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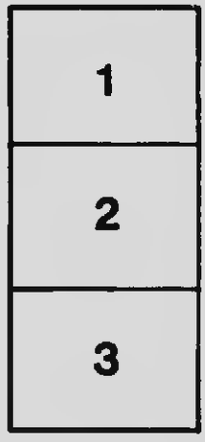

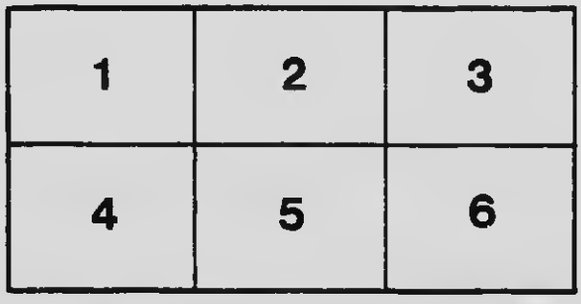

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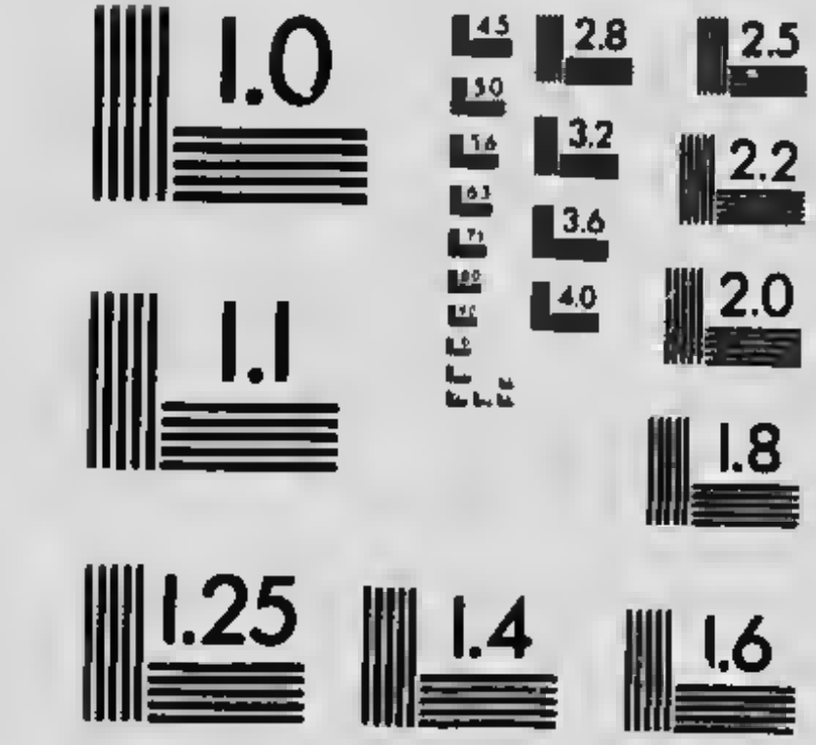

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A

CONCISE TREATISE

ON THE

LAW OF WILLS.

SEVENTH EDITION.

A

CONCISE TREATISE

ON THE

LAW OF WILLS.

BY

H. S. THEOBALD,

OF THE INNER TEMPLE, ONE OF HIS MAJESTY'S COUNSEL, AND FORMERLY FELLOW OF WADHAM COLLEGE, OXFORD.

SEVENTH EDITION.

WITH NOTES OF CANADIAN STATUTES AND CASES

BY

E. D. ARMOUR, K.C.,

OF OSGOODE HALL, BARRISTER-AT-LAW.

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1908

PREFACE TO THE SEVENTH EDITION.

Few important changes have been made in this Edition. A chapter has been added on the "Devolution of Trusts and Powers," concentrating the law on this subject, which in former editions was dispersed under various heads.

The closely-related subjects of gifts to children who survive their parents and gifts over of the shares of children who die before their shares are payable have been re-worked—a thankless task. The old judges approached such cases with the preconception that the share of a child ought not to be contingent upon surviving his parents, and that it ought not to be given over if the child attained the age when the share was likely to be wanted. There was thus a constant conflict between this preconception and the language of the instrument, and, if possible, the language was twisted to suit the preconception. Modern judges have no such prejudice—they approach the instrument with the single object of ascertaining its meaning. They know nothing of what it ought to mean. But when they have found out its meaning they are met with a string of cases which say that the natural meaning is not to prevail. Then the question has to be discussed whether the language is too strong for the preconception, or the preconception strong enough to control the language—a most unsatisfactory debate, the issue of which in any particular case it is difficult to forecast.

Some research has also been expended on the construction of gifts over upon death before payment vesting, and similar phrases. These investigations have again brought out how often there is a lack of decisions upon points which must very frequently arise in practice.

Three years have passed since the last edition was published. During that period there has been no lack of cases falling within

the limits of the work. There have been three notable decisions in the House of Lords. Two of them correct a disposition to seek for and lean upon rules of construction either by finding in the construction put upon a particular phrase in a particular will a canon of construction, or by making universal a rule strictly limited by the reason given for it by the old authorities. Vice-Chancellor Kindersley, in *Loring* v. *Thomas*, had held that in a gift over "If any of my children shall die in my lifetime," the word "shall" in that particular will had not a future sense. The House of Lords, in *Gorringe* v. *Mahlstedt*, saw no reason in that why it should not have a future sense in another will where there was no controlling context, and refused to admit that *Loring* v. *Thomas* established any principle or rule of construction. For the purpose of a gift to children "born" at a particular time, a child *en ventre* at that time is to be deemed born because thereby the child is benefited—not a good reason, but still a reason which satisfied the old judges, and established a rule which cannot now be questioned. The House of Lords, in *Villar* v. *Gilbey*, refused to allow the rule to be applied where the reason was absent—where, in fact, to apply it would have been injurious to the child. In this connection it should be noted that the subtle though unsubstantial distinction taken in *In re Salaman* (see p. 270) between a gift to children born at the date of the will and a gift to children born at or at some time after the testator's death has been overruled since the book was in type.

In *Grimond* v. *Grimond* the House of Lords held that religious institutions were not necessarily charitable. The case was a Scotch appeal. It was not, however, decided on any ground of law peculiar to Scotland, but simply on the meaning of an English word. The case ought therefore to be influential (though it has not influenced the Irish Courts) in setting right a mistake made by the English Courts in holding that what is religious must necessarily be charitable. In *White* v. *White*, which established the doctrine here, Lord Lindley knew very well that religious is not always charitable, but he thought himself constrained by authorities which can hardly be said to have laid down any such proposition. Perhaps before long a judge may be found to take the truer view supported by *Grimond* v. *Grimond*.

In re Johnson, which decided that a person who has acquired a domicile in a country which does not recognize domicile has not

acquired that domicile, remains unstrengthened by approval and unshaken by dissent. Some observations on the case which were made in the last edition have been omitted, not because reflection has brought repentance, but because they seemed inappropriate in a work of this description.

Upon the question whether, where there is an appointment void for perpetuity, and a gift to the person entitled in default of appointment, the latter is put to his election, some weighty votes have been cast for the negative. It may be permissible here to say a few words on this question, though "vain and wind-dispersed" the words will be.

A testator gives away my property and gives me a benefit. Equity says it would be "against conscience" for me to take the gift and at the same time to claim my own property. If I take the gift I must carry out the testator's wishes, and let my property go as he wishes. If I do not, I must, out of the property given to me, compensate the legatee whom I disappoint. Equity acts on the conscience of the legatee; if he elects to take under the will, the alienation of his own property takes effect not under the testator's will, but by force of the legatee's election. So in the case of an appointment: the testator has power to appoint to issue; he appoints to children for life, then to their issue. The appointment to issue is void for perpetuity. B. takes in default of appointment; the testator gives him a benefit; to put B. to his election is not to uphold an invalid appointment. The appointment is invalid. The appointees take through the voluntary act of B., a voluntary act no doubt induced by the educative influence which a Court of Equity exercises over his conscience; and he is not required to do anything illegal, but merely to dispose of his own in a way entirely within his competence, namely, to settle it on his children with remainder to their children.

Suppose the testator says, I have a power to appoint Blackacre to B. and his children. I want it to go to B. for life and then to his children, but such an appointment by me would be void for perpetuity; B. is entitled in default of appointment. I therefore let Blackacre pass to B. in default of appointment, and I give him 10,000*l.* on condition that he settles Blackacre on himself for life with remainder to his children. Could it be maintained that such

a condition is invalid because it seeks to evade the rule against perpetuity? Yet is there any distinction between such an express condition and the implied condition which Equity reads into the will in the former case, except the immaterial distinction that the legatee electing against the will compensates, while the legatee refusing to perform the condition forfeits?

The course of decision on this point is not without singularity. In *Wollaston* v. *King* Lord Justice James, when Vice-Chancellor, expressed his opinion against election, but there were other grounds why there could be no election; and though the case against election when an appointment is void for perpetuity was argued, nothing appears to have been said on the other side, possibly because it was felt that the other arguments against election were unanswerable.

In *Warren's Trusts* the Judge seems to have been led astray by a phrase. The appointment is "*ex facie* void," therefore no election. "*Ex facie* void" is good, but like many another phrase in a foreign tongue it conceals an infirmity of thought. Whiteacre belongs to B.; I wish A. to have it and I give B. 10,000*l*. *Ex facie* void, yet a case for election. I have power to appoint to children. I appoint to grandchildren and give benefits to those entitled in default; *ex facie* void, yet a clear case for election. The authority of the decision cannot stand higher than the reason given for it. The matter then crossed the Channel and came before the Irish Courts. It is true the point did not arise, but it was decided nevertheless.

Handcock's Trusts was a case where there was a power which by the Vice-Chancellor and the Court of Appeal was held to be a power to appoint to children. The testator appointed to a child for life with remainder to grandchildren. The latter were not within the power; there was no appointment to them, therefore no question of perpetuity arose. The most that can be said is, that if the power had been a power to appoint to issue the appointment would have been void for perpetuity. It was the simple case of an appointment to non-objects, and a gift to the persons entitled in default, a well-settled case for election; and so the Vice-Chancellor held. Not so the Court of Appeal; it insisted upon treating the case as an appointment void for perpetuity, and though it gave

excellent reasons for a contrary decision, it held that there was no election.

The point was, for the first time, fully argued in *In re Bradshaw*, where Mr. Justice Kekewich held that there was election, on the ground that it was as much against conscience for a legatee to take a legacy, and yet to refuse to settle his property on a child for life, with remainder to grandchildren, in the case where the disposition of the testator is void for perpetuity, as where it is void for excess; in either case the legatee can make the settlement without infringing any rule of law.

This decision has not been followed. It seems to be thought that to ask the Court to put the person entitled in default of appointment to his election in such a case involves some moral obliquity. It is asking the Court to participate in the testator's illegal act. But the illegal act remains illegal. The Court is only asked to require the donee in default to act according to conscience, and to do an act which for him is perfectly legal and infringes no rule of law or equity or not to take the testator's bounty.

Again it is said you shall not do indirectly what you cannot do directly. But this eleventh commandment is broken with impunity as often as the other ten. The recognized cases of election are examples of its breach, and it would not be difficult to cite other examples from many branches of law.

It is also noticeable that in *Oliver's Settlement*, where the sacro-sanctity of the rule against perpetuity was upheld with the greatest vigour of language and power of illustration, no question of perpetuity arose, for the facts were the same as in *Handcock's Trusts*.

It must, however, be admitted that the arguments here suggested must be wrong, for, counting echoes as well as voices and including Ireland, no less than eight learned judges, two of them now members of the Court of Appeal, have expressed their opinions against election.

An Irish testator deserves honourable mention for his skill in puzzling the Courts of his country. The case might not be worth

attention for its humours alone. But it illustrates in a remarkable way the determination of the Court not to be beaten by a testator, but to find a meaning for his words if it can possibly be done. The words looked innocent enough, but they proved, as the Court of Appeal said, almost a family affliction. One Boamish, having six properties and seven sons, gave a property to each son except the third, to whom he gave a shilling. He then gave the portion of each son over if he should die under thirty, and then provided that if any son should die without issue over thirty his share should go to "his next eldest brother and so on respectively." All the sons had attained thirty and none had died without issue, but they were naturally anxious to know what would happen if any of them should die without issue, and they accordingly applied to the Court to find out. The case came before three judges of the King's Bench Division. One thought next eldest brother meant the next brother in a descending series, one thought it meant the next brother in an ascending series, the third was unable to make up his mind—so the point remained undecided. If there ever was a case in which the Court of Appeal might have arrived at the conclusion that the proviso was void for uncertainty it was this one. They, however, refused to accept that view, and held that the next brother in a descending series was intended—a construction as good as any other if construction there was to be, but arrived at by a somewhat doubtful process. The testator was summoned as a witness, and by putting such leading questions as who is your oldest son? who is his next eldest brother? and so on, they arrived at the desired conclusion. There was no one to cross-examine or put the questions in the reverse order—who is your youngest son? who is his next eldest brother? and so on. The Court hinted at several other interesting questions that would or might arise for the instruction of the lawyers and the detriment of the beneficiaries. It is to be hoped that the latter followed the advice given them and settled all further disputes by a deed of family arrangement while there was yet time.

There has been a goodly crop of cases on charitable gifts. They do not show any important development in the law, but they illustrate the unbridled licence allowed to testators in gratifying their charitable sentiments. Perhaps the furthest limit to which the Court has gone was reached when it upheld as charitable a gift for ringing church bells on the anniversary of the Restoration of

the Monarchy. This matter will before long call for legislative interference. If all the useless, if not harmful, charitable gifts made by testators could be swept into one fund and applied to some useful purpose, the State would greatly benefit.

The question so frequently discussed in Ireland of the validity of a gift to communities bound by monastic vows has at last been raised in England, in a case as yet unreported of *In re Boyd*, and decided against the community.

A small difficulty referred to on page 639 with reference to a married woman trustee has been cured by the Married Women's Property Act, 1907 (7 Edw. 7, c. 18), s. 1, which has a retrospective effect. That section enables a married woman trustee to dispose of real and personal property vested in her alone or jointly with any other person as trustee or personal representative as if she were a *feme sole*.

It has hitherto been supposed that Hinde Palmer's Act, which placed specialty and simple contract creditors on the same footing, had neither enlarged nor diminished the executor's right to prefer or retain. It has now been decided, in *In re Samson*, that the Act has enlarged the executor's right to prefer, that is to say, that he may now prefer a simple contract to a specialty creditor. It by no means follows that the Act has the same effect as regards retainer.

The cases have been dealt with down to and including October, 1907.

H. S. T.

7, New Square, Lincoln's Inn.
Dec. 5th, 1907.

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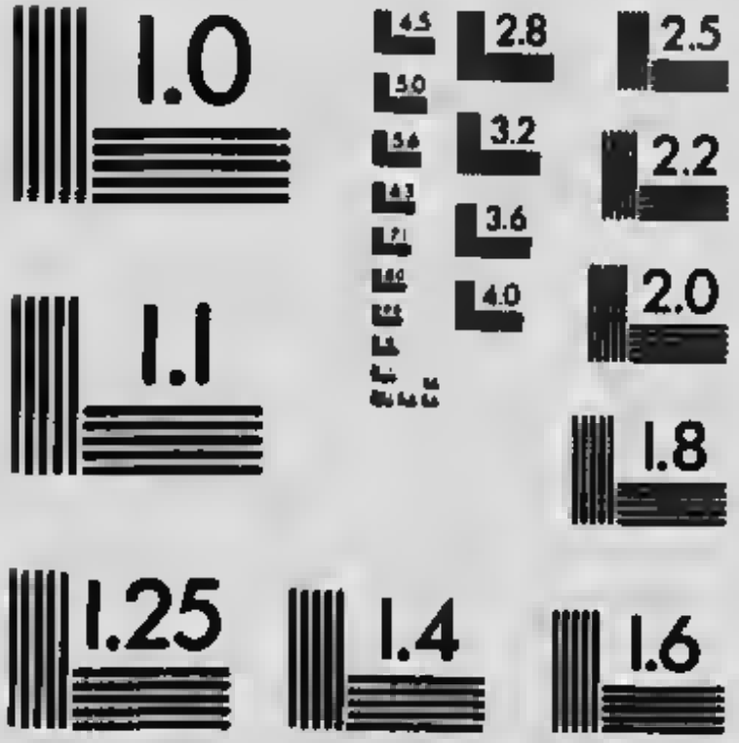

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PREFACE TO THE CANADIAN NOTES.

In preparing the Canadian Notes for the text of Mr. Theobald there was no intention to constitute them a complete treatise in themselves. That would have been out of the question for two reasons: (1) Mr. Theobald's work is the treatise: (2) the Canadian cases do not cover the whole subject.

In so far as Canadian cases go, they have been arranged, as well as it was possible for me to do it, according to Mr. Theobald's method, and they are appended to each chapter, with very little, and in most cases no, comment.

The notes on testamentary powers of executors and trustees are appended to the chapter on Administrative Powers of Trustees, because there seemed to be no more suitable place for them.

The notes include the statutes, and the cases in the concluded volumes of reports from all the Provinces of Canada except Quebec, Prince Edward Island, and the two new Provinces of Alberta and Saskatchewan.

The oddities which appear in so many badly drawn wills make it a matter of extreme difficulty to arrange the cases thereon according to any scientific system of classification. But the attempt has been made: how far it has been successful can only be left to the indulgent judgment of the profession.

The index has been prepared by Archibald D. Armour, Esq., Barrister-at-law, who assisted the undersigned in putting the work through the press.

Toronto, March, 1908.

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A CONCISE TREATISE ON WILLS.

CHAPTER I.

BY WHAT LOCAL LAW WILLS ARE REGULATED.

Will of immovables.

A WILL, so far as it relates to immovable property, must be made in accordance with the formalities required by the law of the land where the immovable property is situated.

Leaseholds.

Immovable property for this purpose includes leaseholds; the validity and construction, therefore, of wills, so far as they affect leaseholds in England, must be governed by English law. *Freke* v. *Lord Carbery*, 16 Eq. 461; *In bonis Gentili*, I. R. 9 Eq. 541; *De Fogassieras* v. *Duport*, 11 L. R. Ir. 123; *Duncan* v. *Lawson*, 41 Ch. D. 394; *Pepin* v. *Bruyère*, (1902) 1 Ch. 24.

Immovable property also includes land in a colony, which, according to the law of the colony, descends like personalty. *Rea* v. *Rea*, (1902) 1 Ir. 451.

Proceeds of sale of immovables.

There appears to be a conflict of cases on the question whether proceeds of sale of immovables devised on trust for sale are governed by the *lex loci* or by the law of the domicile. In *Freke* v. *Lord Carbery* the Thellusson Act, which does not extend to Ireland, was held to render invalid certain trusts of the proceeds of sale of English leaseholds devised on trust for sale by a testator domiciled in Ireland. On the other hand, in *In re Piercy; Whitcham* v. *Piercy*, (1895) 1 Ch. 83, the trusts of the proceeds of sale of land in Sardinia devised on trust for sale by a testator domiciled in England were held to be subject to English law.

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Personalty to be laid out in purchase of foreign lands.

If personalty is by an English will directed to be laid out in land in Scotland, to be settled to uses which are valid in Scotland, but are invalid in England, the Scotch law applies. *Fordyce* v. *Bridges*, 2 Ph. 497, 515.

Use of technical language in devising foreign land.

If a domiciled Englishman uses the technical language of English law in devising land in Scotland, the English terms will so far as possible be transmuted into the corresponding terms of Scotch law, so as to give the will the fullest effect. *Studd* v. *Cook*, 8 App. C. 577, see *Beaufort* v. *Young*, 26 Ch. D. 656; 29 Ch. D. 617.

Will of realty under power.

A will made in exercise of a power to appoint realty must be made in accordance with the law of the place, where the realty is. The same rule applies to realty held upon trust for sale, if it has not been sold. *Marrow* v. *Chapernowne*, (1901) 2 Ir. 232.

Will of personalty under power.

A power to appoint personalty by will, conferred by an English instrument, *primâ facie* refers to a will recognised by English law as valid, that is to say, either a will made in accordance with the Wills Act, or a will made in accordance with the law of the testator's domicile.

Thus, a will executed according to the Wills Act may execute a power, though the will would be invalid according to the law of the testator's domicile. *Tatnall* v. *Hankey*, 2 Moo. P. C. 342; *In bonis Alexander*, 6 Jur. N. S. 354; 29 L. J. P. 93; 1 Sw. & T. 454, n.; *In bonis Hallyburton*, 1 P. & D. 90; *In bonis Huber*, (1896) P. 209, see *Povey* v. *Hordern*, (1900) 1 Ch. 492; *In bonis Trefond*, 81 L. T. 56; *In re Mégret; Tweedie* v. *Maunder*, (1901) 1 Ch. 547; overruling on this point, *Crookenden* v. *Fuller*, 1 Sw. & T. 441, 454.

And so may a will valid according to the law of the testator's domicile, but not executed according to the Wills Act. *D'Huart* v. *Harkness*, 34 L. J. Ch. 311; 11 Jur. N. S. 633; 34 B. 324; *In re Price; Tomlin* v. *Latter*, (1900) 1 Ch. 442; *In re D'Este's Settlement Trusts; Poulter* v. *D'Este*, (1903) 1 Ch. 898.

In re Kirwan's Trusts, 25 Ch. D. 373 (explained in *In re Price*), only decides that the Wills Act, 1861, does not affect sect. 10 of the Wills Act, 1837, which makes an appointment

by will—that is to say, by the will of a person domiciled in England—invalid if not executed in accordance with the Act. A will, therefore, admitted to probate by virtue only of the Act of 1861, but not executed according to the Act of 1837, does not exercise a testamentary power of appointment. See, too, per Lord Cranworth in *Dolphin* v. *Robins*, 7 H. L. C. 414; *Hummel* v. *Hummel*, (1898) 1 Ch. 642.

Power to appoint by will with certain formalities.

If the power requires a will executed with certain formalities, a will without those formalities will not exercise the power unless sect. 10 dispenses with them, which it does not in the case of a person not domiciled in England. *Barretto* v. *Young*, (1900) 2 Ch. 339.

By the Wills Act, 1861 (24 & 25 Vict. c. 114), which extends only to testamentary instruments made by persons dying after the 6th August, 1861, it is enacted:—

Wills made out of the kingdom to be admitted to probate if made according to the law of the place where made.

1. Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms of execution by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin. See *In bonis De la Saussaye*, 3 P. & D. 42; *In bonis Donahlson*, 3 P. & D. 45; *In bonis Lacroix*, 2 P. D. 94; *In bonis Gatti*, 27 W. R. 323.

Wills made in the kingdom to be admitted if made according to local usage.

2. Every will and other testamentary instrument made within the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, 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.

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Change of domicile not to invalidate will.

3. No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same.

Sects. 1 and 2 apply to British subjects.

Sects. 1 and 2 apply to British subjects only, and neither this Act nor sect. 2 of the Naturalization Act, 1870 (33 Vict. c. 14), enables an alien to make a will in English form, whether his domicile at the date of the will and death is foreign or English. *In bonis Von Buseck*, 6 P. D. 211; *S. C., Bloxam* v. *Favre*, 8 P. D. 101; 9 *ib.* 130; *In bonis Keller*, 61 L. J. P. 39; 65 L. T. 763.

But a foreigner who has obtained letters of naturalization as a British subject is a British subject within the meaning of the Act. *In bonis Gally*, 1 P. D. 438.

"Personal estate" includes leaseholds.

The words "personal estate" in sects. 1 and 2 include leaseholds. *In re Watson; Carlton* v. *Carlton*, 35 W. R. 711; *In re Grassi; Stubberfield* v. *Grassi*, (1905) 1 Ch. 584.

Effect of sect. 3.

Sect. 3 is not limited to wills of British subjects. *In bonis Groos*, (1904) P. 269.

By virtue of that section the will in Scotch form of a person domiciled in Scotland who afterwards marries there and then acquires an English domicile is not revoked, inasmuch as marriage does not revoke a will in Scotland. *In bonis Reid*, 1 P. & D. 74.

Only one law applied at a time.

In ascertaining the validity of testamentary papers the Court will apply the law of one country only at a time. Thus, where a codicil well executed in Italy according to Italian law was endorsed on an unexecuted will, but according to Italian law the codicil could not stand alone and could not confirm the will, it was held that Italian law could not be applied, so as to uphold the codicil, and English law, so as to confirm or republish the will, but that neither could be proved. *Pechell* v. *Hilderley*, 1 P. & D. 673.

Country without testamentary law.

When there is no testamentary law in force in the place where the will is made, a will simply signed but not attested would probably be good. *Stokes* v. *Stokes*, 78 L. T. 50 (Congo Free State).

Domicile.

The validity of wills of personal property, except in the

case of British subjects dying after August, 1861, is governed by the law of the testator's domicile at the date of the death. *Anstruther* v. *Chalmer*, 2 Sim. 1; *Stanley* v. *Bernes*, 3 Hag. 373; *Price* v. *Dewhurst*, 8 Sim. 279; 4 M. & Cr. 76; *Preston* v. *Melville*, 8 Cl. & F. 1; *Craigie* v. *Lewin*, 3 Curt. 435; *De Zichy Ferraris* v. *Lord Hertford*, 3 Curt. 468; *Bremer* v. *Freeman*, 10 Moo. P. C. 306; *Enohin* v. *Wylie*, 10 H. L. 1; see *Eames* v. *Hacon*, 16 Ch. D. 407.

Legislative changes in the law of the country, where the deceased was domiciled, made after his death, though with express reference to his will, cannot be considered in deciding upon the right to have the will proved in this country. *Lynch* v. *Provisional Government of Paraguay*, 2 P. & D. 268.

Domicile governs administration and construction of will.

The administration of the personal property of a deceased person, whether a British subject or not, including the construction of his will, is governed by the law of his domicile at the time of his de... unless the testator indicates that the will was intended to take effect with reference to some other law. *Enohin* v. *Wylie*, 10 W. R. 467; 10 H. L. 1; see *Doglioni* v. *Crispin*, L. R. 1 H. L. 301; *Ewing* v. *Orr-Ewing*, 9 App. C. 34; 10 App. C. 453; *In re Hernando*; *Hernando* v. *Sawtell*, 27 Ch. D. 284; *In re Trufort*; *Trafford* v. *Blanc*, 36 Ch. D. 600; *In re Marsland*, 55 L. J. Ch. 581; *Abd-ul-Messih* v. *Farra*, 13 App. C. 431, P. C.; *In re Price*; *Tomlin* v. *Latter*, (1900) 1 Ch. 442.

There is an exception to this general rule in the case of a will made in exercise of a general power of appointment in a foreign instrument, such as a Scotch will. In that case an appointment by will is governed by Scotch law, though the appointor may be domiciled in England. *Re Bald*; *Bald* v. *Bald*, 76 L. T. 462; see *In re Mégret*; *Tweedie* v. *Maunder*, (1901) 1 Ch. 547.

Procedure.

In matters of procedure, such as payment of interest on legacies, the Court follows its own practice. *Hamilton* v. *Dallas*, 38 L. T. 215.

Validity of foreign wills in England.

The question has frequently arisen how far the will of a foreigner domiciled in a foreign country can take effect in

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England free from testamentary restrictions imposed by foreign law.

Effect of English settlement conferring testamentary powers.

Where, upon the marriage of an English woman with a foreigner, a settlement is executed in English form of property belonging to the lady invested in England in the names of English trustees, the inference is that the settlement was intended to be governed by English law. *Van Grutten* v. *Digby*, 31 B. 561; *In re Bankes; Reynolds* v. *Ellis*, (1902) 2 Ch. 333; see *In re Fitzgerald; Surman* v. *Fitzgerald*, (1904) 1 Ch. 573.

If then the settlement confers a general or special power of appointment by will on the married woman, or the effect of it is that the property is to be held for her separate use, she can dispose of it by will free from the restrictions which the law of her domicile imposes on the right of testamentary disposition. *In re Hernando; Hernando* v. *Sawtell*, 27 Ch. D. 284; *Pouey* v. *Horden*, (1900) 1 Ch. 492; *In re Mégret; Tweedie* v. *Maunder*, (1901) 1 Ch. 547; see, too, *Kelly* v. *Selwyn*, (1905) 2 Ch. 117.

Frenchman married in France becoming domiciled in England.

Where a Frenchman marries without a settlement, so that the law of community of goods applies, the effect is the same as if he had executed a marriage settlement in accordance with that law, and if he dies domiciled in England he cannot dispose of his personal property in such a way as to interfere with the rights of the wife under the law of community of goods. *In re De Nicols; De Nicols* v. *Curlier*, (1900) A. C. 21; where *Lashley* v. *Hog*, 4 Pat. 581, is explained.

CHAPTER II.

DOMICILE.

Domicile independent of allegiance.

THE question of domicile is independent of naturalization and allegiance. *Udny* v. *Udny*, L. R. 1 H. L. Sc. 441; *Hahlane* v. *Eckford*, 8 Eq. 631; *Brunel* v. *Brunel*, 12 Eq. 299; *Douglas* v. *Douglas*, 12 Eq. 617. The following cases on this point are overruled—*Moorhouse* v. *Lord*, 10 H. L. 272; *In re Capdevielle*, 2 H. & C. 985; *A.-G.* v. *Countess de Wahlstatt*, 3 H. & C. 374; *Jopp* v. *Wood*, 34 B. 88; 13 W. R. 481; *Maltass* v. *Maltass*, 1 Rob. 67.

Domicile in a country that does not recognise domicile. Renvoi.

A difficulty arises when a British subject is by an English Court found to be domiciled in a foreign country, and the law of that country recognises only nationality and not domicile. In such a case it has been held that the law of the deceased person's domicile of origin applies. *In re Johnson*; *Roberts* v. *A.-G.*, (1903) 1 Ch. 821.

Domicile of origin.

According to English law every person has a domicile. If a domicile of choice has not been acquired, the law attributes to him a domicile, which is called his domicile of origin.

The better opinion appears to be that domicile of origin means the domicile at birth and not the last domicile imposed by the choice of a father or other person having authority to change the domicile of an infant by changing his own; see *Udny* v. *Udny*, L. R. 1 H. L. Sc. 441; Westlake's Private Int. Law, p. 312, § 261; *In re Craignish*; *Craignish* v. *Hewitt*, (1892) 3 Ch. 180.

Domicile of children.

The domicile of origin of a legitimate child is that of its father; of an illegitimate child that of its mother. *Dalhousie* v. *Macdonall*, 7 Cl. & F. 817; *Munro* v. *Munro*, 7 Cl. & F. 842; *Re Patten*, 6 Jur. N. S. 151.

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After the death of their father, the mother, so long as she remains a widow, has power to change the domicile of her infant children. They do not necessarily acquire her domicile. *Potinger* v. *Wightman*, 3 Mer. 67; see *Johnston* v. *Beattie*, 10 Cl. & F. 42, 66; *In re Beaumont*, (1893) 3 Ch. 490.

The power of the mother to change the domicile of her infant children apparently continues after her remarriage. See *In re Beaumont*, *supra*; *Lamar* v. *Micou*, 112 U. S. Rep. 452; 114 U. S. Rep. 218

It is doubtful whether a guardian can change an infant's domicile. *Douglas* v. *Douglas*, 12 Eq. 617, 625; *Lamar* v. *Micou*, *supra*.

Domicile of lunatic.

The domicile of a person who is a lunatic when he attains his majority, and so remains up to the time of his death, changes with that of his father in the case of a legitimate child, and with that of his mother in the case of an illegitimate child, when there is no committee of the person. *Sharpe* v. *Crispin*, 1 P. & D. 611.

Domicile of married woman.

The domicile of a married woman at any given time is the domicile of her husband at that time. *Warrender* v. *Warrender*, 2 Cl. & F. 488; *Dalhousie* v. *Mardonall*, 7 Cl. & F. 817; *Whitcomb* v. *Whitcomb*, 2 Curt. 351; *Dolphin* v. *Robins*, 7 H. L. 390; *Bell* v. *Kennedy*, L. R. 1 H. L. Sc. 307; *Harvey* v. *Farnie*, 8 App. C. 43.

The fact that the marriage is voidable makes no difference. *Turner* v. *Thompson*, 13 P. D. 37.

A married woman living apart from her husband under an agreement for a separation has no power to change her domicile by her own act. *Warrender* v. *Warrender*, 2 Cl. & F. 488; *In re Daly's Settlement*, 25 B. 456.

After a decree for a divorce the wife can select her own domicile. *Williams* v. *Dormer*, 2 Rob. 505.

It would seem that the same rule should apply after a judicial separation. See *Dolphin* v. *Robins*, 7 H. L., pp. 416, 420; *Le Sueur* v. *Le Sueur*, 1 P. D. 139; 2 P. D. 79.

Military service.

Persons entering the military service of any state acquire the domicile of that state. *President of United States* v. *Drummond*, 12 W. R. 701; 33 B. 449.

As to the civil service, see *Urquhart* v. *Butterfield*, 37 Ch. D. 377.

But the domicile of a person domiciled within the United Kingdom, for instance in Jersey, is not changed by entering the military service of the Crown. *Re Patten*, 6 Jur. N. S. 151; *Brown* v. *Smith*, 15 B. 444; *Yelverton* v. *Yelverton*, 29 L. J. P. 34; 1 Sw. & T. 574; *Ex parte Cunningham*; *In re Mitchell*, 13 Q. B. D. 418; *Re Macreight*; *Paxton* v. *Macreight*, 30 Ch. D. 165.

East India Company's service.

Entry into the service of the East India Company formerly effected a change of domicile. *Bruce* v. *Bruce*, 2 B. & P. 229, n.; 5 B. P. C. 566; *Munroe* v. *Douglas*, 5 Mad. 379; *Forbes* v. *Forbes*, Kay, 341; *Craigie* v. *Lewin*, 3 Curt. 435.

Anglo-Chinese domicile.

The Court does not recognise an Anglo-Chinese domicile. *In re Tootal's Trusts*, 23 Ch. D. 532.

The domicile of origin endures until an actual change is made by which another domicile is acquired. *Bell* v. *Kennedy*, L. R. 1 H. L. Sc. 307; *Ommaney* v. *Bingham*, cit. 5 Ves. 757; *Somerville* v. *Lord Somerville*, 5 Ves. 749, 786; *Moore* v. *Budd*, 1 Hag. 346; *Munro* v. *Munro*, 7 Cl. & F. 842, 876; *Countess of Dalhousie* v. *Macdonall*, 7 Cl. & F. 817; *A.-G.* v. *Dunn*, 6 M. & W. 511; *De Bonneval* v. *De Bonneval*, 1 Curt. 856.

The abandonment of a domicile of origin is a serious matter and must be proved by satisfactory evidence. *Marchioness of Huntly* v. *Gaskell*, 1906) A. C. 56.

Domicile of choice.

A domicile of choice is acquired by a person who fixes his sole or principal residence in a country which is not his country of origin with the intention of residing there for a period not limited as to time. *King* v. *Foxwell*, 3 Ch. D. 518; *Drevon* v. *Drevon*, 12 W. R. 946; *The Harmony*, 2 C. Rob. Ad. 322; *Bempde* v. *Johnstone*, 3 Ves. 198.

Whether country must recognise domicile.

Possibly the above proposition must now be qualified by adding that the country must be one which recognises domicile. *In re Johnson*; *Roberts* v. *A.-G.*, (1903) 1 Ch. 821.

China and Turkey.

Every presumption is to be made against the acquisition by an Englishman of a domicile of choice in such countries as China and Turkey, where there is a total difference of religion, customs, and habits. *The Indian Chief*, 3 C. Rob. Ad. 22, 29;

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Mallass v. *Mallass*, 1 Rob. 67; *In re Tootal's Trusts*, 23 Ch. D. 532.

Trading settlements.

Residence in a foreign state as a privileged member of an extra-territorial community destroys a domicile of choice acquired elsewhere, but does not create a new domicile; and persons residing in such communities retain or resume, as the case may be, their domicile of origin. *In re Tootal's Trusts*, 23 Ch. D. 532; *Abd-ul-Messih* v. *Farra*, 13 App. C. 431, P. C.

Disability to acquire domicile of choice.

A person may by the duties of his position, or by his profession, be disqualified from acquiring a domicile of choice.

Thus it seems that an officer holding a commission from the Crown cannot acquire a new domicile unless he is on half-pay. *Craigie* v. *Lewin*, 3 Curt. 435; *Hodgson* v. *De Beauclerc*, 12 Moo. P. C. 285; *Cockrell* v. *Cockrell*, 25 L. J. Ch. 730; *Re Macreight*; *Paxton* v. *Macreight*, 30 Ch. D. 165; see *The Lauderdale Peerage*, 10 App. C. 692.

Ambassador or peer.

But there is nothing in the position of an ambassador or peer of the realm to prevent the acquisition of a domicile of choice. *Heath* v. *Samson*, 14 B. 441; *A.-G.* v. *Kent*, 1 H. & C. 12; *Hamilton* v. *Dallas*, 1 Ch. D. 257.

Compulsory residence.

A domicile of choice can only be acquired by choice; therefore a compulsory residence abroad as a refugee, or to avoid creditors, will not effect a change of domicile, unless followed by voluntary adoption of the new domicile. *De Bonneval* v. *De Bonneval*, 1 Curt. 864; *Pitt* v. *Pitt*, 12 W. R. 1089; *In re Dalcep Singh*; *Ex parte Cross*, 7 Morrell, 228; see *In re Martin*; *Loustalan* v. *Loustalan*, 69 L. J. P. 74.

Similarly residence abroad in the performance of a public duty, such as that of judge, military officer, or consul, does not in itself confer a foreign domicile. *A.-G.* v. *Rowe*, 1 H. & C. 31; *A.-G.* v. *Napier*, 6 Ex. 217; *Sharpe* v. *Crispin*, 1 P. & D. 611.

Residence for sake of health.

A person compelled to go abroad for the sake of his health would probably not acquire a foreign domicile. See *Johnston* v. *Beattie*, 10 Cl. & F. 42, 138; *Winans* v. *A.-G.*, (1904) A. C. 287.

But where a foreign country is selected as a residence in the hope or opinion that it may be better suited to the health or

constitution, a domicile of choice may be acquired. *Hoskins* v. *Matthews*, 8 D. M. & G. 13.

Domicile of choice constituted by completed intention.

Domicile of choice is a mixed question of intention and act; there must be an intention to reside permanently in a particular country, followed by actual residence. Where the intention is clear, length of residence is immaterial.

Where there is no direct evidence of intention, length of residence is material as showing what the intention was. See *In re Groves*; *Vauclier* v. *The Solicitor to the Treasury*, 40 Ch. D. 216.

Thus a fixed intention to adopt a certain place as a domicile, followed by arrival at that place, at once constitutes that place a domicile. *Bell* v. *Kennedy*, L. R. 1 H. L. Sc. 307.

Quæres quo se confirat.

The fact of residence in a particular place will not constitute that place a domicile of choice, so long as the person residing is in search of some permanent place of residence, and has not made up his mind where it shall be. *Bell* v. *Kennedy*, L. R. 1 H. L. Sc. 307; *Whicker* v. *Hume*, 7 H. L. 124; *Re Patience*; *Patiner* v. *Main*, 29 Ch. D. 976; see *In re Craignish*; *Craignish* v. *Hewitt*, (1892) 3 Ch. 180.

Permanent residence.

By permanent residence must be understood residence to which no definite limit of time can be assigned.

Thus residence abroad with a view to making a fortune will effect a change of domicile. *Lyall* v. *Paton*, 25 L. J. Ch. 746; *Allardice* v. *Onslow*, 33 L. J. Ch. 434; see *Goulder* v. *Goulder*, (1892) P. 240.

So an intention to reside in a country as long as another person lives is in effect an intention to reside permanently. *Anderson* v. *Laneuville*, 9 Moo. P. C. 325.

Intention to return.

Where a person has in fact taken up a permanent residence in a country, that country will be his domicile notwithstanding an intention to retain his domicile of origin, or some other domicile. *A.-G.* v. *Kent*, 1 H. & C. 12; *A.-G.* v. *Fitzgerald*, 3 Dr. 610; *In re Steer*, 3 H. & N. 594; *Doucet* v. *Geoghegan*, 26 W. R. 825; 9 Ch. D. 441. See, too, *Stanley* v. *Bernes*, 3 Hag. 373; *Anderson* v. *Laneuville*, 9 Moo. P. C. 325; *In bonis Raffenel*, 3 Sw. & T. 42; *Stevenson* v. *Masson*, 17 Eq. 78.

Two residences.

Where a person has two residences, the place where he

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usually resides with his wife and family will be considered his place of domicile. *Forbes* v. *Forbes*, Kay, 341; *Aitcheson* v. *Dixon*, 10 Eq. 589; *Platt* v. *A.-G. of New South Wales*, 3 App. C. 336; *D'Etchegoyen* v. *D'Etchegoyen*, 13 P. D. 132.

Revival of domicile of origin.

Where a domicile of choice is abandoned, the domicile of origin is revived until a fresh domicile of choice is acquired. *The Indian Chief*, 3 C. Rob. Ad. 12; *In bonis Bianchi*, 3 Sw. & T. 16; *Udny* v. *Udny*, L. R. 1 H. L. Sc. 441; *King* v. *Foxwell*, 3 Ch. D. 518; *In re Marrett; Chalmers* v. *Wingfield*, 36 Ch. D. 400; overruling *Munroe* v. *Douglas*, 5 Mad. 379, 405, so far as inconsistent.

Domicile Act, 1861.

By the Domicile Act, 1861 (24 & 25 Vict. c. 121), where a convention has been entered into with a foreign state willing to adopt the provisions of the Act, an order in Council may direct that no British subject resident in such state shall acquire a domicile there unless he shall have been resident there for a year, and shall have made a declaration of his intention to become domiciled there; and the subjects of the foreign state are to acquire a British domicile only after the same formalities have been gone through.

This power has not been exercised.

CHAPTER III.

GENERAL CHARACTERISTICS OF TESTAMENTARY INSTRUMENTS.

Testamentary gift.

A GIFT intended to be testamentary can only be effectually made by an instrument duly executed as a will. Thus, a direction to give property to a person after the donor's death, where the donor retains full control of the property during his life, is invalid. *Powell* v. *Hellicar*, 26 B. 261; *Fletcher* v. *Fletcher*, 4 Ha. 79; *Hughes* v. *Stubbs*, 1 Ha. 481; *Maguire* v. *Dodd*, 9 Ir. Ch. 452; *Farquharson* v. *Carr*, 2 Coll. 356; *Gough* v. *Findon*, 7 Ex. 48; *O'Flaherty* v. *Browne* (1907), 2 Ir. 416.

Deed to take effect after death.

In the same way a deed not intended to have any effect till the settlor's death is testamentary. *Cousett* v. *Bell*, 1 Y. & C. C. 569; *Rigden* v. *Vallier*, 2 Ves. Sen. 253; *Dillon* v. *Coppin*, 4 M. & Cr. 647; *In bonis Morgan*, 1 P. & D. 214; *Fielding* v. *Walshaw*, 27 W. R. 492; *In re Rabson*; *Exley* v. *Davidson*, 30 W. R. 257; *Milnes* v. *Foden*, 15 P. D. 155.

Voluntary settlement.

A voluntary settlement, though reserving to the settlor a life interest and containing a power of revocation, is not testamentary. *Thompson* v. *Browne*, 3 M. & K. 32. The case of *A.-G.* v. *Jones*, 2 Pr. 368, is overruled; see *Marjoribanks* v. *Hovenden*, Dr. 11, 27, 34; *Sheldon* v. *Sheldon*, 1 Rob. 83; *Brown* v. *Adcock*, 1 Macq 79; *Hope* v. *Harman*, 11 Jur. 1097; *Hope* v. *Hope*, 10 B. 581.

Similarly, an instrument coming into operation immediately, and of which no part is revocable, more especially if it involves anything in the nature of consideration, cannot take effect as a will. *In bonis Robinson*, 1 P. & D. 384; see *In bonis Halpin*, I. R. 8 Eq. 567; *Thorncroft* v. *Lashmar*, 10 W. R. 783.

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Deed in part testamentary.

On the other hand, if a deed is in part clearly testamentary, such part may take effect as a will, though other parts are not testamentary. *Doe* d. *Cross* v. *Cross*, 8 Q. B. 714; see *Peacocke* v. *Monk*, 1 Ves. 127, Belt, 82; *Bagnall* v. *Downing*, 2 Lee, 3.

What may take effect as a will.

Any instrument executed in the manner required by the Wills Act may take effect as a will, provided the intention was that it should not operate till after the death of the donor.

Thus, the following instruments, being properly executed, have been allowed to take effect as testamentary dispositions:—

Orders on a savings bank, and on a banker. *In bonis Marsden*, 1 Sw. & T. 542; *Jones* v. *Nicolay*, 2 Rob. 288.

A cheque to take effect after death. *Bartholomew* v. *Henley*, 3 Phillim. 317.

A letter. *Denny* v. *Barton*, 2 Phillim. 575; *In bonis Mundy*, 2 Sw. & T. 119; 9 W. R. 171.

A paper containing wishes and a dying request. *In bonis Lowry*, 5 N. of C. 619; *In bonis Mundy*, 2 Sw. & T. 119.

A deed of gift to take effect at death. *Habergham* v. *Vincent*, 2 Ves. J. 204; 4 B. C. C. 355; *Thorold* v. *Thorold*, 1 Phillim. 1; *Shergold* v. *Shergold*, cit. *ib.* 10; *In bonis Montgomery*, 5 N. of C. 99; *In bonis Morgan*, 1 P. & D. 214; *Fielding* v. *Walshaw*, 27 W. R. 492.

An instrument to take effect two years "after my wife's death if she survives me." *In bonis Newens*, 7 Jur. N. S. 688.

A nomination paper under the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. [illegible] s. [illegible], though not operative under the Act. *In bonis Baxter*, (1900) P. 12.

Instrument must refer to death.

Where there is nothing to show that an instrument has reference to the death of the person executing it, it cannot have effect as a will. *Glynn* v. *Oglander*, 2 Hag. 428; *King's Proctor* v. *Daines*, 3 Hag. 218; *Shingler* v. *Pemberton*, 4 Hag. 359; *Marjoribanks* v. *Horsenden*, Dru. 11.

Evidence of testamentary intention.

But evidence is admissible to show that a deed or other instrument of gift, which on the face of it is not testamentary,

was not intended to operate till the death of the person executing it. *Cook* v. *Cooke*, 1 P. & D. 241; *Robertson* v. *Smith*, 2 P. & D. 43; *In bonis Coles*, 2 P. & D. 362; *In bonis Webb*, 3 Sw. & T. 482; 10 Jur. N. S. 709; *In bonis English*, 3 Sw. & T. 586; *In bonis Slinn*, 15 P. D. 156.

And, conversely, evidence is admissible to show that an instrument on the face of it testamentary was not intended to be a will. *Nicholls* v. *Nicholls*, 2 Phillim. 183; *Lister* v. *Smith*, 3 Sw. & T. 282; *Trevelyan* v. *Trevelyan*, 1 Phillim. 149; *In bonis Noscorthy*, 11 Jur. N. S. 570.

Intention to make will.

An instrument, expressing merely an intention of instructing a solicitor to prepare a testamentary instrument with a view to make a particular legacy, will not take effect as a testamentary instrument, where there is no extraneous evidence of testamentary intention. *Corentry* v. *Williams*, 3 Curt. 787.

Instructions for will.

A duly executed instrument, described as instructions for a will, may have effect as a will, if it appears that it was intended to take effect in the absence of a more formal instrument. *Bone* v. *Spear*, 1 Phillim. 345; *Torre* v. *Castle*, 1 Curt. 303; 2 Moore, P. C. 133; *Barrick* v. *Mullings*, 2 Hag. 225; *Hattatt* v. *Hattatt*, 4 Hag. 211; *Whyte* v. *Pollok*, 7 App. C. 400; see *Ferguson-Davie* v. *Ferguson-Davie*, 15 P. D. 109.

Conditional wills.

Wills are often expressed to be conditional upon the testator's death before a given period, such as return from a voyage or a military expedition, or the like, and if the condition is clearly expressed, the will does not take effect if the condition is not fulfilled. *Parsons* v. *Lance*, 1 Ves. Sen. 189; *In bonis Winn*, 2 Sw. & T. 147; *Roberts* v. *Roberts*, *ib.* 337; *In bonis Porter*, 2 P. & D. 22; *In bonis Robinson*, *ib.* 171; *Lindsay* v. *Lindsay*, *ib.* 459; *In bonis Hugo*, 2 P. D. 73.

On the other hand, if the will is so expressed as to show that the contingency is the motive which induces the testator to make the will, the will is not conditional. *Burton* v. *Collingwood*, 4 Hag. 176; *In bonis Thorne*, 4 Sw. & T. 36; *In bonis Dobson*, 1 P. & D. 88; *In bonis Mayd*, 6 P. D. 17; *Re Stuart*, 21 L. R. Ir. 105.

In other cases it may be gathered from the disposition of

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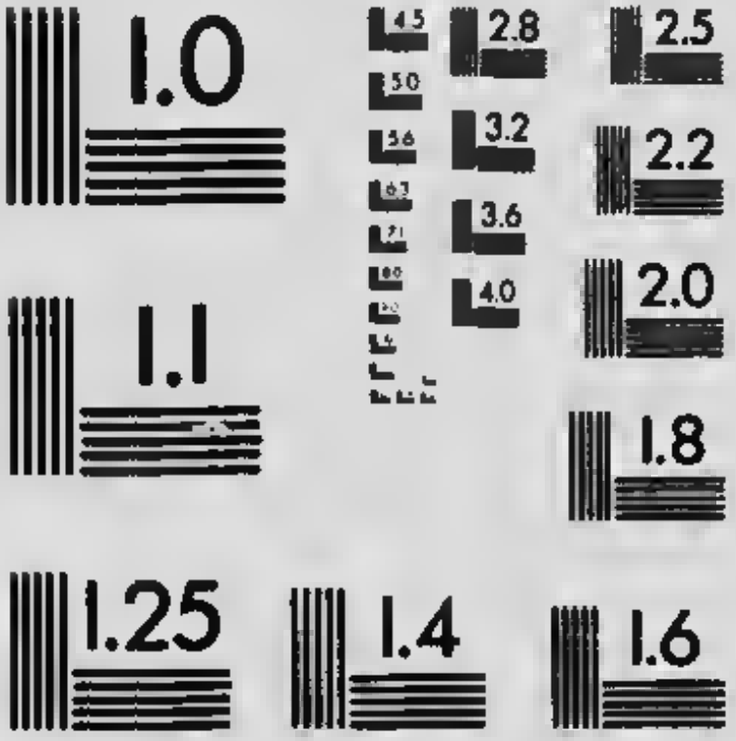

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property and other circumstances that a will expressed to be conditional was intended to take effect without regard to the condition. *In bonis Martin*, 1 P. & D. 380; *In bonis Spratt*, (1897) P. 28, where the cases are discussed; *Halford* v. *Halford*, *ib.* 36; *Townsend* v. *Moore*, (1905) P. 66.

Conditional codicil.

Probate may be granted of a conditional codicil, as it may have the effect of republishing the will. *In bonis Silva*, 2 Sw. & T. 315.

Option to third person to declare instrument testamentary.

It would seem that a testator cannot leave it to another person to decide whether an instrument shall take effect as a will or not. The testator himself would be without t stamentary intention. But probably a testamentary instrument may be made conditional on the assent of a third person.

Where a testator in a codicil gave his wife the option of adding the codicil to his will or not, and she did not wish it proved, it was held that the codicil ought not to be proved. It does not follow that it could have been proved if she had wished it. *In bonis John Smith*, 1 P. & D. 717.

Will revocable.

A will is in all cases revocable, even though the testator may declare it to be irrevocable. *Vinyor's Case*, 8 Rep. 82a.

Joint wills.

Persons may make joint wills, which are, however, revocable at any time by either of them or by the survivor. *Hobson* v. *Blackburn*, 1 Add. 274; *In bonis Stracey*, Dea. & S. 6; *In bonis Lovegrove*, 2 Sw. & T. 453; *In bonis Fletcher*, 11 L. R. Ir. 359.

A joint will may be made to take effect after the death of both testators; and if the joint will is not a disposition by each testator of his own property, but a disposition of joint property after the death of the survivor, the will cannot be proved till the death of the survivor. *In bonis Raine*, 1 Sw. & T. 144.

In ordinary cases a joint will is looked upon as the will of each testator, and may be proved on the death of one. *In bonis Stracey*, 1 Jur. N. S. 1197; Dea. & S. 6; *In bonis Miskelly*, I. R. 4 Eq. 62, where *In bonis Raine* is disapproved; see *In bonis Piazzi Smyth*, 77 L. T. 375.

Mutual wills.

It seems that two persons may agree to make mutual wills, which remain revocable during the joint lives by either with

such notice to the other as may enable him to alter his will also, but become irrevocable after the death of one of them if the survivor takes advantage of the provisions made by the other. *Dufour* v. *Pereira*, 1 Dick. 419; 2 Harg. Jur. Arg. 272; 2 Harg. Jur. Ex. 101; see 3 Ves. 416; *Lord Walpole* v. *Lord Orford*, 3 Ves. 402; *Denyssen* v. *Mostert*, L R. 4 P. C. 236; *Dias* v. *De Livera*, 5 App. C. 123, P. C.; *Stone* v. *Hoskins*, (1905) P. 194.

CHAPTER IV.

TESTAMENTARY CAPACITY.

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General capacity.

A TESTATOR must, at the time of making his will, have an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who have a claim to be the objects of his bounty, and the manner in which it is to be distributed. *Harwood* v. *Baker*, 3 Moo. P. C. 282; *Longford* v. *Purdon*, 1 L. R. Ir. 75.

The question of sanity is a question of fact, and there is no presumption that a testator is sane till the contrary is shown. *Sutton* v. *Sadler*, 5 W. R. 880; 3 C. B. N. S. 87; *Symes* v. *Green*, 1 Sw. & T. 401; *Cleare* v. *Cleare*, 1 P. & D. 655.

Delusions.

Where a testator is subject to delusions with regard to persons who would be the natural objects of his testamentary bounty, his will made while he is under the influence of such delusions is invalid. *Dew* v. *Clark*, 3 Add. 79; 5 Russ. 163; *Waring* v. *Waring*, 6 Moo. P. C. 341; *Smith* v. *Tebbitt*, 1 P. & D. 398; *Boughton* v. *Knight*, 3 P. & D. 64.

Where a testator is subject to delusions, which leave the general power of understanding unaffected and are wholly unconnected with his testamentary dispositions, such delusions do not affect his capacity to make a will. *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549; *Smee* v. *Smee*, 5 P. D. 84; see *Jenkins* v. *Morris*, 14 Ch. D. 674; *Murfett* v. *Smith*, 12 P. D. 116; *Hope* v. *Campbell*, (1899) A. C. 1.

Will of person who has been or is insane.

A will made by a testator after he has been insane must be shown to have been made after his recovery or in a lucid interval. *Groom* v. *Thomas*, 2 Hagg. 433; *A.-G.* v. *Parnther*, 3 B. C. C. 443; *Hall* v. *Warren*, 9 Ves. 611; *Waring* v. *Waring*, 6 Moo. P. C. 341.

And a lunatic so found by inquisition may make a will during a lucid interval, though a deed executed by him is void. *In bonis Watts*, 1 Curt. 594; *Cooke* v. *Cholmondeley*, 2 Mac. & G. 18, 22; *Bannatyne* v. *Bannatyne*, 16 Jur. 864; *In re Walker*, (1905) 1 Ch. 160.

Lucid interval.

Upon the question whether a will was made during a lucid interval, the rational character of the will, where it is prepared by the testator without assistance, is evidence to show that it was made in a lucid interval. *Cartwright* v. *Cartwright*, 1 Phillim. 90, 100; *White* v. *Driver*, 1 Phillim. 88; *Brogden* v. *Brown*, 2 Add. 445; *Ayrey* v. *Hill*, 2 Add. 210.

Every person of sound mind and not under some special disability may make a will.

Infants.

A will made by a person under twenty-one (unless he is a soldier in actual military service, or a mariner or seaman at sea) is invalid. 1 Vict. c. 26, s. 7; Sugd. R. P. Stat. 330.

Married women.

Sect. 8 of the Wills Act provides that no will made by any married woman shall be valid except such a will as might have been made by a married woman before the passing of the Act.

The effect of the section is to leave the testamentary capacity of a married woman as it was before the Act, but it does not exclude the wills of married women from the operation of the Act. Where a married woman had power before the Act to make a will, then since the Act all the provisions of the Act apply to a will so made. *Bernard* v. *Minshull*, Jo. 276, 297; *Thomas* v. *Jones*, 1 D. J. & S. 63, 80.

Married Women's Property Act, 1882.

Under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (1), a married woman may dispose by will of any real or personal property as her separate property, as if she were a *feme sole*.

Married Women's Property Act, 1893.

And sect. 3 of the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), enacts that "sect. 24 of the Wills Act, 1837, 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."

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The Act was passed on the 5th December, 1893. No time is fixed for its commencement; it therefore takes effect from the date of its passing. Sect. 3 is not in terms limited to the wills of married women who die after the passing of the Act; but no doubt it must be so limited. It is not limited to wills made after the passing of the Act. *In re Wylie; Wylie* v. *Moffat*, (1895) 2 Ch. 116.

Effect of Married Women's Property Act, 1882.

As regards a woman married before the 1st January, 1883, sect. 5 of the Act of 1882 makes any property her title to which accrues after that date her separate estate, and therefore disposable by will. If the title whether vested or contingent or in reversion accrues before that date, the Act does not apply. *Reid* v. *Reid*, 31 Ch. D. 402; *In re Bacon; Toovey* v. *Turner*, (1907) 1 Ch. 475.

Where property comes to a married woman under a bequest to next of kin to be ascertained at a certain time, her title accrues at that time, and not at the testator's death. *In re Parsons; Stockley* v. *Parsons*, 45 Ch. D. 51.

The Act of 1882 did not enlarge the testamentary capacity of married women, except in so far as it converted certain property into separate estate, which was not separate estate before the Act.

Thus a woman married before the Act could not by a will made during the coverture dispose of property her title to which accrued before the Act, and the Act did not enable a married woman by a will made during the coverture to dispose of property accruing to her after the coverture. *In re Cano; Mansfield* v. *Mansfield*, 43 Ch. D. 12; *In re Price; Stafford* v. *Stafford*, 28 Ch. D. 709; *In re Taylor; Whitby* v. *Highton*, 57 L. J. Ch. 430; 58 L. T. 842; 36 W. R. 683.

This is now altered by the Act of 1893; see *supra*.

Powers of married women before the Act.

Before the Married Women's Property Act, 1882, a married woman had no power to make a will except in the following cases:—

1. Might continue representation to an estate.

1. A married woman, who was an executrix, could make a will and appoint an executor for the purpose of continuing the representation to the original testator. *Scammell* v. *Wilkinson*, 2 East, 552; *Birkett* v. *Vandercom*, 3 Hagg. 750; *In bonis Richards*, 1 P. & D. 156.

2. Will under power.

2. A married woman might by a will made in exercise of a power dispose of the legal and equitable estate in lands and of personal estate. *Driver* v. *Thompson*, 4 Taunt. 294; *Willock* v. *Noble*, L. R. 7 H. L. 580; *In re Austis; Chetwynd* v. *Morgan*, 31 Ch. D. 5, 5.

A power of making a testamentary appointment given to a woman by a settlement made on her first marriage might be exercised during that or any subsequent marriage. *Burnett* v. *Mann*, 1 Ves. Sen. 156; *Hawksley* v. *Barrow*, 1 P. & D. 147.

Whether power destroyed by conveyance.

In the case of realty, where a married woman having appointed by will under a power survived her husband and took a conveyance to herself, the conveyance has been held to execute the power and to revoke the will. *Lawrence* v. *Wallis*, 2 B. C. C. 319.

In the case of personalty, however, it has been held that where a married woman having made a will under a power survived her husband and took an assignment of the fund over which the power extended from the trustees, the will was nevertheless valid. *Dingwell* v. *Askew*, 1 Cox, 427; *Clough* v. *Clough*, 3 M. & K. 296. These cases are probably open to reconsideration.

3. Will of separate estate.

3. A married woman could dispose by will of personal estate and of the beneficial interest in real estate when settled to her separate use. *Taylor* v. *Meads*, 10 Jur. N. S. 166; 34 L. J. Ch. 203; 4 D. J. & S. 597; *Pride* v. *Bubb*, 7 Ch. 64; *Hall* v. *Waterhouse*, 10 Jur. N. S. 361; 5 Giff. 64; see *Dye* v. *Dye*, 13 Q. B. D. 147.

A restraint upon anticipation affecting *corpus* does not prevent a disposition by will. *Re Currey; Gibson* v. *Wey*, 56 L. T. 80.

After-acquired separate estate.

Though the married woman had no separate estate at the date of the will, the will took effect as regards after-acquired separate estate. *Charlemont* v. *Spencer*, 11 L. R. Ir. 347, 490.

Property which becomes the separate estate of a married woman under the Married Women's Property Act is for this purpose on the same footing as her other separate estate. *In re Bowen; James* v. *James*, (1892) 2 Ch. 291.

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The legal estate not being affected by the separate use could not be disposed of by will.

Savings.

The accumulations of property belonging to a married woman for her separate use, made during coverture, whether by herself or a trustee for her, are separate estate. *Mayd* v. *Field*, 3 Ch. D. 587; *In re Wilson*; *Menteith* v. *Campbell*, 26 W. R. 848; *In bonis Tharp*, 3 P. D. 76.

Separate use to arise on contingency.

In Ireland it has been held that property given to a married woman for her separate use in the event of the insolvency of her husband could not be disposed of before the husband became insolvent. *Mara* v. *Manning*, 2 J. & Lat. 311; 8 Ir. Eq. 218; *Bestall* v. *Bunbury*, 13 Ir. Ch. 318; *Keays* v. *Lane*, I. R. 3 Eq. 1; see *In re Smallman's Estate*, I. R. 8 Eq. 249. But the doctrine of these cases is not consistent with English authorities.

Where a married woman had a power to appoint if she should not survive her husband, and an absolute interest to her separate use if she survived him, a will made during coverture, expressed to be in virtue of the power and of every other power enabling her, took effect upon the separate estate if she survived her husband. *Bishop* v. *Wall*, 3 Ch. D. 194.

4. Will *ex assensu viri*.

4. A married woman might with her husband's assent, which could be given before or after her death, dispose by will of personal property not settled to her separate use and over which she had no power of appointment. *Willock* v. *Noble*, L. R. 8 Ch. 778; 7 H. L. 580; *Ex parte* [illegible]*ne*, 16 Sim. 406; *Elliot* v. *North*, (1901) 1 Ch. 424.

It was necessary that the assent of the husband should be given to the particular will with knowledge of its contents.

It was said in *Noble* v. *Willock*, 8 Ch. p. 790, that the husband might withdraw his assent until he had either assented to probate or had acted upon the will.

But an assent to the probate of the will once given after the wife's death could not be withdrawn. *Maas* v. *Sheffield*, 1 Rob. 364; *In bonis Cooper*, 6 P. D. 34; *Chappell* v. *Charlton*, 56 L. J. P. 73; 57 L. T. 496.

Probate is now granted of the will of a married woman without any exception or limitation, and the husband is not,

by proving the will, to be deemed to have assented to the will as a disposition of property which could only be disposed of with his assent. *In re Atkinson; Waller* v. *Atkinson*, (1899) 2 Ch. 1; *Elliot* v. *North*, (1901) 1 Ch. 424; see *In bonis Leman*, (1898) P. 215; *In bonis Davis*, W. N. 1899, 61.

Assent revoked by death.

The will of a married woman, in so far as it requires her husband's assent, becomes invalid by his death in her lifetime, whether he has assented to it or not. *Price* v. *Parker*, 15 Sim. 198; *Trimmell* v. *Fell*, 19 B. 537; *Willock* v. *Noble*, L. R. 7 H. L. 580; *In re Wilson; Menteith* v. *Campbell*, 26 W. R. 848.

5. Wife of exile and felon.

5. The wife of a person banished for life by Act of Parliament (*a*), or attainted (*b*), and the wife of an alien enemy (*c*), and of a convict transported for life, though he has received a conditional pardon (*d*), is for testamentary purposes a *feme sole* as regards property vested in her after her husband's disability has been incurred. *Countess of Portland* v. *Prodgers*, 2 Vern. 104 (*a*); *Newsome* v. *Bowyer*, 3 P. W. 37 (*b*); *Deerly* v. *Mazarine*, 1 Salk. 116 (*c*); *Re Martin*, 2 Rob. 405; 15 Jur. 686; *In bonis Coward*, 11 Jur. N. S. 569; 24 L. J. P. 120 (*d*).

The wife of a convict transported for years would seem to be in the same position, notwithstanding *Coombs* v. *Queen's Proctor*, 2 Rob. 547, which was not decided on the ground that the sentence was only for years and is inconsistent with *Re Harrington's Trusts*, 29 B. 24; *Atlee* v. *Hook*, 23 L. J. Ch. 776.

6. Judicial separation. Protection orders.

6. By virtue of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 25, in every case of judicial separation the wife is from the date of the sentence to be considered a *feme sole* with respect to property which she may acquire or which may come to or devolve upon her, and such property may be disposed of by her as a *feme sole*.

Under sect. 21 of the same Act, a wife deserted by her husband may obtain a protection order, and if such an order is made, the wife is during the continuance thereof to be and to be deemed to have been during the desertion in the same position as if she had obtained a decree of judicial separation.

Under this section the will of a married woman made after

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the desertion but before the protection order is valid. *In bonis Elliott*, 2 P. & D. 274.

In the case of a protection order the husband may oppose grant of probate on the ground that the order was obtained by fraud. *Mudge* v. *Adams*, 6 P. D. 54; *Mahoney* v. *McCarthy*, (1892) P. 21.

Under the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 4, protection orders may be made for assault, desertion, persistent cruelty, or wilful neglect to maintain, and by sect. 5 such orders are to have the effect of a decree of judicial separation. See *In bonis Jones*, W. N. 1905, 106.

Limit of testamentary power of married woman.

In cases not within the Married Women's Property Act, 1893, the will of a married woman made during coverture is ineffectual to pass property coming to her after the coverture and not given to her separate use.

Thus such a will does not pass property coming to her under her husband's will, or property settled upon her absolutely if she survives her husband, or the dividends received after the husband's death upon stock settled upon her for life for her separate use, or stock standing in the joint names of husband and wife and coming to the wife by survivorship. *Willock* v. *Noble*, L. R. 7 H. L. 581; *In re Cuno*; *Mansfield* v. *Mansfield*, 43 Ch. D. 12; *Mayd* v. *Field*, 3 Ch. D. 587; *In re Wilson*; *Monteith* v. *Campbell*, 26 W. R. 848; *In bonis Tharp*, 3 P. D. 76; *In re Young*; *Trye* v. *Sullivan*, 28 Ch. D. 705.

As already stated, the Married Women's Property Act, 1882, did not alter the law in this respect. But the Act of 1893 has now done so.

Aliens.

By the Naturalization Act, 1870 (33 Vict. c. 14), which is not retrospective, real and personal property may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject. See *Sharp* v. *St. Saveur*, 7 Ch. 343; *De Geer* v. *Stone*, 22 Ch. D. 243.

Traitors, felons, and suicides.

There appears never to have been any testamentary incapacity as such, affecting traitors, felons or suicides. They were not incapable of making wills; they were only incapable of disposing of such property as was forfeited for their offence.

Thus a *felo de se* could make a will of realty which was not forfeited, and could also appoint an executor by will. *Norris* v. *Chambres*, 7 Jur. N. S. 59; *In bonis Bailey*, 2 Sw. & T. 156.

Forfeiture abolished.

By the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), forfeiture and escheat for treason and felony are abolished, and sect. 8 enacts that every convict shall be incapable during the time while he shall be subject to the operation of the Act of alienating or charging any property, or of making any contract. See *Ex parte Graves; In re Harris*, 19 Ch. D. 1; *In re Gaskell and Walters' Contract*, (1906) 2 Ch. 1.

Sects. 9—17 contain provisions for the administration of the convict's property by administrators, and sect 18 provides that the property shall be invested and accumulated for the benefit of the convict and his heirs and legal personal representatives, and shall revest in the convict upon his ceasing to be subject to the operation of the Act, or his heirs or legal personal representatives. See *Carr* v. *Anderson*, (1903) 2 Ch. 279.

The Act appears to leave the testamentary power of a convict untouched, and it would seem, therefore, that a convict may now dispose of his property by will.

Outlawry.

By the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59), s. 3, outlawry in any civil proceeding is abolished.

CANADIAN NOTES.

Persons Capable of Making a Will.

Infants.

An infant cannot make a will. Statutes enabling a married woman to make a will remove only the disability of coverture, not that of infancy. *Re Murray Canal*, 6 O.R. 685. See R.S.B.C. c. 193, s. 5; R.S.M. c. 174, s. 4; R.S.N.B. c. 160, s. 3; R.S.N.S. c. 139, s. 4; R.S.O. c. 128, s. 11.

Aliens.

Aliens are empowered to take, hold and transmit property in all the Provinces of Canada, and therefore can make wills. See R.S.B.C. c. 6; R.S.M. c. 3; R.S.N.B. c. 157; R.S. N.S. c. 136, s. 1; R.S.O. c. 118.

Traitors, felons and suicides.

By 32 & 33 Viet. c. 29, s. 55, except in cases of treason, or abetting, procuring or counselling the same, no attainder was to extend to the disinheriting of any heir, or to the prejudice of the right or title of any person other than the right or title of the offender during his natural life. And by s. 56, every person to whom, after the death of any such offender, the right or interest to or in any lands, tenements or hereditaments should or would have appertained if no such attainder had taken place, may, after the death of such offender, enter into the same.

By the Criminal Code, 1892, 55 & 56 Viet. c. 29, s. 965, no confession, verdict, inquest, conviction 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 fine or penalty imposed on any person by virtue of his sentence, or any forfeiture in relation to which special provision is made by any Act of the Parliament of Canada. Re-enacted R.S.C. c. 146, s. 1033.

Indians.

An Indian, male or female, may make a will, and dispose of real or personal property, subject to the provisions of the Indian Act, R.S.C. c. 81, s. 25. *Johnson* v. *Jones*, 26 O.R. 109.

Married women.

In British Columbia, by the Married Women's Property Act, a married woman is enabled, in accordance with the provisions of the Act, to dispose by will of any real or personal property, as her personal property in the same manner as if she were a *feme sole*. R.S.B.C. c. 130, s. 4.

The Wills Act does not by its terms include married women. R.S.B.C. c. 193.

In Manitoba, by the Married Women's Property Act, a married woman may, by will, devise or bequeath her property in any manner she may see fit, as freely as if she were unmarried. R.S.M. c. 106, s. 6.

And by the Manitoba Wills Act, the expressions "per-

son" and "testator" respectively, include married women. R.S.M. c. 174, s. 2(*d*). Chap. IV.

In New Brunswick, by the Married Women's Property Act, a married woman is enabled to dispose by will of any real and personal property as her separate property in the same manner as if she were a *feme sole*. R.S.N.B. c. 78, s. 3(1). And by the Wills Act, any married woman may make a will in the same manner as if she were a *feme sole*, and the consent of her husband is not necessary. R.S.N.B. c. 160, s. 28(1).

In Nova Scotia, by the Wills Act, "person" and "testator" include married women. R.S.N.S. c. 139, s. 2(*c*). And by the Married Women's Property Act, a married woman is enabled to dispose by will of any real or personal property, as her separate property, in the same manner as if she were a *feme sole*. R.S.N.S. c. 112, s. 4.

In Ontario and Upper Canada, a married woman from and after 4th May 1859, was enabled to dispose of real and personal property, her separate estate, to or among her issue or children, and failing such issue then to her husband. C.S. U.C. c. 73, s. 6; now R.S.O. c. 128, s. 6.

Under this enactment a married woman could not devise to one of several children to the exclusion of others. *Munro* v. *Smart*, 26 Gr. 310.

Nor could she devise to her husband or any other person, except a child or children, if she had a child or children. *Mitchell* v. *Weir*, 19 Gr. 568.

By the Wills Act, 1873, 36 Vict. c. 20, s. 4, "person" and "testator" included married women, and a married woman was thereby enabled to dispose by will of property other than separate estate. In the revision of 1887, this clause was dropped out, and no statutory power to make a will existed, except with regard to separate estate, under R.S.O. c. 132, s. 3(1), until the clause was again inserted in the revision of 1897. R.S.O. c. 128, s. 9(5).

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Corporation Sole.

A Roman Catholic Bishop who was a corporation sole recited in his will that although all the church property ought to be vested in the Bishop for the benefit of, etc., yet to meet any want or mistake I give, etc., and then devised all his estate to the Bishop of St. John, it was held to pass his private property notwithstanding the recital. *Travers* v. *Casey*, 34 S.C.R. 419.

Mental Capacity.

Mental capacity—onus of establishing.

The *onus* of establishing testamentary capacity is on those who propound a will. Therefore the fact of capacity cannot be left to a jury in the absence of evidence on the fact. *Doe dem. Levi* v. *Samuel*, 12 N.B.R. 265; *Doe dem. Violette* v. *Therriau*, 17 N.B.R. 389.

When the evidence does not shew that the testator, when he made his will, had sufficient memory to enable him to comprehend the extent of his property and the manner of distributing it, the will cannot be sustained. *Re Harrison*, 39 N.B.R. 164.

Testator capable when giving instructions.

If a testator is of testamentary capacity, at the time of giving instructions for a will, a will in conformity therewith understood by him to be a will, and properly executed by him, is valid, though he was not of sufficient disposing capacity when the will was signed. *Kaulbach* v. *Archbold*, 31 S.C.R. 387.

Will not understood.

Where a very old man on his death-bed had a prepared will read over to him which he executed with difficulty, but without explanation of its contents, the will was set aside though he was *compos mentis*, the Court being of opinion that he did not thoroughly understand it. *Freeman* v. *Freeman*, 19 O.R. 141.

Stupor.

Stupor occasioned by disease does not incapacitate a testator, if he understands the instructions which he gives and the will when read to him. *McLaughlin* v. *McLellan*, 26 S.C.R. 646.

A will made by a testator on his death-bed, while *compos mentis*, though so physically weak that his instructions were

given at intervals and were with difficulty understood, was upheld, there being no fraud or undue influence, and the Court being convinced that he understood the will. *Martin* v. *Martin*, 15 Gr. 586. See *Emes* v. *Emes*, 11 Gr. 325.

Will by interrogation.

A will made by interrogation of a testator *in extremis* and very old, unable to originate any suggestion or give any information as to his property, and without any previous intention to make a will, was upheld, though he was a man of education and had been of great mental vigour, but during the process of having his will prepared fell into a doze after each disposition was arranged and assented to, from which he had to be aroused to continue, and the will when completed after two hours' preparation was contained in one sheet of foolscap and was signed with his mark. *Thompson* v. *Torrance*, 28 Gr. 253; 9 App. R. 1.

Frivolous and eccentric conduct.

Frivolous and capricious conduct, and an excitable and impulsive temperament, are not sufficient to establish incompeteney. *Re Hazen*, 16 N.B.R. 329.

Nor is marked eccentricity of conduct sufficient. *Re Wilkie*, 17 N.S.R. 543.

Lucid interval.

A testator, proved to have been insane at one time, afterwards made a will which was upheld, though he was at the time of making it and afterwards of eccentric habits, the Court being satisfied that he had a clear appreciation of the value and extent of his property and of the objects of his bounty. *Ingoldsby* v. *Ingoldsby*, 20 Gr. 131.

Unfounded belief not delusion.

It is not sufficient, in order to establish an insane delusion, merely to prove an unfounded belief in the testator. It must be established that he is under a delusion resulting from unsoundness of mind. And so, where a testator excluded a child from the benefits of his will under an unfounded belief that she was not his child, general testamentary capacity having been proved, the Court, though holding that he had no ground for his belief, held on the evidence that it did not amount to an insane delusion. *Bell* v. *Lee*, 8 App. R. 185. And see *Re Kidney*, 33 N.B.R. 9.

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And where a testator entertained an unfounded belief respecting relations between his wife and son, and treated his wife with cruelty and banished his son from his house in consequence, and reduced the benefits given to them by a former will, but appointed his wife an executrix and guardian of his infant children, the will was upheld, there being no proof to satisfy the Court that the belief was an insane delusion, and the will itself affording evidence contrary to such an hypothesis. *Skinner* v. *Farquharson*, 32 S.C.R. 58.

Insane delusion.

But where a testator who had been several times insane and under restraint, attributed his being placed under restraint to his wife, who was living separate from him when he made his will, by which he left her nothing, and at the trial it was not proved that the wife had any part in the proceedings to place him under restraint, and the testator, apart from any question of insane delusion as to his wife, was of general testamentary capacity, the Court being of opinion that, in consequence of the insane delusion as to his wife, he was not capable of considering her claims upon his bounty, refused to uphold the will. *Re Maxwell*, 10 N.S.R. 229.

Will drawn by testator.

The drawing of a rational will by a testatrix herself, without advice or assistance, is strong evidence of mental capacity, though she may be subject to some harmless delusions arising from extreme age and senile dementia; and such a will was upheld. *McHugh* v. *Dooley*, 10 B.C.R. 537.

Evidence of witnesses to will.

The evidence of the witnesses to the will in favour of mental capacity is not necessarily binding on the Court, which must form its conclusions on the whole evidence. *Re Harrison*, 30 N.B.R. 164.

Evidence of interested persons.

The evidence of interested persons as to testamentary capacity is overborne by that of disinterested persons to the contrary. *Wright* v. *Jewell*, 9 M.L.R. 607.

The evidence of medical men as to incapacity from senile dementia rejected, where the will was a rational one drawn by the testatrix herself without any advice or assistance. In this case the Court was of opinion that the chief medical

witness was influenced in the box by a certificate of incapacity which he had hastily and inadvisedly given beforehand. *McHugh* v. *Dooley*, 10 B.C.R. 537.

The evidence of medical men that the testator was in a comatose condition for some days before making the will in question, and that his mind was not in such a state as to be capable of continuous action when he made it, preferred to that of interested persons who deposed that he was clear in his mind, and understood what he was doing. *Wilson* v. *Wilson*, 22 Gr. 39; 24 Gr. 377.

And so, when the medical evidence is in favour of competency. *Menzies* v. *White*, 9 Gr. 574.

Probate *prima facie* evidence of capacity.

Letters probate granted in common form are only *primâ 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.

CHAPTER V.

REQUISITES FOR A VALID WILL.

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Knowledge of contents.

No will can be valid of which the testator does not know and approve the contents. *Barry* v. *Butlin*, 2 Moo. P. C. 480; *In bonis Duane*, 8 Jur. N. S. 752; 31 L. J. P. 173; *Sutton* v. *Sadler*, 3 C. B. N. S. 87; 26 L. J. C. P. 284; *Hastilow* v. *Stobie*, 1 P. & D. 64; *Cleare* v. *Cleare*, *ib.* 655; *In bonis Hunt*, 23 W. R. 553; 3 P. & D. 250; overruling *Cunliffe* v. *Cross*, 3 Sw. & T. 37; 32 L. J. P. 68.

Delegation of testamentary power.

A testator cannot, therefore, delegate his testamentary power to another person; that is to say, he cannot adopt and execute a will made for him without knowing its contents. *Hastilow* v. *Stobie*, 1 P. & D. 64; *Cleare* v. *Cleare*, *ib.* 655. See *ante*, p. 16.

But a will prepared in accordance with the testator's instructions is valid, though at the time of execution the testator remembers only that he has given instructions and believes the will to be in accordance with them. *Parker* v. *Felgate*, 8 P. D. 171; *Perera* v. *Perera*, (1901) A. C. 354.

Legatee preparing will must prove knowledge.

Whenever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, it is for those who propound the will to remove such suspicion. *Barry* v. *Butlin*, 2 Moo. P. C. 48[illegible]; *Fulton* v. *Andrew*, L. R. 7 H. L. 448; *Brown* v. *Fisher*, 63 L. T. 465; *Tyrrell* v. *Paynton*, (1894) P. 151.

The fact, that the will is prepared by or on the instructions of the person taking a benefit under it, is a circumstance raising such suspicion. *Paske* v. *Ollatt*, 2 Phillim, 323; *Ingram* v. *Wyatt*, 1 Hagg. 388; *Billinghurst* v. *Vickers*, 1 Phillim. 187; *Baker* v. *Batt*, 2 Moo. P. C. 317; *Seoular* v. *Plowright*, 5 W. R. 99; 10 Moo. P. C. 440; *Fulton* v. *Andrew*, L. R. 7 H. L.

448; *Hegarty* v. *King*, 5 L. R. Ir. 249; 7 *ib.* 18; *Parker* v. *Duncan*, 62 L. T. 642. See *Donnelly* v. *Broughton*, (1891) A. C. 435, P. C.

Fiduciary relation.

But the influence of a person standing in a fiduciary relation to the testator may lawfully be exercised to obtain a will or legacy, 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. *Hindson* v. *Weatherill*, 5 D. M. & G. 301; *Walker* v. *Smith*, 29 B. 394; *Parfitt* v. *Lawless*, 2 P. & D. 462.

The rules therefore applicable in the case of gifts *inter viros* to persons standing in a fiduciary relation to the donor do not apply to wills. In the case of gifts *inter viros*, such persons have to show not only that the donor intended to give, but that his intention was not influenced by the donee, a burden of proof which in most cases it is impossible to discharge, at any rate so long as the fiduciary relation subsists.

Undue influence.

To establish a case of undue influence, it must be shown that fraud or coercion has been practised on the testator in relation to the will itself, not merely in relation to other matters or transactions. *Boyse* v. *Rossborough*, 6 H. L. 2; *Hall* v. *Hall*, 1 P. & D. 481; *Wingrove* v. *Wingrove*, 11 P. D. 81; *Baudains* v. *Richardson*, (1906) A. C. 169. See *Longford* v. *Purdon*, 1 L. R. Ir. 75.

A case of undue influence is more easily established where there is evidence to show that the person influenced was of feeble mental capacity or in a weak state of health. *Hampson* v. *Guy*, 64 L. T. 778.

If a testator is prevented by threats from altering his will the Court of Probate may, if the case is proved, declare the persons exercising the coercion trustees of the benefits they take under the will. *Betts* v. *Doughty*, 5 P. D. 26.

Will read over.

A will which has been read over to the testator in a proper manner, or the contents of which have been brought to his notice before execution, must, in the absence of fraud or coercion, be presumed to have been approved by him. *Guardhouse* v. *Blackburn*, 1 P. & D. 109; *Goodacre* v. *Smith*, *ib.* 359; *Atter* v. *Atkinson*, *ib.* 665; *Rhodes* v. *Rhodes*, 7 App.

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C. 192; *Beamish* v. *Beamish*, (1894) 1 I. R. 7; *Garnett-Botfield* v. *Garnett-Botfield*, (1901) P. 335.

Fraud and mistake.

Words or clauses introduced into a will by fraud, accident, or mistake, without the knowledge of the testator, will be struck out of the will, although their rejection may affect the sense of the words which remain. *In bonis Wray*, I. R. 10 Eq. 267; *In bonis Duane*, 2 Sw. & T. 590; 31 L. J. P. 173; *In bonis Oswald*, 3 P. & D. 162; *Morrell* v. *Morrell*, 7 P. D. 68; *Rhodes* v. *Rhodes*, 7 App. C. 192; *In bonis Boehm*, (1891) P. 247; *In bonis Gordon*, (1892) P. 228; *In bonis Moore*, (1892) P. 378; *In bonis Snowden*, 75 L. T. 279; *Karunaratne* v. *Ferdinandus*, (1902) A. C. 405; *Brisco* v. *Baillie Hamilton*, (1902) P. 234.

Words cannot be inserted.

But though words can be struck out, the right words cannot be substituted for them. *In bonis Walkeley*, 69 L. T. 419; *In bonis Schott*, (1901) P. 190, overruling *In bonis Bushell*, 13 P. D. 7, and *In bonis Huddleston*, 63 L. T. 255.

Where a testator has executed a will with knowledge of the contents, nothing can be added or omitted after his death on the ground of mistake. *In bonis Davy*, 1 Sw. & T. 262; *Guardhouse* v. *Blackburn*, 1 P. & D. 109; *Harter* v. *Harter*, 3 P. & D. 11; *Collins* v. *Elstone*, (1893) P. 1; *Beamish* v. *Beamish*, (1894) 1 Ir. 7.

Fraud of residuary legatee.

Where a residuary legatee prepares the will and is directed to give further legacies which he purposely omits, and at the time when the will is read over and executed the further legacies are not present to the mind of the testator as the residuary legatee knows, the will will nevertheless be admitted to probate. *Mitchell* v. *Gard*, 3 Sw. & T. 75.

The remedy in such a case would appear to be to have the residuary legatee declared a trustee so far as regards the legacies omitted.

Omission of scandalous passages.

The Court has, it seems, power to direct a passage containing a gross libel to be omitted from the probate copy of the will, though it will not exercise the power merely on the ground that the charge is offensive and untrue. *In bonis Wartnaby*, 1 Rob. 423; *Marsh* v. *Marsh*, 1 Sw. & T. 528, 536 (passages

omitted); *Curtis* v. *Curtis*, 3 Add. 33; *In bonis Honywood*, 2 P. & D. 251 (omission refused).

Wills Act, s. 9.

By the Wills Act (1 Vict. c. 26), s. 9, it is enacted that no will shall be valid unless it shall be in writing and executed in manner thereinafter mentioned.

1. Signature by testator.

The requirements as to execution are as follows:—in the first place the will must be signed at the foot or end thereof by the testator or by some other person in his presence or by his direction.

Intention to execute.

The signature of the testator must be intended as an act of execution of the will. A signature to each page of the will, where the last page is left unsigned, is not *primâ facie* a sufficient execution. *Sweetland* v. *Sweetland*, 4 Sw. & T. 6; *Burke* v. *Moore*, I. R. 9 Eq. 609; *In bonis Maddock*, 3 P. & D. 169.

Mark.

The mark of the testator is a sufficient signature, whether he can write or not. *Baker* v. *Dening*, 8 A. & E. 94; *Wilson* v. *Beddard*, 12 Sim. 28; *In bonis Bryce*, 2 Curt. 325; *In bonis Amiss*, 2 Rob. 116; *In bonis Douce*, 2 Sw. & T. 593; *In bonis Clarke*, 1 Sw. & T. 22.

Initials stamp.

Signature by initials or by a stamped name is sufficient. *In bonis Savory*, 15 Jur. 104; *Jenkyns* v. *Gaisford*, 3 Sw. & T. 93; 11 W. R. 854.

Assumed name.

Signature in an assumed name is sufficient. *In bonis Glover*, 5 N. of C. 553; *In bonis Ridding*, 2 Rob. 339; *In bonis Clarke*, 1 Sw. & T. 22; *In bonis Douce*, 2 *ib.* 593.

Seal.

A seal is not sufficient. *Smith* v. *Evans*, 1 Wils. 313; *Grayson* v. *Atkinson*, 2 Ves. Sen. 459; *Ellis* v. *Smith*, 1 Ves. Jun. 13, 15; *Wright* v. *Wakeford*, 17 Ves. 459. The case of *Lemayne* v. *Stanley*, 3 Lev. 1; 1 Freem. 538, is overruled.

But a seal with the testator's initials, and acknowledged as his hand and seal, is sufficient. *In bonis Emerson*, 9 L. R. Ir. 443.

Dry pen.

Passing a dry pen over a written signature is not enough. *Casement* v. *Fulton*, 5 Moo. P. C. 130; *Playne* v. *Scriven*, 1 Rob. 772; see *Kevil* v. *Lynch*, I. R. 9 Eq. 249.

Signature by agent.

Another person, though he may be also an attesting witness, may by the testator's direction sign the testator's name, or impress a stamp with the testator's name engraved on it, or

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sign his own name on behalf of the testator. *Jenkyns* v. *Gaisford*, 11 W. R. 851; 3 Sw. & T. 93; *Clarke's Case*, 2 Curt. 329; *In bonis Bailey*, 1 Curt. 914; *Smith* v. *Harris*, 1 Rob. 262.

Connection of signature with will.

The sheets of which a will consists need not be severally signed by the testator nor be connected together, but they must be in the same room where the execution took place. *Gregory* v. *Queen's Proctor*, 4 N. of C. 620; *Marsh* v. *Marsh*, 1 Sw. & T. 528; *Bond* v. *Seawell*, 3 Burr. 1773.

And the signature must be physically connected with the will. *In bonis Horsford*, 3 P. & D. 211; *In bonis M'Kay*, I. R. 11 Eq. 220.

Position of signature.

By the Wills Act Amendment Act, 1852 (15 & 16 Vict. c. 24), s. 1, it is provided that a will shall be valid 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 (*a*), and no 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 circumstance that the signature shall be placed among the words of the testimonium clause, or of the clause of attestation (*b*), either with or without a blank space intervening, or shall follow (*c*) or be after or under, or beside 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 (*d*) above the signature, or by the circumstance that there shall appear to be sufficient space (*e*) 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. *In bonis Jones*, 34 L. J. P. 41; 4 Sw. & T. 1; *In bonis Williams*, 1 P. & D. 4; *In bonis Coombs*, 1 P. & D. 302; *In bonis Fuller*, (1892) P. 377; *In bonis Effrench*, 23 L. R. Ir. 433; *In bonis Madden*,

(1905) 2 Ir. 612 (*a*); *In bonis Walker*, 2 Sw. & T. 354; *In bonis Casmore*, 1 P. & D. 653; *In bonis Pearn*, 1 P. D. 70 (*b*); *In bonis Puddephatt*, 2 P. & D. 97; *In bonis Horsford*, 3 P. & D. 211 (*c*); *In bonis Wright*, 30 L. J. P. 104; 4 Sw. & T. 35; *Hunt* v. *Hunt*, 1 P. & D. 209; *In bonis Archer*, 2 P. & D. 252; *In bonis Wotton*, 3 P. & D. 159; *Royle* v. *Harris*, (1895) P. 163; *In bonis Gilbert*, 78 L. T. 762 (*d*); *In bonis Williams*, 1 P. & D. 4 (*e*).

Words under signature.

The same section enacts that 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 shall be made. See *In bonis Greator*, 2 Jur. N. S. 1172; *In bonis Dallow*, 1 P. & D. 189; *In bonis Ainsworth*, 2 P. & D. 151; *In bonis Dearle*, 39 L. T. 93; *In bonis Arthur*, 2 P. & D. 273; *In re White*, (1896) 1 Ir. 269.

It is a question of fact whether a disposition is underneath or follows a signature. For instance, if a testator begins halfway down the page and fills the lower part of the page and then goes to the top of the same page and signs below what he last writes, then the part first written, as it is in context anterior to the signature, may be considered as following that context. *In bonis Kempton*, 3 Sw. & T. 427.

And in some cases words following the signature, but connected with the will by asterisks, have been treated as interlineations and admitted to probate. *In bonis Bird*, 2 P. & D. 214; *In bonis Greenwood*, (1892) P. 8.

If the signature of the testator intended to be in execution of the will is followed by words intended to form part of the will, effect may be given to the part of the will preceding the signature, if that part in effect constitutes the whole of the dispositive portion of the will. *Keating* v. *Brooks*, 2 Curt. 421; 4 N. of C. 260; *In bonis Davis*, 3 Curt. 748; *In bonis Cotton*, 6 N. of C. 307; 1 Rob. 658; see *In bonis Topham*, 7 N. of C. 272; 2 Rob. 189; *Sweetland* v. *Sweetland*, 4 Sw. & T. 6 (in which case the question was whether there was a due execution of any part of the will); *In bonis Wray*, 31 W. R. 476; *In bonis Anstee*, (1893) P. 283.

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The same rule applies if the words following the signature contain unimportant bequests or appoint executors only. *In bonis Standley*, 7 N. of C. 69; 1 Rob. 755; *In bonis Amiss*, 7 N. of C. 274; 2 Rob. 116.

Signature in the middle or in the margin of the will is not a sufficient signature. *Margary* v. *Robinson*, 12 P. D. 8; *In bonis Hughes*, 12 P. D. 107.

2. Signature must be witnessed.

In the second place, the signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time.

The signature of the testator must be written or acknowledged by the testator in the actual visual presence of both witnesses together, before either of them attests and subscribes the will. *In bonis Allen*, 2 Curt. 331; *In bonis Olding*, *ib.* 865; *In bonis Byrd*, 3 *ib.* 117; *Moore* v. *King*, *ib.* 243; *Pennant* v. *Kingscote*, *ib.* 643; *In bonis Summers*, 2 Rob. 295; *Cooper* v. *Bockett*, 3 Curt. 648; 4 Moo. P. C. 419; *Hindmarsh* v. *Charlton*, 1 Sw. & T. 433; 8 H. L. 160; *Wyatt* v. *Berry*, (1893) P. 5; *Brown* v. *Skirrow*, (1902) P. 3.

Will not void for incompetency of witness.

The Wills Act (1 Vict. c. 26), s. 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.

Sect. 15 enacts in effect that a will attested by a beneficiary under the will is valid, though the gift to the attesting witness is void.

Sect. 16 enacts 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.

Sect. 17 enacts 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.

a. Signature made in presence of witnesses.

Where the testator writes something on the will in the presence of the witnesses summoned to attest the will, it will be presumed that he wrote his signature, though the witnesses may not see the signature and may not know that the document is his will. *Smith* v. *Smith*, 1 P. & D. 143; see *Wright* v. *Sanderson*, 9 P. D. 149; *Woodhouse* v. *Balfour*, 13 P. D. 2.

b. Acknowledgment of signature already made.

The acknowledgment may be by gestures. *In bonis Davies*, 2 Rob. 337; *In bonis Owston*, 10 W. R. 410.

Acknowledgment by a third person in the hearing of the testator, and acquiesced in by him, is an acknowledgment by the testator. *In bonis Jones*, Dea. & Sw. 3; *In bonis Bosanquet*, 2 Rob. 577; *Faulds* v. *Jackson*, 6 N. of C., supp. 12; *Inglesant* v. *Inglesant*, 3 P. & D. 172; *In bonis Bishop*, 30 W. R. 567.

Will acknowledged; signature seen.

It is clear that if the will is acknowledged to be the testator's will, and the witnesses see the signature of the testator, that is sufficient. *In bonis Dinmore*, 2 Rob. 641; *In bonis Philpot*, 3 N. of C. 2.

Will acknowledged; signature not seen.

There is no sufficient acknowledgment, if the signature of the testator is covered up, so that the attesting witnesses do not see it. *Hudson* v. *Parker*, 1 Rob. 14; *In bonis Gunstan*; *Blake* v. *Blake*, 7 P. D. 102, overruling *Guillim* v. *Guillim*, 3 Sw. & T. 200; 29 L. J. Prob. 31; *Beckett* v. *Howe*, 2 P. & D. 1.

It seems there may be a sufficient acknowledgment, if the testator's signature might have been seen by the witnesses if they had looked, though they may swear that they did not in fact see it. *In bonis Gunstan*; *Blake* v. *Blake*, 7 P. D. 102; see *Kelly* v. *Keatinge*, I. R. 5 Eq. 175; *Lloyd* v. *Roberts*, 12 Moo. P. C. 158; *Cooper* v. *Bockett*, 4 Moo. P. C. 419; *Blake* v. *Knight*, 3 Curt. 547; *In bonis Huckvale*, 1 P. & D. 375; *In bonis Pearn*, 1 P. D. 71.

Signature seen; will not acknowledged.

A request to sign a paper not declared to be a will, when the witnesses see the signature of the testator, though it is not acknowledged by him as his signature, is sufficient. *Keigwin* v. *Keigwin*, 3 Curt. 607; *Gaze* v. *Gaze*, 3 Curt. 451; *In bonis Ashmore*, 3 Curt. 756; *In bonis Thompson*, 4 N. of C. 643; *Faulds* v. *Jackson*, 6 N. of C., supp. 1; *Leech* v. *Bates*, 6 N.

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of C. 704; *Inglesant* v. *Inglesant*, 3 P. & D. 172; *Daintree & Butcher* v. *Fusolo*, 13 P. D. 67, 102; see, however, *In bonis Arthur*, 2 P. & D. 273.

Signature not seen; will not acknowledged.

But a mere request to witnesses to attest an instrument, the nature of which is not explained to them, and the signature to which they do not see, is not sufficient. *In bonis Ashton*, 5 N. of C. 548; *In bonis Rawlins*, 2 Curt. 326; *In bonis Hammond*, 3 Sw. & T. 90; *In bonis Harrison*, 2 Curt. 863; *In bonis Pearson*, 33 L. J. P. 177; *Hott* v. *Genge*, 3 Curt. 160; 4 Moo. P. C. 265; *Hudson* v. *Parker*, 1 Rob. 14; *In bonis Trinder*, 3 N. of C. 275; *Shaw* v. *Neville*, 1 Jur. N. S. 408; *In bonis Swinford*, 4 P. & D. 130; *Pearson* v. *Pearson*, 2 P. & D. 454; *Fischer* v. *Popham*, 3 P. & D. 246.

When the testator's will is signed by some other person by his direction, the signature must be acknowledged by the testator in presence of two witnesses; it is not sufficient that the witnesses see the signature written if they are not present when the testator directs the signature to be made, and the will is not acknowledged as a will. *Burke* v. *Moore*, I. R. 9 Eq. 609.

3. Signature by witnesses.

In the third place, such witnesses shall attest and subscribe the will in the presence of the testator, but no form of attestation is necessary.

Witnesses need not sign in each other's presence.

The witnesses must subscribe in the presence of the testator, but they need not subscribe in the presence of each other. *White* v. *British Museum*, 6 Bing. 310; *Faulds* v. *Jackson*, 6 N. of C., supp. 4; *In bonis Webb*, 1 Jur. N. S. 1096; 2 *ib.* 309; *Sullivan* v. *Sullivan*, 3 L. R. Ir. 299; see *Casement* v. *Fulton*, 5 Moo. P. C. 14.

Presence of the testator.

The witnesses will be considered to have subscribed in the presence of the testator if, under the circumstance, the testator might have seen them if he had chosen to look, though he may not have seen them. *Shires* v. *Glascock*, 2 Salk. 688; *Davy* v. *Smith*, 3 Salk. 395; *Todd* v. *Winchelsea*, M. & Malk. 12; 1 C. & P. 488; *Casson* v. *Dade*, 1 B. C. C. 99; *Doe* v. *Manifold*, 1 M. & S. 249; *Winchelsea* v. *Wauchope*, 3 Russ. 441; *In bonis Newman*, 1 Curt. 914; *In bonis Ellis*, 2 *ib.* 395; *Newton* v. *Clarke*, 2 *ib.* 320; *In bonis Colman*, 3 *ib.* 118; *Tribe* v. *Tribe*, 7 N. of C. 132; 1 Rob. 775; *Norton* v. *Bazett*, Dea. & Sw. 259;

2 Jur. N. S. 766; 3 Jur. N. S. 1084; *In bonis Trimnell*, 11 Jur. N. S. 248; *In bonis Piercy*, 1 Rob. 278; *Jenner* v. *Finch*, 5 P. D. 106.

Position of signatures.

The signatures of the witnesses need not be in any particular part of the will, if it appears that they were intended to attest the operative signature of the testator. *In bonis Davis*, 3 Curt. 748; *In bonis Chauncy*, 1 Rob. 737; *Roberts* v. *Phillips*, 4 E. & B. 450; *In bonis Wilson*, 1 P. & D. 269; *In bonis Pearse*, 1 P. & D. 382; *In bonis Braddock*, 1 P. D. 433; *In bonis Streatley*, (1891) P. 172; *In bonis Ellison*, (1907) 2 Ir. 480.

Signatures must be connected with will.

But the signatures, if not on the same paper as the will, must be on a paper physically connected with it. *In bonis West*, 12 W. R. 89; *In bonis Saunders*, 3 L. J. P. 53; *Cook* v. *Lambert*, 32 L. J. P. 93; 3 Sw. & T. 46; *In bonis Goosden*, 2 Sw. & T. 362; *In bonis M'Kay*, I. R. 11 Eq. 220; *In bonis Braddock*, 1 P. D. 433.

Where the testater signs the will, and the witnesses sign a duplicate, the will is not sufficiently attested. *In bonis Hatton*, 6 P. D. 204.

Witnesses must attest operative signature.

The witnesses must attest the signature, which is intended as an execution of the will; and where there are several signatures, the attestation of any but that intended as an execution of the will is invalid to give effect to the will or any part of it. *In bonis Martin*, 6 N. of C. 604; 1 Rob. 712; *Ewen* v. *Franklin*, Deane, 7; 1 Jur. N. S. 1220; *Sweetland* v. *Sweetland*, 4 Sw. & T. 6; 34 L. J. P. 42; 13 W. R. 504; *Phipps* v. *Hale*, 3 P. & D. 166; *In bonis Dilkes*, 3 P. & D. 164; *Lemaire* v. *Lemaire*, (1902) P. 243.

Intention to attest.

The attesting witnesses must subscribe with the intention, that the subscriptions made should be a complete attestation of the will, and evidence is admissible to show whether such was the intention or not. *In bonis Wilson*, 1 P. & D. 269; *In bonis Sharman*, 1 P. & D. 661; *Griffiths* v. *Griffiths*, 2 P. & D. 300; *In bonis Murphy*, I. R. 8 Eq. 300.

Adding an address to, or correcting a signature already made, or writing a christian name when the witness is unable to complete his signature, is insufficient. *In bonis Trevanion*, 2 Rob. 315; 14 Jur. 919; *Hindmarsh* v. *Charlton*, 1 Sw. & T.

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423; 8 H. L. 160; *In bonis Maddock*, 3 P. & D. 169; *M'Conville* v. *M'Creesh*, 3 L. R. Ir. 73.

So a witness writing the name of a second witness opposite the mark of the latter cannot be said to subscribe. *In bonis Eynon*, 3 P. & D. 92.

A signature made without any intention of attesting will be excluded from probate. *In bonis Sharman*, 1 P. & D. 661; *In bonis Murphy*, I. R. 8 Eq. 300; *In bonis Smith*, 15 P. D. 2.

Form of signature.

Witnesses need not sign by name; initials, or a description, or a mark, are sufficient. *In bonis Christian*, 2 Rob. 110; 7 N. of C. 265; *In bonis Martin*, 6 N. of C. 694; *In bonis Sperling*, 3 Sw. & T. 272; 12 W. R. 354; *In bonis Amiss*, 2 Rob. 116; *In bonis Ashmore*, 3 Curt. 756.

But a seal is insufficient. *In bonis Byrd*, 3 Curt. 117.

One witness cannot sign for another. *In bonis White*, 2 N. of C. 461; *In bonis Middleton*, 33 L. J. P. 16; *Re Duggins*, 39 L. J. P. 24.

Nor can a third person sign for a witness. *In bonis Cope*, 2 Rob. 335; *Pryor* v. *Pryor*, 20 L. J. P. 114.

And a witness cannot sign in the name of another person. *In bonis Leverington*, 11 P. D. 80.

But a witness or a third person may guide the hand of the second witness, or may subscribe for the witness if the witness holds the top of the pen while the signature is being made. *Harrison* v. *Elvin*, 3 Q. B. 117; 2 G. & D. 769; *In bonis Frith*, 4 Jur. N. S. 288; 27 L. J. P. 6; *In bonis Lewis*, 31 L. J. P. 153; 7 Jur. N. S. 688; see *In bonis Kilcher*, 6 N. of C. 15.

The papers found at the testator's death to compose his will must, in the absence of proof to the contrary, be presumed to be the will executed by him. *Gregory* v. *Queen's Proctor*, 4 N. of C. 620; *Marsh* v. *Marsh*, 1 Sw. & T. 528; *Rees* v. *Rees*, 3 P. & D. 84.

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Statutes.

Execution and attestation.

In British Columbia, R.S.B.C. c. 193, s. 6; Manitoba, R.S.M. c. 174, s. 5: Nova Scotia, R.S.N.S. c. 139, s. 6, and Ontario, R.S.O. c. 128, s. 12, the requirements as to execution and attestation are at present the same, viz., the will must be in writing, signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and the signature must be made or acknowledged by the testator in the presence of two or more witnesses, present at the same time, and such witnesses must attest and subscribe the will in the presence of the testator. Then follow the provisions of the Imperial Act as to the position of the testator's signature.

Nova Scotia married women.

With regard to the wills of married women it is also provided, in Nova Scotia, that no will of a married woman, under which her husband takes a greater interest than he would be entitled to in case of her dying intestate, shall be valid unless it is executed when her husband is not present, or unless, at the time of execution, the married woman declares in the presence of the witnesses to the will that she executes it of her own free will, and without any fear, threat or compulsion, or other undue influence of, from or by her husband. Before probate will be granted of such a will such declaration must also be made before a judge of the Supreme Court, or a judge of a County Court, a barrister, notary, commissioner for taking affidavits, or a justice of the peace, and the functionary who takes the declaration must append a certificate of the declaration to the will. Or, it must be proved before the probate Court that such declaration was made in the presence of the witnesses. R.S.N.S. c. 139, s. 15.

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New Brunswick.

In New Brunswick, by 36 Geo. III. c. 11, s. 1, a will of lands was to be in writing, signed by the testator, or by some other person in his presence and by his express direction, and attested and subscribed in the presence of the testator by three or more credible witnesses.

Under this Act, where neither the signature, nor any acknowledgment of it, was made in the presence of witnesses, but they were called in to witness a will, it was held that the circumstances amounted to an acknowledgment, and the will was upheld. *Doe dem. McVey* v. *Daniel*, 15 N.B.R. 372.

By 1 Viet. c. 9, s. 7, the will was to be in writing signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and the signature was to be made or acknowledged by the testator in the presence of two or more witnesses, present at the same time, who were to attest and subscribe in the presence of the testator.

And at present, the will is to be in writing, signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and the signature is to be made or acknowledged by the testator, in the presence of two or more witnesses present at the same time, who are to subscribe in the presence of the testator *and of each other*. R.S.N.B. c. 160, s. 4.

Ontario and Upper Canada.

By C.S.U.C. c. 82, s. 13, now R.S.O. c. 128, s. 5, it was enacted that any will affecting land executed after 6th March, 1834, and before 1st January, 1874, in the presence of and attested by two or more witnesses, should have the same validity and effect as if executed in the presence of and attested by three witnesses; and that it should be sufficient if the witnesses subscribed their names in the presence of each other, although their names were not subscribed in the presence of the testator.

This enactment changed the number of the witnesses only, and not their character, and therefore they were still re-

quired to be credible to satisfy the requirements of the Statute of Frauds. *Ryan* v. *Devereux*, 26 U.C.R. 100. Chap. V.

It did not repeal the Statute of Frauds as to execution of wills, but was in amplification thereof, and a will might be supported under either or both statutes. *Crawford* v. *Curragh*, 15 C.P. 55.

If any person attesting a will is, at the time of execution thereof, or becomes at any time afterwards, incompetent to be admitted as a witness to prove the execution, such will is not on that account invalid. R.S.O. c. 128, s. 16; R.S.B.C. c. 193, s. 11; R.S.M. c. 174, s. 11; R.S.N.B. c. 160, s. 8. Competency of witnesses.

A devisee, legatee or the wife or husband of one is a competent witness, but the gift is void. R.S.O. c. 128, s. 17; R.S.B.C. c. 193, s. 12; R.S.M. c. 174, s. 12. In New Brunswick it is provided that if there are two witnesses who are not so interested and who prove the will, and a supernumerary witness who or whose wife or husband takes a benefit under the will, the gift to the latter is not void. Legatee, witness.

Where a will charges real or personal property with the payment of debts, any creditor or the wife or husband of a creditor whose debt is charged is a competent witness. R.S.O. c. 128, s. 18; R.S.B.C. c. 193, s. 13; R.S.M. c. 174, s. 13; R.S.N.B. c. 160, s. 10. Creditor, witness.

No person on account of his being an executor is incompetent to prove the execution of the will. R.S.O. c. 128, s. 19; R.S.B.C. c. 193, s. 14; R.S.M. c. 174, s. 14; R.S.N.B. c. 160, s. 11. Executor, witness.

In Nova Scotia:—

No will shall be invalid on account of the incompetency of the witnesses thereto to prove its execution. R.S.N.S. c. 139, s. 11. Nova Scotia.

Every devise, bequest or appointment other than a charge or direction for the payment of debts to an attesting witness of the will, or to the wife or husband of such witness shall be void; and such witness shall be admitted to prove the execution of the will, or the validity or invalidity thereof; pro-

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vided that where there are two competent witnesses to the will besides such person, such devise, bequest or appointment shall not be void. *Ibid.* s. 12.

The provisions as to creditors and executors being competent witnesses are substantially the same as in the other provinces. *Ibid.* ss. 13, 14.

Soldiers and seamen.

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. R.S.O. c. 128, s. 14; R.S.B.C. c. 193, s. 9; R.S.M. c. 174, s. 8; R.S.N.B. c. 160, s. 6; R.S.N.S. c. 139, s. 9.

Execution and Attestation.

Testamentary paper unwitnessed.

An insured person 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. Insurance Company. To be paid to none other unless at my request dated later." He handed the document to the plaintiff in the action, saying, "There, that is as good as a will." The document was held to be testamentary, and to fail for want of witnesses. *Krch* v. *Moses*, 22 O.R. 307.

Unfinished draft.

An unfinished draft of a will signed by a testator who had expressed no wish to sign it but did so at the suggestion of another person cannot be admitted to probate. *Re Gilbert*, 17 N.B.R. 525.

Execution and attestation.

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.

Regular attestation clause.

Where the attestation clause is regular, there is a strong presumption in favour of proper attestation, even though a witness to the will swears that he thought he did not see the testator sign. The presumption was strengthened in this

case by the fact that the witness subsequently signed a memorial of the will for registration in which he declared that he had seen the testator sign. *Little* v. *Aikman*, 28 U.C.R. 337.

So, where the witnesses to a holograph will could not be found, nor their signatures proved, but the signature of the testator was proved, the will found in a place where he was accustomed to keep his papers, and post-testamentary letters of the deceased in which he referred to a will, and the knowledge of the deceased as to the requirements of attestation, and the fact that he had been seen in the company of two strangers on the day of the date of the will, to which he referred in one of his letters, were all proved, and the Surrogate Court judge was satisfied with the proof, a Divisional Court refused to disturb his finding. *Re Young*, 27 O.R. 698.

Testator in position to see witnesses.

Where the witnesses are required to sign in the presence of the testator, it is not sufficient that he is in the same room with them when they sign. He must both be able to see them sign and mentally capable of understanding what is being done. *Doe dem. Violette* v. *Therriau*, 17 N.B.R. 389.

But a will is sufficiently attested if the testator could see the witnesses sign had he chosen to do so, though there is no proof that he actually did see them, and they were in an adjoining room. *Carrigan* v. *Carrigan*, 6 N.B.R. 8.

And where the evidence shews, either that the signing by the testator has been seen by the witnesses, or that they had the opportunity of seeing him sign, and they subscribe in the presence of the testator, the will is well executed. *Scott* v. *Scott*, 13 C.R. 551.

Tacit acknowledgment.

If a testator produces a paper as his signed will and asks witnesses to attest it, it is not necessary to prove the actual signature. The Court is at liberty to infer from the circum-

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stances that the will was either signed or acknowledged in presence of the witnesses. *Re Ferguson*, 21 N.B.R. 71.

Probate acted on for years.

And where there was no positive evidence of the subscription by a witness, since deceased, yet from the circumstances attending the execution, and the fact that possession of the land devised had for sixteen years been in accordance with the will, the Court inferred subscription by the witness in question. *Crawford* v. *Curragh*, 15 C.P. 55.

A will was proved in common form on the oath of one of the witnesses and was unquestioned for twenty-four years. The other witness and his brother, who were interested persons, subsequently swore that the witnessea did not subscribe until after the testator's death, and the probate judge revoked the probate. On appeal his decision was reversed. *Re Hill*, 34 N.S.R. 494.

One of three witnesses said he believed he had signed as a witness to a will nearly thirty years old, but neither he nor another of the witnesses could remember having signed it. Another witness at the trial, who was not a subscribing witness to the will, swore that it was executed by the testator in the presence of the three witnesses to it and that she had seen them sign as witnesses, and the will was upheld. *McDonald* v. *McKinnon*, 5 N.S.R. 527.

Where witnesses are marksmen.

Two out of three witnesses to a will were marksmen, and were unable at the trial to identify the will when produced, but the third did so and also proved the marks of the other two, and the will was upheld. *Re Hanlon*, 15 N.B.R. 136.

One witness incompetent.

And where there were three witnesses to a will requiring that number, one of whom was defendant in the action and therefore not competent as a witness at the trial, and the other two witnesses proved their own attestation but could

not prove that of the defendant, on proof of his handwriting the Court held the will to be properly executed. *Hamilton* v. *Love*, 4 N.B.R. 243.

Acknowledgment by testator.

A testator may sign his name in the presence of one witness, and when another 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.

The will in the above case was afterwards altered by taking out two sheets and re-writing them. The new sheets were placed in the will, the whole pinned together, and the date changed. The signatures of the testator and the witnesses remained, and were acknowledged by all three. The two re-written sheets were subsequently taken out and destroyed by the direction of the testator but not in his presence, and this will was held not to have been properly executed.

If the signature of the testator is not made in the presence of the witnesses, acknowledgment in their presence must be proved. Thus, where a solicitor deposed that a will was signed before the witnesses appeared, and he, on their arrival, asked the testatrix if the signature was hers, and if she wished the witnesses to attest, to which she answered "yes"; but the two witnesses deposed that they did not hear what was alleged to have been said, the judge of probate held against the will, and the Supreme Court of Canada refused to interfere. *McNeill* v. *Cullen*, 35 S.C.R. 510.

A will though drawn substantially in accordance with a sketch prepared by the testator, one clause of which was not correctly read to him, and signed by one of the executors named without his consent and without authority from him, he being unable to sign himself, was held not to be well executed. *Re Pine*, 2 N.S.R. 307.

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But acknowledgment may be inferred from surrounding circumstances. *Doe dem. McVey* v. *Daniel*, 15 N.B.R. 372.

Evidence.

Letters written by a testator after he had made his will referring to a will, and stating that he had been in company with two acquaintances, are admissible as evidence of execution of a will, where the witnesses could not be found, and it was shewn that he had been seen in company with two strangers on the day of the date of the will. *Re Young*, 27 O.R. 698.

But letters written by a testator to his relatives before making his will, stating his intention to leave his property to them, are not admissible in evidence to defeat a will in favour of other persons, in an action attacking the will on the ground of want of mental capacity. *Doe dem. Levi* v. *Samuel*, 12 N.B.R. 265.

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.

Undue Influence.

Persuasion.

The mere exercise of influence over a testator is not sufficient to invalidate his will, unless the control is of such a nature as to make the will that of the other person and not his own. *Waterhouse* v. *Lee*, 10 Gr. 176. See also *Donaldson* v. *Donaldson*, 12 Gr. 431; *Roman Catholic Episcopal Corporation for Diocese of Toronto* v. *O'Connor*, 14 O.L.R. 665.

Persuasion by a niece of the testator, a legatee under the will in question, who had lived with him for nearly thirty years, during part of which time she was his housekeeper, to

benefit her under the will, was held not sufficient to impeach a codicil made in her favour, in the absence of any undue influence. *Kaulbach* v. *Archbold*, 31 S.C.R. 387.

And the influence of a spiritual adviser and confessor may lawfully be exerted to obtain a legacy, as long as the testator thoroughly understands what he is doing, and is a free agent; but if the legatee in such a case takes part in drawing the will, the *onus* rests upon him to discharge any imputation of undue influence. *Collins* v. *Kilroy*, 1 O.L.R. 503; *Re Dooley*, 18 N.S.R. 407.

Promoter of will.

Though a person who promotes a will in his own favour cannot uphold it, if his evidence is uncorroborated that the will was read over to and understood by the testator; *British and Foreign Bible Society* v. *Tupper*, 37 S.C.R. 100; *Hogg* v. *Maguire*, 11 A.R. 507; yet, where, there being contradictory evidence as to reading over such a will, the testator lived for several years afterwards, and spoke of having made his will and did not alter it, the will was upheld. *Connell* v. *Connell*, 37 S.C.R. 404.

Through the *onus* of removing the suspicion, arising from the instrumentality of a person in procuring a will in his own favour, rests upon him, yet where it appeared that the sole legatee had instructed a solicitor, who was a stranger to both the testator and himself, to prepare such a will, and the solicitor afterwards did so, and read it to the testator, who was ill at the time but capable of making a will, and the testator assented to it and duly executed it, the will was upheld. *Adams* v. *McBeath*, 3 B.C.R. 513; affirmed 27 S.C.R. 13. And see *Re Fitch*, 26 N.S.R. 195.

Undue influence.

In order to set aside a will for undue influence it must be shewn that the circumstances are inconsistent with any other hypothesis; it is not sufficient merely to shew that they

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are consistent with the hypothesis of undue influence. *Adams* v. *McBeath*, 27 S.C.R. 13.

There must also be evidence that the testator is not in fact a free agent. So where it was shewn that a testator, physically weak and suffering from disease of the brain, and under the influence of his wife in business matters, made a will under her influence revoking a prior one which he had shown no inclination to alter, the latter will was set aside, and the former upheld. *Waterhouse* v. *Lee*, 10 Gr. 176. See *Donaldson* v. *Donaldson*, 12 Gr. 431; *Roman Catholic Episcopal Corporation for Diocese of Toronto* v. *O'Connor*, 14 O.L.R. 666.

CHAPTER VI.

ALTERATIONS, INTERLINEATIONS, AND ERASURES.

Blank spaces.

It is immaterial that the will contains blank spaces or even a blank page. *Cornehy* v. *Gibbons*, 1 Rob. 705; *In bonis Rice*, I. R. 5 Eq. 176; *In bonis Wotton*, 3 P. & D. 159.

Oral and written declarations of a testator made before or after the execution of the will are admissible in evidence for the purpose of showing what were the constituent parts of the will at the time of execution. *Gould* v. *Lakes*, 6 P. D. 1.

Evidence when alterations made.

Where a will contains obliterations, additions, or other alterations, evidence must, if possible, be produced to show when they were made. *In bonis Hindmarch*, 1 P. & D. 307; *In bonis Duffy*, I. R. 5 Eq. 506; *Moore* v. *Moore*, I. R. 6 Eq. 166; *In bonis Tonge*, 66 L. T. 60.

For this purpose declarations of the testator with regard to his testamentary intentions made before the date of the will are admissible. *Doe* v. *Palmer*, 16 Q. B. 747; *In bonis Sykes*, 3 P. & D. 26; *Dench* v. *Dench*, 2 P. D. 60.

The fact that a date earlier than the date of the will is annexed to alterations is not alone sufficient to show that they were made before execution. *In bonis Adamson*, 3 P. & D. 253.

As to the proper inference where there is evidence that some at least of the alterations in a will were made before execution, see *Williams* v. *Ashton*, 1 J. & H. 115; *Moore* v. *Moore*, I. R. 6 Eq. 166; *Doherty* v. *Dwyer*, 25 L. R. Ir. 297.

Presumption as to alteration.

Alterations made in ink before execution will be presumed to be final. *Gann* v. *Gregory*, 3 D. M. & G. 780; *Ibbott* v. *Bell*, 35 B. 395.

Deliberative alterations.

Alterations made before execution in pencil, the will being written in ink, are *primâ facie* deliberative, and the original

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writing will have effect. *Hawkes* v. *Hawkes*, 1 Hag. 322; *Edward* v. *Astley*, *ib.* 490; *Ravenscroft* v. *Hunter*, 2 *ib.* 68; *Parkin* v. *Bainbridge*, 3 Phillim. 321; *Lavender* v. *Adams*, 1 Add. 403; *Bateman* v. *Pennington*, 3 Moo. P. C. 223; *Francis* v. *Grover*, 5 Hu. 39; *In bonis Hull*, 2 P. & D. 256; *In bonis Adams*, *ib.* 367. See *In bonis Bellamy*, 14 W. R. 501.

Presumption as to date of alteration.

Alterations and additions made in a will complete without them must be presumed, in the absence of evidence, to have been made after the execution of the will or any subsequent codicil. *Cooper* v. *Bockett*, 4 N. of C. 685; 4 Moo. P. C. 419; *Simmons* v. *Rudall*, 1 S. N. S. 115; *Greville* v. *Tylee*, 7 Moo. P. C. 320; *Gann* v. *Gregory*, 3 D. M. & G. 780; *Doe* v. *Palmer*, 16 Q. B. 747; *Williams* v. *Ashton*, 1 J. & H. 115; *Christmas* v. *Whingates*, 3 Sw. & T. 81; *In bonis Sykes*, 3 P. & D. 26.

Alterations and additions made in a will which would be incomplete without them, must be presumed to have been made before execution. *In bonis Cudge*, 1 P. & D. 543; *Birch* v. *Birch*, 1 Rob. 675; 6 N. of C. 581; *In bonis Swinden*, 3 Rob. 192; *Greville* v. *Tylee*, 7 Moo. P. C. 320, *In bonis Bird*, 2 P. & D. 214; *In bonis Adams*, *ib.* 367; *In bonis King*, 23 W. R. 552. See, however, *In bonis White*, 30 L. J. P. 55.

Alterations after date of will and before codicil.

Interlineations and alterations made in a will which is afterwards confirmed by a codicil are admitted to probate if it appears from the codicil or otherwise that they were made before the execution of the codicil. *Tyler* v. *Merchant Taylors*, 15 P. D. 216; *In bonis Heath*, (1892) P. 253.

Wills Act, s. 21.

The Wills Act (1 Vict. c. 26), s. 21, enacts 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.

An alteration opposite which the testator and two witnesses have set their initials in the margin is sufficiently executed under this section. *In bonis Blewitt*, 49 L. J. P. 31; 5 P. D. 116; see, too, *In bonis Treeby*, 3 P. & D. 242; *In bonis Shearn*, 50 L. J. P. 15.

A sentence commenced on the second page and carried over to the third was admitted to probate, though the testator and witnesses had initialled only the second page. *In bonis Wilkinson*, 6 P. D. 100.

Obliteration complete.

Where the original is completely obliterated and not ascertainable, the will must be considered blank, so far as the obliteration, interlineation or other alteration is concerned. *In bonis Ibbetson*, 2 Curt. 337; *Townley* v. *Watson*, 3 Curt. 761; *In bonis James*, 1 Sw. & T. 238; *Doherty* v. *Dwyer*, 25 L. R. Ir. 297.

The Court will only endeavour to discover the original by the use of glasses or similar means, and not by the use of chemicals, or removal of any substance from the will. *In bonis Beavan*, 2 Curt. 369; *In bonis Horsford*, 3 P. & D. 211; *In re Nelson*, I. R. 6 Eq. 569; *In bonis Brasier*, (1899) P. 36. See *Lushington* v. *Onslow*, 6 N. of C. 183; *Ffinch* v. *Combe*, (1894) P. 191.

But where a testatrix wrote something on the back of a codicil and subsequently pasted a piece of blank paper over the writing, it was held that the paper might be removed. *In bonis Gilbert*, (1893) P. 183.

It appears to be clear that no external evidence would be admitted to show what the original words were, except in a case of dependent relative revocation. *In bonis Horsford*, 3 P. & D. 211; *In re Nelson*, I. R. 6 Eq. 569. See *Townley* v. *Watson*, 3 Curt. 761; *Jeffery* v. *Cancer Hospital*, 57 L. T. 600.

The decision of the Probate Division upon a question of interlineation has been adopted upon a question relating to a devise of realty under the same will. *In re Crittenden; Davey* v. *Lansdell*, 30 W. R. 57.

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Enactments. 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. R.S.O. c. 128, s. 23; R.S.B.C. c. 193, s. 18; R.S.M. c. 174, s. 18; R.S.N.B. c. 160, s. 15.

Nova Scotia. In Nova Scotia the same section is substantially enacted but it is preceded by the following words:—"No cancelling by drawing lines across a will or any part thereof and"—then proceeding "no obliteration, etc." And the word "cancellation" is introduced in the body of the section in conjunction with "alteration."

Cancellation of signatures before act. Before the above enactments, a will was found after the testator's death by his heir at law, with the signature of the testator and the subscriptions of the witnesses cancelled, and a jury found that the will was revoked by the cancellations. The Court refused to disturb the verdict, and held that the heir was not bound to account for the cancellation, no fraud being imputed. *Crooks* v. *Cummings*, 6 U.C.R. 305.

Interlineations before act. Where a will, before the above enactments, contained interlineations not noted, and possession had gone for a long time consistently with the will as affected by the interlineations, the Court presumed that they were made before execution. If possession had gone consistently with the will as unaffected by the interlineations, the presumption would have been otherwise. *Doe dem. McVey* v. *Daniel*, 15 N.B.R. 372.

Alterations after Act must be signed.

Any alteration or revocation made in the provisions of a will after the coming into force of the above enactment, must be signed and attested in the manner thereby required, though the will was made before the enactment. *Smith* v. *Meriam*, 25 Gr. 385

The *onus* rests on a party asserting it to shew that an interlineation, made since the above enactments, which is not signed and attested, was made before execution, where the will contains other interlineations properly signed and attested. *Re Lawson*, 25 N.S.R. 454.

Unauthorized clause.

A clause inserted in a will by a solicitor recited a sale of two parcels of land to one S., and devising the land to the plaintiff in the action, with a direction to convey, and disposing of the purchase money. There was a written contract to sell one parcel to S., but no evidence of a contract to sell the other. After the testator's death, the solicitor procured the plaintiff, who was under age, to convey both parcels to S., without providing for the purchase money. On a bill filed by the plaintiff the conveyance was set aside. *Archer* v. *Scott*, 17 Gr. 247.

CHAPTER VII.

REVOCATION.

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Will to be revoked by marriage.

SECT. 18 of the Wills Act enacts 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).

Law as to revocation by marriage part of matrimonial law.

The English law as to the revocation of wills by marriage is part of the matrimonial law of England. *In re Martin; Loustalan* v. *Loustalan*, 69 L. J. P. 74.

Revocation depends on domicile at time of marriage.

Whether the English law applies depends on the domicile of the parties at the time of the marriage. *In re Martin; Loustalan* v. *Loustalan*, 69 L. J. P. 74.

Where a will made in exercise of a power which would not be revoked by marriage disposes of other property of the testator, it will be revoked by marriage only so far as regards the property not subject to the power. *In bonis Russell*, 15 P. D. 111.

A will, though made in contemplation of marriage, is revoked by marriage. *In bonis Cadywold*, 1 Sw. & T. 34; *Marston* v. *Roe* d. *Fox*, 8 A. & E. 14; *Israell* v. *Rodon*, 2 Moo. P.C.51.

Will under power.

A will made in exercise of a power is not revoked by marriage where the heir, executor, or administrator, or statutory next of kin, would not in all events take in default of appointment. *In bonis Fenwick*, 1 P. & D. 319; *In bonis Worthington*, 20 W.R. 260.

Nor is such a will revoked by marriage if the persons

taking in default of appointment, though they may in fact be the heir or statutory next of kin of the donee of the power, do not take in that capacity under the instrument creating the power.

Thus the will is not revoked if the gift in default of appointment is to children of the testator, or to the next of kin simply instead of statutory next of kin. *In bonis Fitzroy*, 1 Sw. & T. 133; *In bonis McVicar*, 1 P. & D. 671; see *In bonis Russell*, 15 P. D. 111.

Where the limitation of real estate in default of appointment is to the donee, her heirs or assigns, the will is revoked by marriage. *Vaughan* v. *Vanderstegen*, 2 Dr. 165, 168.

No will to be revoked by presumption.

Sect. 19 of the Wills Act enacts that no will shall be revoked by any presumption of an intention on the ground of an alteration of circumstances.

No will to be revoked but by another will or codicil, or by destruction.

Sect. 20 enacts that "no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, 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."

Where a will has been destroyed against the wishes of a testator, it is doubtful whether he can subsequently ratify such destruction. *Mills* v. *Millward*, 15 P. D. 20.

Writing declaring intention to revoke.

A statement at the foot of an obliterated codicil, "We are witnesses to the erasure of the above," signed by the testator and attested by two witnesses, has been held to be a "writing declaring an intention to revoke." *In bonis Gosling*, 11 P. D. 79.

A statement in the attestation clause of a codicil that a previous codicil is revoked does not revoke the codicil. *In bonis Atkinson*, 8 P. D. 165.

Revocation while insane invalid.

Revocation while the testator is of unsound mind is ineffectual, though he may subsequently recover. *Borlase* v. *Borlase*,

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4 N. of C. 166; *Brunt* v. *Brunt*, 3 P. & D. 37; *In bonis Hine*, (1893) P. 282.

A will left in the possession of a testator who subsequently becomes insane, and revoked by him, must be shown to have been revoked while he was of sound mind. *Harris* v. *Berrall*, 1 Sw. & T. 153; *Sprigge* v. *Sprigge*, 1 P. & D. 608.

Act of destruction not done *animo revocandi*.

Revocation is in all cases a question of intention, and if the act done, though in itself sufficient to revoke a testamentary instrument, can be shown to have been done for a purpose other than revocation, it will not revoke the instrument.

Thus destruction of a will on the erroneous supposition that it is invalid (*a*), or that it has been revoked or become useless (*b*), or that another instrument is valid (*c*), will not revoke the will. *Giles* v. *Warren*, 2 P. & D. 401; *In bonis Thornton*, 14 P. & D. 82 (*a*); *Scott* v. *Scott*, 1 Sw. & T. 258; *Clarkson* v. *Clarkson*, 2 Sw. & T. 497; 31 L. J. P. 143; *In bonis Middleton*, 2 Sw. & T. 583; 10 Jur. N. S. 1109; *Beardsley* v. *Lacey*, 78 L. T. 25; *Stamford* v. *White*, (1902) P. 46 (*b*); *Hyde* v. *Hyde*, 1 Eq. Ab. 409; *Onions* v. *Tyrer*, 1 P. W. 345; *Perrott* v. *Perrott*, 14 East, 423; *Dancer* v. *Crabb*, 3 P. & D. 98 (*c*).

Some of the cases above cited have been called cases of dependent relative revocation. They are really cases in which there was no *animus revocandi* whatever. The instruments were destroyed, not with a view to revoke them, but because the testator thought they had been revoked.

In the same way the destruction of a codicil which has revived a revoked will will not revoke the will if it appears that the codicil was destroyed on the supposition that the will would still stand. *James* v. *Shrimpton*, 1 P. D. 431.

So, too, an act of destruction done merely for the purpose of making a fair copy of the will, or to improve the handwriting, has no revocatory effect. *In bonis Kennett*, 2 N. R. 461; *In bonis Appleby*, 1 Hag. 144; *In bonis Tozer*, 2 N. of C. 11.

Dependent relative revocation.

A revocation made with a view of making or reviving some other disposition will only take effect if such other disposition is effectually made or revived. It is not material that the other disposition is never put into writing. *Onions* v. *Tyrer*, 1 P. W. 343; 2 Vern. 742; Prec. Ch. 459; 1 Eq. Ab. 408; *Ex parte*

Ilchester, 7 Ves. 348, 372; *Lord Thynne* v. *Stanhope*, 1 Add. 52; *Dixon* v. *Treasury Solicitor*, (1905) P. 42.

But to bring the case within this doctrine it must appear that the testator considered the substitution of some valid disposition as part of the act of revocation at the time when the act was done.

The mere revocation of a will, followed by a subsequent ineffectual disposition, will not set up the original will if the two acts are not so connected, that it can be said the substitution of an effectual disposition was the condition of the revocation of the original will. *In bonis Mitcheson*, 32 L. J. P. 202; *In bonis Weston*, 1 P. & D. 633; *In bonis Gentry*, 3 P. & D. 80.

The point in these cases is not that a revoked will is set up again, if a subsequent disposition is ineffectual, but that the original will is not itself intended to be revoked, unless or until an effectual disposition of the property is made. See *Powell* v. *Powell*, 1 P. & D. 209; *In bonis Weston*, 1 P. & D. 633; *Eckersley* v. *Platt*, 1 P. & D. 281; *Cossey* v. *Cossey*, 69 L. J. P. 17.

In cases of revocation the intention of the testator may always be proved by evidence.

Will revoked to make fresh will.

Thus, if a will is shown to have been cancelled for the purpose of making a fresh will, the original will is not revoked if no fresh will is made. *In bonis De Bode*, 5 N. of C. 189; *In bonis Eeles*, 2 Sw. & T. 600.

Nor, under similar circumstances, is the old will revoked if the fresh will, though made, is not effectual. *Hyde* v. *Mason*, Vin. Abr. Devise, R. 2, pl. 17; Com. 451; 1 Lee, 423, n. (*a*); *Dancer* v. *Crabb*, 3 P. & D. 98.

To set up prior will.

Similarly, a will cancelled in order to set up a prior will which cannot be so set up, is not thereby revoked. *Powell* v. *Powell*, 1 P. & D. 209; see *Dickinson* v. *Swatman*, 4 Sw. & T. 205; *Eckersley* v. *Platt*, 1 P. & D. 281; *In bonis Weston*, 1 P. & D. 633; *Welch* v. *Gardner*, 51 J. P. 760.

Perhaps where a will is cancelled upon the execution of another invalid instrument which differs from the cancelled will only in matters of detail, such as the persons appointed trustees, the fact that the dispositions in the two documents

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are the same would, even in the absence of express evidence of intention, be sufficient to show that the prior will was only intended to be revoked if the second instrument was effectual. See *Onions* v. *Tyrer*, 1 P. W. 343; *Short* v. *Smith*, 4 East, 419; *In bonis Middleton*, 3 Sw. & T. 583.

Obliteration of part of legacy.

Upon the same principle, when the amount of a bequest is obliterated after the execution of the will, and a different, even though it may be a smaller, amount is written over or interlineated, the substituted bequest being incapable of taking effect, the original bequest remains, the inference being that it was the testator's intention to revoke the original bequest only if the substituted bequest was effectually made. *Brooke* v. *Kent*, 3 Moo. P. C. 334, overruling *In bonis Brooke*, 2 Curt. 343; *Soar* v. *Dolman*, 3 Curt. 121, overruling *S. C. nom. In bonis Rippin*, 2 Curt. 332; *In bonis Horsford*, 3 P. & D. 211; *In re Nelson*, I. R. 6 Eq. 569; *Starton* v. *Shellock*, 31 W. R. 382; see *Kirke* v. *Kirke*, 4 Russ. 435; *Locke* v. *James*, 11 M. & W. 901; *Winsor* v. *Pratt*, 2 B. & B. 650. The case of *In bonis Livock*, 1 Curt. 906, is overruled.

In such a case evidence is admissible to show what the original legacy was, and if necessary the Court will employ chemical means to ascertain it. *In bonis Horsford*, *supra*—see *ante*, p. 39.

Erasure without interlineation.

If there is an erasure simply, without any substitution or interlineation, the doctrine does not apply, even though the erasure may be of part of a legacy—as for instance, where a legacy of one hundred and fifty pounds is given, and the words "and fifty" are erased. *In bonis Ibbetson*, 2 Curt. 337; *In bonis Horsford*, 3 P. & D. 211; *In re Nelson*, I. R. 6 Eq. 569.

Erasure of name of executor.

Upon similar principles, when the name of an executor has been obliterated and another executor substituted after the execution of the will, the name of the original executor will be restored, if it can be shown by external evidence what the name was. The presumption that the testator intended to appoint some executor or other is a strong one. *In bonis Parr*, 29 L. J. P. 70; 6 Jur. N. S. 56; *In bonis Harris*, 1 Sw. & T. 536; 29 L. J. P. 79; *In bonis Greenwood*, (1892) P. 7.

Erasure of

Where the name of a legatee is obliterated, and that of

another legatee substituted after execution, and there is no further evidence of intention, no case of dependent relative revocation arises. Under such circumstances, however, a case of dependent relative revocation may be raised by proper evidence. Name of legatee.

Thus, if it appears from external evidence that a gift has been made to a person only on the supposition by the testator that another person was incapable of taking, and after the execution of the will the name of the first person has been obliterated and the name of the second substituted, the original legatee takes on the ground that he was intended to take in the event of the substituted legatee being incapable of taking. *In bonis McCabe*, 3 P. & D. 94.

A subsequent will is no revocation of a former one if the contents of the later will are unknown, or if, though it is known that the later will differed from the former one, it is unknown in what respects it differed. *Hitchins* v. *Bassel*, 3 Mod. 204; 2 Salk. 592; Show. P. C. 146; *Dickinson* v. *Stidolph*, 11 C. B. N. S. 341, 357; *Hellier* v. *Hellier*, 9 P. D. 237; see *McAra* v. *McCay*, 23 L. R. Ir. 138; see also 19 Ind. Ap. 87. Subsequent will—contents unknown.

Where there are several testamentary instruments which are not inconsistent, they will together be considered the will of the testator so far as they are not inconsistent. *In bonis Budd*, 3 Sw. & T. 196; *Berks* v. *Berks*, 4 Sw. & T. 23; *Lemage* v. *Goodban*, 1 P. & D. 57; *In bonis Fenwick*, *ib.* 319; *In bonis Griffith*, 2 *ib.* 457; *In bonis Patchell*, 3 *ib.* 153; *In bonis Hartley*, 50 L. J. P. 1; *In bonis Hodgkinson*, 69 L. T. 150. Several testamentary instruments.

The fact that both instruments appoint a person sole executor will not cause the later instrument to revoke the former *In bonis Leese*, 2 Sw. & T. 442; *In bonis Graham*, 3 *ib.* 69; *Graves* v. *Price*, 3 *ib.* 71.

Where a subsequent will disposes or shows an intention of disposing of all the testator's property, it will be held to have revoked a prior will *in toto*, whether the dispositions contained in the subsequent will are different from the earlier dispositions or not. *Henfrey* v. *Henfrey*, 2 Curt. 468; 4 Moo. P. C. 29; *Pepper* v. *Pepper*, I. R. 5 Eq. 85; *Plenty* v. *West*, 2 Phillim. 264; *Cottrell* v. *Cottrell*, 2 P. & D. 397; *Dempsey* v. *Lawson*, Inconsistent instruments.

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2 P. D. 98; *O'Leary* v. *Douglass*, 3 L. R. Ir. 323; *In re M'Farlane*, 13 L. R. Ir. 264; *In bonis Tarnour*, 56 L. T. 671; *In bonis Palmer: Palmer* v. *Peat*, 58 L. J. P. 44; *Cadell* v. *Wilcocks*, (1898) P. 21; *Kent* v. *Kent*, (1902) P. 108.

This doctrine applies even though the second will cannot be found, and must be presumed to have been revoked. *McAra* v. *McCay*, 23 L. R. Ir. 133.

Where there are two testamentary instruments, and from their nature and the surrounding circumstances it is doubtful whether the later was intended to be in substitution for the earlier one, evidence is admissible to show the intention; and the Court may infer from the similarity between two testamentary instruments that the later was intended to be substituted for the earlier. *Jenner* v. *Finch*, 5 P. D. 106; *Wainewright* v. *Wainewright*, 71 L. T. 265; *Chichester* v. *Quatrefages*, (1895) P. 186; *In bonis Began*, (1907) P. 125.

Several instruments of same date not consistent.

Where there are two testamentary instruments of the same date not consistent with each other, but there is nothing to show which was executed last, the Court will, if possible, construe them so that they may both stand; if they are so inconsistent that they cannot stand together, neither can be proved. *Townsend* v. *Moore*, (1905) P. 66.

Last will.

The description of a testamentary document as the last or last and only will of the testator will not alone have the effect of revoking prior testamentary papers. *Cutlo* v. *Gilbert*, 9 Moo. P. C. 131; *Stoddart* v. *Grant*, 1 Macq. 171; *Lemage* v. *Goodban*, 1 P. & D. 57; *Leslie* v. *Leslie*, I. R. 6 Eq. 332; *Freeman* v. *Freeman*, Kay, 479; 5 D. M. & G. 704; *In bonis De la Saussaye*, 3 P. & D. 42; *In re O'Connor*, 13 L. R. Ir. 406; *Simpson* v. *Foxon*, (1907) P. 54.

Clause of revocation.

A will containing a clause revoking all former wills revokes a will made in execution of a general or special power. *Solheron* v. *Dening*, 20 Ch. D. 99; *Harvey* v. *Harvey*, 23 W. R. 476; *In re Kingdom*; *Wilkins* v. *Pryer*, 32 Ch. D. 604; *Cadell* v. *Wilcocks*, (1898) P. 21; see *In bonis Tenny*, 45 L. T. 78.

In several cases where a will was made in exercise of a power, a second will made in exercise of another power, and

containing a general clause of revocation, has been held not to revoke the first will, but these cases may be considered overruled. *In bonis Meredith*, 29 L. J. P. 155; *In bonis Merritt*, 1 Sw. & T. 112; 7 W. R. 543; *In bonis Jays*, 30 L. J. P. 169; 4 Sw. & T. 214.

A will under a power is revoked if a subsequent will contains an express reference to the power, or disposes of the property subject to the power, though it may not dispose of all of it. *Richardson* v. *Barry*, 3 Hag. 249; *In bonis Eustace*, 3 P. & D. 183; *Harvey* v. *Harvey*, 23 W. R. 478; *Kent* v. *Kent*, (1902) P. 108.

And a testamentary appointment under a general power is revoked by a subsequent will containing a residuary bequest. *In re Gibbes' Settlement*; *White* v. *Randolf*, 37 Ch. D. 143.

A will making an appointment under a special power is not revoked by a subsequent will, which contains no clause of revocation and does not exercise the power. *Cadell* v. *Wilcocks*, (1898) P. 21.

Codicil reviving revoked will.

A codicil reviving a revoked will thereby revokes a will intermediate in date between the first revoked will and the codicil, and inconsistent with the first will. *Lord Walpole* v. *Oxford*, 3 Ves. 402; *In bonis Reynolds*, 3 P. & D. 35.

Codicil reviving destroyed will.

Where will A is revoked by will B and destroyed, and there is a codicil, purporting to revive will A but ineffectual to do so, because will A is not in existence, the question arises whether will B is revoked.

