, 33 Beav. 556.

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 the representatives are to take in equal shares, or that they are to take only the share which the original legatee would have taken, or otherwise indicates that they are to take beneficially, "representatives" will generally be held to mean statutory next of kin, unless the words of division can be referred to the original legatees.

6th ed., p. 1610. *Wing* v. *Wing*, 24 W. R. 878.

Those cases in which the words "executors and administrators" are not used as words of limitation must now be considered.

6th ed., p. 1620.

GIFT TO "EXECUTORS OR ADMINISTRATORS" AS PURCHASERS.

Gifts to "executors" or "executors or administrators" are more strictly construed than gifts to "representatives," and consequently a substitutional gift to "executors" will not, without further words, enure for the benefit of the next of kin.

6th ed., p. 1620. *Re Clay*, 54 L. J. Ch. 648. *Re Valdez's Trust*, 40 Ch. D. 150.

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. And a gift to the

"executors" or "representatives" of A. (who is dead at the date of the will,) receives the same construction.

6th ed., p. 1621. *Trethewy* v. *Helyar*, 4 Ch. D. 53.

WHETHER EXECUTORS OR ADMINISTRATORS ARE ENTITLED FOR THEIR OWN BENEFIT.

But of course a testator may add explanatory words which show that by "executors or administrators" he means next of kin.

Ibid.

Unless a contrary intention appears by the context, whatever is bequeathed to the executors or administrators of a person vests in them as part of his personal estate.

Ibid. *Stocks* v. *Dodsley*, 1 Kee. 325.

And the same rule prevails though the original gift is immediate, and the legatee dies in the testator's lifetime, or is dead at the date of the will.

Ibid. *Long* v. *Watkinson*, 17 Bea. 471.

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.

5th ed., p. 965. *Dixon* v. *Dixon*, 24 Bea. 135.

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

6th ed., p. 1621.

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 show that the testator's intention is clearly so; but that the person so constituted will, in the absence of a clear intention to the contrary, take the property as part of the estate of the person whose representative he is, and not beneficially.

5th ed., p. 966. *Holloway* v. *Clarkson*, 2 Hare 523.

CONSTRUCTION OF GIFT TO EXECUTORS 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.

6th ed., p. 1622. Chapter XVIII.

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.

Ibid.

The question whether a bequest to an executor is beneficial or fiduciary, generally arises with reference to residuary gifts, but sometimes it arises with reference to a specific or pecuniary bequest.

Ibid.

BENEFICIAL LEGACY TO EXECUTOR GENERALLY PRESUMED TO BE GIVEN TO HIM IN THAT CHARACTER.

When a testator gives to his executors, describing them as such, a specific or pecuniary legacy, which is clearly beneficial, the general rule, in the absence of indication of intention to the contrary, is to regard the legacy as given to the persons so described in their character of executors. And accordingly no such person will be entitled to claim the legacy unless he undertakes the duties of the office to which he has been appointed. "Nothing is so clear as that if a legacy is given to a man as executor, whether expressed to be for care and pains or not, he must, in order to entitle himself to the legacy, clothe himself with the character of executor," either by proving the will, or by taking upon himself the duties of executor.

Ibid. Lewis v. *Mathews*, L. R. 8 Eq. 277.

Thus, if a testator says "I give 50*l.* to A. as my executor," or "for his trouble," or "I appoint A. my executor, desiring him to accept 100*l.*," or if he appoints A. his executor and in a subsequent part of the will gives a legacy to "the said A.," 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, or even if the appointment as executors follows the bequest of the legacy, in all such cases the legacy is regarded as annexed to the executorship.

6th ed., p. 1623.

ADDITIONAL EXECUTOR.

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.

Ibid. Hillersdon v. *Grove*, 21 Bea. 518.

THE PRESUMPTION MAY BE REBUTTED BY INDICATION OF CONTRARY INTENTION.

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.

5th ed., p. 967. *Stackpoole* v. *Howell*, 13 Ves. 417.

WHAT WILL BE SUFFICIENT TO INDICATE CONTRARY INTENTION.

A renouncing executor will he entitled to claim his legacy, if he can show that the testator intended him to take independently of his office hy the context of the bequest, or hy indications of such intention appearing in other parts of the will, or even, as has heen said, hy adducing parol evidence of such intention.

5th ed., p. 967

WORD EXPRESSIVE OF REGARD AND AFFECTION.

The presumption may, accordingly, be rehutted, if the hequest itself contains exprcssions indicating that the testator's motive in giving the legacy was that of personal regard and affection, and not to provide a remuneration for trouhle in administering the estate.

5th ed., p. 967. *Cockerell* v. *Barber*, 2 Russ. 585.

MENTION OF TESTATOR'S RELATIONSHIP TO THE LEGATEE-EXECUTOR.

Similarly, the description of a legatee named as executor hy his degree of relationship to the testator has been held sufficient to rehut the presumption that the legacy is annexed to the office.

6th ed., p. 1624. *Compton* v. *Bloxham*, 2 Coll. 201.

The presumption has in several cases heen held to he rebutted where a legacy to a person named executor was given in remainder expectant on the determination of a life-interest.

6th ed., p. 1624. *Wildes* v. *Davies*, 22 L. J. Ch. 495.

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 he rebutted hy 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 suhsequent part of the will, or that the appointment is made hy the will and the legacy is given by a codicil to the person so appointed, merely naming him.

5th ed., p. 970. *Stackpoole* v. *Howell*, 13 Ves. 417.

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 as-

sumption of the character of an executor to entitle them to claim their legacies.

5th ed., p. 971.

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. And he may prove at any time before the estate is fully administered. Proving the will is primâ facie regarded as an acceptance of the trust.

5th ed., p. 971. *Hollingsworth* v. *Grasett*, 15 Sim. 52. *Mucklow* v. *Fuller*, Jac. 198.

ACTING AS EXECUTOR.

It will also be a sufficient assumption of office if the legatee, though he does not prove the will, unequivocally shows by his conduct that he intends to perform his duty as executor.

5th ed., p. 971.

INCAPACITY TO ACT.

But in order to entitle an executor-legatee to his legacy he must either prove or act under the will. He will not be entitled to the legacy, by its being shown that he was incapacitated from undertaking the office by age and infirmity, or illness, or by death before he had time to prove the will.

5th ed., p. 971. *Griffiths* v. *Pruen*, 11 Sim. 202.

PROBATE FRAUDULENTLY OBTAINED.

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 trust of the will; à fortiori if in consequence of misconduct as executor he is restrained from interfering in the administration of the estate.

5th ed., p. 971. *Harford* v. *Browning*, 1 Cox. 302.

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, 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. 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.

6th ed., p. 1627. *Baker* v. *Martin*, 8 Sim. 25. *Re Muffett*, 55 L. T. 671, 56 L. T. 685.

GIFTS TO "RELATIONS," HOW CONSTRUED.
OBJECTS OF A GIFT TO RELATIONS DETERMINED BY STATUTES OF DISTRIBUTION.

Tho word relations taken in its widest extent embraces an almost illimitahle range of ohjects; for it comprehends persons of every degree of consanguinity, however remote, and hence, unless some line were drawn, the effect would he, that every such gift would he void for uncertainty. In order to avoid this consequence, recourse is had to the Statutes of Distrihution; and it has been long settled, that a hequest to relations applies to the person or persons who would, by virtue of thosc statutes, take the personal estate under an intestacy, either as next of kin, or hy representation of next of kin.

1st ed., Vol. II., p. 45. *Re Caplin's Will*, 2 Dr. & Sm. 527.

AS TO REAL ESTATE.

It was formerly douhted whether this construction extended to devises of real estate, hut the affirmative was decided in the case of Doe d. Thwaites v. Over.

Ibid. and 6th ed., p. 1628. *Doe d. Thwaites* v. *Over*, 1 Taunt. 263.

The rule which makes the Statutes of Distrihution 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 therehy 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 hrother, of the testator.

Ibid. and 6th ed., p. 1628. *Rayner* v. *Mowbray*, 3 B. C. C. 234.

TO "RELATION" IN THE SINGULAR.

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

1st ed., Vol. II., p. 46.

"RELATIVES."

The expressions "hlood rclations" and "relatives" have the same meaning as "relations."

6th ed., p. 1629. *Salusbury* v. *Denton*, 3 K. & J. 529.

"NEXT OF BLOOD."

In a deed, a limitation of land to the "ncxt of hlood," or "nearest of hlood," of A. would, it scems, 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. 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.

Ibid.

WHETHER "RELATIONS" TAKE PER STIRPES OR PER CAPITA.

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 proportionately among the stocks, not equally among the several individual objects of every degree.

1st ed., Vol. II., p. 46.

EFFECT OF WORDS DIRECTING AN EQUAL DISTRIBUTION.

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

1st ed., Vol. II., p. 47.

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.

6th ed., p. 1631. *See Fielden* v. *Ashworth*, contra. L. R. 20 Eq. 410.

"NEAR" AND "NEAREST" RELATIONS.
"AS SISTERS, NEPHEWS, AND NIECES."

The objects of a gift to "relations" are not varied by its being associated with the word "near." But where the gift is to the "nearest relations," the next of kin will take, to the exclusion of those who, under the statute, would have been entitled by representation. Thus, surviving brothers and sisters would exclude the children of deceased brothers and sisters, or a living child or grandchild, the issue of a deceased child or

grandchild. Where, however, the testator added to a devise to nearest relations, the words "as sisters, nephews, and nieces," Sir 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.

6th ed., p. 1632. *Re Nash*, 71 L. T. 5.

RELATIONS OF THE HALF-BLOOD.

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.

1st ed., Vol. II., p. 48.

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.

6th ed., p. 1632. *Re Deakin* (1894), 3 Ch. 565.

Again, a testator may be his own dictionary; that is, he may by his language show that he uses the term "relations" as including illegitimate relations.

6th ed., p. 1633.

RELATIONS BY AFFINITY.

A gift to next of kin or relations, of course, does not extend to relations by affinity, 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.

1st ed., Vol. II., p. 49.

HUSBAND OR WIFE.

It is clear that a gift to next of kin or relations does not include a husband or wife; and such has been also the adjudged construction of a bequest to "my next of kin, as if I had died intestate;" 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."

6th ed., p. 1633. *Watt* v. *Watt*. 3 Ves. 244.

POWER TO APPOINT TO RELATIONS.

It is explained elsewhere 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 power fails to exercise it, and a gift is consequently implied in favour of the objects of the power, the persons who take are the statutory next of kin.

Ibid. *Cole* v. *Wade*, 16 Ves. 27. Chapter XXIII.

GIFTS "TO POOR RELATIONS," HOW CONSTRUED.

A difficulty in construing the word relations sometimes arises from the testator having superadded a qualification of an indefinite nature; as where the gift is to the most deserving of his relations; or to his poor or necessitous relations. In the former case, the addition is disregarded, as being too uncertain; 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. In an early case 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.

1st ed., Vol. II., p. 49. *Widmore* v. *Woodroffe*, Amb. 636.

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.

6th ed., p. 1635. Ante p. 116.

"NEPHEWS," "FIRST COUSINS," &c., DO NOT INCLUDE GREAT NEPHEWS OR SECOND COUSINS.

"COUSINS" MEANS FIRST COUSINS.

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," nor a great grand-nephew in a gift to "grand-nephews." So descendants of first cousins will not take under a gift to "first cousins or cousins german;" nor a first cousin once removed under a gift to second cousins. And "cousins" primâ facie means first cousins. Again, relations by affinity do not, without the aid of a context, take under gift to "relations" generally, or to relations of a particular denomination, as nephews and nieces. And a gift to nephews or nieces

will not include all great-nephews or great-nieces, or all nephews or nieces by marriage, 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.

Ibid.

Re Parker, 17 Ch. D. 262; *Stevenson* v. *Abingdon*, 31 Bea. 305; *Hibbert* v. *Hibbert*, L. R. 15 Eq. 372.

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.

6th ed., p. 1636. *James* v. *Smith*, 14 Sim. 214.

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 or wife 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. And under corresponding circumstances first cousins once removed may take under a gift to "second cousins." 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.

6th ed., p. 1637.

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.

Ibid. *McHugh* v. *McHugh* (1908), 1 Ir. 155.

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. But if the testator has no nephews or nieces in the primary

sense of the word, the door is open to admit the nephews and nieces of his wife.

Ibid. *Wells* v. *Wells*, L. R. 18 Eq. 504.

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, 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.

6th ed., p. 1638. *Re Cozens* (1903), 1 Ch. 138.

And the larger construction may after all be excluded by the context.

6th ed., p. 1638.

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.

Ibid. *Caldecott* v. *Harrison*, 9 Sim. 457.

"ELDEST," &c.

The meaning of "eldest," "youngest," "next eldest," and similar expressions, is discussed in connection with gifts to children.

6th ed., p. 1639. Chap. XLII.

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: and so with regard to every other degree of relationship. But, of course, this construction may be excluded by clear words.

Ibid. *Grieves* v. *Rawley*, 10 Ha. 63.

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.

Ibid. Chapter XXXV.

ILLEGITIMATE RELATIONS.

A gift to "brothers," "nephews," "cousins," and other classes of relations is primâ facie confined to persons who are legitimate relations, but this rule may be excluded by the context of the will and the facts in the particular case.

Ibid. *Seale-Hayne* v. *Jodrell* (1891), A. C. 304.

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. Thus, a gift to A. for life and after his death to his brothers, will include the brothers born during the life of A.; and the same has been held with regard to nephews and nieces, and cousins.

6th ed., p. 1640.

WHERE OBJECTS TAKE PER CAPITA.

Under a gift to A. and the brothers of B. and the nephews of C., all take per capita.

Ibid.

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.

Ibid.

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 show how the property was to be divided, each brother, whether alive at the date of the will or not, being treated as a stirps. 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. The presumption may, of course, be rebutted by the context or by the state of facts at the date of the will.

Ibid. See Chap. XXXVI.

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.

6th ed., p. 1641. *Re Wood* (1894), 3 Ch. 381.

A gift to great-nieces "born previously" to the date of the will includes a great-niece en ventre sa mère at that time.

Ibid.

WHEN DEATH OF TESTATOR IS THE PERIOD.

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. 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; there being nothing in the mere circumstance of the gift to the next of kin being preceded by a life or other limited interest to vary the construction; the result in fact being the same as if the gift had been "to my next of kin, subject to a life interest in A." The death of A. is the period, not when the objects are to be ascertained, but when the gift takes effect in possession.

1st ed., Vol. II., p. 51.

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.

6th ed., p. 1642. *Wharton* v. *Barker*, 4 K. & J. 502.

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.

Ibid. Re Ham's Trust, 2 Sim. N. S. 106.

OF PERSON WHO SURVIVES TESTATOR.

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. 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.

1st ed., Vol. II., p. 52. *Re Parsons*, 45 Ch. D. 63.

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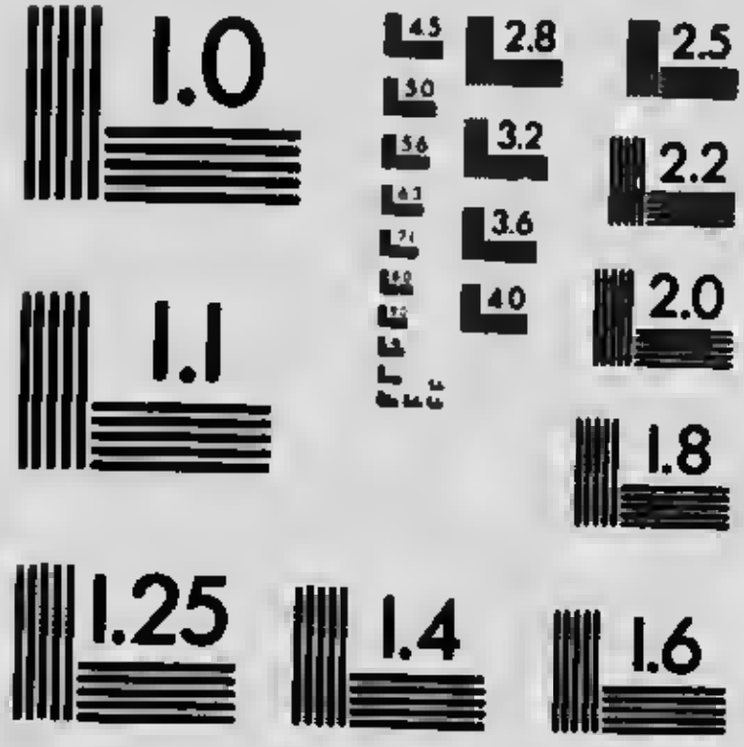

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TESTATOR'S NEXT OF KIN LIVING AT A FUTURE PERIOD.

The rule of construction, which makes the death of the testator the period of ascertaining the next of kin, is adhered to, notwithstanding 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.

6th ed., p. 1643. *Bishop* v. *Cappel*, 1 De G. & S. 411.

WHERE TENANT FOR LIFE IS NEXT OF KIN.

Cases sometimes occur where there is a gift to A. for life and then to the testator's next of kin, or to A. for life and after his death to his children or appointees, with a gift over in default to the testator's next of kin. According to some of the older authorities, if in such a case A. is one of the next of kin or the sole next of kin, at the testator's death the gift will be considered as referring to the persons who are the testator's next of kin at A.'s death. But it is now settled that the improbability in 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 prevent the application of the general rule of construction.

6th ed., p. 1644. *Ware* v. *Rowland*, 2 Ph. 635.

QUESTION OF INTENTION.

In all these cases, however, it is a question of intention, and each case depends on the wording of the particular will.

6th ed., p. 1644.

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.

6th ed., p. 1645. *Holloway* v. *Radcliffe*, 23 Bea. 163.

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.

Ibid. *Stert* v. *Platel*, 5 Bing. N. C. 434.

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 show an intention to refer to some other persons than those who answer the description at that time.

6th ed., p. 1646. *Bird* v. *Wood*, 2 My. & K. pp. 86, 89

But the mere exception from a gift to the next of kin of persons who if the tenant for life were out of the way would, as matters stand at the date of the will, be included among the next of kin, is not sufficient reason for departing from the general rule: for this would be to assume that the testator expected the state of his family to remain the same at his death as at the date of the will, an assumption which we have already seen ought not to be made. It may very well be that the testator introduced the exception with this view, that if the tenant for life should die in his lifetime and his next of kin should consist of the class to which the excepted persons belonged, those persons should be excluded from the bequest, and if the matter is thus left in doubt the general rule prevails.

Ibid. *Lee* v. *Lee*, 1 Dr. & Sm. 85.

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, or only of distribution. This principle, however, does not apply where the power may be exercised by any writing, 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.

6th ed., p. 1647. *Re Caplin's Will*, 2 Dr. & S. 527.

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, even if the donee of the power survives the tenant for life.

Ibid. *Birch* v. *Wade*, 3 V. & B. 198.

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: as in the case of a gift to A. for life and afterwards "to those who shall be my next of kin." But 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.

1st ed., Vol. II., p. 58; 6th ed., p. 1648.

ARTIFICIAL CLASS OF NEXT OF KIN.

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. 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. 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.

6th ed., p. 1648. *Sturge and G. W. Ry.*, 19 Ch. D. 444.

GIFT TO PERSONS "THEN ENTITLED."
"THEN" NOT ALWAYS AN ADVERB OF TIME.

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. Moreover, "then" has more meanings than one, each equally common: it may mean "at that time" or "in that case"; 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.

6th ed., p. 1649. *Bullock* v. *Downes*, 9 H. L. C. pp. 1, 19. *Re Wilson*, C. A. (1907), 2 Ch. 572.

GIFTS TO PERSONS OF TESTATOR'S NAME.

Sometimes (as in the last case) it is made part of the description or qualification of a devisee or legatee, that he be of the testator's name. The word "name," so used, admits of either of the following interpretations:—First, as designating one whose name answers to that of the testator (which seems to be the more obvious sense); and, secondly, as denoting a person of the testator's family; the word "name" being, in this case, synonymous with "family" or "blood." The former, as being the more natural construction, prevails in the absence of an explanatory context; and such is most indisputably its meaning, when found in company with some other term or expression, which would be synonymous with the word "name," if otherwise

construed; for no rule of construction is better established, or obtains a more unhesitating assent, than that where words are susceptible of several interpretations, we are to adopt that which will give effect to every expression in the context, in preference to one that would reduce some of those expressions to silence.

1st ed., Vol. II, p. 61; 6th ed., p. 1650.

TO NEXT OF KIN OF TESTATOR'S NAME.

Thus, where a testator gives to the next of kin of his name, or to the next of his name and blood, it is evident that he does not use the word "name" as descriptive of his relations or family only, because that would be the effect, if the mention of the name were wholly omitted, and the gift had been simply to his next of kin or the next of his blood; and hence, according to the principle of construction just adverted to, it is held that the testator means additionally to require that the devisee or legatee shall bear his name. Where, on the other hand, the testator gives to the next of his name, there is ground to presume that he intends merely to point out the persons belonging to his family or stock, without regard to the surname they actually bear.

6th ed., p. 1650.

AS TO FEMALES LOSING NAME BY MARRIAGE.

Where a gift to persons of the testator's name is held, according to the more obvious sense, to point to persons whose names answer to that of the testator, of course it does not apply to a female who was originally of that name, but has lost it by marriage.

1st ed. Vol. II., p. 65; 6th ed., p. 1651.

ACQUISITION OR ASSUMPTION OF NAME.

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

6th ed., p. 1652. *Re Roberts*, 19 Ch. D. 520.

The question in these cases is whether the testator wishes to confine his bounty to members of a certain family, or whether he wishes to perpetuate a certain name.

6th ed., p. 1653.

AT WHAT PERIOD LEGATEE MUST ANSWER PRESCRIBED DESCRIPTION.

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

1st ed., Vol. II., p. 66 and *ibid.*

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.

6th ed., p. 1653.

GIFTS TO "FRIENDS."

The meaning of "friends and relations" in a power of appointment has been already considered.

Chapter XXXIII.

Life Insurance Policy—"Family"—"Children."—The insured by his will directed the $500 to be paid to his executors to invest and retain all interest earned by the investment as a fund to which the mother might resort in event of her having exhausted her own money; her funeral expenses were also to be paid from the fund, and after her death, fund was to be applied for general support of his family. The mother survived insured a few days only. Her estate was left to the grandchildren, who would take under their father's will if the word "family" was construed as children:—Held, here the word family might well mean children alone, indeed that was its primary meaning, and the Court would only attach a secondary meaning, which would invalidate the gift, when driven to do so by the context. *Re Hope* (1910), 16 O. W. R. 1016, 2 O. W. N. 63.

Bequest—Classes of Relatives "Most in Need."—A clause of a will, directing that the surplus of assets, if any, be distributed amongst the brothers and sisters or nephews and nieces of the testator, who are most in need, in the discretion of the trustees, is not void for uncertainty. Such distribution need not be made by representation, i.e., amongst the brothers and sisters living, and the children of those deceased at the time of the testator's death, but may be made, in the discretion of the trustees, amongst the brothers and sisters, and nephews and nieces, children of brothers and sisters, even if such brothers and sisters be also living at the time of the testator's death. Judgment in 26 Que. S. C. 466, reversed. *Dore* v. *Brosseau*, 13 Que. K. B. 538. Affirmed, 35 S. C. R. 205.

Devise of Real and Personal Estate—Life Interest to Widow—Remainder to Daughters with Power of Appointment—"Then" Construed to Mean "in that Event."—On motion for construction of a will, Middleton, J., held, that widow took life estate; that the word "then" should be read to mean "in that case" or "in that event;" that upon death of widow the property was to be divided between two daughters if living. If either daughter should die leaving issue, such issue to take, and if either leave no issue she was given power of appointment under the will, and if power of appointment is not exercised, there will be an intestacy as to her prospective share. *Re Hunsley* (1910), 16 O. W. R. 995, 2 O. W. N. 29.

Heirs and Personal Representatives—Next of Kin.—By this will the testator directed that his executors were, after his widow's death,

.) divide the residue and pay some in equal proportions to those of his heirs and personal representatives who would be entitled if he died intestate. "Personal representatives" here mean "next of kin," excluding the widow. "Heirs and next of kin" here mean "heirs," that is heirs at law at the death of the testator. The division is to be per capita. *Re Read*, 12 O. W. R. 1009.

"**Heirs and Personal Representatives.**"—"Personal representatives" mean persons claiming as executors or administrators. If there is an indication of intention that the "representatives" are to take beneficially and not in any fiduciary capacity, the words generally mean next of kin, including a widow. *Birkitt* v. *Tozer*, 17 O. R. 587.

The word "heirs" means those who, by the law of the land, are, at the date of the will, technically heirs at law, unless a contrary intention appears, and such a contrary intention is not **shewn by** the fact that the gift is part or the whole of a fund derived from the sale of real or personal property. *Coatsworth* v. *Carson*, 24 O. R. 185.

"**Family**" means children, and is a gift to a class—does not include a member of the class who dies before testator. *Re Wilkie*, 7 O. W. R. 474; *Re Harvey* (1893), 1 Ch. 567; *In re Clark*, 8 O. L. R. 590, 4 O. W. R. 414.

"**Nearest of Kin**"—**Period of Ascertainment—Tenants in Common**—"**Then.**"—In the absence of any controlling context, the persons entitled under the description "nearest of kin" in a will are the nearest blood relations of the testator at the time of his death in an ascending and descending scale. And where the testator devised his farm to his only child, a daughter, giving his widow the use of it until the daughter became of age or married, and provided that in the event of the latter dying without issue, "then in that case" it should be equally divided between his "nearest of kin;" and the daughter died while still an infant and unmarried:—Held, that although the persons intended by the description took only in defeasance of the fee simple given to the daughter alone in the first instance, she was, nevertheless, entitled as one of the "nearest of kin;" and the widow, as heiress-at-law of the daughter, and the father and mother of the testator, were each entitled to an undivided one-third in fee simple as tenants in common. *Bullock* v. *Downes*, 9 H. L. C. 1; *Mortimore* v. *Mortimore*, 4 App. Cas. 448; and *Re Ford, Patten* v. *Sparks*, 72 L. T. N. S. 5, followed. The word "then," introducing the ultimate devise, was not used as an adverb of time, but merely as the equivalent of the expression "in that case," which followed it, and did not affect the construction of the will. *Brabant* v. *Lalonde*, 26 O. R. 379.

"**Heirs and Representatives.**"—Where a testator, by his will, in which he used the words "executor" and "executrix" several times, made a residuary bequest and devise to "the heirs and representatives of M. B.:"—Held, that, having regard to the context, the next if kin according to the Statute of Distributions, and not the executor of M. B., were entitled to take under the above words. The weight of decision shows that the word "representatives," when standing alone, means "executors or administrators," but that very slight expressions in the context have turned the meaning in the other direction, to that of "next of kin." *Burkitt* v. *Tozer*, 17 O. R. 587.

Birth of Issue.—A., being seised in fee, devised as follows: "I give and bequeath to my wife (naming her) all that piece of land (in dispute) as long as she may remain a widow, unless it should please God in his mercy within the next three months to give me issue by my wife, now pregnant, in which case I bequeath the above to my said issue, whether male or female." 2. "In case there should be no issue, or in case my wife should marry again, I give and devise to my youngest brother, S. K., &c., all the above property, subject to my wife's dower, and in case of his death to the next of kin in my own family." 3. "In case of the death of my wife

while a widow, and without any issue, as aforesaid, I also give and bequeath all my real estate to my youngest brother S. K., aforesaid, and failing him to my next of kin as above." A son was born the day after the will bore date, (23rd July, 1855), and died on the 25th October, 1855. A., the testator, died 23rd August, 1855, and his widow 30th January, 1856, there being no other issue, and she not having married again:—Held, that the son took the estate, which on the son's death vested in the widow of the testator, and the limitation over to S. K. was defeated. *King* v. *Dougherty*, 11 C. P. 481.

CHAPTER XLII.

DEVISES AND BEQUESTS TO CHILDREN, GRANDCHILDREN, ETC.

"CHILDREN," HOW CONSTRUED.
WHETHER IT EXTENDS TO GRANDCHILDREN, AND WHEN.

The legal construction of the word childre , accords with its popular signification; 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. It has sometimes been asserted, however, that a gift to children extends to grandchildren, where there is no child.

1st ed., Vol. II., p. 69; 6th ed., p. 1656.

GIFT TO CHILDREN OF A.
GIFT TO CHILDREN OF A., B. AND C.

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. But if the gift is to the children of the late A. B., the late C. D., and the late E. F., and some of these have left children, and one has left grandchildren only, then the Court considers there is a difficulty in holding that the word "children," only once used, can have a different meaning where there are in one case children and in another case grandchildren.

6th ed., p. 1656. *Re Smith*, 35 Ch. D. 355. *Fenn* v. *Death*, 23 Bea. 73.

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.

6th ed., p. 1657.

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.

6th ed., p. 1658.

PRIDE v. FOOKS.

The principle established by the decision of the Court of Appeal in Pride v. Fooks.

6th ed., p. 1659. *Pride* v. *Fooks*, 3 De G. & J. 252.

AND MAY BE EXCLUDED, EVEN FROM SUCH CASES, BY CONTEXT.

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.

Ibid. Loring v. *Thomas*, 1 Dr. & Sm. pp. 497, 508.

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.

1st ed., Vol. II., p. 72; 6th ed., p. 1660.

"CHILDREN" WHEN SYNONYMOUS WITH "ISSUE."

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.

1st ed., Vol. II., p. 73; 6th ed., p. 1660.

The cases 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.

6th ed., p. 1660.

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.

6th ed., p. 1661. *Moffatt* v. *Burnie*, 18 Bea. 211

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.

6th ed., p. 1662; post pp. 822, 823.

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. But he may be referred to in the residuary gift or gift over in such a way as to exclude him.

Ibid.

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.

Ibid.

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.

Ibid. Jennings v. *Newman*, 10 Sim. 219.

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.

Ibid.

"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 show that the testator had in view a future marriage, but only that the terms of the will are not so wholly inconsistent with such a notion as necessarily to limit the generality of the word children, in which latter case effect will of course be given to the testator's language. 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.

6th ed., p. 1663. *Stavers* v. *Barnard*, 2 Y. & C. C. C. 539.

CHILDREN BY AFFINITY NOT INCLUDED.

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

1st ed., Vol. II., p. 73 and *ibid.*

STEP-CHILDREN.

But a gift to "children" may take effect in favour of step-children, if circumstances show that that was the testator's intention.

6th ed., p. 1663.

AS TO CLASS OF CHILDREN ENTITLED.

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, 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.

1st ed., Vol. II., p. 73; 6th ed., p. 1664.

The following are the rules of construction regulating the class of objects entitled in respect of period of birth under general gifts to children.

6th ed., p. 1664.

IMMEDIATE GIFTS CONFINED TO CHILDREN LIVING AT DEATH OF TESTATOR.

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 or a deceased person and whether to children simply or to all the children, and whether there be a gift over in case of the decease of any of the children under age or not, 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.

6th ed., p. 1665.

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.

Ibid.

RULE DOES NOT APPLY WHERE DISTRIBUTION POSTPONED.
BUT APPLIES TO GIFTS OF INCOME.

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 number of years; and the not keeping demands of this sort open has very properly induced the Court to confine this to such children as were in being at death of the testator, when the number is known, and the proportions they are entitled to, and the time when to receive it. The rule usually defeats the intention of testators, 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. It might also be supposed that it would not apply where the gift is one not of corpus but of income, but in Re Powell, 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.

Ibid. Re Powell (1898), 1 Ch. 227.

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 F nd every other child hereaftor to be born of the said A. during the life of the said B. or within nine months after his decease.

Ibid.

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.

6th ed., p. 1695. Chapter XXXVI.

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. 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. 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 tes-

tator 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.

Ibid.

EFFECT OF GIFT OVER.

The general rule now under consideration, applies, "whether there be a gift over in case of the decease of any of the children under age or not." 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.

Ibid. Hutcheson v. *Jones*, 2 Madd. 124.

INTERMEDIATE INCOME.

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 accured before his birth.

6th ed., p. 1667. *Re Holford* (1894), 3 Ch. 30.

IN FUTURE GIFTS, CHILDREN BORN BEFORE PERIOD OF DISTRIBUTION LET IN.

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. 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.

1st ed., Vol. II., p. 75: 6th ed., p. 1667.

The rule is the same where the life interest is not of the testator's own creation, but is anterior to his title.

Ibid. Walker v. *Shore*, 15 Ves. 122.

RULE APPLIES WHERE INTEREST BEQUEATHED IS REVERSIONARY. CHILDREN TAKE VESTED SHARES, LIABLE TO BE DIVESTED PRO TANTO.

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 is transmissible) devolve to their respective representatives; though the rule is sometimes inaccurately stated, as if existence at the period of distribution was essential.

Ibid.

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. 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.

6th ed., p. 1668. *Oppenheim* v. *Henry*. 10 Hare 441.

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.

Ibid.

The effect of a gift in remainder to children who attain a certain age, is considered in the next section.

Ibid.

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 re-

mainder 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 is ascertained at the date of her marriage and the gift takes effect immediately.

Ibid.

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. 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.

6th ed., p. 1669. *Re Smith*, 2 J. & H. 594.

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 rule, be ascertained at the testator's death, or whatever the new period of distribution may be.

Ibid.

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.

6th ed., p. 1670. *Goodier* v. *Johnson*, 18 Ch. D. 441.

WHERE PARTIAL LIFE INTEREST IS GIVEN.
MERE CHARGING OF LANDS DOES NOT LET IN FUTURE CHILDREN.

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. 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.

1st ed., Vol. II., p. 77 and *ibid.*

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 is shall afterwards fall into the residue, and the residue is bequeathed to the children

of A., those children who are in existence at the time of the testator's death are alone entitled to the particular sum (subject to the temporary purpose), as well as the residue.

6th ed., p. 1670.

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.

6th ed., p. 1671.

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.

Ibid. *King* v. *Cullen*, 2 De G. & S. 252.

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.

Ibid. See *Re Hiscoe*, 48 L. T. 510.

GIFT TO CHILDREN "THEN LIVING," OR TO CHILDREN OF PERSON "THEN DEAD."

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."

6th ed., p. 1672.

LITERAL CONSTRUCTION.

If the language of the will is clear, effect must be given to it, although the probable intention is thereby defeated.

Ibid. *Ex parte Hunter*, 3 Y. & C. 610.

WHERE MEANING OF "THEN LIVING" IS AMBIGUOUS.

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.

6th ed., p. 1673. *Gill* v. *Barrett*, 29 Bea. 372.

WHERE STRICT CONSTRUCTION WOULD DEFEAT INTENTION.

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.

Ibid. *Gaskell* v. *Holmes*, 3 Ha. 438.

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, "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."

6th ed., p. 1674. 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). *See Re Milne*, 57 L. T. 828; *Hodgson* v. *Smithson*, 21 Bea. 354.

RULE WHERE DISTRIBUTION IS POSTPONED TILL A GIVEN AGE.

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

1st ed., Vol. II., p. 78; 6th ed., p. 1675. *Whitbread* v. *Lord St. John*, 10 Ves. 152.

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 it at the period of such death no child should have attained twenty-one, then all the children of A. who may subsequently come into existence before one shall have attained that age will be also included.

6th ed. p. 1675.

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;") nor is any such variation produced by a clause of ac-

cruer, 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.

6th ed., p. 1676. *Freemantle* v. *Taylor*, 15 Ves. 363.

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.

6th ed., p. 1677. *Fox* v. *Fox*, L. R. 19 Eq. 286.

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. 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.

Ibid. *Locke* v. *Lamb*, L. R. 4 Eq. 372.

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, nor (it seems) is it applicable if there is no child in existence at the death of the testator.

Ibid.

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.

Ibid.

RE BEDSON'S TRUSTS.

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.

6th ed., p. 1678. *Re Bedson's Trusts*, 25 Ch. D. 458.

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. 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.

4th ed., Vol. II., p. 162. *Kevern* v. *Williams*, 5 Sim. 171, cited 16 Sim. 285.

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.

6th ed., p. 1680. *Picken* v. *Matthews*, 10 Ch. D. 264.

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 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. If there is no child in existence at the testator's death, the legacies fail altogether. 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, 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. And, of course, the testator may so clearly express his in-

tention of including all the children, whenever born, that effect must be given to it.

Ibid. *Rogers* v. *Mutch*, 10 Ch. D. 25. *Evans* v. *Harris*, 5 Bea. 45. *Dias* v. *De Livera*, 5 A. C. at p. 134.

GIFT TO GRANDCHILDREN WHEN ALL HAVE ATTAINED TWENTY-ONE.

The rule is not to be applied except when necessity requires, accordingly it 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.

6th ed., p. 1683. *Re Stephens* (1904), 1 Ch. p. 328. *Mainwaring* v. *Beevor*, 8 Ha. 44.

CONTRARY INTENTION.

On the other hand, if the testator clearly expresses an intention to include only those children who are born before the youngest in esse attains twenty-one, effect will of course be given to it.

6th ed., p. 1684.

PROVISION FOR MAINTENANCE AND ADVANCEMENT MAY EXCLUDE RULE.

It seems that a trust for maintenance may have the effect of admitting after-born children.

6th ed., p. 1685. *Bateman* v. *Faster*, 1 Coll. 118.

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.

6th ed., p. 1685. *Gimblett* v. *Purton*, L. R. 12 Eq. 427, disapproving *at Bateman* v. *Gray*, L. R. 6 Eq. 215.

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.

Ibid.

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 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. 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.

Ibid. *Re Stephens* (1904), 1 Ch. 322.

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. 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. 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.

6th ed., p. 1686. *Stone* v. *Harrison*, 2 Coll. 715. *Re Jeffery* (1895) 2 Ch. 577.

The same result follows where real estate is given upon the same trusts as the residuary personal estate.

Ibid.

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, carry interest, and consequently the income arising from, or attributable to, the legacy is not available for maintenance. 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 which is therefore available for maintenance.

Ibid. Re Inman (1893), 3 Ch. 518.

SPECIFIC BEQUEST

The same rules apply where the gift is a specific bequest of leaseholds or other personalty.

6th ed., p. 1687.

REAL ESTATE.

It has been already pointed out 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. The rule is the same if the devise is to a trustee, so that the limitations are equitable.

Ibid. ante p. 463. *Re Averill* (1898), 1 Ch. 523.

RULE WHERE NO OBJECT EXISTS AT PERIOD OF DISTRIBUTION.

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, 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.

1st ed. Vol. 2, p. 84. 6th ed., p. 1687.

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; 2nd, As to the appropriation of the income between the birth of the first and the birth of the last child.

6th ed., p. 1688.

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. 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; nor would the circumstance of there being an immediate devise of the real estate to trustees 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 object.

Ibid. *Gibson* v. *Lord Montfort*, 1 Ves. sen. 485.

The other question arising on these gifts to children is, as to the destination of the income accuring 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.

1st ed. Vol. 2, p. 87. 6th ed. 1689.

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.

6th ed., p. 1690, ante p. 817. *Haughton* v. *Harrison*, 2 Atk. 329.

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.

6th ed., p. 1691, ante p. 810. *Rogers* v. *Mutch*, 10 Ch. D. 25.

EFFECT WHERE THERE IS NO OBJECT AT OR BEFORE TIME OF DISTRIBUTION. LEGAL CONTINGENT REMAINDER.

The next inquiry is, as to the rule of construction which obtains, where the gift to the children is preceded by an anterior interest, and no object comes into existence before its determination; as in the case of a gift to A. for life, and after his decease, to the children of B.; and B. has no child until after the death of A. It is clear that in such a case, if the limitation to the children of B. were a legal remainder of freehold lands, it would fail by the determination of the preceding particular estate before the objects of the remainder came in esse.

1st ed. Vol. 2, p. 88. *Ibid.*

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." The correctness of the rule thus stated is clearly established.

1st ed. Vol. 2, p. 92; 6th ed., p. 1692.

WHERE FUND DISTRIBUTABLE ON DEATH OF TENANT FOR LIFE.

If a period is distinctly fixed when the distribution is to take place, the children born after that period are not entitled.

Ibid. Godfrey v. *Davis*, 6 Ves. 43.

EXISTENCE UP TO TIME OF DISTRIBUTION NOT NECESSARY.

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.

1st ed., Vol. 2, p. 97; 6th ed., p. 1693.

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 the preceding gift.

Ibid.

GIFT TO CHILDREN TO BE BORN OR TO BE BEGOTTEN.
WHERE THEY EXTEND THE CLASS.

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

1st ed. Vol. 2, p. 98; 6th ed., p. 1694. *Mogg* v. *Mogg*, 1 Mer. pp. 654, 658.

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.

6th ed., p. 1694. *Sprackling* v. *Ranier*, 1 Dick. 344.

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.

6th ed., p. 1696. *Scott* v. *Scarborough*, 1 Bea. at p. 168.

*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).

Followed in *Eddowes* v. *Eddowes*, 30 Bea. 603.

WORDS OF FUTURITY DO NOT VARY THE CONSTRUCTION OF A FUTURE GIFT.

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.

1st ed. Vol. 2, p. 100. *Ibid. Paul* v. *Compton*, 8 Ves. 375.

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.

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

6th ed., p. 1697. *Doe d. James* v. *Hallett*, 1 M. & Sel. 124.

"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, 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.

6th ed., p. 1698. *Re Pickup's Trusts*, 1 J. & H. 380.

INTENTION TO EXCLUDE EXISTING CHILDREN.

But the context may require expressions of this kind to be construed strictly as importing a future time.

6th ed., p. 1699. *Early* v. *Benbow*, 2 Coll. 342.

The authorities were examined by Stirling, J., in Locke v. Dunlop.

Ibid. Locke v. *Dunlop*, 39 Ch. D. 387.

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. There is, however, authority the other way.

Ibid. Doe v. *Haslewood*, 10 C. B. 544. See *White* v. *Barber*, 3 Burr. 2703.

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.

6th ed., 1700.

WORDS "BORN" AND "BEGOTTEN" DO NOT EXCLUDE AFTER-BORN CHILDREN.

A gift to children "born" or "begotten" will extend to children coming in esse subsequently to the making of the will, and even after the death of the testator, where, the time of distribution under the gift being posterior to that event, the gift would, by the general rule of construction, include such after-born children.

1st ed. Vol. 2, p. 102; 6th ed., p. 1700. *Browne* v. *Groombridge*, 4 Mad. 495.

GIFT TO CHILDREN "BORN" OR "LIVING" AT A TIME NAMED.

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. But it is otherwise, of course, if the gift is to children living at the time.

6th ed., p. 1701. *Fox* v. *Garrett*, 28 Bea. 19.

HELD TO TAKE AS OBJECTS LIVING AT A GIVEN PERIOD.

CHILDREN EN VENTRE, WHEN INCLUDED.

In the application of the preceding rules, and indeed, for all purposes of construction, a child en ventre sa mère is considered as a child in esse.

1st ed. Vol. 2, p. 103; 6th ed., p. 1701. *Doe* v. *Clarke*, 2 H. Bl. 399.

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.

6th ed., p. 1702. *Trower* v. *Butts*, 1 S. & St. 181.

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.

6th ed., p. 1703. *Re Burrows* (1895), 2 Ch. 497.

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, or prevents a gift to it, or an estate otherwise vested in it, as by

descent, from being divested. But it is limited to cases where the unborn child is benefited by its application.

Ibid. *Blasson* v. *Blasson*, 2 D. J. & S. 665.

After some difference of judicial opinion, this doctrine has been conclusively established as a general rule of construction. 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.

6th ed., p. 1704. *Villar* v. *Gilbey* (1905), 2 Ch. 301; (1907) A. C. 139.

"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.

Ibid.

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.

Ibid.

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.

Ibid. *Re Wilmer's Trusts* (1903), 2 Ch. 411. See ante Chap. X.

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.

Ibid. *Rawlins* v. *Rawlins*, 2 Cox 425.

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.

Ibid. *Goodale* v. *Gawthorne*, 2 Sm. & G. 375.

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.

6th ed., p. 1705.

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. The same rule applies where the gift to the children in default is implied.

Longmore v. *Broom*, 7 Ves. 124.

(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. 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, unless the power is confined to children living at A.'s death, in which case only those children take who survive A. On the other hand, if the power is merely testamentary, only those children take by implication who survive A.

Lambert v. *Thwaites*, L. R. 2 Eq. 151. *Faulkner* v. *Lord Wynford*, 15 L. J. Ch. S. *Re Phene's Trusts*, L. R. 5 Eq. 346.

(iii.) It sometimes happens that the tenant for life and the donee 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. The same rule seems to apply if the donee of the power survives the tenant for life. 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.

Ibid. *Re Phene's Trusts*, L. R. 5 Eq. 346.

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.

6th ed., p. 1706. *Re Hutchinson*, 55 L. J. Ch. 574.

RULE WHERE NUMBER OF CHILDREN IS ERRONEOUSLY REFERRED TO.

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.

1st ed. Vol. 2, p. 108 and *Ibid.*

WHERE NUMBER SPECIFIED IN WILL EXCEEDS ACTUAL NUMBER.

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.

1st ed. Vol. 2, p. 109; 6th ed., p. 1708. *Re Sharp* (1908), 2 Ch. 190.

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, and the circumstance that the testator knows the true number of children is not a sufficient reason for departing from the rule.

6th ed., p. 1708. *Daniell* v. *Daniell*, 3 De G. & S. 337.

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. 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.

6th ed., p. 1709. *Glanville* v. *Glanville*, 33 Bea. 302.

WHERE NUMBER AGREES WITH ACTUAL NUMBER OF CHILDREN BORN AT DATE OF WILL.

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.

1st ed. Vol. 2, p. 110; 6th ed., p. 1711. *Sherer* v. *Bishop*, 4 B. C. C. 55.

TO THE CHILDREN OF A. AND B., OR TO A. AND THE CHILDREN OF B.

Where a gift is to the children of several persons, whether it be to the children of A. and B., or to the children of A. and the children of B., they take per capita, not per stirpes.

1st ed. Vol. 2, p. 111. *Ibid.* *Paine* v. *Wagner*, 12 Sim. 184.

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.;" 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 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.

6th ed., p. 1712. *Payne* v. *Webb*, L. R. 19 Eq. 26. *Cancellor* v. *Cancellor*, 2 Dr. & S. 194

A direction that the parents and children are to be classed together and share in equal proportions, puts the question beyond doubt.

Ibid. *Turner* v. *Hudson*, 10 Bea. 222.

CONSTRUCTION WHERE CONTEXT INDICATES DIFFERENT INTENTION.

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

Ibid. *Brett* v. *Horton*, 4 Bea. 239.

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.

6th ed., p. 1713. *Nockolds* v. *Locke*, 3 K. & J. 6.

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.

Ibid. *Congreve* v. *Palmer*, 16 Bea. 435.

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 show that the primary division is to be per stirpes.

6th ed., p. 1714. *Davis* v. *Bennett*, 4 D. F. & J., 327.

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.

Ibid.

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. 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; in such a case the division will be per capita, unless there are words in the ultimate gift requiring a division per stirpes.