The cases on this subject are complicated. The rule appears to be, that if there are no dispositions in the codicil inconsistent with will B, the mere fact that the codicil is described as a codicil to will A does not revoke will B. *Rogers* v. *Goodenough*, 2 Sw. & T. 342; *In bonis Reade*, (1902) P. 75.

On the other hand, if the codicil contains dispositions inconsistent with will B, or expressly confirms will A, it seems will B is revoked, and the codicil alone is admissible to probate. *Hale* v. *Tokelove*, 2 Rob. 318; *Newton* v. *Newton*, 12 Ir. Ch. 118.

Revocation of codicil.

The destruction or cancellation of a will, whereby it is revoked, will not revoke a codicil. *In bonis Dutton*, 3 Sw. & T. 66; *In bonis Ellice*, 12 W. R. 353; *In bonis Hollinrell*, 4 N. & C. 400;

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In bonis Caulthard, 11 Jur. N. S. 184; *Tagart* v. *Hooper*, 1 Curt. 289; *Black* v. *Jobling*, 1 P. & D. 685; *In bonis Savage*, 2 *ib.* 78; *In bonis Turner*, *ib.* 403; *Gardiner* v. *Courthope*, 12 P. D. 11; *In bonis Clements*, (1892) P. 254; *Paige* v. *Brooks*, 75 L. T. 455; see *Fulle* v. *Godfrey*, 14 A. C. 70.

But if will and codicil are on the same piece of paper, cutting off the signature to the will will revoke the codicil, if the intention was to revoke both. *In bonis Bleckley*, 8 P. D. 169.

Effect of codicil revoking will on earlier codicils.

Where a will is revoked by a subsequent codicil, it is a question of construction whether intermediate codicils are also revoked.

If the revoking codicil refers to the will by date, or distinguishes between the will and subsequent codicils, the latter are not revoked. *Farrer* v. *St. Catharine's Coll.*, 16 Eq. 19; see *Bunny* v. *Bunny*, 3 B. 109; *Pratt* v. *Pratt*, 14 Sim. 129.

Re-execution of will containing clause of revocation.

The re-execution of a will, containing a clause revoking all former testamentary instruments, will not revoke a codicil to the will, at any rate if the object of the re-execution appears to have been to give effect to alterations in the will, or if there is evidence to show that revocation of the codicil was not intended. *Wade* v. *Nazer*, 1 Rob. 627; *Upfill* v. *Marshall*, 3 Curt. 636; *In bonis Rawlins*, 48 L. J. P. 64; 28 W. R. 139.

Codicil confirming will.

A codicil making an alteration in a will, referred to as a will of a particular date, and confirming that will, does not, without other circumstances, revoke intermediate codicils. *Smith* v. *Cunningham*, 1 Add. 448; *Crosbie* v. *Macdoual*, 4 Ves. 610; *In bonis De la Saussaye*, 3 P. & D. 42; *Green* v. *Tribe*, 9 Ch. D. 231.

But an intermediate codicil may in effect be revoked if the second codicil shows an intention to confirm the will without the alteration made by the intermediate codicil. *McLeod* v. *McNab*, (1891) A. C. 471, P. C.

A codicil confirming the will except as altered by an earlier codicil referred to by its date does not revoke an intermediate codicil by which alterations have been made in the will. *Follett* v. *Pettman*, 23 Ch. D. 337.

Where a codicil revoking a will in part is itself revoked, the will remains as altered by the codicil. *In bonis Debac*, 77 L. T. 374. Revocation of revoking codicil.

A letter, duly signed and attested, requesting a third person to destroy the testator's will, is sufficient to revoke it. *In bonis Durance*, 2 P. & D. 406. Testamentary letter.

Where a testator intends to revoke his will by the performance of a succession of acts, some only of which he actually performs, the will is not revoked, though the acts performed might alone be sufficient to revoke it if the testator intended to do no more. *Doe* v. *Perkes*, 3 B. & A. 489; *In bonis Colbery*, 2 Curt. 832; *Elias* v. *Elias*, 1 Sw. & T. 155. See, too, *Watson* v. *Pratt*, 2 B. & B. 650; *Locke* v. *James*, 11 M. & W. 901; *Kirke* v. *Kirke*, 4 Russ. 435; *Doe* v. *Harris*, 6 A. & E. 209; 2 N. & P. 615. Revocation by succession of acts.

But though a testator may have done everything which he considered necessary to revoke his will, the will is not revoked if he has not adopted one or other of the modes of revocation pointed out in sect. 20. See *ante*, p. 41. Acts done must be those named in the statute.

Thus, writing across a will that it is revoked, and throwing it into the waste paper basket, will not revoke the will if it is in fact preserved. *Cheese* v. *Lovejoy*, 2 P. D. 251; see *Andrew* v. *Motley*, 12 C. B. N. S. 514.

The revocatory acts, if done by a third person by the testator's direction, must also be done in his presence. Revocation by third person.

Thus, a will burnt by the testator's order, but not in his presence, is not revoked. *In bonis Dadds*, Dea. & Sw. 290; *Clark* v. *Dixon*, 8 Times L. R. 11.

Striking through the will or the signature of the testator with a pen, or partial erasure of the signature by a knife, is not sufficient to revoke his will. *Stephens* v. *Taprell*, 2 Curt. 458; *In bonis Rose*, 4 N. of C. 101; *Benson* v. *Benson*, 2 P. & D. 172; *Re Brewster*, 6 Jur. N. S. 56; *In bonis Godfrey*, 69 L. T. 22. Striking through signature.

A will found in the possession of the testator with the signature cut off or scratched away will, in the absence of evidence to the contrary, be presumed to be revoked. *In bonis Lewis*, 1 Sw. & T. 31; *Walker* v. *Armstrong*, 21 B. 305; 4 W. R. 770; *In bonis Gullan*, 1 Sw. & T. 23; *Hobbs* v. *Knight*, 4 Tearing off signature.

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Curt. 768; *Bell* v. *Fothergill*, 2 P. & D. 148; *In bonis Morton*, 12 P. D. 141.

And this is the case, though the piece cut off may be carefully preserved with the will. *In bonis Simpson*, 5 Jur. N. S. 1366; *In re White*, 3 L. R. Ir. 413; *Bell* v. *Fothergill*, 2 P. & D. 148; *Magnesi* v. *Hazelton*, 44 L. T. 586.

Tearing off names of witnesses.

Obliterating or tearing off the names of the attesting witnesses is sufficient to revoke the will. *In bonis James*, 7 Jur. N. S. 52; *Abraham* v. *Joseph*, 5 Jur. N. S. 179; *Evans* v. *Dallow*, 31 L. J. P. 128.

Tearing off the name of one of the attesting witnesses would, no doubt, be sufficient to revoke the will. But the will is not revoked if the name is carefully preserved with the will, and there is other evidence from the mode in which the piece cut off has been treated to rebut the presumption of revocation. *In bonis Wheeler*, 41 L. J. P. 29; *In bonis Taylor*, 63 L. T. 230.

Tearing off signatures recited to have been made.

The destruction of signatures not necessary to the validity of the will, but recited in the attestation clause to have been made, is sufficient to revoke the will. *Price* v. *Price*, 3 H. & N. 341; *Lambell* v. *Lambell*, 3 Hag. 568; *Davies* v. *Davies*, 1 Cas. t. Lee, 444; *Williams* v. *Tyley*, Johns, 530; *In bonis Harris*, 3 Sw. & T. 485.

Destruction of portion of will.

Where a portion of the will not necessary to its validity as a testamentary instrument is destroyed, the question whether the portion destroyed is so important as to rebut the presumption that the rest cannot have been intended to stand without it, or whether it is unimportant and independent of the rest of the will. *Clarke* v. *Scripps*, 2 Rob. 563; *In re White*, 3 L. R. Ir. 413; *Leonard* v. *Leonard*, (1902) P. 243.

Thus, the destruction of a clause at the commencement of a will, or cutting out various legacies, or a clause appointing executors, will not revoke the rest. *In bonis Woodward*, 2 P. & D. 206; *In bonis Nelson*, I. R. 6 Eq. 569; *In bonis Maley*, 12 P. D. 134; *In bonis Leach*, 63 L. T. 111.

On the other hand, where the middle pages only of a will were preserved, the whole was held to be revoked, though each

page had been signed and attested. *In bonis Gullan*, 1 Sw. & T. 23; *Gullan* v. *Grove*, 26 B. 64; where the facts are badly stated. See *Treloar* v. *Lean*, 14 P. D. 49.

A gift by deed of property disposed of by a prior will is not a revocation of the will, though it may make the will ineffectual. *Ford* v. *De Pontes*, 30 B. 572.

Will in duplicate.

Where a will is executed in duplicate, and the testator retains one while he deposits the other in the custody of another person, the destruction of the duplicate in the testator's possession revokes the whole. *Seymour's Case*, Com. Rep. 453; 1 P. W. 346; 2 Vern. 742; *Onions* v. *Tyrer*, 1 P. W. 346; *Bartenshaw* v. *Gilbert*, Cowp. 49; *Boughey* v. *Moreton*, 2 Cas. t. Lee, 532; 3 Hag. 191; *Rickards* v. *Mumford*, 2 Phillim. 23; *Colvin* v. *Fraser*, 2 Hag. 266; see *Payne* v. *Trappes*, 1 Rob. 583.

The same result follows if the duplicate in the testator's possession cannot be found at his death. *Jones* v. *Harding*, 58 L. T. 60.

Will not found.

A will or codicil left in the testator's possession and not forthcoming at his death must, in the absence of evidence to the contrary, be presumed to have been revoked. *Welch* v. *Phillips*, 1 Moo. P. C. 299; *Padmore* v. *Whatton*, 3 Sw. & T. 49; *In bonis Shaw*, 1 Sw. & T. 62; *Brown* v. *Brown*, 8 E. & B. 876; *Eckersley* v. *Platt*, 1 P. & D. 281; *Sugden* v. *Lord St. Leonards*, 1 P. D. 154; *In bonis Debac*, 77 L. T. 374; *Allan* v. *Morrison*, (1900) A. C. 604.

But the contents of the will and the declarations of the testator down to his death are admissible in evidence for the purposes of rebutting this presumption. *Patten* v. *Poulten*, 6 W. R. 458; 1 Sw. & T. 55; *Battyl* v. *Lyles*, 4 Jur. N. S. 718; *Finch* v. *Finch*, 1 P. & D. 371; *Whiteley* v. *King*, 17 C. B. N. S. 756; *Keen* v. *Keen*, 3 P. & D. 105; *Sugden* v. *Lord St. Leonards*, 1 P. D. 154.

Evidence of contents of lost will.

Where a will shown not to have been revoked, cannot be found at the testator's death, or has been lost or destroyed after his death but before probate, evidence is admissible to prove its contents. *Brown* v. *Brown*, 8 E. & B. 876; *In bonis*

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Barber, 1 P. & D. 267; *Burls* v. *Burls*, *ib.* 472; *In bonis Leigh*, (1892) P. 82.

And for this purpose the declarations, written or oral, of the testator, made before the execution of the will, may be admitted, *Doe* d. *Shaleross* v. *Palmer*, 16 Q. B. 747; *Quick* v. *Quick*, 3 Sw. & T. 442; *Johnson* v. *Lyford*, 1 P. & D. 546; *Sugden* v. *Lord St. Leonards*, 1 P. D. 154.

Declarations made by the testator after the execution of the will were also held admissible in *Sugden* v. *Lord St. Leonards*, but there is grave doubt whether the decision was right in that respect. See *Woodward* v. *Goulstone*, 11 App. C. 469; *Atkinson* v. *Morris*, (1897) P. 40.

The contents of the will may be established by the evidence of a single interested witness whose veracity and competency are unimpeached. *Sugden* v. *Lord St. Leonards*, 1 P. D. 154: see *Flood* v. *Russell*, 29 L. R. Ir. 91.

Where it is impossible to ascertain the whole contents of the will, effect will be given to such portions as can be ascertained, if the Court is satisfied that they substantially represent the intention of the testator. *Sugden* v. *Lord St. Leonards*, 1 P. D. 154; *Dickinson* v. *Stidolph*, 11 C. B. N. S. 341; *Woodward* v. *Goulstone*, 11 App. C. 469.

CANADIAN NOTES.

Chap. VII. Revocation.

All the Provinces have substantially enacted the Imperial Wills Act, some literally. The language in some, though slightly modified, is apparently intended to have the same effect.

Before this legislation it was held in Upper Canada that a codicil merely appointing a new executor did not revoke but confirmed a will. *Doe dem. Baker* v. *Clark*, 7 U.C.R. 44.

Enactments.

The revocation of a will, or revival of a revoked will, now depends upon the following enactments:—

Marriage—Ontario and Nova Scotia.

In Ontario, from 13th April, 1897, and in Nova Scotia, every will is revoked by the marriage of the testator, except in the following cases, namely:—

"(*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;

(In Nova Scotia the instrument of election is to be filed in the Court of Probate in which probate is sought to be taken, or taken.)

"(*c*) Where the will is made in the exercise of a power of appointment and the real or personal estate thereby appointed would not, in default of such appointment, pass to the testator's heir, executor or administrator, or the person entitled as the testator's next of kin under the Statute of Distribution." R.S.O. c. 128, s. 20(1); R.S.N.S. c. 139, s. 18.

Other provinces.

In Ontario, before 13th April, 1897, and in the other Provinces, every will is revoked by the marriage of the testator, except a will made in exercise of a power of appointment, where the property would not, in default of appointment, go to his heir or other representative as set out in clause (*c*) above. R.S.O. c. 128, s. 20(2); R.S.B.C. c. 193, s. 15; R.S.M. c. 174, s. 15; R.S.N.B. c. 160, s. 12.

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Change in circumstances.

"No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances." R.S.O. c. 128, s. 21; R.S.B.C. c. 193, s. 16; R.S.M. c. 174, s. 16; R.S.N.B. c. 160, s. 13; R.S.N.S. c. 139, s. 19.

Marriage under assumed names. subsequent ceremony.

Where a man and woman were married in Ireland under assumed names in 1880, and lived together for two years, and in 1885 went through another ceremony in New Brunswick in their right names, it was held, without any evidence as to the law of Ireland, that the first ceremony must be presumed to have constituted a marriage, and therefore that a will made after it and before the second ceremony was not revoked by the second. *Re Tiernay*, 25 N.B.R. 286.

Birth of child.

Since the above enactments the birth of a child does not revoke a will. *Re Tobey*, 6 P.R. 272.

Marriage.

Marriage alone will revoke a will, since the above enactments, except in the cases removed from the operation of the Acts.

With regard to the class of cases comprised in clause (*a*), inasmuch as it is a statutory requirement that there shall be a declaration in the will that it is made "in contemplation of such marriage," it is conceived that no evidence would be admissible, either extraneous or by inference from the nature of the disposition contained in the will, to shew such contemplation or intention, if the declaration should not expressly appear in the will.

The declaration must apparently be made respecting a particular marriage. The words are a declaration "made in contemplation of *such* marriage." Consequently, a disposition to A., but in case of marriage to my wife, would apparently not suffice, for two reasons: (1) because there is no formal declaration, and, (2) because it is not made in contemplation of a particular marriage.

Clause (*b*) is no doubt intended to cover cases not within clause (*a*), and to provide for wills made *in the event* of marriage, but not in contemplation of a particular marriage. If the will contained an express declaration, it would fall within clause (*a*), and clause (*b*) need not be resorted to.

But where there is no express declaration, then election by the husband or wife of the testator will prevent revocation. It is a necessary hypothesis for the application of clause (*b*) that there should be a disposition in favour of the wife or husband, otherwise an election to take could not be made. Thus the above suggested disposition in a will would be one made *in the event* of marriage, and would prevent revocation if the wife should elect to take under it. But if a testator made a bequest or devise to A., but in case of marriage then to his children, so that his wife could not elect to take under it, the revocation would be complete by marriage.

Subsequent testamentary document.

"No will or codicil or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, 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." R.S.O. c. 128, s. 22; R.S.B.C. c. 193, s. 17; R.S.M. c. 174, s. 17; R.S.N.B. c. 160, s. 14; R.S.N.S. c. 139, s. 20.

The provision that a will shall not be revoked except by another will or codicil duly executed, means a will or codicil executed in the same manner as a will and which is sufficient as a testamentary disposition, not one which fails to take effect. *Re Parker*, 20 Gr. 389.

Destruction.

Since the above enactments 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 will which had a seal upon it was found after testator's death with the seal cut out and pencil marks drawn through the signature, and a subsequent document not properly signed as a will. The Court on the evidence held that the will was revoked absolutely and not dependently upon another will taking effect. *Re Drury*, 22 N.B.R. 318.

Partial destruction.

From a duly executed will two sheets were taken, by direction of the testator, and were re-written. The new sheets

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were inserted in the will, and the signatures were acknowledged, but the will as altered was not duly executed. The two sheets were afterwards taken out and destroyed, by the direction of the testator, but not in his presence, and it was held that the original will was not revoked, the intention of the testator evidently being not to revoke the earlier document, but only to make some changes in it, which were never accomplished. *O'Neill* v. *Owen*, 17 O.R. 525.

Lost will.

Statements of a testator made to his solicitor and others respecting his will and the provisions of it are admissible in evidence in an action to establish a will which could not be found after the testator's death, and were held to be sufficient corroboration of the evidence of the plaintiff who had drawn the will and was claiming large benefits under it, the testator being without any relatives and knowing that if he made no will, his property would go to the Crown. *Stewart* v. *Walker*, 6 O.L.R. 495.

CHAPTER VIII.

WILLS OF SOLDIERS AND SEAMEN.

Soldiers and sailors excepted from Statute of Frauds as regards wills of movables.

THE Statute of Frauds (29 Car. II. c. 3), sect. 23, provides that, notwithstanding that Act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his movables, wages, and personal estate as he or they might have done before the making of the Act.

Exception continued by Wills Act.

The Wills Act (1 Vict. c. 26), sect. 11, 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 the making of the Act.

The Navy and Marines (Wills) Act, 1865.

By the Navy and Marines (Wills) Act, 1865 (28 & 29 Vict. c. 72), as amended by the Navy and Marines (Wills) Act, 1897 (60 & 61 Vict. c. 15), as to persons dying after June 3, 1897, it is provided:—

2. In this Act—

Interpretation of terms.

The term "seaman or marine" means a petty officer or seaman, non-commissioned officer of marines or marine, or other person forming part in any capacity of the complement of any of Her Majesty's vessels, or otherwise belonging to Her Majesty's naval or marine force, exclusive of commissioned, warrant, and subordinate officers and assistant engineers, and of kroomen.

Will made before entry ineffectual as to wages, &c.

3. A will made after the commencement of this Act by any person at any time previously to his entering into service as a seaman or marine shall not be valid to pass any wages, prize money, bounty money, grant, or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty.

Will invalid if combined with power of attorney.

4. A will made after the commencement of this Act by any person while serving as a seaman or marine shall not be valid

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for any purpose if it is written or contained on or in the same paper, parchment, or instrument with a power of attorney.

Regulations for wills of seamen, &c. as to wages, &c.

5. A will made after the commencement of this Act by any person while serving as a seaman or marine shall not be valid to pass any wages, prize money, bounty money, grant, or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty, unless it is made in conformity with the following provisions:—

(1.) Every such will shall be in writing and be executed with the formalities required by the law of England in the case of persons not being soldiers in actual military service or mariners or seamen at sea:

(2.) Where the will is made on board one of Her Majesty's ships, one of the two requisite attesting witnesses shall be a commissioned officer, chaplain, or warrant or subordinate officer belonging to Her Majesty's naval or marine or military force:

(3.) Where the will is made elsewhere than on board one of Her Majesty's ships, one of the two requisite attesting witnesses shall be such a commissioned officer or chaplain or warrant or subordinate officer as aforesaid, or the governor, agent, physician, surgeon, assistant surgeon, or chaplain of a naval hospital at home or abroad, or a justice of the peace, or the incumbent, curate, or minister of a church or place of worship in the parish where the will is executed, or a British consular officer, or an officer of customs, or a notary public, or a solicitor, or in Scotland a law agent.

A will made in conformity with the foregoing provisions shall, as regards such wages, money, or effects, be deemed to be well made for the purpose of being admitted to probate in England; and the person taking out representation to the testator under such will shall exclusively be deemed the testator's representative with respect to such wages, money, or effects.

As to wills made by prisoners of war.

6. Notwithstanding anything in this or any other Act, a will made after the commencement of this Act by a seaman or

marine while he is a prisoner of war shall (as far as regards the form thereof) be valid for all purposes if it is made in conformity with the following provisions:—

(1.) If it is in writing and is signed by him, and his signature thereto is made or acknowledged by him in the presence of and is in his presence attested by one witness, being either a commissioned officer or chaplain belonging to Her Majesty's naval or marine or military force, or a warrant or subordinate officer of Her Majesty's navy, or the agent of a naval hospital, or a notary public:

(2.) If the will is made according to the forms required by the law of the place where it is made:

(3.) If the will is in writing and executed with the formalities required by the law of England in the case of persons not being soldiers in actual military service or mariners or seamen at sea.

Payment under will not in conformity with Act.

7. Notwithstanding anything in this Act, in case of a will made after the commencement of this Act by any person while serving as a marine or seaman, and being either in actual military service or a mariner or seaman at sea, the Admiralty may pay or deliver any wages, prize money, bounty money, grant, or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty, to any person claiming to be entitled thereto under such will, though not made in conformity with the provisions of this Act, if, having regard to the special circumstances of the death of the testator, the Admiralty are of opinion that compliance with the requirements of this Act may be properly dispensed with.

Commencement of Act.

By sect. 8, the Act was to commence in effect on the 1st January, 1866, with power for Her Majesty in Council, with reference to places out of the United Kingdom, to direct that the Act shall not commence until a time after that day.

It follows, therefore, that except in the cases mentioned in the Navy and Marines (Wills) Act, 1865, any soldier in actual military service, and any mariner or seaman being at sea,

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can make a testamentary disposition of his personalty in the manner allowed before the Statute of Frauds.

It is not proposed here to go into a full discussion of the old law. It may, however, be useful shortly to state some of the more important points relating to the wills of these privileged persons.

Infancy.

Such privileged persons may make wills disposing of their personal property, provided they have attained the age of fourteen. *In bonis Farquhar*, 4 N. of C. 651; *In bonis McMurdo*, 1 P. & D. 540; Swinburne, part ii., sect. 2, p. 75.

Soldier defined.

The term "soldier" in sect. 11 of the Wills Act includes an officer and a surgeon. *Drummond* v. *Parish*, 3 Curt. 522; *In bonis Hayes*, 2 Curt. 338; *In bonis Donaldson*, 2 Curt. 386.

Military service.

The words "on actual military service" are equivalent to "on an expedition."

Meaning of "on an expedition."

A soldier is "on an expedition" if he has taken a step towards joining the forces in the field, for instance if he goes into barracks under orders with a view to embarcation, or if an order to mobilise has been issued to the battalion to which he belongs. *In bonis Hiscock*, (1901) P. 78; *Gattward* v. *Knee*, (1902) P. 99; *May* v. *May*, *ib.* 103, n.

But a will made by an officer while quartered at home or abroad in barracks is not within this section. *Drummond* v. *Parish*, 3 Curt. 522; *White* v. *Repton*, 3 *ib.* 818; *In bonis Phipps*, 2 *ib.* 368; *In bonis Johnson*, *ib.* 341; *In bonis Hill*, 1 Rob. 276; *Herbert* v. *Herbert*, D. & Sw. 10; see *In bonis Donaldson*, 2 Curt. 386.

Mariner defined.

The term "mariner or seaman" includes a purser and a surgeon, and it seems the whole profession. *In bonis Hayes*, 2 Curt. 338; *In bonis Saunders*, 1 P. & D. 16; *In bonis Rae*, 27 L. R. Ir. 116.

It also includes persons serving in the merchant service. *In bonis Milligan*, 2 Rob. 108; *Morrell* v. *Morrell*, 1 Hag. 51; *In bonis Parker*, 2 Sw. & T. 375.

"At sea."

The term "at sea" appears to be equivalent to "on maritime service," including the period while the testator is returning from such service. Thus wills made on board a vessel in a river, or in port, have been held valid within sect. 11. *In bonis*

Austen, 2 Rob. 611; *In bonis Corby*, 18 Jur. 634; *In bonis Lay*, 2 Curt. 375; *Seymour's Case*, cit. 3 Curt. 530; *In bonis Saunders*, 1 P. & D. 16; *In bonis McMurdo*, *ib.* 540; *In bonis Rae*, 27 L. R. Ir. 116; *In bonis Patterson*, 79 L. T. 123.

Nuncupative wills.

The privileged persons above mentioned may make nuncupative wills, which will remain operative, though at the time of their death they may not be on service or at sea. *Morrell* v. *Morrell*, 1 Hag. 51; *In bonis Leese*, 17 Jur. 216; *In bonis Scott*, (1903) P. 243; see, too, *Leman* v. *Bousall*, 1 Add. 389.

They may make a will by any testamentary paper, whether in their handwriting or not, and whether signed by them or not, provided it can be shown that such paper was intended to take effect as the testator's last will. *Friswell* v. *Moore*, 3 Phillim. 135; *Constable* v. *Steibel*, 1 Hag. 56; *Maclae* v. *Ewing*, 1 Hag. 317; *Read* v. *Phillips*, 2 Phillim. 122; *Masterman* v. *Maberly*, 2 Hag. 235. See *Rymer* v. *Clarkson*, 1 Phillim. 22; *In bonis Cosser*, 1 Rob. 633; *Fulleck* v. *Atkinson*, 3 Hag. 527; *Wood* v. *Medley*, 1 Hag. 661; *In bonis Rae*, 27 L. R. Ir. 116.

The following rules must be understood as relating only to wills of personalty not within the Statute of Frauds or the Wills Act.

Proof of handwriting.

A will not found in the testator's possession cannot be established merely on the proof of the testator's handwriting. *Machin* v. *Grindell*, 2 Lee, 406; *Jameson* v. *Cooke*, 1 Hag. 82; *Crisp* v. *Walpole*, 2 Hag. 541; *Rutherford* v. *Maule*, 4 Hag. 213; *Bussell* v. *Marriott*, 1 Curt. 9; *Wood* v. *Goodlake*, 2 Curt. 82, 176; 2 Moo. P. C. 354, 436.

Will with attestation clause, but not attested.

A will bearing an execution or attestation clause, but unexecuted or unattested, will be presumed not to have been finally adopted as the will of the testator. *Scott* v. *Rhodes*, 1 Phillim. 19; *Abbott* v. *Peters*, 4 Hag. 380; *Beaty* v. *Beaty*, 1 Add. 154; *Montefiore* v. *Montefiore*, 2 Add. 357; *Stewart* v. *Stewart*, 2 Moo. P. C. 193; *Bragg* v. *Dyer*, 3 Hag. 207.

Such presumption may be rebutted if sufficient grounds can be shown for the omission to execute or attest it, such as ill-health, or unavoidable accident, or if it appears that it was intended to take effect as the testator's will in the form in

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which it is found. *In bonis Taylor*, 1 Hag. 641; *L'Huille* v. *Wood*, 2 Cas. t. Lee, 22; *Lamkin* v. *Babb*, 1 Cas. t. Lee, 1; *Scott* v. *Rhodes*, 1 Phillim. 12; *Masterman* v. *Maberly*, 2 Hag. 247; *Hoby* v. *Hoby*, 1 Hag. 146; *Forbes* v. *Gordon*, 3 Phillim. 614; *Thomas* v. *Wall*, 3 Phillim. 23; *In bonis Lamb*, 4 N. of C. 561; *Buckle* v. *Buckle*, 3 Phillim. 323; *Allen* v. *Manning*, 2 Add. 490; *Harris* v. *Bedford*, 2 Phillim. 177.

Will including realty.

Where the will includes property which can only be given by a will executed with certain formalities, the same presumption arises that the will was intended to be executed with such formalities. *In bonis Herne*, 1 Hag. 222, 226; *Douglas* v. *Smith*, 3 Knapp, 1; *Elsden* v. *Elsden*, 4 Hag. 183; *Gillor* v. *Burne*, 4 Hag. 291; *Reynolds* v. *White*, 2 Lee, 214; *Reeves* v. *Glover*, 2 Lee, 359.

It seems if the will includes realty, and the gift of the personalty is made dependent on the gift of the realty, probate of the will as regards the personalty would be refused as well. *Tudor* v. *Tudor*, 4 Hag. 199, n.

Temporary will.

A paper intended to be effectual, pending the preparation of a more formal document, will take effect as a will, if no formal document is executed. *Popple* v. *Canison*, 1 Add. 377; *Forbes* v. *Gordon*, 3 Phillim. 614; *Hattatt* v. *Hattatt*, 4 Hag. 211.

Instructions for will.

Instructions for a will may take effect as a will, if the testator was prevented by death from executing a formal will. *Bone* v. *Spear*, 1 Phillim. 345; *Green* v. *Skipworth*, *ib.* 53; *Wood* v. *Wood*, *ib.* 357; *Huntington* v. *Huntington*, 2 *ib.* 213; *Sikes* v. *Smith*, *ib.* 351; *Must* v. *Sutcliffe*, 3 *ib.* 104; *Nathan* v. *Morse*, *ib.* 529; *Lewis* v. *Lewis*, *ib.* 109; *Allen* v. *Manning*, 2 Add. 490; *Goodman* v. *Goodman*, 2 Lee, 109; *Robinson* v. *Chamberlayne*, *ib.* 129; *Brown* v. *Furrant*, *ib.* 418; *Burrows* v. *Burrows*, 1 Hag. 109.

Where there is an interval between the preparation of instructions for a will and the death of the testator, the instructions will take effect as a will only upon evidence that the testator adhered to them down to his death. *Bone* v. *Spear*, 1 Phillim. 345; *Devereux* v. *Bullock*, *ib.* 60, 72; *Sandford* v. *Vaughan*, *ib.* 48; *In bonis Herne*, 1 Hag. 222; *Barwick* v. *Mullings*, 2 Hag. 225; *Mitchell* v. *Mitchell*, *ib.* 74;

Dingle v. *Dingle*, 4 *ib.* 388; *Reay* v. *Cowcher*, 2 *ib.* 249; *Antrobus* v. *Nepean*, 1 Add. 399; *Munro* v. *Coutts*, 1 Dow, 437; *Matthews* v. *Warner*, 4 Ves. 186; *Torre* v. *Castle*, 2 Moo. P. C. 133.

Partial disposition.

An unexecuted paper, containing only a partial disposition of the testator's property, will not take effect as a will, unless it be shown to contain the final intention of the testator as far as it goes. *Montefiore* v. *Montefiore*, 2 Add. 354; *Cundy* v. *Medley*, 1 Hag. 140; *Mackie* v. *Ewing*, *ib.* 317; *In bonis Wenlock*, *ib.* 551; *In bonis Robinson*, *ib.* 643; *Devereux* v. *Bullock*, 1 Phillim. 60; *Sandford* v. *Vaughan*, *ib.* 48; *Thrakston* v. *Marson*, 4 Hag. 200; *Bayle* v. *Mayne*, 3 Phillim. 504.

Alterations.

Alterations in the will of a soldier which was made while on actual military service will be presumed to have been made during the continuance of such service. *In bonis Tweedale*, 3 P. & D. 204.

Charge of legacies on realty.

A charge of legacies on real estate contained in a will duly executed to affect realty will include legacies given by a subsequent unattested will when the testator is one of the persons competent to dispose of his personalty by such will. *Buckeridge* v. *Ingram*, 2 Ves. jun. 652; *Sheldon* v. *Godrich*, 8 Ves. 481; *Wilkinson* v. *Adam*, 1 V. & B. 445; *Swift* v. *Nash*, 2 Kee. 20; see *Rose* v. *Cunynghame*, 12 Ves. 29.

Legacies charged upon real estate as an auxiliary fund may be revoked by a subsequent valid will, though not executed so as to affect realty. *Brudenell* v. *Broughton*, 2 Atk. 268; *A.-G.* v. *Ward*, 3 Ves. 327.

Legacies charged only upon real estate cannot be revoked by a subsequent valid will not executed so as to affect realty. *Beckett* v. *Harden*, 4 Man. & S. 1; *Locke* v. *James*, 11 M. & W. 901; see *Mortimer* v. *West*, 2 Sim. 274; *Fitzgerald* v. *Field*, 1 Russ. 428.

Legacies given out of a mixed fund of realty and personalty can be revoked by a valid will not executed to affect realty only so far as they are payable out of the personalty. *Stocker* v. *Harbin*, 3 B. 479.

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A valid will of personalty not executed to affect realty may dispose of any portion of the personalty free from legacies, though the effect may be to increase a charge of legacies on realty contained in a prior will effectually disposing of real estate. *Coxe* v. *Bassett*, 3 Ves. 155.

Revocation by marriage and birth of children.

The marriage of a privileged testator or the birth of a child subsequent to the date of the will will not alone revoke the will. *Doe* v. *Barford*, 4 M. & S. 10; *Wellington* v. *Wellington*, 4 Burr. 2171; *Wells* v. *Wilson*, 5 T. R. 52, n.; *Jackson* v. *Hurlock*, Amb. 495.

But the birth of children alone after the date of the will affords a presumption against the will. *Johnston* v. *Johnston*, 1 Phillim. 447.

A privileged will is revoked by the subsequent marriage of the testator and the birth of children, unless the wife and children are provided for by the will or by a previous settlement. *Overbury* v. *Overbury*, 2 Stow. 242; see 1 Phillim. 479; *Kenebel* v. *Scrafton*, 2 East, 530; *Doe* v. *Lancashire*, 5 T. R. 49 (posthumous child).

Marriage of widower.

The same rule applies to the case of a widower who marries a second time and has children, though the will may be in favour of children by the first marriage. *Christopher* v. *Christopher*, Dick. 445; *Holloway* v. *Clarke*, 1 Phillim. 339; *Walker* v. *Walker*, 2 Curt. 854.

It appears to be unsettled whether the birth of children by a first wife after the date of the will and marriage to a second wife revokes the will. *Gibbons* v. *Caunt*, 4 Ves. 848.

The will is not revoked where it does not dispose of all the testator's estate. See *Kenebel* v. *Scrafton*, 2 East, 541; *Marston* v. *Roe* d. *Fox*, 8 Ad. & E. 57; *Brady* v. *Cubitt*, Dougl. 40; *Doe* d. *Shelley* v. *Edlin*, 4 A. & E. 582.

Provision for wife.

Provision made for the wife alone by a settlement or by the will itself will not prevent its revocation. *Marston* v. *Roe* d. *Fox*, 8 A. & E. 14; 2 Nov. & P. 504.

Provision by a settlement subsequent to the will will not prevent revocation. *Israell* v. *Rodon*, 2 Moo. P. C. 51; see *Talbot* v. *Talbot*, 1 Hag. 705; *Ex parte Ilchester*, 7 Ves. 348; *Johnston* v. *Wells*, 2 Hag. 561; *In bonis Cadywold*, 1 Sw. & T. 34.

The will is not revoked where such revocation would not benefit the afterborn children. *Sheath* v. *York*, 1 V. & B. 390.

The fact that the wife and children predecease the testator will not revive the revoked will. *Helyar* v. *Helyar*, 1 Phillim. 413; *Sullivan* v. *Sullivan*, *ib.* 343; *Emerson* v. *Boville*, *ib.* 342; overruling *Wright* v. *Netherwood*, 2 Salk. 539, n.; 2 P[illegible]. 266, n.

In the case of privileged wills it seems clear that a will, though revoked by marriage and birth of children, may be set up again by evidence of intention to adhere to it, such wills being free from the operation of the Statute of Frauds and Wills Act. See *Marston* v. *Roe* d. *Fox*, 8 A. & E. 14; *Gibbons* v. *Cross*, 2 Add. 455; *Fox* v. *Marston*, 1 Curt. 494; *Israell* v. *Rodon*, 2 Moo. P. C. 51; *Matson* v. *Magrath*, 1 Rob. 680; *Tupster* v. *Holtzappfel*, 5 N. of C. 554.

CHAPTER IX.

REVIVAL—REPUBLICATION—INCORPORATION.

I.—Revival of Wills.

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No will revoked to be revived otherwise than by re-execution, or a codicil to revive it.

The Wills Act (1 Vict. c. 26), s. 22, enacts, that no will or codicil, or any part thereof which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner thereinbefore 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.

Revocation of revoking will.

Where a testamentary disposition is revoked by a subsequent disposition, which latter is in its turn revoked, the former disposition is not thereby revived. *Burtenshaw* v. *Gilbert*, Cowp. 49; *In bonis Brown*, 1 Sw. & T. 32; *Brown* v. *Brown*, 8 E. & B. 876; *Wood* v. *Wood*, 1 P. & D. 309; see *M'Ara* v. *M'Cay*, 23 L. R. Ir. 138.

Where the testator by his will gave all his property to A and by a second will gave his real estate to B and then revoked the second will, it was held that the first will took effect only on the personalty. *In bonis Hodgkinson*, (1893) P. 339.

Revival by codicil.

It has been doubted whether since the Wills Act a codicil, described as a codicil to a will of a particular date which has been revoked, would be sufficient to revive the revoked will in the absence of any additional evidence of "intention to revive the same." *In bonis Steele*, 1 P. & D. 575; see *In bonis Lindsay*, 8 Times L. R. 507.

There is an obvious distinction between a codicil incorporating and giving effect to earlier unattested instruments, for which purpose a mere reference is sufficient, and a codicil reviving a revoked instrument.

There are, however, cases in which a codicil described as a codicil to a particular will which has been revoked by marriage, there being no other will in existence, has been held sufficient to revive the revoked will. *In bonis Chapman*, 1 Rob. 1; *Payne* v. *Trappes*, 1 Rob. 583.

This was clearly the rule before the Wills Act. *Lord Walpole* v. *Earl of Orford*, 3 Ves. 402; *S. C.*, 7 T. R. 138.

In the case of *Neate* v. *Pickard*, 2 N. of C. 406, and in *In bonis Reynolds*, 3 P. & D. 35, there appear to have been express words of confirmation; see, too, *McLeod* v. *McNab*, (1891) A. C. 471, P. C.

Contingent codicil.

It seems a codicil described as a codicil to a will of a particular date, though the codicil is directed to take effect only in events which do not happen, may have the effect of reviving the will. *In bonis Da Silva*, 2 Sw. & T. 315; see *Parsons* v. *Lanoe*, 1 Ves. Sen. 190.

Codicil referring to will revoked by later will.

If there are two wills, the later of which revokes the earlier, it seems a codicil described as a codicil to the testator's last will, but giving the date of the revoked will, will not revive that will or revoke the second will. *In bonis May*, 1 P. & D. 581; *In bonis Ince*, 2 P. D. 111. These cases may very well be supported on the ground that the description of the will by the codicil was ambiguous, the will of the date mentioned not being the last will of the testator, or, in fact, his will at all, as it had been revoked. *In bonis Edge*, 9 L. R. Ir. 516.

In *In bonis Anderson*, 39 L. J. P. 55, the principle applied was the same. In that case the codicil was expressed to be a codicil to the testator's last will, but confirmed a will by date which had been revoked.

In *In bonis Wilson*, 1 P. & D. 582, the codicil, though referring to a revoked will by date, went on to refer to certain bequests as contained in that will, which were, in fact, contained in a later will. There was, therefore, a clear case of mistaken description.

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If the codicil not only refers to the revoked will by date but also refers to the provisions of the revoked will, probate will be granted of the revoked will, the subsequent will and the codicil together. *In bonis Stedham; In bonis Dyke*, 6 P. D. 205; *In bonis Chilcott*, (1897) P. 223.

Where a will was revoked by a subsequent will, a codicil described as a codicil to the testator's last will, and confirming certain dispositions contained in the revoked will, had the effect of reviving the revoked will. *In bonis Van Cutsem*, 63 L. T. 252.

Where a codicil merely refers by recital to a revoked will, the revoked will is not revived. *In bonis Dennis*, (1891) P. 326.

Writing on the will referring to its contents.

A testamentary disposition, written at the foot of a will revoked by marriage, and referring to a bequest contained in the will, though not referring to the will in terms or described as a codicil, is sufficient to revive the will. *In bonis Terrible*, 2 Sw. & T. 8.

Codicil attached to revoked will.

The fact that a codidil is found attached by tape to a will which has been revoked by a later will will not revive the revoked will. *Marsh* v. *Marsh*, 1 Sw. & T. 528.

Destroyed will.

A will which has been destroyed and no longer exists in writing cannot be revived by a codicil, though there may be a draft of the will in existence. *Hale* v. *Tokelove*, 2 Roh. 318; *Newton* v. *Newton*, 12 Ir. Ch. 118; *Rogers* v. *Goodenough*, 2 Sw. & T. 342; *In bonis Reade*, (1902) P. 75.

Codicil confirming will altered by earlier codicil.

A codicil which refers to a will by date and makes certain alterations in it and then confirms the will, does not revive so much of the will as has been altered by intermediate codicils. *Crosbie* v. *Macdoual*, 4 Ves. 610; *Green* v. *Tribe*, 9 Ch. D. 231.

But a second codicil confirming the will and reciting and treating as unrevoked certain dispositions of the will which have in fact been revoked by a first codicil, revives the will without the alterations made by the first codicil. *McLeod* v. *McNab*, (1891) A. C. 471, P. C.

Where a testator had by a third codicil revoked the first and second codicils, and by a fourth codicil confirmed his will and former codicils, it was held that, as the fourth codicil confirmed

the third, the first and second remained revoked. *In bonis Carritt*, 66 L. T. 379.

A codicil which revokes one of several legacies which have been ineffectually struck through since the execution of the will and confirms the will confirms it with the legacies which have been erased except so far as revoked by the codicil. *In re Hay; Kerr* v. *Skinner*, (1904) 1 Ch. 317.

II.—Republication.

Republication of earlier testamentary instrument.

A distinction must be made between revival of a revoked testamentary instrument and republication of a valid testamentary instrument in such a way as to make it operate as at the date of republication.

It is clear that any reference which would be sufficient to revive a revoked instrument would be sufficient to republish an earlier unrevoked instrument. But a reference, sufficient to republish, would not necessarily revive a revoked instrument.

Thus a codicil described as a codicil to a will republishes the will though it may not be sufficient to revive the will if revoked. *Acherley* v. *Vernon*, 3 B. P. C. 85; *Barnes* v. *Crowe*, 1 Ves. Jun. 486; *Skinner* v. *Ogle*, 5 N. of C. 74; 1 Rob. 363; *Rowley* v. *Eyton*, 2 Mer. 128, as corrected in 45 Ch. D. 637; *In re Champion; Dudley* v. *Champion*, (1893) 1 Ch. 101.

Again, a testamentary instrument not described as a codicil but written at the foot of the will and containing a reference to the executors named in the will republishes the will. *Serocold* v. *Heming*, 2 Lee Eccl. 490.

But a will is not republished by a testamentary instrument not described as a codicil and not containing any reference to the will. *In re Smith; Bilke* v. *Roper*, 45 Ch. D. 632.

A codicil referring to a will of a particular date does not republish an intermediate codicil. *Burton* v. *Newbery*, 1 Ch. D. 234.

III.—Incorporation of Documents.

Incorporation of documents.

Any document in existence when the will is executed, and sufficiently described to enable it to be identified, may be incorporated with the will, and may be referred to for purposes

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of construction, whether incorporated in the probate or not. *Hitchings* v. *Wood*, 2 Moo. P. C. 355; *Aaron* v. *Aaron*, 3 De G. & S. 475; *In bonis Sunderland*, 1 P. & D. 198; *In bonis Mercer*, 2 P. & D. 91; *In bonis Daniell*, 8 P. D. 14; see *In bonis Pascall*, 1 P. & D. 606; *In bonis Gill*, 2 P. & D. 6; *Quihampton* v. *Going*, 24 W. R. 917; *In bonis Garnell*, (1894) P. 90; *Singleton* v. *Tomlinson*, 3 App. C. 404.

Whether document must be described as existing.

It has been said that the document must not only be in fact in existence when the will is executed, but also that it must be described as existing. *Van Straubenzee* v. *Monk*, 3 Sw. & T. 6; *In bonis Watkins*, 1 P. & D. 19; *In bonis Dallow*, *ib.* 189; *In bonis Sunderland*, *ib.* 198; *In re Kehoe*, 13 L. R. Ir. 13.

If, however, the document is proved to have been in existence at the date of the will, and is sufficiently identified by the description in the will, it is not necessary that it should be actually described as existing. *Singleton* v. *Tomlinson*, 3 App. C. 404; *In re Coyte*, *Coyte* v. *Coyte*, 56 L. T. 510; *University College of North Wales* v. *Taylor*, (1907) P. 228.

Incorporation of documents in existence at date of codicil.

A document sufficiently referred to in the will, though not in existence, may be incorporated if it exists at the date of a codicil to the will. *In bonis Hunt*, 2 Rob. 622; *In bonis Stewart*, 32 L. J. P. 94; 3 Sw. & T. 192; 4 Sw. & T. 211; *In bonis Lady Truro*, 1 P. & D. 221, not following *In bonis Mathias*, 32 L. J. P. 115; 3 Sw. & T. 100.

But for this purpose it must be clear that the will, if read as of the date of the codicil, refers to a definite instrument, and that the instrument in question satisfies the description in the will. *Durham* v. *Northen*, (1895) P. 66; *In bonis Smart*, (1902) P. 238.

Thus, a codicil confirming a will, which directs certain property to be distributed as the testator may by any memorandum or deed direct, will not have the effect of incorporating memoranda executed between the dates of the will and codicil. *In bonis Lancaster*, 29 L. J. P. 155; see *In bonis Warner*, 10 W. R. 566; *In bonis MacGregor*, 60 L. T. 840.

Memorandum on back of will.

A memorandum, not described as a codicil, written on the back or the fourth side of a paper containing an invalid will, to

which it does not refer, does not incorporate the will. *In bonis Drummond*, 2 Sw. & T. 8; *In bonis Torey*, 47 L. J. P. 63; see *In bonis Willmott*, 1 Sw. & T. 36.

So a reference to executors "hereunder named," or the words "turn over," will not incorporate a clause not contained in the body of the will, though written before execution. *In bonis Dallow*, 1 P. & D. 189; *In bonis Dearle*, 39 L. T. 93; see *In bonis Watkins*, 1 P. & D. 19.

On the other hand, the words "see over," with an asterisk, have been held sufficient to incorporate a sentence on the second side of a sheet of paper, by the side of which was also written "see over," with an asterisk. *In bonis Birt*, 2 P. & D. 214; see *In bonis Greenwood*, (1892) P. 7.

The cases above cited on the subject of revival are also authorities on the subject of incorporation.

Memorandum referring to contents of will.

Thus it would seem that a memorandum at the foot of a will, referring to something contained in the will, would incorporate it, though there is no express reference to the will as such. *In bonis Terrible*, 2 Sw. & T. 8; *In bonis Widdrington*, 35 L. J. P. 66; see *Gardiner* v. *Courthope*, 12 P. D. 14.

Upon similar principles it has been held that a testamentary disposition not described as a codicil, but written on the back of the will underneath two codicils described as codicils to the will, and altering a provision contained in the second codicil, had the effect of republishing the will and codicils. *Guest* v. *Willasey*, 2 Bing. 429; 3 Bing. 614.

Reference to a will in a codicil incorporates an unattested will.

A reference by a duly attested codicil to a will incorporates the will, if the reference is such as to show that the testator intended to incorporate it, and if there is only one document in existence to which the term "will" can apply. *Barnes* v. *Crowe*, 1 Ves. Jun. 485; *Doe* d. *Williams* v. *Evans*, 1 Cr. & Mee. 42; *Allen* v. *Maddock*, 11 Moo. P. C. 427; *In bonis Heathcote*, 6 P. D. 31.

Reference to unattested codicil.

Similarly, a reference in a codicil to a prior unattested codicil will incorporate it. *Ingoldby* v. *Ingoldby*, 4 N. of C. 493; *Smith's Case*, 2 Curt. 796.

Reference to will where there are a

A reference, however, in a codicil to a will and prior codicils, where there are a will and codicils duly attested, will

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not incorporate a codicil not duly attested. *Croker* v. *Marquis of Hertford*, 3 Curt. 468; 4 Moo. P. C. 339.

valid will and codicils.

Reference to will where there are a valid will and unattested codicils.

And upon the same principle it would seem that a reference by a codicil to a will, where there are a duly attested will and some unattested codicils, will not set up the unattested codicils. *Utterton* v. *Robins*, 1 Ad. & E. 423; 2 Nev. & M. 821; *In bonis Phelps*, 6 N. of C. 695; *Haynes* v. *Hill*, 7 N. of C. 256; see, however, *Radburn* v. *Jervis*, 3 B. 450; *Guest* v. *Willasey*, 2 Bing. 429; 3 Bing. 614.

Will may include will and codicils.

Possibly a reference to a will in general terms would incorporate all the valid instruments constituting the will, such as a will and several codicils.

Reference to will by date.

A codicil referring to a will by date incorporates the will of that date only, and not subsequent codicils. *Burton* v. *Newbery*, 1 Ch. D. 234; *In bonis Reynolds*, 3 P. & D. 35; *French* v. *Hoey*, (1899) 2 Ir. 472.

The case is not altered by the fact, that a valid codicil, referring to the will by date, is written on the same paper as a valid will and an intermediate unattested codicil. *In bonis Hutton*, 5 N. of C. 598; *In bonis Phelps*, 6 *ib.* 695; *In bonis Willmott*, 1 Sw. & T. 36; *In re Spotten*, 5 L. R. Ir. 403.

Perhaps where a codicil is directed to be taken as part of the will, a subsequent codicil referring to the will by date and confirming it will have the effect of confirming the codicil as well. See *Gordon* v. *Lord Reay*, 5 Sim. 274, disapproved in *Burton* v. *Newbery*, *supra*.

If the codicil recites the will by date and a codicil by date, and then confirms the "said will," the term "will" may include both will and codicil. *Aaron* v. *Aaron*, 3 De G. & S. 475.

As to whether a codicil headed "This is a fourth codicil to my will" would incorporate a codicil headed "This is a third codicil to my will," see *Stockil* v. *Punshon*, 6 P. D. 9.

Effect of incorporation.

Incorporation of an instrument into a will does not alter the effect of the instrument so far as it is already valid. So far as it is invalid as an independent instrument it takes effect as a testamentary disposition, subject to the ordinary rules as to lapse, ademption, &c., applicable to wills. The

result may be that a voluntary settlement, which is inoperative as regards certain property comprised in it, because it has not been effectually vested in the trustees, may, if the voluntary settlement is confirmed by the will, become an effectual testamentary gift of the property. *Bizzey* v. *Flight*, 3 Ch. D. 269.

Paper not in existence cannot be incorporated.

A paper not in existence at the date of the execution of a testamentary instrument cannot be incorporated in it or referred to for purposes of construction. *Countess Ferraris* v. *Lord Hertford*, 3 Curt. 468; *In bonis Watkins*, 1 P. & D. 19; *In bonis Dallow*, *ib.* 189; *Singleton* v. *Tomlinson*, 3 App. C. 404; *Smith* v. *Conder*, 9 Ch. D. 170: see *In bonis Keller*, 61 L. J. P. 39; 65 L. T. 763.

Power cannot be reserved by will of making a subsequent unattested will.

A testator cannot reserve by his will the power of making a testamentary disposition of his property by a subsequent unattested paper. *Habergham* v. *Vincent*, 2 Ves. Jun. 204; 4 B. C. C. 353; *Countess De Zichy Ferraris* v. *Lord Hertford*, 3 Curt. 468; 4 Moo. P. C. 339.

Thus, a gift to trustees to hold upon the uses appointed by a letter to be signed by the testator is invalid. *Johnson* v. *Ball*, 5 De G. & S. 85.

Persons to take under a particular description may depend on a subsequent act of the testator.

But there is no objection to a gift to persons to be ascertained by a subsequent act on the part of the testator, provided the act is one which must be done as the natural result of the state of the property at the date of the will, and is in no way dependent upon a power reserved by the will. *Stubbs* v. *Sargon*, 2 Kee. 255; 3 M. & Cr. 507, where the gift was to the persons who should be in co-partnership with the testatrix at the time of her decease, or to whom she should have disposed of her business.

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Revival.

No will or codicil, 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;

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and where any will or codicil 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. R.S.O. c. 128, s. 24; R.S.B.C. c. 193, s. 19; R.S.M. c. 174, s. 19; R.S.N.B. c. 160, s. 16; R.S.N.S. c. 139, s. 22.

Since the above enactments a mere reference in a codicil to the date of a revoked will, and the removal of an executor named therein and the substitution of another, does not revive the will. A will which has been revoked cannot be revived by a codicil unless the intention to revive is clear on the face of the codicil, either by express words, or by a disposition of property inconsistent with any other intention. *Macdonell* v. *Purcell*, 23 S.C.R. 101.

A codicil dated 21st July, 1882, was expressed to be a codicil to a will dated 17th July, 1880, and the testator thereby confirmed his will. There was an intermediate codicil revoking a particular bequest in the will. The reference simply to the date of the will was held not to be in itself sufficient to restrict the confirmation to that particular document, but other words and circumstances were held to convey an intention, with reasonable certainty, to confirm the will *in toto* without being affected by the partial revocation made by the intermediate codicil. *McLeod* v. *McNab*, (1891) A.C. 471, affirming *Re McLeod*, 23 N.S.R. 154.

A codicil to an existing will confirming it does not bring the date of the will to the date of the codicil when the source of the bounty springs from the will itself, so as to bring the gift within the statutory limits of the Mortmain Acts. *Holmes* v. *Murray*, 13 O.R. 756.

Incorporation of documents.

Documents in existence at the date of the execution of a will may be incorporated with the will by express reference to them, but not documents coming into existence after the execution of the will. And so, entries in a book sufficiently referred to in a will which are made before the execution of the will are incorporated in the will but not those made after

the execution. And a codicil confirming the will, made subsequent to all the entries, but not referring to them in any way, does not incorporate the entries made between the execution of the will and the execution of the codicil. *Re Seaman*, 6 N.S.R. 185.

CHAPTER X.

CONTRACT AND TRUST AS AFFECTING TESTAMENTARY DISPOSITION.

I.—CONTRACT.

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Contract to make will in favour of a person.

A CONTRACT to make a testamentary disposition in favour of a particular person is valid.

Contract to devise land must be in writing.

If the contract relates to a devise of land, the contract or some memorandum or note thereof must be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized. *Humphreys* v. *Green*, 10 Q. B. D. 148; *Maddison* v. *Alderson*, 8 App. C. 467.

Distinction between offer resulting in contract and statement of intentions as to the future.

In many cases a testator upon the marriage of a daughter or upon some other occasion makes a statement as to his testamentary intentions, and a marriage follows or the conduct of the person to whom the statement is made is in some way influenced by it.

In these cases the question is, Was the statement an offer the acceptance of which constituted a contract (*a*), or was it a mere statement of intentions as regards the future made with a view to influence the conduct of those to whom it was made, but not intended to create a binding obligation upon the person making it (*b*)? *Hammersby* v. *De Biel*, 12 Cl. & F. 45; *Coverdale* v. *Eastwood*, 15 Eq. 121; *Synge* v. *Synge*, (1894) 1 Q. B. 466(*a*); *Maddison* v. *Alderson*, 8 App. C. 467; *In re Fickus; Farina* v. *Fickus*, (1900) 1 Ch. 331 (*b*).

Contract to devise land will be specifically enforced.

If a contract is established to make a testamentary gift of particular property, for instance a specific piece of land, it can be specifically enforced against persons claiming under the testator as volunteers. *Goylmer* v. *Paddiston*, 2 Vent. 353, *S.C. sub*

nom. Goilmere v. *Battison*, 1 Vern. 48; *Synge* v. *Synge*, (1894) 1 Q. B. 466.

If the testator disposes of the property in his lifetime a right of action immediately arises, as the performance of the covenant has become impossible through his act. *Synge* v. *Synge*, (1894) 1 Q. B. 466. *If testator makes performance impossible, action lies.*

A covenant to leave a legacy of fixed amount creates a debt, and is not satisfied by a gift of the legacy if there are not sufficient assets out of which to pay it. *Eyre* v. *Monro*, 3 K. & J. 305; *Graham* v. *Wickham*, 1 D. J. & S. 474. *Covenant to leave legacy creates debt.*

But a covenant to leave the covenantee all the property or a share of the property of the covenantor does not create a debt. *Bennett* v. *Houldsworth*, 6 Ch. D. 671; *A.-G.* v. *Murray*, 20 L. R. Ir. 124; *Re Vernon*; *Garland* v. *Shaw*, 95 L. T. 48. *Covenant to leave residue.*

The effect of such a covenant is to leave the covenantor free to dispose of his property in his lifetime by gift or otherwise as he thinks fit, so long as he does not dispose of it in fraud of the covenant. The covenantee is entitled to have the covenant specifically enforced, and he will take subject to payment of the funeral and testamentary expenses and debts of the covenantor. *Logan* v. *Wienholt*, 1 Cl. & F. 630; 7 Bl. N. S. 1; *Jones* v. *Martin*, 3 Anst. 882; 5 Ves. 266, n.; *Needham* v. *Kirkman*, 3 B. & Ald. 531; *Coverdale* v. *Eastwood*, 15 Eq. 121.

If the covenant is limited to the personal property of the covenantor and he buys real estate, the real estate is, in the hands of the heir or a devisee, charged with the purchase money. *Lewis* v. *Madocks*, 8 Ves. 150; 17 Ves. 48; *Cochran* v. *Graham*, 19 Ves. 63. *Evasion of covenant not permitted.*

And though the covenantor can dispose of the property in his lifetime, he cannot defeat the covenant by a disposition by will, nor by any disposition, which has the same effect as a testamentary disposition, for instance, a voluntary settlement whereby he settles property on himself for life with remainders over. *Jones* v. *Martin*, 3 Anst. 882; 5 Ves. 266, n.; *Fortescue* v. *Hennah*, 19 Ves. 67.

If the covenant is to give a sum of money by deed or will and the covenantor performs it by will, the covenantee is in the position of a legatee, and subject to all the risks of a *Covenantor making will in performance of*

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legatee as regards debts and lapse. *In re Brookman's Trust*, 5 Ch. 182; *Jervis* v. *Wolferstan*, 18 Eq. 18.

covenant need not provide against lapse.

A covenant to give a sum of money by deed or will is discharged, if the covenantee dies before the testator. *Jones* v. *How*, 7 Ha. 267; see *Needham* v. *Smith*, 4 Russ. 318.

Contract to leave share of property.

A contract by a father that on his death a child shall have her share of his property may mean an equal share, but a contract that a child shall have a share may be satisfied by a legacy. *Lacey* v. *Fielder*, 32 B. 1; *In re Fickus; Farina* v. *Fickus*, (1900) 1 Ch. 331.

Covenant to settle or leave money performed by intestacy.

A covenant to settle an estate or to leave or pay at the covenantor's death a sum of money or a share of residue, is performed by allowing the estate or sum or share of residue to come to the covenantee under the intestacy of the covenantor. *Wilcocks* v. *Wilcocks*, 2 Vern. 558; *Blandy* v. *Widmore*, 2 Vern. 709; 1 P. W. 324; *Lee* v. *D'Aranda*, 1 Ves. Sen. 1; 3 Atk. 419; *Goldsmid* v. *Goldsmid*, 1 Sw. 211; *Garthshore* v. *Chalie*, 10 Ves. 1.

If less than the share covenanted to be left comes to the covenantee under the intestacy, the share so coming must be taken in part performance of the covenant. *Garthshore* v. *Chalie*, 10 Ves. 1; see *Lechmere* v. *Earl of Carlisle*, 3 P. W. 211, 227.

Covenant to appoint.

And a covenant to appoint a share of a fund is satisfied by allowing that share to pass to the covenantee in default of appointment. *Thacker* v. *Key*, 8 Eq. 408.

Covenant to leave annuity not performed by intestacy.

But intestacy is not a performance of a covenant to leave an annuity. *Couch* v. *Stratton*, 4 Ves. 391; *Salisbury* v. *Salisbury*, 6 Ha. 526.

Upon performance of covenants generally, see also *Bethell* v. *Abraham*, 3 Ch. D. 590, n.; 22 W. R. 745; *Cartwright* v. *Cartwright*, (1903) 2 Ch. 306.

Covenant not to revoke will.

A covenant not to revoke a will, though made under a general power of appointment, is a valid covenant. A breach cannot be prevented by injunction. But, if it is broken otherwise than by marriage, an action for damages lies. *Robinson* v. *Ommanney*, 23 Ch. D. 285.

Covenant not to appoint.

A covenant not to exercise a power operates as a release of the power, either wholly or in part, according to the extent of the covenant. *Hurst* v. *Hurst*, 16 B. 372; *Davies* v. *Haguenin*, 1 H. & M. 730.

Covenant to exercise general power.

A covenant to exercise a general power to appoint by will is a valid covenant. It cannot be enforced by an order for specific performance, but, if it is broken, an action for damages lies. An appointment by will in pursuance of the covenant makes the fund assets for payment of debts, and the covenantee has no priority. *In re Parkin*; *Wild* v. *Sclater*, (1892) 3 Ch. 510; *Beyfus* v. *Lawley*, (1903) A. C. 411.

Covenant to exercise special power.

A covenant to exercise a special testamentary power of appointment has been held to be valid. *Palmer* v. *Locke*, 15 Ch. D. 294; *In re Lord Inverclyde*; *Brodebank* v. *Brodebank*, (1902) 1 Ch. 436.

Covenant does not invalidate appointment.

But it is settled that where such a covenant has been entered into, a will made in performance of the covenant is a valid exercise of the power. *Coffin* v. *Cooper*, 2 Dr. & Sm. 365; *Palmer* v. *Locke*, 15 Ch. D. 291.

II.—Trust.

A. *Trust not Disclosed by Will.*

Directions acquiesced in by residuary legatee.

If a testator gives a residuary legatee directions which have the effect of diminishing the residue, and he accepts them either expressly or by silence, a trust will be fixed on him to carry them out. *Wekett* v. *Raby*, 2 B. P. C. 386; *Byrn* v. *Godfrey*, 4 Ves. 5; *Flower* v. *Martin*, 2 M. & C. 459; *Cross* v. *Sprigg*, 6 Ha. 552; *In re Applebee*; *Leveson* v. *Beales*, (1891) 3 Ch. 422.

Secret trust.

Again, where a gift is made in absolute terms, but the testator, before or after the date of his will, communicates to the legatees his intention, that they are to hold the gift in trust, and they either accept the trust or acquiesce in it by silence, evidence of the trust is admissible; and if the evidence establishes the trust, effect will be given to it if it is valid; if it is not, the property will go to the heir or next of kin, as the

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case may be. *Wallgrave* v. *Tebbs*, 2 K. & J. 313; *Moss* v. *Cooper*, 1 J. & H. 352; *Jones* v. *Badley*, 3 Ch. 362; *French* v. *French*, (1902) 1 Ir. 172 (H. L.); *Morrison* v. *M'Ferran*, (1901) 1 Ir. 360; *O'Brien* v. *Condon*, (1905) 1 Ir. 51.

Such evidence is admissible, although the will states that the gift is not by way of trust. *Russell* v. *Jackson*, 10 Ha. 204; *Re Spencer's Will*, 57 L. T. 519; see *In re Crawshay; Crawshay* v. *Crawshay*, 43 Ch. D. 615.

The details of the trust must be disclosed to the trustee in the testator's lifetime, otherwise it cannot be enforced, and the devisee will take as trustee for the next of kin or heir. *In re Boyes; Boyes* v. *Carritt*, 26 Ch. D. 531.

Evidence of trust must be clear.

And the intention to create a trust must be clearly established. *Jones* v. *Badley*, 3 Ch. 362; *M'Cormick* v. *Grogan*, L. R. 4 H. L. 82; *Re Downing's Estate*, 60 L. T. 140; *In re Pitt Rivers; Scott* v. *Pitt Rivers*, (1902) 1 Ch. 403; *Sullivan* v. *Sullivan*, (1903) 1 Ir. 193.

Gift to A and B induced by promise of A where A and B are joint tenants.

If the testator is induced by A to make a gift to A and B jointly on the faith of A's promise that it shall be applied for certain purposes, the trust attaches to the gift to both, though B may have known nothing of the matter. *Russell* v. *Jackson*, 10 Ha. 204.

Where A and B are tenants in common.

A different rule applies if A and B are tenants in common and not joint tenants. In that case B may take his moiety free from any trust. *Rochotham* v. *Dunnett*, 8 Ch. D. 430; *In re Stead; Witham* v. *Andrew*, (1900) 1 Ch. 237; *Freeman* v. *Laing*, (1899) 2 Ch. 359; *Gaddes* v. *Semple*, (1903) 1 Ir. 73.

Gift left unrevoked by subsequent promise.

If a gift is made by will to A and B as tenants in common (*a*), or as joint tenants (*b*), and the testator afterwards communicates the gift to A, and leaves it unrevoked on the faith of a promise by A to apply the money to certain purposes, the trust attaches to A's moiety only, and not to B's. There is here no fraud inducing the original gift. *Tee* v. *Ferris*, 2 K. & J. 357 (*a*); *In re Stead; Witham* v. *Andrew*, (1900) 1 Ch. 237 (*b*); see also *Barney* v. *Macdonald*, 15 Sim. 6; *Rochotham* v. *Dunnett*, 8 Ch. D. 430.

B. *Gift upon Trust Verbally Disclosed.*

Gift upon trusts already communicated verbally.

Where a gift of personalty is made to a person and the testator goes on to declare that it is to be held upon trusts or applied for purposes already communicated to the legatee, evidence is admissible to show what the trusts or purposes are, and if they have been communicated to the legatee before the date of the will effect will be given to them if they are valid. *Crook* v. *Brooking*, 2 Vern. 50, 106; *Pring* v. *Pring*, 2 Vern. 98; *Irvine* v. *Sullivan*, 8 Eq. 673; *Riordan* v. *Banon*, I. R. 10 Eq. 469; *In re Fleetwood; Sidgreaves* v. *Brewer*, 15 Ch. D. 594; *In re Huxtable; Huxtable* v. *Crawfurd*, (1902) 2 Ch. 793; see *In bonis Marchant*, (1893) P. 254, a curious case.

Evidence must not contradict the will.

Evidence is not, however, admissible to contradict the will. For instance, if on the face of the will the whole is given on trust, evidence is not admissible to show that the trust was to take effect only during the life of the donee. *In re Huxtable*, *supra*.

The doctrine of these cases appears to have been established before the Wills Act by analogy to the cases of incorporation of documents in wills, but it is difficult to understand how it can have been upheld since the Wills Act. That Act declares that no will shall be valid unless it shall be in writing; the cases decide, that a will may be valid, though it is partly in writing and partly not.

Mere power to dispose of property according to verbal wishes

These cases do not apply where a power is given to a tenant for life to dispose of the property in accordance with wishes verbally expressed. *In re Hetley; Hetley* v. *Hetley*, (1902) 2 Ch. 866.

Wishes not communicated till after date of will.

Nor do they apply where the trusts or purposes have not been communicated till after the date of the will. *Johnson* v. *Ball*, 5 De G. & S. 85, discussed in *In re Fleetwood*, 15 Ch. D. 594, 603; *Scott* v. *Brownrigg*, 9 L. R. Ir. 246; *Balfe* v. *Halpenny*, (1904) 2 Ir. 486.

Trust of lands must be in writing.

As regards lands, tenements, or hereditaments, the Statute of Frauds (29 Car. II. c. 3), s. 7, enacts that all declarations of trusts shall be manifested and proved by some writing by the person who is by law entitled to declare such trust, or by his will, or else they shall be utterly void and of none effect. See *Tierney* v. *Wood*, 19 B. 330; *Kronheim* v. *Johnson*, 7 Ch. D. 60.

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Agreement may be enforced.

An agreement to make a will in favour of a particular person may be enforced against the personal representatives of the testator. *Roberts* v. *Hall*, 1 O.R. 388.

A bond given by a testator to a devisee conditioned not to alter his will is broken by the testator's subsequently selling and conveying the land comprised in the devise to another person. *McCormick* v. *McRae*, 11 U.C.R. 187.

Consideration.

Where a person changes his position, in consequence of a promise by a testator to benefit him in a particular way by his will, the will becomes irrevocable. Thus a testator having made a will in favour of his son, induced him to leave his residence and reside near the testator, representing to him that he had made a will in his favour, and the son having acted upon this and removed to a residence near the testator and lived there until the testator's death, it was held that the will became irrevocable. *Fitzgerald* v. *Fitzgerald*, 20 Gr. 410.

Similarly, where a promise was made by a testator to another that if that other would buy a piece of land and convey it as the testator appointed, he, the testator, would pay off the incumbrance on the land, and the land was bought and conveyed as directed, but the testator refused to pay off the incumbrance, and the promisee paid it himself, and the testator subsequently promised to make a will bequeathing a certain sum to the promisee's wife, which promise he also broke, it was held that there was a sufficient consideration for the promise to make the will, and the promisee recovered the amount agreed to be bequeathed. *Halleran* v. *Moon* 28 Gr. 319.

And where a testator had made a will giving legacies to two of his daughters in consideration of which they conveyed certain lands to him, it was held that the bequests to them were irrevocable. *Gilpin* v. *Scovil*, 12 N.B.R. 379.

Statute of Frauds.

A contract to devise land is within the Statute of Frauds, and the mere production of a revoked will is not significant as importing such a contract, but is merely indicative of a

benevolent intention displayed by a revocable instrument. If there is no written contract, there must be shewn part performance by the person claiming the right to an irrevocable will. *Campbell* v. *McKerricher*, 6 O.R. 85. See *Gilpin* v. *Scovil*, 12 N.B.R. 379.

Evidence.

The evidence to support a contract to make a will must be such as to leave as little doubt upon the mind of the Court as if a properly executed will were produced before it. Therefore, where an oral contract, by which the testator was to have a home with the plaintiff as long as he lived, and to leave to her "what was left," was set up by the plaintiff, and was sworn to by other witnesses, the Court, apart from the Statute of Frauds, refused to enforce it, a will making other dispositions having been admitted to probate without objection by the plaintiff. *Cross* v. *Cleary*, 29 O.R. 542.

Uncertainty.

Where there is uncertainty in the contract to devise, it cannot be specifically enforced. Thus, where a testator promised to make the same provision for the promisee, his granddaughter, as he made for his own daughters, and took the promisee from her home at the age of twelve years, and adopted and maintained her while she worked for him for nine years, but left her nothing by his will though he made his daughters residuary devisees, it was held that specific performance could not be granted, as the promise and the consideration were too uncertain; but that the promisee was entitled to wages for her work as on an implied contract. *Walker* v. *Boughner*, 18 O.R. 448.

A promise made by a testator to his grandchild to provide for her by will as one of his daughters, in consideration of services performed, is not enforceable; but, it being clear that the services were not to be gratuitous, recovery was had for their performance. *McGugan* v. *Smith*, 21 S.C.R. 263. See also *Murdoch* v. *West*, 24 S.C.R. 305.

CHAPTER XI.

PROBATE AND ITS EFFECT.

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Jurisdiction to grant probate depends on property within the jurisdiction.

THE jurisdiction to grant probate depends upon the existence within the jurisdiction of personal, or since the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), of real property of the deceased. *In bonis Drummond*, 2 Sw. & T. 118; *In bonis Tucker*, 3 Sw. & T. 585; *Evans* v. *Burrell*, 28 L. J. P. 82; *In bonis Fittock*, 32 L. J. P. 157; *In bonis Bootle*, 3 P. & D. 177; *In bonis Butson*, 9 L. R. Ir. 21.

Personal property of foreigner in jurisdiction.

If there is personal property within the jurisdiction probate will be granted of the will of a person not domiciled within the jurisdiction. *Robinson* v. *Palmer*, (1901) 2 Ir. 489.

What may be proved.

Every instrument containing a testamentary disposition or affecting a prior testamentary disposition of personal property, is entitled to probate if properly executed and attested. *In bonis Durance*, 2 P. & D. 406; *Toomer* v. *Sobinska*, (1907) P. 106.

Testamentary part of instrument may be proved.

If an instrument is testamentary only in part, so much as is testamentary may be proved. *Wolfe* v. *Wolfe*, (1902) 2 Ir. 246.

Instrument appointing executor.

A testamentary instrument appointing an executor is entitled to probate, though the executor renounces probate. *O'Dwyer* v. *Geare*, 1 Sw. & T. 465; 29 L. J. P. 47; *In bonis Lancaster*, 1 Sw. & T. 454; *In bonis Jordan*, 1 P. & D. 555.

Codicil.

A properly attested codicil is entitled to probate by itself, although it may by its language be dependent on an unattested will. *Gardiner* v *Courthope*, 12 P.D. 14; see *Eyre* v. *Eyre*, (1903) P. 131, 138.

Contingent will.

A will to take effect upon a contingency is not admissible to probate for any purpose if the contingency does not happen, and is inoperative to revoke a previous will. *In bonis Hugo*, 2 P. D. 73.

Contingent codicil.

But the principle does not apply to a codicil which will be admitted to probate, even if it is conditional and contains a declaration that it is not to be proved unless the condition is fulfilled, as it may have the effect of republishing the will. *In bonis Da Silva*, 2 Sw. & T. 315; *In bonis Colley*, 3 L. R. Ir. 243.

Instrument appointing guardians.

An instrument appointing guardians merely is not entitled to probate. *In bonis Morton*, 33 L. J. P. 87.

Revocatory instrument.

When an instrument simply revokes a will, administration will be granted with a note referring to the instrument [illegible] instrument will not be annexed to the grant. *Tanner* v. *Schinsky*, (1907) P. 106.

Wills of married women.

Probate of the will of a married woman is now granted in the ordinary common form, whether she was married before or since the commencement of the Married Women's Property Act, 1882. See Probate Rules, March, 1887, cited *In re Lambert's Estate*; *Stanton* v. *Lambert*, 39 Ch. D. 626; *In re Jones*, 13 L. R. Ir. 1; *In bonis Price*, 12 P. D. 137; see *ante*, p. 19 *et seq.*

Effect of probate.

The effect of such probate is to enable the executor to get in the assets, whether they pass under the will or not, but it does not affect the beneficial title. *In re Lambert's Estate*; *Stanton* v. *Lambert*, 39 Ch. D. 626; *Smart* v. *Tranter*, 43 Ch. D. 587.

Will under power of married woman domiciled abroad.

When a married woman is domiciled abroad and makes a will, which is not valid according to the law of her domicile, but is a valid execution of a power of appointment over property within the jurisdiction, probate of the will cannot be granted, but administration with the will annexed will be granted, either general or limited to the property disposed of under the power, according as the husband does or does not consent. *In bonis Hallyburton*, 1 P. & D. 90; *In bonis Trefoud*, (1899) P. 247; *In bonis Vannini*, (1901) P. 330.

Land Transfer Act 1897.

By virtue of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1 (which applies only in cases of death after the 1st January, 1898), real estate, including real estate appointed under a general power of appointment by will, devolves to the personal representatives of a deceased person as if it were a chattel real, and probate and letters of administration may be granted in respect of real estate only, although there is no

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personal estate. Real estate does not include land of copyhold tenure or customary freehold in any case in which an admission, or any act by the lord of the manor, is necessary to perfect the title of a purchaser from the customary tenant.

The Act does not bind the Crown. *In bonis Hartley*, (1899) P. 10.

Will of realty.

In cases not within the Act, a will disposing of real estate only, though the real estate was directed to be converted and debts and legacies were directed to be paid, was not entitled to probate. *In bonis Drummond*, 2 Sw. & T. 118; *In bonis Bootle*, 3 P. & D. 177.

For the purpose of probate the proceeds of sale of land sold under the Settled Estates Act and subject to re-investment in land were treated as realty. *In bonis Lloyd*, 9 P. D. 65; see now the Settled Estates Act, 1877 (40 & 41 Vict. c. 18).

But if the real estate disposed of was under another instrument held upon trust for sale so as to be converted in equity, the will was entitled to probate. *In bonis Gunn*, 9 P. D. 242.

Appointment of executor.

A will disposing of realty only was entitled to probate if the testator appointed an executor. *In bonis Jordan*, 1 P. & D. 555; *In bonis Miskelly*, I. R. 4 Eq. 62; *In bonis Cubbon*, 11 P. D. 169.

The will of a married woman disposing only of real estate belonging to her for her separate use and appointing an executor was, even before the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), entitled to probate. *Brownrigg* v. *Pike*, 7 P. D. 61; *In bonis Hornebuckle*, 15 P. D. 149.

Before that Act the will of a married woman made in pursuance of a power, and taking effect only upon real estate, was not entitled to probate where the married woman survived the coverture without republishing the will, though an executor might be appointed. *O'Dwyer* v. *Geare*, 1 Sw. & T. 465; *In bonis Barden*, 1 P. & D. 325; *In bonis Tomlinson*, 6 P. D. 209.

Foreign will.

As regards foreign wills, where a person is in terms appointed executor, probate will be granted to him; but where the powers granted by the will fall short of the powers of executors according to English law, a grant of administration will be made her with powers as near as may be to those granted by the will

In bonis Earl, 1 P. & D. 450; *In bonis Briesemann*, (1894) P. 260; *In bonis Von Linden*, (1896) P. 148.

If the original will cannot be produced in England, a notarial copy may be proved. *In bonis Lemme*, (1892) P. 89; *In bonis Von Linden*, (1896) P. 148.

Where the testator made two wills, one of property vested in him as trustee, the other of his own property, the two wills were included in one probate. *In bonis Claus*, 31 W. R. 924.

Perfect will presumed to be duly executed.

If a will purports to be properly executed and attested, and there is no doubt that it is the testator's will, the Court will assume that it was properly executed and attested, though the evidence of the attesting witnesses as to the execution may not be satisfactory. This doctrine, of course, does not apply if the recollection of the attesting witnesses as to some defect in execution is clear. *Lloyd* v. *Roberts*, 12 Moo. P. C. 158; *Wright* v. *Sanderson*, 9 P. D. 149; *Woodhouse* v. *Balfour*, 13 P. D. 2; *Wyatt* v. *Berry*, (1893) P. 5; *Clery* v. *Barry*, 21 L. R. Ir. 152; *Glover* v. *Smith*, 57 L. T. 60; *Dayman* v. *Dayman*, 71 L. T. 699; *In bonis Moore*, (1901) P. 44; *Whiting* v. *Tanner*, 89 L. T. 71.

Affidavit of witness.

In the absence of an attestation clause, or if the attestation clause does not state the performance of the necessary ceremonies, the will must be proved by an affidavit of one of the witnesses. *Bryan* v. *White*, 2 Rob. 315; *Belbin* v. *Skeats*, 1 Sw. & T. 148; *Bowman* v. *Hodgson*, 1 P. & D. 362; *In bonis Wilson*, 1 P. & D. 269.

Attesting witnesses dead.

If no evidence is obtainable from the attesting witnesses, the will will be presumed to have been duly executed, even in the absence of an attestation clause. *Burgoyne* v. *Showler*, 1 Rob. 5; *In bonis Luffman*, 5 N. of C. 183; *In bonis Dickson*, 6 N. of C. 278; *Winnicomb* v. *Butler*, 13 W. R. 392; *In bonis Nicks*, 34 L. J. P. 30; *In bonis Rees*, *ib.* 56; *Foot* v. *Stanton*, 1 Dea. 19; 2 Jur. N. S. 380; *In bonis Torre*, 8 Jur. N. S. 494; *In bonis Puddephatt*, 2 P. & D. 97; *In bonis Perevett*, (1902) P. 205; see *In bonis Jones*, 46 L. J. P. 80; *Clarke* v. *Clarke*, 5 L. R. Ir. 47; *Harris* v. *Knight*, 15 P. D. 170; *In bonis Malins*, 19 L. R. Ir. 231.

Declarations by testator.

Declarations by a testator that he has duly executed his will are inadmissible as evidence of its due execution. *In bonis*

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Ripley, 1 Sw. & T. 68; *Atkinson* v. *Morris*, (1897) P. 40; *Eyre* v. *Eyre*, (1903) P. 131.

Foreign probate.

A foreign probate will not affect personal property in England, but a duly authenticated copy of a will proved in a foreign country will be admitted to probate in England without further evidence of the validity of the will. *In bonis Smith*, 16 W. R. 1130; *In bonis Earl*, 1 P. & D. 450; *In bonis Hill*, 2 P. & D. 89; *Miller* v. *James*, 3 P. & D. 5; *In bonis Rule*, 4 P. D. 76; see *In bonis Prince Henry the 69th*, 49 L. J. P. 67; *In bonis Dost Aly Khan*, 6 P. D. 6; *In re Vallance*, 48 L. T. 941.

Where the will has been proved abroad the codicils must also be proved abroad. *In bonis Miller*, 8 P. D. 167.

As to Scotch confirmations, see the Confirmation of Executors (Scotland) Act, 1858 (21 & 22 Vict. c. 56), ss. 12, 16; *In bonis Ryde*, 2 P. & D. 86; *Hood* v. *Lord Barrington*, 6 Eq. 218; *In bonis Ewing*, 6 P. D. 19.

As to Irish probates, see the Probates and Letters of Administration Act (Ireland), 1857 (20 & 21 Vict. c. 79), s. 95.

As to Colonial probates, see the Colonial Probates Act, 1892 (55 & 56 Vict. c. 5). *In bonis Smith*, (1894) P. 114.

Whether incorporated document should be included in probate.

The question whether documents not in themselves of a testamentary character, but incorporated with the will, should be included in the probate is mainly one of convenience.

If the document is valid in itself independently of the will, it would seem that it need not be included in the probate, if there is a difficulty in procuring its production. *Sheldon* v. *Sheldon*, 1 Rob. 81; *In bonis Sebthorp*, 1 P. & D. 106; *In bonis Balme*, (1897) P. 261.

If the document derives its validity from the will it ought, as a general rule, to be included in the probate. *Sheldon* v. *Sheldon*, *supra*.

If the document incorporated with the will is itself testamentary it should be included in the probate.

Thus, where an English will refers to and incorporates a foreign will the foreign will must be included in the probate, though the executors of the English will may have nothing

do with the property disposed of by the foreign will. *In bonis Harris*, 2 P. & D. 83; *In bonis Lord Howden*, 43 L. J. P. 26; *In bonis Crawford*, 15 P. D. 212; *In bonis Lockhart*, 69 L. T. 21; *In bonis Western*, 78 L. T. 49.

On the other hand, where the testator makes two independent wills, one disposing of property in England and the other of property in a foreign country, probate will only be granted of the English will. *In bonis Coode*, 1 P. & D. 449; *In bonis Astor*, 1 P. D. 150; *In bonis Smart*, 9 P. D. 64; *In bonis Bolton*, 12 P. D. 202; *In bonis Callaway*, 15 P. D. 147; *In bonis De La Rue*, 15 P. D. 185; *In bonis Seaman*, (1891) P. 253; *In bonis Fraser*, (1891) P. 285; *In bonis Tamplin*, (1894) P. 39; *In bonis Murray*, (1896) P. 65.

Where the deceased person makes no disposition of his English property, but leaves a will expressly confined to foreign property, administration of the English property will be granted as upon an intestacy. *In bonis Mann*, (1891) P. 293.

Where a clause of a revoked instrument is incorporated the clause alone will be included in the probate. *In bonis Kehoe*, 7 L. R. Ir. 343.

Where will must be proved.

Probate of a will must be applied for in the Probate Division, and no proceedings can be taken under a will of personal property till the will has been proved, unless, perhaps, probate is alleged and admitted on the pleadings. *Pinney* v. *Hunt*, 6 Ch. D. 98; see *Tarn* v. *Commercial Bank of Sydney*, 12 Q. B. D. 294; *Priestman* v. *Thomas*, 9 P. D. 210; *Bradford* v. *Young*, 26 Ch. D. 656; see 29 Ch. D. 617; *In re Masonic and General Life Assurance Co.*, 32 Ch. D. 373.

Probate, how far evidence as to realty.

By the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), s. 62, it is provided that where the will is proved in solemn form, or its validity declared in a contentious matter, the probate shall be conclusive evidence of the validity and contents of the will in all proceedings affecting real estate.

Sect. 63 provides for citing the heir. If the heir is a party to a probate action as one of the next of kin and appears and defends, he cannot afterwards dispute the validity of the will

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in respect of real estate, though he was not cited as heir. *Beardsley* v. *Beardsley*, (1899) 1 Q. B. 746.

Sect. 64 provides for notice of intention to use the probate of a will not proved in solemn form in an action as evidence of a testamentary disposition affecting realty. *Barraclough* v. *Greenhough*, L. R. 2 Q. B. 612.

Action to establish will of real estate.

Where the will had not been proved there can be no doubt that before the Land Transfer Act, 1897, an action lay in the Chancery Division to establish it, so far as it related to real estate. For the old practice on this subject, see a valuable note in Mr. Dunning's Concise Precedents, pp. 510 *et seq.*

Chancery Division will not set aside will for fraud of legatee.

Probate is conclusive upon the question whether the will does or does not express the true will of the testator.

If the whole or any part of a will is procured by fraud the objection must be taken when probate is applied for.

After probate of a will has been granted, no proceedings can be taken in the Chancery Division to have a legatee declared a trustee, on the ground that the testamentary instrument under which he claims was obtained by fraud. *Allen* v. *M'Pherson*, 1 H. L. 191; *Meluish* v. *Milton*, 3 Ch. D. 27; see *Betts* v. *Doughty*, 5 P. D. 26; *In re Birchall*; *Wilson* v. *Birchall*, 29 W. R. 461.

Probate procured by fraud.

Where the validity of a will has been contested in an action and probate granted, an action will lie to have the probate revoked on the ground that it was procured by fraud, and such an action will lie as against persons who were not parties to the fraud. *Birch* v. *Birch*, (1902) P. 62, 130.

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Ontario D.E. Act.

All estates of inheritance in fee simple, and all estates for the life of another, all chattels real, all personal property of any person dying domiciled in Ontario, and all real and personal property comprised in any disposition made by will in exercise of a general testamentary power of appointment, on death, notwithstanding any testamentary disposition, devolve upon and become vested in the legal personal representative of the deceased from time to time, and subject to the payment of his debts; and so far as such property is not disposed of by deed, will, contract or other effectual disposition, the same is to be distributed as personal property not so disposed of is to be distributed. R.S.O. c. 127, ss. 3, 4; 2 Edw. VII. c. 1, s. 3.

The effect of this enactment is to vest in the personal representative by force of the statute, and in spite of the will, all land of the estates mentioned, as well as all personalty, to which the testator is entitled at the time of his death. See *Gardiner* v. *Gardiner*, 2 O.S. at p. 591, as to the effect of the Statute of Frauds on estates *pur autre vie*.

Where infants are interested in real estate which, but for the Act would not devolve upon executors, no sale or conveyance shall be valid under the Act without the written consent or approval of the official guardian, or in the absence of such consent or approval, without an order of the High Court. R.S.O. c. 127, s. 8.

But where land is devised to the executors in trust to sell the official guardian's consent is not necessary. *Re Booth's Trusts*, 16 O.R. 429; and see *Re Koch & Wideman*, 25 O.R. 262.

Powers of sale generally are given by sections 9, 16 and 6 Edw. VII. c. 23, s. 3, repealing section 16 and substituting another therefor.

Surrogate Court Act.

The jurisdiction to grant probate depends upon the existence of estate or effects in Ontario. R.S.O. c. 59, ss. 17, 18.

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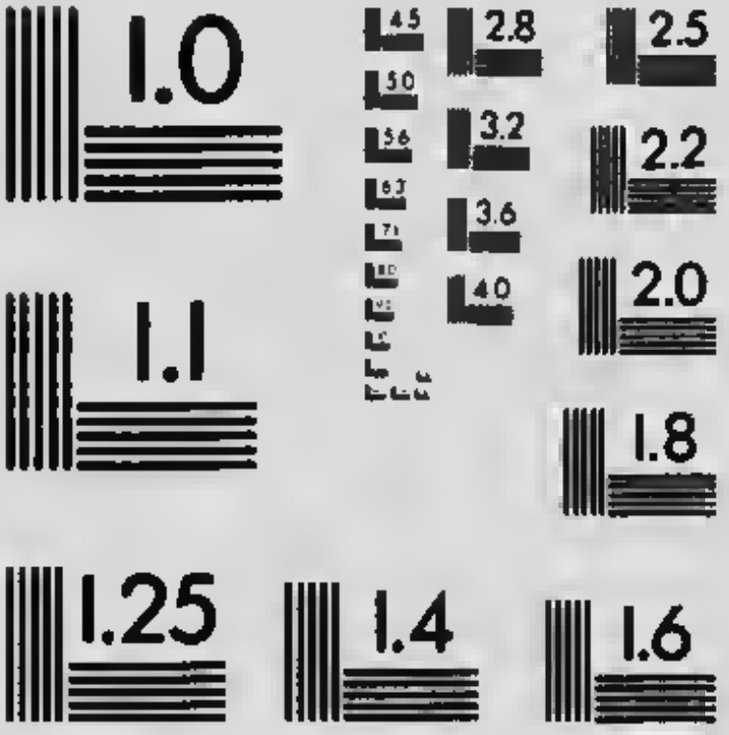

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Foreigners.

But where a testator has no fixed place of abode in, or resides out of, Ontario at the time of his death, and leaves real or personal property in the county to the Surrogate Court of which application is made for probate, or leaving no real or personal property in Ontario, probate may be granted after publishing notice in the *Ontario Gazette*. R.S.O. c. 59, s. 39. *Jennings* v. *G. T. R. Co.*, 15 A.R. 477; *Grant* v. *G. W. R. Co.*, 7 C.P. 438; 5 L.J. 210; *Re Thorpe*, 15 Gr. 76.

Probate effective in all parts of Ontario.

Probate or letters of administration granted by whatever Court has effect over the property of the deceased in all parts of Ontario, subject to the limitations imposed by s. 61. *Ibid.* s. 21.

Limited grant.

By section 61 a person entitled to take out *letters of administration* to the estate of a deceased person shall be entitled to take out such letters limited to the personal estate of the deceased exclusive of the real estate.

"Administration" shall include all letters of administration of the effects of deceased persons whether with or without the will annexed, and whether granted for general, special or limited purposes. *Ibid.* s. 2, s.-s. 2.

It is not clear from these sections whether probate of a will may be granted limited to personalty. Nor is it clear what is meant by the definition of "administration." The expression "letters of administration . . . with or without the will annexed" imports the existence of a will in each case. If probate is limited to personalty it has never been decided whether the real estate will vest in the personal representatives, but as it is the Devolution of Estates Act which vests the land in the personal representative, and not the grant of probate, it may be that even in that case the land will vest in the executor.

Re-sealing probate.

Where probate, or other legal document purporting to be of the same nature, granted by a Court in the United Kingdom, or in any Province or Territory of Canada, or in any other British Province, is produced to, and a copy thereof deposited with, the registrar of any Surrogate Court, the same may be sealed with the seal of such Surrogate Court, and shall there-

upon be of the like force and effect, as respects *personal* estate only, as if the same had been granted by such Surrogate Court. *Ibid.* s. 78. Chap. XI.

A will made in Quebec, by a person domiciled there, before two notaries, in accordance with the law of that Province, but not proved in any Court is not within the above enactment. *Re Maclaren*, 22 A.R. 18. Notarial will.

Each County Court has jurisdiction, concurrently with the Supreme Court, in all questions relating to testacy or intestacy where the personal estate does not exceed $2,500, and has power to grant probate of wills "of the personal estate and effects of persons dying within the territorial limits of its county." R.S.B.C. c. 52, s. 42. British Columbia.

"From and after the first day of July, 1885, land in the Province, whatever the estate or interest therein, went and hereafter shall go to the personal representative of deceased owners thereof in the same manner as personal estate goes; and the personal representative shall have power to dispose of or otherwise deal with all land so vested in him with all the like incidents, but subject to all the like rights, equities and obligations as if the same were personal property vested in him." R.S.M. c. 48, s. 21. Manitoba.

Probate of the will of a person having estate or effects in Manitoba may be granted by the Surrogate Courts concurrently with the King's Bench. R.S.M. c. 41, ss. 18, 19; R.S.M. c. 40, s. 23.

If the testator had no fixed place of abode, or resided out of Manitoba at the time of his death, the Court of the county or district in which he had either real or personal property, has jurisdiction. *Ibid.* s. 22.

In other cases any Court has jurisdiction. *Ibid.* s. 23. And if there are no assets in Manitoba probate may be granted. *Ibid.* s. 32.

Probate, by whatever Court granted, shall, unless revoked, have effect over the real and personal estate of the deceased in all parts of Manitoba. *Ibid.* s. 24.

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In case probate was granted before the Act which had not operation over all the property of the testator, the Court may grant probate of the real or personal property not covered by the former probate and the grant shall be limited accordingly. *Ibid.* s. 40.

Any probate granted by any Court of the United Kingdom or any Province or Territory of Canada other than Manitoba, or of any other British Province or Colony, may be resealed in Manitoba. *Ibid.* s. 97.

The effect of these enactments is to vest all land as well as all personalty in the executors.

New Brunswick.

In New Brunswick, assets in the Province are necessary to entitle the executor to probate, both for inhabitants and persons not inhabitants. R.S.N.B. c. 118, s. 13.

If on a deficiency of personal estate to pay debts and the cost of administration, it becomes necessary to apply real estate, a judge may make an order licensing the executor to sell land according to the provisions of the Act. *Ibid.* ss. 59 *et seq.*

Nova Scotia.

In Nova Scotia the grant of probate belongs to the Court in whose district the testator had a fixed place of abode at the time of his death; if he had no fixed place of abode, then the Court within whose district he had property at the time of his death; and in other cases any Court. R.S.N.S. c. 158, s. 11.

If the testator had no fixed place of abode or resided out of the Province, having real or personal property in the district of the Court applied to, probate may be granted by that Court after notice in the *Gazette*. *Ibid.* s. 14.

The person entitled to take out probate may take it limited to personalty, subject to the provisions of the Act as to sale, mortgaging or leasing of realty. *Ibid.* s. 17.

If the personal property is not sufficient to pay debts and legacies, or the costs of the executors, the Court may in its discretion grant a licence to sell, mortgage or lease the land or any part thereof for a term not exceeding twenty-one

years. Only such part of the land as is charged with the payment of legacies or is undevised may be sold, mortgaged or leased for the payment of legacies. *Ibid.* s. 42. It is entirely in the discretion of the judge of probate to grant a licence under this enactment. *Re O'Sullivan*, 5 N.S.R. 549.

Where probate is granted in the United Kingdom or in any British Province, Territory or possession, it may be re-sealed in Nova Scotia. *Ibid.* s. 33.

Bare trustee

In Ontario and Manitoba 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 in the legal personal representative, from time to time, of such trustee. R.S.O. c. 129, s. 7; R.S.M. c. 170, s. 10.

Proof of Wills.

Probate or a copy thereof.

In all the Provinces provision is made for proving a will by production of the probate or a copy thereof stamped with the seal of the probate or Surrogate Court.

Ontario.

In Ontario, where in any action it is necessary to produce and prove an original will, the party intending to prove it may give notice to the opposite party ten days before the trial or other proceeding of his intention to give the probate in evidence, or a copy thereof stamped with the seal of the Court which granted it, and in such case the probate or such copy shall be sufficient evidence of the will, and of its validity and contents, unless the party receiving the notice within four days after the receipt gives notice that he disputes the validity of the devise. R.S.O. c. 73, s. 41.

British Columbia. Manitoba.

In British Columbia and Manitoba similar enactments exist. R.S.B.C. c. 71, s. 35; R. S. M. c. 57, s. 22.

Examined copy.

An examined copy of the probate to which is annexed a certificate stamped with the seal of the Court is sufficient under this enactment. *Dehart* v. *Dehart*, 26 C.P. 489.

Probate, proof of death.

The probate when used in evidence, being proof of the validity of the will, is proof also of the death of the testator. *Davis* v. *VanNorman*, 30 U.C.R. 437.

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Probate as evidence.

If, on production of the probate, after the statutory notice, without a counter-notice having been given, the attestation clause does not shew due execution, the probate is nevertheless sufficient proof of the will. But if a counter-notice is served and the will does not appear on its face to have been duly executed, proof of due execution may be given. *Stewart* v. *Lees*, 24 Gr. 433.

Notice of intention to use.

Notice of intention to use the probate ten days before the actual trial is sufficient, though the ten days have not elapsed before the first day of the sittings. *Dehart* v. *Dehart*, 26 C.P. 489.

And the notice is available at any trial and not only at the first trial after giving the notice. *Wilson* v. *Baird*, 19 C.P. 98.

New Brunswick.

Where a party desires to give in evidence in any Court a will admitted to probate or any copy which may have been registered, he may produce a copy of such registry certified by the registrar, which copy shall be received and allowed as evidence of the contents of such will, and *primâ facie* evidence of its validity and due execution, but before any such copy shall be allowed in evidence six days' notice of intention to use it accompanied by a copy of such certified copy is to be given to the adverse party. R.S.N.B. c. 127, s. 65.

Registered probate.

Where the probate has been registered, and the notice given, the certified copy may be given in evidence. *Doe dem. Simonds* v. *Gilbert*, 22 N.B.R. 576.

But a certified copy of a registered will which has not been admitted to probate cannot be used in evidence under this enactment. *Doe dem. Savoy* v. *Savoy*, 30 N.B.R. 227.

Nova Scotia.

In Nova Scotia, the probate of a will, or a copy thereof certified under the hand of the registrar of probate, or proved to be a true copy of the original will, when such will has been recorded, shall be received as evidence of the original will; but the Court may, upon due cause shewn upon affidavit order the original will to be produced in evidence, or may direct such other proof of the original will as under the circumstances appears necessary or reasonable for testing the

authenticity of the alleged original will and its unaltered condition and the correctness of the prepared copy. R.S.N.S. c. 163, s. 22(1).

The enactment above referred to aiding proof of domestic wills applies to wills and the probate of wills proved elsewhere than in the Province, provided that the original wills have been deposited in the Courts having jurisdiction over the proof of wills, or their custody. R.S.N.S. c. 163, s. 22(2).

Ten days' notice of intention to use such probate must be given, but may be dispensed with by the judge. *Ibid.* s. 23.

Certified copy.

Under a similar provision (R.S.N.S. 2nd series, c. 130, s. 36), a will was held to be sufficiently proved by the production of a certified copy where the notice of intention to use it was proved. *Carrigan* v. *Carrigan*, 6 N.S.R. 8.

Extra territorial probate: Ontario.

In case of the death of any person in any of His Majesty's possessions out of Ontario, after having made a will sufficient to pass real estate in Ontario, and whereby such real estate has been devised, charged or affected, and such will has been proved in any Court having the proof and issuing probate of wills in any of such possessions, and remains filed in such Court, then on notice given one month before the same is to be used of intention to use the probate or a certificate of the judge, registrar or clerk of such Court, that the original is filed and remains in the Court and purports to have been executed before two witnesses, such probate or certificate shall in any proceeding in any Court in Ontario, concerning such real estate be sufficient *primâ facie* evidence of the will and the contents thereof, and of the same having been executed so as to pass real estate, without the production of the original will; but it is not to be used if, on cause shewn before the Court or a judge, the Court or judge finds reason to doubt the sufficiency of the execution of the will and makes an order disallowing the production of the probate. R.S.O. c. 73, s. 41.

British Columbia, Manitoba.

In British Columbia and Manitoba similar enactments exist. R.S.B.C. c. 71, s. 37; R.S.M. c. 57, s. 24.

The expression in these enactments, "any of His Majesty's possessions out of" includes England. *Coltman* v. *Brown*, 16 U.C.R. 133.

New Brunswick.

When a will affecting lands in New Brunswick is deposited in any Court out of the Province, the probate purporting to be under the hand of the officer having the custody of the records of the Court and the seal of the Court or an exemplification of the probate purporting to be so certified may be proved before any person authorized to take proof of deeds respecting lands in the Province, and shall then be deemed to be evidence of the original being deposited in the Court granting the probate, and the probate or exemplification so proved may be registered and when registered shall have the same effect as if the original will had been registered. R.S. N.B. c. 151, s. 31.

When a will affecting lands in New Brunswick has been proved in any Court in His Majesty's dominions out of New Brunswick, a copy of such will purporting to be under the hand of any Master in Equity or other officer of the Court in which the will purports to have been proved, and purporting to be authenticated by the seal of such Court, together with a certificate purporting to be signed by the chief justice or other judge of such Court, that the master in Equity or other officer is such officer, shall be deemed to be evidence of the original will having been proved and registered in such Court and of the probate, and such probate so certified may be registered and when registered shall have the same effect as if the original had been registered, and a certified copy is admissible in evidence in the same manner as a certified copy of the original will if registered would be. *Ibid.* s. 32.

CHAPTER XII.

WHAT PROPERTY MAY BE DISPOSED OF BY WILL.

1 Vict. c. 26, s. 3.

All property may be disposed of by will;

By sect. 3 of the Wills Act, it is enacted that every person may, by his will, bequeath or dispose of "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; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee or otherwise, to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this Act, if this Act had not been made; and also to estates *pur autre vie* . . . . and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof by

comprising customary freeholds and copyholds without surrender a. l before admittance; also such of them as could not be devised before the Act;

estates *pur autre vie;*

contingent interests;

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rights of entry; and property acquired after execution of will.

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 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."

Before Wills Act after-acquired lands did not pass.

Before this section a testator could only devise lands belonging to him at the date of his will. The will was inoperative as regards lands acquired after its date. Now the will operates upon all lands belonging to the testator at the time of his death.

Devise bars widow's dower.

By the Dower Act, 1833 (3 & 4 Will. IV. c. 105), a widow is not to be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime or by his will.

Under this section and sect. 3 of the Wills Act a devise of land, whether specific or by general words, bars the widow's right to dower. *Lacey* v. *Hill*, 19 Eq. 346, not following dicta in *Rowland* v. *Cuthbertson*, 8 Eq. 466.

Copyholds pass without surrender to use of will.

A devise of real estate generally now passes copyholds though not surrendered to the use of the will, whether there are also freeholds or not. It also passes an equitable estate in copyholds. *Doe* d. *Clarke* v. *Ludlam*, 7 Bing. 275; *Torre* v. *Browne*, 5 H. L. 555, 574; see *Seaman* v. *Woods*, 24 B. 372, 378.

Until the devisee is admitted the customary estate descends to the heir. Though the lord will not be compelled to admit the heir if there is a devisee, he cannot seize because the devisee refuses to be admitted if the heir is willing to come in. *R.* v. *Garland*, L. R. 5 Q. B. 269; *Garland* v. *Mead*, *ib.* 6 Q. B. 441; see *Allen* v. *Bewsey*, 7 Ch. D. 453.

Widow's freebench.

The widow's right to freebench is barred by a devise whether there is or is not a custom to bar freebench by a surrender. *Lacey* v. *Hill*, 19 Eq. 346; *Berry* v. *Gaukroger* (1874), B. 264. Order on further consideration, July 2nd, 1880, see Appendix.

Lands liable to escheat.

It has been suggested that lands of a testator dying without heirs which would therefore not devolve upon "the heir-at-

law of him," but would escheat to the lord, are not within this section, and therefore that a will disposing of lands in such a case must be executed with the formalities required by the Statute of Frauds. Williams' Real Prop. 17th ed. p. 53, n.; Dunning's Concise Prec. p. 3. But see, as to the construction of a similar clause in a colonial statute, *Wentworth* v. *Humphrey*, 11 App. C. 619, P. C.; see, too, *Ingilby* v. *Amcotts*, 21 B. 585.

Estates *pur autrie vie* are dealt with in Chapter XLII.

Estates *pur autre vie.*

A possibility of reverter on failure of a fee simple conditional is devisable. *Pemberton* v. *Barnes*, (1899) 1 Ch. 544.

Possibility of reverter.

A contingent interest in real or personal estate vesting in a person after his death is transmissible and devisable. *Anon.*, 2 Vent. 347; *Pinbury* v. *Elkin*, 1 P. W. 563; *Ingilby* v. *Amcotts*, 21 B. 585; *In re Creswell*; *Parkin* v. *Creswell*, 24 Ch. D. 102.

Contingent interest vesting after death.

A person in possession of land without other title has a devisable interest. *Asher* v. *Whitlock*, L. R. 1 Q. B. *Clarke* v. *Clarke*, I. R. 2 C. L. 395; see *Gresley* v. *Mousley*, 4 De G. & J. 78.

Title by possession is devisable.

The third section does not make any kind of personalty bequeathable which could not be bequeathed before; thus a testator cannot bequeath a promissory note made to him so as to pass the right to sue on it, which remains in the executor. *Bishop* v. *Curtis*, 18 Q. B. 879.

But not the right to sue in testator's name.

Property held by the testator in joint tenancy survives to the other joint tenants and cannot be given by will; thus, for instance, property transferred by the testator into the joint names of himself and his wife where there is nothing to rebut the presumption of advancement cannot be given by will, whether by specific gift or otherwise. *Dummer* v. *Pitcher*, 2 M. & K. 262; *Coates* v. *Stevens*, 1 Y. & C. Ex. 66; *Grosvenor* v. *Durston*, 25 B. 97; *Turner* v. *A.-G.*, I. R. 10 Eq. 386.

Property held in joint tenancy.

A general power to an ascertained person to appoint the use in lands, where the power is to arise only upon a certain contingency, could always be exercised before the contingency happened. *Dalby* v. *Pullen*, 2 Bing. 144; 9 J. B. Moo. 300; *Logan* v. *Bell*, 1 C. B. 872.

Power to arise upon a contingency.

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Power to contingent person over the legal estate.

Prior to the Wills Act it was held that a general power to appoint property operating upon the legal estate given to the survivor of two persons could not be exercised till the survivor was ascertained. *Doe* v. *Tomkinson*, 2 Man. & S. 165.

This doctrine, however, had no application to equitable estates, and is apparently abolished by the Wills Act. *Thomas* v. *Jones*, 1 D. J. & S. 63.

Power exercisable by survivor of two persons.

A power to be exercised by the survivor of two persons "after the decease of the other of them" can of course not be exercised till the survivor is ascertained. *Care* v. *Care*, 8 D. M. & G. 131; *In re Blackburn; Smiles* v. *Blackburn*, 43 Ch. D. 75.

The ordinary power in a marriage settlement given to the husband and wife, and the survivor of them, appears to come within this principle. The fact, that the power is given to them jointly during their joint lives, shows that neither was intended to exercise it alone during the life of the other. *In re Moir's Trusts*, 46 L. T. 723; see *MacAdam* v. *Logan*, 3 B. C. C. 310.

A power to appoint to persons living at a certain time cannot be exercised before the time arrives. *Blight* v. *Hartnoll*, 19 Ch. D. 294.

Power to be exercised in writing.

A power to be exercised by an instrument in writing could always be exercised by will. *Lisle* v. *Lisle*, 1 B. C. C. 533.

A general power to appoint by deed or instrument, sealed and delivered before a certain period, cannot be exercised by a will which does not take effect till after the period. *Cooper* v. *Martin*, 3 Ch. 47.

A power to appoint by will to A and others may be exercised after A's death. *Paske* v. *Haselfoot*, 2 N. R. 568; 33 B. 125.

Power of disposition not cut down to testamentary power.

Where a power of disposition over property is given to a person, the power may be exercised by deed or will, and will not be cut down to a testamentary power without clear words.

Thus a gift to A for life, with a power to dispose of the property then or at or after his decease, gives A a power exercisable by deed or will. *Anon.*, 3 Leon. 71, pl. 108; *Ex parte Williams*, 1 J. & W. 89; *Tomlinson* v. *Dighton*,

1 P. W. 149; 1 Cem. 194; *In re David's Trusts*, Jo. 495; *In re Mortlock's Trusts*, 3 K. & J. 456; *Humble* v. *Bowman*, 47 L. J. Ch. 62; *In re Jackson's Will*, 13 Ch. D. 189; see, too, *Sinnott* v. *Walsh*, 5 L. R. Ir. 27. The cases of *Kennedy* v. *Kingston*, 2 J. & W. 431; *Reid* v. *Reid*, 25 B. 469; *Freeland* v. *Pearson*, 3 Eq. 658, may be considered overruled.

On the other hand, if any words are used which would be appropriate only to a testamentary gift, such as leave or bequeath, the power can only be exercised by will. *Doe* v. *Thorley*, 10 East, 438; *Walsh* v. *Wallinger*, 2 R. & M. 78; *Paul* v. *Hewetson*, 2 M. & K. 431.

Where a married woman who is tenant for life has power at her decease to dispose of property, the mere fact that the life interest is subject to a restraint on anticipation will not cut down the power to a testamentary power. *In re Waddington*; *Bacon* v. *Bacon*, W. N. 1897, p. 6 (8).

But the power may be so cut down if there is a restriction upon alienation which affects the *corpus*. *Archibald* v. *Knight*, 9 Sim. 161; *In re Flower*; *Edmonds* v. *Edmonds*, 55 L. J. Ch. 200; 34 W. R. 149; 53 L. T. 717.

Under a gift to A for life, with power to dispose of the property for her own use, with a gift over "in the event of her decease, should there be anything then remaining," the tenant for life has no power of disposition by will. *In re Thomson's Estate*; *Herring* v. *Barrow*, 13 Ch. D. 144; 14 Ch. D. 263; *In re Pounder*; *Williams* v. *Pounder*, 56 L. J. Ch. 113; 56 L. T. 104.

Power to jointure before Statute of Devises.

A power to jointure conferred by an Act before the Statute of Devises has been held exercisable by any instrument known to the law for the time being, including since that statute a will. *In re Bolton Estates*; *Russell* v. *Meyrick*, (1903) 2 Ch. 461.

Power to appoint in writing executed in a certain way.

A power to appoint by an instrument in writing executed with certain formalities is exercisable by will executed with those formalities. *Kibbet* v. *Lee*, Hob. 312; *Smith* v. *Adkins*, 14 Eq. 402; *Orange* v. *Pickford*, 4 Dr. 363.

But a power to appoint by will or instrument in writing executed with certain formalities cannot be exercised by a

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testamentary instrument executed with those formalities, but invalid as a will. *Bainbridge* v. *Smith*, 8 Sim. 86; *In re Daly's Settlement*, 25 B. 456.

Writing in nature of or purporting to be a will.

Though a power to appoint by a writing in the nature of a will cannot be exercised except by a valid will, a power to appoint by writing purporting to be a will may be exercised by a writing expressed to be a will, but not properly executed as a will. *In re Broad; Smith* v. *Draeger*, (1901) 2 Ch. 86.

S. 10 of the Wills Act.

Sect. 10 of the Wills Act enacts that no appointment made by will in exercise of any power shall be valid unless the same be executed in manner thereinbefore required; and every will so executed 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.

Defective execution not aided.

Since this section the Court cannot aid the defective execution of a testamentary power of appointment. *In re Kirwan's Trusts*, 25 Ch. D. 373.

S. 10 not affected by Lord Kingsdown's Act.

This section is not affected by the Wills Act, 1861 (24 & 25 Vict. c. 114). Therefore a will admitted to probate by virtue of that Act, but not executed in accordance with the Wills Act, 1837, does not exercise a testamentary power. *In re Kirwan's Trusts*, *supra*.

S. 10 does not apply to will of domiciled foreigner.

The section does not apply to the will of a person domiciled abroad. *Barretto* v. *Young*, (1900) 2 Ch. 339.

Applies to powers created since the Act.

The section applies to powers created since as well as to powers created before the Act. *Hubbard* v. *Lees*, L. R. 1 Ex. 255.

But only to powers testamentary in terms.

The section, however, only applies to powers which are in terms testamentary, and therefore a power to appoint by instrument in writing executed with certain formalities cannot be exercised by a will executed only with the statutory formalities. *West* v. *Ray*, Kay, 385; *Taylor* v. *Meads*, 4 D. J. & S. 597.

Property in dead body;

The law does not recognise any property in a dead body.

directions as to burial.

The executor is entitled to possession of the testator's corpse, which cannot be detained for any claims against the deceased. Directions given by the will as to the disposition of the body are invalid. *Reg.* v. *Sharpe*, Dea. & Bell, C. C. 166; *Reg.* v. *Scott*, 2 Q. B. 248, n.; *Reg.* v. *Fox*, 2 Q. B. 246; *Williams* v. *Williams*, 20 Ch. D. 659.

Persons having lawful custody of bodies may permit them to undergo anatomical examination in certain cases.

By the Anatomy Act, 1832 (2 & 3 Will. IV. c. 75), s. 7, it is enacted that it shall be lawful for any executor or other party having lawful possession of the body of any deceased person, and not being an undertaker, or other party interested with the body for the purpose only of interment, to permit the body of such deceased person to undergo anatomical examination, unless, to the knowledge of such executor or other party, such person shall have expressed his desire, either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, that his body after death might not undergo such examination, or unless the surviving husband or wife, or any known relative of the deceased person shall require the body to be interred without such examination.

Provision in case of persons directing anatomical examinations after their death.

By sect. 8 of the same statute it is enacted, that if any person, either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, shall direct that his body, after death, be examined anatomically, or shall nominate any party by this Act authorised to examine bodies anatomically to make such examination, and if, before the burial of the body of such person, such direction or nomination shall be made known to the party having lawful possession of the dead body, then such last-mentioned party shall direct such examination to be made, and in case of any such nomination as aforesaid shall request and permit any party so authorised and nominated as aforesaid to make such examination, unless the deceased person's surviving husband or wife, or nearest known relative, or any one or more of such person's nearest known relatives, being of kin in the same degree, shall require the body to be interred without such examination.

Cremation.

Cremation is now governed by the Cremation Act, 1902

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(2 Edw. VII. c. 8), under sect. 7 of which the Home Office has made regulations prescribing in what cases and under what conditions the burning of any human remains may take place. St. R. & O. Rev., Vol. 4, p. 1. See also *R.* v. *Price*, 12 Q. B. D. 247; *In re Dixon*, (1892) P. 386; *In re Kerr*, (1894) P. 284.

CANADIAN NOTES.

What Property may be Disposed of by Will.

Before 1st January, 1874, "land" in the Wills Act extended to "messuages, and all other hereditaments, whether corporeal or incorporeal, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles and interests or any of them, are in possession, reversion, remainder or contingency." R.S.O. c. 128, s. 2. Chap. XIV. Ontario.

Under this enactment it was held that a right of entry for condition broken was a possibility and devisable under this clause, and passed under a general devise of all the land of the testator, though the condition was not broken until after the death of the testator. *Re Melville*, 11 O.R. 626.

On and after 1st January, 1874, every person may devise, bequeath or dispose of by will 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 heir at law, or upon his executor (*sic*) or administrator; and the power given by the statute extends to estates *pur autre vie*, whether there be or be not any special occupant thereof, and whether the same be corporeal or incorporeal hereditaments; and also to all contingent, executory or other future interests in any real or personal estate, whether the testator be or be not ascertained as the person or one of the persons in whom the same may respectively become vested, and whether he be entitled thereto under the instrument by which the same were respectively 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 and personal estate as the

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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. R.S.O. c. 128, s. 10.

Seisin of a trespasser.

The wrongful seisin of a trespasser is capable of being disposed of by will. *Heward* v. *Heward*, 15 Gr. 516.

Patentee out of possession, old law.

Where the patentee of the Crown was not in possession and a trespasser was, without his knowledge, in occupation of the land, it was held, under the old law of Upper Canada, that he was not disseised and could devise the land. *McGillis* v. *McGillivray*, 9 U.C.R. 9.

British Columbia, New Brunswick, Manitoba.

In British Columbia, Manitoba and New Brunswick there is substantially the same enactment. R.S.B.C. c. 193, s. 3; R.S.M. c. 174, s. 3; R.S.N.B. c. 160, s. 1.

Nova Scotia.

In Nova Scotia the enactment is the same as the first part of the Ontario section; but the definition of property is omitted. R.S.N.S. c. 139, s. 3.

But by section 2 of the Nova Scotia Act "real property" is defined as including messuages, lands, rents and hereditaments whether of freehold or any other tenure whatsoever, and wheresoever situated, and whether corporeal or incorporeal or personal, and any undivided share thereof, and any estate, right or interest other than a chattel interest.

Personal property includes leasehold estates and other chattels real, and also moneys, shares of Government and other stocks or funds, securities for money not being real property, debts, rights of action, rights, credits, goods and all other property whatsoever which by law devolves upon the executor or administrator and any share or interest therein.

CHAPTER XIII.

TRUST AND MORTGAGE ESTATES.

Effect of Conveyancing Act.

By sect. 30 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), which applies to persons dying after the 31st of December, 1881, trust and mortgage estates vest in the personal representatives from time to time of the deceased, notwithstanding any testamentary disposition, as if the same were a chattel real vesting in them.

Executor's title vests from death.

Administrator's relates back.

The title of an executor is derived from the will, and the estate vests in him as from the death. The title of an administrator is derived from the grant. Therefore, when the executors disclaim or predecease the testator, or an executor has not been appointed, the estate descends to the heir, but is divested as soon as an administrator is constituted and the administrator's title relates back to the death. *Rex.* v. *Inhabitants of Horsley*, 8 East, 405. *In bonis Pryse*, (1904) P. 301.

Sect. 30 applies to copyholds. *Re Hughes*, W. N. 1884, 53.

Trust copyholds of inheritance not to descend as chattels real.

Sect. 45 of the Copyhold Act, 1887 (50 & 51 Vict. c. 73), which became law on the 16th September, 1887, enacted that sect. 30 of the Conveyancing and Law of Property Act, 1881, should not apply to land of copyhold or customary tenure vested in the tenant on the Court rolls of any manor upon any trust, or by way of mortgage.

The effect of this section was considered in *In re Mills' Trusts*, 37 Ch. D. 312; 40 Ch. D. 14.

The Copyhold Act, 1887, is repealed by the Copyhold Act, 1894 (57 & 58 Vict. c. 46), but sect. 45 of the Act of 1887 is re-enacted by sect. 88 of the Act of 1894.

In cases where the Conveyancing Act does not apply the following propositions are deducible from the cases:—

Legal estate in trust and

A general devise to a person absolutely without more will

mortgage estates.

pass the legal estate in property of which the testator is trustee or mortgagee. *Lord Braybroke* v. *Inskip*, 8 Ves. 417.

There is, however, a distinction between cases where the testator is mortgagee in trust, and where he is also beneficially entitled to the mortgage money.

Where the testator is mortgagee and beneficially entitled to the mortgage money.

1. Where the testator has the legal estate in a mortgage, and the beneficial interest is also vested in him, the legal estate passes under a gift of "all the rest of my real and personal estate to A for her own use and benefit," though there may be a charge of debts. *Re Stevens' Will*, 6 Eq. 597. In such a case it is reasonable to suppose that the beneficial ownership and the legal estate were meant to go together.

If the devise is to *trustees*, subject to a charge of debts, apparently the legal estate would not pass, the argument from the convenience of uniting the legal estate with the beneficial interest being away. *Re Horsfall*, M'C. & Y. 292.

This is *à fortiori* the case where the devise is to trustees subject to the payment of debts upon trusts inapplicable to the legal estate. See *Packman* v. *Moss*, 1 Ch. D. 215, where the testator was beneficially interested in a moiety of the equity of redemption.

But if the trustees are directed to get in debts due on any security, they take the legal estate. *Re Arrowsmith's Trusts*, 6 W. R. 642.

The legal estate will not pass where the devise is after payment of debts to two persons as tenants in common (*a*); or where it is to several persons in definite shares, though not subject to debts (*b*); or where it is to an indefinite class, as tenants in common (*c*). *Doe* d. *Roylance* v. *Lightfoot*, 8 M. & W. 553 (*a*); *Martin* v. *Laverton*, 9 Eq. 563 (*b*); *Re Finney's Estate*, 3 Giff. 465 (*c*).

Mere trust estates.

2. Mere trust estates will not be prevented from passing under a general devise by words of benefit superadded. *Bainbridge* v. *Lord Ashburton*, 2 Y. & C. Ex. 347; *Sharpe* v. *Sharpe*, 12 Jur. 398; *Lewis* v. *Mathews*, L. R. 2 Eq. 177; and see *Ex parte Shaw*, 8 Sim. 159.

Charge of debts, trust for sale, uses

But they will not pass if there is a charge of debts, whether by express words or by implication from a residuary devise

where legacies have been previously given (*a*); nor if the devise is on trust for sale (*b*); or to uses in strict settlement (*c*). *Doe* d. *Reade* v. *Reade*, 8 T. R. 118; *Duke of Leeds* v. *Munday*, 3 Ves. 348; *Hope* v. *Liddell*, 21 B. 183; *In re Bellis' Trusts*, 5 Ch. D. 504; see, however, *In re Brown & Sibly*, 3 Ch. D. 156 (*a*); *Ex parte Marshall*, 9 Sim. 555; *Re Cautley* or *Cautley*, 17 Jur. 124; 22 L. J. Ch. 391; *Morley's Will*, 10 Ha. 293; *In re Smith's Estate*, 4 Ch. D. 70 (*b*); *Thompson* v. *Grant*, 4 Mad. 438 (*c*). In strict settlement.

As to whether a devise to the separate use will prevent trust estates from passing, see *Lindsell* v. *Thacker*, 12 Sim. 178. Separate use.

3. Where a testator has contracted to sell real estate, so that he is a constructive trustee of the legal estate, it will pass under a devise of trust estates, and not under a general devise upon trust for sale. *Lysaght* v. *Edwards*, 2 Ch. D. 499. *Purser* v. *Darby*, 4 K. & J. 41, only decides that where the estate contracted to be sold is specifically devised it is excepted from a general devise of trust estates. Constructive trust.

If there is no devise of trust estates, the legal estate in lands contracted to be sold will pass under a general devise of real and personal estate upon trust to get in and dispose of the personalty, the legal estate being required for the purpose of the trust. *Wall* v. *Bright*, 1 J. & W. 494; *Lysaght* v. *Edwards*, 2 Ch. D. 499, 515.

But it will not if the devise is to tenants in common with limitations over. *Thirtle* v. *Vaughan*, 24 L. T. 5; 2 W. R. 632.

A devise of mortgaged estates on trust to get in the mortgage debts will not pass a legal estate which has descended to the testator as heir of a deceased mortgagee. *Ex parte Morgan*, 10 Ves. 100.

The term securities for money passed the legal estate in mortgaged property whether there were words of limitation or not. *King's Mortgage*, 5 De G. & S. 644; *Ex parte Barber*, 5 Sim. 451; *Mather* v. *Thomas*, 6 Sim. 115; 10 Bing. 44; 3 M. & Sc. 687; *Rippen* v. *Priest*, 13 C. B. N. S. 308. Securities for money passed the legal estate in mortgaged property.

This was the case though the gift was expressly made subject

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to payment of debts. *Re Field*, 9 Ha. 414; *Knight* v. *Robinson*, 2 K. & J. 503; overruling *Silvester* v. *Jarman*, 10 Pr. 78.

The fact that the gift was to several persons as tenants in common, did not prevent the legal estate from passing. *Ex parte Whiteacre*, cited 1 Sand. on Uses, 359, n.; 1 Jar. 649.

Money on security.

It was doubtful whether the term "money on security" by itself passed the legal estate in mortgaged property; but it did if the donee was to receive the money on security, &c. *Re Cantley* or *Cantley*, 17 Jur. 124; 22 L. J. Ch. 391; *Doe* d. *Guest* v. *Bennett*, 6 Ex. 892; *Arrowsmith's Trust*, 27 L. J. Ch. 704; 4 Jur. N. S. 1123; see *Brown* v. *Brown*, 6 W. R. 613.

CHAPTER XIV.

EXECUTORS—GUARDIANS—RELIGIOUS EDUCATION, ETC.

I.—Executors.

Special executors.

A testator may appoint special executors of any portion of his property; see 2 Key & Elphinstone, 6th ed. 826; 4 Dav. Conv. 102; Dunning, Cono. Prec. 435.

He may also appoint different executors for different countries. *In bonis Wallich*, 1 Sw. & T. 423; *Velho* v. *Leite*, *ib.* 456.

The executor appointed in the country of the testator's domicile is entitled to receive the clear surplus in the hands of limited executors. *Eames* v. *Hacon*, 12 Ch. D. 347.

Executors on a contingency.

A testator may substitute other executors in the event of the absence or death of those appointed, and he may appoint a person executor if and when he returns to England. *In bonis Langford*, 1 P. & D. 458; *In bonis Foster*, 2 P. & D. 304; *In re Arbib*, (1891) 1 Ch. 601.

Delegation of power.

He may delegate the power of appointing executors to another who may appoint himself. *In bonis Cringan*, 1 Hag. 548; *In bonis Ryder*, 2 Sw. & T. 127.

Limited company.

If he appoints a limited company, administration with the will annexed will be granted to their nominee, and the bond of the company as surety will be accepted. *In bonis Hunt*, (1896) P. 288.

Probate will not be granted to a limited company and individuals jointly. *In bonis Martin*, 90 L. T. 264.

Married woman executrix.

Since the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), a married woman can act as executrix, without her husband's consent. *In bonis Ayres*, 8 P. D. 168.

Before that Act, if the husband refused his consent, probate

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was granted to the married woman's attorney. *Clerke* v. *Clerke*, 6 P. D. 103.

A person appointed executrix of all property not named in the will is not an executrix of the will or entitled to probate. *In bonis Wakeman*, 2 P. & D. 395.

Executors appointed by several instruments.

Where there are several testamentary papers not inconsistent and each appointing sole executors, probate is granted to all the executors. *In bonis Graham*, 3 Sw. & T. 69; *Geares* v. *Price*, 3 Sw. & T. 71; *In bonis Strahan*, (1907) 2 Ir. 484. See *In bonis Morgan*, 1 P. & D. 323.

Reappointment by a 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. *In bonis Leese*, 2 Sw. & T. 442; *In re Lloyd*, I. R. 6 Eq. 348.

A codicil appointing a person "sole" executor of the will revokes the appointment of executors made by the will. *In bonis Lowe*, 3 Sw. & T. 478; *In bonis Baily*, 1 P. & D. 628.

Where a testator appointed A without saying to what office, and afterwards referred to his executor, A was held to be executor. *In bonis Bradley*, 8 P. D. 215; see *In bonis Earl of Leven and Melville*, 15 P. D. 22.

Executor according to tenor.

Though no executors are expressly appointed, if the testator has directed any person to pay his debts and administer the estate, or to pay his debts only, such person will be executor according to the tenor. *In bonis Montgomery*, 5 N. of C. 99; *In bonis Adamson*, 3 P. & D. 253; *In bonis Bluett*, 15 L. R. Ir. 140; *In bonis Wilkinson*, (1892) P. 227; *In bonis Cook*, (1902) P. 114. See *In bonis Lush*, 13 P. D. 20; *In bonis Russell*; *In bonis Laird*, (1892) P. 380; *In bonis Tandy*, 27 L. R. Ir. 114; *In bonis Pryse*, (1904) P. 301.

Trustees to whom the testator's personal estate is given, subject to a charge of debts, or who are to hold and administer in trust all the estate, are in effect executors. *In bonis Baylis*, 1 P. & D. 21; *In bonis Bell*, 4 P. D. 85; see *In bonis Palmer*, 11 L. R. Ir. 1; *In bonis Hamilton*, 17 L. R. Ir. 277; *In bonis Gray*, 21 L. R. Ir. 249; *In bonis Way*, (1901) P. 345.

Request to act with executrix.

A request that certain persons shall act for or with an executrix appointed by the will, makes them executors according to the tenor. *In bonis Brown*, 2 P. D. 110.

A person appointed to carry out the intentions of the will is executor according to the tenor. *In re Archdall*, 5 L. R. Ir. 168; *In bonis McKane*, 21 L. R. Ir. 1; *In bonis Allam*, 66 L. T. 382.

Sole trustee not an executor.

The appointment of a person sole trustee of a will will not in itself make him executor according to the tenor. *In bonis Punchard*, 2 P. & D. 309; *In bonis Lowry*, 3 P. & D. 157. See *Bourdman* v. *Stanley*, I. R. 6 Eq. 590; *Smith* v. *Kerran*, I. R. 11 Eq. 447; *In bonis Earl of Lerra and Melville*, 15 P. D. 22.

It seems trustees, to whom the residue only is given on trust to pay debts, are not executors. *In bonis Lore*, 7 L. R. Ir. 178. See *In bonis Toomy*, 3 Sw. & T. 562.

And when in exercise of a testamentary power property is directed to be distributed by the trustees of the settlement, this does not make the trustees executors. *In bonis Fraser*, 2 P. & D. 183.

II.—Guardians.

Parents may dispose of the custody of children during minority.

The lands of children and the management of their personal estate by their guardians.

By 12 Car. II. c. 24, s. 8, a father, whether he is of full age or not, may by deed or will dispose of the custody and tuition of his infant children; and by sect. 9, the person to whom the custody of the children has been so disposed or devised, may take into his custody to the use of such children, the profits of all lands, tenements, and hereditaments of such children, and also the custody, tuition, and management of their goods, chattels, and personal estate, and may bring such actions in relation thereunto, as by law a guardian in common socage may do.

Sect. 1 of the Wills Act declares that the word will shall include a disposition by will of the custody of a child under 12 Car. II. c. 24. It follows that an infant cannot appoint testamentary guardians by will (sect. 7).

Powers of trustees under s. 42 of Conveyancing Act.

Whether trustees within the meaning of sect. 42 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), would be entitled to possession as against the testamentary guardian, has not been decided. See *In re Helyar*; *Helyar* v. *Berkett*, (1902) 1 Ch. 391.

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But trustees appointed for the purposes of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), are not "trustees with power of sale" within that section. *In re Helyar*, *supra*.

Receipt for legacy by testamentary guardian.

The testamentary guardian can give a good receipt for a legacy left to the infant, though the Court will not necessarily pay to him a fund belonging to the infant, which has been paid into Court under the Legacy Duty Act. *McCreight* v. *McCreight*, 13 Ir. Eq. 314; *Re Cresswell*, 45 L. T. 468.

An instrument appointing a testamentary guardian is valid though attested by the guardian. *Morgan* v. *Hatchell*, 24 L. J. Ch. 135.

Father delegate appointment of guardian.

The statute enables a father to give a testamentary guardian authority to nominate a guardian. *In bonis Purcell*, 2 P. & D. 379.

Illegitimate children.

A father has no legal power to appoint a testamentary guardian of his illegitimate children, though the person selected by him would in most cases be appointed by the Court. *Sherman* v. *Wilson*, 13 Eq. 36; see *Re Ulbe*; *Ex Nawab Nazim of Bengal's Infants*, 53 L. T. 711; 54 L. T. 286.

Guardian entitled to custody.

The testamentary guardian has a legal right to the custody of the child, and is entitled to a writ of habeas corpus to obtain possession of his ward. *In re Andrews*, L. R. 8 Q. B. 153; see, too, *In re Ethel Brown*, 13 Q. B. D. 614.

There is nothing to prevent a father from appointing a Roman Catholic ecclesiastic the guardian of his children. *Talbot* v. *Earl of Shrewsbury*, 4 M. & Cr. 672; *In re Andrews*, L. R. 8 Q. B. 153; *In re Byrnes*, I. R. 7 C. L. 199.

How guardian appointed.

No precise words are necessary to appoint a testamentary guardian.

Thus it is sufficient to direct, that the children are to be brought up under the care and direction of a certain person, or that he is to have the management and care of the house and children, or that he is to take care to see the child educated. *Bridges* v. *Hales*, Mosley, 109; *Miller* v. *Harris*, 14 Sim. 540; 9 Jur. 388; *Lady Teynham* v. *Leonard*, 4 B. P. C. 302.

A person appointed guardian of the estate is not a testamentary guardian. *In re Norbury*, I. R. 9 Eq. 134.

As to the rights of the mother of an illegitimate child, see *Reg.* v. *Nash*, 10 Q. B. D. 454; *Barnardo* v. *McHugh*, (1891) 1 Q. B. 194; (1891) A. C. 388; *Re Ulez; the Naval Nazim of Bengal's Infants*, 58 L. T. 711; 54 L. T. 286.

Before the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), the mother had no testamentary power of appointing guardians, but that Act provides as follows:—

On death of father, mother to be guardian alone or jointly with others.

2. On the death of the father of an infant, and in case the father shall have died prior to the passing of this Act, then from and after the passing of this Act the mother, if surviving, shall be the guardian of such infant, either alone when no guardian has been appointed by the father, or jointly with any guardian appointed by the father. When no guardian has been appointed by the father, or if the guardian or guardians appointed by the father is or are dead or refuses or refuse to act, the Court may if it shall think fit, appoint a guardian or guardians to act jointly with the mother.

Mothers may appoint guardians in certain cases.

3. (1) The mother of any infant may by deed or will appoint any person or persons to be guardian or guardians of such infant after the death of herself and the father of such infant (if such infant be then unmarried), and where guardians are appointed by both parents they shall act jointly.

(2) The mother of any infant may by will or deed provisionally nominate some fit person or persons to act as guardian or guardians of such infant after her death jointly with the father of such infant, and the Court, after her death, if it be shown to the satisfaction of the Court that the father is for any reason unfitted to be the sole guardian of his children, may confirm the appointment of such guardian or guardians, who shall thereupon be authorised and empowered so to act as aforesaid, or make such other order in respect of the guardianship as the Court shall think right.

(3) Authorises the guardians, if they cannot agree, to apply to the Court for directions.

Powers of guardian.

4. Every guardian in England or Ireland under this Act shall have all such powers over the estate and the person, or over the estate (as the case may be) of an infant as any guardian appointed by will or otherwise now has in England under the

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Act 12 Car. II. c. 24, or in Ireland under the Act of the Irish Parliament, 14 & 15 Car. II. c. 19, or otherwise.

The Act does not affect the power of the Court to remove a guardian, if it is for the benefit of the infant to do so, but under the Act the mother is the sole guardian, if the father does not appoint, and the Court will not without strong grounds appoint another guardian to act with her. *In re McGrath*, (1893) 1 Ch. 143; *In re X.; X.* v. *Y.*, (1899) 1 Ch. 526; *In re F.*, (1902) 1 Ch. 688.

A testamentary appointment of a guardian by the mother under sect. 3 (2) is not invalid because the guardian is not expressed to be appointed jointly with the father. *In re G.*, (1892) 1 Ch. 292.

Act of 1891.

As to the custody of infants, see, too, the Custody of Children Act, 1891 (54 Vict. c. 3). *In re O'Hara*, (1900) 2 Ir. 232.

III.—Religious Education.

Religious education.

A father is entitled to direct the religion in which he wishes his children to be brought up after his death, and this right is not affected by the Guardianship of Infants Act, 1886. *In re Scanlan*, 40 Ch. D. 200; *In re Grey*, (1902) 2 Ir. 684.

The cases show that less weight will be given to the wishes of a deceased than to those of a living father, but even where the father is living the Court will not interfere in favour of the religion selected by the father if he has done anything amounting to an abandonment of his rights, or if the interference would not be for the benefit of the children. *Hacksworth* v. *Hacksworth*, 6 Ch. 539; *Andrews* v. *Salt*, 8 Ch. 622; *In re Agar-Ellis; Agar-Ellis* v. *Lascelles*, 10 Ch. D. 49; 24 Ch. D. 317; *In re Clarke*, 21 Ch. D. 817; *In re Walsh*, 13 L. R. Ir. 269; *In re Nevin*, (1891) 2 Ch. 299; *In re McGrath*, (1893) 1 Ch. 143; *In re Magees*, 31 L. R. Ir. 513; *In re Newton*, (1896) 1 Ch. 740.

IV.—Agents, Solicitors.

Appointment of agent or solicitor.

A testator may, there can be no doubt, appoint a person, agent or solicitor to his estate in such a way as to entitle the

person to be employed. *Hibbert* v. *Hibbert*, 3 Mer. 631; *Williams* v. *Corbet*, 8 Sim. 349.

But a request that a particular person may be employed as manager or receiver, or a declaration that a particular person is to be the solicitor to the estate, does not impose on the trustees a duty to employ him. *Shaw* v. *Lawless*, 5 Cl. & F. 129; *Finden* v. *Stephens*, 2 Ph. 142; *Delaney* v. *Kelly*, 19 W. R. 1171; *Foster* v. *Elsley*, 19 Ch. D. 518.

Profit costs.

An authority to a solicitor or other professional man who is appointed a trustee to charge for his professional services is in effect a legacy, and he cannot make any charge as against creditors. *In re White; Pennell* v. *Franklin*, (1898) 2 Ch. 217; see *In re Thorley; Thorley* v. *Massam*, (1891) 2 Ch. 613 (legacy duty).

V.—Administration Action.

Direction to administer the estate in an action.

A direction by the testator to his trustees to commence an action for the administration of his estate by the Court, does not deprive the Court of its discretion to refuse an order, though weight will be given to it by the Court in determining whether an order should be made. *In re Stocken; Jones* v. *Hawkins*, 38 Ch. D. 319.

CHAPTER XV.

I.—THE EQUITABLE DOCTRINE OF ELECTION.

A. *General Principles.*

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When election arises.

A TESTATOR can, by means of the doctrine of election, in many cases in effect dispose of the property of others. Thus, where a testator disposes of the property of a person, and at the same time gives that person property of his own by his will, the person whose property is given away is bound to elect whether he will keep his own property and surrender an equivalent value of the benefits given him by the will, or whether he will take entirely under the will. *Rogers* v. *Jones*, 3 Ch. D. 688; *Re Carpenter*; *Carpenter* v. *Disney*, 61 L. T. 773.

Legatee must elect for or against the whole instrument, will and codicils,

The person electing must elect to take under or against the whole instrument, will and codicils, and not merely that part of it which disposes of his own property. *Cooper* v. *Cooper*, L. R. 6 Ch. 15; *ib.* 7 H. L. 53.

Two contemporaneous instruments, *e.g.*, a deed under a power and a will, which effectuate one entire disposition, are, for the purposes of raising an election, treated as one instrument. *Kirkham* v. *Smith*, 1 Ves. Sen. 258; *Bacon* v. *Cosby*, 4 De G. & S. 261; *In re Woodleys*, 29 L. R. Ir. 304.

unless the testator limits the election to some particular benefit.

If, however, there is a gift expressly in lieu of dower, or the testator declares that the legatee is to elect only between one of the benefits given him by the will and his own property, election will be confined to that. *Walker* v. *Inge*, Rom. N. of C. 95; *East* v. *Cook*, 2 Ves. Sen. 30, explained in *Wilkinson* v. *Dent*, 6 Ch. 339; *Coote* v. *Gordon*, I. R. 11 Eq. 180, 279.

Gift in satisfaction of a debt will not

But a gift, though declared to be in satisfaction of any sums in which the testator may be indebted to the donee at the time

of his decease, or in satisfaction of a rent charge, the object being testamentary bounty, will put the legatee to his election to take under or against the whole will. *Wilkinson* v. *Dent*, 6 Ch. 339; see, too, *Coutts* v. *Acworth*, 9 Eq. 519. limit election to that particular gift.

Election arises whether the property given away by the testator be vested or contingent or in possession or reversion. *Wilson* v. *Lord Townshend*, 2 Ves. Jun. 693; *Webb* v. *Earl of Shaftesbury*, 7 Ves. 480; *Williams* v. *Mayne*, I. R. 1 Eq. 519. Applies to contingent and reversionary property.

It also arises between specific chattels given to the legatee and his own property given away. *Kater* v. *Rogel*, 4 Y. & C. Ex. 18. Specific chattels.

In a case of election arising under a will, the amount of compensation payable and the rights generally are to be ascertained, as at th testator's death. *In re Lord Chesham*; *Cavendish* v. *Dacre*, 31 Ch. D. 466; *In re Hancock*; *Hancock* v. *Pawson*, (1905) 1 Ch. 16. Rights ascertained at testator's death.

Thus there is no election if the property disposed of by the testator is not acquired by the beneficiary till after the testator's death. *Howells* v. *Jenkins*, 2 J. & H. 706; 1 D. J. & S. 617; *Grissell* v. *Swinhoe*, 7 Eq. 291; see *Lady Caran* v. *Pulteney*, 2 Ves. Jun. 544; 3 *ib.* 384. Property acquired after testator's death.

A case of election arises, though the property given away by the testator belongs to beneficiaries under the will, who derive title to it only as next of kin or as residuary legatees or devisees of a person dead at the testator's death. In the case of a title as next of kin the interest must be estimated as at the death of the intestate, his debts being rateably distributed over his estate. *Cooper* v. *Cooper*, L. R. 6 Ch. 15; 7 H. L. 53. Derivative title.

A creditor of the intestate who receives a benefit under the will is not put to his election between his claim against the intestate's estate and the benefit under the will, inasmuch as the claim is a mere personal right. *Cooper* v. *Cooper*, L. R. 7 H. L. p. 66.

The nature of the property out of which compensation is to be made may be such as to negative the intention to put a beneficiary to his election. Out of what property compensation to be made.

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Thus, where heirlooms settled with a mansion-house were disposed of by a testator who gave his residue to the tenant for life of the mansion-house, no case of election arose, as the tenant for life could not dispose of the heirlooms. *In re Lord Chesham; Cavendish v. Dacre*, 31 Ch. D. 466.

And it may appear from the instrument that no case of election is intended to be raised, for instance, by the recognition of the title of a person, to whom an interest is given, to certain property, in respect of which he might otherwise have to elect. *In re Wells: Hardisty* v. *Wells*, 42 Ch. D. 646.

Married woman restrained from anticipation.

And a married woman is not put to her election between property belonging to her and a life interest settled upon her with a restraint upon anticipation which cannot be impounded to make compensation. *Smith* v. *Lucas*, 18 Ch. D. 531; *In re Wheatley*, 27 Ch. D. 606; *In re Vardon's Trusts*, 31 Ch. D. 275; *Hamilton* v. *Hamilton*, (1892) 1 Ch. 396; reversing *Willoughby* v. *Middleton*, 2 J. & H. 344.

Cesser of restraint on anticipation by death of husband.

As the matter depends upon intention it makes no difference that at the time of payment, or even it would seem at the testator's death, the restraint upon anticipation has ceased to operate owing to the death of the husband. *Haynes* v. *Foster*, (1901) 1 Ch. 361.

Determinable life interest.

But it has been held that a life interest determinable on alienation may be impounded to make compensation, though the effect is to put an end to it. *McCarogher* v. *Whieldon*, 3 Eq. 236; *Carter* v. *Silber*, (1891) 3 Ch. 553; reversed on another point, (1893) A. C. 360.

Married woman's reversion.

It has been held that a married woman who, under the old law, was unable to dispose of her reversionary interest, was put to her election between that interest which was given away by a testator and a benefit given by the will, but that inasmuch as she could not elect during coverture the legacy must be impounded till she could elect. *Williams* v. *Mayne*, I. R. 1 Eq. 519; see *In re Lord Chesham*, 31 Ch. D. 466, p. 475; *Harle* v. *Jarman*, (1895) 2 Ch. 419.

Property subject to special power.

As regards property subject to a special power of appointment, if the donee of the power appoints to persons not objects of the power and gives benefits to those who take in default of

appointment, the latter must elect. *Whistler* v. *Webster*, 2 Ves. Jun. 366; *Prescott* v. *Edmunds*, 4 L. J. Ch. 111; *Fearon* v. *Fearon*, 3 Ir. Ch. 19; *Tomkyns* v. *Blanc*, 28 B. 422; *White* v. *White*, 22 Ch. D. 555; *In re Wheatley*; *Smith* v. *Spence*, 27 Ch. D. 606; *In re Brookshank*; *Beauclerk* v. *James*, 34 Ch. D. 160; *In re Wells*; *Hardisty* v. *Wells*, 42 Ch. D. 646; *King* v. *King*, 13 L. R. Ir. 531.

Appointment subject to charge in favour of non-objects.

The same principle applies where there is an appointment subject to a charge in favour of persons who are not objects.

The appointee can only take what he is intended to have, namely, the property less the amount charged. *White* v. *White*, 22 Ch. D. 555; *King* v. *King*, 13 L. R. Ir. 531.

Election not applied to make an appointment void for perpetuity valid.

There is a majority of cases in favour of the view, that there is no case for election, where a testator makes an appointment which is void for perpetuity and at the same time gives the persons entitled in default of appointment property of his own. *Wollaston* v. *King*, 8 Eq. 165; *In re Warren's Trusts*, 26 Ch. D. 208; *In re Hancock's Trusts*, 23 L. R. Ir. 34; *In re Oliver's Settlement*; *Eeeed* v. *Leigh*, (1905) 1 Ch. 191; *In re Beales' Settlement*; *Barrett* v. *Beales*, *ib.* 256; *In re Wright*; *Whitworth* v. *Wright*, (1906) 2 Ch. 288, as against *In re Bradshaw*; *Bradshaw* v. *Beadshaw*, (1902) 1 Ch. 436.

Appointment subject to invalid restrictions.

There must be distinguished the case of an appointment to an object of the power followed by invalid restrictions, such as an attempt to settle the appointed fund. In such a case there is no election. The invalid restriction is rejected. *Carver* v. *Bowles*, 2 R. & M. 301; *Blacket* v. *Lamb*, 14 B. 482; *Woolridge* v. *Woolridge*, Jo. 63; *Churchill* v. *Churchill*, 5 Eq. 44; see *Moriarty* v. *Martin*, 3 Ir. Ch. 26; *King* v. *King*, 15 Ir. Ch. 479.

No election between share appointed and share in default of appointment.

In order to put a person entitled to claim property in default of appointment to his election, there must be a gift to him of free disposable property. Where there is an appointment to A an object, and to B not an object, A is not put to his election between the share appointed to him and the share he takes in default of appointment. *Bristow* v. *Warde*, 2 Ves. Jun. 336, p. 350.

Again, if there is an appointment by will to three objects of a power, and then an appointment by deed to one of the three

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of part of the fund, the one who takes under the deed is not bound to elect between the amounts so appointed by the deed and will. *Montague* v. *Montague*, 15 B. 565; *In re Ashton*; *Ingram* v. *Papillon*, (1897) 2 Ch. 574; reversed on a different point, (1898) 1 Ch. 142.

Appointment under several powers.

Where a person is an object of two special powers and an appointment is made to him under the first and an appointment under the second to a person who is an object of the first but not of the second, the appointee under the first power is not bound to elect between his interest in default of appointment under the second power and the appointment made to him under the first. *In re Fowler's Trust*, 27 T. 362; *In re Aplin's Trust*, 13 W. R. 1062; see, too, *In re Wills*, 42 Ch. D. 646.

Appointment of larger in substitution for smaller share.

Where the donee of a special power makes irrevocable appointments of a share to some of the objects and afterwards appoints a larger share to each of the then objects, and the intention is that each object is to have the larger share only, the earlier appointments of the smaller shares are superseded by the subsequent appointment. The appointees of the smaller shares cannot claim the smaller and the larger shares as well. *England* v. *Lavers*, 3 Eq. 63; *In re Tancred's Settlement*: *Somerville* v. *Tancred*, (1903) 1 Ch. 715.

No election between two clauses of same instrument.

Election arises only between a gift by the will and a title outside the will. It does not arise between two clauses of the same will. When, therefore, there was an invalid appointment and a residuary gift which was sufficient to pass the amount invalidly appointed, the residuary legatees were not bound to elect between the benefits given to them by the will and the fund invalidly appointed. *Wollaston* v. *King*, 8 Eq. 165; *Wallinger* v. *Wallinger*, 9 Eq. 301; *In re Swinburne*; *Swinburne* v. *Pitt*, 27 Ch. D. 696.

Right of action of disappointed legatee.

A disappointed legatee may maintain an action against a person who has elected against an instrument to recover the proper compensation. *Rogers* v. *Jones*, 7 Ch. D. 345.

Persons electing against instrument may be

Persons who elect to take against the will may be entitled to compensation *inter se*, and the compensation received by A from B is applicable to compensate C, if he is disappointed by

A's election to take against the instrument. *In re Booth*; *Booth* v. *Robinson*, (1906) 2 Ch. 321.

entitled to compensation *inter se*.

If the person entitled to elect dies before electing, the property given to him and his property which has been given away may go to different persons. In such case there can be no election. But the property given to the deceased person passes charged with the compensation which he would have had to make if he had elected to keep his own property. *Pickersgill* v. *Rodger*, 5 Ch. D. 163; *Griffith Foscawen* v. *Scott*, 26 Ch. D. 358; see *Spread* v. *Morgan*, 11 H. L. 588.

Death before election.

On the other hand, if the property given to the deceased person and his property, which had been given away, go to the same persons they can elect. In the case of personalty, where the person who would have had to elect dies intestate, the right of election belongs not to the administrator, but to the next of kin, each of whom has a separate right of election. *Fytche* v. *Fytche*, 7 Eq. 494.

As between several persons disappointed by an election they are entitled to share in the compensation in proportion to the value of the interests of which they have been disappointed. *Howells* v. *Jenkins*, 1 D. J. & S. 617.

Apportionment of compensation.

Where a person electing against an instrument has received payments under it, there is an equity to have those payments made good out of the property he elects to keep, and the equity has priority over the rights of a mortgagee or a trustee under a deed of arrangement. *Codrington* v. *Lindsay*, 8 Ch. 578; L. R. 7 H. L. 854; *Carter* v. *Silber*, (1891) 3 Ch. 553; reversed on another point, (1893) A. C. 360; see *Greenwood* v. *Penny*, 12 B. 403, where the equity was not recognised.

Repayment of sums received before election against instrument.

B. *Election arising under Wills.*

In order to raise a case for election under a will there must be on the face of the will a disposition on the part of the testator of something belonging to a person who takes an interest under the will.

To raise election the testator must actually dispose of something not his own.

An erroneous belief on the part of the testator, that certain property has been disposed of in a particular way, even though

Erroneous belief or

Recital will not raise election.

he expressly declares that he has made his will on the faith of it, will not raise an election. *Langston* v. *Langston*, 21 B. 552; *Dashwood* v. *Peyton*, 18 Ves. 27; *Box* v. *Barrett*, 3 Eq. 244; see *Lewis* v. *Lewis*, I. R. 11 Eq. 340; *In re Woodley*, 29 L. R. Ir. 304.

Revocation of settlements.

A revocation of all former wills and settlements *primâ facie* refers only to settlements which the testator has power to revoke. *Re Booker*; *Booker* v. *Booker*, 54 L. T. 239.

1. Cases where testator has no interest in property given away.

General words limited to testator's own property.

Even in wills made before the Wills Act, general words were not construed to apply to property not belonging to the testator, though at the date of his will and his death he had no property of his own, to which the words could apply. *Read* v. *Crop*, 1 B. C. C. 492; *Jervoise* v. *Jervoise*, 17 B. 566; *Thornton* v. *Thornton*, 11 Ir. Ch. 474.

Devise in strict settlement where testator has only estate *pur autre vie*.

Nor will the fact, that the devise is to uses in strict settlement, extend general words to more than the testator's interest, though his devisable interest is only an estate *pur autre vie*. See *Cosby* v. *Lord Ashdown*, 10 Ir. Ch. 219.

The testator may of course show that he included lands not his own under the general words by describing them as lands in his own occupation. *Honywood* v. *Foster*, 30 B. 14.

Property in particular place.

If the devise be of property in a particular place, if there is any property of the testator answering the description it will be confined to that. *Ranelifle* v. *Parkyns*, 6 Dow, 149; *Maddison* v. *Chapman*, 1 J. & H. 470.

Property held in joint tenancy.

Where a testator has transferred stock into the names of himself and his wife, a general gift of his stock, or even a gift of stock exactly the same in amount as that so transferred, will not put the wife to her election. *Dummer* v. *Pitcher*, 2 M. & K. 262; *Poole* v. *Odling*, 10 W. R. 337.

To raise a case of election there must be a specific reference to the stock in question. *Coates* v. *Stevens*, 1 Y. & C. Ex. 66; *Grosvenor* v. *Durston*, 25 B. 97.

Devise of estate and interest.

A devise of the testator's estate and interest in certain property, where he has none, does not raise a case of election, unless he goes on to show that he considered his estate and

interest to be a fee simple; for instance, by settling the property. *Whitley* v. *Whitley*, 31 B. 173; explained in *Galvin* v. *Devereux*, (1903) 1 Ir. 185.

For a case where a testatrix being entitled to a debt from A. which was secured by an assignment of a covenant by B, released the debt and covenant, see *Synge* v. *Synge*, 9 Ch. 128. Release of debt.

2. The case is more difficult where the testator has a devisable interest in certain property, and the question arises whether he intended to give the whole property.

a. Where the testator is entitled in moieties:—

When the testator is entitled in moieties.

If the devise is of the testator's interest or property in a house or lands, only what belongs to him is intended to pass. *Henry* v. *Henry*, I. R. 6 Eq. 286.

But if the gift is of a house by a particular description, this is a sufficient indication of an intention to pass the whole house, whether there is (*a*) or is not (*b*) a direction to repair. *Padbury* v. *Clark*, 2 Mac. & G. 298; *Howells* v. *Jenkins*, 2 J. & H. 706; see *Swan* v. *Holmes*, 19 B. 471 (*a*). *Fitzsimons* v. *Fitzsimons*, 28 B. 417; *Miller* v. *Thurgood*, 33 B. 496; *Wilkinson* v. *Dent*, 6 Ch. 339 (*b*). Gift of a house with a direction to repair.

b. Where land is subject to a charge, a devise of the land without more is a devise subject to the charge. *Stephens* v. *Stephens*, 3 Dr. 697; 1 De G. & J. 62; *Henry* v. *Henry*, I. R. 6 Eq. 286. When the testator is entitled to land subject to a charge.

On the other hand, if the testator repudiates the instrument creating the charge, and the dispositions of his will are inconsistent with that instrument, the property is intended to pass freed from the charge. *Sadlier* v. *Butler*, I. R. 1 Eq. 415.

So, too, if the devise of the land is inconsistent with the charge, as if it be for a long term on trust to raise a sum immediately for payment of debts and legacies, the prior charge being itself secured by a long term. *Blake* v. *Bunbury*, 1 Ves. Jun. 514.

c. Where the testator has a reversionary interest in land, limited to take effect after the decease of persons to whom he gives a life interest in those lands, so that the will would be of no effect if it were intended only to deal with the reversion, When the testator is entitled to the reversion in lands.

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and there are besides powers of leasing and management implying actual enjoyment, the intention must have been to dispose of the whole property. *Welby* v. *Welby*, 2 V. & B. 187; *Winfour* v. *Clifton*, 21 B. 447; 8 D. M. & G. 641; *Minchin* v. *Gabbett*, (1896) 1 Ir. 1.

So, too, a direction that an annuity is to be paid to a person for life out of lands of which the testator has only the reversion shows an intention to dispose of the whole. *Usticke* v. *Peters*, 4 K. & J. 437.

But if in a doubtful case the testator expressly confirms the settlement by which the reversion in the property in question is limited to him, only his own interest will be held to be intended to pass. *Ranelagh* v. *Parkyns*, 6 Dow, 149.

3. Widow's dower and freebench:—

What amounts to an intention to dispose of lands free from dower or freebench.

The question whether the testator has shown an intention to dispose of his real estate, freed from the widow's right to dower or freebench, is of importance only, with regard to the former, in the case of widows married prior to the 1st January, 1834; and with regard to the latter, in the case of wills not coming under the Wills Act; see the Dower Act (3 & 4 Will. IV. c. 105), ss. 4, 14. *Lacey* v. *Hill*, 19 Eq. 346; *Berry* v. *Gaukroger*, see Appendix.

As the old law on the subject is now practically obsolete, it has not been thought necessary to repeat in this edition the discussion of the cases in which widows have been held bound to elect between their dower or freebench and benefits conferred on them by the will.

When the heir is put to election.

4. Under the old law, by which a testator could not by a will dispose of lands acquired after the date of the will, the heir was nevertheless put to his election if there was a clear intention to dispose of them.

Disposition of after-acquired lands before the Wills Act.

It is clear that such an intention was sufficiently indicated where the testator drew a distinction between lands to which he was entitled and lands to which he might be entitled at his decease. *Schroder* v. *Schroder*, Kay, 578; 24 L. J. Ch. 510; *Hance* v. *Trawhitt*, 2 J. & H. 216; see *Plowden* v. *Hyde*, 2 Sim. N. S. 471; 2 D. M. & G. 684; *Jacob* v. *Jacob*, 78 L. T. 451, 825; 82 L. T. 270.

And it seems the words "land which I shall die possessed of" sufficiently indicated an intention to pass after-acquired lands, and not merely so much of the lands belonging to the testator at the date of his will as should remain at his death. *Churchman* v. *Ireland*, 1 R & M. 250, overruling *Back* v. *Kell*, Jac. 534.

No election when the will invalid to pass realty.

Where the will was insufficiently executed to pass realty, the heir was not put to his election between realty attempted to be disposed of by the will and benefits given to him, so much of the will as attempted to dispose of realty being considered non-existent. *Sheldon* v. *Goldrich*, 8 Ves. 481.

So, too, when the testator or testatrix was incompetent to dispose of property from infancy or coverture no case of election arose. *Hearle* v. *Greenbank*, 1 Ves. Sen. 298; 3 Atk. 695, 714; *Rich* v. *Cockell*, 9 Ves. 370; *In re De Burgh Lawson*; *De Burgh Lawson* v. *De Burgh Lawson*, 34 W. R. 39; see *Blaikhock* v. *Grindle*, 7 Eq. 215.

Foreign heir.

These rules do not, however, apply to a foreign heir, and therefore if there is clear evidence of an intention to dispose by will of land in Scotland or elsewhere which cannot be so disposed of, the heir is put to his election between the land and the benefits he may take under the will. *Brodie* v. *Barry*, 2 V. & B. 127; *Dewar* v. *Maitland*, L. R. 2 Eq. 834; *Orrell* v. *Orrell*, 5 Ch. 302.

It must be clear that land in Scotland or elsewhere is referred to, and therefore general words will only be held to refer to those lands upon which the will can take effect. *Johnson* v. *Telford*, 1 R. & M. 244; *Allen* v. *Anderson*, 5 Ha. 163; *Maxwell* v. *Maxwell*, 16 B. 106; 2 D. M. & G. 705; *Maxwell* v. *Hyslop*, 4 Eq. 407; *Baring* v. *Ashburton*, 54 L. T. 463.

C. *How election made.*

Person electing entitled to information.

A person who has to elect is entitled to be informed of all the circumstances which may influence his decision, and he will not be bound by an election made in ignorance of the true facts. He may take proceedings to have the value of

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the property subject to the election ascertained. *Dillon* v. *Parker*, 1 Sw. 381; 1 Cl. & F. 305; *Douglas* v. *Douglas*, 12 Eq. 617.

Election by conduct.

There may be election by conduct, but to establish such a case the election must be by a person who has positive information as to his rights to the property, and with that knowledge really means to give the property up. *Stratford* v. *Powell*, Ba. & Be. 1; *Wake* v. *Wake*, 3 B. C. C. 254; 3 Ves. 321; *Padbury* v. *Clark*, 2 Mac. & G. 298; *Worthington* v. *Wigiuton*, 20 B. 67; *Spread* v. *Morgan*, 11 H. L. C. 588; *Wilson* v. *Thornbury*, 10 Ch. 239; *Sweetman* v. *Sweetman*, I. R. 2 Eq. 141.

Election on behalf of infants.

In the case of infants the Court elects for them, and if necessary directs an inquiry as to what is most beneficial. *Brown* v. *Brown*, L. R. 2 Eq. 481; *Cooper* v. *Cooper*, L. R. 7 H. L. 53.

In the case of an infant tenant in tail the Court will make an order under the Trustee Act, 1893, declaring the infant a trustee of the estate of which he is tenant in tail bound by the election, and appointing a person to convey. *In re Montagu*; *Faber* v *Montagu*, (1896) 1 Ch. 519; 65 L. J. Ch. 372; 74 L. T. 346; 44 W. R. 583.

Election on behalf of lunatics.

In the case of a lunatic so found by inquisition the Court in Lunacy has jurisdiction to elect on his behalf so as to bind both legal and equitable interests in real and personal property. *In re Earl of Sefton*, (1898) 2 Ch. 378.

This jurisdiction appears not to exist in the case of persons not being lunatics so found by inquisition, with reference to whom a person has been appointed under sect. 116 (2) of the Lunacy Act, 1900 (53 Vict. c. 5), to exercise "such of the powers of this Act as are made exercisable by the committee of the estate," since those powers do not include the power to elect. *In re Earl of Sefton*, *supra*.

It was suggested in *Wilder* v. *Pigott*, 22 Ch. D. 263, that the Court of Chancery had jurisdiction to elect on behalf of a lunatic not so found, but there appears to be no authority for the suggestion.

Election by married women.

The authorities as regards election by married women are not in a satisfactory state. A married woman was not under a personal disability to elect as an infant would be. Her disability arose from her limited power under the old law of dealing with her property. For instance, there can be little doubt that a married woman could elect when only her separate estate was in question.

It would seem that where the married woman had no power of disposition over the property affected by the election she could not elect, and the Court could not elect for her. On the other hand, where husband and wife were put to their election as to the wife's fund, which she could with the consent of her husband and after separate examination by the Court dispose of, the Court would direct an inquiry as to which course would be most beneficial, and would elect on her behalf. *Cooper* v. *Cooper*, L. R. 7 H. L. 53; see *Griggs* v. *Gibson*, L. R. 1 Eq. 685.

Whether married woman could affect her realty by election.

It has been said that a married woman could by election, and without deed acknowledged, affect her real estate not settled to her separate use. See *Barrow* v. *Barrow*, 4 K. & J. p. 419; *Nicholl* v. *Jones*, 3 Eq. p. 709. See, too, Swanston's note to *Gretton* v. *Haygard*, 1 Sw. 409, p. 415.

It may be doubted whether these dicta can be supported by any decided case, unless it be *Ardesoife* v. *Bennet*, 2 Dick. 463; and they seem contrary to well-established principles. See *Field* v. *Moore*, 19 B. 176; 2 Jur. N. S. 145; *Cahill* v. *Cahill*, 8 App. C. 420, 426.

Ardesoife v. *Bennet* was a very peculiar case, and the decision may very well be supported apart from any question of election by a married woman. The case is discussed in *Campbell* v. *Ingilby*, 21 B. 567, 582. *Barrow* v. *Barrow* and other cases of that class are not cases of election in the strict sense of the word at all. They are cases of confirmation by an adult married woman of a voidable deed entered into before marriage and during minority.

II.—Election to Confirm Invalid Deed.

Confirmation of invalid instruments.

Cases of confirmation of instruments entered into by persons under age after they have attained full age are sometimes called cases of election, but they stand on a different footing. They have usually arisen with regard to covenants in marriage settlements to settle some property of the wife who is a minor. Such a covenant is voidable and not void, and unless repudiated within a reasonable time after the wife attains her majority it binds her and her property as if she had been of full age when she entered into it. *Barrow* v. *Barrow*, 4 K. & J. 409; *Smith* v. *Lucas*, 18 Ch. D. 531; *Wilder* v. *Pigott*, 22 Ch. D. 263; *Greenhill* v. *North British and Mercantile Insurance Co.*, (1893) 3 Ch. 474; *In re Hudson*; *Williams* v. *Knight*, (1894) 2 Ch. 421; *Viditz* v. *O'Hagan*, (1899) 2 Ch. 569; rev. on another point, (1900) 2 Ch. 87. *Smith* v. *Lucas*, so far as it decided that there was a right to repudiate from time to time as regards any fresh property falling into possession, will not be followed. *Viditz* v. *O'Hagan*, *supra*.

III.—Election by Express Direction.

Election distinguished from condition.

A testator may of course impose upon a devisee a condition that he shall in return for the testator's bounty dispose of his own property in a particular way.

Cases of this kind must be distinguished from cases of election proper. In the latter it is immaterial whether the testator knew or not that the property of which he was disposing was not his own, in the former he must have known that it was not. The characteristic of the former is forfeiture of the latter compensation. Thus a devise to A on condition of his conveying certain property of his own is not a case for election.

The condition must be complied with, and if the testator gives bounty on condition that the beneficiary conveys his or

her own property in a particular manner, and the beneficiary cannot do so, the whole bounty fails. See *Boughton* v. *Boughton*, 2 Ves. Sen. 12.

Inability to convey.

The Court could not before the Conveyancing Act, 1881, s. 39, assist a married woman in such a case by removing a restraint upon anticipation so as to enable her to comply with such a condition. *Robinson* v. *Wheelwright*, 6 D. M. & G. 535.

Lunatic.

Where a condition to convey his real estate is imposed upon a lunatic, the Court will elect on his behalf. *In re Earl of Sefton*, (1898) 2 Ch. 378.

Construction of condition.

Where the testator directed a residuary legatee to bring an estate into hotchpot, and to convey it so that it might become the property of all his residuary legatees, and the estate had been sold in the testator's lifetime, the condition was held to be satisfied by bringing the purchase-money of the estate into hotchpot. *Middleton* v. *Windross*, 16 Eq. 212.

IV.—Election between Onerous and Beneficial Gifts.

Onerous beneficial gifts.

Where there are several gifts to the same legatee, some of which are onerous and some beneficial, the question has in some cases arisen whether he is bound to take all or none, or whether he can elect to take the beneficial and reject the onerous gift.

The general rule is, that, where several independent gifts are made to the same legatee, the legatee may reject the onerous legacies without forfeiting the others. *Andrew* v. *Trinity Hall*, 9 Ves. 525; *Moffett* v. *Bates*, 3 Sm. & G. 468; *Warren* v. *Rudall*, 1 J. & H. 1; *Aston* v. *Wood*, 22 W. R. 893; 43 L. J. Ch. 715. *Syer* v. *Gladstone*, 30 Ch. D. 614, is explained in *Fewen* v. *Law Life Assurance Society*, (1896) 2 Ch. p. 516, and further explained in *In re Baron Kensington; Earl of Longford* v. *Baron Kensington*, (1902) 1 Ch. 203, 211, n.

Gift of residue or aggregate thing.

But the legatee of a residue or of property given as one aggregate thing cannot reject so much of the residue or property as is onerous. He must take all or none. *Green* v.

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Britten, 42 L. J. Ch. 187; *Guthrie* v. *Walrond*, 22 Ch. D. 573; *In re Hotchkys*; *Freke* v. *Calmady*, 32 Ch. D. 408; *Fraser* v. *Law Life Assurance Society*, (1896) 2 Ch. 511; *Parnell* v. *Boyd*, (1896) 2 Ir. 571.

Even where two gifts are given independently the Court may collect an intention that the legatee is not to take one without the other. Such an intention has been inferred from the fact that the testator knew that a leasehold house was underlet at a rent not sufficient to produce the head rent, and accordingly the legatee of the house was held bound to take it, if he took the other benefits given by the will. *Talbot* v. *Lord Radnor*, 3 M. & K. 252, more fully stated and followed in *Fairtlough* v. *Johnstone*, 16 Ir. Ch. 442.

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Election Generally.

Evidence is not admissible to shew that a provision made by will is in lieu of dower. *Fairweather* v. *Archibald*, 15 Gr. 255.

Heir-at-law, void devise.

Where, in consequence of a devisee being a witness to the will, the devise is void, and there is an intestacy as to the land so attempted to be devised, the heir is not put to his election between such land and a legacy given him by the will. *Munsie* v. *Lindsay*, 1 O.R. 164.

Must be disposition of devisee's property.

A testator gave policies of insurance on his life to his wife in lieu of the house and premises deeded to her, but since disposed of; the house and premises had not, in fact, been disposed of, but were held by the wife at the time of the testator's death. Held, not a case of election, and the wife was entitled to both. *Mutchmor* v. *Mutchmor*, 8 O.L.R. 271, and see *King* v. *Yorston*, 27 O.R. 1.

A testatrix gave the income of $4,500 to R., the capital to be divided between his children at his death and directed that he was to get no other benefit from her "estate" and that the legacy was in lieu of any share in the insurance on her life. There was a policy on her life in favour of R. and two others. Held, that this policy was not part of her "estate," and therefore that R. was not put to his election between the legacy and a share in this policy. *King* v. *Yorston*, 27 O.R. 1.

A testator devised A.'s land to B., and gave A. certain benefits by his will. A., after the testator's death refused to convey his land to B., and sold it. He accepted the benefits under the will. Held, that he, having elected to take under the will, should have conveyed his land to B., and not having done so, was bound to make compensation to him. *Kirk* v. *Kirk*, 40 N.S.R. 147.

Where a testator disposes of the property of another, though the act of election may be postponed for some time, it relates back to the death of the testator when made, and compensation to the person disappointed based upon the

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election is to be computed from the death. *Davis* v. *Davis*, 27 O.R. 532.

On a devise to a grandson charged with maintenance of the testator's widow, the latter entered into possession and assumed to rent the land. In an action by the next of kin against the executors to make them account for the rents it was held that the widow having elected to take her support from the rents the executors were not liable. *Montgomery* v. *Douglas*, 14 Gr. 268.

Election, Dower.

General rule.

Where no provision in lieu of dower is made by will expressly, the rule of construction, as to whether the widow is obliged to elect between her dower and the benefits of the will, is to ascertain whether the will contains any disposition of property inconsistent with the assertion of a demand of a third of the lands to be set out by metes and bounds for the widow's use during life. Boyd, C., in *Mariott* v. *McKay*, 22 O.R. 320.

Devise of part of land.

A devise to the widow of part of the testator's land is not inconsistent with her claim to dower in the remainder when they are separate devises.

So, where the use of one house was devised to the widow, a second being devised to other persons for a certain period in such a manner as to be inconsistent with the allotment of dower therein, the widow was not excluded from claiming dower in the remainder. *Leys* v. *Toronto General Trusts Co.*, 22 O.R. 603, following *Cowan* v. *Besserer*, 5 O.R. 624, and *Laidlaw* v. *Jackes*, 25 Gr. 293; 27 Gr. 101, in preference to *Stewart* v. *Hunter*, 2 Ch. Ch. 386, which may be supported on the ground that there was one devise. *Rudd* v. *Harper*, 16 O.R. 422; *Re Hurst*, 11 O.L.R. 6.

Nor is the gift of large legacies with power to select lands to answer them sufficient to put her to her election. *Elliott* v. *Morris*, 27 O.R. 485.

So, a devise in trust for sale at the expiration of an existing lease, the proceeds to be divided amongst the daughters

of the testator, is insufficient, though a provision was made for the widow by the will. *Fairweather* v. *Archibald*, 15 Gr. 255.

Nor is a devise of the use of certain rooms in a house coupled with an annuity charged on the land. *Wilson* v. *Wilson*, 7 O.R. 177. And see *Murphy* v. *Murphy*, 25 Gr. 81; *Ripley* v. *Ripley*, 28 Gr. 610.

Nor a devise of a house for life coupled with an annuity. *Re Biggar*, 8 O.R. 372.

But a bequest of an annuity in lieu of dower puts the widow to her election, although by a separation deed she had already had a provision made for her in lieu of dower. *Carscallen* v. *Wallbridge*, 32 O.R. 114.

A devise of part of the land to the widow *durante viduitate* with a direction to sell the part devised to the widow at her death or marriage, does not put her to her election. *Beilstein* v. *Beilstein*, 27 Gr. 41.

Occupation by another.

But where the devise requires the land to be occupied by another in a manner inconsistent with the allotment of dower, the widow must elect.

So, where there was a devise in tail to a son, upon condition that he should support the widow, with a provision for occupation of the house by her, and that two other sons should have a home on the farm, the widow was required to elect. *McLellan* v. *Grant*, 15 Gr. 65.

Where there was a devise to a son, with a reservation in favour of a daughter of a house and four acres for her occupation, it was held that the widow was bound to elect. *Hutchinson* v. *Sargent*, 16 Gr. 78. *Sed qu.*

Upon a devise to the widow of a house and orchard, part of a farm, as a home for herself and the testator's children, and a devise of the farm at her death to a son charged meanwhile with her support, the son to "hold possession of the farm," the holding of possession being inconsistent with allotment of dower, the widow was put to her election. *McLellan* v. *McLellan*, 29 Gr. 1.

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So also, where part of the house on a farm was devised to the widow *durante viduitate*, the remainder of the farm to be kept in entirety and occupied by the sons of the testator, the widow was put to her election. *Coleman* v. *Glanville*, 18 Gr. 42.

Power of leasing land.

Where there is a power or direction to lease the land, it is inconsistent with a demand for dower, and the widow must elect.

So, where there was a devise to executors with power to lease, and a direction to convey to children at a certain period, it was held that the leasing was inconsistent with the allotment of dower, and that the widow must elect. *Patrick* v. *Shaver*, 21 Gr. 123.

So also, after bequests to the widow, there was a devise of a farm, the only real estate, upon trust to lease until the testator's nephew attained twenty-one, and the widow was put to her election. *Rody* v. *Rody*, 29 Gr. 324.

A direction to lease all the testator's land till the youngest child attains twenty-one, and then to sell it and divide equally between the widow and children, puts the widow to her election. *Dawson* v. *Fraser*, 18 O.R. 496.

And a devise of one hundred acres to the widow, the remainder of the testator's land to be rented until sold, the rent to be given to the widow for the support of herself and children, calls for an election. *Armstrong* v. *Armstrong*, 21 Gr. 351.

Dowress cannot also be tenant of freehold.

Where there was a devise of an undivided half to the widow for life, and subject thereto a devise of the whole in fee to the son, the widow was put to her election. *Card* v. *Cooley*, 6 O.R. 229.

Blending of realty and personalty

Where there is a blending of realty and personalty for the purpose of dividing the whole fund between the widow and children, the widow must elect.

Thus, where a testator directed that all his real and personal property should be sold, and divided the blended fund, upon certain events which happened, according to the Statute of Distribution, the widow was put to her election. *Re Quimby*, 5 O.R. 738; *McGregor* v. *McGregor*, 20 Gr. 450.

And a devise upon trust to sell and pay four per cent. of the purchase money to the widow, the residue to be invested and the income therefrom to be paid to her for life, puts her to her election. *Mariott* v. *McKay*, 22 O.R. 320.

But where the realty and personalty are blended, not for the purpose of division, but for the purpose of providing an income for the widow, that does not deprive her of dower. *Leys* v. *Toronto General Trusts Co.*, 22 O.R. 603; *Re Shunk*, 31 O.R. 175.

So also, where the income of the whole real and personal property is given to the testator's sons, they to maintain the widow, she is not deprived of dower. *McGarry* v. *Thompson*, 29 Gr. 287.

And where the testator directed the annual income from his real and personal property to be paid to his widow *durante viduitate* and until his eldest son attained twenty-one, for the support of herself and the education, maintenance and support of his children, and directed a division of the property after the youngest child attained twenty-one, it was held that the widow was not bound to elect. *Laidlaw* v. *Jackes*, 25 Gr. 293; 27 Gr. 101.

Remoteness of gift to widow.

Upon a devise to children in tail with cross-remainders, and in the event of their dying without issue, to testator's brother, the widow in that event to receive one-half the realty, the latter devise to the widow upon the contingency of her surviving all the children was held to be too remote to compel her to elect. *Travers* v. *Gustin*, 20 Gr. 106.

Insufficient estate.

Where there is not sufficient estate to answer the benefits given to the widow and also her dower, she is put to her election.

Thus, where there was a devise of a life estate to the widow in parts of the realty, and a bequest of annual allowances sufficient for her support; and after payment of the allowances there was not sufficient to answer the value of dower, the widow was put to her election. *Becker* v. *Hammond*, 12 Gr. 485; *Lapp* v. *Lapp*, 19 Gr. 608.

Where there is a doubt as to the sufficiency of the estate an enquiry will be directed. *Lapp* v. *Lapp*, 16 Gr. 159.

Election between legacy and legatee's property.

Upon a bequest of a sum of money to the widow in lieu of dower, with a direction revoking all gifts or deeds of real estate made at any time theretofore, it was held that the widow was put to election between the legacy and an estate formerly conveyed to her by deed. *Lee* v. *McKinly*, 18 Gr. 527.

Election, second marriage.

Where a devise was made to a widow *durante viduitate* under such circumstances that she was bound to elect between dower and the provision in the will, and the widow elected to take under the will, it was held that upon her second marriage, she could not claim dower in her first husband's land. *Coleman* v. *Glanville*, 18 Gr. 42.

CHAPTER XVI.

WHO MAY BE DEVISEES OR LEGATEES.

1. Corporations.

1. PRIOR to the Wills Act a devise of lands to a corporation was void, bodies corporate being excepted out of 32 Hen. VIII. c. 1, and 34 & 35 Hen. VIII. c. 5, s. 5.

And it seems that 43 Eliz. c. 4, had no effect in passing the legal estate where the devise was to a corporation existing for charitable purposes, notwithstanding *Bene't Coll.* v. *Bishop of London*, 2 W. Bl. 1182; see *Incorp. Soc.* v. *Richards*, 1 Dr. & War. 258.

The Wills Act repeals 32 Hen. VIII. c. 1, and 34 & 35 Hen. VIII. c. 5, but does not expressly authorise devises to corporations, and since the inability of corporations to hold lands was created by various statutes antecedent to 34 & 35 Hen. VIII. c. 5, the mere repeal of that statute does not give validity to devises to corporations.

Since the Wills Act, however, the inability is not in the power of devising, but in the capacity of corporations to take, and it would seem to follow that corporations with power to hold land, such as companies incorporated under the Companies Act, 1862 (25 & 26 Vict. c. 89), might take by devise except so far as objections might arise on the ground of perpetuity. The question is, however, not likely to be of much practical importance; see *Incorp. Soc.* v. *Richards*, 1 Dr. & War. 258; *Thomson* v. *Shakespear*, Joh. 612; 1 D. F. & J. 399; *Carne* v. *Long*, 2 D. F. & J. 75; *Cocks* v. *Manners*, 12 Eq. 574; *Chaudière Mining Company* v. *Desbarats*, L. R. 5 P. C. 277.

A trade union registered under the Trade Union Acts, 1871 and 1876, cannot take land by devise. *In re Amos*; *Carrier* v. *Price*, (1891) 3 Ch. 159.

2. Voluntary association.

2. A gift to a voluntary association which is not charitable is valid, provided it does not tend to a perpetuity.

Stewart v. *Green*, I. R. 5 Eq. 470; *Morrow* v. *M'Conville*, 11

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L. R. Ir. 236, so far as they decide that a gift to a voluntary society not charitable is void, because the society has no corporate existence, must be considered overruled. See cases cited below.

Thus a gift of a sum of money to a voluntary association not charitable, which is to go into its coffers, and be spent with its other funds, is valid. *Cocks* v. *Manners*, 12 Eq. 574; *In re Wilkinson's Trusts*, 19 L. R. Ir. 531; *In re Clarke*; *Clarke* v. *Clarke*, (1901) 2 Ch. 110; *Langham* v. *Peterson*, 87 L. T. 744.

Where individual members may take.

In some cases such gifts have been construed to be gifts to the individual members composing the association. But such a construction is only possible where the gift to the association is expressed to be for the benefit of the members, or where the association is so described as to indicate the members who compose it. Thus gifts in trust for the Sisters of Mercy at Bantry for the benefit of the Convent of Mercy at Bantry (*a*), to the Superioress of St. Anne's Convent of Mercy in trust for the community of the convent, and to the Marist Sisters of the Convent of Carrick-on-Shannon (*b*), have been held gifts to the individual persons who satisfied the description. *In re Delany's Estate*, 9 L. R. Ir. 227; see *Henrion* v. *Bonham*, O'Leary on Char. cit. 11 L. R. Ir. 241 (*a*); *Bradshaw* v. *Jackman*, 21 L. R. Ir. 12 (*b*).

On the other hand, a gift to be applied to the use of and benefit of a convent or to a trade union by its registered name cannot be construed as a gift to the individual members of the convent or trade union. *Morrow* v. *M'Conville*, 11 L. R. Ir. 236; *In re Amos*; *Carrier* v. *Price*, (1891) 3 Ch. 159.

Devise of land to voluntary association.

In the case of a devise of land to a voluntary association, there is the further difficulty, that a devise cannot be made to an uncertain body of persons.

Thus a devise of land to the monks named Christian Brothers, who were a numerous body, was held void on the ground that the intention was to vest the land in them as a body corporate, which they were not. *Hogan* v. *Byrne*, 13 Ir. C. L. 166; see, too, *Stewart* v. *Green*, I. R. 5 Eq. 470.

3. By the Naturalization Act, 1870 (33 Vict. c. 14), real and personal property of every description, except a British ship, may be taken, acquired, held, or disposed of by an alien in the same manner in all respects as by a natural-born British subject. 3. Aliens.

As to what constitutes an alien, see *De Geer* v. *Stone*, 22 Ch. D. 243.

It has been decided that the Act is not retrospective. And apparently it does not apply to a will made before the passing of the Act, though not coming into operation till afterwards. *Sharp* v. *St. Saveur*, 7 Ch. 343.

In cases before the Act, land devised to an alien remained in him till office found, when it devolved to the Crown, whether the land was devised to trustees or not. *Barrow* v. *Wadkin*, 24 B. 1; *Sharp* v. *St. Saveur*, 7 Ch. 343.

An alien could always take the proceeds of land devised on trust for sale. *Du Hourmelin* v. *Sheddon*, 1 B. 79; 4 M. & Cr. 525.

4. Formerly personal property vested in a felon after his conviction, during the period of his punishment or before his pardon, was forfeited to the Crown. *Roberts* v. *Walker*, 1 R. & M. 752. 4. Felons.

But property not vested in a felon till after he had undergone his punishment, or received a pardon, was not forfeited. *Stokes* v. *Holden*, 1 Kee. 145; *Barnett* v. *Blake*, 2 Dr. & S. 117; *Gough* v. *Davies*, 2 K. & J. 623; *Re Thompson's Trusts*, 22 B. 506; *Re Harrington's Trusts*, 29 B. 24.

Now, by the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), forfeiture and escheat for treason, felony, and suicide are abolished; and by sect. 10 all the real and personal property, including choses in action, to which the convict was at the time of his conviction, or shall afterwards become entitled, vests in an administrator appointed under the Act. See *Carr* v. *Anderson*, (1903) 1 Ch. 90; 2 Ch. 279.

By the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59), s. 3, outlawry in consequence of any civil proceeding is abolished.

5. By sect. 15 of the Wills Act, a legacy given to an attesting 5. Attesting witnesses.

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witness, or to the husband or wife of an attesting witness is void.

The section does not make the gift void for all purposes. Therefore, if there is a gift to A or her children, and A attests the will, the children cannot take. *Aplin* v. *Stone*, (1901) 1 Ch. 543.

The subsequent marriage of an attesting witness to a devisee does not avoid the devise. *Thorpe* v. *Bestwick*, 6 Q. B. D. 311.

A person attesting the signature of two marksmen, witnesses to a will, is himself an attesting witness. *Wigan* v. *Rowland*, 11 Ha. 157.

Gift by will to witness to codicil.

But a gift by will to the attesting witness of a codicil is good. *Gurney* v. *Gurney*, 3 Dr. 208; *Re Marcus*; *Marcus* v. *Marcus*, 57 L. T. 399.

Where, however, a contingent gift by will is made absolute by a codicil which the legatee attests and the legatee could only have taken under the codicil, the gift is void. *Gaskin* v. *Rogers*, L. R. 2 Eq. 281.

And a gift to an attesting witness is void, though there may be a sufficient number of witnesses without him. *Randfield* v. *Randfield*, 11 W. R. 847; see 8 H. L. 225; *Cozens* v. *Cozens*, 21 W. R. 781. See, however, *In bonis Sherman*, 1 P. & D. 661; *In bonis Smith*, 15 P. D. 2, and *ante*, p. 36.

Power to charge profit costs.

Where a solicitor-trustee attests a will, a clause empowering him to charge profit costs is avoided by this section. *In re Barber*; *Burgess* v. *Winicombe*, 31 Ch. D. 665; see 34 Ch. D. 77; *In re Pooley*, 40 Ch. D. 1.

Republication of will.

A gift to a witness attesting the will is good, if the will is afterwards republished by a codicil referring to it, and is not avoided by the fact that the legatee attests a second codicil. *Anderson* v. *Anderson*, 13 Eq. 381; *In re Trotter*; *Trotter* v. *Trotter*, (1899) 1 Ch. 764.

A witness to the will, under which a benefit is given him, who attests a codicil, which confirms the will, cannot take under the will. *Re Marcus*; *Marcus* v. *Marcus*, 57 L. T. 399.

Gift to witness as trustee.

A gift to an attesting witness as trustee is not void. *Cresswell* v. *Cresswell*, 6 Eq. 69.

Whether attesting

Where a legacy is given to a person which in terms is for his

own use and benefit, and a secret trust is established in favour of an attesting witness, the attesting witness is not disqualified from taking under the secret trust (*a*), though the case may be different if the will discloses that there is a secret trust which has been communicated to the legatee (*b*). *O'Brien* v. *Condon*, (1905) 1 Ir. 51 (*a*); *In re Fleetwood; Sidgreaves* v. *Brewer*, 49 L. J. Ch. 514; 15 Ch. D. 594 (*b*); see *Cullen* v. *A.-G. for Ireland*, L. R. 1 H. L. 190; *Sullivan* v. *Sullivan*, (1903) 1 Ir. 193.

Witness can take under secret trust.

6. A gift of a sum of money in trust to erect in a churchyard or a church a monument to the testator, or possibly even to another person, is a valid bequest to this extent, that the trustees may insist upon carrying out the testator's directions, and if they do their action cannot be called in question, but there is no one who can enforce such a trust. *Mellick* v. *President of the Asylum*, Jacob, 180; *Adnam* v. *Cole*, 6 B. 353; *Trimmer* v. *Danby*, 25 L. J. Ch. 424; *Hoare* v. *Osborne*, L. R. 1 Eq. 585 (the memorial window).

6. Gift to erect a monument to the testator.

Possibly such directions, at least in the case of a monument to the testator, may be upheld on the ground that they are part of the funeral obsequies. But it is doubtful whether a testator could validly devote a large sum of money to the erection of a private monument to himself unconnected with his burial.

A condition imposed upon a legatee that he shall during his life keep the testator's vault, not in a church, in repair, the [illegible]le, is valid and is said to create a hindr[illegible]s difficult to see how it can do so. *Lloyd* v. *Lee*, 2 Sim. N. S. 255.

7. Another anomalous kind of gift is a gift for the benefit of animals belonging to the testator. It has been decided that a gift for the maintenance of the testator's dogs and horses is a valid gift. *In re Dean; Cooper-Dean* v. *Stevens*, 41 Ch. D. 553, following *Mitford* v. *Reynolds*, 16 Sim. 105; 1 Ph. 185; see, too, *Pettingall* v. *Pettingall*, 11 L. J. Ch. 176.

7. Gifts for the benefit of particular animals.

It is, however, difficult to see how such a gift can be supported on any legal ground. Such a gift is not charitable; there is no one who can enforce it, and a trust which cannot be enforced is invalid.

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Aliens. Aliens are capable of taking by will any real or personal property. *Ante*, p. 25.

Felons. Felons are also capable of taking. *Ibid.*

A devisee under the will of a testator whose death was caused by the criminal act of the devisee, cannot take the devise; and there is no distinction between the cases of murder and manslaughter. *Lundy* v. *Lundy*, 24 S.C.R. 650.

Foreign State. A bequest to a foreign state, in this case the State of Vermont, is valid, and a direction for accumulation does not render it void, it being for the Courts of the foreign state to determine the validity of the direction in that respect. *Parkhurst* v. *Roy*, 7 A.R. 614.

Witnesses. Though a gift to witness is void, it may be shewn that, after the legatee subscribed his name, the will was newly attested before two other witnesses, and the gift to the supernumerary witness is then good though his subscription has not been erased. *Re Sturgis*, 17 O.R. 342.

A devise of rents is a devise of land and if made to a witness, while 25 Geo. II., c. 6, was in force, was void. *Hopkins* v. *Hopkins*, 3 O.R. 223.

Codicil confirming will. A legacy to a witness may be validated by a codicil reviving the will witnessed by independent witnesses. *Purcell* v. *Bergin*, 20 A.R. 535.

Supernumerary witness. Where the will is sufficiently attested by two witnesses, and a third, who is a devisee, also subscribes as a witness, the gift to him is, nevertheless, void. *Little* v. *Aikman*, 28 U.C.R. 337. But see *ante*, p. 36*c*, as to New Brunswick and Nova Scotia.

Interpretation where devisee is witness. In interpreting a will where there is a devise to a witness, the will should first be construed without considering that the devise is to a witness; and then the section making the devise void should be applied. *Re Maybee*, 8 O.L.R. 601.

Where the husband of one of several residuary legatees was a witness to the will, and the legacy failed in consequence, the will was read as if the gift to the witness did not appear

in the will, and the residue was distributed amongst the other residuary legatees. *Farewell* v. *Farewell*, 22 O.R. 573.

Where there is a devise to a witness, with a devise over if the witness should die without children, the devise to the witness being void the devise over is accelerated. *Re Maybee*, 8 O.L.R. 601.

Illegal purposes.

A legacy for the promotion of free thought and free speech is opposed to Christianity and void. *Kinsey* v. *Kinsey*, 26 O.R. 99.

Quære, whether a legacy to an Agricultural Society, incorporated under an Act for the promotion of agriculture, to be given in prizes to all competitors except freemasons, orangemen or oddfellows, is valid as to the exception. *Kinsey* v. *Kinsey*, 26 O.R. 99.

CHAPTER XVII.

EVIDENCE.

I.—How Far Admissible to Construe Will.

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Sir J. Wigram's treatise.

Sir James Wigram's Treatise on "The Rules of Law respecting the admission of extrinsic evidence in aid of the interpretation of wills" has settled the principles with reference to the admissibility of evidence for the purpose of construing wills. The difficulties, which now arise, relate chiefly to the application of the principles there laid down.

Probate conclusive as to what will is.

The probate is conclusive as to what the will is. The original will cannot be looked at for the purpose of altering or correcting the probate. The probate can only be corrected on application to the Probate Division. *Gann* v. *Gregory*, 3 D. M. & G. 777; *Walker* v. *Tipping*, 3 Ha. 802, n.; *In re Cliff's Trusts*, (1892) 2 Ch. 229.

When original will may be looked at.

But the Court has in some cases looked at the original will to ascertain the punctuation, the introduction of capital letters, parentheses, and other marks indicating where a sentence begins or ends, and the effect of a blank in the probate. *Child* v. *Elsworth*, 2 D. M. & G. 679, 683; *Manning* v. *Purcell*, 24 L. J. Ch. 522; 7 D. M. & G. 55; *Compton* v. *Bloxham*, 2 Coll. 201; *Milsome* v. *Long*, 3 Jur. N. S. 1073; *In re Harrison; Turner* v. *Hellard*, 30 Ch. D. 390.

Words omitted or inserted by mistake.

In a Court of construction evidence is not admissible to shew that words have been omitted or left in the will by mistake. *Earl of Newburgh* v. *Countess of Newburgh*, 5 Mad. 364; 1 M. & Sc. 352; *Langston* v. *Langston*, 2 Cl. & F. 194, 240; *In re Bywater; Bywater* v. *Clarke*, 18 Ch. D. 17.

Duplicates or substitutional instruments.

When several testamentary instruments have been admitted to probate, the question sometimes arises, whether one of them

is not a mere duplicate of or intended to be in substitution for another of them.

Upon this question probably evidence of the testator's intention, such as declarations by him and the like, would not now be admitted, notwithstanding *Coote* v. *Boyd*, 2 B. C. C. 521, and *Hubbard* v. *Alexander*, 3 Ch. D. 738; see *Wilson* v. *O'Leary*, 7 Ch. 448.

Evidence has, however, been admitted as to the persons with whom the different instruments were deposited and the testator's dealings with them. *Whyte* v. *Whyte*, 17 Eq. 50.

Blanks.

The will may contain blanks. No evidence is admissible to fill them up. *Winn* v. *Littleton*, 2 Ch. Ca. 51; *Baylis* v. *A.-G.*, 2 Atk. 239; *Hunt* v. *Hort*, 3 B. C. C. 311; *Taylor* v. *Richardson*, 2 Dr. 16.

Patent ambiguity.

It is sometimes said, that evidence is not admissible to explain a patent ambiguity. Some remarks are made upon this doctrine by Plumer, M.R., in *Colpoys* v. *Colpoys*, Jac. 451, 463, 464. Certainly it is not correct in its application to wills, if it means, that, wherever on the face of the will there is something which requires explanation, it must be left unexplained.

The rule appears to be, that if the testator employs a word or symbol, which has no meaning to anyone but himself, and is employed by him *ad hoc*, though he may have preserved evidence of his meaning by written declarations or by telling some other person what he meant, that evidence is not admissible.

On the other hand, if the testator in his will uses a word or symbol, which he is in the habit of using in his conversation or business, and its meaning is known to those who come into contact with him, their evidence as to what is meant is admissible.

Thus, if the testator uses such a word as "mod," which has no meaning, or designates devisees by letters arbitrarily chosen, evidence is not admissible to explain what he meant. *Goblet* v. *Beechey*, 2 R. & M. 624; *Clayton* v. *Lord Nugent*, 13 M. & W. 206; see *Sullivan* v. *Sullivan*, I. R. 4 Eq. 457.

Guesses by a third person as to what the testator may or

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must have meant, such as were tendered in *Goblet* v. *Beechey*, are not admissible. They are not evidence at all. The Court does not recognise an expert in guessing riddles. What may have been meant is a matter for argument, not for evidence.

On the other hand, evidence is admissible to explain letters used by a testator to denote the amount of legacies, the letters being private marks to denote prices used in his business, and therefore (it is assumed, though it does not appear in the report), known to those employed in the business (*a*), and to explain whom the testator habitually called Mr. G., to whom a legacy was left by that title (*b*). *Kell* v. *Charmer*, 23 B. 195 (*a*); *Abbot* v. *Massie*, 3 Ves. 148; considered in *Clayton* v. *Nugent*, 13 M. & W. 206 (*b*).

Words defined by statute.

If a testator uses a word denoting a weight or measure to which a meaning is given throughout the United Kingdom by the Weights and Measures Acts, 1878 to 1897, evidence is not admissible to show that he used the word in a sense peculiar to a particular locality. *O'Donnell* v. *O'Donnell*, 1 L. R. Ir. 284; 13 *ib.* 226.

Technical meaning of ordinary word.

If the testator uses a word which has a meaning in ordinary language, but has also a technical or special meaning among persons following the same business or profession as the testator, or in a particular district with which the testator was connected, or among persons belonging to the religious sect to which the testator belonged, evidence of the technical or special meaning is admissible, and it is for the Court to determine whether the testator has used the word with that meaning. *Clayton* v. *Greyson*, 5 A. & E. 302 (levels in a mining lease); *Smith* v. *Wilson*, 3 B. & Ad. 728 (1,000 rabbits meaning 1,200); *Shore* v. *Wilson*, 9 Cl. & F. 525 ("godly persons" used by a dissenter).

So it may be shown that a parish is by the inhabitants supposed to include certain lands which are not in fact within the parish. *Austee* v. *Nelms*, 1 H. & N. 225.

Ordinary language used ungrammatically.

But, when a word is not a word of art, but is simply a word of everyday English intelligible to everyone, evidence is not, it would seem, admissible to show that a testator of the

present day habitually used, or that the class to which he belonged habitually use, the word in a loose or inaccurate sense. The Court knows the meaning of the English language, as to which it is the supreme expert. No doubt, just as the mind of the Court may require to be informed of the law by argument and reference to cases, so it may require to be informed by argument and quotations from the best authors as to the meaning of the English language; but the information should be by way of argument and reference to popular usage, and not by means of evidence. In *In re Rayner*; *Rayner* v. *Rayner*, (1904) 1 Ch. 176, better reported in 89 L. T. 681, such evidence was rejected in the Court below. In the Court of Appeal the case was decided on the construction of the will apart from evidence; see also *In re Parker*; *Bentham* v. *Wilson*, 17 Ch. D. 262.

And evidence is not admissible to show that a testator, who held old shares of a company and an equal number of new shares which had been allotted in respect of the old shares, meant when he used the word "share" a double share, comprising an old and a new share. *Millard* v. *Bailey*, 1 Eq. 378.

How far interpreter may place himself in position of testator.

It has been said, that to construe the will of a testator "you may place yourself, so to speak, in his armchair and consider the circumstances by which he was surrounded when he made his will to assist you in arriving at his intention." *Boyes* v. *Cook*, 14 Ch. D. 53, 56; see *In re Gibbs*; *Martin* v. *Harding*, (1907) 1 Ch. 465.

But this proposition must be accepted with several reservations. What has to be done is first to construe the will. The meaning placed upon the language used as the result of this process cannot be altered by reference to the surrounding circumstances when the will was executed. The procedure is not—first ascertain the surrounding circumstances and with that knowledge approach the construction of the will, but first construe the will; if the meaning is clear, surrounding circumstances cannot be looked at to throw a doubt upon that meaning, or to give the will a different meaning. *Higgins* v. *Dawson*, (1902) A. C. 1.

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Higgins v. *Dawson.*

That case, as reported in the House of Lords, leaves the reader in perplexity as to what there could be to argue. It may therefore be as well shortly to state the facts.

The testator, who was a Roman Catholic priest, when he sat down to make his will, was the owner of some real estate, plate, and china, and of two mortgage debts amounting to 13,187*l.*, and of nothing else except the accruing interest on the mortgage debts. By his will he made specific gifts of the real estate, plate and china. He then gave a large number of legacies, amounting to about 10,000*l.* These were followed by a gift of the residue of the mortgage debts after payment of his debts to a charity. The question was whether the residue of the mortgage debts meant what might remain of the mortgage debts after paying thereout first the legacies, and secondly the debts, or whether it meant what remained after paying debts only. Upon the latter construction, if the testator had died the next day all the legacies would have failed, as there was nothing out of which to pay them. As a matter of fact, the testator had, between the date of his will and his death, become entitled to other property which was not sufficient to pay the legacies in full. Approaching the will with knowledge of these facts, the conclusion was almost irresistible that the legacies were meant to be paid out of the mortgage debts, and that residue must mean residue of the mortgage debts after paying the legacies as well as the debts. It was held, however, that the evidence was inadmissible. The *primâ facie* meaning of the word "residue" as used in the will was residue deducting debts, and that meaning could not be altered by reference to evidence.

Whether evidence of the amount of the testator's property is admissible.

The question has sometimes been raised whether the quantity of a testator's property is admissible in evidence for the purpose of construing the will.

Suppose a testator makes gifts of three sums of "500*l.* stock in Long Annuities," and dies immediately after executing his will, the question is, Does he mean in each case Long Annuities producing 500*l.* a year, or three capital sums of 500*l.* each? Is evidence admissible that the testator had only 120*l.* a year Long Annuities, which would be very

cogent to show that capital sums only can have been intended? The answer given by *Higgins* v. *Dawson* is that such evidence is not admissible. The will must first be construed, nothing whatever being known of the state of the property. When it has been so construed the construction cannot be altered by external facts. *Fonnereau* v. *Poyntz*, 1 B. C. C. 472; *Colpoys* v. *Colpoys*, Jac. 451, so far as they decided that such evidence was admissible, must be considered overruled. See *In re Grainger*; *Dawson* v. *Higgins*, (1900) 2 Ch. 756, 768; see, too, *Singleton* v. *Tomlinson*, 3 App. C. 404.

In the same way evidence of the amount of a testator's property is not admissible to show that he must have intended to exercise a power of appointment. *Andrews* v. *Emmot*, 2 B. C. C. 297; *Nannock* v. *Horton*, 7 Ves. 391, 399; *Jones* v. *Curry*, 1 Sw. 66; *Davies* v. *Thorns*, 3 De G. & S. 347; *In re Huddleston*; *Bruno* v. *Eyston*, (1894) 3 Ch. 595.

Effect of s. 24 of Wills Act.

Since under sect. 24 of the Wills Act a will speaks from the death, unless there is a contrary intention, this is an additional reason why, in the absence of such intention, evidence of the value of the property at the date of the will is not admissible.

But it seems that it can make no difference if the gift refers to specific property belonging to the testator at the date of his will; for instance, if it had been a gift of "50*l.* Long Annuities" now standing in my name. *Boys* v. *Williams*, 2 R. & M. 689, is probably not to be followed.

The only case in which evidence of value may be admissible is if the testator shows on the face of his will that he has made his dispositions with reference to the value of his property at the time. *Barksdale* v. *Gilliat*, 1 Sw. 562; *Druce* v. *Denison*, 6 Ves. 385; *A.-G.* v. *Grote*, 2 R. & M. 699, discussed in *In re Grainger*; *Dawson* v. *Higgins*, (1900) 2 Ch. 756, 769.

What evidence admissible as to objects and subjects of gifts.

The Court has not only to construe the will as a piece of English, it has also to apply it to the existing facts. It has to ascertain who the objects of the testator's bounty are, and in the case of specific gifts, what the subject-matter of these gifts is.

Evidence of intention and

For this purpose the important distinction must be borne

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Surrounding circumstances.

in mind between evidence of the testator's intention—for instance, declarations by him as to what he meant—and evidence of surrounding circumstances from which his intention may be inferred. The former evidence is hardly ever, the latter is in most cases, admissible. *Miller* v. *Travers*, 1 Mo. & Sc. 342; *Doe* d. *Hiscocks* v. *Hiscocks*, 5 M. & W. 363.

For the purpose of ascertaining the persons intended to be benefited, evidence is admissible of the state of the testator's family and of his relations with the various persons who claim to be benefited by the will, and also evidence of the names by which he habitually called certain persons, whether proper names or names indicating relationship inaccurately applied—for instance, that he called a wife's nephew his nephew. *Drake* v. *Drake*, 8 H. L. 172; *Lee* v. *Pain*, 4 Ha. 251; *Grant* v. *Grant*, L. R. 5 C. P. 380, 727; *Charter* v. *Charter*, L. R. 7 H. L. 364.

Old wills may be admissible.

In order to show the name which the testator applied to a particular person, or his knowledge of a particular family, old wills are admissible. *Reynolds* v. *Whelan*, 16 L. J. Ch. 434; affirmed on appeal, see 1 K. & J. 532; *Re Feltham's Trusts*, 1 K. & J. 532; *Re Waller*; *White* v. *Scales*, 80 L. T. 701; *Flood* v. *Flood*, (1902) 1 Ir. 538.

Gifts to societies.

If the object is an institution or society, evidence is admissible to show what institutions or societies the testator knew and subscribed to and what he called them in his books. *Wilson* v. *Squire*, 1 Y. & C. C. 654; *In re Briscoe's Trust*, 20 W. R. 355, 504; *In re Kilvert's Trusts*, 7 Ch. 170; *In re Fearn's Will*, 27 W. R. 392; *British Home and Hospital for Incurables* v. *Royal Hospital for Incurables*, 90 L. T. 601.

Person who completely satisfies description takes.

If, among the persons shown to have been known to the testator, there is someone who completely satisfies the description given in the will, evidence is not admissible to show that some other person is meant. *Delmare* v. *Robello*, 1 Ves. Jun. 412; 3 B. C. C. 446; *Holmes* v. *Custance*, 12 Ves. 279; *In louis Peel*, 2 P. & D. 46.

If, therefore, there is a gift to my niece Eliza, and the testator has a niece Eliza and also an illegitimate niece Eliza, evidence of surrounding circumstances is not admissible to

show that the illegitimate niece was intended. *In re Fish; Ingham* v. *Rayner*, (1894) 2 Ch. 83.

Nor is evidence admissible to show that the person who satisfies the description was on bad terms with the testator, or that he was not a person the testator was likely to benefit. *Sherratt* v. *Mountford*, 8 Ch. 928.

Evidence as to specific things.

In like manner, in order to show what things a testator intends by a specific description, all the circumstances relating to his property, material to identify the thing described, are admissible in evidence.

"All facts relating to the subject-matter of the devise, such as that it was or was not in the possession of the testator, the mode of acquiring it, the local situation, and the distribution of the property, are admissible to aid in ascertaining what is meant by the words used in the will." *Doe* d. *Templeman* v. *Martin*, 4 B. & Ad. 771, 785.

"My Briton Ferry estate," &c.

If an estate is devised by a specific title, as "my Briton Ferry estate," or "my estate called Ashford Hall," or "my Quendon Hall estates," or "my Bishop's Mill lands," the acts, conduct, and dealings of the testator are admissible in evidence to show what the testator included under the name. *Doe* d. *Beach* v. *Earl of Jersey*, 3 B. & C. 870; *Ricketts* v. *Turquand*, 1 H. L. 472; *Webb* v. *Byng*, 1 K. & J. 580; *Jennings* v. *Jennings*, 1 L. R. Ir. 552.

Such evidence is immaterial and therefore inadmissible if the testator describes his land by reference to locality, for instance, if he gives his estate of Asbton, meaning his estate in the parish of Asbton, or his lands at Cescomb, or his demesne of Woodville. *Doe* d. *Chichester* v. *Oxenden*, 3 Taunt. 147; 4 Dow, 65; *Doe* d. *Browne* v. *Greening*, 3 M. & S. 171; *Doe* d. *Tyrrell* v. *Lyford*, 4 M. & S. 550; *King* v. *King*, 13 L. R. Ir. 531.

Land added to estate after date of will.

Whether, where the testator devises an estate by name, and after the date of his will adds lands to the estate, evidence is admissible to show that the name includes the added lands, is a question as to which the cases are conflicting. *Webb* v. *Byng*, 1 K. & J. 580; *In re Midland Railway Co.*, 34 B. 525; *Castle* v. *Fox*, 11 Eq. 542; *Re Potter; Stevens* v. *Potter*, 83 L. T. 405.

General expression may refer to specific thing.

If a testatrix uses a general expression such as "all my real estate," and it appears on the face of the will that she is referring to specific property which she then possesses, evidence is admissible to show what the property is. *In re Glassington; Glassington* v. *Follett*, (1906) 2 Ch. 305.

Gift of "my house in Grosvenor Square," where house sold and another bought in that square.

In the case of a specific gift of a thing where the testator after the date of his will sells that particular thing and acquires another thing of the same description, the question arises whether evidence is admissible to raise a case of ademption, or whether, as there is at the testator's death a thing to which the description applies, that passes.

For instance, suppose the testator to devise "my house in Grosvenor Square," and afterwards to sell his house and buy another, also in Grosvenor Square: does the latter pass? According to sect. 24 of the Wills Act the will must be construed, with reference to the real and personal property comprised in it, to speak and take effect as if it had been executed immediately before the death, unless a contrary intention appears by the will.

Possibly the true view is, that, if the testator gives a particular and specific thing, there is a contrary intention. He must be taken to be speaking of some thing which he has at the date of the will, and evidence of the sale and purchase of another similar thing would be admissible. *Goodlad* v. *Burnett*, 1 K. & J. 341; *In re Gibson; Mathews* v. *Foulsham*, 2 Eq. 669. However, Malins, V.-C., had "not a doubt about it" that the second thing would pass. *Castle* v. *Fox*, 11 Eq. 542, 551; see *In re Portal and Lamb*, 30 Ch. D. 50, and p. 145, *post*.

Specific gift not limited to what testator has at the date of his will.

But if the gift, though specific, is not limited to a definite thing which the testator possesses at the date of the will—for instance, if it is of the interest arising from money invested in a particular company, which could carry money so invested after the date of the will, sect. 24 applies, and if there is no such money at the date of the death the legacy fails, and the state of things at the date of the will is not material. *In re Slater; Slater* v. *Slater*, (1907) 1 Ch. 665.

Evidence as to powers vested in testator.

Where a testator purports to appoint, evidence is admissible to show that he had only one power of appointment. *In re*

Milner; *Bray* v. *Milner*, (1899) 1 Ch. 563; *In re Mayhew*; *Spencer* v. *Cuthush*, (1901) 1 Ch. 677.

Equivocation.

If, among the persons shown to have been known to the testator, there are several who accurately satisfy the description given in the will, there is a case of equivocation, and evidence, including evidence of the testator's intention, is admissible to show who was meant.

Thus, if there is a devise to "my son John," and there are two sons called John, one of whom the testator supposed to be dead (*a*), or to "John Cluer, of Calcot," and there are two John Cluers, father and son (*b*), or to "William Reynolds, my farming man," and there are two (*c*), or to "my son Edward for life, with remainder to my grandson Henry," where Edward and another son had each a son Henry (*d*), or to "my nephew," or to "my granddaughter," followed by a blank, and there are several nephews or granddaughters (*e*), evidence of intention is admitted to show who is meant. *Lord Cheyney's Case*, 5 Co. 68b (*a*); *Jones* v. *Newman*, W. Bl. 60 (*b*); *Reynolds* v. *Witham*, 16 L. J. Ch. 434 (*c*); *Fleming* v. *Fleming*, 1 H. & C. 242 (*d*); *Phelan* v. *Slattery*, 19 L. R. Ir. 177; *In the estate of Habbuck*, (1905) P. 129 (*e*).

The description "Miss Sanders" *primâ facie* means the eldest Miss Sanders if there are several sisters. *Lee* v. *Pain*, 4 Ha. 201. But William Marshall, the father, and William J. R. B. Marshall, the son, usually called by the testator William Marshall, both equally answer the description William Marshall. *Bennett* v. *Marshall*, 2 K. & J. 740.

Surrounding circumstances may be looked at to see whether the words of the will are equally applicable to two persons. For instance, if there is a gift to "my grandson Robert William Henderson," and there is a grandson Robert William Henderson and a grandson William Robert Henderson, evidence is admissible to show that the testator commonly called the latter Robert William, so as to raise a case of equivocation. *Henderson* v. *Henderson*, (1904) 1 Ir. 353.

Nephew proper and wife's nephew.

The legatee may be described by name and by a word descriptive of relationship, such as nephew or niece, or some similar word, which is often used in a loose and inaccurate

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manner. In such a case, if there is a gift to "my nephew A," and there is a nephew A and a wife's nephew A, there is no case of equivocation. Evidence even of surrounding circumstances is not admissible with a view to shew that the wife's nephew is meant. *In re Fish; Ingham* v. *Rayner*, (1894) 2 Ch. 83.

Grant v. *Grant*, 2 P. & D. 8; L. R. 5 C. P. 380, 727, is sometimes supposed to be an authority that if the testator habitually called his wife's nephew "my nephew Joseph," there is a case of equivocation. But that case can be supported on other grounds, and so far as it is an authority for any such proposition, it is bad law. It has been commented on in *Wells* v. *Wells*, 18 Eq. 504; *Sherratt* v. *Mountford*, 8 Ch. 928, 930; *In re Parker; Beatham* v. *Wilson*, 17 Ch. D. 262, 265; *In re Taylor; Cloak* v. *Hammond*, 34 Ch. D. 255. *In bonis Ashton*, (1892) P. 83, may be supported on the ground that the testator there in fact said, When I use the word nephew, I mean nephew, whether legitimate or illegitimate.

The evidence is not excluded because it appears from other parts of the will that there are two persons equally answering the description. *Doe* d. *Gord* v. *Needs*, 2 M. & W. 129. The gift there was to George Gord the son of Gord, and there were other gifts to George Gord the son of George Gord, and to George Gord the son of John Gord. The headnote misses the point.

It has been suggested that if part of a description applies to no one and the rest applies equally to two persons, the first part may be rejected so as to let in evidence of intention. Lord Abinger, in *Doe* d. *Hiscocks* v. *Hiscocks*, 5 M. & W. 363, 370, explains *Price* v. *Page*, 4 Ves. 680; *Still* v. *Hoste*, 6 Mad. 192; *Careless* v. *Careless*, 19 Ves. 604; 1 Mer. 384, on this ground: see also *Douglas* v. *Fellows*, Kay, 114, 120. But *Price* v. *Page* appears to have been a case of equivocation pure and simple. In *Still* v. *Hoste* nothing was decided as to evidence, and in *Careless* v. *Careless* evidence of intention was not tendered.

There is no equivocation if upon the construction of the will it can be ascertained which of two persons equally answering a

description is meant; but slight and inconclusive indications of intention are not enough.

Thus, a gift to Morgan Morgan, followed by a gift to Morgan Morgan of Mottvey, where there were two Morgan Morgans, one of Mottvey and one not, is not enough to show that the first Morgan Morgan was the one not of Mottvey. *Doe* d. *Morgan* v. *Morgan*, 1 Cr. & M. 235.

And a gift to John Allen charged with payment to his brothers and sisters, where there are two John Allens, one with brothers and sisters, and one without, is not enough to show as a matter of construction that the one with the brothers and sisters was meant, as the other might thereafter have brothers and sisters. *Doe* d. *Allen* v. *Allen*, 12 A. & E. 451.

On the other hand, in a gift to "Matthew Westlake my brother and to Simon Westlake my brother's son," Simon the son of Matthew is meant, and the fact that there are three Simons, all sons of brothers, is not material. *Doe* d. *Westlake* v. *Westlake*, 4 B. & Ald. 57. See, too, *Douglas* v. *Fellows*, Kay, 114; *Healey* v. *Healey*, I. R. 9 Eq. 418.

Gift to the two children of A, who has four.

When there is a gift to the two children of A, and he has four, evidence is not admissible to show which two the testator intended. *Matthews* v. *Foulshaw*, 12 W. R. 1141; see *Daniell* v. *Daniell*, 3 De G. & S. 337; *In re Mayo; Chester* v. *Keirl*, (1901) 1 Ch. 404.

Name and description followed by reference to name only.

It has been said, that when a person has once been fully described by name and description, and there is then a gift to a person of the same name, the first person must be intended, and evidence is therefore not admissible to show that there is another person of the same name. It would not be safe to assume that there is such a rule. It must depend upon the circumstances of each case. *Webber* v. *Corbett*, 16 Eq. 515.

Which of two antecedents referred to.

If there is a question to which of two antecedents a word of reference applies, such as "her" where the wife and a niece have been previously mentioned, or "the said Ann Collins," where Ann Collins of St. Ives and Ann Collins of Hereford have been previously mentioned, this is a matter of construction

of the will upon which evidence of intention cannot be admitted. *Castledon* v. *Turner*, 3 Atk. 257.

Equivocation in description of things.

In like manner, if there is a gift of a thing and there are two things equally answering the description, evidence of intention is admissible to show which was intended to pass. The point has not often arisen in this form.

Thus, if the testator devises his close in Kirton, now in the occupation of John Watson, and he has two closes in Kirton in John Watson's occupation, evidence would be admitted to show which he intended. *Richardson* v. *Watson*, 4 B. & Ad. 787.

Where a testatrix gives "my 140 shares" in a particular company, and she has 240 shares partly paid and 40 shares fully paid, a case of equivocation does not arise so as to admit evidence as to which class she meant to give. *In re Cheadle*; *Bishop* v. *Holt*, (1900) 2 Ch. 620.

What evidence of intention admitted.

When evidence of intention is admissible, declarations made by the testator before and after, as well as declarations contemporaneous with the will, are admissible. *Langham* v. *Sanford*, 19 Ves. 641, 649; *Doe* d. *Allen* v. *Allen*, 12 A. & E. 451.

II.—Evidence to Rebut Presumption.

Evidence to rebut presumption.

In some cases the law raises a presumption for or against the title of a particular person. As a rule evidence is admissible to rebut such a presumption, but not to alter the construction of the will.

If will raises a trust, evidence to rebut it not admitted.

If upon the true construction of a will a gift is made to a person as a trustee, evidence is not admissible to show that he was intended to take beneficially. *Irvine* v. *Sullivan*, 8 Eq. 673; *Croome* v. *Croome*, 59 L. T. 582.

Presumption in cases of election.

It has been said that there is a presumption that a testator intends only to dispose of his own property, and that this presumption can be rebutted by evidence, so as to raise a case of election. A testator cannot dispose of what is not his own, and ordinarily does not intend to do so. But this is not a presumption in any proper legal sense of the word. It is now

well settled that evidence is not admissible in such a case. *Pole* v. *Lord Somers*, 6 Ves. 322; *Doe* v. *Chichester*, 4 Dow, 76, 89, 90; overruling *Pulteney* v. *Darlington*, 2 Ves. Jun. 544; the dicta in *Pickersgill* v. *Rodger*, 5 Ch. D. 163, 174, are not consistent with authority.

Legacies to same person by different instruments.

When legacies are given to the same person by different instruments, evidence is not admissible to show that the legacies were intended to be substitutional. *Hurst* v. *Beach*, 5 Mad. 351; *Lee* v. *Pain*, 4 Ha. 201, 216.

Legacies of same amount by same instrument.

On the other hand, if legacies of the same amount are given by the same instrument, or legacies of the same amount expressed to be given from the same motive are given by different instruments, the presumption that they were intended to be substitutional may be rebutted by evidence. *Hurst* v. *Beach*, 5 Mad. 351, 360.

Debtor appointed executor.

If a creditor appoints his debtor executor or one of several executors, the right of action at law is gone, though the debt remains assets for payment of creditors; but in equity the debt remains owing for the benefit of legatees and next-of-kin.

To rebut this equity it is clear that evidence that the testator intended by appointing the debtor executor to forgive the debt, is not admissible. *Selwin* v. *Brown*, Ca. t. Talbot, 240; 3 B. P. C. 607.

On the other hand, evidence is admissible to show that the testator has forgiven the debt in his lifetime, though the mode in which he has done so may not have been effectual in law to release the debt. Then, the legal right of action being gone, and the equity keeping the debt alive being rebutted by the evidence of a settled intention to release, the debt is gone. *Strong* v. *Bird*, 18 Eq. 315; *In re Applebee; Lereson* v. *Beales*, (1891) 3 Ch. 422; see *In re Griffin; Griffin* v. *Griffin*, (1899) 1 Ch. 408.

A letter written by the testator stating that the debt is cancelled, not communicated to the debtor, and not intended to take effect until after the testator's death, and not admitted to probate, is not admissible. *In re Hyslop; Hyslop* v. *Chamberlain*, (1894) 3 Ch. 522.

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Executor's title to residue undisposed of.

Under the old law the executor was entitled to the residue not disposed of.

By the Executors Act, 1830 (11 Geo. IV. & 1 Will. IV. c. 40), the executor holds the residue undisposed of on trust for the next-of-kin, unless it appears by the will that he was intended to take beneficially.

The intention that the executor was intended to take beneficially must appear by the will, and cannot be proved by extraneous evidence. *Lore* v. *Gaze*, 8 B. 472.

A presumption against the executor's title arises if a legacy is given to him in general terms and not for his trouble, or if there is an intention manifested to dispose of the residue but the name of the residuary legatee is left blank. A presumption also arises against one executor if a legacy for his trouble is given to another. In all these cases evidence, including declarations by the testator, is admissible to rebut the presumption. *Bishop of Cloyne* v. *Young*, 2 Ves. Sen. 91; *Nourse* v. *Finch*, 1 Ves. Jun. [illegible]; 2 Ves. Jun. 78; *Clennell* v. *Lewthwaite*, 2 Ves. Jun. 465, 644; *Williams* v. *Jones*, 10 Ves. 77; *Langham* v. *Sanford*, 17 Ves. 435; *In re Bacon's Will; Camp* v. *Coe*, 31 Ch. D. 460.

And a direction that a proper account is to be kept has been held to raise a presumption only against the executor's title which could be rebutted by evidence. *Gladding* v. *Yapp*, 5 Mad. 56.

On the other hand, if the true construction of the will is that the executor is to take as trustee only, evidence to support his title to the residue is not admissible; if, for instance, a legacy is given to him for his trouble, showing that he is to take the office as an office of burthen. *Rachfield* v. *Careless*, 2 P. W. 158; *Langham* v. *Sanford*, 17 Ves. 433, 443; *Barrs* v. *Feakes*, 13 W. R. 987.

Evidence on behalf of the next-of-kin is only admissible to contradict evidence given in support of the executor's title. *Bishop of Cloyne* v. *Young*, 2 Ves. Sen. 91; *White* v. *Williams*, 3 V. & B. 72.

Evidence to rebut presumption

In cases of satisfaction as well as of ademption, declarations by the testator are admissible to rebut the presumption against

double portions. *Kirk* v. *Eddowes*, 3 Ha. 509; *In re Tussaud's Estate; Tussaud* v. *Tussaud*, 9 Ch. D. 363; *In re Scott; Langton* v. *Scott*, (1903) 1 Ch. 1. Evidence against double portion.

And evidence is admissible to rebut the presumption of satisfaction of a debt by a legacy. *Wallace* v. *Pomfret*, 11 Ves. 542. Satisfaction of debt by legacy.

Where a legacy is stated to be given for a particular purpose, and afterwards the testator in his lifetime gives a sum for the same purpose, 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, is admissible to determine whether the legacy is adeemed or not. *In re Pollock; Pollock* v. *Worrall*, 28 Ch. D. 552, 556. Legacy given for a purpose adeemed.

Original will. For the purpose of construing a will the original will may be looked at; but *quære* whether deleted words can be looked at. *Thorne* v. *Parsons*, 4 O.L.R. 682; 33 S.C.R. 309.

Intention. Extrinsic evidence of the intention of the testator is never admissible. And therefore evidence cannot be received to shew that a benefit given by the will to the testator's widow was intended to be in lieu of dower. *Fairweather* v. *Archibald*, 15 Gr. 255.

Surrounding circumstances. Evidence of the surrounding circumstances of the testator may be given to rebut a presumption. *Davidson* v. *Boomer*, 15 Gr. 218.

Thus, in the last case a legacy of £1,500 was given for the erection of a parsonage. Evidence was admitted to shew that a site for the parsonage had been given by another person, that the testator knew of this, and that the testator had himself built a school house adjoining this site, but not on it, lest he should interfere with its use for a parsonage, in order to rebut the presumption that the legacy was to be employed partly in buying land as well as in erecting the parsonage.

Impossible contingency. In another case, evidence was admitted to shew that a certain contingency mentioned in the will could never have taken place to the knowledge of the testator, and it was held that the interpretation of the will must conform to that fact. Thus, the testator made devises and bequests to five children, the land to one of his sons for life and after his death "to his heirs and to their heirs and assigns for ever," and provided that, in the event of either of his sons or either of his daughters "dying before they come of age or without issue," then his or her devise or legacy to be divided amongst the survivors. At the time of making the will three of the children were of full age and two under age. Consequently, in some cases the contingency of dying under age could not, to the knowledge of the testator, happen. Evidence having been received of the ages, the Court held that the ordinary presumption that "or" should be read "and" in these cases

or that both contingencies must happen before the gift over should take effect was rebutted by the knowledge that one of the contingencies could never happen as to three of the children; and therefore that upon death of a devisee without issue, though of full age, the gift over took effect. *Forsyth* v. *Galt*, 22 C.P. 115.

Identity of legatee.

Evidence may also be given for the purpose of identifying a legatee, or to rebut a presumption of error arising from evidence itself.

Thus, in an old will a testator had given legacies to the "four daughters of" A., who had four daughters and a son. In a subsequent will he gave similar legacies to the "four children of" A. Evidence was received of the old will, and to rebut the presumption of a change of intention and of a mistake in the testator, evidence was received that the conveyancer who drew the second will had been told to give legacies to the children of A., "the same as in the old will," and also of independent witnesses that they had heard the testator say that A. had property of his own and should provide for his son, and that he, the testator, would provide for the daughters. *Ruthven* v. *Ruthven*, 25 Gr. 534.

And 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 shew 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 Gr. 496.

So where a testator left a legacy to his "sister Anastasia Cummins," evidence was given to shew that the testator had two sisters, Maria Cummins and Catherine Kelly, and it was held that Maria Cummins was sufficiently identified as being, first, a sister and, secondly, married to a man called Cummins, as there was no other person to answer the description. *Re Whitty*, 30 O.R. 300.

But where a testator gave a legacy to his "grandson Rufus" having two grandsons of that name, one legitimate and one illegitimate, it was held that evidence was not admissible

to shew which he meant, but that the legitimate one took the legacy. *Doe dem. McEacheran* v. *Taylor*, 6 N.B.R. 525.

Description of land.

Where land is described in a will, and there is a parcel of land belonging to the estate of the testator which answers that description, parol evidence is not admissible to shew that another parcel was intended to be included not answering the description. *Lawrence* v. *Ketchum*, 4 A.R. 92. See *O'Day* v. *Black*, 31 U.C.R. 38.

Ambiguous description.

While evidence is admissible to shew what land a testator owned, no evidence of intention as to its disposition can be received. And where the parol evidence does not raise an ambiguity but would render the will uncertain, it cannot be received.

Therefore, where a testator devised lot 14 in the 10th concession, and it was shewn that he did not own lot 14 but owned lot 21 in the 10th concession, evidence of his intention to devise the latter was excluded. *Summers* v. *Summers*, 5 O.R. 110. See also *Hickey* v. *Stover*, 11 O.R. 106, overruling *Re Shaver*, 8 P.R. 312; *Re Bain & Leslie*, 25 O.R., at p. 139.

In these cases the wills contained adequate descriptions of parcels of land which existed and could be identified. There was no ambiguity in the descriptions, and no ambiguity was raised by the evidence. Therefore the rule that a latent ambiguity raised by the evidence may be resolved by the evidence, did not apply.

Where the testator devised his land in "Flamborough," there being two townships, East Flamborough and West Flamborough, but no Township of Flamborough, on its being shewn that he owned the land claimed by the devisee in East Flamborough, and not shewn that he owned any other in either township, it was held that the land in East Flamborough passed. *Nicholson* v. *Burkholder*, 21 U.C.R. 108.

But where a will devised "the 18 acres deeded to me by Henry Buckner" and it was shewn that this land had been sold by the testator before making his will and that he had a parcel of 21 acres bought from Henry Buck which he spoke of as 18 acres, the devise failed for uncertainty. *Buckner* v. *Buckner*, 6 C.P. 314.

To explain terms used.

Upon a devise of lot 16, concession 7, N. H. real and personal property, evidence was received to shew that N. H. meant north half, that the testator owned no other land than land in the Township of Morris, being lot 16, concession 7. *Young* v. *Purvis*, 11 O.R. 597.

To identify land.

A devise of "that 100 acres which he (the devisee) 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 division 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." It was shewn that the stone fence, if continued, would include part of lot 25, and it was held that such part passed by this devise with lot 26. *McDonald* v. *McPhail*, 17 U.C.R. 299.

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DESCRIPTION OF THINGS.

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WHEN the admissible evidence has been taken, the following rules may be of assistance to determine to what the words of description used by the testator refer:—

Where there is something answering the testator's description, that alone passes.

1. *Non accipi debent verba in falsam demonstrationem quæ competunt in limitationem veram.*

Therefore, where there is property which exactly fits all the terms of the description, that property passes and no more. *Webber* v. *Stanley*, 16 C. B. N. S. 698; *Smith* v. *Ridgway*, L. R. 1 Ex. 331; *In re Seal; Seal* v. *Taylor*, (1894) 1 Ch. 316.

It is immaterial whether the larger words precede or follow the restricting words, provided there is something to which the whole description applies.

Reference to occupation.

Thus, a devise of lands described as in the parish A., and in the occupation of a particular person, will not pass lands not in that parish or not in the occupation of that person. *Doe* d. *Parkin* v. *Parkin*, 5 Taunt. 321; *Morrell* v. *Fisher*, 4 Ex. 591; *Evans* v. *Angell*, 26 B. 202; *Homer* v. *Homer*, 8 Ch. D. 758.

Reference to title of person from whom lands derived.

So the general description may be restricted by a reference to the person from whom the testator purchased or derived the land. *Doe* d. *Tyrrell* v. *Lyford*, 4 M. & S. 550; *Doe* d. *Conolly* v. *Vernon*, 5 East, 51; *Doe* d. *Harris* v. *Greathed*, 8 East, 91; *Doe* d. *Ryall* v. *Bell*, 8 T. R. 579; *Doe* d. *Newton* v. *Taylor*, 7 B. & C. 384; *Emuss* v. *Smith*, 2 De G. & S. 722; *Cooch* v. *Walden*, 46 L. J. Ch. 639; see *Corballis* v. *Corballis*, 9 L. R. Ir. 309.

So a devise of cottages and premises "which I have lately purchased" will not include land belonging to the testator

which adjoins the cottages but was not purchased with them. *Care* v. *Harris*, 57 L. J. Ch. 62; 57 L. T. 786; 36 W. R. 182.

Reference to county.

If the lands are described as being at A in the county of B, lands not in that county will not pass. *Webber* v. *Stanley*, 16 C. B. N. S. 698; *Pedley* v. *Dodds*, 2 Eq. 819.

Devise of lands at A.

The expression "lands at A," where A is a parish, is probably not to be limited to lands within the parish. At any rate, the words "at or within" are not to be so limited. *Homer* v. *Homer*, 8 Ch. D. 758.

The expression lands "at" A, where A is not a parish or manor, indicate proximity to A, so that if there are lands near A those alone pass. *Doe* v. *Bower*, 3 B. & Ad. 453; *Attwater* v. *Attwater*, 18 B. 330; see *Doe* d. *Dell* v. *Pigott*, 7 Taunt. 552; *Pogson* v. *Thomas*, 6 Bing. N. C. 337.

Manufactory in a street.

A devise of a manufactory on the west side of a street with the appurtenances, will not include a manufactory on the east side of the street. *Smith* v. *Ridgway*, L. R. 1 Ex. 46, 331.

A devise of property in a street may pass the whole of a piece of land which, when purchased by the testator, had a frontage on that street and on another street, though the testator has subsequently divided the land, and built two houses upon it, one abutting on one street and one on the other. *Harman* v. *Garner*, 35 B. 478; see, too, *Newton* v. *Lucas*, 6 Sim. 54; 1 M. & Cr. 391.

And where the testator had houses in Bullen Court, Strand, and also in the Strand and Maiden Lane, they were all held to pass under a devise of "my freehold estates in Bullen Court, Strand, and Maiden Lane, in the county of Middlesex." *Gauntlett* v. *Carter*, 17 B. 586.

Property held under lease.

A devise of two houses in a street will pass only two houses, though the testator may be possessed of three houses in the street held under the same lease, two of which are comprised in one underlease, and the third in a separate underlease. *Tapley* v. *Eagleton*, 12 Ch. D. 683.

So a devise of certain lands held under a lease where the testator goes on to describe the lands by name, passes only such of the lands held under the lease as are named. *West* v. *Lawday*, 11 H. L. 375.

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2. *Falsa demonstratio non nocet, cum de corpore constat.*

Inaccurate description—part inaccurate.

a. Thus, where an object is sufficiently described, additional words, which have no application to anything, may be rejected. *Blagne* v. *Gold*, Cro. Car. 447, 473; *Doe* d. *Dunning* v. *Cranstoun*, 7 M. & W. 1.

Subordinate description, if inaccurate, rejected.

b. Where there is a complete description, and the testator goes on to add words for the purpose of identifying or elaborating the previous description, these words, if inconsistent with the previous description, may be rejected. *Armstrong* v. *Buckland*, 18 B. 204; see *Slingsby* v. *Grainger*, 7 H. L. 273; *Travers* v. *Blundell*, 6 Ch. D. 436.

Inconsistent description.

c. Where there is one continuous description, and there is something answering to part of it, and something answering to other part, but the two together are inconsistent, the question is, Which are the leading words of description?

In the first class of cases under this head there is no repugnancy between the general terms and the particular superadded description; in the second and third class there is a repugnancy between two parts of a description.

Name followed by occupation.

Where the estate is devised by a specific name, followed by a reference to occupation, the reference to occupation may be rejected if the whole estate known by the name is not in the occupation of the person referred to. *Goodtitle* d. *Radford* v. *Southern*, 1 M. & S. 299; *Down* v. *Down*, 7 Taunt. 343; 1 J. B. Moo. 80; see *Doe* d. *Beach* v. *Earl of Jersey*, 1 B. & Ald. 550; 3 B. & Cr. 870; *Paul* v. *Paul*, 1 W. Bl. 255; 2 Burr. 1089; see, too, *Cunningham* v. *Butler*, 3 Giff. 37; 7 Jur. N. S. 461; *In re Boulter*, 4 Ch. D. 241.

Name followed by locality.

Upon similar principles a description by a specific name will prevail over an erroneous reference to a parish or county, or to acreage. *Hardwick* v. *Hardwick*, 16 Eq. 168; *Whitfield* v. *Langdale*, 1 Ch. D. 64.

Freehold farm.

Under a devise of "my freehold farm and lands, situate at Edgware, and now in the occupation of A," the whole farm consisting of 50 acres of freehold and 26 acres of copyhold land was held to pass. There was no residuary devise, and there was no reasonable doubt on the will that the whole farm was meant to pass. *In re Bright-Smith; Bright-Smith* v. *Bright-Smith*, 31

Ch. D. 314; and see the comments there made upon *Stone* v. *Greening*, 13 Sim. 390; *Hall* v. *Fisher*, 1 Coll. 47.

Though the estate is not described by a specific name, if the general description contains words which would not be satisfied if the reference to occupation is allowed to restrict the devise, the reference to occupation may be rejected. *White* v. *Birch*, 36 L. J. Ch. 174; see *Doe* d. *Parkin* v. *Parkin*, 5 Taunt. 321.

What are the leading words?

For the purpose of ascertaining the leading words, it would seem that where a description is followed by restrictive words inconsistent with it, the earlier words will prevail, especially if the restrictive words are less clear and accurate than the earlier words. Cases *supra* and *Doe* d. *Remor* v. *Ashley*, 10 Q. B. 663.

Where the more restrictive description of property is followed by a wider description, which would include other property as well, it seems the more restricted description will prevail; for instance, under "my lands in Cokefield, called Hayes Lands," only so much of the Hayes Lands as were in Cokefield passed. *Wodden* v. *Osbourn*, Cro. El. 674; *Hall* v. *Fisher*, 1 Coll. 47.

Of course, if the restrictive words can be looked upon as inserted for the purpose of giving the lands carved out of the devise to someone else, they will have their full force. *Higham* v. *Baker*, Cro. Eliz. 16; *Press* v. *Parker*, 10 J. B. Moo. 158; 2 Bing. 456.

No property answering description.

3. Where there is nothing answering to any part of the description the devise fails.

Thus a devise of lands in a particular county or parish cannot be extended to lands in an adjoining county or parish, though those may be the only lands the testator possessed. *Miller* v. *Travers*, 8 Bing. 244; *Barber* v. *Wood*, 4 Ch. D. 885.

Same rules apply to specific bequests.

4. The same rules are applicable to specific bequests of personal property. Therefore, if there is something which answers fully the words of description, that and that alone will pass. *Slingsby* v. *Grainger*, 7 H. L. 273; *Ridge* v. *Newton*, 2 D. & War. 239; *Ex parte Kirk*; *In re Bennett*, 5 Ch. D. 800; *Dillon* v. *Arkins*, 13 L. R. Ir. 557; 17 L. R. Ir. 636; *In re Bodman*; *Bodman* v. *Bodman*, (1891) 3 Ch. 135.

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Right of selection.

5. In some cases the effect of a specific gift may be to give the legatee a right of selection.

For instance, a gift of two acres out of four, or a gift of a house and ten acres of land adjoining, where the testator has more than ten acres, gives the devisee the right in each case to select. *Grace Marshall's Case*, Dyer, 281a, n.; 8 Vin. Ab. 48, pl. 11; *Hobson* v. *Blackburn*, 1 M. & K. 571.

Intention to give choice must appear in the will.

The language of the will must be such as to indicate an intention that there was to be a choice. A gift of "one of my closes" clearly indicates this. The same inferences may be drawn where the gift is of one close in Ridgway Field, where the testator has two, or of two houses in King Street, where he has three. *Duckmanton* v. *Duckmanton*, 5 H. & N. 219; *Tapley* v. *Eagleton*, 12 Ch. D. 683.

Gift of certain number of shares.

Again, a gift of a certain number of shares in a company, where the testator has two classes of shares in that company, each sufficient to answer the gift, gives the legatee a right to select. *Jacques* v. *Chambers*, 2 Coll. 435; *Millard* v. *Bailey*, 1 Eq. 378; *O'Donnell* v. *Welsh*, (1903) 1 Ir. 115.

If testator purports to select, legatee cannot do so.

But a gift of "the close in Kirton, now in the occupation of John Watson," or of "No.—, Sudeley Place, to A, and No.—, Sudeley Place, to B," or of "my 140 shares in the Crown Brewery Company," is a gift of a specific, definite thing. The testator has himself made the selection, though he has made it inadequately. The legatee cannot select. *Richardson* v. *Watson*, 4 B. & Ad. 787; *Asten* v. *Asten*, (1894) 3 Ch. 260; *In re Cheadle*; *Bishop* v. *Holt*, (1900) 2 Ch. 620.

If there is a gift of "my 140 shares," and the testator has 40 fully paid and 240 partly paid shares, the gift must be satisfied out of the partly paid shares, as the fully paid shares are not enough to satisfy it. *In re Cheadle*; *Bishop* v. *Holt*, (1900) 2 Ch. 620.

Priority of selection.

If, having two closes in X, the testator gives a close in X to A, and a close in X to B, the beneficiaries must select, and apparently they are entitled to select according to the priority in which they are named in the will. *Duckmanton* v. *Duckmanton*, 5 H. & N. 219.

What would happen if the person entitled to select dies

before selecting is not clear. Probably the gift would fail. See *Bullock* v. *Burdett*, Dyer, 281a; Co. Lit. 145a; *Boyce* v. *Boyce*, 16 Sim. 476.

Express right of selection.

In some cases testators give an express right of selection. For instance, gifts of such articles of furniture and the like as the beneficiary may select are not uncommon. In such cases the rule is that the beneficiary may take the whole. Upon the language of the will the beneficiary might take everything, with the exception of an article of no value, and the maxim *de minimis non curat lex* applies. *Arthur* v. *Machinnon*, 11 Ch. D. 385; *Re Sharland*; *Kemp* v. *Rozey*, 74 L. T. 681, where *Kennedy* v. *Kennedy*, 10 Ha. 438, is explained.

Inaccurate description.

6. If there is a specific gift, as, for instance, of certain stock, and the testator at the date of his will possessed no such stock, but possessed other stock nearly answering the description, the latter will pass.

Upon this principle Bank stock has been held to pass as East India Stock (*a*); 3 per cent. South Sea Annuities as 3 per cent. Consols (*b*); 3 and 5 per cent. Bank Annuities as money in the Bank of England (*c*); 3 per cent. Reduced Annuities as Long Annuities (*d*); 3 per cents. in the names of trustees over which a testatrix had a general power of appointment as "monies invested in my name in the 4 per cent. Government securities" (*e*); Consols in the names of trustees as property "which stands in the English bank" of Coutts & Co., who received the dividends (*f*); stock in the names of trustees as stock "in my name" (*g*); French Rentes in the names of the testator's agents as French Rentes "inscribed in my name" (*h*); Wilts and Somerset Stock of the Great Western Railway Company, and preference and other stock of that company, as "my shares in the Great Western Railway" (*i*); a deposit receipt and cash at a bank as "all I hold" in that bank; a bond of a company as shares of that company, and shares of a company as bonds of that company, and debenture stock of a company as shares of that company (*j*); 6,800 dollars United States Bonds as "my 7,000 dollars or the produce thereof" (*k*); debentures of a company as "debenture stock or shares" of that company (*l*); 200*l.* stock of a company

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as two shares of that company, which never had shares but stock only (*m*); and ordinary stock of the Dublin and Kingston Railway Company as preference stock in the Dublin, Wicklow and Wexford Railway Company, which latter company had taken a lease of, and was working, the undertaking of the first company (*n*). *Door* v. *Geary*, 1 Ves. Sen. 254 (*a*); *Dobson* v. *Waterman*, 3 Ves. 307, n. (*b*); *Gallini* v. *Noble*, 3 Mer. 691 (*c*); *Penticost* v. *Ley*, 2 J. & W. 207 (*d*); *Mackinley* v. *Sison*, 8 Sim. 561 (*e*); *Sheffield* v. *Von Donop*, 7 Ha. 42 (*f*); *Quennell* v. *Turner*, 13 B. 240 (*g*); *Ellis* v. *Eden*, 25 B. 482 (*h*); *Trinder* v. *Trinder*, L. R. 1 Eq. 695 (*i*); *Townsend* v. *Townsend*, 1 L. R. Ir. 180; *In re Weeding; Armstrong* v. *Wilkin*, (1896) 2 Ch. 364 (*j*); *Palin* v. *Brookes*, 26 W. R. 877 (*k*); *In re Nottage; Jones* v. *Palmer* (No. 2), (1895) 2 Ch. 657 (*l*); *Brannigan* v. *Murphy*, (1896) 1 Ir. 418 (*m*); *Flood* v. *Flood*, (1902) 1 Ir. 538 (*n*).

It is not clear what the result would be if the testator after the date of his will acquires property exactly answering the description. See *In re Weeding*, *supra*.

Gift of estate may pass proceeds of sale.

If the testator devises an estate by name, when in fact he has an interest only in the proceeds of sale of the estate, that interest passes. *Cooper* v. *Martin*, 3 Ch. 47; *In re Lowman; Devenish* v. *Pester*, (1895) 2 Ch. 348; *In re Glassington; Glassington* v. *Follett*, (1906) 2 Ch. 305.

But a general gift of leaseholds will not pass the proceeds of sale of leaseholds, which at the date of the will the testator had contracted to sell. *Goold* v. *Teague*, 7 W. R. 84; 5 Jur. N. S. 116.

Specific gift of something testator has had but has not at date of will.

7. "If a testator has had at a time antecedent to the will a certain kind of stock or property and has parted with it before the date of the will, and by his will purports to dispose of it in a way which, if he had retained it, would have been a specific legacy, it will be treated by the Court as a general legacy of equivalent amount payable out of the general personal estate." Per Porter, M.R. (Ir.), in *Findlater* v. *Lowe*, (1904) 1 Ir. 519, 528, following *Selwood* v. *Mildmay*, 3 Ves. 306; see *Lindgren* v. *Lindgren*, 9 B. 358; *Goodlad* v. *Burnett*, 1 K. & J. 341.

Gift of something the testator thinks he has but has not.

8. On the other hand, if the testator makes a specific gift of a thing he thinks he has, but never had, or of a thing which he intends to purchase, but does not, the gift is void. *Waters* v. *Wood*, 5 Do G. & S. 717; *Evans* v. *Tripp*, 6 Mad. 91; *Millar* v. *Woodside*, I. R. 6 Eq. 546.

Confirmation by codicil.

9. If the testator sells the specific thing and buys another thing closely resembling the former, the subsequent confirmation of the will by a codicil will not have the effect of passing the fresh acquisition, if the description in the will is not accurately appropriate to it. *Pattison* v. *Pattison*, 1 M. & K. 12; *Macdonald* v. *Irvine*, 8 Ch. D. 101; see *Pilkington's Trusts*, 6 N. R. 246; and see the chapter on Ademption.

Stock intended to be purchased.

10. Possibly a specific gift, for instance, of "my stock," might pass stock which the testator had at his death agreed to purchase. See *Collison* v. *Girling*, 4 M. & Cr. 63, p. 75.

But it would not include stock which the testator has directed his brokers to purchase, but which is not in fact purchased till after his death. *Thomas* v. *Thomas*, 27 B. 537.

Effect of s. 24 of Wills Act.

11. Sect. 24 of the Wills Act enacts that a will is to be construed, with reference to the real 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.

The effect of the section has already been to some extent considered in the chapter on the admissibility of evidence, p. 130, *ante*.

What is a contrary intention.

It was there pointed out, that, where there is a gift of a definite specific thing, the testator must be speaking of something he has at the date of the will, and that may be sufficient evidence of a contrary intention. See *In re Gray*; *Dresser* v. *Gray*, 36 Ch. D. 205.

But a gift of "my cottage and all my land at S.," is not sufficient to indicate a contrary intention as regards the land at S. *In re Portal and Lamb*, 30 Ch. D. 50; *In re Champion*; *Dudley* v. *Champion*, (1893) 1 Ch. 101.

Use of the present tense.

The use of the present tense, for instance, a devise of lands "of which I am seised," though in another gift the testator

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gives "what I am or at my death shall be possessed of," will not restrict a general devise to property belonging to the testator at the date of the will. *Doe* d. *York* v. *Walker*, 12 M. & W. 591; *Lady Langdale* v. *Briggs*, 3 Sm. & G. 246; 8 D. M. & G. 391; *Hepburn* v. *Skirving*, 4 Jur. N. S. 651; *Lord Lilford* v. *Powys Keck* (No. 2), 30 B. 300.

Effect of the word "now."

On the other hand, the word "now" used in the description of property refers to the date of the will, and, if it is an essential part of the description, it limits the gift to property then belonging to the testator. *Cole* v. *Scott*, 1 M. & G. 518; *Hutchinson* v. *Burrow*, 6 H. & N. 583; *Williams* v. *Owen*, 2 N. R. 585; *Re Edwards*; *Rowland* v. *Edwards*, 63 L. T. 481.

If, on the other hand, such words as "now occupied by me," or the like, are merely added as an additional description not intended to cut down the generality of the earlier words, the devise will not be restricted to property belonging to the testator at the date of the will. *All Souls' College* v. *Coddrington*, 1 P. W. 597; *In re Midland Railway Co.*, 34 B. 525; *Wagstaff* v. *Wagstaff*, 8 Eq. 229; *In re Ord*; *Dickinson* v. *Dickinson*, 12 Ch. D. 22; *In re Champion*; *Dudley* v. *Champion*, (1893) 1 Ch. 101.

Effect of s. 24 upon a clause of exception.

It is not clear what effect sect. 24 has upon a clause excepting certain property from a devise. But when property comprised in a certain deed is excepted from a devise the exception does not extend to property afterwards conveyed by another deed to uses resembling those of the earlier deed. *Hughes* v. *Jones*, 1 H. & M. 765.

Codicil confirming will.

12. The effect of a codicil confirming the will is to bring the will down to the date of the codicil and effect the same disposition of the testator's estate as if the testator had at that date made a new will containing the same disposition as the original will, but with the alterations introduced by the codicil. *Doe* d. *York* v. *Walker*, 12 M. & W. 591; *Lady Langdale* v. *Briggs*, 3 Sm. & G. 246; *In re Champion*; *Dudley* v. *Champion*, (1893) 1 Ch. 101; *In re Rayer*; *Rayer* v. *Rayer*, (1903) 1 Ch. 685; *In re Fraser*; *Lowther* v. *Fraser*, (1904) 1 Ch. 726.

Upon the same principle a codicil made after coverture republishing the will of a married woman made during coverture

rendered the will effective to pass property which the married woman could not dispose of during coverture, and where a power was conferred on the survivor of husband and wife, exercisable after the death of one, a will made during the coverture, but republished by a codicil after the coverture was held to execute the power. *In re Smith; Bilke* v. *Roper*, 45 Ch. D. 632; *In re Blackburn; Smiles* v. *Blackburn*, 43 Ch. D. 75.

Under the old law land acquired between the date of the will and a codicil confirming the will passed by a general devise. But if the codicil referred in terms only to the land devised by the will, and did not confirm the will but was only directed to be taken as part of it, the republication did not enlarge the effect of the will. *Bowes* v. *Bowes*, 2 B. & P. 500; *Hughes* v. *Turner*, 3 M. & K. 666; *Monypenny* v. *Bristow*, 2 R. & M. 117; *Re Taylor; Whitby* v. *Highton*, 58 L. T. 843.

CANADIAN NOTES.

Land, general words.

A devise of "All my estate, goods and chattels I give to A." passes the testator's lands. *McCabe* v. *McCabe*, 22 U.C.R. 378.

Either of the words "property" or "estate" is sufficient to pass land. *Cameron* v. *Harper*, 21 S.C.R. 273.

"All properties, moneys and personal effects now in my possession" passes land though in the occupation of a tenant, his possession being the possession of the testator. *Re Hargan & Fritzinger*, 16 O.R. 28.

Land expropriated.

A devise, in specific terms, of land which has been taken for a railway, does not pass the right to compensation payable therefor. *Young* v. *Midland Ry. Co.*, 16 O.R. 738. See *Trail* v. *The Queen*, 7 Ex. C.R. 92.

Homestead.

Upon a devise of "the homestead" it was shewn that, with the house in which the testator had lived, there was enjoyed a yard, a garden, orchard, carriage house and lane, in all about four acres, part of a farm of 150 acres. The testator also owned another farm of 50 acres. There were indications in the will that he intended his sons to be treated alike, and

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it was held that the four acres only passed as "the homestead." *Bigelow* v. *Bigelow*, 19 Gr. 549.

House by street number.

A devise by the street number of a house passes only the house and the land usually enjoyed therewith, although coupled with the expression "All that real estate now owned by me." In this case there was a second house in the rear facing on another street and having a separate street number. *Scanlon* v. *Scanlon*, 22 O.R. 91.

"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 devise would not have been void for uncertainty, but the devisee might have elected which he would take. *Metzler* v. *Spike*, 20 N.S.R. 139.

Description partially incorrect.

A testator purporting to devise "all his real estate" gave specifically to one son the north 50 acres of lot 21, and to another the south 50 acres of the same lot. He owned the east half of lot 21, being 100 acres in extent, but had no interest in the west half. The Court held that one son took the north 25 acres, and the other the south 25 acres of the east half, by specific description, and that the 50 acres lying between passed to both sons as tenants in common, under the general words. *McFadyen* v. *McFadyen*, 27 O.R. 598. It seems difficult to support this as a mere matter of interpretation. The testator expressed his intention to dispose of all his real estate, and to give one half severally to each son, and it would seem to be nearer his meaning, therefore, to amalgamate the expressions of intention, and interpret the will as giving "the north 50 acres of all my real estate in lot 21" to one son, and as making a similar disposition of the south 50 acres to the other.

Where the number of a lot is given correctly, but the wrong concession number is named, the lot does not pass but falls into the residue, there being no context to aid. *Campbell* v. *Campbell*, 14 U.C.R. 17.

On a devise of "that certain messuage lands and premises

(describing them by metes and bounds) now occupied by T. L." it appeared that some of the rooms projected over an archway which was devised by the same will to another person, and it was held that they passed as part of the messuage in the occupation of T. L. *Potts* v. *Boivine*, 16 O.R. 191.

Broken front.

A description carrying the broken front of a lot with the lot. *Hawley* v. *Miller*, 12 C.P. 70.

Special descriptions of land and mode of measurement. *Saunders* v. *Breakie*, 5 O.R. 603, and see *Tucker* v. *Phillips*, 24 U.C.R. 626.

Falsa demonstratio.

A devise of "200 acres of land, the west half of lot 14, etc.," the west half containing 100 acres only, and the testator owning the whole lot, passes the west half, the statement of the quantity being a false addition to a certain description. And this, although the west half was under contract of sale, the devisee being held entitled to the purchase money. *Holtby* v. *Wilkinson*, 28 Gr. 550.

Where there are general words which, without the specific description would carry the land, a wrong description or enumeration following the general words may be rejected as a false addition or enumeration.

Thus, a devise of "all my real estate," then misdescribing the lot by number, passes what the testator owns under the general words. *Wright* v. *Collings*, 16 O.R. 182; *Doe dem. Taylor* v. *Paterson*, 3 O.S. 497.

So, a devise of "my property," the proper number of the lots but the wrong number of the concession being added carries the property under the general description of "my property." *Hickey* v. *Hickey*, 20 O.R. 371. See also *Doe dem. Lowry* v. *Grant*, 7 U.C.R. 125.

So also, "my farm" being lot 15, carried the broken front with lot 15, as it was part of the farm. *Smith* v. *Bonnisteel*, 13 Gr. 29.

General words not connected with devise.

But the general words must be strictly connected with the devise.

Thus, where a testator opened his will by the expression "wishing to dispose of my worldly property," and proceeded

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to dispose as follows: "To my son . . . the property I may die possessed of in the Village of M., Township of P., also lot 28 in the 10th concession of the Township of B.," and it was found that he did not own lot 28, but did own lot 29, it was held that neither the general opening words, nor the expression "the property I may die possessed of," could be relied on to pass lot 29, as they were not grammatically or by their import connected with the devise of lot 28. *Re Bain & Leslie*, 25 O.R. 136.

Residue.

The rule is the same in a devise of "the residue of my estate," which will pass the residue of the lands of the testator, though misdescribed in detail. *Doyle* v. *Nagle*, 24 A.R. 162.

And a residuary disposition of all the residue of my estate was held to carry a lapsed devise of lands though the addition was "consisting of money, promissory notes, etc." *Re Farrell*, 12 O.L.R. 580.

Misdescription of estate.

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 shewed 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.

Will speaks from death.

By the Wills Act, "Every will shall be construed, with reference to the real and personal property 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." R.S.O. c. 128, s. 26(1); R.S. B.C. c. 193, s. 21; R.S.M. c. 174, s. 22; R.S.N.B. c. 160, s. 18; R.S.N.S. c. 139, s. 24(1).

In Ontario, before this enactment, wills in this respect were governed by an enactment which is now R.S.O. c. 128, s. 5, and applies to the wills of persons dying after 6th March, 1834. "Where a will . . . 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." Under this Act the presumption was the same as before, viz., that after-acquired land did not pass; but the Act enabled the testator to overcome that presumption by a devise in any form of words shewing that he intended after-acquired land to pass. A mere devise of all "the rest and residue of my estate" was not sufficient. *Plumb* v. *McGannon*, 32 U.C.R. 8; *Whateley* v. *Whateley*, 13 Gr. 436; 14 Gr. 430.

The presumption under the present Act is that all after-acquired property does pass, unless the contrary is shewn by the will.

Contrary intention.

What is a sufficient contrary intention as appearing by the will must be determined by the terms of each particular will. There are two classes of cases, however, from which rules may be laid down. The first, that where the will refers to its own date, it is intended to apply only to property then owned; and secondly, where property is specifically described as passing, the devise is restricted to such property.

Present tense.

First as to time. It is not every reference to the present which will shew a contrary intention. For *primâ facie* the will speaks from the death: and indefinite expressions such as "now" "at the present time" *primâ facie* refer to the time of speaking of the will, viz., the death. The reference as to time must plainly point to the date of the will. *Hatton* v. *Bertram*, 13 O.R. at p. 777.

Thus, a testator devised and bequeathed all his real and personal estate "which I may die possessed of" as follows—then he gave to his sister the house and land with all household furniture and all the stock in trade "now in house and out of house with all book accounts now due me." He was a shop-keeper and after making his will sold his house and business and subsequently re-purchased them. It was held

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that the word "now" was not sufficient to prevent the will from speaking from the death. *Re Holden*, 5 O.L.R. 156.

A devise of "Walkerfield, being the property I now reside upon" was held to pass property acquired subsequently to the will, for the purpose, as shewn by evidence, of being added to Walkerfield, and the word "now" was held not to shew a contrary intention. *Hatton* v. *Bertram*, 13 O.R. 766.

But where a testator devised to A. "the homestead farm on which I reside," and, after making the will, acquired other land not connected with the farm to which he removed, and on which he lived at the time of his death, it was held that the after-acquired land did not pass under the devise of the homestead, although the word "now" was not used. *Ayer* v. *Estabrooks*, 2 N.B. Eq. 392.

"As at present invested" is not sufficient to indicate a contrary intention, though the testatrix in her will referred to her estate as being "worth upwards of $40,000," and she acquired after making the will about $60,000. *Re Lawson*, 25 N.S.R. 454.

Words of futurity and general description in a residuary devise will, however, restrict the language of specific devises.

Thus, a devise of "the property on H. Street" was followed by a gift of "all the rest and residue of my estate, real and personal, which I shall be entitled to at the time of my decease." The testator after making his will acquired other property in H. Street: and it was held to pass as part of the residue, the residuary devise being by its language intended to pass future-acquired property. *Morrison* v. *Morrison*, 9 O.R. 223; 10 O.R. 303.

Specific description.

Secondly, as to specific description. A devise of specific parcels of land to specific devisees followed by a devise of "the remainder of my estate" with detailed description of parcels constituting the remainder, is a specific or restricted description of land and does not carry after-acquired property. *Crombie* v. *Cooper*, 24 Gr. 470.

But a devise of "all my real estate," followed by an enumeration of lands owned at the time of the will, will pass after-

acquired land. The will speaks from the death, and the general words cover all the land; the enumeration which follows is therefore a false addition. *Re Smith*, 10 O.L.R. 449.

In *Vansickle* v. *Vansickle*, 9 A.R. 352, a great difference of opinion arose out of an exception. The testator devised "the south 80 acres of lot 12 excepting so much thereof as I may have sold and conveyed." At the date of the will the testator had sold portions of the 80 acres, but they were afterwards reconveyed to him and he died seised. Ferguson, J., was of opinion that these portions did not pass under the will as it contained a specific description of what was left of the 80 acres after deducting what had been sold. 1 O.R. 107. In the Court of Appeal Spragge, C.J.O., and Morrison, J.A., agreed with this view; while Burton and Patterson, JJ.A., were of opinion that the language should be taken as spoken immediately before the death of the testator, at which time no part was sold and conveyed, and therefore that the excepted portions passed.

Misdescription of fund.

The sum of £2,900 being due to the testatrix from another estate, she bequeathed "the £290 due", and there being no general words descriptive of the whole fund, the sum of £290 only was held to pass. *Re Sherlock*, 28 O.R. 638.

A testator commenced his will by saying that he disposed of all of his estate, and then gave two legacies which did not exhaust it. Held, that he died intestate as to the excess, the rule respecting wrong enumeration not applying. *McLennan* v. *Wishart*, 14 Gr. 512.

A general intention shewn to pass the whole estate followed by two pecuniary legacies not sufficient to exhaust the estate, there being no residuary bequest, passes the legacies only, and there is an intestacy as to the residue. *Re Nelson*, 14 Gr. 199, 512.

A bequest of the principal sum secured by a mortgage does not carry interest due at the date of the will or accruing during the life of the testator. *Loring* v. *Loring*, 12 Gr. 374.

Share in partnership.

A bequest, by a member of a partnership, of the "interest in the business together with all sums of money" advanced the testator, gives the legatee the testator's share of any

surplus of the assets after all liabilities have been satisfied, and does not render him liable for the debts of the partnership. *Robertson* v. *Jankin*, 26 S.C.R. 192.

Chattels and personalty.

Although a bequest of a testator's chattels in general terms, and unrestricted by any context will carry all the personal estate (including a mortgage; *Re McMillan*, 4 O.L.R. 415), yet where a distinction is made between chattels and other personalty by the will itself, the word "chattels" will be restricted to such tangible and movable articles as furniture, farm implements, etc. *Peterson* v. *Kerr*, 25 Gr. 583.

So, a bequest of "all my household furniture, goods and chattels of whatever nature or kind, and wherever situate," followed by a bequest of annuities charged on the estate generally, and a residuary disposition of realty and personalty in general terms, restricts the above words to movables. *Davidson* v. *Boomer*, 15 Gr. 1.

And a bequest of "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 Gr. 228.

A bequest of promissory notes upon which, after making his will, the testator has recovered judgment, which judgment is unsatisfied at the time of his death, does not pass the notes. *Wetmore* v. *Ketchum*, 10 N.B.R. 408.

Impossible fractions aliquot proportions.

On a devise and bequest to children living at a certain date of the whole estate, in the proportions of two-thirds to each son, and one-third to each daughter, it was found when the time arrived that there were five sons and seven daughters entitled to share, and the Court held that the estate should be divided between all the children in the proportion of two parts to a son and one to a daughter. *Lasby* v. *Crewson*, 21 O.R. 93.

A bequest of "carpets, blankets and whatever else I may have at the house," does not carry mortgages and a bank deposit receipt at such house, but only such articles as are of a like kind with those enumerated. *Smith* v. *Knight*, 18 Gr. 492.

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 Gr. 364.

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.

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 sister for life, remainder to his nephew, and he gave all the residue of his estate real and personal to his nephew. Held, that his brother took wearing apparel and a watch only; the sister all the other personal property, and the residuary bequest was ineffective. *Re Pink*, 4 O.L.R. 718.

A residuary disposition of all the residue of an estate consisting of money, promissory notes, vehicles and implements, was held to carry land, a devise of which had lapsed, notwithstanding a gift to another of all the real and personal estate. *Re Farrell*, 12 O.L.R. 580.

A bequest of $20,000 for a hospital to a town was given on condition that a like sum should be procured by the corporation "by a tax on the citizens or from private donations or otherwise" to be added to the bequest. Held, that a sum procured by a grant from the Legislature was within the expression "or otherwise." *Paulin* v. *Windsor*, 36 N.S.R. 441.

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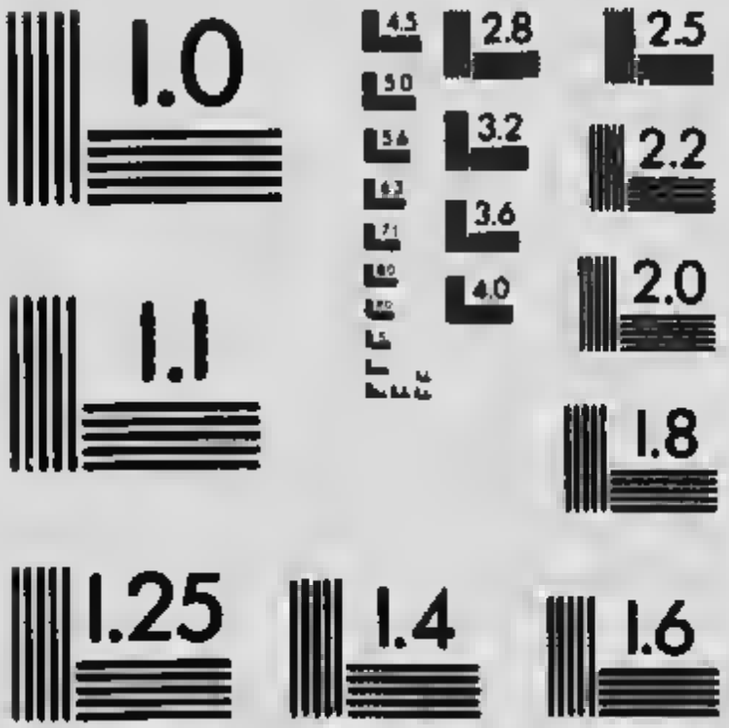

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CHAPTER XIX.

SPECIFIC, GENERAL, AND DEMONSTRATIVE LEGACIES.

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General and specific legacies distinguished.

IN the case of bequests of personalty it is often a question of difficulty whether a legacy is general or specific. A general legacy is a legacy not of any particular thing, but of something which is to be provided out of the testator's general estate. If a particular fund is made primarily liable, the legacy is demonstrative, but does not fail by the failure of the particular fund. On the other hand, a specific legacy is a gift of a severed or distinguished part of the testator's property. It does not abate till after the general legacies are exhausted, but it is liable to ademption by the testator in his lifetime.

Gift of particular thing may be a general legacy.

A gift of a particular thing—for instance, of shares of a particular description—if there is nothing on the face of the will to shew that the testator is referring to shares belonging to him, is a general legacy, though he may in fact possess the shares in question.

The legatee is entitled to a sum equal to the value of the shares at the time when he is entitled to the legacy. If owing to alterations in the constitution of the company it is impossible to ascertain the value of the shares, the legacy fails. *Macdonald* v. *Irvine*, 8 Ch. D. 101, 109; *In re Gray; Dresser* v. *Gray*, 36 Ch. D. 205.

The most common, though not the only kind of specific legacy, is where the testator gives something which he possesses at the date of the will.

In those cases there must be on the face of the will enough to shew that the testator is referring to something actually existing at the time.

A mero legacy of stock in round numbers, though the testator may possess the exact amount of stock, is not specific. *Partridge* v. *Partridge*, 9 Mod. 269; Ca. t. Talb. 226; *Simmons* v. *Vallance*, 4 B. C. C. 345; *Wilson* v. *Brownsmith*, 9 Ves. 180. Legacy of stock is not specific.

Similarly, a bequest of 5,000*l.* in the South Sea Company's stock is general, though the testator may have the exact amount at the date of his will. *Purse* v. *Snaplin*, 1 Atk. 415; *Bronsdon* v. *Winter*, Amh. 57; *Bishop of Peterborough* v. *Mortlock*, 1 B. C. C. 565; *Webster* v. *Hale*, 8 Ves. 410; *Robinson* v. *Addison*, 2 B. 515; *Macdonald* v. *Irvine*, 8 Ch. D. 101; *In re Gray; Dresser* v. *Gray*, 36 Ch. D. 205; see *Page* v. *Young*, 19 Eq. 501, where a gift of "the interest of 4,500*l.*, money in the funds," was held specific. Nor of money in stock.

As to whether the gift is of so much money to be invested in stock, or of stock of that value, see *Allan* v. *Kelly*, 7 W. R. 139.

But though the actual gift may not contain anything to show that it is specific, it may appear from the rest of the will that it is so.

A direction to transfer a certain amount of stock, or to pay it as soon as possible, will not make the legacy specific. *Sibley* v. *Perry*, 7 Ves. 522, 529; *Webster* v. *Hale*, 8 Ves. 410. Nor of stock to be transferred.

But a gift of stock generally to trustees on trust to sell, shows that the testator referred to specific stock. *Ashton* v. *Ashton*, Ca. t. Talb. 152; 3 P. W. 384. Gift on trust to sell is specific.

So where a testator, having given legacies of stock generally, then gives the rest of the stock "standing in my name," the earlier legacies must be specific. *Sleech* v. *Thorington*, 2 Ves. Sen. 560; see *Millard* v. *Bailey*, L. R. 1 Eq. 378. Gift of "rest of my stock" makes previous gifts of stock specific.

A direction that if the testator should not have sufficient stock standing in his name to answer the legacies of stock previously given, the executors should purchase sufficient to make up the deficiency, shows that the testator meant to give something in existence at the time. *Townsend* v. *Martin*, 7 Ha. 471; *Fountaine* v. *Tyler*, 9 Pr. 94; *Queen's Coll.* v. *Sutton*, 12 Sim. 521. Direction to purchase if the testator should not have sufficient stock to answer legacies of stock previously given.

The same is the case with a gift of 4,000*l.*, capital stock, in the 3 per cent. Consolidated Bank Annuities, "or in whatsoever of the Government funds the same shall be *found* invested." *Hosking* v. *Nicholls*, 1 Y & C. C. 478.

Legacy of stock not in round numbers where the testator has the exact amount.

Where the legacy was not of stock in round numbers, but of 2,702*l.* 3*s.* Bank Stock, and the testator had the exact amount, it was held specific. At the present day it would probably be held that that fact ought not to affect the construction of the will. *Jeffreys* v. *Jeffreys*, 3 Atk. 120; see *Robinson* v. *Addison*, 2 B. 515.

Gift of "my" stock.

A gift of "my" stock is specific. *Ashburner* v. *Macguire*, 2 B. C. C. 108; *Miller* v. *Little*, 2 B. 259.

Effect of Wills Act.

The effect of the Wills Act upon such a gift is to leave it specific, though it includes all the stock of the particular description belonging to the testator at his death. *Lady Langdale* v. *Briggs*, 8 D. M. & G. 391; *Goodlad* v. *Burnett*, 1 K. & J. 341; *Trinder* v. *Trinder*, L. R. 1 Eq. 695; *Bothamley* v. *Sherson*, 20 Eq. 304; *In re Slater; Slater* v. *Slater*, (1907) 1 Ch. 665.

Specific gift of stock where testator has smaller amount.

A specific gift of a sum of stock, where it turns out that the testator had only a smaller sum, passes the smaller sum. *Ashton* v. *Ashton*, 3 P. W. 384; *Gordon* v. *Duff*, 3 D. F. & J. 662.

Gifts of long annuities.

Long annuities were a form of property which proved very puzzling to testators. They also puzzled the Courts and were the occasion of a good deal of very doubtful law. The particular difficulties which arose upon gifts of these annuities are not likely to arise now, and it will be sufficient to give references to the principal cases. *Fonnereau* v. *Poyntz*, 1 B. C. C. 471; explained 6 Ves. 400; *Colpoys* v. *Colpoys*, Jac. 451; *Boys* v. *Williams*, 2 R. & M. 688; commented on in *Gordon* v. *Duff*, 3 D. F. & J. 662; *A.-G.* v. *Grote*, 2 R. & M. 699.

Gift of part of specific fund.

A gift of a part of a specific fund is specific. *Ford* v. *Fleming*, 1 Eq. Ca. Ab. 302, pl. 3; 2 P. W. 469; *Nelson* v. *Carter*, 5 Sim. 530; *Oliver* v. *Oliver*, 11 Eq. 506; *McClellan* v. *Clark*, 50 L. T. 616.

So, too, a gift of a specific thing to be sold and divided in definite shares among several persons is a gift of specific legacies. *Page* v. *Leapingwell*, 18 Ves. 463; *Jeffrey's Trusts*, L. R. 2 Eq. 68.

Gift of money out of money.

Similarly, a gift of money "out of" specific money, or of stock "out of" specific stock, is specific; as, for instance, money out of the dividends of stock, or money out of money invested in stock. *Drinkwater* v. *Falconer*, 2 Ves. Sen. 623; *Morley* v. *Bird*, 3 Ves. 628; *Hosking* v. *Nicholls*, 1 Y. & C. C. 478; *Badrick* v. *Stevens*, 3 B. C. C. 431; *Mullins* v. *Smith*, 1 Dr. & Sm. 204.

Money out of stock.

On the other hand, a gift of money out of stock is not specific, but demonstrative. *Kirby* v. *Potter*, 4 Ves. 748; *Deane* v. *Test*, 9 Ves. 146.

Independent gift followed by a direction to pay out of a certain fund.

If there is an independent gift of money, followed by a direction to pay it out of certain specific moneys, the legacy is demonstrative. *Roberts* v. *Pocock*, 4 Ves. 150; *Acton* v. *Acton*, 1 Mer. 178.

An appointment of a fund expressed to be subject to legacies previously given to objects of the power, may have the effect of making the legacies demonstrative, payable primarily out of the appointed fund. *Disney* v. *Crosse*, 2 Eq. 592.

Gift of "100*l.* of my funded property."

Where the gift is not "out of" but "of" only, as "100*l.* of my funded property," it is more difficult to decide under which of the two last heads the gift falls. It seems, however, that if the testator estimates his stock in money, a gift of "100*l.* of my stock" is specific. *Davies* v. *Fowler*, 16 Eq. 308; see *Brennan* v. [illegible]*man*, I. R. 2 Eq. 321.

But if he does not, and makes merely a gift of "100*l.* of my funded property," it is equivalent to a gift of money out of stock, and is therefore not specific. *Lambert* v. *Lambert*, 11 Ves. 607.

Legacy may be specific yet not subject to ademption.

It has been said that a specific legacy must be liable to ademption, and that therefore there could not be a specific legacy of a thing which the testator had not at the date of the will. See *Parrott* v. *Worsfold*, 1 J. & W. 594.

But it is now clear that a testator may make a specific gift of a thing of which he contemplates the acquisition, as, for

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instance, of the stock he may die possessed of. *Fountaine* v. *Tyler*, 9 Pr. 94; *Stewart* v. *Denton*, 4 Dougl. 219; 2 Chitty, 456; *Stephenson* v. *Dowson*, 3 B. 342; *Queen's Coll.* v. *Sutton*, 12 Sim. 521.

Whether a gift of a sum "invested" in a particular way is specific.

Whether the gift of a sum "invested" in a particular way is specific or not, depends on the question whether the testator meant the legatee to have the sum however invested, or whether the actual investment is the important part of the description.

Thus, a gift of "the" 7,000*l.* out on mortgage is clearly specific. *Gardner* v. *Hatton*, 6 Sim. 93.

A bequest of 1,000*l.* described as "now" invested or even only as invested in a certain way is specific. *Harrison* v. *Jackson*, 7 Ch. D. 339 (where *Le Grice* v. *Finch*, 3 Mer. 50, is disapproved); *McClellan* v. *Clark*, 50 L. T. 616; *Re Robe; Slade* v. *Walpole*, 61 L. T. 497; *In re Pratt; Pratt* v. *Pratt*, (1894) 1 Ch. 491; *In re Nottage; Jones* v. *Palmer* (No. 2), (1895) 2 Ch. 657; *In re Slater; Slater* v. *Slater*, (1907) 1 Ch. 665. See *Sparrow* v. *Josselyn*, 16 B. 135.

A gift of 3,000*l.* "invested in Indian security" has upon the general language of the will been held to be demonstrative. *Mytton* v. *Mytton*, 19 Eq. 30; see *Bevan* v. *A.-G.*, 4 Giff. 361; 2 N. R. 52; *McClellan* v. *Clark*, *supra*; *In re Pratt; Pratt* v. *Pratt*, *supra*.

But if the gift is of 300*l.*, *or thereabouts*, invested by the testatrix in a certain way, the words "or thereabouts" show that the investment is the important part of the gift. *Kermode* v. *Macdonald*, L. R. 1 Eq. 457; *ib.* 3 Ch. 584.

Examples of specific gifts.

The following gifts have been held to be specific:—

A gift of a particular debt, or of the money due on a particular security; as, for instance, of "my mortgage," or "the money now owing to me from A." *Innes* v. *Johnson*, 4 Ves. 568; *Sidebotham* v. *Watson*, 11 Ha. 170; *Ellis* v. *Walker*, Amb. 309; *Smallman* v. *Goolden*, 1 Cox, 329; *Gardner* v. *Hatton*, 6 Sim. 93; *Re Bridle*, 4 C. P. D. 336; see *Sidney* v. *Sidney*, 17 Eq. 65.

A gift of the interest of money on a particular security. *Ashburner* v. *Macguire*, 2 B. C. C. 108.

A gift of a sum of money "which" is secured in a particular way. *Chaworth* v. *Beech*, 4 Ves. 556; *Gillaume* v. *Adderley*, 15 Ves. 384; *Davies* v. *Morgan*, 1 B. 405.

A gift of money described as "being" on a particular security. *Nelson* v. *Carter*, 2 Sim. 530; *Ford* v. *Fleming*, 2 P. W. 469; 1 Eq. Ca. Ab. 302, pl. 3. See *Sparrow* v. *Josselyn*, 16 B. 135; *Smith* v. *Pybus*, 9 Ves. 566.

A legacy directed to be paid out of the amount of a debt due to the testator is a demonstrative legacy. *Vickers* v. *Pound*, 6 W. R. 580; 4 Jur. N. S. 543; 6 H. L. 885.

Forgiveness of debt.

Forgiving a debt amounts to a specific gift of the debt. *In re Wedmore; Wedmore* v. *Wedmore*, (1907) 2 Ch. 277.

Secret trust of specific part of residue.

If a residuary legatee has by arrangement with the testator outside the will accepted a trust as to a specific part of the residue, that part is in effect a specific legacy. *In re Maddock; Llewelyn* v. *Washington*, (1902) 2 Ch. 220.

Legacies in exercise of power.

Upon the question whether legacies given in supposed exercise of a power which the testator cannot exercise are specific; see *Walker* v. *Laxton*, 1 Y. & J. 557; *Re Young; Trye* v. *Sullivan*, 52 L. T. 754.

Legacies Connected with Land.

Devise of land is specific whether residuary or not.

A devise of lands, whether by specific description or by residuary devise, is specific. *Hensman* v. *Fryer*, L. R. 3 Ch. 420; *Lancefield* v. *Iggulden*, 10 Ch. 136.

Devise on trust to sell and divide.

A devise of land to be sold and divided among certain persons makes them specific legatees. *Page* v. *Leapingwell*, 18 Ves. 463; *Newbold* v. *Roadknight*, 1 R. & M. 677.

Gift of rent-charge.

The gift of a rent-charge or annuity to be paid out of land with powers of distress is specific. *Long* v. *Short*, 1 P. W. 403; *Davenhill* v. *Fletcher*, Amb. 244; *Creed* v. *Creed*, 11 Cl. & F. 491; *Patching* v. *Barnett*, 51 L. J. Ch. 74; see *Poole* v. *Heron*, 42 L. J. Ch. 348.

Of sum to be paid out of land.

But a mere gift of an annual sum or of a legacy to be paid out of real estate will not be specific. *Mann* v. *Copland*, 2 Mad. 223; *Fowler* v. *Willoughby*, 2 S. & St. 354; *Colvile* v. *Middleton*, 3 B. 570.

Legacy with mere charge on land.

Nor will a gift of a legacy or an annuity with a mere charge on land be specific. *Willox* v. *Rhodes*, 2 Russ. 452; *Davies* v. *Ashford*, 15 Sim. 42; *Paget* v. *Haish*, 1 H. & M. 663.

Trust to raise a sum out of land.

But a trust to raise a sum of money out of land, which sum is then given, is a specific legacy. *Welby* v. *Rockcliffe*, 1 R. & M. 571; *Dickin* v. *Edwards*, 4 Ha. 273.

So, too, a direction to pay a sum out of land, the only gift being in the direction to pay, is specific. *Spurway* v. *Glyn*, 9 Ves. 483.

In such a case the fact that the personalty is given after payment of legacies will not make the gift of a sum out of the proceeds of sale of realty demonstrative. *Rickets* v. *Ludley*, 3 Russ. 418.

Effect of directions in the will on legacies in themselves specific.

A general direction to pay the legacies "hereinafter" given may make a legacy to be paid out of the proceeds of sale of real estate demonstrative. *Hodges* v. *Grant*, 4 Eq. 140; see *Fream* v. *Dowling*, 20 B. 624; 4 Eq. 145, n.

And where a legacy was given out of a fund which was not available till the death of A, but there was a direction that it was to be paid with the other legacies, it was held demonstrative. *Williams* v. *Hughes*, 24 B. 474.

Whether a Gift is Specific or Residuary.

Whether a gift is specific or residuary.

A gift of the whole of the testator's personal estate may be specific. *Powell* v. *Riley*, 12 Eq. 175; *Roffey* v. *Early*, 42 L. J. Ch. 472. And the fact that the testator provides another fund for payment of debts affords a strong argument that the personal estate was intended to be specifically given. See the cases cited under the head of Exoneration of Personalty.

But where a testator, after directing his executors to pay his debts, and giving legacies, gave all his personal estate to A, with certain exceptions, and gave the residue of his estate to his executors on certain trusts, the gift of the personalty was held not to be specific. *Robertson* v. *Broadbent*, 8 App. C. 812.

Enumeration of specific things.

A mere enumeration of specific things in a residuary bequest will not make the gift of those things specific. *Taylor* v. *Taylor*,

6 Sim. 246; *Sutherland* v. *Cooke*, 1 Coll. 498; *Fielding* v. *Preston*, 1 De G. & J. 438; *Fairer* v. *Park*, 3 Ch. D. 309; *In re Green*; *Baldock* v. *Green*, 40 Ch. D. 610.

A direction that certain funds are in certain events to fall into the residue will not make the gift of those funds specific. *In re Lyne's Estate*, 8 Eq. 482.

A gift of residue including certain specified property will not make the gift of that property specific. *In re Tootal's Estate*, 2 Ch. D. 628; *Macdonald* v. *Irvine*, 8 Ch. D. 101.

Effect of words "together with," "as well as," &c.

If it can be gathered that the principal object of the testator is to give the specific things, and the residue is thrown in; if, for instance, the residue is added by such words as "together with," or "as well as," the gift of the specific things is specific. *Hill* v. *Hill*, 11 Jur. N. S. 806; *Langdale* v. *Esmonde*, I. R. 4 Eq. 576; see *Clarke* v. *Butler*, 1 Mer. 304.

Possibly if the enumeration of specific things comes after the gift of the residue, the same result may follow. *Bethune* v. *Kennedy*, 1 M. & Cr. 114; *Mills* v. *Brown*, 21 B. 1.

The subject of residuary gifts will be found discussed in Chapter XXIII.

Gifts of Aliquot Parts of a Fund.

Gift of fund in aliquot parts.

If a testator, purporting to dispose of a specific fund of 3,000*l*., gives one-third to A, one-third to B, and one-third to C, each legacy is specific, and each legatee takes a third, whatever the fund may turn out to be, whether more or less than 3,000*l*.

Where the gift is not in form in aliquot parts, it may appear that that is in effect the intention. See *Chambers* v. *Chambers*, Mos. 333, commented on in *Booth* v. *Alington*, 6 D. M. & G. 613; and *Cordell* v. *Noden*, 2 Vern. 148, commented on in *Smith* v. *Fitzgerald*, 3 V. & B. 2.

Division of fund in specific sums.

If the fund is stated by the testator to be 3,000*l*., and he gives 1,000*l*. to each of three legatees, this is in effect the same as if he had given it in aliquot parts. If the fund is deficient, the legatees abate rateably; and if the gift of one of the sums fails, the failure does not enure for the benefit of the legatees

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of the other sums. *Page* v. *Leapingwell*, 18 Ves. 463; *Hazlewood* v. *Green*, 28 B. 1; *In re Jeaffreson's Trusts*, L. R. 2 Eq. 276; *Walpole* v. *Apthorp*, 4 Eq. 37; see *In re Craddas*; *Craddas* v. *Smith*, (1900) 1 Ch. 730.

Effect of lapse of appointed sums.

If the fund is one over which the testator has a power of appointment, the case, as regards the last point, appears to be different. If the testator overestimates the fund and appoints it in specific sums, and the appointment of one of such sums fails, the failure enures for the benefit of the other legatees so far as necessary to make up the sums appointed to them. *Eales* v. *Drake*, 1 Ch. D. 217.

When gift of residue of specific fund specific.

Where the sum last given out of a specific fund is given as the surplus or residue of the fund, a contest has frequently arisen whether the so-called surplus is not in effect a gift of the specific sum remaining.

If the sum last given is stated in figures but is also described as the residue of the fund, or the residue of the fund is given and the amount is then stated in figures, this is a specific gift. *Hazlewood* v. *Green*, 28 B. 1; *In re Jeaffreson's Trusts*, L. R. 2 Eq. 276; *Walpole* v. *Apthorp*, 4 Eq. 37.

And the authorities appear to establish that, when the testator shows that he is dealing with a fund of a specific amount, and gives a sum to A, a sum to B, and the residue to C, and there is no contrary intention, the residue is as specific as the named sums. *Page* v. *Leapingwell*, 18 Ves. 463; *Ex parte Chadwin*, 3 Sw. 380; *Easum* v. *Appleford*, 5 M. & C. 56; *Wright* v. *Weston*, 26 B. 429; *Elves* v. *Causton*, 30 B. 554; *Walpole* v. *Apthorp*, 4 Eq. 37; *Baker* v. *Farmer*, 3 Ch. 537, p. 540. See *Miller* v. *Huddlestone*, 6 Eq. 65.

Testator not dealing with a fund of definite amount.

To make the gift of the residue specific it must appear that the testator is dealing with a fund which he conceives to be of a certain amount, otherwise there is no ground for saying that the residue is specific. *Falkner* v. *Butler*, Amb. 514; *Petre* v. *Petre*, 14 B. 197; *Vivian* v. *Mortlock*, 21 B. 252; *De Lisle* v. *Hodges*, 17 Eq. 441.

If debts are directed to be paid out of the fund, or if the residue has to bear payments which must be of uncertain

amount, the residue is not specific. *Harley* v. *Moon*, 1 Dr. & S. 623; *In re Cu[illegible]. Bjorkman* v. *Kimberley*, 36 W. R. 752.

And if, the fund being stock, the testator makes gifts partly of stock and partly of money, a gift of the residue is not specific. *Carter* v. *Taggart*, 16 Sim. 423

In *In re Harries' Trust*, Jo. 199, where the fund was policy moneys, the appointment of definite sums exhausted the amount insured and the residue could only carry bonuses of uncertain amount, the residue was therefore, not specific. See, too, *Corballis* v. *Corballis*, 9 L. R. Ir. 309.

There may, of course, be special circumstances or indications of intention which will make the gift of the residue of a specific fund specific. *Lakin* v. *Lakin*, 13 W. R. 704; *Re Bringloe's Trusts*, 26 L.T. 58; *Fee* v. *McManus*, 15 L.R. Ir. 31.

Gift of sum part of larger sum.

A gift of a sum of 30,000*l*., "part of" 120,000*l*., is a gift of 30,000*l*., though the fund may turn out less than 120,000*l*. *Booth* v. *Alington*, 6 D. M. & G. 613.

Effect of gifts out of uncertain amount.

Where a testator is dealing with a specific fund of uncertain amount and directs legacies to be paid out of it, the legacies are not aliquot parts of the fund. They must abate rateably if the fund is insufficient to pay them. On the other hand, if the fund is more than sufficient to pay them, they do not share in the increase. Lastly, if one of the legacies fails by lapse, the lapse does not benefit the residuary legatee until the other legacies have been paid in full. *In re Tunno; Raikes* v. *Raikes*, 45 Ch. D. 66.

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A bequest of "plate, plated goods, books, pictures, together with all accounts, papers and effects that may be in my possession at the time of my death," and another bequest of horses, cattle, cows, sheep and farming implements, are specific, and there being no residuary disposition, the residue of personalty if any, is undisposed of. *McKidd* v. *Brown*, 5 Gr. 633.