Ibid. *Wills* v. *Wills*, L. R. 20 Eq. 342. *Re Hutchinson's Trusts*, 21 Ch. D. 811.

CONTRARY INTENTION.

And in any case an intention that the children should take per capita, however improbable, must of course, prevail, if clearly indicated.

6th ed., p. 1715. *Smith* v. *Streatfield*, 1 Mer. 358.

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 property, the interest to be divided among four named persons for their lives, and the property to "devolve" on the children of three of those persons equally, it was held, that on the death of each of the tenants for life, their shares, then set free, went over at once to the children of the three per capita. In such a case it is obvious that there may be some additional members of the class at the time each share falls in, but that is an inconvenience (if it be one) which frequently arises on wills of this description.

Ibid. Swan v. *Holmes*, 19 Bea. 471.

SECONDLY, WHERE A. AND B. ARE JOINT TENANTS.

On the other hand, if the tenants for life take jointly, or (which is for this purpose equivalent) as tenants in common with express or implied survivorship, the whole subject of the devise remains undivided until the death of the survivior, and then goes over in a mass. In this case there is but one period of distribution, and presumably one class of objects; who. therefore, primâ facie take per capita.

6th ed., p. 1716.

SUCCESSIVE GENERATIONS.

Sometimes grandchildren as well as children are referred to in the gift.

Ibid. Barnaby v. *Tassell*, L. R. 11 Eq. 363.

"CHILDREN AND THEIR ISSUE."

A gift to "the children of A. and their issue" primâ facie means the descendants of A. living at the period of distribution, per capita. But the word "and" sometimes has the effect of making a gift to issue substitutional.

6th ed., p. 1716. *Lea* v. *Thorp*, 27 L. J. Ch. 649. See Chap. XXXVI.

TO THE YOUNGER SONS OF J. AND S., J. HAVING NONE.

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

1st ed. Vol. ' p. 112; 6th ed., p. 1716.

GIFT TO A. AND B.'S CHILDREN.

Where the gift is to A. and B.'s children, or to "my brother and sister's children," (the possessive case being confined to B. and the sister), it is read as a gift to A. and the children of B., or to the brother and the children of the sister, as it strictly and

properly imports, and not to the respective children of both, as the expression is sometimes inaccurately used to signify.

Ibid.

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.

6th ed., p. 1717. *Lugar* v. *Harman*, 1 Cox. 250.

WHERE THERE IS NO REASON TO PREFER ONE PARENT

But where there is nothing to show that the testator meant to draw a distinction between the two persons named in the gift—and à fortiori where he shows 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.

6th ed., p. 1718. *Mason* v. *Baker*, 2 K. & J. 567.

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. 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."

Ibid. Re Walbran (1906), 1 Ch. at p. 66.

WHETHER DYING WITHOUT CHILDREN MEANS HAVING OR LEAVING A CHILD.

Another subject of inquiry is whether a gift over, in case of a prior devisee or legatee dying without children, means without having had or without leaving a child.

1st ed., Vol. 2, p. 112; 6th ed., p. 1718.

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.

6th ed., p. 1719. *See Re Booth* (1900), 1 Ch. 768.

"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, "child or children" being treated as equivalent to "issue."

6th ed., p. 1720. *Parker* v. *Birks*, 1 K. & J. 156.

There is authority for saying that the same construction applies in the case of personalty.

Ibid.

"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.

Ibid. *Raggett* v. *Beaty*, 5 Bing. 243.

"WITHOUT HAVING CHILDREN," HOW CONSTRUED.

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

1st ed. Vol. 2, p. 113; 6th ed., p. 1720. *Wall* v. *Tomlinson*, 16 Ves. 413.

WORD "LEAVING" REFERS TO PERIOD OF DEATH.

The word "leaving" obviously points at the period of death. Thus a gift to such children or issue as a person may leave, is held to refer to the children or issue who shall survive him, in exclusion of such objects as may die in his lifetime; and this construction was applied in a recent case 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.

1st ed. Vol. 2, p. 114; 6th ed., p. 1721.

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"), 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. Whether the gift over takes effect on the death of A. leaving no child, but only remoter issue, is another matter. The following is the present state of the authorities.

6th ed., p. 1721. *Re Ball*, 40 Ch. D. 11, ante p. 830.

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.

6th ed., p. 1722. *Doe* v. *Webber*, 1 B. & Ald. 713.

IN CASE OF TWO PERSONS, HUSBAND AND WIFE, LEAVING NO CHILDREN.

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.

1st ed. Vol. 2, p. 115, and *Ibid.*

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

Ibid.

"LEAVING" SOMETIMES CONSTRUED "HAVING," SO AS NOT TO DIVEST PREVIOUS GIFT.

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 chidren living at the death of the parent.

1st ed. Vol. 2, p. 114; 6th ed., p. 1723.

MAITLAND V. CHALIE.

Besides the favour always shewn to provisions for children, it requires very strong words to defeat a prior vested gift.

6th ed., p. 1723. *Maitland* v. *Chalie*, 6 Mad. 243.

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." The rule is not confined to the case in which the tenant for life stands in loco parentis to the legatee in remainder; 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.

6th ed., p. 1724. *Re Ball*, 59 L. T 801. *Re Cobbold* (1903), 2 Ch. 299.

Cases in which there is no ambiguity in the term used, as "without leaving any issue at the time of her decease," or "should all his children die before himself," are not within the rule. So also where the expression is "die without leaving any child her surviving."

Ibid. Chadwick v. *Greenoll*, 3 Giff. 221. *Re Hamlet*, 39 Ch. D. 426.

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. 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. 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.

Ibid. 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.

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.

6th ed., p. 1725. *Re Hemingway*, 45 Ch. D. 543. *Bythesea* v. *Bythesea*, 23 L. J. Ch. 1004.

"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." *Ibid.*

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. 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. 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. 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, especially if there is an accumulation of such indications.

6th ed., p. 1726. *Re Watson's Trusts*, L. R. 10 Eq. 36. *Selby* v. *Whittaker*, 6 Ch. D. 239.

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. *Ibid.* *Re Schnadhorst* (1902), 2 Ch. 234.

WHERE "YOUNGER" MEANS "UNPROVIDED FOR."

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

1st ed. Vol. 2, p. 116; 6th ed., p. 1720. *Collingwood* v. *Stanhope*, L. R. 4 H. L. at p. 52. *Hall* v. *Luckup*, 4 Sim. 5.

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; and, by parity of reason, the appointee of the estate, though a younger son, will be excluded.

6th ed., p. 1727.

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.

Ibid.

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, but not (it seems) where the person who is the eldest son at the date of the will is excluded by name.

Ibid. *Shuttleworth* v. *Murray* (1901), 1 Ch. 819.

The principle it 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. So that if father and eldest son, tenant for life and in tail, execute a disentailing deed and acquire the fee simple, a younger son cannot afterwards become an elder within the meaning of the rule; for the settlement is destroyed, and though he becomes eldest in fact, it can never give him the estate; and should he afterwards acquire the estate by a new title, as by descent or devise from the elder brother, yet as this will not be under the settlement, it will not exclude him from participating in portions provided by the will or settlement for younger children. Nor will a younger son who takes by virtue of the exercise of a power of revocation and new appointment, be excluded, if he afterwards becomes an eldest son, for he does not take as eldest son, but by a new title. But the eldest son, who has concurred with his father in resettling the property, will be excluded, if by the resettlement he takes back substantially what the settlement gave him; as a life-estate with remainder to his issue in tail, instead of the estate tail in himself;

or the property burdened with a charge of which he has had the benefit, or if he joins with his father in raising money by mortgage of the estate, and receives out of it the equivalent in value of a younger child's share. And the fact that the estate charged proves to be of less value than the portions, or even of no value at all, will not give to the eldest son any right to participate in the portions.

Ibid. Macoubrey v. *Jones*, 2 K. & J. 684. *Collingwood* v. *Stanhope*, L. R. 4 H. L. 43.

ONLY ONE "ELDEST SON."

Only one person can be excluded as "eldest son" under the rule 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.

6th ed., p. 1728.

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.

6th ed., p. 1729.

SHIFTING CLAUSES.

The rule does not apply to a shifting clause, or an exception in the nature of a shifting clause. The construction of clauses of this kind is considered elsewhere.

Ibid. Law Union &c., Co. v. *Hill* (1902), A. C. 263, Chapter XXXVIII.

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. 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. 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.

Ibid.

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.

Ibid. Wilbraham v. *Scarisbrick*, 1 H. L. C. 167.

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.

Ibid. *Re Prytherch*, 42 Ch. D. 590.

ONLY CHILD HELD TO TAKE AS YOUNGEST CHILD.

It may be observed, that a bequest to "the youngest child of" A. has been held to apply to an only child. An only son has also been held to be excluded by an exception of "the eldest son" from a devise to "second, third, and other sons."

6th ed., p. 1730. *Emery* v. *England*, 3 Ves. 232. *Tuite* v. *Birmingham*, L. R. 7 H. L. 634.

RULE CONFINED TO PARENTAL PROVISIONS.

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

1st ed., Vol. 2. p. 116. 6th ed., p. 1730.

Again where there is a gift, by a person not in loco parentis, to the children of A., excluding the eldest son, the words of exclusion receive their ordinary interpretation.

6th ed., p. 1730.

A grandparent does not place himself in loco parentis towards his grandchildren merely by making provision for them by will.

Ibid.

CLEAR LANGUAGE NOT CONTROLLED BY EXPRESSION OF MOTIVE.

A mere expression of the testator's reason for excluding the eldest son will not generally make a non-parental provision subject to the rule above considered.

Ibid. *Livesey* v. *Livesey*, 2 H. L. C. 419.

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; a contingent interest would primâ facie not be sufficient.

6th ed., p. 1731. *Umbers* v. *Jaggard*, L. R. 9 Eq. 200.

AS TO PERIOD OF ASCERTAINING WHO ARE "YOUNGER CHILDREN."

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

1st ed. Vol. 2. p. 117: 6th ed., p. 1731.

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.

Ibid. Coleman v. *Seymour*, 1 Ves. Sen. 209.

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.

Ibid.

OBJECTS ARE ASCERTAINED WHEN PORTIONS ARE PAYABLE.

It should seem, then, 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.

6th ed., p. 1732. *Reid* v. *Hoare*, 26 Ch. D. at p. 369.

CONTRARY INTENTION.

But the rule of construction will of course yield to a clear expression of intention.

6th ed., p. 1734. *Windham* v. *Graham*, 1 Russ. 331.

WHETHER OBJECTS OF NON-PARENTAL GIFT MUST SUSTAIN THE CHARACTER AT PERIOD OF DISTRIBUTION.

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, 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.

1st ed. Vol. 2, p. 119; 6th ed., p. 1734. *Livesey* v. *Livesey*. 2 H. L. C. 419

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 exclusio unius est inclusio alterius.

6th ed, p. 1739. *Windham* v. *Graham*, 1 Russ. 331.

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.

Ibid. *Adams* v. *Burch*, 8 Scott, 405.

NOT WHERE CONTEXT SHEWS CONTRARY INTENTION.

The context, however, may show an intention that the class to 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.

6th ed., p. 1740. *Madden* v. *Ikin*, 2 Dr. & Sm. 207.

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. 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, or if he speaks of a son who is not first-born "becoming eldest," or of the eldest at a given period, or for the time being.

6th ed., p. 1741. *Meredith* v. *Treffry*, 12 Ch. D. 170. *Bowles* v. *Bowles*, 10 Ves. 177.

WHERE ONLY ONE SON OR CHILD.

The term "eldest" or "youngest" may apply to an only son or only child.

Ibid. *Tuite* v. *Bermingham*, L. R. 7 H. L. 634.

"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; so that if he dies before the testator the gift lapses; unless it is within the protection given by stat. 1 Vict. c. 26, ss. 32, 33; or unless the testator has, in the event disposed of the subject otherwise.

Ibid.

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.

6th ed., p. 1742. *Trafford* v. *Ashton*, 2 Vern. 660.

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 ths will, and dies before the testator, is not reckoned.

Ibid.
Lomax v. *Holmden*, 1 Ves. Sen. 290.

"BECOMING ELDEST SON OF A."

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.

6th ed., p. 1743. *Bathurst* v. *Errington*, 2 A. C. 698.

"NEXT SURVIVING SON."

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.

Ibid.

"NEXT ELDEST"

"Next eldest brother," as applied to one of the testator's sons, may mean next younger.

Ibid. *Crofts* v. *Beamish* (1905) 2 Ir. 349.

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 to his or her children, with a gift over in default of children to "the others" of the sons and daughters, this primâ facie means the individuals other than the deceased legatee, and not the survivors who are living at his or her death. If the gift over is to "the others or other, and if more than one in equal shares," the question arises whether these words show that the testator contemplated a diminution in the number of persons to take under the gift over.

Ibid. *Re Hogen's Trusts*, 46 L. J. Ch. 665. *Langston* v. *Longston*. 8. Bligh. N. S. 167.

INTENTION TO EXCLUDE ELDEST SON.

If the general scheme of the will shows an intention to exclude the eldest son, he will not be included under a general limitation to "other sons."

6th ed., p. 1744.

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.

6th ed., p. 1745.

As a general rule a gift to A. and his children is construed as a gift to them concurrently. 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.

Ibid. *Newill* v. *Newill*, L. R. 7 Ch. 253.

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.

Ibid. *Cormack* v. *Copaus*, 17 Bea. 397.

The rule in Wild's Case forms the subject of Chapter L.

Ibid.

Gift to Class—Ascertainment.—A testator bequeathed the sum of $500, as to income to be applied for the support of his grandchildren, children of his son John, and as to principal to be paid to them equally as they respectively attained the age of twenty-one years, and that those grandchildren born after the death of the testator and before that time were entitled to share. *In re Archer*, 24 C. L. T. 230, 7 O. L. R. 491, 3 O. W. R. 510.

Gift to Class—Death of Member before Testator—Children of Deceased Member.—The testator, who at the time of making his will in 1891, had four children living at Barnstable, England, devised two houses to his "children at Barnstable, England, to be divided among them in equal shares." One of the four children died after the making of the will and before the testator, leaving children:—Held, applying the principle of *Re Williams*, 23 C. L. T. 156, 5 O. L. R. 345, that s. 36 of the Wills Act did not apply, and that the children of the deceased child took no share. *In re Clark*, 24 C. L. T. 399, 8 O. L. R. 599, 4 O. W. R. 414.

"Per Stirpes."—A testator prior to his death made advances to each of his children, stating in his account book that these advances were to be charged against the amount willed to them. One of the testator's sons predeceased him and the question arose as to whether that son's son was chargeable with the advances made to his father:—Held, that the expression "per stirpes" used by the testator, showed that he had considered the issue of a deceased son in their representative capacity and that the share of the infant must be reduced by the amount advanced to the father. *Re Carter Estate* (1909), 14 O. W. R. 1244, 1 O. W. N. 275, 20 O. L. R. 127.

Devise of Income Per Stirpes—Subsequent Devise of Corpus Per Capita—Intent.—The testator by his will devised certain land after his wife's death to his two daughters "to receive the rents and profits of the same equally during the natural lives of my said daughters, and at the death of either before the other, the children of such deceased daughter to receive their proportion of said rents or profits of said lands, during the life of my said surviving daughter, as the case may be, and at the death of both my said daughters . . . that the land hereinbefore devised to them be sold and the price thereof equally divided between the children of my said daughters . . . or their legal representatives:"—Held, that after

the death of both daughters, their children took per capita, and not per stirpes. *Re Ianson*, 9 O. W. R. 278, 14 O. L. R. 82.

"Dying without Issue"—Vested Estate on Birth of Child—Absolute Estate in Fee.—A testatrix by her will gave certain real estate to an adopted daughter; but in the event of her "dying without issue" the devise was to lapse. There was no devise over:—Held, that "dying without issue" meant without a child being born; and therefore, on the birth of a child, the devise became absolute. *Re Johnson & Smith*, 12 O. L. R. 262, 7 O. W. R. 845.

Gift to Class—Time for Distribution—Income—Provision for Maintenance—Costs.—Held, upon the terms of the will in question in the next preceding case, that the eldest child, having reached the age of twenty-five years, was entitled to be paid her share of the corpus of the estate, and took an absolute vested interest:—Held, that the remainder of the capital was not to be set apart now, but held in trust until another child reached the age of twenty-five years, when another division must be made.—Held, that the oldest child was not now entitled to any share of the accumulated income. That could only be divided when all possible claims upon it had ceased.—It was ordered that the costs in this matter, as between solicitor and client, be paid out of the corpus of the estate. *Earle* v. *Lawton* (No. 2), 4 N. B. Eq. 92, 5 E. L. R. 502.

"All my Children"—Children of Predeceased Child.—The testator by his will directed that after the death of his wife his estate should "be divided amongst all my children." One daughter died, leaving issue, before the execution of the will:—Held, that the daughter's children did not take directly under the will, nor by virtue of s. 36 of the Wills Act of Ontario, there having been no gift to their parent. *In re Williams*, 23 C. L. T. 156, 5 O. L. R. 345, 2 O. W. R. 47.

Grandchildren, Bequest to.—*Daniels Settlement Trust*, 1 Ch. D. 175, distinguished. "Grandchildren daughters" excludes grandson, although "he or she" used. *Re Gilbert*, 2 O. W. R. 135.

Insertion of Word "of" Prohibited.—*Lugar* v. *Harman*, 1 Cox 250; *Hawes* v. *Hawes*, 14 Ch. D. 614; *Re Featherstone's Trusts*, 22 Ch. D. 111; *Re Walleran* (1906), 1 Ch. 64.

Description of a Class—Children or other Issue.—A testator left certain residue of his estate "unto and equally between the children or other issue" of certain persons who should be living at the death of his wife. "All such children or other issue to take in equal shares per capita:"—Held, that if there were any children alive at the time of the death of the wife of the testator, they took the property to the exclusion of all others, per capita; but if there were no children then alive, the other issue took per capita. *In re Pearce, Eastwood* v. *Pearce*, 56 S. J. 61.

Grandchildren Take Share of Deceased Mother.—Motion by the executors for an order construing the will of the late Maria Reuber. *Per* Curiam: — it was the manifest intention of the testatrix that the grandchildren should take share of their deceased mother. The gift is saved from being a gift to a class by the fact that the individuals to be benefitted do not bear the same relation to the testatrix. It does not, therefore, lapse or go to other members of the alleged class. Theobald, 7th (Can.) ed. 787; *Kingsbury* v. *Walter* (1901), A. C. 187, 192; *Re Venn. London* v. *Ingram* (1904), 2 Ch. 52. These infants will take their mother's share. Costs out of estate. *Re Reuber* (1911), 20 O. W. R. 91; 3 O. W. N. 102

"Remaining Children."—The words "remaining children" unless another meaning can be inferred from the context, must be taken to mean the other children, or "the rest" of the children not otherwise dealt with, and cannot be construed, apart from other circumstances in the will, to suggest such construction to mean the surviving children. *In re Speak. Speak* v. *Speak*, 56 S. J. 273.

Per Stirpes or Per Capita.—A bequest to the children of A. and B. in equal shares, the children take per capita. When the word "respective" is used as part of the description of the issue who are to take, the general rule does not apply. *Davis* v. *Bennett*, 31 L. J. Ch. 337; *Hawes* v. *Hawes*, 14 Ch. D. 614, distinguished. *Re Smith*, 6 O. W. R. 45.

"Children"—"Heirs."—A testator died in 1847, leaving a will in which, after devising his farm to his wife for life, and at her decease to be divided by his executors between his sisters F. and H. in certain proportions, he continued: "and in case either or both of my sisters F. and H. die previous to my decease, then my will is that each of their portions devised to them respectively, shall be by my executors divided between their and each of their heirs, share and share alike, that is each sister's share to each sister's children, to them, their heirs and assigns for ever." The testator's sister H. predeceased him, leaving children, who survived him, and having had also a daughter who predeceased her, leaving a son, H. H.: —Held, that H. H. took no share of the devise to H., for it was clear the testator was using "heirs" in a colloquial and not a technical sense, as meaning "children," and the legal construction of the word "children" accords with its popular signification, viz., as designating immediate offspring. *Paradis* v. *Campbell*, 6 O. R. 632.

Grandchildren—Issue—Legacy—Period of Vesting.—A testator devised and bequeathed his real and personal estate to his wife for life, or until remarriage, with powers of disposal: and by a residuary clause devised the residue—not specifically devised or bequeathed, and not sold or disposed of by his said wife—immediately after her death or remarriage, to his executors to sell and convert the same into money, and out of the proceeds pay a specific sum to each of his five sons, and to divide the balance, share and share alike, between his three daughters, and if his said daughters should die before him, or before said distribution, leaving issue, the share or shares of his said daughters so dying should be divided ratably and proportionately amongst the child or children of said daughter or daughters living at the time of said distribution, so that the issue of any of his said daughters who might be dead should receive her or their parents' share. The widow survived the testator and died without having remarried. A son, C. K. R., and a daughter, M., also survived the testator but died prior to the widow, the son leaving no issue, and the daughter a son, F., and a daughter, M. C., the said last named daughter having also died leaving two children:—Held, that the word "children" here must be taken in its primary sense, i.e., the immediate children of the testator, and excluded grandchildren, so that F. took the whole of his mother's share to the exclusion of the children of the daughter M. C.; and that the legacy to C. K. R. became vested on testator's death, payable on the widow's death, and that his personal representatives were entitled thereto. *Rogers* v. *Carmichael*, 21 O. R. 658.

"Children by First Marriage"—Testator Thrice Married.—A testator, after making sundry dispositions of his estate, devised a portion of it to executors to sell, and the proceeds, after payment of debts, "to divide equally between my said son C. W. S. and my daughters by my first marriage." The testator had been thrice married. Of the first marriage there was no issue living at the date of the will—several years after the death of his first wife. By the second marriage he had issue, one son, C. W. S., and four daughters, all surviving. By his third wife, who survived him, he had issue, one son, J. S., and four daughters:—Held, that the daughters by the second marriage sufficiently answered the description in the will, who, with their brother (C. W. S.), were entitled per capita; not that C. W. S. was entitled to one moiety, and the daughters, as a class, to the other moiety. *Ling* v. *Smith*, 25 Chy. 246.

CHAPTER XLIII.

DEVISES AND BEQUESTS TO ILLEGITIMATE CHILDREN AND OTHER RELATIONS.

EFFECT OF DOMICIL.

In cases of gifts by will to the children of a person, the question of legitimacy is, as a general rule, determined by the law of the parents' domicil, whether the subject of the gift is personalty, or realty, or land devised upon trust for sale.

6th ed., p. 1746. *Re Andros*, 24 Ch. D. 637. *Re Grey's Trusts* (1892), 3 Ch. 88.

EXISTING ILLEGITIMATE CHILDREN CAPABLE OF TAKING.
GIFTS TO CHILDREN, PRIMA FACIE, MEAN LEGITIMATE CHILDREN.

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. 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, excluding those who are illegitimate, agreeably to the rule, "Qui ex damnato coitu nascuntur, inter liberos non computentur." Nor will expressions, or a mode of disposition affording mere conjecture of intention, be a ground for their admission.

1st ed. Vol. 2, p. 129; 6th ed., p. 1748. *Cartwright* v. *Vawdry*, 5 Ves. 530.

ILLEGITIMATE CHILDREN NOT LET IN MERELY FROM ABSENCE OF OTHER OBJECTS.

And it is clear that the fact of there being no other than illegitimate children when the will takes effect, or at any other period, so that the gift, if confined to legitimate children, has

eventually failed for want of objects, does not warrant the application of the word "children" to the former objects.

6th ed., p. 1750. *Godfrey* v. *Davis*, 6 Ves. 43.

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: whether the gift also includes after-born children is a question discussed later.

6th ed., p. 1751. *Bentley* v. *Blizard*, 4 Jur. N. S. 652.

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, is one of reputation.

Ibid. Ante p. 844.

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.

Ibid. *Re Brown's Trust*, L. R. 16 Eq. 239.

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.

Ibid. *Re Mayo* (1901), 1 Ch. 404.

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 granddaughter Mary," the testator leaving no child or grandchild of those names, except such as are illegitimate. 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, unless the language of the will shews that the testator used "grandchild" as including illegitimate grandchildren, in which case extrinsic evidence would be admissible to show which grandchild he meant.

Ibid. *Re Fish* (1894), 2 Ch. 83.

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."

6th ed., p. 1752. *Hartley* v. *Tribber*, 16 Bea. 510.

So where the gift is to the children of a woman.

Ibid.

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.

Ibid.

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, 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. It seems, however, that the principle does not apply where the testator is ignorant of the fact that the children are illegitimate (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; a gift to after-born illegitimate children may be good, but such cases rest on a different principle.

6th ed., p. 1752. *Re Bolton*, 31 Ch. D. at p. 553.

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.

1st ed. Vol. 2, p. 137; 6th ed., p. 1753.

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.

6th ed., p. 1753.

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. So where the gift is to the children "born or to be born," or "begotten or to be begotten," of A. : if at the date of the will A. has none but illegitimate children, and their existence is known to the testator, they will take, unless, it seems, A. afterwards has legitimate children born during the testator's lifetime. And the fact that the testator believes the children to be legitimate is immaterial.

Ibid. Blundell v. *Dunn*, Cit. 1 Mad. p. 433.

CHILDREN OF DECEASED PERSON.

Upon the same principle, a gift to "the children of C.," a person who at the date of the will was dead, leaving illegitimate, but no legitimate, children, is good as to such illegitimate children, if the facts that C. was dead and that he had children were known to the testator, but it is not (apparently) necessary that the testator should know that they were illegitimate; it is sufficient that he should know of the existence of persons reputed to be the children of a deceased person.

6th ed., p. 1754.

GIFT TO CHILDREN OF SINGLE WOMAN PAST CHILD-BEARING.

It would also seem to follow that if a testator gives property to the children of a woman who, to his knowledge, has children living at the date of the will, and is also known by him to be past the age of child-bearing, those children will take under the gift, although they are illegitimate, provided she has no legitimate children.

Ibid. Re Eve (1909), 1 Ch. 796.

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.

Ibid. Lepine v. *Bean*, L. R., 10 Eq. 160.

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 son; 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.

Ibid. Savage v. *Robertson*, L. R. 7 Eq. 17.

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. 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. 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." 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.

6th ed., p. 1755. *Hill* v. *Crook*, L. R. 6 H. L. at p. 282.

Where Number is Specified.

For example, 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.

1st ed. Vol. 2, p. 147; 6th ed., p. 1755.

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 testator, two or more children of that person living, only one of whom is legitimate, the illegitimate child or children will be included in the gift.

6th ed., p. 1755. *Re Humphries*, 24 Ch. D. 691.

Legitimate and Illegitimate Children Referred to by Name.

On the same principle, if a testator refers by name to several persons, some of whom are legitimate and the others illegitimate,

as the "children" of A., and in the same will makes a gift in favour of "the children of A.," the illegitimate children will, as a general rule, be included in the gift.

6th ed., p. 1756. *Evans* v. *Davies*, 7 Ha. 498.

"DICTIONARY" PRINCIPLE OF CONSTRUCTION.

For since Bagley v. Mollard [1830], and Meredith v. Farr [1843], were decided, a more liberal principle of construction has been adopted, which may be shortly described as the "dictionary" principle.

6th ed., p. 1758. *Bagley* v. *Mollard*, 1 R. & My. 581; *Meredith* v. *Farr*, 2 Y. & C. C. C. 525; *Hill* v. *Crook*, L. R. 6 H. L. 265.

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.

6th ed., p. 1760. *Holt* v. *Sindrey*, 38 L. J. Ch. 126.

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.

6th ed., p. 1761. *Dorin* v. *Dorin*, L. R. 7 H. L. 568.
Re Haseldine, 31 Ch. D. 511.

INTENTION TO BENEFIT EXISTING PERSONS.

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.

6th ed., p. 1762. *Beechcroft* v. *Beechcroft*, 1 Mad. 430, disapproved in *Re Overhill's Trust*, 1 Sm. & G. 362.

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.

6th ed., p. 1764.

ILLEGITIMATE CHILDREN EN VENTRE.

It is now clear, that a gift to a natural child of which a particular woman is enceinte, without reference to any person as the father, is good.

1st ed. Vol. 2, p. 149; 6th ed., p. 1764. *Gordon* v. *Gordon*, 1 Mer. 141.

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. 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. There appears, at least, to be no case in which reputation acquired before birth has been recognised, there would be great if not insuperable difficulties in the way of proving it.

6th ed., p. 1768. *Occleston* v. *Fullalove*, L. R. 9 Ch. 158.

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.

6th ed., p. 1769. *Re Goodwin's Trust*, L. R. 17 Eq. 345.

OBJECTIONS AS TO CHILDREN BEGOTTEN AFTER TESTATOR'S DEATH. BUT NOT AS TO CHILDREN BEGOTTEN BETWEEN THE WILL AND 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. 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.

6th ed., p. 1772. *Re Harrison* (1894) 1 Ch. 561.

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.

6th ed., p. 1774. *Occleston* v. *Fullalove*, L. R. 9 Ch. 147. *Re Hastie's Trusts*, 35 Ch. D. 728.

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.

Ibid.

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.

Ibid.

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. Whether a gift to the "children" of a man can include his reputed illegitimate children, born or begottten between the date of the will and the date of the testator's death is not satisfactorily settled.

6th ed., p. 1775. Ante, p. 846.

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. So if he has gone through the form of 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." 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.

6th ed., p. 1776. *Re Bolton*, 31 Ch. D. 542.

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 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.

1st ed. Vol. 2, p. 155; 6th ed., p. 1779

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; 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.

6th ed., p. 1780.

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.

Ibid. *Hill* v. *Crook*, I. R. 6 H. L. 265.

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.

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.

Ibid.

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. 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. The decision of Jessel, M.R., in Re Goodwin's Trust is, it is submitted, right.

Ibid. ***Occleston*** v. ***Fullalove***, L. R. 9 Ch. 147. ***Re Goodwin's Trust***, L. R. 17 Eq. 345.

If the gift is to the future children of a man and woman whom the testator believes to be lawfully married, it fails as to their unborn illegitimate children.

Ibid.

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.

6th ed., p. 1781. ***Earle*** v. ***Wilson***, 17 Ves. 528.

Doubt is strengthened by the tendency of the modern decisions, which are in favour of putting a rational construction on gifts of this nature. 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.

Ibid.

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.

Ibid.

This doctrine is exploded.

It should be added that a gift cannot be made to illegitimate children born after the testator's death.

Ibid.

GIFT TO RELATIONS MEANS LEGITIMATE RELATIONS.

As a gift to children or other issue imports primâ facie legitimate children or issue, 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. Similarly the words "relatives" or "next of kin" primâ facie means legitimate kindred.

Ibid. ***Re Hall***, 35 Ch. D. 551. ***Re Deakin*** (1894), 3 Ch. 565.

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. The case is similar to that of a bachelor or spinster who refers to his or her children, which cannot mean legitimate children. 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.

6th ed., p. 1782. *In bonis Frogley* (1905), p. 137.

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. 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.

Ibid. Re Wood (1902), 2 Ch. 542.

"Including"—"Estate"—Policies of Insurance.—By a clause in his will a testator bequeathed to his wife one-half his estate, "including policies of insurance made payable to her upon my death." The testator left three policies, one for $1,000 payable to his wife, the second providing for payment to his wife of an annuity of $250 per annum, for twenty years, and the third payable at his death to the "legal heirs." There were no children, grandchildren, or mother, living at the time of the testator's death, but his widow survived him:—Held, that the third policy, being payable to the heirs and not to the widow as a preferred beneficiary, formed part of the testator's estate, although as a fact the widow was the legal heir; but the first two policies did not form part of the estate. By them a trust was created in favour of the wife as a preferred beneficiary, and so remained until the death of the testator:—Held, also, that "including" imported addition. *In re Duncombe*, 22 C. L. T. 167, 3 O. L. R. 510, 1 O. W. R. 153.

Bequest to "Children"—Legitimate and Illegitimate—Illegitimate Previously Mentioned by Name.—Testator married in England and had lawful issue, whom he deserted and came to Canada. Here he again went through a form of marriage with another woman and had three illegitimate children by her. In his will he devised his property to these three illegitimate children by name and his reputed wife. The property given to this wife was to be divided after her death among his children share and share alike. The legitimate children claimed to share in the estate of their father:—Held (1910), 16 O. W. R. 200, 21 O. L. R. 262, 1 O. W. N. 848, that the word "children" wherever it appeared in the will, meant only the three illegitimate children, and it was the intention of the testator to exclude his legitimate children. *Lobb* v. *Lobb* (1910), 17 O. W. R. 212, 2 O. W. N. 44; 22 O. L. R. 15.

CHAPTER XLIV.

JOINT TENANCY AND TENANCY IN COMMON.

JOINT-TENANCY AND TENANCY IN COMMON.

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

6th ed., p. 1783.

DEVISEES JOINT-TENANTS, WHEN.

A devise to two or more persons simply, it has been long settled, makes the devisees joint-tenants; but this rule is subject to exception.

Ibid.

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. *Quarm* v. *Quarm* (1892), 1 Q. B. 184.

DEVISEES IN TAIL TENANTS IN COMMON, 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 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, tenants in common in respect of the estate tail. 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, and the inheritance in tail descends to the issue (if any) subject to such estate for life.

Ibid. De Windt v. *De Windt*, L. R. 1 H. L. 87. *Tufnell* v. *Borrell* L. R. 20 Eq. 194.

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, 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.

Law Guarantee, etc., Society v. *B. of England*, 24 Q. B. D. 406.

FORMERLY HUSBAND AND WIFE TOOK BY ENTIRETIES.

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.

6th ed., p. 1785.

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.

Ibid. *Thornley* v. *Thornley* (1893), 2 Ch. 229.

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.

Ibid.

UNLESS THE GIFT IS TO A CLASS.

The rule above stated governing devises to husband and wife is also applicable to personalty.

But the rule does not apply to a gift to a class.

6th ed., p. 1786. *Ward* v. *Ward*, 14 Ch. D. 506.

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.

Ibid. *Owen* v. *Gibbons* (1902), 1 Ch. 636.

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, where a gift to A. and his children has, on slight grounds, been held not to create a joint-tenancy in parent and children, which is its primary effect, but to make A. tenant for life with remainder to his children. It has been already seen that where one devises 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.

Ibid. *Newill* v. *Newill*, L. R. 7 Ch. 253. Post. Chap. L.

JOINT-TENANCY IN CHATTELS.
IN PECUNIARY LEGACIES AND RESIDUES OF PERSONALTY.

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, and that whether the gift be by way of trust or not, 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.

6th ed., p. 1787. *Bustard* v. *Saunders*, 7 Bea. 92. *Whitmore* v. *Trelawny*, 6 Ves. 129.

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, including, it should seem, dispositions in favour of children.

Ibid. "Family," *Wood* v. *Waad*, 3 Hare. 65. "Next of Kin," *Withy* v. *Mangles*, 4 Bea. 358. *Re Nightingale* (1900), 1 Ch. 385. "Issue," *Hill* v. *Nalder*, 17 Jur. 224.

ALTHOUGH MEMBERS OF THE CLASS MAY BECOME ENTITLED AT DIFFERENT TIMES.

It also applies to a gift to children in remainder, or quasi remainder, after a prior estate for life. 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.

6th ed., p. 1788. *Kenworthy* v. *Ward*, 11 Hare, 196.

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 agsinst 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. the intent; and the intent, as appearing by the words, is to create a joint-tenancy.

Ibid. *Oates d. Hatterley* v. *Jackson*, 11 Hare, 196.

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.

6th ed., p. 1789.

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.

Ibid. *Bridge* v. *Yates*, 12 Sim. 645.

NOR IN GIFT OF ACCRUING SHARES.
NOR FROM ANOTHER GIFT CONNECTED BY THE WORD "ALSO."

Accruing shares will not be held in common merely because that quality is attached to the original shares. Neither will words importing a tenancy in common in one bequest be extended by implication to another bequest which is connected with the former by the term "also."

6th ed., p. 1790. *Re Woolley* (1903), 2 Ch. 206.

EXECUTORY TRUSTS.

It should be observed, that, in carrying into effect executory trusts, the Courts will not make the objects joint-tenants, without a positive and unequivocal expression of intention to that effect.

Ibid. *Mayn* v. *Mayn*, L. R. 5 Eq. 150.

WHAT WORDS CREATE A TENANCY IN COMMON.
"TO BE DIVIDED."
"IN JOINT AND EQUAL PROPORTIONS."

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

Ibid.

WORDS IMPORTING DIVISION CREATE TENANCY IN COMMON.

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. Accordingly, a devise or bequest to several persons, in the terms below, has been held (in contradiction of some of the very early cases) to make the objects tenants in common. And a similar construction has been given to a devise to several their heirs and assigns, "all to have part and, alike every of them to have as much as the other."

Re Woolley (1903) 2 Ch. 206.

"EQUALLY AMONGST THEM."
Warner v. *Hone*, 1 Eq. Ca. Ab. 292, pl. 10.

"EQUALLY."
Denn v. *Gaskin*, Cowp. 657.

"IN EQUAL MOIETIES."
Harrison v. *Foreman*, 5 Ves. 207.

"SHARE AND SHARE ALIKE."
Perry v. *Woods*, 3 Ves. 204.

"RESPECTIVELY."
Vanderplank v. *King*, 3 Hare, 1.

WITH A LIMITATION TO THEIR HEIRS, "AS THEY SHALL SEVERALLY DIE."
Sheppard v. *Gibbons*, 2 Atk. 441.

"TO EACH OF THEIR RESPECTIVE HEIRS."
Gordon v. *Atkinson*, 1 De. G. & S. 478.

"TO THEIR EXECUTORS AND ADMINISTRATORS RESPECTIVELY."
Re Moore's Settlement Trusts, 31 L. J. Ch. 368.

TO SEVERAL "BETWEEN."
Att.-Gen. v. *Fletcher*, L. R. 13 Eq. 128.

"AMONGST" THEM.
Richardson v. *Richardson*, 14 Sim. 526.

TO "EACH OF SEVERAL PERSONS."
Hatton v. *Finch*, 4 Bea. 186.

LEANING IN FAVOUR OF TENANCY IN COMMON.

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

1st ed. Vol. 2, p. 163; 6th ed., p. 1792.

Under a gift to a class by reference to the Statute of Distribution they take as tenants in common.

6th ed., p. 1793. *Re Nightingale* (1909), 1 Ch. at p. 389.

GIFT TO COMPOUND CLASS.
DOUBLE WORDS OF SEVERANCE REQUIRED.

To the general principle above stated—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—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.

6th ed., p. 1704. *Bridge* v. *Yates*, 12 Sim. 645.

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.

Ibid.

TO CHILDREN OF SEVERAL PARENTS "RESPECTIVELY."

In a gift to the children of several persons "respectively," the word may have the effect only of attributing to each parent his own children, and of causing the property to devolve per stirpes; the children taking inter se as joint-tenants.

Ibid. *Hobgen* v. *Neale*, L. R. 11 Eq. 48.

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.

6th ed., p. 1705. *Chatfield* v. *Berchtoldt*, 18 W. R. 887.

Of course expressions which, standing alone, would create a tenancy in common, may be controlled and neutralized by the context: and such, it seems, is the effect of the testator's postponing the enjoyment of an ulterior devisee, or legatee, until the decease of the survivor of the several co-devisees or legatees for life, which, it is thought, demonstrates an intention that the property shall,

in the meantime, devolve to the survivors, under the jus accrescendi which is incidental to a joint-tenancy.

1st ed. Vol. 2, p. 163; 6th ed, p. 1795. *Cranswick* v. *Pearson*, 31 Bea. 624. *Kelsey* v. *Ellis*, 38 L. T. 471.

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.

6th ed., p. 1796. *Pearce* v. *Edmeades*, 3 Y. & C. 246.

INTENTION MUST BE CLEAR.
GIFT OVER "AT THEIR DEATH."

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. 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 have been contemplated, and "at their respective deaths" is a meaning more likely to suit the intention than "at the death of the survivor."

6th ed., p. 1798. *Re Hutchinson's Trusts*, 21 Ch. D. 811. *Wills* v. *Wills*, L. R. 20 Eq. 342.

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; à fortiori if the gift is of separate properties.

Ibid. *Swan* v. *Holmes*, 19 Bea. 471.

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, 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.

Ibid.

DISTINCTION BETWEEN JOINT-TENANCY AND TENANCY IN COMMON, AS TO LAPSE, &C.

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, or subsequently revoked, or by reason of the decease of the devisee in the testator's lifetime, the other or others will take the whole. But the rule is different as to tenants in common, whose shares, in case of the failure or revocation of the devise to any of them, descend to the heir-at-law or residuary devisee of the testator; 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.

6th ed., p. 1799. *Young* v. *Davies*, 2 Dr. & Sm. 167. *Short* v. *Smith*, 4 East. 418. *Boulcott* v. *Boulcott*, 2 Drew. 25. *Kingsbury* v. *Walter* (1901), A. C. 187.

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, it is now settled that the objects take as tenants in common, and it should seem that under an implied gift resulting from a power of selection the same rule prevails.

Ibid.

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. 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.

6th ed., p. 1800. *Paragraph quoted, Re Ware*, 45 Ch. D. at p. 275.

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.

6th ed., p. 1801.

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.

Ibid.

GIFT FOR "SUPPORT" OF CHILDREN—JOINT-TENANCY.

A testator gave to his daughter A. all the cash he had in bank, to be used by her for her own support and that of his children, B. and C., and gave to her all his stock-in-trade and furniture and other effects, to be applied by her for the like purpose. B. and C. were adults at the date of the will:—Held, that the word "support" was equivalent to "benefit," and that A. B. and C. took the property absolutely and as joint tenants.

Nolan, In re; Sheridan v. *Nolan* (1912), 1 Ir. R. 416.

Devise to Children as Joint Tenants—Subsequent Clause—Jus Accrescendi—Issue of Child Dying to Take Parent's Share, or, in Default of Issue, Surviving Children—Effect on Devise.—By the ninth clause of a will certain property was left to four daughters as joint tenants. By a later clause upon the death of one of testator's children their lawful issue should stand in their place, etc.:—Held, that the later clause does not make a severance of the joint tenancy, and this objection to the title is not valid. The fifteenth clause may relate to other devises or it relates to the death of the children during the lifetime of the testator or the lifetime of his wife, and does not take effect after the estate is vested. *Re Millar & Roman Catholic* (1909), 14 O. W. R. 205.

Gift of Income to Fourteen Named Persons during their Respective Lives—Substitutional Gift to Children.—The general rule of construction which, by implying a joint tenancy or survivorship prevents a partial intestacy on a gift of income to several persons, with a gift over of the corpus on the death of the survivor, is not due to be extended to cases where there is an express gift of the parent's share to the children of any of the life tenants who died before the period of dissolution leaving children. Accordingly there may be in such a case an intestacy as to the income of some shares until the period of sale and distribution. *Hobson, In re Barwick* v. *Holt*, 56 S. J. 400.

Testator, on the 20th December, 1833, after devising certain land to his son G. and his wife, and to the survivor of them, added, "after the decease of the said G. and his wife, I give, devise, and bequeath the said lands (so devised to them) to the children of the said G. and his wife, including E., son of the said G. by his first wife, to have and to hold the same to the said children of the said G., or the survivors of them, for ever, share and share alike." G. and his wife left two children surviving them. E. died before the father. In ejectment by one child against a purchaser from the other:—Held, that the two children took as tenants in common, and not as joint tenants, and that the plaintiff therefore was entitled only to one undivided moiety. *Keating* v. *Cassels*, 24 U. C. R. 314.

Tenants in Common.—Held, upon the special terms of a will set out in the report, giving the estate to trustees with directions for accumulation and distribution, that the intention of the testator was that his estate should be divided, and that the children of the testator's daughter took as tenants in common, and consequently on the death of the eldest son the whole right, title and interest in his share, vested in the appellant. *Fisher* v. *Anderson*, 4 S. C. R. 406.

Widow and Issue.—A testator who died 1st October, 1853, devised his estate, upon trust, inter alia, as follows: "To pay my debts and funeral

expenses, and manage the said premises so given, granted, devised, and conveyed to the said executors, in whatever manner they consider most advantageous for my wife and my issue, who I will and declare to be entitled to receive the benefits of any and every portion of the aforesaid lands, goods," &c.:—Held, that the widow and children of the testator took as tenants in common. *Shaw* v. *Thomas*, 19 Chy. 489.

Testator gave the sole use of a farm to his widow until his son John became 21. John then was to get the east of and half of all property on farm at that time. They might then work farm together, or if widow was tired of working the place, then John was to have the full management, but was to support his mother during widowhood, and his four sisters until of age or married, at which time each sister was to receive £10, etc.:—Held, (1) That the claims the sisters had to legacies under the will were barred by Statute of Limitations. (2) That the three sisters who had remained out of possession for the statutory period were barred by the statute. (3) That the son and the sister who had remained in possession were entitled to a two-fifths interest of the farm as tenants in common and to a three-fifths interest of the estate *pur autre vie* of the married sisters. (4) That John was entitled to remainder in fee. *McKinnon* v. *Spence* (1909), 14 O. W. R. 1144, 1 O. W. N. 240, 20 O. W. R. 57.

Estate for Life—Remainder to Heirs—"Then Surviving."—A testator devised land to his wife "during the full term of time that she remains my widow and unmarried," and subject thereto to two sons "during the full term of time of their natural lives, and if either of my said sons should die not leaving heirs the issue of his own body, his surviving brother shall inherit his share of the said lands for the time being, and after the decease of both of my said sons, the before mentioned land and premises shall be sold and the proceeds thereof of each share shall be equally divided and given unto their respective lawful heirs then surviving them, share and share alike:—Held, that the will gave a life estate for the joint lives of the two persons answering the description of the heirs of each son at the death of the longest liver of the two sons. *Haight* v. *Dangerfield*, 23 C. L. T. 87, 5 O. L. R. 274, 1 O. W. R. 551.

Devise to Two Persons—Death of One before Testator—Lands and Personalty—Lapse.—A testator, by his will, among other provisions, devised certain land to two sisters, naming them, to whom he also gave his residuary estate. One of the sisters predeceased the testator:—Held, that, as regards the land, the sisters would have taken as tenants in common, and therefore as to the deceased sister's share there was a lapse, and it was undisposed of, but as to the personalty they would have taken as joint tenants, and the survivor took the whole. *Re Gamble*, 8 O. W. R. 797, 13 O. L. R. 299.

Charge of Maintenance.—Testator, after 1st July, 1834, devised to his sons C. and F., the land in question, with the mills thereon erected, "the said land and mills to be held and divided by the said C. and F., as they shall deem most equal and just;" and a direction was added, that they should equally contribute towards the maintenance of the testator and his wife during their lives, and to the payment of his debts:—Held, that the devisees took a fee as tenants in common, not as joint tenants. *Ingalls* v. *Arnold*, 14 U. C. R. 296.

Devisees Directed to Value Lands in their Possession.—H. P., who died in 1833, desired by his will that his sons and daughters should meet to have an inventory taken of all his goods and lands, and if any of them had received any goods they should give them in to be appraised, and keep them as part of their shares, and if any of them were living on his lands they should keep the same at the inventory price; and at a subsequent meeting they should agree together for the division of "my said goods and chattels, lands and tenements, by me given and bequeathed to them, their heirs, and each of their heirs and assigns for ever, to share and share alike." He left seven children, one of whom, a married daughter, was

living on the land in question with her husband at the testator's death, and had been so for many years previous. The plaintiff, claiming through another daughter, contended that the will made all testator's children tenants in common of all his land, and that he was entitled to a one-seventh part of this:—Held, that even if the will created a tenancy in common as to all other lands, it did not extend to lands on which any of the children were living. *Moross* v. *McAllister*, 26 U. C. R. 368.

Direction to Pay Debts.—A will devised certain property to the testator's two sons, their heirs, &c., and provided that the devisees should jointly and in equal shares pay testator's debts and the legacies in the will. There were six legacies of £50 each to other children of the testator, and these were to be paid by the devisees at the expiration of two, three, four, five, six and seven years respectively. The estate vested before the statute abolishing joint tenancies in Nova Scotia came into operation:—Held, that these provisions for payment of debts and legacies indicated an intention on the testator's part to effect a severance of the devise, and the devisees took as tenants in common and not as joint tenants. *Fisher* v. *Anderson*, 4 S. C. R. 406, followed. On the trial of a suit between persons claiming through the respective devisees to partition the real estate so devised, evidence of a conversation between the devisees, which plaintiff claimed would show that a severance was made after the estate vested, was tendered and rejected as being evidence to assist in construing the will:—Held, that it was properly rejected.—Held, per Gwynne and Patterson, JJ., that the evidence might have been received as evidence of a severance between the devisees themselves, if a joint tenancy had existed. *Clark* v. *Clark*, 17 S. C. R. 376.

Joint Tenancy with Devise over.—A testator, in a will containing inconsistent provisions, devised certain real estate, after the death of his daughter, to his grandsons, J. and F., "to hold as joint tenants, and not as tenants in common. To have and to hold the same to them during their joint lives, and to the survivors of them, and to their male heirs after their or either of their decease, and to their heirs and assigns forever," and in case of the death of F. without leaving lawful issue, then the portion that would have belonged to him if living, the testator gave to another grandson, H., for his life, and after his death to his heirs and assigns for ever:—Held, that the remainder after the death of the daughter went to J. and F. as joint tenants for life, with several inheritances in tail male, and with remainder in fee as to F.'s part to H. *Hellem* v. *Severs*, 24 Chy. 320.

Remainder to Children.—A testator on the 23rd February, 1819, devised all his property, real and personal, to his wife for life or widowhood, and directed the same to descend equally between his children, A., B., C., D., and E., their heirs and assigns, lawfully begotten, and in case of failure of issue the same property, real and personal, to F., his heirs and assigns:—Held, that the children took estates tail in the realty as tenants in common and with cross-remainders amongst them, and that B., C., D., and E. took the share of A., who died before the testator.—Per Esten, V.C., the bequest over of the personalty was void for remoteness. *Heron* v. *Walsh*, 3 Chy. 606.

CHAPTER XLV.

ESTATES IN FEE.

OLD LAW.

DEVISE WITHOUT WORDS OF LIMITATION BEFORE 1 VICT. C. 26.

Nothing is better settled, "than that a devise of messuages, lands, tenements, or hereditaments (not estate), without words of limitation, occurring in a will which is not subject to the Wills Act, 1837, confers on the devisee an estate for life only, notwithstanding the testator may have commenced his will with a declaration of his intention to dispose of his whole estate, or may have given a nominal legacy to his heir, 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, or the devise in question may be to a class embracing the heir, as to the testator's children, 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; 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. 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 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.

1st ed., Vol. 2, p. 170, 6th ed., p. 1802.

NEW LAW.

A DEVISE WITHOUT WORDS OF LIMITATION, TO PASS THE FEE.

Perhaps there was no one of the old rules of testamentary construction which so directly clashed with popular views, as that which required words of limitation, or some equivalent expression, to pass the inheritance; and hence the attention of the framer of the Wills Act, was naturally directed to the abolition of this technical

doctrine. Accordingly, by section 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."

1st ed. Vol. 2, p. 194, 6th ed., p. 1806.

The Ontario enactment is section 31, as follows:—

31. Where any real estate is devised to any person without any words of limitation, such devise shall, subject to The Devolution of Estates Act, be construed to pass the fee simple, or other the whole estate or interest, which the testator had power to dispose of by will, unless a contrary intention appears 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.

6th ed., p. 1807.

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, or that a special power of appointment is (in terms) given to the devisee, 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 show that the testator meant a gift to A. for life, with remiander to B. in fee. 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.

Ibid. *Gravenor* v. *Watkins*, L. R., 6 C. P. 500. *Quarm* v. *Quarm* (1892), 1 Q. B. 184.

DEVISE OF INCOME OF LAND.

A devise of rents and profits or of income of land now carries the fee simple. Under the old law it carried only an estate for life, unless words of inheritance were added.

6th ed., p. 1808. *Mannox* v. *Greener*, L. R. 14 Eq. 456.

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.

Ibid.

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. 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.

Ibid. Chap. XXXI., ante, p. 547.

Estate in Fee Old Law.—Semble, that a devise of lands to testator's wife for life, to be at her full and free disposal, to whom and whensoever she pleases, and out of which the testator's just debts are to be paid, gives an estate in fee, and not for life, with a power of sale. *Doe d. Humberstone* v. *Thomas*, 3 O. S. 516.

Where a testator devised lands to his daughter, without words of inheritance, and the rest of his estate, except that devised to his daughter, to his sons in fee:—Held, that the daughter also took a fee in the lands devised to her. *Doe d. Stevenson* v. *Hainer*, M. T. 3 Vict.

Where a testator devised as follows: "As touching my worldly estate, I give, devise, and dispose of the same in the following manner. I will that my just debts be paid, should any remain unpaid at my decease; I hereby give and bequeath unto my executors, hereinafter named, my real property, for the purpose of satisfying the same; after which I will that the residue of my lands, messuages, hereditaments, and premises, with my personal estate, or the proceeds thereof (if sold by my executors, which I hereby authorize them to do for the benefit of my children), be divided in equal shares among my six beloved children (naming them)," and then appointed executors:—Held, that the children took an estate in fee, not for life, in the real estate. *Baby* v. *Baby*, 1 U. C. R. 54. See *Dixon* v. *Dixon*, 14 U. C. R. 275.

"My farm, situate on the river Thames, in the first concession of Harwich, lot No. 23, likewise all the rest of my personal goods and chattels of what kind and nature soever, I give and bequeath, after the

decease of my beloved wife S., to my children, married as well as unmarried, to be equally divided amongst them after the youngest becomes of age, which said property is not to be sold out of the family," &c.; adding below the attestation clause, but above the signatures of the witnesses, "It is my request, before signing the above, that Mr. A. K. is to be maintained by my heirs during his life:"—Held, that the children took a fee. *Smith* v. *Holmes*, 14 U. C. R. 572.

"And as touching such worldly estate as wherewith it has pleased God to bless me in this life, I give, devise, and dispose of the same in the following manner and form: first, I give and bequeath to M., my dearly beloved wife," whom he made sole executrix, "all and singular my lands, messuages, and tenements, together with my ready cash, household goods, debts, and movable effects, by her freely to be possessed and enjoyed:"—Held, that the widow took a fee in the land. *Hurd* v. *Levis*, see 22 U. C. R. 11. Followed in *Brooke* v. *McCaul*, 22 U. C. R. 9.

A testator, by his will, written in French, after devising to his wife "the full enjoyment of all his goods, property (biens) real and personal, movables and immovables of what nature or kind they may be, during her life," proceeded. "I will and order that after the decease of my wife A., all my goods, property (biens) aforesaid whatever they may be, be divided and owned equally among all my children (naming them):"—Held, that the devisees were tenants in common in fee, and not merely for life. *Sanders* v. *Janette*, 3 U. C. C. P. 292.

The testator, who died in 1832, devised as follows:—"I make and give all my property, both land, house, and all the stock, and every other article I possess or own, to my loving wife Elizabeth, making her my executrix:"—Held, that the wife took an estate in fee. *Hicks* v. *Snider*, 44 U. C. R. 486.

Estate in Fee—Later Law—"Absolutely"—In the Event of Her Death.—A testator, who died on the 9th April, 1891, seised in fee, by his will devised and bequeathed all his real and personal estate to his wife absolutely, and in the event of her death to be equally divided among her children:—Held, that the will was to be construed as if the words "in my lifetime" followed the words "in the event of her death," and that the widow took an estate in fee simple in the lands. Construction of s. 30 of the Wills Act, R. S. O. 1887 c. 109. *Re Walker and Drew*, 22 O. R. 332.

Conditional Fee.—A devise to two persons of separate lots of land with a proviso that if either devisee should die without lawful issue the part and portion of the deceased should revert to the surviving devisee, and with the further proviso that in case both devisees should die without issue the devised lands should be divided by certain named persons as they should deem right and equitable among the relatives of the testatrix, confers upon each devisee only a defeasible fee simple. *Nason* v. *Armstrong*, *McClelland* v. *Armstrong*, *Wright* v. *Armstrong*, 21 A. R. 183. Reversed by the Supreme Court, on another point, 25 S. C. R. 263.

Executory Devise.—A testator by his will devised as follows: "I give and bequeath to my son F. . . lot No. . . at the age of twenty-one years, giving the executors power to lift the rent and to rent," said executors paying F. all former rents due after my decease up to his attaining the age of twenty-one years . . . At the death of any one of my sons or daughters having no issue their property to be divided equally among the survivors." F. attained twenty-one and died unmarried and without issue:—Held, a conditional fee, with an executory devise over. *Little* v. *Billings*, 27 Chy. 353, distinguished. *Crawford* v. *Broddy*, 25 O. R. 635. Reversed in appeal on another ground, 22 A. R. 307.

Devise Over.—W. F. died in 1841, leaving a will as follows: "I will and devise unto my son C. F., all and singular that farm, &c., the same to be by him the said C. F. peacably possessed and enjoyed for and during his natural life; and after his decease I will and devise the same to the heirs of the said C. F., and to their heirs and assigns for ever; . . . and in the event of either of my sons C. F., I. B. F., or R. F., or either of my daughters, S. F. or M. F., dying before they come

of lawful age, or without lawful issue, then, and in such case, the legacies herein devised and bequeathed to them shall be equally divided amongst the surviving ones, share and share alike." C. F. died at the age of thirty, and unmarried:—Held, that the plaintiff, as heir-at-law of the testator, could not recover. Per Robinson, C.J., the word "or" should be read "and;" and C. F. took an estate in fee, subject to an executory devise over, in case he should die under age and without issue. Per Burns, J., the will should be read without alteration; C. F. took an estate tail, and therefore on failure of such estate the devise over took effect. *Doe d. Forsythe* v. *Quackenbush*, 10 U. C. R. 148

Testator devised certain lands to his son H. in fee, with a devise over, and "in case my son H. shall die intestate or without issue:"—Held, that "or" must be read "and," and that the condition was inoperative. *Re Babcock*, 9 Chy. 427.

By his will, dated 28th January, 1840, testator devised as follows: "I will and devise to my son C., all and singular &c. (certain land), to be by him peaceably possessed and enjoyed for and during his natural life, and after his decease I will and devise the same to the heirs of the said C., and to their heirs and assigns for ever; in consideration whereof I will, order, and direct, that the said C. shall pay yearly and every year unto his mother the sum of £25 during her widowhood; and also, that he shall pay to his sister M. the sum of £25 yearly and every year, so long as she shall remain single." Then followed a devise to his son I. B. of certain lands in similar words; and then, after certain devises and bequests to others of his children, including a gift of £500 to his son R., there was this further provisi . "and in the event of either of my sons, C., I. B., or R., or either of my daughters, S. or M., dying before they come of age, or without issue, then and in such case the legacies herein devised and bequeathed to them, shall be equally divided amongst the surviving ones, share and share alike:"—Held, that extrinsic evidence of the ages of testator's children was admissible for the purpose of aiding in the construction of the will. (2) That C. having been over twenty-one years of age at the date of the will, and having died without issue, the gift over took effect as respected the land devised to him. (3) Per Draper, C.J., and Gwynne, J., the gift to C. was an estate in fee simple, subject to an executory devise over in the event of his dying without issue. *Forsyth* v. *Galt*, 21 C. P. 408, 22 C. P. 115.

"All the property to my wife S. for her sole use and benefit so long as she remains my widow, but in the event of her marrying again then P. to be paid out of my estate $500 and in case my wife marries again M. to be paid $500 from my estate." Wife takes an estate in fee subject only to the payments in case of re-marrying. There is no disposition of the balance of the estate in case of re-marriage. The Court leans against intestacy. *Re Morton*, 10 O. W. R. 211.

Impossibility of Event—"And"—Lifetime of Two Persons—Death of One.—A testatrix devised and bequeathed all her real and personal estate to her son in fee with a proviso that in case he should die without issue previous to the death of "my brother . . . and sister . . . " then over. The sister mentioned died in the lifetime of the son:—Held, that, as the event, viz., the death of the son previous to the death of both the brother and sister, could not happen, the son took an estate in fee simple. *Lillie* v. *Willis*, 31 O. R. 198.

Direction for Sale—Trust—Perpetuities.—A testator by his will devised certain lands to his son N. M. for life and after his decease to his heirs and assigns for ever, but subject to the payment within three years out of the rents and income of a sum of money charged upon the lands therein specified; after his death the land was to be sold provided N. M.'s youngest child then living was of the age of twenty-one years, the proceeds thereof to be equally divided between N. M.'s children at the time of sale:—Held, that under the rule in Shelley's Case N. M. took an estate in fee simple in the land, and that there was no trust in favour of N. M.'s children. Held, also, that by the terms of the will there was a restraint on alienation by sale, but not by mortgage. Held,

lastly, that the executory devise in favour of N. M.'s children was void as a violation of the rule against perpetuities. *Meyers* v. *Hamilton Provident and Loan Co.*, 19 O. R. 358.

Executory Devise—Death of Devisee before Contingency Happens.—A testator devised his farm to his wife "to have and to hold unto my said wife until my daughter E. shall arrive at the age of twenty-one years. After that, to my said daughter and her heirs for ever, and should my said daughter die before attaining the age of twenty-one years, I give and devise the said farm to my said wife, to have and to hold unto her and her heirs for ever." The widow died intestate before the daughter, who was the only child, and who herself died intestate and unmarried before attaining twenty-one:—Held, that the widow, under the second gift to her, took an executory devise in fee, which passed upon her death to the daughter, upon whose death it passed to her proper representatives. *Re Bowey, Bowey* v. *Ardill*, 21 O. R. 361.

Happening of Event.—A testator devised a farm to his executors in trust for his grandson, with power to sell and apply the proceeds for his benefit, and in case he died before attaining twenty-one, they were to transfer the land, or, if sold, the balance of the proceeds, to his father. The father died before his son, who died before attaining twenty-one without issue. The land was not sold:—Held, that the grandson took a vested estate in fee simple, subject to be divested on the happening of a certain event, which had become impossible, and that his estate had become absolute. *Parkes* v. *Trusts Corporation of Ontario*, 26 O. R. 494.

Residuary Devise.—A testator devised certain land to his son W. during his lifetime; and in the event of his death, leaving his wife surviving him, he devised the rents, issues, and profits to her during her lifetime or widowhood; but in the event of both dying within thirty years from his death, in such case he devised the rents and profits thereof, until the expiration of such thirty years, to W.'s children equally, share and share alike; and after W.'s death, and after the death or remarriage of his said wife, and provided that the thirty years should have elapsed, to all of W.'s children by his said wife, share and share alike, to have and to hold the same after the specified periods to them, their heirs and assigns for ever:—Held, that under the will the fee in the land, subject to the estate devised to the children until the expiration of the thirty years, vested in W. and his heirs, and, in the absence of any evidence showing whether or not W. had disposed of the land, the children could not impart a good title in fee. *Re Garbutt and Rountree*, 26 O. R. 625.

In 1857 James Gray made a will, in which he said: "I give and devise to my son John Gray, his heirs and assigns, &c., to have and to hold the premises above described to the said John Gray, his heirs and assigns for ever. But if my son John should die without leaving any issue of his body lawfully begotten, or the children of such issue surviving him, then and in such case I will and devise the said, &c., to my son Thomas Gray, his heirs and assigns, to have and to hold the same at the death of the said John Gray:"—Held, that under the will John Gray took an estate in fee, with an executory devise over to Thomas Gray in the event that happened, of John Gray dying without leaving lawful issue. *Gray* v. *Richford*, 2 S. C. R. 431.

Executory Limitation—Legacy—Mode of Application.—J. C. by his will directed his trustees to divide his real estate equally between his sons then living, when his eldest son should attain the age of twenty-five years, when the share coming to his eldest son was to be conveyed to him and they were to give him $2,000 to stock the same. In case any of his sons should die, before attaining the age of twenty-five years, without issue, then the share of the party so dying should be divided equally among the survivors. J. J. C., the eldest son, died under the age of twenty-five leaving a widow and infant daughter, having made a will making no devise of real estate, but giving his wife his life insurance, then standing in favour of a loan company, and directed that so much of his $2,000 as was necessary be used to redeem the insurance

from the company, and the balance he gave to his wife:—Held, that the devise to the eldest son was a devise in fee simple, subject to an executory limitation over on his dying under twenty-five and without issue, and as issue was left, the infant was entitled to the land, as her father's heiress-at-law, subject to her mother's dower. Held, also, that the $2,000 was an absolute bequest, with a direction as to its application, and that the legatee was entitled to the money regardless of the particular mode of its application. *Cook* v. *Nobis*, 5 O. R. 43.

Failure of Heirs.—Testator devised his farm to G., and directed that if G. should die without heirs the land should be sold and a legacy paid; and if the testator's widow should die or marry before G. should have paid $2,000, the balance should be equally divided amongst the testator's heirs. In a subsequent part of the will the testator directed that G. should pay $2,500:—Held, that the estate intended for G. was the fee simple, with an executory devise over in case he should die without issue living at his death. *Bateman* v. *Bateman*, 17 Chy. 227. Held that the words "heirs" in the bequest of the balance did not include the widow; and the same construction was put upon the word "heirs" in a residuary clause contained in the subsequent part of the will. *Ib.*

Habendum Applied to Two Devises—Indefinite Restricting Clause.—"To my son J. P. I give and devise all that my real estate situate, lying and being, lot number five in the fourth concession of Yarmouth, in the London district, containing 200 acres, be the same more or less." (the land in question), "and also I give and bequeath to my said son J. all that my real estate situate, lying and being lot number six in the fourth concession of Yarmouth, in the London district, containing 200 acres, be the same more or less, to hold unto him, the said J. P., his heirs and assigns for ever." After several other devises of land in fee to other children, with other special provisions, he added, "It is my further wish that all my estate herein devised to my children shall be entailed to their heirs and successors for ever, none of the lots to be divided, but to be the sole property of the heir-at-law; at the same time there shall be an incumbrance on the said lots of land, whatever may be considered a fair allowance, according to the interest of the said estate, to be for the support and benefit of the younger heirs:"—Held, that J. P., by the first part of the will, took a fee in lot five, the habendum applying to that lot as well as to lot six; and (2) that the subsequent general clause was not sufficiently definite or intelligible to cut down such estate to an estate tail. *Philan* v. *Graham*, 22 U. C. R. 380.

Heirs but not Assigns.—A devise in a will was as follows: "I also will, devise, and bequeath to my daughter L. A. the land and premises on which she now lives, and being all the land in said locality now owned by me, to her and her heirs, but not to their assigns." L. A. married and had issue:—Held, that she took an estate in fee simple. *Re Traynor and Keith*, 15 O. R. 469.

Implication—"Child or Children."—T. S. after providing for his widow in his will, made the following devise: "And I give and devise to my nephew R. S., lot No. 30 in the 2nd con., said township of Etobicoke, during the term of his natural life (excepting he have a child or children), if not at the expiration of his life to go to my daughter Ann Guardhouse or her heirs, &c., . . ." The will also contained a residuary devise in favour of the testator's widow. R. S. took possession, married, had children and died leaving his widow and several children. In an action by the widow of T. S., claiming that R. S. was only entitled to a life estate in the lot and that she was entitled to it in fee under the residuary clause: — Held, following *Lethieullier* v. *Tracy*, 3 Atk. 796, that an estate in fee might by implication be vested in the child or that the testator's intention might be properly effectuated by applying the rule in Bifield's Case (acted upon in *Doe d. Jones* v. *Davies*, 4 B. & Ad. 55), and reading "child or children" as nomen collectivum, and so creating an estate tail in R. S. Under the circumstances in this case "child" was not a designatio personæ, but compre-

hended a class, and therefore the plaintiff must fail. *Stobbart* v. *Guardhouse*, 7 O. R. 239.

Limiting Gift Over.—"In the first place, my will is that my beloved wife shall inherit all my messuages and tenements, situated, &c., with the appurtenances thereunto belonging; also, all my personal estate, goods and chattels, of what kind and nature soever, I give and bequeath to my loving wife, and during her widowhood; and in case of her marriage or decease, then to be disposed of and equally divided between my sons and daughters," &c., (naming them.) To my son J. S. I bequeath 100 acres of land (describing it). And for the execution hereof I do hereby appoint T. M. and C. S. to be my executors of this my last will and testament, with full power and authority to do and perform everything herein mentioned." On the 21st September following, this codicil was added: "And further, it is my will that my youngest daughter, E., born on the 23rd August, during my sickness, should equally share with the rest of my children (naming them); and in case of the death of either of the above named children before the estate be divided, then their share to be justly divided between the survivors." The testator died in 1818:—Held, that the widow took a fee in the land first mentioned. *Wright* v. *Wright*, 16 U. C. R. 184.

Power to Devisee to Dispose of Land.—Testator gave to his wife certain land, to be at her disposal during her natural life, and to his son the reversion of all his property that this mother might not have disposed of in her lifetime:—Held, that she had the power, during her life, of disposing of the estate by any conveyance in fee or otherwise. *Doe d. Anderson* v. *Hamilton*, 8 U. C. R. 302.

"Should my beloved wife C. survive me, all my worldly substance, all that I am worth, all my worldly estate, I give and bequeath to her for ever, to dispose of it as she may think proper. Be it understood this power of authority it is only during her widowhood; if the estate or property be not alienated during her natural life, or no will by her made in favour of any of my brothers and sisters or any of their children, then, and not till then, I give and bequeath unto my sister M., or to her heirs for ever, (the land in question). Those lands or estate devised is not to be sold or mortgaged for ever out of the family, except one brother or sister to the other, or to a brother's or sister's children, as far as the second degree:"—Held, that the widow took an estate in fee. *Bergin* v. *Sisters of St. Joseph*, 22 U. C. R. 204.

Repugnant Devise Over.—F., who died in 1861, by his will, made in 1861, gave to his wife all his lands for life; and after her decease he devised to each of his seven children separate lands, adding "and in case any of the aforesaid legatees should die before he or she comes of age, or shall die intestate, then and in such case his or her portion shall be equally divided among the remaining survivors." J. F., the oldest son and one of the devisees, died intestate in 1867, at the age of thirty, leaving a son, the testator's widow having died in 1864:—Held, that J. F., being twenty-one at his father's death, took an absolute vested interest in fee in remainder expectant on his mother's death: that the devise over was void as being repugnant to this gift preceding it; and that the land devised to J. F. went therefore to his son, not among the other surviving devisees. Semble, that if necessary "or" in the devise over might have been read "and." *Farrell* v. *Farrell*, 26 U. C. R. 652.

A testator devised as follows: (1) I will and direct that all my just debts and funeral expenses be paid by my two sons, A. and B., share and share alike, and I hereby charge the estate hereinafter devised to them with the said payments . . . (3) I give and devise unto my son B. the north part of lot 24, to have and to hold unto the said B., his heirs and assigns to and for his and their sole and only use for ever . . . (6) I desire it should be distinctly understood that the property hereinbefore devised unto my two sons, A. and B., is to be held by them only during their lifetimes and then to become the property of their heirs, and that they, my said sons, shall have no power to convey or dispose of the said lands in any manner whatever:"—Held,

that the rule in Shelley's Case applied, and B. took an absolute and unconditional estate in fee simple, and that the limitations contained in clause (6) were void as repugnant to the estate devised by clause (3) and unreasonable. *Re Casner*, 6 O. R. 282.

"To my wife or to her heirs as long as she remains my widow and on her death or her marrying again in case of no heirs" over. The widow takes an estate in fee simple—the marying provision is in terrorem and void. *Re Bray*, 2 O. W. R. 520.

"The premises is *sic.* never to be sold" void. *Re Corbit*, 5 O. W. R. 242, following *Re Watson*, 14 O. R. 48; *Blackburn* v. *McCallum*, 33 S. C. R. 65.

The testator intended that A. should take an estate in fee simple under a devise to him and his heirs or an estate tail under a devise to him and the heirs of his body. *May* v. *Logie*, 23 A. R. 785, followed. *Re Walton and Nicholls*, 2 O. W. R. 1035.

CHAPTER XLVI.

ESTATES OF TRUSTEES.

WHETHER DEVISES ARE WITHIN THE STATUTE OF USES.

The question whether a devise to uses operates by virtue of tha Statutes of Wills alone, or hy force of thosa statutes concurrently with tha Statutes of Uses, has been the subject of much learned controvarsy. Tha prevailing, and, it is conceived, tha 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 hy tha latter statutes could not, at the time of the passing of the Statute of Uses, have been in the contemplation of the legislature.

1st ed. Vol. 2, p. 196; 6th ed., p. 1811.

PRINCIPLE WHICH DETERMINES WHETHER PERSONA 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, tha 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 tha legal estate depends chiefly on the fact whether the testator has imposed upon him sny trust or duty the performance of which requires that the estate should be vested in him. If he has not, the legal ownership passes to the beneficial devisee, and 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.

6th ed., p. 1813. *Re Brooke* (1894), 1 Ch. 43. *Doe d. Terry* v. *Collier*, 11 East. 377.

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.

6th ed., p. 1814.

EFFECT OF CHANGING LANGUAGE OF LIMITATIONS BY INTRODUCING WORDS OF DIRECT GIFT.

So, it is clear, that the mere change of language, in a series of limitations, by substituting words of direct gift to the persons taking the beneficial interest, for the phrase "in trust for," will not clothe such persons with the legal estate, if the purposes of the will, in any possible event, require that the legal estate should be in the trustees.

1st ed. Vol. 2, p. 199 and *Ibid.* *Marthwaite* v. *Jenkinson*, 2 B. & Cr. 357.

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.

Ibid.

WHERE DEVISE INCLUDES OTHER PROPERTY AS TO WHICH TRUSTEES TAKE THE LEGAL ESTATE.

It seems, that where a will is so expressed as to leave it doubtful whether the testator intended the trustees to take the fee or not, the circumstance that there is included in the same devise other property which necessarily vests in the trustees for the whole of the testator's interest, affords a ground for giving to the will the same construction as to the estate in question.

1st ed. Vol. 2, p. 228; 6th ed., p. 1815. *Houston* v. *Hughes*, 6 B. & Cr. 403.

This principle, or "doctrine of attraction," as it has been called, was followed by Lord Romilly, M.R., in Baker v. Parson.

6th ed., p. 1815. *Baker* v. *Parson*, 42 L. J. Ch. 228.

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.

6th ed., p. 1816. *Cox* v. *Parker*, 22 Bea. 168.

TRUSTEE TAKES LEGAL ESTATE, WHEN DIRECTED TO APPLY THE RENTS.

Where the person to whom the real estate is devised for the benefit of another is intrusted with the application of the rents, he must, according to the principle before laid down, take the legal estate, in order that he may have a command over the possession and income.

1st ed. Vol. 2, p. 200; 6th ed., p. 1816

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. 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.

6th ed., p. 1818. *Doe d. Leicester* v. *Biggs*, 2 Taunt 100.

Effect where Both Expressions are Used.

Where the expression 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), be governed by the posterior expression.

Ibid Chap. XVII.

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.

Ibid. *Biscoe* v. *Perkins*, 1 V. & B. 485.

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. 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.

6th ed., p. 1819. *Re Fisher and Haslett*, 13 L. R. Ir. 546.

Separate Use.

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.

1st ed. Vol. 2, p. 203; 6th ed, p. 1819.

Receipts with the Approbation of Trustees to be Good.

And where 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.

Ibid.

DIRECTION TO SELL OR CONVEY GIVES LEGAL ESTATE TO DEVISEE.

Where the duty imposed on the devisee is to sell or convey 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.

1st ed. Vol. 2, p. 204; 6th ed., p. 1820. *Commented on in Richardson* v. *Harrison*, 16 Q. B. D. at p. 105.

POWER OF SALE WHERE INTERESTS ARE EQUITABLE.

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.

6th ed., p. 1821. *Richardson* v. *Harrison*, 16 Q. B. D. 85.

WHERE NO DEVISE TO TRUSTEES.

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.

Ibid. London & S. W. Ry. v. *Bridger*, 12 W. R. 948.

LANDS BEING CHARGED WITH DEBTS AND LEGACIES WILL NOT VEST THE ESTATE IN THE TRUSTEES.

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.

1st ed. Vol. 2, p. 205; 6th ed., p. 1822. *Kenrick* v. *Lord W. Beauclerk*, 3 B. & P. 175.

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.

6th ed., p. 1823. *Morshall* v. *Gingell*, 21 Ch. D. 790.

To Pay Debts in Aid of Personalty Where Devise is in Terms Contingent on Personalty Being Insufficient.

Here, it may be observed, that where real estate is devised to trustees for the payment of debts and legacies, though the property becomes applicable only in case of the deficiency of the personal estate, the trustees take the legal estate instanter, independently of the fact of the personalty proving deficient. 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, etc., then I devise, etc."). 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.

1st ed. Vol. 2, p. 208; 6th ed., p. 1824. *Goodtitle d. Hart* v. *Knot*, Cowp. 43. See *Hawker* v. *Hawker*, 3 B. & Ald. 537.

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.

6th ed., p. 1825.

Authority to Grant Leases when it Confers the Fee.

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.

1st ed. Vol. 2, p. 208; 6th ed., p. 1826. *Doe d. Tomkyns* v. *Willan*, 2 B. & Ald. 84.

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.

Ibid. White v. *Parker*, 1 Scott, 542.

Modern View.

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. 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."

6th ed., p. 1828. *Watson* v. *Pearson*, 2 Ex. at p. 593.

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.

Ibid. *Doe d. Kimber* v. *Cafe*, 7 Ex. 675.

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, possibly the right construction of such a direction is that it gives them merely a power.

6th ed., p. 1829.

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. 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.

Ibid. *Collier* v. *Walters*, L. R., 17 Eq. at p. 265.

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, or of the will, or trustees "to see justice done," or the direction alone without such appointment, is, it seems, an implied devise of the fee to those persons; so also a direction for payment of debts, etc., and distribution of the residue, without saying by whom such pay-

ment and distribution is to be made, has been held to give the legal estate in fee to the executors.

6th ed., p. 1830. *Doe* v. *Woodhouse*, 4 T. R. 89.

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. 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 show what less estate will serve the purpose.

6th ed., p. 1831. *Doe d. White* v. *Simpson*, 5 East, 162. *Collier* v. *Walters*, L. R. 17 Eq. 252.

The same principles apply to leaseholds.

6th ed., p. 1831.

PRINCIPLE WHICH REGULATES THE QUANTITY OF ESTATE.

The same principle which determines whether the trustees take any estate, regulates also the nature and duration of that estate; the established doctrine being (subject to certain positive rules of construction, lately propounded by the legislature, and which will be presently considered) that trustees take exactly that quantity of interest which the purposes of the trust require; and the question is not whether the testator has used words of limitation, or expressions adequate to carry an estate of inheritance; but whether the exigencies of the trust demand the fee-simple, or can be satisfied by any and what less estate.

1st ed. Vol. 2, p. 213: 6th ed., p. 1831.

ESTATE OF TRUSTEES COMMENSURATE WITH DUTIES.

Thus, in the case of a devise to a trustee and his heirs, upon trust to pay and apply the rents for the benefit of a person for life, and after his decease to hold the lands in trust for other persons; the direction to apply the rents being limited to the cestui que trust for life, the estate of the trustee will terminate at his decease. And it seems that a limitation to trustees and their heirs may be restrained by implication to an estate pur autre vie even in a deed.

6th ed., p. 1832. *Curtis* v. *Price*, 12 Ves. 89. The rules of construction affecting deeds are not the same as in the case of wills. *Cooper* v. *Kynock*, L. R. 7 Ch. 398.

Words of devise to trustees and their heirs are to have their natural effect to give a fee simple, unless something shows that it is cut down to an estate terminating at some time ascertained at the time of the testator's death. If no precise period for the termination can be shown, it remains an estate in fee. 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 he cut down to that estate.

6th ed., p. 1833.

COPYHOLDS AND LEASEHOLDS.

The same rule applies mutatis mutandis to devises of copyholds and leaseholds.

Ibid.

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, etc., or to lease. So a power to trustees to reimhurse 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.

Ibid. *Collier* v. *Walters*, L. R. 17 Eq. 252. See ante p. 879.

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 he 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, cach of which requires them to have the legal estate, and these are eeparated hy a period during which no such necessity exists, a special rule prevails, which has been thus stated: "Where there are rccurring occasions for the exercise of active duties hy 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 he deemed to be vested in them throughout, notwithstanding the duration in the meantime of what would hut for the recurring duties he construed as uses executed in the beneficiaries."

6th ed.. p. 1834. *Van Grutten* v. *Foxwell* (1897), A. C. at p. 683.

TRUSTEES TAKE THE FEE, THOUGH TRUST NOT STRICTLY COMMENSURATE.

Even under the old law, it was held that if the purposes of the trust could not be satisfied hy 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 rot exhaust the entire fee sir ple.

1st. ed. Vol. 2, p. 221; 6th ed., p. 1835. *Harton* v. *Harton*, 7 T. R 652.

INDEFINITE DEVISES TO THE USE OF TRUSTEES SUSCEPTIBLE OF ENLARGEMENT OR RESTRICTION.

Though (as we have seen) where the devise is to the use of the trustees, they tske the legal estate independently of the evi-

dence 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.

1st ed. Vol. 2, p. 214; 6th ed., p. 1836. *Riley* v. *Garnett*, 3 De G. & S. at p. 632.

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.

Ibid.

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. Thus, a bequest of property of this description to A., simply in trust for B., would unquestionably vest the legal estate in A., although no duty or office were cast on him requiring that he should have the legal ownership; and, by necessary consequence, A. must, in such a case take the entire term, there being nothing to restrict or qualify his estate.

6th ed., p. 1837.

EFFECT WHERE TESTATOR, WHO APPARENTLY CREATES A TRUST, HAS AN EQUITABLE INTEREST ONLY.

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 pre-

scribed duty in respect of the devised equitable interest, no less than if the legal estate had passed under it. For instance, supposing the testator to devise lands in which he has only an equity of redemption to A. in fee-simple, in trust for B., the devise would not confer any estate, or impose any duty on A., but the entire beneficial interest 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.

6th ed., p. 1838.

DEVISES TO PAY DEBTS, LEGACIES, &C.

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.

6th ed., p. 1839.

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.

1st ed. Vol. 2, p. 224; 6th ed., p. 1840. *Venables* v. *Morris*, 7 T. R. pp. 342 and 438.

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. 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.

6th ed., p. 1841. *Cunliffe* v. *Brancker*, 3 Ch. D. at p. 401. *Nash* v. *Coates*, 3 B. & Ad. at p. 839.

IMPLICATION OF INDEFINITE TERM OF YEARS ABOLISHED.
STAT. 1 VICT. C. 26, SS. 30, 31.

Of all the adjudged points connected with the subject, that which has been deemed the least satisfactory, is the doctrine of those decisions 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 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 estates 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."

1st ed. Vol. 2, p. 228: 6th ed., p. 1842.

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."

Ibid.

The following corresponding sections of the Ontario Act are as follows:—

34. Where any real estate is devised to a 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 is thereby given to him expressly or by implication.

35. Where any real estate is 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, is not given to any person for life or such beneficial interest is given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall, subject to The Devolution of Estates Act, 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 are satisfied.

REMARKS ON STAT. 1 VICT. C. 26. SS. 30, 31.

These clauses have been the subject of much criticism. It is not easy to perceive why the provision regulating the estates of trustees should have been split into two sections, and still more difficult is it to give to each of those sections such a construction as will preserve it from collision with the other. The design

of the 30th section would seem to be simply to negative the construction which, in certain cases, gave to a trustee an undefined term of years, for it allows him to take an estate of freebold, 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 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 co-extensive with life; for instance, a trust to keep on foot a policy of life insurance. Possibly it would be held that such a case is excluded from 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.

Ibid.

Even under wills made or republished since the year 1837, it may still be questionable whether trustees take any estate or only a power; also whether they take an estate limited to the lives of the tenants for life of the beneficial interest, or an estate in fee-simple; and consequently there should be no relaxation in the anxious care of framers of wills, to preclude ambiguity in this particular. It cannot, however, according to the suggested construction of the 31st section, under such wills become a ques-

tion, whether trustees take an estate in fee, or a chattel interest, in order to raise money, or for any other purpose.

6th ed., p. 1843.

The new doctrine would not, it is conceived, preclude the construction that trustees take an estate pur autre vie, with a power of sale over the inheritance. The writer is not aware, however, of any adjudged instance of such a construction, for where an estate is devised to trustees indefinitely, the authorities (with one solitary exception, in which there seems to have been an opposing context) conduct to the conclusion, that whatever duty is subsequently imposed on them, must be in virtue of their estate, the quality and duration of which are to be measured accordingly. The point, of course, depends on the conclusion to be fairly drawn from the entire will.

6th ed., p. 1844. See *Hawker* v. *Hawker*, 3 B. & Ald. 537.

The general rule, however, seems now to be that where there is a devise to trustees and their heirs, and they have some duty to perform requiring the legal estate, they take the legal estate and not merely a power.

Ibid. Re Tanqueray-Williams and Landau, 20 Ch. D. at p. 479.

TRUST FOR SEPARATE USE OF F. C. WITH POWER TO LEASE FOR TWENTY-ONE YEARS.

Similar questions may arise regarding other powers, as, to lease or to apply rents for the maintenance of minors.

Ibid. Berry v. *Berry*, 7 Ch. D. 657.

CHAPTER XLVII.

WHAT WORDS CREATE AN ESTATE TAIL.

Proper Terms of Limiting an Estate Tail.

A limitation to a person and the heirs of his body creates an estate tail general. If it be to him and the heirs male or the heirs female of his body, he takes an estate tail special, descendible in the male or female line, as the case may be. In the one case the land devolves upon the male issue and (unless the tenure be gavelkind or Borough-English) according to the law of primogeniture, in the other upon the females as coparceners. If the estate tail be general, it will run in this manner through both lines, in their established order of succession.

1st ed. Vol. 2, p. 232; 6th ed., p. 1846.

What Informal Expressions Create an Estate Tail.

But though these are the correct and technical terms of limiting an estate tail, yet such an estate may be created in a will by less formal language; indeed by any expressions denoting an intention to give the devisee an estate of inheritance, descendible to his or some of his lineal, but not to his collateral heirs, which is the characteristic of an estate tail as distinguished from a fee-simple. The former is transmissible to lineal descendants only; the later in default of lineal devolves to collateral and now to ascendant heirs.

Ibid.

Limitation to "Heirs Male," or "Right Heirs Male, for Ever." Or to Heirs by a Particular Wife.

A devise to A. and his heirs male for ever, or to A. and his heirs male living to attain the age of twenty-one, or to A. for life, and after his death to his heirs male, or his right heirs male, for ever, has been held to confer an estate tail male; the addition of the word "male," as a qualification of "heirs," showing that a class of heirs less extensive than heirs general was intended. 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. And in Idle v. Cook, 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 ever, this would give them an estate tail.

Ibid. 1 P. W. 70. *Doe d. Earl of Lindsey* v. *Colyear*, 11 East, 548.

It has even been decided that a devise to one, et hæredibus suis legitimè procreatis, creates an estate tail, though the addition merely describes a circumstance which is included in the definition of heir simply, an heir being ex justis nuptiis procreatus.

6th ed., p. 1847. *Nanfan* v. *Legh*, 2 Marsh. 107.

"Heirs to the Third Generation."

A devise to A., with a direction that neither he nor his heirs to the third generation should mortgage or sell the devised property, will, it seems, create an estate tail.

Ibid.

To Several and their Heirs "Successivelt."

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. 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.

6th ed., p. 1848. *Lewis* v. *Waters*, 6 East. 337. *Studdert* v. *Von Steiglitz*, 23 L. R. Ir. 564.

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.

Devise to A. and His Issue, &c.

A devise to A. et semini suo or to A. and his issue, clearly creates an estate tail, as is shewn more at large in a subsequent chapter. A devise to A. and his offspring, and a devise to A. and his family according to seniority, have also been held to create an estate tail general.

Ibid.

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.

Ibid.

Clause of Forfeiture.

An intention to create an estate tail may appear from a clause of forfeiture.

Ibid.

To Heir of the Body in the Singular.

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; and a devise to A. and such heir of her body as shall be living at her decease, or to A. and his heir male living to attain

twenty-one, and for want of such issue male the inheritance to go over, has received the same construction.

1st ed. Vol. 2, p. 233; 6th ed., p. 1849.

LIMITATION TO NEXT OR FIRST HEIR MALE.

Nor is the effect varied by the word "next" or "first" being prefixed to "heir."

Ibid.

TO "NEXT HEIR MALE," WITH SUPERADDED WORDS OF LIMITATION. ARCHER'S CASE.

But though a devise to the next heir male simply, following a devise to the ancestor for life, does not, confer on the heir an estate by purchase (the words being construed as words of limitation), yet if the testator has engrafted words of limitation on the devise to the next heir male, he is considered as indicating an intention to use the term "heir" as a mere descriptio personæ; in other words, as descriptive merely of the individual who fills the character of heir male at the ancestor's decease; the superadded words of limitation having the effect of converting the expression "next heir male" into words of purchase, an effect, however, which (as will be shewn at large in the sequel) does not, in general, belong to such superadded expressions of this nature. This rule of construction is founded on the authority of Archer's Case, where lands were devised to A. for life, and after to the next heir male and the heirs male of the body of such next heir male, and it was unanimously agreed by the Court that this was a contingent remainder to the heir, and that A. was but tenant for life, and he having made a feoffment of the devised lands, it was held that such contingent remainder was destroyed.

1st ed., Vol. 2, p. 234. *Ibid.* 1 Rep. 66, *Willis* v. *Hiscox*, 4 My. & Cr. 197.

The mother has an estate expressly for life; and after her death the devise is to the heir male of her body, in the singular number, with words of limitation to the heirs general of such heir, which it is clearly settled, gives an estate for life only to the parent, and the inheritance, by purchase, to the heir of the body, as was decided in Archer's Case, and assumed by Hale in King v. Melling, 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.

6th ed., p. 1850. *King* v. *Melling*, 1 Vent. 214.

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 show that the heir was intended to be a new stirps. But it is not necessary, as sometimes contended, that the superadded words should change the course of descent.

6th ed., p. 1851. See *Fuller* v. *Chamier*, L. R. 2 Eq. 682.

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.

6th ed., p. 1851. *Chamberlayne* v. *Chamberlayne*, 6 Ell. & Bl. 625.

"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.

Ibid.

The terms of a gift over may have the effect of showing that the testator meant the prior gift to confer an estate tail, and not an estate in fee simple.

Ibid.

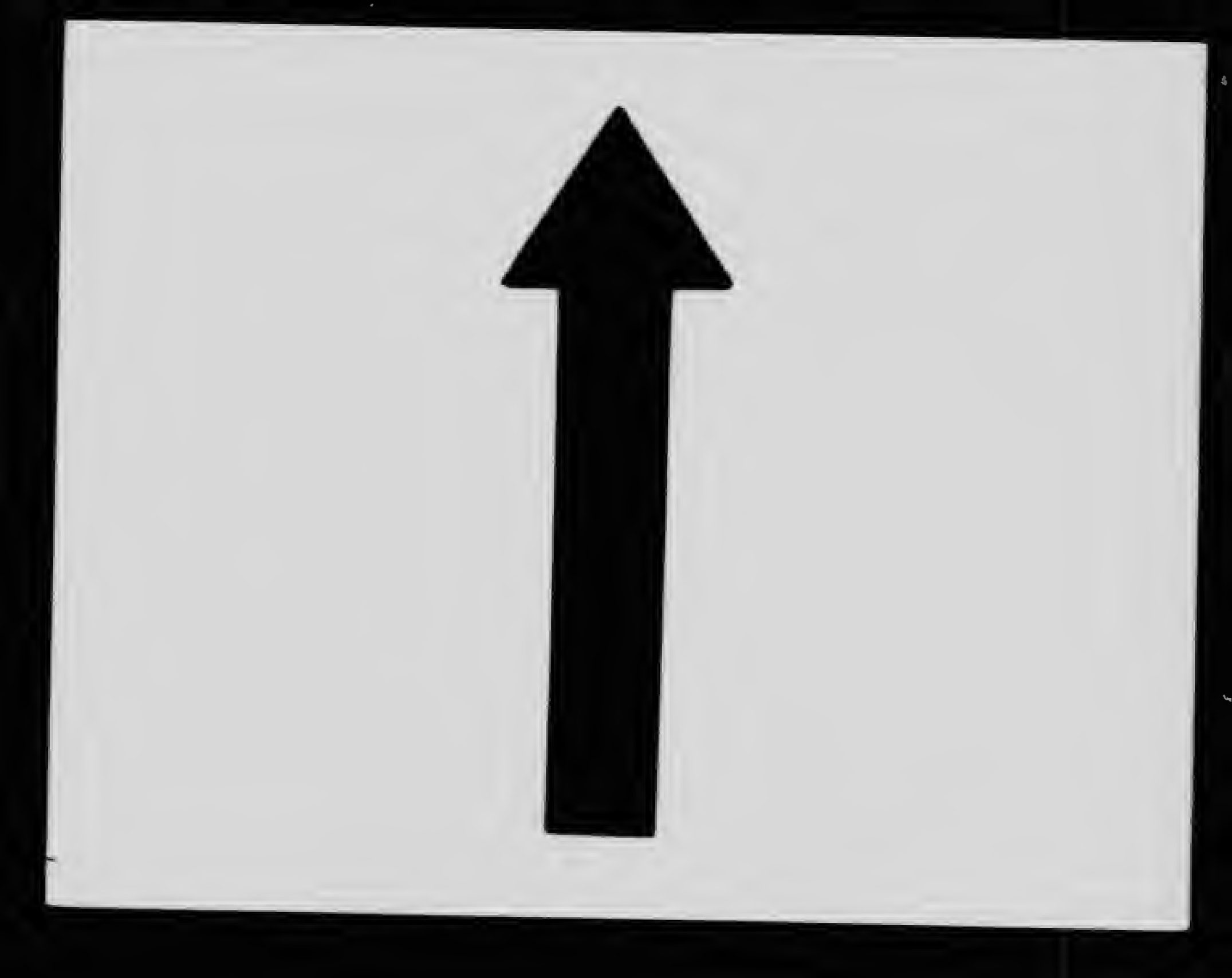
MEANING OF PRIOR GIFT EXPLAINED BY GIFT OVER.