A bequest of stock, cattle, etc., "upon or belonging to" certain lands is specific. *Rudd* v. *Harper*, 16 O.R. 422.

A bequest to a widow of "the full control of all my real and personal estate, stock and implements during her lifetime" is specific as to stock and implements. *Augustine* v. *Schrier*, 18 O.R. 192.

A direction to sell real and personal property and pay legacies thereout makes them specific. *Bleeker* v. *White*, 23 Gr. 163.

A bequest of "$5,000 of the money to which I may be entitled as my share of the partnership business," to be invested and the income to be applied to the maintenance of the testator's daughter, with a provision that if the income should fall short of $400 it should be supplemented out of the general estate, is demonstrative. *Day* v. *Harris*, 1 O.R. 147.

Demonstrative.

A bequest of "the interest on £1,000, out of the moneys invested by me in the Montreal Bank in Canada, to be annually paid to her . . . during her life, and at her death

the above £1,000 to be equally divided amongst, etc.," the testator having much more than that quantity of the stock at the time of his death, is not specific but demonstrative. *Re Logan*, 3 M.L.R. 49; 4 M.L.R. 19.

CHAPTER XX.

CUMULATIVE AND SUBSTITUTIONAL LEGACIES.

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Legacies by same instrument of equal amount;

I. LEGACIES of equal amount given by the same instrument are merely repetitions. *Greenwood* v. *Greenwood*, 1 B. C. C. 30, n.; *Garth* v. *Meyrick*, 1 B. C. C. 30; *Holford* v. *Wood*, 4 Ves. 75; *Manning* v. *Thesiger*, 3 M. & K. 29; *Brine* v. *Ferrier*, 7 Sim. 549; *Early* v. *Benbow*, 2 Coll. 342; *Early* v. *Middleton*, 14 B. 453.

But there may be an intention to give both. *Barkenshaw* v. *Hodge*, 22 W. R. 484, where the gift was to trustees, and the legacies were introduced by the words "upon trust to pay," and "upon further trust to pay," &c.

of unequal amount.

If the legacies are not equal, the legatee is entitled to both. *Yockney* v. *Hansard*, 3 Ha. 622; *Curry* v. *Pile*, 2 B. C. C. 225; *Baylee* v. *Quin*, 2 Dr. & War. 116; *Adnam* v. *Cole*, 6 B. 353.

The rules with regard to cumulative legacies do not apply to the case of a pecuniary gift and a residue given to the same person. In such a case the legatee is entitled to both. *Kirkpatrick* v. *Bedford*, 4 App. C. 96.

Legacies by different instruments.

II. Legacies of equal, less, or greater amount, given by different instruments, as by will and codicil, to the same person, are *primâ facie* cumulative. *Hooley* v. *Hatton*, 1 B. C. C. 390, n.; *Lee* v. *Pain*, 4 Ha. 201, 216; *Roch* v. *Callen*, 6 Ha. 531; *Cresswell* v. *Cresswell*, 6 Eq. 69; *Wilson* v. *O'Leary*, 12 Eq. 525; 7 Ch. 448; *Walsh* v. *Walsh*, I. R. 4 Eq. 396; *In re Armstrong; Mayne* v. *Woodward*, 31 L. R. Ir. 154.

Bequests of a share of residue by will and of a pecuniary legacy by a codicil are, of course, cumulative. *Gordon* v. *Anderson*, 4 Jur. N. S. 1097; *Ledger* v. *Hooker*, 18 Jur. 481.

It makes no difference that the codicil recites the gift by will. *Guy* v. *Sharp*, 1 M. & K. 589.

The fact, that some legacies in the codicil are expressed to be in addition, affords an argument, that the others are substitutional, but is not conclusive. *Hooley* v. *Hatton*, 1 B. C. C. 390, n.; *Allen* v. *Callow*, 3 Ves. 289; *Mackenzie* v. *Mackenzie*, 2 Russ. 272; *Wray* v. *Field*, 2 Russ. 257; 6 Mad. 300; *Barclay* v. *Wainwright*, 3 Ves. 462.

The fact that a legacy given by a codicil is expressed to be in addition to a legacy given by the will does not show that it is not also in addition to a legacy by a prior codicil. *Spire* v. *Smith*, 1 B. 419; *Watson* v. *Reed*, 5 Sim. 431; see *Surrey* v. *Rumney*, 5 De G. & S. 698.

III. It may, however, appear that the gift by the later instrument is intended to be substitutional. This may be shown:— Legacies by different instruments will be substitutional—

1. By the form of the second instrument.

a. If the instrument by which the second gift is made is not a codicil, but is described as a last will and testament, the presumption is strong that it was intended to be in substitution so far as it goes for the prior instrument. *Jackson* v. *Jackson*, 2 Cox, 35; *Kidd* v. *North*, 14 Sim. 463; 2 Ph. 91; *Tuckey* v. *Henderson*, 33 B. 174. See *In bonis Bryan*, (1907) P. 125. if the instruments themselves are substitutional,

b. If the additional instrument recites that the testator has not time to alter his will, legacies given by it will be substitutional. *Russell* v. *Dickson*, 4 H. L. 293.

c. If the additional instrument is treated as explanatory of and to be incorporated into the will, the case may be brought within the rule as to additional gifts in the same instrument. *Duke of St. Albans* v. *Beauclerk*, 2 Atk. 636; *Fraser* v. *Byng*, 1 R. & M. 90.

And in the same way several testamentary papers may be so connected together as to be in fact one instrument. *Brine* v. *Ferrier*, 7 Sim. 549.

The same will be the case where there is a gift to a person with a different gift written in the margin of the will. *Martin* v. *Drinkwater*, 2 B. 215.

2. By the contents of the second instrument. or mere repetitions of each other,

For instance, where the second instrument is not a codicil but a testamentary paper, and in effect makes the same

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dispositions as a prior testamentary paper. *Gillespie* v. *Alexander*, 2 S. & St. 145; *A.-G.* v. *Harley*, 4 Mad. 263; *Hemming* v. *Gurney*, 2 S. & St. 311; 1 Bl. N. S. 479.

So one codicil may appear to be a mere repetition of another; if, for instance, both are of the same date and contain the same provisions in all respects. *Whyte* v. *Whyte*, 17 Eq. 50.

So if, though not of the same date, the legatees are the same, and certain specific legacies, as well as the residue, are given by both. *Duke of St. Albans* v. *Beauclerk*, 2 Atk. 636; see *Coote* v. *Boyd*, 2 B. C. C. 521; *Campbell* v. *Earl of Radnor*, 1 B. C. C. 271; *Roxburgh* v. *Fuller*, 13 W. R. 39.

if the terms of the second gift show that it was meant to be substitutional.

3. By the character of the second gift itself:—

a. If the second gift only adapts the bounty to circumstances that have happened; as, for instance, the death of prior legatees. *Barclay* v. *Wainwright*, 3 Ves. 462; *Allen* v. *Callow*, 3 Ves. 289; *Osborne* v. *Duke of Leeds*, 5 Ves. 369.

b. If the second gift can be looked upon as explanatory of the prior gift. *Moggridge* v. *Thackwell*, 3 Ves. Jun. 473.

c. If by a codicil the testator revokes a portion of a prior gift, and then repeats the rest, so that the repetition may be explained as *ex abundanti cautelâ*. *Benyon* v. *Benyon*, 17 Ves. 34; *Hinchcliffe* v. *Hinchcliffe*, 2 Dr. & S. 96.

d. If the second gift is coupled with a gift of some specific thing already given, this shows it to be substitutional. *Carrie* v. *Pye*, 17 Ves. 462; see *Lord Mayor of London* v. *Russell*, Finch, 290; explained 6 Ir. Ch. 131.

e. And generally it seems that the difference in the way in which the two gifts are given is in favour of their being cumulative. *Hodges* v. *Peacock*, 3 Ves. 735; *Lee* v. *Pain*, 4 Ha. 201. Though, on the other hand, if the two gifts are of the same amount, but given to different trustees, the argument is the other way. *Benyon* v. *Benyon*, 17 Ves. 34.

f. The testator may show by a reference to a gift in one codicil as a sufficient provision, that the gift so given was all the legatee was intended to have. *Robley* v. *Robley*, 2 B. 95.

g. The presumption that two legacies given by two codicils are cumulative is rebutted by the fact that both are expressed

to be in substitution for a legacy given by the will. *In re Armstrong; Mayne* v. *Woodward*, 31 L. R. Ir. 154.

IV. Gifts by different instruments of the same amount and expressed to be given from the same motive are substitutional. *Benyon* v. *Benyon*, 17 Ves. 34. Gifts of the same amount given from the same motive are substitutional.

It must, however, be clear that the testator is expressing a motive and not merely giving a description; thus, in the case of gifts of equal amount to a "servant," the term servant is merely descriptive. *Roch* v. *Callen*, 6 Ha. 531; *Suisse* v. *Lowther*, 2 Ha. 424; *Wilson* v. *O'Leary*, 12 Eq. 522; 7 Ch. 448.

If, however, the gifts are not of the same amount they are cumulative. *Hurst* v. *Beach*, 5 Mad. 352.

V. How far substituted or additional legacy subject to conditions of original legacy. Substituted legacy when subject to conditions of original legacy.

"Where a pecuniary legacy is given in a will or codicil expressly in lieu of one previously given of a different value, the Court usually adopts the interpretation that the alteration is intended to apply to the amount of the legacy only, and that therefore the new amount is to be substituted for the amount of the original legacy, and becomes subject to the same conditions and limitations." *In re Boden; Boden* v. *Boden*, (1907) 1 Ch. 132, 149.

The simplest illustration of this rule is where a legacy is given by will free from legacy duty, and by codicil a larger or smaller legacy to the same person is substituted for it. The legacy given by the codicil is also free from legacy duty. It matters not whether the legacy given by the codicil is given merely in substitution for the legacy given by the will or whether the codicil revokes the legacy given by the will and gives a fresh legacy in lieu thereof. *Cooper* v. *Day*, 3 Mer. 154; *Earl of Shaftesbury* v. *Duke of Marlborough*, 7 Sim. 237; *Fisher* v. *Brierley*, 30 B. 267. Illustrations of rule.

In a similar case the substituted legacy may be payable out of the same fund or at the same time as the original legacy. *Bristow* v. *Bristow*, 5 B. 289; *Giesler* v. *Jones*, 26 B. 418.

The rule does not apply where the legacy given by the codicil is given to a different person; for instance, where the testator by a Limits of the rule.

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codicil gives a legacy to his son-in-law "instead of" the legacies to his daughter, who had died since the date of the will. *Chatteris* v. *Young*, 2 Russ. 183; *Re Gibson*, 2 J. & H. 656.

Where a testator specifically disposed of his personal estate and directed his debts to be paid out of his real estate, which he devised in trust to sell and pay certain legacies, and then by a codicil revoked some of the legacies given by the will, and gave other legacies "instead thereof" to the same legatees and also gave fresh legacies, but did not disturb the gift of the personal estate, it was held that the legacies given by the codicil must be intended to be paid out of the proceeds of sale of the real estate. *Leacroft* v. *Maynard*, 3 B. C. C. 233; 1 Ves. Jun. 279.

Legacy not expressed to be substitutional.

Where a codicil revokes a legacy given by the will and gives the same legatee a different legacy, which is not expressed to be in substitution for the revoked legacy, it is easier to arrive at the conclusion that the legacy given by the codicil is a new and independent gift, and not subject to the incidents of the revoked legacy. *Burrows* v. *Cottrell*, 3 Sim. 375.

Option to take A or B only arises if legatee entitled to A.

Where an annuity was given to the testator's wife so long as she should continue his widow, with an option to take in lieu thereof a legacy, and the marriage was dissolved in the testator's lifetime, it was held that, as the lady was not the testator's widow, she could not take the annuity, and that she therefore had no option and could not take the legacy either. *In re Boddington*; *Boddington* v. *Clairat*, 25 Ch. D. 685; see p. 689, where Lord Selborne expresses the opinion that the rule does not depend on the circumstance of the original gift being by will and the substitutional gift by codicil, but on the natural inference from a gift being given by way of substitution or in lieu of another.

Rule as to additional legacies.

Where a testator gives a legacy by his will and by a codicil he gives to the same legatee what is expressed to be a further sum, or a sum in addition to that given by the will, then the additional legacy is subject to the same provisions as regards legacy duty (*a*), separate use (*b*), time of payment (*c*), fund out of which it is payable (*d*), and conditions as to vesting (*e*) as the original legacy, unless there is an intention expressed which prevents the application of the rule. *Johnstone* v. *Earl of*

Harrowby, 1 D. F. & J. 183(*a*); *Day* v. *Croft*, 4 B. 561(*b*); *Re Colyer; Middleton* v. *Snelling*, 55 L. T. 344(*c*); *Crowder* v. *Clowes*, 2 Ves. Jun. 449(*d*); *Crowder* v. *Clowes, supra; Re Benyon; Benyon* v. *Grieve*, 51 L. T. 116 (*e*).

And this rule applies even if the legacy given by the codicil is not expressed to be in addition, and there is no reference to the legacy given by the earlier instrument. *Johnstone* v. *Earl of Harrowby*, 1 D. F. & J. 183; see *Re Smith*, 2 J. & H. 594.

As in the case of substitutional legacies, the rule is not limited to additional gifts by a different instrument. For instance, if an annuity is to be paid out of income to A, and in certain events a further annuity is given to A, the presumption is that the second annuity is also to be paid out of income. *Miller* v. *Huddlestone*, 3 Mac. & G. 513, 530, 531; see, too, *In re Boden; Boden* v. *Boden*, (1907) 1 Ch. 132.

But the rule must be limited to what may be called administrative provisions. Therefore, where a legacy is given for life by will, and by codicil an additional legacy is given in terms which create an absolute interest, the limitations of the original legacy cannot be imported into the gift of the additional legacy so as to cut the latter down to an interest for life (*a*), and this applies also to a substitutional legacy(*b*). *In re Mores' Trust*, 10 Ha. 171; *Mann* v. *Fuller*, Kay, 624; *Hill* v. *Jones*, 37 L. J. Ch. 465(*a*); *Hargreaves* v. *Pennington*, 12 W. R. 1047(*b*). Limits of rule.

Primâ facie, a gift by a codicil in absolute terms in lieu of a gift by the will is not subject to a gift over to which the original gift was subject (*a*); but it may be so if an intention that it should be so appears in the will; if, for instance, the testator states that the only object of the substitutional gift was to alter the amount of the original gift (*b*). *Alexander* v. *Alexander*, 5 B. 518 (*a*); *Prescott* v. *Edmunds*, 4 L. J. (O.S.) Ch. 111 (*b*); see, too, *Haley* v. *Bannister*, 23 B. 336; *Donnellan* v. *O'Neill*, I. R. 5 Eq. 523.

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Cumulative legacies.

A bequest to an executor in one clause of a will of the interest on certain funds to compensate him for his trouble and expense in attending to the will, and a bequest to the same executor in another clause of $100 per annum for going from H. to T. to submit his accounts from time to time, are not inconsistent, and the executor may take both. *Hellem* v. *Severs*, 24 Gr. 320.

A bequest in a will of a residue to the churchwardens of a church for the general purposes of the church, and a bequest in a codicil of a legacy to named trustees as an endowment for the same church are not substitutional. *Ball* v. *Rector, etc., of Church of Ascension*, 5 O.R. 386.

A bequest of $150 a year to a widow *durante viduitate* in lieu of dower charged upon the real estate, and a charge in her favour of $100 a year on the fund produced by the sale of the realty and personalty which was bequeathed to two sons subject to each paying the widow $50 a year are cumulative. *Edwards* v. *Pearson*, 4 O.R. 514.

A bequest of an annuity to a widow, and subject thereto a bequest of a blended fund to a legatee, with the provision that if he died under thirty the fund should be distributed according to the Statute of Distribution, entitles the widow to her distributive share as well as the annuity. *Re Quimby*, 5 O.R. 738.

A devisee was directed by the will to make a competent provision for the testator's niece. By a codicil made on the same day the testator devised to his niece a parcel of land. Held, that the devises were cumulative. *Baby* v. *Miller*, 1 E. & A. 218.

Substitutional

Where a testator gave two legacies to charities, both to be paid out of certain stock, and by a codicil reduced the legacy to one charity and gave the amount by which it was reduced to a third charity, it was held that the new legacy came out of the stock. *Smith* v. *Seaton*, 17 Gr. 397.

Though the presumption is that gifts given by a will and codicil are cumulative, it gives way to a plain intention

Therefore, when a testator gave to his daughter one-fourth of a share in his estate on certain terms, and by a codicil gave her "that share or division of my estate as referred to in a former will, in land," it was held that the devise was substitutional for the bequest. Held, further, that she took the land in fee and not subject to the terms of the bequest. *Scott* v. *John*, 4 O.R. 457.

CHAPTER XXI.

THE INCIDENTS ATTACHING TO SPECIFIC AND GENERAL LEGACIES.

I. ADEMPTION.

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Ademption of specific legacy.

A SPECIFIC gift is adeemed if at the testator'a death the subject-matter of the gift has been destroyed by the act of God or converted into something else by the act of the testator or by duly constituted authority. *In re Slater; Slater* v. *Slater,* (1907) 1 Ch. 665.

Ademption destroys charge.

If the gift is adeemed a charge imposed upon it is also adeemed. *Cowper* v. *Mantell,* 22 P. 223.

Ademption by loss at sea,

Thus a gift of chattels is adeemed if they are lost at sea with the testator. *Durrant* v. *Friend,* 5 De G. & S. 343.

by Act of Parliament.

So a devise of advowsons is adeemed by an Act of Parliament abolishing the advowsons and giving compensation to the owners. *Frewen* v. *Frewen,* 10 Ch. 610.

Specific devise adeemed by sale.

A specific devise of land is adeemed if the land is afterwards sold, though the purchase money may be impressed with a trust for reinvestment in land. *In re Bagot's Settlement,* 31 L. J. Ch. 772.

Sale or conversion of security given.

If a particular security is given and the testator sells it or converts it into something substantially different, for instance, from debentures of a company into debenture stock of the same company, tbe gift is adeemed. *Humphreys* v. *Humphreys,* 2 Cox, 184; *Harrison* v. *Jackson,* 7 Ch. D. 339; *Macdonald* v. *Irvine,* 8 Ch. D. 101; *In re Lane; Luard* v. *Lane,* 14 Ch. D. 856; *Manton* v. *Tabois,* 30 Cb. D. 92.

Contract for sale.

A contract for sale entered into after the date of the will and binding on the testator at his deatb, tbough not completed till afterwards, is sufficient to cause ademption. *Watts* v. *Watts,* 17 Eq. 219.

Rights of specific donee as to rents till completion.

In such a case the specific legatee is entitled to enjoy the property and to take the rents and profits until the time for completion of the sale arrives, or, if no time is fixed for completion, until the time when the sale ought reasonably to be completed. *Townley* v. *Bedwell*, 14 Ves. 591; *Watts* v. *Watts*, *supra*.

Contract not binding.

An offer not accepted at the death or a contract not enforceable against the testator or rescinded by the purchaser on the ground that the testator has no title will not cause ademption. *In re Pearce*; *Roberts* v. *Stephens*, 8 R. 805; *Crowe* v. *Menton*, 28 L. R. Ir. 519; *In re Thomas*; *Thomas* v. *Howell*, 34 Ch. D. 166. See the Chapter on Conversion.

Option to purchase.

In some cases specific property has been given which was subject to a lease containing an option of purchase. In such cases, if the property is specifically given after the option has been created, the specific donee takes the property or the proceeds of sale, if the option is exercised after the testator's death. *Drant* v. *Vause*, 1 Y. & C. C. 580; *Emuss* v. *Smith*, 2 De G. & S. 722; *In re Pyle*; *Pyle* v. *Pyle*, (1895) 1 Ch. 724; *Duffield* v. *McMaster* (1896), 1 Ir. 370; see *In re Isaacs*; *Isaacs* v. *Reginall*, (1894) 3 Ch. 506.

But if the testator creates the option after the date of his will its exercise after his death adeems the gift. *Weeding* v. *Weeding*, 1 J. & H. 424.

The case of a gift of a lease with provisions for compensation if the lease is determined is different. In such a case the legatee is entitled to the compensation. *Coyne* v. *Coyne*, I. R. 10 Eq. 496.

Transfer of security to testator.

Mere transfer of a security from trustees to the testater or from the testator into Court under an order in lunacy, though the gift is of a security described as in the testater's name, will not cause ademption. *Dingwell* v. *Askew*, 1 Cox, 427; *Clough* v. *Clough*, 3 M. & K. 296; *Jones* v. *Southall*, 32 B. 31; *In re Wood*; *Anderson* v. *London City Mission*, (1894) 2 Ch. 577; *Re Vickers*; *Vickers* v. *Mellor*, 81 L. T. 719.

And a request from the testator to his agents to sell, not acted upon till after the testater's death, does not cause ademption. *Harrison* v. *Asher*, 2 De G. & S. 436.

Slight alteration.

Nor will an alteration which leaves the thing substantially the same. Thus, conversion by the company of its shares into stock does not cause ademption. *Oakes* v. *Oakes*, 9 Ha. 666, 672; see *Partridge* v. *Partridge*, Ca. t. Talb. 226 (conversion of South Sea Stock into annuities by Act of Parliament); *Re Pilkington's Trusts*, 6 N. R. 246 (conversion of bonds into shares); *Longfield* v. *Bantry*, 15 L. R. Ir. 101; see *In re Slater*; *Slater* v. *Slater*, (1907) 1 Ch. 665.

As to the effect of the National Debt Conversion Act, 1888 (51 & 52 Vict. c. 2), upon specific gifts of 3 per cent. Annuities, see *Duke of Northumberland* v. *Percy*, (1893) 1 Ch. 298, *In re Howell-Shepherd*; *Churchill* v. *St. George's Hospital*, (1894) 3 Ch. 649.

No distinction between testator's property and appointed property.

For the purposes of ademption no distinction can be drawn between a testator's own property and property appointed under a general or special power. *In re Dowsett*; *Dowsett* v. *Meakin*, (1901) 1 Ch. 398; *In re Moses*; *Beddington* v. *Beddington*, (1902) 1 Ch. 100, 123; in D. P. *sub nom. Beddington* v. *Baumann*, (1903) A. C. 43.

Appointment of land ademed by sale.

Therefore, if land is appointed by will in terms appropriate only to land, and the land is afterwards sold either under a power in the settlement or under the Settled Land Acts, the devise is ademed. *Gale* v. *Gale*, 21 B. 349; *Blake* v. *Blake*, 15 Ch. D. 481; *In re Moses*; *Beddington* v. *Beddington*, (1902) 1 Ch. 100; in D. P. *sub nom. Beddington* v. *Baumann*, (1903) A. C. 43.

Intention to appoint property however invested.

In like manner, if particular bank annuities are appointed under a power and they are afterwards sold and the proceeds invested in a different manner, the gift is ademed unless the will shows an intention to appoint the property for the time being representing the bank annuities. *In re Johnstone's Settlement*, 14 Ch. D. 162, and *Willett* v. *Finlay*, 29 L. R. Ir. 156, 497, are explained in *In re Moses*; *Beddington* v. *Beddington*, (1902) 1 Ch. 100, 118, 120, 121, 123.

Ademption of gift of mortgage or debt.

On the same principle, if the testator makes a specific gift of a mortgage or other debt owing to him and the debtor afterwards pays it to the testator, whether voluntarily or under compulsion, the gift is ademed and a fresh debt subsequently

accrued due will not pass. *Ashburner* v. *Macguire*, 2 B. C. C. 108; *Stanley* v. *Potter*, 2 Cox, 180; *Fryer* v. *Morris*, 9 Ves. 360; *Gardner* v. *Hatton*, 6 Sim. 93; *Malcomn* v. *Ardagh*, I. R. 10 Eq. 445; *Aston* v. *Wood*, 13 L. J. Ch. 715; *In re Bridle*, 4 C. P. D. 339; see *Sidney* v. *Sidney*, 17 Eq. 65.

Conversion by lawful authority.

If the thing specifically given is converted by lawful authority, such as an order in lunacy, the gift is gone. *Jones* v. *Green*, 5 Eq. 555; *In re Fryer*; *Fryer* v. *Fryer*, 22 Ch. D. 622; see *A.-G.* v. *Marquis of Aldesbury*, 12 App. C. 672.

Effect of Lunacy Act, 1890, s. 123.

Having regard to the provisions of sect. 123 of the Lunacy Act, 1890 (53 Vict. c. 5), which is not, like sect. 119 of the Lunacy Regulation Act (16 & 17 Vict. c. 70), limited to land, it is probable that a sale under an order in lunacy would not adeem a specific legacy so far as the proceeds remain unapplied at the lunatic's death.

Unauthorised conversion.

There will be no ademption where the specific thing has been converted without authority. *Bason* v. *Brandon*, 8 Sim. 171; *Taylor* v. *Taylor*, 10 Ha. 475; *Jenkins* v. *Jones*, L. R. 2 Eq. 323; see *Bourne* v. *Groombridge*, 4 Mad. 495; *In re Larking*; *Larking* v. *Larking*, 37 Ch. D. 310.

Gift adeemed though traceable.

In cases of ademption it is not material that the property can be traced or that it has been kept apart from the rest of the testator's property. Cases *supra*; *In re Bridle*, 4 C. P. D. 336.

Effect of republication by codicil.

Where a specific gift has been adeemed by conversion into something else, a codicil republishing the will will not have the effect of passing to the legatee the thing into which the subject-matter of the specific gift has been converted. *Drinkwater* v *Falconer*, 2 Ves. Sen. 626; *Monck* v. *Monck*, 1 Ba. & Be. 506; *Montague* v. *Montague*, 15 B. 565; *Cowper* v. *Mantrit*, 22 B. 223; *Hopwood* v. *Hopwood*, 7 H. L. 728; *Sidney* v. *Sidney*, 17 Eq. 65; *Macdonald* v. *Irvine*, 8 Ch. D. 101.

Intention to give property whatever its condition.

The gift may be so worded as to show that the subject-matter was to pass to the legatee whatever its condition might be at the testator's death. This construction has been applied in several cases where the testator disposed of what was coming to him from another estate. In such a case the

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fact that the testator gets in the property does not destroy the gift if the property can be traced. The case is not one of ademption at all. *Lee* v. *Lee*, 27 L. J. Ch. 824; *Morgan* v. *Thomas*, 6 Ch. D. 176; *Re Kenyon's Estate*: *Mann* v. *Knapp*, 56 L. T. 626; *Toole* v. *Hamilton*, (1901) 1 Ir. 383; see *Moore* v. *Moore*, 29 B. 496. The cases of *Le Grice* v. *Finch*, 3 Mer. 50; *Clark* v. *Browne*, 2 Sm. & G. 524, may possibly be supported on this ground; but see *Harrison* v. *Jackson*, 7 Ch. D. 339.

Gift of things in a house when adeemed.

Where things in a particular place, such as a house, are given and are afterwards removed to another place, the question is, whether the place is a substantive part of the bequest or whether it is merely descriptive of the things the testator refers to.

Removal is immaterial if the place is merely descriptive.

In the latter case the removal of the things to another place is immaterial. *Cunningham* v. *Ross*, 2 Cas. t. Lee, 272; *Norris* v. *Norris*, 2 Coll. 719; *Blagrove* v. *Coore*, 27 B. 138; *Norreys* v. *Franks*, I. R. 9 Eq. 18.

Similarly, a bequest of furniture in a house will pass furniture intended to be placed there. *Rawlinson* v. *Rawlinson*, 3 Ch. D. 392; but see *Lord Brooke* v. *Earl of Warwick*, 2 De G. & S. 425.

Semble, if the intention is to give only such things as may be in the place.

If, however, the bequest of the things is connected with the enjoyment of the house, both being given to the legatee; or if the gift is of such furniture as may be in a particular place at the testator's decease, a permanent removal works an ademption. *Colleton* v. *Garth*, 6 Sim. 19; *Shaftesbury* v. *Shaftesbury*, 2 Vern. 747; *Heseltine* v. *Heseltine*, 3 Mad. 276; *Green* v. *Symonds*, 1 B. C. C. 129, n.; *Spencer* v. *Spencer*, 21 B. 518.

Temporary removal will not adeem.

But a removal for a temporary purpose will not have this effect. *Domvile* v. *Baker*, 32 B. 604; *Chapman* v. *Hart*, 1 Ves. Sen. 271; *Norreys* v. *Franks*, I. R. 9 Eq. 18; *Land* v. *Devaynes*, 4 B. C. C. 537; *Lord Brooke* v. *Earl of Warwick*, 2 De G. & S. 425; *In re Johnston*; *Cockerell* v. *Earl of Essex*, 26 Ch. D. 538.

II. Change of Interest of Testator.

Effect of change in the testator's interest after the date of the will.

A somewhat different question arises where the nature of the testator's interest in the subject-matter of a bequest alters between the date of the will and his death; if, for instance, the testator subsequently acquires the reversion of leaseholds given by his will.

Acceptance of a new lease.

Before the Wills Act a specific bequest of a lease was adeemed by the acceptance of a new lease or the acquisition of the reversion, unless the testator, being *cestui que trust*, gave his interest in the lease, which includes the right to the benefit of a renewal by the trustee, or expressly gave his future interest. *Carte* v. *Carte*, 3 Atk. 174; *James* v. *Dean*, 11 Ves. 383; 15 Ves. 238; *Morwood* v. *Turner*, 3 P. W. 163; *Abney* v. *Miller*, 2 Atk. 593; *Capel* v. *Girdler*, 9 Ves. 509; *Shelley* v. *Nolan*, 16 Ves. 197.

Purchase of equity of redemption.

In the same way, the purchase of the equity of redemption revoked a devise of the mortgaged estate. *Steede* v. *Lacy*, *Falkland*, 2 Vern. 621; *Yardley* v. *Holland*, 20 Eq. 428.

Devise of equitable fee revoked by conveyance to dower uses.

And a devise of the equitable fee was revoked if the testator afterwards took a conveyance to uses to bar dower in his own favour. *Rawlins* v. *Burgis*, 2 V. & B. 382; *Plowden* v. *Hyde*, 2 Sim. N. S. 171; 2 D. M. & G. 684; *Jacob* v. *Jacob*, 78 L. T. 451, 825; 82 L. T. 270.

And a general gift of lands or a house in which the testator had a chattel interest was *prima facie* a gift of that interest and subject to ademption in the same way. *Radstone* v. *Anderson*, 2 Ves. Sen. 418; *Howe* v. *Medcraft*, 1 B. C. C. 261; *Coppin* v. *Fivey*, 2 B. C. C. 291; *Ockyere* v. *Manby*, 6 Mad. 72; 2 Russ. 238.

Sect. 23 of Wills Act.

Sect. 23 of the Wills Act enacts 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

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shall have power to dispose of by will at the time of his death.

The effect of the section appears to be merely to repeal the old law under which a change of interest in itself revoked a gift, and to leave the Court free to construe the will in such a way as to carry out the testator's intention. The section does not make something newly acquired pass under a gift if the language of the gift is not appropriate to pass it. See *Blake* v. *Blake*, 15 Ch. D. 487.

Thus, where a testator, having a leasehold house, gives his house for all his interest therein, or for all the residue of his term therein, and afterwards acquires the reversion, the fee simple has in several cases been held to pass. The testator's intention in those cases was that the devisee should have the testator's interest whatever it might be. He intends to describe the property and not merely to limit the gift to the estate he has in it at the date of his will. *Struthers* v. *Struthers*, 5 W. R. 809; *Miles* v. *Miles*, L. R. 1 Eq. 462; *Cox* v. *Bennett*, 6 Eq. 422; *Leckey* v. *Watson*, I. R. 7 C. L. 157; *Wedgwood* v. *Denton*, 12 Eq. 290; *Saxton* v. *Saxton*, 13 Ch. D. 359; see *Emuss* v. *Smith*, 2 De G. & S. 722; which may be upheld on other grounds.

Share of business.

So where the testator, being entitled to a third share of a business, bequeathed his share and interest in the business, and afterwards acquired the whole business, the whole business was held to pass. *In re Russell*; *Russell* v. *Chell*, 19 Ch. D. 432.

On the other hand, a gift of the lease of the house in which the testator should reside at his death will not pass a freehold house subsequently purchased by the testator. *In re Knight*; *Knight* v. *Burgess*, 34 Ch. D. 518.

And where a testator devises a freehold estate and afterwards sells it and allows part of the purchase-money to remain on mortgage of the estate, the mortgage money does not pass under the devise of the estate. *Moor* v. *Raisbeck*, 12 Sim. 123; *In re Clowes*, (1893) 1 Ch. 214.

III. Exoneration of Specific Legacies.

1. Liabilities created by testator.

Exoneration of specific legacies from debts and liabilities of testator.

A specific legatee has the right to have his specific legacy freed from the debts and liabilities of the testator existing at his decease. *Stewart* v. *Denton*, 4 Doug. 219; *S. C.*, 2 Chit. 456; *Barry* v. *Harding*, 1 J. & Lat. 489; *Fitzwilliams* v. *Kelly*, 10 Ha. 266.

So if the testator has pledged the legacy, whether for his own debt or not, the legatee is entitled to compensation. *Knight* v. *Davis*, 3 M. & K. 358; *Bothamley* v. *Sherson*, 20 Eq. 304.

2. Liabilities incidental to the thing.

Land subject to lease.

Where land is devised subject to a lease the devisee must bear liabilities under the lease which are in their nature incident to the relation of landlord and tenant, but not liabilities which are preparatory to the establishment of the relation.

For instance, liability at the end of the term to pay for the tenant's property at a valuation must be borne by the devisee. *Mansel* v. *Norton*, 22 Ch. D. 769.

On the other hand, liability under covenant to lay down land in grass within a year must be borne by the residuary legatees and not by the devisee. *Eccles* v. *Mills*, (1898) A. C. 360.

Specific gift of leaseholds.

In the case of specific legatees of leaseholds the rule is that liabilities existing at the death must be paid out of residue, but those accrued after the death must be borne by the legatee.

Thus liability for rent and fines due at the death and for dilapidations then existing must be paid out of residue, and it seems, if the testator has allowed the property to go out of repair so that there is a risk of forfeiture, the specific legatee is entitled to have it put in repair at the expense of the estate. *Fitzwilliams* v. *Kelly*, 10 Ha. 266; *In re Courtier*; *Coles* v. *Courtier*, 34 Ch. D. 136; *Brereton* v. *Day*, (1895) 1 Ir. 519; *In re Betty*; *Betty* v. *A.-G.*, (1899) 1 Ch. 821; see *Hickling* v. *Boyer*, 3 Mac. & G. 635; *Marshall* v. *Holloway*, 5 Sim. 196.

On the other hand, the specific legatee must bear the ordinary outgoings incident to the property, such as fines and ground rent accrued since the death, and ordinary outgoings

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and the continuing obligations under the lease. *Fitzwilliams* v. *Kelly, supra*; *Garratt* v. *Lancefield*, 2 Jur. N. S. 177; *In re Taber*; *Arnold* v. *Kayess*, 46 L. T. 805; 30 W. R. 883; 51 L. J. Ch. 721; *In re Redding*; *Thompson* v. *Redding*, (1897) 1 Ch. 876; *Kingham* v. *Kingham*, (1897) 1 Ir. 170; *In re Betty*; *Betty* v. *A.-G.*, (1899) 1 Ch. 821; not following *In re Baring*; *Baring* v. *Baring*, (1893) 1 Ch. 61; *In re Tomlinson*: *Tomlinson* v. *Tomlinson*, (1898) 2 Ch. 232.

Calls upon shares.

Where shares are specifically bequeathed, calls made before the testator's death are payable out of his estate; calls made after his death must, as between residuary and specific legatee, be borne by the latter. *Armstrong* v. *Burnet*, 20 B. 424; *Addams* v. *Ferick*, 26 B. 384; *Day* v. *Day*, 1 Dr. & S. 261; see *In re Box*, 1 H. & M. 552. The earlier cases, *Blount* v. *Hopkins*, 7 Sim. 43; *Jacques* v. *Chambers*, 2 Coll. 435; 4 R. C. 205, 499; *Wright* v. *Warren*, 4 De G. & S. 367; *Clive* v. *Clive*, Kay, 600, may be considered overruled.

Where the residue was given to a tenant for life and after his death specific shares were given, calls on the shares made after the testator's death were held payable out of the general residue. *In re Box*, 1 H. & M. 552. But ought they not to have been charged upon the shares? See, too, *Macdonald* v. *Irvine*, 8 Ch. D. 101 (as to the policy).

IV. Exoneration of Mortgaged Property.

Exoneration of mortgaged property in cases before Locke King's Act.

In cases not affected by the Real Estate Charges Act, 1854, commonly called Locke King's Act (17 & 18 Vict. c. 113, amended by 30 & 31 Vict. c. 69, and 40 & 41 Vict. c. 34, the devisee of mortgaged lands, whether freehold or leasehold, the mortgages upon which had been either created or adopted by the testator, was entitled, in the absence of a contrary intention, to have the mortgage paid off out of the first four classes of property in the administration of assets; and as regards the fourth, viz., real estate charged with debts generally, if the mortgaged lands were themselves included in the general charge of debts, they bore a proportionate part of the mortgage

Middleton v. *Middleton*, 15 B. 450; *Harper* v. *Munday*, 7 D. M. & G. 369.

Similarly, where mortgaged lands descended, the heir was entitled to exoneration out of the first two classes of property. *Hill* v. *Bishop of London*, 1 Atk. 621; *Chester* v. *Powell*, 7 Jur. 389; *Yonge* v. *Furse*, 20 B. 380.

No right against specific devisee or legatee.

The devisee had no right to call upon other specific devisees or legatees to contribute to pay off the mortgage. *O'Neal* v. *Mead*, 1 P. W. 693; *Halliwell* v. *Tanner*, 1 R. & M. 633; *In re Butler*: *Le Bas* v. *Herbert*, (1894) 3 Ch. 250.

Devise of mortgaged lands subject to the mortgage did not exonerate the personalty.

A devise of lands expressly subject to the mortgage thereon did not exonerate the personalty, the words "subject to the mortgage" being held merely descriptive. *Duke of Ancaster* v. *Mayer*, 1 B. C. C. 454; *Bickham* v. *Cruttwell*, 3 M. & Cr. 763.

Direction to pay off certain mortgage.

A direction that a mortgage on a certain estate was to be paid off did not exonerate the personalty from paying off mortgages on other estates. *In re Bull*: *Catty* v. *Bull*, 49 L. T. 592.

Nor did a direction that part of the mortgaged land was to bear a larger proportion of the mortgage than another part. *Goodwin* v. *Lee*, 1 K. & J. 377.

Devise to A, he paying the mortgage.

Under a devise of land to A, he paying a mortgage thereon, with a gift to the sub-mortgagee of a sum smaller than the mortgage debt to exonerate the mortgage, it was held that the devisee was not entitled to have the mortgage paid off out of the personalty beyond the sum given for the purpose. *Lockhart* v. *Hardy*, 9 B. 379.

Mortgage on settled estate.

Where the owner of an estate made a voluntary settlement of the estate, reserving a general power of appointment to himself, under which he created a mortgage on the settled estate, with a covenant to pay, it was held that the settled estate was the primary fund for the payment of the mortgage. *Jenkinson* v. *Harcourt*, Kay, 688.

Locke King's Act.

The law on this subject has been altered by the Real Estate Charges Act, 1854 (17 & 18 Vict. c. 113), which enacts that "when any person shall, after the 31st of December, 1854, die seised of or entitled to any estate or interest in any land

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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 no. 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 of January, 1855.

The Real Estate Charges Act, 1867 (30 & 31 Vict. c. 69), extends and defines the meaning of the words "contrary or other intention" in the case of testators dying after the 31st of December, 1867, and by sect. 2 declares that in the construction of the principal 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.

By the Real Estate Charges Act, 1877 (40 & 41 Vict. c. 34), it is enacted as follows:—

1. The Acts mentioned in the schedule hereto (17 & 18 Vict. c. 113; 30 & 31 Vict. c. 69) shall, as to any testator or intestato dying after the 31st December, 1877, be held to extend to a testator or intestato 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 mort-

gage, or any other equitable charge, including any lien for unpaid purchase-money; and the devisee or legatee or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate, unless (in the case of a testator) he shall, within the meaning of the said Acts, have signified a contrary intention; and such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate, or residuary real estate.

2. This Act shall not extend to Scotland.

Aggregate lands liable for aggregate debts.

Where different lands subject to separate mortgages are devised together the effect, since Locke King's Act, is that the aggregate lands are liable for the aggregate mortgage debts. *In re Baron Kensington*; *Earl of Longford* v. *Baron Kensington*, (1902) 1 Ch. 203.

What Persons are within the Acts.

What persons are within the Acts.

The Crown taking personalty in default of next of kin is within the words "persons claiming through or under the deceased person" in Locke King's Act. *Dacre* v. *Patrickson*, 1 Dr. & Sm. 186.

The heir taking by descent, owing to lapse or otherwise, from a person dying after the 31st December, 1854, is not entitled to exoneration under the exception in the proviso in the original Act, though the will may be made before the 1st January, 1855. *Power* v. *Power*, 8 Ir. Ch. 340; *Piper* v. *Piper*, 1 J. & H. 91; *Nelson* v. *Page*, 7 Eq. 25.

On the other hand, a devisee taking under a will made before the 1st January, 1855, is within the proviso, though the will may have been republished after that date. *Rolfe* v. *Perry*, 3 D. J. & S. 481.

The donee of an option to purchase land at a fixed price is not a devisee within the Act. *Given* v. *Massey*, 31 L. R. Ir. 126.

Next of kin within Act of 1877.

Next of kin are not mentioned in the Act of 1877, but the Act extends to them. *In re Fraser*; *Lowther* v. *Fraser*, (1904) 1 Ch. 726.

What Property is within the Acts.

Copyholds. Copyholds are within Locke King's Act. *Piper* v. *Piper*, 1 J. & H. 91.

Land on trust for sale. Land devised on trust for sale, and coming to the testator as personalty, is not within that Act. *Lewis* v. *Lewis*, 13 Eq. 219.

Leaseholds. Leaseholds are not within the original Act or the Act of 1867. *Solomon* v. *Solomon*, 12 W. R. 540; 33 L. J. Ch. 473; *Gael* or *Gall* v. *Fenwick*, 22 W. R. 211; 43 L. J. Ch. 178; *In re Wormsley's Estate*; *Hill* v. *Wormsley*, 4 Ch. D. 665.

They are within the Act of 1877, and so is a rent-charge charged on leaseholds. *In re Kershaw*; *Drake* v. *Kershaw*, 37 Ch. D. 674; *In re Fraser*; *Leather* v. *Fraser*, (1904) 1 Ch. 111, 726.

The Act applies where real and personal estate are directed to be converted, and the proceeds made a mixed fund. *Elliott* v. *Dearsley*, 16 Ch. D. 322.

If the mortgage includes freeholds and leaseholds, the mortgage must be apportioned between the freeholds and leaseholds according to their values at the testator's death, and the amount apportioned in respect of the leaseholds will, in cases not within the Act of 1877, be discharged out of the personal estate or out of the fund appointed for payment of debts. *Gall* v. *Fenwick*, *supra*.

What Mortgages are within the Acts.

Mortgage by deposit. Mortgages by deposit of title deeds, with or without a memorandum of agreement to execute a legal mortgage, are within the Acts. *Pembroke* v. *Friend*, 1 J. & H. 132; *Davis* v. *Davis*, 24 W. R. 962.

So is a deposit of deeds, with a memorandum, though expressed to be only a collateral security. *Coleby* v. *Coleby*, L. R. 2 Eq. 803.

But a mere general charge by a testator on real estate in aid of his personalty was not within the original Act. *Hepworth* v. *Hill*, 30 B. 476.

Mortgage to A mortgage to secure the debt of a firm in which the testator

is a partner is not within the Acts if the partnership is solvent and able to pay the debt. The debt is the debt of the firm, and the assets out of which the debt is payable are the partnership assets and not the testator's separate estate. *In re Ritson*; *Ritson* v. *Ritson*, (1899) 1 Ch. 128. Secure firm's debt.

A judgment under which the land has been delivered in execution under a writ of elegit and a judgment mortgage in Ireland are charges within the Acts. *In re Anthony*; *Anthony* v. *Anthony*, (1892) 1 Ch. 450; *Nesbett* v. *Lander*, 17 L. R. Ir. 53. Judgment.

A deed containing a covenant to pay an annuity with a charge on land and powers of distress and entry and a demise to trustees to secure the annuity, creates an equitable charge within the meaning of the Act of 1877. *Re Sharland*; *Kemp* v. *Rozey*, 74 L. T. 664.

A lien for unpaid purchase-money on lands purchased by a testator is, by 30 & 31 Vict. c. 69, s. 2, declared to be within the original Act. But that Act mentions only a lien upon lands purchased by a testator, which was construed to mean a person who makes a will, though it may not dispose of the land. It did not extend to the case of an intestate. *Harding* v. *Harding*, 13 Eq. 493; *Dowdall* v. *M'Cartan*, 5 L. R. Ir. 313, 942. Lien for purchase-money.

The Act of 1877 extends to the lands of an intestate.

Where a testator contracted to buy real estate, and the contract was not completed at his death and was afterwards rescinded, it was held that the devisees of the real estate were entitled to claim against the personalty only the price of the estate less the unpaid purchase-money. *In re Cockcroft*; *Broadbent* v. *Groves*, 24 Ch. D. 94. See, too, *Day* v. *Day*, 14 W. R. 261; *In re Kidd*; *Brooman* v. *Withall*, (1894) 3 Ch. 558.

What is a Contrary Intention within the Acts.

The contrary intention is to be ascertained by referring not only to the will, but also to the mortgage and other deeds connected with it. *In re Campbell*; *Campbell* v. *Campbell*, (1893) 2 Ch. 206. How contrary intention ascertained.

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Direction to pay debts.

It was decided that a general direction to pay debts, or to pay debts out of the estate, did not show the contrary intention required by Locke King's Act. *Pembroke* v. *Friend*, 1 J. & H. 132; *Brownson* v. *Lawrance*, 6 Eq. 1; *Woolstencroft* v. *Woolstencroft*, 2 D. F. & J. 347.

Whether the fact that mortgaged lands are devised in strict settlement would make any difference seems doubtful; at any rate it would not where the testator himself contemplates the mortgages as subsisting from generation to generation. *Cook* v. *Lowndes*, 10 Eq. 376.

Direction to pay debts out of the personal estate or a particular fund.

But a direction, that the debts are to be paid out of the personal estate or out of any particular fund, was held to show a contrary intention. *Moore* v. *Moore*, 1 D. J. & S. 602; *Eno* v. *Tatham*, 3 D. J. & S. 443; 32 L. J. Ch. 311; *Mellish* v. *Vallins*, 2 J. & H. 194; *Newman* v. *Wilson*, 31 B. 33; *Maxwell* v. *Hyslop*, L. R. 4 Eq. 407; *ib.* 4 H. L. 506. See *Allen* v. *Allen*, 30 B. 395; *Porcher* v. *Wilson*, 14 W. R. 1011.

The Amendment Act, 30 & 31 Vict. c. 69.

By 30 & 31 Vict. c. 69, however, it is enacted that in the wills of testators dying after the 31st December, 1867, a declaration that debts are to be paid out of the personal estate is not to be deemed a declaration of intention to exonerate mortgaged lands.

Under this Act, "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 unmistakably to refer to them": per Giffard, V.-C., in *Nelson* v. *Paye*, 7 Eq. 25, p. 28. See *Allen* v. *Allen*, 30 B. 395; *Greated* v. *Greated*, 26 B. 621.

Direction to pay debts.

In cases governed by the Act of 1867, a direction to pay debts out of a mixed fund of realty and personalty, or a direction to pay debts out of the personal estate in exoneration of the real estate, or a charge of debts on certain real estate in aid of the personal estate, and in exoneration of the other real estate, will not entitle the devisee of mortgaged lands to have the mortgage discharged. *Gael* or *Gall* v. *Fenwick*, 22 W. R. 211; 43 L. J. Ch. 178; *In re Rossiter*; *Rossiter* v. *Rossiter*, 13 Ch. D. 355; *In re Newmarch*; *Newmarch* v. *Storr*, 9 Ch. D.

12; *Elliott* v. *Dearsley*, 16 Ch. D. 322; and see the Act of 1877, *supra*, p. 174. Chap. XXI.

A direction to pay all debts of every kind, including specialty debts, has been held not to include mortgage debts. *Buckley* v. *Buckley*, 19 L. R. Ir. 544.

But a direction to pay debts, except a mortgage debt on particular property, shows that other mortgages are to be paid off. *In re Vulpy; Vulpy* v. *Vulpy*, (1906) 1 Ch. 531.

Charge of trade debts.

Where a testator charged his trade debts upon his residue, and after the date of his will deposited the title deeds of real estate with his bankers to secure an overdrawn trade account, it was held that the charge showed a contrary intention. *In re Fleck; Colston* v. *Roberts*, 37 Ch. D. 677.

So where a testator charged his property used in trade with his trade debts, and his residue with all other debts, inasmuch as the trade debts included debts secured by mortgage, it was held that other debts charged on the residue also included debts secured by mortgage. *In re Nevill; Robinson* v. *Nevill*, 59 L. J. Ch. 511; 62 L. T. 864.

Devise subject to trade debts.

And a gift of a business and business premises subject to trade debts may indicate an intention that the business premises are to be exonerated from other debts. *Thompson* v. *Bell*, (1903) 1 Ir. 489.

Specific devisee of part of land subject to a mortgage is not entitled to exoneration.

Where part of lands subject to a mortgage is specifically devised, and the rest given to the residuary devisee, or where a life interest is given, and the remainder is given to the residuary devisee, there is no evidence of an intention, that the mortgage is to be borne by the residuary devisee. *Gibbins* v. *Eyden*, 7 Eq. 371; *Sackville* v. *Smyth*, 17 Eq. 153; *In re Smith; Hannington* v. *True*, 33 Ch. D. 195; overruling *Brownson* v. *Lawrance*, 6 Eq. 1.

Direction to pay mortgages out of insufficient fund.

The further question may arise whether, supposing the testator directs the mortgages to be paid out of a specific fund, the devisees will be entitled to exoneration if that fund is insufficient.

It would seem, where the fund is a fund of personalty, the devisees will not be entitled to exoneration beyond the value of the fund. *Rodhouse* v. *Mold*, 13 W. R. 854; 35 L. J. Ch. 67.

On the other hand, it is laid down by Lord Romilly in *Allen* v. *Allen*, 30 B. 403, that where a mortgage on Whiteacre is directed to be paid out of Blackacre, the mortgagee is entitled to exoneration out of the personal estate in the first place, as the Act only directs that the mortgaged land shall be primarily liable, and does not alter the ordinary rules of administration where there is an intention that it should not be so liable. See, too, *Smith* v. *Moreton*, 57 L. J. Ch. 6; *Corballis* v. *Corballis*, 9 L. R. Ir. 309.

How far mortgaged lands applicable in payment of mortgages.

It would seem, that where mortgages are directed to be paid and the personalty is insufficient to pay them, the several lands bear only the mortgages secured upon them, and not a proportionate share of all the mortgages. *Wisden* v. *Wisden*, 5 Jur. N. S. 455.

V. Rents, Profits, and Income.

Present devise.

1. A present devise of lands being specific carries the rents and profits from the death of the testator.

Specific bequest.

2. A specific bequest, including an appointment of specific funds under a power, if vested, carries all the income and profits which may accrue upon it after the testator's death. *Clive* v. *Clive*, Kay, 600; *Maclaren* v. *Stainton*, 3 D. F. & J. 202; *In re Marten; Shaw* v. *Marten*, (1901) 1 Ch. 370.

This is the case, though the executors have an option to transfer one or other of two specific stocks, and the option is to be exercised within twelve months after the death. *Chester* v. *Urwick*, 23 B. 402.

The income must be apportioned as at the date of the death. *Re Bearan; Bearan* v. *Bearan*, 53 L. T. 245.

Future devise does not carry the intermediate rents.

3. A future devise of lands, whether residuary or not and whether the fee is vested in trustees or is in abeyance, does not carry the intermediate rents and profits, which pass either under the residuary clause, if there is one, or to the heir. *Hopkins* v. *Hopkins*, Ca. t. Talb. 45; 1 Ves. Sen. 268; 1 Atk. 581; *Duffield* v. *Duffield*, 3 Bl. N. S. 260; *Percival* v. *Percival*, 9 Eq. 386; *In re Eddels' Trusts*, 11 Eq. 559; *Countess of Bective* v. *Hodgson*, 1 H. & M. 376; 10 H. L. 656; see, however, *Best* v. *Donmall*, 40 L. J. Ch. 160.

The intermediate rents are undisposed of till the actual birth of the devisee. *Richards* v. *Richards*, Jo. 754; *Mowlem's Trust*, 18 Eq. 9; see *Rawlins* v. *Rawlins*, 2 Cox, 425; *Goodale* v. *Gwelhorne*, 2 W. R. 680; 2 Sm. & G. 375.

If the devise is to the members of a class who attain twenty-one, the first who attains twenty-one takes the whole of the rents until another member of the class attains twenty-one and so on. *In re Averill*; *Salsbury* v. *Buckle*, (1898) 1 Ch. 523.

Contingent specific bequests.

4. A contingent specific bequest of chattels real or personalty, or a contingent pecuniary legacy, where the subject-matter of the gift is not directed to be set apart from the rest of the estate, will not carry the intermediate profits, except perhaps in the case of a person who would be entitled to interest on a general legacy from the testator's death. *Wyndham* v. *Wyndham*, 3 B. C. C. 58; *Shaw* v. *Cunliffe*, 4 B. C. C. 144; *Harris* v. *Lloyd*, T. & R. 310; *Holmes* v. *Prescott*, 12 W. R. 636; 33 L. J. Ch. 264; *Guthrie* v. *Walrond*, 22 Ch. D. 573; see *Wright* v. *Warren*, 4 De G. & S. 367.

Property set apart carries income.

5. Where a legacy, either specific or general, is given to trustees upon certain trusts, or is otherwise directed to be set apart from the rest of the testator's estate it carries the income, though the beneficiaries take only contingent interests. *Boddy* v. *Davies*, 1 Kee. 362; *Dundas* v. *Wolfe Murray*, 1 H. & M. 425; *Johnson* v. *O'Neill*, 3 L. R. Ir. 476; *In re Medlock*; *Ruffle* v. *Medlock*, 55 L. J. Ch. 738; 54 L. T. 828; *In re Smaith*; *Smaith* v. *Smaith*, 42 W. R. 568; 71 L. T. 318; *In re Clements*; *Clements* v. *Pearsall*, (1894) 1 Ch. 665; *In re Woodin*; *Woodin* v. *Glass*, (1895) 2 Ch. 309, where *Furneaux* v. *Rucker*, W. N. 1879, 135, is considered; *In re Couturier*; *Couturier* v. *Shea*, (1907) 1 Ch. 470.

Probably *In re Smaith* went too far in giving interest from the testator's death.

In the case of leaseholds a specific contingent gift given directly without the medium of a trust is probably a sufficient segregation to bring the case within this rule. *Kiersey* v. *Flaharan*, (1905) 1 Ir. 45.

A fund which has been severed for the benefit of a tenant for

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life and remainderman carries the interest accruing between the death of the tenant for life and the vesting in the remainde man. *Kidman* v. *Kidman*, 40 L. J. Ch. 359.

So, too, an appointed fund carries the intermediate interest. *Long* v. *Ormsden*, 16 Ch. D. 691.

To entitle the legatees of a severed fund to interest before the time of payment, the severance must take place by virtue of directions given by the testator with reference to the fund. A fund set aside by the executors, merely because the rest of the estate has become distributable, does not carry interest. *Festing* v. *Allen*, 5 Ha. 578; *In re Judkin's Trusts*, 25 Ch. D. 743; *In re Inman; Inman* v. *Rolls*, (1893) 3 Ch. 518.

Future residuary devise.

6. A future residuary devise, or a devise subject to prior limitations which may or may not take effect, will not carry intermediate rents and profits. *Hodgson* v. *Countess of Beelive*, 1 H. & M. 376; 10 H. L. 656; *Wade Gery* v. *Handley*, 1 Ch. D. 653; 3 Ch. D. 374; overruling *Sidney* v. *Wilmer*, 1 D. J. & S. 84.

A future residuary bequest carries the intermediate interest.

7. A contingent residuary gift of personalty carries the intermediate interest during the period allowed for accumulation. *Green* v. *Ekins*, 2 Atk. 473; *Drakeley's Estate*, 19 B. 295; *Countess of Beelive* v. *Hodgson*, 10 H. L. 656; *Re Lindo; Askin* v. *Ferguson*, 59 L. T. 462; *In re Taylor; Smart* v. *Taylor*, (1901) 2 Ch. 134; not following *Green* v. *Tribe*, 47 L. J. Ch. 783; 27 W. R. 39.

Chattels real comprised in a residuary gift follow the same rule as personalty proper. *Hodgson* v. *Countess of Beelive*, 1 H. & M. 376; 10 H. L. 656.

So will a future residuary gift of realty and personalty together.

8. If realty and personalty are blended in a future residuary gift, though the realty may not be directed to be sold, so as to create a mixed fund, intermediate profits will pass. *Genery* v. *Fitzgerald*, Jac. 468; *Glanvill* v. *Glanvill*, 2 Mer. 38; *Ackers* v. *Phipps*, 9 Bl. N. S. 431; 3 Cl. & F. 665; see *In re Townsend's Estate; Townsend* v. *Townsend*, 34 Ch. D. 357.

This rule applies though the realty and personalty are given in separate clauses, if both are intended to go in the same way. *In re Dumble; Williams* v. *Murrell*, 23 Ch. D. 360; *In re Burton's Will; Banks* v. *Heaven*, (1892) 2 Ch. 38.

But the rule does not apply where some of the limitations of the realty and personalty are distinct. *Re Williams; Spencer v. Brighouse*, 54 L. T. 831.

Where real and personal estate were devised on trust to sell and pay the income to A for life, and after his death in trust for his children, and A's life interest was void, and he had no children living, it was held that during A's life, and so long as he had no children, the income was undisposed of. *In re Townsend's Estate; Townsend* v. *Townsend*, 34 Ch. D. 357; a case not easily reconcilable with *Countess of Bective* v. *Hodgson*, 10 H. L. 656.

9. Personalty to be laid out in land, or realty to be converted, follows the rules of personalty and realty respectively. *Countess of Bective* v. *Hodgson*, 10 H. L. 656.

Fund carrying income given to a class.

10. Where there is a gift to a class of a fund, which carries intermediate income, the following further rules apply:—

a. If the members of the class take vested interests at birth, the income is divisible among those members of the class who are for the time being in existence. A member of the class is entitled to income only as from his birth. *Shepherd* v. *Ingram*, Amb. 448; *Mills* v. *Norris*, 5 Ves. 335.

b. If the gift is to members of the class who attain twenty-one, a member of the class who has attained twenty-one is entitled to the income upon his share, having regard to the number of members of the class then in existence, but without regard to the possibility of other members of the class being subsequently born. *Hawkins* v. *Combe*, 1 B. C. C. 335; *Brandon* v. *Aston*, 2 Y. & C. C. 30; *Maincaring* v. *Beever*, 8 Ha. 44; *Rochford* v. *Hackman*, 9 Ha. 475; *In re Holford; Holford* v. *Holford*, (1894) 3 Ch. 30; *In re Jeffrey; Arnold* v. *Burl*, (1895) 2 Ch. 577.

It follows that if a second member of the class is born during the minority of the first, the whole income until the birth of the second member belongs to the first if he attains twenty-one. If this were not so, difficulties would arise in applying the income for maintenance until the limits of the

class are ascertained. See *Mills* v. *Norris*, 5 Ves. 335; *Scott* v. *Earl of Scarborough*, 1 B. 154.

But a member of the class who has attained twenty-one, there being other members of the class in existence under twenty-one, is only entitled to the income of his share, having regard to the number of members of the class for the time being in existence. *Brandon* v. *Aston*, 2 Y. & C. C. 30; *In re Burton's Will*; *Banks* v. *Heaven*, (1892) 2 Ch. 38; *In re Holford*; *Holford* v. *Holford*, (1894) 3 Ch. 30; see *In re Jeffery*; *Burt* v. *Arnold*, (1891) 1 Ch. 671, where the decision was founded upon an erroneous report of *Furneaux* v. *Rucker*, W. N. 1879, 135; *In re Adams*; *Adams* v. *Adams*, (1893) 1 Ch. 329.

Fund not carrying income given to a class.

11. Where there is a gift to the members of a class who attain twenty-one of a fund or property which does not carry the intermediate income, it would seem that the members of the class who have for the time being attained twenty-one are entitled to the whole income, though there may be other members of the class in existence who have not attained twenty-one. *Stone* v. *Harrison*, 2 Coll. 715; *Furneaux* v. *Rucker*, W. N. 1879, 135, as explained in *In re Burton's Will*: *Banks* v. *Heaven*, (1892) 2 Ch. 38, p. 46; and *In re Adams*; *Adams* v. *Adams*, (1893) 1 Ch. 329, p. 331; see, too, *In re Woodin*; *Woodin* v. *Glass*, (1895) 2 Ch. 309.

VI. What is Income of Specific Gift—Apportionment.

The question often arises, What are profits accruing after the testator's death?

Partnership profits.

The profits of a partnership, declared after the testator's death for a period ending in his lifetime, belong to the testator's estate, and not to the legatee of the testator's interest in the business. *Ibbotson* v. *Elam*, L. R. 1 Eq. 188; *Browne* v. *Collins*, 12 Eq. 586.

On the other hand, the profits of a partnership declared after the testator's death for a period partly before and partly after the death are income, and go to the legatee. *Browne* v.

Collins, supra. See, too, *Johnston* v. *Moore*, 27 L. J. Ch. 453; *Lambert* v. *Lambert*, 22 W. R. 359.

Debts.

A debt is to be considered as the profits of the year in which it is paid. *Maclaren* v. *Stainton*, 3 De. F. & J. 202; *Edmondson* v. *Crosthwaite*, 34 B. 30.

A dividend or bonus on shares declared in the testator's lifetime, though not payable until after his death, is capital of the estate. *Wright* v. *Tuckett*, 1 J. & H. 266; *Lock* v. *Venables*, 27 B. 598; *De Gendre* v. *Kent*, 4 Eq. 282.

And it would seem that a dividend declared after the death for a period expiring before the death is also capital. If the dividend is declared for a period partly before and partly after the death, then, if the Apportionment Act applies, the dividend would be apportionable, otherwise it is income. *Jones* v. *Ogle*, 8 Ch. 192; *In re Hopkins' Trusts*, 18 Eq. 696.

Dividends on shares.

In some cases dividends on shares declared before the death, but not payable till afterwards, and dividends declared after the death for a period before the death have been held income, but these cases turned upon the special constitution of the companies. *Clive* v. *Clive*, Kay, 600; see 1 J. & H. 266; *Bates* v. *Mackinley*, 31 B. 280.

Apportionment Act.

Since the Apportionment Act (33 & 34 Vict. c. 35) rents, annuities, dividends, and other periodical payments in the nature of income are to be considered as accruing from day to day, and are apportionable where the testator dies between two rent days.

Sect. 5 defines dividends as including all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies, whether such payments shall be usually made or declared at any fixed times or otherwise; but they do not include payments in the nature of a return or reimbursement of capital.

Will before Act.

The Act has been held to apply to a will executed before and confirmed by a codicil executed after the passing of the Act. *Hasluck* v. *Pedley*, 19 Eq. 271; *Constable* v. *Constable*, 48 L. J. Ch. 621; see *Roscingrave* v. *Burke*, I. R. 7 Eq. 187.

It has also been held to apply to the will of a testator dying before the Act came into operation. *In re Cline's Estate*, 18

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Eq. 213; *Patching* v. *Barnett*, 28 W. R. 886; *Lawrence* v. *Lawrence*, 26 Ch. D. 795; see *Jones* v. *Ogle*, 8 Ch. 192.

The Act applies to specific as well as to residuary devises. *Capron* v. *Capron*, 17 Eq. 288; *Pollock* v. *Pollock*, 18 Eq. 329, overruling *Whitehead* v. *Whitehead*, 16 Eq. 528; see *A.-G.* v. *Daly*, I. R. 8 Eq. 495.

Profits of private partnership.

A private trading partnership, and a business belonging to the testator, are not within the Act. *Jones* v. *Ogle*, 8 Ch. 192; *In re Cox's Trusts*, 9 Ch. D. 159.

A limited company is a public company within the Act. *In re Lysaght*; *Lysaght* v. *Lysaght*, (1898) 1 Ch. 115.

And an insurance company not incorporated, but authorised by special Act to sue and be sued, has been held to be a public company within the Act. *In re Griffith*; *Carr* v. *Griffith*, 12 Ch. D. 655.

Bonuses or surplus profits distributed among the shareholders of a public company once in five years are apportionable under the Act. *In re Griffith*, *supra*.

In determining what is *corpus* and what interest, the Apportionment Act applies as well between tenant for life and remainderman as where in certain events an absolute interest is cut down to a life interest. *Clive* v. *Clive*, 7 Ch. 433.

Purchase of stock cum dividend.

The Act does not apply where a testator directs interest to be paid on a legacy till it is appropriated, and the executors purchase stock on which five months' interest has accrued. In such a case the tenant for life is entitled to interest up to the date of the investment and to the whole dividend. *In re Clarke*; *Barker* v. *Perowne*, 18 Ch. D. 160.

Rent payable in advance.

The Act does not apply to rent payable in advance. *Ellis* v. *Rowbotham*, (1900) 1 Q. B. 740.

Express stipulation against apportionment.

The Act does not extend to any case in which it is expressly stipulated that no apportionment shall take place (see sect. 7). It does not, therefore, apply if there is a direction that every share given by the will shall carry the dividend accruing thereon at the testator's death (*a*); or if the gift is of the whole of the income derived under a particular deed (*b*). *In re Lysaght*, (1898) 1 Ch. 115 (*a*); *Re Meredith*; *Stone* v. *Meredith*, 78 L. T. 492 (*b*); see *Shore* v. *Weekly*, 3 De G. & S. 467.

Probably the stipulation must be contained in the will or instrument of gift. At any rate, a provision in Articles of Association that a dividend is to be deemed to accrue on the day on which it is declared, and is to belong to the members registered on that day is not such a stipulation. *In re Oppenheimer; Oppenheimer* v. *Boatman*, (1907) 1 Ch. 399.

Stipulation in Articles of Association.

VII. Interest on General Legacies.

Sect. 43 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), provides that "where any property is held by trustees in trust for an infant either for life or for any greater interest, and whether absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education or benefit, the income of that property or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education or not."

Conveyancing Act, 1881.

Sect. 43 of the Conveyancing Act does not make a legacy to an infant at a future time carry interest.

Effect of 44 & 45 Vict. c. 41, s. 43.

The income, therefore, cannot be applied in maintenance, unless the legacy carries interest. *In re Judkin's Trusts*, 25 Ch. D. 743; *In re Dickson; Hill* v. *Grant*, 28 Ch. D. 291; 29 Ch. D. 331, following the similar decisions under Lord Cranworth's Act (23 & 24 Vict. c. 145), s. 26; *In re Cotton*, 1 Ch. D. 232; *In re George*, 5 Ch. D. 837.

Where a legacy is contingent or payable at a future time, and interest is given in the meantime, or the income is given for maintenance, the whole interest or income as it accrues vests absolutely in the legatee. *Harris* v. *Finch*, M'Clel. 141; *In re Peck's Trust*, 16 Eq. 221.

Interest given to a legatee vests absolutely as it accrues.

Where a legacy is charged upon land only, interest is payable from the testator's death. *Spurway* v. *Glyn*, 9 Ves. 483; *Shirt* v. *Westby*, 16 Ves. 393; *Pearson* v. *Pearson*, 1 Sch. & Lef. 10.

Legacy charged on land only.

Legacy charged on proceeds of sale of land.

An immediate legacy charged on the proceeds of sale of land carries interest only from a year after the death, but if the legacy is given at the death of the tenant for life, when the land is to be sold, it carries interest from the death of the tenant for life. *Turner* v. *Buck*, 18 Eq. 301; *In re Waters*; *Waters* v. *Boxer*, 42 Ch. D. 517.

In the case of legacies not charged on land only, the rule is that the legacy carries interest from the time when it is payable:—

(A.) Where no time of payment is fixed:—

General legacies, including general gifts by appointment under a power vested in a married woman, are payable at and carry interest from the end of a year from the testator's death. *Tothe m* v. *Drummond*, 2 H. & M. 262.

Legacy for life with remainder.

In the same way in the case of a gift of a sum of money to one for life with remainders over, interest begins to run from the end of a year from the testator's death. *Gibson* v. *Bott*, 7 Ves. 89; *In re Whittaker*; *Whittaker* v. *Whittaker*, 21 Ch. D. 657.

Income of tenant for life accumulated during minority.

Where the tenant for life is a minor, and a portion of the income is accumulated during the minority, the accumulations belong to the tenant for life; and sect. 43 of the Conveyancing Act, 1881, does not convert them into capital. *In re Wells*; *Wells* v. *Wells*, 43 Ch. D. 281; *In re Humphreys*; *Humphreys* v. *Levett*, (1893) 3 Ch. 1.

Tenants for life taking contingent interest.

Where a residue is given to a class, who attain twenty-one, and the shares are settled for life, a life tenant on attaining twenty-one is not entitled to accumulations of income, but they become capital of his share. *In re Bowlby*; *Bowlby* v. *Bowlby*, (1904) 2 Ch. 685, overruling *In re Scott*; *Scott* v *Scott*, (1902) 1 Ch. 918.

Power to accelerate or postpone payment.

Directions that a legacy is to be paid as soon as possible, or that it is not to be payable till six months after the testator's death, or that it is to be paid within four years from his decease, do not alter the date from which interest will run. *Webster* v. *Hale*, 8 Ves. 410; *Benson* v. *Maude*, 6 Mad. 15; *Varley* v. *Winn*, 2 K. & J. 700; *Jauncey* v. *A.-G.*, 3 Giff. 308; *In re Olive*; *Olive* v. *Westerman*, 32 W. R. 608.

Where there is a clear gift of a legacy, a direction to pay it out of a particular fund when received will not alter the rule that the legatee is entitled to interest from the end of a year after the testator's death. *Wood* v. *Penoyre*, 13 Ves. 326; see *Kirkpatrick* v. *Bedford*, 4 App. C. 96. Direction to pay out of fund when received.

If the trust to pay legacies only arises after the fund is got in, interest is not payable till then. *Lord* v. *Lord*, L. R. 2 Ch. 782.

A direction to apply a sum for building a church when it is wanted, without interest in the meantime, will not deprive the legacy of interest if payment is delayed by litigation. *Fisher* v. *Brierley*, 30 B. 268.

The rule as to interest is not altered by the fact that the legacies are charged upon personalty and a reversionary interest in realty, and if the personalty is insufficient, the legacies nevertheless bear interest from a year after the death. *Freeman* v. *Simpson*, 6 Sim. 75; *Earl of Milltown* v. *French*, 4 Cl. & F. 276; 10 Bl. N. S. 1; *In re Blachford*; *Blachford* v. *Worsley*, 27 Ch. D. 676. Effect of charge on a reversionary interest.

But this is not the case where the fund out of which the legacy is primarily payable is wholly reversionary. *Earle* v. *Bellingham*, 24 B. 448; *Re Ludlam*; *Ludlam* v. *Ludlam*, 63 L. T. 330; *In re Gyles*; *Gibbon* v. *Chaytor*, (1907) 1 Ir. 65.

Interest upon a legacy to an executor as such runs from the time when he assumes the office. An infant cannot assume the office till he attains twenty-one. *Angermann* v. *Ford*, 29 B. 349; *Re Gardner*; *Long* v. *Gardner*, 67 L. T. 552; 41 W. R. 293; 3 R. 96. Legacy to executor.

On the other hand, interest is payable from the testator's death:— Interest payable from the death.

1. Where the testator is the father or *in loco parentis* to the legatee, provided the latter is an infant. *Wilson* v. *Maddison*, 2 Y. & C. C. 372. Testator *in loco parentis* to an infant.

If the infant is *en ventre* at the testator's death, interest runs only from his birth. *Rawlins* v. *Rawlins*, 2 Cox, 425.

2. Where the legatee, though a stranger, is an infant, and maintenance is given out of the legacy. *Newman* v. *Bateson*, 3 Sw. 689. Maintenance directed out of the legacy.

Legacy in satisfaction of a debt.

3. Where the legacy is in satisfaction of a debt of the testator. *Clarke* v. *Sewell*, 3 Atk. 99.

A legacy to a wife does not carry interest until a year from the death (*a*), even if given in lieu of jointure or in lieu of dower and freebench (*b*). *Stent* v. *Robinson*, 12 Ves. 461; *Lowndes* v. *Lowndes*, 15 Ves. 301; *In re Percy*; *Percy* v. *Percy*, 24 Ch. D. 616; *In re Bignold*; *Bignold* v. *Bignold*, 45 Ch. D. 493 (*a*); *Elton* v. *Montague*, 1 L. J. Ch. (O. S.) 212; *In re Bignold*; *Bignold* v. *Bignold*, 45 Ch. D. 496 (*b*).

A legacy in satisfaction of the debts of another person will not *primâ facie* carry interest till the expiration of a year from the testator's death. *Askew* v. *Thompson*, 4 K. & J. 620.

But if certain property is to be applied among such persons as have "any just or indisputable demand" upon a third person, interest will be payable on the debts as far as the fund will go. *Aston* v. *Gregory*, 6 Ves. 151.

(B.) Where a time for payment is fixed:—

When a time of payment is fixed, interest runs from then.

A legacy payable at a future day, whether vested or not, carries interest only from the time fixed for its payment. *Lloyd* v. *Williams*, 2 Atk. 108, *Heath* v. *Perry*, 3 Atk. 101; *Crickett* v. *Dolby*, 3 Ves. 10; *Tyrrell* v. *Tyrrell*, 4 Ves. 1; *Festing* v. *Allen*, 5 Ha. 575; *Gotch* v. *Foster*, 5 Eq. 311; *Lord* v. *Lord*, L. R. 2 Ch. 782; *Holmes* v. *Crispe*, 18 L. J. Ch. 439.

If the residuary legatee has a discretion to postpone payment for a given period and he exercises it, interest runs only from the end of the period. *Thomas* v. *A.-G.*, 2 Y. & C. Ex. 525.

If the time for payment arrives in the testator's lifetime, interest runs from his death. *Coventry* v. *Higgins*, 14 Sim. 30; *Pickwick* v. *Gibbes*, 1 B. 271.

The personal representatives of a legatee entitled to a vested legacy stand in no better position than the legatee; therefore, where a time for payment is fixed and the legatee would not have been entitled to interest in the meantime, the legacy is not payable to the personal representatives till the time when it would have been payable to the legatee. *Chester* v. *Painter*, 2 P. W. 336; *Roden* v. *Smith*, Amb. 588; *Maher* v. *Maher*, 1 L. R. Ir. 22.

Exceptions.

But though a time is appointed for payment, or the legacy is contingent, interest runs from the death :—

Testator *in loco parentis* to an infant.

1. Where the legatee is an infant child of the testator, or an infant to whom the testator has placed himself *in loco parentis*, and the will provides no other maintenance, whether the legacy be vested or contingent. *Harvey* v. *Harvey*, 2 P. W. 21; *Inchedon* v. *Northcote*, 3 Atk. 432, 438: *Donovan* v. *Needham*, 9 B. 164; *May* v. *Potter*, 25 W. R. 507; see *Mole* v. *Mole*, 1 Dick. 310; *In re Bowlby: Bowlby* v. *Bowlby*, (1904) 2 Ch. 685.

Provision for maintenance.

If the testator has made a provision for the maintenance of his infant children, interest only runs from the time when the legacy is payable. *Hearle* v. *Greenbank*, 3 Atk. 695, 716; 1 Ves. Sen. 298; *Wynch* v. *Wynch*, 1 Cox, 433; see *In re George*, 5 Ch. D. 837.

Apparently a gift of residue to the children, the income of which, by virtue of the Conveyancing Acts, would be applicable for their maintenance, would not alter the rule. *In re Moody; Woodroffe* v. *Moody*, (1895) 1 Ch. 101.

A power to raise part of the expectant share of a child and apply the same for his advancement, preferment or benefit, does not alter the rule. *In re Moody: Woodroffe* v. *Moody*, *supra*.

Where there is provision for maintenance during part of the minority, interest on the legacy will be allowed during the rest. *Chambers* v. *Goldwin*, 11 Ves. 1; *Martin* v. *Martin*, L. R. 1 Eq. 369; see *Cusack* v. *Jellicoe*, 22 W. R. 344.

2. If the infant legatee is a stranger, but the income is given for maintenance, interest runs from the death. *In re Richards*, 8 Eq. 119; *Chidgey* v. *Whitby*, 41 L. J. Ch. 699.

General intention to provide maintenance.

3. Upon similar grounds, where the legatees are strangers, if a general intention is expressed of providing for their maintenance out of their legacies, interest runs from the death. *Pett* v. *Fellows*, 1 Sw. 561, n.; *Lambert* v. *Parker*, Coop. t. Eldon, 143; *Leslie* v. *Leslie*, Ll. & G. t. Sug. 1.

The fact that maintenance is given in one particular event which does not happen is not enough. *Festing* v. *Allen*, 5 Ha. 575.

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Future gift of principal with interest.

Where there is a future gift of principal "with interest," interest is calculated from the end of a year after the testator's death till the time of payment. *Knight* v. *Knight*, 2 S. & St. 490.

Vested legacy divested.

Where a vested legacy is given to an infant, and no time of payment is fixed, and the legacy is given over upon a contingency, the infant or his representatives will be entitled to the interest which has accrued due till the contingency happens. *Taylor* v. *Johnson*, 2 P. W. 504; *Barber* v. *Barber*, 3 M. & Cr. 688; *Mills* v. *Roberts*, 1 R. & M. 555.

The provisions of Lord Cranworth's Act (23 & 24 Vict. c. 145), s. 26, and the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 43, sub-s. (2), enabling trustees to apply the income of infants' property towards their maintenance, and directing the residue to be accumulated for the benefit of the persons ultimately entitled to the property, do not alter the law so as to deprive the representatives of the infant of accumulations made before the gift over takes effect. *In re Buckley's Trusts*, 22 Ch. D. 583; *In re Wells; Wells* v. *Wells*, 43 Ch. D. 281; *In re Humphreys; Humphreys* v. *Levett*, (1893) 3 Ch. 1; *In re Scott; Scott* v. *Scott*, (1902) 1 Ch. 918; *In re Bowlby*, (1904) 2 Ch. 685.

The person taking a vested interest under the gift over, no condition as to payment being annexed to his gift, is entitled to interest from the time when the gift over takes effect, or from a year after the testator's death, whichever period is latest. *Laundy* v. *Williams*, 2 P. W. 481.

Rate of interest.

The rate of interest allowed on legacies is 4 per cent., and as the rate is fixed by Rule of Court (Order 55, rule 64) it cannot be altered except by rule. It appears to be settled that that rate only will be allowed though the personalty is in a country where the current rate of interest is higher. *Bourke* v. *Ricketts*, 10 Ves. 330; *Hamilton* v. *Dallas*, 38 L. T. 215.

A direction to pay interest at the rate of 3 per cent. half-yearly gives the legatees interest at 6 per cent. per annum. *Re Booker; Booker* v. *Booker*, 54 L. T. 239.

Interest on portions.

Portions charged on land by a father for the benefit of his children, whether contingent or vested, carry with them such rate of interest as the Court may consider necessary for the reasonable maintenance of the children. *In re Greaves' Settled Estates; Jones* v. *Greaves*, (1900) 2 Ch. 683.

Power to fix rate of interest.

In the case of a power to direct portions to be raised out of land, if the power enables the donee to direct whether the portion is to be raised or not, he may also fix the rate of interest.

But if the power merely enables the donee to distribute the portions, only the ordinary rate of interest can be allowed, namely, 4 per cent. in the case of land in England, 5 per cent. in the case of land in Ireland. *Balfour* v. *Cooper*, 23 Ch. D. 472.

If the power authorises the appointment of interest the donee may, if it is beneficial for the infants, direct the portions to carry interest to be payable to himself as the guardian of his children. *In re De Hoghton; De Hoghton* v. *De Hoghton*, (1896) 2 Ch. 385.

Arrears of interest.

With regard to arrears of interest in cases where the Statute of Limitations does not apply, the Court will, in cases of delay, follow the analogy of the statute, and allow only six years' arrears to be recovered. *Thomson* v. *Eastwood*, 2 App. C. 215.

VIII. Payment of Annuities.

From what time annuities are payable.

An annuity, whether given simply or through a direction to purchase it, begins to run from the death of the testator; the first payment is therefore due at the end of a year unless the annuity is directed to be paid monthly or quarterly, in which case instalments are payable at the end of the first month or quarter. *Houghton* v. *Franklin*, 1 S. & St. 390; *In re Robbins; Robbins* v. *Legge*, (1907) 2 Ch. 8.

If payment on stated quarterly days is directed, a proportional part is payable on the first quarterly day. *Williams* v. *Wilson*, 5 N. R. 266.

If the first payment of an annuity payable quarterly is directed to be made at the end of eighteen months, a quarter's

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instalment is payable at that time. *Irvin* v. *Ironmonger*, 2 R. & M. 531.

As to the postponement of an annuity till debts and legacies are paid, see *Astley* v. *Earl of Essex*, 6 Ch. 898; *Rawson* v. *M'Causland*, I. R. 7 Eq. 284; 22 W. R. 145.

Sum to produce annuity.

Where a sum of money is directed to be invested in the purchase of an annuity, the gift is to be considered as a legacy payable at the end of a year. *In re Friend*; *Friend* v. *Young*, 78 L. T. 222; *Gibson* v. *Bott*, 7 Ves. 89.

Arrears of an annuity do not carry interest.

Arrears of an annuity will not, as a rule, carry interest. *Batten* v. *Earnley*, 2 P. W. 163; *Anderson* v. *Dwyer*, 1 Sch. & Lef. 301; *Martyn* v. *Blake*, 3 Dr. & War. 125; *Taylor* v. *Taylor*, 8 Ha. 120; *Torre* v. *Browne*, 5 H. L. 555; *Wheateley* v. *Davies*, 24 W. R. 818.

IX. Duties.

Legacy duty.

Legacy duty, in the absence of a direction to the contrary, is in all cases payable by the legatee even though the legacy is to a creditor in discharge of a debt due from a third person. *Foster* v. *Ley*, 2 Sc. 438; 2 B. N. C. 269.

Estate duty. Settlement estate duty.

Estate duty is *primâ facie* payable out of the residuary estate, but settlement estate duty is payable out of the settled fund. *In re Maryon-Wilson*; *Wilson* v. *Maryon-Wilson*, (1900) 1 Ch. 565; *In re Duke of St. Albans*; *Loder* v. *Duke of St. Albans*, (1900) 2 Ch. 873.

A legacy given free of duty by a will made before the Finance Act, 1894 (57 & 58 Vict. c. 35), is free from settlement estate duty. *In re Turnbull*; *Skipper* v. *Wade*, (1905) 1 Ch. 726.

Direction to pay legacy duty.

A direction to pay legacy duty does not include succession duty payable in respect of leaseholds. *In re Johnston*; *Cockerell* v. *Earl of Essex*, 26 Ch. D. 538.

A general direction in the will to pay all legacies free of deduction for tax or duty will include legacies given by a codicil. *Byne* v. *Currey*, 2 Cr. & Mee. 603; 4 Tyr. 479. See *Kirkpatrick* v. *Bedford*, 4 App. C. 96; *Re Sealy*; *Tomkins* v. *Tucker*, 85 L. T. 451.

Legacies herein given.

But a direction in the will to pay the duty on legacies "herein given" will not include legacies given by a codicil. *Early* v. *Benboe*, 2 Coll. 354; *Gilhooly* v. *Plunkett*, 9 L. R. Ir. 324. See *Bonner* v. *Bonner*, 13 Ves. 378; *Badburn* v. *Jervis*, 3 B. 450.

In some cases, however, such words as "foregoing legacies" or "herein mentioned" have upon the general intention been extended to legacies given by a codicil. *Williams* v. *Hughes*, 24 B. 474; *Jauncey* v. *A.-G.*, 3 Giff. 308.

A direction to pay legacies free of duty is not necessarily limited to pecuniary legacies, but may include a debt which is forgiven, and stock legacies and specific legacies. *Morris* v. *Livie*, 11 L. J. Ch. 172; *Ansley* v. *Cotton*, 16 L. J. Ch. 55; *In re Johnston; Cockerell* v. *Earl of Essex*, 26 Ch. D. 538.

A direction to pay the legacy duty on the legacies and bequests given by the testator has been held not to include the duty on the proceeds of sale of realty directed to be sold and held on certain trusts. *White* v. *Lake*, 6 Eq. 188.

Free from deductions.

Legacies given free from deduction or free from expense, or free from charge or liability, are free from duty. *Barksdale* v. *Gilliatt*, 1 Sw. 652; *Courtoy* v. *Vincent*, T. & R. 433; *Gosden* v. *Dotterill*, 1 M. & K. 56; *Louch* v. *Peters*, 1 M. & K. 489; *Warbrick* v. *Varley*, 30 B. 241; see *Stow* v. *Davenport*, 5 B. & Ad. 357; 2 Nev. & M. 835; and see *Turner* v. *Mullineux*, 1 J. & H. 334.

If annuities charged on land are given free from deduction except legacy duty, the annuitants must bear the succession duty, which by the Customs and Inland Revenue Act, 1888 (51 Vict. c. 8), s. 21, is substituted in the case of legacies charged on land for legacy duty. *In re Rayer; Rayer* v. *Rayer*, (1903) 1 Ch. 685.

Estate duty.

A sum to be paid without any deduction is free from estate duty and from settlement estate duty. *In re Parker-Jervis; Salt* v. *Locker*, (1898) 2 Ch. 642; *In re Maryon-Wilson; Wilson* v. *Maryon-Wilson*, (1900) 1 Ch. 565.

Settlement estate duty.

A direction to pay estate duty or my testamentary expenses and duties includes settlement estate duty. *In re Leveridge;*

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Spain v. *Lejeindre*, (1901) 2 Ch. 830; *In re Pinnn*: *Sharpe* v. *Hodgson*, (1904) 2 Ch. 345.

But a direction to pay the duties "payable by law out of my estate" does not. *Re Lewis*; *Lewis* v. *Smith*, (1900) 2 Ch. 176; see *In re Cayley*; *Audry* v. *Cayley*, (1904) 2 Ch. 781.

Gift of a "clear" sum.

A gift of a clear or net sum or annuity is a gift clear of legacy duty and of settlement estate duty. *Gude* v. *Mumford*, 2 Y. & C. Ex. 448; *Ford* v. *Ruston*, 1 Coll. 403; 66 R. R. 122; *Haynes* v. *Haynes*, 3 D. M. & G. 590; *In re Currie*: *Bjorkman* v. *Lord Kimberley*, 57 L. J. Ch. 743; 59 L. T. 200; 36 W. R. 752; *In re Saunders*; *Saunders* v. *Gore*, (1898) 1 Ch. 17; *Re Dyet*; *Morgan* v. *Dyet*, 87 L. T. 744.

This is the case although in another part of the will a clear yearly sum is expressed to be given fr. of legacy duty. *Re Robins*; *Nelson* v. *Robins*, 58 L. T. 382.

The same principle applies in the case of an appointment, and a direction to raise a net sum which is to belong to a donee is a gift of the sum free from succession duty. *In re Saunders*; *Saunders* v. *Gore*, (1898) 1 Ch. 17.

A gift of a fund to produce a clear annual sum, which sum is to be paid to the legatee is also free of duty. *Morris* v. *Burton*, 11 Sim. 161; *Cole's Will*, 8 Eq. 271.

The distinction which has been made between such a gift and a gift of a fund to produce a clear annual sum, and to pay the dividends of the stock, and not the exact sum to the legatee, cannot now be relied on. *Banks* v. *Braithwaite*, 32 L. J. Ch. 35; see *In re Saunders*, *supra*.

The case may be different if the annuity is given to persons in succession who would pay different rates of duty. *Sanders* v. *Kiddell*, 7 Sim. 536; *Priddie* v. *Field*, 19 B. 497.

A gift to employés of their "full salary" is not free from legacy duty, the word "full" being referred to incidental deductions. *In re Marcus*; *Marcus* v. *Marcus*, 56 L. J. Ch. 830; 57 L. T. 399.

Income tax.

A direction to pay an annuity free from deduction or abatement will not release the legatee from paying income tax, unless the testator shows that he regards income tax as a deduction. *Abadam* v. *Abadam*, 12 W. R. 615; 33 B. 475;

Turner v. *Mullineux*, 1 J. & H. 334; *Sadler* v. *Rickards*, 4 K. & J. 302; *Pearetli* v. *Marriott*, 22 Ch. D. 182; *Gleadow* v. *Leetham*, 22 Ch. D. 269; *In re Buckle*; *Williams* v. *Marson*, (1894) 1 Ch. 286.

But the testator may by proper words direct the income tax upon an annuity to be paid out of his estate. *Festing* v. *Taylor*, 11 W. R. 70; 3 B. & S. 217, 235; *Lord Lovat* v. *Duchess of Leeds*, 10 W.R. 397; 2 Dr. & Sm. 62; *In re Bannerman's Estate*; *Bannerman* v. *Young*, 21 Ch. D. 105.

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Ademption.

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A disposition of farm stock is adeemed by the sale of the stock in lunacy proceedings during the life of the testator. *Miller* v. *Miller*, 25 Gr. 224.

A bequest of a specific sum of money secured by mortgage, is not adeemed by the sale of the equity of redemption and the taking by the testator of a fresh mortgage from the assignee of the equity of redemption on the same and other land, the original mortgage being retained. *Loring* v. *Loring*, 12 Gr. 103.

A testator by his will gave $6,000 a year, for life, to each of two daughters. Subsequently he purchased securities bearing $1,200 per annum and assigned them absolutely to one daughter, and by a codicil reduced her annuity to $4,800. He afterwards purchased a like amount of securities and assigned them to his other daughter, the plaintiff, and gave instructions for a like codicil, but died before it was made. Entries in his books, a letter to the plaintiff, instructions for the codicil, and the testator's declarations as to the reduction were received in evidence, and the annuity was held to be adeemed by the amount of the gift. *Tuckett-Lowry* v. *Lamoureaux*, 3 O.L.R. 577.

Change of Interest of Testator.

Wills Act.

By the Wills Act, it is enacted that "no conveyance or other act made or done subsequently to the execution of a will, of or relating to any real or personal estate therein comprised, except an act by which such will is revoked as aforesaid, shall prevent the operation of the will with reference to such estate or interest in such real or personal estate as

the testator had power to dispose of by will at the time of his death." R.S.O. c. 128, s. 25; R.S.B.C. c. 193, s. 20; R.S.M. c. 174, s. 21; R.S.N.B. c. 160, s. 17; R.S.N.S. c. 139, s. 23.

Cases before the Act.

Before this enactment a conveyance to a devisee of a part of land devised to him by a will made before the conveyance revoked the whole devise. *Doe dem. Marsh* v. *Scarborough*, 5 U.C.R. 499.

So also, where a testator devised 200 acres to his son and 100 to his wife, and afterwards conveyed the 300 acres to a trustee on trust to convey the 100 acres to the wife, which was done, and to hold the 200 on trust to convey to any person the testator might appoint, the will was wholly revoked *Loughead* v. *Knott*, 15 Gr. 34.

And where a testator devised all the residue of his real and personal property to two persons, and then contracted to sell the realty and died, and after his death the contract was rescinded, although the devise was thereby revoked, the residuary legatees, being entitled to the proceeds of the sale as personalty, if the sale had been completed, took the land on rescission of the contract. *Ross* v. *Ross*, 20 Gr. 203.

But where a testator was equitably entitled to land under a contract to purchase and devised all his land, his subsequent acquisition of the legal estate did not revoke the devise. Thus, land held by a testator under lease with a right to purchase the fee, was devised by a general devise of all his real estate, and he afterwards exercised his right of purchase of the fee and died seised in fee simple and the fee was held to pass under the will. *Sinclair* v. *Brown*, 17 Gr. 333. Though this was decided after the above enactment there is no reference in the report to it, nor is there anything to shew the date of the death; the judgment proceeds on the principle above stated.

Cases after the Act.

Since the enactment, a sale of the whole land revokes the devise, and where the purchase money is partly paid in ready money, and the remainder is secured by mortgage on

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the land, the mortgage passes under the bequest of personalty. *Re Dods*, 1 O.L.R. 7.

Sale to devisee.

A testator devised certain land specifically to his son, and by his will provided that if any sale should be made of any lands before his death the purchase money should form a charge on his estate and become due to the devisee of such lands and the securities therefor should be transferred to him. After making the will the testator conveyed the lands so devised to his son in part payment of a debt. Held, that such sale did not revoke the devise. *Severn* v. *Archer*, Cas. Dig. (1893), 875, reversing C.A., 8 A.R. 725.

Exoneration of Specific Legacies.

Where a testator bequeathed shares in a company, upon which there were calls due for which he might have been sued in his lifetime, the legatee was held entitled to have the calls paid out of the general estate, but subject to all calls not completed in the testator's lifetime. *Manson* v. *Ross*, 1 B.C.R., Part II. 49.

Exoneration of Mortgaged Lands.

Wills Act.

By the Wills Act it is enacted that:

"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 or sums 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 mortgaged debts charged on the whole thereof.

"2. Nothing herein contained shall affect or diminish any right of the mortgagee of such real estate 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; and nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed or document made before the 1st day of January, 1874.

"3. Where any person dies on or after the 13th day of April, 1897, seised of or entitled to any estate or interest in any real estate, which at the time of his death is charged with the payment of any sum of money by way of equitable charge, including any lien for unpaid purchase money, the provisions of this section shall apply to such charge in the same manner as they would be applicable if such charge were a mortgage." R.S.O. c. 128, s. 37; R.S.B.C. c. 140, s. 2, except sub-s. 3; R.S.M. c. 174, ss. 32, 33, except sub-s. 3; R.S. N.B. c. 152, s. 34.

And in the construction of any will to which the foregoing enactment relates, a general direction that the debts or that all of 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 in the enactment, 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 or debt by way of mortgage on any part of his real estate. R.S.O. c. 128, s. 38; R.S.M. c. 174, s. 33; R.S.N.B. c. 152, s. 34.

Before this act, a testator mortgaged land which he had disposed of by will, and it was held that the devisee was entitled to have the mortgage discharged out of personalty. *Lapp* v. *Lapp*, 16 Gr. 159.

Devise after payment of debts.

A devise of a portion of mortgaged lands to the testator's widow in lieu of dower, and a devise of the residue to another devisee "subject to the payment of all my just debts" exonerates that portion devised to the widow from payment of the mortgage. *Dungey* v. *Dungey*, 24 Gr. 455.

But a devise of mortgaged lands "after payment of debts" does not exonerate the land. *Burk* v. *Burk*, 26 Gr. 195.

Free from incumbrances.

A devise of land "free from all incumbrances" exonerates the land, though by another clause of the will a fund was provided for payment of the debts which failed. And where part of a mortgaged property was so devised and such a fund provided which failed, the remainder of the mortgaged property was charged with its proportion of the mortgage only, and the proportion charged on the exonerated land was directed to be paid out of the personalty. *Toronto General Trusts Corporation* v. *Irwin*, 27 O.R. 491.

Express charge.

Where the testator charges all his lands with the payment of debts and incumbrances, the specific devisees of incumbered portions are entitled to have the rents and profits of all the lands funded to remove the incumbrances. *Sproatt* v. *Robertson*, 26 Gr. 333.

Devolution of Estates Act.

The Devolution of Estates Act (Ontario), by which land passes to the personal representative, subject to the payment of debts, has not superseded the above enactment. *Mason* v. *Mason*, 13 O.R. 725.

A specific devise of one mortgaged parcel, following by a general devise of all the testator's real and personal property other than the parcel specifically devised, which included another mortgaged parcel, upon trust to pay debts and for other purposes, is not sufficient to exonerate the parcel specifically devised from its own mortgage. *Ibid.*

But a direction in a will charging "my estate with the payment of all incumbrances upon the said lands" which were specifically devised, exonerates them. *Scott* v. *Supple*, 23 O.R. 393.

A devise to three devisees of several parcels of land, which were all under a mortgage of $4,000, was accompanied by a direction that, if the mortgage was not paid off at the testator's death, each of the devisees should contribute $150 "to assist in meeting that debt," and their lands were charged with these amounts. Held not to exonerate the lands from the mortgage debt. *Re Goulet*, 10 O.L.R. 197.

A voluntary grantee of a parcel of land mortgaged by the testator takes it free of the mortgage on the administration of the estate, the mortgage as a debt of the testator being paid out of the general estate. *Lewis* v. *Moore*, 24 A.R. 393. See also *Wilson* v. *Dalton*, 22 Gr. 160. Testator's mortgage debt.

A testator devised his land to a mortgagee thereof, charged with a legacy in favour of an infant, and bequeathed legacies to other persons. Held, that the devisee was not entitled to have the personalty applied to his mortgage in preference to the legacies, but that his mortgage debt should be satisfied out of the land first, and then the legacies should be raised. *Ricker* v. *Ricker*, 14 Gr. 264.

In New Brunswick before the above enactment, a devise to A. of mortgaged lands, on trust to apply the rents and profits was made for the benefit of his wife and children, with power to lease for terms not exceeding one year, and charged with an annuity in favour of another legatee. The residuary estate was bequeathed to certain legatees after payment of debts and general and testamentary expenses and certain legacies. Held, that A. was entitled to have the mortgages paid out of the residuary estate. *McLeod* v. *Firth*, 16 N.B.R. 453. New Brunswick.

Municipal taxes which have accumulated during the life of a testator and form a charge on land, and for which the testator might have been sued in debt, are not an incumbrance within the meaning of the Act which the devisee of the land is to assume, but are a debt of the testator's payable in course of administration. *Re Watkins*, 12 B.C.R. 97. Municipal taxes not within the Act.

Interest on Legacies.

Where legacies are to be paid out of an estate directed to be converted, and no time is fixed for the sale, and the legacies are not to be paid until conversion is effected, they do not bear interest until the whole estate is realized. *Smith* v. *Seaton*, 17 Gr. 397. On conversion.

But where a time is fixed within which conversion is to take place, the legacies payable out of the proceeds bear in-

terest from that time, or from the conversion if it takes place sooner. *Re Robinson*, 22 O.R. 4[illegible], *McMylor* v. *Lynch*, 24 O.R. 632.

Interest is payable on legacies the payment of which is not postponed, although it is not possible to pay them on account of the income of the whole estate being appropriated for a life tenant. *Toomey* v. *Tracey*, 4 O.R. 708.

Postponed legacies.

But where the payment is postponed until the life tenant dies, interest runs from the death of the tenant for life only. *Re Scadding*, 4 O.L.R. 632.

Maintenance of infant.

Where a testator directed a legacy to be paid to a legatee at the age of twenty-three, and provided that, in order to maintain the legatee between the ages of twenty-one and twenty-three, his executors should pay to him the annual interest of the fund bequeathed, it was held that he was entitled to all the accumulations of interest from a year after the testator's death, and not only the annual payments accruing in the two years. *Fuller* v. *Macklem*, 25 Gr. 455.

Where an infant is entitled to a legacy payable at majority, from a parent, or a testator who stood *in loco parentis* to him, he is entitled to interest thereon for maintenance during his minority if he has no other means of support, but not otherwise. *Spark* v. *Perrin*, 17 Gr. 519; *Rees* v. *Fraser*, 26 Gr. 233.

Legacies payable dating from will.

Where legacies were made payable seven years after the date of the will, which period the testator outlived, interest was allowed only as in ordinary cases, viz., from a year after the testator's death. And the same rule was applied in the same will, where there was a direction to accumulate interest from a date seven years after the date of the will until the legatee attained twenty-one. *Miller* v. *Miller*, 25 Gr. 224.

Succession Duty.

Succession duty—Ontario.

In Ontario, succession duty must be deducted from each legacy, and is not chargeable to the residue unless the legacies are given free of duty. *Kennedy* v. *Protestant Orphans' Home*, 25 O.R. 235; *Ross* v. *The Queen*, 32 O.R. 143.

A direction to pay debts does not exonerate the legacies. *Re Mackey*, 6 O.L.R. 292; *Re Bolster*, 10 O.L.R. 591.

British Columbia.

In British Columbia, succession duty is not part of the testamentary expenses, but is chargeable against the different properties devised. *Re Watkins*, 12 B.C.R. 97.

New Brunswick.

In New Brunswick, succession tax is payable out of a specific legacy, unless otherwise directed by the will; and a direction that a sum of money be paid annually to a legatee until the legacy is paid in full, is not a direction to the contrary. *Re Botsford*, 33 N.B.R. 55.

CHAPTER XXII.

THE MEANING OF CERTAIN WORDS.

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Money—what it includes.

MONEY includes bank notes (*a*), money at the bank on a current account as well as on deposit (*b*), money in the hands of an agent of the testator (*c*), apparently arrears of a superannuation allowance from Government, and money payable by a friendly society for funeral expenses (*d*), and any money, of which at the time of the testator's death he might have claimed immediate payment (*e*). *Chapman* v. *Hart*, 1 Ves. Sen. 217 (*a*); *Manning* v. *Purcell*, 7 D. M. & G. 55 (*b*); *Ogle* v. *Knipe*, 8 Eq. 434 (*c*); *Collins* v. *Collins*, 12 Eq. 455 (*d*); *Byrom* v. *Brandreth*, 16 Eq. 475 (*e*).

What it does not include.

It will not pass an apportioned part of an annuity nor accruing interest or dividends (*a*), nor money deposited with a stakeholder to abide the event of a bet (*b*), nor money due on a current account from a salesmaster (*c*), nor a legacy not acknowledged to be at the testator's disposal (*d*), nor stock in the funds (*e*), nor a sum due to the testator (*f*). *Byrom* v. *Brandreth*, 16 Eq. 475; see *Re Beavan; Beavan* v. *Beavan*, 53 L. T. 245 (*a*); *Manning* v. *Purcell*, 7 D. M. & G. 55 (*b*); *Smith* v. *Butler*, 3 J. & L. 565; *De Roebuck* v. *Lord Cloncurry*, I. R. 5 Eq. 588 (*c*); *Byrom* v. *Brandreth*, 16 Eq. 475 (*d*); *Hotham* v. *Sutton*, 15 Ves. 319; *Gosden* v. *Dotterill*, 1 M. & K. 56; *Ommaney* v. *Butcher*, T. & R. 260; *Lowe* v. *Thomas*, Kay, 369; 5 D. M. & G. 315; *Collins* v. *Collins*, 12 Eq. 455 (*e*); *Dillon* v. *M'Donnell*, 7 L. R. Ir. 335 (*f*).

Money may, however, pass stock where stock is expressly referred to as money. *Newman* v. *Newman*, 26 B. 218; *Chapman* v. *Reynolds*, 28 B. 221, cannot be looked upon as a case of much authority.

In some cases a larger sense has been given to the term "money," and it has been held to pass the residuary personalty:—

When the word "money" will pass the residue.

1. It is clear that a gift of "the whole of my money" will only pass money properly so called, though there may be very little of it, and it is given for life with remainders, at any rate where the gift is followed by specific or general bequests. *Lowe* v. *Thomas*, Kay, 369; 5 D. M. & G. 315; *Larner* v. *Larner*, 3 Dr. 704.

So, too, "money" must be construed strictly where it is used as one of several terms of description, showing that it was not alone meant to pass the personal estate. *Cowling* v. *Cowling*, 26 B. 449; see *In bonis Aston*, 30 W. R. 92.

2. But where the testator declared himself desirous of making a settlement of his affairs, and appointed executors to take and receive all moneys in his possession or due to him, the whole personal estate was held to pass. *Waite* v. *Combes*, 5 De G. & S. 676.

And a gift of "all my money" except a sum "invested in the Belgravian Dairy Co." was held to pass the general personal estate. *Re Buller; Buller* v. *Giberne*, 74 L. T. 406.

And in *Prichard* v. *Prichard*, 11 Eq. 232, the whole personal estate was held to pass under a gift of the "income of my principal money" to A for life, and afterwards to be divided among her children, apparently on the ground that there was only a sum of 239*l.* money proper at the testator's death. See *Cooke* v. *Wagster*, 2 Sm. & G. 296.

And in *In re Cadogan; Cadogan* v. *Palagi*, 25 Ch. D. 154, the whole personal estate passed under a gift of "one-half of the money of which I am possessed" to A, "and the remainder to" B. See, too, *In re Townley; Townley* v. *Townley*, 32 W. R. 549; *In bonis Bramley*, (1902) P. 106.

Gifts of residue of money after payment of debts and legacies.

When there is a direction to pay debts, or legacies have been given, and the residue of money is then given, the whole personal estate will pass. The general personalty being liable to pay debts and legacies, the residue must be a residue *ejusdem generis*. *Lynn* v. *Kerridge*, West. Rep. tem. Hard. 172; *Legge* v. *Asgill*, T. & R. 265, n.; *Rogers* v. *Thomas*, 2 Kee. 8; *Dowson*

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v. *Gaskoin*, *ib.* 14; *Stocks* v. *Barré*, Jo. 54; *Barrett* v. *White*, 24 L. J. Ch. 724; 1 Jur. N. S. 652; *Grosvenor* v. *Durston*, 25 B. 99; *In bonis White*, 7 P. D. 65; *In re Hart*; *Hart* v. *Hernandez*, 52 L. T. 217; *In re Smith*; *Henderson-Roe* v. *Hitchins*, 42 Ch. D. 302; *In re Egan*; *Mills* v. *Penton*, (1899) 1 Ch. 688; see, too, *Langdale* v. *Whitfield*, 4 K. & J. 426; *Re Maclean*; *Williams* v. *Nelson*, 11 T. L. R. 82.

In such a case the fact that a specific legacy is afterwards given makes no difference. *Montagu* v. *Earl of Sandwich*, 33 B. 324; *In re Pringle*; *Walker* v. *Stuart*, 17 Ch. D. 819.

Similarly, where the testator gave his money and goods to his wife for life, and at her death bequeathed certain legacies and the remainder of his property, the money was held to include the personal estate, as the testator showed that he was disposing at his wife's death of the same property as he meant her to have for life. *Glendening* v. *Glendening*, 9 B. 324.

A gift of "the rest of my money however invested" has been held to pass the residuary personal estate. *In re Pringle*; *Walker* v. *Stuart*, 17 Ch. D. 819.

Of course, if there is an express gift of residue, money must be construed in its strict sense. *Willis* v. *Plaskett*, 4 B. 208.

See as to the meaning of a direction to pay debts out of money, when there is a residuary bequest, *Lloyd* v. *Lloyd*, 54 L. T. 841; 34 W. R. 608.

And a gift by codicil of "all moneys that may be left after my decease" where there is a gift of residue in the will, passes only money properly so called. *Williams* v. *Williams*, 8 Ch. D. 789.

Ready money, &c.

Such words as "ready money" (*a*), or "money to my account" (*b*), or "money in bonds or consols or anything else" (*c*), or money referred to as "cash" (*d*), would require a very strong context to pass more than would be included in the words if taken in the ordinary sense. *Re Powell*, Jo. 49; *Bevan* v. *Bevan*, 5 L. R. Ir. 57 (*a*); *Hastings* v. *Hane*, 6 Sim. 67 (*b*); *Stooke* v. *Stooke*, 35 B. 396 (*c*); *Nevinson* v. *Lady*

Leonard, 34 B. 487 (*d*); see *In re Sutton*; *Stone* v. *A.-G.*, 28 Ch. D. 464.

Money "of or to which the testator may be possessed or entitled," will include moneys due on security or otherwise. *Langdale* v. *Whitfield*, 4 K. & J. 426; see *Wilkes* v. *Collin*, 8 Eq. 338.

Money "of or to which I may be possessed or entitled."

"Money due and owing at the testator's decease" will pass a balance at the bank (*a*), stock (*b*), damages recovered by the executor and unliquidated at the time of the death (*c*), money receivable on a policy of insurance upon the testator's life (*d*), and money due to the testator from an executor where the estate has been got in before the testator's death (*e*). *Carr* v. *Carr*, 1 Mer. 541 (*a*); *Waite* v. *Combes*, 5 De G. & S. 676 (*b*); *Bide* v. *Harrison*, 17 Eq. 76 (*c*); *Petty* v. *Wilson*, 4 Ch. 574 (*d*); *Bainbridge* v. *Bainbridge*, 9 Sim. 16 (*e*); see *Byrom* v. *Brandreth*, 16 Eq. 475.

Money due and owing.

Such words will not pass a distributive share in a residuary personal estate not proved to have been got in at the time of the death; nor money due on a contract of service not completed till after the testator's death. *Martin* v. *Hobson*, 8 Ch. 401; *Stephenson* v. *Dowson*, 3 B. 342; see *Collins* v. *Doyle*, 1 Russ. 135.

"Moneys owing to me at my decease" will pass money on deposit at a bank whether notice of withdrawal is required or not. *In re Derbyshire*; *Webb* v. *Derbyshire*, (1906) 1 Ch. 135.

Money owing at my decease.

"Ready money" will pass money at call at a bank, or in the hands of an agent used as a banker and money on a drawing account, and on a deposit account, for which no notice of withdrawal was wanted, and a deposit receipt payable without notice. *Parker* v. *Marchant*, 1 Y. & C. C. 290; 1 Ph. 356; *Powell's Trust*, Jo. 49; *Vaisey* v. *Reynolds*, 5 Russ. 12; *Fryer* v. *Rankin*, 11 Sim. 55; *Stein* v. *Ritterdon*, 37 L. J. Ch. 369; *Mayne* v. *Mayne*, (1897) 1 Ir. 324.

Ready money.

It will not pass notes of hand (*a*), nor debts due from an agent (*b*), or in the hands of a salesmaster (*c*), nor dividends not demanded (*d*), nor rent or interest due on a mortgage (*e*), nor money on deposit subject to more than twenty-four hours' notice of withdrawal (*f*), nor proportionate parts of pensions, interest

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on mortgages and dividends (*g*). *Powell's Trust*, Jo. 49 (*a*); *Parker* v. *Marchant*, 1 Y. & C. C. 290 (*b*); *Smith* v. *Butler*, 1 J. & L. 692 (*c*); *May* v. *Grove*, 3 De G. & S. 462 (*d*); *Fryer* v. *Rankin*, 11 Sim. 55 (*e*); *Mayne* v. *Mayne*, *supra*; *In re Wheeler*; *Hankinson* v. *Hayter*, (1904) 2 Ch. 66; *In re Price*; *Price* v. *Norton*, (1905) 2 Ch. 55 (*f*); *Stein* v. *Ritterdon*, *supra* (*g*).

Cash.

Similarly "cash" will not include bonds, long annuities or promissory notes. *Beales* v. *Crisford*, 13 Sim. 592.

A gift of "all I hold in the bank" has been held to pass deposit receipts and cash. *Townsend* v. *Townsend*, 1 L. R. Ir. 180.

Money in the funds.

As to the meaning of the words "money in the funds," see *Burnie* v. *Getting*, 2 Coll. 324; *Mangin* v. *Mangin*, 16 B. 300; *Ridge* v. *Newton*, 2 D. & War. 239; *Slingsby* v. *Grainger*, 7 H. L. 273; *Ellis* v. *Eden*, 23 B. 543; *Brown* v. *Brown*, 6 W. R. 613.

Funds "purchased."

A bequest of funds "purchased" out of separate estate will not pass savings of separate estate at the bank. *Askew* v. *Booth*, 17 Eq. 426.

Property bequeathed.

Nor will a gift of "property bequeathed to me" pass property intended to be bequeathed to the testator, but in fact given to him by act *inter vivos*. *In re Armstrong*, 49 L. J. Ch. 53.

Securities for money.

"Securities for money" will not pass a balance on current account at the bank (*a*), money on a deposit account (*b*), shares (*c*), bank stock (*d*), mere debts (*e*), or money lent on mortgage where the legal estate is in trustees, and the testator is entitled only to the residue after certain payments (*f*). *Vaisey* v. *Reynolds*, 5 Russ. 12 (*a*); *Hopkins* v. *Abbott*, 19 Eq. 222 (*b*); *Huddlestone* v. *Gouldbury*, 10 B. 547; *Turner* v. *Turner*, 21 L. J. Ch. 843; *M'Donnell* v. *Morrow*, 23 L. R. Ir. 591; see *Murphy* v. *Doyle*, 29 L. R. Ir. 333 (*c*); *Ogle* v. *Knipe*, 8 Eq. 434 (*d*); *Re Mason's Will*, 34 B. 494 (*e*); *Ogle* v. *Knipe*, *supra* (*f*). See, too, *In re Rayner*; *Rayner* v. *Rayner*, (1904) 1 Ch. 176.

But it passes a lien for unpaid purchase-money (*a*), consols (*b*), money lent on mortgage, the right to receive which is in the testator (*c*), and railway debenture stock (*d*). *Callow* v. *Callow*,

42 Ch. D. 550, distinguishing *Goold* v. *Teague*, 7 W. R. 84; 5 Jur. N. S. 116 (*a*); *Beesley* v. *Peck*, 1 S. & St. 500; *Re Bearan*; *Bearan* v. *Bearan*, 53 L. T. 245 (*b*); *Ogle* v. *Knipe*, 8 Eq. 434 (*c*); *Re Bearan*; *Bearan* v. *Bearan*, 53 L. T. 245 (*d*).

"Securities for money invested in my name" has been held to pass India stock, railway debenture stock, and shares in a limited company. *Re Johnson*; *Greenwood* v. *Johnson*, 89 L. T. 84.

An I O U is not, but a promissory note is, a security for money. *Barry* v. *Harding*, 1 J. & Lat. 475; *Re Bearan*; *Bearan* v. *Bearan*, 53 L. T. 245.

As to the meaning of "securities for money" and similar expressions, see also *Ogle* v. *Knipe*, 8 Eq. 434; *Earl Poulett* v. *Hood*, 35 B. 234.

Pecuniary investments.

"Pecuniary investments" will not pass money on deposit subject to ten days' notice of withdrawal. *In re Price*; *Price* v. *Newton*, (1905) 2 Ch. 55.

Mortgages on real security.

Mortgages on real security do not include mortgages of turnpike road tolls and of turnpike road toll-houses. *Carendish* v. *Carendish*, 24 Ch. D. 685; 30 Ch. D. 227.

Rights and credits.

Possibly the expression rights and credits might pass the personal estate. *Hutchinson* v. *Hutchinson*, 13 Ir. Eq. 332.

Gift of debt when it passes arrears of interest.

A gift of "the amount of the bond I hold" for 1,000*l.* carries arrears of interest accrued during the testator's life (*a*); but a gift of 100*l.* owing upon a bond passes the principal only (*b*). *Harcourt* v. *Morgan*, 2 Kee. 274 (*a*); *Roberts* v. *Kussin*, 2 Atk. 112; *Hawley* v. *Cutts*, 2 Freem. 23 (*b*).

Debts due from A.

A gift to A of the debts due from him to the testator means the debts remaining after deducting a debt due from the testator to A. *Ekins* v. *Morris*, 8 W. R. 301; *Ganly* v. *Dowling*, 5 L. R. Ir. 628.

Book debts.

Book debts appear to mean the amount due to the testator after deducting trade debts and private debts due from him. *Chick* v. *Blackmore*, 2 Sm. & G. 274.

A gift to A of a debt due from him means a debt due from him solely if there is such a debt, and not a debt due from the firm to which A belongs. *Ex parte Kirk*; *In re Bennett*, 5 Ch. D. 800.

In the same way a bequest of a debt due to the testator from A would naturally mean a debt due to the testator alone and not the testator's share of a debt due from A to the testator's firm, though it may have that meaning if there is no debt due to the testator solely. *Maybery* v. *Brooking*, 7 D. M. & G. 673.

Mistake as to debt.

A direction to pay to a creditor a debt owing by the testator the amount of which is overstated, will not entitle the creditor to more than the sum due unless there is something in the will to show that the creditor was to have the sum named. *Whitfield* v. *Clemment*, 3 Mer. 402; *Wilson* v. *Morley*, 5 Ch. D. 776; see *Re Dyke*: *Dyke* v. *Dyke*, 44 L. T. 568; *In re Rowe*; *Pike* v. *Hamlyn*, (1898) 1 Ch. 153.

A bequest of a certain sum, described as the amount in which the legatee is indebted to the testator, would entitle the legatee to the sum given, though the debt may be paid before the death of the testator. *Vickers* v. *Pound*, 6 H. L. 885.

A direction that a debtor is to be released from all claims in respect of moneys "now owing" to the testator, and all other moneys due from him, will release the debtor from advances made subsequent to the date of the will. *Everett* v. *Everett*, 7 Ch. D. 428.

Railway shares.

Under the description "railway shares," shares and stock will pass together. *Morrice* v. *Aylmer*, L. R. 10 Ch. 148; *ib.* 7 H. L. 717, overruling *Oakes* v. *Oakes*, 9 Ha. 666.

Mining shares.

As to the meaning of "mining shares," see *Duchess of Cleveland* v. *Meyrick*, 37 L. J. Ch. 125.

Shares pass right to successive officers.

A gift of shares passes all rights incidental to the shares, including the right to claim sums fraudulently retained by officers of the company. *Carron Co.* v. *Hunter*, L. R. 1 H. L. So. 362.

Foreign bonds.

Foreign bonds will not include colonial bonds. *Hull* v. *Hill*, 4 Ch. D. 97; and see *Cadell* v. *Earle*, 46 L. J. Ch. 798.

Plate.

A gift of plate does not include plated articles. *Holden* v. *Ramsbottom*, 4 Giff. 205.

Furniture.

Furniture includes plate and pictures and probably ornaments: but not wine or books or tenant's or trade fixtures or an altar stone and relics. *Kelly* v. *Powlett*, Amb. 605; *Porter*

v. *Tournay*, 3 Ves. 311; *Field* v. *Peckett*, 9 W. R. 526; *Finney* v. *Grice*, 10 Ch. D. 13; *In re Loudesborough*: *Bridgman* v. *Fitzgerald*, 50 L. J. Ch. 9; *In re Seton-Smith*: *Burnand* v. *Waite*, (1902) 1 Ch. 717; *Petre* v. *Ferrers*, 61 L. J. Ch. 426; 65 L. T. 568.

A gift of furniture in a house passes only the furniture permanently kept there. *Wilkins* v. *Jodrell*, 11 W. R. 588.

Where the testator carries on business as a hotel-keeper, and lives in the hotel, a gift of his furniture and other personal effects at the hotel will pass furniture used for trade purposes as well as that used for his own purposes. *In re Seton-Smith*: *Burnand* v. *Waite*, (1902) 1 Ch. 717.

Household goods.

A gift of household goods where the testator has furniture at his private house and also at a place of business, does not pass the latter. *Pratt* v. *Jackson*, 2 P. W. 302; 1 B. P. C. 222.

Household furniture.

And it seems the expression "household furniture" has a more restricted sense than furniture simply, and does not as a rule pass furniture used for business purposes if there is other furniture. *Le Farrant* v. *Spencer*, 1 Ves. Sen. 97; *Manning* v. *Purcell*, 7 D. M. & G. 55; explained in *In re Seton-Smith*: *Burnand* v. *Waite*, (1902) 1 Ch. 717.

Household property.

The expression "my household property, including house in Mildmay Grove," has been held to pass the residue. *Re Johnson*; *Sandy* v. *Reilly*, 92 L. T. 357.

Household furniture and effects.

In a gift of household furniture and effects, the word "household" is to be read as limiting effects as well as furniture. *Northey* v. *Paxton*, 60 L. T. 30; *MacPhail* v. *Phillips*, (1904) 1 Ir. 155.

Such words pass lathes, sewing and copying machines, tools, an organ, pictures, books, wines and liquors, but not fowling-pieces, a cow, a pony, a parrot (*a*), jewellery (*b*), or stock in trade (*c*). *Cole* v. *Fitzgerald*, 1 S. & St. 189; 3 Russ. 301 (*a*); *Northey* v. *Paxton*, 60 L. T. 30 (*b*); *MacPhail* v. *Phillips*, (1904) 1 Ir. 155 (*c*).

Fixed furniture.

Fixed furniture includes looking glasses and book cases fixed by nails to the wall. *Birch* v. *Dawson*, 2 A. & E. 37.

Effects.

Effects in a gift of furniture and effects, or of effects following an enumeration of chattels personal, will in general be

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restricted to things *ejusdem generis* as those described by the words which it follows. It has been held under such circumstances not to include jewellery, guns, pistols, tricycles, and scientific instruments (*a*), or bank-notes, stock-receipts, and certificates of railway stock (*b*), but to include wine (*c*), and horses and carriages (*d*). *Northey* v. *Paxton*, 60 L. T. 30; *Re Miller; Daniel* v. *Daniel*, 61 L. T. 365; *Manton* v. *Tubois*, 30 Ch. D. 92 (*a*); *Re Miller*, *supra* (*b*); *Re Bourne; Bourne* v. *Brandreth*, 58 L. T. 537 (*c*); *Re Hammersley; Heasman* v. *Hammersley*, 81 L. T. 150 (*d*).

But a gift of all other effects, following an enumeration of specific things, may pass the residuary personalty where there is no other residuary gift. *In bonis Jupp*, (1891) P. 300; *Re Parrott; Parrott* v. *Parrott*, 53 L. T. 12. See *Anderson* v. *Anderson*, (1895) 1 Q. B. 749.

Household ornament.

A gift of articles of household or domestic ornament may include valuable orchids used to adorn the house. *Re Owen; Peat* v. *Owen*, 78 L. T. 643.

Objects of virtu.

"Objects of virtu or taste" would not, as a general rule, include valuable pict[illegible]. *In re Londesborough; Bridgman* v. *Fitzgerald*, 50 L. J. Ch. 9.

Chattels in a house.

A bequest of chattels in a house will not pass choses in action, such as bonds or securities for money in the house, which are considered not property in the house, but evidence of title to property elsewhere. *Green* v. *Symonds*, 1 B. C. C. 129, n.; *Lady Aylesbury's Case*, 11 Ves. 662; *Chapman* v. *Hart*, 1 Ves. Sen. 271; *Moore* v. *Moore*, 1 B. C. C. 127; *Fleming* v. *Brook*, 1 Sch. & L. 318; *Brooke* v. *Turner*, 7 Sim. 671; *Hertford* v. *Lowther*, 7 B. 1; see *Re Miller; Daniel* v. *Daniel*, 61 L. T. 365.

Bank-notes will pass under such a bequest. *Popham* v. *Lady Aylesbury*, Amh. 68; *Brooke* v. *Turner*, *supra*.

Where there is a gift of particular things in a house, followed by general words such as "other articles and effects" or the like, and the house is also given to the same legatee, the question arises whether the general words are to be limited to things *ejusdem generis* with those enumerated. To admit this

construction the enumeration must be sufficient to establish a genus.

The mention of one particular class of things, coupled with general words, will not cut down the general words.

Thus, under a bequest of furniture and other movable goods in a house, money will pass. *Swinfen* v. *Swinfen*, 29 B. 207; *Mahony* v. *Donovan*, 14 Ir. Ch. 262, 388; *Cole* v. *Fitzgerald*, 3 Russ. 301.

On the other hand, if there is a long enumeration of particulars, such as furniture, plate, linen, and the like, followed by general words, the general words will be confined to things *ejusdem generis*; so that, for instance, money in the house would not pass. *Trafford* v. *Berrige*, 1 Eq. Ab. 201, pl. 4; *Boon* v. *Cornforth*, 2 Ves. Sen. 278; *Campbell* v. *M'Grain*, I. R. 9 Eq. 537; *Watson* v. *Arundel*, I. R. 10 Eq. 299; see *Dutton* v. *Hockenhull*, 22 W. R. 701.

The argument in favour of a restricted construction of the general words is strengthened, if there is anything to show that the testator intended the chattels in question to be enjoyed with the house. *Gibbs* v. *Lawrence*, 7 Jur. N. S. 137; 30 L. J. Ch. 171; *Bradish* v. *Ellames*, 13 W. R. 128; 10 Jur. N. S. 1170, 1231.

The same is the case if the things given are annexed to the house as heirlooms, a term implying durability. *Hare* v. *Pryce*, 12 W. R. 1072; *Fitzgerald* v. *Field*, 1 Russ. 427.

And in a similar gift the fact that a pecuniary legacy is given to the same legatee affords an argument that money in the house was not intended to pass under a gift of goods and chattels. *Roberts* v. *Kussin*, 2 Atk. 112; *Anon.*, Prec. Ch. 8. See *In re Robson*; *Robson* v. *Hamilton*, (1891) 2 Ch. 559; see, too, *In re O'Brien*; *O'Brien* v. *O'Brien*, (1906) 1 Ir. 649.

Articles in a mill.

A gift of articles in or about the testator's mill has been held not to pass a cargo of wheat in course of transit at the testator's death. *Lane* v. *Sewell*, 43 L. J. Ch. 378.

Property in a locality.

The expression property used with reference to a locality has a wider meaning than goods and chattels in a locality. Thus "my property in England," would include money in

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the funds, debts owing in England, arrears of a pension and the like. *Arnold* v. *Arnold*, 2 M. & K. 365.

A gift of property in a particular county or in a foreign country passes simple contract and specialty debts owing by persons living there. *Earl of Tyrone* v. *Marquis of Waterford*, 1 D. F. & J. 613; *Guthrie* v. *Walrond*, 22 Ch. D. 573; *In re Clark*; *McKecknie* v. *Clark*, (1904) 1 Ch. 294.

Colonial shares on the English register.

Where the testator has shares in a colonial company, which can be transferred in the colony or in England, and the testator's name is on the English register and the certificates are in England, the shares must be taken to be situate in England. *In re Clark*; *McKecknie* v. *Clark*, (1904) 1 Ch. 294.

A gift of property at a bank was held to pass a cash balance and also French inscribed rentes and railway shares, "nominatives" and "au porteur," the certificates for which were at the bank. *In re Prater*: *Desinge* v. *Beare*, 37 Ch. D. 481.

And a gift of a desk "with the contents thereof" passes coin, bank-notes, a deposit receipt, cheques to the testator's order, and promissory notes; but it does not pass securities kept in a box, the key of which was found in the desk. *In re Robson*: *Robson* v. *Hamilton*, (1891) 2 Ch. 559.

Business.

A direction to transfer a business to a son at twenty-one has been held not to include a freehold shop where the business was conducted. *In re Henton*; *Henton* v. *Henton*, 30 W. R. 702; see *Devitt* v. *Kearney*, 13 L. R. Ir. 45.

Goodwill.

The term goodwill *primâ facie* does not carry the freehold or leasehold premises where the business is carried on. But goodwill has been defined as the "probability that the old customers will resort to the old place." Per Lord Eldon in *Cruttwell* v. *Lye*, 17 Ves. 335, 346. And goodwill may upon the context pass the business premises.

Thus a gift of plant and goodwill has been held to carry the leasehold business premises. *Blake* v. *Shaw*, Jo. 732.

Plant, business and goodwill.

The expressions "plant," and "business and goodwill," do not include stock in trade. *Blake* v. *Shaw*, Jo. 732; *Delany* v. *Delany*, 15 L. R. Ir. 55.

A gift of the testator's business and goodwill does not pass

the capital in the business nor the book debts. *Delany* v. *Delany*, 15 L. R. Ir. 55.

Capital.

A gift of the testator's capital in a business includes a debt due from a partner. *Bevan* v. *A.-G.*, 4 Giff. 361.

Interest in a partnership.

A gift of the testator's share, right and interest in a partnership does not pass a debt due to the testator from the partnership. *In re Beard*; *Simpson* v. *Beard*, 57 L. J. Ch. 887; 58 L. T. 629; 36 W. R. 519.

But a gift of the testator's share and interest in the business of a solicitor, which has no goodwill, carries his share of the capital and undrawn profits. *Re Barfield*; *Goodman* v. *Child*, 84 L. T. 28.

Share of business premises.

A gift of "all my share of the leasehold premises in which my business is carried on" where the testator was in partnership and the premises were vested in him and his partner as joint tenants, was held to pass only the interest of the testator, if any, after paying the partnership debts. *Farquhar* v. *Hadden*, 7 Ch. 1. See *In re Holland*; *Brettell* v. *Holland*, (1907) 2 Ch. 88.

Stock in trade.

A bequest by a barge builder of his business and stock in trade will pass old barges taken in part payment for new barges, and subsequently let out on hire. *Richardson* v. *Pulliner*, 50 L. J. Ch. 483.

Upon the question whether a bequest of the stock in trade of a carriage builder will pass an unfinished carriage, see *Elliott* v. *Elliott*, 9 M. & W. 23.

Fortune.

The word "fortune" in its largest sense includes real and personal estate. *Baring* v. *Ashburton*, 54 L. T. 463.

Patrimony.

For the meaning of the word "patrimony," see *Green* v. *Giles*, 5 Ir. Ch. 25.

Legacy.

The word "legacy" is primarily applicable to personalty only. It does not apply to land given on trust for sale and division, but it does to a legacy charged on real estate. *White* v. *Lake*, 6 Eq. 188; *Hodges* v. *Grant*, 4 Eq. 140; see *In re King's Trust*, 29 L. R. Ir. 401.

But it may refer to realty if there is nothing else to which it can refer. *Hope* d. *Brown* v. *Taylor*, 1 Burr. 268; *Hardacre* v. *Nash*, 5 T. R. 716; see *Jackson* v. *Hosie*, 27 L. R. Ir. 450.

Legatee.

Similarly, the appointment of a residuary legatee will only give him personal property. *Windus* v. *Windus*, 21 B. 373; 6 D. M. & G. 549; *Hillas* v. *Hillas*, 10 Ir. Eq. 134; *Wills* v. *Wills*, 1 D. & War. 439; *Re Giles*, 14 Ir. Ch. 311; *Kellett* v. *Kellett*, 3 Dow, 248; *Cooney* v. *Nicholls*, 7 L. R. Ir. 107; *Gethin* v. *Allen*, 33 L. R. Ir. 236; *In re Morris; Morris* v. *Atherden*, 71 L. T. 179; *In re Gibbs; Martin* v. *Harding*, (1907) 1 Ch. 465.

When the residuary legatee takes realty.

But the appointment of a person "residuary legatee of all *my property*" will give him realty. *Warren* v. *Newton*, Drury, 464; *Day* v. *Daveron*, 12 Sim. 200; *Davenport* v. *Coltman*, 9 M. & W. 481; 12 Sim. 588.

So, too, if the testator expresses an intention of disposing of all his real and personal estate, and then appoints a residuary legatee. *Pitman* v. *Stevens*, 15 East, 505.

Probably, if the testator, after making certain devises, appoints a residuary legatee, real estate would pass to him. At any rate, this is the case if the testator prefaces his will with the expression of an intention to dispose of his estate, which must mean his whole estate. *Hughes* v. *Pritchard*, 6 Ch. D. 24; *Re Salter; Farrant* v. *Carter*, 44 L. T. 603; see *In re Methuen & Blore's Contract*, 16 Ch. D. 696, where there was no previous devise of realty.

The testator may show that he includes realty in the residuary gift, by a direction not to sell a house till the death of the tenant for life, on whose death the property becomes divisible among the residuary legatees. *Davenport* v. *Coltman*, 9 M. & W. 481.

When realty and personalty are made a mixed fund for the payment of legacies, it seems the residuary legatee will take everything that remains. *Evans* v. *Crosbie*, 15 Sim. 602; *Wildes* v. *Davies*, 1 Sm. & G. 475; see *post*, pp. 255—257.

So where there is an absolute direction to sell the testator's real estate and he disposes of the proceeds of his property, the appointment of a residuary legatee gives him the residue of the proceeds of sale of the realty. *Singleton* v. *Tomlinson*, 3 App. C. 404.

Annuities are legacies.

The word "legacies" includes annuities. *Bromley* v. *Wright*, 7 Ha. 334; *Ward* v. *Grey*, 26 B. 485; *Mullins* v. *Smith*,

1 Dr. & S. 204; *Heath* v. *Weston*, 3 D. M. & G. 601; *Sibley* v. *Perry*, 7 Ves. 522. Chap. XXII.

And the term "pecuniary legacies" would also, it would seem, include annuities. *Gaskin* v. *Rogers*, L. R. 2 Eq. 284.

But if the testator expressly distinguishes between legatees and annuitants, legacies will not include annuities. *Gaskin* v. *Rogers*, *supra*; *Weldon* v. *Bradshaw*, I. R. 7 Eq. 168.

It seems the term "legacy" does not *primâ facie* include a gift of residue, though "legatee" would include a residuary legatee. *Ward* v. *Grey*, 26 B. 485; see *In re Elcom*; *Layborn* v. *Grover Wright*, (1894) 1 Ch. 303; *In re Aiken*; *Bolon* v. *Gilliland*, (1898) 1 Ir. 335.

Land includes land built upon unless there is a contrary intention.

Though the word "land" is sufficient to pass land with buildings, it may be used in such a context as to exclude land built upon.

Thus a devise of messuages and lands in A and all other lands, meadows, and pastures in B does not pass houses in B, as the context shows that land is not used in its general sense. *Ewer* v. *Hayden*, Cro. El. 476, 658.

And a gift of "my cottage and all my land" at A will not include a house with ten acres of land at A subsequently purchased. *In re Portal & Lamb*, 30 Ch. D. 50.

Money subject to trust to invest in land passes land.

Money arising from the sale of land and subject to a trust for re-investment in land will pass under a devise of land; and, as between a general devise of land and a devise of land in a particular county, it passes under the former, though the land sold was in that county. *In re Duke of Cleveland's Settled Estates*, (1893) 3 Ch. 244.

Lands purchased.

A devise of lands "purchased" by the testator may include lands taken in exchange. *Doe* d. *Meyrick* v. *Meyrick*, 1 Cr. & M. 820.

Land does not pass mortgages of land.

A devise of land does not without more include mortgages of land. *Strode* v. *Russel*, 2 Vern. 621, 625; *Casborne* v. *Scarfe*, 1 Atk. 603, 605; see 2 J. & W. 195.

Purchase-money of land sold left on mortgage does not pass by devise of the land.

Where land is devised and afterwards sold by the testator, who leaves a portion of the purchase money on mortgage, the mortgage money does not pass to the devisee. *Knollys* v. *Shepherd*, cit. 1 J. & W. 450; *Moor* v. *Raisbeck*, 12 Sim. 123;

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Farrar v. *Earl of Winterton*, 5 B. 1; *In re Clowes*, (1893) 1 Ch. 214.

Devise of land by mortgagee may pass mortgage money.

But a devise of certain land by a testator who is mortgagee in possession may pass the mortgage money. *In re Carter; Dodds* v. *Pearson*, (1900) 1 Ch. 801; see *Martin* d. *Weston* v. *Mowlin*, 2 Burr. 969.

And a devise of particular lands, of which the testator is only mortgagee in possession, to several persons in succession may show an intention to pass the mortgage debt. *Woodhouse* v. *Meredith*, 1 Mer. 450.

Devise of land where testator owns the land and also a charge upon it.

If the testator is owner in fee of land and owner, subject to a life interest, of a charge upon the land, so that the charge does not merge, a devise of the land would probably not pass the charge as well. *Wilkes* v. *Collin*, 8 Eq. 338.

Devise of estate and interest in land.

A devise of all the testator's estate and interest in particular lands may pass the lands and also mortgages or charges on the lands to which he is entitled. *Mackesy* v. *Mackesy*, (1896) 1 Ir. 511; *Kilkelly* v. *Powell*, (1897) 1 Ir. 457.

And the will itself may show that the testator intended a charge upon the land to which he was entitled to merge in the land. *In re Nunn's Estate*, 23 L. R. Ir. 286.

Devise of land carries emblements.

The devisee of land is entitled to the emblements, unless they are expressly given away; and a general residuary bequest is not sufficient for the purpose. *Cooper* v. *Wright*, 2 H. & N. 122; see *Blake* v. *Gibbs*, 5 Russ. 13, n.

Farming stock.

Under the term "stock," growing crops will pass to the devisee of the land where they grow. *Blake* v. *Gibbs*, 5 Russ. 13, n.

If the farm is devised to A and the stock to B, growing crops will pass to B whether the gift of the stock is coupled with the general personal estate or not. *Cox* v. *Godsalve*, 6 East, 604, n.; *West* v. *Moore*, 8 East, 339; *Rudge* v. *Winnall*, 12 B. 357; *In re Roose; Evans* v. *Williamson*, 17 Ch. D. 696, overruling *Vaisey* v. *Reynolds*, 5 Russ. 12; and see *Harvey* v. *Harvey*, 32 B. 441; *Creagh* v. *Creagh*, 13 Ir. Ch. 28; *Burbidge* v. *Burbidge*, 16 W. R. 76.

Live and dead stock.

As to live and dead stock, see *Hutchinson* v. *Smith*, 11 W. R. 417.

Devise of freehold land.

A devise of freehold land may include privileged copyholds, generally called customary freeholds, in the locality. *In re Steel; Wappett* v. *Robinson*, (1903) 1 Ch. 135.

Such a demise *primâ facie* excludes leaseholds. *Stone* v. *Greening*, 13 Sm. 390; *Hall* v. *Fisher*, 1 Coll. 47; *Emuss* v. *Smith*, 2 De G. & S. 722; see *In re Bright-Smith*; *Bright-Smith* v. *Bright-Smith*, 31 Ch. D. 314.

But a devise of freehold land in a particular parish, when the testator had only leaseholds there, has been held to pass the leaseholds. *Day* v. *Trig*, 1 P. W. 286; *Doe* d. *Dunning* v. *Cranstoun*, 7 M. & W. 1.

And this principle applies to wills executed since the Wills Act, under which freeholds acquired after the date of the will would pass. *Nelson* v. *Hopkins*, 21 L. J. Ch. 410.

Devise of freehold land may include leasehold interest belonging to the testator.

A devise of freehold land where the testator held, as to part, an underlease and the reversion in fee subject to the head lease, was held to pass the leasehold interest as well as the reversion, though there was an express devise of leasehold land as well, the intention being that the whole property was to go together to the devisee. *Mathews* v. *Mathews*, 4 Eq. 278; *In re Guyton and Rosenberg's Contract*, (1901) 2 Ch. 591; see *Vallance* v. *Vallance*, 2 N. R. 229.

On the other hand, where the testator was owner in fee of a house subject to a lease, and also mortgagee of the lease, the mortgage debt was held not to pass by a devise of "my freehold house." *Bowen* v. *Barlow*, 11 Eq. 454; 8 Ch. 171.

Manor.

The term manor comprises the demesne lands, including the waste of the manor and the freehold inheritance of the customary lands held of the manor, the services of freehold tenants of the manor, and the right to hold a Court Baron and a customary Court.

There may also be included in the manor certain franchises, such as a Court leet, treasure trove, wreck of the sea, and the like. See Elton on Copyholds, p. 11.

The term of course includes allotments made to the lord under an Inclosure Act in respect of his right in the soil. Such lands are already parcel of the manor, and the effect of the inclosure

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is only to free them from customary and prescriptive rights. *Hicks* v. *Sallitt*, 2 W. R. 173; 3 D. M. & G. 782; see, too, *Williams* v. *Phillips*, 8 Q. B. D. 437.

Further, the word manor includes copyhold tenements of the manor, purchased by the lord, though the lord's equitable title may not be perfect. *Hicks* v. *Sallitt*, *supra*.

Freehold lands held of the manor may again become parcel of the manor by escheat. *Delacherois* v. *Delacherois*, 11 H. L. 62.

Manor does not include purchased freeholds.

But freehold lands held of the manor and purchased by the lord do not thereby become parcel of the manor, so as to pass by the description manor, though no doubt they might become parcel of the manor by reputation. *Delacherois* v. *Delacherois*, *supra*; *R.* v. *Duchess of Buccleuch*, 6 Mod. 151.

Rents from mines.

A devise, under a power, of the surface to A and the mines to B carries to A accumulations of rent down to the testator's death derived from the mines under a lease under the Settled Estates Act, the money being subject to investment in land under the Act. *In re Scarth*, 10 Ch. D. 499.

Advowson.

If an advowson is directed to be sold, and the proceeds invested for the benefit of a tenant for life, the tenant for life is entitled to present upon a vacancy occurring before sale. *Briggs* v. *Sharp*, 20 Eq. 317.

If the proceeds of sale are divisible among tenants in common, the right of presentation before the advowson is sold will be determined by lot. *Johnstone* v. *Baber*, 4 W. R. 827; 6 D. M. & G. 439.

A devise of hereditaments situate in A will not pass an advowson in gross, if there is property to which the devise may apply, unless an intention can be gathered from the instrument and the surrounding circumstances that the advowson was meant to pass. *Crompton* v. *Jarratt*, 30 Ch. D. 298, where the early cases, *Anon.*, 3 Dyer, 323b, and *Kensey* v. *Langham*, Ca. t. Talb. 143, are discussed; *In re Hodgson*; *Taylor* v. *Hodgson*, (1898) 2 Ch. 545.

Living.

The word living may mean the advowson or the next presentation. If the devise is coupled with words which contemplate personal enjoyment by the devisee, and there are no words of

inheritance, the next presentation alone passes. *Webb* v. *Byng*, 4 W. R. 657; 2 K. & J. 669.

Next presentation.

Under a devise of lands and hereditaments which include an advowson to trustees upon trust to pay the surplus rents and profits during a given period to a beneficiary, the beneficiary is entitled to nominate if a vacancy occurs during that period. *Earl of Albemarle* v. *Rogers*, 7 B. P. C. 522; *Cust* v. *Middleton*, 13 W. R. 249.

But a person entitled under a trust only to receive the rents of lands will not be entitled to present upon a vacancy occurring in a living which is included in the devise to the trustees. *Martin* v. *Martin*, 12 Sim. 579; see *Sherrard* v. *Lord Harborough*, Amb. 164.

Hereditaments.