Accordingly, where a testator, in the first instance, devises lands to a person and his heirs, and then proceeds to devise over the property in terms which show that he used the word "heirs," in the prior devise, in the restricted sense of heirs of the body: such devise, of course, confers only an estate tail, the effect being the same as if the latter expression had been originally employed. Thus, if lands are devised to A. and his heirs, and if he shall die without heirs of his body, or without heirs male of his body, or without an heir or 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.

1st ed., Vol. 2, p. 236; 6th ed., p. 1851.

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.

6th ed., p. 1852. *Dutton* v. *Engram*, Cro. Jac. 427. *Doe d. Jearrad* v. *Bannister*, 7 M. & W. 292.



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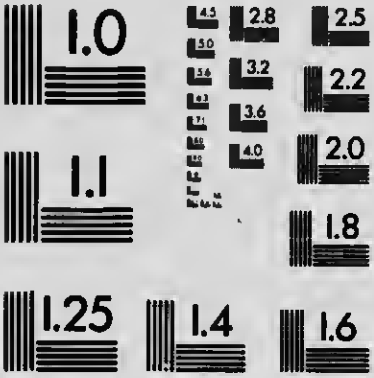

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DEFAULT OF A CHILD, OR SON.

The same principle of construction haa been applied where the devise over is in default of a son.

Ibid.

DEFAULT OF ISSUE.

The words "in default of issue," or words to that effect, stand pre-eminent for the number and variety of the questions of construction to which 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, 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 old law) have the effect of enlarging such prior devise to an estate tail, unless they are restrained as before suggested, or unless there is an intermediate devise to some class or denomination of issue to which they can be referred.

1st ed. Vol. 2, p. 361; 6th ed., p. 1853. Ante, p. 325 and post. chap. LII. *Crumpe* v. *Crumpe* (1900), A. C. 127. See ante, Chap. XXXVI.

The first doctrine referred to—namely, that a devise to A. and his heirs, followed by a limitation over in case of his dying without issue, gives A. an estate tail, unless "issue" means issue living at his death—has lost its practical importance, by reason of the rule of construction introduced by sec. 29 of the Wills Act.

6th. ed., p. 1854.

The second doctrine is still sometimes of importance, in casea where the devise over is capable of a referential construction, This subject is discussed in Chapter LII., where the authorities are referred to.

Ibid. Ante, p. 326.

DEVISE OVER ON FAILURE OF HEIRS TO A PERSON IN LINE OF DESCENT CREATES ESTATE TAIL.

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 devisec 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.

This construction is induced by the evident absurdity of supposing the testator to mean that his devise over should depend on an event which cannot happen without involving the extinction of its immediate object.

1st ed., Vol. 2, p. 238. *Ibid.* *Simpson* v. *Ashworth*, 6 Bea. 412.

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.

6th ed., p. 1854. *Re Waugh* (1903), 1 Ch. 744.

OTHERWISE WHERE TO A STRANGER IN BLOOD.

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; and formerly a relation of the half-blood, or a parent or grandparent was, for this purpose, considered as a stranger, such persons being then excluded from taking by descent: but the law, at least as to persons dying since the 31st of December 1833, is now regulated by the statute 3 and 4 W. 4, c. 106, which has admitted relations of the half-blood, and parents and other ancestral relations in the ascending line, to the heirship.

1st ed., Vol. 2, p. 238; 6th ed., p. 1855. *Harris* v. *Davis*, 1 Coll 416.

AS TO LIMITATION OVER TO THE RIGHT HEIRS OF THE DEVISEE.

Of course the limiting of the estate over, in default of heirs of the body or issue, to the right heirs of the devisee, does not vary the construction farther than to give the devisee the remainder in fee expectant on the estate tail.

1st ed. Vol. 2, p. 239; 6th ed., p. 1856. *Brice* v. *Smith*, Willes 1.

ESTATE TAIL GENERAL CUT DOWN TO AN ESTATE TAIL SPECIAL BY IMPLICATION.

Sometimes, an estate tail general is cut down to an estate tail special by implication.

Ibid. *Fitzgerald* v. *Leslie*, 3 B. P. C. Tomi. 154.

Sons to take Successively.—A testator, after devising land to his son William and his heirs, added, "and it is my will and intention that if the said William should die leaving no legitimate issue, the said two lots to vest and be to the said Walter," (another son,) "and his heirs," &c., making provision for the estate going to his other sons successively, in case of failure of issue; "and if the last named should die leaving no legitimate issue, then the same to the surviving heirs of my family, in equal proportion:"—Held, that William took an estate tail, not a fee, and that a conveyance by him (before 9 Vict. c. 11) was void *O'Reilly* v. *Corrie*, 11 U. C. R. 557.

"**Sons of the Body in Tail Male.**"—The testator devised certain lands to his son W. M. "for and during and unto the end and term of his natural life," and after the determination of that estate to the sons

of the body of W. M. in tail male, as they should be in point of birth, and for want of such issue to the daughters of the body of W. M. and the heirs of the body of such daughters, who were to take as tenants in common, and for want of such issue the lands were to be divided amongst the testator's other sons, or the heirs of their respective bodies, who at the death of W. M. should be entitled to any part of the lands devised in tail in the will to hold to his said other sons respectively, or the heirs of their respective bodies in the same course of descent in tail as the other lands devised to them in tail respectively, and for default of such other sons and of their issue at the death of W. M. to the right heirs of W. M. for ever:—Held, that W. M. took a life estate, with remainder in tail male, to his first and other sons successively, according to priority of birth, and failing male issue, with a further remainder to his daughters. And though circumstances might arise in which W. M. would have an estate in tail by way of remainder after the intermediate limitations to his first and succeeding sons, yet he could not so deal with that ultimate remainder as to divest their right to take as purchasers. *Riddell* v. *McIntosh*, 9 O. R. 606.

Trust for Devisee and Heirs of his Body.—H. devised land "in trust for the only benefit of R. B., for and during his natural life, without impeachment of waste, and from and after the determination of that estate, in trust for the heirs of the body of him, the said R. B., and in default of such issue, then in trust for the next heirs of me, the said H.:"—Held, clearly within the rule in Shelley's Case, and that R. B. took an estate tail. *Tunis and Bamberger* v. *Passmore*, 32 U. C. R. 419.

Estate Tail.—"To the use of A. for and during the period of her natural life and at her decease to the use of the heirs of her body begotten and their heirs and assigns in fee simple forever," and on her death a gift over in fee. The addition of "their heirs and assigns" does not alter the significance: *Mills* v. *Seward*, 1 J. & H. 733. "In fee simple" supererogatory. *In King* v. *Evans*, 24 S. C. R. 356, the devise was "to A. for the term of his natural life and after his decease to the lawful issue of said A. to hold in fee simple." Held, there that "in fee simple" diverted the word "issue" from its *prima facie* meaning as "a word not of purchase but of limitation equivalent to 'heirs of the body.'" 'Issue' is a more flexible expression than 'heirs of the body.' *In re Brand* "in fee simple" followed "and their heirs and assigns." *Re Brand*, 4 O. W. R. 473.

"Survivor"—"Estate Tail."—The testator died in 1845, and by his will devised a farm to his two sons, without words of limitation, to be equally divided between them, adding: "And in case either of my sons should die without lawful issue of their bodies, then his share to go to the remaining survivor:"—Held, that the gift in the earlier part of the devise, though without words of limitation, was sufficient to carry the fee to the sons, unless a lesser estate appeared to be intended on the face of the will. Both sons outlived the father: one died in 1874 leaving issue: the other died without issue in 1890:—Held, that the son who first died had an estate in fee simple absolute in one-half of the land; and, as the other left no survivor, he was not within the words of the will, and nothing had happened to divest him of the estate in fee given by the earlier part of the will, and therefore he also died seised in fee simple of one-half of the land. The word "survivor" is to be read as meaning "longest liver," not "other." The words "die without issue" do not mean an indefinite failure of issue which would give rise to an estate tail. *Ashbridge* v. *Ashbridge*, 22 O. R. 146.

"Dying without Heirs"—Estate.—A testator gave and devised to his daughter all his real and personal property, subject to the payment of certain legacies and charges, and "in the event of her dying without heirs" then to the testator's brothers and sisters:—Held, that the ulterior devisees being related to the first devisee, the "heirs" of the first devisee must be construed to be "heirs of the body," and therefore that as to the realty the daughter took an estate tail, and as to the

personalty an absolute estate. *In re McDonald*, 23 C. L. T. 326, 6 O. L. R. 478, 2 O. W. R. 968.

Inconsistent Clauses—Executory Devise—Failure of Issue—Estate in Fee.—A testator, by the third clause of his will, devised a lot of land to his son, "his heirs and assigns forever," and in the fourth clause stated it to be "my will and desire, provided my (said) son shall have no lawful heir or children, that the above mentioned tract of land, after his death, that (the plaintiff) shall have it with all the right and title that my (said) son had to it heretofore." By the fifth clause he gave to his wife "the use" of half the lot "during life; after her decease my will is that the same shall belong to my (said) son, his heirs and assigns forever." The son died after the testator without having had any children:—Held, that the fifth clause removed from the operation of the third and fourth clauses one-half of the lot, which vested in the son subject to the mother's life estate, while as to the other half the son had under the third clause an estate in fee simple, subject under the fourth clause to an executory devise over in favour of the plaintiff, which, in the events which had happened, had taken effect. *McMillan* v. *McMillan*, 20 C. L. T. 199, 27 A. R. 209.

Cross-remainders.—A. McL., by his will, after leaving other land to his daughter H., "his heirs, executors, and assigns, for ever," devised the land in question to his son A., "and to his heirs lawfully begotten," and to his grandson J. other land, in the same manner, adding, "in the event of any of the above named devisees," (naming the three,) "dying before they have, or without, a lawful heir, then his, her, or their devise, or property given them by his will, shall be equally divided among the survivors or survivor; but if they shall all die without a lawful heir, then the property given them by this will shall be equally divided among my sister E. S.'s children:"—Held, that the devisees took an estate tail with cross-remainders; and consequently, A. and J. having died without issue, and H. having left children, t J.'s share went to them not to his heir-at-law. *Ray* v. *Gould*, 15 . C. R. 131.

Death without Heirs—General Reference to Previous Devise.—A testator, who died in 1868, devised land to his son D., and other land to his daughter A., charged with legacies to his other children. The will further declared that if D. died without heirs D.'s property "shall remain for the use of his widow during her life, after which it shall be divided as seems best between the rest of my children," and if A. died without heirs the property devised to her "shall revert in the same way." D. was married before the making of the will, and A., after the testator's death married the plaintiff, and died in 1870:—Held, that D. and A. took estates tail; for the persons in remainder, the rest of the testator's children, being the collateral heirs of D. and A., only lineal heirs could have been intended to take under D. and A. Held, also, that the words "revert in the same way," meant "shall follow in like manner," and that therefore A.'s husband after her decease took a life estate in the property devised to her, as D.'s wife would take in that devised to D. *Jardine* v. *Wilson*, 32 U. C. R. 498.

Devise over on Death without Issue.—Testator, after devising certain land to his wife for life, provided that at her death the said land, together with the residue of his real estate, should be equally divided between his two daughters, to hold during their lives, and after the death of either her share to be equally divided between her children, share and share alike, as soon as they should attain the age of 21 or should marry; and in case either should die without leaving legal issue, then her share to be equally divided among the testator's brothers, &c. He died in 1832, leaving these two daughters, his only children:—Held, that the widow took no interest in the residue; that the daughters took an estate tail therein; and that under the Act either of them could convey a fee simple in her share. *Sisson* v. *Ellis*, 19 U. C. R. 559.

Devise over on Death without Heirs.—The testatrix devised lands to A., his heirs and assigns for ever, subject to certain legacies,

and declared that in case A. died without leaving lawful heirs, his widow should enjoy the property during her widowhood; and that on her marrying again the land should be sold, and the proceeds equally divided among such of the sons and daughters of the testatrix or their heirs as were living:—Held, that A. took an estate tail, and by a disentailing deed could give a good title to a purchaser of the fee. *Dale* v. *McGuinn*, 15 Chy. 101.

Estate Tail.—The estate was created by will dated 7th January, 1865, before sec. 32 of the Wills Act changed the law. By the law as it then stood the words "die without male issue" do not of themselves create an estate tail male. *In re Smith*, 4 O. W. R. 226.

Devise in Fee—"Entailed."—By a will made in 1847 a testator, who died in 1854, devised to his son a piece of land, describing it, and proceeded: "All which shall be and is hereby entailed on my said son and his heirs for ever." In 1859 and again in 1860 the son granted the land in question in fee by way of mortgage, each mortgage being duly registered within less than six months of its execution and each containing the usual proviso that it should be void on payment at a named date. No discharge or either mortgage or reconveyance of the mortgaged land had been registered, and there was no evidence whether either mortgage had in fact been paid:—Held, estate tail, barred. *Lawlor* v. *Lawlor*, 10 S. C. R. 194, applied, and *Pomley* v. *Felton*, 14 App. Cas. 61, distinguished. *Culbertson* v. *McCullough*, 27 A. R. 459.

Direction for Transmission from Father to Son.—A. devised land to his son J., "to hold to him and his heirs for ever," and then added, "My will is that none of my sons shall have power to alienate the lands thus bequeathed to them respectively, but they shall transmit them from father to son, or the next nearest heir so that they may be always preserved in the family:"—Held, that J. took an estate tail by implication, and that the restriction being only such as distinguished an estate in tail, was not illegal. *Doe d. McIntyre* v. *McIntyre*, 7 U. C. R. 156.

Direction to Entail.—A testator, who died before the 6th March, 1834, seised in fee, devised to each of three sons, D., R., and C., "to be by him entailed to any of his issue he may think proper," with the further provision, that if any of the three should die without issue, the property should "be divided equally between their successors, subject to entailment:"—Held, that the three sons took estates tail in the land; that D. and R. had a contingent interest in fee tail on failure of the issue of C.; and that D., as the heir-at-law of the testator, had the reversion in fee. *Dumble* v. *Johnson*, 17 C. P. 9.

"Dying without Heirs."—By his will and codicil a testator devised to his son J. on the death of his mother, certain land in consideration for which he was to pay the sum of £150 to the executors in four years. In the event of his dying without heirs the land was to be sold and the amount received therefor over and above £150 "to be equally divided amongst my surviving children:"—Held, (1) that J. took a fee-tail in remainder after an implied life estate in favour of the mother, as the "dying without heirs" must be taken to mean heirs of the body, not heirs generally, he having brothers and sisters still living. J. died during the lifetime of his mother:—Held, (2) that the period of division should be the death of the tenant for life, and the survivors at the time of such death were to take the whole amount realized by the sale of the lands, upon which, however, the £150 was to form a charge. *Tyrwhitt* v. *Dewson*, 28 Chy. 112.

Dying without Issue—Executory Devise.—A testator, amongst other devises and bequests, devised as follows:—"Secondly, I bequeath to my son, Robert Little, eighty-six acres of land (describing them), also one span of horses and one-half of my farming utensils; he is nevertheless subject to pay the sum of £112 10s. to my daughters, as hereinafter provided, the sum of £18 15s. to be paid annually, the first instalment to

be paid one year after my decease, until the whole is paid." He next devised to his son John fifty acres of land, together with one span of horses and one-half of his farming utensils, subject also to a charge of £112 10s. for his daughters. He then made several bequests in favour of his daughters and wife; and if his unmarried daughters should die before their legacies were paid, John and Robert were to divide the unpaid sums equally between them. He then provided as follows: "Should either of my two sons, Robert and John, die without issue, I wish that their shares should be divided equally among my surviving children:"—Held, that the sons took an estate tail, and not a fee simple subject to an executory devise over. *Little* v. *Billings*, 27 Chy. 353.

"**Dying without Issue.**"—The testator directed all the lands to be sold by public auction or private sale on his youngest surviving child attaining twenty-one, and the proceeds to be divided amongst nine of his children, share and share alike; but in the event of any of the nine children dying without issue before the youngest surviving child should attain twenty-one, the share of the one so dying should go to the survivors:—Held, that these words did not create an estate tail or quasi entail, and that the shares of the legatees were vested. *Scott* v. *Duncan*, 29 Chy. 496.

Estate Tail by Cy pres—Void Devise over.—A testator, who died in 1849, devised as follows: "It has pleased the Lord to give me two sons, equally dear to my heart. To give them equal justice I leave all my land to the first great grandson descending from them by lawful ordinary generation in the masculine line. To him I bequeath it, and to him I will that it pass free from any incumbrance, except the burying ground, and the quarter of an acre for a place to worship." (To Duncan, his son, he gave his family Bible and 5s., above what he had done for him.) "To Peter Ferguson, my son. I bequeath my implements belonging to my farm, and to occupy the farm, and to answer state dues and public bindings himself and the lawful male offspring of his body, until the proper heir come of age to take possession, but Peter himself and all are restricted and prohibited from giving any wood or timber, of whatsoever kind, away off the land, or bringing any other family on to it out his own. But if he leave a situation so advantageous . . . I appoint Peter McVicar, my grandson, to take charge of the place, farm, and all that pertains to it, and occupy the same for his own benefit and advantage, according to the forementioned restrictions and conditions, until the heir be of lawful age as aforesaid." The testator died in 1849, leaving the land subject to a lease, which expired in 1857. Peter Ferguson, after having gone into occupation, in that year conveyed his interest to Peter McVicar, named in the will, and left the place in the same year. Neither of the testator's sons had any sons born during the testator's lifetime. The plaintiff in ejectment, the heir-at-law of Peter Ferguson, the son, claimed that under the will his father took an estate tail, which descended to him. The defendant was the heir-at-law of the testator, and had also a conveyance from Peter McVicar. But held on appeal that the devise by the testator to his first great grandson being void for remoteness, and there being no intention to give to P. F., junr., any estate or interest independent of or unconnected with the devise to the great grandson, there was no valid disposition to disinherit the heir-at-law, and therefore the plaintiff was not entitled to recover. *Ferguson* v. *Ferguson*, 2 S. C. R. 497. See 1 A. R. 452.

When the rule of law, independent of and paramount to testator's intentions, defeats the devise, the proper course is to let the property go as the law directs in cases of intestacy. *Ib.*

Failure of Heirs.—B., being nominee of the Crown, devised the land to his son J. and his heirs; and in failure of his heirs male, then to the heir-at-law of his son T. The patent issued after B.'s death to J., the devisee, his heirs and assigns, to the uses specified in the will of the devisor:—Held, that the patent gave to J. whatever estate he would have been entitled to under the will if the testator had died seised in

fee; that he was only tenant in tail, and had therefore no estate which could be sold after his death to satisfy his debts. *Doe* d. *Butler* v. *Stevens*, 6 O. S. 63.

A testator devised lands to his daughter, to hold during her life, and afterwards to her heirs for ever, adding a provision for its division among others, "should it so happen that my daughter shall not have heirs," &c:—Held, that she took only an estate tail. *Doe* d. *Anderson* v. *Fairfield*, 3 U. C. R. 140.

"Heirs of the Body."—M. C. by her will devised as follows: "First, I give and devise to my grandson, J. C., the farm . . . to have and to hold the same and every part thereof for and during his natural life, and after his death to the heirs of his body, should he leave any such, him surviving, and in the event of his leaving no such heirs, then the same and every part thereof is to be divided as fairly and equally as may be, amongst . . . to have and to hold the same to them, their heirs and assigns for ever; but my will and desire is that my said grandson, J. C., shall not have or go into the possession . . . until he shall have attained the age of twenty-five years, or five years after my death. Secondly, I give and bequeath to my son, J. C., $100 annually during his natural life, the same to be paid to him quarterly . . . and to be a charge on the farm or homestead above devised to his said son John:"—Held, that the effect of the limitations was to give J. C. an estate tail, which he had barred as the result of his dealings with the land by way of conveyance. *Greenwood* v. *Verdon*, 1 K. & J., 74, distinguished. *In re Cleator*, 10 O. R. 326.

Life Estate to Wife—Remainder to Husband and "Heirs of their Bodies."—A devise was to A. C. M. for life with remainder to her husband, W. M., "and the heirs of their bodies for ever."—Held, that W. M. took an estate tail. By a subsequent clause the will provided that, in the event of the said W. M. dying without making a will, the property should be divided among his surviving children in certain shares, but declaring it to be the intention of the testatrix that he should have full powers, with the consent of his wife, to sell and convey absolutely any part or portion thereof; "and in case of his making a disposition by will to vary the shares and proportions thereof as he may deem best:"—Held, that the powers so given to W. M. to vary the shares or proportions of the heirs in tail, did not affect the quality of the estate devised. *Fleming* v. *McDougall*, 27 Chy. 459.

Power of Appointment to Heirs.—A testator devised property to his son A., and to the heirs of his body lawfully to be begotten, with power to appoint any one or more of such heirs to take the same:—Held, that A. took an estate tail; that there was no trust in favour of his children; and that mortgages theretofore executed by him took precedence of the claims of the children under an appointment which he afterwards executed in their favour. *Trust and Loan Co. v. Fraser*, 18 Chy. 19.

CHAPTER XLVIII.*

RULE IN SHELLEY'S CASE.

NATURE OF THE RULE IN SHELLEY'S CASE.

The rule in Shelley's Case is a rule of law, and not of construction. The rule simply is, that, where an estate of freehold is limited to a person, and the same instrument contains a limitation, either mediate or immediate, to his heirs or the heirs of his body, the word heirs is a word of limitation, i.e., the ancestor takes the whole estate comprised in this term. Thus, if the limitation be to the heirs of his body, he takes a fee tail; if to his heirs general, a fee simple.

6th ed., p. 1858. *Shelley's Case*, 1 Rep. 93, 104a.

ONLY APPLIES TO LIMITATIONS BY WAY OF REMAINDER.

The rule is usually stated in the above general terms, but by the word "limitation," we must understand a limitation by way of remainder, as distinguished from 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.

Ibid. *Perrin* v. *Blake*, 4 Burr. 2579.

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; 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.

6th ed., p. 1860.

PRELIMINARY QUESTION OF CONSTRUCTION.

Whether the testator, by this or any other expression, means to describe heirs of the body, is a totally distinct inquiry, and has therefore in the present treatise been separately discussed. The blending of the two questions tends to involve both in unnecessary perplexity.

Ibid.

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.

Ibid. *Moore* v. *Parker*, Ld. Raym. 37, Skinn. 558.

*This Chapter is almost entirely the original text of Mr. Jarman.

WILL AND SCHEDULE.

But a will, and a schednle to it, are considered as one instrument for the purposes of this rule; and the same principle undoubtedly applies to a will and a codicil, or several codicils.

6th ed., p. 1861. *Hayes d. Foorde* v. *Foorde*, 2 W. Bl. 698.

LEGAL AND EQUITABLE INTERESTS.

The rule in Shelley's Case applies to equitable as well as legal interests; but the estate of the ancestor, and the limitation to the heirs, must be of the same quality, i.e. both legal or both equitable. It frequently happens that a testator devises land in trust for a person for life, and, after his death, in trust for the heirs of his body, but gives the trustees some office in regard to the tenant for life that causes them to retain the legal estate during his life, but which, ceasing at his death, does not prevent the limitation to the heirs of the body from being executed in them. In such cases, by the rule just stated, they take as purchasers. The converse case of course may, but it rarely does, occur.

Ibid. *Re Youman's Will* (1901), 1 Ch. 720. *Re White and Hindle's Contract*, 7 Ch. D. 201.

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.

Ibid.

RULE CONSIDERED IN RELATION TO ESTATE FOR LIFE.

The estate of freehold may be an estate for the life of the devisee himself, or of another person, or for the joint lives of several persons, and may be either absolute or determinable on a contingency, as an estate durante viduitate, and may arise either by express devise, or by implication of law, which must be, we have seen, a necessary implication.

6th ed., p. 1862. Ante, Chap. XIX. *Coape* v. *Arnold*, 4 D. M. & G. 574.

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; 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.

6th ed., p. 1865.

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, nor a declaration that the first taker shall have a power of jointuring, or that his estate shall be without impeachment of waste, or, if a woman, for her separate use, or that the devisee shall only have an estate for life, or be "strict" tenant for life, will prevent the remainder to the heirs attaching in the ancestor.

Ibid. *Hodgson* v. *Ambrose*, 1 Doug. 337. *Bennett* v. *E. of Tankerville*, 19 Ves. 170.

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.

Ibid. *Fuller* v. *Chamier*, 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.

6th ed., p. 1866.

RULE IN REGARD TO LIMITATION TO THE HEIRS.

IMMATERIAL UNDER WHAT DENOMINATION HEIRS ARE DESCRIBED.

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. 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.

Ibid. *Doe* v. *Rucastle*, 8 C. B. 876. *Re Buckton* (1907), 2 Ch. 406.

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) 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, which brings it to the common case illustrative of the rule.

Ibid.

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.

Ibid.

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.

6th ed., p. 1867.

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.

Ibid. Curtis v. *Price*, 12 Ves. 89.

Limitation to Heirs of Tenant of Freehold and of Another Person.

It is essential to the operation of the rule in Shelley's Case, that the heirs of the body should proceed from the person taking the estate of freehold, and of that person only; for, if the devise be to A. for life, and, after his decease, to the heirs of the body of A., and of another person, who might have a common heir of their bodies, it is a contingent remainder in tail to the heirs.

Ibid. Gossage v. *Taylor*, Sty. 325.

It may be observed, that, under such limitations, if the person taking the estate for life die in the lifetime of the other, the contingent remainder to the heirs fails; for, as there could be no heir of their bodies until the death of both (nemo est hæres viventis,) the failure of the particular estate before that period defeats the remainder.

6th ed., p. 1868.

Distinction where there Could not be Joint Heirs of the Bodies.

But if, in such a case, the tenant for life and the other person to whose heirs the limitation is made are of the same sex, or being of different sexes, are not actually married, and are so related by

consanguinity or affinity, that they cannot have, or be presumed to have, common heirs of their bodies, the effect is obviously different; for, as the testator cannot mean heirs issuing from them both, the limitation is to be read as a limitation to the heirs of the body of A., the tenant for life, and to the heirs of the body of the other person respectively. The consequence is, that the former becomes, by force of the rule, tenant in tail of one undivided moiety, and the heir of the latter takes the other moiety by purchase.

Ibid.

WHERE ANCESTOR IS TENANT IN COMMON OF FREEHOLD.

Pari ratione, if A. and B. were tenants in common for life, with remainder, as to the entirety, to the heirs of the body of A., he would be tenant in tail of one undivided moiety, and there would be a contingent remainder in tail to the heirs of his body in the other moiety.

Ibid.

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. 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.

6th ed., p. 1869.

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.

Ibid.

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. 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.

Ibid.

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; 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.

Ibid.

On the other hand, if the devise be to the wife for life, and then to the heirs of her body to be begotten by the husband, she takes an estate tail special, by force of the rule under consideration. The distinction, it will be perceived, is between heirs on the body and heirs of the body.

Ibid.

So if the limitation were to the husband for life, remainder to the heirs of the body of the husband on the wife to be begottten, he wonld, by the application of the same principle, have an estate tail special. But if, in the former case, the estate for life had been limited to the husband, and, in the latter, to the wife, the heirs of the body would have taken by purchase.

6th ed., p. 1870.

TENANT IN TAIL AFTER POSSIBILITY OF ISSUE EXTINCT.

Under limitations in special tail, if the tenant in tail survive the other person from whom the heirs are to spring, and there be no issue, such surviving tenant in tail becomes, as is well known. tenant in tail after possibility of issue extinct.

Ibid. *Platt* v. *Powles*, 2 M. & Sel. 65 *Bagshaw* v. *Spencer*, contra overruled. 1 Ves. sen. 142.

RULE CONSIDERED IN REGARD TO EXECUTORY TRUSTS.

The preceding remarks, it should be observed, apply only to executed trusts; for between trusts executed and executory there is a very material difference, which requires particular examination.

Ibid.

EXECUTORY TRUST, WHAT.

A trust is said to be executory or directory where the objects take, not immediately under it, but by means of some further act

to be done by a third person, usually him in whom the legal estate is vested. As where a testator 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. 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.

Ibid. This statement cited with approval D. R., 4 H. L. at p. 572.

DISTINCTION BETWEEN MARRIAGE ARTICLES AND WILLS.

Most of the cases of this kind have arisen on marriage articles, 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 favour of the issue, which does not belong to wills.

6th ed., p. 1878.

MERE DIRECTION TO CONVEY DOES NOT MAKE A TRUST EXECUTORY.

All trusts, said Lord St. Leonards, 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?

6th ed., p. 1881. *Egerton* v. *Brownlow*, 4 H. L. C. at p. 210.

TRUST IN TERMS PARTLY DIRECT AND PARTLY EXECUTORY.

It is clear, that where a testator devises real estate to trustees upon trusts, and then directs, that, in certain events, they shall convey the estate in a prescribed manner, the fact that the will contains such a direction does not constitute a ground for regarding the whole series of trusts as executory, and for applying to the former that liberality of construction which is peculiar to trusts of this nature.

6th ed., p. 1882.

PRACTICAL BEARINGS OF THE RULE IN SHELLEY'S CASE.
AS TO LAPSE.

It may be useful, as supplementary to the preceding discussion of the Rule in Shelley's Case, to state, for the use of the student, the practical bearings of the alternative whether the heir takes by descent or by purchase; which will be best shown by suggesting a case of each kind. Suppose, then, a devise to A. for life, remainder to the heirs of his body; and suppose another devise to the use of trustees for the life of B., in trust for B., remainder to the use of the heirs of his body. In the former case, the ancestor being tenant in tail, the heirs of his 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.

Ibid.

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 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, or subject to curtesy, if the ancestor were a married woman, who left a husband by whom she had issue born alive, capable of inheriting, and which attaches whether the estate be legal or equitable. On the other hand, where the heir takes by purchase, of course none of these rights, which are incident to estates of inheritance, attach, the ancestor being merely tenant for life.

6th ed., p. 1883. It now makes no difference whether the estate be legal or equitable only.

ALIENATION BY AN ENROLLED CONVEYANCE.

OPERATION OF DISENTAILING ASSURANCE UPON ESTATES INTERVENING BETWEEN THE FREEHOLD AND THE LIMITATION TO THE HEIRS.

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. On the other hand, the heir claiming by purchase is unaffected by the acts of his ancestor, except so far as those acts might before the statute 8 & 9 Vict. c. 106 s. 8, have happened to destroy the contingent remainder of such heir, if not supported (as it always should have been) by a preceding vested estate of freehold. The conveyance, it should be observed, of a person becoming tenant in tail by force of the rule in Shelley's Case, under a limitation to the heirs of his body not immediately expectant on his estate for life, had no effect upon the mesne estates, unless they happened to be legal remainders contingent and unsupported. Thus, in the case of a limitation to A. for life, remainder to his first and other sons in tail male, remainder to the heirs of the body of A., with remainders over; A., being tenant in tail by the operation of the rule, may make a disentailing assurance; but though such assurance will bar the remainders ulterior to the limitation to the heirs of his body, it will not affect the intervening estate of the first and other sons, unless there were no son born at the time, and no estate interposed to preserve the remainders of the sons, in which case such remainders, being contingent, would, before the statute above referred to, have clearly been destroyed. That statute puts it out of the power of the owner of the preceding estate of freehold to destroy the contingent remainders depending thereon.

Ibid.

FARTHER POINTS SUGGESTED.

It may be useful to illustrate the practical consequences of a limitation of another description. Suppose a devise to A. and B. jointly for their lives, remainder to the heirs of their bodies; if they were not husband and wife (or, it would seem, persons who may lawfully marry), they would be joint-tenants for life, with several inheritances in tail.

6th ed., p. 1884. *Ex parte Tanner*, 20 Bea. 374.

If the limitations were to them successively for life, A. would be tenant for life of the entirety, with the inheritance in tail in one moiety, subject, as to the latter, to B.'s estate for life, and B. would be tenant for life in remainder of one moiety, and tenant in tail in remainder of the other moiety. A. being tenant in tail

in possession, might make a disentailing assurance, which would give him the fee-simple in a moiety of the inheritance, but would not, as before shown, affect B.'s estate for life in remainder in that moiety. B., on the other hand, having no immediate estate of freehold, could not during the life of A., and without his concurrence, acquire, by means of an enrolled conveyance, a larger estate than a base fee determinable on the failure of issue inheritable under the entail. A. and B. might conjointly convey the absolute fee-simple in the entirety.

Ibid.

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. 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, 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.

6th ed., p. 1885. *Green d. Crew* v. *King*, 2 W. Bl. 1211.

Legal Estate Divided into Three Equal Shares.—The testator by his will gave his wife all his real and personal estate for her life, and, upon the death of his wife, he gave all his real and personal property to his three children, share and share alike, "subject nevertheless as to the share therein of my son H. that he shall hold the same as trustee of his heirs and use the income as he may see fit and that he shall not be accountable for the expenditure of such income, but that it shall be left entirely to his judgment and discretion." Held that the rule in Shelley's case did not apply to the devise to the testator's son H., and that H. took under the will a legal estate for his life and an equitable estate in the remainder for those who should be his heirs at the time of his death. If the devise were to be treated as a devise of realty, the limitations were such as to give the equitable fee simple to H., the legal estate being in the executors, if not outstanding mortgagees; and, if the legal estate was not vested in the executors or mortgagees, H. would be entitled to the legal and equitable estate in fee simple. But looking at all the provisions of the will, it appeared that the testator contemplated conversion of his estate; and therefore it should all be deemed personalty. Treating the gift as a bequest of personalty, it was not to be governed by the same rules as a devise of realty or one of mixed realty and personalty; and the conclusion was the same as that of the majority of the Court, viz., that H. should be declared entitled to a life interest only. *Re McAllister* (1911), 20 O. W. R. 261; 3 O. W. N. 184; 25 O. L. R. 17.

Devise—Estate—Rule in Shelley's Case.—"I give and devise to my daughter Mary . . . the following described parcels of real estate to be held and controlled by her during her natural life, and after her death to be divided in a legal manner among her heirs:"—Held,

that the devisee took an estate in fee simple, under the rule in Shelley's Case. *In re McCallum—Hall* v. *Trull*, 21 C. L. T. 535.

Devise—Estate—Rule in Shelley's Case—Specific Performance.—Action by the vendor to compel the purchaser to specifically perform a contract for the purchase of certain lands, the title to which was obtained under the following devise: "I give and bequeath to my son Francis (the plaintiff) for the term of his natural life and at his decease to his heir, all that, etc. . . ." The defence was, that, on the proper construction of the will, the plaintiff was not entitled to the lands in fee simple, but only for the term of his natural life. The will was dated the 19th July, 1881, and the testator then had a wife, three daughters, and two sons; the devise to the other son, Gregoire, who was then the father of two children, was as follows: "I give, devise, and bequeath to my son Gregoire for the term of his natural life and at his decease to be divided between the children of my said son, share and share alike, but in the event of his leaving no issue the said property shall go to the next heir," etc.:—Held, that, as it was doubtful whether the testator so used the word "heir" as to make the rule in Shelley's case applicable, and thereby confer a fee simple, the devisee could not get specific performance of a contract for the purchase of land, his title to which depended on the will. *Garriepie* v. *Oliver*, 21 C. L. T. 424, 8 B. C. R. 89.

Rule in Shelley's Case Applied.—Testator, by his last will, devised to his sister, M. B., one-half of a lot of land described "to have and to hold . . . for and during her natural life, and after her decease to go to and be enjoyed by her heirs." M. B. died in testator's lifetime:—Held, there being nothing in the will to show that the testator used the word "heirs" in any other than its ordinary technical sense, but the rule in Shelley's case applied; that the devise to M. B. was a fee simple, and lapsed upon her decease before testator. *Atkinson* v. *Purdy*, 43 N. S. R. 274.

Estate—Rule in Shelley's Case—Vested Remainder subject to be Divested—Executory Gift over to Class.—The testator devised to his wife, the defendant, all his real estate for life, and directed that at her death it should be divided equally among two brothers, the children of a deceased brother, and a sister. He then added: "Should either of my two brothers or my sister predecease my said wife, then one-quarter of my real estate is to go to their heirs, executors and administrators." The sister predeceased the wife, leaving a son, the plaintiff, and by her will disposed of her real and personal property:—Held, that the sister took a vested remainder, to which the rule in Shelley's Case was not applicable; that under the clause above quoted, she having died before her estate became vested in possession, her estate was divested and her heirs took her share as *personæ designatæ* as upon an executory gift to them as a class; and that the plaintiff was, therefore, entitled to take his share as purchaser under the will of the testator. *Glendinning* v. *Dickinson* (1910), 14 W. L. R. 419.

Separate Gifts.—Rule in Shelley's Case.—Action for the recovery of land, into the possession of which the defendants had entered under an agreement of sale made between them and the plaintiff. The plaintiff alleged a title in fee to the land by a conveyance from a devisee under a will as follows: "I give and devise to my grandson J. H. the last half . . . for the term of his natural life; after his death I devise the same to his children, lawfully begotten, in equal shares; should he die without a child living at the time of his death, then I devise said land to my son G. for the term of his natural life, and after his death to his children in equal shares, and if G. should die without a child living at the time of his death, then," &c., &c. J. H. was alive at the time of this action, aged 50 years, and had one child, a daughter, born after the death of the testator:—Held, that neither the rule in Wild's Case nor that in Shelley's Case applied. There were plainly two gifts, one to J. H. for life, and the other to his children in equal shares, which carried the remainder in fee to the child, or children, subject

to be divested if he died without a child living at his death. *Young* v. *Denike*, 22 C. L. T. 27, 2 O. L. R. 723.

Shelley's Case.—"Unto my beloved wife E., her heirs, executors and assigns to and for her own absolute use and benefit during her natural life and then to heirs" If the widow took an absolute estate in the realty she was also entitled to personal estate absolutely.

Butterfield v. *Butterfield*, 1 Ves. 154; *Garth* v. *Baldwin*, 2 Ves. 646; *Elton* v. *Eason*, 19 Ves. Jr. 78; *Comfort* v. *Brown*, 10 Ch. D. 143.

Rule in Shelley's case held to apply. *Re Newbigging*, 10 O. W. R. 213.

Rule in Shelley's Case.—The rule in Shelley's Case does not apply as "issue" is by the will interpreted to mean "children" who take as *personæ designatæ* "issue" therefore is not a word of limitation as it does not "import the whole succession of inheritable blood" *Van Grutten* v. *Foxwell* (1897), A. C. 658 at 667, 677.

A gift to X. for life with remainder to A., and if A. dies unmarried, or without children, to B. is an executory gift over which will defeat the absolute interest of A. in the event of A. dying at any time unmarried or without children. *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388. *Semble*, if a contrary intention appear from the will. *Re Eagle*, 10 O. W. R. 995.

Rule in Shelley's Case.—"The whole of my estate shall belong to my sons G. and T. conjointly to have and to hold the same for their use during their lifetime and at their death to their children their heirs and assigns for ever. But if my sons G. and T. both die without issue then to be equally divided among my grandchildren then living share and share alike" The words "their children" are a specific designation of individuals who are to take the fee upon the death of the surviving life tenants and are not intended as a general term including all who could inherit at that time so that the rule in Shelley's Case does not apply.

See *Chandler* v. *Gibson*, 2 O. L. R. 442.

On the construction of gifts to a class see *Kingsbury* v. *Walter* (1901), A. C. 187. *Re Rutherford*, 7 O. W. R. 746.

The rule in Shelley's Case applies only when the testator has used the technical words "heirs" or "heirs of his body" and has no application in a case where the words used are "children" or "issue" or unless the Court can find that these words are equivalent to the technical words. *Re Anderson*, 18 O. W. R. 924.

Upon the death of both sons the corpus fails to be sold and divided as directed. See *Evans* v. *Evans* (1892), 2 Ch. 173 *Haight* v. *Dangerfield*, 1 O. W. R. 551, 2 O. W. R. 121.

"Children" interpreted as equivalent to include issue of any degree. *In re Weir*, 6 O. W. R. 58.

"From and after the death of A. I give and devise to the use of the children of the said A. lawfully begotten or to be begotten and the heirs of the body of the said children of the said A. respectively."

No doubt the rule in Shelley's Case has sometimes been applied where the word "children" has been used instead of "heirs" or "heirs of the body" but never I think where there has been an express life estate left to the ancestor. The rule in Wild's Case does not apply—the gift to the children not being immediate. *Grant* v. *Fuller*, 33 S. C. R. 34; *Chandler* v. *Gibson*, 2 O. L. R. 442; *Re Sharon and Stuart*, 8 O. W. R. 625, 12 O. L. R. 605. The two last cases are also against the applicability of the rule in Shelley's case. *Bullen* v. *Nesbitt*, 10 O. W. R. 119.

CHAPTER XLIX.*

WHAT WILL CONTROL THE WORDS "HEIRS OF THE BODY."

EFFECT OF CONTEXT IN CONTROLLING "HEIRS OF THE BODY."

It has been already shown, that a devise to A. and to the heirs of his body, or to A. for life, and after his death, to the heirs of his body, 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 from the first point for inquiry.

6th ed., p. 1886.

SIMILAR LIMITATION SUPERADDED IS INOPERATIVE.

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.

Ibid. *Burnet* v. *Coby*, 1 Barn. B. R. 367.

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.

6th ed., 1887. *Goodright d Lisle* v. *Pullyn*, 2 Ld. Raym. 1437.

NOR BY INTERPOSITION OF ESTATE TO PRESERVE CONTINGENT REMAINDERS.

The interposition of trustees to preserve contingent remainders is inoperative to invest superadded words of limitation with any controlling efficacy.

6th ed., p. 1888. *Measure* v. *Gee*, 5 B. & Ald. 910. *Doe* v. *Goff*, 11 East. 668, has been overruled.

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. And the same principle of course would

*In this chapter Mr. Jarman's words are principally used.

apply where a limitation to the heirs male of the body is annexed to a limitation to the heirs female, and vice versâ.

6th ed., p. 1889. *Shelley's Case*, 1 Rep. 95. b.

EFFECT OF SUPERADDED WORDS OF MODIFICATION INCONSISTENT WITH AN ESTATE TAIL.

We next proceed to inquire as to the effect of coupling a limitation to heirs of the body with words of modification importing that they are to take concurrently, or distributively, or in some other manner inconsistent with the course of devolution under an estate tail, as by the addition of the words "share and share alike," or "as tenants in common," or "whether sons or daughters," or "without regard to seniority of age or priority of birth." In such cases, the great struggle has been to determine whether the superadded words are to be treated as explanatory of the testator's intention to use the term heirs of the body in some other sense, and as descriptive of another class of objects, or are to be rejected as repugnant to the estate which those words properly and technically create.

6th ed., p. 1890.

EXPRESSIONS SUPERADDED TO THE LIMITATION "TO HEIRS OF THE BODY."

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.

6th ed., p. 1891. *Jesson* v. *Wright*, 2 Bligh 1. The only touchstone one can use in trying to separate the true metal from the dross is the ruling in *Jesson* v. *Wright*, *per* Lord Macnaughten. *Van Grutten* v. *Foxwell* (1897), A. C. at p. 673.

LORD REDESDALE.

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 advisor to say what is the estate of a person claiming under a will.

6th ed., p. 1895.

LORD REDESDALE'S STATEMENT OF THE PRINCIPLE OF THE DECISION.

Technical words shall have their legal effect unless from subsequent inconsistent words it is very clear that the testator meant otherwise.

Ibid.

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 ob-

jects, or whether, on the other hand, it includes the whole line of succession capable of inheriting.

6th ed., p. 1897. *Van Grutten* v. *Foxwell* (1897), A. C. 658.

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.

Ibid.

OBSERVATIONS.

The cases present many shades of difference, but they all concur in establishing the principle, that words of inconsistent modification engrafted on a limitation to heirs of the body are to be rejected. Every case, therefore, in so far as it is inconsistent with the principles laid down by the House of Lords in Jesson v. Wright, Roddy v. Fitzgerald, and Van Grutten v. Foxwell, must be considered overruled.

6th ed., p. 1898. 2 Bli. 1. 6 H. L. C. at p. 881. (1897) A. C. 658.

EFFECT OF CLEAR WORDS OF EXPLANATION ANNEXED TO "HEIRS OF THE BODY."

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.

6th ed., p. 1899.

Husband's Interest. *Re Hunt*, 2 O. W. R. 94, refers to *Eager* v. *Furnivall*, 17 Ch. D. 115; *Johnson* v. *Johnson*, 3 Hare 157; *Re Scott* (1901), 11 K. B. 228.

CHAPTER L.

RULE IN WILD'S CASE.

CHILDREN, WHERE A WORD OF LIMITATION.
RULE IN WILD'S CASE.
WHEN NO CHILD AT THE TIME OF THE DEVISE.

The rule of construction commonly referred to as the doctrine of Wild's Case, is this; that where lands are devised to a person and his children, and he has no child at the time of the devise, the parent takes an estate tail; for it is said, "the intent of the devisor is manifest and certain that the children (or issues) should take, and as immediate devisees they cannot take, because they are not in rerum naturâ, and by way of remainder they cannot take, for that was not his (the devisor's) intent, for the gift is immediate; therefore such words shall be taken as words of limitation."

1st ed., vol. 2, p. 307. 6th ed., p. 1906. 6 Rep. 16 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.

6th ed., p. 1908.

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, 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.

Ibid.

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 which that construction has been restored 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.

Ibid. But now see sec. 32 of the Wills Act (sec. 36 of the Ontario Act). *Buffar* v. *Bradford*, 2 Atk. 220.

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, the rule which makes the parent tenant in tail would (if at all) only come into operation in the absence of any such objects.

6th ed., p. 1909; 6th Rep. 16b. *Broadhurst* v. *Morris*, 2 B. & Ad. 1.

RULE IN WILD'S CASE.

WHEN THERE ARE CHILDREN AT THE TIME OF THE DEVISE.

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 certainty is the resolution in Wild's Case, as reported in Coke, 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."

1st ed., vol. 2, p. 312. 6th ed., p. 1911. *Oates & Hatterley* v. *Jackson*, 2 Stra. 1172.

"CHILDREN" HELD TO BE A WORD OF LIMITATION, NOTWITHSTANDING THE EXISTENCE OF CHILDREN.

DEVISE TO A. AS A "PLACE OF INHERITANCE TO HER AND HER CHILDREN, OR HER ISSUE."

The second branch of the rule will not, any more than the first, be applied where it would defeat the intention as shown by the context. To give effect to the intention so manifested the

Courts will construe "children" a word of limitation, notwithstanding the existence of children. Thus, in Wood v. Baron, 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.

6th ed., p. 1912; 1 East 259. *Webb* v. *Byng*, 2 K. & J. 669, affirmed 10 H. L. C. 171.

"To A. and his Children in Succession."
"To A., to her and her Children."

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. 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 "and her children" were words of purchase and not of limitation. "To her," &c., was read as the tenendum defining what estate A. was to take by the previous devise.

6th ed., p. 1913. *Roper* v. *Roper*, 36 L. J. C. P. 270.

Bequests of Personal Annuities.

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; yet where an annuity is so given, the annuitant takes only for life.

6th ed., p. 1915. See Chapter XXXI.

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, unless it can be collected that the declaration is intended to affect the whole fund.

6th ed., p. 1918. *De Witte* v. *De Witte*, 11 Sim. 41.

Devises to Sons not Distinguishable from Devises to Children.

The same principle which regulates devises to children applies to devises to sons, the only difference being that the estate tail, which the latter term, where used as nomen collectivum, creates, will be an estate tail male. A devise to A. for life, and after his decease to his sons, of course gives to A. an estate for life, with remainder to his sons as joint tenants, which remainder will be either for life or in fee, according to the fact whether the will is regulated by the old or the new law. 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.

1st ed., vol. 2, p. 317. 6th ed., p. 1918. *Re Buckton* (1907), 2 Ch. 406.

"CHILD," "SON," "DAUGHTER," ETC., WHERE USED AS NOMINA COLLECTIVA.

We now proceed to consider a point which has often occupied the attention of the Courts, and still more frequently that of the conveyancing practitioner—namely, whether the word "son" or "child" in the singular is a word of limitation; which, of course, is commonly its effect where used in a collective sense, i.e. as synonymous with issue male or issue general.

Ibid *Mellish* v. *Mellish*, 2 B. & Cr. 520.

"SON," HELD TO BE A WORD OF LIMITATION.

It may be collected from the authorities that if the word son be used, not as designatio personæ, but with a view to the whole class, or as comprising the whole of the male descendants, severally and successively, then it is the manifest intention of the testator to give an estate tail; and it is equally clear the words are not to operate as an executory devise which are capable of operating in any other way.

6th ed., p. 1920.

WHETHER TERM "ELDEST SON" USED AS NOMEN COLLECTIVUM.

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.

1st ed., vol. 2, p. 325. 6th ed., p. 1925. *Parker* v. *Tootal*, 11 H. L. C. 143.

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.

6th ed., p. 1927. *Jenkins* v. *Hughes*, 8 H. L. C. 571.

CHAPTER LI.*

"ISSUE" AS A WORD OF LIMITATION IN DEVISES OF REAL ESTATE.

"ISSUE" A WORD OF LIMITATION, WHEN.

"Issue" is nomen collectivum, and a word of very extensive import. The term embraces descendants of every degree whensoever existent, and, unless restricted by the context, cannot be satisfied by being applied to descendants at a given period. The only mode by which a devise to the issue can be made to run through the whole line of objects comprehended in the term, is by construing it as a word of limitation synonymous with heirs of the body, by which means the ancestor takes an state tail; an estate capable of comprising in its devolution, though not simultaneously, all the objects embraced by the word "issue," in its largest sense.
6th ed., p. 1929.

"Issue" is primâ facie a word of limitation, equivalent to "heirs of the body," but more flexible than these and more essily restricted in its meaning by the context.
6th ed., p. 1930.

With regard to a devise simply to a person and his issue, no doubt can at this day be raised as to its conferring an estate tail; and it may be observed, that such a devise is not (like a devise to a person and his children) dependent on, or, it seems, in the least degree, influenced by the fact of there being or not being issue of the devisee living at the date of the will or at any other period.
Ibid.

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.

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.
6th ed., p. 1931.

*In this Chapter, the text is chiefly Mr. Jarman's.

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," "to my son C. and each issue male as he may have by marriage with a fit and worthy gentlewoman," 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."

SO TO A CLASS AND THEIR ISSUE.

So a devise to several persons and their issue, or to a class and their issue, confers an estate tail.

Ibid.

Parkin v. *Knight*, 15 Sim. 83 (the gift was to several "or" their issue, and "or" was read "and"). *Campbell* v. *Bouskell*, 27 Bea. 325.

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. 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. All the objects might then have taken by purchase.

Ibid.

EFFECTS OF WORDS OF MODIFICATION INCONSISTENT WITH AN ESTATE TAIL.

So far, the cases present little that can be the subject of controversy; but difficulty frequently arises from the introduction into the devise of expressions inconsistent with the course of devolution or enjoyment under an estate tail, as, that the issue shall take in equal shares or as tenants in common, or that the estate shall go over in case they die under twenty-one, which has been regarded as inapplicable to issue indefinitely. If the Courts had uniformly rejected these inconsistent provisions as repugnant, immense litigation and discordancy of decision would have been prevented. This has been shown to be now the established rule in regard to limitations to heirs of the body; 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, 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.

6th ed., p. 1932.

Some confusion arises in the cases from the neglect to distinguish between a devise to A. and his issue in one unbroken limitation, and a devise to A. for life, and after his death to his issue. It is true they both converge to the same point, when issue is construed a word of limitation; but if, on the other hand, the issue are held to be purchasers, they must, it is conceived, take differently in the two cases; in the former jointly with the parent, in the latter by way of remainder after him; though certainly, in some of the cases, this distinction has been overlooked, and the Courts have shown a readiness, even where the devise is to a person and his issue, not only to read "issue" as a word of purchase, on account of words of modification inconsistent with an estate tail being found in the devise, but to hold the issue to take by way of remainder expectant on the estate for life of the ancestor.

Ibid *Doe d Davy* v. *Burnsall* 6 T. R. 30.

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, an estate tail.

6th ed., p. 1935. Ante, Chapter XLVIII. See *Jordan* v. *Lowe*, 6 Bea. 350.

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.

6th ed., p. 1937. *Roe d Dodson* v. *Grew*, 2 Wils. 322.

SUPERADDED LIMITATION TO THE HEIRS GENERAL OF THE ISSUE.

It is also established, that the addition of a limitation to the heirs general of the issue will not prevent the word "issue" from operating to give an estate tail as a word of limitation.

6th ed., p. 1938. Quoted with approval in *Williams* v. *Williams*, 51 L. T. 779.

A limitation to the heirs of the issue superadded to the devise to the "issue" is inoperative to vary the construction.

6th ed., p. 1940. *Denn d Webb* v. *Puckey*, 5 T. R. 299.

SUPERADDED WORDS OF LIMITATION WHICH CHANGE THE COURSE OF DESCENT.

But, as already shown, if the superadded words of limitation narrow, the course of decent, 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." This principle appears to be equally applicable where the prior word is "issue."

6th ed., p. 1942. Ante p. 911.

WORDS OF DISTRIBUTION INCONSISTENT WITH AN ESTATE TAIL.

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.

6th ed., p. 1943.

BEFORE WILLS ACT.

With regard to this class of cases, the following propositions are now recognized:—

1st. Where words of distribution, but without words to carry an estate in fee, are annexed to the devise to the issue, and there is a gift over in default of issue of the ancestor generally, or in default of "such" issue, or in default of issue living at the death of the ancestor, the ancestor takes an estate tail. As to the validity of this position, the cases seem to admit of no reasonable doubt, and it appears to be immaterial that between the gift to the ancestor and that to the issue, there is a limitation to trustees to preserve contingent remainders.

Woodhouse v. *Herrick*, 1 K. & J. 352.

2ndly. Where the gift is as in the first proposition, but there is no gift over in default of issue, still, since the issue taking by purchase could only take for their lives, the ancestor is held to take an estate tail, which, if not barred, will descend to his issue, this being the only mode of carrying the inheritance to the issue.

6th ed., p. 1944. *Jackson* v. *Calvert*, 1 J. & H. 235.

DOCTRINE EXTENDED WHEN UNDER THE OLD LAW A LIMITATION IN FEE COULD BE IMPLIED.

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.

6th ed., p. 1949. *Montgomery* v. *Montgomery*, 3 J. & L. 47.

GENERAL PROPOSITION TO BE DEDUCED FROM THE CASES.

It would seem then that, as to devises to one for life with remainder to his issne, when the words of distribntion are superadded expressions sufficient to carry the inheritance the rule may be stated as follows: Where the words of distribution, together with words which wonld 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," or by such words as "estate," "part," "share," etc., occurring in the description of the subject of gift, or by words imposing a pecuniary charge npon the issue, and whether the gift to the issne be direct or by implication from a power to appoint to them, and whether there is a gift over on general failure of the issne of the ancestor or not; and the sane rule applies where the issne would take an estate tail.

6th ed., p. 1950. *Lees* v. *Mosley*, 1 Y. & C. 589. *Montgomery* v. *Montgomery*, 3 Jo. & Lat. 47. *Parker* v. *Clarke*, 6 D. M. & G. 104.

THE RESULT OF THE CASES AS APPLIED TO WILLS MADE SINCE 1837. GENERAL RULE AS TO SUCH WILLS.

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 inclndes all other cases where the words are sufficient to give them the fee, and since nnder the etatute 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 thst we mnst, in a will made since 1837, construe devises to one for life with remainder to his issue with words of distribntion, wheth[illegible] there is a gift over or not, in the same manner as if words of limitation were snperadded, and such devises will then coincide with those falling within the rule above stated. The law on this point as to wills made since 1837 will thus be reduced to a very simple general rule—namely, that every devise to a person for life and after his decease to his issne, in words which direct or imply distribution between the issue, gives the issue an estate in fee in remainder by purchase.

Ibid. See ante, p. 921.

"ISSUE" EXPLAINED TO MEAN SONS.

If the testator annex to the gift to the issue words of explanation, indicating that he uses the term "issue" in a specisl and limited sense, it is, of course, restricted to that sense.

6th ed., p. 1951. *Mandeville* v. *Lackey*, 3 Ridg. P. C. 352.

LIMITATION OVER IF THE DEVISEE LEAVE NO ISSUE AT HIS DEATH.

It remains to be observed, that where a devise to a person and his issue (or to him and the heirs of his body), is followed

by a limitation over in case of his dying without leaving issue "living at his death," the only effect of these special words is to make the remainder contingent on the prescribed event. They are not considered as explanatory of the species of issue included in the prior devise, and, therefore, do not prevent the prior devisee taking an estate tail under it. The result simply is, that if the tenant in tail has no issue at his death, the devise over takes effect; if otherwise, the devise over is defeated, notwithstanding a subsequent failure of issue.

6th ed., p. 1956. *Hutchinson* v. *Stephens*, 1 Kee. 240. *Eden* v. *Wilson*, 4 H. L. C., pp. 257, 281.

Predecease of Devisee.—(Sec. 36 of Wills Act) issue are not substituted for devisee but gift to him absolutely as though he had survived testator. *Re Greenwood*, 9 O. W. R. 100.

CHAPTER LII.

WORDS REFERRING TO FAILURE OF ISSUE.

OLD LAW: "DIE WITHOUT ISSUE."

Under the old law before the Wills Act, it was settled that words referring to the death of a person without issue, whether the terms were "if he die without issue," "if he have no issue," "if he die without having issue," "if he die before he has any issue" or "for want" or "in default of issue," unexplained by the context, and whether applied to real or personal estate, were construed to import a general indefinite failure of issue, that is, a failure or extinction of issue at any period.

6th ed., p. 1958. The full statement of the old law is omitted.

EXCEPTIONS TO THE OLD RULE.

FIRST, WHERE PHRASE IS, "LEAVING NO ISSUE."

Even under the old law, this rule admitted of two exceptions. The first is, where the phrase is "leaving no issue;" with respect to which the settled distinction is, that applied to real estate, it means an indefinite failure of issue, but in reference to personal estate (and real estate directed to be converted is for this purpose regarded as personalty), it imports a failure of issue at the death.

1st ed., vol. 2, p. 418. 6th ed., p. 1958. *Farthing* v. *Allen*, 2 Mad. 310.

SECOND EXCEPTION TO GENERAL RULE.

The other exception to be noticed to the general rule is, where a testator, having no issue, devises property in default or on failure of issue of himself; in which case it is considered that the evident object of the testator is simply to make the devise contingent on the event of his leaving no issue surviving him, and that he does not refer to an extinction of issue at any time. This exceptional construction a fortiori prevails where the devise over is for the purpose of paying debts and legacies.

6th ed., p. 1960. *Sanford* v. *Irby*, 3 B. & Ald. 654.

THE PRESENT LAW SINCE 1 VICT. C. 26.

WORDS IMPORTING A FAILURE OF ISSUE TO MEAN ISSUE LIVING AT THE DEATH.

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, 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."

6th ed., p. 1961.

Section 33 of the Ontario Act as follows, answers to sec. 29 above quoted.

33. In any devise or bequest of real estate or personal estate, the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention appears 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; but this Act shall not extend to cases where such words import if no issue described in a preceding gift be born, or if there be no issue who live to attain the age, or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

EXCEPT IN TWO CASES.

The result, of sec. 29, appears to be, that the words denoting a failure of issue refer to a failure at the death in every case, unless one of two points can be established. First, that the words are referential to the objects of a prior estate or a preceding gift; or, secondly, that they are so clearly and explicitly used to denote a failure of issue at any time as to exclude the statutory rule of construction, which, it will be observed, only obtains where there is an ambiguity, i.e., where the words may import either a failure of issue 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.

1st ed., vol. 2, p. 455. 6th ed., p. 1962.

"MALE ISSUE."

It has been held that the section applies where the words are "without leaving any male issue," or "shall not leave any child or children or issue of the same," or where there is a gift over "in case of there being no heir," unless, of course, the property is land, and the devisee takes an estate tail under the prior gift.

6th ed., p. 1962. *Re Edwards* (1894), 3 Ch. 644. *Harris* v. *Davis*, 1 Coll. 416.

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.

Ibid.

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.

6th ed., p. 1963. *Jarman* v. *Vye*, L. R. 2 Eq. 784.

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 Will Act; the principles to be deduced from the authorities will now be considered.

6th ed., p. 1964.

WHERE WORDS "IN DEFAULT OF ISSUE," &C., ARE REFERABLE TO THE OBJECTS OF A PRIOR DEVISE OR BEQUEST.

Construction in Regard to Personalty.—Where the words are "in default of such issue" it is clear that whatever be the class of issue included in the preceding gift whether children, sons, or daughters, and whatever the extent of interest given to those objects, the bequest over in default of such issue is construed to mean in default of such children, sons or daughters.

Ibid. *Stanley* v. *Leigh*, 2 P. W. 686 and see 3 Myl. & Cr. at p. 153.

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.

6th ed., p. 1965. *Re Hopkins' Trusts*, 9 Ch. D. 131.

"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."

Ibid. As to the meaning of the words "as aforesaid," see *Walker* v. *Petchell*, 1 C. P. 652.

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. 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. And on the whole the tendency of the authorities is to give a referential construction to words importing a failure of issue.

Ibid. *Vandergucht* v. *Blake*, 2 Ves. jun. 534 ("death without issue."). *Pride* v. *Fooks*, 3 De G. & J. 252.

But of course, although the primary gift is so expressed that there may be issue who may not take under it, the context may show that the omission or mistake is not in that gift, but in the gift over.

6th ed. p. 1969. *Re Merceron's Trusts*, 4 Ch. D. 182.

"DEFAULT OF SUCH ISSUE."

Construction with regard to real estate (1) Where the expression is "such issue." With regard to real estate also (bearing in mind that, where the referential construction is adopted, the rules laid down in the earlier decisions still apply), it is clear, that the words "in default of such issue," following an express devise to any particular branch of issue, as children, sons, or daughters, will be construed to refer to the issue before described; that is, as meaning in default of "such" children, sons, etc. And in cases of this class (as distinguished from those which form the subject of the next section), this rule prevails, whether the objects of such preceding devise take estates of inheritance, or only estates for life.

1st ed., vol. 2, p. 368, and *Ibid.*

GENERAL PRINCIPLE "IN DEFAULT OF SUCH ISSUE" IS REFERENTIAL.

The result of the authorities at the time Mr. Jarman wrote was that the phrases "in default of such issue," "for want of such issue," or "on failure of such issue," following a devise to any class of issue, or even to any individual child or other descendant, is simply and exclusively referential, and does not enlarge, or in any manner affect any of the prior estates. The cases are numerous—the construction has been adopted after

a devise to children in fee; to children for life; to sons for life; to daughters for life; to sons in tail male; and to a son in tail male.

1st ed., vol. 2, p. 372. 6th ed., p. 1970. *Hey* v. *Earl of Coventry*, 3 T. R. 83.

EFFECT WHERE PRIOR DEVISE IS IN FAVOUR OF A SINGLE CHILD.

Even where the prior devise embraces a single child only, the words "for want of such issue" are construed for want of such child, and have not the effect of conferring an estate tail on the parent of that child.

6th ed., p. 1970. *Doe* v. *Charlton*, 1 M. & Gr. 429.

Of course, where the word "issue," occurring in an express devise to issue, is therein explained to mean children, the words "in default," or "for want of such issue," immediately following, are construed "in default of such children."

"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."

6th ed., p. 1971. *Lewis d Ormond* v. *Waters*, 6 East. 337.

IN DEFAULT OF ISSUE GENERALLY (WITHOUT THE WORD "SUCH.")

2. Where the reference is to issue simply. It is well settled also, that words importing a failure of issue (without the word "such"), following a devise to children in fee simple or fee tail, refer to the objects of that prior devise, and not to issue at large.

1st ed., vol. 2, p. 372. 6th ed., p. 1972. Quoted with approval in *Bowen* v. *Lewis*, 9 A. C. at p. 900.

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 an absolute interest in A.'s lifetime, and then you have a gift over simply in these terms, "if A. dies without leaving childr. .," you are to construe the expression "leaving" so as not to destroy any prior vested interest. In other words, you construe it as meaning "without leaving a child who has not attained a vested interest."

6th ed. p. 1973. *Re Cobbold* (1903), 2 Ch. at p. 304.

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.

6th ed., p. 1975. *Eastwood* v. *Avison*, L. R. 4 Ex. 141.

EFFECT WHERE WORDS REFER TO FAILURE OF ISSUE OR CHILDREN, OBJECTS OF PRIOR DEVISE.

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; although, it will be observed, by this construction two different meanings are given to the word "issue" in the same sentence.

1st ed., vol. 2, p. 370, and *Ibid.* *Doe d Bernard* v. *Reason*, cit. 3 Wils. at p. 244. *Ives* v. *Legge*, 3 T. R. 488 n "in default thereof."

WHEN WORDS IMPORTING FAILURE OF ISSUE RAISE AN ESTATE BY IMPLICATION.

3. Where the prior gift 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.

6th ed. p. 1976. *Doe d Rew* v. *Lucraft*, 8 Bing. 386.

RESULT OF DECISIONS UNDER OLD LAW.

The result of the decisions on the questions, under the law before the Wills Act, was thus stated in the third edition of Mr. Jarman's work.

CONCLUSIONS SUGGESTED.

1st. That the words, in default of issue, or expressions of a similar import, following a devise to children in fee-simple, mean in default of children, and following a devise to children in tail, mean in default of children or of issue inheritable under the entail. This is free from all doubt.

2nd. That these words following a devise to all the sons successively in tail male, and daughters concurrently or successively in tail general, or in tail special, are also to be construed as signifying such issue, even in the case of an executory trust.

3rd. That words devising over the property on failure of issue male, following a devise to the whole line of sons successively in tail male, are also referential to those objects.

4th. That where the children take a life estate only the words "in default of issue" introducing the gift over will create

an estate tail by implication in the parent subject to the children's life estates.

5th. That where there is a prior devise to a definite number of sons only in tail male, with a limitation over in case of default of issue or issue male of the parent, an estate tail will also be implied in the parent, in order to give a chance of succession to the other sons.

6th. That in the case of executory trusts, words importing a dying without issue, following a devise to the first and other sons of a particular marriage in tail male, authorize the insertion of a limitation to the parent in tail general, in remainder expectant on those estates.

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, in remainder expectant on the estate for life or in tail of the son; and which rule also, it seems, applies where children only who survive a specified period take estates tail.

8th. That the circumstances of the preceding devise to children, etc., being subject to a contingency or not including the whole subject of the devise over 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.

6th ed., pp. 1978-9.

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: 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.

1st ed., vol. 2, p. 414. 6th ed., p. 1979.

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.

Ibid.

Such a case, however, can only occur where the devise to the children, or any other class of issue gives estates in fee, as it would under wills which are subject to the present law, even without words of limitation; for if the devise in question confers estates for life only, the determination of such estates is involved in the failure of the issue whose extinction is the contingency on which the ulterior devise depends. We see, therefore, in the effect of the new law, increased motive for adhering to the principle that, where a devise to children in fee is followed by a devise over to take effect on the failure of the issue of the parent of such children, the words importing a failure of issue refer to the children or other issue, who are the objects of the prior devise, which principle would, it is conceived, apply to devises embracing any other class of children, as sons or daughters.

6th ed., p. 1980.

For instance, if lands are devised to A. for life, with remainder to his sons, and if A. should die without issue, then to B., each son of A., under the original devise would, immediately on his birth, take a vested remainder in fee-simple in his own aliquot share; and if the subsequent words were held merely to refer to the objects of the prior devise, the ulterior limitation, of course would not disturb or affect such vested remainder; but if the words in question were adjudged not to bear this construction, but to point to issue of every degree living at the death of A., they would subject the vested estate of the sons of A. to an executory devise, to take effect in the event of A. dying without leaving issue surviving him, a result which it is conceived the Courts, when applying the new rules of construction, will not hesitate to reject.

Ibid.

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.

6th ed., p. 1981. 3rd ed., vol. 2, p. 431n. Referred to with approval in *White* v. *Summers* (1908), 2 Ch. at p. 272.

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.

Ibid.

DEVISES OF REVERSIONS.

WHETHER WORDS REFER TO DETERMINATION OF SUBSISTING ESTATES.

Devises of reversions, sometimes give rise to a question which bears a strong analogy to that discussed in the present chapter. This occurs where a testator, having a reversion in fee, subject to estates tail belonging to the sons or other partial issue of a person, devises the reversion as property in the event of that person dying without issue, which necessarily raises the question whether these words refer to the determination of the subsisting estates, or to a general failure of issue, or, in other words, whether they are words of description or donation: in the former case the devise operates as an immediate disposition of the reversion; in the latter, it is an executory devise, and as such, is in cases governed by the old law, void for remoteness.

1st ed., vol. 2, p. 406. 6th ed., p. 1981. *Lytton* v. *Lytton*, 4 Br. C. C. at p. 459.

SUGGESTED CONCLUSION FROM THE CASES.

The sound rule would seem to be, that, wherever it may be collected from the general context of the will, that it is the testator's intention to dispose of his reversionary interest expectant on the subsisting estates tail, such intended disposition will not be defeated by the neglect of the testator to adapt his language with

precision to the events on which the reversion will fall into possession. The consequence of rejecting this construction commonly has been (we have seen), to invalidate the intended devise of the reversion for remoteness (as depending upon a general failure of issue); but in this respect the recent Act, the Wills Act, 1837, has made an alteration, for as we have seen, where the words denoting the failure of issue have the effect neither of referring to the objects of the prior devise, nor of creating an estate tail by implication, the effect of the Wills Act is to prevent the ulterior devise from being void for remoteness.

6th ed., p. 1986.

"Death without issue" means death without issue surviving the parent, and a gift over in the case of death without children, of a previous taker means death at any time without children, and not death prior to death of testator. *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388; *Cowan* v. *Allen*, 26 S. C. R. 292.

In cases in which the devise is to A. in fee and if he dies without issue then at his death over, a failure of issue is imported restricted to the time of the death of the first devisee. *Gray* v. *Rochford*, 2 S. C. R. 431. *Re Fitzsimmons*, 1 O. W. R. 220.

CHAPTER LIII.

WHAT WORDS WILL CHARGE REAL ESTATE WITH DEBTS AND LEGACIES.

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, the Debts Recovery Act, 1830, and the Administration of Estates Acts, 1833 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. But under the old law a testator could always charge his real estate with the payment of his debts, with the result of making his specialty and simple contract debts payable pari passu, and hence it was a question of importance (and sometimes too of no small difficulty) to determine in any particular case whether such a charge was in point of fact created by the will. Although the importance of the subject has been much diminished by the statutes above referred to, the question may still arise, for the executor's right of retainer is not taken away by these acts; nor is it extended so as to enable the executor to retain his debt as against a creditor of higher degree than himself; nor do the acts give to an executor a right of retainer as regards real estate. Again, the question whether a testator has charged his debts on his real estate is often of importance with reference to the right of a legatee to marshal the assets.

6th ed., p. 1987. *Walters* v. *Walters*, 18 Ch. D. 182. See 1st ed., Vol. 2, p. 511.

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, LIV.

6th ed., p. 1989.

With regard to the latter question, the Courts have construed the expression "debts" with considerable latitude.

Ibid

WHETHER CHARGE OF DEBTS INCLUDES FUTURE DEBTS.

It is also to be observed, that, in construing provisions for payment of debts, the Courts are averse to an interpretation which would restrict the provision to debts subsisting at a given period during the life of the testator; and therefore, although words in the present tense generally refer to the time of making the will, yet it has been held that, a charge of all the debts, "I have contracted since 1735" extended to future debts. Lord Hardwicke said, "If it had been 'all debts that I owe,' still it would be extended to the time of her death."

1st ed., vol. 2, p. 530. 6th ed., p. 1990.

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.

6th ed., p. 1990.

"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.

Ibid. Maxwell v. *Maxwell*, L. R. 4 H. L. 506.

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.

Ibid.

CONDITION.

A charge of debts may be created in the form of a condition imposed on a devisee of the land, unless the circumstances show that this cannot be the testator's meaning.

6th ed., p. 1991.

AUTHORITY.

A mere discretionary authority to pay debts does not charge them on the testator's real estate.

Ibid. Re Head's Trustees and Macdonald, 45 Ch. D. 310.

EXCEPTIONS TO THE GENERAL RULE.

FIRST EXCEPTION. WHERE SPECIFIC FUND APPROPRIATED.

The rule, however, seems to be subject to two material exceptions. First, where the testator, after generally directing his debts to be paid, has provided a specific fund for the purpose.

1st ed., Vol. 2, p. 520, 6th ed., p. 1991.

However, it is clear, that a charge created by general introductory words is not controlled by a subsequent passage furnish-

ing conjecture only of a contrary intention, and not actually inconsistent with such charge.

Ibid.

SECOND EXCEPTION, WHERE THE PAYMENT IS TO BE MADE BY THE EXECUTORS.

The second exception to the general rule under discussion occurs where the debts are directed to be paid by executors, in which case, unless land be devised to them, it will be presumed that payment is to be made exclusively out of funds which, by law, devolve to the executors in their representative character.

1st ed., vol. 2, p. 523, 6th ed., p. 1992.

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.

6th ed., p. 1993. *Dowling* v. *Hudson*, 17 Bea. 248.

WHERE EXECUTOR IS DEVISEE.

Where 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.

1st ed., Vol. 2, p. 525 and *ibid.* *Doe d. Pratt* v. *Pratt*, 6 Ad. & Ell. 180.

SAME RULE WHERE EXECUTOR IS DEVISEE IN TRUST.

And even where the land is devised to the executors upon trust for other persons, the effect is the same. Having the estate, and being charged with the payment of the debts, they are to consider the creditors as having the first claim upon the trust.

6th ed., p. 1994. *Dormay* v. *Borrodaile*, 10 Bes. 263.

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 personality and the appointment of the executor, and separated by several intervening sentences from the devise of the lands, are, it seems, immaterial.

1st ed., Vol. 2, p. 526, 6th ed., p. 1995.

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.

Ibid.

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. Indeed,

such is clearly the rule even where an estate *in fee* is devised to *one* of several executors.

Ibid. Warren v. *Davies*, 2 My. & K. 40.

But if a testator directs that his debts shall be paid by his executors, and devises all his real estate to them in such a way that they take the legal estate upon trusts under which they take unequal beneficial interests, the debts are charged on the real estate.

6th ed., p. 1006. *Re Tanqueray-Williams and Landau*, 20 Ch. D. 465.

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 and undivided, the implied charge may be rebutted by the context; as, if part only of the real estate is given to them, and other parts to other persons; in such a case the distribution of the estate may be such as to make it very improbable that the testator intended that the former part should be charged, and the latter not; especially if the part given to the executors is not for them beneficially, but in trust for other persons.

Ibid. Re Bailey, 12 Ch. D. 268.

GENERAL RULE, STATED BY FRY, J.

The general rule has been thus stated: "Where there is a direction that the executors shall pay the testator's debts, followed by a gift of all his real estate to them, either beneficially or on trust, all the debts will be payable out of all the estate so given to them. The same rule applies whether the executors take the whole beneficial interest, as in Henvell v. Whitaker, or only a life interest, as in Finch v. Hattersley, or no beneficial interest at all, as in Hartland v. Murrell." But the testator's intention must be ascertained 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.

Ibid. Henvell v. *Whitaker*, 3 Russ. 343. *Finch* v. *Hattersley*, 3 Russ. 345n. *Hartland* v. *Murrell*, 27 Beav. 204.

WHERE DIRECTION TO EXECUTORS TO PAY DEBTS IS FOLLOWED BY A DEVISE TO ONE OF THEM "SUBJECT AS AFORESAID."

If a testator begins with the 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."

6th ed., p. 1997. *Dowling* v. *Hudson*, 17 Bea. 248.

WHETHER CHARGE EXTENDS TO SEVERAL PRECEDING SUBJECTS OF DISPOSITION.

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.

1st ed., Vol. 2, p. 528 and *ibid.* *Withers* v. *Kennedy*, 2 My. & K. 607.

WHETHER SAME WORDS WILL CHARGE LEGACIES AS DEBTS.

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.

1st ed., Vol. 2, p. 530, 6th ed., p. 1998.

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 prima facie applies only to the personalty.

6th ed., p. 2000. *Re Cameron*, 26 Ch. D. 19.

DEVISE UPON CONDITION.

A devise of land to A. upon condition that he pays a legacy to B. charges the legacy on the land.

Ibid.

MIXED FUND.

It is clear that the rule in Kidney v. Coussmaker applies to legacies as well as to debts; although the personalty is not in terms charged with the payment of them.

Ibid. *Kidney* v. *Coussmaker*, 1 Ves. jun. 436.

GIVING LEGACIES, AND THEN THE REST OF THE REAL AND PERSONAL ESTATE, CHARGES THE LEGACIES.

It is also clear that where legacies are given and then "all the residue of the real and personal estate," the legacies are charged on the realty.

Ibid. *Re Bawden* (1894), 1 Ch. 693. *Greville* v. *Browne*, 7 H. L. C. 689.

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; and it applies to an additional legacy given by codicil to a legatee named in the will.

6th ed., p. 2001.

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.

6th ed., p. 2001. *Elliott* v. *Dearsley*, 16 Ch. D. 322. *Re Smith* (1899) 1 Ch. 365.

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.

Ibid.

These cases are based on the general principle that a residuary gift may comprise property which is specifically described.

Ibid.

Of course the rule is not excluded by a direction to the executors (to whom there is no devise of real estate), to pay debts and legacies: such a direction is mere surplusage. But the rule is not applicable to a case where the testator first dealing exclusively with his personal estate allots certain portions of it to several objects, and then disposes of the residue of his real and personal estate.

6th ed., p. 2002. *Gyett* v. *Williams*, 2 J. & H. 429.

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 and personal estate is not of itself enough to charge legacies on real estate.

Ibid. See *Nyssen* v. *Gretton*, 2 Y. & C. 222.

MIXED FUND.

It must be remembered that, although the principle of Greville v. Browne requires that the residuary real and personal estate should be treated as one mass, it does not follow that it is to be treated as a mixed fund under the doctrine of Roberts v. Walker so as to make the legacies payable out of the real and personal estate pro rata.

Ibid. *Greville* v. *Browne* Ut. Sup.; *Roberts* v. *Walker*, 1 R. & My. 752; *Re Boards* (1895) 1 Ch. 499.

ANNUITIES USUALLY INCLUDED IN A CHARGE OF LEGACIES.

It may here be observed, that, under a charge of legacies, annuities will generally be included, unless the testator manifests an intention to distinguish them, as by sometimes using both words.

6th ed., p. 2003. *Shipperdson* v. *Tower*, 1 Y. & C. C. C. 441. *Gaskin* v. *Rogers*, L. R. 2 Eq. 284.

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.

Ibid.

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.

Ibid.

RULE IN CASE OF LEGACIES.

And first as to legacies. 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.

Ibid. Spong v. *Spong*, 1 Y. & J. 300. See *Mirehouse* v. *Scaife*, 2 My. & Cr. at pp. 704, 705.

Both these cases occurred under the old law. The statute 1 Vict. c. 26 has not diminished the distinction between specific and residuary devises.

6th ed.. p. 2004.

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; 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.

Ibid. Maskell v. *Farrington*, 3 D. J. & S. 338.

DIRECTION TO RAISE MONIES OUT OF THE RENTS AND PROFITS.

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; but the question which has chiefly given rise to perplexity in reference to these words is, whether a direction or power to raise money out of the *rents and profits* authorizes a sale, the doubt being, whether, in such cases, the testator or settlor, by the words "rents and profits," means the *annual* income only, according to their ordinary and popular signification, or uses the phrase in a more comprehensive sense, as designating the proceeds or "profits" of the inheritance, and, therefore, as impliedly conferring a power to dispose of such inheritance.

1st ed., Vol. 2, p. 534, 6th ed., p. 2005. *Doe* v. *Lakeman*, 2 B. & Ad. at p. 42. *Allan* v. *Backhouse*, 2 V. & B. 65.

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.

6th ed., p. 2006.

The signification of the phrase is governed wholly by the nature of the purpose for which the money is to be raised, and the general tenor of the will.

6th ed., p. 2008.

EXCEPTION WHERE ESTATE IS TREATED AS EXISTING ENTIRE AFTER RAISING OF DEBTS.

If the testator or settlor manifests, by the context of the instrument, that he contemplates the identical subject, out of whose "rents and profits" the money shall have been raised, being afterwards enjoyed by the devisees, or remaining otherwise available for the purposes of the will, it is evident that he intends the current annual income only to be applied; for by such means alone can the raising of money be made consistent with the preservation of the entire subject of disposition.

Ibid. *Wilson* v. *Halliley*, 1 R. & My. 590.

So, if the testator treats the raising of 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.

Ibid.

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.

6th ed., p. 2009.

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.

Ibid. *Wilson* v. *Halliley*, 1 R. & My. 590.

The general rule that a direction to pay out of rents and profits means primâ facie out of the estate.

6th ed., p. 2010. *Metcalfe* v. *Hutchinson*, 1 Ch. D. 591.

DIRECTION TO RAISE OUT OF THE RENTS AND PROFITS, OR BY SALE OR MORTGAGE.

Where the direction is to raise out of the rents and profits, *or* by sale or mortgage, it is obvious that these words (being evidently used in contradistinction), cannot mean the same thing; rents and profits, therefore, must import annual rents and profits; and if, in such a case, the charges to be raised by these respective modes are of two kinds, one annual, and the other in gross, the words will be distributed, the annual charges being raiseable out of the annual rents, and the sums in gross by sale or mortgage.

1st ed., vol. 2, p. 540, and *ibid.* *Marker* v. *Kekewich*, 8 Ha. 291.

AS TO RAISING FINES FOR RENEWAL OF LEASES.

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.

6th ed., p. 2011. *Allan* v. *Backhouse*, 2 V. & B. 65.

WHERE OTHER WORDS THAN "RENTS AND PROFITS" ARE USED.

The early Judges seem to have thought themselves justified in laying down the general rule now under discussion, by treating the annual rents as "ordinary profits," and the proceeds of a sale or mortgage as "extraordinary profits." Consequently, if the phrase used by the testator is not simply "rents and profits," the general rule does not necessarily apply.

6th ed., p. 2012. *Re Green*, 40 Ch. D. 610.

ANNUAL RENTS AND PROFITS.

A charge on corpus is, of course, excluded where the expression is "annual rents and profits."

Ibid. *Forbes* v. *Richardson*, 11 Hs. 354.

IMPLIED PROHIBITION OF MORTGAGE.

Where the testator expressly says that the charges are to be raised out of rents and profits, but not by sale, this would, as a general rule, also prohibit a mortgage or other virtual alienation of the estate.

Ibid.

Specific Fund.—A testator gave £3,000 to Trinity College, and £1,000 to Trinity Church, both to be paid out of certain gas stock. By

a codicil he reduced the latter bequest to £500, and gave to two other churches a further sum of £300:—Held, that this sum was to come out of the gas stock. *Smith* v. *Seaton*, 17 Chy. 397.

Trust—Claim on Assets—Priority—Charge on Realty.—T. H. and his brother were partners in business, and the latter having died, T. H. became by will his executor and residuary legatee. A legacy was left by the will to E. H., part of which was paid and judgment recovered against the executor for the balance. T. H. having incumbered both his own share of the partnership property and that devised to him, one of his creditors, and a mortgagee of the property, obtained judgment against him, and procured the appointment of receivers of his estate. E. H. then brought an action to have it declared that his judgment for the balance of his legacy was a charge upon the moneys in the receiver's hands in priority to the personal creditors of T. H.:—Held, that it having been established that the moneys held by the receivers were personal assets of the testator, or the proceeds thereof, E. H. was entitled to priority of payment, though his judgment was registered after those of other creditors. Held, also, that the legacy of E. H. was a charge upon the realty of the testator, the residuary devise being of "the balance and remainder of the property and of any estate" of the testator, and either the words "property" and "estate" being sufficient to pass realty. This charge upon realty operated against the mortgagees, who were shown to have had notice of the will. *Cameron* v. *Harper*, 21 S. C. R. 273.

Bequest of Bonds—Specific or Demonstrative—Succession Duty.—A testator possessed both at the time of making a codicil to his will and at the time of his death of a considerable number (more than 5) of $1,000 debentures, bearing interest at four per cent., of a certain city, by the codicil devised to each of two devisees "one debenture of (the city) for the sum of $1,000, bearing interest at four per cent. per annum," and directed "that, if I should deliver over any of the said debentures in my lifetime to any of the above legatees, such delivery shall be considered and taken as a satisfaction of the legacy of the person to whom it is so delivered." He had in previous clauses bequeathed to each of five named persons one debenture of (the city) for the sum of $1,000, bearing interest at four per cent.:—Held, that the legacies to the two legatees were not specific legacies; and that, even if they had been, the legatees were not entitled to receive them free of succession duty, and the executors should either deduct or collect the duty before paying them the legacies. *In re Mackey*, 23 C. L. T. 207, 6 O. L. R. 292, 2 O. W. R. 230, 689.

Charges upon land devised are charges upon the equity of redemption and must be taken to have been intended by the testator as sums which the devisee taking the equity of redemption must pay out of it. *Re Foster*, 2 O. W. R. 895.

Payable out of Personalty.—A testator, by his will, gave to his widow an annuity of $4,000 in lieu of dower. His will contained certain devises, and gave other legacies and annuities, which the testator charged on the whole of his estate not before devised, and he empowered his executors to sell any of his property which they should think necessary. The widow elected to take the annuity:—Held, that the legacies and annuities were payable primarily out of the personal estate. *Davidson* v. *Boomer*, 18 Chy. 475.

Payment out of Estate.—A testator, after directing that his funeral charges and debts should be paid by his executor, disposed of his real and personal estate as follows: First, he gave and bequeathed certain legacies "to be paid out of my estate," and then he gave the residue and remainder of his estate, real and personal, to his son W. absolutely, and he nominated W. sole executor:—Held, that the legacies were by the will, charged upon the estate, real and personal, and failing personal estate became a charge on the land; and that W. had power to sell the land, and a purchaser from him was not bound to see to the application of the purchase money. *Moore* v. *Mellish*, 3 O. R. 174.

Personalty Insufficient to Pay Legacy—Real Estate Devised to Legatee and Others.—A testator by his will, after directing payment of his debts by his executors, gave his personal estate and the dwelling house with the land occupied therewith, to his daughter M., and gave M. a legacy of $2,000. He then devised the residue of his real estate to his executors in trust, to lease the same and pay the interest to his wife for life, and after her death to sell the same and divide the proceeds between his children, share and share alike. At the time of the testator's death, the personal estate was of small value, and was exceeded by the amount of the debts; and it did not appear whether, when the will was made, the testator had sufficient personal estate out of which the legacy could be paid:—Held, that M. could not claim to have the $2,000 paid out of the proceeds of the real estate devised to the executors, but that there should be no deduction from her share by reason of the real estate devised to her. Held, also, that the children of a deceased child took the share of the proceeds of the real estate which their parent was entitled to. *Totten* v. *Totten*, 20 O. R. 505.

Real and Personal Estate.—Where debts and legacies are charged on real and personal estate, and there is no direction to sell the real estate, the personalty is the primary fund to pay, and the realty is liable only in case of a deficiency. *Davidson* v. *Boomer*, 17 Chy. 500.

A testator by his will bequeathed certain legacies of different amounts to his sons and daughters, and directed his "real and personal property" to be sold by auction, and then added, "And the household furniture also to be sold by auction, and the proceeds of the sale to be equally divided amongst my daughters:"—Held, that the legacies to the sons and daughters were payable out of the mixed fund of real and personal estate. *In re Gilchrist, Bohn* v. *Fyfe*, 23 Chy. 524.

Share in Partnership.—A testator by his will directed that "$5,000 of the money to which I may be entitled as my share of the partnership business now carried on at," &c., under the name of E. H. & Co., should be invested by his executors at interest, and that the income derived therefrom should by them be paid over, as received, to his daughter M., for her maintenance until she attained twenty-one, when she should be entitled to $5,000; and if the interest in any year from the investment should fall short of $400, the difference to make up that sum should be paid by his executors out of the interest or profits derived from the remainder of his estate. Subject as aforesaid, he gave the residue of his estate, real and personal, to his executors in trust for his son. Subsequently to the making of the will the partnership of E. H. & Co. was dissolved, and the testator until his death carried on the business alone, but under the name of E. H. & Co., his interest in the partnership having been realized by him and carried into his new business:—Held, that the legacy of $5,000 was demonstrative and not specific, and that the legatee was entitled to be paid the same out of the general estate. *Day* v. *Harris*, 1 O. R. 147.

Devise Subject to Payment of Legacies.—A testator devised his real estate and chattel property (excepting some bequests to his wife) to his son Robert, subject to the payment of his just debts, funeral expenses, and certain specified legacies, which legacies he directed his executors to pay. By a codicil he directed the chattel property (except the specific bequests to his wife) to be sold, and the proceeds equally divided amongst all his children:—Held, that the specific legacies were a charge on the real estate. *Stewart* v. *Dick*, 10 P. R. 411.

Direction for Payment of Debts—Cattle.—By the first clause in his will, a testator directed that his executrix should pay his debts out of his personal estate, and then proceeded to leave to his wife, whom he named as his executrix, certain lands subject to incumbrances, and all his stock, cattle, &c., upon the said lands, and then devised the residue of his real and personal estate (after payment of his just debts and funeral expenses) and all the rents and issues thereof to a brother and sister for their lives, to be equally divided between them, share and share alike, and after their death, to their children, their heirs and assigns for ever,

share and share alike. The brother predeceased the testator. The widow now brought this action for the construction of the will:—Held, that the bequest of the stock, cattle, &c., to the testator's wife was a specific legacy, and was not subject to the testator's debts, notwithstanding the first clause of the will. Held, also, that the gift of the residue to the brother and sister was a gift to them as tenants in common, but that the brother having predeceased the testator, there was an intestacy as to his share. *Rudd* v. *Harper*, 16 O. R. 422.

Implied Charge.—A testator bequeathed to his wife maintenance or an annuity at her option, to be furnished or paid by his sons R. and G. and gave divers legacies, some of which he directed his executors to pay; and as to others, including the legacy to the plaintiff, he did not say how they should be paid. He then devised his farm to his sons R. and G., subject to his wife's maintenance, and subject to the maintenance of his younger children, and subject also to the legacies and bequests therein before contained:—Held, that the plaintiff's legacy was a charge on the farm. *Jones* v. *Jones*, 15 Chy. 40.

A testator devised a portion of his real estate to his widow and eldest son James, jointly, and his heirs, "My wife Jane to have and to hold the aforesaid premises as long as she remains my widow, for my wife Jane Clark's support and my small children's support . . . and after her death my wife's part will belong to my son James Clark aforesaid . . . My son James Clark will pay my daughters, naming them, $200 each when they become of the age of twenty-one years, that is, each as she becomes of the age of twenty-one years:"—Held, that the legacies to the daughters were payable out of the corpus of the estate devised to James. *Clark* v. *Clark*, 17 Chy. 17.

The testator directed that his grandson F. should be sent to college and his expenses paid for out of his estate by his executors. The estate consisted of land only, after taking out a specific bequest of the furniture and the expenses of the funeral:—Held, that the land was charged with the bequest. *Hellem* v. *Severs*, 24 Chy. 320.

Devise after Payment of Legacies.—A testator after devising certain pecuniary legacies and a home to two of his children until they became of age, provided as follows: "And I will and bequeath unto my daughter C. J., all my real estate and the remainder of my personal estate after the above legacies are paid:"—Held, that the legacies were charged upon the real estate. *Johnson* v. *Denman*, 18 O. R. 66.

Devise of Real Estate—Payment of Legacy out of Annual Produce.—A testator, after a bequest of a legacy to the plaintiff amongst others, devised to a daughter "my two farms," describing them, and desired his executors to pay the said legacies out of "the annual produce of the farms, or as to them should seem best." The executors renounced, and no one administered. The daughter took possession of the whole estate, paid the debts and received the rents and profits of the farms which she subsequently mortgaged, and they were sold by the first mortgagee, under his power of sale, and after satisfying his claim, the balance of the purchase money was paid into Court, and was claimed by a subsequent mortgagee:—Held, that the plaintiff's legacy was a charge upon and payable out of the annual produce of the farms, and that the charge was not affected by the subsequent words, "or" as to the executors "should seem best;" that the fact that sufficient annual produce of the farms had been received which, if set apart, would have paid off the legacy, was no answer to plaintiff's claim, for it could not be set up by the daughter by virtue of her possession and receipt, and her grantees or mortgagees could be in no better position; that if necessary a receiver of such annual produce should be appointed until payment of the legacy with interest not exceeding six years' arrears, that the balance of purchase money should remain in Court as indemnity to the purchaser against the plaintiff's claim; and that subject thereto the subsequent mortgagee was entitled to it. *Callaghan* v. *Howell*, 29 O. R. 329.