The expression "hereditaments" *prima facie* means property capable of being inherited, but a direction to settle "the estates or other hereditaments" subject to a settlement has been held to include the proceeds of sale of some of the land which were liable to reinvestment in land. *Basset* v. *St. Levan*, 13 R. 235; *In re Gosselin*; *Gosselin* v. *Gosselin*, (1906) 1 Ch. 120.

Farm.

The word "farm" passes both freehold, copyhold, and leasehold portions of the farm unless there is a context excluding one or the other. *Lane* v. *Stanhope*, 6 T. R. 345; *Doe* d. *Belasyse* v. *Earl of Lucan*, 9 East, 448; *Arkell* v. *Fletcher*, 10 Sim. 299; *Holmes* v. *Sayer Milward*, 47 L. J. Ch. 522.

Ground rents.

A devise of freehold or leasehold ground rents passes the reversion. *Maundy* v. *Maundy*, 2 Stra. 1020; *Kerry* v. *Derrick*, Moore, 171; Cro. Jac. 104; *Kaye* v. *Laxon*, 1 B. C. C. 76.

Lease.

A gift of a lease does not pass the benefit of a contemporaneous covenant by the lessor authorising the testator to deduct 40*l.* a year from the rent, until a debt due from the lessor to the testator should be paid. *Ledger* v. *Stanton*, 2 J. & H. 687.

Gift of rents.

Where a testator forgave to a tenant "all rents or arrears of rent which may be due and owing from him to me at the time of my decease," it was held that rent accrued since the last quarter day before the testator's death was

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not forgiven. *In re Lucas; Parish* v. *Hudson*, 55 L. J. Ch. 101; 54 L. T. 30.

Where the devise is of rents due prior to the testator's death derived from property of which the testator is tenant for life, interest upon charges must be deducted, unless the charges are vested in the testator. *Lindsay* v. *Earl of Wicklow*, I. R. 6 Eq. 72.

As to the effect of a gift of arrears of rents and profits to a specific devisee, subject to "outgoings properly chargeable against such arrears," see *In re Duke of Cleveland's Estate*; *Wolmer* v. *Forester*, (1894) 1 Ch. 164.

A devise of all the testator's interest in an estate when recovered will not carry rents accrued due prior to his death. *Scott* v. *Best*, 6 L. R. Ir. 1.

Lessees.

A devise of the reversion of land subject to leases to the lessees or holders of present leases was held to include assignees of the leases. *King* v. *Rymill*, 78 L. T. 696.

Messuage.

Under a devise of messuages in a particular parish, freehold and leasehold messuages may pass together, unless the limitations are only appropriate to freeholds or there is some other evidence of intention to exclude the leaseholds. *Thompson* v. *Lady Lawley*, 2 B. & P. 303; *Hobson* v. *Blackburn*, 1 M. & K. 571.

The term messuage or house will pass the orchard, garden and curtilage. Co. Litt. 5 b; *Carden* v. *Tuck*, Cro. El. 89; 3 Leon. 214, pl. 283; see *Lombe* v. *Stoughton*, 18 L. J. Ch. 100; *Heath* v. *Prichard*, W. N. 1882, 140.

It will also pass a piece of land or a cellar severed from the house, but near it and necessary for the convenient use of it. See *Hiben* v. *Hiben*, 11 W. R. 455; 32 L. J. Ch. 374; *Doe* v. *Collins*, 2 T. R. 498; *Steele* v. *Midland Ry. Co.*, L. R. 1 Ch. 275, 289.

House.

If the testator in one part of his will gives a house and lands, and in another part uses the word house only, probably the latter devise would not carry land occupied with the house. *Buck* d. *Whalley* v. *Nurton*, 1 B. & P. 53; see 1 Bing. 498; *Roe* d. *Walker* v. *Walker*, 3 B. & P. 375.

"The leasehold premises, 32, Prince's Gate," has been held

to pass stables held with the house under a separate lease. *Mocatta* v. *Mocatta*, 49 L. T. 629.

Appurtenances.

A devise of a house with its appurtenances probably has no wider meaning than a devise of a house alone. Such a devise will pass everything naturally belonging to the enjoyment of the house, such as a garden and orchard and a small piece of land occupied with the house. *Boocher* v. *Samford*, Cro. El. 113; *Doe* d. *Lempriere* v. *Martin*, 2 W. Bl. 1148; *Saul* v. *Whalley* v. *Norton*, 1 B. & P. 53; see *Willis* v. [illegible], 51 L. J. Ch. 400 (yards).

But land will not pass as appurtenant to a house or to other lands. See Plowd. 169a, 170; Co. Litt. 121b; *Hare* v. [illegible], Cro. Car. 57; *Lister* v. *Pickford*, 34 B. 576; see *Chitheral* v. *Robinson*, 30 W. R. 366.

If the devise is of certain property with the lands appertaining or belonging thereto, this is not to be taken in the strict sense of appurtenant, but in the sense of usually occupied therewith. *Hill* v. *Grange*, 1 Plow. 170; Dyer, 130b; *Ongley* v. *Chambers*, 1 Bing. 483; *Doe* d. *Gore* v. *Langton*, 2 B. & Ald. 680.

Use and occupation.

Upon the construction of a complicated will a gift of the use and occupation of the testator's house was held to give a life interest only. *Conrad* v. *Larkman*, 60 L. T. 1.

A gift of the use and occupation of a house does not involve a personal use so as to prevent the donee from letting. *Rabbeth* v. *Squire*, 4 De G. & J. 406; *Mannox* v. *Greener*, 14 Eq. 456.

But a gift over, if the donee ceases to occupy the house, shows that the testator contemplated a personal use. *Maclaren* v. *Stainton*, 27 L. J. Ch. 442; 4 Jur. N. S. 199.

A provision that the testator's widow might reside rent free in his residence did not, in cases not affected by the Settled Land Act, enable her to let the house, but she might reside there from time to time without forfeiting her right. *May* v. *May*, 44 L. T. 412.

The effect of sect. 51 of the Settled Land Act upon such gifts will be found discussed under conditions requiring residence.

Use of plate.

A gift of the use of plate, with power to dispose of such portion as the legatee should think proper, following a gift

of other articles to the same legatee in absolute terms has been held a gift for life only. *Espinasse* v. *Luffingham*, 3 J. & L. 186.

Use and enjoyment of pictures.

A gift of the use and enjoyment of pictures allows the legatee to let the pictures with his house and possibly without it. *Marshall* v. *Bleic*, 2 Atk. 217; *Re Williamson; Murray* v. *Williamson*, 94 L. T. 613.

For the meaning of a gift of the use of book debts and capital, see *Terry* v. *Terry*, 12 W. R. 66.

Jointure.

A jointure is *primâ facie* an estate to the wife for life to take effect upon her husband's death, but it may take effect in the husband's life if there is a sufficient context to support that view. *Jamieson* v. *Trevelyan*, 10 Ex. 269; *In re De Hoghton; De Hoghton* v. *De Hoghton*, (1896) 2 Ch. 385.

Devise of a house as occupied by A.

A devise of a house as occupied by A will not pass a merely occasional easement enjoyed by A over other property of the testator, though the words "as enjoyed by A" might. *Polden* v. *Bastard*, L. R. 1 Q. B. 156; *Bodenham* v. *Pritchard*, 1 B. & C. 350; see *Tarr* v. *Knowles*, (1891) 2 Q. B. 564.

Right of way.

Where a testator devises a piece of land to A. and another piece of land to B, and the only access to the latter is over the former, B is entitled to a right of way over A's land.

If the testator has himself used a certain way for purposes of access to B's land, that will be the way to which B is entitled. *Pearson* v. *Spencer*, 1 B. & S. 571; 3 B. & S. 761.

If no way can be said to have been used by the testator for the purpose of access to the land-locked land, it would seem that the owner of the servient tenement would be entitled to set out the way, subject to the restriction that taking all the circumstances into consideration it must be a reasonable way. See *Bolton* v. *Bolton*, 11 Ch. D. 968; and as to the user of the way, see *Corporation of London* v. *Riggs*, 13 Ch. D. 798.

Right of light.

On the same principle, where a testator devises to A a house with windows, and to B a field over which the light passes which is required for the windows, the right to the light over the field passes to A, though the house may be in the possession of a lessee. *Phillips* v. *Low*, (1892) 1 Ch. 47; *Barnes* v. *Loach*, 4 Q. B. D. 494.

Premises.

The proper legal meaning of "the premises" is *præmissa*, but it may be used in a popular sense as a description of certain property, as in the phrase "house and premises"; in such a case it will only include property in connection with the particular property mentioned. *Sanford* v. *Irby*, 4 L. J. Ch. (O. S.) 23; *Lethbridge* v. *Lethbridge*, 3 D. F. & J. 523; 4 *ib.* 35; *Read* v. *Read*, 15 W. R. 165.

Moiety.

The word "moiety" may be used as equivalent to share. *Morrow* v. *McConville*, 11 L. R. Ir. 236.

London.

In a devise to the hospitals of London, the expression London was held not to be confined to a definite area, but to be used in a popular sense. *Wallace* v. *A.-G.*, 33 B. 384.

Option to sell, residue of proceeds of sale given but no sale

When a testator gives his trustees an option to sell his real and personal estate, and then gives the residue of the proceeds of sale, and the option is not exercised, an intention may be inferred to give the property whether sold or not. *Waddington* v. *Yates*, 15 L. J. Ch. 223.

Option to purchase.

Testators sometimes give options of purchasing a part of their property. Such an option may be personal to the beneficiary or it may be transmissible. *In re Cousins: Alexander* v. *Cross*, 30 Ch. D. 203; *Belshaw* v. *Rollins*, (1904) 1 Ir. 284.

If transmissible it must be so limited as not to transgress the rule against perpetuities.

The person to whom the option is given is entitled, if he exercises the option, to have the property free from incumbrances. *Given* v. *Massey*, 31 L. R. Ir. 126.

But he must comply strictly with the terms of the option, and if the option is to be exercised and the purchase-money paid within a given time, the option will be lost if this is not done, though there may be difficulties on the title or any other circumstance has caused delay. *Brooke* v. *Garrod*, 3 K. & J. 608; 2 De G. & J. 62.

If an offer is to be made by the executors and accepted within a given time, time does not run till a proper offer containing the terms is made. *Lord Lilford* v. *Powys Keck* (No. 1), 30 B. 295; *Austin* v. *Tawney*, L. R. 2 Ch. 143.

It is a question, to be determined on the facts of each case, whether the person accepting the option is in the same position

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as an ordinary purchaser, so that he may require an abstract of title, or whether he must take the property as he finds it. See *Re Davison & Torrens*, 17 Ir. Ch. 7; *Given* v. *Massey*; *Brooke* v. *Garrod*, *supra*.

A right of purchase at a fixed price is not destroyed by a compulsory purchase under the Land Clauses Act after the testator's death. In such a case the person to whom the option is given may take the purchase-money less the fixed price. *In re Cant's Estate*, 4 De G. & J. 503; *In re Kerry*, W. N. 1889, 3.

Words appropriate to Realty and Personalty respectively.

Personal property.

1. The words *personal* property, estate, and effects, *primâ facie* pass personal property only. *Delaney* v. *Delaney*, L. R. 2 Eq. 210; 2 Ch. 138; *Jones* v. *Robinson*, 3 C. P. D. 344.

But they may be used in such a context as to pass realty. *Re Wass*, 95 L. T. 750.

Possibly the word property would not pass realty if it is coupled with explanatory words relating only to personalty, such as "both in stock, household furniture, cash, &c., &c." *Mullaly* v. *Walsh*, I. R. 6 C. L. 314; see 3 L. R. Ir. 244.

Words estate or property alone will pass realty,

2. The words estate or property alone are, however, sufficient to carry real estate. *Mayor of Hamilton* v. *Hodsdon*, 6 Moo. P. C. 76; 11 Jur. 193; *Hawksworth* v. *Hawksworth*, 27 B. 1; see *Hounsell* v. *Dunning*, (1902) 1 Ch. 512.

where coupled with other words.

Where these words are coupled with other words which would alone be sufficient to carry the whole of the personal property, the word estate will, *primâ facie*, carry realty, as it would otherwise be insensible. *Tilley* v. *Simpson*, 2 T. R. 659, n.; *Edwards* v. *Barnes*, 2 Bing. N. C. 252; *Doe* d. *Waite* v. *Langlands*, 14 East, 370; *Jongsma* v. *Jongsma*, 1 Cox, 362; *Patterson* v. *Huddart*, 17 B. 210; *Hamilton* v. *Buckmaster*, L. R. 3 Eq. 323; *Sanderson* v. *Dobson*, 7 C. B. 81, and 10 B. 47, overruling same case, 1 Ex. 141; *Kirby-Smith* v. *Parnell*, (1903) 1 Ch. 483; and see *Dobson* v. *Bowness*, 5 Eq. 491; *Loftus* v. *Stoney*, 17 Ir. Ch. 178.

If there are any words in the gift accurately applicable to realty, such as "devise," the fact that the trusts declared are only applicable to personalty will not prevent the real estate from passing. *Doe* d. *Burkitt* v. *Chapman*, 1 H. Bl. 23; *Dunnage* v. *White*, 1 J. & W. 583; *Stokes* v. *Salomons*, 9 Ha. 75; *Lloyd* v. *Lloyd*, 7 Eq. 458; *Longley* v. *Longley*, 13 Eq. 133.

Real estate will pass even if there are no words technically appropriate, and the trusts declared are not literally applicable to realty, if they can be held popularly applicable. *Saumarez* v. *Saumarez*, 4 M. & Cr. 331; *D'Almaine* v. *Moseley*, 1 Drew. 632; *Morrison* v. *Hoppe*, 4 De G. & S. 234.

Thus the words "collect and get in" will not prevent realty from passing. *Hamilton* v. *Buckmaster*, Ir. R. 3 Eq. 323.

So, too, if the trust is for sale or investment, the inapplicability of the subsequent trusts to realty is immaterial. *O'Toole* v. *Browne*, 3 E. & B. 572; *Streatfield* v. *Cooper*, 27 B. 338; *Fullerton* v. *Martin*, 22 L. J. Ch. 803; *Dobson* v. *Bowness*, 5 Eq. 404. See, too, *Affleck* v. *James*, 17 Sim. 121. Trust for sale.

The fact that the gift is to trustees, their executors, administrators and assigns, on trusts exclusively applicable to personalty, indicates that real estate was not intended to pass. *Doe* d. *Spearing* v. *Buckner*, 6 T. R. 610; *Pogson* v. *Thomas*, 6 Bing. N. C. 337; *Coard* v. *Holderness*, 20 B. 147.

It has sometimes been said that if the words with which the word "estate" is coupled are not sufficient to carry all the personal property, estate will be confined to personalty. See *Tilley* v. *Simpson*, 2 T. R. 659, n; *D'Almaine* v. *Moseley*, 1 Dr. 634. The rule appears, however, to be unsupported by actual decision, and has been disapproved of. See *Lottus* v. *Stoney*, 17 Ir. Ch. 178; *Re The Greenwich Hospital Improvement Act*, 20 B. 458. Estate coupled with words insufficient to pass personalty.

At any rate, where there is a prior devise of lands a gift of "the rest and residue of my estate," or "all other my estate," though coupled with words which would not alone carry all the personalty, will carry realty. *Scott* v. *Alberry*, Com. 337; 8 Vin. Abr. 229, pl. 14; *Fletcher* v. *Smilon*, 2 T. R. 656.

Of course where the testator shows that he uses the word

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estate as equivalent to effects, only personalty will pass. *Timewell* v. *Perkins*, 2 Atk. 102; *Doe* d. *Hurrell* v. *Hurrell*, 5 B. & Ald. 18.

Real estate.

3. The words "real estate" *primâ facie* do not include leaseholds, though leaseholds may pass if there is no real estate, or an intention to include them can be gathered from the will. *Turner* v. *Turner*, 21 L. J. Ch. 843; *Gully* v. *Davis*, 10 Eq. 562; *Moase* v. *White*, 3 Ch. D. 763; *Butler* v. *Butler*, 28 Ch. D. 66; *Re Davison*; *Greenwell* v. *Davison*, 58 L. T. 304; *In re Ullermare*: *Leeson* v. *Foulis*, W. N. 1893, 158.

Seised.

4. A devise of "real estate of which I may die seised" will not pass lands which at the testator's death are in the wrongful possession of strangers. *Leach* v. *Jay*, 6 Ch. D. 496; 9 Ch. D. 42.

What I may die possessed of.

5. The words "whatever I may die possessed of" alone would probably carry realty.

At any rate this is clearly the case where they are coupled with words sufficient to carry the whole personalty. *Evans* v. *Jones*, 46 L. J. Ex. 280.

It makes no difference that the person to whom the gift is made is also appointed executor. *Pitman* v. *Stevens*, 15 East, 505; *Wilce* v. *Wilce*, 5 M. & P. 682; 7 Bing. 664; *Thomas* v. *Phelps*, 4 Russ. 348.

Monk v. *Maudsley*, 1 Sim. 286, and *Cook* v. *Jaggard*, L. R. 1 Ex. 125, were both cases before the Wills Act, in which the question was whether the words, "whatever I die possessed of," would pass the fee to a devisee to whom specific devises for life and in tail had already been made.

All the rest.

6. The words "all the rest," though following gifts of personalty, will pass realty. *Atree* v. *Atree*, 11 Eq. 280; *Smyth* v. *Smyth*, 8 Ch. D. 561.

Effects.

7. The word "effects" *primâ facie* will not pass real estate. *Doe* v. *Dring*, 2 Man. & S. 448; *Doe* d. *Hare* v. *Earles*, 15 M. & W. 450; see, however, *Smyth* v. *Smyth*, *supra*; *A.-G. of British Honduras* v. *Bristowe*, 50 L. J. P. C. 15; *Hall* v. *Hall*, (1892) 1 Ch. 361.

But the testator may show that he intended realty to pass by

the word effects, by referring, for instance, to property including realty as "such effects," *Marquis of Titchfield* v. *Horncastle*, 2 Jur. 610; *Milsome* v. *Long*, 3 Jur. N. S. 1073; see *In re Sheridan*, 17 L. R. Ir. 179.

The words "effects both real and personal" will pass realty. *Hogan* v. *Jackson*, 3 B. P. C. 388; Cowp. 299.

See, as to the meaning of effects, pp. 205, 206.

Chattels. 8. "Chattels real and personal" *primâ facie* will not pass realty, unless explained by the context. *Grayson* v. *Atkinson*, 1 Wils. 333.

Worldly goods. 9. The expression "worldly goods of what nature and kind soever" passes realty. *Wright* v. *Shelton*, 18 Jur. 445.

Appointment of executor. 10. The appointment of a person executor of the testator's property has been held sufficient to give him the fee in real estate. *Doe* d. *Hickman* v. *Haslewood*, 6 A. & E. 167; *Doe* d. *Pratt* v. *Pratt*, *ib.* 180; *Murphy* v. *Donelly*, I. R. 4 Eq. 111.

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General rule. The same meaning should, as far as possible, be given to the same words in a will. *Boys' Home* v. *Lewis*, 4 O.R. 18.

Descriptions of Persons.

Children. "Children" is *primâ facie* confined to immediate offspring, and does not include grandchildren. *Deedes* v. *Graham*, 20 Gr. 258; *Paradis* v. *Campbell*, 6 O.R. 632; *Rogers* v. *Carmichael*, 21 O.R. 658; *McPhail* v. *McIntosh*, 14 O.R. 312; *Gourley* v. *Gilbert*, 12 N.B.R. at p. 85.

"Child" and "children" are primarily words of purchase in a will, but may be converted into words of limitation. *Gourley* v. *Gilbert*, 12 N.B.R. at p. 85.

"Child or children" treated as *nomen collectivum* and creating an estate tail on a devise to A. for life, and if he have no child or children, then over. *Stobbart* v. *Guardhouse*, 7 O.R. 239.

"Children if any at her death" with devise over, not words of limitation. *Grant* v. *Fuller*, 33 S.C.R. 34; *Chandler* v. *Gibson*, 2 O.L.R. 442.

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"Children and children's children" words of purchase. *Peterborough R. E. Co.* v. *Patterson*, 15 A.R. 751.

Children by first marriage was satisfied by children of a second marriage, the testator having been married three times, and no children of his first marriage having been alive at the date of his will. *Ling* v. *Smith*, 25 Gr. 246.

"Child or other issue" in the Wills Act means legitimate child. *Hargraft* v. *Keegan*, 10 O.R. 272.

Cousins.

"Cousins" include first cousins only. *Higginson* v. *Kerr*, 30 O.R. 62.

Executors and administrators.

"Executors and administrators" is equivalent to "heirs" as a word of limitation in a will devising lands. *Mercer* v. *Neff*, 29 O.R. 680.

Family.

"Family" primarily means children only. *Harkness* v. *Harkness*, 9 O.L.R. 705; *Anderson* v. *Bell*, 29 Gr. 452. See *Ferguson* v. *Stewart*, 22 Gr. 364.

But it may include a widow. *Dawson* v. *Fraser*, 18 O.R. 496.

Heirs.

"Heirs," in a devise to heirs as purchasers, signifies those persons who are, by the law at the date of the will, technically heirs at law, if no contrary intention appears.

Therefore, where a testator devised land to his right heirs by a will, made before the Upper Canada Statute which abolished primogeniture, and died after such enactment, the eldest son took under the devise as the person designated by the expression "right heirs" when the will was made. *Tyler* v. *Deal*, 19 Gr. 601; *Baldwin* v. *Kingstone*, 18 A.R. 63, and app.

Similarly, where a testator devised lands to the heirs of A., after such enactment, the word "heirs" was given the signification it would have had if A. had died intestate. *Sparks* v. *Wolff*, 29 S.C.R. 585. And see R.S.O. c. 128, s 31.

"Heirs" "heirs-at-law," "my own right heirs," signify, in a gift of a blended fund, those who would succeed to realty on an intestacy. *Coatsworth* v. *Carson*, 24 O.R. 185; *Stephens* v. *Beatty*, 27 O.R. 75.

"Heirs" in a will does not include a widow, where there is a devise of land to be sold and the proceeds distributed amongst the heirs of the testator. *Bateman* v. *Bateman*, 17 Gr. 227; *Re Woodworth*, 5 N.S.R. 101.

"Heirs" is primarily a word of limitation in a will. *Gourley* v. *Gilbert*, 12 N.B.R. at p. 85.

But the word may be restricted by the context to mean children. *Scott* v. *Gohn*, 4 O.R. 457; *Paradis* v. *Campbell*, 6 O.R. 632; *Smith* v. *Smith*, 8 O.R. 677; *Otty* v. *Crookshank*, 21 N.B.R. 169.

Where legacies were charged on land in favour of two daughters, to be raised and invested in bank stock, and the dividends paid to the two daughters for life and after their death the legacies to be "divided between their heirs," it was held that "heirs" could not be a word of limitation as no division between heirs could then be implied, and therefore it must mean children. *Rogers* v. *Lowthian*, 27 Gr. 559.

A gift to the "heirs and assigns of A." gives A. no interest or power of appointment, but the children of A. living at the testator's death take. *Levitt* v. *Wood*, 17 Gr. 414.

"Heirs and next of kin" embrace all members of each class, who take equally a blended fund of realty and personalty bequeathed to them. *Rees* v. *Fraser*, 25 Gr. 253.

"Heirs and representatives" of A., held to mean his next of kin, and not executors, in a will in which the testator had properly used the terms "executor" and "executrix." *Burkett* v. *Tozer*, 17 O.R. 587.

Issue. "Issue" construed as a word of purchase and not of limitation in a devise. *Fisher* v. *Anderson*, 4 S.C.R. 415.

Legal personal representatives. "Legal personal representatives" added to a gift to a legatee, in case he dies before receiving his share, indicates a vested legacy in the legatee. *Kerr* v. *Smith*, 27 O.R. 409.

Nearest of kin. "Nearest of kin," in a devise, are the nearest blood relatives, in the absence of a controlling context. *Brabant* v. *Lalonde*, 26 O.R. 399.

Offspring. "Offspring," in a devise to A., and his offspring defined. *Sweet* v. *Platt*, 12 O.R. 229.

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Offspring, as a word of limitation. *McDonald* v. *Jones*, 40 N.S.R., at p. 235.

Poor relatives. In a bequest to "poor relatives," the word "poor" is vague and indefinite, and must be rejected, and the relatives who take are those who would succeed in case of an intestacy. *Ross* v. *Ross*, 25 S.C.R. 307.

Parties mentioned. A direction to distribute a residue amongst "the parties mentioned in my will" means the parties mentioned as beneficiaries. *Re Mile*, 14 O.L.R. 241.

Descriptions of Things.

Corporation sole, devise by. A devise of all my estate real and personal, by a Roman Catholic Bishop, who was a corporation sole, passed private property, though preceded by a recital applicable to church property. *Travers* v. *Casey*, 34 S.C.R. 419.

Dower. The word "dower" used, not in its technical sense, but as giving one third of the whole estate. *Re Manuel*, 12 O.L.R. 286.

Effects. "Effects" is sufficient to pass realty, in a residuary disposition, which directed "the balance of personal property" to be given to one, and "if there be any effects possessed by me at the time of my decease" the same to be given to another. *Hammill* v. *Hammill*, 9 O.R. 530.

Equally. In a devise to two or more persons equally, the word "equally" refers to the area of the land, not the estates of each therein. *Fraser* v. *Fraser*, 26 S.C.R. 316.

Estate. "Estate, goods and chattels," passes land. *McCabe* v. *McCabe*, 22 U.C.R. 378.

Home. "Home" does not include maintenance of an adult, though it probably would in case of an infant. *Augustine* v. *Scheier*, 18 O.R. 192.

Where land on which were several houses was devised to a trustee, on trust to permit A., his wife and children, "to use it for a home," and to convey the same to such person as A. should nominate by his will, it was held that A. and his family took no estate in the land, but that he was not restricted to the use of a house only, but that he and his

family, in addition to occupying one house, were entitled to the rents of the others. *Cameron* v. *Adams*, 25 O.R. 229.

Homestead. "Homestead" may be identified by extrinsic evidence. *Bigelow* v. *Bigelow*, 19 Gr. 549.

Described land. "Above described lands," referring to a devise in which some lands were described by lot numbers and others not, held to apply only to those described by numbers. *Campbell* v. *Fretwell*, 10 U.C.R. 328.

Legacy. "Legacy" includes annuity. *Wilson* v. *Dalton*, 22 Gr. 160; *Woodside* v. *Logan*, 15 Gr. 145.

But it does not include devise. *Edwards* v. *Smith*, 25 Gr. 150. But where a testator used the expression "bequeath" when disposing of land, legatee was held to include devisee. *Patterson* v. *Hueston*, 40 N.S.R. 4.

Money. "Money in the bank or funds" does not include money in a chest in the house, there being a residuary bequest. *Re Barry*, 9 N.S.R. 463.

A gift of money in a residue, to be distributed after a life estate, imports a trust for conversion, and so includes all that would be money at that time. *Ferguson* v. *Stewart*, 22 Gr. 364.

Premises. "Premises" referring to house and land occupied by a devisee. *Martin* v. *Martin*, 8 O.L.R. 462.

Proceeds. "Proceeds of a farm" for life, gives an estate for life in the farm, there being a devise over in fee after the death of the devisee for life. *Brennan* v. *Munro*, 6 O.S. 92; *Moore* v. *Power*, 8 C.P. 109; *Casselman* v. *Hersey*, 32 U.C.R. 333.

"Proceeds" of an invested fund means the income. *Chubback* v. *Murray*, 30 N.B.R. 23.

Property. "Property" or "estate" includes land. *Cameron* v. *Harper*, 21 S.C.R. 273. See *Hargan* v. *Fritzinger*, 16 O.R. 28.

Rents. A devise of "rents" is equivalent to a devise of the land. *Re Thomas*, 2 O.L.R. 660.

Stock. In a bequest of "horses, stock and farming utensils" the word "stock" includes hay and other crops on the farm as well as live stock. *Wetmore* v. *Ketchum*, 10 N.B.R. 408.

"Stock and trade" of a shopkeeper, held to include money on deposit and in the house, promissory notes taken in settle-

ments of book debts, cordwood, horses, harness and vehicles, in a badly drawn will. *Re Holden*, 5 O.L.R. 156.

Worldly estate.

"Worldly estate" includes not only the *corpus* of the testator's property but his whole interest therein. *Town* v. *Borden*, 1 O.R. 327.

General Expressions.

Advancement.

"Advancement" defined. *Re Lewis*, 29 O.R. 609.

At the same time.

A will disposing of property in case the testator and his wife died at the same time, held not to take effect as the wife died on the 11th, and the testator on the 28th, December. *Henning* v. *Maclean*, 4 O.L.R. 660; 33 S.C.R. 305.

Between.

A gift of the proceeds of real estate converted, to be "equally divided *between* my wife and my brother and sister," is a gift of one half to the wife, and the remaining half to the brother and sister. *Hutchinson* v. *La Fortune*, 28 O.R. 329.

Die childless.

"Die childless," means die without leaving any children at the time of the death of the person referred to. *Re Thomas & Shannon*, 30 O.R. 49. See *Gourley* v. *Gilbert*, 12 N.B.R. 80; *Vanluven* v. *Allison*, 2 O.L.R. 198.

Having given.

"Having already given to my son lot number one," does not of itself constitute a devise. *Doe dem. Smith* v. *Meyers*, 2 O.S. 301. But see *Miles* v. *Coy*, 12 N.B.R. 174.

Including.

"Including" imports something in addition to something already given. Therefore a bequest of one half the testator's estate "including policies of insurance" meant that the policies passed in addition to half the remaining estate. *Re Dunscombe*, 3 O.L.R. 510.

Option.

An option to purchase land given to three legatees cannot be exercised where all three desire to purchase, and the land therefore passes under an alternative disposition in the will. *Jeffrey* v. *Scott*, 27 Gr. 314.

An option to a person named in a will to redeem incumbered land, gives him an absolute title on redemption, the incumbrances nearly equaling the value of the lands. *Stevenson* v. *Stevenson*, 28 Gr. 232.

"Pay or apply," when applied to shares in realty does not necessarily work a conversion thereof, where they consist of vested equitable estates in remainder. *McDonell* v. *McDonell*, 24 O.R. 468. Pay or apply.

"Pro rata," in a direction to divide a residue amongst legatees previously named in a will, means in proportion to the respective amounts of their legacies. *Kennedy* v. *Protestant Orphans' Home*, 25 O.R. 235. *Pro rata.*

"Protestant charitable institutions" refers to the objects, as well as the government, of such institutions, and includes those designed for, and managed by, Protestants. *Manning* v. *Robinson*, 29 O.R. 483. Protestant.

"Public securities," in a direction by a testator as to investing, does not include municipal debentures. *Ewart* v. *Gordon*, 13 Gr. 40. Public securities.

A devise of land "to revert in the same way" as a previous devise, on the happening of a certain event, means "to follow the same course," the word "revert" not having its technical meaning under the circumstances. *Jardine* v. *Wilson*, 32 U.C.R. 498. See *Osterhout* v. *Osterhout*, 7 O.L.R. 402; 8 O.L.R. 685. Revert.

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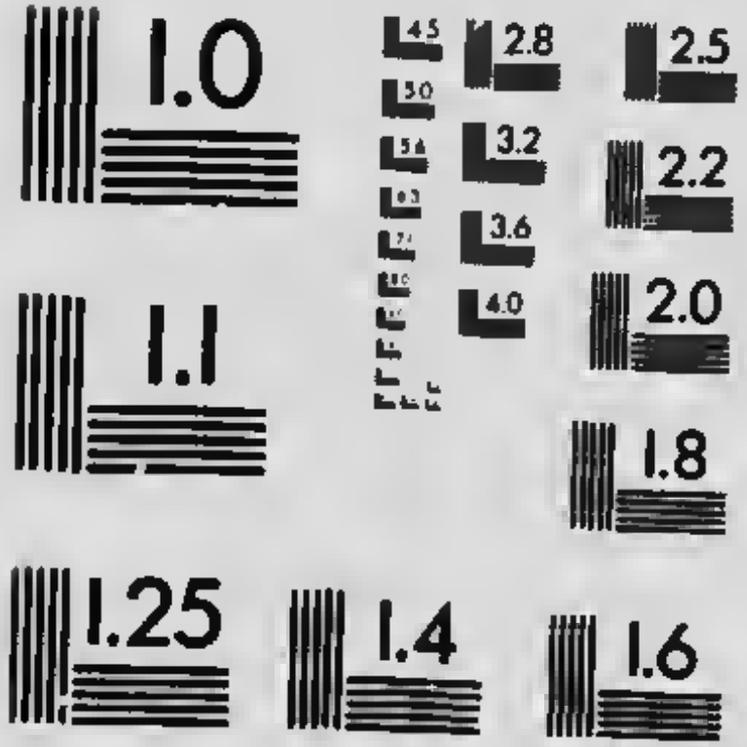

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CHAPTER XXIII.

RESIDUARY GIFTS.

I. What is a Residuary Gift.

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Language appropriate for residuary devise.

It is not always easy to determine whether a devise is residuary or not. It is not necessary that the word "residue" should be used.

Residuary devise need not include every kind of land.

Nor need the devise be so framed as to include every kind of real estate. For instance, a devise of "all other my freehold estate" is residuary, though it would not include copyholds. *Mason* v. *Ogden*, (1903) A. C. 1.

There may be several residuary devises.

There may also be several devises in a will, each of which is residuary. For instance, a devise of all the residue of my freehold property and a devise of all the residue of my copyhold property would each be residuary. *In re Mason; Ogden* v. *Mason*, (1901) 1 Ch. 619, 630.

Residue of lands subject to settlement or in a certain parish is not residuary.

On the other hand, if the testator is dealing only with lands comprised in a particular settlement, or situate in a particular parish, a devise of the residue of those lands is not residuary. *In re Brown's Trusts*, 1 K. & J. 522; *Springett* v. *Jennings*, 6 Ch. 333.

Residuary bequests.

No particular words are necessary to pass the residuary personalty. Such words as goods, chattels, or effects, may be sufficient. *Bland* v. *Lamb*, 3 J. & W. 399; *Hearne* v. *Wigginton*, 6 Mod. 120; *Fleming* v. *Burrows*, 1 Russ. 276; *Leighton* v. *Baillie*, 3 M. & K. 267; *In re Bassett's Estate; Perkins* v. *Fladgate*, 14 Eq. 54; see *In bonis Aston*, 6 P. D. 203.

Distinction between general and particular residue.

In some cases the question has arisen, whether a gift was intended to pass the general residue or only the residue of a particular fund.

Where the testator deals with particular property, and then gives the rest or remainder generally without defining it, the

proper inference may be that only the residue of the particular property is intended. It is a question of construction. *Ommanney* v. *Butcher*, T. & R. 260; *Wrench* v. *Jutting*, 3 B. 521; *Boys* v. *Morgan*, 3 M. & Cr. 661; *Markham* v. *Iratt*, 29 B. 579; *Jull* v. *Jacobs*, 3 Ch. D. 703.

Doctrine of *ejusdem generis*.

The question frequently arises, whether words in themselves large enough to pass the residue, but coupled with an enumeration of particular things, will be cut down to pass only things *ejusdem generis* with those enumerated.

Enumeration of particulars followed by *et cætera*.

With regard to the meaning of *et cætera* following an enumeration of specific things, no precise rule can be laid down. The tendency of the most recent cases is to give the words the widest possible meaning, so that they would pass even real estate. *Chapman* v. *Chapman*, 4 Ch. D. 800; *Mullally* v. *Walsh*, 3 L. R. Ir. 244.

On the other hand, in some of the earlier cases *et cætera* following an enumeration of particulars has been confined to things *ejusdem generis*. *Marquis of Hertford* v. *Lowther*, 7 B. 1; *Newman* v. *Newman*, 26 B. 220; *Barnaby* v. *Tassell*, 11 Eq. 363.

Large words followed by an enumeration of particulars.

Where there are comprehensive words followed by an enumeration of particulars, an *et cætera* will not restrict the meaning of the large words. *Kendall* v. *Kendall*, 4 Russ. 360; *Gorer* v. *Davis*, 29 B. 222.

Large words, such as goods, chattels, or effects, when they are followed by an enumeration of particulars, will not be limited to things *ejusdem generis*. *Fisher* v. *Hepburn*, 14 B. 627; *Patterson* v. *Huddart*, 17 B. 210; *Ellis* v. *Selby*, 7 Sim. 352; 1 M. & Cr. 286; *Swinfen* v. *Swinfen*, 29 B. 207; *Avison* v. *Simpson*, Jo. 43.

Explanatory words.

The same is the case, though the particulars are introduced by words intended to be explanatory of the former words, for instance, "namely," "consisting in," "together with," "such as," "both in," or similar words. *Bridges* v. *Bridges*, 8 Vin. Abr. Devise, 295, pl. 13; *Gorer* v. *Davis*, 29 B. 222; *In bonis Goodyar*, 1 Sw. & Tr. 127; 4 Jur. N. S. 1243; *Mahoney* v. *Donovan*, 14 Ir. Ch. 262, 388; *Drake* v. *Martin*, 23 B. 89; *Dean* v. *Gibson*, 3 Eq. 713; *Maberley's Trusts*, 19 W. R. 522; *King* v. *George*, 4 Ch. D. 435; 5 *ib.* 627; *In re Fleetwood; Sidgreaves*

v. *Brewer*, 15 Ch. D. 594; *Mullally* v. *Walsh*, 3 L. R. Ir. 244; see *Kendall's Trust*, 14 B. 608; *Tighe* v. *Fetherstonhaugh*, 13 L. R. Ir. 401. *Timewell* v. *Perkins*, 2 Atk. 103, is not to be followed.

And the words "whether in money or in the public funds or other securities of any sort or kind whatsoever," have an enlarging rather than a restrictive force, so far as personal property is concerned. *Cambridge* v. *Rous*, 8 Ves. 12; see *Reeves* v. *Baker*, 18 B. 372.

So, where a testator gave his wife "all my property, leasehold and freehold, which I now possess," it was held that "leasehold and freehold" was added *ex abundanti cautelâ* and not to restrain the generality of the word "property." *Re Roberts; Kiff* v. *Roberts*, 55 L. J. Ch. 628; 54 L. T. 386; 55 L. T. 498; 35 W. R. 176.

Property in certain securities.

On the other hand, a gift of all the testator's property in certain securities is a gift of those securities only. *Enohin* v. *Wylie*, 1 D. F. & J. 410; 10 H. L. 1.

But such a gift may be enlarged to a residuary gift, if the testator goes on to state, that it is his intention to dispose of all his property among the legatees in question. *Patrick* v. *Featherd*, 12 W. R. 304.

Express inclusion of things which would have passed without mention.

It seems that the express inclusion in the large words of some particular property, which would have passed without being expressly included, affords an argument for excluding from the gift things *ejusdem generis* with that included. *Steignes* v. *Steignes*, Mos. 296.

Enumeration of particulars preceding large words will not restrict the latter.

General words following an enumeration of particulars will *primâ facie* have their full force whether introduced by the word "other" or not, if a restricted construction would cause an intestacy. *Arnold* v. *Arnold*, 2 M. & K. 365; *Swinfen* v. *Swinfen*, 29 B. 207; *Campbell* v. *Prescott*, 15 Ves. 503; *Michell* v. *Michell*, 5 Mad. 69; *Martin* v. *Glover*, 1 Coll. 269; *Parker* v. *Marchant*, 1 Y. & C. C. 290; *Nugee* v. *Chapman*, 29 B. 290; *Hodgson* v. *Jex*, 2 Ch. D. 122; see, too, *Re Lloyd's Estate*, 2 Jur. N. S. 539; *Everall* v. *Browne*, 1 Sm. & G. 368; *In bonis Jupp*, (1891) P. 300; *Anderson* v. *Anderson*, (1895) 1 Q. B. 749.

The fact that specific and general legacies are given in later parts of the will is not sufficient to restrict the general words. *In bonis Shepheard*, 48 L. J. P. 62.

It is immaterial that certain things which would have passed under the previous words, if read in their largo sense, are subsequently given to the same legatee. *Bennett* v. *Batchelor*, 1 Ves. Jun. 63; 3 B. C. C. 27; *Fleming* v. *Burrows*, 1 Russ. 276.

It makes no difference, that the gift is not strictly residuary, so that there might possibly be property which it would be ineffectual to pass. *Hodgson* v. *Jex*, 2 Ch. D. 122.

The word "article," however, has not the same large sense as goods or effects. *Collier* v. *Squire*, 3 Russ. 467.

But if it is clear that the gift was not meant to be residuary, and the large words, if not confined to things *ejusdem generis*, would carry the residue, they must be so confined.

Large words confined to things *ejusdem generis*,

1. This is the case, if there is an express residuary gift. *Woolcomb* v. *Woolcomb*, 3 P. W. 112; *Stuart* v. *Marquis of Bute*, 1 Dow. 84; *Lamphier* v. *Despard*, 2 Dr. & War. 59; *Mullins* v. *Smith*, 1 Dr. & Sm. 204; *Campbell* v. *M'Grain*, I. R. 9 Eq. 397; *Waite* v. *Morland*, 13 W. R. 963; *Smith* v. *Davis*, 14 W. 942.

if there is another residuary gift,

2. So when the residue has been given and the will is then revoked so far as relates to the bequest to the residuary legatee of the testatrix's plate, linen, household goods, and other effects, these words would be confined to things *ejusdem generis*. *Hotham* v. *Sutton*, 15 Ves. 319.

or it is clear that the gift in question was not meant to be residuary.

If, however, the revocation of the same enumerated things and "other effects (except money)," the testatrix shows that she considered things not *ejusdem generis* would be included, and the large words will have their full force. *Hotham* v. *Sutton*, 15 Ves. 326; *Ivison* v. *Gassiott*, 3 D. M. & G. 958; see *Steignes* v. *Steignes*, Mos. 296. *Fleming* v. *Brook*, 1 Sch. & Lef. 318, is inconsistent with *Hotham* v. *Sutton*.

So, too, if something stated to be a portion of certain specific property, together with the testator's household furniture and effects of what nature or kind soever, is given to a legatee, and the testator then makes other gifts, the earlier gift being clearly not residuary will only pass things

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ejusdem generis with those enumerated. *Rawlings* v. *Jennings*, 13 Ves. 39.

And it would seem that where there is a gift of certain articles and all other goods of whatever kind to a legatee at the commencement of a will, followed by dispositions of other portions of the testator's property, and the remainder of the latter property is given to the same legatee, it is clear that the first gift was not meant to be residuary. *Wrench* v. *Jutting*, 3 B. 521.

So, too, a gift of the remainder of the testator's money and effects to be expended in purchasing a suitable present for his godson must be read as limited to things *ejusdem generis* with money. *Borton* v. *Dunbar*, 1 Giff. 221; 2 D. F. & J. 338; 30 L. J. Ch. 8.

or there is an explanatory reference.

3. Or, again, the testator may show by subsequent reference or explanation that he meant only things *ejusdem generis* to pass. *Sutton* v. *Sharp*, 1 Russ. 149; see *A.-G.* v. *Wiltshire*, 16 Sim. 38.

II. What Passes under a Residuary Gift.

Effect of s. 24 of Wills Act.

By sect. 24 of the Wills Act, every will shall be construed with reference to the real 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.

Effect of s. 25 of Wills Act.

By sect. 25, unless a contrary intention shall appear by the will, such part of the 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 testator 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.

These sections abolish the old law by which a residuary devise included neither land acquired by the testator after the date of his will, nor land the devise of which by the will failed by lapse or otherwise.

There is now, therefore, no distinction in its scope and operation between a residuary devise and a residuary bequest. Each passes property, within the meaning of the words used, which belonged to the testator at the time of his death, and each passes property the gift of which fails through lapse, invalidity, or from any other cause.

Residue not otherwise disposed of or not herein bequeathed.

The words not otherwise disposed of, or not herein specifically bequeathed, added to a residuary gift mean not otherwise effectually disposed of or bequeathed, and do not exclude property the gift of which fails through lapse or invalidity. *Green* v. *Dunn*, 20 B. 6; *De Trafford* v. *Tempest*, 21 B. 564; *Patching* v. *Barnett*, 28 W. R. 886, 890; *Johns* v. *Wilson*, (1900) 1 Ir. 342; *In re Mason*; *Ogden* v. *Mason*, (1901) 1 Ch. 619, 626.

Residuary devise includes reversions, remainders, leaseholds for lives.

Where general words, such as all other my lands or the like are used, which, according to their natural meaning, are sufficient to include such interests as a reversion (*a*), or remainder (*b*), or leaseholds for lives (*c*), those interests are not to be excluded because some of the limitations of the will cannot take effect as regards the reversion or remainder, or are inappropriate to a terminable interest like leaseholds for lives. *A.-G.* v. *Vigor*, 8 Ves. 256; *Church* v. *Mundy*, 15 Ves. 296; *Doe* d. *Cholmondeley* v. *Weatherby*, 11 East, 322; *Goodright* d. *Earl of Buckinghamshire* v. *Marquis of Downshire*, 2 B. & P. 600; *Doe* d. *Howell* v. *Thomas*, 1 M. & Gr. 335; *William* d. *Hughes* v. *Thomas*, 12 East, 141; *Doe* d. *Nethercote* v. *Bartle*, 5 B. & Ald. 492; *Mostyn* v. *Champneys*, 1 Bing. N. C. 341; *Doe* d. *Pell* v. *Jeyes*, 1 B. & Ad. 593 (a deed); *Kelly* v. *Duffy*, 4 L. R. Ir. 601; *Jacob* v. *Jacob*, 78 L. T. 451, 825; 82 L. T. 270 (*a*); *Ford* v. *Ford*, 6 Ha. 486 (*b*); *Fitzroy* v. *Howard*, 3 Russ. 225; *Weigall* v. *Brome*, 6 Sim. 99 (*c*). *Roe* d. *James* v. *Avis*, 4 T. R. 605, is overruled; see *Tennent* v. *Tennent*, 1 J. & Lat. 379, 388.

On the other hand, if a reversion is referred to as descending to a son to whom it could not pass if it is included in the will, it will not pass by the will. *Strong* v. *Teatt*, 2 Burr. 912; 3 B. P. C. 219; *Hounsell* v. *Dunning*, (1902) 1 Ch. 512.

Reversion

Again, a testator may have given partial interests in land by

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upon particular estates created by the will.

his will, and the question then arises, whether a subsequent residuary devise passes the reversion of those lands. It is well settled that it does, though the residuary devise may be of lands "not hereinbefore devised or disposed of," and there may be directions or limitations which are not appropriate to the reversion in the lands previously devised. *Rooke* v. *Rooke*, 2 Vern. 461; *Lydcott* v. *Wellows*, 3 Mod. 229; *Tuaffe* v. *Ferrall*, 10 Ir. Ch. 183; *Tennent* v. *Tennent*, 1 J. & Lat. 379; *Doe* d. *Moreton* v. *Fossick*, 1 B. & Ad. 186; *Morris* v. *Lloyd*, 33 L. J. Ex. 202; *Allston* v. *Chapple*, 6 Jur. N. S. 288.

But a general devise, that only excepted which he had given to his three sons in tail, has been held not to include the reversion upon the estates tail. *Hyley* v. *Hyley*, 3 Mod. 228.

Devise of lands not settled.

A testator may of course exclude from a general devise particular lands, if he uses appropriate words. But a layman, who desires to exclude from such a devise lands which he has settled, would probably not be successful in doing so, for a series of authorities shows that a devise of lands not settled or out of settlement, or of unsettled lands, includes any interest in the settled land which the testator has power to dispose of, such as a reversion in fee limited to him by the settlement. This is so, though some of the limitations of the will are in favour of persons to whom the settled lands are already limited by the settlement, or are otherwise not applicable to the reversion. *Cooke* v. *Gerrard*, 1 Lev. 212; *Strode* v. *Russel*, 2 Vern. 621; *Chester* v. *Chester*, 3 P. W. 56; *Glover* v. *Spendlove*, 4 B. C. C. 337; *Crowe* v. *Noble*, Sm. & B. 12; *Incorporated Society* v. *Richards*, 1 Dr. & War. 258; *Jones* v. *Skinner*, 5 L. J. Ch. 87; *Kelly* v. *Duffy*, 4 L. R. Ir. 601. *Goodtitle* d. *Daniel* v. *Miles*, 6 East, 494, unless it can be supported on the special language used, must be considered overruled: see *Tennent* v. *Tennent*, 1 Jo. & Lat. 379, 388.

Ultimate trust of personalty for testator.

The principle above stated has been applied to an interest in remainder in personal property limited by a settlement to the testator, his executors and administrators, which was held to pass under a devise of property not included in the settlement. *Walsh* v. *Green*, 31 L. R. Ir. 338.

A devise of lands in Gloucestershire, Worcestershire, and elsewhere, expressed to be subject to certain limitations created by the testator's marriage settlement, does not limit the devise to the reversion in the settled estates which were all in the counties named. *Freeman* v. *Duke of Chandos*, Cowp. 363.

Devise subject to limitations of settlement does not exclude lands not settled.

With regard to leaseholds for years, a general devise of lands, tenements, and hereditaments before the Wills Act did not carry them, if there were any freeholds; on the other hand, if there were no freeholds, leaseholds might pass. *Rose* v. *Bartlett*, Cro. Car. 292; *Thompson* v. *Lawley*, 2 B. & P. 303; *Gully* v. *Davis*, 10 Eq. 562.

Leaseholds for years before the Wills Act.

But leaseholds passed under a gift of lands or of real estate, if there were any words applicable to them, or an intention could be gathered from the will that they were to be included. Thus leaseholds passed under the description lands which the testator "then stood seised or possessed of, or any ways interested in." *Addis* v. *Clement*, 2 P. W. 456.

Words of description applicable to leaseholds.

The word "possessed" was considered the important word, and leaseholds did not pass under a similar devise without the word possessed. *Pistol* v. *Riccardson*, 2 P. W. 459, n.; *Davis* v. *Gibbs*, 3 P. W. 26.

And leaseholds passed where the devise was subject to ground rents or to certain persons to hold for over, or otherwise according to the nature and tenures thereof. *Hartley* v. *Hurle*, 5 Ves. 540; *Swift* v. *Swift*, 1 D. F. & J. 169.

The same result followed if the lands were described by acreage, which could only be satisfied by including leaseholds. *Goodman* v. *Edwards*, 2 M. & K. 759.

Sect. 26 of the Wills Act 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 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

S. 26 of the Wills Act.

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extend as the case may be as well as freehold estates unless a contrary intention shall appear by the will.

The section was probably intended to do no more than to abolish the rule established by *Rose* v. *Bartlett*, and other cases, and to leave the Court to ascertain the testator's intention unfettered by technical rules. See *Butler* v. *Butler*, 28 Ch. D. 75; *Re Davison*; *Greenwell* v. *Davison*, 58 L. T. 304.

The section is not limited to a devise of "land," but applies to any general devise. It does not apply to a devise of "real estate." *Butler* v. *Butler*, 28 Ch. D. 66; *Re Davison*; *Greenwell* v. *Davison*, 58 L. T. 304.

Contrary intention.

There is a contrary intention if the will contains an express devise of leasehold estate. *In re Guyton and Rosenberg's Contract*, (1901) 2 Ch. 591.

A contrary intention is not shown by the fact that the lands in question are devised in strict settlement without any provision to prevent the leaseholds from vesting indefeasibly in the first tenant in tail at his birth. *Wilson* v. *Eden*, 11 B. 237; 5 Ex. 752; 14 B. 317; 18 Q. B. 474; 16 B. 153

But if there is a direction to accumulate the rents and profits during the minority of a tenant for life or in tail, and if he attains twenty-one to pay the accumulations to him, or if he dies under twenty-one to invest them in freehold land, to be settled to the same uses—a direction inconsistent with the absolute vesting of the leaseholds in a tenant in tail at birth—and a power of selling the "lands" and investing the proceeds in leaseholds, to be settled upon the same trusts, but so that they shall not vest in any tenant in tail dying under twenty-one, and there is a gift of the residuary personal estate upon trusts corresponding with the uses of the devised lands with the same proviso against absolute vesting, the testator by the provisions against the vesting of leaseholds in any tenant in tail dying under twenty-one shows that he would have inserted similar provisions in the devise of the "lands" unless he had intended leaseholds not to pass under that name. *Prescott* v. *Barker*, 9 Ch. 174.

Residuary bequests.

In like manner a residue of personalty has the largest

operation. It sweeps in property which no disposition is attempted, and property of which an attempted disposition fails.

It has been held to include property directed to be considered as part of the testator's personal estate, and to go in the course of administration. *Scott* v. *Moore*, 14 Sim. 53.

But the terms in which the residue is given may exclude certain property.

Language of residuary bequest may limit its operation. Sm. ll balance, small remainder.

Thus, though a "small balance," or "any little money left" (*a*), would include any balance that may remain after making the payments directed by the testator, "the small remainder" will not include interests that lapse (*b*). *Page* v. *Young*, 19 Eq. 501; *In re Douglas*; *Douglas* v. *Simpson*, (1905) 1 Ch. 279 (*a*); *A.-G.* v. *Johnstone*, Amb. 576 (*b*), see *Bland* v. *Lamb*, 2 J. & W. 399.

Recital that property is settled does not exclude it if not settled.

A recital by the testator in his will that certain property is settled in a particular manner when it is not so settled, does not prevent the property from passing under a gift of residue. *In re Bagot*; *Paton* v. *Ormerod*, 1893) 3 Ch. 248, overruling so far as *contra Circuitt* v. *Perry*, 23 B. 275; *Harris* v. *Harris*, I. R. 3 Eq. 610; *Hanks* v. *Longridge*, 29 L. T. 449; *Clibborn* v. *Clibborn*, 9 Ir. Jur. 381.

Property excepted from residue may pass.

If there is a residuary gift, and certain property is excepted from it which is disposed of by a later or earlier part of the will, the presumption is that the exception was made for the purposes of the particular disposition, and if that disposition fails the excepted property passes by the residuary gift. *Evans* v. *Jones*, 2 Coll. 516; *Wingfield* v. *Newton*, cit. 2 Coll. 520; *Thompson* v. *Whitelock*, 4 De G. & J. 490; *Torrens* v. *Millington*, 26 W. R. 753; *Blight* v. *Hartnoll*, 23 Ch. D. 218; *Re Powell*; *Campbell* v. *Campbell*, 83 L. T. 24; *In Jupp*; *Gladman* v. *Jupp*, 87 L. T. 739.

If, however, no disposition of the excepted property is attempted by the testator, or a codicil recognises that an attempted disposition has failed and confirms the will, the same reasoning does not apply, and the excepted property is undisposed of. *In re Fraser*; *Lowther* v. *Fraser*, (1904) 1 Ch. 726.

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Nor does it apply, if the true conclusion upon the construction of the will is, that the excepted property was excepted for all purposes. *Wainman* v. *Field*, Kay, 507; explained and not approved in *Blight* v. *Hartnoll*, 23 Ch. D. 218, 220, 223.

In some cases an exception has been held to except the property in question only from certain administrative powers, such as a trust for sale, and not to prevent the property from passing under the residuary gift. *James* v. *Irving*, 10 B. 276; *Dobson* v. *Banks*, 32 B. 259.

Limit of rule as to excepted property.

In order that the principle of the above cases may apply there must be on the one hand a clear residuary gift, and on the other hand an exception from it. If the testator declares his intention of disposing of certain property by codicil, and then gives his residue not "reserved to be disposed of by codicil," the only gift is a gift of limited residue, and if the excepted property is not disposed of by codicil there is no residue into which it can fall. *Davies* v. *Davies*, 3 P. W. 40.

In the same way, if the gift is of residue beyond 10,000*l.*, which sum is directed to be set apart, the residue by the force of the description used cannot include any part of the 10,000*l.* which lapses. *Green* v. *Pertree*, 5 Ha. 249.

Residue of a share of residue.

Where the residue is given in certain shares, and a legacy is given out of one of these shares, and the residue of that share is then disposed of, the question arises, whether the last mentioned residue carries the legacy if the legacy is revoked or fails by lapse. It has been held, in two cases, that it does not and that the legacy is undisposed of. But those cases have been disapproved, and they will not be followed if the share is given over as a whole in certain events. *Skrymsher* v. *Northcote*, 1 Sw. 566; *Lloyd* v. *Lloyd*, 4 B. 231; *In re Parker: Stephenson* v. *Parker*, (1901) 1 Ch. 408.

When a share of residue is given as to one-fourth in a certain way, and as to the rest upon other trusts, the word "rest" may be equivalent to the remaining three-fourths so that it would not pass the first fourth if it becomes undisposed of. *Simmons* v. *Rudall*, 1 Sim. N. S. 115.

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Where the residue is given between several persons nominatim as tenants in common, and the gift to one of them is revoked, the gift of that share lapses, whether the revocation be of the share or of the trusts of the will, so far as they relate to the share. *Cresswell* v. *Cheslyn*, 2 Ed. 123; *Ramsay* v. *Shelmerdine*, L. R. 1 Eq. 129; *Sykes* v. *Sykes*, 4 Eq. 200; 3 Ch. 301.

Revocation of share of residue.

But if the share of a member of a class is revoked there is no lapse. *M'Kay* v. *M'Kay*, (1900) 1 Ir. 213.

If a share is expressed to be revoked with a view to put the other residuary legatees on an equality with the one whose share is revoked, the revoked share passes to the others. *Woodley* v. *Howard*, 2 W. R. 32.

Where the residue is completely disposed of, and by a subsequent clause, the testator directs that another person is to take a share, the effect of a revocation of the latter gift is to leave the earlier gift of the whole residue effectual. *Harris* v. *Davis*, 1 Coll. 416.

Where a testator revokes or alters a gift of a share of residue, and directs that the share, or the share subject to the alteration, shall fall into residue, or gives a similar direction in the event of the trusts of a share of residue not taking effect or becoming exhausted, there is no lapse, but the share is divisible amongst the other residuary legatees. *In re Palmer; Palmer* v. *Ainsworth*, (1893) 3 Ch. 369; *In re Allan; Dow* v. *Cassaigne*, (1903) 1 Ch. 276, overruling *Humble* v. *Shore*, 7 Ha. 217; 1 H. & M. 550. The cases in which *Humble* v. *Shore* was followed, *Lightfoot* v. *Burstall*, 1 H. & M. 546; *In re Barker's Estate; Hetherington* v. *Longridge*, 15 Ch. D. 635; *Re Bevis's Trusts*, 20 W. R. 359; and *In re Savage's Trusts*, 50 L. J. Ch. 131, must also be taken as overruled. See also *Crawshaw* v. *Crawshaw*, 14 Ch. D. 817; 29 W. R. 68; *In re Rhoades; Lane* v. *Rhoades*, 29 Ch. D. 142; *In re Ballance*, 42 Ch. D. 62; *Re Owen*, 36 Sol. J. 539; *Holgate* v. *Jennings*, 37 Sol. J. 303.

Direction that share of residue shall fall into residue.

Where the residue was given as to three sevenths to class A and as to four sevenths to class B and in a certain event the share of a member of class A was directed to lapse and form part of the residuary estate and the event happened, the lapsed

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share was divided as to three sevenths among the other members of class A, and as to four sevenths among the members of class B. *In re Wand; Escritt* v. *Wand*, (1907) 1 Ch. 391.

Where one of the residuary legatees dies, and the testator, by codicil, confirms the will, except as to any legacy lapsed, it has been held that the share of the deceased legatee is undisposed of. *Re Mary Wood's Will*, 29 B. 236.

III. Particular Residue.

A. *Residue of Particular Property Belonging to Testator.*

Particular residue.

The analogy of general residuary gifts has been applied to gifts of the residue of particular portions of the testator's personal property, but not to gifts of the residue of particular lands.

Residue of specific lands.

Where a testator disposes of part of his lands comprised in a particular settlement or in a particular parish, and then devises the residue of those lands, the residuary devise is specific, and will not carry a lapsed share. *In re Brown's Trusts*, 1 K. & J. 522; *Springett* v. *Jennings*, 6 Ch. 333.

Residue of fund of personalty.

In the case of personalty, where the testator cannot be supposed to have in his mind the distinct portions of which the property is composed, a different rule applies. If he disposes of a particular portion of his personalty, and then gives the residue of that portion, whether it is described as residue not otherwise disposed of or after payment of the sums previously given, the particular residue passes shares in the property which lapse or are invalidly given. *De Trafford* v. *Tempest*, 21 B. 564; *Ashton* v. *Wood*, 43 L. J. Ch. 715; *Champney* v. *Davy*, 11 Ch. D. 949; *In re Larking; Larking* v. *Larking*, 37 Ch. D. 310; *Langan* v. *Bergin*, (1896) 1 Ir. 331; *M'Kay* v. *M'Kay*, (1900) 1 Ir. 213; *Johns* v. *Wilson*, (1900) 1 Ir. 342; *De Quetteville* v. *De Quetteville*, 93 L. T. 579.

On the other hand the gift of the residue of particular things may upon the construction of the will be specific, and in that case it will not carry gifts of the things which fail. *Patching* v. *Barnett*, 28 W. R. 886, 889.

B. *Residue of Appointed Property.*

Appointment of land.

If the property subject to the power is land, and part of the land is appointed to one person and the residue to another, the residue is specific and does not pass the land first appointed if the appointment fails through lapse or invalidity. *In re Brown's Trusts*, 1 K. & J. 522; see *In re Mason: Ogden* v. *Mason*, (1901) 1 Ch. 619, 628.

Appointment of personalty: residue carries sums lapsed or invalidly appointed.

On the other hand, in the case of personalty a gift of the residue of an appointed fund, whether the power is general or special, carries interests in the fund which have been appointed, but the appointments of which fail from lapse or invalidity. *Falkner* v. *Butler*, Amb. 514; *Oke* v. *Heath*, 1 Ves. Sen. 134; *Carter* v. *Taggart*, 16 Sim. 423; *In re Harries' Trust*, Jo. 199; *In re Hunt's Trusts*, 31 Ch. D. 308; *In re Marten; Shaw* v. *Marten*, (1902) 1 Ch. 314.

Effect of words "after payment."

This is so, though the residue is given "after payment" of the appointed sums. Cases *supra*.

The fact, that an appointed sum is directed to fall into the residue in a certain event, which does not happen, does not prevent it from falling into residue, if it is invalidly appointed. *In re Meredith's Trusts*, 3 Ch. D. 757.

The residue may be a specific sum.

If the appointment of the residue is in effect the appointment of a specific sum, it does not carry sums which lapse or are invalidly appointed. *Easum* v. *Appleford*, 3 M. & Cr. 56; *In re Jeaffreson's Trusts*, 2 Eq. 276; see *Ratcliffe* v. *Hampson*, 1 Jur. N. S. 1104.

Specific residue subject to prior invalid gifts.

If the proper construction is that the residue, though specific, is appointed subject to certain payments which are not within the power, the appointee takes free from the charge. *In re Jeaffreson's Trusts*, 2 Eq. 276; *Douglass* v. *Waddell*, 17 L. R. Ir. 384.

IV. Questions between Real and Personal Residue.

Land held on trust for sale is personalty.

As a general rule land subject to a trust for sale is to be treated as personalty, and personalty subject to a trust for investment in land is to be treated as land.

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A deviso of land does not, therefore, carry the proceeds of salo of land subject to a trust for salo (*a*); such proceeds pass under a gift of residuary personal estate (*b*). On the other hand, a gift of residuary personalty does not pass a fund subject to a trust for investmeut in land (*c*); such a fund passes under a deviso of land (*d*). *Adams* v. *Austen*, 3 Russ. 461 (*a*); *Stead* v. *Newdigate*, 2 Mer. 521 (*b*); *Gillies* v. *Longlands*, 4 De G. & S. 372; *In re Greaves' Settlement Trusts*, 23 Ch. D. 313 (*c*); *In re Duke of Cleveland's Settled Estates*, (1893) 3 Ch. 244 (*d*); see *In re Harman*; *Lloyd* v. *Tardy*, (1894) 3 Ch. 607.

There is no distinction for this purposo between a deviso or bequest and an appointment. *Gale* v. *Gale*, 21 B. 349; *Blake* v. *Blake*, 15 Ch. D. 481, approved *In re Moses*; *Beddington* v. *Beddington*, (1902) 1 Ch. 100.

Power to devise land and a sum charged.

Upon similar principles, where a testator has power to devise land and also a sum of money charged on tho land, tho land passes under a devise of land and tho money under a gift of personalty. *Clifford* v. *Clifford*, 9 Ha. 675.

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Where there is a devise on trust for sale and to apply the proceeds for purposes some of which fail, with a disposition of the residue of the proceeds of sale, and a gift of the general residue of the estate, the gifts which fail go to augment the particular residue of the devise and not the general residue of the estate. *McMylor* v. *Lynch*, 24 O.R. 632. Particular residue.

When a testator charged his debts, funeral and testamentary expenses and legacies upon debts due to him, the deficiency, if any, to be made up out of his land which he specifically devised, and gave his household furniture and other personal chattels, except his piano, to his wife, and there was no other residuary clause in his will, the whole of the residuary estate except the debts and piano were held to pass to the wife exonerated from the payment of debts. *Scott* v. *Scott*, 18 Gr. 66. Implied residuary gift.

When land is devised for life, a residuary devise of all the real estate passes the reversion in the same land. *Swart* v. *Gregory*, 15 U.C.R. 335; *Doe dem. Ford* v. *Bell*, 6 U.C.R. 527. Reversion.

And where an annuity is given for life a residuary bequest carries the capital. *Re Watt*, 29 N.S.R. 100.

Where a residuary bequest directs the residue to be "divided *pro rata* amongst the legatees" previously named in the will, they share the residue in proportion to the re- Distribution of residue.

spective amounts of their prior legacies. *Kennedy* v. *Protestant Orphans' Home*, 25 O.R. 235.

"Should there be any surplus . . . a *pro rata* addition . . . to be made to the following bequests," namely, the pecuniary legacies previously mentioned, is a residuary bequest to the pecuniary legatees in proportion to their respective legacies. *Ray* v. *Annual Conference of New Brunswick*, 6 S.C.R. 308.

An annuitant is a legatee and entitled to share in such a distribution. *Woodside* v. *Logan*, 15 Gr. 145.

A testator directed the residue of his estate to be converted into money and certain pecuniary legacies to be paid thereout, amongst others the interest to be paid to A. on a capital sum which was to be divided at the death of A. amongst his brothers and sisters, and he directed the residue to be divided "amongst all the legatees herein mentioned." The persons held entitled to share were the pecuniary legatees including A., but not his brothers and sisters. the legatee of a mortgage, certain debtors of the testator whose debts were directed to be cancelled, the legatee of household furniture and other chattels, and persons entitled to the interest of invested purchase money derived from the sale of land; but not a devisee. *Edwards* v. *Smith*, 25 Gr. 159.

Where a residue was directed to be divided amongst the "different parties mentioned" in my will, it was held to mean parties mentioned as beneficiaries, and to exclude those

mentioned in the codicil. Partica mentioned living at a certain date would not include corporations. *Re Miles*, 14 O.L.R. 241.

Time for payment.

A testator gave legacies payable in three and four years respectively after his decease, the intermediate income to be paid to the legatees, and the interest of a fund to his sister for her life; and directed that should there be any surplus after paying out these legacies the same should be divided between his sister and one of the above legatees. It was held that the residue was distributable as soon as the legacies were provided for, and that payment was not postponed until the legacies were actually paid. *Macklem* v. *Daniel*, 18 O.R. 434.

What residue contains.

A testator, prefacing that he could not give his grandchildren more than one-sixth of the residue, devised and bequeathed such one-sixth, and then directed that certain lands "form part of the share of my said grandchildren in this partition" and directed sale thereof and investment of the proceeds. Held, that the lands so mentioned formed part of the residue, and were not devised in addition to the one-sixth. *Hazen* v. *Hazen*, 20 N.B.R. 70.

Charge on residue.

A direction that, in the event of "my estate being insufficient to pay" certain pecuniary legacies, they shall abate proportionately, does not charge them on the residue, the word "estate" in connection with pecuniary legacies meaning that portion of the general estate out of which pecuniary legacies are primarily payable. *Re Fairley*, 1 N.B. Eq. 91.

Residue undisposed of.

Where a testator opened his will by declaring his intention to dispose of his whole estate and then gave two legacies

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As to lapsed gifts falling into the residue, see notes to Chapter LIX.

CHAPTER XXIV.

EXECUTION OF GENERAL POWERS.

Effect of s. 27 of the Wills Act on general powers.

SECT. 27 of the Wills Act enacts 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.

Whether section applies to will of person domiciled abroad.

The section does not apply to the will of a person domiciled abroad, unless the will shows an intention that English rules of construction are to be adopted. *In re Price; Tomlin* v. *Latter*, (1900) 1 Ch. 442; *In re D'Este's Settlement Trusts; Poulter* v. *D'Este*, (1903) 1 Ch. 898; *In re Scholefield; Scholefield* v. *St. John*, (1905) 2 Ch. 408.

The effect of the section is to put property over which the testator has a general power of appointment in the same position as his own property.

Testamentary power.

A power to appoint by will only is a general power within the section. *Re Powell's Trust*, 18 W. R. 228; 39 L. J. Ch. 188.

A power to appoint generally, with the exception of specified persons, is not a general power within the section. *In re Byron's Settlement; Williams* v. *Mitchell*, (1891) 3 Ch. 474.

Such a power might be within the section if the exceepted persons were dead when the power was exercised. *In re Byron's Settlement, supra.*

Power to appoint by will referring to power.

A power to appoint by will expressly referring to the power is not a general power within the section. *In re Phillips: Robinson* v. *Burke*, 41 Ch. D. 417; *In re Turrant's Trust*, 58 L. J. Ch. 780; *Phillips* v. *Cayley*, 43 Ch. D. 222 (overruling *In re Marsh: Mason* v. *Thorne*, 38 Ch. D. 630); *In re Davies; Davies* v. *Davies*, (1892) 3 Ch. 63.

Gift on trusts to be declared by wife of her residuary estate.

A devise by a testator of leaseholds upon such trusts as his wife might have declared or should thereafter declare with respect to the disposition of her residuary estate by her will, gives the wife a general power of disposition, and a specific bequest of the leaseholds is effectual. *Bristow* v. *Skirrow*, 27 B. 585.

Power to charge and appoint.

A power to charge land with a sum of money and to appoint the money when charged, is not a power within the section. *In re Wallinger*, (1898) 1 Ir. 139; *In re Salvin; Marshall* v. *Wolseley*, (1906) 2 Ch. 459.

But where the testator gives his real and personal estate on trust for sale, and then gives a beneficiary power to appoint that a given sum may be raised and paid to such persons as the donee of the power thinks fit, this is in effect a power to appoint the sum, and is within the section. *In re Jones: Greene* v. *Gordon*, 34 Ch. D. 65.

Chandler v. *Pocock.*

The meaning of the words "personal estate" in the latter part of the section was discussed in *Chandler* v. *Pocock*, 15 Ch. D. 491; 16 Ch. D. 648.

In that case land, over which a testatrix had a general power of appointment by will, was subject to a power of sale and trust for reinvestment of the proceeds in land and was sold and the proceeds were handed over to the donee of the power. It was held, that the proceeds passed under a gift in the will of the donee of the power of the residue of her personal estate.

The case was a peculiar one and is not likely to occur again. The decision of Jessel, M.R., was affirmed by James and Cotton,

LJJ., Lush, LJ., concurring. It is therefore a decision the authority of which cannot be denied. But there are observations, especially in the judgment of the Master of the Rolls, which have not been approved (see *In re Duke of Cleveland's Settled Estates*, (1893) 3 Ch. 244, 250). The irrelevant fact that unless the appointed property was included there would not be enough to pay the legacies, is referred to in the head-note, but there is nothing to show that it influenced the decision.

What is property described in a general manner.

A gift of "such part of my personal estate as shall consist of money or securities for money" or "of all stocks, shares and securities which I possess or to which I am entitled" is a bequest of personal property described in a general manner, and will exercise a general power so far as it extends to property of the kind described. *Turner* v. *Turner*, 21 L. J. Ch. 843; *In re Jacob*; *Mortimer* v. *Mortimer*, (1907) 1 Ch. 445.

Contrary intention.

The fact that the power is contained in a settlement made by the testator before the date of his will raises no presumption that the will was not intended to execute the power. *In re Clark's Estate*; *Maddick* v. *Marks*, 14 Ch. D. 422.

An attempted appointment of the fund is not a contrary intention, and will not prevent the residuary gift from passing the property subject to the power, though an appointment of part of the property may have been already made in favour of the residuary legatee. *Spooner's Trust*, 2 Sim. N. S. 129; *Bernard* v. *Minshull*, Jo. 276, 300; *Re Elen*: *Romas* v. *M'Kechnie*, 68 L. T. 816.

Confirmation of settlement.

A contrary intention is not indicated by an express confirmation of the trusts of the instrument creating the power, where there is anything to which such confirmation can apply; as, for instance, other settled property or prior trusts of the property over which the testator has the power, though the property may be disposed of in default of appointment. *Lake* v. *Currie*, 2 D. M. & G. 536; *Hutchin* v. *Osborne*, 4 K. & J. 252; 3 De G. & J. 142.

Nor by the fact that a life interest is given to a person when, if that person survives the testator, the power will be gone. *Thomas* v. *Jones*, 2 J. & H. 475; 1 D. J. & S. 63.

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But it has been held that a gift of property "not otherwise disposed of" does not execute a power where the property subject to the power is disposed of in default of appointment. *Moss* v. *Harter*, 3 Sm. & G. 458, *sed qu.*; see *Bush* v. *Cowan*, 9 Jur. N. S. 429; 11 W. R. 395.

Appointment of residuary legatee. General pecuniary legacy.

The appointment of a residuary legatee and the gift of a general pecuniary legacy are sufficient under the section to execute a general power. *Spooner's Trust*, 2 Sim. N. S. 129; *Clifford* v. *Clifford*, 9 Ha. 675; *A.-G.* v. *Brackenbury*, 1 H. & C. 782; *Hawthorn* v. *Sheldon*, 3 Sm. & G. 293; *Shelford* v. *Acland*, 23 B. 10; *Re Wilkinson*, 4 Ch. 587.

Effect upon a general power of a direction to pay debts.

A direction to executors to pay the testator's debts out of his personal estate operates as an execution of a general power in favour of the executor. *Wilday* v. *Barnett*, 6 Eq. 193.

A simple direction to pay debts without the appointment of an executor would have the same effect. *Laing* v. *Cowan*, 21 B. 112.

But the mere appointment of an executor would probably not be enough. Per Wickens, V.-C., *In re Davies' Trusts*, 13 Eq. 166.

Power exercised by will made previous to instrument creating power.

By the combined effects of sects. 24 and 27, a general power may be exercised by a general gift in a will made prior to the instrument creating the power, and it is now settled that a general devise or bequest executes a general power contained in a settlement subsequently made by the testator, though the will thereby makes the whole settlement nugatory. *Boyes* v. *Cook*, 14 Ch. D. 53; *Airey* v. *Borrer*, 12 App. C. 263, overruling *In re Radley's Settlement*, 14 Eq. 266; see, too, *In re Hernando: Hernando* v. *Sawtell*, 27 Ch. D. 284.

A subsequent power created by the testator will of course *à fortiori* be executed where the previous will expressly gives all property over which the testator has any power. *Patch* v. *Shore*, 2 Dr. & Sm. 589; *Re Old's Trusts: Pengelley* v. *Herbert*, 54 L. T. 677.

Or where the will expressly refers to the property, which is afterwards settled by the testator, who reserves to himself a power. *Stillman* v. *Weedon*, 16 Sim. 26, discussed in *In re*

Hayes; *Turnbull* v. *Hayes*, (1900) 2 Ch. 332, 336; *Meredyth* v. *Meredyth*, I. R. 5 Eq. 565; *Cofield* v. *Pollard*, 3 Jur. N. S. 1203.

Contingent power.

The same is the case where the power, though existing at the date of the will, is then only contingent, being given to the survivor of two persons of whom the testator is one. *Thomas* v. *Jones*, 2 J. & H. 475; 1 D. J. & S. 63.

Where the settlor and testator were the same person and the power was to be executed by a last will, and the testator made a will before and another after the creation of the power, the latter purporting to be his last will, it was held that the first will was not meant to be an execution of the power. *Pettinger* v. *Ambler*, L. R. 1 Eq. 510.

Where the facts were: first settlement, with power to appoint by deed or will, will purporting to execute only the power in this settlement, second settlement under the power in the first, and creating a power to appoint by will, the will was held not to execute the power in the second settlement. *Thompson* v. *Simpson*, 50 L. J. Ch. 461; see, however, *Airey* v. *Bower*, 12 App. C. 263.

Power created by third person.

It does not appear to have been decided, that a mere general gift will execute a power subsequently given to the testator by third persons, though there can be no doubt that it would.

Power created by will of person who survives donee.

But a general gift will not execute a power given to the testator by the will of a person who survives him. *Jones* v. *Southall*, 32 B. 31.

It will not do so, even though the testator expressly refers to the power and purports to exercise it. *Sharpe* v. *M'Call*, (1903) 1 Ir. 179.

In what cases an appointment makes the property appointed the testator's own for all purposes.

It is a question of intention, whether the donee of a general power by exercising it has taken the property subject to the power out of the instrument creating the power for all purposes or only for the limited purpose of giving effect to the particular disposition expressed.

No distinction for this purpose can be drawn between the will of a man and the will of a married woman. *Hoare* v. *Osborne*, 12 W. R. 661; 33 L. J. Ch. 586; 10 Jur. N. S. 694, has been disapproved. *In re Pinckl's Settlement*, 48 L. J. Ch. 741, 743

(Jessel, M.R.); *Willoughby Osborne* v. *Holyoake*, 22 Ch. D. 238, 241 (Fry, J.); *In re De Lusi's Trusts*, 3 L. R. Ir. 232, 240.

Appointment to executors or trustees.

An appointment to executors or trustees of a fund, over which the testator has a general power, takes the fund away from the donees in default of appointment, though some of the trusts declared by the testator may fail or trusts only exhausting part of the fund are declared. *Chamberlain* v. *Hutchinson*, 22 B. 444; *Keown's Estate*, I. R. 1 Eq. 372; *Brickenden* v. *Williams*, 7 Eq. 310; *Wilkinson* v. *Schneider*, 9 Eq. 423; *Scriven* v. *Sandom*, 2 [illegible] & H. 743; *In re Pinède's Settlement*, 12 Ch. D. 667; *In re* [illegible]*ringill's Estate*; *Hinsley* v. *Ickeringill*, 17 Ch. D. 151; *Blight* v. *Hartnoll*, 23 Ch. D. 218; see *Re Horton*: *Horton* v. *Perks*, 51 L. T. 420.

Real estate subject to a power.

The rule applicable to personalty applies also to real estate, subject to a power, so that an appointment to trustees upon trust for a person, who predeceases the testator, takes the estate from the persons entitled in default of appointment. *In re Van Hagen*: *Sperling* v. *Rochfort*, 16 Ch. D. 18; *Willoughby Osborne* v. *Holyoake*, 22 Ch. D. 238; *Coxen* v. *Rowland*, (1894) 1 Ch. 406.

Power exercised by deed.

The same doctrine has been applied where a general power was exercised by a marriage settlement. The settlor was held to have made the property subject to the power her own, so that upon failure of the ultimate trusts of the settlement there was a resulting trust for the settlor. *In re Scott*; *Scott* v. *Hanbury*, (1891) 1 Ch. 298.

Appointment to beneficiary direct.

The testator may make the property his own for all purposes though it is appointed to a beneficiary without the intervention of trustees; for instance, if the property subject to the power is treated as if it belonged to the testator and is blended with his own property in a residuary gift by words referring to property subject to a power. *Coxen* v. *Rowland*, (1894) 1 Ch. 406; *In re Morten*: *Shaw* v. *Morten*, (1902) 1 Ch. 314.

If the residue is given directly to a beneficiary without any words referring to the power, or if the testator expressly distinguishes between his own property and that subject to the power, the intention cannot be gathered to make the property his own for all purposes. *In re Davies' Trusts*, 13 Eq. 163;

In re De Last's Trusts, 3 L. R. Ir. 232; both explained in *In re Marten*, (1902) 1 Ch. 314, 324; *In re Boyd*: *Kelly* v. *Boyd*, (1897) 2 Ch. 232.

Again, a mere direction to pay debts takes the fund from the persons entitled in default of appointment only so far as it is required to pay the debts. *Laing* v. *Cowan*, 24 B. 412.

And where a testatrix by her will only exercised the power by appointing the property to her husband for life and then to her niece, and appointed an executor, but made no other disposition of her property, it was held that on the death of the niece before the testatrix the property went as in default of appointment. *In re Thurston*: *Thurston* v. *Evans*, 32 Ch. D. 508; see *Bristow* v. *Skirrow*, 10 Eq. 4.

Administration of appointed fund.

Where a general power of appointment over a fund is executed by will, the executors of the will, or the administrators with the will annexed, are the proper persons to administer and give a discharge for the fund. *In re Philbrick's Trusts*, 13 W. R. 570; 34 L. J. Ch. 368; *Hayes* v. *Oatley*, 14 Eq. 1; *In re Hoskin's Trusts*, 5 Ch. D. 229; 6 *ib.* 284; *In re Peacock's Settlement*: *Kelcy* v. *Harrison*, (1902) 1 Ch. 552.

This rule applies in the case of a will made under a power by a married woman, who died before the Married Women's Property Act, 1882. *In re Peacock's Settlement*, *supra*.

Passing to executors "as such."

Whether the fund passes to the executors "as such" within the meaning of the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9 (4), has been discussed with much difference of opinion. See *In re Treasure*; *Wild* v. *Stanham*, (1900) 2 Ch. 648; *In re Maddock*; *Llewellyn* v. *Washington*, (1901) 2 Ch. 372; *In re Power*; *Acworth* v. *Stone*, (1901) 2 Ch. 659; *In re Dodson*: *Gibson* v. *Dodson*, (1907) 1 Ch. 284, as against *In re Moore*: *Moore* v. *Moore*, (1901) 1 Ch. 691; *In re Fearnsides*; *Baines* v. *Chadwick*, (1903) 1 Ch. 250; see also *In re Dixon*: *Penfold* v. *Dixon*, (1902) 1 Ch. 248.

Power of revocation and new appointment.

A general devise or bequest will not, under sect. 27, execute a power of revocation and new appointment. *Pomfret* v. *Perring*, 18 B. 618; 5 D. M. & G. 775; *Palmer* v. *Newell*, 20 B. 32; *Charles* v. *Burke*, 43 Ch. D. 223, n.; *In re Bruce*:

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Welch v. *Colt*, (1891) 2 Ch. 671; *In re Goulding*; *Dobell* v. *Dutton*, 48 W. R. 183; see *In re Wells*; *Hardisty* v. *Wells*, 42 Ch. D. 646.

However, a general bequest by will has been held to exercise a general power, which had been previously exercised by a testamentary appointment not referred to in the will, and thereby to revoke the testamentary appointment. *In re Gibbes' Settlement*; *White* v. *Randolf*, 37 Ch. D. 143.

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By the Wills Act, "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." R.S.O. c. 128, s. 13; R.S. B.C. c. 193, s. 8; R.S.M. c. 174, s. 7; R.S.N.B. c. 160, s. 8; R.S.N.S. c. 139, s. 8.

By the Wills Act it is enacted that "A general devise 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 (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 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 (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 appears by the will. R.S.O. c. 128, s. 29; R.S.B.C. c. 193, s. 24; R.S.M. c. 174, s. 25; R.S.N.B. c. 160, s. 21; R.S.N.S. c. 139, s. 27.

Exercise by will.

A power (given by deed endorsed on a mortgage which was payable to the executors or administrators of the mortgagee) to appoint the moneys secured by the mortgage, is well exercised by a will disposing of the mortgage moneys, or, if defective in its execution, is one which would be rectified by the Court. *Dermott* v. *Keenan*, 14 O.R. 687.

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But, where property went to children in default of appointment by deed, and the donee of the power affected to appoint by will to one child, it was held that the appointment was defective, and would not be rectified in favour of the plaintiff who was an illegitimate child. *Shore* v. *Shore*, 21 O.R. 54.

Delegation.

A testator having a power of appointment by will cannot delegate it by will to another. *Smith* v. *Chishome*, 15 A.R. 738.

Appointment for all purposes.

A testatrix, having a general power to appoint by will or otherwise, devised her estate to executors "in trust to convert the same into cash" and pay certain legacies, and gave the residue for an object which failed for indefiniteness. Held, that this was an exercise of the power for all purposes, and that the residue which failed was held by the executors on trust for the next of kin. *Re Wilson*, 30 O.R. 553.

CHAPTER XXV.

EXECUTION OF SPECIAL POWERS.

Special powers not within s. 27 of Wills Act.

SPECIAL powers are not within sect. 27 of the Wills Act. *Clores* v. *Audry*, 12 B. 604; *Russell* v. *Russell*, 12 Ir. Ch. 377; *Re Caplin's Will*, 2 Dr. & Sm. 527; *Humphery* v. *Humphery*, 36 L. T. 90; *Holyland* v. *Lewin*, 2 Ch. D. 266.

Not within s. 25.

Nor are they within sect. 25, so that where a testamentary appointment under a special power fails, a residuary gift will not by virtue of that section pass the property, the appointment whereof has failed. *Holyland* v. *Lewin*, 26 Ch. D. 266; overruling *Freme* v. *Clement*, 18 Ch. D. 499.

Not within s. 24.

And a will disposing of specific property which the testator afterwards settles, reserving to himself a special power of appointment, does not, by virtue of sect. 24 of the Wills Act, execute the special power. *In re Wells; Hardisty* v. *Wells*, 42 Ch. D. 646; *Doyle* v. *Coyle*, (1895) 1 Ir. 205; *In re Hayes; Turnbull* v. *Hayes*, (1900) 2 Ch. 332; (1901) 2 Ch. 529; not following *Stillman* v. *Weedon*, 16 Sim. 26.

Since the Wills Act the fact that a person who purports to devise real estate has no real estate, but has a special power to appoint real estate, is not alone sufficient to show an intention to execute the power.

It is a question of construction upon the whole will, whether the special power was intended to be executed. *In re Mills; Mills* v. *Mills*, 34 Ch. D. 186; *In re Esther Williams; Foulkes* v. *Williams*, 42 Ch. D. 93; *Peirce* v. *McNeale*, (1894) 1 Ir. 118.

Intention not to appoint on a mistaken view of the rights.

If the testator states, that he does not execute a power, because the property will go in a particular way, when in fact he is mistaken, this cannot be treated as an execution of the power so as to make the property pass in accordance with

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his view. *Langston* v. *Langston*, 21 B. 552; *In re Jack*; *Jack* v. *Jack*, (1899) 1 Ch. 374.

How special power executed.

In order to exercise a special power, there must be a reference to the power or to the property subject to the power, or an intention otherwise expressed in the will to exercise the power. *Wildbore* v. *Gregory*, 12 Eq. 482; *Harvey* v. *Harvey*, 23 W. R. 478; *In re Herdman's Trusts*, 31 L. R. Ir. 87; *In re Huddleston*; *Bruno* v. *Eyston*, (1894) 3 Ch. 595; *Byrne* v. *Cullinan* (1904) 1 Ir. 42.

What is a sufficient reference to a power.

1. What is a sufficient reference to a power.

A ratification of the trusts of the settlement creating a power is no evidence of an intention to execute the power. *Re Bringloe's Trust*, 26 L. T. 58.

A recital that a person is entitled to certain funds or to an estate, over which the testator has a power of appointment, will not amount to an execution of the power in favour of that person. *Minchin* v. *Minchin*, I. R. 5 Eq. 178, 258; *Pennefather* v. *Pennefather*, I. R. 7 Eq. 300; *L'Estrange* v. *L'Estrange*, 25 L. R. Ir. 399; *Haverty* v. *Curtis*, (1895) 1 Ir. 23; see *Lees* v. *Lees*, I. R. 5 Eq. 549; *In re Walsh's Trusts*, 1 L. R. Ir. 320.

A reference to a power as contained in a settlement of 1819, when the power was, in fact, contained in a re-settlement of 1839, has been held a sufficient reference. *Re Wilmot*, 9 B. 644.

Beneficial power.

Words referring to a "beneficial power" do not *primâ facie* mean a special power, though they may do so upon the language of a particular will. *Ames* v. *Cadogan*, 12 Ch. D. 868; *Von Brockdorff* v. *Malcolm*, 30 Ch. D. 172.

Effect of gift of property over which testator has disposing power.

Where a testator gives his own property and any property over which he has any disposing power, and he has only a special power of appointment, the latter words may be sufficient to include a special power. The intention must be gathered from the whole will. The cases do not lay down any general principles, and are not easily reconcilable.

The case in favour of execution of a special power is strong where it is clear that a power of appointment is referred to, or the word "appoint" is used. On the other hand, it is weak

where the word "appoint" is absent, and though the word "power" is used, the context shows that it is not used in the technical sense of a power of appointment, but popularly, as equivalent to capacity or ability to give by will. See *Cooke* v. *Cunliffe*, 17 Q. B. 245; *Sykes* v. *Campbell*, (1903) 1 Ir. 17.

Gift not in excess of power.

The simplest case is where powers of appointment are referred to in general terms and the gift is made to objects of the power, and is not in excess of the power. In such a case the power will be exercised. *Grinsford* v. *Dunn*, 17 Eq. 405; *In re Swinburne*; *Swinburne* v. *Pitt*, 27 Ch. D. 696; *In re Mayhew*; *Spencer* v. *Cuthbush*, (1901) 1 Ch. 677.

Gift in excess of power.

The fact that the will, if treated as an execution of the power, gives a greater interest than the power authorises—for instance, an absolute interest instead of a life interest—is not necessarily conclusive against an exercise of the power. *In re Teape's Trusts*, 16 Eq. 42.

Gift to persons not objects.

Nor is the fact that a part of the property is given for purposes not authorised by the power or to persons who are not objects of the power. *Bailey* v. *Lloyd*, 5 Russ. 330; *Pidgely* v. *Pidgely*, 1 Coll. 255; *In re Swinburne*; *Swinburne* v. *Pitt*, 27 Ch. D. 696; *Re Boyd*; *Nield* v. *Boyd*, 63 L. T. 92.

Trust to pay debts.

Nor the fact that the property is given as a residue or even that it is given upon trust to pay the testator's debts, as effect may be given to this trust by limiting it to the testator's own property. *Corr* v. *Foster*, 1 J. & H. 30; *Ferries* v. *Jay*, 10 Eq. 550; *In re Teape's Trusts*, 16 Eq. 442; *In re Swinburne*; *Swinburne* v. *Pitt*, 27 Ch. D. 676; *In re Milner*; *Bray* v. *Milner*, (1899) 1 Ch. 563; see *In re Cotton*; *Wood* v. *Cotton*, 40 Ch. D. 41. *Clogstoun* v. *Walcott*, 13 Sim. 523, is not to be followed; see *In re Teape's Trusts*, *supra*.

But each of these circumstances affords an argument that the will was not intended to execute the power, and a combination of them may be sufficient to prevent the power from being exercised. See *Hope* v. *Hope*, 5 Giff. 13; *In re Cotton*; *Wood* v. *Cotton*, 40 Ch. D. 41; *In re Weston's Settlement*; *Neeves* v. *Weston*, (1906) 2 Ch. 620.

A gift of "all my property whereof I have power to dispose" may also execute a special power if the circumstances or the

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language of the will are sufficient to indicate an intention to exercise the power. *Cooke* v. *Cunliffe*, 17 Q. B. 245; *Cox* v. *Foster*, 1 J. & H. 30; *Thornton* v. *Thornton*, 20 Eq. 599; *In re Sharland*; *Rew* v. *Wippell*, (1899) 2 Ch. 536; see *In re Richardson's Trusts*, 17 L. R. Ir. 436.

Power not in existence when will made.

But a mere general reference to property over which the testator has any disposing power will not exercise a special power conferred by an instrument which was not in existence when the will was made. *In re Hayes*: *Turnbull* v. *Hayes*, (1901) 2 Ch. 529.

2. What is a sufficient reference to the property subject to the power.

There must be a reference to a specific fund.

There must be no doubt on the face of the will that the testator is referring to some specific fund in existence at the time of making the will.

Therefore, the fact that property of the same kind as that subject to the power is given merely in general terms—as, for instance, some particular kind of stock—will not execute the power, since the gift would be satisfied by purchasing the stock in question. *Webb* v. *Honnor*, 1 J. & W. 352; *Mattingley's Trusts*, 2 J. & H. 427; *In re Wait*: *Workman* v. *Petgrave*, 30 Ch. D. 617.

Nor will the fact that legacies are given equal in amount to the fund subject to the power. *Jones* v. *Tucker*, 2 Mer. 533; *Davies* v. *Thorns*, 3 De G. & S. 347; *Forbes* v. *Ball*, 3 Mer. 437; explained in *Davies* v. *Thorns*.

Nor that legacies are given largely in excess of the testator's estate, unless the property subject to the power is included in it. *Lowe* v. *Pennington*, 10 L. J. Ch. 83.

On the other hand, where the testator uses words showing that he is disposing of a specific fund, the power will be executed. *Lowndes* v. *Lowndes*, 1 Y. & J. 445; *Innes* v. *Sayer*, 7 Ha. 381; 3 Mac. & G. 607; *Rooke* v. *Rooke*, 2 Dr. & S. 38; *David's Trusts*, Johns. 495; *Gratwick's Trusts*, L. R. 1 Eq. 177; *Fletcher* v. *Fletcher*, 7 L. R. Ir. 40.

And this is the case though some of the persons, in whose favour the power is exercised, are incapable of taking. *Gratwick's Trusts*, *supra*; *Bruce* v. *Bruce*, 11 Eq. 371.

Where a specific fund is referred to, the fact that the fund subject to the power is misdescribed, or that the donee purports to appoint under a different power, makes no difference. *Mackinley* v. *Sison*, 8 Sim. 561; *Bruce* v. *Bruce*, 11 Eq. 371.

In the same way, where a portion of the property subject to the power is excepted out of a general gift, the rest of the property subject to the power passes. *Walter* v. *Mackie*, 4 Russ. 76; *Reid* v. *Reid*, 25 B. 469.

Whether residuary gift executes a power already partially exercised.

3. There is a third class of cases, where a power is partially exercised, either by a gift of some of the property subject to the power or by an express reference to the power, and there is then a general residuary gift. The question then arises whether the residuary gift executes the power so far as it remains unexecuted.

A mere residuary gift without more would not have this effect. *Hughes* v. *Turner*, 3 M. & K. 666; *Butler* v. *Gray*, 5 Ch. 26.

But if appointed parts of the fund are charged on the residue, or there is an intention expressed to appoint the whole fund, or there is evidence on the face of the will that the testator treats the fund subject to the power as his own, a residuary gift may execute the power so far as it remains unexecuted. *Elliott* v. *Elliott*, 15 Sim. 321; *Davies* v. *Fisher*, 5 B. 201; *Re Comber's Settlement*, 14 W. R. 172; *Harvey* v. *Stracey*, 1 Dr. 73.

And a gift of "the residue of my property and over which I have any power of disposal by will" may pass a share of a fund appointed by the will under a special power to a person not an object of the power. *In re Hunt's Trusts*, 31 Ch. D. 308.

Republication of will.

Where there was a special power exercisable by the survivor of a husband and wife, after the death of the other of them, and the husband made a will in the lifetime of the wife containing words sufficient to refer to the special power, and after her death republished the will by a codicil, the will was held to execute the power. *In re Blackburn; Smiles* v. *Blackburn*, 43 Ch. D. 75; see *Hope* v. *Hope*, 5 Giff. 13.

Execution of power of revocation.

Where property is appointed under a power and a power of revocation is reserved, the power of revocation may be impliedly exercised, if the will is expressed to be in exercise of the original power or appoints the property subject to the power. See *Quinn* v. *Armstrong*, I. R. 11 Eq. 161.

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But where a special power in a settlement has been partially exercised by a deed reserving a power of revocation, an appointment by will expressed to be made by virtue of the power in the settlement or otherwise howsoever, will not exercise the power of revocation, but will take effect only on the unappointed property. *Pomfret* v. *Perring*, 5 D. M. & G. 775.

And a will expressly exercising a special power, which is afterwards exercised by a deed reserving a power of revocation, will not operate upon so much of the property as is well appointed by the deed. *In re Wells' Trusts; Hardisty* v. *Wells*, 42 Ch. D. 646.

An appointment expressed to be under a particular power and all other powers enabling the testator, may take effect upon such interest as the testator has, if the particular power does not in the events that have happened become exercisable. *Sing* v. *Leslie*, 2 H. & M. 68.

Appointment under special power of land to trustees on trust for sale;

It is well settled that a power to appoint land, whether the power extends to the legal or only to the equitable estate, is well exercised by an appointment to trustees on trust for sale: and also that a power to appoint a fund is well exercised by an appointment of the fund to trustees for certain persons, provided in each case the persons beneficially interested under the appointment are objects of the power. *Long* v. *Long*, 5 Ves. 445; *Kenworthy* v. *Bate*, 8 Ves. 793; *Crozier* v. *Crozier*, 3 D. & War. 371; *Thornton* v. *Bright*, 2 M. & Cr. 230; *In re Redgate; Marsh* v. *Redgate*, (1903) 1 Ch. 356.

In the case of an appointment of land to trustees on trust for sale, those trustees can execute the trust whether they take the legal estate or not. *In re Pagel*; *Mellor* v. *Mellor*, (1898) 1 Ch. 290; *In re Adams' Trustees*, (1907) 1 Ch. 695.

of personalty to new trustees.

But in the case of a fund vested in trustees and appointed under a special power to new trustees upon trusts, the original trustees are the persons to administer the trusts. *Busk* v. *Aldam*, 19 Eq. 16; *Von Brockdorff* v. *Malcolm*, 30 Ch. D. 172: see *Scotney* v. *Lomer*, 29 Ch. D. 535; 31 Ch. D. 380; *In re Cotton; Wood* v. *Cotton*, 40 Ch. D. 41; *In re Tyssen; Knight-Bruce* v. *Butterworth*, (1894) 1 Ch. 56.

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Excessive exercise

A power to appoint amongst children does not authorize an appointment to grandchildren. And therefore, where, under such a power, a testatrix affected to appoint the interest on a fund to a child and the capital to grandchildren, it was held that the appointment was effective only to give a life interest to the child. *Deedes* v. *Graham*, 20 Gr. 258.

A power to appoint land in fee tail does not authorize an appointment in fee simple, and such an attempted exercise of the power is wholly void. *Scane* v. *Hartwick*, 11 U.C.R. 550.

Fraud on power.

A testator having a power of appointment amongst his children, or to his brother or sister, appointed part of the property to two of his children, and the residue to his brother, directing him to free his life policy from a debt for which it was pledged, which policy he bequeathed to a stranger. Held, that the appointment to the brother was, under the circumstances, a fraud on the power, and that there was a failure as to the residue, but that the appointment to the children was valid. *Bell* v. *Lee*, 8 A.R. 185. And see *Re Ontario L. & S. Co. & Powers*, 12 O.R. 582.

Reference to subject.

A testatrix, having a power of appointment amongst children, made a will disposing of "the moneys now or at my death invested in mortgages or otherwise." Held, a sufficient reference to the subject of the power to shew an intention to exercise it, it being shewn that the testatrix had no property of her own so invested. *Deedes* v. *Graham*, 16 Gr. 167.

A testatrix having no property of her own recited that the property which she was entitled to came to her under her father's will by which she had only a general power of appointment, and she directed her debts to be paid and then disposed of the property amongst children. Held, an exercise of the power. *Hutchinson* v. *Baird*, 1 N.B. Eq. 624.

Time of exercise.

A devise to a widow *durante viduitate*, with power to appoint to sons of the testator, upon her death or marriage, may be exercised at any time during the life of the donee of

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the power. And *quære*, whether, on a second marriage it must not be exercised after such marriage. *Cowan* v. *Bessere*, 5 O.R. 624.

Estate tail with power.

A grant in fee tail was followed by a proviso giving power to the donee in tail to appoint by deed or will "which or in what manner her said heirs shall have the lands." Held, that if this power was valid, a will attempting to dispose of the land to the donee's eldest son with instructions to dispose of it amongst the husband and children of the donee in proportions mentioned in her will, was not an exercise of the power. *Archer* v. *Urquhart*, 23 O.R. 214. *Sed quære*, whether the power was not altogether void.

Covenant not to exercise power.

A devise to trustees upon trust for A. for life, and to convey to his children at his death, with power to A. to appoint to his brothers and sisters or their children, cannot be exercised by appointing to a brother and covenanting not to revoke the will. A subsequent appointment by will to another object would be a good appointment. *Re Collard & Duckworth*, 16 O.R. 735.

But where there was a devise to A. for life with general power of appointment by will, and no devise over, it was held that the devisee and the heirs of the testator could make a good title to a purchaser, the devisee covenanting not to exercise his power of appointment. *Re Drew & McGowan*, 1 O.L.R. 575.

CHAPTER XXVI.

CONVERSION.

I. What Amounts to a Direction to Convert.

Imperative direction to convert.

If there is an imperative direction to convert, the property is in equity treated as converted from the testator's death.

Direction that land is to be considered money or money land.

A direction that land is to be considered as money or *vice versâ* will not work a conversion, but an actual change of one form of property into another must be intended. *Johnson* v. *Arnold*, 1 Ves. Sen. 171; *A.-G.* v. *Mangles*, 5 M. & W. 120; *Edwards* v. *Tuck*, 23 B. 268; 3 D. M. & G. 40; *In re Grange*; *Chadwick* v. *Grange*, (1907) 2 Ch. 20.

Void trust for sale.

A trust for sale, which is void for remoteness, does not effect a conversion. *Goodier* v. *Edmunds*, (1893) 3 Ch. 455; *In re Appleby*; *Walker* v. *Lever*, (1903) 1 Ch. 565.

Power may be a trust and *vice versâ*.

Upon the construction of the whole will, what is in form only a power to convert may be shewn to be in effect an imperative trust; and on the other hand, what is in form a trust for sale may be shown to be a discretionary power only. *Burrell* v. *Baskerfield*, 11 B. 525; *In re Hotchkys*; *Freke* v. *Calmady*, 32 Ch. D. 408; *Glover* v. *Heelis*, 32 L. T. 534; 23 W. R. 677.

Direction to divide.

A direction to divide does not imply a conversion. *Cornick* v. *Pearce*, 7 Ha. 477; *Lucas* v. *Brandreth*, 28 B. 273.

But a direction to get together and divide among a large number of legatees property consisting of realty and personalty and previously described as scattered about and not realised, coupled with a direction to invest some of the shares, is in effect a direction to convert. *Mower* v. *Orr*, 7 Ha. 475; see *Owen* v. *Owen*, (1897) 1 Ir. 583.

Discretion as to time.

Where a conversion is directed, the fact that the trustees have a discretion as to time will not alter the general rule.

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Doughty v. *Bull*, 2 P. W. 320; *In re Rae*; *Morris* v. *Griffiths*, 26 Ch. D. 604.

Conversion upon request.

When conversion is to take place upon request the question is, whether the conversion was intended to be made in all events, and the request is only an additional safeguard, or whether no conversion was intended till request.

If the conversion is to be upon request of certain persons, and the property is disposed of, whether converted or not, there is no conversion till the request. *In re Taylor's Settlement*, 9 Ha. 596; *Davies* v. *Goodhew*, 6 Sim. 585; see *Mc. Guire* v. *Mc. Guire*, (1900) 1 Ir. 200.

On the other hand, if there is a general intention to convert evidenced by the fact that the limitations are applicable only to the property as converted, and by the fact that the conversion is to be at the request of certain persons or the survivor or the executors or administrators of the survivor, the property will be considered as converted. *Thornton* v. *Hawley*, 10 Ves. 129; see *Lechmere* v. *Earl of Carlisle*, 3 P. W. 211; *Battiste* v. *Maunsell*, I. R. 10 Eq. 314.

Power or discretion to convert.

Where trustees have a power to convert or an absolute discretion to convert or not, the property remains unconverted till the power or discretion is exercised. *Greenway* v. *Greenway*, 2 D. F. & J. 128; *Polley* v. *Seymour*, 2 Y. & C. Ex. 708; *Yates* v. *Yate*, 6 Jur. N. S. 1023; *Brown* v. *Bigg*, 7 Ves. 279; *Walter* v. *Maunde*, 19 Ves. 424; *Bourne* v. *Bourne*, 2 Ha. 35.

Similarly, where trustees have an option to convert either into realty or personalty, the property will be considered of that species into which the trustees converted it. *Van* v. *Barnett*, 19 Ves. 102; *Walker* v. *Denne*, 2 Ves. Jun. 170; *Rich* v. *Whitfield*, L. R. 2 Eq. 583.

Where there is a settlement of real estate with the usual power of sale, and trust for reinvestment in freeholds or leaseholds with power of interim investment in personalty, a sale and investment of the proceeds in personalty will not effect a conversion. *In re Bird*; *Pitman* v. *Pitman*, (1892) 1 Ch. 279.

Discretion may be controlled by the context.

The option of the trustees may, however, be controlled by the general intention expressed in the will. Thus, if personalty is directed to be laid out in land or other security, and

settled in the same way as realty devised by the will, the general intention that the real and personal estate are to go together may override the option. *Earlom* v. *Saunders*, Amb. 241; *Curley* v. *Harstonge*, 1 Dow. 361; *see Minors* v. *Battison*, 1 App. C. 428.

And an option to lay out a sum in the purchase of lands may amount to a positive direction, if there is a provision, that, if the purchase is not made, the securities are to be and enure to such purposes as if land had been purchased. *Johnson* v. *Arnold*, 1 Ves. Sen. 169.

But where the will disposes only of personalty, and the trust for conversion does not apply to securities for money, and there is then a trust to invest the proceeds of conversion in the purchase of real estate or in the public funds, the fact that the limitations are appropriate only to realty will not control the trustees' option so as to convert the personalty. *Evans* v. *Bell*, 30 W. R. 899; 47 L. T. 165.

The fact that personalty which trustees have an option to convert is given to a person, his heirs and assigns, is not alone sufficient to limit the option of the trustees. *Cookson* v. *Cookson*, 12 Cl. & F. 121; *Atwell* v. *Atwell*, 13 Eq. 23.

II. Whether Conversion is Directed for all the Purposes of the Will.

It is a question of construction in each case whether conversion is directed for all or only for some of the purposes of the will; whether, for instance, personalty to be laid out in land goes to the residuary devisee, or land directed to be sold goes to the residuary legatee if the immediate purpose for which conversion is directed fails.

Money to be laid out in land.

1. If personalty is directed to be laid out in the purchase of land to be subject to the uses of the testator's real estate, and those uses fail, the conversion fails also, and the personalty goes to the residuary legatee. *Hereford* v. *Ravenhill*, 5 B. 51.

Proceeds of sale of realty to form part of the personal estate.

2. Where realty is directed to be converted and form part of the personal estate, it will be subject to all the limitations of the personal estate, and will pass by the residuary bequest.

Kibley v. *Coussmaker*, 1 Ves. Jun. 436; *Robinson* v. *Governors of London Hospital*, 10 Ha. 19, 27; see *Bright* v. *Larcher*, 3 De G. & J. 148; *Field* v. *Peckett*, 29 B. 568; *quære*, whether *Collins* v. *Wakeman*, 2 Ves. Jun. 683, would be followed.

But notwithstanding a direction that moneys to arise from a sale of realty are to be considered as part of the personal estate, they will not pass under a gift of the residuary personalty if the residuary gift is followed by a gift of the moneys arising from the sale. *Amphlett* v. *Parke*, 4 Russ. 75; 2 R. & M. 221.

Whether converted realty passes by a residuary bequest.

3. Upon the question whether realty directed to be converted is converted for all the purposes of the will, the cases run into fine, though, perhaps, not irreconcilable distinctions.

Direction to convert at a certain time and divide among persons who may not then be in existence.

a. When conversion is directed at the death of a tenant for life, and the proceeds are to be divided among a class of persons who at that time may not be in existence, or may never come into existence—for instance, such of the children of the tenant for life as attain twenty-one—conversion is not merely for the purpose of division, but for all the purposes of the will, and the property passes to the residuary legatee as personalty. *Wall* v. *Colshead*, 2 De G. & J. 683.

Absolute direction to sell.

b. Where there is an absolute direction to sell realty not limited to any particular purpose, the surplus proceeds will pass to the residuary legatee. *Singleton* v. *Tomlinson*, 3 App. C. 404, affirming *S. C.* nom. *Walson* v. *Arundell*, I. R. 11 Eq. 53.

Sale for certain purposes.

c. If the realty is to be sold for a particular purpose—for instance, to pay legacies—the surplus proceeds will not pass under a gift of residuary personalty unless the gift is so expressed as to show that the proceeds of sale of land are intended to be included. *Mallabar* v. *Mallabar*, Ca. t. Talb. 78; *Maugham* v. *Mason*, 1 V. & B. 410; *Collis* v. *Robins*, 1 De G. & S. 131.

Gift of a mixed fund to be converted.

d. Where realty and personalty are once for all blended together and directed to be converted, interests undisposed of will pass to the residuary legatee. *Durour* v. *Motteux*, 1 Ves. Sen. 320; 1 S. & St. 292, n.; *Byam* v. *Munton*, 1 R. & M. 503; *Green* v. *Jackson*, 5 Russ. 35; 2 R. & M. 238; *Salt* v. *Chattaway*, 3 B. 576; *Spencer* v. *Wilson*, 16 Eq. 501; *Court* v. *Buckland*, 45 L. J. Ch. 214; *Norreys* v. *Franks*, I. R. 9 Eq. 18.

Cruse v. Barley, 3 P. W. 20, may probably be accounted for on the principle that the gift of residue there was not of a real residue, but of the residue of a real residue. The residue had in effect already been given among the testator's children, and the subsequent words only indicated what shares in that residue each was to take, and upon lapse of one of those shares a portion of the residue was thereby undisposed of.

Realty directed to be converted the subject of a separate gift.

e. But when the realty directed to be converted and the personalty are the subject of separate gifts, and are treated as distinct funds, the residuary bequests will not carry interests undisposed of in the realty. *Maugham* v. *Mason*, 1 V. & B. 410; *Hutcheson* v. *Hammond*, 3 B. C. C. 128.

Realty and personalty blended but treated as distinct funds.

f. Intermediate between the last two classes of cases falls a class of cases where the real and personal estates are blended together, but the two funds are treated as distinct and independent, in which case the interests in the realty undisposed of will not pass to the residuary legatee.

Thus, though realty and personalty are blended together and directed to be converted, if the proceeds of the sale of the realty are treated as a separate fund for certain payments, interests undisposed of will not pass under the gift of the residuary personalty. *Dixon* v. *Dawson*, 2 S. & St. 327.

So, too, if there is a gift as well of the residue of the moneys to arise from the sale as of the residue of the personal estate, the latter residue will not carry legacies given out of the proceeds of sale which lapse. *Gravenor* v. *Hallum*, Amb. 643; *Gibbs* v. *Rumsey*, 2 V. & B. 294.

But the fact, that the residue of the money to arise from the sale of realty is expressly given, will not prevent such money from passing under the residuary personalty, if the residue of the money is only mentioned as part of the enumeration of the things of which the residuary personalty consists. *Kinnell* v. *Abbott*, 4 Ves. 802.

III.—Conversion is Limited to the Purposes of the Will.

Who is entitled to property

Conversion directed by a testator is a conversion only for the purposes of the will, and all that is not wanted for these

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directed to be converted but undisposed of by the will.

purposes goes to the persons who would have been entitled but for the will. Therefore where real and personal estate is directed to be sold, and after payment of debts and legacies the residue is given to persons, some of whom die before the testator, the lapsed shares go proportionately to the heir-at-law and next of kin. *Ackroyd* v. *Smithson*, 1 B. C. C. 503.

If the devise of a share to a person who is the heir is revoked, whereby there is a lapse, the heir nevertheless takes so much as is derived from realty. *Gordon* v. *Atkinson*, 1 De G. & S. 478.

Declaration that proceeds of sale of realty are to be personal estate.

A declaration, that the proceeds of the sale of realty are to be part of the personal estate for all purposes, will not deprive the heir of such proportion of the proceeds of realty as is undisposed of, there being no express gift to the next of kin. *Shallcross* v. *Wright*, 12 B. 503; *Taylor* v. *Taylor*, 3 D. M. & G. 190; overruling *Phillips* v. *Phillips*, 1 M. & K. 649.

Nor will a declaration, that the proceeds of the sale shall not lapse for the benefit of the heir, exclude the heir, if a disposition is intended to be made of the property. *Flint* v. *Warren*, 16 Sim. 124; *Fitch* v. *Weber*, 6 Ha. 145.

But if the surplus of the sale of real estate is directed to be personal estate, and given to the executors, they take in trust for the next of kin. *Countess of Bristol* v. *Hungerford*, 2 Vern. 645; corrected 3 P. W. 194; 1 De G. & S. 482.

Money to be invested in land.

The converse rule applies to the case of money to be invested in land, which, upon failure of the particular dispositions, or any of them, results so far for the next of kin. *Cogan* v. *Stephens*, 5 L. J. Ch. 17; 1 B. 482, n.; *Hereford* v. *Ravenhill*, 1 B. 481; 5 B. 51; *Head* v. *Godlee*, Johns. 536; *Countess of Bective* v. *Hodgson*, 10 H. L. 656.

IV.—How the Heir and Next of Kin take Property Directed to be Converted.

Where the purpose of the conversion wholly fails.

1. When a conversion of realty is directed and the objects of the conversion wholly fail, the heir takes the property as realty, whether a sale has taken place or not. *Davenport* v. *Coltman*, 12 Sim. 610. In *Chitty* v. *Parker*, 2 Ves. Jun. 271;

4 B. C. C. 411, the question appears to have been whether the real and personal estate was applicable rateably to payment of debts. See, as to that case, 4 D. M. & G. 411; L. R. 9 Ex. p. 35.

Where it fails partially.

2. But where some purpose of the will can be answered by a sale—where, for instance, there is a tenant for life or one of several tenants in common who survives the testator—the heir takes the property whether converted or not as personalty. *Wright* v. *Wright*, 16 Ves. 188; *Smith* v. *Claxton*, 4 Mad. 484; *Wilson* v. *Coles*, 28 B. 215; *A.-G.* v. *Lomas*, L. R. 9 Ex. 29; *Hamilton* v. *Foote*, I. R. 6 Eq. 572; *In re Lewis*; *Foxwell* v. *Lewis*, 30 Ch. D. 654; *In re Richerson*; *Scales* v. *Heyhoe*, (1892) 1 Ch. 379.

Upon this principle, where a sum is directed to be raised out of devised lands and is given for life with remainders, and the remainders fail, upon the death of the tenant for life the sum charged belongs to the devisee of the land as personalty. *In re Newberry's Trust*, 5 Ch. D. 746.

At what time it is to be ascertained that purposes have failed.

It is laid down in Jarman (5th Ed.) Vol. I. p. 597, that "the question whether the will causes a conversion or not is to be determined by the circumstances as they exist at the testator's death, and therefore where it is uncertain at that period whether a conversion will be required for the purposes of the will, the heir will take the property as personalty, although these purposes may have failed before a sale takes place," citing *Carr* v. *Collins*, 7 Jur. 165. The proposition may be right, but no such question arose in *Carr* v. *Collins*, where there was no intestacy.

Money to be laid out in land goes to the next of kin as land.

3. In the same way personalty laid out in land in pursuance of a direction in the will, but only partially disposed of, will go to the next of kin as land. *Cogan* v. *Stephens*, 5 L. J. Ch. 17; *Carteis* v. *Wormald*, 10 Ch. D. 172, overruling *Reynolds* v. *Godlee*, Johns. 536, 582; *In re Skerrett's Trusts*, 15 L. R. Ir. 1.

V.—Conversion by Events Extraneous to the Will.

Contract for sale.

A binding contract for the sale of land belonging to the testator, though not completed at his death, converts the land, and the proceeds of sale fall into the personal residue.

Farrar v. *Earl of Winterton*, 5 B. 1. See, too, the Chapter on Ademption.

If the heir adopts and carries into effect a parol contract entered into by the testator, the land is converted, and the heir is not entitled to the purchase-money. *Frayne* v. *Taylor*, 12 W. R. 287; 33 L. J. Ch. 228; 10 Jur. N. S. 119; *In re Harrison*; *Parry* v. *Spencer*, 34 Ch. D. 214.

If the contract is binding on the testator at his death, but the purchaser loses his right to specific performance by laches, the land is converted and goes to the next of kin. *Curre* v. *Bowyer*, 5 B. 6, n.

If the testator's title turns out to be bad as to part of the property sold, and the contract is rescinded on this ground after his death, there is no conversion. *In re Thomas*; *Thomas* v. *Howell*, 34 Ch. D. 166; see *Crowe* v. *Menton*, 28 L. R. Ir. 519.

Heir setting aside sale by testator must repay purchase-money.

If the heir after the testator's death procures a sale by the testator to be set aside on the terms of repaying the purchase-money, the heir must pay the purchase-money himself, and has no equity to be repaid out of the estate. *Ryder* v. *Ryder*, I. R. 8 Eq. 83.

Contract enforceable against, not by, testator.

Upon the question whether there would be conversion where the contract could be enforced against, but not by, the testator, see *Lysaght* v. *Edwards*, 2 Ch. D. 499, 507; *Edwards* v. *West*, 7 Ch. D. 858, 862; *Crowe* v. *Menton*, 28 L. R. Ir. 519, 524.

Purchases under compulsory powers.

In the case of purchases of the testator's land under compulsory powers, except so far as the purchase-money may remain subject to a trust for reinvestment in land, a notice to treat under the Lands Clauses Act, followed by an agreement as to the price to be paid, converts the land, though there may be no sufficient memorandum in writing of the contract to satisfy the Statute of Frauds. *Ex parte Hawkins*, 13 Sim. 569; *Re Manchester and Southport Railway*, 19 B. 365; *In re Bagot's Settlement*, 31 L. J. Ch. 772; *Watts* v. *Watts*, 17 Eq. 217.

Notice to treat.

A mere notice to treat is not sufficient to effect a conversion, nor is a notice to treat followed by a statement on the part of

the vendor of the sum he is willing to take, if he dies before his offer has been accepted. *Haynes* v. *Haynes*, 1 Dr. & Sm. 426; *Re Battersea Park Acts: Ex parte Arnold*, 32 B. 591; see *Coyne* v. *Coyne*, I. R. 10 Eq. 496.

And an agreement, if land is taken under compulsory powers to pay so much an acre for it, will not cause conversion. *Ex parte Walker*, 1 Dr. 508.

Exercise of option to purchase.

The doctrine of conversion by a contract for sale has been extended to cases where there is an option of purchase which is afterwards exercised.

Thus where land included in a general devise is subject to a lease with a power for the lessee to buy the land, and the option of purchase is exercised by the lessee after the testator's death, the land is converted as from the date when the option is exercised and the proceeds of sale fall into the personal residue. *Lawes* v. *Bennett*, 1 Cox, 167; *Townley* v. *Bedwell*, 14 Ves. 591; *Collingwood* v. *Row*, 26 L. J. Ch. 649; *In re Isaacs*; *Isaacs* v. *Reginall*, (1894) 3 Ch. 506.

The case is the same whether the option to purchase is given before or after the date of the will. *Weeding* v. *Weeding*, 1 J & H. 424.

The rule applies though the purchase-money is payable to the testator, his heirs, or assigns. *Townley* v. *Bedwell*, 14 Ves. 591; *Weeding* v. *Weeding*, 1 J. & H. 424.

It is immaterial that the option does not arise until after the testator's death. *In re Isaacs*; *Isaacs* v. *Reginall*, *supra*.

Somewhat different considerations apply to cases of specific gifts. See the Chapter on Ademption.

The doctrine of *Lawes* v. *Bennett* has not met with approval, and though it must be applied in similar cases, it is not to be extended. See *Edwards* v. *West*, 7 Ch. D. 858, 863; *In re Adams and Kensington Vestry*, 27 Ch. D. 394.

Redemption money for rent-charge.

In the case of a rent-charge redeemable on payment of a lump sum, it was held upon the language of the instrument giving the right to redeem, that the heir of the last owner of the rent-charge was entitled to the redemption money. *In re Graves Minors*, 15 Ir. Ch. 357; see *In re Crofton*, 1 Ir. Eq. 304.

Interm. diate profits until conver-ion.

In cases where conversion takes place the devisee is entitled to the rents between the testator's death, and the completion of the purchase. *Watts* v. *Watts*, 17 Eq. 217.

If the conversion is brought about by the exercise of an option to purchase, the devisee takes the rents and profits until the option is exercised. *Townley* v. *Bedwell*, 14 Ves. 591.

Interest on purchase-money.

Interest payable by the purchaser on his purchase-money does not go to the devisee, but forms part of the personal estate. *Townley* v. *Bedwell*, 14 Ves. 591; *Purley* v. *Purley*, 1 N. R. 509.

Contract to purchase realty.

Since the Real Estate Charges Act, 1877 (40 & 41 Vict. c. 34), which applies to testators dying after the 31st December, 1877, if a testator contracts to buy realty and dies before the purchase is completed and the vendor has a lien for the purchase-money, it seems that the purchase-money as between persons entitled to the real and personal estate is to be borne by the realty purchased. *In re Cockcroft; Broadbent* v. *Groves*, 24 Ch. D. 94.

In cases not within that Act, if there is a contract to purchase realty, which is binding on the testator at his death, the purchase-money is converted into realty, and the heir or devisee is entitled to it, though the vendor may retain a power of rescission which is actually exercised after the testator's death. *Whittaker* v. *Whittaker*, 4 B. C. C. 30; *Garnett* v. *Acton*, 28 B. 333; *Hudson* v. *Cook*, 13 Eq. 417.

If the contract goes off owing to a defect in the title, there is no conversion, and a devisee has no right to waive the want of title, and call upon the executor to complete. *Broome* v. *Monck*, 10 Ves. 597.

Contract to build a house.

If the testator has contracted with a builder for the building of a house on a piece of land devised by him, the devisee is entitled to have the contract performed out of the personal estate, whether the Court would decree specific performance of the contract or not; but this principle does not extend to a contract to build on land not belonging to the testator. *Holt* v. *Holt*, 2 Vern. 322; *Cooper* v. *Jarman*, 3 Eq. 98; *In re Day; Sprake* v. *Day*, (1898) 2 Ch. 510; see *Re Tann*, 7 Eq. 434.

Conversion under statutory powers.

Upon the same principles, where certain property is after the date of the will converted into personalty by Act of Parliament, the property passes as personalty, though the conveyances required by the Act may not have been executed. *Cadman* v. *Cadman*, 13 Eq. 470; see *Frewen* v. *Frewen*, 10 Ch. 610.

Conversion by trustee in bankruptcy or by order of Court.

Where realty has been rightfully converted, whether by a trustee in bankruptcy or under an order of the Court, it passes as personalty, and in the latter case the conversion takes place as from the date of the order absolute, but not from the date of an order *nisi* though afterwards made absolute. *Banks* v. *Scott*, 5 Mad. 493; *Steed* v. *Preece*, 18 Eq. 192; *Arnold* v. *Dixon*, 19 Eq. 113; *Hyett* v. *Mekin*, 25 Ch. D. 735; *In re Beamish's Estate*, 27 L. R. Ir. 326; *In re Henry's Estate*, 31 L. R. Ir. 158; *Hartley* v. *Pendarvis*, (1901) 2 Ch. 498.

Where more than was necessary has been sold under a decree, for instance, for payment of a mortgage debt, the surplus proceeds of sale retain their former character. *Cooke* v. *Dealey*, 22 B. 196; *Jermy* v. *Preston*, 13 Sim. 356; *Scott* v. *Scott*, 9 L. R. Ir. 367; but see *Steed* v. *Preece*, *supra*.

Sale by order of Court.

A sale by order of the Court for the convenience of the parties and not for the purposes of the suit, converts the property out and out. *Ferguson* v. *Benyon*, 17 L. R. Ir. 212.

Sale under Partition Acts.

As regards a sale under the Partition Acts, sect. 8 of the Act of 1868 (31 & 32 Vict. c. 40) incorporated sects. 23—25 of the Settled Estates Act (19 & 20 Vict. c. 20), providing for the reinvestment of the purchase-money in land and payment to any person absolutely entitled. A sale under the Act of 1868 did not convert the share of a person under disability, if the money remained in Court, but if it was paid to trustees as persons absolutely entitled, the share was converted. *Foster* v. *Foster*, 1 Ch. D. 558; *In re Barker*, 17 Ch. D. 241; *In re Morgan*; *Smith* v. *Mac*, (1900) 1 Ch. 474.

Sect. 6 of the Act of 1876 (39 & 40 Vict. c. 17) authorises a request for sale to be made in the case of a married woman, infant, person of unsound mind, or person under any other disability, by the next friend, guardian, committee in lunacy (if so authorised by order in lunacy), or other person authorised

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to act on behalf of the person under such disability. It has been held that a request made by a married woman under the section converts her share (*a*), but it seems a similar request by a guardian of an infant has not this effect (*b*). *Wallace* v. *Greenwood*, 16 Ch. D. 362 (*a*); *Howard* v. *Jolland*, W. N. 1891, 210; *In re Norton; Norton* v. *Norton*, (1900) 1 Ch. 101 (*b*).

Land of lunatic.

As to the effect of taking the lands of a lunatic under the Lands Clauses Act, under a notice to the lunatic and not to the committee, see *Ex parte Flamank*, 1 Sim. N. S. 260; *In re Tugwell*, 27 Ch. D. 309.

Money of lunatic invested in land.

Money of a lunatic laid out under an order in lunacy in the purchase of land, with a declaration that the land is to be considered personal estate, remains personal estate of the lunatic (*a*); but a contract by a lunatic to buy land, confirmed by an order in lunacy, converts the purchase-money into land (*b*). *A.-G.* v. *Marquis of Ailesbury*, 12 App. C. 672 (*a*); *Baldwyn* v. *Smith*, (1900) 1 Ch. 588 (*b*); see also *In re Gist*, (1904) 1 Ch. 398.

Conversion into fee simple of renewable leaseholds held in *quasi* tail.

As to the effect of the conversion of renewable leaseholds for lives and years held in *quasi* tail into a fee under statutory powers, see *Morris* v. *Morris*, I. R. 6 C. L. 73; *ib.* 7, p. 295; *In re Dane's Estate*, I. R. 10 Eq. 207; *Batteste* v. *Maunsell*, I. R. 10 Eq. 314.

CANADIAN NOTES.

Pay or apply realty.

A direction to "pay or apply" shares in land in remainder after the death of a life tenant, does not work a conversion. *McDonell* v. *McDonell*, 24 O.R. 468.

A direction to sell and divide imports a conversion. *Coatsworth* v. *Carson*, 24 O.R. 185.

Conversion imperative.

A devise upon trust to convert and invest the proceeds and apply the *corpus* and income in a specified manner is imperative, and one which the Court will enforce though there is a subsequent clause in the will giving the executors "full discretionary power as to the mode, time, conditions of sale, amount to be paid down, etc." *Lewis* v. *Moore*, 24 A.R. 393.

After giving pecuniary legacies, the testator proceeded: "When my lands are sold and all the legacies paid, the money remaining is to be divided, etc." Held, a direction to executors to convert. *Woodside* v. *Logan*, 15 Gr. 145.

Executors cannot postpone conversion when imperative.

Executors under an obligation to convert cannot unduly postpone conversion. *Jarvis* v. *Crawford*, 21 Gr. 1.

And they cannot postpone payments by selling land upon credit. *Smith* v. *Seaton*, 17 Gr. 397.

Selling after date fixed.

Where there is a direction to convert for payment of debts, and a provision that conversion shall not be postponed beyond

a certain time, the provision is directory only, and the executors may sell after the date fixed. *Scott* v. *Scott*, 6 Gr. 366.

Discretionary power.

Where executors have a discretion to sell, the property is not converted until the executors exercise their discretion by a sale. And the Court will not interfere with their discretion. *Re Parker*, 20 Gr. 389. See *Rowsell* v. *Winstanley*, 7 Gr. 141; *Re Curry*, 23 Gr. 277.

A declaration that it shall be lawful for executors to sell, gives a discretion not only as to the time of sale, but also as to whether there shall be a sale at all. *Rowsell* v. *Winstanley*, 7 Gr. 141.

A direction that lands should continue unsold in care of executors until they should see fit to sell is a trust for sale. *Patulo* v. *Boyington*, 4 C.P. 125.

To save dilapidations.

The fact that a tenant for life has no means of keeping a house in repair, in consequence of which it is becoming dilapidated, is a proper matter for trustees with powers of sale to consider in determining whether they will sell or not. *Holmes* v. *Wolfe*, 26 Gr. 228.

Rents devised to life tenant

Where the "rents and interest" of the testator's estate were given to a tenant for life, and there was a direction to divide after the death of the tenant for life, it was held that conversion was not required or authorized during the life of the tenant for life, who was evidently intended to enjoy the land *in specie*. *Henry* v. *Simpson*, 19 Gr. 522.

Conversion effected.

Where one-third of the personalty was bequeathed to one legatee, it was held that a conversion was effected, and the

personnlty should be sold, as it was the only method of ascertnining what one-third would be. *Ferguson* v. *Stewart*, 22 Gr. 364.

Where the interest on £1,000 out of moneys invested in stocks was given to n legntee, and the executors set apart a certain quantity of the stock to nnswer the legacy, it was held that no conversion was effected, stock not being a proper investment. *Re Logan*, 3 M.L.R. 49; 4 M.L.R. 19.

Where conversion is directed by the will for the purpose of giving successive interests, though it does not in fnct take place, it will as between life tenant and remaindermen, be considered as having tnken place at the expiration of a year from the denth of the testator. *Ibid.*

A direction to trustees to sell and invest effects a conversion, and the interests of the beneficiaries in the fund are to be ascertained as if the will disposed of personalty. *McGarry* v. *Thompson*, 28 Gr. 287.

Mortgages at testator's death.

Portions of the estate, consisting of mortgages at the time of the testator's death, which would have been proper investments if the executors had so invested, are to be considered as converted immediately after the testator's death. *Smith* v. *Seaton*, 17 Gr. 397.

Though there is a trust for conversion, the parties entitled to the proceeds of the conversion may elect to take the land *in specie*. *Crawford* v. *Lundy*, 23 Gr. 244.

Parties may waive conversion.

Though, where conversion is directed, the parties may elect to take *in specie*, yet, if one of several jointly interested

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does not concur, the trust for sale continues. *Re Dennis*, 14 O.R. 267.

Expropriation of land.

The expropriation of land which has been specifically devised works a conversion and the compensation paid does not pass under the devise. *Young* v. *Midland R.W. Co.*, 16 O.R. 738. See *Trail* v. *The Queen*, 7 Ex.C.R. 98.

CHAPTER XXVII.

GIFTS TO PERSONS DESIGNATE AND TO PERSONS FILLING A CERTAIN CHARACTER.

I. GIFTS TO PERSONS DESIGNATE.

Gift to an individual must mean a known individual.

WHERE a gift is made to an individual by a particular name or description, a testator must be referring to some one known to him.

Therefore, under a gift to "Elizabeth, daughter of Mary Beynon" or to "my nephew, Joseph," neither Elizabeth, an illegitimate daughter, nor a nephew called Joseph will take if it appears that the testator was not aware of their existence. *Doe d. Thomas* v. *Beynon*, 12 A. & E. 431; *Grant* v. *Grant*, L. R. 5 C. P. 380, 727; see *In bonis Blake*, 6 P. D. 217.

Gift to an individual must mean an individual living at date of will.

Again, when there is a gift to an individual, the testator cannot be supposed to intend to benefit a person whom he knows to be dead at the [illegible], though such a person may accurately answer [illegible] given. In such a case some other person [illegible] ying the description may take. *Doucet* v. *Sweet*, Amb. 175; *Parsons* v. *Parsons*, 1 Ves. Jun. 266; *Re Blackman*, 16 B. 377; *Dooley* v. *Mahon*, I. R. 11 Eq. 299; *Stringer* v. *Gardiner*, 4 De G. & J. 168. In *Re Ely: Tottenham* v. *Ely*, 65 L. T. 452, this principle was not recognised.

Gift to society known to be defunct.

In the same way a testator cannot intend to make a gift to a society which he knows has ceased to exist at the date of his will. In such a case, therefore, though the defunct society exactly answers the description, some other society to whom the description applies with less accuracy may take. *Coldwell* v. *Holme*, 2 Sm. & G. 31.

The principle cannot be applied where the defunct society

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is accurately described and there is nothing to show that the testator knew that it had ceased to exist. *Makeown* v. *Ardagh*, I. R. 10 Eq. 445; *In re Orey*; *Broadbent* v. *Barrow*, 29 Ch. D. 560, 564.

Knowledge of facts material.

In other cases the knowledge of the testator with regard to the objects of his bounty may be very material in construing the will. For instance, where there is a gift to "the children of my nephew the late James Coghlan," and the testator had a deceased nephew James who did not leave children and a deceased nephew Henry who did, whether the children of Henry could take would depend on the testator's knowledge of the facts. *Danbeny* v. *Coghlan*, 12 Sim. 507.

If a person answers the description he alone can take.

If there is a person known to the testator who answers the description, that person alone can take, though there may be circumstances which make it improbable that that person was intended.

Thus, where there was a gift to the children of his sisters Reyne and Estrella, and the testator had three sisters, Reyne, Estrella, and Rebecca, but Reyne had become a professed nun and changed her name, it was held that the children of Rebecca could not take. *Delmare* v. *Robello*, 1 Ves. Jun. 412; 3 B. C. C. 446.

And under a gift to James, son of Thomas Androws, of Eastcheap, printer, where there was no Thomas, but there was a James Andrews of Eastcheap, who had two sons, Thomas and James, it was held that the son Thomas could not take. *Andrews* v. *Dobson*, 1 Cox, 425.

And under a gift to the children of Robert Holmes, late of Norwich, but now of London, where there was a Robert Holmes who had formerly lived in Norwich, but had gone to London and was dead at the date of the will, leaving a child, it was held that the children of George Holmes, formerly of Norwich and then of London, could not take. *Holmes* v. *Custance*, 12 Ves. 279.

And when the testator appointed Francis Courtenay Thorpe, of Hampton, gentleman, one of his executors, and he was a boy of twelve, it was held that his father, Francis Corbert Thorpe, could not claim to be executor. *In bonis Peel*, 2 P. & D. 46.

Gift may be void for uncertainty.

If there is no one accurately answering the description and several persons to whom it applies with more or less accuracy, and there is nothing to enable the Court to decide between them, the gift is void for uncertainty. *Thomas* v. *Thomas*, 6 T. R. 677; *Andrews* v. *Dobson*, 1 Cox, 423; *Mostyn* v. *Mostyn*, 5 H. L. 155; *Drake* v. *Drake*, 8 H. L. 172.

Instances of identification of person inaccurately described.

But the Court is unwilling to hold a gift void for uncertainty, and it will use every endeavour to ascertain who is meant and in some cases it has gone very far in identifying a legatee.

Thus Mrs. Swapper has been identified as "Mrs. Sawyer" (*a*); Gertrude Yardley as "Catherine Earnley" (*b*); James Sweet, as "John, son of John Sweet" (*c*); Andrew Pitcairne as "William Pitcairne, eldest son of Charles Pitcairne" (*d*); John, the only illegitimate child of Elizabeth Abbott, as "Elizabeth Abbott, a natural daughter of Elizabeth Abbott" (*e*); Mrs. and Miss Washbourne, a daughter and granddaughter of one Bowden, as "Mrs. and Miss Bowden"; Francis Anne Jameson as "Miss Sarah Jameson" (*f*); a brother-in-law, Edward O'Kelly, as "my brother-in-law Edmund O'Kelly" (*g*); the two daughters of Mary Anne M'Entyre, who was married to Sergeant Simons, as "the two daughters of Sergeant-Major Gibb, late of the Second Dragoon Guards, and who was lately stationed at Newbridge barracks, and who is married to my cousin, Mary Anne M'Entyre" (*h*); the daughters of Joseph John Scoles, deceased, the father of Ignatius Scoles, as "the daughters of my late friend Ignatius Scoles," who was living and was a Jesuit priest (*i*); and Herbert William Hooper as "Percy Hooper, son of Charles Adams Hooper" (*j*). *Masters* v. *Masters*, 1 P. W. 425 (*a*); *Beaumont* v. *Fell*, 2 P. W. 141 (*b*); *Dorset* v. *Sweet*, Amb. 175 (*c*); *Pitcairne* v. *Brase*, Finch, 403 (*d*); *Ryall* v. *Hannam*, 10 B. 536 (*e*); *Lee* v. *Pain*, 4 Ha. 251, 253 (*f*); *In bonis Twohill*, 3 L. R. Ir. 21 (*g*); *Baxter* v. *Morgan*, 7 L. R. Ir. 501 (*h*); *Re Waller; White* v. *Scoles*, 80 L. T. 701 (*i*); *In re Hooper; Hooper* v. *Warner*, 51 W. R. 153 (*j*); see, too, *Douglas* v. *Fellows*, Kay, 114.

Beaumont v. *Fell* considered.

Beaumont v. *Fell*, 2 P. W. 141, has been said to be overruled, see *Mostyn* v. *Mostyn*, 5 H. L. 155, 168; but as it involved

no principle and was decided entirely on its peculiar facts, tho most that can be said is that other judges have not approved of it. The matter is of little consequence, as the same facts cannot possibly occur again.

Corporation and society incorrectly described.

In the same way in the case of gifts to a corporation or institution, the mayor, jurats and commonalty of Rye have taken as "the mayor, jurats and town council of the ancient town of Rye" (*a*); the Charing Cross Hospital, Agar Street, Strand, as "the Westminster Hospital, Charing Cross" (*b*); the Orphan Working School, in the City Road, as "the London Orphan Society in the City Road" (*c*); and the South American Missionary Society as "the Patagonian Chilian and Peruvian Missionary Society" (*d*). *A.-G.* v. *Rye Corporation*, 7 Taunt. 746 (*a*); *Bradshaw* v. *Thomson*, 2 Y. & C. C. 295 (*b*); *Wilson* v. *Squire*, 2 Y. & C. C. 654 (*c*); *Makeown* v. *Ardagh*, I. R. 10 Eq. 445 (*d*).

Veritas nominis tollit errorem demonstrationis.

Sometimes a correct name is given coupled with an erroneous description. There is a person of that name but no one to whom the description applies. The person of that name takes. *Veritas nominis tollit errorem demonstrationis. Standen* v. *Standen*, 2 Ves. Jun. 589; 6 B. P. C. 193; *Doe* d. *Gains* v. *Rouse*, 5 C. B. 422; *Re Blackman*, 16 B. 377; *Stringer* v. *Gardiner*, 4 De G. & J. 468; *Re Ingle's Trusts*, 11 Eq. 578; *Dooley* v. *Mahon*, I. R. 11 Eq. 299.

Nihil facit error nominis cum de corpore constat.

On the other hand, if there is no one who answers to the name but there is a person who answers to the description, the latter may take. *Nihil facit error nominis cum de corpore constat. Garth* v. *Meyrick*, 1 B. C. C. 30; *Parsons* v. *Parsons*, 1 Ves. Jun. 266; *Doe* d. *Cook* v. *Danvers*, 7 East, 299; *Stockdale* v. *Bushby*, 19 Ves. 381; *Camoys* v. *Blundell*, 1 H. L. 778; *In bonis Chappell*, (1894) P. 98.

Conflict between name and description.

There is more difficulty where a person is indicated by name and description and there is no one who answers both name and description, but there is some one who answers the name and some one who answers the description.

For the purpose of ascertaining, whether there is a description, which is not consistent with the name, the whole will must be looked at, and it may then appear that the person contem-

plated by the testator is a person who is living in his house, which the person named does not, or that he contemplates a person likely to marry his daughter, whereas the person named is a married man with a family. *Charter* v. *Charter*, L. R. 7 H. L. 364; *In re Wolverton Mortgaged Estates*, 7 Ch. D. 197.

In these cases the person intended must be ascertained by a consideration of all the circumstances of the case. It has been said that "there are more instances in which the demonstration prevailed than in which the name prevailed." *Drake* v. *Drake*, 8 H. L. 172, 179; *Charter* v. *Charter*, L. R. 7 H. L. 364, 381.

Loose use of word "cousin."

If the name applies correctly to one person and the description applies in a popular sense—as for instance a cousin's wife may be called a cousin—that person may take as against a person who is a true cousin, but does not bear the name. *In re Taylor*; *Cloak* v. *Hammond*, 34 Ch. D. 255.

Description may supply a motive.

If the description supplies a motive for the gift—for instance, if the gift is to "my godchild" (*a*), or "my housekeeper" or "servant" (*b*), it may prevail over the name. *In re Blayney's Trust*, I. R. 9 Eq. 413; *In re Blake's Trusts*, (1904) 1 Ir. 98 (*a*); *In re Nunn's Trust*, 19 Eq. 331; *In re Fry; Matthews* v. *Greenman*, 22 W. R. 679, on app. sub nom. *In re Fry; Mathews* v. *Freeman*, 22 W. R. 813 (*b*).

In other cases the nature of the description may lead to the inference that the error is more likely to occur in the description than the name. *Smith* v. *Coney*, 6 Ves. 42; *Adams* v. *Jones*, 9 Ha. 485.

Cases in which name has prevailed.

On the other hand the intimacy of the testator with a particular person, or the fulness with which the name is given, may show that the name ought to prevail. *Garner* v. *Garner*, 29 B. 114; *Bernasconi* v. *Atkinson*, 10 Ha. 345; *Dooley* v. *Mahon*, I. R. 11 Eq. 299; *Farrer* v. *St. Catharine's College, Cambridge*, 16 Eq. 19; *In re Lyon's Trusts*, 48 L. J. Ch. 245.

Description of A as second son when A is third son.

Sometimes a named legatee is described as the eldest or second son of his father whom the son bearing the name is not the eldest or second son, and the eldest or second son does not bear the name.

Here again the puzzle must be solved by a consideration of

the language of the will and of all the circumstances of the case. *Doe* d. *Le Chevalier* v. *Hathwaite*, 8 Taunt, 306; 2 Moo. 304; 3 B. & Ald. 632.

If there is nothing at all to assist the construction the name may prevail. *Pryce* v. *Newbolt*, 14 Sim. 354; *Garland* v. *Beverley*, 9 Ch. D. 213.