Legacies—Payment out of Real Estate.—A testator by his will devised a farm to each of his two sons, subject to the right of his widow to work and manage the farms for her own benefit until certain fixed dates, and subject to the payment to her after those dates of certain sums of money by the devisees. He then gave legacies to his daughters, and proceeded as follows:—"I give to my wife all the moneys that remain after paying my former 'bequeaths,' debts, and funeral expenses, and all that may accrue from the farm during her term of management, to dispose of as she pleases, but if she should die without disposing, then I order that the undisposed part be divided among my sons and daughters then living. I order my executors to sell my undisposed real estate and divide it equally amongst my children then living."—Held, that there had not been created a blended fund composed of the residuary real and personal estate so as to make applicable the rule established in *Greville* v. *Browne*, 7 H. L. C. 689, and that, the undisposed of personal estate being insufficient to pay them, the legacies to the daughters could not be paid out of the undisposed of real estate. *In re Bailey*, 24 C. L. T. 54, 6 O. L. R. 688, 3 O. W. R. 20.

Agreement to Pay Legacy as Purchase Money.—A., by agreement, disposed of all his real estate to B., his son-in-law, who agreed to pay to A. an annuity for life, and after A.'s death to pay the purchase money in equal annual instalments to A.'s daughters. A., by his will, made some years after, assumed to grant a legacy to his wife out of the real estate, directing the same to be deducted from the payments to be made to his daughters:—Held, that the agreement was complete, and the proceeds of the realty could not therefore be charged. *Honsberger* v. *Martin*, 8 Chy. 361.

Priority of Legatees over Mortgagees.—That part of s. 22 of R. S. O. 1887 c. 110 which provides that the four preceding sections "shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies," is of general application, and applies to wills coming into operation as well after as before the 18th September, 1865. S. 8 of R. S. O. 1887 c. 11 (s. 15 of R. S. O. 1887 c. 102) did not apply; because the money was not money payable upon an express or implied trust, or for a limited purpose, within the meaning of the section. *McMillan* v. *McMillan*, 21 Chy. 594, and *Moore* v. *McIlish*, 3 O. R. 174, distinguished. *Gray* v. *Richmond*, 22 O. R. 256.

Sale by Executors in Order to Pay the Legacy.—A testator devised to his daughter a lot of land charged with a legacy. The daughter predeceased the testator, leaving two children, to whom the lot descended. On an application by the executors at the instance of the official guardian, it was held, that it was the duty of the executors to sell the land and pay the legacy. *Re Eddie*, 22 O. R. 556.

Control for Life—Farm Stock and Implements.—The testator bequeathed to his wife, "the full control of all my real and personal estate, stock and implements, during her lifetime," and willed that at his wife's decease "all the stock of whatever kind, with the farming implements on the farm at my wife's decease shall be equally divided between my sons:"—Held, that the bequest to the widow of the stock and farm implements was specific, and therefore exempt from the payment of the pecuniary legacies. *Augustine* v. *Schrier*, 18 O. R. 192.

Charges on Land Devised — Expenses of Administration—Debts.—Where a testator devised a quarter section to one son, directing him to pay $100 to each of two daughters, and to another son another quarter section, and all personal property and cash, directing the latter to bear all sickness and funeral expenses, to keep the testator's wife, and to pay her $100 every year:—Held, that the quarter sections were respectively chargeable with the moneys directed to be paid by the respective devisees.—Held, also, that the specific devises of the lands and the charging of them with the legacies and the annuity, indicated that the testator had no intention of making them liable for the payment of debts,

nnless there was not sufficient movable property or cnsh to satisfy these.—Semble, that the provisions of the Land Titles Act, 1894, 57 & 58 V. c. 28, s. 3, and 63 & 64 V. c. 21, s. 5, making land descend as personal property, have not altered the common law rule that the personal property is the primary fund for the payment of debts. *Re McVicar*, 3 W. L. R. 492, 6 Terr. L. R. 363.

Charge—Maintenance.—The testatrix bequeathed the balance of moneys remaining in the hanks to her credit, after payment of certain specified charges, to M. M. and E. M., share and share alike. To her son, A., she devised her half of the homestead property charged with the comfortable maintenance of M. M. and E. M. upon such homestead during their lives:—Held, that the maintenance of M. M. and E. M. under the terms of the will was made a charge upon the property, and not upon A. personally:—Held, that a sum of money having been set apart which would be sufficient for the support of the plaintiff for the period of 13 years, and such maintenance being a charge upon the land, binding it as effectually as a mortgage, it was not necessary to provide for securing future payments. *McKean* v. *McKean*, 33 N. S. R. 310.

Bequest of Rents.—A testator devised land to his son, and in his will directed the son to pay debts and legacies:—Held, that the effect of this was to charge the payment of both debts and legacies upon the land devised. *Robson* v. *Jardine*, 22 Chy. 420, followed. *McMillan* v. *McMillan*, 21 Chy. 594, distinguished. The testator by his will gave a house and lot to his daughter, but by a codicil purported to revoke the gift, and directed as follows: "I will that the said house and lot be held by my daughter . . . who shall receive all rents and benefits therefrom during her natural life, and at her decease that all rents shall be invested for the benefit of her heirs on their coming of age."—Held, that by the rule in Shelley's Case the daughters took an estate in fee simple in the lands. *Van Grutten* v. *Foxwell*, [1897] A. C. 658, and *Verulam* v. *Bathurst*, 13 Sim. 374, followed. With reference to another parcel of land, the codicil directed that all rents derived from it were to be divided between the testator's wife and daughter equally, and that on the death of a life-tenant the property should be sold and one-half the proceeds given to his wife or her heirs, and the other half invested, the principal for the benefit of the heirs of his daughter, and interest to go to his daughter during her life.—Held, that as to one-half of this land also the daughter took an estate in fee simple. The testator did not provide for the payment of administration expenses, though he directed that his debts and funeral expenses should be paid by his son.—Held, that the estate as a whole should defray the expenses of administration, and if there was a different disposition of the real and personal parts, there should be ratable apportionment according to the respective values of the real and personal estate. *In re Thomas*, 21 C. L. T. 594, 2 O. L. R. 660.

Debts Charged on Real Estate.—Where a testator directed his debts to be paid out of his "estate" and then bequeathed to his widow an annuity of £100, to be paid out of the proceeds of his "estate," and also bequeathed to her all his personal property; and further directed that the whole of his property should be sold by his executor at the death of his widow; and finally empowered his executor to sell such portions of his property as he might think best, to liquidate any just claims due by the testator, at any time the executor might find it necessary to do so:—Held, that the debts were charged upon the real estate as the primary fund. *Harrold* v. *Wallis*, 10 Chy. 197.

CHAPTER LIV.

ADMINISTRATION OF ASSETS, EXONERATION OF DEVISED LANDS, EXEMPTION OF PERSONALTY, MARSHALLING OF ASSETS, ETC.

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, 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."

6th ed., p. 2013. *Re Kloebe*, 28 Ch. D. at p. 177.

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 movable property, regard must be had to the law of the testator's domicil, and so far as it deals with immovable property, regard must be had to the lex loci rei sitae.

6th ed., p. 2014.

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.

Ibid.

FUNERAL EXPENSES.

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. 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, so that if a testator were to direct his executors to expend an extra-

vagant amount upon his funeral, they would not be justified in doing so.

Ibid.

TESTAMENTARY EXPENSES.

Testamentary expenses are expenses incident to the proper performance of the duty of an executor in connection with the personal estate, including the estate duty on property passing to the executor as such, the costs of proving the will, of obtaining legal advice as to the distribution of the estate, the expenses of ascertaining the persons entitled to a legacy or specific fund, and the expenses of getting in property abroad.

Ibid. Sharp v. *Lush*, 10 Ch. D. 468. *Re Pullen* (1910) 1 Ch. 564.

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.

6th ed., p. 2015. *Re Pearce* (1909), 1 Ch. 819.

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.

Ibid. Re Spencer Cooper (1908), 1 Ch. 130.

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 apportion the expenses of obtaining probate, and of administering the estate as a whole, between the realty and the personalty.

Ibid.

APPOINTED PROPERTY.

If a testator directs his testamentary expenses to be paid out of the residue, this exonerates an appointed fund.

6th ed., p. 2016. *Re Fearnsides* (1903), 1 Ch. 250.

INTEREST IN EXPECTANCY.

If the interest appointed by the testator is an interest in expectancy which is subject to a life interest in himself, and a subsequent life interest in a person who survives him, the duty is not payable by the executors, and is, therefore, not a testamentary expense.

Ibid. Re Dixon (1902), 1 Ch. 248.

ADMINISTRATION SUIT.

The costs of an administration suit, or of proceedings to ascertain the construction of the testator's will, even on a point con-

cerning only a specific fund, so far as the proceedings relate to the personal estate, are testamentary expenses. But any costs exclusively occasioned by the administration of the real estate are thrown upon the real estate.

Ibid. *Re Vincent* (1909), 1 Ch. 810; *Re Copland*, 44 W. R. 94.

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.

6th ed., p. 2017. *Re Betts* (1907), 2 Ch. 149.

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.

Ibid.

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.

Ibid.

EXECUTORSHIP EXPENSES.

"Executorship expenses" are the same as testamentary expenses.

Ibid. *Sharp* v. *Lush*, 10 Ch. D. 468.

EXONERATION OF GENERAL PERSONAL ESTATE.

A testator can direct his funeral or testamentary expenses, or both, to be paid out of a specific part of his personal estate, and then that part is primarily liable. But a mere charge of such expenses on the real estate does not exonerate the personalty.

6th ed., p. 2018.

WHERE RESIDUE DEFICIENT.

Where the residuary personal estate is insufficient to defray the costs of administration, the deficiency is borne by the specifically bequeathed personalty and the realty.

Ibid. *Re Price*, 31 Ch. D. 485.

ADMINISTRATION OUT OF COURT.

Where the estate is being administered out of Court, whether the estate is solvent or insolvent, 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 order, subject to his

right of retainer and his right to prefer any creditor (including himself), to all other creditors of equal degree, and subject also, in the case of a legatee who is indebted to the estate, to the right of set-off.

Ibid. As to the effect of appointing a debtor to be executor, see *Re Bourne* (1906), 1 Ch. 697.

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.

ORDER OF DEBTS PAYABLE OUT OF LEGAL ASSETS.

The order of administration, in the case of legal assets, is as follows:—*

(1) Crown debts by record or specialty.
(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.
(3) Judgment debts (registered).
(4) Recognizances and statutes.
(5) Judgments recovered against the executor.
(6) Crown debts not by record or specialty.
(7) Specialty and simple contract debts (other than voluntary bonds and covenants).
(8) Loans under the Partnership Act, 1890, sec. 3.
(9) Voluntary bonds and covenants.

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. But this rule seems to be subject to the prerogative of the Crown to be paid in full in priority to other creditors.

The executor has no right of preference or retainer in respect of equitable assets.

6th ed., p. 2019-20.

WHAT FUNDS LIABLE TO CREDITORS.

Where a testator possessed of property of various kinds dies indebted, having disposed of his estate among different persons, or not having made such disposition, it often becomes material to consider the order, and sometimes the proportions and mode, in

*This 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.
Note by Ed. 6th Edition.

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.

1st ed., Vol. 2, p. 543, 6th ed., p. 2020.

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.

6th ed., p. 2020.

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, 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; and this rule is now established to apply in opposition to the old doctrine, to mere charges, by which the descent is not broken, and to devises in trust for the payment of debts, though made to the same persons as are constituted executors. 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, 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.

Ibid. ***Barker*** v. ***May***, 9 B. & Cr. 489.

It is clear, however, that a trust to pay, or a charge of, debts, does not make simple contract debts carry interest, or revive a debt which has been barred by the Statute of Limitations.

6th ed., p. 2021. *Askew* v. *Thompson*, 4 K. & J. 620. *Burke* v. *Jones*, 2 V. & B. 275.

EQUITABLE INTERESTS NOT NECESSARILY DISTRIBUTABLE AS EQUITABLE ASSETS.

But it should be observed that property which the testator had not subjected to debts is not distributable as equitable assets, merely because it is an object of equitable jurisdiction.

6th ed., p. 2022.

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. And therefore the trust of all chattels, real as well as personal, is legal assets, though recoverable only in equity. Formerly an equity of redemption of leaseholds was supposed to be equitable and not legal assets; but this apparently rested on the precarious nature in former times of the mortgagor's interest in the property, 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.

Ibid. Att.-Gen. v. *Brunning*, 8 H. L. C. 243; *Cook* v. *Gregson*, 3 Drew. 547.

SIMPLE TRUST OF FREEHOLDS MADE LEGAL ASSETS BY STATUTE OF FRAUDS. BUT NOT AN EQUITY OF REDEMPTION.

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. Freehold lands held upon a simple trust for the debtor, which but for the Statute of Frauds would have been equitable assets, were by that statute made liable at law in the hands of the heir, executor, or administrator, and by subsequent statutes were also made liable at law in the hands of the devisee, 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: thus an equity of redemption of freeholds was equitable assets. 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.

Ibid. Walters v. *Walters*, 18 Ch. D. 182.

TENANT IN TAIL.

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.

6th ed., p. 2023.

EFFECT OF EXERCISING POWER OF APPOINTMENT.

It should also be stated that property over which the testator has a general power of appointment only (and in which he takes no transmissible interest in default of appointment), is assets for the payment of creditors, provided the power be exercised, but not otherwise; and it will be remembered that, as to wills made or republished since the year 1837, every general or residuary devise

or bequest operates as a testamentary appointment, unless a contrary intention appear.

1st ed., Vol. 2, p. 545, and *ibid.*

In the case of judgment creditors since the Act 1 & 2 Vict. c. 110, who have issued execution upon their judgments, whereby lands over which the debtor has a disposing power, which he might without the assent of any other person exercise for his own benefit, the lands are bound in favour of such creditors, whether the power be exercised or not.

6th ed., | 2024.

COVENANT TO APPOINT.

It makes no difference that the appointment is made in pursuance of a covenant entered into by the testator in his lifetime for valuable consideration.

Ibid. *Beyfus* v. *Lawley* (1903), A. C. 411.

WHETHER APPOINTED PROPERTY IS LEGAL OR EQUITABLE ASSETS.

Where personal property passes to the executor of the donee of a power by virtue of an appointment made in his will, or under sec. 27 of the Wills Act, the question whether it is legal or equitable assets is one on which there is a great divergence of opinion.

Ibid.

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.

6th ed., p. 2025.

RIGHT OF THE CREDITOR TO TAKE PROPERTY OUT OF ITS PROPER ORDER.

In stating the order in which the several funds liable to debts are to be applied, 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, 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.

1st ed., Vol. 2, p. 545, and *ibid.*

ORDER IN WHICH FUNDS TO BE APPLIED.

The order of the application of the several funds liable to the payment of debts is as follows:—

1. The general personal estate not expressly or by implication exempted, 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, but excluding property comprised in a residuary bequest and subject to a secret trust.

2. Land expressly devised or directed to be sold to pay debts, whether it descends to the heir or not.

3. Estates which descend to the heir, whether acquired before or after the making of the will.

4. Real estate devised subject to a charge or debts, and personal property specifically bequeathed, subject to a charge of debts.

5. General pecuniary legacies, pro rata.

6. Specific legacies and real estate devised, whether in terms specific or residuary, are liable to contribute pro rata.

7. Real and personal property over which the testator has a general power of appointment, and which he has in terms (not merely by a general devise or bequest), appointed by his will.

8. The paraphernalia of the testator's widow.

6th ed., p. 2025.

WHAT IS A DEBT?

For the purpose of these rules, a liability of the testator which constitutes a debt payable by his estate, is not necessarily considered a debt as between his beneficiaries.

6th ed., p. 2028.

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.

Ibid.

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, nor by the circumstance

that they come to the heir by lapse and not as simply undisposed of, nor by both of these circumstances together. 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.

6th ed., p. 2029. *Barber* v. *Wood*, 4 Ch. D. 885; *Stead* v. *Hardaker*, L. R. 15 Eq. 175.

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.

Ibid. *Fisher* v. *Fisher*, 2 Kee. 610.

Life Interest.

On the same principle, if land is devised to A. for life with remainders over, and A.'s life estate is forfeited under the provisions 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 forefeiture.

6th ed., p. 2030. *Hurst* v. *Hurst*, 28 Ch. D. 159.

Portions and Legacies Charged on Land.

It has been already mentioned 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.

Ibid. *Jackson* v. *Hamilton*, 9 Ir. Eq. R. 430.

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.

6th ed., p. 2031. *Re Peerless* (1901), W. N. 151.

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.

Ibid. *Harrison* v. *Harrison*, L. R. 8 Ch. 342; *Henty* v. *Reg.* (1896), A. C. 567.

PRINCIPLE OF CONTRIBUTION, WHEN APPLIED.

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. And, by parity of reason, where several estates, subject to a common charge, devolve by descent upon different persons (which happens where they descended to the last owner from opposite lines of ancestry, and his own paternal and maternal heirs are different persons, or they are held by several tenures, involving different courses of descent), the same principle of contribution obtains.

1st ed., Vol. 2, p. 548, 6th ed., p. 2031. *Aldrich* v. *Cooper*, 8 Ves. at p. 390.

IMMATERIAL THAT PART OF THE PROPERTY CHARGED IS REAL AND PART PERSONAL.

And the rule is the same where the property charged is partly real and partly personal. Thus, if a testator, after commencing his will with a general direction that his debts shall be paid, proceeds to dispose specifically of his real and personal estate among different persons; as the charge would, we have seen, affect the whole property so given, real as well as personal, the devisees and legatees will bear their respective shares of the burden pro rata.

6th ed., p. 2032. *Irvin* v. *Ironmonger*, 2 R. & My. 531.

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.

Ibid.

So, if a testator mortgages real and personal property, the debt must be borne by them rateably, unless of course one is made the primary security.

6th ed., p. 2032. *Leonino* v. *Leonino*, 10 Ch. D. 460.

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.

Ibid. *Re Dunlop*, 21 Ch. D. 583.

EFFECT WHERE REAL AND PERSONAL ESTATE CONSTITUTE A MIXED FUND TO ANSWER CHARGES.

In precise accordance with this principle, too, where a testator creates out of real and personal 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.

1st ed., Vol. 2, p. 540, and *ibid.* *Shallcross* v. *Wright*, 12 Bea. 505.

CODICIL RELEASING REALTY.

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.

6th ed., p. 2033. *Tetlock* v. *Jenkins*, Kay. 654.

REMAINDERS FAILING.

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 is falls into residue, its value for the purpose of contribution to debts, &c., is its value when the remainders fall in.

Ibid. *Re Moore* (1907), W. N. 181.

CONSTRUCTIVE CHARGE OF DEBTS NOT SUFFICIENT.

The mere fact that a testator creates a mixed fund for purposes of distribution does not exempt the personalty from its primary liability to debts, unless they are made payable out of the mixed fund.

6th ed., p. 2034. *Luckcraft* v. *Pridham*, 48 L. J. Ch. 636.

IMPLIED EXONERATION OF A LEGATEE FROM ORDER OF ADMINISTRATION DIRECTED.

The order in which a testator directs his estate to be administered may be such as impliedly to shew that one of two devisees or legatees is to have priority over the other, though under the gift simply to them they would have contributed rateably to payment of debts.

Ibid. *Bateman* v. *Hotchkin*, 10 Bea. 426.

INCUMBRANCES.

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.

6th ed., p. 2035.

CHATTEL MUST BE REDEEMED FOR SPECIFIC LEGATEE.

Thus if a testator bequeathes a watch or a painting, and it turns out at his decease that 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; 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.

1st ed., Vol. 2, p. 552, 6th ed., p. 2035. *Bothamley* v. *Sherson*, L. R. 20 Eq. 304.

Debentures charged on land are within the rule, not being an "interest in land" within the meaning of Locke King's Act.

6th ed., p. 2035. *Halliwell* v. *Tanner*, 1 R. & My. 633.

RIGHT AS AGAINST OTHER SPECIFIC LEGATEES, &c.

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, or given a general direction for payment of his debts.

Ibid. *Re Chantrell* (1907), W. N. 213.

LIABILITIES.

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 lifetime.

Thus, if the testator holds shares not fully paid up, and bequeaths them to A., the testator's estate is liable for all calls made during his lifetime, and A. must pay any calls made subsequently.

6th ed., p. 2036. *Addams* v. *Ferick*, 26 Bea. 384.

TENANT FOR LIFE OF SHARES.

Where shares are given to a person for life with remainder over, different considerations arise.

Ibid. Re Bos, 1 H. & M. 552.

If the shares had been given for life at a specific beqnest, such shares would be taken by the legatees cum onere, and that the tenant for life, and those entitled in remainder, would have to provide for the payment of the calls, either out of the shares themselves or otherwise, as they might think fit; the residne of the testator's estate would have nothing further to do with them. As between the tenant for life and the remainderman, 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 reqnired for payment of the calls raised out of capital, she paying the interest on it dnring her life.

Ibid. See *Fitzwilliams* v. *Kelly*, 10 Ha. at p. 279.

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 dnring the testator's lifetime are payable out of the general personal estate: all future rents and liabilities must be borne by the legatee. 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.

6th ed., p. 2037. *Hickling* v. *Boyer*, 3 Mac. & G. 635.

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: bnt not as between himself and the remainderman. If the property is out of repair at the testator's death, it seems that the cost of pntting it in repair ought to be borne by A. and B. in proportion to their interests; clearly A. cannot be called npon to make good dilapidations existing at the testator's death. As regards expenditure which is properly payable out of capital, the principle stated above in the case of shares in companies seems also applicable to leaseholds. 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 the tenant for life must be borne by the tenant for life and remainderman in pro-

portion to their interests, either by making it a charge on the property, in which case the tenant for life keeps down the interest, or by dividing it between the tenant for life and remainderman by actuarial valuation.

Ibid. *Re Gjers* (1899), 2 Ch. 54. *Re Courtier*, 34 Ch. D. 136.

LEASEHOLDS INCLUDED IN RESIDUE.

If leaseholds are bequeathed as part of a residue to be enjoyed in specie by A. for life with remainder to B., it seems that they are governed by the rule stated above as applying to shares in companies. If, therefore, the property is out of repair at the testator's death, the repairs must be borne by the residue and not by the tenant for life. And if the testator has entered into a covenant to erect buildings on the property, it must be performed at the expense of the residue.

6th ed., p. 2038. *Marshall* v. *Halloway*, 5 Sim. 196.

PARTNERSHIP PROPERTY.

If a testator has a share in a business and the partnership assets include leaseholds, and by his will he bequeaths his share of the leaseholds to A., this entitles A. to take it free from liability to contribute to the partnership debts; they must be satisfied out of the other partnership assets. But if the business is insolvent, A. takes subject to the partnership debts; he cannot claim to have them satisfied out of the general personal estate.

Ibid. *Farquhar* v. *Hadden*, L. R. 7 Ch. 1.

ORDINARY OUTGOINGS.

A devisee of land takes it subject to charges and outgoings incident to it—such as quit-rents, chief rents, &c., and obligations towards the tenants.

Ibid. *Mansel* v. *Norton*, 22 Ch. D. 769.

PARTNERSHIP PROPERTY.

Under a devise of land forming part of the assets of a partnership, the devisee takes subject to the partnership debts, if the other assets are insufficient to pay them.

Ibid.

MORTGAGE DEBTS, &c.

Before the passing of Locke King's Act (17 & 18 Vict. ch. 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. So if he contracted to purchase land and died before completing the purchase, the money was payable primarily out of his personal estate.

6th ed., p. 2039. *Barnwell* v. *Iremonger*, 1 Dr. & Sm. at p. 255.

This rule still applies in cases not falling within Locke King's Act or the amending acts. Thus if land belonging to a tenant in tail is taken in execution under the Judgments Act, 1838, and he dies before the judgment is satisfied, the debt is payable primarily out of his personal estate in exoneration of the land.

6th ed., p. 2040. *Re Anthony* (1893), 3 Ch. 498.

In cases not falling within the Act, the points which have been chiefly in controversy and are here to be considered, are:—

MORTGAGED ESTATE, WHEN TO BE EXONERATED.

1st, whether the will indicates an intention that the devisee or legatee shall take cum onere; and, if not, then 2ndly, out of what funds he is entitled to claim exoneration. The Courts require very clear expressions in order to fasten the incumbrance on the devisee or legatee of the property in question.

1st ed., Vol. 2, p. 553, 6th ed., p. 2040.

DEVISE SUBJECT TO THE MORTGAGE.

Thus it is settled that a devise of lands, subject to the mortgage or incumbrance thereupon, does not so throw the charge on the estate, as to exempt the funds, which by law are preferably liable; the testator being considered to use the terms merely as descriptive of the incumbered condition of the property, and not for the purpose of subjecting his devise to the burthen—a construction which, though well established, it is probable, generally defeats the intention.

Ibid. *Bickham* v. *Cruttwell*, 3 M. & Cr. 763.

DEVISE SUBJECT TO SPECIFIED PART OF MORTGAGE.

So where a testator having two estates subject to one mortgage devised one estate to A. subject to the payment of part of the debt, and the other to B. subject to the payment of the residue, it was held that this only fixed the proportions in which the estates inter se were to bear the charge, and did not imply that the devisees were to take them cum onere.

Ibid. *Goodwin* v. *Lee*, 1 K. & J. 377.

FUNDS LIABLE TO EXONERATE MORTGAGED ESTATE.

Suppose, then, that the will contains no intimation of an intention to the contrary, the devisee of a mortgaged estate is entitled to have the encumbrance discharged out of the following funds:—1st, The general personal estate; 2ndly, Lands expressly devised for payment of debts; 3rdly, Lands descended to the heir; and 4thly, Lands devised charged with debts: and if the charge happened to reach the last class of estates, and if the devised mortgaged estate were included therein (as it of course would be if the

charge were general), the devisee in question would be liable to contribute rateably with the other devisees.

1st ed., Vol. 2, p. 554, 6th ed., p. 2041.

NOT SPECIFIC LEGACIES.

But the devisee of a mortgaged estate is not entitled to have it exonerated out of personalty specifically bequeathed.

Ibid. *Emuss* v. *Smith*, 2 De G. & S. pp. 737, 738.

And à fortiori a specific legatee of encumbered leaseholds cannot call upon a specific legatee of unencumbered leaseholds to contribute towards the liquidation of the mortgage debt affecting the former exclusively; and a direction that the mortgage money shall be paid out of the general personal estate, would not confer such right.

Ibid. *Halliwell* v. *Tanner*, 1 R. & My. 633.

NOR PECUNIARY LEGACIES.

It is clear, also, that the devisee of a mortgaged estate cannot claim exoneration as against pecuniary legatees.

6th ed., p. 2042.

NOR OTHER DEVISED LANDS.

And, of course, such a devisee is not entitled to call upon the devisees of other lands, not charged by the testator with debts, for contribution, although such other estates were liable to the creditor. It is true that a devisee of encumbered land can only claim exoneration out of property which the creditor of the testator can reach, but the converse of the proposition is not true.

Ibid.

HEIR ENTITLED TO EXONERATION.

So where an estate descends subject to a mortgage, the heir is entitled to exoneration out of those funds which in the established order of application are anterior to the descended assets, namely, the general personal estate, and realty expressly devised for the payment of debts.

Ibid. *Wisden* v. *Wisden*, 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 show an intention to exonerate the mortgaged property so as to throw any unsatisfied mortgage debts on the residuary real estate.

6th ed., p. 2043. *Rodhouse* v. *Mold*, 35 L. J. Ch. 67.

EXONERATION DOCTRINE DOES NOT EXTEND TO ESTATES WHICH CAME TO THE TESTATOR CUM ONERE.
UNLESS HE MANIFEST AN INTENTION TO ADOPT THE DEBT.

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.

1st ed., Vol. 2, p. 556, and *Ibid.* *Swainson* v. *Swainson*, 6 D. M. & G. 648.

ACTS NOT AMOUNTING TO ADOPTION.

Thus it has been held that the giving a bond or covenant on the transfer of the mortgage has no such effect, even though it include an agreement to pay a higher rate of interest, or a further sum be advanced to pay an arrear of interest on such mortgage, in which case the effect is merely to convert interest into principal.

Ibid. *Leman* v. *Newnham*, 1 Ves. sen. 51. *Earl of Tankerville* v. *Fawcett*, 1 Cox 237.

Nor in such a case is the personal estate of the last owner rendered primarily liable by a covenant or bond given for particular purposes, as upon the apportionment of the debt among several persons entitled to different parts of the property subject to the charge. Nor where the equity of redemption has become divided among several persons does a new proviso for redemption, providing for reconveyance to each person of his own share, throw the debt upon such persons personally, since it only expresses what the law would imply.

6th ed., p. 2044. *Hedges* v. *Hedges*, 5 De G. & S. 330.

WHERE NEW MORTGAGE IS CREATED.

But if the devisee so deals with the mortgage as in effect to take the debt upon himself or create a new mortgage, his personal estate is primarily liable.

Ibid. *Bruce* v. *Morice*, 2 De G. & S. 389.

CHARGE OF DEBTS CONFINED TO TESTATOR'S OWN DEBTS.

Upon the same principle, where a testator charges his estate with the payment of his debts, an incumbrance on a real estate devised or descended to him will not be considered as his debt, so as to bring it within the operation of the charge.

1st ed., Vol. 2, p. 558, and *ibid.* *Lawson* v. *Lawson*, 3 B. P. C. Toml. 424.

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, or to a legatee to secure his legacy, 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.

6th ed., p. 2045. *Earl of Tankerville* v. *Fawcett*, 2 B. C. C. 57.

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"; but at his death the person upon whom the estate devolves takes it cum onere.

Ibid. *Duke of Ancaster* v. *Mayer*, 1 B. C. C. 454.

COVENANT WITH THE VENDOR.

And it is immaterial whether the covenant with the vendor be to pay the debt or to indemnify him against it.

Ibid.

WITH THE MORTGAGEE: THIS AMOUNTS TO ADOPTION OF DEBT.

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.

Ibid. *Waring* v. *Ward*, 7 Ves. 332.

And the same principle of course applies where upon the purchase the mortgage is transferred to a new mortgagee, who advances a further sum of money.

Ibid. *Woods* v. *Huntingford*, 3 Ves. 128.

How far an actual dealing with the mortgagee is essential to make the debt personal to the purchaser was formerly a subject of discussion. The statute 17 and 18 Vict. c. 113 has rendered these distinctions comparatively unimportant. For even assuming the purchaser to have made the debt his own, it seems that the statute

interposes, and, unless a contrary intention is signified by some further act of the deceased, makes the mortgaged land the primary fnnd for payment of the charge npon it.

6th ed., p. 2046. *Hepworth* v. *Hill*, 30 Bea. at p. 483.

MONEY SETTLED AND SECURED BY MORTGAOE HELD PRIMARILY A CHARGE ON THE LAND.

Another exception to the general rule is where the mortgage money never was strictly a debt but merely money agreed to be settled, even though the security comprise a covenant for payment. In such cases the mortgaged property is primarily charged.

Ibid.

MONEY RAISED UNDER POWER BY TENANT FOR LIFE NOT HIS PERSONAL DEBT.

NOR MONEY PREVIOUSLY CHARGED, AND TO WHICH THE SETTLEMENT IS MADE SUBJECT.

CONTRA WHERE A COVENANT TO PAY THE CHARGE.

Again, where a tenant for life of settled property raises by mortgage under a power a sum of money for his own use, and covenants for payment of it, his personal estate is not primarily liable, though it received the benefit; 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, and if the settlor subsequently pays off any of the charges he becomes himself an incumbrancer to that extent. On the other hand, where the settlement contains a covenant for payment of the charge by the settlor his personal estate is primarily liable.

Ibid. *Barham* v. *Earl of Clarendon*, 10 Hare, 126.

WHETHER FAILURE OF LIMITATIONS IN LIFETIME OF TENANT FOR LIFE AFFECTS PRIMARY LIABILITY OF LAND, AND VICE VERSA.

Where a tenant for life with a power to charge and (after intermediate limitations), the remainder in fee to himself creates a charge, and afterwards by failure of the intermediate limitations becomes entitled in fee , it does not seem certain whether his personal estate would be primarily liable; clearly if he had died tenant for life it would not, 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. 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 qnestion that his personal liability ceases, since the money would be at home in the hands of the covenanter.

6th ed., p. 2047.

REAL ESTATE CHARGES ACT, 1854.

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, 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, 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."

The corresponding Ontario enactment is section 38 of the Ontario Wills Act, as follows:—

38. (1) Where any person has died since the 31st day of December, 1865, or hereafter dies seised of or entitled to any estate or interest in any real estate, which, at the time of his death was or is charged with the payment of any sum of money by way of mortgage, and such person has not, by his will or deed or other document, signified any contrary or other intention, the heir or devisee to whom such real estate descends or is 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; but the real estate 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 is charged, every part thereof according to its value bearing a proportionate part of the mortgage debts charged on the whole thereof.

REAL ESTATE AND INTERESTS WITHIN THE ACT.

The words "heir or devisee to whom such lands or hereditaments shall descend or be devised," has the effect of excluding leaseholds, and a share of money to arise by sale of land previously settled on trust to sell, 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.

6th ed., p. 2048. *Elliott* v. *Dearsley*, 16 Ch. D. 322. But see under later Act, post p. 970.

EQUITABLE MORTGAGE.
TRUST FOR SALE.
VENDOR'S LIEN.
GENERAL CHARGE OF DEBTS.

The Act applies to an equitable mortgage by deposit of title deeds; but it appeared doubtful whether the words "charged by way of mortgage" covered a charge under which foreclosure was not the remedy, e.g., a conveyance on trust for sale. A vendor's lien for unpaid purchase money was clearly not within those words. And land charged by will generally with debts and legacies, and so devised, is not, in the hands of the devisee, land charged with a sum by way of mortgage, within the Act, unless and until the amount is ascertained and the devisee has "expressly taken the estate subject to such ascertained charge."

Ibid. *Barnwell* v. *Iremonger*, 1 Dr. & Sm. p. 255; *Hepworth* v. *Hill*, 30 Beav. 476.

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.

6th ed., p. 2049. *Re Ritson* (1899) 1 Ch 128.

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, or his personal estate, 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.

Ibid. *Allen* v. *Allen*, 30 Bea. 395.

REAL ESTATE CHARGES ACT, 1867.
VENDOR'S LIEN.

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 of the said Act and of this Act the word 'mortgage' shall be deemed to extend to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a testator."

Ibid.

This section in the Ontario Statutes is sub-section 2 of section 38 of the Wills Act, as follows:—

(2) In the construction of a will to which this section relates, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate, or a charge or direction for the payment of debts upon or out of residuary real estate and personal estate or residuary real estate shall not be deemed to be a declaration of an intention contrary to or other than the rule in sub-section 1 contained, unless such contrary or other intention is further declared by words expressly or by necessary implication referring to all or some of the testator's debts charged by way of mortgage on any part of his real estate.

(3) Nothing herein shall affect or diminish any right of the mortgagee to obtain full payment or satisfaction of his mortgage debt, either out of the personal estate of the person so dying, or otherwise; and nothing herein shall affect the rights of any person claiming under any will, deed, or document made before the first day of January, 1874.

WHAT WORDS EXCLUDE THE STATUTES.

The meaning of sec. 1, "though it is not perhaps so happily expressed as it might be," appears to be this, that if a testator wishes to give a direction which shall be deemed a declaration of an intention contrary to the rule laid down by Locke King's Act, "it must be a direction applying to his mortgage debts in such terms as distinctly and unmistakeably to refer to or describe them," And although the Act speaks only of the insufficiency of a direction to pay debts out of personal estate, it has been decided that a direction to pay out of real estate, or out of real and personal estate, is also insufficient to exonerate the mortgaged property, unless mortgage debts are expressly or impliedly referred to. It has also been held that such a reference cannot be implied from a direction to pay the debts "in aid of the personal and in exoneration of the real estate," or simply "in exoneration of the real estate," or from a direction to pay "debts of every kind, including specialty debts." But where a testator bequeathed the residue of his personal estate subject to the payment of his "trade debts," and died, having, after the date of his will, deposited with his bankers the title deeds of real estate to secure an overdrawn trade account, it was held that there was a sufficient declaration of contrary intention, so as to exonerate the real estate from the banker's lien. So where a testator made a distinction between his trade property and trade debts on the one hand and his private property and private debts on the other hand.

6th ed., p. 2050. *Re Newmarch*, 9 Ch. D. 12; *Re Nevill*, 59 L. J. Ch. 511.

EXCEPTION OF SPECIFIC MORTGAGE DEBT.

A direction to pay debts, "except mortgage debts on Blackacre," out of residne, implies that other mortgage debts are to be paid ont of residue.

Ibid. Re Valpy (1906), 1 Ch. 531.

The word "testator" as nsed in sec. 2 was another of the "unhappy" expressions occurring in these Acts. Its effect was to exclude a lien for purchase-money where the purchaser died intestate. Moreover, this Act omitted to provide for the case of leaseholds excluded from the first.

Ibid.

REAL ESTATE CHARGES ACT, 1877.

INCLUDES LEASEHOLDS.

ANY EQUITABLE CHARGE.

By yet another Act, therefore, it is provided 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 equitahle 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 npon or out of residuary real and personal estate or residuary real estate."

6th ed., p. 2051.

WHAT IS A CHARGE WITHIN THE ACTS.

The charge created hy the delivery of land in execution under a writ of elegit (duly registered), is within this enactment. So is an eqnitahle interest in land created to secure an annuity, and a statutory charge of estate duty.

Ibid.

ALL THE ACTS NOW APPLY TO LEASEHOLDS AND NEXT OF KIN.

Thc effect of this Act is to make the earlier Acts apply to leaseholds in the case of a pcrson dying since 1877. Next of kin taking chattels real under an intestacy are within the Acts.

Ibid.

NOT TO DEBENTURES.

They do not apply to dehentures charged on land, or to the proceeds of sale of land.

Ibid. Re Chantrell (1907), W. N. 213; *Lewis* v. *Lewis*, L.-R. 13 Eq. 218.

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.

Ibid. Re Wilson (1908), 1 Ch. 839.

In the case of an intestate, an intention to exclude the operation of the Acts can be expressed by deed or other document if the charge is created by mortgage, but not if it is a vendor's lien; and if a testator or intestate purchases real estate under a contract which gives the vendor no lien, the Acts do not apply, and the devisee or heir is entitled to have the purchase-money paid out of the personal estate.

6th ed., p. 2052.

"CONTRARY INTENTION" NOT SHOWN BY PROVISION FOR PAYMENT OUT OF ANOTHER FUND.

Where a testator throws the primary burden of a mortgage debt on a special fund, this does not shew a "contrary intention," within the meaning of the Act: the Act is excluded only to the extent of the substituted fund, so that if this proves insufficient the right to exoneration is exhausted and the mortgaged land is liable for the balance.

Ibid. Smith v. *Moreton*, 37 L. J. Ch. 6.

"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; 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.

6th ed., p. 2053. *Eno* v. *Tatham*, 3 D. J. & S. 443.

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.

Ibid.

Since Locke King's Acts a collective devise of lands of any tenure to the same devisee prima facie throws the aggregate charges on the aggregate lands in exoneration of the testator's personal estate.

Ibid. Re Kensington (1902), 1 Ch. 203.

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 of the person creating the charge.

Ibid. *Brownson* v. *Lawrance*, L. R. 6 Eq. 1 is overruled. *Sackville* v. *Smyth*, L. R. 17 Eq. 153.

WHAT WILL EXEMPT PERSONAL ESTATE.

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.

1st ed., Vol. 2, p. 564, 6th ed., p. 2055.

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.

Ibid. *Boughton* v. *Boughton*, 1 H. L. C. 406.

MERE CHARGE ON LAND DOES NOT EXONERATE PERSONALTY.

Thus in numerous cases it has been held that neither a charge of debts on the testator's lands generally, or on a specific portion of them, nor a devise upon trust for sale, however formally or anxiously framed, nor the creation of a term of years for the purpose of such charge, will exonerate the personalty.

Ibid.

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.

6th ed., p. 2056. *Watson* v. *Brickwood*, 9 Ves. 447.

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.

Ibid. Ante. p. 958.

HISTORY OF THE IMPLICATION DOCTRINE.

In order to exonerate the personal estate, the very early cases required express words; 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. 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 manifested, that the old rule had been restored, but this was open to trouble in the state of the authorities, and perhaps would have been hardly consistent with right principles of construction, for it is difficult to perceive any solid ground for excluding implication in this more than in any other species of case. The evil seems to have consisted in the extreme laxity with which the implication-doctrine was, at one period, applied, which tended in effect to subvert altogether the rule establishing the primary liability of the personal estate: but this has been so far corrected by later adjudications, as greatly to diminish the uncertainty which the numerous cases occurring on the subject 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.

1st ed., Vol. 2, p. 565, and *ibid.*

RULE NOW ESTABLISHED.

It is well settled that the intent is to be collected from the whole will, 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.

6th ed., p. 2057. *Kilford* v. *Blaney*. 31 Ch. D. 56.

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. The inference is not drawn where the debts, &c., are merely charged on the real estate.

6th ed., p. 2058. Post p. 975. *Re Banks* (1905), 1 Ch. 547.

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.

Ibid Post p. 977.

PAROL EVIDENCE INADMISSIBLE.

It has long been established, in opposition to some early decisions, that, in order to exonerate the personalty, parol evidence is not admissible, 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; for the fact that the charges will exhaust the whole subject-matter of the residuary bequest does not vary the construction.

1st ed., Vol. 2, p. 567, and *ibid.* *Tait* v. *Lord Northwick*, 4 Ves. 816.

MERE EXTENSION OF THE CHARGE TO FUNERAL AND TESTAMENTARY EXPENSES NOT SUFFICIENT.

It is clear that the charging the land with (in addition to debts), funeral or testamentary expenses, or both, will not per se exempt the personalty; for although it seems improbable that the testator should mean to create an auxiliary fund to answer expenses which are payable out of the personal estate in priority to all other claims, and which it could hardly be insufficient to liquidate, yet such an argument amounts only to conjecture, and falls short of that necessary implication which is now held to be requisite to transfer the primary onus to the new fund.

1st ed., Vol. 2, p. 568, 6th ed., p. 2059.

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 not merely to onerate the real estate but to exonerate and discharge the personal estate.

6th ed., p. 2060. *Kilford* v. *Blaney*, 31 Ch. D. 56. *Re Banks* (1905), 1 Ch. 547.

WHERE PERSONALTY IS EXPRESSLY SUBJECTED TO LEGACIES OR A CLASS OF DEBTS.

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.

1st ed., Vol. 2, p. 572, 6th ed., p. 2061. *Brydges* v. *Phillips*, 6 Ves. 567.

EFFECT WHERE THE GIFT IS OF ALL THE PERSONAL ESTATE TO PERSON MADE EXECUTOR.

Another question which has much divided the opinions of Judges is, whether the circumstances of the bequest being of all the personal estate (with or without an enumeration of particulars), not a gift of the residue, demonstrates an intention to exempt it from the charges to which the general personal estate is primarily liable. The negative appears to have been decided in several instances where the legatee was appointed executor, a circumstance which has always been considered to 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.

1st ed., Vol. 2, p. 577, 6th ed., p. 2063. See *Trott* v. *Buchanan*, 28 Ch. D. 446.

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.

6th ed., p. 2065. *Collis* v. *Robins*, 1 De G. & S. 131.

BEQUEST OF ALL THE READY MONEY, &C., AND PERSONAL ESTATE. CASES OF EXEMPTION UPON GROUNDS NOT NOW DEEMED SATISFACTORY.

In several subsequent cases, 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 oncrated with all the charges to which the personal estate is liable, namely, the debts, funeral expenses, and costs of proving the will.

1st ed., Vol. 2, p. 582, 6th ed., p. 2066. See *Jones* v. *Bruce*, 11 Sim. 221, and *Lance* v. *Aglionby*, 27 Bea. 65.

GENERAL CONCLUSION FROM PRECEDING CASES.

These cases, then, seem to authorize the proposition, that wherever the personal estate is bequeathed in terms as a whole and not as a residue, and the debts, funeral and testamentary charges are thrown on the real estate, this constitutes the primary fund for their liquidation.

1st ed., Vol. 2, p. 586, 6th ed., p. 2069.

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.

6th ed., p. 2069. *Paterson* v. *Scott*, 1 D. M. & G. 531.

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.

Ibid. *Re Banks* (1905), 1 Ch. 547.

RESIDUE OF REAL FUND TO BE ADDED TO PERSONALTY. PERSONALTY TO "COME CLEAR" TO THE LEGATEE.

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 residne shall be added to the testator's personal estate, 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.

1st ed., Vol. 2, p. 587, 6th ed., p. 2070. *McCleland* v. *Shaw*. 2 Sch. & L. 538; *March* v *Fowke*, Finch, 414.

ESTATE MADE SECONDARY FUND IN EXONERATION OF PERSONALTY. PERSONALTY TO PAY IN AID OF REALTY.

Again, where the testator charges his debts, funeral and testamentary expenses and legacies, on estate A. "as a primary fund," and in case that should be deficient, he charges estate B. with the deficiency, he thereby conclusively shows that the latter estate is the secondary fund in exoneration of the personal estate. 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.

Ibid.

EFFECT WHERE BEQUEST OF EXEMPTED PERSONALTY FAILS.

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.

Ibid. *Forrest* v. *Prescott*, L. R. 10 Eq. 545.

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.

6th ed., p. 2071. *Dacre* v. *Patrickson*. 1 Dr. & Sm. pp. 186, 189.

DISTINCTION BETWEEN A GENERAL CHARGE OF LEGACIES AND A TAUST TO PAY CERTAIN SUMS.

It has been already stated that under a general charge of or a trust to pay legacies, the several funds liable to their liquidation

are applied in the same order as in the case of debts, and therefore the general personal estate, if not exempted, is first applicable; but such cases are carefully to be distinguished from those in which the trust is to pay certain specified sums, when, as the only gift is in the direction to pay them out of the land, that fund alone is liable.

1st ed., Vol. 2, p. 593, and *ibid.* ***Ouseley*** v. ***Anstruther***, 10 Bea. 453. ***Reade*** v. ***Litchfield***, 3 Ves. 475.

Thus, where a testator devises his estate to trustees, upon trust to sell, and out of the proceeds to pay legacies generally, and afterwards give 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.

6th ed., p. 2072. ***Newbold*** v. ***Roadknight***, 1 R. & My. 677.

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.*

Ibid. ***Noel*** v. ***Lord Henley***, 7 Pri. 241, Dan. 211.

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.

6th ed., p. 2076.

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.

6th ed., p. 2077. ***Clutterbuck*** v. ***Clutterbuck***, 1 My. & K. 15.

*Charge of a particular debt with a personal obligation on devisee, ***Welby*** v. ***Rockcliffe***, R. & My. 571. Charge of particular debt without such personal obligation. ***Quennell*** v. ***Quennell***, 13 Bea. 240.

WHERE PERSONAL FUND IS SUBJECTED TO CERTAIN CHARGES.

It should seem that where a specific portion of personal estate is appropriated to charges to which the general personalty is liable, such fund is not, as in the case of land, subsidiary only, but is primarily applicable.

1st ed., Vol. 2, p. 598, and *ibid.*

CHARGE ON A PARTICULAR FUND, AND EXEMPTION OF OTHERS, DOES 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.

6th ed., p. 2079. *Lord Brooke* v. *Earl of Warwick*, 1 H. & Tw. 142.

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.

6th ed., p. 2080. *Young* v. *Young*, 26 Bea. 522.

DISTINCTION BETWEEN DEBTS AND LEGACIES.

In many of the cases cited in the preceding subdivisions 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 the will." 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.

Ibid. *Hancox* v. *Abbey*, 11 Ves. 179; *Ion* v. *Ashton*, 28 Bea. 379.

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.

6th ed., p. 2091.

EXONERATION OF LEGACIES IN STRICT SENSE.

In the strict sense of the term, as has been already pointed out, "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 primarily liable for their payment, so that they are not payable out of the general personal estate unless the primary source is insufficient; in such a case the legacies or annuities are demonstrative.

Ibid.

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."

6th ed., p. 2082. *Bunting* v. *Marriott*, 19 Bea. 163.

There is also an intermediate class of cases, where legacies and annuities are payable out of the residuary real and personal estate, pari passu.

Ibid. Ante p. 977.

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. 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.

Ibid. Ante pp. 958, 976.

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.

Ibid. Chapter XXX.

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.

Ibid.

RIGHTS OF CREDITORS AGAINST EXECUTOR; AGAINST BENEFICIARIES. LIABILITIES IN RESPECT OF LAND.

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. 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. Under the same Act (ss. 27, 28), where 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.

Ibid.

ABATEMENT OF SPECIFIC AND DEMONSTRATIVE LEGACIES: FOR PAYMENT OF DEBTS.

Specific legacies do not, of course, abate with general legacies, but if the specific legatees are required to contribute to the payment of debts, they abate rateably inter se. Demonstrative legacies also do not abate with general legacies, 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.

6th ed., p. 2083. *Mullins* v. *Smith*, 1 Dr. & Sm. 204.

If the general personal estate is insufficient for payment of debts, specific and demonstrative legacies abate rateably.

Ibid.

FOR INSUFFICIENCY OF FUND.

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. So if the bequests are of stock. 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. 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. A testator may, however, so deal with a fund of uncertain

amount as to show that the gift of the residue of it is not to include such parts of it as are bequeathed upon trusts which fail.

Ibid. *Page* v. *Leapingwell*, 18 Ves. 463. *Harley* v. *Moon*, 1 Dr. & S. 623.

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.

6th ed., p. 2084. *Gordon* v. *Duff*, 3 D. F. & J. 662.

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. But if the general personal estate is insufficient to pay debts, demonstrative legacies abate rateably with specific bequests and devises.

Ibid. *Re Turner* (1908), 1 Ir. 274.

GENERAL LEGACIES MAY BE CHARGED ON LAND.

The fund for payment of general legacies 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.

Ibid. Ante p. 938.
Effect of devastavit. *Richardson* v. *Morton*, L. R. 13 Eq. 132.

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; he must follow the personal estate into the hands of the persons among whom the executors have distributed it.

6th ed., p. 2085. *Trousdale* v. *Hayes* (1883), W. N. 13.

GENERAL LEGACIES PAYABLE OUT OF RESIDUE.

In the absence of a direction by the testator, general legacies are payable out of the general personal estate, and therefore take priority over the residuary legatee.

Ibid. *Willmott* v. *Jenkins*, 1 Bea. 401.

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, 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.

Ibid. ***Ex parte Chadwin***, 3 Sw. 380.

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. Nor à fortiori, can they do so when the loss has arisen without any fault of the executor. 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.

Ibid. ***Fenwick*** v. ***Clarke***, 4 D. F. & J. 240.

SHARE OF RESIDUE.

The same rule applies to shares of residue.

Re Winslow, 45 Ch. D. 249.

ABATEMENT OF GENERAL LEGACIES.

If the personal estate is insufficient to pay all the general legacies in full, they abate rateably.

6th ed., p. 2086. ***Re Tootal's Estate***, 2 Ch. D. 628.

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 cessor 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. 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.

Ibid. ***Hichens*** v. ***Hichens***, 36 L. T. 8.

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.

Ibid.

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.

Ibid. *Roper* v. *Roper*, 3 Ch. D. 714, and ante p. 526.

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 inside 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."

Ibid. *Re Greenwood* (1892), 2 Ch. 205, see p. 526.

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; 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.

6th ed., p. 2087. *Re Wedmore* (1907), 2 Ch. 277.

INTENTION TO GIVE LEGACY PRIORITY.

As a general rule, legacies are payable pari passu, in whatever order they appear in the will; and no legacy has priority unless a clear intention appears. It is immaterial that the legacies are made payable at different dates or periods, or are given in succession, some being payable "in the first place," or "in the next place," and others "afterwards." 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 shows an intention that the legacies given generally shall have priority. 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.

Ibid. *Re Smith* (1899) 1 Ch. 365.

See *Re Hardy*, 17 Ch. D. 798. The theory that the testator owes a duty to Nature not now followed. *Re Schweder's Estate* (1891) 3 Ch. 44.

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.

6th ed., p. 2088.

BEQUEST CONDITIONAL ON SUFFICIENCY OF ASSETS.

If a testator bequeaths two sets of legacies, and clearly shows 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.

Ibid.

EXECUTOR.

A legacy to an executor for his care and pains has no priority.

Ibid. *Duncan* v. *Watts*, 16 Bea. 204.

ANNUITIES.

It has been already mentioned 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.

Ibid. Chap. XXX.

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. If the annuitant is dead, the value is the amount which he would have actually received if the fund had not been deficient. 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. 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. Where there are 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.

Ibid. *Re Metcalf* (1903), 2 Ch. at p. 424 and 428. *Potts* v. *Smith*, L. R. 8 Eq. 683.

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.

6th ed., p. 2089.

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. 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.

Ibid. *Farmer* v. *Mills*, 4 Russ. 86.

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. 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. But a testator may show an intention to give one annuity priority over another by expressly directing the latter to be paid out of residue.

Ibid. *Thwaites* v. *Foreman*, 10 Jur. 483.

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.

6th ed., p. 2090. *Roper* v. *Roper*, 3 Ch. D. 714.

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.

Ibid. *Creed* v. *Creed*, 11 Cl. & F. 491.

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. The legatee under a contingent bequest has no such right, but he is entitled to have security for payment.

Ibid. *King* v. *Malcott*, 9 Ha. 692.

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

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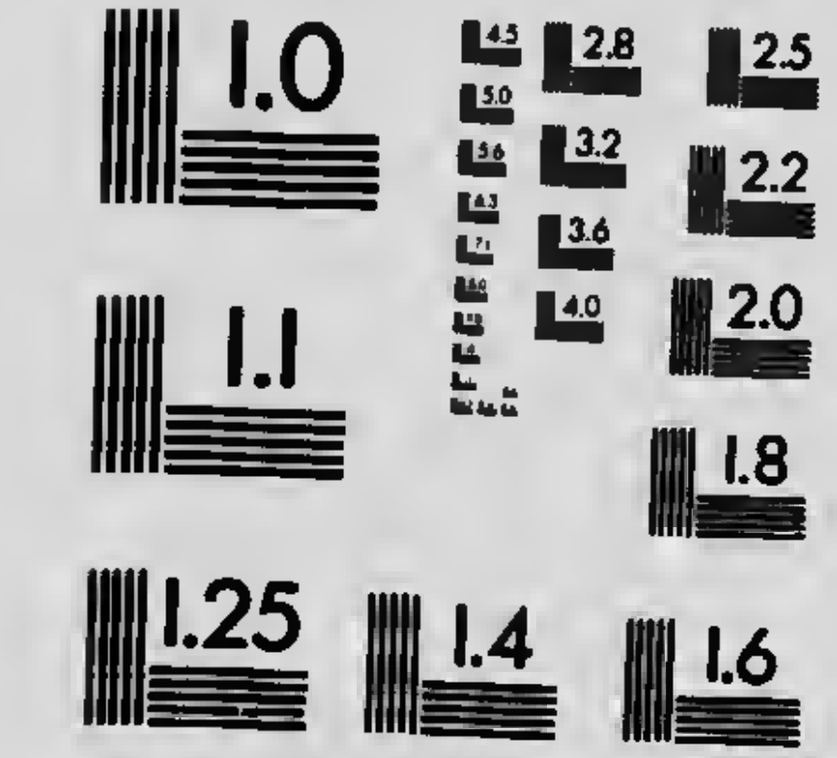

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meet it, so as to be able to divide the residue. But unless power is given by the will, expressly or impliedly, to make such an appropriation, it does not bind the legatee, and therefore if the fund turns out to be insufficient, the legatee can claim against the residuary legatees. The executor is not liable if the appropriation is fairly made.

Ibid. Re Hall (1903), 2 Ch. 226.

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.

Ibid. Prendergast v. *Prendergast*, 3 H. L. C. 195.

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. 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 that a fund should be set apart and invested to answer the legacy.

6th ed., p. 2090. *Re Hall* (1903) 2 Ch. at p. 233.

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, the legatee cannot require a sum to be appropriated to answer the legacy; and conversely the executors without the consent of the legatee have no power to make an appropriation which may be detrimental to him. 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. 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.

6th ed., p. 2091.

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.

Ibid. Re Salaman (1907), 2 Ch. 46.

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 direc-

tions 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. 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, or to indemnify themselves against liabilities incurred with reference to other parts of the estate.

Ibid. Fraser v. *Murdoch*, 6 A. C. 855.

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. If the value of the remaining parts of the residuary estate is diminished he cannot be required to bring the appropriated investment into account.

Ibid.

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 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.

Ibid. Re Campbell (1893), 3 Ch. 468.

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.

6th ed., p. 2092. *Re Hall* (1903), 2 Ch. 226.

ANNUITANT.

An annuitant is entitled to have his annuity sufficiently secured. Or the Court may set apart a sufficient sum to meet it, and thus release the residuary estate. 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.

Ibid. Re Parry, 42 Ch. D. 570.

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.

Ibid. Barnett v. *Sheffield*, 1 D. M. & G. 371.

SHARE OF RESIDUE.

Apart from the Land Transfer Act, 1897, s. 4, executors and trustees have power, with the consent of the 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.

Ibid. Re Nickels (1898), 1 Ch. 630.

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.

Ibid. Re Beverly (1901), 1 Ch. 681.

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.

6th ed., p. 2093.

MARSHALLING OF ASSETS.

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, whereever 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.

1st ed., Vol. 2, p. 600, and *ibid.*

IN FAVOUR OF LEGATEES AGAINST THE HEIR.

Thus, if the specialty creditors of a testator who died before the 29th of August, 1833, 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; such descended assets,

according to the order of application before stated, being liable before pecuniary legacies or even personalty specifically bequeathed.
Ibid.

BUT NOT AGAINST DEVISEES.

But legatees are not entitled to have the assets marshalled against the devisees of real estate, either specific or residuary; for to throw the debts upon the devisees, in such a case, would be to apply devised real estate before personal estate not specifically bequeathed, and thereby break in upon the established order of application before stated.
Ibid. *Dugdale* v. *Dugdale*, L. R. 14 Eq. 234.

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.
6th ed., p. 2094. *Foster* v. *Cook*, 3 B. C. C. 347.

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), equity will give those legatees a claim on the estate to the extent to which their funds may have been applied in its exoneration.
Ibid. *Binns* v. *Nichols*, L. R. 2 Eq. 256.

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.
Ibid. *Lilford, Lord* v. *Powys Keck*, L. R. 1 Eq. 347.

EFFECT OF LOCKE KING'S ACT.

Since Locke King's Act, 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.

6th ed., p. 2095. *Re Smith* (1899), 1 Ch. 365.

MARSHALLING WHERE ONE PARTY HAS SEVERAL FUNDS, AND ANOTHER ONE ONLY.

The preceding cases, however, in which equity interferes to prevent an eventual derangement, by the act of third persons, of the order of applying the assets, do not completely exemplify an important principle by which the Courts, in marshalling assets, are governed, and which forms the peculiar feature of the doctrine; it is this,—that wherever a party has a claim upon one fund only, and another upon more than one, the party having several funds must resort, in the first instance, to that on which the other has no claim, or, in other words, the Court will so arrange the funds as to let in as large a number of claims as possible, and if the person having the several funds should, in violation of this rule, have resorted to the fund common to himself and the person having no other fund, the Court will place that person in his room, to the extent to which the common fund has been so applied.

1st ed., Vol. 2, p. 606, and *ibid.*
Aldrich v. *Cooper*, 8 Ves. 382. Marshalling will not be applied to the prejudice of third persons. *Dolphin* v. *Aylward*, L. R. 4 H. L. 486.

This principle is applied in favour of both creditors and legatees.

6th ed., p. 2096.

MARSHALLING AMONG LEGATEES.

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.

1st ed., Vol. 2, p. 607. *Ibid.*

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.

6th ed., p. 2097. *Sellon* v. *Watts*, 9 W. R. 847.

FUNERAL EXPENSES.

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.

Ibid. *Re McMyn*, 33 Ch. D. 575.

LOAN TO HUSBAND.

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. But if she is his executrix she can retain the amount out of assets in her hands.

Ibid. Re Ambler (1905), 1 Ch. 697.

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. And earnings made her separate estate by the M. W. P. Act, 1870, followed the same rule. 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 Woman'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.

6th ed., p. 2098.

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 auticipation. 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.

Ibid. Sprange v. *Lee* (1908), 1 Ch. 424.

POWER OF APPOINTMENT.

The effect of the Married Woman'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. If contracted since the latter date, it is immaterial whether she had separate estate or not. 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, and for debts contracted by her while under a protection order. 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; but she could of course charge it by her will expressly or by implication, with her "debts." 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.

Ibid. *Hodges* v. *Hodges*, 20 Ch. D. 749.

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.

6th ed., p. 2099. *Re Hodgson* (1899), 1 Ch. 666.

Devise in Lieu of Dower.—The testator, by his will made 26th June, 1876, devised a portion of his lands, which were subject to mortgages, to his wife in lieu of dower; the residue of his lands and all his personal estate he gave to his father, subject to the payment by his executors of all his just debts, funeral and other expenses:—Held, that the father was bound to discharge the mortgages, and that the widow was entitled to hold the part devised to her, freed from the debts of the testator. *Dungey* v. *Dungey*, 24 Chy. 455.

Devise Subject to Payment of Debts.—Lands subject to mortgage were devised, "after payment of debts," to the widow for life, remainder to the plaintiff, who accepted from the widow a lease for her life of the premises. The widow having refused to pay the interest accruing on the mortgage, the plaintiff paid the same, and also the principal money thereon:—Held, that these facts did not entitle the plaintiff to call upon the widow for payment out of the rents reserved by the lease or out of the personal estate bequeathed to her; the only relief to which he was entitled being to have the mortgage debt, together with the interest on the sum secured until it became due, raised out of the land. *Burk* v. *Burk*, 26 Chy. 195.

Distribution of Estate.—The testatrix, who died in 1891, specifically devised to her grandson a part of her land, which was incumbered. To the plaintiff she gave a legacy of $5,000. The remainder of her estate, consisting of personalty and other lands, she did not dispose of or in any way refer to in her will, except in this clause: "I hereby charge my estate with payment of all incumbrances upon the said lands at the time of my death:"—Held, that the residue of the estate was charged with mortgage debts to the exclusion of the land specifically devised. Such residue was to be treated as one fund, and as if it were all personalty, under s. 4 of the Devolution of Estates Act, R. S. O. 1887 c. 108; and out of it the debts, including the mortgage debts upon the land specifically devised, were first to be paid, and then the legacy; the balance, if any, to go to the heirs-at-law and next of kin. *Scott* v. *Supple*, 23 O. R. 393.

Mortgaged Land Charged with Legacies.—A testator devised all his real estate to a mortgagee thereof, charged with a legacy in favour of an infant, and bequeathing legacies to others. The mortgagee filed a bill claiming to have the sums appropriated as legacies applied to the payment of his mortgage debt:—Held, that he was not entitled to be paid out of the personalty in preference to the legacies; but that he was entitled to be paid his mortgage debt out of the property so devised to him, before the sums charged thereon for legacies were raised. *Ricker* v. *Ricker*, 14 Chy. 264.

Mortgage after Will.—Where a testator devised property and afterwards mortgaged it, and the personal estate was insufficient to pay the debts and legacies, it was held that the devisee of the mortgaged property was entitled, as against the legacies, to have the property exonerated from the mortgage at the expense of the personal estate. *Lapp* v. *Lapp*, 16 Chy. 159.

Settlement of Mortgaged Land.—Certain land, subject with other lands to an overdue mortgage made by the settlor, was conveyed by him to trustees for his daughter by way of settlement to take effect on his death or her marriage. The conveyance to the trustees contained no covenants by the settlor and no reference to the mortgage, which remained unpaid at the time of the settlor's death:—Held, that the mortgage should be paid out of the settlor's general estate. *Lewis* v. *Moore*, 24 A. R. 393.

Specific Charge.—Lands were conveyed to the son of the testatrix, and he, as to part thereof, stated in writing that he held it in trust for his mother for her life, and after her death for her daughters, H. and M., in fee. The son created a mortgage upon the whole property, and by the writing acknowledging the trusts—to which the testatrix was a party—it was agreed that £600, part of the mortgage money, should be charged on that part of the mortgaged premises settled on the daughters:—Held, that this sum was payable as a debt out of the estate. *Wilson* v. *Dalton*, 22 Chy. 180.

Payment of Debts—Mixed Fund.—By clause 3 of his will, the testator directed all his real and personal property to be converted into money, and, by the first part of clause 4, directed payment of his debts, funeral and testamentary expenses, and expenses of administration; after payment of which, also by clause 4, he bequeathed to his wife "a one-third part of the proceeds of all my personal property and effects, in satisfaction and lieu of all claims she may have as my widow on my decease;"—Held, that the debts, etc., should be paid out of the fund raised by the conversion of the real and personal property into money, and that the bequest to the widow was a specific one of one-third of his personal property, provided one-third was left after payment of debts. *Re Cooper* (1910), 14 W. L. R. 522, 3 Sask. L. R. 186.

General Bequest of Personalty — "Goods and Chattels" — "Book Debts"—Intestacy as to Part of Realty. — The testator bequeathed to his wife "all moneys in bank, notes, mortgages, and all goods and chattels whatsoever and wheresoever, including my beneficiary certificate," etc.:—Held, that the testator's book debts were covered by the general words in the will, "all goods and chattels whatsoever and wheresoever," and that there was no context which interfered with that construction. The will dealt with certain lands and all the goods of the testator. The goods were given by general (not by specific or residuary) bequest to the widow, and nothing was said in the will as to payment of debts. The testator left some real property not mentioned or included in the will, and as to which he died intestate. As against the widow, it was contended that the debts should be paid out of the personalty in exoneration of the lands descended:—Held, that, notwithstanding the Devolution of Estates Act, ss. 4 and 9, the personal estate is still the primary fund for the payment of debts. *Re Hopkins Estate* (1900), 32 O. R. 315; *Re Tatham* (1901), 2 O. L. R. 343, and *In re Moody Estate* (1906), 12 O. L. R. 10, approved. And in this will no sufficient indication was to be found of the testator's intention to relieve the personalty from the payment of the debts. *Re McGarry* (1909), 18 O. L. R. 524, 13 O. W. R. 982, 14 O. W. R. 244.

Specific Devise — Charge of "Debts" and Expenses on Residuary Fund — Taxes. — The testatrix made a will in 1896 leaving certain lands to devisees therein named. Between the date of the will and her death, in 1900, municipal and provincial taxes had accumulated on the devised lands. The persons taking the lands under the will claimed the right to have the taxes paid out of the executors from the other parts of the estate, on the ground that the residuary fund was, by the will, expressly made liable as a fund for the payment of her funeral and testamentary expenses and debts:—Held, that the succession duty payable under the Succession Duty Act, R. S. B. C. 1897 c. 175, in respect of the real estate of a deceased person, did not form part of the testamentary expenses of the deceased, but was chargeable against the different properties devised under the will.—2. That the taxes due by deceased were payable out of the residuary estate, and not chargeable against the different properties in

respect of which the taxes had been imposed.—3. To allow taxes to fall into arrears does not charge land by way of mortgage so as to bring it within the operation of Locke King's Act. 17 & 18 V. c. 113. *In re Watkins*, 12 B. C. R. 97, 3 W. L. R. 471.

Specific Devise—Residuary Devise.—A testator bequeathed all his personal estate to his son, to whom he also specifically devised a farm, and he devised the residue of his real estate to his executors upon certain trusts, and directed that the debts and funeral and testamentary expenses should be paid "out of my estate:"—Held, that the whole personal estate was primarily chargeable with such payments, and that the balance remaining unsatisfied should be borne by all the real estate *pro rata*.—Section 7 of the Devolution of Estates Act provides that "the real and personal property of a deceased person comprised in any residuary devise or bequest shall (except so far as a contrary intention shall appear from his will or any codicil thereto), be applicable ratably, according to the respective values, to the payment of his debts;"—Held, that this section does not apply where there is not both real and personal property comprised in the residuary gift, and, as the bequest of the testator's personal property was not in its nature residuary in the original sense, the section did not apply to it.—Among other personal property bequeathed were a threshing machine and engine under the usual conditional sales agreement:—Semble, that, as the gift was in no sense a specific legacy, these chattels were not exonerated from the liens created by such agreement at the expense of the real estate. *Re Moody*, 12 O. L. R. 10, 7 O. W. R. 808.

Compensation to Executors.—Where a testator gives a legacy to his executors, expressly as a compensation for their trouble, and there is a deficiency of assets, such legacy does not in this country abate with legacies which are mere bounties, even though the legacy somewhat exceeds what the executors would otherwise have been entitled to demand. *Anderson* v. *Dougall*, 15 Chy. 405.

Equality among Legatees.—A testator by his will directed that a farm should be sold and that his executors should "first out of the said proceeds set apart the sum of $2,000, and invest the same in some safe security for the benefit of and for the maintenance and education of" the testator's grandson, subject to certain provisions as to payment of the income and corpus, and he then further directed that "out of the proceeds of the sale of the land there shall be paid the following legacies" to three daughters and a son of the testator:—Held, that the general rule of equality among legatees applied, and that, there not being sufficient to pay all the legacies in full, the grandson's legacy should abate proportionately. *Lindsay* v. *Woldbrook*, 24 A. R. 604.

Provision for Widow.—The provision for the widow of a testator and certain legacies being charged upon real estate which it was apprehended might prove deficient, the legacies, not the provision for the widow, were in such case ordered to be abated ratably. *Becker* v. *Hammond*, 12 Chy. 485.

Specific Legacies.—A testator out of the proceeds of his real and personal estate gave to one son $200, to another $100, and to the third $1,800, the balance to be equally divided between his daughters, six in number, naming them. By a codicil he revoked the bequest to the second named son of $100, and gave an additional sum of $100 to the first named son. The household furniture to be equally divided between his two daughters last named in the will:—Held, that these legacies were specific and not merely demonstrative, and if the fund was insufficient to pay them all, they must abate proportionately. *Bleeker* v. *White*, 23 Chy. 163.

Legacies—Abatement.—Testator died in 1878 having made a will and a codicil. By the will he gave to his wife certain chattels for her life, and all the rest of his estate to his two executors upon trust to sell and out of the proceeds to pay funeral and testamentary expenses and the legacies bequeathed by the will or any codicil thereto, and to invest the residue in their own names and pay the annual income to the wife for life, and after her death to divide the estate between themselves (the executors) in the

proportion of two-thirds to one and one-third to the other. By the codicil and testator gave certain specific legacies and directed that they should be paid by the executors after the decease of the wife from out of the two-thirds given to one of the executors. That executor died in 1885. After his death the other executor appropriated to his own use a part of the moneys of the estate, and died insolvent in 1900. The widow died in 1901. It was then found that more than one-third of the estate had been dissipated:—Held, that the part which remained belonged to the estate of the innocent executor, subject to the payment of the legacies given by the codicil, which should be paid in full and should not abate proportionately with the two-thirds share given to that executor. *In re Dunn*, 24 C. L. T. 295, 7 O. L. R. 560, 3 O. W. R. 311.

Sections 52, 56 and 57 of the Ontario Trustee Act (chapter 26 Ontario Statutes, 1911), are as follows:—

52. On the administration of the estate of a deceased person, in the case of a deficiency of assets, debts due to the Crown and to the personal representative of the deceased person, and debts to others, including therein debts by judgment or order, and other debts of record, debts by specialty, simple contract debts, and such claims for damages as are payable in like order of administration as simple contract debts, shall be paid *pari passu* and without any preference or priority of debts of one rank or nature over those of another; but nothing herein shall prejudice any lien existing during the lifetime of the debtor on any of his real or personal property.

56. Property over which a deceased person had a general power of appointment which he might have exercised for his own benefit without the assent of any other person, shall be assets for the payment of his debts, where the same is appointed by his will; and, under an execution against the personal representatives of such deceased person, such assets may be seized and sold, after the deceased person's own property has been exhausted.

57 (1) When a person dies having by will appointed an executor, such executor, in respect of any residue not expressly disposed of, shall be deemed to be a trustee for the person (if any), who would be entitled to the estate under the Devolution of Estates Act, in case of an intestacy, unless it appears by the will that the executor was intended to take such residue beneficially. Imp. Act, 11 Geo. IV. and 1 Wm. IV., ch. 40, sec. 1.

(2) Nothing in this section shall prejudice any right in respect of any residue not expresly disposed of, to which, if this Act had not been passed, an executor would have been entitled where there is not any person who would be entitled to the testator's estate under the Devolution of Estates Act in case of an intestacy. Imp. Act, 11 Geo. IV, and 1 Wm. IV., ch. 40, sec. 2.

Sections 6 and 7 of the Devolution of Estates Act are as follows:—

6. Subject to the provisions of sec. 38 of the Wills Act, the real and personal property of a deceased person comprised in any residuary devise or bequest shall, except so far as a contrary intention appears from his will or any codicil thereto, be applicable rateably, according to their respective values, to the payment of his debts, funeral, and testamentary expenses, and the cost and expenses of administration.

7. When any part of the real property of a deceased person vests in his personal representative under this Act, such personal representative, in the interpretation of any statute of this province, or in the construction of any instrument to which the deceased was a party, or under which he is interested, shall, while the estate remains in him, be deemed in law his heir, as respects such part, unless a contrary intention appears, but nothing in this section shall affect the beneficial right to any property, or the construction of words of limitation of any estate in or by any deed, will or other instrument.

Relative Priority.—Prima facie all general bequests are upon an equal footing, and those who claim priority or payments in full in case of deficiency of assets, must positively and clearly establish that it was the intention of the testator that the bequests should not abate ratably. *Re Battershall*, 10 O. W. R. 937; *Thwaites* v. *Foreman*, 1 Coll. C. C. 414. The words "in full" express such a manifest intention. *Marsh* v. *Evans*, 1 P. Wms. 668; *Johnson* v. *Johnson*, 14 Sim. 313.

CHAPTER LV.

LIMITATIONS TO SURVIVORS.

"SURVIVORS" WHEN CONSTRUED "OTHER."

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.

1st ed., Vol. 2, p. 600. 6th ed., p. 2100.

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.

6th ed., p. 2101. *Inderwick* v. *Tatchell* (1903), A. C. 120.

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.

6th ed., p. 2102. 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. 997.

EFFECT WHERE GIFT OVER IS COMBINED WITH A COLLATERAL EVENT.

In Aiton v. Brooks, 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 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.

Ibid. *Aiton* v. *Brooks*, 7 Sim. 204. See contra *Leeming* v. *Sherratt*, 2 Hare 14. See also *Gee* v. *Liddell*, L. R. 2 Eq. 341.

EFFECT OF GIFT OVER ON DEATH OF ALL IN A GIVEN MANNER.

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."

6th ed., p. 2104.

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.

Ibid. *Re Bowman*, 41 Ch. D. 525. This is known as the second rule in *Re Bowman*.

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.

6th ed., p. 2105. *Wake* v. *Varah*, 2 Ch. D. at p. 357.

GIFT OVER INOPERATIVE ON THE CONTEXT.

But if property is given to several as tenants in common for life, with several remainders to their children, and if any of the tenants for life die without children, to the "survivors" absolutely, or in tail, "survivors" will not be construed "others," even though there is also an ultimate gift over in case of all so dying.

Ibid. *Maden* v. *Taylor*, 45 L. J. Ch. p. 573. *Re Roper's Estate*, 41 Ch. D. 409.

It was held at one time that the ultimate gift over was not indispensable in these cases to the construing of "survivors" as "others." In the case of Re Bowman, Kay, J., enunciated the so-called third rule in Re Bowman. But the Court of Appeal dissented, so that at the present 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.

6th ed., p. 2107; *Re Bowman*, 41 Ch. D. 525. *Inderwick* v. *Tatchell* (1901), 2 Ch. 738; (1903), A. C. 120.

"STIRPITAL" CONSTRUCTION.

In Waite v. Littlewood, 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.

Ibid. *Waite* v. *Littlewood*, L. R. 8 Ch. at p. 73.

The stirpital construction was adopted by Joyce, J., in the case of Re Bilham.

6th ed., p. 2109. (1901) 2 Ch. 169.

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.

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.

6th ed., p. 2110. *Re Corbett's Trusts*, Joh. at p. 597.

"SURVIVORS" READ "OTHERS" TO EFFECT INTENTION THAT CHILDREN SHOULD STAND IN THEIR PARENTS' PLACE.

In Eyre v. Marsden, "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 as well as original, which their parents would have been entitled to if living at the period of distribution.

6th ed., p. 2112; *Eyre* v. *Marsden*, 4 My. & C. 231. affirming 2 Kee. 564.

"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, where a testator bequeathed his residuary estate between his children A. and B., and if either died without issue, to the survivor; by allowing the word its proper sense, the failure of issue was confined to failure at the death of the prior legatee, whereas by reading it as "other," such failure would have been indefinite.

6th ed., p. 2113. *Turner* v. *Frampton*, 2 Coll. 331.

CAN "SURVIVOR" MEAN "LONGEST LIVER?"

The word "survivor" requires a context. Survivor of whom? Survivor when? But in some cases the words "survivors or sur-

vivor" have been held to mean "longest livers or longest liver," in spite of the difficulty that a person cannot survive himself.

6th ed., p. 2114. *Taaffe* v. *Conmee*, 10 H. L. C. at p. 78. *Maden* v. *Taylor* (1876), 45 L. J. Ch. 560.

The result then would seem to be that the word "survivor" when unexplained by the context must be interpreted according to its literal import; but the conviction that this construction most commonly defeats the actual intention of testators and that the word is one peculiarly liable to misuse has induced a readiness in the Courts to yield to the slightest indication in the context of an intention to use the word in the sense of "other."

Ibid.

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 by the second's original share, for the accruing share is as a new legacy, and there is no further survivorship."

1st ed., Vol. 2, p. 621, 6th ed., p. 2115. *Pain* v. *Benson*, 3 Atk. at p. 80.

The question sometimes arises as to the effect of particular expressions to carry the accrued as well as the original share.

Ibid.

The word "share" from an early period has been held not to have this operation.

Ibid Vandergucht v *Blake*, 2 Ves. jun. 534. *Ex parte West*, 1 B. C. C. 575.

And the word "portion," which is evidently synonymous with "share," has also been held not to comprise an accrued share.

6th ed., p. 2115. *Bright* v. *Rowe*, 3 My. & K. 316.

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.

1st ed., Vol. 2, p. 622, 6th ed., p. 2116. *Eyre* v. *Marsden*, 2 Keen. 564, 4 My. & C. 231.

"BENEFIT OF SURVIVORSHIP" HELD TO CARRY ACCRUED SHARES. "INTEREST."

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. It seems also that "share and interest" will carry accrued shares proprio vigore.

Ibid. Re Henriques' Trusts (1875), W. N. 187.

ACCRUING SHARES NOT NECESSARILY SUBJECT AS THE ORIGINAL.

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; 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.

1st ed., Vol. 2, p. 626, 6th ed., p. 2117. *Gibbons* v. *Langdon*, 6 Sim. 260.

UNEQUAL DIVISION.

Where the subject of gift is disposed of among the original objects in unequal shares, there is no necessary inference, in the absence of any declared intimation of intention to assimilate the accruing to the original shares, that the survivors are to take accruing shares in the same relative proportions.

Ibid. Walker v. *Main*, 1 J. & W. 1.

GIFT OF ACCRUED SHARES "IN THE SAME MANNER" AS ORIGINAL.

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.

6th ed., p. 2118. *Melsom* v. *Giles*, L. R. 5 C. P. 614. 6 H. L. 24.

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.

6th ed., p. 2119. *Carver* v. *Burgess*, 18 Bea. 541.

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.

Ibid. Re Ridge's Trusts, L. R. 7 Ch. 665.

To what Period Survivorship Referable.

Another question which arises under gifts to survivors is, whether they mean survivors indefinitely or survivors at some specific point of time.

1st ed., Vol. 2, p. 631: 6th ed., p. 2120.

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.

6th ed., p. 2121. *Smith* v. *Horlock*, 7 Taunt. 129.

Where Gift Not Immediate.

Where, however, the gift was not immediate (i.e. in possession), there being a prior life or other particular interest carved out, so that there was another period to which the words in question could be referred, the point was one of greater difficulty. In these cases, indeed, as well as in those of the other class, the Courts for a long period uniformly applied the words of survivorship to the death of the testator, on the notion (as already observed) that there was no other mode of reconciling them with the words of severance creating a tenancy in common. The weight ascribed to this argument, however, was still more extraordinary in these than in the former cases; for, even if indefinite survivorship were inconsistent with a tenancy in common (but which it clearly was not), yet surely there could be no incongruity between such an interest and a limitation to the survivors at a given period: nevertheless, decision rapidly followed decision, in which, on reasoning of this kind, survivorship was held, in cases of this sort, to refer to the period of the testator's decease.

1st ed., Vol. 2, p. 633, 6th ed., p. 2122.

GENERAL RULE, CRIPPS V. WOLCOTT.

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. 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. 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.

6th ed., p. 2128. Per Cur. *Cripps* v. *Wolcott*, 4 Mad. 11.

RESULT OF THE CASES AS TO PERSONALTY.

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.

1st ed., Vol. 2, p. 651, 6th ed., p. 2130.

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.

Ibid.

DISTINCTION IN REGARD TO REAL ESTATE REJECTED.

It was for some time 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; and at length, in Re Gregson's Trusts, it was held to be untenable. 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 a remainder might by early vesting escape the liability to destruction and other inconveniences of tenure incident to contingent remaind-

ers; and that here, no less than in the case of personal estate, survivorship must be referred to the death of the tenant for life.

6th ed., p. 2130. *Re Gregson's Trusts*, 2 D. J. & S. 428.

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 distinction. But, of course, it must yield to a context clearly indicating a contrary intention.

6th ed., p. 2131. *Cripps* v. *Wolcott*, 4 Mad. 11; *Shailer* v. *Groves*, 6 Hare 162.

RULE WHERE GIFT TO SURVIVORS IS CONTINGENT.

It is to be observed, that where the gift to survivors is to take effect upon a contingency, none of the reasoning (infirm as that reasoning is), upon which it was held to refer to survivors at the death of the testator applies; for it cannot for an instant be contended that a tenancy in common is inconsistent with such a qualified survivorship. The only question, therefore, in such a case is, whether the gift was meant to extend to survivors indefinitely (i.e., whenever the contingency should happen), or is restricted to survivorship within a given period after the testator's decease.

1st. ed., Vol. 2, p. 651, 6th ed., p. 2132.

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.

6th ed., p. 2133. *Carver* v. *Burgess*, 18 Bea. 541. 7 D. M. & G. 96.

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.

Ibid. *Bowers* v. *Bowers*, L. R. 5 Ch. pp. 244, 247.

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.

6th ed., p. 2136. *Wilmot* v. *Flewitt*, 11 Jur. N. S. 820.

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.

Ibid.

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, or other future event.

6th ed., p. 2137. *Re Hunter's Trusts*, L. R. 1 Eq. 205.

SURVIVORSHIP REFERRED TO MAJORITY IN PREFERENCE TO ANOTHER EVENT.

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), or until the death of a previous legatee for life, the Court strongly inclines to construe a gift to the survivors as referring to the former event exclusively, in order to arrive at what is considered to be a more reasonable scheme of disposition than that of rendering the interests of the legatees liable to be defeated by the event of their dying before the time to which, for some reason irrespective of the personal qualifications of the legatees, the distribution was postponed.

1st ed., vol. 2, p. 653; 6th ed., p. 2139. *Crozier* v. *Fisher*, 4 Russ. 398.

SURVIVORSHIP REFERRED TO MAJORITY BY FORCE OF GIFT OVER.
CONTRARY EFFECT OF GIFT OVER ON DEATH OF ALL BEFORE TENANT FOR LIFE.

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. On the other hand, if the prior bequest is followed by a gift over on the death of all the previous legatees (among whom the survivorship is to take place), in the lifetime of the tenant for life, the death of the tenant for life is the period to which survivorship is to be referred.

6th ed., p. 2140. *Bouverie* v. *Bouverie*, 2 Phil. 340, *Daniel* v. *Gosset*, 19 Bea. 478.

TO SEVERAL AS TENANTS IN COMMON FOR LIFE, AND TO SURVIVOR, WITH GIFT OVER AFTER DEATH OF SURVIVOR.

Where a gift is made to several persons as tenants in common for life, and the survivor, with a limitation over after the death of the survivor, indicating therefore unequivocally that the survivor is to take at all events, the testator is considered to refer to survivorship indefinitely and not to survivorship at his own death.

1st ed., Vol. 2, p. 655, 6th ed., p. 2141. *Doe d. Borwell* v. *Abey*, 1 M. & Sel. 428.

WORDS OF SEVERANCE CONFINED TO THE INHERITANCE.

It remains to be observed, that, in devises of estates of inheritanee, 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.

6th ed., p. 2142. *Haddelsey* v. *Adams*, 22 Bea. 266.

This chapter may, like the first section of it, be concluded with a caution. This word "survivor," is certainly one that ought to be avoided by any person who is not a consummate master of the art of conveyancing, for I suppose no word has occasioned more difficulty.

6th ed., p. 2143. Per Cur. *Re Gregson's Trusts*, 33 L. J. Ch. at p. 532.

Legacy—Survivorship—Accruer.—A testator gave a legacy of $500 to each of three grandchildren, and directed "the said moneys so bequeathed to be kept invested by my executors, and the same with accrued interest to be paid over to the said William and Thomas on their attaining their majority, and the said legacy to my said granddaughter to be paid to her with the interest accrued thereon on her attaining her majority or on her marriage, whichever event shall first happen. In case of the death of any one of my said grandchildren, the bequests and legacies to them in this my will contained shall be divided among and go to the survivor or survivors of them share and share alike." One of the grandsons died under age and unmarried, and then the granddaughter died under age and unmarried.—The other grandson attained his majority, and the executor paid him the whole amount of the legacies. In an action by the personal representative of the granddaughter seeking payment by the executor of half of the legacy given to the grandson who died first and the accumulations thereon:—Held, that the share of the deceased grandson's legacy which accrued to the granddaughter on his death passed on her death to the surviving grandson, and that the plaintiff was not entitled to it. *Clifton* v. *Crawford*, 20 C. L. T. 301, 27 A. R. 315.

Vesting of Shares—"Divide and Pay"—Survivorship.—A testator by his will directed his executors and trustees "to divide all my estate, share and share alike among my children, and to pay" his or her share to each upon their respectively attaining twenty-one or marrying. The income, and, if necessary, part of the corpus was to be expended upon maintenance and education, and regard was to be had to this necessity in paying over any share. If more of his children survived the testator, the estate was to go to charitable institutions:—Held, that the direction to divide could not be separated from the direction to pay, and that consequently the shares did not vest, but the share of a child who survived the testator, and died before the time for payment arrived, was divisible among the children who survived until that time. *Re Sandison*, 5 W. L. R. 316, 6 Terr. L. R. 313.

Survivorship.—Testator devised real estate to his wife for life, with remainder to A., B. and C., or the survivors or survivor of all of them, their heirs and assigns, for ever:—Held, that the clause of survivorship meant the survivors at the death of the tenant for life, and not of the testator. *Peebles* v. *Kyle*, 4 Chy. 334.

Survivorship—Failure of Issue.—A testator devised land to his two sons, their heirs or assigns, or the survivor of them, when they attained twenty-five, to hold the same share and share alike for ever, and directed that if the two sons should die without issue before they inherited the property devised, their share should go to the survivors of the testator's children living at that time. One of the sons died under twenty-five, without issue:—Held, that the surviving son, who attained twenty-five took the whole property. *In re Charles McIntosh*, 13 Chy. 309.

Survivorship—Surplus after Annuity.—R. bequeathed an annuity of $500 to her brother J. A. W., and at his decease she gave and devised

all the real estate to which she might be entitled to her two nephews as tenants in common. The residue of her personal estate she gave and bequeathed to her executors, in trust to pay out of the same the said annuity to J. A. W., and to equally divide yearly between her brother G. W. and her sister S. R. D., or the survivor of them, the surplus of interest and rents remaining after payment of the said annuity of $500 to J. A. W., "and at his decease equally to divide share and share alike all moneys and securities for money in their hands between my brother G. W. and my sister S. R. D. or the survivor of them," after payment of all proper expenses of carrying out the will. S. R. D. died in August, 1870, and G. W. died in September, 1873, by his will disposing of all his interest in the estate of his sister R. W. J. A. W. was still living when a bill was filed by the executors of G. W. for a construction of the will of R. W.:—Held, that G. W. took the whole of the surplus income of R. W.'s estate beyond J. A. W.'s annuity. *Allan* v. *Thompson*, 21 Chy. 279.

Period of Distribution—Clauses of Will—Survivors—Vested Estates.—*Cripps* v. *Wolcott*, 4 Madd. 11 followed. *Shailer* v. *Groves*, 6 Ha. 162, distinguished. *In re Fingland, Fingland* v. *McKnight*, 21 C. L. T. 566.

Period of Distribution—Gifts to Class—"Wife and Child or Children"—Life Insurance Policy — Declaration—Trust—Immediate Vesting.—A testator directed a certain investment, after the death of his son, "to be appropriated for the benefit of his wife and child or children:"—Held, that it being a gift that was not immediate, a second wife and also all the children coming into existence before the period of distribution were entitled to share in the bequest, as well as the children living at testator's death.—A testator, having a policy of life insurance which was made payable to his executors, subsequently executed a declaration indorsed on the policy, which stated that all advantages to arise from said policy should accrue for the benefit of all his children, the policy to be held in trust for his children, who were to share equally. The children of the first wife claimed the whole fund, to the exclusion of the children of the said wife:—Held, that such a gift was, in effect, immediate, the right to the fruits of the policy vesting in the trustee at the moment of its delivery to him in trust, and the gift, being then complete, both as to the settlor and the children of the settlor, then in existence, vested in such children exclusively. *Starr* v. *Merkel*, 40 N. S. R. 23.

Shares of Estate — Period of Distribution — Life Interest — Children Born after Testator's Death.—If a fund is given by a will to be divided into as many shares as there are children of S. who survive S., one share to be paid to each child for life, and on his death to his children, the children of those children of S. who were born in the testator's life will take the share in which their parent had a life interest, while the children of such children of S. as were not born until after the testator's death, will take nothing. *McDonald* v. *Jones*, 40 N. S. R. 232.

Gift not taking effect in possession immediately on death of testator, survivorship referred to the period when the fund becomes divisible. *Cripps* v. *Wolcott*, 4 Madd. 15; *Holcomb, Howard* v. *Collins*, L. R. 7 Eq. 349; *Re Garver*, 3 O. W. R. 584; *Re Hopkins Trust*, 2 H. & M. 411; *Doe d. Long* v. *Prigg*, 9 H. & L. 281, followed in *Re McCubbin*, 6 O. W. R. 771.

After-born Son.—A testator devised certain lands to trustees for and on behalf of his two sons, W. and J., "and any other son or sons to be hereafter lawfully begotten by me," with right of survivorship as between W. and J., without providing for any such right as to an after-born son in case of his dying. Another son was born to the testator, who died after his father, under age and without issue:—Held, as to the deceased son's share, that the brothers and sisters took equally as his heirs. *Dobbie* v. *McPherson*, 19 Chy. 262.

CHAPTER LVI.

WORDS REFERRING TO DEATH SIMPLY, WHETHER THEY RELATE TO DEATH IN THE LIFETIME OF THE TESTATOR.

"IN CASE OF THE DEATH," &c., TO WHAT PERIOD REFERRED. WHERE THE BEQUEST IS IMMEDIATE.

Where a bequest is made to a person, with a gift over in case of his death, a question arises whether the testator uses the words "in case of," in the sense of at or from, and thereby as restrictive of the prior bequest to a life interest, i.e., as introducing a gift to take effect on the decease of the prior legatee under all circumstances, or with a view to create a bequest in defeasance of or in substitution for the prior one, in the event of the death of the legatee in some contingency. The difficulty in such cases arises from the testator having applied terms of contingency to an event of all others the most certain and inevitable, and to satisfy which terms it is necessary to connect with death some circumstance in association with which it is contingent; that circumstance naturally is the time of its happening, and such time, where the bequest is immediate (i.e., in possession), necessarily is the death of the testator, there being no other period to which the words can be referred.

1st ed., Vol. 2, p. 659, 6th ed., p. 2144.

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.

6th ed., p. 2145. *Cambridge* v. *Rous*, 8 Ves. 12. As to a similar question arising on the word "or" as in a gift to A. "or his children." see Chap. XXXVI.

"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 that the additional words did not make the event of death more contingent: it being a certainty that one must die in the lifetime of the other.

***Ibid.* *Howard* v. *Howard*, 21 Bea. 550.**

CASES OF CONTRARY CONSTRUCTION.

There are, however, a few cases of immediate bequests in which the words under consideration have been construed to refer to death at any time, and not to the contingent event of death in the lifetime of the testator; but in each there seems to have been some circumstance evincing an intention to use the

words in that rather than in the ordinary sense. Thus, the circumstance of the testator having bequeathed other property to the same person, to be 'at her own disposal,' has been considered to indicate that the testator had a different intention in the instance in question.

1st ed., Vol. 2, p. 660, 6th ed., p. 2146. *Nowlan* v. *Nelligan*, 1 B. C. C. 489.

RULE OF CONSTRUCTION STRICTLY APPLIED.

So firmly is the rule of construction established, that even where the testator in one part of his will uses the words "in the event of the death" as meaning "upon the death," this does not prevent the technical construction being placed upon the same words in another part of the will. Thus, if the testator gives property to A. for life "and in the event of his death" to B., and gives other property to X. absolutely, "and in the event of his death" to Y., although in the former gift the words "in the event of his death" must necessarily mean "upon the death of A.," yet in the latter gift they will be construed as referring to the death of X. in the lifetime of the testator.