Where the devise was to Robert, the fourth son, and Robert was the third son, and there was good reason for excluding the first and second sons but none for excluding the third, the name again prevailed. *Gillett* v. *Gane*, 10 Eq. 29.

On the other hand, if there is a gift to the children of a brother "except Thomas, his eldest son," and Thomas is the youngest son but the eldest son is amply provided for, or if the son described is the testator's godson, the description will prevail. *Hodgson* v. *Clarke*, 1 D. F. & J. 394; *Re Gregory's Will*, 34 B. 600.

In the case of successive limitations of real estate to second, third, and fourth sons, the character of the limitations may lead to the conclusion that the description ought to prevail. *Bradshaw* v. *Bradshaw*, 2 Y. & C. Ex. 72; *Neeld* v. *Neeld*, W. N. 1878, 219.

Gift to A with full description and subsequent gift to A without description.

It has been said, that, where there has been a gift to A B with a full description, and there is a subsequent gift to A B without any description, the same person must be intended. *Webber* v. *Corbett*, 16 Eq. 515; see *Careless* v. *Careless*, 1 Mer. 384.

Gift to "my nephew A" followed by gift to "my nephew."

When a gift is made to "my nephew A," and there is then a subsequent gift to "my nephew" simply, the conclusion may be that the nephew A is meant. But there may not be the same reason for that conclusion where there is first a gift to "my nephew" and then a gift to "my nephew A." *Phelan* v. *Slattery*, 19 L. R. Ir. 177; see *Doe* d. *Morgan* v. *Morgan*, 1 Cr. & M. 235.

Two persons of same name followed by reference to "the said" person.

When two different persons of the same name have been referred to and there is then a reference to "the said" person by name only, so that it is uncertain which is meant, probably as a general rule the word "said" must be taken to refer to the last antecedent, but it is a question of construction on the whole

will. *Castledon* v. *Turner*, 3 Atk. 257; *Fox* v. *Collins*, 2 Ed. 107; *Healy* v. *Healy*, I. R. 9 Eq. 418.

Clause of inclusion or exclusion with names in blank.

Where there is a clear gift to a certain class, and an intention is expressed of including or excluding certain persons whose names are left in blank, the clause of inclusion or exclusion only is void for uncertainty, and the gift to the class is good. *Illingworth* v. *Cooke*, 9 Ha. 37; *Gill* v. *Bagshaw*, L. R. 2 Eq. 746; see *Cope* v. *Henshaw*, 35 B. 420.

But if the testator goes on to define the class by name, and inserts the names of persons who cannot alone be said to constitute the class, leaving blanks for other names, the gift is void for uncertainty; for instance, if the gift be to "my nephews and nieces, John and Nanny," followed by a blank, "John and Nanny" not satisfying the description "nephews and nieces." *Greig* v. *Martin*, 5 Jur. N. S. 329.

The fact that a blank is left for the Christian name, or for the surname, of the legatee, will not avoid the legacy if there is no doubt to whom the rest of the name applies. *Price* v. *Page*, 4 Ves. 680; *Phillips* v. *Barker*, 1 Sm. & G. 582, where the gift was to —— Davis, daughter of S. Davis, and the testator knew only of one daughter at the date of the will. *In bonis De Rosaz*, 2 P. D. 66; see *Re Gregson's Trusts*, 12 W. R. 935.

Although a blank is left for the name of a legatee, the Court may be able from the context to ascertain who was intended to take. *In re Harrison; Turner* v. *Hellard*, 30 Ch. D. 390; *Furniss* v *Phear*, 36 W. R. 521.

II. Gifts to Persons Filling a Certain Character.

Gift to Lord S.

Under a gift to Lord S. as an heirloom, the person who was Lord S. at the date of the will was held to be meant. *In re Whorwood; Ogle* v. *Lord Sherborne*, 34 Ch. D. 446.

Gift to testator's wife by name.

A gift by a testator to his wife by name, as "to my wife A," is effectual, though she may not be his lawful wife, or though the marriage may afterwards be declared void *ab initio*. *Giles* v. *Giles*, 1 Keo. 685; *In re Boddington; Boddington* v. *Clariat* (or *Clairat*), 22 Ch. D. 597; 25 Ch. D. 685.

Gift to "my wife" simply.

Even if the gift is to "my wife," without the addition of her name, the person who is living with the testator as his wife may take, though she is not his lawful wife. The testator cannot by the description "my wife" intend a future lawful wife, as marriage would revoke the will. *Pratt* v. *Mathew*, 22 B. 328; *In re Petts*; 27 B. 576; *S. C.* sub nom. *In re Pitt's Will*, 5 Jur. N. S. 1235; *In bonis Howe*, 33 W. R. 48.

Where it appeared in the will that the testator was about to marry a lady, and in case of his death gave a legacy to "my wife," it was held the lady was entitled. *Schloss* v. *Stiebel*, 6 Sim. 1.

Gift provided she continues a widow.

A gift of income to a person described as the testator's wife, who as the testator knows is not his lawful wife for life, provided she continues his widow and unmarried, is a gift to her so long as she does not marry after his death. *Lepine* v. *Bean*, 10 Eq. 160; *In re Wagstaff*; *Wagstaff* v. *Jalland*, (1907) 2 Ch. 35.

On the other hand, an annuity given to A B "while she continues my widow and unmarried" cannot be taken by A B if after the date of the will the marriage between her and the testator is declared void for nullity. *In re Boddington*; *Boddington* v. *Clariat* (or *Clairat*), 22 Ch. D. 597; 25 Ch. D. 685, where *Rishton* v. *Cobb*, 5 M. & Cr. 145, is considered.

If the legatee fraudulently assumed the character of wife for the purpose of deceiving the testator, and procuring a legacy, the question of fraud must be raised in the Court of Probate. A Court of Construction has no jurisdiction to go into the question of fraud when the will has once been proved. *Meluish* v. *Milton*, 3 Ch. D. 27, overruling *Kennell* v. *Abbott*, 4 Ves. 802; *Wilkinson* v. *Joughin*, L. R. 2 Eq. 319; see *ante*, pp. 28, 82.

Gift to wife of another.

A gift to the wife of A, without mentioning a name, will not go to a person, whom the testator knew to be living with A as his wife, if there is nothing on the face of the will to show that an existing wife is referred to. *Re Davenport's Trusts*, 1 Sm. & G. 126.

Where the testator supposed the reputed wife of A to be his wife, and referred to "A's present wife" in the will, a gift to

her "if she shall become A's widow" took effect upon her surviving A. *In re Lowr; Danily* v. *Platt*, 61 L. J. Ch. 415.

And n trust for A if she survives her new intended coverture takes effect upon A's divorce from her husband. *In re Crawford's Settlement; Cooke* v. *Gibson*, (1905) 1 Ch. 11.

A gift to A B, described as the wife of the testator's son, goes to that person, though she may not be the son's lawful wife, and though the testator may have given the legacy merely because he was informed by the son that she was his wife without having any personal acquaintance with her. *Turner* v. *Brittain*, 3 N. R. 21; *Anderson* v. *Berkley*, (1902) 1 Ch. 936.

Servants and employés.

A gift to servants or employés has been held, upon the context of the will in each case, to refer to servants in the testator's employment at the date of his will (*a*), at his death (*b*), both at the date of the will and death (*c*), and at any time (*d*). *Parker* v. *Marchant*, 1 Y. & C. C. 290 (*a*); *In re Marcus; Marcus* v. *Marcus*, 56 L. J. Ch. 830; 57 L. T. 399 (*b*); *Jones* v. *Henley*, 2 Ch. Rep. 162 (*c*); *In re Shorland; Kemp* v. *Rozey*, (1896) 1 Ch. 517 (*d*).

The word "servants" is not necessarily confined to servants living in the house. It has been held to include a farm-bailiff, a gardener and under-gardener, and a house-steward. *Batling* v. *Ellice*, 9 Jur. 936; *Thrupp* v. *Collett*, 26 B. 147; *Armstrong* v. *Clavering*, 27 B. 226.

Such persons as stewards of Courts, a coachman provided by a jobmaster, or a boy occasionally employed, are not included under the term. *Townshend* v. *Windham*, 2 Vern. 546; *Chilcott* v. *Bromley*, 12 Ves. 114; *Thrupp* v. *Collett*, 26 B. 147.

Domestic servants.

The term domestic or household servants excludes out-door servants. *Ogle* v. *Morgan*, 1 D. M. & G. 359; *Vaughton* v. *Booth*, 16 Jur. 808; *Re Drax; Savile* v. *Veatman*, 57 L. T. 475; *Cochrane* v. *Ogilby*, (1903) 1 Ir. 525.

Gift of a year's wages.

If the gift is of n year's wages it will not include servants who are hired and paid by the week or month. *Booth* v. *Dean*, 1 M. & K. 560; *Blackwell* v. *Pennant*, 9 Ha. 551; *Breslin* v. *Waldron*, 4 Ir. Ch. 334; *In re Ravensworth; Ravensworth* v. *Tindale*, (1905) 2 Ch. 1.

A bequest to "the two servants who shall be living with me

at my death," has been held to go to all living with the testator at his death, though there may have been only two at the date of the will. *Sleech* v. *Thorington*, 2 Ves. Sen. 560.

"Living with me at my death."

"Servants living with me at my death" means servants then in the testator's service. They need not live in the same house with him. *Townshend* v. *Windham*, 2 Vern. 546; *Blackwell* v. *Pennant*, 9 Ha. 551.

Under such a bequest servants wrongfully discharged before the testator's death, or voluntarily leaving the service, or dismissed on account of the testator's lunacy, are not entitled to anything. *Durlow* v. *Edwards*, 1 H. & C. 547; *Re Serres' Estate*; *Venes* v. *Marriott*, 10 W. R. 751; 31 L. J. Ch. 519; *In re Hartley's Trusts*, 26 W. R. 590; 47 L. J. Ch. 610; see *In re Benyon*; *Benyon* v. *Grieve*, 51 L. T. 116; 32 W. R. 871.

But a servant who at the testator's death has temporarily left his house and is to return to service is entitled to the legacy. *Herbert* v. *Reid*, 16 Ves. 481.

Gift to the testator's wife.

In wills under the Wills Act a gift to the testator's wife must mean the person calling herself his wife at the date of the will, as a second marriage operates as a revocation of the will, and therefore a deceased wife's sister may take under the description of the testator's wife. *Pratt* v. *Mathew*, 22 B. 328; *In re Potts*, 27 B. 576; 5 Jur. N. S. 1235.

Gift to the wife or husband of a third person.

Primâ facie a gift to the wife of A, who has a wife living at the date of the will, goes to that wife and no other, whether the gift is in possession or after a life interest to the husband or absolute or for life only. *Borcham* v. *Bignall*, 8 Ha. 131; *Barrow's Trusts*, 10 L. T. 184; *Firth* v. *Fielden*, 22 W. R. 622; see *In re Hancock*; *Malcolm* v. *Barford-Hancock*, (1896) 2 Ch. 173; *In re Laffan & Downes*, (1897) 1 Ir. 469.

The same rule applies in the case of a husband.

Reference to existing husband or wife.

If there is anything on the face of the will to shew that an existing person is referred to the case is clear; for instance, a reference to the "beloved" wife of A, or a reference to daughters as the wives of named husbands. *Niblock* v. *Garrett*, 1 R. & M. 629; *Bryan's Trust*, 2 Sim. N. S. 103; *Franks* v. *Brooker*, 27 B. 635.

Intention to include any

On the other hand, there may be indications of intention in

the will that the testator means by wife or husband any wife or husband.

husband or wife.

The fact that the gift to the wife of A is connected with a gift to his children, which is so expressed as to include his children by any wife, is not enough to show that a future wife was intended to be benefited. *Re Barrow's Trusts*, 10 L. T. 184; *In re Griffith's Policy*, (1903) 1 Ch. 739; *In re Coley: Hollinshead* v. *Coley*, (1903) 2 Ch. 102, overruling *In re Lyne's Trust*, 8 Eq. 65.

But where the shares of legatees, some of whom were married and some not, were in the event of bankruptcy directed to be applied for the benefit of their wives and children, the term was held to include any wife. *Longworth* v. *Bellamy*, 40 L. J. Ch. 513.

And a reference to a gift, in which a wife took a life interest, as a gift for the benefit of A and his family, shows that the testator intended to include any wife. *In re Drew; Drew* v. *Drew*, (1899) 1 Ch. 336.

Gift to the wife of a person who is unmarried.

If there is no person answering the description of husband or wife at the date of the will or the death, the gift vests indefeasibly in the first person who answers the description. *Radford* v. *Willis*, 12 Eq. 105; 7 Ch. 7; see *Peppin* v. *Beckford*, 3 Ves. 570.

Divorced wife or husband.

Where there is a gift to a son or daughter for life with remainder to any wife or husband of the son or daughter for life, a divorced wife or husband will not take, but a divorced husband will take if the gift be to any husband with whom the testator's daughter may intermarry, where the gift is so worded as to make the marriage and not the status of husband the controlling part of the gift. *In re Morrieson; Hitchins* v. *Morrieson*, 40 Ch. D. 30; *Bullmore* v. *Wynter*, 22 Ch. D. 619.

Gifts to husband and wife and third person.

The construction of a gift to a husband and wife and a third person by a will made after the commencement of the Married Women's Property Act, 1882 (1st January, 1883), is not affected by the Act. *In re March; Maunder* v. *Harris*, 24 Ch. D. 222; 27 Ch. D. 166; *In re Jupp; Jupp* v. *Buckwell*, 39 Ch. D. 148; see *Thornley* v. *Thornley*, (1893) 2 Ch. 229.

"If an estate be made of land to a husband and wife, and to

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a third person, in this case the husband and wife have in law in their right but the moiety." *Littleton*, sect. 291. The same rule applies to personalty, and it makes no difference whether the bequest is a joint tenancy or a tenancy in common.

Thus a bequest to A and B his wife and C as tenants in common goes in moieties to A and his wife and to C. *In re Wylde's Estate*, 2 D. M. & G. 724; *In re Jupp; Jupp* v. *Bucknell*, 39 Ch. D. 148.

A bequest to A and B his wife and C during their lives and the life of the survivor of them, and after the death of the survivor over, would be enough to show that the wife was to take a separate interest. *Marchant* v. *Cragg*, 31 B. 398.

If the bequest is to A, B and C and the wife of C equally, the second "and" is looked upon as a *subcopula*, and the property goes in thirds. *Bricker* v. *Whatley*, 1 Vern. 233.

So, too, if the gift is to A, his wife and children, the husband and wife take one share. *Gordon* v. *Whiddon*, 11 B. 170; *Atcheson* v. *Atcheson*, *ib.* 485.

But very slight evidence of intention that the wife is to take a separate share has been held sufficient to prevent the rule; thus, if the words are "to A, B, C, and his wife as tenants in common," husband and wife take several shares. *Warrington* v. *Warrington*, 2 Ha. 54; *In re Dixon; Byram* v. *Toll*, 42 Ch. D. 306, where the earlier cases are discussed; see, too, *Paine* v. *Wagner*, 12 Sim. 184.

And apparently if the words are "to my son-in-law B and my daughter P, his wife, their executors, administrators, and assigns," both take equally—the gift not being to husband and wife, but to son-in-law and daughter. *A.-G.* v. *Bacchus*, 9 Pr. 30; 11 Pr. 547.

Possibly the rule of the unity of husband and wife would not be applied to a husband and wife living under a foreign law, which recognises the separate existence of the wife. *Dias* v. *De Livera*, 5 App. C. 123.

Where a husband and wife are members of a class to which property is given, each takes a share. *In re Gue; Smith* v. *Gue*, 61 L. J. Ch. 510; 40 W. R. 553.

Meaning of the word "unmarried" in a direct gift.

Whether a gift to unmarried children is *designatio personarum* or not depends on the language of the will. Thus, a gift to the son and unmarried daughters of A goes to the daughters unmarried at the date of the will, the gift to the son showing that particular persons are meant. *Hall* v. *Robertson*, 4 D. M. & G. 781; see *Elliott* v. *Elliott*, 11 Ir. Ch. 482.

Where the gift designates a class ascertainable at the testator's death, the subsequent marriage of one of the class will not avoid the gift. *Jubber* v. *Jubber*, 9 Sim. 503; see *Blogrove* v. *Coore*, 27 B. 138.

The primary meaning of "unmarried" in a direct gift is, never having been married. *Thistlethwayte's Trusts*, 1 Jur. N. S. 881; 24 L. J. Ch. 713; *Dalrymple* v. *Hall*, 16 Ch. D. 715; *In re Sergeant*; *Mertens* v. *Walley*, 26 Ch. D. 575.

Under a gift to A B, if she be sole and unmarried, the legatee, whose marriage had been dissolved by the Divorce Court, was held entitled. *In re Lessingham's Trusts*, 21 Ch. D. 703.

And under a gift after the death of the husband to the wife so long as she continues unmarried, the wife is entitled though she has been divorced. *Knox* v. *Wells*, 31 W. R. 559; 48 L. T. 655.

Eldest son means eldest at date of will.

A gift to the eldest son of A, who has two sons living at the date of the will, goes to the elder of those two sons and fails if he dies before the testator. *Amyot* v. *Dwarris*, (1904) A. C. 268.

Gifts to a first or second son.

The natural meaning of first or second son is first or second in order of birth.

1. No difficulty arises where all the sons born are living at the testator's death, or where no sons have then been born. In the latter case, the first or second son born afterwards will take. See *Driver* v. *Frank*, 3 Man. & S. 25; 8 Taunt. 468; *Alexander* v. *Alexander*, 16 C. B. 59; *Bennett* v. *Bennett*, 2 Dr. & Sm. 266; *Sheridan* v. *O'Reilly*, (1900) 1 Ir. 386.

The second born son will take as second son though his elder brother may die before he is born. *Trafford* v. *Ashton*, 2 Vern. 660.

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2. If there is a first son at the date of the will he would take as *persona designata*. *Saunders* v. *Richardson*, 18 Jur. 714; *Amyot* v. *Durrris*, (1904) A. C. 268, where *Re Harris*, 2 W. R. 689, is discussed.

So, too, if there were a first and second son living at the date of the will the second son would take under the description second son. Whether the second son at the date of the will, whose elder brother had died, would take as second son is not so clear.

3. If a first or second son is dead at the date of the will the term will mean first or second son at the testator's death. *King* v. *Bennett*, 4 M. & W. 36; *Thompson* v. *Thompson*, 1 Coll. 388—where the provisions of the will were confirmed by a codicil after the death of the first born son.

4. If a first or second son is born after the date of the will and dies in the testator's lifetime, a first or second surviving son will take. *Lomax* v. *Holmden*, 1 Ves. Sen. 290.

But this is not the case if the testator contemplates the possibility of lapse and provides for it: for instance, by a gift to the seventh or youngest child of a person who at the date of the will had six children. *West* v. *Lord Primate of Ireland*, 2 Cox, 258; 3 B. C. C. 148.

Meaning of the terms elder and younger.

The terms elder and younger in wills must *primâ facie* be considered as used in their strict sense as applicable to age, and not in the figurative sense of anterior and posterior in order of limitation of estates. *Scarisbrick* v. *Lord Skelmersdale*, 4 Y. & C. Ex. 78; 2 H. L. 167; *Lyddon* v. *Ellison*, 19 B. 565; *Livesey* v. *Livesey*, 2 H. L. 419; *Longfield* v. *Bantry*, 15 L. R. Ir. 101.

In the case of limitations of real estate devised for life with remainders in tail, the natural meaning of eldest son is first born son. *Bathurst* v. *Errington*, 2 App. C. 698, 709.

Therefore, under a devise to the eldest son of A. for life with remainder to his first and other sons successively in tail, with remainder to the second and other sons of A successively in tail, if the first born son of A dies in the testator's lifetime without issue, A's second son takes an estate tail. *Meredith* v. *Treffry*, 12 Ch. D. 170.

The term eldest son may mean only son, as youngest child may mean only child. *Tuite* v. *Birmingham*, L. R. 7 H. L. 634; *Emery* v. *England*, 3 Ves. 232.

If the testator contemplates a younger son as becoming eldest, or if the eldest were dead at the date of the will, eldest son can, of course, not mean first born son. *Hervey-Bathurst* v. *Scawby*, 4 Ch. D. 251; S. C. sub nom. *Bathurst* v. *Errington*, 2 App. C. 698.

A clause shifting estates in the event of a younger son becoming the eldest son of his father applies only to a son becoming the eldest in his father's lifetime. *Bathurst* v. *Errington*, 2 App. C. 698.

Next surviving son.

When a testator has made a disposition in favour of his sons, arranging them in a descending order of birth with a gift over of their respective shares in certain events to "my next surviving son," the next younger son takes under this description. *Eastwood* v. *Lockwood*, 3 Eq. 487.

Next eldest brother.

And a gift over in certain events of land devised to a son to "his next eldest brother" has been held to refer to the next son in a descending order. *Crofts* v. *Beamish*, (1905) 2 Ir. 349.

Gift to second and other sons has in some cases included a first son.

An eldest son has been included under the expression "second and other sons," in cases where the probability was that the eldest son had been left out by mistake. *Longston* v. *Longston*, 8 Bl. N. S. 16; 2 Cl. & F. 194; *Blake's Estate*, 19 W. R. 765; *Turernor* v. *Grindley*, 32 L. T. 424; *Grattan* v. *Langdale*, 11 L. R. Ir. 473.

But this construction will not be adopted when there are sufficient reasons for the exclusion of the eldest son. *Bermingham* v. *Tuite*, I. R. 7 Eq. 221; L. R. 7 H. L. 634; *Locke* v. *Dunlop*, 39 Ch. D. 387.

The class of younger children is to be ascertained at the time of vesting.

With regard to the time at which the class of younger children is to be ascertained—

If there is an immediate gift to younger children, the class will be ascertained at the testator's death, and a child who after that time becomes eldest will not be excluded. *Coleman* v. *Seymour*, 1 Ves. Sen. 209; *Umbers* v. *Jaggard*, 9 Eq. 201.

Similarly, if the gift is to the younger children who attain twenty-one, a child who is a younger child when he attains

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twenty-one will take, though he may afterwards become eldest. *Adams* v. *Roberts*, 25 B. 658. The decision in *Matthews* v. *Pant*, 3 Sw. 328, may be supported on the ground that the son excluded was the eldest at the time of vesting as well as at the time of distribution. See *Domvile* v. *Winnington*, 26 Ch. D. 382.

In the same way an eldest son to be excluded will be ascertained at the time of vesting and not at the time of distribution. *Sandeman* v. *Mackenzie*, 1 J. & H. 613; *Adams* v. *Bush*, 8 Sc. 405; 6 Bing. N. C. 164; *Theed's Settlement*, 3 K. & J. 375; *Adams* v. *Adams*, 25 B. 642; *Domvile* v. *Winnington*, 26 Ch. D. 382.

Contrary intention.

The testator may, however, show that the persons filling the character of eldest or youngest children were to be ascertained at the time of distribution by contemplating, for instance, the possibility that several persons successively might become eldest sons after the time of vesting. *Boucles* v. *Boucles*, 10 Ves. 177; *Livesey* v. *Livesey*, 2 H. L. 419; *Madden* v. *Ikin*, 2 Dr. & S. 207.

Gift to a class of younger children upon a contingency.

Where the gift is to younger children upon some contingency, the cases are conflicting.

If there are no children surviving when the contingency happens the gift goes to the representatives of those who died in the lifetime of an elder brother. *Lady Lincoln* v. *Pelham*, 10 Ves. 166.

If there are children living when the contingency happens, *Ellison* v. *Airey*, 1 Ves. Sen. 111, and *Hall* v. *Hewer*, Amb. 204, are direct authorities for saying that the eldest child is to be then ascertained, and not before. See, too, *Stevens* v. *Pile*, 30 B. 284.

But now it would probably be held that the class ought to be ascertained at the time when the interests become transmissible, and it was so decided in *Bryan* v. *Collins*, 16 B. 14. See, too, *Sanders' Trust*, L. R. 1 Eq. 675.

Gifts to a class excluding a member of the class.

Testators sometimes make gifts to a class, excluding a member of the class whom they consider to be otherwise provided for. Such clauses of exclusion must receive their natural construction.

Therefore a devise of real estate to the sons of A, except an eldest son entitled to the possession of the C estate, does not exclude the eldest son if before the testator's death the C estate has been sold, so that he cannot be in possession of it. It makes no difference that he may be interested in the proceeds of sale. *Law Union and Crown Insurance Co.* v. *Hill*, (1902) A. C. 263.

The word "entitled" in such clauses of exclusion may, according to the context, mean entitled in possession, or entitled in interest at some particular time. *Chorley* v. *Loreband*, 33 B. 189; *In re Grylls's Trusts*, 6 Eq. 589; *Umbers* v. *Jaggard*, 9 Eq. 201. See, too, *Wyndham* v. *Fane*, 11 Ha. 287; *Johnson* v. *Foulds*, 5 Eq. 268.

In what cases "eldest son" means a son taking the bulk of the estates.

When the testator has placed himself *in loco parentis*, and shows an intention to provide portions for younger children, the rule established with regard to marriage settlements, that "elder son" means a son taking the bulk of the estate, and "younger son" a son unprovided for, applies to wills, as well in the case of personalty as of realty. *Bayley's Settlement*, 9 Eq. 491; 6 Ch. 590.

In such cases the rule is that where the bulk of an estate is settled in strict settlement, and by the same settlement portions are provided for younger children, a child taking the bulk of the estate by virtue of the limitations in strict settlement shall not take any benefit from the portions. *Macaulay* v. *Jones*, 2 K. & J. 684, 690.

Even in marriage settlements, however, this construction will not be adopted, unless it appears upon the face of the instrument that the exclusion had reference to the fact of the person to be excluded taking other property. *Re Theed's Settlement*, 3 K. & J. 375; *Hervey-Bathurst* v. *Stanley*, 4 Ch. D. 251, 262; see *Domville* v. *Winnington*, 26 Ch. D. 382.

The time for ascertaining who fills the character of eldest son is the time for distributing the portions, but he need not then be entitled to the settled estate if he has substantially had the benefit of it. *Collingwood* v. *Stanhope*, L. R. 4 H. L. 43; *In re Fitzgerald's Settled Estates; Saunders* v. *Boyd*, (1891)

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3 Ch. 394; *In re Smith's Estate*, 27 L. R. Ir. 121; *Rooke* v. *Plunkett*, (1902) 1 Ir. 299.

"Younger son" may mean son not taking the family estate.

And a younger son who at that time has become the eldest and takes the estate will be excluded from a portion, though the portion may have already vested in him. *Gray* v. *Earl of Limerick*, 2 De G. & S. 370; *Richards* v. *Richards*, Johns. 754; *Davies* v. *Huguenin*, 1 H. & M. 730; *Swinburne* v. *Swinburne*, 17 W. R. 47; see *Leake* v. *Leake*, 10 Ves. 476.

The question whether more than one son can be excluded from portions was considered in *In re Fitzgerald's Settled Estates*; *Saunders* v. *Boyd*, (1891) 3 Ch. 394; see, too, *Morton's Trusts*, (1902) 1 Ir. 310, n.

If the eldest son is excluded not as eldest son, but by name, the rule does not apply. *Wood* v. *Wood*, 4 Eq. 48.

And if the testator specifically mentions those whom he includes in the class of younger children, the rule does not apply. *In re Prytherch*; *Prytherch* v. *Williams*, 42 Ch. D. 590.

In what cases the eldest son is to be ascertained at the time of vesting.

There may, however, be circumstances showing that the eldest son is to be ascertained at some other time than the time of distribution; for instance, at the time of vesting.

A mere gift over to take effect on a younger son becoming an eldest before attaining twenty-one will not alter the rule. *Bayley's Settlement*, 9 Eq. 491; 6 Ch. 590.

But if there is a clear intention that the portions are to vest indefeasibly before the time of distribution, the eldest son is ascertained at the time of vesting. *Windham* v. *Graham*, 1 Russ. 331; see *Ex parte Smyth*, 12 Ir. Ch. 487; *Re Rivers' Settlement*, 40 L. J. Ch. 87.

Under what title a son must take the family estates in order to be excluded from a portion.

The further question arises, in what manner a child must be entitled to the estate in order to be excluded from a portion.

The fact that the estate has been sold for a sum not sufficient to satisfy the portions does not entitle the eldest son to a portion. *Reid* v. *Hoare*, 26 Ch. D. 363.

A second son, becoming an eldest son, but prevented from taking the estate by a recovery suffered in the lifetime of his brother, is entitled to share in portions provided by the settlement for younger children. *Tennison* v. *Moore*, 13 Ir. Eq. 424; *Spencer* v. *Spencer*, 8 Sim. 87; *Macaulay* v. *Jones*, 2 K. & J.

684; *Adams* v. *Beck*, 25 B. 648, overruling *Peacocke* v. *Pares*, 2 Kee. 689.

So, too, a younger son succeeding to the reversion of the settled estates, not under the settlement creating the portions, but by descent or by devise, is not within the rule, and does not lose his right to a portion. *Sing* v. *Leslie*, 2 H. & M. 68; *Adams* v. *Beck*, 25 B. 648.

An elder son not taking the estate may be entitled to a portion.

On the other hand, as a younger child becoming elder is excluded from taking a portion, so an elder child not taking the estate is admitted to a portion. *Duke* v. *Doidge*, 2 Ves. Sen. 203.

And if he dies before the time of distribution his representatives are entitled, whether the exclusion is of the eldest son for the time being or not. *Ellison* v. *Thomas*, 2 Dr. & Sm. 111; 1 D. J. & S. 18; *Davies* v. *Huguenin*, 1 H. & M. 730; *Swinburne* v. *Swinburne*, 17 W.R. 47.

CANADIAN NOTES.

Identification of legatee.

A gift to the children of A. held to mean the daughters of A., who had four daughters and a son, to the knowledge of the testator, extrinsic evidence being admitted to identify the legatees. *Ruthven* v. *Ruthven*, 25 Gr. 534.

Where a legacy was given to the sons and daughter of A., who had two daughters, one daughter was identified as the legatee by extrinsic evidence. *McIntosh* v. *Bessey*, 26 Gr. 496.

A sister of the testator named Maria Cummins held entitled to a legacy given to his 'sister Anastasia Cummins," he having only one other sister, named Catherine Kelly. *Re Whitty*, 30 O.R. 300.

Illegitimate person excluded.

A legacy to the testator's "grandson Rufus" was held to go to a legitimate grandson of that name, the testator having also one of the same name who was illegitimate. *Doe dem. M'Eacheran* v. *Taylor*, 6 N.B.R. 525.

Children by first marriage.

Where a testator had been married three times, and at the date of his will had no children living by his first wife, but had children by his second and third wives then living, a

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legacy to the children by his first marriage was held to go to the children by the second marriage. *Ling* v. *Smith*, 25 Gr. 246.

Wife.

On a devise to trustees to pay the rents and profits "to and for the use and benefit of my nephew A. and his wife, and for the use and benefit of the survivor of them during their natural lives, or during the widowhood of the wife of A. in case she should survive her husband, and, at their decease or upon the second marriage of his said widow I give to such of" the children, etc., it appeared that A.'s wife died in the testator's lifetime, and after the testator's death A. married again and died leaving his widow and children by both marriages, and it was held that the widow took under the devise to the wife of A., with remainder to children of both marriages. *Wilmott* v. *De Neill*, 32 N.B.R. 8.

And on a devise to A. for life and after his death to his wife, A. being unmarried at the date of the will, any wife that A. might have will take. *Re Sharon & Stuart*, 12 O.L.R. 605.

Lodge of Oddfellows.

A testator domiciled in a foreign country bequeathed personalty in Ontario to an unincorporated Lodge of Oddfellows at his domicile. Held, a bequest to the members of the Lodge. *Graham* v. *Canandaigua Lodge*, 24 O.R. 255.

Sisters of Charity.

A devise on trust to convert and pay the proceeds to the "Sisters of Charity of Hamilton to be their property absolutely," in the absence of evidence shewing the Sisters to be an incorporated body, held to be a devise to the individuals who answered that description at the time of the testator's death. *Walker* v. *Murray*, 5 O.R. 638.

Society misdescribed.

Under a bequest to "the Protestant Orphans' Home for boys in Toronto," two societies of the kind, known as the Boys' Home and the Orphans' Home, were held entitled to share equally, there being no home known by the name used in the will. *Williams* v. *Roy*, 9 O.R. 564.

A bequest to the "Wesleyan Methodist Superannuated Ministers' Fund" was held to go to "the Connexional Society of the Wesleyan Methodist Church" as the one most

nearly answering the description, there being no society of the name used in the will. *Edwards* v. *Smith*, 25 Gr. 159. Chap. XXVII.

Under a devise to "the Missionary Society of the Methodist Church in Canada," the Methodist Church held entitled, the description, though inaccurate, being sufficient to identify the object of the testator's bounty. *Tyrrell* v. *Senior*, 20 O.R. 156.

CHAPTER XXVIII.

CONSTRUCTION OF GIFTS TO CHILDREN.

I.—ILLEGITIMATE CHILDREN.

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"Children" means legitimate children.

"THE description 'child,' 'son,' 'issue,' every word of that species, must be taken *primâ facie* to mean legitimate child, son, or issue": per Lord Eldon, *Wilkinson* v. *Adam*, 1 V. & B. 422. And it may be stated as a general rule, that, where there is a bequest to children, without anything on the face of the will or in the surrounding circumstances to shew that the testator meant by children illegitimate children, and there is a possibility at the date of the will of legitimate children to satisfy the terms of the bequest, evidence *dehors* the will is not admitted to prove that the testator may or must have meant illegitimate children. *Hill* v. *Crook*, L. R. 6 H. L. 265; *Dorin* v. *Dorin*, L. R. 7 H. L. 568.

The rule applies though the person whose children were to be benefitted had, at the date of the will, only illegitimate children, and at the testator's death there was no possibility of any others. *Godfrey* v. *Davis*, 6 Ves. 43; *Kelly* v. *Hammond*, 26 B. 36; *Dorin* v. *Dorin*, L. R. 7 H. L. 568. *Fraser* v. *Pigott*, Yon. 354, as regards the children of William, is contrary to the general current of authority.

In the will of a Jew domiciled in England, children must mean legitimate children according to English and not according to Jewish law. *Levy* v. *Solomon*, 25 W.R. 842.

In the case of a Jew domiciled in England the Court does not recognize a marriage valid according to Jewish custom if it is not valid according to English law. *In re De Wilton; De Wilton* v. *Montefiore*, (1900) 2 Ch. 481.

Legitimacy determined by domicile.

The term "children" in a gift by will of personalty (*a*), or land devised upon trust for sale (*b*), or realty (*c*), to the children of a

person domiciled abroad, includes children who are legitimate according to the law of their parents' domicile. And the Court recognises the marriage law of the domicile unless it is contrary to the law of Christendom (*d*). *In re Andros; Andros* v. *Andros*, 24 Ch. D. 637 (*a*); *Skottowe* v. *Young*, 11 Eq. 474 (*b*); *In re Grey's Trusts; Grey* v. *Stamford*, (1892) 3 Ch. 88 (*c*); *In re Bozzelli's Settlement: Hussey-Hunt* v. *Bozzelli*, (1902) 1 Ch. 751 (*d*). *In re Wright's Trusts*, 2 K. & J. 595; *Boyes* v. *Bedale*, 1 H. & M. 798, so far as *contra*, are overruled. See, too, *In re Wilson's Trusts*, L. R. 1 Eq. 247; *ib.* 3 H. L. 55; *Atkinson* v. *Anderson*, 21 Ch. D. 100.

Succession *ab intestato*.

As regards succession *ab intestato* a different rule applies to realty and to personalty. A person can only claim as heir by descent who is legitimate by English law. *Doe* v. *Vardill*, 2 Cl. & F. 571; 7 Cl. & F. 895; 6 Bing. N. C. 385; 9 Bl. N. R. 32. But next of kin of an intestate will include persons who are legitimate by the law of their parents' domicile. *In re Goodman's Trusts*, 14 Ch. D. 619; 17 Ch. D. 266.

In order that a child may be legitimated by the subsequent marriage of its parents, the father must be domiciled, both at the child's birth and at the marriage, in a country which allows of such legitimation. *In re Grove; Vaucher* v. *Solicitor to the Treasury*, 40 Ch. D. 216.

In considering the question of illegitimate children in connection with gifts to children, four cases must be distinguished:—

A. Children born at the date of the will.

B. A child *en ventre sa mère* at the date of the will.

C. Children born after the date of the will and before the testator's death.

D. Children born after the testator's death.

A. Children Born at the Date of the Will.

Illegitimate children born at date of will.

It is well settled that if upon a true construction of the will, having regard to the admissible evidence, illegitimate children are referred to, illegitimate children living at the date of the will

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may take. If the gift is to the children of a woman there is no difficulty. If the gift is to the children of a man, children who have at the date of the will acquired the reputation of being his children may take though the description refers to the fact and not the mere reputation of paternity. *Wilkinson* v. *Adam*, 1 V. & B. 422, affirmed in D. P., 12 Pr. 470.

Legitimate and illegitimate children may take by the same description.

It was at one time supposed that legitimate and illegitimate children could not take together under a gift to children, though there might be a manifest intention to include illegitimate children. But it is now well settled that they may take together. *Barnett* v. *Tugwell*, 31 B. 232; *Owen* v. *Bryant*, 2 D. M. & G. 697; *Hill* v. *Crook*, L. R. 6 H. L. 265, 279, 283, not following *Fraser* v. *Pigott*, Yen. 354; *Bagley* v. *Mollard*, 1 R. & M. 581; *Pratt* v. *Mather*, 22 B. 328, 339.

1. Reference to Existing Children.

Reference to existing children.

The will may refer to existing children, and the only existing children may be illegitimate children, or it may be necessary to include illegitimate children in order to satisfy the terms of the bequest.

(*a.*) *Children of Deceased Person.*

Children of a deceased person.

A gift to the children of a deceased person necessarily refers to persons living at the date of the will.

Therefore, if a gift is made to the children of a deceased person who had only illegitimate children and they were known to the testator, they take. *Lord Woodhouselee* v. *Dalrymple*, 2 Mer. 419; *Edmunds* v. *Fessey*, 29 B. 233.

If the deceased person is not shown to be deceased on the face of the will, it must be proved that the testator was aware of his death and that he had only illegitimate children. *Re Herbert's Trusts*, 1 J. & H. 121; *Milne* v. *Wood*, 42 L. J. Ch. 545.

In such a case it is immaterial that the testator believed the children to be legitimate. But it probably would be material if he did not know of their existence. Though in form the gift is to a class, there is in substance *designatio personarum*, and a

person unknown to the testator could not take as a designated person.

If the deceased person had both legitimate and illegitimate children, the illegitimate children cannot take. Evidence to show that the testator treated both legitimate and illegitimate children alike as the children of the person in question would be either inadmissible or immaterial. *Seaine* v. *Kennerley*, 1 V. & B. 469; *Edmunds* v. *Fessey*, 29 B. 233 (the sons); *In re Fish*; *Ingham* v. *Rayner*, (1894) 2 Ch. 83.

If the testator is married to a lady who at the date of the will is past child-bearing, and there are no legitimate children, probably a gift to his children would be held to refer to existing illegitimate children of the testator, who were always treated as his children. *Lepine* v. *Bean*, 10 Eq. 160; *Re Jeans*; *Upton* v. *Jeans*, 72 L. T. 835, where under such circumstances step-children were let in. See, too, *Dilley* v. *Mathews*, 11 Jur. N. S. 425; 13 W. R. 676.

The same conclusion might possibly be drawn in the case of a gift to the children of a woman who is past child-bearing and has only illegitimate children, if the testator is shown to be aware of the woman's age and to be acquainted with the children. *Re Brown*; *Penrose* v. *Manning*, 63 L. T. 159; see *Paul* v. *Children*, 12 Eq. 16.

(*b.*) *Reference in Will to Existing Children.*

Express reference to existing children.

If the gift is to children born or to be born, and at the date of the will the only children born are illegitimate children and they are well known to the testator, those children will take. *In re Nixon*, 2 Jur. N. S. 970; *Holt* v. *Sindrey*, 7 Eq. 170, corrected in (1901) 2 Ch. 445; *Gubb* v. *Prendergast*, 1 K. & J. 439.

Here again it appears to be immaterial that the testator did not know that the children were illegitimate. But it would be material, if the testator did not know, whether or not there were any children living at the date of the will. *Holt* v. *Sindrey*, 7 Eq. 170.

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If the gift is to the children in the plural of a deceased person, and there is only one legitimate child and several illegitimate children known to the testator, the latter will be included to satisfy the language of the bequest. *Gill* v. *Shelley*, 2 R. & M. 336; *Leigh* v. *Bacon*, 1 Sm. & G. 486; *Edmunds* v. *Fessey*, 29 B. 233; *In re Humphreys*; *Smith* v. *Milledge*, 24 Ch. D. 691.

In such cases knowledge on the part of the testator of the state of the family is material. If he does not know the state of the family the same arguments do not apply. See *Hart* v. *Durand*, 3 Anst. 684, explained in *Gill* v. *Shelley*, 2 R. & M. 336, 342.

The testator may show that he refers to existing illegitimate children by adding in another gift to children, namely A, B, C, and D, some of whom were illegitimate; or by reciting that he has nine children, giving their names, which included an illegitimate child; or by a gift to the two youngest daughters of A B, a spinster. *Meredith* v. *Farr*, 2 Y. & C. C. 525; *Owen* v. *Bryant*, 2 D. M. & G. 697; *Savage* v. *Robertson*, 7 Eq. 176; see *Hartley* v. *Tribber*, 16 B. 510.

There is a similar *designatio personarum*, where a testator directs the interest of a legacy to be paid to a woman, with whom he cohabited, for life or until she married, for the support of her children N and R, and on her death or marriage for the use of her children. *In re Connor*, 2 J. & L. 456.

Again it may appear from the fact that the testator made his will in contemplation of an early death, coupled with the nature of the gift, which was a sum for mourning for each of the children of A, that living illegitimate children were meant. *In re Haseldine*; *Grange* v. *Sturdy*, 31 Ch. D. 511, a case no doubt rightly decided, but very near the line, like *Laker* v. *Hordern*, 1 Ch. D. 644. See *Durrant* v. *Friend*, 5 De G. & S. 343, a case on the other side of the line.

The fact that the testator divides his estate into shares corresponding in number with his children, including those who are illegitimate, is not alone enough to show that illegitimate children were to be included. *Cartwright* v. *Vawdry*, 5 Ves. 530; *In re Wells' Estate*, 6 Eq. 599.

(c.) *Definition of Persons called Children.*

Interpretation clause defining children.

If there is what is equivalent to an interpretation clause in the will, by which the testator defines the expression "child" as including an illegitimate child, that child will be included in a subsequent gift to children.

For instance, if there is a gift to the children of A, followed by "namely" A. B, C, and D, where A is illegitimate; or the testator recites that he has nine children, giving their names, and one of the children named is illegitimate, the illegitimate child will take under a gift to children. *Meredith* v. *Earr*, 2 Y. & C. C. 525; *Owen* v. *Bryant*, 2 D. M. & G. 697.

(d.) *Illegitimate Child called a Child.*

Illegitimate child called a child.

Upon the question whether, where a gift is made to A, described as the child of B, and A is an illegitimate child, A is intended to be included in a subsequent gift to the children of B, the cases are conflicting. *Bagley* v. *Mallard*, 1 R. & M. 581; *Meyson* v. *Hindle*, 15 Ch. D. 198; *In re Brown*; *Brown* v. *Brown*, 37 W. R. 472, against, and *In re Byron*; *Drummond* v. *Leigh*, 30 Ch. D. 110; *In re Parker*; *Parker* v. *Osborne*, (1897) 2 Ch. 208; *In re Smiller*; *Bedford* v. *Hughes*, (1903) 1 Ch. 198; *Re Couturier*; *Couturier* v. *Shea*, 96 L. T. 560, in favour of inclusion.

Probably in most of the cases there were circumstances assisting the decision in one direction or the other, as in *Woels* v. *Cubitt*, 19 B. 421; *Keans* v. *Davies*, 7 Ha. 498; *Re Brown*; *Walsh* v. *Browne*, 62 L. T. 899; *In re Walker*; *Walker* v. *Lutyens*, (1897) 2 Ch. 238.

The mere description of an illegitimate child as the testator's nephew has been held insufficient to include him in a subsequent gift to children of his sister. There the word defined by the testator was "nephew" and not "child." *In re Hall*; *Bronston* v. *Weightman*, 35 Ch. D. 551. See *Re Couturier*, *supra*.

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On the other hand, where an illegitimate son was referred to as "my son George," the children of George were held entitled to come in under a gift to grandchildren. *Re Kiddle; Gent* v. *Kiddle*, 92 L. T. 724.

Where a testator has made gifts to several persons described as cousins and nieces, and some of the so-called cousins are illegitimate, and then gives his residue to his relatives thereinbefore named, the proper inference may be that the illegitimate cousins were intended to be included in the word "relatives." *Seale Hayne* v. *Jodrell*, (1891) A. C. 304.

Gifts over.

Where a testator devised real estate to an illegitimate daughter, whom he described as his eldest daughter, and the will contained a gift over under certain circumstances of the share, whether land or money, of any of the testator's children, it was held that the gift over applied to the real estate devised to the illegitimate daughter. *Smith* v. *Jobson*, 59 L. T. 397; see *Allen* v. *Webster*, 2 Giff. 177.

If the testator expressly includes an illegitimate child in a gift to children, this *primâ facie* shows that the word "children" is not intended to include that child where he is not expressly named. *Meredith* v. *Farr*, 2 Y. & C. C. 525; see *In re Smiller; Bedford* v. *Hughes*, (1903) 1 Ch. 198.

(c.) *Strong Probability.*

Inference from facts that illegitimate child intended.

Suppose the gift is to the children of A, a living person, and that there is nothing on the face of the will to show that existing or illegitimate children are intended, is the Court at liberty to infer from the surrounding circumstances that existing illegitimate children are intended to be included, for instance, from the fact that the testator believed A to be married and was on terms of familiarity with his illegitimate children, whom he believed to be legitimate? In *In re De Bochet; Mansell* v. *Allen*, (1901) 2 Ch. 441, it was held that, under such circumstances, there was so strong a probability of it being the intention of the testatrix to use in her will the words "children being daughters of my nephew Richard" as including two illegitimate daughters living at the date of the will, that a

contrary intention could not be supposed. The case goes beyond any previous authority and appears to be inconsistent with many leading authorities. Strong probability is not enough. See *Harris* v. *Lloyd*, T. & R. 310; *Dorin* v. *Dorin*, L. R. 7 H. L. 568; *Re Browne*: *Raggett* v. *Browne*, 61 L. T. 463.

2. Express or Implied Reference to Illegitimate Children.

The language of the will may show either expressly or impliedly that illegitimate children are referred to or intended to be included.

(*a.*) *Express Reference to Illegitimate Children.*

Express reference to illegitimacy.

Illegitimate children may be expressly referred to; illegitimate children living at the date of the will may take. For instance, if the gift is to "the natural children of the Duke of Devonshire by Mrs. Heneage" (*a*); or to "the children legitimate or illegitimate of my brother Henry" (*b*); or to the natural children of a man with whom the testatrix was living (*c*); or if the testator shows that he knows the legality of his marriage to be doubtful and the children are to take as if the marriage were valid (*d*); or if the gift is to "my children, legitimate or otherwise" (*e*); or if the gift is to the children of a daughter by her putative husband, or any other person, whereas the testator knew his daughter was living with a married man (*f*). *Metham* v. *Duke of Devonshire*, 1 P. W. 529 (*a*); *Barnett* v. *Tugwell*, 31 B. 232 (*b*); *Bentley* v. *Blizard*, 1 Jur. N. S. 652 (*c*); *Bayley* v. *Snetham*, 5 Ves. 534, n.; 1 S. & St. 78 (*d*); *Howarth* v. *Mills*, 2 Eq. 389 (*e*); *In re Brown's Trust*, 16 Eq. 239 (*f*).

(*b.*) *Implied Reference to Illegitimate Children.*

Implied reference to illegitimacy.

Where a bachelor makes a gift to "my children," followed by another to "the mother of my children," illegitimate children must be meant. *Beachcroft* v. *Beachcroft*, 1 Mad. 430.

Nephews and nieces of illegitimate testator.

In like manner a gift by an illegitimate testator to his nephews and nieces must mean children of his natural brothers

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and sisters, and the children of a natural sister not named in the will cannot be excluded because other natural brothers and sisters are referred to as brothers and sisters. *In re Corsellis; Freeborn* v. *Napper*, (1906) 2 Ch. 316.

Where a testator refers on the face of his will to his wife, and also to a woman described as now living with him, and speaks of the children he may have by that woman, illegitimate children must be intended. *Wilkinson* v. *Adam*, 1 V. & B. 422, affd. in D. P., 12 Pr. 470.

If a child, whom the testator knows to be illegitimate, is excepted from a gift to children, that shows that the testator thought the word "children" alone would include illegitimate children. *In re Lowe; Danily* v. *Platt*, 61 L. J. Ch. 415; 40 W. R. 475.

A gift to "A, B, C, and every other child of Martha Davies," where A, B, and C were illegitimate children, has been held insufficient to show that the words "other child" were intended to include illegitimate children. *Mortimer* v. *West*, 3 Russ. 370.

Rule in *Hill* v. *Crook*.

The terms "husband and wife," "father and mother," and "children" are correlative terms. If a testator knows that A is not legally married to B, and speaks of A as the wife of B, and then of the children of A, he must be taken to intend to include the children of the illegal union. *Hill* v. *Crook*, L. R. 6 H. L. 265, 285; *In re Horner; Eagleton* v. *Horner*, 37 Ch. D. 695; *In re Harrison; Harrison* v. *Higson*, (1894) 1 Ch. 561; *In re Walker; Walker* v. *Lutyens*, (1897) 2 Ch. 238; *In re De Wilton; De Wilton* v. *Montefiore*, (1900) 2 Ch. 481, 488. *Ellis* v. *Houstoun*, 10 Ch. D. 236, was decided before the rule was developed.

As to *Hill* v. *Crook*, see *In re Du Bochet; Mansell* v. *Allen*, (1901) 2 Ch. 441, 446.

Knowledge of testator material.

This principle does not apply if it does not appear that the testator knew that A and B were not lawfully married. In that case there is nothing to show that the word "wife" and consequently the word "children" are not used in the strict legal sense. *In re Ayles' Trusts*, 1 Ch. D. 282, as explained in

In re Horner; Eagleton v. *Horner*, 37 Ch. D. 695, 706; *Re Brown; Penrose* v. *Manning*, 63 L. T. 159.

The case in which the principle has been carried furthest was one where a testatrix referred to her daughter by the surname of the man with whom she was living, without calling her his wife, and gave property to her separate use with a restraint upon anticipation. *O'Loughlin* v. *Beller*, (1906) 1 Ir. 487; see, too, *In re Loveland; Loveland* v. *Loveland*, (1906) 1 Ch. 543.

Gift by bachelor to his children.

A gift by the will of a bachelor or a spinster to his or her children must mean illegitimate children. None but illegitimate children could take under the will, as it would be revoked by marriage. *Clifton* v. *Goodhan*, 6 Eq. 278; see, however, *In re Bolton; Brown* v. *Bolton*, 31 Ch. D. 542, 547; *In the estate of Frogley*, (1905) P. 137.

It has been said that this argument only applies where the testator knows that the woman with whom he is living is not his wife, and not where he has married a woman without certain knowledge whether her first husband is living or dead. *In re Bolton; Brown* v. *Bolton*, 31 Ch. D. 542, 553.

B. A Child *en ventre sa mère* at the Date of the Will.

Child *en ventre* at date of will.

A gift to the illegitimate child with which a woman is pregnant at the date of the will is valid. *Gordon* v. *Gordon*, 1 Mer. 141; *Evans* v. *Massie*, 8 Pr. 22.

If the gift is to the children of a woman, and upon the construction of the will the word "children" includes illegitimate children, an illegitimate child *en ventre* at the date of the will will take. *Crook* v. *Hill*, 3 Ch. D. 773.

But if the gift is to "such child as she may be *enceinte* of by me," there is a reference to the fact of paternity, which invalidates the gift, and a child *en ventre* at the date of the will cannot take. *Earle* v. *Wilson*, 17 Ves. 528; *Pratt* v. *Mather*, 22 B. 328.

It has sometimes been said that a child *en ventre* may have a name by reputation or may be reputed to be the child of a particular man. *In re Connor*, 2 J. & Lat. 456, 460; *Pratt* v. *Mather*, 22 B. 328, 339.

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But it seems clear that an illegitimate child cannot be reputed to be the child of a man before its birth. See *Eccleston* v. *Fullalove*, 9 Ch. 147, 158; *In re Bolton; Brown* v. *Bolton*, 31 Ch. D. 542, 549; *In re Shaw; Robinson* v. *Shaw*, (1894) 2 Ch. 573.

C. Children Born after the Date of the Will and before the Testator's Death.

Illegitimate child born after date of will may take.

There is no objection in law to a gift to illegitimate children born after the date of the will and before the testator's death. But they must be so described as to be capable of being ascertained. *Eccleston* v. *Fullalove*, 9 Ch. 147, overruling *Medworth* v. *Pope*, 27 B. 71; *Howarth* v. *Mills*, 2 Eq. 389; *Holt* v. *Sindrey*, 7 Eq. 171; see *In re Du Bochet: Mansell* v. *Allen*, (1901) 2 Ch. 441, 445.

If the gift is to the future illegitimate children of a woman, there is no difficulty. *In re Hastie's Trusts*, 35 Ch. D. 728; *In the estate of Frogley*, (1905) P. 137; *In re Loveland; Loveland* v. *Loveland*, (1906) 1 Ch. 542.

If the gift is to the reputed children of a man by a particular woman, there is also no difficulty. The reputation of paternity is a fact which the law allows to be proved. *Eccleston* v. *Fullalove*, 9 Ch. 157.

If the children are described by reference to the fact and not the reputation of paternity—if it is, for instance, to the illegitimate children of a man or of a man by a particular woman—the gift fails. The fact of paternity involves an inquiry which the law will not undertake. *In re Bolton; Brown* v. *Bolton*, 31 Ch. D. 542; *In re Du Bochet; Mansell* v. *Allen*, (1901) 2 Ch. 441; *In re Shaw; Robinson* v. *Shaw*, (1894) 2 Ch. 573, overruling *In re Goodwin's Trust*, 17 Eq. 345.

D. Children Born after the Testator's Death.

Child born after death.

Children born after the testator's death cannot take under the will. *Crook* v. *Hill*, 3 Ch. D. 773.

The same rule applies to the case of a deed. An illegitimate

child born after the date of the deed cannot take under it. *Blodwell* v. *Edwards*, Cro. Eliz. 509; Noy, 35; *Thompson* v. *Thomas*, 27 L. R. Ir. 457; *In re Shaw*; *Robinson* v. *Shaw*, (1894) 2 Ch. 573.

II.—Step-Children.

Intention to include step-children.

Step-children may take under the description of children if there is enough in the will and surrounding circumstances to show that they were intended. *Re Jeans*; *Upton* v. *Jeans*, 72 L. T. 835.

III.—Legitimate Children.

The term "children" includes children by a first and second marriage.

1. "Children" *primâ facie* includes children by a first and second marriage. *Barrington* v. *Tristram*, 6 Ves. 345; *Critchett* v. *Taynton*, 1 R. & M. 541; *Andrews* v. *Andrews*, 15 L. R. Ir. 199.

And even where there was an express reference to a present or any future husband, children by a former husband were not excluded. *Pasmore* v. *Huggins*, 21 B. 103; *Re Pickup's Will*, 1 J. & H. 389.

But there may be an intention to exclude the children of a first marriage. *Stavers* v. *Barnard*, 2 Y. & C. C. 539; *Lovejoy* v. *Carter*, 35 B. 149.

"Children" do not include grandchildren.

2. A gift to the children of a living person will not go to his grandchildren, though he may have only grandchildren living at the date of the will and the testator's death. *Moor* v. *Raisbeck*, 12 Sim. 123.

If, however, the gift is to the children of a person deceased, who had only grandchildren living at the time, the grandchildren will take, and they will take to the exclusion of great-grandchildren. *Berry* v. *Berry*, 3 Giff. 134; 9 W. R. 889; *Fenn* v. *Death*, 23 B. 73.

But a gift to the children of a deceased person, who has only grandchildren living at the date of the will, will not go to the grandchildren if the will distinguishes between children and grandchildren. *Loring* v. *Thomas*, 1 Dr. & S. 497.

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And a gift to the children of several persons deceased will not include the grandchildren of one, who had no children at the date of the will, if there are any children of the others to take. *Radcliffe* v. *Buckley*, 10 Ves. 195; *In re Kirk*; *Nicolson* v. *Kirk*, 52 L. T. 346; see *In re Smith*; *Lord* v. *Hayward*, 35 Ch. D. 558.

Gift to children to be born will not exclude those born already.

3. A gift to children hereafter to be born or that may be born will not, without more, exclude children already born. *Hebblethwait* v. *Cartwright*, Ca. t. Talb. 31; *Wilkinson* v. *Adam*, 1 V. & B. 422, 464; *Doe* v. *Hallett*, 1 M. & S. 124; *Harrison* v. *Harrison*, I. R. 10 Eq. 290. See *Locke* v. *Dunlop*, 39 Ch. D. 387.

But where there are gifts to three out of four children living at the date of the will, a gift to each child that may be born applies only to afterborn children. *Early* v. *Middleton*, 14 B. 453; 3 D. F. & J. 1.

Posthumous children.

And in the same way a testator may confine his bounty to posthumous children. *Doe* d. *Blackiston* v. *Haslewood*, 10 C. B. 544; see *White* v. *Barber*, 5 Burr. 2703; *Re Lindsay*, 3 Ir. Ch. 239.

Afterborn children, where excluded.

4. Words *primâ facie* referring to present children, such as "to children lawfully gotten," or "to every child he hath," will not exclude afterborn children if they can fairly be construed as referring to the *stirps*. *Browne* v. *Groombridge*, 4 Mad. 495; *Ringrose* v. *Bramham*, 2 Cox, 384; see *Goodfellow* v. *Goodfellow*, 18 B. 356.

A gift to "children who survive me" will not exclude those born after the testator's death. *Re Clark's Estate*, 3 D. J. & S. 111.

Express gift to a child will not exclude him from a subsequent gift to children.

5. An express gift to one child will not prevent his taking under a subsequent gift to children. *Reay* v. *Rawlins*, 29 B. 88; see *Hanna* v. *Bell*, 7 Ir. Ch. 208.

Nor will a gift to A and her daughter for their lives exclude the daughter from taking under a gift in remainder to the children of A and her daughter. *Almack* v. *Horn*, 1 H. & M. 630.

On the other hand, a gift to several children by name will not prevent other children from taking under a subsequent gift

to children. *Moffat* v. *Burnie*, 18 B. 211; see *Re Connar*, 2 J. & Lat. 456; 8 Ir. Eq. 401.

A gift to children "from A downwards" includes A. *Lott* v. *Osborne*, 17 L. T. 40.

When child *en ventre* included under description of child living or born.

6. Upon the question whether under the expression children "living" or "born" at a particular time, a child *en ventre* at that time can be said to be included, the law has been brought back to a sound state by a decision of the House of Lords, *Villar* v. *Gilbey*, (1907) A. C. 139.

There is an obvious distinction between the words living and born. A child *en ventre*, afterwards born alive, may possibly be said to have been living while *en ventre*; but it is more difficult to see how it can be said to have been born. The same rule applies, however, in one respect, to both words.

Child *en ventre* deemed living or born for the purpose of taking a benefit.

The rule is that for the purpose of conferring a benefit upon a child *en ventre* at a particular future time, it will be included in the expression children living (*a*) or born (*b*) at that time. *Miller* v. *Turner*, 1 Ves. Sen. 85; *Doe* v. *Clarke*, 2 H. Bl. 399; *Clarke* v. *Blake*, 2 B. C. C. 319; 2 Ves. Jun. 677; *Rawlins* v. *Rawlins*, 2 Cox, 425; *Whitelock* v. *Heddan*, 1 B. & P. 243 (*a*); *Trower* v. *Butts*, 1 S. & St. 181 (*b*); *In re Gardiner's Estate*; *Garratt* v. *Weeks*, 20 Eq. 647, is inconsistent with these authorities.

It is only a slight extension of the principle to say that a gift over if there should be no children living or born at a particular time, will not take effect if there is a child *en ventre* at that time, where the result is not to divest a previous gift under which the child *en ventre* takes. *Pearce* v. *Carrington*, 8 Ch. 969.

Person born at date of will.

The case is different if the class is not a class of children living or born at a future time, but to a class such as great-nephews and great-nieces "born previously to the date of this my will," which suggests persons of whose existence the testator knows. *In re Salaman*; *De Pass* v. *Sonnenthal*, (1907) 2 Ch. 46.

Child illegitimate if born at time of distribution does not take.

A child *en ventre* is supposed to be born at the time mentioned. If, supposing it to have been then born, it would have been illegitimate, it will not be admitted to take, notwithstanding

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the marriage of its parents before its birth. *In re Corlass*, 1 Ch. D. 460.

But the expression "children born at a particular time" will include a child then *en ventre* only for the purpose of conferring a benefit on the child.

Therefore a clause cutting down the estates tail of children born in the testator's lifetime to estates for life does not apply to a child *en ventre* at the testator's death. *Villar* v. *Gilbey*, (1907) A. C. 139.

And if a fund is divisible, when the youngest child born at the testator's death attains 21, among the children then living, a child *en ventre* at the testator's death is not to be taken into account in fixing the time of division. *Blasson* v. *Blasson*, 2 D. J. & S. 665.

Distinction between living and born.

The word "living" is more easily applicable to a child *en ventre*. It may, therefore, have been well decided that a gift to A, if she has issue living at a particular time, takes effect if she has a child *en ventre* at that time. *In re Burrows*; *Cleghorn* v. *Burrows*, (1895) 2 Ch. 497.

10 & 11 Will. 3, c. 16.

The Act 10 & 11 Will. 3, c. 16 (Rev. Ed. 10 Will. 3, c. 22), deals with posthumous children in the case of marriage and other settlements.

Children of parents dead at the date of the will.

7. When there is a gift to the members of a class for their lives, with remainder to their children, the death of a member of the class in the lifetime of the testator, after the date of the will, will not prevent his children from taking, but the children of members of the class dead at the date of the will will not take. *Habergham* v. *Ridehalgh*, 9 Eq. 395.

On the other hand, if the gift is to the testator's brothers and sisters for their lives, with remainder to their children, and the testator has only one brother living at the date of the will, children of deceased brothers and sisters will take. *Barnaby* v. *Tassell*, 11 Eq. 363.

Gifts to the children of A and B.

8. Gifts to the children of A and B.

a. It seems that the *primâ facie* grammatical construction of a gift to the children of A and B is that B and the children of A are entitled. *In re Featherstone's Trusts*, 22 Ch. D. 111; *Re Walbran*; *Milner* v. *Walbran*, 33 L. T. 745.

b. If A and B are described as bearing the same relation to the testator, and equal legacies have been given to them, the children of both take—as in a gift to the children of my brother A and my brother B. *Mason* v. *Baker*, 2 K. & J. 567; see *Whicker* v. *Mitford*, 3 B. P. C. 442.

c. If they do not bear the same relation to the testator, and A has children at the date of the will, while B. is unmarried, the gift goes to B and the children of A. *Stammwoll* v. *Hales*, 34 B. 124.

d. So, too, if A is described as deceased; for instance, if the gift be to the children of the late A and B, B and the children of A will take. *Lugar* v. *Harman*, 1 Cox, 250; *Hawes* v. *Hawes*, 14 Ch. D. 614; but see *Re Davies' Will*, 29 B. 93.

This is *a fortiori* the case where B is referred to as a legatee. *Ingle's Trusts*, 11 Eq. 578.

e. A gift for "the benefit of the children of A and of B" goes to the children of A and of B. *Peacock* v. *Stockford*, 3 D. M. & G. 73.

g. If there is a gift to the six children of A. who has only six living at the date of the will, the legacy goes to them. *Sherer* v. *Bishop*, 4 B. C. C. 55.

Gift to a certain number of children when there are more.

And a seventh child *en ventre* at that time will not be admitted to a share. *Re Emery's Estate*, 24 W. R. 917.

And where the gift was to "my four nephews and niece, namely," and there then followed the names of three nephews and a niece, it was held that a fourth nephew could not take. *Glanville* v. *Glanville*, 33 B. 302.

If the testator knows only of three children of A, a fourth child cannot take under a gift to the three children of A. *In re Mayo; Chester* v. *Keirl*, (1901) 1 Ch. 404.

If the number does not correspond with the number living at the date of the will, all the children then living will take, whether the gift is of a lump sum or of a distinct sum to each, in which latter case each child will be entitled to a legacy of that sum. *Garey* v. *Hibbert*, 19 Ves. 125; *Stebbing* v. *Walkey*, 2 B. C. C. 85; 1 Cox, 250; *Lee* v. *Pain*, 4 Ha. 249; *Harrison* v. *Harrison*, 1 R. & M. 72; *Morrison* v. *Martin*, 5 Ha. 507;

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Yeats v. *Yeats*, 16 B. 170; see 4 Ch. D. 46; *Lee* v. *Lee*, 10 Jur. N. S. 1041; *Spencer* v. *Ward*, 9 Eq. 507; *In re Bassett's Estate*; *Perkins* v. *Fladgate*, 14 Eq. 54; *In re Groom*: *Booty* v. *Groom*, (1897) 2 Ch. 407.

The fact that a blank is left for the insertion of the names of the legatees makes no difference. *M'Kechnie* v. *Vaughan*, 15 Eq. 289.

On the same principle, a gift to the five daughters of A, who has one daughter and five sons goes to the daughter. *Lord Selsey* v. *Lord Lake*, 1 B. 151. See *Berkeley* v. *Pulling*, 1 Russ. 496.

But a gift of 100*l.* apiece to the four sons of A, who had three sons and a daughter, includes the daughter, the intention being to give four legacies. *Lane* v. *Green*, 4 De G. & S. 235.

Explanatory context.

If there is anything to indicate which of the children the testator meant—for instance, an allusion to their residence—the rule does not apply. *Wrightson* v. *Calvert*, 1 J. & H. 250; see *Hampshire* v. *Peirce*, 2 Ves. Sen. 216.

So where the gift was to the three children of W, widow of W, and the widow of W had at the date of the will married again, and there were two children by W and six by her second husband then living, it was held that the two children by the first marriage were alone intended to take. *Newman* v. *Piercey*, 4 Ch. D. 41.

It appears never to have been decided whether, when the number of children living at the date of the will is erroneously stated, children born after the date of the will and before the testator's death would be included.

IV.—Distribution per Capita and per Stirpes.

Whether a gift to the children of several parents is to be distributed *per stirpes* or *per capita*.

A gift to A and the children of B goes *prima facie* to all *per capita*, and not *per stirpes*. *Dowding* v. *Smith*, 3 B. 541; *Rickabe* v. *Garwood*, 8 B. 579.

So, too, a gift to the children of A and B, or even to class A, and class B and C, goes *per capita* to all. *Dugdale* v. *Dugdale*, 11 B. 462; *Dowding* v. *Smith*, 3 B. 541; *Patterson*

v. *Pattison*, 19 B. 638; *Armitage* v. *Williams*, 27 B. 346; *Rook* v. *A.-G.*, 31 B. 313; *Mason* v. *Harris*, 19 B. 210; *Tyndale* v. *Wilkinson*, 23 B. 74; *Baker* v. *Baker*, 6 Ha. 261; *Fletcher* v. *Fletcher*, 9 L. R. Ir. 301.

So a gift of two fourth parts to the children of A and the children of B goes *per capita*. *Lady Lincoln* v. *Pelham*, 10 Ves. 166.

Gifts to parents and their issue.

Similarly a gift to several and their issue, or to the children and grandchildren of A, goes to all children and grandchildren coming into being before the time of distribution *per capita*. *Barnaby* v. *Tassell*, 11 Eq. 363; *Lea* v. *Thorp*, 6 W. R. 480; 4 Jur. N. S. 447; 27 L. J. Ch. 649.

In the same way a gift after a life interest to surviving children and their issue goes to all the children and issue who survive the time of distribution *per capita*. *Re Fox's Will*, 35 B. 163; 13 W. R. 1013; *Cancellor* v. *Cancellor*, 11 W. R. 16; 2 Dr. & Sm. 199. *Shailer* v. *Groves*, which, as reported in 6 Hare, 162, might be cited in favour of a different construction, is there wrongly reported, and moreover the order was not drawn up in accordance with the reported judgment. See 11 Jur. 485; 16 L. J. Ch. 367; 2 Jarman, ed. 5, 1548.

The rule applies where the classes are next of kin or families. *Rook* v. *A.-G.*, 31 B. 313; *Barnes* v. *Patch*, 8 Ves. 603.

A direction that parents and children are to be classed together, and share in equal proportions, will not import a distribution *per stirpes*. *Turner* v. *Hudson*, 10 B. 222.

A gift to "George Barker, his sister Mary Barker, and the children now living of Richard Hollings who attain twenty-one, if more than one, in equal shares," is divisible *per capita*. *Kekewich* v. *Barker*, 88 L. T. 130, overruling *S. C.* sub nom. *Cupit* v. *Dalton*, 86 L. T. 129.

Distribution *per stirpes*.

The following indications of intention have been held sufficient to import a distribution *per stirpes*:—

a. A gift of one share in certain events to the other legatees *per stirpes*. *Nettleton* v. *Stephenson*, 18 L. J. Ch. 191.

b. A gift of the share of a child dying, not to the other members of the class, but to the brothers and sisters of the

child. *Archer* v. *Legg*, 31 B. 187; see *Ayscough* v. *Savage*, 13 W. R. 373.

e. A gift of the income to four persons (including the mother of certain children) till those children attained twenty-one, and then a gift of the principal to three of those persons (not including the mother) and the children equally. *Brett* v. *Horton*, 4 B. 239.

d. A direction that the share is to be divided in equal shares if more than one of "such respective issue." *Davis* v. *Bennett*, 4 D. F. & J. 327.

e. If the issue of a *stirps* are treated as taking among them only one equal share, the construction *per stirpes* will be adopted. *Brett* v. *Horton*, 4 B. 239; *Hunt* v. *Dorsett*, 5 D. M. & G. 570.

f. And a gift to be equally divided between A and the children of B, where A and B were nephews, has been held to go as to one-half to A and as to the other half to the children of B. *Re Walbran*; *Milner* v. *Walbran*, 93 L. T. 745.

As to the word "devolve," see *Stonor* v. *Curwen*, 5 Sim. 264.

A gift to several and their issue "*per stirpes*," or a direction that issue are to take only their parents' share is sufficient to show that the issue were not meant to take in competition with the original takers. *Pearson* v. *Stephen*, 2 D. & Cl. 328; 5 Bl. N. S. 203; *Johnson* v. *Cope*, 17 B. 561.

In what cases the distribution will be *per stirpes* throughout.

Whether a direction that issue are to take only the share their ancestor would have taken will have the effect of making the distribution a distribution *per stirpes* throughout, seems not to be settled.

The word "parent" used in a recurring or sliding sense.

Where the direction is that the issue are to take a parent's share, and the word "parent" is used in a recurring or sliding sense, so as to apply to successive generations of issue, it is clear that the distribution will be *per stirpes* throughout. *Ross* v. *Ross*, 20 B. 645; *In re Orton's Trust*, 5 Eq. 375; *Palmer* v. *Cruttwell*, 8 Jur. N. S. 479.

So, too, where the direction is that the children *or* grandchildren are to take an original share between them. *Powell* v. *Powell*, 28 L. T. 730.

But a mere direction that the share of any of the original

takers dying is to go to his issue would, it seems, not have the effect of preventing remoter issue from taking that share with issue less remote *per capita* between them. *Birdsall* v. *York*, 5 Jur. N. S. 1237; *Southall* v. *Blake*, 2 W. R. 146; *Hickson* v. *Hoyland*, 4 D. F. & J. 564. *Robinson* v. *Sykes*, 23 B. 10, which is *contra*, was on a marriage settlement.

Effect of the words *per stirpes*.

If the gift is to several and their issues *per stirpes*, the distribution *per stirpes* will be carried through throughout, so that no children or remoter issue can take in competition with the parents. *Dick* v. *Lacy*, 8 B. 214; *Gibson* v. *Fisher*, 5 Eq. 51.

Gift to parents for life and then to their children.

When the gift is to several for life and then to their children, the cases are not easily reconcilable.

1. It seems clear that a gift to A and B, as tenants in common for their lives, and then at their death, or at or after their deaths, or at the death of A and B, to their children, goes, upon the death of each tenant for life, to his children. *Flinn* v. *Jenkins*, 1 Coll. 365; *Tanière* v. *Pearkes*, 2 S. & St. 383; *Willes* v. *Douglas*, 10 B. 47; *Arrow* v. *Mellish*, 1 De G. & S. 353; *Waldron* v. *Baulter*, 22 B. 284; *Turner* v. *Whitaker*, 23 B. 196; *Savil* v. *Savil*, 23 B. 87; *In re Hutchinson's Trusts*, 21 Ch. D. 811; see, too, *Doe d. Patrick* v. *Royle*, 13 Q. B. 100; *Brown* v. *Jarris*, 2 D. F. & J. 168; *Re Babbins*: *Gill* v. *Worrall*, 79 L. T. 313.

If the gift is after the deaths of the tenants for life to their children and grandchildren, the families take *per stirpes*, but the children and grandchildren take *per capita inter se*. *Barnaby* v. *Tassell*, 11 Eq. 363.

But if the testator goes on to explain what he means by "their children," by adding "that is to say, the children of A and B," they take *per capita*. *Abrey* v. *Newman*, 16 B. 431.

Gift to A and B for life, then to children of A and B.

2. If the gift be to A and B for their lives, and at their death, not to their children, but to the children of A and B, there seems less reason for contending that the children are to take *per stirpes*.

However, in *Wells* v. *Wells*, 20 Eq. 342, the construction *per stirpes* was adopted. See *Milnes* v. *Aked*, 6 W. R. 430;

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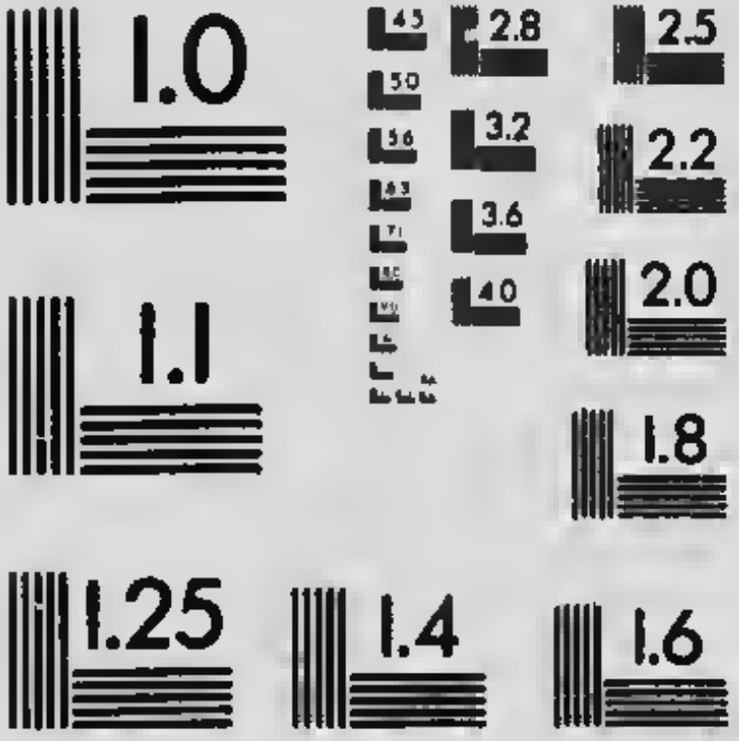

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Sutcliffe v. *Howard*, 38 L. J. Ch. 472; *Re Nott's Trusts*, W. R. 569.

In such a case a superadded direction that, "if there is b one child, the whole is to go to such only child," would affo an argument that the distribution was meant to be *per capit Pearce* v. *Edmeades*, 3 Y. & C. Ex. 246; 2 W. R. 672; *Swab* v. *Goldie*, 1 Ch. D. 380; see, too, *Peacock* v. *Stockford*, D. M. & G. 129.

Gift to children after death of surviving tenant for life.

3. If the gift to the children is not till after the death of t survivor of the tenants for life, it would seem the distributi would be *per capita*; at any rate if the gift is to the childr of A and B, and not merely to "their children." *Malco* v. *Marlin*, 3 B. C. C. 50; *Pearce* v. *Edmeades*, 3 Y. & C. E 246; *Stevenson* v. *Gullan*, 18 B. 590; *Nockolds* v. *Loc* 3 K. & J. 6; *Swabey* v. *Goldie*, 1 Ch. D. 380; see *Alt Gregory*, 8 D. M. & G. 221. Perhaps *Smith* v. *Streatfie* 1 Mer. 353, comes under this head.

The fact that upon the death of each life tenant his share income is given to his children does not import a distributi of the capital *per stirpes*. *In re Stone*; *Baker* v. *Stone*, (189 2 Ch. 196.

But the children will take *per stirpes* if there is any referen to classes of children, such as a gift to the children of each the tenants for life. *In re Campbell's Trusts*, 31 Ch. D. 68 33 Ch. D. 98.

Substitutional gifts.

If the gift is substitutional, as to several or their childre the children take *per stirpes*. *Congreve* v. *Palmer*, 16 B. 43 *Timins* v. *Stackhouse*, 27 B. 434; *Gowling* v. *Thompson*, L. T. 242; 11 Eq. 366, n.; *In re Sibley's Trusts*, 5 Ch. 494; *In re Battersby's Trusts*, (1896) 1 Ir. 600.

A simple gift, however, to several or their issue, though would import a distribution *per stirpes* among the famili would not prevent all the issue of each family from taki *per capita inter se*. *Gowling* v. *Thompson*, 19 L. T. 242; *In Sibley's Trusts*, 5 Ch. D. 494.

How the *stirpes* ascertained.

Under a gift to cousins then living and the issue of th then dead, according to the stocks, where the cousins w referred to as the children of the testator's late aunts a

uncles, it was held that the cousins and not the aunts and uncles were to be taken as the stocks. *In re Wilson; Parker v. Winder*, 24 Ch. D. 664.

Where the gift is to the descendants of A. and B. *per stirpes*, Lord Westbury held that there should be as many shares as there are families in existence at the testator's death, each family taking a share. *Robinson* v. *Shepherd*, 10 Jur. N. S. 53; 12 W. R. 234; 4 D. J. & S. 129.

On the other hand, Lord Romilly held that A. and B. were the original *stirpes*, and that this mode of division was to be carried out throughout. *Gibson* v. *Fisher*, 5 Eq. 51.

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Children.

The word "children" is *primâ facie* descriptive of immediate offspring only, and does not include grandchildren. *Paradis* v. *Campbell*, 6 O.R. 632; *Rogers* v. *Carmichael*, 21 O.R. 658; *McPhail* v. *McIntosh*, 14 O.R. 312; *Gourley* v. *Gilbert*, 12 N.B.R. at p. 85. Confined to first generation.

"Child or other issue" in the Wills Act means legitimate child. And therefore a legacy to an illegitimate child, who dies in the testator's lifetime leaving issue who survive the testator, lapses. *Hargraft* v. *Keegan*, 10 O.R. 272. Legitimate children.

A legacy to the testator's "grandson Rufus" held to go to a legitimate grandson of that name, and evidence of intention to give it to an illegitimate grandson of the same name was excluded. *Doe dem. McEacheran* v. *Taylor*, 6 N.B.R. 525.

The words "child" and "children" are *primâ facie* words of purchase in a will, but the context may shew them to be words of limitation. *Gourley* v. *Gilbert*, 12 N.B.R. at p. 85. Word of purchase.

"Children if any at her death," with a devise over if there are no children, are not words of limitation. *Grant* v. *Fuller*, 33 S.C.R. 34; *Chandler* v. *Gibson*, 2 O.L.R. 442.

"Child or children" treated as *nomen collectivum*, and creating an estate tail. *Stobbart* v. *Guardhouse*, 7 O.R. 239. *Nomen collectivum.*

Child *en ventre.*

A child *en ventre* at testator's death is within the meaning of a residuary disposition in favour of children, although the children are named in the will. *Aldwell* v. *Aldwell*, 21 Gr. 627.

Distribution per Capita and per Stirpes.

Per capita.

A devise over on trust for sale and to be distributed amongst grandchildren requires a distribution *per capita*. *Wight* v. *Church*, 15 Gr. 413.

Where there is a gift to A. and B. and their children (there being living children), or to A. and B., and the heirs of deceased persons, or to the heirs of several persons none of whom are married to each other, the distribntion is to be made *per capita*.

Thus, a gift to the testator's two sisters and to their children, all to share alike if living, constitutes the two sisters and the children tenants in common, sharing *per capita*. *Bradley* v. *Wilson*, 13 Gr. 642.

After a direction for conversion of his whole estate, the testator bequeathed the residue after payment of debts, etc. to be 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." Held, that all the "heirs" took in their own right and not by representation, and that distribution was to be made *per capita*. *Wood* v. *Armour*, 12 O.R. 146.

After a devise to a tenant for life, the testator devised land to the heirs of C. and E., "to be equally divided between them." C. died after the testator leaving five children. The life tenant then died, leaving E. surviving, who had one child living. It was held that the children of C. and E. living at the death of the life tenant took *per capita*. *Sunter* v. *Johnson*, 22 Gr. 249.

On a bequest of the proceeds of converted property to four daughters, three sons and their children, two of the latter being born after the will was made, it was held that they all took *per capita*. *Dryden* v. *Woods*, 29 Gr. 430.

A bequest of the proceeds of property, directed to be converted after the death of a life tenant thereof, to be divided equally between those of the testator's sons and daughters who should then be living, and the children of those who should have died, requires a distribution *per capita*. *Houghton* v. *Bell*, 23 S.C.R. 498; *Re Bossi*, 5 B.C.R. 446.

A bequest after the death of a life tenant of the whole estate to be equally divided between brothers of the testator, and a deceased sister's children or their heirs, requires a distribution *per capita* amongst all the legatees. *Re Gardner*, 3 O.L.R. 343.

And on a devise to two daughters as tenants in common for life, with a direction that, on the death of either one, her children should take "their proportion" of the rents during the life of the surviving daughter, and on the death of both "the land hereinbefore devised to be sold and the price equally divided between the children" of the two daughters, it was held that the children took *per capita*, notwithstanding the stirpital disposition of the rents, and the use of the word between. *Re Ianson*, 14 O.L.R. 82.

And a bequest to "the children of J. C. and of my daughter A. J. B. share and share alike" and an additional one "to be divided share and share alike between the family of my son J. C. and the family of my daughter A. J. B." are to be distributed *per capita*. *Anderson* v. *Bell*, 8 A.R. 531.

A bequest of a blended fund "to my legal heirs to be equally divided amongst them," where the testator leaves heirs in unequal degrees of relationship to him, requires a distribution *per capita*. *Chadbourne* v. *Chadbourne*, 9 P.R. 317.

Per stirpes.

But a bequest of a similar fund, under similar circumstances, to the testator'a "own right heirs" is to be divided *per stirpes*. The distinction seems to lie in the direction for equal division in the former case. *Coatsworth* v. *Carson*, 24 O.R. 185.

CHAPTER XXIX.

RULES FOR ASCERTAINING CLASS.

I.—As Regards Personalty.

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Rule as to fund of personalty.

For the purpose of ascertaining the class to take under a gift of a fund the Court has adopted certain rules of convenience, the principle being that the class is to be ascertained as soon as possible in order that the beneficiaries may know what their shares are and that the executor may distribute the fund.

These rules apply not only to wills but also to voluntary settlements, and probably also to settlements for value. *In re Knapp's Settlement; Knapp* v. *Vassall*, (1895) 1 Ch. 91.

The rules are as follows:—

Direct gifts.

1. Under a direct gift to a class without any provisions as to time of vesting, if any members of the class are born at the testator's death they may take to the exclusion of after-born members. *Hill* v. *Chapman*, 1 Ves. Jun. 405; 3 B. C. C. 391; *Viner* v. *Francis*, 2 Cox, 190; *Davidson* v. *Dallas*, 14 Ves. 576.

Effect of gift over.

The class will not be enlarged by a gift over on death of any or all of the class under twenty-one, nor by a gift over in default of children. *Davidson* v. *Dallas*, 14 Ves. 576; *Scott* v. *Harwood*, 5 Mad. 332; *Berkeley* v. *Swinburne*, 16 Sim. 275; *Andrews* v. *Partington*, 3 B. C. C. 401; see *Hutcheson* v. *Jones*, 2 Mad. 124.

No children at death.

If there are no children at the testator's death all the children whenever born are entitled. *Weld* v. *Bradbury*, 2 Vern. 705; *Shepherd* v. *Ingram*, Amb. 448; *Hutcheson* v. *Jones*, 2 Mad. 124; *Harris* v. *Lloyd*, T. & R. 310.

Future gifts.

2. In the case of a gift in remainder or after a trust to

accumulato, all children born at the death of the testator and coming into *esse* before the death of the tenant for life or the end of the period of accumulation, take a share to the exclusion of those born afterwards. *Middleton* v. *Messenger*, 5 Ves. 136; *Odell* v. *Crone*, 3 Dow. 61; *Holland* v. *Wood*, 11 Eq. 91; *Barnaby* v. *Tassell*, 11 Eq. 363; *Watson* v. *Young*, 28 Ch. D. 436; *In re Stephens; Kilby* v. *Betts*, (1904) 1 Ch. 322.

If the life interest is determinable on bankruptcy or some other event, the class is fixed at the time of determination, unless there is something in the context to enlarge the class, such as postponement of payment till the death of the tenant for life or a declaration that the fund is to go as if the tenant for life were dead. *Re Smith*, 2 J. & H. 594; *Aylwin's Trusts*, 16 Eq. 585; *Brandon* v. *Aston*, 2 Y. & C. C. 24, 30; *In re Bedson's Trusts*, 25 Ch. D. 458; 28 Ch. D. 523.

If no children are born before the death of the tenant for life all afterborn children are admitted. *Chapman* v. *Blissett*, Ca. t. Talb. 145; *Wyndham* v. *Wyndham*, 3 B. C. C. 58.

But this rule does not apply, if there is a clear intention, that distribution is to be made once for all when the fund falls into possession. *Godfrey* v. *Davis*, 6 Ves. 43; explained in *Conduitt* v. *Soane*, 4 Jur. N. S. 502.

Imperfect limitations.

3. In cases where the limitations are imperfect, for instance, where there is a gift to A during life or widowhood, with a gift over on her death, and A marries again, the class to take under the gift over will be ascertained when the prior limitation is out of the way—in the case put, on A's remarriage, although the interest of members may be expressed to be contingent upon surviving the tenant for life. *Bainbridge* v. *Cream*, 16 B. 25; *Stanford* v. *Stanford*, 34 Ch. D. 362; *In re Tucker; Bouchier* v. *Gordon*, 56 L. J. Ch. 449; 56 L. T. 118; 35 W. R. 344; *In re Dear; Helby* v. *Dear*, 58 L. J. Ch. 659; 61 L. T. 432; 38 W. R. 31.

Gift of reversionary property.

4. On the same principle, if the interest bequeathed is reversionary, the class remains open till the interest falls into possession. *Walker* v. *Shore*, 15 Ves. 122; *Harvey* v. *Stracey*, 1 Dr. 122.

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But this does not apply where a residuo is given and some portion of tho property which falls into it is reversionary, unless there are provisions indicating an intention to treat the reversionary property separately. *Hill* v. *Chapman*, 1 Ves. Jun. 405; 3 B. C. C. 391; *Hagger* v. *Payne*, 23 B. 474; *Coventry* v. *Coventry*, 2 Dr. & Sm. 470; *King* v. *Cullen*, 2 De G. & S. 252.

Gift to be paid at twenty-one.

5. If there is a direct gift "to be paid at twenty-one, or to such as attain twenty-one":

a. If any member of the class has attained twenty-one at the testator's death the class is fixed at the death. *Hagger* v. *Payne*, 23 B. 474.

b. If none attain twenty-one in the testator's lifetime, all born at the testator's death and coming into existence before the eldest attains twenty-one are admitted. *Andrews* v. *Partington*, 3 B. C. C. 401; *Hoste* v. *Pratt*, 3 Ves. 729; *Balm* v. *Balm*, 3 Sim. 492; *Blease* v. *Burgh*, 2 B. 221; *Oppenheim* v. *Henry*, 10 Ha. 441; *Gillman* v. *Daunt*, 3 K. & J. 48; *Locke* v. *Lamb*, 4 Eq. 372; *Gimblett* v. *Purton*, 12 Eq. 427; *In re Knapp's Settlement*; *Knapp* v. *Vassall*, (1895) 1 Ch. 91.

As a rule each child attaining twenty-one is entitled to have his share paid to him, but this is not so if the whole income is given for maintenance and there are children who require maintenance. *Berry* v. *Briant*, 2 Dr. & Sm. 1.

c. It seems doubtful whether, if there are no children at the testator's death, all would be admitted whether born before or after the eldest attains twenty-one. *Armitage* v. *Williams*, 2 B. 346, better reported in 7 W. R. 650, which seems an authority for the affirmative, was probably decided on the authority of *Maincaring* v. *Beevor*, *post*; see *Harris* v. *Lloyd*, T. & R. 310.

Exceptions to the general rule.

There are the following exceptions to the rule: -

Kevern v. *Williams*; *Elliott* v. *Elliott*.

a. Where after a life interest there was a gift to the grand children of the testator's brother followed by a direction that it was to be received by them when they should severally attain twenty-five years of age, it was held that only grand children living at the death of the tenant for life were entitled. The gift would have been void for perpetuity if, according

the ordinary rule, the class had been ascertained when the eldest grandchild attained twenty-five. *Kercen* v. *Williams*, 5 Sim. 171; see, too, *Elliott* v. *Elliott*, 12 Sim. 276. No reasons are given for the decision in *Kercen* v. *Williams*. Both cases are unsatisfactory. *Elliott* v. *Elliott* has, however, been followed in *In re Coppard*; *Howlett* v. *Hodson*, 35 Ch. D. 350; but see *In re Wenmoth's Estate*; *Wenmoth* v. *Wenmoth*, 37 Ch. D. 266, p. 270; *In re Mervin*; *Mervin* v. *Crossman*, (1891) 3 Ch. 197.

Maintenance out of vested and presumptive shares.

b. Maintenance out of the shares or presumptive shares of children will not extend the class. *Gimblett* v. *Purton*, 12 Eq. 427.

But if maintenance and advancement are continued beyond the time when the eldest child attains twenty-one, if, for instance, advancement is directed out of vested and presumptive shares, all children will be let in. *Iredell* v. *Iredell*, 25 B. 485; *Bateman* v. *Gray*, 6 Eq. 215; *In re Courtenay*; *Pearce* v. *Foxcell*, 74 L. J. Ch. 654.

In *Defflis* v. *Goldschmidt*, 19 Ves. 566; 1 Mer. 417, where expressions were used showing that the parent could not die leaving a child who would not be entitled to maintenance, all children were included. See *Evans* v. *Harris*, 5 B. 45.

Distribution when the youngest attains twenty-one.

c. If distribution is to be made when all attain twenty-one, or when the youngest attains twenty-one, all children will be admitted. *Hughes* v. *Hughes*, 3 B. C. C. 434; 14 Ves. 256; *Maimearing* v. *Beevor*, 8 Ha. 44; *Pilkington* v. *Pilkington*, 29 L. R. Ir. 370; and perhaps *Armitage* v. *Williams*, 27 B. 346; 7 W. R. 650.

On the other hand, the class would again be restricted if the distribution is to be made when the youngest for the time being attains twenty-one. *Gooch* v. *Gooch*, 14 B. 565; 3 D. M. & G. 366.

Gift of fixed sum to each member of a class.

d. When the gift is of a particular sum to each member of the class, the class is fixed at the death of the testator, whether possession is postponed to twenty-one or not. *Ringrose* v. *Bramham*, 2 Cox, 384; *Storrs* v. *Benbow*, 2 M. & K. 46; 3 D. M. & G. 390; *Butler* v. *Lowe*, 10 Sim. 317.

And if there are no children then in existence, the gift fails. *Mann* v. *Thompson*, Kay, 638; *Rogers* v. *Mutch*, 10 Ch. D. 25.

Gift to children who attain twenty-one after life interest.

6. If the gift is to A for life, then to children who attain twenty-one, the class will be fixed as regards exclusion at the death of A, or when the eldest attains twenty-one, whichever is last. *Clarke* v. *Clarke*, 8 Sim. 59; *Robley* v. *Ridings*, 11 Jur. 813; *Beckton* v. *Barton*, 27 B. 99; 5 Jur. N. S. 349; *In re Emmet's Estate*; *Emmet* v. *Emmet*, 13 Ch. D. 484; *In re Knapp's Settlement*, (1895) 1 Ch. 91.

II.—As Regards Gifts of Income.

Gifts of income.

Even as regards personalty the rules already stated do not apply when the reason for their application does not exist. Thus, under a gift of income among a class of children during their lives to be paid on their attaining twenty-one years, the class is not ascertained when the first attains twenty-one, but a child born after that time will be admitted. *In re Wenmoth's Estate*; *Wenmoth* v. *Wenmoth*, 37 Ch. D. 266; discussed in *In re Stephens*; *Kilby* v. *Betts*, (1904) 1 Ch. 322; see *In re Powell*; *Crosland* v. *Holliday*, (1898) 1 Ch. 227.

III.—As Regards Real Estate.

Rules as to realty.

The principle, upon which the rules applicable to personal for ascertaining the class of takers rest, namely, an early distribution of the estate, does not apply to real estate.

Immediate devise.

1. As to the effect of a direct devise to the children of A the cases are not satisfactory.

There is authority for saying that if there are children living at the testator's death these children alone take, to the exclusion of afterborn children.

This position may be supported either on the ground that, a matter of construction, a devise to the children of A means children living at the testator's death, or on the ground that such a devise is subject to the old rule that "no limitation which is capable of taking effect at the common law shall be construed to take effect as an executory limitation" (Challis, Real Property, p. 96).

If, therefore, there are children living at the testator's de

the limitation can take effect at common law, and these children only take.

If the former ground is the correct one, afterborn children cannot take even if there are no children living at the testator's death. If the latter is correct, then, if there are no children living at the testator's death, the devise can only take effect as an executory devise, and all afterborn children will come in.

The former view is supported by *Singleton* v. *Gilbert*, 1 Cox, 68; *S. C.* sub nom. *Singleton* v. *Singleton*, 1 B. C. C. 544, n.; *Scott* v. *Harwood*, 5 Mad. 332; *In re Powell*; *Crosland* v. *Halliday*, (1898) 1 Ch. 277, the latter by *Wild's Case*, 6 Rep. 16b; *Shepherd* v. *Ingram*, Amb. 448; the observations of Downes, C. J., in *Crone* v. *Odell*, 1 Ba. & Be. 449, p. 448. See, too, the arguments in *Mogg* v. *Mogg*, 1 Mer. 654, 676, 682; *Weld* v. *Bradbury*, 2 Vern. 705; Fearne, Cont. Rem. 532; Shepherd's Touchstone by Preston, 436. In *Cook* v. *Cook*, 2 Vern. 545, a daughter living at the testator's death and a son born after his death were admitted to take. But the case is very shortly reported. See also *Allgood* v. *Blake*, L. R. 8 Ex. 339, 353.

The objection to the former view is that it puts a different meaning upon the same words as applied to real and personal estate.

In accordance with the latter view it has been held that if there are no children living at the testator's death all children born after his death will be admitted. In such a case the devise must take effect as an executory devise. *Shepherd* v. *Ingram*, Amb. 448 (a residue of real and personal estate).

Children born and to be born.

If the devise is to children begotten and to be begotten, the devise must also be construed as executory, so as to let in all the children, whether born before or after the testator's death. *Mogg* v. *Mogg*, 1 Mer. 654; *Eddowes* v. *Eddowes*, 30 B. 603; see *Gooch* v. *Gooch*, 14 B. 565; 3 D. M. & G. 366; *O'Hea* v. *Slattery*, (1895) 1 Ir. 7.

Devise of equitable estates.

If the devise is to trustees upon trust for the children of A, in such a way as to give the children equitable estates, it would seem on principle that unless, upon the proper construction of the will, children means only children living at the testator's

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death, all children ought to be admitted, but there appears to be no authority in point.

Contingent remainder.

2. A devise of the legal estate to A for life with remainder to a class of children is governed, in the case of wills not executed revived or republished after the 2nd of August, 1877 (40 & 41 Vict. c. 33), by the rules of law applicable to contingent remainders; that is to say, only those children can take whose interests become vested before the determination of the life interest. If there are none at that time whose interests have become vested the devise in remainder fails. *Rhodes* v. *Whitehead*, 2 Dr. & Sm. 532; *Price* v. *Hall*, 5 Eq. 399; *Percival* v. *Percival*, 9 Eq. 386; *Brackenbury* v. *Gibbons*, 2 Ch. D. 417; *Cunliffe* v. *Brancker*, 3 Ch. D. 393.

An ordinary devise to a tenant for life with remainder to his children who attain twenty-one comes within this rule and goes to those children only who have attained twenty-one at the death of the tenant for life.

Contingent Remainders Act.

By the Contingent Remainders Act, 1877 (40 & 41 Vict. c. 33), it is enacted:—

"Every contingent remainder, created by any instrument executed after the passing of this Act (2nd August, 1877), or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure which would have been valid as a springing, shifting use or executory devise or other limitation, had it not a sufficient estate to support it as a contingent remainder, shall in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other limitation."

A doubt has been suggested whether the Act applies where the remainder has become vested in one member of a class, in such a case it cannot be said that the particular estate is determined "before the contingent remainder vests" (Williams on Seisin, pp. 205—208).

There is at present no authority as to the effect of the Act upon the question of ascertaining the class to take.

3. A devise after a life interest to a class, if the devise to the class is to be construed as an executory devise, includes all members of the class who satisfy the description whenever they may be born. *Blackman* v. *Fysh*, (1892) 3 Ch. 209.

Who are included under executory devise.

IV.—Class to take in Default of Appointment.

When there is a gift to children, as A may appoint, with no gift in default of appointment, and no appointment is made, similar rules apply as to the period at which the class is to be ascertained.

At what time the class to take in default of appointment is to be fixed.

1. A direct gift to children, as A may appoint, goes apparently to all the children living at the death of the testator, to the exclusion of those born afterwards, though before the death of A. *Coleman* v. *Seymour*, 1 Ves. Sen. 209.

2. A gift to A for life, with remainder to his children as he shall appoint, goes to all the children born in the testator's lifetime and coming into being before A's death. *Crone* v. *Odell*, 1 Ba. & Be. 449; 3 Dow, 68; *Norman* v. *Norman*, Ben. 430; *Pattison* v. *Pattison*, 19 B. 638; *Lambert* v. *Thwaites*, L. R. 2 Eq. 151.

3. If the only gift is through the power, so that the children take by implication only, in default of appointment, the rules are the same.

Case when the only gift is through the power.

Thus, where there is a power to A to dispose of certain property among children, the property, in default of appointment, goes to those born at the testator's death, to the exclusion of those born subsequently. *Longmore* v. *Broom*, 7 Ves. 124.

And where the gift is to A for life, and then to dispose of the capital among his children, all children born before A's death take a share. *Grieveson* v. *Kirsopp*, 2 Kee. 653.

4. If the donee of the power and the tenant for life are different persons, and the donee dies before the tenant for life, the class is ascertained at the death of the latter. *Re White's Trusts*, Johns, 656.

And, apparently, if there is anything to show that personal enjoyment by the beneficiaries was intended, those dying before

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the tenant for life would be excluded. *Re White's Trusts*, *supra*; *Carthew* v. *Enraght*, 20 W. R. 743; *In re Phene's Trusts*, 5 Eq. 346.

At what time the class would be ascertained if the donee of the power survives the tenant for life is uncertain; though by analogy to the case of a direct gift it seems it would be ascertained at the death of the tenant for life, and not of the donee of the power.

Power to appoint by deed or will.

5. When there is a direct vested gift to children as A shall appoint, the fact that the power is to appoint by deed or will, or by will only, will not affect the class to take in default of appointment. *Casterton* v. *Sutherland*, 9 Ves. 445; *Falkner* v. *Lord Wynford*, 15 L. J. Ch. 8; *Lambert* v. *Thwaites*, L. R. 2 Eq. 151, see *Winn* v. *Fenwick*, 11 B. 438, there discussed.

6. If the only gift is through the power, and a gift can be implied in favour of the objects of the power, only those will take by implication in default of appointment who could have taken under the power; and, therefore, if the power is testamentary, only those who survive the donee can take in default of appointment. *Cruwys* v. *Colman*, 9 Ves. 319; *Walsh* v. *Wallinger*, 2 R. & M. 78; *Kennedy* v. *Kingston*, 2 J. & W. 431; *Reid* v. *Reid*, 25 B. 469; *Freeland* v. *Pearson*, 3 Eq. 658; *In re Susanni's Trusts*, 47 L. J. Ch. 65; *Sinnot* v. *Walsh*, 5 L. R. Ir. 27; *Moore* v. *Effolliot*, 19 L. R. Ir. 499; see *Brown* v. *Pocock*, 6 Sim. 257, where it does not appear from the report whether the wife survived her husband or not; see L. R. 2 Eq. 157.

And if at the death of A a power is given to B to divide the property among the testator's children, and all the children die in A's lifetime, before the power became exercisable, no gift to the children can be implied. *Halfhead* v. *Shepherd*, 2 L. J. Q. B. 249.

7. On the other hand, if the gift is to such children of A as he shall by any writing appoint, all his children, whether or not they survive prior tenants for life or their own parent, are entitled to share. *Wilson* v. *Duguid*, 24 Ch. D. 244.

V.—Effect of Words of Futurity.

How far words of futurity affect the ordinary rules for fixing the class to take under a gift to children.

Mere words of futurity as, for instance, a gift to the children that may be born, will not extend the class. *Storrs* v. *Benbow*, 2 M. & K. 46; 3 D. M. & G. 390; *Townsend* v. *Early*, 3 D. F. & J. 1: see *Gibbons* v. *Gibbons*, 6 App. C. 471.

Where the words are "born or to be born," the rules appear to be:—

Children born or to be born.

1. When the gift is after a life estate, such words will not extend the class. *Sprackling* v. *Ranier*, 1 Dick. 344; *Whitbread* v. *St. John*, 10 Ves. 152; *Parsons* v. *Justice*, 34 B. 598.

In *Scott* v. *Earl of Scarborough*, 1 B. 154, the class was extended on the ground that the words were "now born or who shall hereafter be born during the lifetime of their respective parents." But these words are only the expression "all the children" writ large. There were, however, expressions in the will sufficient to support the decision.

On the other hand, in *Parsons* v. *Justice*, 34 B. 598, no effect was given to a direction that no child should be excluded in consequence of any other child attaining a vested interest.

2. The rule is the same where the gift is to children now born or who may be born hereafter who shall attain twenty-one. *Iredell* v. *Iredell*, 25 B. 485; *Bateman* v. *Gray*, 29 B. 447; 6 Eq. 215.

3. In the case of a direct gift of personalty to children, the words "now born or to be born hereafter" would probably be held to be intended to refer to children born between the date of the will and the death. *Dias* v. *De Livera*, 5 App. C. 123.

For the meaning of the words "born in due time" see *In re Wass; Marshall* v. *Mason*, W. N. 1882, 158.

4. If the gift is of a legacy to each of the children begotten or to be begotten, the class will not be extended beyond the testator's death, as not merely the distribution of what the children are to take, but of the whole estate of the testator would be indefinitely postponed. *Butler* v. *Lowe*, 10 Sim. 317.

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Vested remainders.

A distinction must be observed in the cases between devises to a class after a life estate, which constitute vested remainders, and devises or gifts to a class purely.

Thus, a devise to E. during M.'s life, and after that to the children of M., gives a vested estate to the children of M. in existence at the testator's death, subject to be partially divested in favour of those born during the life of M. On the death of any one of the children during the life of E. they transmit their interest to their representatives. *Latta* v. *Lowry*, 11 O.R. 517; see also, *Town* v. *Borden*, 1 O.R. 327; *Re Sharon & Stuart*, 12 O.L.R. 605; *Caie* v. *Moulton*, 40 N.S.R. 308; *Ferguson* v. *Stewart*, 22 Gr. 364; *Hellem* v. *Severs*, 24 Gr. 320.

But where the devise is to those living at the death of the life tenant, those who die during the life of the tenant for life take nothing. *Baird* v. *Baird*, 26 Gr. 367. Explained in *Town* v. *Borden, supra; McDonald* v. *Jones*, 40 N.S.R. 232.

Under a gift to the wife and children of A., at A.'s death a second wife and all children coming into existence during A.'s life take. *Starr* v. *Merkel*, 40 N.S.R. 23.

Remainder to survivors.

A devise to A. and B. for life, and after the decease of A. and B. to their children "or the survivors of them," means those surviving at the period of distribution, viz., the death of the tenants for life. Therefore, a child dying after the testator and before the death of the tenants for life is excluded. *Keating* v. *Cassels*, 24 U.C.R. 314.

Devise to class simply.

Where there is a devise to a class simply, as to the testator's "children at Barnstable" only those living at the testator's death take, the representatives of one dying in the testator's lifetime after the will was made being excluded. *Clark*, 8 O.L.R. 599.

Where one of class named.

A devise to children as a class is not affected by the fact that one is mentioned by name, and is given a double portion, and such a one dying in the lifetime of the testator leaving issue is, with the issue, excluded. *Re Moir*, 14 O.L. 541.

The section of "The Wills Act," which provides that a gift to a child or other issue of the testator shall not lapse, if the child dies in the testator's lifetime leaving issue who survive him, does not apply to gifts to a class. *Re Clark*, 8 O.L.R. 599; *Re Moir*, 14 O.L.R. 541. Effect of Wills Act as to lapse.

Where a gift is made to a class, to be divided equally amongst them as they respectively attain twenty-one, the members of the class entitled to share are to be ascertained when the first of the class attains twenty-one. *Re Archer*, 7 O.L.R. 491. To class as they attain twenty-one.

Where there is a devise to a class at twenty-one, with a devise over in case of death under twenty-one, with a provision for the application of the income for maintenance before the period of distribution, the *corpus* cannot be resorted to for maintenance (the income being insufficient), as by possibility the devise over might take effect. *McIntosh* v. *Elliott*, 1 Gr. 440. When devise over, maintenance.

A devise to named persons, though otherwise they would constitute a class, as to "my five sons above mentioned" is not a devise to a class. *McIntosh* v. *Ontario Bank*, 19 Gr. 155. Persons named.

A direction to executors to divide a residue amongst the legatees before named and his executors, or those surviving them in equal shares or proportions, gives the executors one share only, they being treated as a class. *Boys' Home* v. *Lewis*, 4 O.R. 18. Executors as a class.

CHAPTER XXX.

MEANING OF WORDS DESCRIPTIVE OF RELATIONSHIP.

I.—NEPHEWS AND NIECES.

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Nephews and nieces mean *primâ facie* children of brothers and sisters.

NEPHEWS and nieces mean *primâ facie* the children of bro-thers and sisters, including those of the half-blood. *Falkner* v. *Butler*, Amb. 514; *Grieves* v. *Rawley*, 10 Ha. 63; *Cotton* v *Scarancke*, 1 Mad. 45; *In re Cozens; Miles* v. *Wilson*, (1903) 1 Ch. 138: see *Brigg* v. *Brigg*, 33 W. R. 454; *In re Reed*, 5 L. J. Ch. 790; 36 W. R. 682.

The meaning of the word will not be enlarged, where th gift is to each of the present nieces of A., who had only on niece of the first degree living at the date of the will. *Crook* *Whitley*, 7 D. M. & G. 490.

The fact that the gift is to "nephews, descendants of m brothers," will not enlarge the class. *Williamson* v. *Moor* 10 W. R. 536.

The fact that a great-niece or a wife's niece has been pr viously called a niece will not without more enlarge the mea ing of the word. *Shelley* v. *Bryer*, Jac. 207; *Thompson* *Robinson*, 27 B. 486; *Smith* v. *Liddiard*, 3 K. & J. 252; *We* v. *Wells*, 18 Eq. 504; *Merrill* v. *Morton*, 17 Ch. D. 382; *In Cozens; Miles* v. *Wilson*, (1903) 1 Ch. 138: see *Seale-Hay* v. *Jodrell*, (1891) A. C. 304.

Nor will a gift to my great nephew, and such *other* of nephews and nieces as shall be living at my death. *Blowe* *Trusts*, 11 Eq. 97; 6 Ch. 351.

In what cases a wife's nephew may take.

But if the testator has at the date of his will and death nephews and nieces of his own, and there are nephews nieces of his wife, they will take, thoug! he may have brothers and sisters living at the date of his will. *Hogg*

Cook, 32 B. 641; *Sherratt* v. *Mountford*, 15 Eq. 305; 8 Ch. 928; see *Adney* v. *Greatrex*, 17 W. R. 637; *In re Fish*; *Ingham* v. *Rayner*, (1894) 2 Ch. 83.

Tho words "nephews and nieces on both sides" includo a wife's nephew. *Frogley* v. *Phillips*, 30 B. 168; 3 D. F. & J. 466.

If a great-nephew is referrod to as taking a share of a gift to nephews and nieces, the words will he held to include grand-nephows and grand-nieces. *Weeds* v. *Bristoe*, L. R. 2 Eq. 333.

And if the testator expressly defines a niece as "my niece, daughter of my nephew," nephows and nieces will include grand-nephewa and grand-nieces. *James* v. *Smith*, 14 Sim. 214.

A bequest to "male nephews" has been held to include only sons of brothers. *Lucas* v. *Cuddy*, I. R. 10 Eq. 514.

II.—Cousins.

Cousins.

The word cousins means primarily children of uncles and aunts. *Sanderson* v. *Bayley*, 4 M. & Cr. 56; *Caldecott* v. *Harrison*, 9 Sim. 457; *Stoddart* v. *Nelson*, 6 D. M. & G. 68; *Stevenson* v. *Abingdon*, 31 B. 305; *Burbey* v. *Burbey*, 2 Jur. N. S. 96.

Second cousins.

Second cousins are persons who have the same great-grand-father or great-grandmother, and will not therefore include first cousins once removed. *Corporation of Bridgnorth* v. *Collins*, 15 Sim. 541; *In re Parker*; *Bentham* v. *Wilson*, 50 L. J. Ch. 639; 15 Ch. D. 528; 17 Ch. D. 262.

But if there are no second cousins the term will include all within the same degreo of relationship, unless there is an intention to exclude first cousins twice removed, for instance, by a substitutionary gift to the children of second cousins who had died. *Slade* v. *Fooks*, 9 Sim. 386; *In re Bonner*; *Tucker* v. *Good*, 19 Ch. D. 201.

First and second cousins.

In a gift to "first and second cousins," the words will have their strict meaning, unless there is something to show that the testator is not using them in their proper sense. *In re Parker*; *Bentham* v. *Wilson*, 15 Ch. D. 528, where *Mayott* v.

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Mayott, 2 B. C. C. 125, is explained, and *Charge* v. *Goodyer*, Russ. 140; *Silcox* v. *Bell*, 1 S. & St. 301, are disapproved: se *Wilks* v. *Bannister*, 30 Ch. D. 512.

"Cousin" may include the wife of a cousin. *In re Taylor Cloak* v. *Hammond*, 34 Ch. D. 255.

III.—Grandchildren.

Grandchildren.

Similarly, grandchildren, unless explained by the contex will not include great-grandchildren. *Oxford* v. *Churchi* 3 V. & B. 59.

But if the gift is to grandchildren herein named, a grea grandchild who has previously been called grandchild may tak *Hussey* v. *Berkeley*, 2 Ed. 194.

IV.—Issue.

Issue.

A bequest to issue as purchasers goes to all issue, childre grandchildren, &c., as joint tenants, and all come in who a in existence at the time of vesting in possession. *Davenport Hanbury*, 3 Ves. 257; *Freeman* v. *Parsley*, 3 Ves. 421; *Maddo* v. *Legg*, 25 B. 531; *Weldon* v. *Hoyland*, 4 D. F. & J. 56 *Hobgen* v. *Neale*, 11 Eq. 48; *Edyvean* v. *Archer*, (1903) A. 379.

And in the case of a devise of realty, all such issue take joint tenants for life, or in fee, according as the will dates bef or since the Wills Act. *Cook* v. *Cook*, 2 Vern. 545; *Mogg Mogg*, 1 Mer. 654, 689; *Dalzell* v. *Welch*, 2 Sim. 319.

Exceptions.

1. In the case of realty, however, this construction will exeluded if there is a general intention manifest to keep t estates together in a single line of enjoyment, in which case t estates will devolve according to the rule in *Manderille's Ca Allgood* v. *Blake*, L. R. 7 Ex. 339; *ib.* 8 Ex. 160; and *Whitelock* v. *Heddon*, 1 B. & P. 243.

In what cases issue means children.

2. The generality of the word issue will be restrained if testator explains that he meant by issue children.

a. This will be the case if the word issue is coupled w father or mother or parent: for instance, if in a substitutio gift to issue, the issue are directed to take their parent's sh

Sibley v. *Perry*, 7 Ves. 522; *Pruen* v. *Osborne*, 11 Sim. 132; *Smith* v. *Horsfall*, 25 B. 628; *Stevenson* v. *Abingdon*, 31 B. 305; *Macgregor* v. *Macgregor*, 1 D. F. & J. 63; *Martin* v. *Holgate*, L. R. 1 H. L. 175; *Bryden* v. *Willett*, 7 Eq. 472; *Heasman* v. *Pearse*, 7 Ch. 275; *In re Judd's Trusts*, W. N. 1884, 206; see, however, *Ralph* v. *Carrick*, 11 Ch. D. 873.

This rule applies to a deed. *Barraclough* v. *Shillito*, 32 W. R. 875.

If the word parent is not used in the sense of the first taker, whose share the issue are to take by substitution, but in what might be called a sliding sense, so as to denote child, grandchild, great-grandchild, and so on, it will not have the effect of cutting down issue to children. See *Ross* v. *Ross*, 20 B. 645, where the testator distinguished between a parent's share and a child's share, children being the first takers.

There may be other circumstances, which prevent the word parent from restricting issue to children. *Berry* v. *Fisher*, (1903) 1 Ir. 484.

Effect of a gift over in default of issue.

The fact that there is a gift over in default of issue of the first takers affords an argument against construing issue as equivalent to children, though it is not in itself conclusive. See cases *supra cit.*: *Re Kavanagh's Will*, 13 Ir. Ch. 120; *Corrie's Will*, 32 B. 426.

Gift over in default of children or issue.

But if the gift over is not merely in default of issue but in default of "children or issue," it would seem that the word issue cannot be restricted, though the issue are directed to take only a parent's share. *Ross* v. *Ross*, 20 B. 645; *Ralph* v. *Carrick*, 11 Ch. D. 873, 883.

Issue of issue.

b. Issue of issue must mean issue of children, if not children of children. *Pope* v. *Pope*, 14 B. 593; *Williams* v. *Teale*, 6 Ha. 239; *Heasman* v. *Pearse*, 7 Ch. 275; *Livesay* v. *Walpole*, 23 W. R. 825.

So, too, children of issue will mean children of children. *Fairfield* v. *Bushell*, 32 B. 158.

Issue of the marriage in a settlement.

c. In a marriage settlement or in a settlement by will made on marriage of a legatee, limitations in favour of the "issue of the marriage" have in Ireland been confined to children. *In re Dixon's Trusts*, I. R. 4 Eq. 1; *In re Denis's Trusts*, I. R.

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10 Eq. 81; *In re Biron*, 1 L. R. Ir. 258; *Harris* v. *Lofte* (1899) 1 Ir. 491; see *Donoghue* v. *Brooke*, I. R. 9 Eq. 489; *re Warren's Trusts*, 26 Ch. D. 208.

As to the meaning of legal issue by marriage in a will, s *Reed* v. *Braithwaite*, 11 Eq. 514.

Issue lawfully begotten.

The words issue lawfully begotten of a person will not confi issue to children. *Hayden* v. *Willshire*, 3 T. R. 372; *Evans Jones*, 2 Coll. 516.

d. If after a gift to issue the testator adds, "and if but o then to such only child," issue will mean children. *Goldie Greares*, 14 Sim. 348; *Carter* v. *Bentall*, 2 B. 551; *Bryden Willett*, 7 Eq. 472; *In re Hopkins' Trusts*, 9 Ch. D. 13 *In re Biron*, 1 L. R. Ir. 258; see *In re Meade's Trus* 7 L. R. Ir. 51.

Effect of gift over.

e. In a gift to the issue of a tenant for life and their hei followed by a gift over if the tenant for life dies witho children, issue means children. *Mc gan* v. *Thomas*, 9 Q. B. 643.

Explanatory reference.

f. The testator may explain what he meant by issue, instance, by adding after a gift to issue the words "child children" or "whether sons or daughters" (*a*); or by referri to a gift in favour of issue as being a gift in favour children (*b*). *Horsepool* v. *Watson*, 3 Ves. 383; *Farrant Nichols*, 9 B. 327 (*a*); *Macgregor* v. *Macgregor*, 1 D. F. & J. *Baker* v. *Bayldon*, 31 B. 209 (*b*).

No rule that if issue once means children it always means children.

g. It has been said by Lord St. Leonards, referring to meaning of the word issue, "It is a well settled rule of c struction and one to which, from its soundness, I shall alw strictly adhere, never to put a different construction on same word, where it occurs twice or oftener in the same set ment, unless there appear a clear intention to the contrar *Ridgway* v. *Munkittrick*, 1 Dr. & War. 84, 93; see *Roch Roche*, 2 J. & Lat. 561, 568.

That dictum is asserted perhaps too positively as a gen rule of construction. *Edyvean* v. *Archer*, (1903) A. C. 384.

Looking at the case in which the rule was laid down, true meaning of the rule probably is, that if upon the w

will the Court comes to the conclusion that the testator uses the word issue as equivalent to children, it must have that meaning wherever it occurs. *Edwards* v. *Edwards*, 12 B. 97; *Rhodes* v. *Rhodes*, 27 B. 413; *Foster* v. *Wybrants*, I. R. 11 Eq. 40; *In re Harrison's Estate*, 3 L. R. Ir. 114; *In re Birks*; *Kenyon* v. *Birks*, (1900) 1 Ch. 417.

Issue and children used interchangeably.

The fact that the testator uses the words issue and children interchangeably is strong evidence that by issue he means children. Cases *supra*; *Benn* v. *Dixon*, 16 Sim. 21.

When issue will not mean children.

But the fact that in giving a power of appointment to a daughter the words issue and children are used synonymously, while in giving a power to a son over other property the word issue only is used (*a*); that in one place issue is used in a gift over upon death under twenty-one without issue of certain infants, where it must mean children (*b*); that there is a gift to the issue and another gift to the children of the same tenant for life (*c*); that half the estate is given after the death of the tenant for life to her issue, which is explained to mean children, and the other half is given over on her death without issue, nothing being given to the issue (*d*); that a power to appoint to issue is followed by a gift in default of appointment to issue which is interpreted to mean children (*e*), is not sufficient to show that issue is always used as equivalent to children. *Dalzell* v. *Welch*, 2 Sim. 319 (*a*); *Head* v. *Randall*, 2 Y. & C. C. 231 (*b*); *Waldron* v. *Boulter*, 22 B. 284; *Hedges* v. *Harpur*, 9 B. 479; 3 De G. & J. 129; *Re Corrie's Will*, 32 B. 427 (*c*); *Carter* v. *Bentall*, 2 B. 551; see *Caulfield* v. *Maguire*, 2 J. & Lat. 176 (*d*); *In re Warren's Trusts*, 26 Ch. D. 208 (*e*); see *Williams* v. *Teale*, 6 Ha. 239.

At what time the class of issue is to be ascertained in a substitutional gift.

When the gift to issue is substitutional, the class of issue is not to be ascertained once for all at the death of the parent, but it will include persons subsequently born before the time of distribution. *Ive* v. *King*, 16 B. 46; *In re Sibley's Trusts*, 5 Ch. D. 494; *In re Jones's Estate; Hume* v. *Lloyd*, 47 L. J. Ch. 775; overruling *Hobgen* v. *Neale*, 11 Eq. 48.

In the case of a gift in remainder to issue the same rule applies; that is to say, all the issue born at the testator's death

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and coming into being before the death of the tenant for l
are admitted. *Surridge* v. *Clarkson*, 14 W. R. 979.

In the case of cross-remainders.

If the gift is to several for life, and then to their issue, w
cross-remainders between them, the class of issue to take un
the cross-remainders is fixed once for all at the death of
parent, who is tenant for life, and not at the death of
tenant for life dying without issue. *In re Ridge's Trust*
Ch. 665.

V.—Descendants.

Descendants.

Descendants means *prima facie* all descendants living at
time of distribution, and apparently they take *per cap*
Crossley v. *Clare*, Amb. 387; 3 Sw. 320; *Butler* v. *Strat*
3 B. C. C. 367; *Re Flower; Matheson* v. *Goodwyn*, 62 L
216; 63 L. T. 201.

But the expression "descendants or representatives" imp
a distribution *per stirpes*. *Rowland* v. *Gorsuch*, 2 Cox, 187.

The word descendants requires a stronger explanatory
text to confine it to children than the word issue. For inst
a direction that descendants are to take a parent's share w
not limit the class to children. *Ralph* v. *Carrick*, 11 Ch
873.

It would seem that the term "descendants," when used
word of purchase, and coupled with a gift to the ancestor
a substitutional and representative sense, so that in a gi
several and their descendants, descendants would not tak
competition with their ancestor. *Tucker* v. *Billing*, 2 Jur.
483; and perhaps *Jones* v. *Price*, 6 Sim. 255, may be supp
on this principle. See, too, *Smith* v. *Pepper*, 27 B. 86; *B*
Stonehewer, 34 B. 66; 2 D. J. & S. 537.

A power to appoint to descendants does not authori
appointment to the legal personal representative of a desce
though he may happen also to be a descendant. *In re Sus*
Trust, 26 W. R. 93; 47 L. J. Ch. 65.

VI.—Offspring.

Offspring.

Offspring without explanatory context means chi
Tabuteau v. *Nixon*, W. N. 1899, 115.

VII.—Relations.

The words "nearest relations" explain themselves, and no reference to the statute is necessary to determine the persons to take. *Smith* v. *Campbell*, 19 Ves. 400; *Brandon* v. *Brandon*, 3 Sw. 312; *Re Nash*; *Prall* v. *Bevan*, 71 L. T. 5. See *Goodinge* v. *Goodinge*, 1 Ves. Sen. 231; *Edge* v. *Salisbury*, Amb. 70. Nearest relations means next of kin.

But the terms "relations" or "near relations" or "friends and relations" or "relations or friends" are of indefinite meaning, and the Courts, when compelled to determine the persons to take, have restricted them to relations capable of taking within the Statutes of Distribution, both as regards realty and personalty. *Gorer* v. *Maincaring*, 2 Ves. Sen. 86, 110; *Whitehorn* v. *Harris*, 2 Ves. Sen. 527; *Walter* v. *Maunde*, 19 Ves. 424; *Thwaites* v. *Over*, 1 Taunt. 263; *Salusbury* v. *Denton*, 3 K. & J. 529; *Re Caplin's Will*, 2 Dr. & Sm. 527. Relations.

The persons pointed out by the statute take *per capita*, and not in the proportions fixed by the statute, and as joint tenants unless they take by implication from a distributive power, when they take as tenants in common. *Tiffin* v. *Longman*, 15 B. 275; *Eagles* v. *Le Breton*, 15 Eq. 148; *In re Patterson*; *Dunlop* v. *Greer*, (1899) 1 Ir. 324.

But they take in the proportion directed by the statute where the gift is to relations, share and share alike, as the law directs. *Fielden* v. *Ashworth*, 20 Eq. 410.

A power to select relations extends to relations generally. *Harding* v. *Glyn*, 1 Atk. 469; 5 Ves. 501. Power to select.

But a power to distribute does not, and in default of appointment the Court will restrict the relations to those who can take under the statute. Lord Selborne's Act (37 & 38 Vict. c. 37) has not altered the law in this respect. *Pope* v. *Whitcombe*, 3 Mer. 689; *Grant* v. *Lynam*, 4 Russ. 292; *Re Caplin's Will*, 2 Dr. & Sm. 527; *Lawlor* v. *Henderson*, I. R. 10 Eq. 150; *In re Deakin*; *Starkey* v. *Eyres*, (1894) 3 Ch. 565; *In re Patterson*; *Dunlop* v. *Greer*, (1899) 1 Ir. 324.

Of course, the testator may, by explanatory words, extend

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the word relations to persons not within the statute. *Deris* v. *Mellish*, 5 Ves. 529; *Hibbert* v. *Hibbert*, 15 Eq. 372. *Beamish* v. *Hongwood*, Amb. 708.

Gift for relations of a person who is illegitimate.

Where the testator made a gift for the benefit of his wi relations, and the wife was illegitimate, childless, and for seven years old, it was held "relations" must mean those w would have been her relations if she had been legitimate. *I Deakin*; *Starkey* v. *Eyres*, (1894) 3 Ch. 565.

And where the testator had seven children, of whom th were illegitimate, and he called them all his children and sett the shares of daughters upon trusts for the daughters and th children with an ultimate trust in default of children for persons who would have been entitled to the share under statute if the daughter had died without having been marr it was held that upon the death of an illegitimate daugh without children her share passed to those who would have b the next of kin if all the children had been legitimate. *I Wood*; *Wood* v. *Wood*, (1902) 2 Ch. 542, overruling *I Standley's Estate*, 5 Eq. 393.

When the class to take under a gift to relations is to be ascertained.

Prima facie the class of relations to take is to be ascertai at the death of the propositus.

Therefore, where the gift is immediate or in remainder to testator's relations, after gifts to persons who are some of next of kin, his next of kin at his death alone take. *Rayn Mowbray*, 3 B. C. C. 234; *Masters* v. *Hooper*, 4 B. C. C. *Pearce* v. *Vincent*, 1 Cr. & M. 598; 2 M. & K. 860; 2 Sc. 2 Bing. N. C. 328; 2 Kee. 230; see *Eagles* v. *Le Breto* Eq. 148, where there is a discrepancy between the head- and the judgment; see 42 L. J. Ch. 362. See *Sleet* v. *Pla* Bing. N. C. 434.

Gift to such relations as survive the tenant for life.

If the gift is to such relations as survive the tenant for lif class is ascertained at the death of the ancestor, while those die before the tenant for life are excluded. *Bishop* v. *Cap* De G. & S. 411; *Re Nash*: *Pratt* v. *Bevan*, 71 L. T. 5.

Where the tenant for life is sole next of kin at the date of the will and death.

The term relations, however, has not the same direct refe to the death of the propositus as heirs or next of kin, therefore, where there is a gift to A either for life remainder to her children, or to A absolutely, followed by

over, if A dies without issue, to the testator's relations, and A is the sole next of kin at the date of the will and death, the class will be ascertained at A's death. *Marsh* v. *Marsh*, 1 B. C. C. 293; *Jones* v. *Colbeck*, 8 Ves. 38; *Lees* v. *Massey*, 3 D. F. & J. 113; see *post*, p. 340 *seq.*

And the testator may himself fix the time at which his relations are to be ascertained; for instance, by directing his relations to be advertised for at the death of a tenant for life, and giving the property to such of them as claim within two months after such advertisements. *Tiffin* v. *Longman*, 15 B. 275; see *Re Nash*; *Prall* v. *Bevan*, 71 L. T. 5, where the case is doubted.

When the class to take in default of appointment is to be ascertained.

Where there is a power to appoint to relations and no gift in default of appointment:—

1. If there is no life interest, and the power is a general power to appoint to the testator's relations, it seems the class to take will be ascertained at the death of the testator and not when the power expires. *Cole* v. *Wade*, 16 Ves. 27; in which case, however, the actual point did not arise, since the next of kin at the testator's death, and at the time when the power expired, were the same.

2. If there is a life interest and the tenant for life has power to appoint to the testator's or his own relations, the class is to be ascertained at the death of the tenant for life, whether the power is to appoint by deed or will. *Harding* v. *Glyn*, 1 Atk. 468; *Birch* v. *Wade*, 3 V. & B. 198; *In re Patterson*: *Dunlop* v. *Greer*, (1899) 1 Ir. 324; see, too, *Brown* v. *Higgs*, 8 Ves. 561.

And it makes no difference whether the power is one of selection or distribution merely. *Pope* v. *Whitcombe*, 3 Mer. 689, as corrected by Lord St. Leonards on Powers, 662, and *Finch* v. *Hollingsworth*, 21 B. 112; *Caplin's Will*, 2 Dr. & Sm. 527; see, too, *A.-G.* v. *Doyley*, 4 Vin. Ab. 485, where the tenant for life and the donee of the power were different persons, and the class was ascertained at the death of the tenant for life.

VII.—Family—Friends.

Family.

The word family may have a different meaning, according t
the context.

Devise of lands.

1. In the case of devises of land:—

"If land be devised to a stock or family or house it shall l
understood of the heir principal of the house." *Counden*
Clarke, Hob. 33.

This will be the case where the word is used as a qua
word of limitation, where for instance, after a devise to
person, there is a direction that the property is to rema
in his family. *Chapman's Case*, Dyer, 333; *Doe* d. *Chatt*
way v. *Smith*, 5 Man. & S. 126; *Griffiths* v. *Evan*,
B. 241.

A devise to A and his family according to seniority, gives
an estate tail. *Lucas* v. *Goldsmid*, 29 B. 657.

So, too, a devise of land to A for life "in confide
that after her decease she will devise the property to
family," goes to the testator's heir-at-law upon A's dea
Wright v. *Atkyns*, 17 Ves. 255; 19 Ves. 299.

Direction to secure for family.

Under a direction to secure property for the benefit of
person and his family, the realty will be settled for
with successive remainders in tail, and the personalty
be settled for life with remainder to the children. *W*
v. *Briggs*, 15 Sim. 17; 2 Ph. 583; *Woolmore* v. *Burro*
1 Sim. 512.

Bequest of personalty to family.

2. It is now settled that in a bequest of personalty
a mixed bequest of realty and personalty to the fam
of a person, the primary meaning of family is childr
Barnes v. *Patch*, 8 Ves. 604; *Terry's Will*, 19 B. 5
Wood v. *Wood*, 3 Ha. 65; *Parkinson's Trusts*, 1 Sim. N
242; *Beales* v. *Crisford*, 13 Sim. 592; *Burt* v. *Holl*
14 Eq. 160; *Pigg* v. *Clarke*, 3 Ch. D. 672; *In re Hute*
son and Tenant, 8 Ch. D. 540; *In re Mulqueen*, 7 L. R.
127; *Re Muffett; Jones* v. *Mason*, 55 L. T. 671; *I*
Battersby's Trusts, (1896) 1 Ir. 600; see *Woods* v. *Wood*
M. & Cr. 401.

It has been held that the word includes an illegitimate son. *Lambe* v. *Eames*, 10 Eq. 267; 6 Ch. 597; *Humble* v. *Bowman*, 47 L. J. Ch. 62.

3. There is more difficulty in ascertaining the meaning, if the gift is to the A. family or to the family of A., where A. is merely a surname and there are several persons of that name. In such cases the Court will if possible ascertain who is meant, and the gift will go to his children. *Gregory* v. *Smith*, 9 Ha. 708; *Commissioners of Charitable Donations* v. *Dcey*, 27 L. R. Ir. 289.

4. In order to give the word a different meaning there must be some special circumstances.

May mean next of kin.

a. Thus, if there are no children, next of kin may take. *Re Maxton*, 4 Jur. N. S. 407.

b. So a gift to the family of an unmarried person would probably extend to all her relatives. *Snow* v. *Teed*, 9 Eq. 622.

In the widest sense it may include a husband or wife.

c. In some cases, on the context, family has been held to mean those of a man's household, thus including a wife or husband. *Macleroth* v. *Bacon*, 5 Ves. 158; *Blackwell* v. *Bull*, 1 Kee. 176.

When it includes all descendants.

d. Family has been held to include all descendants in existence at the time of distribution: but such a construction would not be adopted without a strong context. *Williams* v *Williams*, 1 Sim. N. S. 358.

Power to appoint to family.

e. It would seem that a power to appoint to a person's family would be limited to his children if there are any. *In re Hutchinson and Tenant*, 8 Ch. D. 540; see *Sinnott* v. *Walsh*, 5 L. R. Ir. 27.

If there are no children the donee of the power may select relations not within the degree of next of kin. *Grant* v. *Lynam*, 4 Russ. 292.

If the power is not exercised the statutory next of kin are entitled. *Cruwys* v. *Colman*, 9 Ves. 319.

5. Where it is clear that the testator has used the word family in a wider sense than any of those here mentioned, but it is uncertain who were meant to be included, the gift will be void for uncertainty. *Yeap Cheah Neo* v. *Ong*

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Cheng Neo, L. R. 6 P. C. 381; see *Robinson* v. *Waddelow*, 8 Sim. 134; *In re Cullimare's Trusts*, 27 L. R. Ir. 18.

When family is construed children, a simple gift to the families of A and B goes *per capita* in joint tenancy. *Gregory* v. *Smith*, 9 Ha. 708.

Whether a gift to several families goes *per capita* or *per stirpes* among them.

So, too, a gift to be divided between the families of A and B goes to all the children of A and B *per capita* as tenants in common. *Barnes* v. *Patch*, 8 Ves. 604; see, however, *Alexander* v. *Douglas*, Rom. N. of C. 93.

Friends.

Under a direction that after the death of the testator's wife, to whom a life interest in lands was given, the lands should revert to the testator's friends, the heir-at-law was held entitled. *Caogan* v. *Hayden*, 4 L. R. Ir. 585.

CANADIAN NOTES.

See the cases cited in the notes to Chapter XXII.

CHAPTER XXXI.

GIFTS TO HEIRS, NEXT OF KIN, REPRESENTATIVES, AND EXECUTORS.

Devise to heirs or right heirs.

SINCE the Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), s. 3, under a devise by the testator to his heir or heirs or right heirs, the heir takes as purchaser, and if there are several co-heirs, they take as joint tenants. *In re Baker*; *Pursay* v. *Hollaway*, 79 L. T. 343; *Owen* v. *Gibbons*, (1902) 1 Ch. 636.

Devise of Borough English and gavelkind lands to the heir.

Where Borough English or gavelkind lands are devised with other lands to the testator's heir, the common law heir is entitled. *Davis* v. *Kirk*, 2 K. & J. 391; *Thorp* v. *Owen*, 2 Sm. & G. 90; *Buchanan* v. *Harrison*, 1 J. & H. 662; *Sladen* v. *Sladen*, 2 J. & H. 369.

So where Borough English lands alone are devised to A for life, with remainder to her sons and daughters and their heirs, and if A dies without having such heirs, to the testator's sons and daughters then living and the heirs of those who may be deceased, the common law heir takes under the ultimate gift. *Polley* v. *Polley*, 31 B. 363.

In the same way a devise of gavelkind lands alone to the testator's right heirs goes to the common law heir. *Garland* v. *Beverley*, 9 Ch. D. 213.

The rule is that "*nemo est hæres viventis*," and therefore a devise to the heirs of a living person is contingent, unless the term heirs is so qualified by express words or by the general intention of the will as to show that the testator meant by heir the heir apparent or presumptive or some other person, who will then take as *persona designata*.

This will be the case if the testator speaks of the heirs of the body of B now living. *Burchett* v. *Durdant*, 2

Vent. 311; Carth. 154; see *Chambers* v. *Taylor*, 2 M. & C 376.

Or the intention of the testator to use the term as designatin a person may be gathered from the whole will; if, for instanc the so-called heir is directed to pay annuities to certain perso during whose life he cannot be strictly heir. *Barbison* d. *Lo* v. *Beaumont*, 1 P. W. 229; 3 B. P. C. 60; *Goodright* v. *Whi* 2 W. Bl. 1010; *Winter* v. *Perratt*, 9 Cl. & F. 606.

A devise to the heirs and assigns of "A, as if she had co tinued sole and unmarried," is a gift to the person filling th character as *persona designata*. *Brookman* v. *Smith*, L. R. 6 E 291; *ib.* 7 Ex. 271; *Dormer* v. *Phillips*, 4 D. M. & G. 85 3 Dr. 39; Fearne, C. R. 209—212.

Co-heirs take as joint tenants.

The persons, if more than one, who constitute the heir, tak as joint tenants. *Swaine* v. *Burton*, 15 Ves. 365; *Mounsey* *Blamire*, 4 Russ. 384; *Berens* v. *Fellowes*, 56 L. T. 391.

Acknowledgment of a person as heir.

The appointment or acknowledgment of a person as hei though he may not be the real heir, is sufficient to carry to hi the testator's real estate. *Parker* v. *Nickson*, 1 D. J. & S. 17 11 W. R. 533; 32 L. J. Ch. 397.

Devise to the heir of a particular name or to heirs male.

A devise to the right heirs male, or to the right heirs of particular name, will go only to the very heir, who must be male or of that name. *Ashenhurst's Case*, Hob. 34; cit. *Coun* v. *Clarke*, Moore, 860, pl. 1181; Hob. 29; *Wrightson* v. *Macaul* 14 M. & W. 214; *Thorpe* v. *Thorpe*, 32 L. J. Ex. 79; s Co. Litt. 24 b, note by Hargrave.

If the devise is to the right heirs exclusive of A, who is t right heir, the devise fails. *Goodtitle* d. *Bailey* v. *Pugh*, Fear Cout. Rem. 573; 2 Mer. 348.

Heirs of the body.

The rule does not, however, apply to heirs of the bod whether taking by descent or purchase. *Wills* v. *Palm* 5 Burr. 2617; 2 W. Bl. 687; *Evans* d. *Weston* v. *Burtensha* Co. Litt. 164a, n. (2).

Whether the heir male taking by purchase must trace his descent through males.

An heir male taking by inheritance must trace his desce entirely through males. Co. Litt. 25a

It is said by Jarman, ii. p. 912 (5th Ed.), that this does n apply to a gift to the heir male or female by purchase, citi Hob. 31; Co. Litt. 25b. At any rate it is clear that if t

word "lineal" be added the heir must trace his descent through males. *Oddie* v. *Woodford*, 3 M. & Cr. 584; *Bernal* v. *Bernal*, 3 M. & Cr. 559; and see *Doe* d. *Angell* v. *Angell*, 9 Q. B. 328; *Thellusson* v. *Rendlesham*, 7 H. L. 429.

It appears, however, to be concluded by authority, that even in the absence of the word "lineal," the heir male taking by purchase must claim through males. *Lycood* v. *Kimber*, 29 B. 38. See per Lord St. Leonards, 7 H. L. 512: and see *Doe* d. *Winter* v. *Perratt*, 3 M. & Sc. 594.

Eldest male lineal descendant.

Under the description of the eldest male lineal descendant, the person entitled must trace his descent through males, and the son of an elder brother will be preferred to a younger brother. *Thellusson* v. *Rendlesham*, 7 H. L. 429.

Heir *ex parte materná*.

Under a devise to the heir *ex parte materná* a person who is also heir *ex parte paternâ* may take. *Rawlinson* v. *Wass*, 9 Ha. 673; *In re Willomier's Trusts*, 16 Ir. Ch. 389.

Devise to heirs of husband and wife.

A devise to the right heir of Walter Read and Mary his wife, is a devise to the person who is heir of both. *Doe* v. *Quartley*, 1 T. R. 630; see *Pycroft* v. *Gregory*, 4 Russ. 526.

Rule in Mandeville's Case, Co. Litt. 26b; Fearne, 80.

Rule in *Mandeville's Case*.

"Where an estate is limited to the heirs special of a particular ancestor, without any estate of freehold limited to the ancestor (either expressly or by implication), it is impossible to effectuate the expressed will of the donor and to make the estate pass through the whole series of the special heirs designated, except by regarding the limitation as if it were an estate tail, which had originally vested in and descended from the ancestor himself, and yet the first taker must take as purchaser, because no estate did in fact vest in or descend from the ancestor." *Vernon* v. *Wright*, 2 Drew. 439; 7 H. L. 35.

The result is the creation of a quasi-entail, partaking of the opposite qualities of purchase and descent. Thus, where the limitation was to Roberge and the heirs of the body of her late husband John de Mandeville by her, where John de Mandeville had left a son and daughter, it was held that the daughter took

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on the death of the son *per formam doni*, as the person who would have been entitled if the estate had descended from the ancestor. *Mandeville's Case*, Co. Litt. 26b.

The rule in *Mandeville's Case* applies equally where the limitation is to the heirs of the body of the testator. *Allgood* v *Blake*, L. R. 7 Ex. 339; *ib.* 8 Ex. 160.

It has been adopted where the term "issue" was used *Whitelock* v. *Heddon*, 1 B. & P. 243.

But it will not be extended to a devise to the heirs of the body of a deceased person, excluding certain lines of descent which would comprehend the real heirs of the body; nor does it apply to a devise to the right heirs male of a person, though a devise to A and his heirs male gives A an estate tail *Allgood* v. *Blake*, *supra*; *Ashenhurst's Case*, Heb. 34; *Baker* v *Wall*, 1 Ld. Raym. 185; *Doe* d. *Lindsey* v. *Colyear*, 11 East 548.

And it does not apply where the limitation is to heirs general *Moore* v. *Simkin*, 31 Ch. D. 95.

In what cases heirs of the body means children.

"Heirs of the body," however, used as a term of purchase may mean children, if the devise is to them as their parent shall appoint, or if they are to take equally among them as tenants in common. *Jordan* v. *Adams*, 9 C. B. N. S. 483; *Right* *Creber*, 5 B. & Cr. 866; in which case the estate of the ancestor being equitable did not coalesce with the limitation to the heirs.

Assigns.

Assigns.

As a rule the words "and assigns," following the word "heirs," have no operation; "they have no conveyancing virtue at all, but are merely declaratory of that power of alienation which the purchaser would have had without them" Wms. R. P. 142; *Brookman* v. *Smith*, L. R. 6 Ex. 291.

Where there was a devise to four persons for ninety-nine years, if they should so long live, with an ultimate devise to the heirs and assigns of the survivor, it was held that the limitation must be read as a limitation to the heirs of the survivor and their assigns, and that a power of appointment

the survivor could not be implied from the word "assigns." *Milman* v. *Lane*, (1901) 2 K. B. 745, where *Tapner* v. *Merlott*, Willes, 177, and *Quested* v. *Michell*, 24 L. J. Ch. 722; 3 W. R. 435, are considered; see, also, *A.-G.* v. *Vigor*, 8 Ves. 256, 291.

The effect, however, of a gift to A or his heirs or assigns, is to give the absolute interest to A. *In re Walton's Estate*, 8 D. M. & G. 173; *Hopkin's Trust*, 2 H. & M. 411. See *post*, p. 346.

Bequests of Personalty to Heirs.

Bequests of personalty to heirs.

1. A bequest of personalty to the right heirs, or to the heirs-at-law, or the next heir of an individual *primâ facie* goes to such heir as *persona designata*, whether the bequest be to the heirs of the testator or of a stranger. *Mounsey* v. *Blamire*, 4 Russ. 384; *Hamilton* v. *Mills*, 29 B. 193; *De Beauvoir* v. *De Beauvoir*, 3 H. L. 524; *Re Rootes*, 1 Dr. & Sm. 228; *Southgate* v. *Clinch*, 27 L. J. Ch. 651; 4 Jur. N. S. 428.

The rule applies, *à fortiori*, to a mixed fund. *De Beauvoir* v. *De Beauvoir*, 3 H. L. 524; *Boydell* v. *Golightly*, 14 Sim. 327; *Todhunter* v. *Thompson*, 26 W. R. 883.

A for life, remainder to heirs.

2. In the same way, if the gift is to A for life with remainder to his heirs, the heir, in the strict sense, is entitled. *In bonis Dixon*, 4 P. D. 81; *Smith* v. *Butcher*, 19 Ch. D. 113, disapproving *Mounsey* v. *Blamire*, 4 Russ. 384; *Skinner* v. *Gumbleton*, (1903) 1 Ir. 36; see *Re Russell*, 52 L. T. 559. The cases of *Evans* v. *Salt*, 6 B. 266; *Low* v. *Smith*, 25 L. J. Ch. 503; 2 Jur. N. S. 344; *Re Peppitt's Estate*; *Chester* v. *Phillips*, 36 L. T. 500, must be considered overruled, unless they can be supported on the special context in each case.

In what cases heirs means next of kin.

3. But the word "heirs" may be controlled by the context, as in *Gamboa's Trust*, 4 K. & J. 757, where a bequest to "the heirs of my late partner for losses sustained during the time that the business of the house was under my sole control," went to the next of kin under the statute; and in *In re Newton's Trusts*, 4 Eq. 171, where the bequest to "the heirs and assigns of my deceased sister" was shown to be quasi sub-

stitutional by other limitations to the testator's living broth and sisters and their heirs and assigns; and see *In re Steeve Trusts*, 15 Eq. 110, as to which case *quære*.

Where the intention is to give A the absolute interest, word "heirs" has been held equivalent to "executors a administrators." *Powell* v. *Boggis*, 35 B. 535, where the was to A for life, then to her heirs as she shall give it by w and if she dies without a will to her right heirs.

And, where the testator directs a division amongst the sev heirs of tenants for life, who are related to each other, so t heirs cannot mean next of kin, heirs will mean children. v. *Comberbach*, 25 B. 540; see *Roberts* v. *Edwards*, 33 B. 25

Substitutional gift to heirs.

4. In a gift to A or his heirs, "heirs" means the pers entitled under the statute. *Vaux* v. *Henderson*, 1 J. & W. 3 *Gittings* v. *M'Dermott*, 2 M. & K. 69; *Jacobs* v. *Jacobs*, 1 557; *Doody* v. *Higgins*, 9 Ha. App. 32; 2 K. & J. 729; *Craven*, 23 B. 333; *Powell* v. *Boggis*, 35 B. 535; *Parson Parsons*, 8 Eq. 260; *Neilson* v. *Munro*, 27 W. R. 36; *Stannard; Stannard* v. *Burt*, 52 L. J. Ch. 354.

If real and personal estate are given together to perso their heirs, but the realty is not converted, the realty goes t heir and the personalty to the statutory next of kin. *Wing* v. *Wingfield*, 9 Ch. D. 658; *Keay* v. *Boulton*, 25 Ch. D. 21

In a bequest to children or their heirs, followed by a gift if all the children die without issue, the word "heirs" has held to mean issue. *Speakman* v. *Speakman*, 8 Ha. 180; see *Roberts* v. *Edwards*, 12 W. R. 33.

Heirs of the body.

In a bequest to A or the heirs of his body, "heirs o body" means such of the persons entitled under the stat may be descendants of A. *Pattenden* v. *Hobson*, 17 Jur. 22 L. J. Ch. 697.

The statute fixes the proportions as well as the persons.

A widow is included in the persons entitled under the st and the statute fixes not only the persons but the proportio which they take. *In re Steevens' Trusts*, 15 Eq. 110; *Jac Jacobs*, *supra*; *Doody* v. *Higgins*, *supra*.

A bequest of personalty to "the heirs or next of kin o has been construed as a gift to next of kin. *In re Thom Trusts*, 9 Ch. D. 607; see p. 337.

NEXT OF KIN.

Next of kin of a foreigner.

In the will of a person domiciled in England, a gift to next of kin of a foreigner goes to the next of kin ascertained according to English law. *In re Fergusson's Will*, (1902) 1 Ch. 483.

Meaning of next of kin.

The words "next of kin," without more, mean the nearest blood relations of the propositus in an ascending and descending line, and they take as joint tenants. *Elmsley* v. *Young*, 2 M. & K. 780; *Withy* v. *Mangles*, 10 Cl. & F. 215; *Lucas* v. *Brandreth*, 28 B. 274; *Arison* v. *Simpson*, Johns. 43; *Hatton* v. *Foster*, L. R. 3 Ch. 505.

The same meaning has been given to the words "legal or next of kin." *Harris* v. *Newton*, 46 L. J. Ch. 268; 25 W. R. 228.

Those of the half-blood are equally entitled with those of the whole blood. *Collingwood* v. *Pace*, 1 Vent. 424; *Brooke* v. *Wood*, Alleyn, 36; *Brigg* v. *Brigg*, 33 W. R. 454; see 2 Wms. Exors. 981.

Gift under power.

But a selective power to appoint to next of kin will authorise an appointment to statutory next of kin. *Snow* v. *Teed*, 9 Eq. 622.

Next of kin *ex parte materna*.

Under a gift to next of kin *ex parte materna*, next of kin *ex parte paterna*, who happen to be also next of kin *ex parte materna*, will not be excluded, except by express words. *Gundry* v. *Pinniger*, 14 B. 94; 1 D. M. & G. 502; *Say* v. *Creed*, 5 Ha. 580.

The effect of a reference to the statute or intestacy.

If there is a gift to next of kin or next of kin in blood followed by an express reference to the statute or intestacy, all kindred entitled under the statute, including those who take by representation under the statute, will come in. *Garrick* v. *Lord Camden*, 14 Ves. 372; *Bullock* v. *Downes*, 9 H. L. 1; *Nichols* v. *Hariland*, 1 K. & J. 504; *In re Gray; Akers* v. *Sears*, (1896) 2 Ch. 802.

Widow does not take as next of kin.

A widow, though she is a person entitled under the statute, is not of kin, and therefore cannot take under the description "next of kin by statute." *Garrick* v. *Lord Camden*, 14 Ves.

372; *Kilner* v. *Leech*, 10 B. 362; *In re Fitzgerald*, 58 L. Ch. 662; 61 L. T. 221; 37 W. R. 552.

Husband not entitled under statute.

A husband does not take under the statute at all but by title paramount; therefore, he can take neither under t description "next of kin by statute" nor under the descripti of "persons entitled under the statute." *Milne* v. *Gilb* 2 D. M. & G. 715; 5 D. M. & G. 510.

If a husband has been expressly excluded in a gift to n of kin under the statute, a widow will be admitted under subsequent gift to next of kin by statute where there is no s exclusion. *In re Collins' Trusts*, W. N. 1877, 87.

If only an intention is declared of leaving property to n of kin according to the statute, which is not carried out, property goes as on an intestacy, and a widow would there be admitted. *Ash* v. *Ash*, 33 B. 187.

What will exclude one of the next of kin from a gift to next of kin.

A person is not excluded from taking property under a to next of kin by the fact that a life interest in the propert expressly given to him. *Gorbell* v. *Davison*, 18 B. 556.

But if the gift is to the "other the next of kin," one of next of kin to whom an interest is expressly given by the will be excluded. *Cooper* v. *Denison*, 13 Sim. 290.

Whether the statute regulates the nature of the interest as well as the persons to take.

If there is a reference to the statute, the statute regul the nature of the interest, as well as the persons, who ar take under it. *Bullock* v. *Downes*, 9 H. L. 1; *In re Rank Settlement Trusts*, 6 Eq. 601.

The above proposition seems to be justified by the opin expressed in *Bullock* v. *Downes*, and would probably be adopted. However, the cases go to this:—

1. Where there is a reference to intestacy, as well as t statute, the statute fixes the proportions as well as the per *Bullock* v. *Downes*, *supra*; *Martin* v. *Glover*, 1 Coll. *Jenkins* v. *Gower*, 2 Coll. 537.

2. So, where the gift is to persons "entitled under "under and according to" the statute. *Horn* v. *Col* 1 Sm. & G. 169; *In re Ranking's Settlement Trusts*, *supra*.

3. If the gift is merely to persons according to the sta the better opinion seems to be that the same result v follow. *Mattison* v. *Tanfield*, 3 B. 131; *Lewis* v. *Morri*

B. 34; *In re Ranking's Settlement Trusts*, 6 Eq. 601, not following *In re Greenwood's Trusts*, 3 Giff. 390.

4. Words importing or directing a tenancy in common, but not requiring equality of division, will not prevent the statute from fixing the proportions. *Mattison* v. *Tanfield*, *supra*; *Lewis* v. *Morris*, *supra*. *Richardson* v. *Richardson*, 15 Sim. 526, must be considered overruled; see *Bullock* v. *Downes*, *supra*.

5. It would seem that a gift *equally* among the persons entitled under the statute would prevent the statute from fixing the proportions. See *Phillips* v. *Gutch*, 3 B. C. C. 69.

But if there are words importing that the distribution is to be according to the statute, the word "equally" will be rejected. *Holloway* v. *Radcliffe*, 23 B. 163; see *Fielden* v. *Ashworth*, 20 Eq. 410.

Nearest of kin by way of heirship.

A devise of land to the nearest of kin by way of heirship goes to the heir. *Williams* v. *Ashton*, 1 J. & H. 115.

A gift of real and personal estate to the person entitled under the statute as on an intestacy goes as regards the realty to the heir. *Re Hudson*; *Kuhne* v. *Hudson*, 72 L. T. 892.

A gift to "next of kin or heir-at-law" would probably go according to the nature of the property. *Lowndes* v. *Stone*, 4 Ves. 649; see *In re Thompson's Trusts*, 9 Ch. D. 607.

Next of kin in the male line.

In *Boys* v. *Bradley*, 10 Ha. 389; 4 D. M. & G. 58; 5 H. L. 873, "next of kin in the male line in preference to the female line" was held to mean next of kin *ex parte paternâ*.

A devise of land to the next male kin goes to all the nearest of kin being males living at the testator's death. *In re Chapman*; *Ellick* v. *Cox*, 32 W. R. 424.

Devise to "nearest" of a class.

A devise of land to the "next" or "nearest" of a particular class of relations goes to the eldest of the class. *Perriman* v. *Pearce*, Co. Litt. 10 b, n. 2; *Power* v. *Queally*, 2 L. R. Ir. 227; 4 *ib.* 20, where the devise was to the "nearest and most deserving male cousin, and a regular Power of the family."

On the other hand, in a gift of real and personal estate together to the nearest relation of a particular name, the word "relation" has been held to be *nomen collectivum*, and to include all the relations of the same degree. *Pyot* v. *Pyot*, 1 Ves. Sen. 335; Belt, 169.

Chap. XXXI.

Next of kin of a particular name.

A devise of land to "next of kin of a particular name" go only to next of kin who are by birth entitled to the name. next of kin who assumes the name of a daughter of that ma who at the testator's death has changed her name by marriag is excluded. *Leigh* v. *Leigh*, 15 Ves. 100; *Johson's Ca* Cro. El. 576; see *Bon* v. *Smith*, Cro. El. 532; *Barlow* *Bateman*, 2 B. P. C. 272.

But it may appear from the will that the assumption of t name by royal licence is intended to be sufficient. *In re Rober* *Repington* v. *Roberts-Gawen*, 19 Ch. D. 520.

Possibly, in the case of personalty, or of real and perso estate given together, a reference to a particular name may more readily understood as referring to the stock or family.

At any rate, it may be so understood if there is explanatory context.

Thus, "nearest relation of the name of the Pyets" has b held to refer to the stock of the Pyets, so that change of na by marriage was immaterial. *Pyot* v. *Pyot*, 1 Ves. Sen. 333

A similar construction was put upon "next of kin of surname of Crump." *Carpenter* v. *Bott*, 15 Sim. 606; see, *Mortimer* v. *Hartley*, 6 Ex. 47.

Whether the person who is to take under the descrip' a particular name must satisfy both parts of the descrip is uncertain: see *Doe* v. *Plumptre*, 3 B. & Ald. 474, and remarks of the Vice-Chancellor on that case in *Carpente* *Bott*, 15 Sim. 606.

Next of kin of husband and wife.

A gift to the next of kin of "John Hardress and Tomli Hardress his wife, both deceased," where they had no chil and were not related, failed. *Pycroft* v. *Gregory*, 4 Russ. 5

Gift to next of kin exclusive of A, who is sole next of kin.

A gift to next of kin, to be ascertained at a particular exclusive of A, who is the sole next of kin, goes to the per who would have been next of kin if A also had been d *White* v. *Springett*, 4 Ch. 300.

The persons to take will be ascertained in the same w the gift is to next of kin by statute simply exclusive of A, happens to be sole next of kin by statute. *Re Taylor*; *T* v. *Ley*, 45 L. T. 210; 52 L. T. 839.

Under a limitation to the statutory next of kin of B, exclusive of A and his representatives, it was held that the daughters of A, who were among the statutory next of kin of B, as representing A, were excluded. *Lindsay* v. *Ellicott*, 46 L. J. Ch. 878.

"Next of kin" explained by the context.

The testator may show that he meant by next of kin the children of a tenant for life, as where the gift was to a daughter for life and then to the testatrix's next of kin, to be vested interests from the testatrix's death, "except as to any child afterwards born of the daughter." *Bird* v. *Wood*, 2 S. & St. 400; see 2 M. & K. 86, 89.

Gift to next of kin of A as if she had died unmarried.

In a gift to the next of kin of A, or even to the person entitled under the Statutes of Distribution, as if she had died intestate and unmarried, "unmarried" will be construed as equivalent to "without leaving a husband," since otherwise children would be excluded. *Houre* v. *Barnes*, 3 B. C. C. 316; *Day* v. *Barnard*, 1 Dr. & S. 351; *Saunders' Trusts*, 3 K. & J. 152; *Norman's Trusts*, 3 D. M. & G. 965; *Mangham* v. *Vincent*, 9 L. J. Ch. 329; *Clarke* v. *Colls*, 9 H. L. 601; *In re Woodhouse's Trusts*, (1903) 1 Ir. 126.

Trust for next of kin of wife as if she had died without having been married.

In a marriage settlement, as in a will, an ultimate limitation in favour of the statutory next of kin of a person as if she had died without having been married, the words "without having been married" must *primâ facie* receive their natural meaning, which excludes issue of the person in question. *In re Brydone's Settlement*, (1903) 2 Ch. 84, approving *Emmins* v. *Bradford*, 13 Ch. D. 493; *Hardman* v. *Maffett*, 13 L. R. Ir. 499; *In re Deane's Trusts*, (1900) 1 Ir. 332; *In re Smith's Settlement*; *Wilkins* v. *Smith*, (1903) 1 Ch. 373; *Re Watson's Trusts*, 55 L. T. 316, and disapproving *In re Ball's Trust*, 11 Ch. D. 270; *Upton* v. *Brown*, 12 Ch. D. 872; *Stoddart* v. *Saville*, (1894) 1 Ch. 480; *In re Mare*, (1902) 2 Ch. 112.

The context and surrounding circumstances may, however, show that issue were not intended to be excluded; if, for instance, there is a declaration that an illegitimate child is to be deemed a lawful child for the purposes of the trust for next of kin. *Wilson* v. *Atkinson*, 4 D. J. & S. 455.

Chap. XXXI.

At what time next of kin and heirs are to be ascertained.

The terms "heirs" and "next of kin" have a direct reference to the death of the ancestor, and therefore the class is to be ascertained at the death of the ancestor, and, where there is in addition a reference to intestacy or to the statute, this rule is almost without exception.

A mixed fund is no exception to the ordinary rule.

The same rules apply to realty, personalty, and to a mixed fund. *Cusack* v. *Rood*, 24 W. R. 391.

Heirs.

1. As regards heirs.

Thus, if the gift is to the heir of the testator, the heir must be ascertained at the death of the testator, though the gift to the heir is after a life interest to the person who is the heir *Doe* d. *Pilkington* v. *Sprott*, 5 B. & Ad. 731; *Boydell* v. *Golightly* 14 Sim. 327; *Rawlinson* v. *Wass*, 9 Ha. 673; *Wrightson* v *Macaulay*, 14 M. & W. 214; *Re Fritt*; *Hindson* v. *Wood*, 8 L. T. 455.

But there may be sufficient evidence of intention to show that the heir is to be ascertained at some other time. *Doe* d *King* v. *Frost*, 3 B. & Ald. 546.

The same rule applies to a gift to the heir of a stranger. He must be ascertained at the death of the latter. *Dancers* v *Earl of Clarendon*, 1 Vern. 35; *In re Grayson*, 48 L. J. Ch. 35

2. As regards next of kin.

a. The rule applies whether the bequest to next of kin is immediate or preceded by a life interest or contingent. *Mo* v. *Dunlop*, Joh. 490; *Bird* v. *Luckie*, 8 Ha. 301.

b. If the gift is to next of kin living at a particular time, will go to such of the next of kin at the testator's death as are living at that time. *Spink* v. *Lewis*, 3 B. C. C. 355; *Bish* v. *Cappel*, 1 De G. & Sm. 411; *Re Nash*; *Prall* v. *Bevan*, 7 L. T. 5.

c. If personalty is given to A for life, and then to the testator's next of kin, though A may be one of the next of kin, or even the only next of kin, at the testator's death, even the only next of kin at the date of the will as well as at the testator's death, the class will nevertheless be ascertained at the testator's death. *Doe* v. *Lawson*, 3 East, 278; *Elmsl* v. *Young*, 2 M. & K. 780; *Ware* v. *Rowland*, 2 Ph. 635

Holloway v. *Holloway*, 5 Ves. 399; *Barker's Trust*, 1 Sm. & G. 118; *Gorbell* v. *Davison*, 18 B. 556; *Starr* v. *Newberry*, 23 B. 436; *Re Ford*; *Patten* v. *Sparke*, 72 L. T. 5.

The mere exception from the class of next of kin of certain persons, who could only be members of the class on the supposition of the death of the tenant for life, will not alter the time for fixing the class. *Lee* v. *Lee*, 1 Dr. & Sm. 85; see *Cooper* v. *Denison*, 13 Sim. 290.

d. The same rules apply where the gift to the next of kin is not by way of remainder, but by way of executory limitation.

Executory gift to next of kin.

Thus, in a gift to A for life, where A is sole next of kin at the date of the will and death, and then to her children, or to A absolutely, and if she dies without children, or under twenty-one, to the testator's next of kin, the next of kin are ascertained at the testator's death. *Lang's Will*, 9 W. R. 589; *Murphy* v. *Donegan*, 3 J. & Lat. 534; *Baker* v. *Gibson*, 12 B. 101; *Harrison* v. *Harrison*, 28 B. 21; *Michell* v. *Bridges*, 13 W. R. 200; see *Urquhart* v. *Urquhart*, 13 Sim. 613; *Minter* v. *Wraith*, 14 Sim. 549; *Hunter* v. *Tedlie*, 7 L. R. Ir. 448.

The case is, however, different if the gift is not to next of kin, but to the "nearest of kin of my own family," or to relations. *Clapton* v. *Bulmer*, 5 M. & Cr. 108; see pp. 324, 325.

In the former case the intention is to let the property go as the law would give it, in the latter to make a complete disposition by the will to a particular class contemplated by the testator, though, owing to the vagueness of the description, the Courts may be compelled to have recourse to the statute, that the gift may not be void for uncertainty.

e. Even if the gift be to a class of persons who must be the testator's next of kin if any survive him, and if they die without issue to his next of kin, the next of kin are ascertained at his death. *Seifferth* v. *Badham*, 9 B. 372.

f. The testator may of course direct the class of next of kin to be ascertained at any time or in any manner he chooses. *Pinder* v. *Pinder*, 28 B. 44; *White* v. *Springett*, 4 Ch. 300.

Effect of words of futurity in ascertaining the class.

The mere use of words of futurity will not alter the ordinary rule; for instance, if the bequest be to A for life and after his death for such persons as shall be my next of kin. *Holloway* v. *Holloway*, 5 Ves. 399; *Doe* v. *Lawson*, 3 East, 278; *Rayner* v. *Mowbray*, 3 B. C. C. 234.

But if the gift is, after the decease of the tenant for life, to such persons as shall *then* be my next of kin, the word "*then*" must refer to the death of the tenant for life. *Long* v. *Blackall*, 3 Ves. 486; *Wharton* v. *Barker*, 4 K. & J. 483; see *Clowes* v. *Hilliard*, 4 Ch. D. 413; *In re Morley's Trusts*, 25 W. R. 825; *Valentine* v. *Fitzsimons*, (1894) 1 I. R. 93; and in such a case the class is to be ascertained as if the testator had lived up to and died at the time referred to. *Sturge* v. *Great Western Railway Co.*, 19 Ch. D. 444.

But it must be clear that the word "then" is used temporally and not as equivalent to "thereupon," and that it may not be referred to other words pointing to the testator's death, as will be the case if the gift is, for instance, "to such persons as would by virtue of the statute for the distribution of intestates' estates have become and been then entitled thereto in case I had died intestate." *Bullock* v. *Downes*, 9 H. L. 1; *Doe* v. *Lawson*, 3 East, 278; *Cable* v. *Cable*, 16 B. 507; *Wheeler* v. *Adams*, 17 B. 417; *Fletcher* v. *Fletcher*, 3 D. F. & J. 775; *Day* v. *Day*, I. R. 4 Eq. 385; *Mortimore* v. *Mortimore*, 4 App. C. 448.

Where the gift is to persons who would, on the death of the tenant for life, be entitled as the testator's next of kin under the statute, the next of kin must be ascertained at the testator's death, though the death of the tenant for life is not necessarily the time of distribution owing to contingent limitations in favour of a class which afterwards fail. *In re Wilson*; *Wilson* v. *Batchelor*, (1907) 1 Ch. 450; affd. W. N. 1907, 206.

Next of kin of wife as if she had survived husband.

Where the gift is to the next of kin of a wife as if she had survived her husband and died intestate, the cases, which arise mainly on marriage settlements, are not easy to reconcile.

The question is, is the only intention to exclude the husband, or is the intention to create a class of kin to be ascertained at the husband's death. In the former case the next of kin will

be ascertained at the wife's death (*a*), in the latter at the husband's (*b*). *Druitt* v. *Seaward*, 31 Ch. D. 234; *Re Bradley*; *Brown* v. *Cottrell*, 58 L. T. 631 (*a*); *Pinder* v. *Pinder*, 28 B. 44; *Chalmers* v. *North*, 28 B. 175; *Clarke* v. *Hayne*, 42 Ch. D. 529; *Re King's Settlement*; *Gibson* v. *Wright*, 60 L. T. 745; *Re Peirson's Settlement*; *Cayley* v. *De Wend*, 88 L. T. 794 (*b*).

Gifts to next of kin of deceased person.

g. By analogy to the case of gifts to the testator's own next of kin, the persons to take under gifts to the next of kin of a deceased person are those who are at the testator's death such next of kin. *Philps* v. *Evans*, 4 De G. & S. 188; *Wharton* v. *Barker*, 4 K. & J. 483.

The rule is the same if the gift is to the next of kin of a person who is not dead at the date of the will, but who dies before the testator's death. *Vane* v. *Henderson*, 1 J. & W. 388, n.; *In re Gryll's Trusts*, 6 Eq. 589; *In re Philps' Will*, 7 Eq. 151.

Exceptions to the rule.

The circumstance that the tenant for life under the will is the sole next of kin at the date of the will, so that if the ordinary rule applies he must take if he survives the testator, would probably not alone be sufficient to alter the rule. *Wharton* v. *Barker*, 4 K. & J. 483.

But if the gift is by a testatrix to such persons as would have become entitled to her husband's personal estate had he died intestate and without leaving a widow, the next of kin must be ascertained at the husband's death, and if one of them dies before the testatrix, there is a lapse as regards his share. *In re Rees*; *Williams* v. *Davis*, 44 Ch. D. 484; see *In re Ham's Trusts*, 2 Sim. N. S. 106.

Next of kin of a living person.

h. If the gift is to the next of kin of a person who survives the testator, the class is ascertained at the death of that person. *Gundry* v. *Pinniger*, 1 D. M. & G. 502; *Jacobs* v. *Jacobs*, 16 B. 557; *Markham* v. *Ivatt*, 20 B. 579.

If the gift is to A for life, then to B if living at A's death, and if not to B's next of kin, and B dies before A, the next of kin are ascertained at the death of B and not of the tenant for life. *Smith* v. *Palmer*, 7 Ha. 225.

Representatives.

Gift to representatives.

The words "representatives," "legal representatives," "personal representatives," or "legal personal representatives" must, in the absence of other controlling words, be taken to mean persons claiming as executors or administrators. *In re Crawford's Trusts*, 2 Dr. 230; *Hinchcliffe* v. *Westwood*, 2 De G. & Sm. 216; *Dixon* v. *Dixon*, 24 B. 129; *Re Turner*, 2 Dr. & Sm. 50; *Smith* v. *Barneby*, 2 Coll. 728; *Leak* v. *Macdowall*, 33 B. 233; *Wyndham's Trust*, L. R. 1 Eq. 290; *Alger* v. *Parrott*, 3 E. 328; *Best's Settlement*, 18 Eq. 686; *In re Ware; Cumberlege* v. *Cumberlege-Ware*, 45 Ch. D. 269.

In what cases "representatives" means next of kin.

If, however, there is an indication of intention that the representatives are to take beneficially and not in a fiduciary capacity, the words can hardly be referred to executors or administrators, and they will generally mean statutory next of kin, including a widow, but not a husband. *Cotton* v. *Cotton*, 2 B. 67; *Smith* v. *Palmer*, 7 Ha. 22; *Holloway* v. *Radcliffe*, 23 B. 163; *King* v. *Cleaveland*, 26 B. 166; 4 De G. & J. 477; *In re Horner; Eagleton* v. *Horner*, 37 Ch. D. 710.

It would seem that by analogy to the case of heirs, the statute would fix the proportions as well as the persons, and that *Walker* v. *Marquis of Camden*, 16 Sim. 329, would not now be followed.

Substitutional gift.

1. If the gift is substitutional, as, for instance, to A or his legal representatives, or even to A, and if he die before me to his representatives, there is an *à priori* improbability that the testator meant to benefit the estate of the legatee if he died in the testator's lifetime, while the legatee himself could derive no benefit from the legacy unless he survived the testator, and therefore "representatives" will be read as equivalent to "statutory next of kin." *Bridge* v. *Abbott*, 3 B. C. C. 224; *Cotton* v. *Cotton*, 2 B. 67; *Re Thompson*; *Machell* v. *Newman*, 55 L. T. 85; see *Howetson* v. *Todhunter*, 22 L. J. Ch. 76.

The next of kin to take are those who would have been next of kin according to the statutes if the legatee had died at the time of the death of the testator. *Bridge* v. *Abbott*, 3 B. C. C. 224; *Re Thompson*; *Machell* v. *Newman*, 55 L. T. 85.

If the gift is to several related persons or their respective representatives, "representatives" will mean descendants. *Styth* v. *Monro*, 6 Sim. 49. See *Horsepool* v. *Watson*, 3 Ves. 383; *Atherton* v. *Crowther*, 19 B 448; *In re Booth*; *Fytton* v. *Booth*, W. N. 1877, 129.

Prior life estate.

2. Where there is a prior life estate the reasons for construing "legal representatives" as "next of kin" do not apply.

The substitutional words may be considered as inserted merely *ex abundanti cautelâ*, to provide for the death of the legatee in the lifetime of the tenant for life. *In re Crawford's Trusts*, 2 Dr. 230, 242; *Re Henderson*, 28 B. 656; *Hinchcliffe* v. *Westwood*, 2 De G. & S. 216; *Chapman* v. *Chapman*, 33 B. 556; *Re Turner*, 2 Dr. & Sm. 501.

The same is the case where there is a direct gift to A or his personal representatives, but the time of payment is postponed, or a gift to A, and if he dies before the whole is expended, to his representatives. *Thompson* v. *Whitelock*, 4 De G. & J. 490; *Dixon* v. *Dixon*, 24 B. 129.

Words of distribution.

3. If there are words of distribution, such as "to and amongst," or "share and share alike," and similar expressions, shewing that the "representatives" are to take beneficially, the legacy will go the statutory next of kin. *King* v. *Cleveland*, 4 De G. & J. 477; *Baines* v. *Otley*, 1 M. & K. 465; *Smith* v. *Palmer*, 7 Ha. 225.

This, however, does not apply where, the gift being to the representatives of several persons who take life interests, the words of distribution can be referred to the *stirpes*. *Wing* v. *Wing*, 24 W. R. 878.

Where both the words executors and representatives occur.

4. If the words executors and administrators have been used in other parts of the will, this is an argument to show that representatives must mean something else. *Jennings* v. *Gallimore*, 3 Ves. 146; *King* v. *Cleveland*, 4 De G. & J. 477;

Nicholson v. *Wilson*, 14 Sim. 549; *Walker* v. *Marquis of Camden*, 16 Sim. 329; *Briggs* v. *Upton*, 7 Ch. 376.

Direction to pay to representatives where an executor is appointed.

5. Where there is a direction to pay to personal representatives, the fact that an executor is appointed would be a strong argument in favour of next of kin. *Robinson* v. *Smith*, 6 Sim 47; *Walter* v. *Makins*, 6 Sim. 148; *Jennings* v. *Gallimore* 3 Ves. 146. See *Briggs* v. *Upton*, *supra*.

Where the term "representatives" is coupled with explanatory words.

6. The same result will follow if there are words added to the term "representatives" inconsistent with the meaning "executors or administrators," such as "personal representatives or next of kin" (*a*); or, "such persons as would be the personal representatives of my daughter in case she had died unmarried" (*b*); or, "legal personal representatives at the time of her death" (*c*); or, "next legal or personal representatives" (*d*). *Philps* v. *Evans*, 4 De G. & S. 188 (*a*); *Gryll's Trust*, 6 Eq. 589 (*b*); *Robinson* v. *Evans*, 22 W. R. 199; 4 L. J. Ch. 82; *Long* v. *Blackall*, 3 Ves. 486 (*c*); *Booth* v. *Vicars*, 1 Coll. 6; *Stockdale* v. *Nicholson*, 4 Eq. 359 (*d*).

Whether, in this latter case, the next of kin proper or the statutory next of kin take, see *Booth* v. *Vicars*, *supra*; *Stockdale* v. *Nicholson*, *supra*.

A gift to "personal representatives *per stirpes*, and not *per capita*," has been held to mean descendants. *Atherton* v. *Crowther*, 19 B. 448; *Re Knowles*; *Rainford* v. *Knowles*, 59 L. T. 359.

For a direction to pay to "legal representatives according to the course of administration," see *Jennings* v. *Gallimore*, 3 Ves. 146; *Briggs* v. *Upton*, 7 Ch. 376.

Effect of the word "assigns."

It would seem that the addition of the word "assigns" in a substitutional gift to heirs or representatives would make it impossible to construe these words as equivalent to next of kin. *Grafftey* v. *Humpage*, 1 B. 46; *Waite* v. *Templer*, 2 Sim. 524.

Representatives of a firm.

Sometimes testators have made gifts to the representatives of a banking or other firm to whom they have incurred obligations. In such cases questions arise whether the persons to take are those for the time being carrying on the business, or their executors of the partners, and in what shares they take.

depends on the language used. *Greville* v. *Greville*, 27 B. 594; *Leak* v. *MacDowall*, 3 N. R. 185; *Kerrison* v. *Reddington*, 11 Ir. Eq. 451.

EXECUTORS.

Gift to A, and in case of his death to his executors.

A gift to A, and in case of his death to his executors or administrators, will go to A's executors in the event of his death before the testator. *Long* v. *Watkinson*, 17 B. 471; *Re Seymour's Trusts*, Johns. 472; *Maxwell* v. *Maxwell*, I. R. 2 Eq. 478; *In re Clay; Clay* v. *Clay*, 32 W. R. 516; affd. 54 L. J. Ch. 648; overruling *Palin* v. *Hills*, 1 M. & K. 470. See, too, *Aspinall* v. *Duckworth*, 35 B. 307; *Re Morgan's Trusts*, 2 W. R. 439.

Of course, where there is a future gift to A or his executors, the word "executors" will be treated as inserted to provide for the death of the donee before the time of vesting in possession. See *Stocks* v. *Dodsley*, 1 Kee. 325.

Executors taking substitutionally take in trust for the next of kin.

It appears to be now settled, notwithstanding *Evans* v. *Charles*, 1 Anstr. 128, that executors taking substitutionally take the property to be administered as part of the assets of the original legatee. *Stocks* v. *Dodsley*, 1 Kee. 325; *Leak* v. *Macdowall*, 33 B. 238; *In re Valdez's Trusts*, 40 Ch. D. 159.

Similarly, a gift to the executors of a dead person is a gift to his legal personal representatives as part of his estate. *Trethewy* v. *Helyar*, 4 Ch. D. 53.

Gifts to the testator's executors only go to them if they accept the office.

A general or specific legacy given by a testator to his executors, whether under the title of executors or not, is *primâ facie* given to them in that character, and therefore they are not entitled to the legacies if they decline or are incapable of undertaking the office. *Reed* v. *Devaynes*, 2 Cox, 285; 3 B. C. C. 95; *Calvert* v. *Sibbon*, 4 B. 222; *Hanbury* v. *Spooner*, 5 B. 630; *Hoskins' Trust*, 33 B. 570; *Piggott* v. *Green*, 6 Sim. 72; *Slaney* v. *Watney*, L. R. 2 Eq. 418; *In re Appleton; Barber* v. *Tebbit*, 29 Ch. D. 893.

What is a sufficient acceptance of the office.

To entitle an executor to receive his legacy, it is sufficient if he either proves the will, which he may do at any time before the estate is fully administered, or if he acts as executor.

Chap. XXXI. *Hollingsworth* v. *Grassett*, 15 Sim. 52; *Angermann* v. *Ford*, B. 349; *Harrison* v. *Rowley*, 4 Ves. 212; *Lewis* v. *Math* 8 Eq. 277.

And it seems that if the legacy is directed to be paid wit twelve months, and there is nothing to show that the execu refuses to act, he is entitled to his legacy if he survives twelve months. *Brydges* v. *Wotton*, 1 V. & B. 134.

But if the executor acts fraudulently, the mere taking probate will not entitle him to his legacy. *Harford* v. *Brown* 1 Cox, 302.

Where an annuity was given to trustees as a recompense their care and trouble in the execution of the trusts, it held that the trustees were entitled to the annuity though t employed an agent to collect the rents. *Wilkinson* v. *Wilkin* 2 S. & St. 237.

But the case is different if an annuity is given expressly their services in collecting the rents. In such a case if t employ an agent they cannot take the annuity. *Re Muff* *Jones* v. *Mason*, 55 L. T. 671; 56 L. T. 685.

In what cases the executor is entitled, though he does not act.

The presumption that a legacy to an executor is given to in that character for his trouble is not rebutted by the that the legacy precedes the appointment of executors, or the fact that legacies of unequal amount are given to executors. *In re Appleton; Barber* v. *Tebbit*, 29 Ch. D. 8 see *Wildes* v. *Davies*, 1 Sm. & G. 475; 22 L. J. Ch. 497.

The presumption would probably not now be held to rebutted by difference in the subject-matter of two bequest executors. *In re Appleton*, *supra*, where *Jewis* v. *Lawre* 8 Eq. 345, is discussed.

The presumption may be rebutted:—

1. If some other motive is expressed, as if the gift is to " friend and executer." *Re Denby*, 3 D. F. & J. 350; *Dix* v. *R* 1 S. & St. 237; *Cockerell* v. *Barber*, 2 Russ. 585; *Burgess* *Burgess*, 1 Coll. 367; *Bubb* v. *Yelverton*, 13 Eq. 131.

2. If the gift is after a life interest. *In re Reeve's Tru* 4 Ch. D. 841.

3. If there is a direction that in the event of the executor's death before the testator, his legacy is to go to his next of kin. *In re Bunbury's Trusts*, I R. 10 Eq. 408.

4. The presumption does not arise if the gift is of residue. *Parsons* v. *Saffery*, 9 Pr. 578 *Griffith* v. *Pruen*, 11 Sim. 202; *Christian* v. *Devereux*, 12 Sim. 264; *In re Maxwell; Eivers* v. *Curry*, (1906) 1 Ir. 386.

CANADIAN NOTES.

Chap. XXXI.

Gifts to heirs when heirs are ascertained.

As to gifts to heirs, see the notes to Chapter XXII.

The word heirs has reference to the death of the ances and when it is necessary to ascertain the class, those are be taken who answer that description at the ancestor's de

Thus, in a bequest to an only child (a son) for life, upon his death to his children, but if he should die child then one-third to go to the heirs-at-law of the testator, son takes absolutely one-third on his death without child and it passes under his will. *Jost* v. *McNutt*, 40 N.S.R. See also *Thompson* v. *Smith*, 27 S.C.R. 628; *Hartshor Wilkins*, 7 N.S.R. 128.

Even a direction, in such a case, to divide the prope equally amongst the testator's own right heirs who m prove their relationship, is not sufficient to shew a contr intention. *Re Ferguson*, 28 S.C.R. 381; *Brabant* v. *Lalo* 26 O.R. 379.

Personal representatives.

A gift to A., but if he die before receiving his share, to his legal personal representatives, gives A. a vested inte and if he die before the period of distribution his execu take. *Kerr* v. *Smith*, 27 O.R. 409.

Legacy to executors.

A legacy to an executor for his trouble and expens forfeited if he renounce. And inequality in the amo given to several executors is not sufficient to rebut the sumption that the legacies are given in that character. *P* v. *Hickson*, 25 Gr. 102.

Legacy to person appointed executor.

A legacy given beneficially is not affected by the appointment of the legatee as executor in a subsequent part of the will. *Lyon* v. *Blott*, 16 Gr. 368.

Where executors were to take "share and share alike" and the only charge imposed on them was the maintenance of the testator's wife who pre-deceased him, it was held that they took beneficially. *Ballard* v. *Stover*, 14 O.R. 153.

And see notes to Chapter XXXIX.

CHAPTER XXXII.

GIFTS TO CHARITABLE USES.

I.—What are Charitable Gifts.

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General rules applicable to charitable gifts.

Charitable gifts are subject to peculiar rules. The ru against perpetuity does not apply to them, nor if a chari able intent is once established can a ch ritable gift fail fo uncertainty or want of a trustee.

On the other hand, the Court does not, in cases where th Mortmain Act applies, marshall assets in favour of a charit and charitable gifts are also subject to certain restrictio imposed by statute.

Legal meaning of charity.

Charity in the legal sense has a far wider meaning than th word conveys in its popular use. It is usual to refer to th preamble to the statute 43 Eliz. c. 4, as defining its meanin but the word is by no means limited to the exact charit there referred to. *Commissioners for Special Purposes of I come Tax* v. *Pemsel*, (1891) A. C. 531.

The statute 43 Eliz. c. 4, has been repealed by the Mo main and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42 s. 13, but the preamble to the earlier Act is recited in a recognized by sect. 13 (2) of the later Act.

Private charity—Benevolence, liberality, philanthropy.

It would be difficult, if not impossible, to give a satisfa tory definition of charity, but it may be noted that while the one hand a gift for private charity (*a*) is too confined to a charity in the legal sense, and is therefore void; on t other hand, gifts for purposes of benevolence (*b*), or libe ality (*c*), or general or public utility (*d*), or ph anthropy (*e*), or for public purposes (*f*), are too wi to be charitable. *Ommaney* v. *Butcher*, T. & R. 260; s however, *In re Sinclair's Trust*, 13 L. R. Ir. 150 (a *James* v. *Allen*, 3 Mer. 17; *In re Jarman's Estate; Leavers*

Clayton, 8 Ch. D. 584 (*b*); *Morice* v. *Bishop of Durham*, 9 Ves. 399; 10 Ves. 522 (*c*); *Kendall* v. *Granger*, 5 B. 300; *Langham* v. *Peterson*, 87 L. T. 744 (*d*); *In re Macduff*; *Macduff* v. *Macduff*, (1896) 2 Ch. 451 (*e*); *Vezey* v. *Jamson*, 1 S. & St. 69; *Blair* v. *Duncan*, (1902) A. C. 37 (*f*).

A fortiori, a gift to be expended in acts of hospitality is not charitable. *Re Hewitt*; *Mayor of Gateshead* v. *Hudspeth*, 49 L. T. 587; 53 L. J. Ch. 132; *Langham* v. *Peterson*, 87 L. T. 744.

It may, of course, appear from the will that the testator uses such words as benevolent or deserving in the sense of charitable, or that, though he uses such words, his main purpose is really charitable. See *Dolan* v. *Macdermott*, 3 Ch. 676; *In re Sutton*; *Stone* v. *A.-G.*, 28 Ch. D. 464; *Re Hewitt*; *Mayor of Gateshead* v. *Hudspeth*, 49 L. T. 587; 53 L. J. Ch. 132; *Lloyd-Greame* v. *A.-G.*, 10 T. L. R. 66; *In re Purdue*; *M'Laughlin* v. *A.-G.*, (1906) 2 Ch. 184.

And a gift for charitable and benevolent purposes is a charitable gift. *Jennitt* v. *Vereil*, Amb. 585, n.; *In re Best*; *Jarvis* v. *Birmingham Corporation*, (1904) 2 Ch. 354.

Charity out of jurisdiction.

Gifts for charitable purposes out of the jurisdiction of the Court are valid. *Re Geck*; *Freund* v. *Steward*, 69 L. T. 819.

Classification of charitable gifts.

It is said [illegible], (1891) A. C. p. 583, that "Charity in its legal [illegible] four principal divisions: Trusts for the relief [illegible] for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community not falling under any of the preceding heads."

It is proposed for convenience to classify the cases with reference to these divisions.

A. Trusts for the relief of poverty:—

A. Relief of poverty.

Under this head come gifts for the poor inhabitants of a parish (*a*); for poor credible industrious persons residing at A, with two children or upwards or above fifty years of age, married or otherwise, unable to get a living (*b*); to let out land to the poor at a low rent (*c*); for poor pious persons, male and female (*d*); for six poor members of a chapel (*e*); for elderly persons in indigent or greatly reduced circumstances (*f*); for relieving distressed persons (*g*); for the redemption of British slaves

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in Turkey and Barbary (*h*); for pensioning off old and wor
out clerks of the firm of Goslings and Sharpe (*i*). *A.-G.*
Clarke, Amb. 422 (*a*); *Russell* v. *Kellett*, 3 Sm. & G. 264 (*b*
Crafton v. *Frith*, 15 Jur. 737; 20 L. J. Ch. 198 (*c*); *Nash*
Morley, 5 B. 177 (*d*); *Gregory* v. *A.-G.*, 2 B. 366 (*e*); *Baldw*
v. *Baldwin*, 22 B. 413 (*f*); *Waldo* v. *Caley*, 16 Ves. 206 (*g*
A.-G. v. *Ironmongers' Company*, 2 B. 313; *A.-G.* v. *Gibson*,
317, n. (*h*); *In re Gosling; Gosling* v. *Smith*, 48 W. R. 300 (*i*

Endowment of hospital.

A gift for endowing or erecting a hospital may come und
this head. *Pelham* v. *Anderson*, 2 Ed. 296; 1 B. C. C. 44
A.-G. v. *Kell*, 2 B. 575.

Relief of aged persons.

The relief of aged, impotent and poor people is expres
referred to in the preamble to 43 Eliz. c. 4, but having regu
to the fact that relief is mentioned and that poverty is coupl
with age and impotence, it would seem that the aged pers
contemplated by the statute must be a person who is destitu
and needs relief.

Intention to relieve poverty inferred.

In some cases, though poverty has not been expres
referred to, it has been inferred that the gift was intend
to relieve destitution. On this ground, gifts for the wido
and orphans of the parish of Lindfield (*a*); for the widows a
children of the seamen of Liverpool (*b*); for twenty ag
widows and spinsters of the parish of Peterborough (*c*); a
annuities of 10*l.* for men and women not under fifty ye
of age, Unitarians, and who attend Lewin's Mead Unitar
Chapel in Bristol, with a direction to put up a tablet in
chapel, "otherwise how should the deserving know of it"
have been held charitable. *A.-G.* v. *Comber*, 2 S. & St. 93
Powell v. *A.-G.*, 3 Mer. 48 (*b*); *Thompson* v. *Corby*, 27 B. 649
In re Wall; Pomeroy v. *Willway*, 42 Ch. D. 510 (*d*).

Friendly society may or may not be a charity.

A friendly society existing for the purpose of providing
subscriptions of its members, a fund to be distributed for t
mutual benefit in case of sickness, lameness, or old age, o
provide annuities for widows of members, but without refere
to poverty, is not (*a*), while a similar society, if by its r
poverty is made a necessary element to entitle a member to
benefits of the society (*b*), is a charity. *In re Clark's T*
1 Ch. D. 497; *Cunnack* v. *Edwards*, (1896) 2 Ch. 679

Spiller v. *Maude*, 32 Ch. D. 158, n.; *Pease* v. *Pattinson*, 32 Ch. D. 154; *In re Buck*; *Bruty* v. *Mackey*, (1896) 2 Ch. 727; *In re Lacy*; *Royal General Theatrical Fund Association* v. *Kydd*, (1899) 2 Ch. 149 (*b*); see, too, *In re Amos*; *Carrier* v. *Price*, (1891) 3 Ch. 159 (a trade union); *Re Clarke*; *Clarke* v. *Clarke*, (1901) 2 Ch. 110 (corps of commissionaires).

Persons receiving parochial relief.

A gift for the benefit of the poor does not include persons receiving parochial relief. *A.-G.* v. *Clarke*, Amb. 422; *A.-G.* v. *Price*, 3 Atk. 109; *Bishop of Hereford* v. *Adams*, 7 Ves. 324; *A.-G.* v. *Corporation of Exeter*, 2 Russ. 47; 3 *ib.* 396; *A.-G.* v. *Braudreth*, 1 Y. & C. C. 200; *A.-G.* v. *Wilkinson*, 1 B. 370; *A.-G.* v. *Bovill*, 1 Ph. 762; *A.-G.* v. *Blizard*, 21 B. 233; see *Re Ashton's Charity*, 27 B. 115.

A gift to the poorest of a class is charitable, if the meaning is that it is to be for those actually poor. It is not charitable if it is merely a gift to the poorest of a wealthy class. *A.-G.* v. *Duke of Northumberland*, 7 Ch. D. 745; see *Liley* v. *Hey*, 1 Ha. 580; *In re Good*; *Hurington* v. *Watts*, (1905) 2 Ch. 60.

Thomas v. *Howell.*

In *Thomas* v. *Howell*, 18 Eq. 198, a gift of 200*l.* to each of ten poor clergymen, whether holding benefices or not, to be selected by A, was held not to be charitable. The gift was of a sum immediately payable, and moreover the word poor was used only in the sense of comparatively poor, as a clergyman holding a benefice might be included. See also *A.-G.* v. *Baxter*, 1 Vern. 248; on appeal, *A.-G.* v. *Hughes*, 2 Vern. 105, where no question of charity seems to have arisen; see 7 Ves. 76.

Gifts to poor relations.

On the question whether a gift to poor relations is charitable:—

1. Of a lump sum immediately distributable.

1. When the gift is of a lump sum immediately distributable the cases are very unsatisfactory.

a. In several cases it has been held that a gift to poor relations is to be confined to statutory next of kin, thus implying that the gift is not charitable, since, if it were, no question of uncertainty could have arisen. *Carr* v. *Bedford*, 2 Ch. Rep. 146; *Griffith* v. *Jones*, *ib.* 394, anno 1694; *Widmore* v. *Woodroffe*, Amb. 636.

On the other hand, relations were not so restricted in *A.-G.*

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v. *Buckland*, cit. Amb. 71; 1 Ves. Sen. 231; and *Mahon* *Savage*, 1 Sch. & Lef. 111.

In *Edge* v. *Salisbury*, Amb. 70; *S. C.*, *nom. Goodinge* *Goodinge*, 1 Ves. Sen. 230; Belt, 128, where the words w "nearest relations," of course only next of kin could take.

b. In *Brunsden* v. *Woolridge*, Amb. 507; 1 Dick. 380, wh tho will was dated in 1757, and was therefore, since tho M main Act, a gift of *realty* to such poor relations as A sho think objects of charity, was held valid, and therefore charitable; and see *Thomas* v. *Howell*, 18 Eq. 198.

2. Of an annual sum.

2. If, however, the gift is not of a sum distributable at or but of an annual sum, or if tho testator has contemplated perpetuity, tho gift is charitable and not confined to statut next of kin. *Isaac* v. *Defries*, Amb. 595; 17 Ves. 373, *A.-G.* v. *Price*, 17 Ves. 371; *White* v. *White*, 7 Ves. 4 *Hall* v. *A.-G.*, 2 Jarman, 980; *Gillam* v. *Taylor*, 16 Eq. 5 some of the observations in the last case were criticised Jessel, M.R., in *A.-G.* v. *Duke of Northumberland*, 7 Ch. 745.

B. Advancement of education.

Schools.

B. Trusts for tho advancement of education:—

The statute of Elizabeth refers to schools of learning with any reference to poverty, consequently all schools of learning to be considered charities. *A.-G.* v. *Lord Lonsdale*, 1 Sim. 1

Under this head come gifts for the benefit, advancement, propagation of education and learning (by means of teachi in every part of tho world (*a*); for tho advancement and p pagation of education in economic and sanitary sciences Great Britain (*b*); for tho endowment or maintenance of named schools (*c*); to found a school for the sons of gen men (*d*); to found prizes for essays on a given subject (*e*) conveyance of a house to be employed as an Inn of Chanc for the good of the gentlemen of the Society and for the ben of the Commonwealth (*f*); to found a home of rest for l teachers (*g*). *Whicker* v. *Hume*, 7 H. L. 124 (*a*); *Re Berrid Berridge* v. *Turner*, 62 L. T. 365; 63 L. T. 470 (*b*); *Kirkb* v. *Hudson*, 7 Pr. 213 (*c*); *A.-G.* v. *Lord Lonsdale*, 1 S 105 (*d*); *Farrer* v. *St. Catharine's College*, 16 Eq. 19; see, ho ever, *Briggs* v. *Hartley*, 19 L. J. Ch. 416 (*e*); *Smith* v. *K*

(1902) 1 Ch. 775 (*f*); *Re Estlin; Prichard* v. *Thomas*, 89 L. T. 88 (*g*).

Gifts to scientific societies.

Under this head also come gifts to institutions and societies which exist for the increase of knowledge generally, such as the British Museum (*a*); or the Smithsonian Institute (*b*); or for the advancement of science or some particular science, such as the Royal Society and the Geographical Society (*c*). *Trustees of the British Museum* v. *White*, 2 S. & St. 594 (*a*); *President of the United States* v. *Drummond*, cit. 7 H. L. 155 (*b*); *Beaumont* v. *Oliveira*, 4 Ch. 309 (*c*).

Art museum.

So the gift of a collection of pictures, china, and the like, to establish an art museum in Bath, is charitable. *Re Holburne; Coates* v. *Mackillop*, 53 L. T. 212.

Kindness to animals.

Gifts for promoting the kind treatment of animals come under this head.

Thus, gifts to establish an institution for investigating, studying and endeavouring to cure maladies, distempers and injuries any quadrupeds or birds useful to man may be found subject to (*a*); to a society to promote prosecution for cruelty to animals (*b*); to a society for the protection of animals liable to vivisection, and to the Home for Lost Dogs (*c*); and to societies for the suppression of vivisection (*d*), are all charitable. *University of London* v. *Yarrow*, 1 De G. & J. 72 (*a*); *Re Vallance*, Seton, 5th ed. 1141 (*b*); *In re Douglas; Obert* v. *Barrow*, 35 Ch. D. 472 (*c*); *Armstrong* v. *Reeves*, 25 L. R. Ir. 325; *In re Foreaux; Cross* v. *London Anti-Vivisection Society*, (1895) 2 Ch. 501 (*d*).

Gifts for the maintenance of particular animals are not charitable. *In re Dean; Cooper-Dean* v. *Stevens*, 41 Ch. 552.

Particular doctrines.

Gifts to promote the doctrines of a particular sect or of a particular person, if the doctrines are not of an immoral or irreligious tendency, may also be charitable.

Thus, a gift for printing, publishing, and propagating the sacred writings of Joanna Southcote (*a*); a gift of 50*l.* a year to be paid to a worthy literary man who had not been very successful in his career, to assist in extending the knowledge of those doctrines in the various branches of literature to which the testator had turned his attention and pen (*b*), and

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a gift to a vegetarian society (*c*), have all been held go charitable gifts. *Thornton* v. *Howe*, 31 B. 14 (*a*); *Thomp* v. *Thompson*, 1 Coll. 395 (*b*); *Webb* v. *Oldfield*, (1898) 1 431 (*c*).

A gift to found a "Socialist school" may be valid if t doctrines to be taught are not immoral or irreligious. *Rus* v. *Jackson*, 10 Ha. 204.

On the other hand, a gift for promoting a philosophy wh the Court thought not consistent with the Christian religion v held void. *Briggs* v. *Hartley*, 19 L. J. Ch. 416.

And a trust for printing and publishing .. book written show that the Pope has in all ecclesiastical matters a suprema which he is not at liberty to alienate or to subject to the te poral sovereign is void as being against public policy. *Themmonis* v. *De Bonneval*, 5 Russ. 288.

A gift for the purchase of such books as may have tendency to promote the interests of virtue and religion a the happiness of mankind, the same to be disposed of in Gr Britain or in any other part of the British dominions, has be held not charitable. *Browne* v. *Yeall*, 7 Ves. 50, n.; see 10 V 27; (1896) 2 Ch. 471.

The charity must be of a public nature.

The limit of the conception of charity of this kind appe to be that it must be of a public nature.

Thus, gifts to form a museum in Shakespeare's house, wh was private property (*a*); to the Penzance Public Libra which was an institution existing only for the benefit a improvement of its subscribers (*b*); and to an Athenæ Mechanics' Institution, a club in which the members ca together for literary purposes and mutual improvement (to support and educate in Ireland boys or men of the surna of Laverty (*d*), are not charitable. *Thomson* v. *Shakespear* D. F. & J. 399 (*a*); *Carne* v. *Long*, 2 D. F. & J. 75 (*b*); *Dutton*, 4 Ex. D. 54 (*c*); *Laverty* v. *Laverty*, (1907) 1 Ir. 9 (see also *Re Joy*; *Purday* v. *Johnson*, 60 L. T. 175.

C. Advancement of religion.

C. Trusts for the advancement of religion:—

It is a nice question whether gifts for religious institutio or religious purposes generally are at the present day go

Whether religious purposes are necessarily charitable.

charitable gifts. *Primâ facie* it would seem that a religious institution or a religious purpose is not necessarily charitable.

However, in *In re White; White* v. *White*, (1893) 2 Ch. 41, the Court of Appeal thought that it was bound by authority to hold that a bequest to a religious institution or for a religious purpose is *primâ facie* a bequest for charitable purposes, though apparently, apart from authority, the Court would have held the gift void. The cases cited as the leading authorities on this head are *Baker* v. *Sutton*, 1 Kee. 224; *Townsend* v. *Carus*, 3 Ha. 257; and *Wilkinson* v. *Lindgren*, 5 Ch. 570.

In *Baker* v. *Sutton*, 1 Kee. 224, the gift was "for such religious and charitable institutions and purposes as the major part of the trustees shall think proper," *i.e.*, institutions and purposes which must be both religious and charitable. In *Townshend* v. *Carus*, 3 Ha. 257, the gift was to the minister of the church "where I have been used to worship" and his former curate, upon trust "for the benefit or advancement of such societies, subscriptions or purposes, having regard to the glory of God in the spiritual welfare of His creatures, as they shall in their discretion see fit, and I entreat them to undertake the office of almoners of my residue." The Court laid stress upon the word almoners, and came to the conclusion that the end proposed by the testatrix was charitable, and that no expenditure was lawful which was not directly conducive to that end. The judge also remarked that the spiritual welfare of God's creatures would be a "religious, and therefore a charitable, purpose." In *Wilkinson* v. *Lindgren*, 5 Ch. 570, the gift was to certain named societies of a charitable nature, or to any other religious institution or purposes as they may think proper, which was held to mean any other religious institution or purpose of the same, namely, of a charitable nature.

So far, therefore, as the words religious institutions or religious purposes occurred in these three cases, they occurred with a strong explanatory context, showing that charity was meant.

No doubt there are dicta to the effect that a religious purpose is a charitable purpose, but those dicta lose much of their weight when read in connection with the cases in which they were pronounced. At that time the words religious institution and

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religious purpose had not been discussed as fully as they h
been in later cases.

If these considerations tend to raise doubts as to the autho
of *In re White*, those doubts are very much strengthened
the decision of the House of Lords in *Grimond* v. *Grim*
(1905) A. C. 124, where a gift for "charitable or relig
institutions and societies" was held void for uncertainty. T
was a Scotch case, but it does not appear that for this pur
there is any distinction between English and Scotch law. Th
is nothing in Scotland similar to the statute of Elizabeth u
which the large meaning given to the word charity is sai
be founded, but the statute of Elizabeth does not men
religion, and therefore causes no difference on the point betw
the two countries. See *In re Pardoe*; *M'Laughlin* v. *A*.
(1906) 2 Ch. 184, 192.

It is also true that in *Grimond* v. *Grimond* the word "
gious" is used as in contradistinction to charitable, but
judgment of Lord Moncrieff ((1905) A. C. 607) which
approved in the House of Lords, puts the matter on the b
ground that religious purposes are not necessarily charit
and that a gift for those purposes is therefore "void
uncertainty." *In re White* has, however, been followe
Ireland since the decision in *Grimond* v. *Grimond*. *Arn*
Arnott, (1906) 1 Ir. 127.

Indefinite purposes connected with religion.

The cases in which gifts for certain indefinite purposes
religious nature have been held invalid may be cited here. T
are gifts for pious uses (*a*), for missionary purposes (*b*), an
Roman Catholic purposes in the parish of Coleraine or
where (*c*). *Heath* v. *Chapman*, 2 Dr. 417 (*a*); *Scott* v. *Brow*
9 L. R. Ir. 246; but not followed *Re Kenny*; *Clark* v. *An*
97 L. T. 130 (*b*); *M'Laughlin* v. *Campbell*, (1906) 1 Ir. 58

Valid gifts for religious purposes.

The difficulties arising upon gifts for religious pur
generally do not arise upon gifts for specific religious pur
of a public nature. Of this kind are—

A gift for the increase and improvement of Chri
knowledge and promoting religion, and to buy Bibles
other religious books (*a*); a gift to be applied in the s
of my Lord and Master, and I trust Redeemer, or to the

and the service of God (*b*); to General Booth for the spread of the Gospel (*c*); to maintain the missionary establishments among heathen nations of the Protestant Episcopal Church, commonly known as the Moravian Church (*d*); for the furtherance of Conservative principles and religious and mutual improvement (*e*); to the Protestant Alliance or kindred institutions having for their object the maintenance and defence of the doctrines of the Reformation and the principles of civil and religious liberty against the advance of Popery (*f*); to ring church bells on the anniversary of the restoration of the monarchy (*g*). *A.-G.* v. *Stepney*, 10 Ves. 22 (*a*); *Powerscourt* v. *Powerscourt*, 1 Moll. 616; *Re Darling; Farquhar* v. *Darling*, (1896) 1 Ch. 50 (*b*); *In re Lea; Lea* v. *Cooke*, 34 Ch. D. 528 (*c*); *Pemsel's Case*, (1891) A. C. 531 (*d*); *In re Scowcroft; Ormrod* v. *Wilkinson*, (1898) 2 Ch. 638 (*e*); *In re Delmar's Charitable Trust*, (1897) 2 Ch. 163 (*f*); *In re Pardoe; M'Laughlin* v. *A.-G.*, (1906) 2 Ch. 184 (*g*).

Trust to buy advowsons.

A trust for the purchase of advowsons is not in itself charitable, if no charitable trust is declared of the advowsons when purchased. *Hunter* v. *A.-G.*, (1899) A. C. 309.

Trust to present proper person.

Nor is a devise of an advowson upon trust to appoint a fit and proper person charitable, but it might be charitable if a person is to be appointed of a particular type of religious thought. *In re Church Patronage Trust; Laurie* v. *A.-G.*, (1904) 1 Ch. 41; *ib.* 2 Ch. 643.

Position of Dissenters and Roman Catholics.

Dissenters and Roman Catholics are, as regards bequests for charitable purposes, on the same footing as the Established Church. 1 W. & M. c. 18; the Roman Catholic Charities Act, 1832 (2 & 3 Will. IV. c. 115), s. 1; *A.-G.* v. *Pearson*, 3 Mer. 353, 405.

Dissenters.

Thus, bequests for the maintenance of Protestant Dissenters, or for the assistance of Unitarian congregations, or for the benefit of Irvingites, are valid. *A.-G.* v. *Pearson*, 3 Mer. 353; *Shrewsbury* v. *Hornby*, 5 Ha. 406; *A.-G.* v. *Lawes*, 8 Ha. 32. See *Dilworth* v. *Commissioners of Stamps*, (1899) A. C. 99.

Roman Catholics.

So bequests to be applied to the use of Roman Catholic schools, or of Roman Catholic priests in and near London,

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or of a Roman Catholic college existing for the educa of ecclesiastics and laymen, or to promote the Roman Catl religion, or to assist in the completion of a Roman Catl cathedral are good. *Bradshaw* v. *Tasker*, 2 M. & K. 2 *A.-G.* v. *Gladstone*, 13 Sim. 7; *Walsh* v. *Gladstone*, 1 290; *West* v. *Shuttleworth*, 2 M. & K. 684; *Dillon* v. *R* I. R. 10 Eq. 152.

Jews.

By the Religious Disabilities Act, 1846 (9 & 10 Vict. c. s. 2, Jews are, in respect to their schools, places for relig worship, education, and charitable purposes, and the prop held therewith, subject to the same laws as Protestant subj dissenting from the Church of England.

Since this statute, bequests to enable persons professing Jewish religion to observe its rites are valid. *Straus* v. *Golds* 8 Sim. 614; *In re Michel's Trusts*, 28 B. 39.

Monastic orders.

It has been held in Ireland that bequests in favour of Jes and members of other religious orders of the Church of R bound by monastic or religious vows are void, as contraver the policy of the Roman Catholic Relief Act, 1829 (10 Geo. c. 7) (see sects. 33—36). No similar case has arisen in E land.

Thus, bequests to be applied for the education and maintena of priests of the order of St. Dominick in Ireland, and for use of the Franciscan Convent at Wexford, and to the Chris Brothers at Cork, have been held to be void under the stat *Sims* v. *Quinlan*, 16 Ir. Ch. 191; 17 Ir. Ch. 43; *Walsh* v. *W* I. R. 4 Eq. 396; *Kehoe* v. *Wilson*, 7 L. R. Ir. 10; *Murph Chevers*, 17 L. R. Ir. 205; *Cussen* v. *Hynes*, (1906) 1 Ir. 5 *M'Laughlin* v. *Campbell*, *ib.* 588.

Gift to repair church of monastic order.

And a gift to build or acquire a site for, or repair or maint or otherwise benefit a chapel or church belonging to a relig order bound by monastic vows is void, though the chapel church may be open to the public. *Carbery* v. *Cox*, 3 Ir. 231; *Sims* v. *Quinlan*, 17 Ir. Ch. 43; *Kehoe* v. *Wilson*, 7 L. Ir. 10.

On the other hand, a gift to the rector of the Jesuits Mungret in aid of the school there for training pupils inten for the Church, or to Franciscans to educate priests for fore

missions, is good. *Roche* v. *M'Dermott*, (1901) 1 Ir. 394; *In re Murphy: Murphy* v. *Hynes*, (1906) 1 Ir. 505.

The statute applies whether the monastic body is settled before or since the Act. *Liston* v. *Keegan*, 9 L. R. Ir. 531.

Societies consisting of females are exempted from the operation of the statute: see sect. 37.

Superstitious uses.

The statutes removing religious disabilities have not affected bequests to superstitious uses.

The statute of 1 Edw. VI. c. 14, relates only to certain superstitious uses then existing. The earlier statute, 23 Hen. VIII. c. 10, relates only to assurances of land to churches and chapels. But by analogy to these statutes certain bequests are considered void as being superstitious uses. *Cary* v. *Abbot*, 7 Ves. 490.

Bequests for masses.

Thus, bequests to priests for offering masses for the souls of the dead are void, notwithstanding the Roman Catholic Charities Act, 1832 (2 & 3 Will. IV. c. 115), and go to the next of kin. *West* v. *Shuttleworth*, 2 M. & K. 684; *Heath* v. *Chapman*, 2 Dr. 417; *Re Blundell's Trusts*, 30 B. 360; *In re Fleetwood; Sidgreaves* v. *Brewer*, 49 L. J. Ch. 514; 15 Ch. D. 594.

They are void, although the legatee resides in a country where such a gift is good. *In re Elliott; Elliott* v. *Johnson*, 39 W. R. 297.

Land devised for a superstitious use goes to the heir. *R.* v. *Portington*, 3 Salk. 334; *Crofts* v. *Evetts*, Moore, 784.

Bequests for masses in Ireland are valid.

Bequests for offering up masses for the souls of the dead are not illegal in Ireland. *Commissioners of Charitable Donations* v. *Walsh*, 7 Ir. Eq. 34; *Read* v. *Hodgens*, *ib.* 17; *Brennan* v. *Brennan*, I. R. 2 Eq. 321; *Phelan* v. *Slattery*, 19 L. R. Ir. 177; *Bradshaw* v. *Jackman*, 21 L. R. Ir. 12; *Reichenbach* v. *Quin*, 21 L. R. Ir. 138.

Whether such bequests are charitable.

After some difference of opinion it is now settled that a gift in Ireland for masses for the repose of the soul of the testator or other deceased persons is a good charitable gift, whether the masses are directed to be celebrated in public or not. *A.-G.* v. *Hall*, (1896) 2 Ir. 291; (1897) 2 Ir. 426; *Perry* v. *Tuomey*, 21 L. R. Ir. 480; *Brannigan* v. *Murphy*, (1896) 1 Ir. 418; *O'Hanlon* v. *Logue*, (1906) 1 Ir. 247; overruling on this point the following seven cases: *Dillon* v. *Reilly*, I. R. 10 Eq. 152;

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A.-G. v. *Delaney*, I. R. 10 C. L. 104; *Kehoe* v. *Wils* 7 L. R. Ir. 10; *Morrow* v. *M'Conville*, 11 L. R. Ir. 236; *Dorr* v. *Gilmore*, 15 L. R. Ir. 69; *Small* v. *Torley*, 25 L. R. Ir. 38 *Healy* v. *A.-G.*, (1902) 1 Ir. 342. *Dillon* v. *Reilly* is consider in *Dorrian* v. *Gilmore* and *Small* v. *Torley*.

O'Hanlon v. *Logue*, *supra*, shows that such a gift would charitable even if the masses are directed to be celebrated private. But if the mass is to be celebrated by priests bou by monastic vows, probably the gift would be void. *Burke Power*, (1905) 1 Ir. 119.

By the Roman Catholic Charities Act (23 & 24 Vict. c. 13 s. 1, it is in effect provided that dispositions of real or p sonal estate upon any lawful charitable trust in favour of Rom Catholics shall not be invalidated by reason that the same est is subjected to a trust deemed to be superstitious; but the p perty may be apportioned, and a portion applied to the law charitable trusts declared by the donor, and the rest applied charitable purposes for the benefit of Roman Catholics, as Court or the Charity Commissioners may think just.

As to the application of the doctrine of superstitious use British colonies, see *Yeap Cheah Neo* v. *Ong Cheng Neo*, L 6 P. C. 381, and the authorities there quoted.

The statute of Elizabeth expressly mentions the repai churches.

Repair of a church.

Thus, gifts to repair the fabric of a church, or even the o ments within it, such as a monument or tomb already the directed to be placed there by the testator, or the parish chu yard and the tombs in it, or to erect and maintain headst to the grave the of a certain class of poor person, are charit *Hoare* v. *Osborne*, L. R. 1 Eq. 585; *In re Rigley's Trust* L. J. Ch. 147; *In re Vaughan*; *Vaughan* v. *Thomas*, 33 Ch 187; *In re Pardoe*; *McLaughlin* v. *A.-G.*, (1906) 2 Ch. *Willis* v. *Brown*, 2 Jur. 987, is not consistent with authorities.

And gifts to provide or maintain a burial ground, even th it is for the use of a particular sect, such as the Societ Friends, is a good charitable gift. *In re Manser*; *A.-*

Lucas, (1905) 1 Ch. 68; *In re Dongian*; *Douglas* v. *Simpson*, *ib.* 279.

Gift to repair a tomb is not a charity.

But a gift to repair the tomb of the testator or his family, not within a church, is not charitable. *Doe* v. *Pitcher*, 3 M. & S. 407; 6 Taunt. 359; *Mellick* v. *President of the Asylum*, Jac. 180; *Lloyd* v. *Lloyd*, 2 Sim. N. S. 255; *Adnam* v. *Cole*, 6 B. 353; *Rickard* v. *Robson*, 31 B. 244; *Hoare* v. *Osborne*, L. R. 1 Eq. 585; *Toole* v. *Hamilton*, (1901) 1 Ir. 385.

Nor is such a gift within the Gifts for Churches Act, 1803 (43 Geo. III. c. 108). *Re Rigley's Trust*, 36 L. J. Ch. 147.

Such a gift, therefore, if it involves a perpetuity, is void. *Rickard* v. *Robson*, *supra*; *Yeap Cheah Neo* v. *Ong Cheng Neo*, L. R. 6 P. C. 381; *In re Vaughan*; *Vaughan* v. *Thomas*, 33 Ch. D. 187. See *In re Tyler*; *Tyler* v. *Tyler*, (1891) 3 Ch. 252; *Roche* v. *M'Dermott*, (1901) 1 Ir. 394.

Gift to build monument.

A gift of a sum of money to erect a monument to the testator, whether it be in a church or in a churchyard, is not charitable. *Mellick* v. *President of the Asylum*, Jac. 180; *Adnam* v. *Cole*, 6 B. 353; *Trimmer* v. *Danby*, 25 L. Ch. 424.

Limit of conception of charity of this class.

The limit of the conception of charity in this direction appears to be that the religious purpose must be something more than mere personal edification. It must be in some way directed to the public good.

Thus, though a gift to a voluntary society established for the personal sanctification of its members, who, as a means thereto, employ themselves in the exercise of works of piety and charity, is a good charitable gift; a gift to a similar society existing only for the spiritual improvement of its members is not. *Cocks* v. *Manners*, 12 Eq. 574; *Morrow* v. *M'Conville*, 11 L. R. Ir. 236; *Mahony* v. *Duggan*, *ib.* 260; *In re Wilkinson's Trusts*, 19 L. R. Ir. 531; *Re Joy*; *Purday* v. *Johnson*, 60 L. T. 175; *In re Delany*; *Conolry* v. *Quick*, (1902) 2 Ch. 642.

A gift of 100*l.* to the Christian Brethren in trust of A and B, who were both members of that community, was held a good charitable gift. The Christian or Plymouth Brethren were a large body of persons in different parts of the kingdom, and the Court came to the conclusion that it was a gift to trustees in

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trust for the Brethren, and not a gift to the Brethren individuals. *In re Brown*; *Paden* v. *Finlay*, (1898) 1 Ir. 423.

D. Purposes beneficial to the community.

D. Trusts for other purposes beneficial to the community n falling under any of the preceding heads:—

Gifts for public purposes generally.

The doubt which exists as to gifts for religious purpos generally does not exist as to gifts for public purposes general Such a gift is void for uncertainty. *Blair* v. *Duncan*, (190 A. C. 37; see *Kendall* v. *Granger*, 5 B. 300 (undertakings general utility); *Langham* v. *Peterson*, 87 L. T. 744 (works public utility).

But gifts for specified public purposes are in many cases val They may be classified as follows:—

1. Gifts to benefit a district.

1. Gifts for the benefit of a particular defined district, s as a parish, a town, or county.

Of this kind are a gift (upon failure of a particular cha able purpose) for some other purpose conducing to the g of the county of Westmoreland and the parish of Lowt especially (*a*); gifts or trusts for the benefit of a parish a trust of an advowson for the benefit of a parish (*c*); gifts the purpose of bringing spring-water from St. Arvan's or e where to the town of Chepstow for the use of the inhabit for ever (*d*); a gift for the improvement of the city of L and of the town of Bolton (*e*); or for the benefit and ornar of the town of Faversham (*f*); a gift to the corporatio Shrewsbury to be applied in the reparation of the bridges walls (*g*); a trust for the benefit of copyhold tenants fo repair of the sea-dykes within the manor (*h*). *A.-G.* v. *Lou* 1 Sim. 105 (*a*); *A.-G.* v. *Lord Hotham*, T. & R. 209; *A.- Webster*, 20 Eq. 483; *In re St. Botolph Without Bisho Parish Estates*, 35 Ch. D. 142 (*b*); *In re St. Stephen, Co Street*, 39 Ch. D. 492 (*c*); *Jones* v. *Williams*, Amb. 65 *House* v. *Chapman*, 4 Ves. 542; *A.-G.* v. *Heelis*, 2 S. 67 (*e*); *Mayor of Faversham* v. *Ryder*, 5 D. M. & G. 350 *Wrexham Corporation* v. *Tamplin*, 21 W. R. 768; *In re Hargreaves* v. *Taylor*, (1905) 2 Ch. 400 (*f*); *A.-G.* v. *Co tion of Shrewsbury*, 6 B. 220 (*g*); *Nelson* v. *Barnes*, 38 C 507 (*h*).

2. Trusts for fluctuating bodies.

2. Trusts for fluctuating bodies of persons defined by some reference to residence or occupation; for instance, a trust of a right for the free inhabitants of ancient tenements in a borough to dredge for oysters during a limited period and to carry them away without stint for sale or otherwise (*a*); a trust for the benefit of the occupiers of all such cottages and tenements containing less than one acre each as were erected on ancient sites or had then been erected more than fourteen years (*b*); and a trust for the freemen for the time being of the city of Norwich (*c*). *Mayor of Saltash* v. *Goodman*, 7 A. C. 633 (*a*); *In re Christchurch Inclosure Act*, 38 Ch. D. 520 (*b*); *In re Norwich Town Close Estate Charity*, 40 Ch. D. 298 (*c*).

3. Gifts in aid of public burdens.

3. Gifts in aid of the public burdens, such as parochial rates or Imperial taxation.

Of this kind are gifts to the churchwardens in aid of the poor's rate (*a*); to His Majesty's Government in exoneration of the National Debt (*b*); to the Government of Bengal, to be applied to charitable, beneficial, and public works at and in the city of Dacca, for the benefit of the native inhabitants (*c*); a gift in exoneration of a tax affecting the commonalty of Grantham (*d*); a gift to the Chancellor of the Exchequer for the advancement of Great Britain (*e*). *Doe* v. *Howell*, 2 B. & Ad. 744; see *A.-G.* v. *Blizard*, 21 B. 233 (*a*); *Newland* v. *A.-G.*, 3 Mer. 684 (*b*); *Mitford* v. *Reynolds*, 1 Ph. 185 (*c*); *A.-G.* v. *Bushby*, 24 B. 299 (*d*); *Nightingale* v. *Goulbourne*, 5 Ha. 484; 2 Ph. 594 (*e*).

4. To encourage good servants. Volunteer corps. Officers' mess.

4. Under this head may also be mentioned a gift for the increase and encouragement of good servants (*a*), for the benefit of a volunteer corps (*b*), and to provide a library and plate for an officers' mess (*c*). *Loscombe* v. *Wintringham*, 13 B. 87 (*a*); *In re Lord Stratheden and Campbell*; *Att* v. *Lord Stratheden and Campbell*, (1894) 3 Ch. 265 (*b*); *In re Good*; *Harington* v. *Watts*, (1905) 2 Ch. 60 (*c*).

The statute of Elizabeth mentions "setting out of soldiers" as a charitable object, and a gift to equip an officers' mess may be upheld on this ground. *In re Good*; *Harington* v. *Watts*, (1905) 2 Ch. 60.

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Gift to encourage sport.

The limit of the legal conception of charity in this direct is that the gift must not be to encourage a mere sport, s as yacht racing. *In re Nottage; Jones* v. *Palmer*, (1895) Ch. 649.

Gift contrary to public policy.

And it must not be contrary to public policy. Thus, a g to purchase the discharge of poachers committed for n payment of fines, fees, or expenses under the Game Laws is void; and a gift towards the political restoration of Jews to Jerusalem and to their own land was also held v as being inconsistent with our own amicable relations with Sublime Porte (*b*). *Thrupp* v. *Collett*, 26 B. 125 (*a*); *Ha sham* v. *Vardon*, 4 De G. & S. 467 (*b*).

It would also seem that the class to be benefited must some well-defined branch of the community and not a mer artificial class created by the testator. Thus, a grant of l to the Roman Catholic clergyman entrusted with spiritual c of the Roman Catholic inhabitants of the parish of R., for purpose of having the rents applied for the benefit of children under the age of twelve of the tenantry of the gran was held not to be a charity. *Browne* v. *King*, 17 L. R. 448. See, too, *Re Tunno; Raikes* v. *Raikes*, W. N. 1886, (a gift to build six labourers' cottages on an estate).

II.—Gifts in Respect of an Office.

Gifts in respect of an office.

In some cases the question arises whether a bequest is gi in respect of a certain office, and is therefore charitable, whether the office is merely used to describe the person.

Thus, a gift to A, minister of a certain church, is not cha able. *Doe* d. *Phillips* v. *Aldridge*, 4 T. R. 264; *Donnell O'Neill*, I. R. 5 Eq. 523.

But a gift to A, minister of a chapel, and his successors ever, is charitable. *Thornber* v. *Wilson*, 3 Dr. 245; 4 Dr. 3 *In re Delany; Conoley* v. *Quick*, (1902) 2 Ch. 642; see *Rob Bp. Dorian*, I. R. 9 C. L. 483; *ib.* 11 C. L. 292; *Gibson Representative Church Body*, 9 L. R. Ir. 1.

And words superadded giving the officer discretion to ap the gift in such manner as he thinks fit, give him only

discretion to apply it to the charitable purposes of his office, and do not invalidate the gift. *In re Garrard; Gordon* v. *Craigie*, (1907) 1 Ch. 382. Chap. XXXII.

III.—Perpetuity in Relation to Charity.

A charitable gift does not necessarily involve a perpetuity. It may be a gift of a capital sum divisible at once. But more commonly it involves the investment of a fund and the application of the income in perpetuity to a charitable purpose. Such gifts, being for the public good, are not subject to the rule against perpetuity. Rule against perpetuity does not apply to charity.

If a fund is immediately devoted to charity it is immaterial that it may not be possible to ascertain within the limits of perpetuity whether the particular mode of application directed by the testator will be possible, or that there are directions for the management of the property which infringe those limits. For this purpose it makes no difference whether there is a general charitable intention with a particular mode of application or only a particular charitable intention. *Martin* v. *Maugham*, 14 Sim. 230; *Chamberlayne* v. *Brockett*, 8 Ch. 206; *Re Clyde; Ward* v. *Little*, 79 L. T. 261; *Wallis* v. *A.-G. for New Zealand*, (1903) A. C. 173; *In re Swain; Mouncton* v. *Hands*, (1905) 1 Ch. 669. Fund devoted to charity, application at a remote date.

If the gift itself is made conditional upon the happening of some event which may not happen within the limits of perpetuity it is void. *In re Lord Stratheden and Campbell; Alt* v. *Lord Stratheden and Campbell*, (1894) 3 Ch. 265; *Worthing Corporation* v. *Heather*, (1906) 2 Ch. 532. Conditional gift.

IV.—Uncertainty.

"A charitable bequest never fails for uncertainty." *In re White; White* v. *White*, (1893) 2 Ch. 41, 53. Charitable gift not void for uncertainty.

This means that if a general intention can be found to give to charity, the gift does not fail because the testator has not indicated the particular charity he wishes to benefit, or because General charitable intent.

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the means he indicates for ascertaining the particular cha
are inadequate.

Thus, a gift to "the following charitable societies," wi
blank left for the insertion of their names, is a valid
There is a general charitable intent, which has not crystall
to particulars. *In re White*; *White* v. *White*, (1893) 2 Ch.
see *Pieschel* v. *Paris*, 2 S. & S. 384.

Alternative gift to charities.

And a gift to charity A or charity B, if the gift is alternati
for instance, a gift "to the Protestant Alliance or some one
more kindred institutions" will be distributed under a sche
though a similar gift to individuals might be void. *In*
Delmar's Charitable Trust, (1897) 2 Ch. 163.

Again, a gift to such charitable uses as the testator
directed (*a*), or for such charities as his executor shall th
fit (*b*), or as the testator shall name thereafter (*c*), will be carr
out by the Court though there are no directions, or though
executor is appointed · he dies before the testator, or thou
no charities are ever .ned. *A.-G.* v. *Syderfin*, 7 Ves. 43,
(1892) 2 Ch. 53; *Commissioners of Charitable Donations*
Sullivan, 1 Dr. & War. 501 (*a*); *White* v. *White*, 1 B. C. C.
Moggridge v. *Thackwell*, 7 Ves. 36; 13 Ves. 416 (*b*); *Mills*
Farmer, 1 Mer. 55; 19 Ves. 483; *Pocock* v. *A.-G.*, 3 Ch.
342; *Gillan* v. *Gillan*, 1 L. R. Ir. 114 (*c*); see *In re Huxtab*
Huxtable v. *Crawford*, (1902) 2 Ch. 798.

The decision in *Chamberlayne* v. *Brockett*, 41 L. J. Ch. 7
(not appealed on this point), that a gift to a person for su
charitable purposes as he thinks most advisable fails by
death before the testator, is not reconcilable with the oth
authorities.

Another illustration of the same principle is where t
testator declares his intention to settle certain property
charitable uses and then devises it to trustees upon trust
which only exhaust a portion of the income, the whole incom
is applicable to charity. *Arnold* v. *A.-G.*, Shower, 22; *A.-G*
v. *Drapers' Co.*, 2 B. 508.

A somewhat similar principle is that laid down in *A.-G.*
Boultbee, 2 Vos. Jun. 380; 3 Ves. 220, that the Court will no
permit the general intention to fail for want of circumstances

annexed, which by the fault or neglect of the parties cannot take effect. In that case a gift to a vicar if nominated by the testator's trustees was upheld, though the trustees did not nominate.

Charitable gift does not fail by failure of trustee.

A gift for a charitable purpose does not fail by the refusal of the donee to accept the gift, if the purpose can be carried out in some other way, though a discretion may be vested in the donee. *A.-G.* v. *Andrew*, 3 Ves. 633; *Reece* v. *A.-G.*, 3 Ha. 191.

Gift for foreign charity.

But a gift to foreign trustees for the purpose of establishing a charity in a foreign country fails if the trustees disclaim, as the Court has no power to settle a scheme for a foreign charity. *Nee* v. *Bonaker*, 4 Eq. 655; see *A.-G.* v. *Sturge*, 19 B. 597.

In all these cases it must appear that there is a charitable intention. The mere fact that a gift is to a municipal corporation or to persons described as trustees of a charity for a purpose, which is not stated to be charitable and is not disclosed, affords no inference that there is a general charitable intent. *Gloucester Corporation* v. *Wood*, 3 Ha. 131; *S. C.*, *Gloucester Corporation* v. *Osborn*, 1 H. L. 272; *Aston* v. *Wood*, 6 Eq. 419; see *Doe* d. *Toone* v. *Copestake*, 6 East, 328.

Discretion to trustees to apply the whole to charity or other indefinite objects.

Where a discretion is left to trustees, which would empower them to apply the whole of the gift either to charitable or other indefinite purposes, the whole gift is void, as it does not appear that the chief object was charity; and, on the other hand, the other object is void for uncertainty. *Williams* v. *Kershaw*, 5 L. J. Ch. 84; 5 Cl. & F. 111; *James* v. *Allen*, 3 Mer. 17; *Morice* v. *Bishop of Durham*, 9 Ves. 399; 10 Ves. 521; *Ommaney* v. *Butcher*, T. & R. 260; *Vezey* v. *Jamson*, 1 S. & St. 69; *Kendall* v. *Granger*, 5 B. 300; *Thompson* v. *Thompson*, 1 Coll. 398; *Down* v. *Worrall*, 1 M. & K. 561; *Boyle* v. *Boyle*, I. R. 11 Eq. 433; *In re Hewitt's Estate*; *Mayor of Gateshead* v. *Hudspeth*, 49 L. T. 587; 23 L. J. Ch. 132; *Hunter* v. *A.-G.*, (1899) A. C. 309; *Grimond* v. *Grimond*, (1905) A. C. 124; see *In re Sutton*; *Stone* v. *A.-G.*, 28 Ch. D. 464.

The trustees cannot exercise their discretion and appoint the whole to charity. *In re Jarman's Estate*; *Learers* v. *Clayton*, 8 Ch. D. 584.

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Discretion to apportion to charity and other ascertainable objects.

If the trustees have a discretion to apportion betwe charitable objects and definite ascertainable objects n charitable, the trust does not fail, but in default of apportic ment by the trustees the Court will divide the fund betwe the objects charitable and non-charitable equally. *A.-G. Doyley*, 4 Vin. 485; 7 Ves. 58, n.; *Salusbury* v. *Dent* 3 K. & J. 529; *Crafton* v. *Frith*, 20 L. J. Ch. 198; *Hunter A.-G.*, (1899) A. C. 309; see, too, *Re Hall's Charity*, 14 B. 1 *In re Douglas*; *Obert* v. *Barrow*, 35 Ch. D. 472.

Gift for a particular purpose where amount uncertain—gift of surplus void.

When a fund is given for a particular purpose and t surplus is given to charity, then, if the primary purpose fa and it cannot be ascertained how much ought to have be expended on it, the gift of the surplus fails also. In m of the cases under this head the primary purpose was involving a substantial outlay, and the surplus was conte plated as being of small amount, and the testator could n have intended the whole fund to go to the charitable purpose the primary purpose should fail.

For instance, where there was a direction to build a chap but with no clue as to the kind of chapel intended, and if a surplus should remain from the purchasing or building t chapel it was given to a charitable object, the gift to build t chapel being void, it was held that the Court could n ascertain what ought to have been spent on it, and co sequently the whole gift failed. *Chapman* v. *Brown*, 6 V 404; *A.-G.* v. *Hinxman*, 2 J. & W. 270; *Limbrey* v. *Gurr* Mad. 151; *Cramp* v. *Playfoot*, 4 K. & J. 479; *Fowler* v. *Fowl* 33 B. 616; *Kirkmann* v. *Lewis*, 38 L. J. Ch. 570; *Re Taylo Martin* v. *Freeman*, 58 L. T. 538.

On the other hand, if the primary object is sufficient definite to enable the Court to ascertain what should be spe on it, it will do so, and the gift of the surplus will be val Cases *supra*; and see *Mitford* v. *Reynolds*, 1 Ph. 185; 16 Si 105; *Magistrates of Dundee* v. *Morris*, 3 Macq. 134; W. R. 556.

Fund to be applied to several objects—some void.

If a fund is to be applied to several objects, some valid a some invalid, the Court will, if possible, ascertain by inqui how much should be applied to each object (*a*). If it comes

tho conclusion that an inquiry would not lead to a satisfactory result, tho fund will ho equally divided between the objects, at any rate, if they are of a similar kind; for instance, tho repair of a vault not in a church, and of a window and monument in a church (*b*). *Adnam* v. *Cole*, 6 B. 353; *In re Rigley's Trusts*, 36 L. J. Ch. 147; *Champney* v. *Davy*, 11 Ch. D. 949; *In re Vaughan; Vaughan* v. *Thomas*, 33 Ch. D. 187 (*a*); *Hoare* v. *Osborne*, L. R. 1 Eq. 585 (*b*).

Trust to apply part of income to void object, residue to charity.

It has been held in several cases that where a fund is bequeathed to trustees upon trust to apply so much of the income as is necessary in repairing tho tomb of tho testator not in a church and to apply the rest in charity, tho result is that, tho trust to repair the tomb being void, tho whole income is applicable to charity. *Fisk* v. *A.-G.*, 4 Eq. 521; *Hunter* v. *Bullock*, 14 Eq. 45; *Dawson* v. *Small*, 18 Eq. 114; *In re Williams*, 5 Ch. D. 735; *In re Birkett*, 9 Ch. D. 576; *In re Vaughan; Vaughan* v. *Thomas*, 33 Ch. D. 187; *In re Rogerson; Bird* v. *Lee*, (1901) 1 Ch. 715.

Jessel, M.R., criticised tho cases in *In re Birkett*. Some of them appear to be only examples of the principle that where a particular fund is given as to part to A and as to tho residue to B, the gift to A, if it fails, falls into the particular residue and passes to B. Those in which there was no gift of a particular residue, but merely a gift of any surplus that might remain after satisfying tho void objects, are more difficult, and may have to be reconsidered.

V.—Lapse in Connection with Charities.

Gift to particular society subject to lapse.

A gift to a particular charitable society or institution is subject to the doctrine of lapse. If therefore tho society has existed, but has ceased to exist at the date of the will (*a*), or then exists, but ceases to exist before the date of the death (*b*), the gift lapses. *Langford* v. *Gouland*, 3 Giff. 617; *Makeown* v. *Ardagh*, I. R. 10 Eq. 445; *In re Orey; Broadbent* v. *Barrow*, 29 Ch. D. 560 (*a*); *Clark* v. *Taylor*, 1 Dr. 642, as corrected in *In re Rymer; Rymer* v. *Stanfield*, (1895) 1 Ch. 19; *Fisk* v. *A.-G.*, 4 Eq. 521 (*b*).

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What is extinction of society.

Whether a society or institution has ceased to exist or not a question of fact.

Not a total loss.

It may exist though a large part of its activity has ceased for instance, if an elementary day school and Sunday school h ceased to be anything but a Sunday school. *Re Waring Hayward* v. *A.-G.*, (1907) 1 Ch. 166.

Dissolution of society.

On the other hand, it may have been dissolved and be cle gone.

If the testator is the society and it exists only through hi and by his exertions, the result may be that it determines wi his death, and there is a lapse. *Re Joy; Purday* v. *Johns* 60 L. T. 175.

Another case is where its funds or its objects have be taken over by another similar society or institution. In such case the first society or institution has ceased to exist and the is a lapse. *Makeown* v. *Ardagh*, I. R. 10 Eq. 448; *In re Ore Broadbent* v. *Barrow*, 29 Ch. D. 560; *In re Rymer; Rymer Stanfield*, (1895) 1 Ch. 19; see, too, *Lee* v. *Pain*, 4 Ha. 2 (Highbury College).

Again, two societies, to whom legacies are given, may ha amalgamated in such a way as to preserve both in the am gamated body. Each society may continue to exist for t purpose of receiving the legacy. *Re Joy; Purday* v. *Johns* 60 L. T. 175.

Another case is, where a legacy is given to a socie described by a particular name, but such society never h existed. If the name imports a charitable object, a gene charitable intent may be inferred, and the gift will be execut *cy près*. *Loscombe* v. *Wintringham*, 13 B. 87 (society for t encouragement of good servants); *In re Clergy Society* K. & J. 615; *In re Maguire*, 9 Eq. 632 (Church Pastoral A Society in Ireland); *In re Davis; Hannen* v. *Hillyer*, (19 1 Ch. 876 (Home for the Homeless).

Case where several societies claim.

The gift may be to a society which has never existed nu the name mentioned, but there may be several societies w names resembling the name mentioned in the will.

If there is nothing to give any of them the preference t legacy will be applied *cy près* and may, if the Attorney-Gene

consents, be divided between them. *Waller* v. *Childs*, Amb. 524; *Simon* v. *Bacher*, 5 Russ. 112; *Bennett* v. *Hayler*, 2 B. 81; *Re Atchin's Trusts*, 14 Eq. 230; *Re Davies' Trusts*, 21 W. R. 154; *Re Hyde's Trusts*, 22 W. R. 69.

Extinction of society after testator's death.

If the society or association existed at the testator's death, but ceases to exist before the legacy is paid, the fund has become devoted to charity, and will be applied *cy près*. *Hayley* v. *Trego*, 5 Russ. 113; *Incorporated Soc.* v. *Price*, 1 J. & Lat. 498; *In re Templemoyle School*, I. R. 4 Eq. 295; *In re Slevin*; *Slevin* v. *Hepburn*, (1891) 2 Ch. 236; *In re Buck*; *Brady* v. *Mackey*, (1896) 2 Ch. 727; *Re Villers-Wilkes*; *Bower* v. *Goodman*, 72 L. T. 323.

Gift for a charitable purpose.

The gift may be not to a society or institution, but to give effect to some charitable purpose. Whether this is so or not is a question of construction. A gift in terms expressed to be given to a building known as the "Mann Institute," founded by the testatrix, but never legally devoted by her to charitable purposes, may be a gift for the charitable purposes for which she used the building. *In re Mann*; *Hardy* v. *A.-G.*, (1903) 1 Ch. 232.

Particular and general intention.

If the gift is for a charitable purpose, the question is, is the testator's intention to promote some specific and well-defined purpose and that only, or is there a general charitable intention, which the testator wishes to carry out in a particular way.

Particular charitable intent only.

In the former case the gift fails if the purpose cannot be carried out. *A.-G.* v. *Bishop of Chester*, 1 B. C. C. 444; 2 M. & K. 579 (to establish a Bishop in America); *A.-G.* v. *Bishop of Oxford*, 1 B. C. C. 444, n.; 4 Ves. 431 (to build a church at Wheatley); *A.-G.* v. *Goulding*, 2 B. C. C. 427; *A.-G.* v. *Whitchurch*, 3 Ves. 141; and *Re Taylor*; *Martin* v. *Freeman*, 58 L. T. 538 (all cases where money was to be applied in connection with a charity on a particular site, which was not effectually devoted to charitable uses); *Cherry* v. *Mott*, 1 M. & C. 136 (to buy a presentation for a boy at Christ's Hospital if estate sufficient, which it was not); *Marsh* v. *Means*, 3 Jur. N. S. 790 (for continuing a periodical called the "Voice of Humanity," which had not been published for a year at the date of the will and for more than six years

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at the date of the death); *In re White's Trusts*, 33 Ch. D. (to build almshouses when a site could be obtained, wh was found impossible); see *Hoare* v. *Hoare*, 56 L. T. 1 *Abbott* v. *Fraser*, L. R. 6 P. C. 96. *Russell* v. *Kellett*, 3 S & G. 264, is open to criticism; see (1895) 1 Ch. 32.

Immediate failure of purpose.

It may be clear at the testator's death that the purp cannot be carried out. In that case the legacy fails at on Cases *supra*.

Uncertainty whether purpose must fail or not.

On the other hand, the possibility of carrying out testator's intention may depend upon the happening of som thing after his death—the obtaining of the necessary la the grant of a charter, the passing of an Act, and the li In that case the fund will be retained at any rate for a limi time to see whether the testator's object can be attain *A.-G.* v. *Bishop of Chester*, 1 B. C. C. 444; *Henshaw* *Atkinson*, 3 Mad. 306; *Baldwin* v. *Baldwin*, 22 B. 419; *Sim* v. *Herbert*, 7 Ch. 232; *In re White's Trusts*, 33 Ch. D. 449.

Interest until purpose takes effect.

If there is an immediate gift for a particular charita purpose, which cannot be carried out for some time, ultimately becomes capable of being carried out, it see that the charity has the same rights as regards interest intermediate income as an ordinary legatee would ha *Forbes* v. *Forbes*, 18 B. 552; see *A.-G.* v. *Craven*, 21 B. 3 where there was perhaps a general charitable intention, s see the cases under that head cited below.

Gift which contravenes policy of an Act.

If the purpose contravenes the policy of a statute, the gif void and goes to the heir, next of kin, or residuary legatee, the case may be. *Thrupp* v. *Collett*, 26 B. 125; *Sims* *Quinlan*, 16 Ir. Ch. 191; 17 *ib.* 43; *Walsh* v. *Walsh*, I. 4 Eq. 397.

The distinction taken by the M.R. in Ireland between gift prohibited by statute and a gift contrary to the pol of a statute was not supported on appeal, and appears not have been taken in England.

Particular charity which afterwards fails.

If a gift for a charitable purpose, which has taken effe subsequently fails, the fund will be applied *cy près*, and w not fall into residue, though the residue is itself given

charity. *Mayor of Lyons* v. *Advocate-General of Bengal*, 1 App. C. 91; see *A.-G.* v. *Day*, (1900) 1 Ch. 31.

General charitable intent with particular mode of carrying it out.

If there is a general charitable intention with a particular mode of carrying it out which is impossible, the fund will be applied *cy près*. *Biscoe* v. *Jackson*, 35 Ch. D. 460; *Wallis* v. *A.-G. for New Zealand*, (1903) A. C. 173.

If there is a general charitable intent, the income goes with the capital, and the residuary legatees or next of kin have no right to income accruing before any application of the fund is possible. *A.-G.* v. *Bowyer*, 3 Ves. 714; *A.-G.* v. *Craven*, 21 B. 392; *Chamberlayne* v. *Brockett*, 8 Ch. 206.

[illegible] to a society for a purpose.

Another class of cases is, where a gift is made to a particular society or institution, and is expressed to be made for a charitable purpose and not merely for the benefit of the society or institution. The non-existence of the society or institution at the testator's death is not material. It is merely the case of the failure of the trustee. *A.-G.* v. *Stephens*, 3 M. & K. 347; *Marsh* v. *A.-G.*, 2 J. & H. 61, explained in *In re Rymer*; *Rymer* v. *Stanfield*, (1895) 1 Ch. 19, 25, 33; *Templemoyle School*, I. R. 4 Eq. 295.

VI.—Increase of Rents of Land Given to Charity.

Land devoted to charity—increase of rents.

In the case of land given to colleges or city guilds or municipal corporations for charitable purposes, where the rents of the land have largely increased, difficulties have often arisen as to the application of the increase.

Gift of the whole of the rents.

If all the rents and profits of land are given to charity, that is a gift of the land itself, and any increase in the value of the land and in the amount of the rents belongs to charity. See *A.-G.* v. *Winchelsea*, 3 B. C. C. 374; *Aberdeen University* v. *Irvine*, L. R. 1 H. L. Sc. 289.

If certain charitable payments are directed, and the residue of the rents is directed to be applied for a purpose which may not exhaust it—for instance, for the reparation of the buildings on the land—the whole is dedicated to charity, and if there is more than is wanted it must be applied *cy près*. *Merchant*

Taylors' Co. v. *A.-G.*, 6 Ch. 512; *A.-G.* v. *Wax Chandlers' C* L. R. 6 H. L. 1.

The whole of the rent may not in terms be given to chari but payments may be directed for charitable purposes which fact exhaust the rents at the time. The result is the same when the whole of the rents is given to charity. *Thetford Sch Case*, 8 Rep. 130 b; *A.-G.* v. *Johnson*, Amb. 189; *A.-G. Coventry*, 2 Vern. 357; 2 J. & W. 305, n.; 3 Mad. 353.

In such cases the increase is apportioned between the seve charitable objects, subject to the discretion of the Court to va the proportions. *A.-G.* v. *Marchant*, 3 Eq. 424; *In re Campe Charities*, 18 Ch. D. 310; see *A.-G.* v. *Jesus College, Oxfo* 29 B. 163.

Surplus not appropriated.

If a small surplus of the rents is left unappropriated, it i question of construction whether that surplus is intended belong to the donees beneficially, or whether in effect the wh is devoted to charity. *A.-G.* v. *Bristol Corporation*, 2 J. & W 294; *Mercers' Co.* v. *A.-G.*, 2 Bl. N. S. 165.

In some cases the surplus rents are expressly or by impli tion given to the college or guild or corporation. *Beverl Corporation* v. *A.-G.*, 6 H. L. 310.

As to this the question may arise, whether the surplus given is a definite sum (*a*), or whether it is intended to inclu the surplus whatever it may be (*b*). In the former case t increase is divisible rateably between the charitable purpo and the donees of the surplus. In the latter the donees of t surplus take the whole benefit of the increase. *A.-G.* *Coopers' Co.*, 3 B. 29; *A.-G.* v. *Drapers' Co.*, 4 B. 67 (*a*) *A.-G.* v. *Smythies*, 2 R. & M. 717; *A.-G.* v. *Brazen No College*, 2 Cl. & F. 295; *A.-G.* v. *Bristol Corporation*, 2 J. W. 294; *South Molton Corporation* v. *A.-G.*, 5 H. L. *Beverley Corporation* v. *A.-G.*, 6 H. L. 310; *A.-G.* v. *Dean Windsor*, 8 H. L. 369 (*b*).

The true construction of the gift may be, that the donees a to take subject to the obligation of making certain charitab payments. In that case the surplus including any increa belongs to the donees. *A.-G.* v. *Bristol Corporation*, 2 J. & W 294; *A.-G.* v. *Brazen Nose College*, 2 Cl. & F. 295; *A.-G.*

Cordwainers' Co., 3 M. & K. 534; *A.-G.* v. *Grocers' Co.*, 6 B. 526; *A.-G.* v. *Trinity College, Cambridge*, 24 B. 383; *A.-G.* v. *Dean of Windsor*, 8 H. L. 369.

VII.—Administration of Charitable Gifts.

Administration under sign manual.

Where the gift is for general charitable purposes without the intervention of a trustee, it must be administered under the authority of the Crown, to be obtained by letters missive under the sign manual. *De Costa* v. *De Pas*, Amb. 228; *A.-G.* v. *Herrick*, *ib.* 712; *Kane* v. *Cosgrave*, I. R. 10 Eq. 211; see *Felan* v. *Russell*, 4 Ir. Eq. 701.

Administration by means of scheme.

Where the gift is to trustees for charitable purposes, whether special or general, the Court will, if necessary, administer the fund by means of a scheme. *Moggridge* v. *Thackwell*, 7 Ves. 36; *Paice* v. *Archbishop of Canterbury*, 14 Ves. 364; *In re Pyne*; *Lilley* v. *A.-G.*, (1903) 1 Ch. 83.

Discretion of trustees not interfered with.

But though the Court has discretion in such cases to settle a scheme, yet, if the trustees are proper persons, and are willing to act, it will allow them to receive and administer the fund, more especially in cases where a discretion is conferred upon them. *Society for P. G.* v. *A.-G.*, 3 Russ. 142; *In re Lea*; *Lea* v. *Cooke*, 34 Ch. D. 528; *Warren* v. *Clancy*, (1898) 1 Ir. 127; *Richardson* v. *Murphy*, (1903) 1 Ir. 227; see *Wellbeloved* v. *Jones*, 1 S. & St. 43; *Corporation of Sons of Clergy* v. *Mose*, 9 Sim. 610.

Distribution of annual sum.

And if an annual sum is given to a person for his life to be distributed in charity, the Court will not interfere with the discretion of the trustee by settling a scheme. *Bennett* v. *Honywood*, Amb. 708; *Waldo* v. *Caley*, 16 Ves. 206; *Horde* v. *Earl of Suffolk*, 2 M. & K. 59.

Payment to charitable institution.

Where a sum is given to a charitable institution for the purposes of the institution, the fund will be paid over without a scheme, and the fund may be paid to the institution, even where the gift is to a trustee, with a discretion to apply the same for the benefit of the institution, and the trustee dies before the testator. *Walsh* v. *Gladstone*, 1 Ph. 290; *In bonis McAuliffe*, 44 W. R. 304.

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Charitable purpose in Scotland.

If a fund is given for charitable purposes in Scotland, it wi be handed over to trustees in Scotland if there are any availabl and if not and a scheme is necessary, the executor or t Attorney-General will be authorised to apply to the Scot Courts for a scheme. *Provost of Edinburgh* v. *Aubery*, Am 236; *A.-G.* v. *Lepine*, 2 Sw. 184; *Emery* v. *Hill*, 1 Russ. 11 *Forbes* v. *Forbes*, 18 B. 552; *In re Fraser*; *Yates* v. *Fraser*, Ch. D. 827.

Gift to foreign trustees for charity.

In the case of a gift to foreign trustees for charita purposes, the fund will be handed over to the foreign trustees be administered by them, though the Court here has no contr over them. *Mouat* v. *Vallimay*, 1 Russ. 117, n.; *Re Gre Freund* v. *Steward*, 69 L. T. 819; see *Re Davis's Trust*, L. T. 430.

If the foreign trustees disclaim, the Court has no power settle a scheme, and the gift fails. *A.-G.* v. *Sturge*, 19 B. 59 *New* v. *Bonaker*, 4 Eq. 655.

The Attorney-General has no authority or duty in relati to the administration of a foreign charity. But it is with his office to see that money given to a foreign charity properly secured. *A.-G.* v. *Sturge*, 19 B. 597; *New* v. *Bonak* 4 Eq. 655.

Fund when retained in Court.

Where a testatrix gave a sum to endow a church, subje to certain conditions as to the services, the Court held t conditions to be continuing and retained the fund in Cou paying the income to the incumbent so long as he perform the conditions. *In re Robinson*; *Wright* v. *Tugwell*, (1892) Ch. 95.

VIII.—Restrictions on Gifts to Charity.

Mortmain and Charitable Uses Act, 1891.

Before the passing of the Mortmain and Charitable Uses A 1891 (54 & 55 Vict. c. 73), land and impure personalty co not be given by will to charity.

But the law has been altered by that Act, which appl only to testators dying after the passing of the Act (the August, 1891); and does not extend to Scotland or Ireland.

The Act provides (sect. 3) that land in the Mortmain a

Charitable Uses Act, 1888, and in this Act shall include tenements and hereditaments, corporeal or incorporeal, of any tenure, but not money secured on land or other personal estate arising from or connected with land.

Income of land given for [illegible] to sell

If the income of land is given to charity during a limited period, this is land within the Act. *In re Ryland: Roper* v. *Ryland*, (1903) 1 Ch. 467.

Land devised on trust for sale, whether immediately or [illegible] after a life interest, is personal estate arising from land, and is therefore not within sect. 5. *In re Wilkinson*, [illegible] (1902) 1 Ch. 841; *In re Sidebottom; Beeley* v. *Winchcombe*, (1902) 2 Ch. 389; *In re Ryland: Roper* v. *Ryland*, (1903) 1 Ch. 467.

Land devised on trust for sale, &c.

Sect. 5 provides that land may be given by will to or for the benefit of any charitable use, but such land shall, notwithstanding anything in the will contained to the contrary, be sold within one year from the death of the testator, or such extended period as may be determined by the High Court, or any judge thereof sitting at Chambers, or by the Charity Commissioners.

Under this section the Court may from time to time extend the time, if the circumstances require it. *In re Sidebottom; Beeley* v. *Sidebottom*, (1901) 2 Ch. 1.

Sect. 6 provides that upon the expiration of the time limited for the sale of any lands, the lands unsold shall vest in the official trustee of charity lands, and the Charity Commissioners are to take steps for the sale of the land.

Sect. 7 provides that any personal estate by will directed to be laid out in the purchase of land to or for the benefit of any charitable uses shall, except as hereinafter provided, be held to or for the benefit of the charitable uses as though there had been no such direction to lay it out in the purchase of land.

Sect. 8 gives power to the Court and the Charity Commissioners, if satisfied that land assured by will to or for the benefit of any charitable use, or proposed to be purchased out of personal estate by will directed to be laid out in the purchase of land, is required for actual occupation for the purposes of the charity, and not as an investment by order

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to sanction the retention or acquisition as the case may be
such land.

Where personalty is directed to be laid out in the purcha
of land as sites for the erection of model dwellings and hous
for use and occupation by the poor to be let at such rents belo
the full rents as the trustees think fit, a valid charitable trust
created under sects. 7 and 8. *In re Sutton; Lewis* v. *Sutto*
(1901) 2 Ch. 640.

Where a testator, by will made before, but coming in
operation after the passing of the Act, gave his residue upo
trust to pay "such part of my said residuary trust estate whic
by law may be given for charitable purposes" to a charity,
was held that the whole residue passed under the gift. *In*
Bridger; Brompton Hospital for Consumption v. *Lewis*, (189
1 Ch. 44; (1894) 1 Ch. 297.

The Act applies to gifts in remainder, as a future interest i
land may be sold under the Act. *In re Hume; Forbes* v. *Hum*
(1895) 1 Ch. 422.

Act of 1888.

Cases to which the Act does not apply are governed by th
Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42
which repealed and substantially re-enacted the Statute
Mortmain (9 Geo. II. c. 36).

The Act of 1888, s. 13 (1), provides in effect that the repe
of the Act 9 Geo. II. c. 36, shall not affect the past operation
that enactment, or any instrument executed before the passin
of the Act.

It may, therefore, still be necessary to consider the Act
9 Geo. II. c. 36, as regards testators who died before the 13t
August, 1888, and possibly also as regards testators who die
after that date but made their wills before it.

The cases decided under the old law are therefore retained.

Legacy duty.

If a charitable legacy was given free of duty, this was i
effect a gift of the duty, which could not therefore be paid ou
of impure personalty. *Wilkinson* v. *Barber*, 14 Eq. 96.

What is an interest in land within the statute.

A. The decisions are numerous as to what is an interest i
land within the Statute of Mortmain.

1. The testator's death is the time to ascertain the pur
personalty.

A gift of a reversionary interest in personalty under a settlement, which at the testator's death is invested on mortgage of real estate, is within the Act, though before the reversion falls into possession it is invested in pure personalty. *Re Prichard's Settlement*; *Playne* v. *Twisden*, 88 L. T. 197. Gift of reversion invested on mortgage.

Where a gift is made to a charity at a future time and power is given to the trustees by the will to invest in real security, this does not alter the character of the pure personalty, nor does an actual investment by the trustees in real security have that effect. *Curtis* v. *Hutton*, 14 Ves. 537, 539; *In re Hamilton*: *Cadogan* v. *Fitzroy*, (1896) 2 Ch. 617. Investment by trustees in realty not material.

But under a gift, after a life interest, of so much of the estate, as is then invested upon securities, which can be given to charity, money invested by the trustees on mortgage will not pass. *Re Corcoran*: *Corcoran* v. *Riddell*, 67 L. T. 754. Reference to estate as found at a future date.

2. Money to arise from the sale of land directed by the testator, though the land is devoted to partnership purposes, is within the statute. *Page* v. *Leapingwell*, 18 Ves. 463; *British Museum* v. *White*, 2 S. & St. 594; *Thornber* v. *Wilson*, 4 Dr. 350; *Incorporated Church Building Society* v. *Coles*, 5 D. M. & G. 324; *Ashworth* v. *Munn*, 28 W. R. 965; 47 L. J. Ch. 747; 15 Ch. D. 563. Money to arise from sale of land.

So is the purchase-money for land contracted to be sold by the testator, but in respect of which he has a lien at his death, and also a premium payable to the testator in respect of a lease granted at a low rent. *Harrison* v. *Harrison*, 1 R. & M. 71; *Shepheard* v. *Beetham*, 6 Ch. D. 597. Lien for purchase-money.

3. On the question, whether money to arise from the sale of land under an instrument other than the testator's will is within the Act, the cases are not entirely satisfactory. Money to arise from sale of land under a prior testator's will.

Where land is given by a first testator on trust for sale, a gift of the proceeds by the will of a second testator is within the Act if the time for selling the land has not arrived at the death of the second testator, or if the land has not in fact been sold, and the second testator might have elected to take it as land. *Brook* v. *Badley*, 4 Eq. 106; 3 Ch. 672; *Lucas* v. *Jones*, 4 Eq. 73; *A.-G.* v. *Harley*, 5 Mad. 321.

Where land is given by a first testator on trust for sale

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and division among several persons, a gift of the proce by the will of a second testator, which does not take eff till after the death of the first, is it seems within the A if the property has not in fact been sold before the seco testator's death. *Marsh* v. *A.-G.*, 2 J. & H. 61, is overrul by *Brook* v. *Badley*, 3 Ch. 672; see *Ashworth* v. *Munn*, Ch. D. 563.

The case has been held not within the Act, where leasehol have been given on trust for sale to pay debts, and have be sold by the executors, in course of administration, after t death of the second testator, though the pure personal was enough to satisfy the debts. *Shadbolt* v. *Thornt* 17 Sim. 49; 13 Jur. 597; but this case is of very doubtf authority. See *Lucas* v. *Jones*, *supra*; *Aspinall* v. *Bow* 29 B. 462.

Crops, leaseholds, mortgages and charges.

4. Further, within the Act are the proceeds of growi crops (*a*), leaseholds (*b*), money secured by mortgage of land (or charged upon land (*d*), including equitable mortgages (and mortgages of leaseholds (*f*). *Symonds* v. *Marine Socie* 2 Giff. 325 (*a*); *Johnston* v. *Swann*, 3 Mad. 457; *Paice* *Archbishop of Canterbury*, 14 Ves. 364; *Entwistle* v. *Da* 4 Eq. 272 (*b*); *White* v. *Evans*, 4 Ves. 21; *Corbyn* v. *Fren* 4 Ves. 418; *Currie* v. *Pye*, 17 Ves. 462; *Paice* v. *Archbis* *of Canterbury*, 14 Ves. 364 (*c*); *A.-G.* v. *Harley*, 5 Mad. 3 *Harrison* v. *Harrison*, 1 R. & M. 71 (*d*); *Alexander* v. *Bea* 30 B. 153 (*e*); *Chester* v. *Chester*, 12 Eq. 444 (*f*).

Money secured by mortgage of a life interest in a fu invested on mortgage of land is not, but money secured mortgage of the life interest and reversion in such a fund within the Act, as in the latter case the mortgagee could foreclosure make himself the owner of the security upon wh the fund is invested. *In re Watts*; *Cornford* v. *Elliott*, Ch. D. 319; 29 Ch. D. 947.

Mortgage of real and personal property.

5. Though personalty may happen to be included in a mo gage given by will, the bequest will not be apportioned, will there be an apportionment, if the bequest is of a s charged upon realty and personalty by a prior testator. *Re*

v. *Bailey*, L. R. 3 Ch. 672; see *In re Hill's Trusts*, 16 Ch. D. 173; *In re Watts*; *Cornford* v. *Elliott*, *supra*.

But if a sum is secured by a promissory note and a mortgage by deposit, and the property mortgaged is worth only half the debt, the bequest is valid as regards the portion not secured by the mortgage. *Smith* v. *Sopeith*, W. N. 1877, 208.

Arrears of rent, judgment charged on land.

6. Within the statute are arrears of interest due on a mortgage, and rent accrued due since the testator's death on land contracted to be sold, and a judgment debt, if it is a charge upon realty. *Alexander* v *Brame*, 30 B. 153; *Edwards* v. *Hall*, 11 Ha. 1; *Collinson* v. *Pater*, 2 R. & M. 344.

Voluntary covenant to leave money is void as regards real assets.

7. A voluntary covenant to leave money by will to a charity is in substance a legacy, and is void if the testator leaves only real assets; if he leaves mixed assets, there will be an abatement in the proportion of the pure to the impure personalty. *Jeffries* v. *Alexander*, 7 D. M. & G. 525; 8 H. L. 594; *Fox* v. *Lowndes*, 19 Eq. 453.

But where A covenants to pay a sum to trustees for B for life with remainder as B appoints, and B appoints to a charity, the appointment is good, though the sum may be payable out of impure personalty of A. *In re Robson*; *Exley* v. *Davidson*, 19 Ch. D. 150.

Shares in public companies are not within the statute.

8. Shares in companies, whether incorporated or not, are not within the statute, provided land is held by them only for the common purposes of the undertaking, and this is the case whether the shares are declared to be personal estate or not, provided the right of the shareholder is merely to call for a share of the profits, and not for a specific part of the land itself. *Walker* v. *Mellor*, 11 B. 507; *Myers* v. *Perigal*, 11 C. B. 90; 2 D. M. & G. 599; *Ireland* v. *Hart*, 11 Ha. 1; 6 D. M. & G. 74; *Hayter* v. *Tucker*, 1 K. & J. 243; *Labouchere* v. *Davis*, 4 Eq. 272. *Morris* v. *Glyn*, 28 B. 218, cannot be considered law.

The surplus lands stock of the Metropolitan Railway has been held pure personality within this principle. *Re Holton*; *Forbes* v. *Hardcastle*, 68 L. T. 160; 69 L. T. 425.

It makes no difference that the company whose shares are in question, has placed itself in the position of landlord, by letting

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its land to another company. *Linley* v. *Taylor*, 1 Giff. 67; D. F. & J. 84.

unless each shareholder is entitled to a definite proportion of land.

But if the land is held in trust for each individual shareholder in proportion to his shares, so that each shareholder has a direct and definite interest in the land, the shares are within the statute. *Baxter* v. *Brown*, 7 M. & Gr. 198. *See Watson* v. *Spratley*, 10 Ex. 222.

9. As to charges created by public statutory undertakings:—

Railway debentures are not within the Act.

a. The debentures, mortgage debentures and debenture stock of railway companies are not within the Act, whatever may be the form of the instruments creating them. *Walker* v. *Milne*, 11 B. 507; *Holdsworth* v. *Davenport*, 3 Ch. D. 185; *In re Mitchell's Estate*; *Mitchell* v. *Moberly*, 6 Ch. D. 655; *Attree* v. *Hawe*, 9 Ch. D. 337; *Re Verburg's Estate*; *Kay* v. *Denby*, 62 L. T. 55; overruling *Ashton* v. *Lord Langdale*, 4 De G. & S. 402.

The principle of these decisions is, that a charge, which only gives a right to the net earnings of an undertaking, does not confer an interest in land; and although tolls derived from land may also be charged, they are only charged incidentally to the charge on the undertaking.

Waterworks mortgage.

On the same principle, a waterworks mortgage issued by a corporation, charging the rents, rates, and waterworks, has been held outside the Act, on the ground that it was practically a mortgage of the undertaking. *In re Parker*; *Wignall* v. *Park*, (1891) 1 Ch. 682; not following *Chandler* v. *Howell*, 4 Ch. D. 651.

Corporation bonds.

b. Bonds of a corporation charging the borough fund are not within the Act, although the fund arises partly from the rents of land. The principle is, that the charge is only a charge on the floating balance of a fund remaining after purposes made prior to the charge by statute have been satisfied, and that therefore, a receiver of the rents could not be appointed. *In re Thompson*; *Bedford* v. *Teal*, 45 Ch. D. 161.

Bonds charging the district fund created by the Public Health Act, 1875, are probably not within the Act, although the fund is partly composed of the proceeds of sale of surplus

lands directed by statute to be sold; and certainly not within the Act if there are no surplus lands. *In re Thompson, supra.*

Leeds corporation debenture stock, which is by statute charged "upon the revenues of all landed and other property" of the corporation, is not within the Act. *In re Pickard; Elmsley* v. *Mitchell*, (1884) 2 Ch. 88; 3 Ch. 704.

Manchester corporation debenture stock, which is by statute a charge upon "the city rate and all landed and other property vested in or belonging to the corporation" and Metropolitan Consolidated Stock, which is a charge "indifferently on the whole of the lands, rents, and property" of the Metropolitan Board of Works, are within the Act. *Re Holmes; Holmes* v. *Holmes*, 63 L. T. 177; 60 L. J. Ch. 267; *Cluff* v. *Cluff*, 2 Ch. D. 222; *In re Crossley; Birrell* v. *Greenhough*, (1897) 1 Ch. 928.

Charge on specific tolls.

c. Where there is a charge on specific tolls, rates, or dues, the charge is within the Act, if the toll, rate, or due is an interest in, or connected with land. *Knapp* v. *Williams*, 4 Ves. 430, n.; *In re Christmas; Martin* v. *Lacon*, 33 Ch. D. 332; *In re David; Buckley* v. *Royal National Lifeboat Institution*, 41 Ch. D. 168; 43 Ch. D. 27.

Thus, duties leviable by harbour commissioners on all ships coming within certain limits, whether they use the land of the commissioners or not, are not connected with land; but tolls received for passing over a bridge, the approaches to which belong to the mortgagors, are connected with land. *In re Christmas, supra; In re David, supra.*

Charge on police rates poor rates.

d. The principle of *Attree* v. *Hawe* has no application to cases in which tolls, rates or dues are specifically mortgaged (*In re Christmas, supra; In re David, supra*), but it has been sometimes treated as governing such cases. Thus, a charge by justices of the peace on the security of the police rates since the County Rates Act, 1844 (7 & 8 Vict. c. 33) (*In re Harris; Jackson* v. *Governors of Queen Anne's Bounty*, 15 Ch. D. 561), and a charge on rates leviable by distress in the same manner as poor rates (*Jervis* v. *Lawrence*, 22 Ch. D. 202), have been held—in both cases on the authority *Attree* v. *Hawe*—to be outside the Act. But probably the older cases, which decided

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that police rates and poor rates were within the Act, would n be upheld. *House* v. *Chapman*, 4 Ves. 542; *Finch* v. *Squire*, Ves. 41; *Thornton* v. *Kempson*, Kay, 592; see *In re Christm* *Martin* v. *Lacon*, 33 Ch. D. 342.

Rent, royalties, fixtures.

10. Arrears of rent due at the testator's death (*a*), app tioned rent (*b*), a royalty on minerals then due (*c*), and tena fixtures (*d*), are not within the Act. *Edwards* v. *Hall*, 11 I 1; 6 D. M. & G. 74 (*a*); *Thomas* v. *Stowell*, 18 Eq. 198 (*b*) *Brook* v. *Badley*, 4 Eq. 106 (*c*); *Johnston* v. *Swann*, 3 M 457 (*d*).

Money to be invested in land.

B. As to what is a gift of personalty to be laid out in t purchase of land or any interest therein within the Mo main Act:

Money to be invested on real or mortgage security.

1. Money directed to be invested on real securities, or ev merely on mortgage security generally, is within the A *Baker* v. *Sutton*, 1 Kee. 224.

The same is the case if the ultimate object of the bequ is investment in land, though other investments may authorised in the meantime. *Mann* v. *Burlingham*, 1 K 235; *A.-G.* v. *Hodgson*, 15 Sim. 146.

But the gift is valid if an option is left to the trustees: instance, if money is directed to be invested in real or oth securities. *A.-G.* v. *Goddard*, T. & R. 348; *Graham* *Paternoster*, 31 B. 30; *Re Beaumont's Trusts*, 32 B. 191.

Bequest to pay off the mortgage debt of a charity.

2. A bequest of money to pay off a debt secured by mo gage, whether legal or equitable, of land belonging to a chari is void. *Corbyn* v. *French*, 4 Ves. 418; *Waterhouse* v. *Holm* 2 Sim. 162; *In re Lyall's Trusts*, 12 Ch. D. 211.

But this is not the case where the debt is no charge upon t land. *Bunting* v. *Marriott*, 19 B. 163.

Gift to improve, enlarge, or repair.

3. A gift to improve, repair or enlarge an existing charitab institution is valid. *Edwards* v. *Hall*, 11 Ha. 1; 6 D. M. & G 74; *Haukins' Trust*, 33 B. 570.

Gift to build a charitable institution is void.

4. A gift to build a charitable institution is held *prima fa* to imply a direction to purchase land for the purpose, and void under 9 Geo. II. c. 36. *Chapman* v. *Brown*, 6 Ves. 404 *A.-G.* v. *Parsons*, 8 Ves. 186; *Pritchard* v. *Arbouin*, 3 Rus 456; *A.-G.* v. *Davies*, 9 Ves. 535; *Martin* v. *Wellsted*, 2 W

657; *Longstaff* v. *Rennison*, 1 Dr. 28; *Watmough's Trusts*, 8 Eq. 272; *Hawkins* v. *Allen*, 10 Eq. 246; *Pratt* v. *Harvey*, 12 Eq. 544; see *Re Taylor*: *Martin* v. *Freeman*, 58 L. T. 538.

A gift to erect a charitable institution does not become valid, because made to a corporation, which has power to hold land in mortmain, and, in fact, possesses land available for the purposes of the bequest. *In re Cox*; *Cox* v. *Davie*, 7 Ch. D. 204.

Discretion to build or apply the money in some legal manner.

5. If, however, an option is given to the trustees either to build a charitable institution or bestow the money in some other manner which is legal, the bequest is good as regards the legal purpose. *Sorresby* v. *Hollins*, 9 Mod. 221; Amb. 211; *A.-G.* v. *Whitchurch*, 3 Ves. 141; *Incorporated Society* v. *Barlow*, 3 D. M. & G. 120; 17 Jur. 217; *Mayor of Faversham* v. *Ryder*, 18 B. 318; 5 D. M. & G. 350; *Edwards* v. *Hall*, 11 Ha. 1; 6 D. M. & G. 74; *Dent* v. *Allcroft*, 30 B. 335; *University of London* v. *Yarrow*, 1 De G. & J. 72.

And a bequest of impure personalty to such charities as trustees may select is good, since the power can be exercised in favour of charities exempt from the law of mortmain. *Lewis* v. *Allenby*, 10 Eq. 668; *Re Smith*; *Smith* v. *A.-G.*, 73 L. T. 732, n.; *In re Piercy*; *Whitcham* v. *Piercy*, (1898) 1 Ch. 565, overruling *Johnston* v. *Swann*, 3 Mad. 457; *Baker* v. *Sutton*, 1 Keen. 224, so far as they decide the contrary.

A discretion to trustees to give a legacy to the poor as they think fit is not within this principle. *In re Clark*; *Husband* v. *Martin*, 33 W. R. 516; 51 L. J. Ch. 1080.

Gift to "establish" a charity.

6. A direction to "establish" would it seems, *prima facie*, imply building, and come under the same rule as a bequest for building. *A.-G.* v. *Hodgson*, 15 Sim. 146; *Longstaff* v. *Rennison*, 1 Dr. 28; *Re Clancy*, 16 B. 295; *A.-G.* v. *Hall*, 9 Ha. 647; *Dunn* v. *Bourns*, 1 K. & J. 591; *Tatham* v. *Drummond*, 4 D. J. & S. 484.

The word may be used in such a context as to exclude building. *A.-G.* v. *Williams*, 2 Cox, 387; *Hall* v. *Jones*, 7 W. R. 657.

And the fact that an annual sum only is given to establish a school would apparently go to show that a testator did not contemplate building. *Hart-Thorne* v. *Nicholson*, 26 B. 38.

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The same is the case with an annual sum given to "provid a school, which may only mean that a school is to be hir *Johnston* v. *Swann*, 3 Mad. 457; *Crafton* v. *Frith*, 20 L. J. C 198; 15 Jur. 737.

A gift to "support or found" a school is valid. *In Hedgman*: *Morl[illegible]. Croxon*, 8 Ch. D. 156.

A bequest t[illegible] found" a chapel implies building. *Hopk* v. *Phillips*, 3 Gif. 182.

A direction to hire rooms does not bring a gift within Mortmain Act. *In re Robson*; *Emley* v. *Davidson*, 19 Ch. 156; *Re Holburne*; *Coates* v. *Mackillop*, 53 L. T. 212.

Gift to endow a charity.

On the other hand, a gift to "endow" would not *pri facie* authorise building, though the word may be so used as involve it. *Salusbury* v. *Denton*, 3 K. & J. 529; *Edwards Hall*, 11 Ha. 1; *Sinnett* v. *Herbert*, 7 Ch. 232; *Kirkbank Hudson*, 7 Pr. 212; *Re Holburne*: *Coates* v. *Mackillop*, 53 L. 212.

Evidence of intention that the testator did not contemplate the purchase of land.

7. But, even though the object of the gift may *primâ fa* imply the purchase of land, it may appear that the testa had no such intention. He may have contemplated building as to be erected either on land already in mortma or on land to be provided after his death from some ot source.

a. Thus, if the testator contemplates land already in mo main, a gift to build a charitable institution is good. This w be the case:—

Land in mortmain referred to expressly,

(i.) If land already in mortmain is expressly referred t the will. *Glubb* v. *A.-G.*, Amb. 373; *Brodie* v. *D of Chandos*, 1 B. C. C. 444, n.

If it is uncertain whether the land, upon whic testator directs the money to be laid out, is already mortmain or not, an inquiry will be direct *Champney* v. *Davy*, 11 Ch. D. 949.

by implication,

(ii.) If land already in mortmain is impliedly referred to, by a direction to build in such manner as is consist with law. *Dent* v. *Allcroft*, 30 B. 335; *Sc Crewe-Read*, L. R. 3 Eq. 60.

(iii.) External evidence may be adduced in order to show that the testator must have contemplated land in mortmain. *A.-G.* v. *Hyde*, Amb. 751; *Gibbett* v. *Hobson*, 3 M. & K. 517; *Booth* v. *Carter*, L. R. 3 Eq. 737; *Cresswell* v. *Cresswell*, 6 Eq. 69. by external evidence.

b. When the testator intends the building to be erected on land to be supplied from some other source after his death:—

(i.) It is clear that a direct inducement offered to any person to give land for the purpose of the building, as, for instance, a bequest to A to build if he will give the land, is bad. *A.-G.* v. *Davies*, 9 Ves. 535. Inducement to give land.

(ii.) If the trustees are directed to beg the land from some person, but their own implied power to purchase remains, the bequest is bad. *Mather* v. *Scott*, 2 Kee. 172. Direction to beg land.

(iii.) Where the bequest is to build, with an express direction that land is not to be bought for the purpose, or that the Mortmain Act is not to be violated, the bequest is valid, whether made conditional upon land being provided, or without any condition. *Henshaw* v. *Atkinson*, 3 Mad. 306; *A.-G.* v. *Williams*, 2 Cox, 387; *Curood* v. *Thompson*, 1 Sm. & G. 409; *Philpott* v. *Governors of St. George's Hospital*, 6 H. L. 338 (overruling *Trye* v. *Corporation of Gloucester*, 14 B. 173); *Chamberlayne* v. *Brockett*, 8 Ch. 206; *In re White's Trusts*, 30 W. R. 837; *Re Jackson*; *Biscoe* v. *Jackson*, 35 Ch. D. 460. Direction not to buy land.

8. Upon similar principles, a bequest to the trustees of a charity, which exists only for the purchase of land, is void. *Wilmore* v. *Woodroffe*, Amb. 636; *Middleton* v. *Clitherow*, 3 Ves. 734; *Denton* v. *Lord J. Manners*, 25 B. 38; 2 De G. & J. 672. Bequest to a charity, the object of which is to acquire land.

On the other hand, it is good if it exists for the purchase of land and other objects. *Incorporated Society* v. *Barlow*, 3 D. M. & G. 120; *Carter* v. *Green*, 3 K. & J. 591; *Wilkinson* v. *Barber*, 14 Eq. 96.

9. A bequest of money to be employed in enlarging or improving a charitable object attempted to be created by a

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testator fails, if the original object is invalid. *A.-G.* v. *Hinxman*, 2 J. & W. 270; *Smith* v. *Oliver*, 11 B. 481; *Crump* v. *Playfoot*, 4 K. & J. 479; *Green* v. *Britten*, 42 L. J. Ch. 187; *In re Cox*; *Cox* v. *Darie*, 7 Ch. D. 204; *Re Taylor*; *Martin* v. *Freeman*, 58 L. T. 538.

Bequest for foreign charity.

10. A bequest of the proceeds of sale of land in England to be laid out in the purchase of land for charitable purposes in a country where land may be well given to charity is void. *Curtis* v. *Hutton*, 14 Ves. 537; *A.-G.* v. *Mill*, 3 Russ. 328; 5 Bl. N. C. 593; 2 Dow & Cl. 393.

But the Statute of Mortmain did not extend to the disposition, grant, or settlement of any estate, real or personal, in Scotland (see sect. 6); therefore bequests of money to be laid out in the purchase of heritable securities or land in Scotland for charitable purposes there were valid. *Oliphant* v. *Hendrie*, 1 B. C. C. 571; *Mackintosh* v. *Townsend*, 16 Ves. 330; see *Whicker* v. *Hume*, 7 H. L. 124.

The Statute of Mortmain does not apply to the Colonies. Therefore a gift by a testator domiciled in a colony of money to be laid out in purchasing land in England for a charitable purpose is good. *A.-G.* v. *Stewart*, 2 Mer. 143; *Mayor of Canterbury* v. *Wyburn*, (1895) A. C. 89; see *Jex* v. *McKinney*, 15 App. C. 77.

Proceeds of sale of land abroad.

The proceeds of sale of land abroad are not within the provisions of the Act. *Beaumont* v. *Oliveira*, 4 Ch. 309, 319.

The Act 9 Geo. II. c. 36, did not, and the Act of 1888 does not, extend to Ireland.

As regards that country, the Charitable Donations and Bequests (Ireland) Act, 1844 (7 & 8 Vict. c. 97), enacts (sect. 16) that after the 1st January, 1845, no donation, devise, or bequest for pious or charitable uses in Ireland shall be valid to create or convey any estate in lands, tenements, or hereditaments, for such uses unless the deed, will, or other instrument containing the same shall be duly executed three calendar months at the least before the death of the person executing the same, with a provision as to registration of every deed or instrument not being a will.

A gift of money to be laid out in land for a charitable

purpose was always valid in Ireland and is not affected by the Act (*a*); and the Act does not affect a gift of money invested on mortgage of land (*b*). *A.-G.* v. *Power*, 1 Ba. & Be. 145; *Pollock* v. *Day*, 14 Ir. Ch. 297 (*a*); *Stewart* v. *Barton*, 1 I. R. 6 Eq. 215; *Muthaud* v. *Perry*, 3 L. R. Ir. 135 (*b*).

A devise of land on trust for sale and to apply the proceeds, or a legacy payable out of the proceeds, for charitable purposes is avoided by the Act if the testator dies within three months. *Sherlock* v. *Blake*, 10 Ir. Jur. N. S. 350; *Donnelly* v. *O'Neill*, I. R. 4 Eq. 523; *Burke* v. *Porter*, (1905) 1 Ir. 119.

But a devise by a will executed more than three months before the death is not invalidated by a codicil republishing the will executed within the three months. *In re Moore*; *Long* v. *Moore*, (1907) 1 Ir. 315.

C. Exceptions from the Statute of Mortmain.

Universities and colleges of Oxford and Cambridge, and Eton, Winchester, and Westminster excepted from the Act.

The Universities of Oxford and Cambridge, and the colleges and houses of learning in the two Universities, and the Colleges of Eton, Winchester, and Westminster, are excepted from the operation of the Act 9 Geo. II. c. 36. But this exception only authorises devises to these institutions for all or some of the purposes for which they exist, and not upon trust for other charitable objects. *A.-G.* v. *Tancred*, 1 Ed. 10; 1 W. Bl. 90; Amb. 351; *A.-G.* v. *Whorwood*, 1 Ves. 534; *A.-G.* v. *Mauby*, 1 Mer. 327.

And if there is a good devise of lands to a college for charitable objects, which the college refuses to accept, the object will be carried out *cy près*. *A.-G.* v. *Andrew*, 3 Ves. 633.

The Act of 1888, s. 7 (1), continues the exception, and extends it to the Universities of London and Durham, and the Victoria University, and the colleges and houses of learning within any of these universities, and to Keble College.

In what cases charities empowered to hold lands may take by devise.

The fact that a charity is empowered by Act of Parliament to hold lands does not entitle a testator to devise lands to it. *Robinson* v. *Governors of London Hospital*, 10 Ha. 19; *Nethersole* v. *School for the Indigent Blind*, 11 Eq. 1; *Chester* v. *Chester*, 12 Eq. 444.

But where charities are empowered to acquire lands by will.

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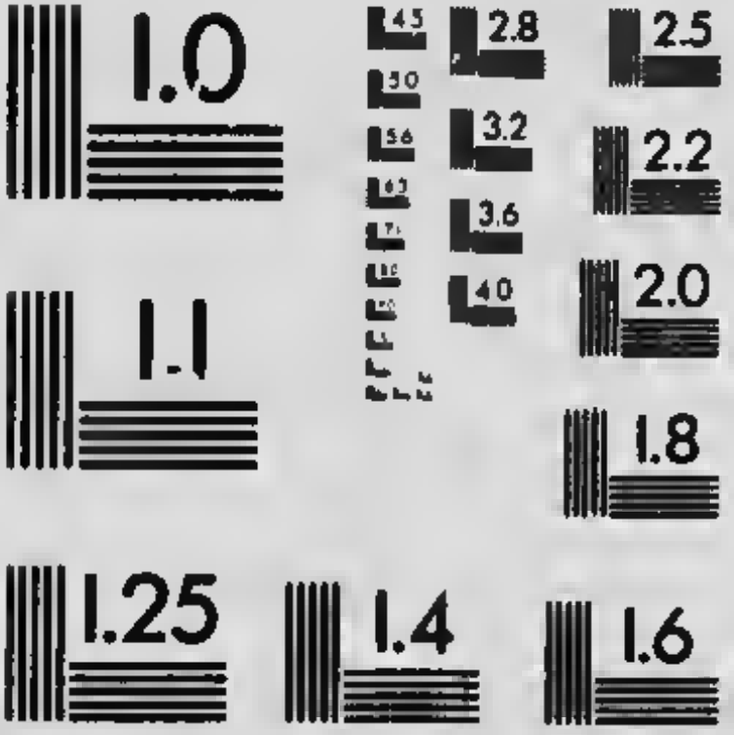

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testators are entitled to devise lands to them. *Perring* v. *Tre* 18 Eq. 88.

It seems that such a power to take lands by devise, wo not necessarily authorise a bequest of money secured mortgage. *Chester* v. *Chester*, *supra*.

An Act passed before the Act 9 Geo. II. c. 36, and enabl a charitable corporation to take lands without a licence mortmain, by authorising testators to devise lands to corporation, does not exempt the corporation from the operat of 9 Geo. II. c. 36. *Luckraft* v. *Pridham*, 6 Ch. D 205.

Redemption of land tax.

Under the Land Tax Redemption Act, 1802 (42 Geo. I c. 116), s. 50, money may be given by will or otherwise redeeming the land tax on lands settled on charitable uses.

Under sect. 162 of the same Act land tax redeemed purchased may be given by deed or will for the augmentat of any living.

Statute 43 Geo. III. c. 108.

The Gifts for Churches Act, 1803 (43 Geo. III. c. 1 authorises the devise of lands not exceeding five acres, o goods or chattels to the amount of 500*l.*, for erecting, repair or providing any church or chapel where the Liturgy of Church of England is used, or any mansion-house for minister of the said Church, and other similar purposes.

The restriction as to amount imposed by the Act is repe by the Mortmain and Charitable Uses Act, 1891 (54 & 55 V c. 73), s. 7. *In re Douglas*; *Douglas* v. *Simpson*, (1905) 1 Ch.

The Gifts for Churches Act does not extend to women co without their husbands, and the Married Women's Prop Act, 1882, has not removed the disability. *In re Sm Estate*; *Clements* v. *Ward*, 35 Ch. D. 589.

Under this Act a secret trust to devote a chapel compr in a residuary devise to the purpose of a parish church has upheld. *O'Br[illegible]* v. *Tyssen*, 28 Ch. D. 372.

Under the same Act a bequest of 500*l.* towards buildi church, if the testator survives the making of the will t months, is good. *Dixon* v. *Barlow*, 3 Y. & C. Ex. 6 *Girdlestone* v. *Creed*, 10 Ha. 480.

The Act, however, does not authorise a devise of lands t sold and the proceeds to be applied towards the purposes of

Act. *Incorporated Church Building Society* v. *Coles*, 1 K. & J. 145; 5 D. M. & G. 324.

Under this Act gifts to keep in repair a parish churchyard (*a*), and to purchase a new clock for a parish church (*b*), have been held good. *In re Vaughan*; *Vaughan* v. *Thomas*, 33 Ch. D. 187 (*a*); *Re Hendry*; *Watson* v. *Blakeney*, 56 L. T. 908 (*b*).

The effect of the Act is, that, under a bequest towards building a church, the legacy will be apportioned between the pure and impure personalty, and be paid out of pure personalty to the extent of its proportion, and out of the impure personalty to the extent of 500*l*. *Sinnett* v. *Herbert*, 7 Ch. 232; *Champney* v. *Davy*, 11 Ch. D. 949.

Endowment of districts for spiritual purposes.

Under the New Parishes Act, 1843 (6 & 7 Vict. c. 37), s. 9, the Ecclesiastical Commissioners may constitute districts for spiritual purposes, and by sect 22, land or money may be given by deed or will for the endowment of the minister of a district, or for providing a church or chapel under the Act.

Under this Act a direction to apply a sum for the purposes authorised by the Act, if the object can be legally carried out within twenty-one years from the testator's death, is valid, if a district is constituted within the stated period, though no district has been constituted at the testator's death. *Baldwin* v. *Baldwin*, 22 B. 419.

Public parks, schools, and museums.

By the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 6, twenty acres may be given for a park, two acres for a museum, and one acre for a school-house, but the will must be executed twelve months before the death.