6th ed., p. 2148. *Re More's Trust*, 10 Ha. 171.

And where there was a bequest of residue to A. and B., and in case of the demise of either to the survivor for life, it was held that A. and B. took life interests only.

Ibid.

WHERE BEQUEST IS FUTURE, THE WORDS ARE EXTENDED TO THE EVENT OF LEGATEE DYING BETWEEN DEATH OF TESTATOR AND PERIOD OF VESTING.

But although in the case of an immediate gift it is generally true that a bequest over, in the event of the death of the preceding legatee, refers to that event occurring in the lifetime of the testator, yet this construction is only made ex necessitate rei, from the absence of any other period to which the words can be referred, as a testator is not supposed to contemplate the event of himself surviving the objects of his bounty; and, consequently, where there is another point of time to which such dying may be referred (as obviously is the case where the bequest is to take effect in possession at a period subsequent to the testator's decease), the words in question are considered as extending quære whether confined? to the event of the legatee dying in the interval between the testator's decease and the period of vesting in possession.

1st ed., Vol. 2, p. 664, and *ibid.* *Hervey* v. *McLaughlin*, 1 Pri. 264.

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.

6th ed., p. 2149.

"OR" USED SYNONYMOUSLY WITH "IN CASE OF."

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 first 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.

Ibid. See ante, p. 635.

"IN CASE OF DEATH" INCLUDES DEATH IN TESTATOR'S LIFETIME.

It will be noticed that in stating the general rule, there seems to be some doubt whether words referring to the death of the legatee apply also to the case of death happening before the testator's decease, which is, indeed, within the literal meaning of the words.

Ibid. *Le Jeune* v. *Le Jeune*, 2 Kee 701.

GIFT VESTED BUT PAYMENT POSTPONED.

The principle above stated applies where payment only, and not vesting, is postponed to a stated period.

6th ed., p. 2150. *James* v. *Baker*, 8 Jur. 750.

DISTINCTION WHERE PRIOR GIFT IS EXPRESSLY FOR LIFE.

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.

1st ed., Vol. 2, p. 666, 6th ed., p. 2151. *Smart* v. *Clark*, 3 Russ. 365.

WHERE PRIOR GIFT COMPRISES THE INCOME ONLY.

Where the prior gift, though not expressly for life, comprises the annual income only of the fund which is the subject of the bequest, the same construction seems to prevail as where the prior gift is expressly for life.

Ibid. *Tilson* v. *Jones*, 1 R. & My. 553.

WORDS FOLLOWING DEVISE OF ESTATE TAIL.

It seems that where a testator devises an estate tail to a person, and "if he die," then over to another, the words "without issue" are supplied to render it consistent with that estate.

6th ed., p. 2152. Ante p. 300.

"Die without lawful issue," held to apply to death in lifetime of testator, and as devisee survived testator, the gift became absolute. *Re McMichael and Doidge*, 2 O. W. R. 689.

CHAPTER LVII.

WORDS REFERRING TO DEATH COUPLED WITH A CONTINGENCY.

DISTINCTION BETWEEN THE CASES DISCUSSED IN THE LAST AND IN THE PRESENT CHAPTER.

The distinction between the cases, which form the subject of the present inquiry, and those discussed in the last chapter, is obvious. There it was necessary either to do violence to the testator's language, by reading the words providing against the event of death as applying to the occurrence of death at any time, (in which sense death is not a contingent event), or else to give effect to the words of contingency, by construing them as intended to provide against death within a given period.

In the cases now to be considered, however, the expositor of the will is placed in no such dilemma; for the testator having himself associated the event of death with a collateral circumstance, full scope may be given to his expressions of contingency without seeking for any restriction in regard to time; and accordingly there seems to be no reason (unless it be found in the context of the will) why the gift over should not take effect in the event of the prior legatee's dying under the circumstances described at any period.

1st ed., Vol. 2, p. 670. 6th ed., p. 2153.

CLASSIFICATION OF THE CASES.

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. 2nd. 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.

1st ed., Vol. 2, p. 670, 6th ed., p. 2154.

ULTERIOR GIFT TAKES EFFECT ON TESTATOR'S DEATH.

It may be stated as a general rule, that where the gift is to a designated individual, with a gift over, in the event of his dying without having attained a certain age, or under any other prescribed circumstances, and the event happens accordingly in the

Note by Ed. of 6th ed.—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.

testator's lifetime, the ulterior gift takes effect immediately on the testator's decease, as a simple absolute gift.

1st ed., Vol. 2, p. 671. *Ibid.* *Re Domvile's Trusts*, 22 L. J. Ch. 947.

THOUGH GIFT OVER BE OF THE "SHARE" OF THE DECEASED.

The construction is the same even where the gift over is of the "legacy" or "share" of the deceased object—terms which might seem in strictness to apply only to persons who, by surviving the testator, had become actual objects of gift, in contradistinction to those who, dying before him, could in point of fact have no "share" or "legacy" under the will.

6th ed., p. 2154. *Walker* v. *Main*, 1 J. & W. 1.

DISTINCTION WHERE GIFT IS TO A CLASS.

Where, however, the gift is to a class, the objects of which are not, according to the general rules of construction, ascertainable until the decease of the testator (as in the case of a gift to children generally), the application of the words providing against the event of death to children dying in the testator's lifetime becomes rather more questionable, they not being, in event, actual objects of the gift, and therefore not within the clause in question, if that clause is to be construed strictly as a clause of substitution. There are not wanting cases, however, in which, even under such circumstances the words have been held to apply to death in the testator's lifetime, though the language of the will seemed to afford a plausible argument in favour of the contrary construction.

1st ed., Vol. 2, p. 673, 6th ed., p. 2155.

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.

6th ed., p. 2156. *Cort* v. *Winder*, 1 Coll. 320.

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 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 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

"sbare" was held to mean tbe part actually taken by a member of the class.

Ibid. *Re Whitmore* (1902), 2 Ch. 66.

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 deatb of any of them can only mean deatb happening after the deatb of the testator.

6th ed., p. 2157. *Shergold* v. *Boone*, 13 Ves. 370.

GIFT OVER IN CASE OF DEATH TO EXECUTORS OR ADMINISTRATORS, OR PERSONAL REPRESENTATIVES.

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.

1st ed., Vol. 2, p. 675, and *ibid.* *Bone* v. *Cook*, 13 Pri. 332.

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; but perhaps this does not much weaken the special ground to which these cases have been referred.

6th ed., p. 2158. Ante pp. 763, 783.

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.

Ibid.

See ante, Chap. XXXVI. and XL. *Gittings* v. *McDermott*, 2 My. & K. 69.

GIFT OVER OF INTEREST OF MARRIED WOMAN, IN CASE OF DEATH, TO HER NEXT OF KIN.

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 life-

time 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.

6th ed., p. 2159.

In such a case it now appears to be settled that the gift to the next of kin does not lapse; at any rate where there is not a direct gift to the married woman and a settlement in the way indicated.

Ibid. *Edwards* v. *Salaway*, 2 De G. & S. 248.

WHETHER GIFT OVER TAKES EFFECT ON HAPPENING OF EVENT SUBSEQUENT TO DEATH OF TESTATOR.

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.

1st ed., Vol. 2, p. 687, and *ibid.*

It is somewhat hazardous, in the state of the authorities, to lay down any general rule on the subject; but it will commonly be found, it is conceived, that where the context is 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.

Ibid.

The rule is, 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.

6th ed., p. 2161. Per Cur. *Child* v. *Giblett*, 3 My. & K. 71.

GIFTS OVER COMPRISING EVERY POSSIBLE EVENT, CONFINED TO TESTATOR'S LIFETIME.

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.

1st ed., Vol. 2, p. 690, 6th ed., p. 2162. *Clayton* v. *Lowe*, 5 B. & Ald. 636.

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 showing a clear intention to give the devisee or legatee a complete power of enjoyment and disposition.

6th ed., p. 2164. *Cooper* v. *Cooper*, 1 K. & J. 658.

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 was a clear case of this kind. 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. 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."

6th ed., p. 2165. *Da Costa* v. *Keir*, 3 Russ. 360. See *Cooper* v. *Cooper*, 1 K. & J. 658.

DISTINCTION WHERE PRIOR GIFT MAY BE REGARDED AS A MERE LIFE INTEREST.

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.

1st ed., Vol. 2, p. 692, and *ibid.* *Miles* v. *Clark*, 1 Kee 92.

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.

6th., p. 2166. *Re Anstice*, 23 Bea. 135.

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. 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.

Ibid. *Brotherton* v. *Bury*, 18 Bea. 65.

"PAY" OR "DIVIDE."

If the primary gift is in the form of a direction to "pay" or "divide" a fund to or among the legatees this shows 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. On the other hand, a direction that the shares are "to be he paid, transferred and assigned" to the legatees "as soon as conveniently may be after my decease," would probably be sufficient without more, to show that they were intended to vest absolutely on the testator's death.

Ibid. *Re Smaling*, 26 W. R. 231. See per Cur. *Farthing* v. *Allen*, 2 Mad. 310; *Ware* v. *Watson*, 7 D. M. & G. 248.

WHERE PRIOR LIFE INTEREST.

In all the preceding cases it will be observed, that the gift to the person on whose death, under the circumstances described, the substituted gift was to arise, was immediate, i.e., to take effect in possession, so that the Court was placed in the alternative of construing the words either as applying exclusively to death in the lifetime of the testator, or as extending to death at any time, the will supplying no other period to which the words could be referred: but where the two concurrent or alternative gifts are preceded by a life or other partial interest, or the enjoyment, under them is otherwise postponed, the way is open to a third construction, namely, that of applying the words in question to the event of death occurring before the period of possession or distribution. In such case, the original legatee, surviving that period, becomes absolutely entitled.

1st ed., Vol. 2, p. 693. 6th ed., p. 2167.

Where the original gift is deferred, as well as where it is immediate, the substituted gift will primâ facie take effect whenever the death under the circumstances described occur.

6th ed., p. 2167. *Re Schnadhorst* (1902), 2 Ch. 234. The "fourth rule" in *Edwards* v. *Edwards*, 15 Beav. 357, must be read subject to *Ingram* v. *Soutten*, L. R. 7 H. L. 408.

CONTINGENCY RESTRICTED TO PERIOD OF DISTRIBUTION BY EXPRESS DIRECTION TO DISTRIBUTE.

When a testator 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.

6th ed., p. 2170. *O'Mahoney* v. *Burdett*, L. R. 7 H. L. at p. 406.

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.

6th ed., p. 2174. *Re Sarjeant*, 11 W. R. 203.

WOAD "PAYABLE" OCCURRING IN GIFT OVER, WHETHER IT REFERS TO MAJORITY OR THE PERIOD OF DISTRIBUTION.

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.

1st ed., Vol. 2, p. 696, 6th ed., p. 2175.

RULE IN EMPEROR v. ROLFE.

And where (as often happens), the question has arisen under marriage settlements, the leaning to this construction is strongly aided by the occasion and design of the instrument, whose primary object obviously is, to secure a provision for the issue of the marriage. In wills, the point, like all others, depends solely upon the intention to be collected from the context; and the cases will be found to present instances of the vesting being held to take place at majority, or at majority or marriage (as the case may be), in the lifetime of the legatee for life, or to be further suspended until

the period of actual distribution, according as the language of the will was deemed to admit or to exclude the more eligible and convenient construction.

Ibid. *Emperor* v. *Rolfe*, 1 Ves. sen. 208. *Wakefield* v. *Maffet*, 10 A. C. 422. See *Joyes* v. *Savage*, L. R. 10 Ch. 555.

"PAYABLE" REFERRED TO MAJORITY.

But it has been expressly laid down that the rule (which is sometimes referred to as the rule in Howgrave v. Cartier, 3 V. & B. at p. 85), 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.

6th ed., p. 2176. *Woodburne* v. *Woodburne*, 3 De G. & S. 643.

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 shown 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; 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. 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.

6th ed., p. 2180.

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 marrisge of the legatee, the construction will not be varied by the accident of the legatee for life dying before the majority or marriage of the legatee in remainder; but that the interest of the latter will remain liable to defessance during minority or until marriage.

Ibid.

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. 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.

6th ed., p. 2181. *Cruwick* v. *Gaskell*, 16 Bea. 577.

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, 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.

Ibid. Per Cur. *Bielefield* v. *Record*, 2 Sim. at p. 358.

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. 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. The legatee must survive both events, the time appointed for payment as well as the death of the testator.

Ibid.

Note by Editor 6th edition.—This is the view expressed by Messrs. Wolstenholme and Vincent, in the third edition of this work, Vol. II. p. 744, and in support of it they cite *Corr* 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 executor's year (Wills, 7th ed., p. 693). Compare *Re Arrowsmith's Trusts*, 29 L. J. Ch. 774.

"ENTITLED IN POSSESSION," &c.

Although the very word "payable" is the most apt to connect itself with a previous direction to "pay," a similar construction has obtained in cases where the gift over was on death before becoming "entitled in possession," or "entitled to the payment," or "to the receipt," or before the legacy is "received"—read "receivable."

6th ed., p. 2182. *West* v. *Miller*, L. R. 6 Eq. 59.

GIFT OVER ON DEATH BEFORE "VESTING" OF IMMEDIATE LEGACY.

The proper legal meaning of the word "vested" is vested in point of interest. But its natural and etymological meaning is said to be vested in possession; and there are many cases of gifts over on the death of the legatee before his legacy has become "vested," where upon the context the word has been held to bear the latter sense. Thus where an immediate legacy, vested at the testator's death, with a direction for payment at twenty-one, was followed by a gift over in case the legatee should die before it became vested as aforesaid, this was held to mean die before twenty-one.

Ibid. The question as to the meaning of "vested" is also discussed in Chap. XXXVII., *Young* v. *Robertson*, 8 Jur. N. S. 825; *Sillick* v. *Booth*, 1 Y. & C. C. C. at p. 121.

OF LEGACY POSSESSION OF WHICH IS DEFERRED.

So where a vested remainder to children was followed—in one case by a gift over "if any die before or after me and before their shares become vested interests"—and in another by distinct gifts over "if any die before me" leaving issue and if any die "before their shares become vested" leaving no issue 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: 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.

Ibid. *Re Morris*, 26 L. J. Ch. 688.

The simple case, unaffected by context, of a gift, vested in interest at the testator's death, but postponed in point of possession, does not appear to have presented itself for interpretation. And it seems doubtful whether, in a divesting clause, a departure from the proper technical sense would be justified merely because that sense imputes to the testator an intention to provide only for death in his own lifetime, and to do so, not by the obvious and simple words "die before me," but by "a circumlocution which is at least of ambiguous import."

Ibid.

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.

6th. p. 2183. *Richardson* v. *Power*, 13 C. B. N. S. 780 in Exch.

"ENTITLED."

Tha 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 tha possession and not to the right.

Ibid. Re Maunder (1903), 1 Ch. 451.

GIFT OVER ON DEATH BEFORE "RECEIVING."
CONSTRUED RECEIVABLE WHEN THE WILL POINTS OUT A TIME FOR PAYMENT.

Executory gifts over in the event of legatees dying before "receiving" their legacies have given rise to much litigation. Actual receipt may be delayed by so many different causes that the Court is unwilling to impute to the testator an intention to make that a condition of the lagacy, and thus indefinitely postpone the absolute vesting of it. If, therefore, the will points out a definita time when the right to receive the legacy accrues, either expressly, as by directing payment at a particular age or time, or by implication from the dispositions of the will, as upon the determination of a prior life estate, the gift over will be referred to that time. And if there is a direction to pay at a specified time, as well as a prior life estate, the case falls within the decisions already noticed respecting gifts over on death before the legacy is "payable."

6th ed., p. 2184. *Re Dodgson's Trust*, 1 Drew. 440. *Rammell* v. *Gillow*, 9 Jur. 704.

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.

6th ed., p. 2185. *Re Arrowsmith's Trusts*, 2 D. F. & J. 474.

GIFT OVER IF A. DIES WITHOUT "LEAVING" CHILDREN, OBJECT OF PRIOR VESTED GIFT, READ WITHOUT "HAVING."

It has been noticed in a former chapter, that where property is given to one for life, and after his death to his children, with a gift over if he dies without leaving children, the gift over is sometimes construed as meaning in default of objects of the prior gift, or, as it is commonly expressed, "leaving" is construed "having." The same principle of construction applies where the gift is to a person for life and after his death to his children (or issue), with a gift over in the event of his death without leaving issue. But it does not apply where there is no ambiguity in the

testator's language, and, of course, it does not apply where there is no gift to the issue.

6th ed., p. 2194. Chap XLII., ante p. 890. *Re Brown's Trust*, L. R. 16 Eq. 239; *Re Ball*, 59 L. T. 800.

Gift of Aliquot Share of Residue to each Child of Testator.—Residuary devise upon trusts to sell and divide proceeds equally among the testator's eight children (naming them), including E., with directions to executor to pay the share bequeathed to E. to W., upon trust, to pay for proper clothing for E., while an inmate of an insane asylum, provided that, in case she died before her share was exhausted, "then I bequeath the remainder of her said share to W., to be applied by him towards the liquidation of the debt on the Roman Catholic Church at C." E. died in testator's lifetime:—Held, that, inasmuch as the children did not take as a class, but of an aliquot part of the estate bequeathed to each child, W. was entitled notwithstanding the death of E., to receive the one-eighth share which she would have been entitled to, to be applied by him as above mentioned. *Stewart* v. *Jones* (1859), 3 De G. & J. 532, discussed and distinguished. *In re Pinhorne*, [1894] 2 Ch. 276, and *In re Whitmore*, [1902] 2 Ch. 66, discussed and followed. *In re Shannon* (1909), 19 O. L. R. 35, 13 O. W. R. 378, 1003.

Gift to two Named Daughters.—A testatrix, after leaving the residue of her estate to be equally divided amongst her four daughters, C., M., H., and E. directed that if C. and M. should "die without leaving a child, or children," her executors should pay annually the interest accruing on the money bequeathed to them to her son R. during his lifetime, and after her son's death the principal should be equally divided amongst all the living children of her two other daughters, M. and H., on attaining their majority:—Held, that the words "die without leaving a child or children" meant in the testator's lifetime; and that the daughters, C. and M., who survived the testatrix, took the shares bequeathed to them absolutely.—The rule in *Bowers* v. *Bowers*, L. R. 8 Eq. 283, applied. *In re Wilkins*, 15 O. L. R. 646, 11 O. W. R. 468.

Death in Lifetime of Testator.—"In the event of the death of either A. or B. the said lot shall belong to the survivor," refers to death in lifetime of testator. *Cambridge* v. *Rous*, 8 Ves. 23; *In Elliott* v. *Smith*, 22 Ch. D. 236, the will directed that the share of a legatee if he died should go to others:—Held, that death means before death of testator even although "share" used.

"And in the event of death of either A. and B., the farm shall belong to the survivor, and in the event of the death of any of my said sons the farm which belonged to the deceased shall be sold and divided." The death spoken of refers to death in the lifetime of testator. *Cambridge* v. *Rous*, 8 Ves. 23, 24. "Belonged" means "which would have belonged." See *Elliott* v. *Smith*, 22 Ch. D. 236; *Re Cumming*, 11 O. W. R. 987.

A devise in fee with a gift over "in the event of death." In such a case to consider death as a contingency, the will most be read as if the will had said "in the event of death in my lifetime."

There is a distinction when the gift over is on death coupled with contingency, and not merely spoken of as a contingency. *Re Hayward*, 19 Ch. D. 470.

Where a gift is made to a person in terms absolute, and that is followed by a gift over in the event of the death of that person *sub modo* (i.e., without issue, or subject to any other limitation which makes the death a contingency), the effect of the gift over is prima facie to prevent the first taker from taking absolutely, to convert the interest of the first taker into one subject to the contingent devise or bequest over. *Re Eagle*, 10 O. W. R. 995.

Period of Division.—"At the time of distribution or settlement of any estate" held to relate to the end of the period, which the law allows for the distribution of the estate of deceased persons, that is twelve months from the death of testator—not the period when the last farthing of the assets has been got in and actually divided. So held in *Re Wilkins; Spencer*

v. *Duckworth*, 18 Ch. D. 634, the words were "final division of my estate." Followed in *Re Goulder; Goulder* v. *Goulder* (1905), 2 Ch. 100, 103—*Re Marshall*, 17 O. W. R. 778.

A testator in 1842 devised certain real estate to his granddaughter; and in case of her dying without lawful issue he directed the property to be sold by his executors; and from the proceeds of such sales, and from such other of his property as might be then remaining in their hands, he directed certain legacies to be paid, and the remainder to be applied at the discretion of his executors to missionary purposes:—Held, that the contemplated "dying without issue" was a dying without issue living at the granddaughter's death. *Chisholm* v. *Emery*, 18 Chy. 407; affirming *Re Chisholm*, 17 Chy. 403.

"**Die without Leaving Living Issue.**"—A testator by his will devised to his son and "to the heirs of his body" a part of his real estate, and to his daughter and "to the heirs of her body" the remainder of the property, and if "either . . . should die without leaving heirs of their body," the share of the deceased to the survivor, and "to the heirs of their body," . . . and should both die "without leaving living issue" then over in fee simple. The daughter died in the lifetime of her brother without issue. The son married and had living issue, and conveyed in fee:—Held, that an estate tail vested in the son, and that there was nothing in the will to give the words "die without leaving living issue," the meaning of "an indefinite failure of issue," and that the ultimate remainder in fee simple expectant on the estate tail, could be barred by the son. *Re Fraser and Bell*, 21 O. R. 455.

Double Condition.—The testator devised his land to his son, an only child, for ever, the testator's wife to have it as long as she lived or remained his widow, and then proceeded: "And if my son die and she marry, all to come to my brothers and sisters equal share alike." The widow married during the lifetime of the son, who subsequently, without ever having married, died intestate:—Held, that the estate given to the son was not taken from him by her marriage, and that the widow took the property as heir of the son. *Snell* v. *Davis*, 23 Chy. 132.

Dying without Leaving Issue.—A testator directed his executors to sell and realize all his estate in such manner as they should think proper, and the residue, after sundry devises and bequests, he desired them to apportion into certain shares, one of which he directed to be equally divided among the daughters of his son, S. V., deceased, to be paid to them on attaining twenty-one, or sooner if the trustees should think it for their advantage; and in the event of the death of any of his said granddaughters without leaving issue, her or their shares to be equally divided among their surviving sisters or their heirs:—Held, that this operated as a conversion of the estate into personalty, and the words "dying without leaving issue" referred to the period of distribution—that is, when the legatees attained twenty-one; and, therefore, that the share of one of them who had died without issue after the testator, and after having attained twenty-one, went to her personal representative. And the Court being of opinion that the difficulty was occasioned by the testator, independently of the fact that the bequest was of residue, ordered the costs of all parties to be borne by the estate. *Gould* v. *Stokes*, 26 Chy. 122.

Dying without Leaving any Lawful Heirs.—Section 32 of R. S. O. 1897 c. 128, is to be construed strictly, and is confined to cases in which the word "issue," or some word of precisely the same legal import, is used; and does not extend to cases in which the word "heirs" is used. Where a testator devised to his grandson, his heirs and assigns for ever, certain land with the qualification that in case of his "dying without leaving any lawful heirs by him begotten" the land was to go to other persons named, the section was held not to apply, and that the grandson took an estate tail. *Re Brown and Campbell*, 29 O. R. 402.

"**Having no Issue**"—**Numbered Paragraphs.**—A testator died in 1856 having previously made his last will divided into numbered paragraphs by which he devised his property amongst certain of his children. By the third clause he devised lands to his son F. on attaining the age of

twenty-one years—"giving the executors powar to lift the rent, and to rent, said executors paying F. all former rents due after my decease up to his attaining the age of twenty-one years," and by a subsequent clause he provided that "at the death of any one of my sons or daughters having no issue, their property to be divided equally among the survivors." F. attained the age of twenty-one years, and died in 1896, unmarried and without issue:—Held, that neither the form nor the language used in the will would authorize a departure from the general rule as to construction according to the ordinary grammatical meaning of the words used by the testator, and that, as there would be no absurdity, repugnance or inconsistency in such a construction of the will in question, the subsequent clause limiting the estates bequeathed by an executory devise over must be interpreted as referring to the property devised to the testator's sons and daughters by all the preceding clauses of the will. Held, further, reversing 22 A. R. 307, and restoring 25 O. R. 635, that the gift over should be construed as having reference to failure of issue at the death of the first devisee who thus took an estate in fee subject to the executory devise over. *Crawford* v. *Broddy*, 26 S. C. R. 345.

"**Die without Heirs.**"—A testator, by his will, provided as follows: "I leave and bequeath to my lawful wedded wife, M. E., all my personal property, as also the sole control and manegement of my real estete . . . said estate being composed . . . I leave and bequeeth the aforesaid estate to my son J. C., after my wife's death . . . and the said estate is not to be sold or mortgaged by my son J. C., but is to belong to his heirs. Should my son J. C. die without heirs the estate . . . my daughters shall get their maintenance off said estate during . . . I also bequeath the sum of eighty dollars to each of my daughters . . . to be paid out of the said estate by my said son J. C.:"—Held, that J. C. took an estate in fee tail in remainder after an implied life estate in his mother, M. E., subject, however, to the charges of the several legacies to each of the testator's daughters. *Re Colliton and Lendergan*, 15 O. R. 471.

See Roy v. *Gould*, 15 U. C. R. 131; *Jardine* v. *Wilson*, 32 U. C. R. 498; *Dale* v. *McQuinn*, 15 Chy. 101; *Tyrwhitt* v. *Dewson*, 28 Chy. 112.

"**Die without Issue.**"—A will provided, after making several devises and bequests: "Should either of my two sons die without issue, I wish that their shares should be divided equally among my surviving children:"—Held, that the sons took an estate tail, and not a fee simple subject to an executory devise over. *Little* v. *Billings*, 27 Chy. 353.

A testratrix devised separate lots of land to each of her two daughters, A. and B., and then provided that if "either of my daughters die without lawful issue, the part and portion of the deceased shall revert to the surviving daughter, and in case of both dying without issue, then I authorize" . . . neming her executors and other living persone to subdivide the estate among her relatives as they should deem right and equitable. B. conveyed the lot devised to her to a purchaser, through whom, in B.'s lifetime, title was sought to be made:—Held, that B. took only a defeasible fee simple with a devise over to her sister and her heirs in case B. should die, leaving no issue at her death. B. being still alive, it was impossible to say that a conveyance from her passed a good title. *Little* v. *Billings*, 27 Chy. 353, followed. *Ashbridge* v. *Ashbridge*, 22 O. R. 146, not followed. *Nason* v. *Armstrong*, 22 O. R. 542, 21 A. R. 183. Reversed on another point in the Supreme Court, 25 S. C. R. 263.

See, also, *Sisson* v. *Ellis*, 19 U. C. R. 559; *Scott* v. *Duncan*, 29 Chy. 496.

Share.—A testator, dying in 1833, by his will, made in the previous year, gave to his two sons, after a life estate to his wife, certain lands, *habendum* to his two sons "as tenants in common, their heirs and assigns for ever, subject, however, to this proviso, that if either of my aforesaid sons should die without legitimate issue, his share as aforesaid shall revert to and become vested in the other son united with him in the aforesaid devise." One son died unmarried in 1843. The other son married and had children, and in 1847 sold the whole property and conveyed it as in fee simple to the purchaser, who failed to observe the provisions of the Act, as to entails by registering his conveyance within six months:—Held, that the devise was of a defeasible fee, which in the event became absolute in the surviving son. Although the words "die without issue" pointed to

an indefinite failure of descendants, the context was sufficient to restrict the interpretation. *Roe d. Nicers* v. *Jeffery*, 7 T. R. 589, and *Greenwood* v. *Verdon*, 1 K. & J. 74, followed. *Chadock* v. *Cowley*, 3 Cro. Jac. 695, distinguished. *Little* v. *Billings*, 27 Chy., at p. 357, commented on. *Van Tassel* v. *Frederick*, 27 O. R. 646.

"Death Unmarried or without Leaving Issue." — Codicil — "Equal Shares."—A testator devised property "equally" to his two sons J. S. and T. G. with a provision that "in the event of the death of my said son T. G. unmarried or without leaving issue" his interest should go to J. S. By a codicil a third son was given an equal interest with his brothers in the property, on a condition which was not complied with, and the devise to him became of no effect:—Held that the codicil did not effect the construction to be put on the devise in the will: that J. S. and T. G. took as tenants in common in equal moieties, the estate of J. S. being absolute, and that of T. G. subject to an executory devise over in case of death at any time, and not merely during the life-time of the testator. *Cowan* v. *Allen*, 26 S. C. R. 202, followed. Held, also, that the word "equal" indicated the respective shares which the two devisees were to take in the area of the property devised, and not the character of the estates given in those shares. *Fraser* v. *Fraser*, 26 S. C. R. 316.

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.

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.

1st ed., Vol. 2, p. 702, 6th ed., p. 2195.

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.

Ibid. *Frogmorton* v. *Holyday*, 3 Burr. 1618.

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.

6th ed., p. 2196. *Murray* v. *Jones*, 2 V. & B. 313.

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 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.

6th ed., p. 2198. *Avelyn* v. *Ward*, 1 Ves. sen. 420.

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.

6th ed., p. 2199. *Warren* v. *Rudall*, 9 H. L. C. 420.

If the event upon which the prior gift is made defeasible, and the subsequent gift to take effect, is one which may happen as well in the lifetime of the testator as afterwards (in which respect such case obviously stands distinguished from those just stated), and the events which happen are 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.

1st ed., Vol. 2, p. 707, and *ibid.* *Doe* v. *Brabant*, 4 T. R. 706.

But it is necessary to find an intention on the part of the testator that the gift over to take effect in a manner different from that pointed out by the mere grammatical meaning of the words.

6th ed., p. 2202. *Re Tredwell* (1891), 2 Ch. 640.

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 in the exact opposite or alternative of that on which

the substituted gift is dependent. To let in the ulterior devise in such case would be to give the estate to one, in the very event in which the testator has declared that it shall go to another, whose incapacity, by reason of death, to take, seems to form no solid ground for changing its object. In the event which has happened, the lapsed devise must be read as an absolute gift.

1st ed., Vol. 2, p. 710, 6th ed., p. 2203.

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 event which has happened, as if the ulterior devise had been simple absolute devise in fee. On the other hand, if the devise were to A. and his heirs, and if he should die without leaving issue at his decease, then to B. for life, with remainder to his children in fee, and A., having survived the testator, dies without leaving issue, and B. also dies without having had a child (whether such event happens in the testator's lifetime or after his decease), the devise to A. becomes absolute and indefeasible, by the removal out of the way of the executory devise engrafted thereon; such devise having failed (not by lapse, as in the former case, but), by the failure of the event on which it was made dependent.

Ibid. *Jackson* v. *Noble*, 2 Kee, 590.

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.

6th ed., p. 2204.

APPENDIX

TEXT OF ONTARIO WILLS ACT—ONTARIO STATUTES 1910 (10 EDWARD VII., chap. 57).

1. This Act may be cited as *The Wills Act.*

2. In this Act (a) "land" shall include messuages, and all other hereditaments, whether corporeal or incorporeal, chattels and other personal property transmissible to heirs, money to be laid out in the purchase of land, and any share of the same hereditaments and properties, or any of them, and any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and any possibility, right or title of entry or action, and any other interest capable of being inherited, whether the same estates, possibilities, rights, titles and interests, or any of them, are in possession, reversion, remainder or contingency.

(*b*) "Mortgage" shall include any lien for unpaid purchase-money, and any charge, incumbrance, or obligation of any nature whatever upon any lands or tenements of a testator or intestate, and "mortgagee" shall have a meaning corresponding with that of mortgage;

Imp. Act. 30-31 Vict. c. 69 s. 2.

(*c*) "Personal estate" shall include leasehold estates and other chattels real, and also money, shares of Government and other funds, securities for money (not being real estate), debts, choses in action, rights, credits, goods, and all other property except real estate, which by law devolves upon the executor or administrator, and any share or interest therein;

(*d*) "Real estate" shall include messuages, lands, rents and hereditaments, whether freehold or of any other tenure, and whether corporeal, incorporeal or personal, and any undivided share thereof, and any estate, right, or interest (other than a chattel interest) therein;

(*e*) "Will" shall include a testament, and a codicil, and an appointment by will, or by writing in the nature of a will in exercise of a power, and also a disposition by will and testament or devise of the custody and tuition of any child, by virtue of the Infants' Act, and any other testamentary disposition.

Imp. Act, 1 V. c. 26, s. 1.

WILLS BEFORE 1ST JANUARY, 1874.

3. Where a will made before and not re-executed, republished or revived after the first day of January, 1874, by any person dying after the 6th day of March, 1834, contains a devise in any form of words of all such real estate as the testator dies seised or possessed of, or of any part or proportion thereof, such will shall be valid and effectual to pass any land acquired by the devisor after the making of such will, in the same manner as if the title thereto had been acquired before the making thereof.

4. Where land is devised in any such will, it shall be considered that the devisor intended to devise all such estate as he was seised of in the same land, whether in fee simple or otherwise, unless it appear upon the face of such will that he intended to devise only an estate for life, or other estate less than he was seised of at the time of making the will containing such devise.

5. Any will affecting land executed after the sixth day of March, 1834, and before the first day of January, 1874, in the presence of and attested

by two or more witnesses, shall have the same validity and effect as if executed in the presence of and attested by three witnesses; and it shall be sufficient if the witnesses subscribed their names in presence of each other, although their names were not subscribed in presence of the testator.

6. After the fourth day of May, 1859, and before the first day of January, 1874, every married woman might, by devise or bequest executed in the presence of two or more witnesses, neither of whom was her husband, make any devise or bequest of her separate property, real or personal, or of any rights therein whether such property was acquired before or after marriage, to or among her child or children issue of any marriage, and failing there being any issue, then to her husband, or as she might see fit, in the same manner as if she were sole and unmarried.

As to wills of married women made after 1st January, 1874. See R. S. O., Chapter 163, Section 3.

WILLS AFTER 1ST JANUARY, 1874.

7. Unless herein otherwise expressly provided, the subsequent sections of this Act shall not extend to any will made before the first day of January, 1874; but every will re-executed or republished, or revived by any codicil, shall, for the purposes of those sections, be deemed to have been made at the time at which the same was so re-executed, republished or revived.

Imp. Act, 1 V. c. 26, s. 34.

8. Sections 22, 23, 26 and 27 shall not apply to the will of any person who died before the first day of January, 1869, but shall apply to the will of every person who died since the thirty-first day of December, 1868, or who dies after the passing of this Act.

9. Subject to the provisions of the Devolution of Estates Act and of the Accumulations Act, every person may devise, bequeath, or dispose of by will executed in manner hereinafter mentioned, all real estate and personal estate to which he may be entitled, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon his heirs, or upon his executor or administrator; and the power hereby given shall extend to estates por autre vie, whether there is or is not any special occupant thereof, and whether the same are corporeal or incorporeal hereditaments; and also to all contingent, executory, or other future interests in any real estate or personal estate, whether the testator is or is not ascertained as the person or one of the persons in whom the same may become vested, and whether he is entitled thereto under the instrument by which the same were created, or under any disposition thereof by deed or will, and also to all rights of entry for conditions broken and other rights of entry, and also to such of the same estates, interests and rights respectively, and other real estate 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.

Imp. Act, 1 V. c. 26, s. 3.

10. A widow may in like manner bequeath the crop of her ground as well of her dower as of other her real estate.

30 Hen. III. (St. of Merton), c. 2.

11. No will made by any person under the age of twenty-one years shall be valid.

Imp. Act, 1 V. c. 26, s. 7.

12. (1) No will shall be valid unless it is in writing, and executed in manner hereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses present at the same time,

and such witnesses, shall attest and shall subscribe the will in the presence of the testator; but no form of attestation shall be necessary.

Imp. Act, 1 V. c. 26, s. 9.

(2) Every will, so far only as regards the position of the signature of the testator, or of the person so signing for him, shall be valid, within the meaning of this Act, if the signature is so placed, at, or after, or following, or under, or beside, or opposite to the end of the will, that it is apparent on the face of the will that the testator intended to give effect by such signature to the writing signed as his will; and no such will shall be affected by the circumstance that the signature does not follow or is not immediately after the foot or end of the will, or by the circumstance that a blank space intervenes between the concluding word of the will and the signature, or by the circumstance that the signature is placed among the words of the testimonium clause, or of the clause of attestation, or follows, or is after or under the clause of attestation either with or without a blank space intervening, or follows, or is after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature is on a side, or page, or other portion of the paper or papers containing the will, whereon no clause or paragraph or disposing part of the will is written above the signature, or by the circumstance that there appears to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature shall be operative to give effect to any disposition or direction which is underneath, or which follows it, nor shall it give effect to any disposition or direction inserted after the signature was made.

Imp. Act, 15-16 V. c. 24, s. 1.

13. No appointment made by will, in exercise of any power, shall be valid, unless the same is 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 has been expressly required that a will made in exercise of such power shall be executed with some additional or other form of execution or solemnity.

Imp. Act, 1 V. c. 26, s. 10.

14. Any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the passing of this Act.

Imp. Act, 1 V. c. 26, s. 11.

15. Every will executed in manner hereinbefore required shall be valid without any other publication thereof.

Imp. Act, 1 V. c. 26, s. 13.

16. If any person who attests the execution of a will is, at the time of the execution thereof, or becomes at any time afterwards, incompetent to be admitted as a witness to prove the execution thereof, such will shall not on that account be invalid.

Imp. Act, 1 V. c. 26, s. 14.

17. If any person attests 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 estate or personal estate other than and except charges and directions for the payment of any debt is 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 such 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 the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.

Imp. Act, 1 V. c. 26, s. 15.

18. In case by any will any real estate or personal estate is charged with any debt, and any creditor, or the wife or husband of any creditor whose debt is so charged attests the execution of such will, such creditor, notwithstanding such charge, shall be admitted as a witness to prove the execution of such will, or the validity or invalidity thereof.

Imp. Act, 1 V. c. 26, s. 16.

19. No person, shall on account of his being an executor of a will, be incompetent to be admitted as a witness to prove the execution of such will, or the validity or invalidity thereof.

Imp. Act, 1 V. c. 26, s. 17.

20. (1) Every will made out of Ontario by a British subject (whatever may be his domicile at the time of making the same or at the time of his death) shall as regards personal estate be held to be well executed for the purpose of being admitted to probate in Ontario, if the same was made according to the forms required either by the law of the place where the same was made or by the law of the place where such person was domiciled when the same was made or by the law then in force in that part of His Majesty's Dominions where he had his domicile of origin.

Imp. Act, 24-25 V. c. 114.

(2) Every will made within Ontario by a British subject whatever may be his domicile at the time of making the same or at the time of his death, shall as regards personal estate be held to be well executed, and shall be admitted to probate in Ontario if the same was made and executed according to the forms required by the law of Ontario.

(3) No will shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered by reason of any subsequent change of domicile of the person making the same.

(4) Nothing in this section shall invalidate any will as regards personal estate which would have been valid if this section had not been passed except as such will may be revoked or altered by any subsequent will made valid by this section.

(5) This section, except sub-section 2, shall extend only to wills made by persons dying after the 17th day of March, 1902, and sub-section 2 shall extend only to wills made by persons dying after that date..

21. (1) Every will made by any person dying on or after the 13th day of April, 1897, shall be revoked by the marriage of the testator, except in the following cases:—

Imp. Act, 1 V. c. 26, s. 18.

(*a*) Where it is declared in the will that the same is made in contemplation of such marriage;

(*b*) Where the wife or husband of the testator elects to take under the will, by an instrument in writing signed by the wife or husband and filed within one year after the testator's death in the office of the surrogate clerk at Toronto;

(*c*) Where the will is made in exercise of a power of appointment and the real estate or personal estate thereby appointed would not, in default

of such appointment, pass to the testator's heirs, executor or administrator, or the person entitled as the testator's next of kin under the Devolution of Estates Act.

(2) The will of any testator who died between the 31st day of December, 1868, and the 13th day of April, 1897, shall be held to have been revoked by his subsequent marriage, unless such will was made under the circumstances set forth in clause (c).

22. No will shall be revoked by any presumption of an intention, on the ground of an alteration in circumstances.

Imp. Act, 1 V. c. 26, s. 19. *See section 8 of this Act.*

23. No will or any part thereof, shall be revoked otherwise than as aforesaid provided by section 21, or by another will executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same, by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

Imp. Act, 1 V. c. 26, s. 20. *See section 8 of this Act.*

24. No obliteration, interlineation or other alteration made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration are not apparent, unless such alteration is 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 are made in the margin or in 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 in some other part of the will.

Imp. Act 1 V. c. 26, s. 21.

25. No will or any part thereof, which has been 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 where any will which has been partly revoked, and afterwards wholly revoked, is revived, such revival shall not extend to so much thereof as was revoked before the revocation of the whole thereof, unless an intention to the contrary is shewn.

Imp. Act, 1 V. c. 26, s. 22.

26. No conveyance or other act made or done subsequently to the execution of a will, of or relating to any real estate or personal estate therein comprised, except an act by which such will is revoked as aforesaid, shall prevent the operation of the will with respect to such estate, or interest in such real estate or personal estate, as the testator had power to dispose of by will at the time of his death.

Imp. Act, 1 V. c. 26, s. 23. *See section 8 of this Act.*

27. (1) 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 appears by the will.

Imp. Act, 1 V. c. 26, s. 24.

(2) This section shall apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any

separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband.

Imp. Act. 56-57 V. c. 63, s. 3. *See section 8 of this Act.*

28. Unless a contrary intention appears by the will, such real estate as is comprised or intended to be comprised in any devise in such will contained which fails or becomes 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..

Imp. Act, 1 V. c. 26, s. 25.

29. A devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner and any other general devise which would describe a leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include his leasehold estates, or any of them to which such description will extend, as well as freehold estates unless a contrary intention appears by the will.

Imp. Act, 1 V. c. 26, s. 26.

30. A general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner shall be construed to include any real estate, or any real estate to which such description will extend, 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 appears by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal estate described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description will extend, 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 appears by the will.

Imp. Act, 1 V. c. 26, s. 27.

31. Where any real estate is devised to any person without any words of limitation, such devise shall subject to the Devolution of Estates Act, be construed to pass the fee simple, or other the whole estate or interest, which the testator had power to dispose of by will, unless a contrary intention appears by the will.

Imp. Act, 1 V. c. 26, s. 28.

32. Where any real estate is devised by any testator, dying on or after the 5th day of March, 1880, to the heir or heirs of such testator, or of any other person, and no contrary or other intention is signified by the will, the words "heir" or "heirs" shall be construed to mean the person or persons to whom the real estate of the testator or of such other person as the case may be, would descend under the law of Ontario in case of an intestacy.

33. In any devise or bequest of real estate or personal estate, the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention appears 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, but this Act shall not extend to cases where such words import if no issue described in a preced-

ing gift be born, or if there be no issue who live to attain the age, or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

Imp. Act. 1 V. c. 26, s. 20.

34. Where any real estate is devised to a 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 is thereby given to him expressly or by implication.

Imp. Act, 1 V. c. 26, s. 30.

35. Where any real estate is 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, is not given to any person for life, or such beneficial interest is given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall, subject to the Devolution of Estates Act, 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 are satisfied.

Imp. Act, 1 V. c. 26, s. 31.

36. Where any person to whom any real estate is devised for an estate tail or an estate in quasi entail, dies in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue are 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 appears by the will.

Imp. Act, 1 V. c. 26, s. 32.

37. Where any person, being a child or other issue of the testator, to whom any real estate or personal estate is devised or bequeathed for any estate or interest not determinable at or before the death of such person dies in the lifetime of the testator, leaving issue, and any of the issue of such person are 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 appears by the will.

Imp. Act, 1 V. c. 26, s. 33.

38. (1) Where any person has died since the 31st day of December, 1865, or hereafter dies seised of or entitled to any estate or interest in any real estate, which, at the time of his death, was or is charged with the payment of any sum of money by way of mortgage, and such person has not, by his will or deed or other document, signified any contrary or other intention, the heir or devisee to whom such real estate descends or is 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; but the real estate 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 is charged, every part thereof according to its value bearing a proportionate part of the mortgage debts charged on the whole thereof.

Imp. Act, 17-18, V. c. 113, s. 1.

(2) In the construction of a will to which this section relates a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate or a charge or direction for the payment of

debts upon or out of residuary real estate and personal estate or residuary real estate shall not be deemed to be a declaration of an intention contrary to or other than the rule in sub-section 1 contained unless such contrary or other intention is further declared by words expressly or by necessary implication referring to all or some of the testator's debts charged by way of mortgage on any part of his real estate.

Imp. Act, 30-31 V. c. 69, s. 1, and 40-41 V. c. 34, s. 1.

(3) Nothing herein shall affect or diminish any right of the mortgagee to obtain full payment or satisfaction of his mortgage debt, either out of the personal estate of the person so dying or otherwise; and nothing herein shall affect the rights of any person claiming under any will, deed, or document made before the first day of January, 1874.

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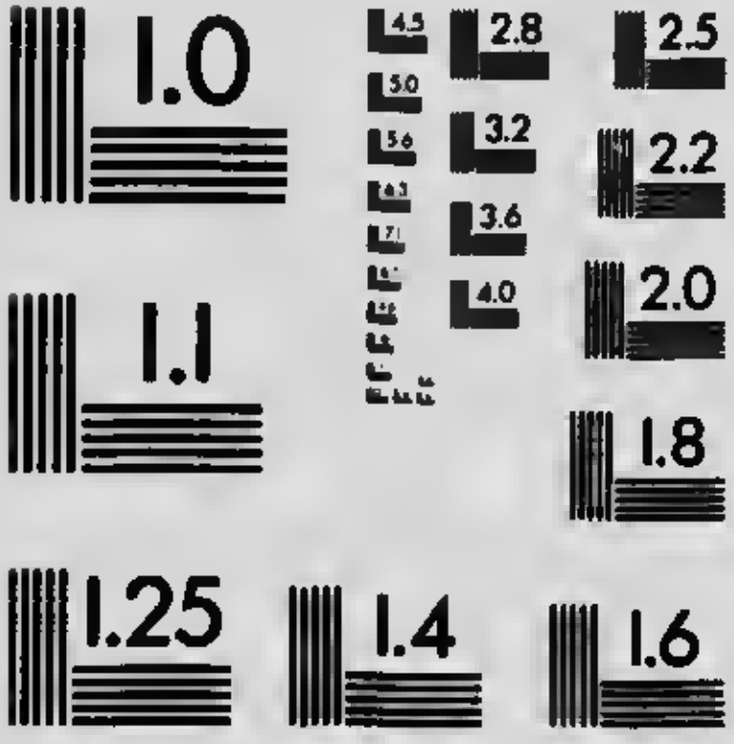

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