Ancient monuments.

By the Ancient Monuments Protection Act, 1882 (45 & 46 Vict. c. 73), ancient monuments, to which the Act applies, may be devised to the Commissioners of Works, who may accept the devise.

Department of Science and Art.

By the Department of Science and Art Act, 1875 (38 & 39 Vict. c. 68), land may be devised to the Department of Science and Art for the purposes of their charter or for any educational or public purpose.

Technical and Industrial Institutions.

By the Technical and Industrial Institutions Act, 1892 (55 & 56 Vict. c. 29), land may be given by will for the

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purposes of that Act free from the restrictions of the Acts of 1888 and 1891; see sect. 10.

Working classes dwellings.

By the Working Classes Dwellings Act, 1890 (53 & 54 Vict. c. 16), five acres of land may be given by will for the purpose of providing dwellings for the working classes in any populous places; see *In re Sutton; Lewis* v. *Sutton*, (1901) 2 Ch. 640.

A list of charities excepted from the Mortmain Act will be found in Tudor's Real Property Cases, 4th ed. p. 680.

Secret trust of land in favour of charity is bad, but the devisee takes the legal estate.

The statute of Mortmain could not be avoided by a secret trust in favour of a charity. *Russell* v. *Jackson*, 10 Ha. 204.

In such a case, however, the devisee took the legal estate *Sweeting* v. *Sweeting*, 12 W. R. 239.

Where land was devised on trust for a person for life with remainder to charity, the legal estate was well devised for life *Young* v. *Grove*, 4 C. B. 668.

The legal estate passed when the trust was for charity, and for other objects which were valid. *Doe* d. *Childey* v. *Harris* 16 M. & W. 517, 518.

But a devise of lands on an express trust for charity only was void, as regards the legal estate as well, by the statute 9 Geo. II. c. 36. *Doe* d. *Burdett* v. *Wrighte*, 2 B. & Ald. 710; see *Churcher* v. *Martin*, 42 Ch. D. 312; *In re Lacy; Royal General Theatrical Fund Association* v. *Kydd*, (1899) 2 Ch. 149

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Superstitious uses.

A bequest to pay for masses for the repose of the testator's soul is good in Ontario, all Christian sects having equal toleration in the practice of their religion. *Elmsley* v. *Madden*, 18 Gr. 386.

Mortmain Act.

Where in force.

In consequence of the assumption of the Legislature of Upper Canada, in passing other statutes, that the Mortmain Act, 9 Geo. II. c. 36, was introduced into that Province as part of the English law, the Courts have held it to be in force. *Doe dem. Anderson* v. *Todd*, 2 U.C.R. 82; *Whitby* v. *Liscombe*, 22 Gr. 203; 23 Gr. 1; *Macdonell* v. *Purcell*, 23 S.C.R. 101.

It has since been repealed in Ontario. See *infra*.

It is not in force in New Brunswick. *Ray* v. *Annual Conference*, 6 S.C.R. 308.

Nor is it in force in British Columbia. *Re ... earce*, 10 B.C.R. 280.

It has been held to be in force in Manitoba. *Law* v. *Acton*, 14 M.L.R. 246.

Void Subjective Dispositions.

Void subjective dispositions.

The following subjective dispositions have been held to be within the 9 Geo. II. c. 36:—

Land directed to be sold and the proceeds applied. *Re John McDonald*, 29 Gr. 241.

Mortgages. *Thompson* v. *Torrance*, 28 Gr. 253; 9 A.R. 1; *Labatt* v. *Campbell*, 7 O.R. 250.

A promissory note secured by a mortgage on land. *Farewell* v. *Farewell*, 22 O.R. 573.

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Money charged on land by the will. *Fulton* v. *Fulton*, 2 Gr. 422.

Money bequeathed for building a parsonage, the presumption being that land will necessarily be bought; but the presumption might have been rebutted by shewing that the land on which the parsonage was to have been built was already in mortmain. *Davidson* v. *Boomer*, 15 Gr. 1; *Murray* v. *Molloy*, 10 O.R. 46.

But where a testator had himself promised to pay for the building of a church, a payment made by his executors in fulfilment of the promise was upheld. *Anderson* v. *Kilborn*, 22 Gr. 385.

A bond conditioned to pay a sum of money for charitable purposes six months after the death of the obligor, could not be enforced against the lands of the obligor. *Anderson* v. *Paine*, 14 Gr. 110.

Assets would not be marshalled in favour of a charity. *Anderson* v. *Kilborn*, 22 Gr. 385; *Becher* v. *Hoare*, 8 O.R. 3

But if the testator so directed, the direction would be carried out. *Farewell* v. *Farewell*, 22 O.R. at p. 577.

Where a mixed fund was given to charities, the legacies abated in the proportion which the amount of the realty or impure personalty bore to the pure personalty. *Re Staebler*, 21 A.R. 266; *Law* v. *Acton*, 14 M.L.R. 246. See *Kinsey* v. *Kinsey*, 26 O.R. 99; *Ostrom* v. *Alford*, 24 O.R. 305.

Void Objective Dispositions.

Void objective dispositions.

The following objective dispositions have been held to be void:—

For a house to be built as a residence for a public school teacher. *Sills* v. *Warner*, 27 O.R. 266.

For a public school. *Law* v. *Acton*, 14 M.L.R. 246.

A bequest to a municipal corporation, to be paid out of pure personalty, for a public library and mechanics' institute; there being nothing but land in the testator's

to answer the bequest. *Whitby* v. *Liscombe*, 22 Gr. 203; 23 Gr. 1. And see *Brown* v. *McNab*, 20 Gr. 179.

To Queen's College for a bursary, the college having power to acquire land, but not necessarily against the provisions of the Mortmain Act. *Ferguson* v. *Gibson*, 22 Gr. 36.

To an Agricultural Society (incorporated) for the purpose of giving prizes for the encouragement of agriculture, the society having power to acquire land but not by will. *Kinsey* v. *Kinsey*, 26 O.R. 99.

By a testator domiciled in the United States, of land in Ontario, "to promote, aid and protect citizens of the United States of African descent in the enjoyment of their civil rights." *Lewis* v. *Doerle*, 25 O.R. 206.

By a testator domiciled in Ontario, of land in Ontario, to the State of Vermont for school purposes. *Parkhurst* v. *Roy*, 27 Gr. 361; 7 A.R. 614.

For foreign charities. *Anderson* v. *Kilborn*, 13 Gr. 219.

To the Lutheran Church (unincorporated) to erect a college; and a bequest of money also, the church having various parcels of land which might have been used for the purpose, but the testator not having forbidden the purchase of lands with the legacy. *Murray* v. *Malloy*, 10 O.R. 46.

To provide for the incumbent of a church. *Stewart* v. *Gesner*, 29 Gr. 329.

To pay the debt on a church which was a lien or incumbrance thereon. *Stewart* v. *Gesner*, 29 Gr. 329.

A devise for repair and maintenance of a church; but a gift of the pure personalty of a mixed fund for that purpose was upheld. *Ostrom* v. *Alford*, 24 O.R. 305.

Proceeds of a mortgage to Algoma Missions, unincorporated. *Labatt* v. *Campbell*, 7 O.R. 250.

Valid Dispositions Under Enabling Acts.

Enabling Acts.

A devise of land for a manse is valid under the Religious Institutions Act. *Sills* v. *Warner*, 27 O.R. 266.

To a Presbyterian church in Manitoba. *Law* v. *Acton*, M.L.R. 246.

Bequests of the proceeds of a mortgage to the Synods Huron and Ontario, valid, under their incorporating A *Labatt* v. *Campbell*, 7 O.R. 250.

The Church of England, under Acts relating thereto power to acquire land by conveyance. *Doe dem. Baker Clark*, 7 U.C.R. 44; *Church Society of Toronto* v. *Crand* 8 Gr. 34.

And a will is a conveyance within the meaning of t Act. *Doe dem. Baker* v. *Clark, supra.*

The Methodist Church, to a certain extent, under Acts lating thereto. *Smith* v. *Methodist Church*, 16 O.R. 199.

The Toronto General Hospital, under enabling Acts. *B land* v. *Gillespie*, 16 O.R. 486.

The Winnipeg General Hospital. *Law* v. *Acton*, 14 M.L 246.

Dispositions not Charitable.

Dispositions not charitable.

A devise to a Bishop by name, in trust for his Dioces not a devise to a charitable use, the uses to which it m be put not being necessarily charitable. *Re McCauley* O.R. 610.

A devise of lands to trustees, to dispose of the same as ministers of a certain religious body might see fit, is necessarily a devise to charitable uses. *Doe dem. Vanco Read*, 3 U.C.R. 244.

A devise of lands to be sold and the proceeds paid to religious and charitable societies as in the judgment of executors require it, is not void, and an enquiry was dire to ascertain what societies were authorized to take *Anderson* v. *Dougall*, 13 Gr. 164.

A gift to home missions or to any such good and benev Christian objects as the executors consider it to be most serving is not a charitable gift and fails for uncerta *Brewster* v. *Foreign Mission Board*, 2 N.B. Eq. 172.

Religious Institutions Act.

Religious Institutions Act.

By the Religious Institutions Act land might be devised to religious institutions if the will were made at least six months before the death of the testator.

A codicil made within the six months, 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.

But not, where the codicil confirmed the will and did not otherwise operate on the devise in question. *Holmes* v. *Murray*, 13 O.R. 756.

Mortmain and Charitable Uses Acts.

Mortmain and charitable uses Acts.

By the "Mortmain and Charitable Uses Act," R.S.O. c. 112, land may be devised to charitable uses, but must be sold within two years from the death of the testator, or such further time as may be determined by the High Court.

Personal estate directed to be laid out in land is to be held as if there had been no direction to lay out.

Money charged or secured on land, or other personal estate arising from or connected with land, is not to be deemed subject to the Mortmain Act, as respects the wills of persons dying on or after the 14th April, 1892, or as respects any other grant or gift made on or after that date.

This Act abolished the limitation of six months before the testator's death, during which devises could not be made to charities. *Re Barrett*, 10 O.L.R. 337.

The following devises have been held to be valid since this Act was passed:—

A devise to executors to be used to further "the cause of our Lord." *Phelps* v. *Lord*, 25 O.R. 259.

A devise on trust for sale, the proceeds to be paid over for the House of Refuge of the County of Bruce. *Re Brown*, 32 O.R. 323.

A gift of realty and personalty on trust for sale and to distribute the proceeds amongst such Protestant institutions

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as the executor should deem advisable. *Manning* v. *Robin*
son, 29 O.R. 483.

A devise on trust for sale, and to pay $2,000 out of th
proceeds to N. W. for the use of the Reformed Presbyterian
Church. *Re Johnson*, 5 O.L.R. 459.

The Statute 9 Geo. II. c. 36 was repealed by the "Mor
main and Charitable Uses Act, 1902." R.S.O. c. 333, s. 7(6
which is to be read with the Act of the same name of 1892.

By the Act of 1902, an assurance of land or personal esta
for charitable uses, unless made in good faith for full an
valuable consideration, must be made at least six month
before the death of the assuror.

A will is not an assurance within the meaning of th
enactment. *Re Kinny*, 6 O.L.R. 459; *Re Barrett*, 10 O.L.
337.

Since this Act the following devises have been held to
valid:—

A devise on trust for sale for the benefit of a Presbyter
Congregation in Ireland, to be used for the relief of the po
Re Kinny, 6 O.L.R. 459.

A devise on trust for sale, for the benefit of trustees o
Baptist Church and Missionary Societies. *Re Barrett*,
O.L.R. 337.

A devise to executors on trust to sell and pay the proce
to the Westlake Meeting of Friends, to be applied to ch
table and philanthropic purposes, the conjunction "a
making the devise wholly charitable. *Re Huyck*, 10 O.
480.

Legacies for Charitable Purposes.

Legacies for charitable purposes.

Legacies, in the following cases have been held to be
charitable legacies:—

A legacy to a Bishop for the support of missions i
diocese; a legacy towards the support of any mission
lished by a named person; a legacy to a college. *To*
General Trusts Co. v. *Wilson*, 26 O.R. 671.

A legacy to ... distributed at the discretion of executors for the support of Christianity throughout the world, such as Bible, Tract, Missionary Societies, and institutions of learning of the Baptist denomination. *Anderson* v. *Kilborn*, 22 Gr. 385.

A legacy to a foreign missionary society incorporated. *Farewell* v. *Farewell*, 22 O.R. 572.

Legacies to the two societies of St. Vincent de Paul, and the House of Providence, both unincorporated. *Elmsley* v. *Madden*, 18 Gr. 386.

Legacies to the U. P. Church of the United States; for a Jewish Mission; for pious, poor, converted Jews that meet for the reading of Scripture; for the poor and destitute, to supply their wants. *Gillies* v. *McConachie*, 3 O.R. 203.

Legacies to Homes for Orphans. *Williams* v. *Roy*, 9 O.R. 534.

A legacy to the benevolent institutions and charities of Owen Sound, to be distributed as the executors should deem fit—being interpreted as a bequest to the Corporation of Owen Sound to be distributed as the executors should direct. *Williams* v. *Roy*, 9 O.R. 534.

A legacy for the purpose of procuring legislation to prohibit the manufacture and sale of intoxicants as beverages. *Farewell* v. *Farewell*, 22 O.R. 573.

Statutes Respecting Charitable Societies.

Statutes respecting charitable societies.

In British Columbia, charitable societies are empowered to acquire by purchase, gift, devise or otherwise, all kinds of personal property, and also real property not exceeding in extent ten acres; but a larger quantity may be acquired and held for special purposes on licence from the Lieutenant-Governor. R.S.B.C. c. 16.

In Manitoba, such societies have the right to acquire lands not exceeding an annual value of $5,000 per annum. R.S.M. c. 18.

In Nova Scotia all grants, devises and bequests of real and personal property made to any religious or charitable cor-

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poration, or any incorporated institution of learning, declared valid. R.S.N.S. c. 135.

Cy près.

Bequests upon trust for two schools on condition of th educating twelve poor children, the schools having sub quently been superseded by free schools supported by t ution, with gifts to an institution for the deaf and dumb assist in educating the poor so afflicted, were applied to institution for the deaf and dumb and an asylum for blind, as the gift was for the benefit of the poor, and apply it to schools supported by taxation would be mer to relieve ratepayers of part of their burden. *Attorney-G eral* v. *Bullock*, R.E.D. 249.

A bequest to aid the inhabitants of a township to maint a free Grammar and English School applies to a con academy established under a Free Schools Statute. *Re C ler*, R.E.D. 159.

CHAPTER XXXIII.

SUCCESSIVE AND CONCURRENT INTERESTS, JOINT TENANCY AND TENANCY IN COMMON.

I.—DEVISE TO A CLASS IN TAIL.

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Devise to a class in tail gives concurrent interests.

In some cases the question has been whether the gift is to several persons concurrently, or whether they are intended to take successively; thus a devise to the sons of a person in tail is *primâ facie* a gift to a class. *De Windt* v. *De Windt*, L. R. 1 H. L. 87; *Surtees* v. *Surtees*, 12 Eq. 400.

Devise to first and other sons.

But a devise to the first and other sons of a person imports succession. *Lewis* d. *Ormond* v. *Waters*, 6 East, 536; *Craddock* v. *Craddock*, 4 Jur. N. S. 626; *Hongwood* v. *Hongwood*, 89 L. T. 235, 378.

Devise to keep property together in one line of enjoyment.

If there is a general intention manifest to keep the estates together in a single line of enjoyment, the members of the class will take successively. *Allgood* v. *Blake*, L. R. 7 Ex. 339; *ib.* 8 Ex. 160.

II.—GIFTS TO A PARENT AND CHILDREN.

Gift to a parent and children gives them concurrent interests.

In the same way a gift to a parent and children is *primâ facie* a gift to them concurrently. *Mason* v. *Clarke*, 17 B. 126; *Sutton* v. *Torre*, 6 Jur. 234; *Wilson* v. *Maddison*, 2 Y. & C. C. 372; *Beales* v. *Crisford*, 13 Sim. 592; *Nevill* v. *Nevill*, 12 Eq. 432; 7 Ch. 253; *In re Seyton; Seyton* v. *Satterthwaite*, 34 Ch. D. 511; *In re Davies' Policy Trusts*, (1892) 1 Ch. 90; *Re Wilmot; Wilmot* v. *Betterton*, 76 L. T. 415. See *Cape* v. *Cape*, 2 Y. & C. Ex. 543.

The fact that the gift is to the parent in trust for herself and her children, is not sufficient to show that they are not to take

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concurrently. *Nevill* v. *Nevill*, 7 Ch. 253; *Jubber* v. *Jub* 9 Sim. 503; *In re Byrne's Estate*, 29 L. R. Ir. 250; *Atki* v. *Atkinson*, 62 L. T. 735. See *Curtis* v. *Graham*, 12 W 998. *Ward* v. *Grey*, 26 B. 485, probably goes beyond present tendency of the Court.

What is a contrary intention.

But if there is anything to show that the parent is to tak different interest from that of the children, he will take for l with remainder to the children.

Words of distribution applied to the children only.

1. If the bequest is to A and his children as tenants common, if more than one, showing that the tenancy in comm is to apply to children only, the father takes for life. *Do Dary* v. *Burnsall*, 6 T. R. 30; 1 B. & P. 215, where issue m have meant children by the force of the gift over in default issue of such issue. See *Doe* d. *Gilman* v. *Elvey*, 4 East, 313

Words of limitation applied to the children only.

2. A devise to A and his children and the heirs of the par and children, gives a joint estate in fee, or an estate tail to parent, according as there are or are not children living at time of the devise. *Oates* d. *Hatterley* v. *Jackson*, 2 Str. 117 *Underhill* v. *Roden*, 2 Ch. D. 494.

But a devise to A and his children, and the heirs of children, would give A an estate for life with remainder to children. *Jeffery* v. *Honywood*, 4 Mad. 398, was decided this ground, though it would seem the word heirs referred the parent as well as the children.

Settlement directed of the whole fund.

3. If the bequest is to a father and his children, and there a desire expressed that the whole fund should be settled secured, a term which would have no meaning as applied the father's interest as joint tenant, the father takes for li *Vaughan* v. *Marquis of Headfort*, 10 Sim. 639; *Combe* v. *Hugh* 14 Eq. 415.

If a continuing trust is created, which is contemplated outlasting the parent's life, there is room for a similar argume in favour of a life interest in the parent. *Oyle* v. *Corthor* 9 Jur. 325.

Gift of the whole fund to the separate use.

4. Whether, where the gift is to the separate use of t mother, it will be considered a sufficient indication of intentio to cut the interest of the parent down to a life interest is n certain. On the whole, the better opinion seems to be th

where the words creating the separate use apply to the whole fund or legacy, it will be construed as giving the mother a life interest. *Newman* v. *Nightingale*, 1 Cox, 341; *French* v. *French*, 11 Sim. 257; *Bain* v. *Lescher*, 11 Sim. 397; *Froggatt* v. *Wardell*, 3 Do G. & S. 685; *Dawson* v. *Bourne*, 16 B. 29; *Jeffery* v. *De Vitre*, 24 B. 296; *Scott* v. *Scott*, 11 Ir. Ch. 114; *Ogle* v. *Corthorn*, 9 Jur. 325, in which case the Vice-Chancellor Wigram thought that a gift to the separate use was conclusive against the children participating with their mother; *Combe* v. *Hughes*, 14 Eq. 415.

On the other hand, the cases of *De Witte* v. *De Witte*, 11 Sim. 41, and *Bustard* v. *Saunders*, 7 B. 92 (which, however, only followed *De Witte* v. *De Witte*), are inconsistent with this rule. See *In re Seyton; Seyton* v. *Satterthwaite*, 34 Ch. D. 511, 515.

Separate use attached to parent's interest or to interests of all.

If the interest of the mother alone is given to her separate use, or the separate use attaches to the interests of all alike, no argument in favour of a life estate can be founded upon the separate use. *Fisher* v. *Webster*, 14 Eq. 283; *Newsom's Trusts*, 1 L. R. Ir. 373.

The same is the case if her interest only is directed to cease on marriage. *Izod* v. *Izod*, 11 W. R. 452.

Division of the whole fund directed at a particular time.

5. If upon the marriage of their mother the fund is to be divided among the children, this affords an argument that it is not to be divided before, and the mother takes for life or till marriage. *Mill* v. *Mill*, I. R. 9 Eq. 104; *ib.* 11 Eq. 158; *In re M'Vicker's Contract*, 25 L. R. Ir. 307.

Gift over of the entire fund if there are no children.

6. If the whole fund is contemplated as remaining undisposed of, if there are no children, if there is a gift over, for instance, in default of children, the same construction is adopted. *Audsley* v. *Horn*, 26 B. 195; 1 D. F. & J. 226. See *Lampley* v. *Blower*, 3 Atk. 396.

Children contemplated as taking the whole fund.

7. If the children are contemplated as taking shares in the whole fund by a direction, for instance, that if there is but one child the whole is to go to that child, since the children are to take the whole, the parent to take anything must take a life interest. *Garden* v. *Poulteney*, Amb. 499; 2 Ed. 323; *Audsley* v. *Horn*, 26 B. 195; 1 D. F. & J. 226.

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Express gift to afterborn children.

8. If the bequest is such as expressly to include a children of the parent, and not merely those in being time of distribution, it will be construed to give a life est the parent, with remainder to the children, since it is a sir intention to impute to the testator that the parent's inter the estate should continually diminish on the birth of child. *Jeffery* v. *De Vitre*, 24 B. 296; *Jeffery* v. *Honyw* Mad. 398.

Part of the fund payable at a future period.

9. If the legacy is payable in part at once, and in part future period, the parent will take for life, as otherwise dif classes of children might take the two portions. *Mo Morse*, 2 Sim. 485.

Words implying that children are not to take till their parent's death.

10. If the children are contemplated as not enjoyin property till after their mother's death, by being called he instance, the parent takes for life only. *Crawford* v. *T* 4 Mad. 36; *Ogle* v. *Corthorn*, 9 Jur. 325; *Wilson* v. *Vans* Amb. 561.

Reference to other gifts.

11. There may be a reference to another gift, to assi Court in giving the parent a life interest. *French* v. *F* 11 Sim. 257; *In re Owen's Will*, 12 Eq. 316.

Executory trust.

12. An executory trust for A and her children will be s on A for life, and afterwards for her children. *In re Be Trust*, 12 Eq. 218.

III.—Joint Tenancy, Tenancy in Common and by Entireties.

A. Joint tenancy.

Individual and corporation.

Formerly an individual and a corporation could not as joint tenants (*Law Guarantee and Trust Society* v. *Be England*, 24 Q. B. D. 406), but this has been altere the Bodies Corporate (Joint Tenancy) Act, 1899 (62 & 63 c. 20).

Gift to several with words of limitation is a joint tenancy.

A gift to two persons or to a class with words of limi *primâ facie* constitutes a joint tenancy between them.

Interests of joint tenants need not vest at the same time.

The rule, that the interests of joint tenants must vest same time, does not apply to estates raised by use, or to *Macgregor* v. *Macgregor*, 1 D. F. & J. 63; *O'Hea* v. *Sl* (1895) 1 Ir. 7.

Thus, a gift to the children or to all and every the child or children of A creates a joint tenancy between them. *Kenworthy* v. *Ward*, 11 Ha. 196; *Morgan* v. *Britten*, 13 Eq. 28; *Binning* v. *Binning*, 13 R. 654; see *Jary* v. *Jary*, 9 L. R. Ir. 207. "All and every."

A devise to two persons who may intermarry, though they may both be married already, and the heirs of their bodies, makes them joint tenants in tail. Co. Litt. s. 25, p. 25 b. Devise to two in tail who may marry.

If an appointment under a special power is made in favour of A and B as joint tenants, and A is not an object of the power, B takes only a moiety, and the other moiety goes as in default of appointment. *In re Kerr's Trusts*, 4 Ch. D. 600. Appointment to object and non-object.

If trustees, who hold property on trust for *cestui que trustent* as tenants in common, convey the property to the *cestui que trustent* as joint tenants, the equitable tenancy in common merges in the joint tenancy. *In re Selous; Thomson* v. *Selous*, (1901) 1 Ch. 921. Conveyance of legal estate to equitable tenants in common jointly.

P. Joint life estates several inheritances.

Intermediate between cases of joint tenancy and of tenancy in common falls a class of cases, in which, in order to give effect to the whole devise, joint estates for life and several inheritances are given.

A devise to several persons who cannot marry, and the heirs of their bodies, give them joint estates for life with several inheritances in tail. Fearne, C. R. 35; *Cook* v. *Cook*, 2 Vern. 545; *Forrest* v. *Whitway*, 3 Ex. 367; *Edwards* v. *Champion*, 3 D. M. & G. 202, 214; *Tufnell* v. *Borrell*, 20 Eq. 194. Devise to several in tail who cannot marry.

A devise to a man and two women, or to two men and one woman, and the heirs of their bodies, gives them joint estates for life and several inheritances. Co. Litt. 25 b.

A devise to two husbands and their wives, and the heirs of their bodies, gives joint estates for life, and several inheritances; the one husband and wife the one moiety, the other husband and wife the other moiety. Co. Litt. 25 b.

A devise to several and the heirs of their respective bodies, gives joint estates for life and several inheritances. But a devise to children and the heirs of their bodies respectively, gives several estates in tail. *In re Tiverton Market Act; Ex parte Tanner*, 20 B. 374. Force of word respective.

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Devise to several in fee.

In the case of real estate devised to several and their hei a similar principle has been followed, words of severan being referred to the inheritance, leaving the life interes joint.

This construction is assisted if there is an express limitatio to the survivor or such a word as jointly is used. *Barker Giles*, 2 P. W. 280; 3 B. P. C. 297; see *Cookson* v. *Bingha* 3 D. M. & G. 668.

Thus a devise to A and B equally as joint tenants, and the several and respective heirs, gives joint estates for life wit several inheritances. *Doe* d. *Littlewood* v. *Green*, 4 M. & W 229.

A devise to several and their heirs respectively creates tenancy in common. *Torret* v. *Frampton*, Styles, 434.

A devise to several and their respective heirs, and a beque of personalty to several and their respective executors, admini trators, and assigns, gives, in the one case, joint estates fo life and several inheritances, and in the other, joint interes for life and absolute interests in remainder. *In re Tiverto Market Act*, *supra*; *In re Atkinson*; *Wilson* v. *Atkinson*, (189 3 Ch. 52.

But a bequest of personalty to four persons and to each their respective heirs, executors, administrators, and assig creates a tenancy in common. *Gordon* v. *Atkinson*, 1 Do G. S. 478.

A devise to several and the survivor and the heirs of suc survivor gives joint life estates with a contingent remainder i fee to the survivor. *Vick* v. *Edwards*, 3 P. W. 371; *H Harrison*, 3 Anst. 836; Fearne, C. R. 357—359; see *Quarm* v *Quarm*, (1892) 1 Q. B. 184, as to the effect of such a devi after the Wills Act.

But a devise to several and the survivor, their heirs an assigns for ever, gives joint estates in fee. *Doe* v. *Sotheran*, B. & Ad. 628, 635.

C. Severance of joint tenancy.

1. Destruction of unity of estate.

Acquisition of reversion by joint tenants for life.

If there are joint tenants for life and the reversion is acquire by one of them either by purchase or descent the joint tenanc

is severed as regards that one. *Wisrot's Case*, 2 Rep. 60; *Robert Morgan's Case*, 2 Anderson, 202.

A joint tenant becoming trustee for himself and others.

And a joint tenancy is severed, if the property becomes vested in one of the joint tenants as trustee for himself and the other joint owner. *Connolly* v. *Connolly*, I. R. I Eq. 376.

2. Severance by disposition.

Disposition by joint tenant.

A joint tenancy may also be severed by a disposition by one of the joint owners amounting at law or in equity to an assignment of the share.

If the disposition is to one of the joint tenants, the joint tenancy is severed as regards the share conveyed, but subsists as regards the other shares. Litt. 304.

Covenant to settle.

A covenant to settle severs a joint tenancy, if the covenant applies to the share of the joint tenant, though the joint tenancy may be created by an instrument not coming into operation till after the date of the covenant. *Caldwell* v. *Fellowes*, 9 Eq. 410; *Baillie* v. *Treharne*, 17 Ch. D. 388; *In re Hewett*; *Hewett* v. *Hallett*, (1894) 1 Ch. 362.

Covenant by infant.

The fact, that the covenant is entered into by an infant, does not prevent a severance, if the settlement is not avoided when the infant comes of age. *Burnaby* v. *Equitable Reversionary Interest Society*, 28 Ch. D. 416.

Mortgage.

A mortgage by one joint tenant of his interest of course severs the joint tenancy. *In re Pollard's Estate*, 3 D. J. & S. 541.

Partial disposition.

A partial disposition may also sever the joint tenancy. Thus, if two are joint tenants in fee, and one makes a lease for the life of the lessee the joint tenancy is wholly severed. Litt. 302. Co. Litt. 191b.

So if two are joint tenants for years a lease for years by one completely severs the joint tenancy. Co. Litt. 192a.

Possibly a lease for years by a joint tenant in fee only severs the joint tenancy during the term. *Clerk* v. *Clerk*, 2 Vern. 323; an unsatisfactory case.

A lease by one joint tenant and the husband of the other, the rent being reserved to the lessors jointly, does not sever the joint tenancy. *Palmer* v. *Rich*, (1897) 1 Ch. 134.

Petition for payment.

An application by petition or summons by a joint tenant

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for payment of his share does not sever the joint tenancy an order for payment is made. *In re Wilks*; *Child* v. *Bu* (1891) 3 Ch. 59.

Severance by marriage.

The old law as to severance by marriage has become of importance since the Married Women's Property Act.

Before that Act marriage severed the wife's joint tenan regards chattels. *Bracebridge* v. *Cook*, Plowd. 416, 418.

It did not sever the wife's joint tenancy in freehol chattels real or choses in action, whether in reversion or p sion. Co. Litt. 185b; *In re Barton's Will*, 10 Ha. 12; *strong* v. *Armstrong*, 7 Eq. 518; *In re Butler's Trusts*; *H* v. *Anderson*, 38 Ch. D. 286, overruling *Baillie* v. *Treharn* Ch. D. 388; *Palmer* v. *Rich*, (1897) 1 Ch. 134; see *Lon* v. *Hoban*, (1896) 1 Ir. 401.

3. Severance by agreement.

Agreement to sever.

A joint tenancy may also be severed by agreement bet the parties, which may be either in writing or may be inf from a course of dealing. *Gould* v. *Kemp*, 2 M. & K. *Wilson* v. *Bell*, 5 Ir. Eq. 501; *Williams* v. *H* man, 1 J. 546.

Joint tenancy in income.

A joint tenancy in income is severed as regards each i ment as soon as it becomes payable. *Walmsley* v. *Forbe* L. J. Ch. 28.

D. What creates a tenancy in common.

The Court leans to a tenancy in common.

1. The Court leans towards a tenancy in common, and prefer it, when there is a doubt, or the testator has give legatees a choice between a joint tenancy and tenancy in mon. *Booth* v. *Alington*, 3 Jur. N. S. 835; 27 L. J. Ch. 5 W. R. 811; *Oakley* v. *Wood*, 16 L. T. 450; 37 L. J. C

Jointly and equally.

So in several cases where there have been such wor "jointly and equally" the Courts have held the gift a ten in common. *Ettricke* v. *Ettricke*, Amb. 656; *Perkins* v. *Bag* 1 B. C. C. 118.

What words create a tenancy in common.

2. Words of division or distribution, such as "to be divi or "equally," or "between," or "amongst," or "respectiv make a tenancy in common. *Vanderplank* v. *King*, 3 H *Campbell* v. *Campbell*, 4 B. C. C. 15; *A.-G.* v. *Fletcher*, 1 128. See *Re Moore's Settlement Trusts*, 10 W. R. 315.

But a direction to divide property upon a certain event is consistent with a joint tenancy till the event happens. *Cookson* v. *Bingham*, 3 D. M. & G. 668, 696; *Jury* v. *Jury*, 9 L. R. Ir. 207.

Part or share.

And the use of the word "share," or similar words, with reference to the interest of the legatees, or even the word "participate," has the same effect. *Gant* v. *Laurence*, Wightw. 395; *Ive* v. *King*, 16 B. 46; *Paterson* v. *Rolland*, 28 B. 347; *Robertson* v. *Fraser*, 6 Ch. 696. See *Alloway* v. *Alloway*, 4 D. & War. 380; *Jones* v. *Jones*, 29 W. R. 786.

Effect of a gift at twenty-one.

3. And it has been held, that where there is a gift to a class when they arrive at twenty-one years or upon their becoming of age, so that some may take vested and others contingent interests, they take as tenants in common. Possibly the Court in these cases read the words as to coming of age as equivalent to "when they respectively come of age." *Woodgate* v. *Unwin*, 4 Sim. 129; *Hand* v. *North*, 12 W. R. 229; 10 Jur. N. S. 7; 33 L. J. Ch. 556; see *Kenworthy* v. *Ward*, 11 Ha. 196; *Buck* v. *Barwise*, 6 N. R. 375; *Macgregor* v. *Macgregor*, 1 D. F. & J. 63.

Incidents inconsistent with a joint tenancy.

4. If there are any incidents attached to the gift inconsistent with a joint tenancy, it will be construed as a tenancy in common:—

If, for instance, one of the objects of the gift is to take the interest of the other, not merely on the death of the latter, but on his death without issue, or on some other contingency. *Ryves* v. *Ryves*, 11 Eq. 539.

Of course a gift over of the interest of one joint tenant in certain events to a third person can have no such effect. *Edwardes* v. *Jones*, 33 B. 348; see *Yarrow* v. *Knightly*, 8 Ch. D. 736.

Power of advancement.

And a general power of advancement has been held to create a tenancy in common, as the power could only be exercised properly if an account is kept of each share separately. *L'Estrange* v. *L'Estrange*, (1902) 1 Ir. 467.

Power to appoint to persons as tenants in common.

5. Where there is a power to appoint to persons, which would authorise a tenancy in common, the Court, if compelled to exercise the power, will make the legatees tenants in common. *White's Trusts*, Joh. 656; *Phene's Trusts*, 5 Eq. 346;

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In re Susanna's Trusts, 47 L. J. Ch. 65; *Wilson* v. *D*
24 Ch. D. 244; see *Armstrong* v. *Armstrong*, 7 Eq. 518.

Executory trust in favour of a parent and children.

6. It would seem, that where a clear executory tr
created by a will, for instance, by a direction to make a s
ment upon a person and her children, the children would
as tenants in common. *Head* v. *Randall*, 2 Y. & C. C.
Stanley v. *Jackson*, 23 B. 450. See *Taggart* v. *Ta*
1 Sch. & L. 84; *Synge* v. *Hales*, 2 Ba. & Be. 499.

At any rate, this is clearly the cas· if the ordinary p
and trusts are directed to be inserted in the settlement.
v. *Mayn*, 5 Eq. 150.

But a mere direction to secure a fund in favour of a
will not make them tenants in common. *White* v. *B*
2 Ph. 583; *Owen* v. *Penny*, 14 Jur. 359.

Issue substituted for parents take as joint tenants between themselves.

7. If there is a gift to children then living and the iss
those then dead as tenants in common, or to be equally di
among children then living and the issue of those then
the issue in each case to take a parent's share, the issu
as joint tenants *inter se*. In these cases the words of seve
occur once only, and are limited to create a tenancy in co
among the children and *stirpes*. *Penny* v. *Clarke*, 1 D. F
425; *Macgregor* v. *Macgregor*, 1 D. F. & J. 64; *Hod*
Trusts, 1 K. & J. 178; *Coe* v. *Bigg*, 1 N. R. 536; *La*
v. *Burk*, 2 Dr. & Sm. 484; *In re Yates*; *Bostock* v. *D'Eyn*
(1894) 3 Ch. 53. *Re Flower*; *Matheson* v. *Goodwyn*, 62
216. *Shepherdson* v. *Dale*, 10 Jur. N. S. 156, may be tak
be overruled.

Double words of severance make issue tenants in common.

But a gift to be divided among children living at a c
date and the issue of those then dead as tenants in co
creates a tenancy in common between the issue by fo
the double words of severance. *Lyon* v. *Coward*, 15 Sim.
Hodges v. *Grant*, 4 Eq. 140; *In re Sophia Smith*, 58 L. J
661; *Re Quirk*; *Quirk* v. *Quirk*, 61 L. T. 364; 37 W. R.
In re Woolley; *Wormald* v. *Woolley*, (1903) 2 Ch. 206.
Bigg, 1 N. R. 536, if inconsistent with this rule may be
sidered overruled.

Severance of joint tenancy as regards the

8. If there is a gift to parents in joint tenancy
direction that the children of parents dying are to

in the place of the parents and take their shares, there is with regard to the *stirps* of children so taking a severance of the joint tenancy. *Heasman* v. *Pearse*, 7 Ch. 275.

share of issue substituted for their parent.

E. Tenants by entireties.

Tenants by entireties.

Where real or personal property was before the Married Women's Property Act given to a husband and wife, though with a declaration that they were to be joint tenants, they held by entireties, and on the death of one the other took not *jure accrescendi*, but by virtue of the original limitation. Co. Litt. 187a; *Kelly* v. *Pollock*, 6 Ir. C. L. 367.

In the case of real estate held by entireties, neither husband nor wife can alienate the property without the consent of the other, nor sever the tenancy. Co. Litt. 187a, b; *Doe* v. *Parratt*, 5 T.R. 652.

Real estate.

In the case of personalty the right of the wife is destroyed, if the husband reduces the property into possession, and the wife has no equity to a settlement. *Atcheson* v. *Atcheson*, 11 B. 485; *Ward* v. *Ward*, 14 Ch. D. 506; *In re Bryan*; *Godfrey* v. *Bryan*, 14 Ch. D. 516.

Personalty.

It would seem, however, that the Court would preserve the wife's right by survivorship by preventing the husband from alienating the property during her life. *Atcheson* v. *Atcheson*, 11 B. 485.

In the case of chattels real held by entireties, the husband can destroy his wife's right by survivorship by alienating the chattels real. In the report of the case of *Grute* v. *Locroft*, Cro. El. 287, usually cited as an authority on this question, the tenancy is stated to have been joint and not by entireties. It may have been a joint tenancy created before marriage. See 2 Preston, Abst. 57; Foster on Joint Ownership, 62; *Knox* v. *Wells*, 2 H. & M. 674.

Chattels real.

Where husband and wife are tenants by entireties a decree absolute for divorce makes them joint tenants. *Thornley* v. *Thornley*, (1893) 2 Ch. 229.

Effect of divorce.

A gift to the husband and wife by a will made after the commencement of the Married Women's Property Act, 1882 (the 1st January, 1883), creates a joint tenancy between them. *Thornley* v. *Thornley*, (1893) 2 Ch. 229.

Married Women's Property Act.

CANADIAN NOTES.

Successive and Concurrent Interests.

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To wife and issue.

A devise to "my wife and my issue" gives an estat common to the testator's wife and his issue. *Shaw* v. *Tho* 19 Gr. 489.

On a devise to trustees for the benefit of children share share alike and also the testator's wife *durante viduitate*, take concurrently and not to the wife for life remainde the children. *Donald* v. *Donald*, 7 O.R. 669; *Rose* v. *Ec* 19 Gr. 544.

Tenancy in Common.

Direction to divide.

Apart from statutory enactment, where there is a d to two or more with a direction for division amongst t or to share in the payment of charges on the land de to them or legacies, they take as tenants in common. *In* v. *Arnold*, 14 U.C.R. 296; *Fisher* v. *Anderson*, 4 S.C.R. *Clark* v. *Clark*, 17 S.C.R. 376.

Share and share alike.

So, also, where they are to take "share and share al *Moross* v. *McAllister*, 26 U.C.R. 368; *Keating* v. *Cassel* U.C.R. 314.

On a devise to a widow for life, remainder to children hold to the said (children) or the survivors of them" and share alike, the children took as tenants in common

word "survivors" referring to the period of vesting in possession, viz., the death of the life tenant, and indicating those who shou. ake at that date. *Keating* v. *Cassels*, *supra*.

Tenancy in common with cross-remainders.

On a devise to a widow for life, then to several children, their heirs and assigns lawfully begotten, and in case of failure of issue to A., and in case of failure of issue of A., then over, it was held that the children took as tenants in common with cross-remainders amongst them. *Heron* v. *Walsh*, 3 Gr. 606.

Statutes Relating to Joint Tenancy.

Statutes as to joint tenancy.

In Ontario, "where by any letters patent, assurance, or will, made and executed after th· first day of July, 1834, land has been or is granted, conveyed or devised to two or more persons other than executors or trustees in fee simple, or for any less estate, it shall be considered that such persons took or take as tenants in common, and not as joint tenants, unless an intention sufficiently appears on the face of such letters patent, assurance, or will, that they are to take as joint tenants." R.S.O. c. 119, s. 11.

In Manitoba, a similar enactment exists. R.S.M. c. 90, s. 2.

In British Columbia, a similar statute existed until 1905, when the words "other than executors or trustees" was struck out. 6 Edw. VII. c. 23, s. 42.

In New Brunswick, "every estate hereafter to be created, granted or devised to two or more persons in their own right, shall be a tenancy in common, unless expressly declared to be a joint tenancy, but every estate vested in trustees or ex-

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centors as such shall be held by them in joint tenanc
R.S.N.B. c. 155, s. 1.

In Nova Scotia, an Act similar to that of New Brunsw
exists, but it applies to estates created before as well as a
its passing. R.S.N.S. c. 136, s. 41.

Devise in joint tenancy, remainder of.

Where there was a devise to two to hold as joint tena
and not as tenants in common, during their joint lives,
to the survivor of them, and to their male heirs after t
or either of their decease, and to their heirs and ass
forever, with the provision that, in case of the death of
of the devisees without lawful issue, his share should go
it was held that the two devisees took as joint tenants
life, with remainders in common in tail male, with remai
in fee simple over. *Hellem* v. *Severs*, 24 Gr. 320.

Personalty.

Personalty.

A gift to the testator's two sisters and to their chil
all to share alike, if living, makes all the legatees tenan
common, sharing *per capita*. *Bradley* v. *Wilson*, 13 Gr.

But a gift to A. and B. unqualified makes them joint
ants. *Re Gamble*, 13 O.L.R. 299.

Tenancy by Entireties.

Entireties.

Since the Married Women's Property Act, it has been
that a gift to a husband and wife makes them tenan
common. *Griffin* v. *Patterson*, 45 U.C.R. at p. 554; *Re W*
v. *Toronto Inc. Elec. Light Co.*, 20 O.R. 397.

As this destroys the right of survivorship which is att
to this estate, it is submitted that, if this peculiar in

is affected at all by the Act in question, it should be held that they take as joint tenants in order to preserve the right of survivorship. See *per* Maclennan, J.A., *Myers* v. *Ruport*, 8 O.L.R. at p. 680.

CHAPTER XXXIV.

ESTATES IN FEE AND IN TAIL.

I.—WORDS TO PASS THE FEE.

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1. WORDS of limitation were never necessary to pass the fee in a devise of lands held in ancient demesne. Winch, 1.

Devise to A and his heirs.

A devise to a man and his heirs gives him the fee, though he may be a bastard, and can have, therefore, only heirs of his body. *Idle* v. *Cook*, 1 P. W. 78.

Devise to A and his lawful heirs.

A devise to A and his lawful heirs carries a fee. *Simpson* v. *Ashworth*, 6 B. 412; *Mathews* v. *Gardiner*, 17 B. 254.

Devise to A, his executors and administrators.

So, too, a devise to a man, his executors and administrators gives him the fee. *Rose* d. *Vere* v. *Hill*, 3 Burr. 1881.

A devise of gavelkind land to a man and his eldest heir passes the fee. Co. Litt. 27a.

The testator may shew that he meant by heirs heirs of the body.

2. The testator may, however, shew by explanatory expressions that he used the word heirs as equivalent to heirs of the body. *Doe* d. *Jearrod* v. *Banister*, 7 M. & W. 292; *Jenkins* v. *Hughes*, 8 H. L. 571; see, too, 4 Mad. 67; *Biddulph* v. *Lees*, E. B. & E. 289; 6 W. R. 592; 7 W. R. 309.

Thus, a devise to the first and other sons of A and their heirs, followed by a gift over in default of such issue or by expressions shewing that the sons are to take in succession, gives the first and other sons successive estates tail. *Lewis* d. *Ormond* v. *Waters*, 6 East, 337; *Hennessey* v. *Bray*, 33 B. 96.

Effect of gift over in default of heirs to a collateral heir.

3. Heirs both in a deed and will will be held equivalent to heirs of the body, if there is a limitation over in default of heirs or a limitation by way of remainder to a person who may be, or to several persons some of whom may be collateral heir or heirs to the first taker, or if the event on which the gift over is made necessarily depends on the existence of

collateral heir of the first devisee at such first devisee's death. *Webb* v. *Hearing*, Cro. Jac. 415; *Doe* d. *Littledale* v. *Sneddle*, 2 B. & Ald. 126; *Wall* v. *Wright*, 1 D. & Wal. 1; *Harris* v. *Davis*, 1 Coll. 416; *In re Smith's Estate*, 27 L. R. Ir. 121; *In re Waugh*; *Waugh* v. *Cripps*, (1903) 1 Ch. 744.

The rule does not apply where the gift over is on failure of issue; therefore, a gift to several in fee, and if they die without issue to a collateral heir, will, since the Wills Act, give a fee with an executory devise over, as it would before the Act have given an estate tail by force of the gift over being in default of issue, not because it was to a collateral heir. See *Gwynne* v. *Berry*, I. R. 9 C. L. 494; *Fay* v. *Fay*, 5 L. R. Ir. 274.

Effect of a gift over in default of issue upon a prior devise in fee.

4. If there is a devise to A, which gives A the fee either by express limitation or by construction, followed by a gift over if he dies without heirs of the body or issue, if these words import an indefinite failure of issue, A's estate is cut down to an estate tail. *Tracy* v. *Glover*, cit. 3 Leon. 130; *Dene* v. *Slater*, 5 T. R. 335; *Dansey* v. *Griffiths*, 4 Man. & S. 61; *Tenny* v. *Agar*, 12 East, 253; *Romilly* v. *James*, 6 Taunt. 263; *Morgan* v. *Morgan*, 10 Eq. 99; see *Bowen* v. *Lewis*, 9 App. C. 890.

If, however, the failure of issue is not an indefinite failure of issue, there is no necessity for this construction, and the gift over will take effect as an executory devise. *Right* v. *Day*, 16 East, 67; *Doe* d. *King* v. *Frost*, 3 B. & Ald. 546; *Parker* v. *Birks*, 1 K. & J. 156; *Ex parte Davies*, 2 Sim. N. S. 114; *Blinston* v. *Warburton*, 2 K. & J. 400; *McEnally* v. *Wetherall*, 15 Ir. C. L. 502; *Coltsmann* v. *Coltsmann*, L. R. 3 H. L. 121.

It appears, that in a deed, a limitation over upon death without such issue or without leaving issue will not cut down a previous limitation in fee to an estate tail. *Idle* v. *Cook*, 1 P. W. 70; *Olivant* v. *Wright*, 9 Ch. D. 646; see *Morgan* v. *Morgan*, 10 Eq. 99; *Arthur* v. *Walker*, (1897) 1 Ir. 68.

Reference in codicil to estate in fee as an entail.

When a clear estate in fee is given by a will, a reference to it by codicil as an entail will not cut down the estate given by the will. *Van Grutten* v. *Foxwell*, (1897) A. C. 658; see, too, *Crumpe* v. *Crumpe*, (1899) 1 Ir. 359; (1900) A. C. 127.

Words of limitation not

5. Before the Wills Act a devise without words of limitation

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necessary to pass the fee.

passed only a life interest, unless there could be found in will sufficient evidence of intention to pass the fee. There i long list of cases, in which the question, what expression intention is sufficient for this purpose, has been consider These cases, which will be found in earlier editions of this wo are omitted here as they are now practically obsolete, since

Effect of the Wills Act in passing the fee.

sect. 28 of the Wills Act, a devise without words of limita passes the fee or other the whole estate or interest, which testator had power to dispose of by will, unless a contr intention shall appear by the will.

The fact that the will contains other devises with word limitation, will not prevent a devise without such words f passing the fee. *Wisden* v. *Wisden*, 2 Sm. & G. 396.

Nor will a power given to the devisee to appoint the prop generally to her children cut a devise without words of limita down to a fee estate. *Brook* v. *Brook*, 3 Sm. & G. 280.

Contrary intention.

But a devise without words of limitation, followed devise of the same property to another person with word limitation, will give the first devisee a life interest *Gravenor* v. *Watkins*, L. R. 6 C. P. 500.

Devise of rents and profits carries the fee.

6. A devise of rents and profits or of the income of carried an estate for life in the lands before the Wills Act since the Act it carries the fee. *Mannox* v. *Greener*, 14 Eq

The same is the case with a devise of rents and profi a time, that may last for ever. *Bunbury* v. *Doran*, I. C. L. 284.

But a devise of a specific annual sum out of land, tho happens to be the whole amount of the rents and profit not carry the land. *Going* v. *Hanlon*, I. R. 4 C. L. 144.

Exception carries as large an estate as the property out of which it is excepted.

7. Under the old law it was held, that, where propert excepted out of a devise in fee, the exception carried as la interest as the devise. *Doe* d. *Knott* v. *Lawton*, 4 Bing. 455; 6 Sc. 363; *Bennett* v. *Bennett*, 2 Dr. & Sm. 266; s v. *Ratley*, 2 J. & H. 634.

The estate of a *cestui que trust* is commensurate with that of the trustee.

8. The estate of a *cestui que trust* is commensurate wi of his trustee, and therefore, where land is devised to a and his heirs in trust for a person without words of lim the latter takes the fee. *Moore* v. *Cleghorn*, 10 B. 42

L. J. Ch. 469; 17 *ib.* 400; *Knight* v. *Selby*, 3 Sc. N. R. 409; 3 M. & Gr. 92; *Challenger* v. *Shepherd*, 8 T. R. 597; *Smith* v. *Smith*, 11 C. B. N. S. 121; see *In re Whiston's Settlement*; *Lovatt* v. *Williamson*, (1894) 1 Ch. 664; *Re Bennett's Estate*, (1898) 1 Ir. 184; *In re Tringham's Trusts*, (1904) 2 Ch. 487; *In re Irwin*; *Irwin* v. *Parkes*, (1904) 2 Ch. 752; *In re Oliver's Settlement*; *Everd* v. *Leigh*, (1905) 1 Ch. 191.

So under a devise to trustees in fee upon trust for a life tenant with remainder in trust for a class without words of limitation, the remaindermen take the fee. *Knight* v. *Selby*, 3 Sc. N. R. 49; 3 M. & Gr. 92; *Maden* v. *Taylor*, 45 L. J. Ch. 569.

The fact, that there are executory gifts over, does not prevent the application of the rule, so far as the gifts over do not take effect. *Yarrow* v. *Knightly*, 8 Ch. D. 736.

The above rule does not apply, where the trustees take for the benefit of ulterior devisees as well. *In re Pollard's Estate*, 3 D. J. & S. 541; see *Sherwin* v. *Kenny*, 16 Ir. Ch. 138; *Blackhall* v. *Gibson*, 2 L. R. Ir. 49.

II.—Words to Pass an Estate Tail.

Copyholds not being within the statute *de donis* are entailable only by custom. In the absence of custom, a devise of copyholds in words, which would create an estate tail in freeholds, will give a fee simple conditional on the birth of issue. *Doe* d. *Blesard* v. *Simpson*, 3 M. & G. 929; *Hardenstle* v. *Denniston*, 10 C. B. N. S. 606. Copyholds.

A. The ordinary mode of limiting an estate tail is by the words "heirs of the body" or "issue." What words create an estate tail.

A special estate may be created by a limitation to a woman and her issue by a marriage with a person of a particular name, or by a limitation to a man and his issue by a fit and worthy gentlewoman. *Page* v. *Hayward*, 2 Salk. 570; *Mugee* v. *Martin*, (1902) 1 Ir. 367; *Pelham Clinton* v. *Duke of Newcastle*, (1902) 1 Ch. 34; (1903) A. C. 111. Estate in special tail.

A devise to A and his heirs male, or to A and his heirs lawfully begotten, is an estate tail. *Baker* v. *Wall*, 1 Ld.

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Raym. 185; *Tufnell* v. *Borrell*, 20 Eq. 194; *Naufan* v. *Legh*, 7 Taunt. 85; *Good* v. *Good*, 7 E. & B. 295; see *Crampe* v *Crampe*, (1900) A. C. 127.

In the case of a deed such words pass a fee Co. Litt. sec. 31

Effect of superadded words of limitation and distribution.

Words of limitation superadded to the words "heirs of the body" will not cut down the estate tail of the ancestor. *Denn* d. *Gearing* v. *Shenton*, Cowp. 419.

Nor will such words as "the elder son of the ancestor to be preferred to the second or younger son," as they merely indicate the notion the testator incorrectly entertained of the descent an estate tail. *Fetherston* v. *Fetherston*, 3 Cl. & F. 67.

And probably a devise to A and the heirs of his body a tenants in common would give A an estate tail, notwithstanding *Doe* d. *Strong* v. *Goff*, 11 East, 668. See 2 Bl. 55, 58; J. & Lat. 54; (1897) A. C. 674.

To create an estate tail the inheritance must be limited to the heirs of the body of the ancestor.

But the heirs, where the word is to be used as a word of limitation, must be the heirs of the ancestor. Therefore devise to the husband for life, with remainder to the heirs of the body of the husband and wife, will not give an estate tail because no person can be supposed to include in himself the heirs of himself and somebody else. Fearne, C. R. 38; see too, *Allgood* v. *Withers*, 2 Burr. 1107.

But a devise to the husband and wife, with remainder to the heirs of the body of the husband and wife, gives them a joint estate tail. Fearne, C. R. 38.

Distinction between heirs *of* the body of the wife and heirs *on* the body of the wife begotten.

A devise to husband and wife for life, with remainder to the heirs *on* the body of the wife by the husband to be begotten vests in both an estate tail; but if the remainder be limited to the heirs *of* the body of the wife by the husband to be begotten the wife alone has an estate tail, the word heirs in the latter case being considered as applied to the wife only. *Alpass* v *Watkins*, 8 T. R. 516; *Denn* v. *Gillott*, 2 T. R. 431; *Frogmorton* d. *Robinson* v. *Wharrey*, 2 W. Bl. 728.

Similarly, a devise to husband and wife for life, remainder to the heirs of the husband on the body of the wife begotten gives the husband an estate in special tail. *Roe* d. *Aistrop* v *Aistrop*, 2 W. Bl. 1228.

It follows that a devise to the wife for life, remainder to th

heirs to be begotten on the body of the wife by the husband, gives the wife no estate tail, because the heirs are not applied to her body. *Gossage* v. *Taylor*, Sty. 325.

Effect of limitation to the heirs of the body of several ancestors who may intermarry.

Where there is a joint limitation for life to two persons who may by possibility intermarry (even though they may be respectively married already), with remainder to the heirs of their bodies, they take an estate tail. Co. Litt. 25b, sect. 25.

So, too, a devise to a man and the heirs of his body by a second wife gives him an estate tail executed in possession, though the devisee had a wife at the time. Fearne, C. R. 35; Vent. 228.

Tenant in tail after possibility of issue extinct.

And a devise to the wife for life, with remainder to the heirs of her body by the testator, where the testator has no issue by his wife, nevertheless makes the wife tenant in tail after possibility of issue extinct. *Platt* v. *Powles*, 2 Man. & S. 65.

Devise to a man or the heirs of his body.

A devise to a man *or* the heirs of his body is an estate tail. *Parkin* v. *Knight*, 15 Sim. 83; *Wright* v. *Wright*, 1 Ves. Sen. 409; *Harris* v. *Davis*, 1 Coll. 416; *Greenway* v. *Greenway*, 2 D. F. & J. 128.

Construction of a devise to a man or his heirs.

And a similar construction has sometimes been placed upon a devise to A or his heirs, both before and since the Wills Act. See *Read* v. *Snell*, 2 Atk. 642, p. 645; *Lachlan* v. *Reynolds*, 9 Ha. 797; *Adshead* v. *Willetts*, 29 B. 358.

Such a devise would, however, probably now be held to be substitutional in wills since the Wills Act, as it is no longer necessary to change "or" into "and," in order to give the devisee the fee. *Wingfield* v. *Wingfield*, 9 Ch. D. 658. See *Parsons* v. *Parsons*, 8 Eq. 260.

Heir in the singular.

B. In some cases the word heir has been held equivalent to heir of the body, where there has been a direction that the land shall descend to the heirs; as, for instance, where there was a devise to A for life, and then to descend to his female heir, whether sister or daughter. *Leathwaite* v. *Thompson*, 36 L. T. 910; *Fay* v. *Fay*, 5 L. R. Ir. 274; see *Re Score*; *Tolman* v. *Score*, 57 L. T. 40.

Next heir male.

The words "next heir male" or "first heir male" added to a devise to A, are *primâ facie* words of limitation and create an estate tail. *Burley's Case*, cit. 1 Vent. 230; *Miller* v. *Seagrave*,

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16 Vin. Ab. (2nd Ed.) Parols H. 4, n.; *Dubber* v. *Trollope*, Amb. 453.

Construction of devises to a man and his issue.

¶ C. With regard to realty, "the word issue in a will *primâ facie* means the same thing as heirs of the body, and is to be construed as a word of limitation." Per Parke, B., in *Slater* v. *Dangerfield*, 15 M. & W. 263.

Thus, a devise to A and his issue, or to several and their issue, as tenants in common, would, it seems, give estates tail. *Martin* v. *Swannell*, 2 B. 249; *Beaver* v. *Nowell*, 25 B. 551; *Campbell* v. *Bouskell*, 27 B. 325; *Re Adams; Adams* v. *Adams*, 94 L. T. 721.

A devise to A and his issue living at his death, or to a wife and the issue of the marriage, has been held to give an estate tail. *University of Oxford* v. *Clifton*, 1 Ed. 473; *Walsh* v. *Johnston*, (1899) 1 Ir. 501.

A devise to A and his issue, and the heirs of such issue, with a gift over in default of issue, before the Wills Act, has the same effect. *Franklin* v. *Lay*, 6 Mod. 258; 2 Bl. 59, n.

The rule in *Wild's Case* applies to a limitation to a man and his issue in fee as tenants in common.

And it has been held, that the rule in *Wild's Case* applies to a devise to several and their issue and their heirs as tenants in common, so that the devisees take estates tail, if there are no issue at the date of the devise. *Underhill* v. *Roden*, 2 Ch. D. 494; Co. Litt. 9a. See *Cancellor* v. *Cancellor*, 11 W. R. 16.

If upon the will there is anything to show that the issue are to take as purchasers, for instance, a direction that they are to take vested interests at twenty-one, then under a devise to A and his issue, A and his issue take jointly in fee, and all issue born before the time of distribution come in. *Re Wilmot*, *Wilmot* v. *Betterton*, 76 L. T. 415.

In some cases, upon the context of the will, a devise to A and his issue has been held to give A a life interest with remainder to his issue. *Doe* d. *Davy* v. *Burnsall*, 6 T. R. 30; 1 B. & P. 215; *Doe* d. *Gilman* v. *Elvey*, 4 East, 313; *Hockley* v. *Mawbey*, 1 Ves. Jun. 142. See the comments on the first two cases, Jarm. p. 1260; *Re Wilmot*, 76 L. T. 415.

Eldest male issue.

The words "eldest male issue," are *primâ facie* not words o

limitation, but mean the eldest son. *Lovelace* v. *Lovelace*, Cro. Eliz. 40; *Sheridan* v. *O'Reilly*, (1900) 1 Ir. 386, 392.

Devise in succession and in priority.

A devise to "the sons in succession" of A gives the sons successive estates tail and a devise to A for life and then to his children in priority in case he marries sons to inherit before daughters, but in case he should die unmarried to B and her heirs, gives the children of A estates tail. *Studdert* v. *Von Steiglitz*, 23 L. R. Ir. 564; *In re Pennefather*; *Savile* v. *Savile*, (1896) 1 Ir. 249.

III.—Words occasionally used as Words of Limitation.

Words "son" and "child" used as words of limitation.

A. The words "son" and "child" may be used as words of limitation, if the testator has clearly shown his intention so to use them. "If the word 'son' be not used as a *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." *Mellish* v. *Mellish*, 2 B. & C. 520.

Thus, if the devise is to A, or to A for life, and if he dies not having a son over, A takes an estate in tail male in a case before the Wills Act. *Bifield's Case*, cited 1 Vent. 231; *S. C.* sub nom. *Milliner* v. *Robinson*, 1 Moore, 682, pl. 939; *Re Bird and Barnard's Contract*, 59 L. T. 166.

The same is the case if the devise be to A for life, and then to his son if he has one, and in default of such issue over. *Robinson* v. *Robinson*, 1 Burr. 38; 2 Ves. Sen. 225; 3 Atk. 736; *Mellish* v. *Mellish*, 2 B. & C. 520; *Doe* d. *Garrod* v. *Garrod*, 2 B. & Ad. 87; *Murphy* v. *Johnston*, 6 Ir. Ch. 230; *Bell* v. *Bell*, 15 Ir. Ch. 517; *Andrew* v. *Andrew*, 1 Ch. D. 410; *In re Buckton*; *Buckton* v. *Buckton*, (1907) 2 Ch. 406; see *Bowen* v. *Lewis*, 9 App. C. 890.

But a devise to A for life, and then to such son as she may leave, and his heirs and assigns, goes to all the sons of A as joint tenants. *Beauchant* v. *Ustieke*, W. N. 1880, 14.

Eldest son.

B. The term "eldest son" is less susceptible of a collective meaning than "son" or "child." But it will receive this meaning if the intention is clear. *Doe* d. *Burvin* v. *Chorlton*, 1 Scott, N. R. 290; 1 M. & Gr. 429; *Lewis* v. *Puxley*, 16 M. &

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W. 733; *Cleary's Trust*, 16 Ir. Ch. 438; *In re Childe*; *C* *Pemberton* v. *Childe*, W. N. 1883, 48.

As between an estate tail in the father or son the Court prefers the former.

If the devise is to A for life, then to his eldest son for and so on to the eldest son of the family, an estate ta remainder will be given to A, and not to his eldest son, to take in the largest number of descendants. *Forsbroo* *Forsbrook*, L. R. 3 Ch. 93.

C. In the same way the word "children" may be a wo limitation.

"Children" used as a word of limitation.

1. Thus a devise to A to hold to him and his childre ever, or to A and his children for ever, or to A and his chil lawfully begotten for ever, gives A an estate tail. *Da* *Stevens*, Dougl. 321; *Broadhurst* v. *Morris*, 2 B. & Ad *Wood* v. *Baron*, 1 East, 259; *Roper* v. *Roper*, L. R. 3 C. P. 36 L. J. C. P. 27; 37 *ib.* 7. See, too, *Doe* d. *Gigg* v. *Bra* 16 East, 399.

In such cases "children" would seem to be a wor limitation quite independently of the so-called rule in *W* *Case*, 6 Rep. 17.

Devise to A and children in succession.

So a devise of all the testator's *property* to A and his chil in succession gives A an estate tail. *Earl of Tyrone* v. *Ma* *of Waterford*, 1 D. F. & J. 613; see *Snowball* v. *Pr* 2 Y. & C. C. 478.

Rule in *Wild's Case*.

2. A simple devise to A and his children, where A ha children at the time of the devise, gives him an estate *Wild's Case*, 6 Rep. 17; *Clifford* v. *Koe*, 5 App. C. 447.

And for this purpose a child *en ventre* at the date of will is considered as non-existent. *Roper* v. *Roper*, L. C. P. 32.

Power to appoint the property to children is not inconsistent with an estate tail.

The rule applies, though the testator may expressly give parent a power of appointing the property in question a his children. *Seale* v. *Barter*, 2 B. & P. 485; *Cliffor* *Brooke*, I. R. 10 C. L. 179; 2 L. R. Ir. 184; *S. C.* *Clifford* v. *Koe*, 5 App. C. 447. See *In re Moyle's E* 1 L. R. Ir. 155.

Exceptions.

3. There may, however, be an intention shown that parent was not to take an estate tail.

Thus, in *Buffar* v. *Bradford*, 2 Atk. 220, the testator showed that he contemplated the mother and children as taking joint interests at a period subsequent to his death. And in *Grieve* v. *Grieve*, 4 Eq. 180, where there was a devise of a house to the testator's nieces and their children, and if they have not any over, a direction that the furniture was to go with the house was held sufficient to show that an estate tail could not have been intended.

If there are children living at the date of devise, "children" is *primâ facie* not a word of limitation. Contrary intention.

4. If there are any children living at the time of the devise, the term "children" is *primâ facie* not a word of limitation. *Byng* v. *Byng*, 10 H. L. 171; *Oates* d. *Hatterley* v. *Jackson*, 2 Str. 1172; *Jeffery* v. *Honywood*, 4 Mad. 398.

But this rule bends to evidence of a contrary intention; thus, a direction that certain things are to go as heirlooms with the estate, is sufficient to rebut a joint tenancy, and to show that an estate tail was intended to be given. *Byng* v. *Byng*, 10 H. L. 171.

By analogy to the rule in *Wild's Case* a devise to A and his sons in tail male, and for want of such issue male over, where A has no sons, gives him an estate tail. *Wharton* v. *Gresham*, 2 W. Bl. 1083; see *Sparling* v. *Parker*, 29 B. 450.

A devise to A and B as tenants in common, and in their respective proportions to their children, or according to their wills, gives the fee to A and B with an executory devise at the death of each to his children or devisees. *Re Buckmaster's Estate*, 47 L. T. 514.

The rule in *Wild's Case* does not apply to personalty. *Audsley* v. *Horn*, 26 B. 196; 1 D. F. & J. 226.

The rule in *Wild's Case* does not apply to personalty.

IV.—The Rule in Shelley's Case.

The construction of devises to heirs and heirs of the body, after a prior estate of freehold in the ancestor, is governed by the so-called rule in *Shelley's Case*, which is a rule of law and not of construction. *Van Grutten* v. *Foxwell*, (1897) A. C. 658 (for the subsequent litigation on this will, see 78 L. T. 231; 79 L. T. 617; 82 L. T. 272).

The rule in *Shelley's Case* stated.

It may be laid down generally that where the ancestor by any will takes an estate of freehold, whether by implication

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or direct limitation, and whether it may or may not dete in his lifetime, and in the same will an estate is limit way of remainder, either mediately or immediately, t heirs or the heirs of his body, in such case the hei always words of limitation of the estate and not wo purchase, and therefore the ancestor takes an estate in fee, tail as the case may be. *Shelley's Case*, 1 Rep. 93b; F C. R. 33, 40; *Pybus* v. *Mitford*, 1 Ventr. 372; *Curtis* v. 12 Ves. 99.

The two limitations must be in the same instrument, b Court considers a will and codicils for this purpose as one i ment. *Hayes* d. *Fourde* v. *Fourde*, 2 W. Bl. 698.

If the ancestor, being the testator's heir, takes a part estate of freehold only by way of resulting trust, it seem rule does not apply. *Coape* v. *Arnold*, 4 D. M. & G. 574.

The rule applies equally to limitations of freehold and hold estates, and to estates *pur autre vie*. *Doe* d. *Jeff* v. *Rob* 8 B. & C. 296; 2 M. & Ryl. 249; see 2 D. & War. *Crozier* v. *Crozier*, 3 D. & War. 373.

It applies to limitations, which are both legal or both able, even where the first is for the separate use of a m woman. *Spence* v. *Spence*, 12 C. B. N. S. 199; Fearne, 56; *Pitt* v. *Jackson*, 2 B. C. C. 51.

It does not apply to cases where one limitation is lega the other equitable. *Right* v. *Creber*, 5 B. & C. 866; *Col McBean*, 34 L. J. Ch. 555; 34 B. 426.

Where by will an equitable estate was given to the au with a legal limitation to the heirs of his body, and by a c the land was devised to trustees upon trust to secure a joi and pay certain debts so that the limitations of the will be all equitable, it was held that the trustees were bound, carrying out their trust, to re-convey the land to the us the will and that the rule did not apply. *Coape* v. *A* 4 D. M. & G. 574.

The rule does not apply so as to destroy intermediate tingent limitations by merger, even in cases before the Property Act, 1845 (8 & 9 Vict. c. 106). *Lewis Bowles'* 11 Rep. 80; Fearne, C. R. 36.

Nor does it apply where the estate to the heirs is limited, not by way of remainder, but by way of executory devise. *Lloyd* v. *Carew*, Prec. Ch. 72; Show. P. C. 137; see Fearne, 275; *Plunket* v. *Holmes*, 1 Lev. 11; Raym. 28; Fearne, 311; *Crofts* v. *Middleton*, 2 K. & J. 194; 8 D. M. & G. 192; see *In re White & Hindle's Contract*, 7 Ch. D. 201; *Richardson* v. *Harrison*, 16 Q. B. D. 85; *In re Youmans' Will*, (1901) 1 Ch. 720.

Application of the rule where the limitation is to the heirs or the heirs of the body of the ancestor.

The rules of construction with reference to cases coming within the operation of the rule in *Shelley's Case* are settled by the leading cases of *Jesson* v. *Wright*, 2 Bl. 1; *Robdy* v. *Fitzgerald*, 6 H. L. 823; *Van Grutten* v. *Foxwell*, (1897) A. C. 658.

A. Where the words "heirs" or "heirs of the body" are used in the limitation of the inheritance the rule applies—

1. Although the limitation of the freehold to the ancestor may be followed by words clearly indicating an intention that his estate is to be for life only.

Restrictions upon the estate of the ancestor are immaterial.

Thus, it is immaterial that the estate of the ancestor may be declared to be "for life and no longer": *Roe* d. *Thong* v. *Bedford*, 4 Man. & S. 362; 1 B. C. C. 313; *Robinson* v. *Robinson*, 1 Burr. 38; 3 B. P. C. 189; 2 Ves. Sen. 225; *Macnamara* v. *Dillon*, 11 L. R. Ir. 29; that he is made unimpeachable for waste: *Jones* v. *Morgan*, 1 B. C. C. 206; *Bennett* v. *Earl of Tankerville*, 19 Ves. 170; that each son is to take for life: *In re Keane's Estate*, (1903) 1 Ir. 215; that powers are expressly given him which would be implied if he were tenant in tail, such as powers to jointure and make leases: *King* v. *Melling*, 1 Vent. 225; *Baile* v. *Coleman*, 2 Vern. 668; *Jones* v. *Morgan*, 1 B. C. C. 206; *Broughton* v. *Langley*, 2 Ld. Raym. 873; that his estate is made subject to the obligation of keeping the buildings in repair: *Jesson* v. *Wright*, 2 Bl. 1; that there is a restraint upon alienation for longer than his life: *Perrin* v. *Blake*, 1 W. Bl. 672; *Hayes* d. *Foorde* v. *Foorde*, 2 W. Bl. 698; that, where there is no executory trust, there is a declaration that special care should be taken that it should never be in the power of the ancestor to dock the entail: *Leonard* v. *Earl of Sussex*, 2 Vern. 526; and that there is a limitation to trustees to preserve contingent remainders. *Wright* v. *Pearson*, Amb. 358; 1 Ed. 119.

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Words of limitation superadded to the word "heirs" will not make it a word of purchase.

2. The rule applies, where words of limitation are superad to the limitation to the heirs or heirs of the body, prov such words are not inconsistent with the nature of the ides pointed out by the first words, for such words may be loo upon as an explanation of what the testator supposed to be course of the descent under an estate tail, and *expressio eo que tacite insunt nihil operatur.*

Thus, words limiting the estate of the heirs to a life es or to a life estate without power to sell or dispose, wil rejected. *Doe* d. *Elton* v. *Stenlake*, 12 East, 515; *Hug Williams*, 14 Eq. 224; *Hayes* d. *Foorde* v. *Foorde*, 2 W. Bl.

The same will be the case with words of limitation in fee tail, superadded to the words "heirs" or "heirs of the body

Thus, a limitation to the heirs of the body of the ance and their heirs, or their heirs, executors, administrators, assigns for ever (*a*); or to the heirs male of the body of ancestor, and their issue (*b*); or to the heirs male of his b in tail, in strict settlement (*c*); or to the heirs male of body, and the heirs male of the body of every such heir severally and successively as they should be in priority of b every elder, and the heirs male of his body, to be preferre every younger (*d*), will not avail to give the heirs an estate purchase. *Morris* d. *Andrews* v. *Le Gay*, cited 2 Burr. 1 and 8 T. R. 518; *Kinch* v. *Ward*, 2 S. & St. 409; *Measu Gee*, 5 B. & Ald. 910; *Nash* v. *Coates*, 3 B. & Ad. 839 *Minshull* v. *Minshull*, 1 Atk. 411 (*b*); *Douglas* v. *Cong* 1 B. 59 (*c*); *Legatt* v. *Sewell*, 1 Eq. Ab. 395, p. 7; 1 P. W. see Fearne, 159, 160; see *Fitherston* v. *Fitherston*, 3 Cl. & 67; 9 Bl. 237 (*d*).

Words of distribution superadded.

3. Words of distribution following the limitation of inheritance will not prevent the application of the r "for it does not follow that a testator did not intend heirs of the body should take because they could not tak the mode prescribed."

Thus, a declaration that the heirs are to take as tenant common, and not as joint tenants (*a*); or equally among th share and share alike (*b*); or in such shares and proportion the ancestor should appoint (*c*); or "as well male as fema

or "whether sons or daughters" as tenants in common (*d*), will not prevent the operation of the rule. *Doe* d. *Candler* v. *Smith*, 7 T. R. 531; *Bennett* v. *Earl of Tankerville*, 19 Ves. 170 (*a*); *Doe* d. *Atkinson* v. *Featherstone*, 1 B. & Ad. 944 (*b*); *Jesson* v. *Wright*, 2 Bl. 1; see *Roddy* v. *Fitzgerald*, 6 H. L. 823; *Dunk* v. *Feaver*, 2 R. & M. 557; *Van Grutten* v. *Farrell*, (1897) A. C. 658 (*c*); *Doe* d. *Bosnall* v. *Harvey*, 4 B. & C. 610; *Pierson* v. *Vickers*, 5 East, 548 (*d*).

Gavelkind lands.

In such a case it makes no difference that the lands are gavelkind. *Doe* d. *Bosnall* v. *Harvey*, *supra*, overruling *Doe* v. *Laming*, 2 Burr. 1100.

The absence of a gift over in default of issue is immaterial, *Doe* d. *Atkinson* v. *Featherstone*, 1 B. & Ad. 944.

Words of distribution and limitation superadded.

4. Nor will words of distribution and limitation together, superadded to the limitation of the inheritance, prevent the operation of the rule.

It has sometimes been laid down that words of distribution and limitation together, superadded to the heirs, would make the latter a word of purchase, but the rule is now clearly settled, overruling *Gretton* v. *Haward*, 6 Taunt. 94, 2 Marsh. 9, and *Crump* d. *Woolley* v. *Norwood*, 7 Taunt. 362; 2 Marsh. 161; see *Anderson* v. *Anderson*, 30 B. 209; *Mills* v. *Secard*, 1 J. & H. 733; *Grimson* v. *Dunning*, 4 Dr. 125; *Van Grutten* v. *Foxwell*, (1897) A. C. 658; and see *Jordan* v. *Adams*, 9 C. B. N. S. 483.

The words "heirs" or "heirs of the body" will, however, be construed as words of purchase:—

Words of limitation inconsistent with the descent of an estate tail in the ancestor.

1. When words of limitation are superadded to them inconsistent with the nature of the descent pointed out by the first words, as where the limitation is to a man for life, and after his decease to the use of his heirs and the heirs female of their bodies. Fearne, C. R. 182; *Shelley's Case*, 1 Rep. 88, 95 b.

There appears to be no other authority for this rule than the argument of counsel in *Shelley's Case*, cited with approbation by Fearne, C. R. p. 182. It has, however, been followed in a case where the word "issue" and not "heir" was used. See *Hamilton* v. *West*, 10 Ir. Eq. 75. In that case the devise was to Margaret for life, remainder to her issue female and the

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heirs of their bodies; and it was held that Margaret took a life estate, with remainder to her daughters in tail g and there seems no reason for supposing that the principle would not be applied, where the word "heirs" i of "issue" is used. See *Dodds* v. *Dodds*, 10 Ir. Ch. 11 *ib.* 374; *Pelham Clinton* v. *Duke of Newcastle*, 1 Ch. 34, 37.

What is an inconsistent course of descent.

In the absence of authority, it is doubtful what amo discrepancy between the two courses of descent will just application of this rule. Fearne, C. R. p. 183, points ou "there does not appear to be the same inconsiste construing the first words, which describe heirs special, words of limitation, where the superadded words ext heirs general, as there is where the first words, and engrafted on them, distinguish two different incom courses of descent, and would not carry the estate to th person; in the latter case it is absolutely impossible, b implied qualification, to reconcile the superadded wo those preceding them, so as to satisfy both by construi first as words of limitation; whereas, in the former ca superadded words are not contrary to or incompatible w preceding, but in their general sense include them; and is no improbability in the supposition that they were u the testator in the same qualified sense as the preceding then both may be satisfied, by taking the first as wo limitation." In *Hamilton* v. *West*, however, the questio between an estate in tail female in the ancestor and an in tail general in the daughters, the latter of which "in the general sense," have included the former; seems, therefore, that Fearne's remark must be taken some modification.

The testator may interpret the sense in which he has used the word heirs.

2. Where the testator has, either by express words, implication, interpreted the meaning he intended to con the term "heirs" or "heirs of the body," those words r words of purchase.

In *Fetherston* v. *Fetherston*, 3 Cl. & F. 67, Lord Brou lays down, "If there is a gift to A and the heirs of his and then, in continuation, the testator, referring to w

had said, plainly tells us that he used the words 'heirs of the body' to denote A's first or other sons, then clearly the first taker would only take a life estate."

However, the mere insertion of such words as, "if more than one child, or, if only one child, then to such child," is not sufficient to show that the testator meant by heirs of the body, children. *Roddy* v. *Fitzgerald*, 6 H. L. 823; *Jesson* v. *Wright*, 2 Bl. 1. Effect of the words "if more than one child, to such child."

And even if the words are, "if there be but one *such* child, to such child, his or her heirs for ever," the term heirs of the body will not be held to mean children, if there are no words to carry the fee to them, except in the event of there being only one child. *Bridge* v. *Chapman*, Notes of Cases, L. J., July 10, 1875, 118; see *Ryan* v. *Cowley*, Ll. & G. t. Sug. 7. Effect of the words "if more than one *such* child," &c.

But in similar cases "heirs of the body" will be construed as "children," if there are words giving them an estate in fee or in tail. *Goodtitle* d. *Sweet* v. *Herring*, 1 East, 264; *Gunmoe* v. *Howes*, 23 B. 184. In *Poole* v. *Poole*, 3 B. & P. 620, this construction was rebutted by other limitations.

So, if the testator, after using the words heirs of the body, continues, "that is to say, the first, second, and other sons, &c." *Lowe* v. *Davies*, 2 Ld. Raym. 1561. Express interpretation clause.

Or again, the testator may explain his meaning by reference to other limitations. *Meredith* v. *Meredith*, 10 East, 503; *Doe* d. *Woodall* v. *Woodall*, 3 C. B. 349; *East* v. *Twyford*, 4 H. L. 517. Interpretation by reference.

And the words "heirs of the body," coupled with a reference to the ancestor as their father, must mean children. *Jordan* v. *Adams*, 9 C. B. N. S. 483. Reference to father.

B. The application of the rule in *Shelley's Case* is the same, where the words are "first heirs male or heirs of the body who shall attain twenty-one." *Minshull* v. *Minshull*, 1 Atk. 411; *Toller* v. *Attwood*, 15 Q. B. 929. First heirs male.

C. When the word "heir" is used in the singular, the rules of law are less stringent in uniting the limitation of the inheritance to the estate for life of the ancestor. Limitation to the *heir* of the tenant for life.

1. However, the word "heir," in the singular, without words

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of limitation superadded, is a word of limitation and not of purchase, even when such words as "next" or "first" are added to it. *Blacklarn* v. *Stables*, 2 V. & B. 367; *Burley's Case*, cit. 1 Vent. 230; *Whiting* v. *Wilkins*, 1 Bulst. 219; *Richards* v. *Lady Bergavenny*, 2 Vern. 324; *White* v. *Collins*, Com. Rep. 289; *Dubber* d. *Trollope* v. *Trollope*, Ambl. 453.

The fact that the limitation is to the heir for ever makes no difference. *Fuller* v. *Chamier*, L. R. 2 Eq. 682.

Words of limitation superadded to the word "heir."

2. But words of limitation in fee or in tail, superadded to the word "heir," make it a word of purchase. *Archer's Case*, 1 Rep. 66; Fearne, C. R. 150; *Clerke* v. *Day*, Moore, 593; *Willis* v. *Hiscox*, 4 M. & Cr. 197; *Greaves* v. *Simpson*, 12 W. R. 773; 10 Jur. N. S. 609.

And even a devise to A to hold to him and the heir male of his body, and the heirs and assigns of such heir male for ever, followed by a gift over, if A died without leaving any son of his body, has been held to give A a life estate only. *Chamberlayne* v. *Chamberlayne*, 6 E. & B. 625.

Where by deed land was conveyed to the use of A during his life without impeachment of waste, with an ultimate limitation to the use of "such person or persons as at the decease of the said A shall be his heir or heirs-at-law, and of the heirs and assigns of such person or persons," it was held that A's heir-at-law took by purchase. *Evans* v. *Evans*, (1892) 2 Ch. 173.

3. Where the estate of the heir is expressed to be for life, inasmuch as he is not to have the inheritance, he cannot take as heir by descent. *White* v. *Collins*, Com. 289; *Pedder* v. *Hunt*, 18 Q. B. D. 565.

The rule in *Shelley's Case* applies where the limitation is to the issue of a tenant for life.

D. The application of the rule in *Shelley's Case*, where the limitation is to the issue of the ancestor, who takes a prior estate of freehold:—

The word "issue," whether used in a will before or since the Wills Act, is *primâ facie* a word of limitation: the rule in *Shelley's Case* applies, therefore, where the limitation in remainder is to the issue of the ancestor. *King* v. *Melling*, 1 Vent. 225; 2 Lev. 58; *Roddy* v. *Fitzgerald*, 6 H. L. 872; *Sandes* v. *Cooke*, 21 L. R. Ir. 445; *In re Keane's Estate*, (1903) 1 Ir. 215.

Distinction between the word "issue" and heirs.

But though this is the *primâ facie* meaning of "issue" "the authorities clearly show that, whatever be the *primâ facie* meaning of the word 'issue,' it will yield to the intention of the testator to be collected from the will, and that it requires a less demonstrative context to show such intention than the technical expression 'heirs of the body' would do." Per Alderson, B., *Lees* v. *Mosley*, 1 Y. & C. Ex. 609.

Words of distribution alone superadded in cases before the Wills Act.

1. Words of distribution alone, superadded to the word "issue," in cases where the issue would not take the inheritance, will not make it a word of purchase. *Doe* d. *Blandford* v. *Applin*, 4 T. R. 82; *Doe* d. *Cook* v. *Cooper*, 1 East, 229; *Roddy* v. *Fitzgerald*, 6 H. L. 823; *Colclough* v. *Colclough*, I. R. 4 Eq. 263; *Woodhouse* v. *Herrick*, 1 K. & J. 352; *Blackhall* v. *Gibson*, 2 L. R. Ir. 49.

This is clear, when there is a gift over upon an indefinite failure of issue; but it seems that a gift over is immaterial, since, under the old law, the issue, if they took as purchasers, could only take for life, and therefore the testator's general intent to benefit all the issue would fail. See per Wood, V.-C., in *Kavanagh* v. *Morland*, Kay, 16, 27, where the same construction prevailed, although the gift over was in default of issue of the tenant for life living at his death; and this is in accordance with *Doe* d. *Cannon* v. *Rucastle*, 8 C. B. 876.

Words of limitation superadded.

2. Words of limitation in fee or in tail, superadded to the word "issue," where there is a limitation in default of issue in cases before the Wills Act, will not make it a word of purchase, provided they do not change the course of descent. *Roe* d. *Dodson* v. *Grew*, 2 Wils. 324; Wilm. 272; *Denn* d. *Webb* v. *Puckey*, 5 T. R. 299; *Frank* v. *Storin*, 3 East, 548; *Griffiths* v. *Evan*, 5 B. 241.

The same rule applies where the gift over is on failure of issue living at the death of the person to whom the prior estate is limited, or on death of the issue under twenty-one. *Warren* v. *Travers*, I. R. 2 Eq. 455; see *Fetherston* v. *Fetherston*, 3 Cl. & F. 67; 9 Bli. 237. *Merest* v. *James*, 1 B. & B. 484; 4 J. B. Moo. 327, must be considered overruled.

Effect of the absence of a gift over in

And the absence of a gift over in default of issue will not convert "issue" into a word of purchase. *Williams* v. *Williams*,

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default of issue.

51 L. T. 779; see, too, *Doe* d. *Cooper* v. *Collis*, 4 T. R. 294 and the remarks of Wood, V.-C., Kay, 16, 27; and see *Mont gomery* v. *Montgomery*, 3 J. & Lat. 47; *Morgan* v. *Thoma* 8 Q. B. D. 575; 9 Q. B. D. 643.

3. If, however, the superadded words of limitation alter th course of descent, the issue will take as purchasers. *Hamilto* v. *West*, 10 Ir. Eq. 75; *Do'ds* v. *Dodds*, 10 Ir. Ch. 476; 11 *i* 374, *ante*, pp. 419, 420.

Words of limitation and distribution superadded make issue a word of purchase.

4. Words of limitation in fee or in tail, and of distributio superadded to the word "issue," make it a word of purchas whether there is a limitation over in default of issue or no *Lees* v. *Mosley*, 1 Y. & C. Ex. 589; *Crozier* v. *Crozier*, 3 D. War. 373; *Greenwood* v. *Rothwell*, 5 M. & Gr. 628; 6 Sc. N. 670; *Montgomery* v. *Montgomery*, 3 J. & Lat. 47; *Slater* *Dangerfield*, 15 M. & W. 263; *Colclough* v. *Colclough*, I. 4 Eq. 263; *M'Kenna* v. *Eager*, I. R. 9 C. L. 79; *Rotheram* *Rotheram*, 13 L. R. Ir. 429; *Shannon* v. *Good*, 15 L. R. I 284.

It makes no difference whether a fee be given to the issue b express words or by implication from a power of appointing t them. *Bradley* v. *Cartwright*, L. R. 2 C. P. 511; *Whitelaw* *Whitelaw*, 5 L. R. Ir. 120.

But a power of appointing to issue, which would authoris an appointment in fee, will not make the word "issue" a wor of purchase, where there is an express gift to issue as tenant in common without words giving them the fee. *Blackhall* *Gibson*, 2 L. R. Ir. 49.

Devise to M for life and her issue since Wills Act.

5. A devise to "M for her life and to her lawful begotte issue," in a will since the Wills Act, followed by a gift over i the event of her leaving none, gives M an estate tail. *Sandes* *Cooke*, 21 L. R. Ir. 445.

Effect of a restraint upon alienation by the tenant for life and his issue or any of them.

6. In *King* v. *Burchell*, Amb. 379; 4 T. R. 226, n., a direc tion against alienation by the tenant for life and his issue, o any of them, was held to show that the word issue was used a a word of limitation. See, too, *Tate* v. *Clarke*, 1 B. 100.

CANADIAN NOTES.

Estates in Fee.

Old law.

Before the statutes which provide for the passing of a fee without words of limitation, the expressions used in the will might, in the absence of words of limitation, shew that the intention was to pass a fee. As this law is now obsolete, a mere reference is made to the cases on the subject. *Doe dem. Humberstone* v. *Thomas*, 3 O.S. 516; *Doe dem. Stevenson* v. *Hainer*, Out. Dig. Col. 7596; *Baby* v. *Baby*, 1 U.C.R. 54; *Dixon* v. *Dixon*, 14 U.C.R. 275; *Smith* v. *Holmes*, 14 U.C.R. 572; *Wright* v. *Wright*, 16 U.C.R. 184; *Hurd* v. *Levis*, 22 U.C.R. 11; *Brooke* v. *McCaul*, 22 U.C.R. 9; *Sanders* v. *Janette*, 3 C.P. 292; *Hicks* v. *Snider*, 44 U.C.R. 486; *Chisholm* v. *Macdonnell*, 7 N.B.R. 137.

Words constituting a fee.

A devise to A. and his heirs but not their assigns passes a fee simple. *Re Traynor & Smith*, 15 O.R. 469.

A devise of the "proceeds" of land directed to be sold is equivalent to a devise of the land itself in fee. *Moore* v. *Power*, 8 C.P. 109; *Casselman* v. *Hersey*, 32 U.C.R. 333.

A devise to one of the rents for life, and at her decease all the rents to be invested for her heirs, passes a fee simple. *Re Thomas*, 2 O.L.R. 660.

A devise to a wife to be at her disposal during her natural life, with reversion to the testator's son of all the property that the widow might not have disposed of during her life, was held to give the widow a complete power to sell in fee. *Doe dem. Anderson* v. *Hamilton*, 8 U.C.R. 302. See also *Bergin* v. *Sisters of St. Joseph*, 22 U.C.R. 204.

Devise to widow for life provided she remain unmarried, on marriage to be equally divided between children; if she remained unmarried to be at her disposal. Held, either a fee simple or a life estate with power of sale, subject to being divested on marriage. *Burgess* v. *Burrows*, 21 C.P. 426.

Fee simple not cut down.

A devise to A. "his heirs and assigns forever," is not cut down to an estate tail by a provision that the land devised "shall be entailed to his heirs and successors forever . . to

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be the property of the heir-at-law." *Philan* v. *Graham*, 2 U.C.R. 380. See *Dumble* v. *Johnson*, 17 C.P. 9; *Culbertson* v *McCullough*, 27 A.R. 459.

A devise in fee simple in remainder is not cut down by provision that if the devisee die and the life tenant marry the estate shall go over, the meaning being if he die before the life tenant's marriage. *Snell* v. *Davis*, 23 Gr. 132.

Estates Tail.

Estates tail when fee simple cut down.

The word "heirs," however, may be cut down to signify heirs of the body, where there is a devise over, for want of heirs, to some person who is capable of being heir to the devisee; the failure of heirs in such case must necessarily mean failure of heirs of the body, and the result is an estate tail in the devisee. *Jardine* v. *Wilson*, 32 U.C.R. 498; *Re Collitor & Landergan*, 15 O.R. 471; *Re McDonald*, 6 O.L.R. 478.

But not if the devise over is to one not capable of being heir to the prior devisee. *Iler* v. *Elliott*, 32 U.C.R. 434.

Failure of heirs of illegitimate devisee.

So, on a devise to an illegitimate daughter of the testator and her heirs, "and should it so happen that she shall not have heirs," then over, it was held that, as the daughter could have no heirs but heirs of the body, the failure of heirs meant failure of heirs of the body, and she took an estate tail. *Doe dem. Anderson* v. *Fairfield*, 3 U.C.R. 140.

Words constituting an estate tail.

A devise to A. and his heirs lawfully begotten gives an estate tail. *Ray* v. *Gould*, 15 U.C.R. 131.

Entail.

There is a difference of opinion as to whether the use of the word "entail" will constitute a fee tail.

Where the words of devise were, to a son J. "to hold unto him and his heirs and assigns forever," followed by a devise over if he died before attaining twenty-one, and this provision, "All my estate herein devised to my children shall be entailed to their heirs and successors forever, none of the lots to be divided, but to be the sole property of the heir-at-law"—it was held that the fee simple given by the prior words was not cut down by the use of the expression "entailed." *Philan* v. *Graham*, 22 U.C.R. 380.

In another case, where there were devises to three sons of several parcels of land, each followed by the words "to be by him entailed to any of his issue he may think proper," but if any son should die without issue "the property before mentioned be divided equally between their successors subject to entailments," it was held that the combined effect of the direction to entail and the devise over was to constitute an estate tail in each devisee. *Philan* v. *Graham*, *ante*, was cited in this case. *Dumble* v. *Johnson*, 17 C.P. 9.

On a devise to a husband and wife for life "and to their children and children's children," with a restraint on alienation, my will being that "the same may be entailed for the benefit of their children," it was held that the children took a fee tail in remainder. *Peterborough R. E. Co.* v. *Patterson*, 15 A.R. 751.

In a fourth case (in which *Dumble* v. *Johnson* was cited but not *Philan* v. *Graham*) the devise was as follows: "I give to my son . . . all which shall be and is hereby entailed on my said son and his heirs." There was no devise over. Ferguson, J., held that an estate in fee simple was created. In the Court of Appeal, Maclennan and Lister, JJ.A., held that a fee tail was created, while Osler and Moss, JJ.A., expressed no opinion (the case not requiring it), the latter doubting whether the use of the word, under the circumstances, indicated an intention to give an estate tail. *Culbertson* v. *McCullough*, 27 A.R. 459.

Devise over if no children.

A devise to R. S. for life (excepting he have a child or children) if not at the expiration of his life then over, was held to give R. S. an estate tail by implication, the words "child or children" being taken as *nomen collectivum*. *Stobbart* v. *Guardhouse*, 7 O.R. 239.

Transmit from father to son.

Where there was a devise to one and his heirs, coupled with a restraint on alienation, and a provision that the devisee "shall transmit (the lands) from father to son or the nearest heir so that they may always be preserved in the family," the word "heirs" was held to be qualified by the direction for transmission, so as to mean heirs of the body; and the restriction on alienation to be that merely which

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attaches to all estates tail. *Doe dem. McIntyre* v. *McInty* 7 U.C.R. 156.

A. for life, remainder to first and other sons.

A devise to A. for life, and after the determination of estate "to the first and all and every the son and sons of t body of the said A. in tail male, etc." gives A. an estate life with remainder in fee tail to his first and other sons s cessively. *Riddell* v. *McIntosh*, 9 O.R. 606.

Technical words not controlled.

An estate tail which is given by technical words is affected by a provision that the tenant in tail may vary t shares or proportions of his heirs-at-law. *Fleming* v. *Dougall*, 27 Gr. 459. And see *Trust and Loan Co.* v. *Fras* 18 Gr. 19; *Archer* v. *Urquhart*, 23 O.R. 214.

A testator devised land to his son for life and after death "to the heirs of his body should he leave any him s viving, and in the event of his leaving no such heirs" th over. Held, that the son took an estate tail, the techni words of limitation not being displaced by what follow *Re Cleator*, 10 O.R. 326.

Nova Scotia.

In Nova Scotia it has been held that the technical wo "heirs of the body" might be controlled by a direction t such heirs were to take "share and share alike," so as to p a fee simple; the intention that one heir should not take the exclusion of others over-riding their effect. *Haliburt* v. *Haliburton*, 6 N.S.R. 312.

Estates tail are now abolished in Nova Scotia.

Estates tail abolished.

Therefore, where a devise is made, in terms to constit an estate tail but for the statute abolishing them, the est is under the statute, to be adjudged a fee simple. *Ernst* *Zwicker*, 27 S.C.R. 594.

Rule in Shelley's Case.

Devise of rents and profits.

A devise that A. shall receive all rents and benefits fr a parcel of land during her life, and at her decease that rents shall be invested for the benefit of her heirs on th coming of age, gives A. an estate in fee simple. So, al where there was a direction to sell land after the death a life tenant and invest the money, the principal, for

benefit of the heirs of A. and the interest to go to A. during her life, it was held that A. took an absolute interest. *Re Thomas*, 2 O.L.R. 660.

And a devise on trust to pay the rents to a married woman for her separate use at stated intervals with remainder to her heirs gives a fee simple. *Nealis* v. *Jack*, N.B. Eq. Cas. 426.

For life, then to heir-at-law.

A devise to a son for life, and after his death to his "heir-at-law should he have any; if not to his brother," was held to give A. an estate in fee simple or fee tail with a devise over to his brother if he left no issue. *Grant* v. *Squire*, 2 O.L.R. 128. As the brother was one of the heirs of the devisee, it seems that the first devise would be an estate tail.

Without impeachment of waste.

The rule is not displaced by a direction that the ancestor shall not be impeachable for waste. *Tunis* v. *Passmore*, 32 U.C.R. 419.

Restraint on alienation.

The rule applies where there is first a limitation in fee simple by technical words, followed by a direction that the ancestor is to hold for life only, without power to alienate; the restriction on alienation being repugnant to the estate in fee simple. *Re Casner*, 5 O.R. 282; *Re Tuck*, 10 O.L.R. 309.

Legal and equitable estates.

The rule does not apply when the estate given to the ancestor is legal, and that to the heirs is equitable. Thus, a devise to executors to the use of A. for life, and after his death on trust for the heirs of his body, and to convey to them when the youngest arrived at twenty-one, gives a life estate to A. *Re Romanes & Smith*, 8 P.R. 323.

Inconsistent course of descent.

Where words are added to the limitations to heirs which are inconsistent with the course of descent expressed by the prior words, the rule does not apply. Thus, on a devise to A. for life, and from and after his death to the lawful issue of A. "to hold in fee simple," A. takes a life estate only with remainder in fee simple to his issue, the holding in fee simple by the issue being incompatible with a fee tail in the ancestor. *Re Hamilton*, 18 O.R. 195.

And this is not affected by a devise over on death without issue. *Evans* v. *King*, 24 S.C.R. 356.

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Remainder to *persona designata*.

Where the devise in remainder is to a *persona designata* the rule does not apply, though the heirs presumptive ar the remaindermen, nor where the use of words which woul otherwise be words of limitation, is with the intention o describing the objects, and not as indicating the mode o succession. *Robinson* v. *Hendry*, R. E. D. 330; *McKa* v. *Annand*, 5 N.S.R. 247.

"Heirs" as children.

The word "heirs" may be cut down to mean children, i which case, of course, the rule will not apply. Thus, on devise to a son for life, and if he should have lawful hei then to be divided equally between them "on the death o their father," but if he should die without leaving lawfu heirs, then to be divided between the other children of th testator, it was held that "heirs" must mean children, i consequence of the reference to the devisee as "their father, and that the devisee took a life estate. *Smith* v. *Smith*, 8 O.R 677.

And the same where there was no gift over on dying with out issue. *Re Johnston & Smith*, 12 O.L.R. 262.

Issue as a word of purchase.

And the word "issue" may be a word of purchase, an not of limitation; as, where there is a reference to the fath or parent of the issue. *Fisher* v. *Anderson*, 4 S.C.R. at p. 41

So, also, on a devise to "my wife and my issue," the wo issue is a word of purchase, the wife and the testator's issu taking as tenants in common. *Shaw* v. *Thomas*, 19 Gr. 48

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CHAPTER XXXV.

ESTATES OF TRUSTEES.

I.—Effect of Land Transfer Act.

Effect of Land Transfer Act.

By sect. 1 (1) of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), which applies in the case of death after the 1st January, 1898, it is enacted that where real estate is vested in any person without a right in any other person to take by survivorship, it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him.

The section applies to real estate, over which a person executes by will a general power of appointment, as if it were real estate vested in him, but real estate does not include land of copyhold tenure or customary freehold in any case, in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant.

Equitable interest in copyholds.

[illegible] from "in any case" onwards apply to copyholds [illegible]stomary freeholds. An equitable interest in [illegible]py[illegible] [illegible]fore passes to the personal representative. *In re Somerville & Turner's Contract*, (1903) 2 Ch. 583.

Land vests in all executors.

In the case of executors the land vests in all those named by the will who have not disclaimed, whether they have proved or not, and those who prove cannot alone make a title. *In re Pawley and London & Provincial Bank*, (1900) 1 Ch. 58; see *John* v. *John*, (1898) 2 Ch. 573, 576.

Special executors not included.

But when there are general executors and also special executors appointed as regards property in the colonies or a foreign country, it vests in the former only. *In re Cohen's Executors*, (1902) 1 Ch. 187.

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As to the vesting in the case of administrators, see *ante*, p. 91.

The real estate is vested in the personal representative for administrative purposes, and when they are satisfied he may (sect. 3) assent to any devise in the will or may convey the land to any person entitled thereto as heir, devisee or otherwise.

It is by no means clear what effect the Act will have upon devises to trustees to uses, whether, for instance, all the estates under the will become equitable. Possibly it may have none. Some light is thrown upon the question by *Coape* v. *Arnold*, 4 D. M. & G. 574, where a devise by codicil to trustees for certain limited purposes was held in effect not to alter the effect of the devises in the will. The following statements made in this chapter must be taken subject to any alteration in the law made by the enactment referred to.

II.—In what Cases Trustees take the Legal Estate.

Appointment of trustees of inheritance.

The appointment of certain persons as trustees of inheritance gives them the fee. *Trent* v. *Hanning*, 1 B. & P. N. R. 116; 7 East, 97; 10 Ves. 495; 1 Dow, 102.

So the appointment of a person as executor, "so far as is necessary to the performance of the trusts relating to my real estate," gives the executor the fee. *Plenty* v. *West*, 6 C. B. 201; 16 B. 175; see *Oates* v. *Cooke*, 3 Burr. 1684; *Doe* d. *Gillard* v. *Gillard*, 5 B. & Ald. 785; *Ex parte Wyneh*, 5 D. M. & G. 188, 221; *Sidebotham* v. *Watson*, 11 Ha. 170; *In re Fisher*, 13 L. R. Ir. 546.

If the land is devised to beneficiaries, and a share is directed to be divided on the death of a beneficiary, persons appointed to carry out all the intentions of the will will take the legal estate, though the case may be different where a sale is only contemplated as possible. *Davies to Jones and Evans*, 24 Ch. D. 190; *L. & S. W. R. Co.* v. *Bridger*, 12 W. R. 948.

Appointment of new trustee by codicil.

Where land is devised to three trustees, and the appointment of one of the trustees is revoked, and another is appointed in his place, the fee passes to the new trustee jointly with the

two remaining trustees. *Re Hough's Will*, 4 De G. & S. 371; *Re Turner*, 30 L. J. Ch. 144; 9 W. R. 174; 2 D. F. & J. 527.

A direction to executors to let the testator's lands, and out of the profits to pay two sums, followed by a gift of the rents of the land, gives the executors no estate beyond the period for accomplishing the purpose indicated. *Lambert* v. *Browne*, I. R. 5 C. L. 218. See *Smith* v. *Smith*, 1 L. R. Ir. 206.

Direction to pay annuities out of realty.

A direction to executors to pay annuities out of the testator's whole estate, which is disposed of after payment of the annuities, gives the executors the fee. *Doe* v. *Woodhouse*, 4 T. R. 89; see *Jenkins* v. *Jenkins*, 1 Willes, 650.

III.—Devises to Uses.

Operation of Statute of Uses.

The Statute of Uses was passed before the Statute of Devises, and therefore does not apply to wills; but devises of real estate are construed in the same way as if the Statute of Uses did apply. *Baker* v. *White*, 20 Eq. 166, 171; per Jessel, M.R.

Devise to A in trust for B.

Thus a devise unto and to the use of trustees leaves the legal estate in the trustees, whereas a devise to trustees upon trust for or to the use of a beneficiary vests the legal estate in the beneficiary.

Trustees retain legal estate so far as wanted for their trust.

The legal estate is not, however, executed in the beneficiary, if it is wanted by the trustees for the purpose of their trust. Thus, if the devise is to trustees upon trust to pay the rents to A for his life, the legal estate remains in the trustees during A's life (*a*). On the other hand, if the devise is to the trustees upon trust to permit A to receive the rents during his life, A takes the legal estate (*b*). If the trust is to pay to or permit A to receive the rents the later words prevail, and A takes the legal estate (*c*). *Doe* d. *Gratrex* v. *Homfray*, 6 A. & E. 206 (*a*); *Right* d. *Phillips* v. *Smith*, 12 East, 455; *Doe* d. *Noble* v. *Bolton*, 11 A. & E. 188 (*b*); *Doe* v. *Biggs*, 2 Taunt. 109; *Baker* v. *White*, 20 Eq. 166; *Re Allsop and Joy's Contract*, 61 L. T. 213; *In re Adams and Perry's Contract*, (1899) 1 Ch. 554 (*c*); see *In re Lashmar*; *Moody* v. *Penfold*, (1891) 1 Ch. 258.

If the beneficiary is to receive only the clear or net rents (*a*), or he is to receive the rents with the approbation of the

trustees (*b*), the legal estate is not executed in him. *White* v. *Parker*, 1 Bing. N. C. 573; 1 Sc. 542; *Barker* v. *Greenwood*, 4 M. & W. 421 (*a*); *Gregory* v. *Henderson*, 4 Taunt. 772 (*b*).

Trustees to preserve.

In the same way, if the trustees are to preserve contingent remainders during the life of a tenant for life, a trust to permit him to receive the rents does not execute the use in him. *Biscoe* v. *Perkins*, 1 V. & B. 485.

Power to give receipts.

Again, a power to the trustees to give receipts, if the only property, to which it can apply, is freehold property devised to uses, would show that the trustees were to retain the legal estate, though this is not so, if there are copyholds to which the power can apply. *Baker* v. *White*, 20 Eq. 166.

Separate use.

If the trust is for a married woman for her separate use, the legal estate remains in the trustees, but a separate use in a deed will not have this effect. *Harton* v. *Harton*, 7 T. R. 652; *In re Hart's Estate; Oxford* v. *Hart*, W. N. 1883, 164; *Williams* v. *Waters*, 14 M. & W. 166.

Power of maintenance.

If there is a devise in remainder to children who shall attain twenty-one, a power of maintenance given to the trustees will prevent the use in remainder from becoming legal. *Berry* v. *Berry*, 7 Ch. D. 657; *In re Tanqueray-Willaume and London*, 20 Ch. D. 465; see *In re Bourne; Rymer* v. *Harpley*, 56 L. J. Ch. 566; 56 L. T. 388; 35 W. R. 359.

Unprotected contingent remainders.

Where there is a devise to trustees and their heirs to uses, the fact that there are contingent remainders in the will, which are unprotected, is not enough to show that the legal estate was to remain in the trustees. *Cunliffe* v. *Brancker*, 3 Ch. D. 393; see *Doe* v. *Willan*, 2 B. & Ald. 84; *Houston* v. *Hughes*, 6 B. & C. 403.

Recurring powers requiring legal estate.

Where there are recurring occasions for the exercise of active duties by the trustees and no repeated devises to them to enable them to perform their duties, the legal estate, if once in the trustees, is to be deemed to be vested in them throughout, notwithstanding the duration in the meantime of what would, but for the recurring duties, be construed as uses executed in the beneficiaries. *Harton* v. *Harton*, 7 T. R. 652; *Brown* v. *Whiteway*, 8 Ha. 145; *Toller* v. *Attwood*, 15 Q. B. 951; *Van Grutten* v. *Foxwell*, (1897) A. C. 658.

Power to sell.

A power to sell, or convey, or mortgage the real estate will prevent the use from being executed in beneficiaries as regards all limitations which are subject to the power. *Bagshaw* v. *Spencer*, 1 Ves. Sen. 142; 2 Atk. 570; *Rackham* v. *Siddall*, 1 Mac. & G. 607; *Doe* d. *Shelley* v. *Edlin*, 4 A. & E. 582; *Watson* v. *Pearson*, 2 Ex. 581; *Blagrave* v. *Blagrave*, 4 Ex. 550; *Croplon* v. *Davies*, L. R. 4 C. P. 159; *Richardson* v. *Harrison*, 16 Q. B. D. 85; *In re Lashmar*; *Moody* v. *Penfold*, (1891) 1 Ch. 258.

Power to revoke uses.

Where all the limitations are to uses so as to give legal estates a power to sell and convey, not by conveyance of the legal estate but by revoking the old and limiting new uses, shows that the trustees were not to take a legal estate. *Cunliffe* v. *Brancker*, 3 Ch. D. 393.

Devise subject to and upon trust to pay debts.

A devise, subject to a charge of debts, to trustees, upon whom the duty is not imposed of paying them, will not prevent the legal estate from passing to the beneficiary (*a*). But if the land is charged with debts and devised to trustees, who are also appointed executors, inasmuch as it is their duty to pay the debts, the legal estate remains in them (*b*). *Kenrick* v. *Lord Beauclerk*, 3 B. & P. 175; *Jones* v. *Lord Say*, 8 Vin. 262, pl. 19; *In re Adams and Perry's Contract*, (1899) 1 Ch. 554 (*a*); *Creaton* v. *Creaton*, 3 Sm. & G. 386; *Smith* v. *Smith*, 11 C. B. N. S. 121; *Spence* v. *Spence*, 12 C. B. N. S. 199; *Marshall* v. *Gingell*, 21 Ch. D. 790; *In re Brooke*; *Brooke* v. *Brooke*, (1894) 1 Ch. 43 (*b*).

A devise upon trust to pay debts and legacies vests the legal estate in the trustees, whether the personal estate is or is not sufficient to pay the debts and legacies. *Marthewaite* v. *Jenkinson*, 2 B. & C. 357; 3 D. & Ry. 765; see *Doe* d. *Cadogan* v. *Ewart*, 7 A. & E. 636, p. 668.

Leaseholds for years and copyholds are not within the Statute of Uses.

The Statute of Uses does not apply to leaseholds for years or to copyholds, and therefore a devise of copyholds to A, in trust for B, gives A the legal estate. *Houston* v. *Hughes*, 6 B. & C. 403; *Baker* v. *White*, 20 Eq. 166.

There is no so-called doctrine of attraction by which, where freeholds and copyholds are given together, the legal estate

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in the freeholds attracts the legal estate in the copyholds, or *vice versâ*. *Baker* v. *White*, 20 Eq. 166; overruling *Baker* v. *Parson*, 42 L. J. Ch. 228.

An appointment, under a power to appoint the use, vests the legal estate in the appointee. 2 Jarman, 1157.

IV.—When Estate of Trustees Cut Down.

When fee simple cut down to a smaller estate.

The question dealt with in the last sub-division of this chapter has been, how far under a devise to trustees in fee to uses the use is to be considered executed in the beneficiary, or how far the legal estate remains in the trustees.

It is a different question whether, where there is a devise to trustees in fee which vests in them the legal estate, their estate in fee is to be cut down to a smaller estate. In determining this question no distinction can be drawn between freeholds, copyholds, and leaseholds. *Doe* d. *Woodcock* v. *Barthrop*, 5 Taunt, 382; *Baker* v. *White*, 20 Eq. 166; *Stevenson* v. *Mayor of Liverpool*, L. R. 10 Q. B. 81; see *Wyman* v. *Carter*, 12 Eq. 309.

General rule.

The general rule is, that, where you find words of devise to trustees and their heirs, then those words are to have their full natural effect as giving an estate of inheritance to the trustees, unless something is found on the face of the will, which cuts that estate down in some determinate event. *Doe* v. *Davies*, 1 Q. B. 430; *Poad* v. *Wilson*, 6 E. & B. 606; *Collier* v. *Walters*, 17 Eq. 252; *In re Townsend's Contract*, (1895) 1 Ch. 716.

Estate of trustees to preserve.

In several cases enough has been found in the will to cut down the estate of trustees to preserve contingent remainders, when limited to them in fee, to an estate to endure during the life of the tenant for life, where there were no subsequent remainders to preserve (*a*), and no power of appointment under which subsequent remainders might be created (*b*). *Doe* d. *Compere* v. *Hicks*, 7 T. R. 433; *Haddelsey* v. *Adams*, 22 B. 266; see *Saunders* v. *Eppe*, 9 W. R. 69 (*a*); *Venables* v. *Morris*, 7 T. R. 342, 437 (*b*).

In a deed as a general rule a limitation to the use of trustees in fee, will not be cut down to a smaller estate. *Wykham* v. *Wykham*, 18 Ves. 395; *Cooper* v. *Kynock*, 7 Ch. 398.

However, it has been held that a limitation in fee to trustees to preserve contingent remainders will, even in a deed, be cut down to an estate *pur autre vie*, if there is a subsequent limitation of a term to the same trustees. *Curtis* v. *Price*, 12 Ves. 89; *Beaumont* v. *Marquis of Salisbury*, 19 B. 198.

But a subsequent limitation in fee to the same trustees, and a grant of a term to other persons, will not cut down the estate of the trustees. *Colmore* v. *Tyndall*, 2 Y. & J. 605; *Lewis* v. *Rees*, 3 K. & J. 132; see *Fowler* v. *Lightburne*, 11 Ir. Ch. 495.

Estate limited by duty.

In the same way, if the trustees have duties to perform only during the life of a beneficiary, their estate will be limited to that life (*a*), and this construction is assisted if the devise in remainder is an independent devise (*b*). *Doe* d. *Woodcock* v. *Barthrop*, 5 Taunt. 382; *Playford* v. *Hoare*, 3 Y. & J. 175 (*a*); *Adams* v. *Adams*, 6 Q. B. 860; *Cooke* v. *Blake*, 1 Ex. 220 (*b*).

Where trustees take estate for a life and an uncertain period beyond.

If the trustees must take an estate during the life of a beneficiary and they may require an estate for an indefinite period beyond the life; for instance, if the trustees are to stand seised during the life of A and also until the testator's debts are paid (*a*), or if there is an indefinite power of leasing (*b*), the fee simple will not be cut down. *Collier* v. *Walters*, 17 Eq. 252, overruling *Collier* v. *McBean*, 34 B. 426 (*a*); *Doe* d. *Tomlyns* v. *Willan*, 2 B. & Ald. 84; *Doe* d. *Keen* v. *Walbank*, 2 B. & Ad. 554; *Riley* v. *Garnett*, 3 De G. & S. 629; see *Doe* d. *Kimber* v. *Cafe*, 7 Ex. 675 (*b*).

A devise to trustees in fee upon trust to pay an annuity to A for life will not be cut down to an estate for A's life, as the trustees may have to raise arrears after the annuitant's death. *Fenwick* v. *Potts*, 8 D. M. & G. 506; *Whittemore* v. *Whittemore*, 38 L. J. Ch. 17.

V.—Effect of Wills Act.

Devise to trustees without words of limitation upon trust to pay debts before the Wills Act.

In cases before the Wills Act a devise to trustees in words, that did not carry the fee, upon trust to pay debts, or make certain specified payments out of the rents, only gave them a chattel interest till the payments were made. *Cordall's Case*, Cro. El. 316; *Doe* d. *White* v. *Simpson*, 5 East, 162; *Ackland* v. *Lutley*, 9 A. & E. 879; *Heardson* v. *Williamson*, 1 Kee. 33.

So where the trustees were to pay annuities, and then a specified sum out of the rents and profits, they took an estate for the lives of the annuitants with a chattel interest superadded. *Doe* d. *White* v. *Simpson*, 5 East, 162.

Sects. 30 and 31 of the Wills Act.

The law, however, on this point has been altered by sects. 30 and 31 of the Wills Act, which provide:—

30. "When any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple, or other the whole estate or interest, which the testator had power to dispose of by will, in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication."

31. "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."

Effect of these sections according to Mr. Jarman.

The short effect of these obscure sections as stated by Jarman, and adopted by most of the writers who have followed him, 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." 2 Jarm. 1166; see Carson's Real Property Stat. 474; Lewin on Trusts, 10th ed. 235.

CANADIAN NOTES.

Words of inheritance, old law.

Before the Act dispensing with words of inheritance in a will a devise to trustees, on trust to convey, gave an estate in joint tenancy in fee simple, though no words of inheritance were used. *Doe dem. Berringer* v. *Hiscott*, IV. Ont. Dig., col. 7645.

Where all do not act.

A devise to three trustees, one being incapable of being a trustee, vests the land in the other two. *Doe dem. Vancott* v. *Read*, 3 U.C.R. 244.

And on a devise to two executors, one renouncing, the estate vests in the other. *Re Hewett & Jermyn*, 29 O.R. 383.

Devise on trust to allow beneficiary to receive.

A devise to executors upon trust "to allow and give the use thereof to" A., authorizes A., and not the executors, to lease the lands. *Hefferman* v. *Taylor*, 15 O.R. 670.

Statute of uses.

The statute of uses applies to wills, if the words require it. And therefore a devise "in trust for the sole benefit of" A., gives A. the legal estate. *Fair* v. *McCrow*, 31 U.C.R. 599

Devise on trust to pay rents.

On a devise of the rents of a farm to A., with a power to executors to lease, and after deducting all necessary expenses to pay the rents to A., it was held that the executors took the legal estate. In this case there was a devise of another parcel to A. direct. *Whiteside* v. *Miller*, 14 Gr. 393. See also *Orford* v. *Orford*, 6 O.R. 6.

Limited estate for purposes of trust.

On a direction that so much of the estate as should be necessary should be sold to pay debts, followed by a devise of all the residue to the executors upon trust for the widow of the testator for life, and after her death to be divided amongst children, it was held that the purposes of the trust did not require the estate of the executors to extend beyond the

widow's life, and that upon her death the children took a legal remainder. *Doe dem. Williams* v. *Driscoll*, 9 N.B.R. 176.

Trust for separate use.

On a devise to trustees for the sole use of a married woman for life, the income to be paid to her at stated intervals, it was held that the trust continued during the coverture though the ultimate limitations were held to give an absolute interest to the married woman. *Nealis* v. *Jack*, N.B. Eq. Cas. 426.

Ontario, D.E. Act.

In Ontario by the Devolution of Estates Act, R.S.O. c. 127, s. 4, all lands held in fee simple or for the life of another and all lands comprised in any disposition made by will in exercise of a general testamentary power of appointment, devolve upon and become vested in the personal representatives from time to time, and subject to the payment of debts, notwithstanding any testamentary disposition. And in so far as they are not disposed of by deed, will, contract or other effectual disposition, they are to be distributed as personalty is distributed.

At the expiration of three years from the death of the testator, if no caution is registered, the lands shift into the beneficiaries without conveyance. But, during the interval, the executors are invested with the fee.

Where infants are interested, and the land vests in the executors under the Act, they can only sell with the consent of the official guardian, or upon an order of the High Court. *Ibid.* s. 8.

Powers not affected by D.E. Act.

The Act, however, does not take away from a testator the power to devise land to his executors upon trusts, nor does it limit his right to give his executors special powers. Therefore, where the testator devises land to his executors upon trusts the estate vests in them by the devise, and not by the statute, though they may resort to the statutory powers as supplementary. *Re Koch & Wideman*, 25 O.R. 262; *Re Hewett & Jermyn*, 29 O.R. 383; *Mercer* v. *Neff*, 29 O.R. 680; *Re Roberts & Brooks*, 10 O.L.R. 395.

And therefore where land is devised to executors on trust for sale, even though infants are concerned, the executors can sell without the consent of the official guardian. *Re Booth*, 16 O.R. 429.

And in such a case a caution need not be registered in order to retain the fee in the executor. *Re Hewett & Jermyn*, 29 O.R. 383; *Mercer* v. *Neff*, 29 O.R. 680.

So, also, if powers are given to executors they may be exercised notwithstanding this enactment. If no devise is made to executors, but bare powers are given them, the statute vests the land in them, and they have both property and power while this lasts. But even if the land should shift into the beneficiaries by lapse of time, the power may still be exercised; for they stand then in the same position as if, before the Act, the land had been devised to a beneficiary, and a mere power given to the executors.

Manitoba, land passes to personal representative.

In Manitoba, since and including 1st July, 1885, all lands, whatever the estate or interest therein, pass to the personal representative of deceased owners thereof, in the same manner as personal estate; and the personal representative has power to dispose of the same with all the like incidents, but subject to all the like rights, equities and obligations as if the same were personal property vested in him. R.S.M. c. 48, s. 21.

By the Wills Act, the provisions of the Imperial Act as to the estates of trustees are enacted in all the provinces. R.S.O. c. 12, ss. 33, 34; R.S.B.C. c. 193, ss. 27, 28; R.S.M. c. 174, ss. 28, 29; R.S.N.B. c. 160, ss. 24, 25; R.S.N.S. c. 139, ss. 28, 29.

CHAPTER XXXVI.

DEVOLUTION OF TRUSTS AND POWERS.

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Power coupled with interest and bare power.

FOR purposes of devolution a distinction must be drawn between a power coupled with an interest and a bare power, and a further distinction between a power given to trustees and executors as such, and a power given to named persons in whom a special confidence is imposed.

A devise to executors to sell passes the interest, but a devise that executors shall sell the land, or that land shall be sold by them, gives them but a power. *Howell* v. *Barnes*, Cro. Car. 382; *Yates* v. *Compton*, 2 P. W. 308; *Lancaster* v. *Thornton*, 2 Burr. 1027; *Doe* v. *Shotter*, 8 A. & E. 905; see *Knocker* v. *Bunbury*, 6 Bing. N. C. 306; *Lambert* v. *Brow..e*, I. R. 5 C.L. 218.

Power annexed to office.

Every power given to trustees which enables them to deal with or affect the trust property is *primâ 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 *primâ 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. Pe Farwell, J., *In re Smith; Eastick* v. *Smith*, (1904) 1 Ch. 139, 144, where *Cole* v. *Wade*, 16 Ves. 27, is discussed.

It is settled that a power of sale given to "my executors hereinafter named" is given to them as executors. It can

therefore be exercised by those for the time being holding the office, but not by a disclaiming executor. *Howell* v. *Barnes*, Cro. Car. 382; W. Jo. 352; *Yates* v. *Compton*, 2 P. W. 308; *Byam* v. *Byam*, 19 B. 58; *Brassey* v. *Chalmers*, 4 D. M. & G. 528; *Crawford* v. *Forshaw*, (1891) 2 Ch. 261. See *Keates* v. *Burton*, 14 Ves. 434; *In re Cooke's Contract*, 4 Ch. D. 454.

Whether a power given to "my executor A" is given to him as executor or not, must depend on the nature of the power and on the general language of the will. A power to mortgage or sell houses so given has been held to be exercisable by the person irrespective of the office, while a power to distribute a fund for charitable purposes was held given in respect of the office. *Madden* v. *Madden*, 23 L. R. Ir. 167; *A.-G.* v. *Fletcher*, 5 L. J. Ch. 75.

Disclaimer by devisee in trust.

Where one of several devisees on trust disclaims the others can execute the trust. *Nicholson* v. *Wordsworth*, 2 Sw. 365; *Adams* v. *Taunton*, 5 Mad. 435; see *Crewe* v. *Dicken*, 4 Ves. 97.

Disclaimer where power annexed to office.

And where a power is given to executors or trustees as such, those for the time being filling the office are the proper persons to exercise the power. For instance, if an executor disclaims the others and they only can exercise the power. No distinction can for this purpose be drawn between a power coupled with an interest and a bare power. The power is annexed to the office. *Earl Granville* v. *M'Neile*, 7 Ha. 156; *Crawford* v. *Forshaw*, (1891) 2 Ch. 261.

21 Hen. 8, c. 4

The statute 21 Hen. 8, c. 4, which applies to powers of sale only provided in effect that where a testator directed his lands to be sold by his executors and some disclaimed, the acting executors could sell. The statute applies to copyholds. *Peppercorn* v. *Wayman*, 5 De G. & S. 230.

Conveyancing Act, 1882, s. 6.

The Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 6, enables a person to whom any power, whether coupled with an interest or not, is given, by deed to disclaim the power and on such disclaimer the power may be exercised by the other or others or the survivors or survivor of the others of the persons to whom the power is given unless a contrary intention is expressed in the instrument creating the power.

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The section applies to powers created by instruments coming into operation before or after the commencement of the Act.

Renunciation under seal is disclaimer.

A renunciation by instrument under seal of the executorship is a disclaimer within the section. *In re Fisher*, 13 L. R. Ir. 546.

Power coupled with a duty.

A power coupled with a duty cannot be released or disclaimed either under this Act or otherwise. *Re Eyre; Eyre* v. *Eyre*, 49 L. T. 259; *Weller* v. *Ker*, L. R. 1 H. L. Sc. 11.

The section is general, and is not, at any rate, in terms limited to persons holding an office such as executors or trustees.

Disclaimer by all the devisees in trust.

Where lands are devised to trustees in fee upon trusts or with powers which require the exercise of judgment and discretion, and the trustees disclaim the devise, so that the legal estate in fee descends on the heir-at-law, such powers or trusts cannot be exercised or carried into execution by the heir. *Robson* v. *Flight*, 4 D. J. & S. 608.

Trustee Act, 1893, ss. 22, 50.

Survivorship of powers and trusts.

The Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 22, provides that where a power or trust is given to or vested in two or more trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being.

The section applies to trusts constituted after or created by instruments coming into operation after December 31st, 1881.

By sect. 50, the expressions "trust" and "trustee" are to include the duties incident to the office of personal representative of a deceased person. It therefore extends to executors.

Limits of sect. 22.

Sect. 22 applies to powers or trusts given to or vested in trustees or executors as such. It does not affect the question whether a power is given to a trustee or executor as such (see *ante*, p. 434), nor does it affect bare powers not connected with the office of executor or trustee.

As regards devisees in trust the section declares but does not alter the law, for the survivors of several devisees in trust could always execute the trust or exercise a power annexed to the trust. *Lane* v. *Debenham*, 11 Ha. 188; *In re Bacon; Toovey* v. *Turner*, (1907) 1 Ch. 475.

As regards powers given to trustees and executors as such the section settles a doubt based upon Co. Lit. 113 a, and *Lock* v. *Loggin*, 1 And. 5. But the better opinion is that such powers could always be exercised by those for the time being holding the office. See *ante*, p. 434.

Powers given to executors by implication.

The same rule applies to a power given to executors by implication. *Anon.*, Dyer, 371, b. 3; *Forbes* v. *Peacock*, 11 M. & W. 630; Farwell on Powers, 461.

Whether executor of executor can exercise power.

It would seem to follow that where a power is given to executors as such, the executor of the last surviving executor could exercise the power, notwithstanding the case 19 Hen. 8, fo. 9a, pl. 4; Chance on Powers, 250, which may have been a case of a bare power given to named persons and not to executors as such. See Farwell on Powers, 92.

Bare power given to several persons.

A bare power given to several persons by name and not in respect of their office cannot be exercised by the survivors. See Co. Lit. 113 a, and Harg. note; *Attaters* v. *Bird*, Cro. Eliz. 856; *Montefiore* v. *Browne*, 7 H. L. 241; Farwell on Powers, 454.

Power to several and their heirs.

If such a power is given to several and their heirs, the survivors and the heirs of those who are deceased can exercise the power, but the survivors alone cannot. *Mansell* v. *Vaughan*, Wilm. 51; *Townsend* v. *Wilson*, 1 B. & Ald. 608; 3 Mad. 261. See *Hall* v *Dewes*, Jac. 189.

Bare power to a class.

But such a power given to a class of persons—for instance, the testator's sons-in-law—to be exercised at a future date, may be exercised by those living when the time for a sale arises. *Lee* v. *Vincent*, Cro. Eliz. 26. See *Sykes* v. *Sheard*, 2 D. J. & S. 6.

Devolution of trusts on personal representative of trustee.

By the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 30, trust and mortgage estates vested in any person solely, devolve on his personal representatives, "and accordingly all the like powers for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities and obligations, as if the same were a chattel real vesting in them or him: and for the purposes of this section

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the personal representatives for the time being of the deceased shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers."

Commencement of section.

The section applies only in cases of death after the 31st December, 1881.

Copyholds.

It does not now apply to copyholds. See *ante*, p. 91.

Effect of section.

The personal representatives are to be deemed the heirs and assigns of a single or sole surviving trustee within the meaning of all trusts and powers.

Under the old law the only persons who could execute a trust were the persons indicated in the instrument creating the trust.

When the heir of sole trustee could execute trust.

Thus, where there was a devise to trustees and their heirs upon trust that the trustees or the survivor of them or the heirs of such survivor, or that the said trustees or the trustees or trustee for the time being should execute the trusts, and possibly in the simple case of a devise to trustees and their heirs upon certain trusts, the heir of the last surviving trustee was a trustee and could execute the trusts, and the personal representatives can do so now. *In re Morton and Hallett*, 15 Ch. D. 143; *In re Pixton and Tong's Contract*, 46 W. R. 187; *In re Cunningham and Frayling*, (1891) 2 Ch. 567.

If, however, the devise is to trustees without words of limitation, and neither heirs nor representatives are mentioned, the personal representatives of the last surviving trustee cannot execute the trust. *In re Ingleby Boak*, 13 L. R. Ir. 326.

When devisee of sole trustee could execute trust.

Again, if the trust was to be executed by the trustees, their heirs and assigns, the devisee of the last surviving trustee could execute it, and no doubt the personal representative could do so now. *Titley* v. *Wolstenholme*, 7 B. 425; *Hall* v. *May*, 3 K. & J. 585.

But if the assigns were not mentioned, the devisee of the last surviving trustee could not execute the trust. *Cooke* v. *Crawford*, 13 Sm. 91; *Wilson* v. *Bennett*, 5 De G. & S. 475; *Macdonald* v. *Walker*, 14 B. 556; *Ashton* v. *Wood*, 3 Sm. & G. 436; *Stevens* v. *Austen*, 3 E. & E. 685. *Osborne* to *Rowlett*, 13 Ch. D. 774, where Jessel, M.R., refused to follow *Cooke* v. *Crawford*, was not approved in *In re Morton and Hallett*, 15 Ch. D. 143.

CHAPTER XXXVII.

ADMINISTRATIVE POWERS OF TRUSTEES.

A POWER of sale and exchange authorises a partition. *In re Frith* to *Osborne*, 3 Ch. D. 618.

A power of or trust for sale will not, as a general rule, authorise a mortgage, though it may if the object of the sale is to raise a particular charge subject to which the estate is devised. *Stroughill* v. *Anstey*, 1 D. M. & G. 635; *Page* v. *Cooper*, 16 B. 396; *Walker* v. *Southcell*, 56 L. T. 882.

Mortgage.

Trustees for sale holding several properties under one lease may sell some of them upon the terms that they shall grant a lease of the properties sold for the whole term less one day at an apportioned rent. *In re Judd and Poland*, (1906) 1 Ch. 684, overruling *In re Walker and Oakshott*, (1901) 2 Ch. 383.

Sale by sub-demise.

An ordinary power of sale does not authorise the severance of the timber or minerals from the land. *Cholmeley* v. *Paxton*, 3 Biug. 207; *S. C.* nom. *Cockrell* v. *Cholmeley*, 10 B. & C. 564; 3 Russ. 565; 1 R. & M. 418; 6 Bl. N. S. 120; 1 Cl. & F. 60; *Buckley* v. *Howell*, 29 B. 546.

Severance of timber and minerals.

The Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 44, gives the Court jurisdiction in the case of trustees authorised to dispose of land by way of sale, exchange, or partition, to sanction sales with an exception or reservation of any minerals. *In re Halloran's Trusts*, (1906) 1 Ir. 526.

A direction to the testator's executors to sell his lands gives the executors a common law authority under which they can vest the legal estate in a purchaser without the concurrence of the heir: Co. Lit. 112 b.

Common law power to sell.

If the lands are devised by the will subject to the direction, it would seem the concurrence of the beneficiaries in the sale

would be no more necessary than the concurrence of the heir, if the land is not devised.

The proper form of conveyance in such a case appears to be a bargain and sale which will not require to be enrolled under 27 Hen. VIII. c. 16, as it takes effect at common law and not under the Statute of Uses.

Direction to sell copyholds.

If the testator directs copyholds to be sold, or to be sold and conveyed, the purchaser is entitled to be admitted without the previous admittance either of the trustees or the heir. *Holder* v. *Preston*, 2 Wils. 400; *R.* v. *Wilson*, 11 W. R. 70; 3 B. & S. 201.

The same principle applies if the copyholds are devised to the trustees subject to the power. *Glass* v. *Richardson*, 9 Ha. 698; 2 D. M. & G. 658.

2. Time for acting under trust or power.

A trustee for sale cannot contract to sell at a future time at a price now fixed. *Clay* v. *Rufford*, 5 De G. & S. 768.

Power of sale at death of tenant for life.

A power of sale to be exercised after the death of a tenant for life cannot be exercised during his life, though he may consent to the sale. *Blacklow* v. *Laws*, 2 Ha. 40; *Johnstone* v. *Baker*, 8 B. 233; *Day* v. *Hide*, 17 Q. B. 91; *Want* v. *Stallibrass*, L. R. 8 Ex. 175.

Sale within given period.

A direction to sell within five years has been held to be directory merely where the purchase-money was to be applied in payment of debts. *Pearce* v. *Gardner*, 10 Ha. 287; see *Cuff* v. *Hall*, 1 Jur. N. S. 972.

Power of sale over reversion.

It appears to be clear, that where a reversion is settled for life with remainders, and a power of sale is given to trustees, the power of sale may be exercised before the property falls into possession. *Clark* v. *Seymour*, 7 Sim. 67; *Blackwood* v. *Borrowes*, 4 Dru. & War. 441, 468.

If the reversion subject to the life interest of A is only to be sold with the consent of the person in possession under the will, the property may be sold if A surrenders his life interest to the person entitled under the will. *Truell* v. *Tysson*, 21 B. 437; see *Giles* v. *Horner*, 15 Sim. 359.

3. What consent is required.

Where the consent of a tenant for life is required, an infant tenant for life may consent, if there is an intention shown, that the power should be exercisable during minority; for instance,

if the power is to be exercised with the consent of a named person, who was an infant at the time. *In re Cardross' Settlement*, 7 Ch. D. 728.

Tenant for life may consent after alienation.

If the consent of the tenant for life is required, he may give his consent, though he has alienod his life estate, if his alienee concurs. *Alexander* v. *Mills*, 6 Ch. 124.

Bankruptcy of tenant for life.

In the event of the bankruptcy of the tenant for life, the power of sale may be exercised with the consent of the tenant for life and his trustee in bankruptcy. *Holdsworth* v. *Goose*, 29 B. 111; *Eisdale* v. *Hammersly*, 31 B. 255; *In re Cooper: Cooper* v. *Slight*, 27 Ch. D. 565; *In re Bedingfield and Herring's Contract*, (1893) 2 Ch. 332; see, too, *Hardaker* v. *Moorhouse*, 26 Ch. D. 417.

Reservation of power of consent.

If the tenant for life upon the alienation of his life estate has expressly reserved his right to consent to the sale, the concurrence of the alienee of the life estate is not necessary. *Warburton* v. *Farn*, 16 Sim. 625.

Power of sale with consent.

Where trustees were authorised to sell with the consent of the tenant for life for the time being and to invest the proceeds, and there was a direction that no investment should be made, while there should be a tenant for life or tenant in tail of full age, without his consent, it was held that the trustees might sell during the minority of a tenant in tail without his consent. *In re Neare's Estates*, 28 W. R. 976; 49 L. J. Ch. 642.

Where the power of sale was exercisable with the consent of any tenant for life entitled to the possession of the estates, and the testater created a term upon trust to pay the rents of all his estates to his wife during her widowhood and in the event of her marriage upon trust to pay her an annuity, it was held that the trustees might sell with the consent of the tenant for life and widow. *Robertson* v. *Walker*, 41 L. J. Ch. 220.

Consent of sons and daughters.

Where the power was not to be exercised over any part of the property without the consent of the testator's "sons and daughters also," who were tenants for life, it was held doubtful whether the power could be exercised after the death of a daughter. *Sykes* v. *Sheard*, 33 B. 114; 2 D. J. & S. 6; see *Jefferys* v. *Marshall*, 19 W. R. 94.

A power of sale given to the testator's executors or administrators may be exercised by his administrator *durante minore ætate*. *Monsell* v. *Armstrong*, 14 Eq. 423.

4. Who may exercise power or trust for sale.

Persons to exercise power not named.

A difficulty sometimes arises where there is a direction to sell the testator's land, but the persons to carry out the sale are not mentioned.

Executors may sell if object of sale is to pay debts.

In such cases, if the purpose of the sale is to pay debts, the executor is the person to sell. *Anon.*, 3 Dyer, 371b; *Blatch* v. *Wilder*, 1 Atk. 420; *Forbes* v. *Peacock*, 11 M. & W. 630; see *Hooper* v. *Stratton*, 12 W. R. 367.

Proceeds of sale mixed with personalty.

The same is the case, if the proceeds of sale are to be divided with the personalty in certain shares, though there may be no charge of debts. *Tylden* v. *Hyde*, 2 S. & St. 238; *Ward* v. *Devon*, cit. 11 Sim. 160; *Forbes* v. *Peacock*, 11 M. & W. 630; 1 Ph. 717.

Direction to sell and divide.

But a mere direction to sell lands and divide the proceeds, where they are not mixed with the personalty, or a direction in certain events to sell lands which are directly devised, gives the executors no power of sale. *Bentham* v. *Wiltshire*, 4 Mad. 44; *Patton* v. *Randall*, 1 J. & W. 189; *Altham* v. *Fryer*, 3 Q. B. 442; *Curtis* v. *Fulbrook*, 8 Ha. 25, 278; *Haydon* v. *Wood*, *ib.* 279. See, however, *Lockton* v. *Lockton*, 1 Ch. C. 179.

5. Implied power of sale.

A devise of real and personal estate upon trust to invest the same in certain securities has been held to give an implied power of sale over the real estate. *Affleck* v. *James*, 17 Sim. 121; *Mower* v. *Orr*, 7 Ha. 473; *Cornick* v. *Pearce*, 7 Ha. 477.

But a power to invest will not have this effect. *Re Holloway*; *Holloway* v. *Holloway*, 60 L. T. 46.

Direction to divide.

A direction to divide real and personal estate into moieties does not alone give an implied power of sale. *Cornick* v. *Pearce*, 7 Ha. 477.

But where the realty and personalty are blended and directed to be divided among a numerous class, the proper inference may be that the testator must have intended a sale. *Flux* v. *Best*, 23 W. R. 228; *Carlisle* v. *Cooke*, (1905) 1 Ir. 269.

Power may extend to purchased land.

Where there was a power to sell trust funds and buy land to be held on such trusts as would best correspond with those then subsisting, with a direction that land purchased should

be considered personalty, it was held that the power of sale extended to purchased lands. *Tait* v. *Lathbury*, 1 Eq. 174; 35 B. 112.

And where there is power to invest in the purchase or on mortgage of land or in investments authorised by law, a power to vary "such securities" gives power to sell land purchased under the investment clause. *In re Gent and Eason's Contract*, (1905) 1 Ch. 386.

Land bought by trustees in breach of trust may be sold.

If trustees have invested trust funds in land without any authority, they can sell the land with the concurrence of a beneficiary, if all the beneficiaries are free from disability and able to elect to take the land as land, or without any concurrence if they are not. *In re Patten*, 52 L. J. Ch. 787; *Power* v. *Banks*, (1901) 2 Ch. 487, 496; *In re Jenkins and H. E. Randall & Co.*, (1903) 2 Ch. 362.

Charge of debts.

A power of sale is also implied from a charge of debts. *Shaw* v. *Borrer*, 1 Kee. 559; *Ball* v. *Harris*, 4 M. & Cr. 264.

6. Who may sell under power implied from charge of debts.

The difficulties raised by the question who is the proper person to sell when a power is implied from a charge of debts have been to a great extent removed by statutory enactment.

Land Transfer Act.

By the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1, the real estate of persons dying after January 1st, 1898, vests in their personal representatives, who by sect. 2 have the same powers over it as if it were a chattel real vesting in them. They can therefore sell it, whether there is an express charge of debts or not.

Lord St. Leonards' Act, ss. 14, 16 and 18.

By the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), which applies to wills coming into operation after the 13th August, 1859, it is in effect enacted (sects. 14—16) that devisees in trust of the testator's whole interest in real estate charged with debts or legacies, no provision being made for the raising such debts or legacies, may raise the same by sale or mortgage, and where the estate subject to the charge is not devised to trustees for the testator's whole interest, the executors have a similar power of raising the amount. See *In re Adams and Perry's Contract*, (1893) 1 Ch. 554.

Sect. 16 does not enable an administrator to sell. *In re Clay and Tetley*, 16 Ch. D. 3.

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Sect. 18 declares that the said sections of the Act shall not extend to a (beneficial) 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, nor shall they affect the power of any such devisee or devisees to sell or mortgage, as he or they may by law now do.

Sect. 18 does not apply where an estate is devised by way of settlement, nor where there is a devise to a person when he attains twenty-four. *Re Wilson; Pennington* v. *Payne*, 54 L. T. 600; *In re Barrow-in-Furness Corporation and Rawlinson*, (1903) 1 Ch. 339.

Wills not within the Act.

In cases where the Act did not apply the law was not in a very satisfactory state.

Devise to trustees of land subject to a general charge of debts.

a. Where debts and legacies were charged on land, and the land was devised to trustees upon trusts not including the payment of debts, the trustees and not the executors were apparently the persons to sell and receive the purchase-money. *Shaw* v. *Borrer*, 1 Kee. 559; *Ball* v. *Harris*, 4 M. & Cr. 264; *Stronghill* v. *Anstey*, 1 D. M. & G. 647; *Sabin* v. *Heape*, 27 B. 553; *Hodkinson* v. *Quinn*, 1 J. & H. 393.

In such a case the fact that the trustees took only an estate *pur autre vie*, the use in remainder being executed by the effect of the Statute of Uses, did not affect their power to sell in order to raise the charge. *Eidsforth* v. *Armstead*, 2 K. & J. 333.

Beneficial devise subject to debts to a person who is also executor.

b. When there was a charge of debts and legacies on land, and the land was devised beneficially, expressly subject to the charge, to a person, who was one of several executors, he could sell and pass the legal estate. *Colyer* v. *Finch*, 5 H. L. 905; *Johnson* v. *Kennett*, 3 M. & K. 624; *Corser* v. *Cartwright*, 8 Ch. 971; L. R. 7 H. L. 731.

Devise to person not executor.

c. Where there was a charge of debts and legacies on land which was given to a devisee for his own use or as to which the testator died intestate, the better opinion appears to be that the executor could not, but the devisee or heir could alone give a good title. *Doe* v. *Hughes*, 6 Ex. 223; *Johnson* v. *Kennett*, 3 M. & K. 624; *Corser* v. *Cartwright*, 8 Ch. 971, 975. See *Gosling* v. *Carter*, 1 Coll. 644.

On the other hand, an intention might be collected from the will, that the executor, and not the devisee, was intended to enforce the charge, in which case the power of sale included the power of passing the legal estate as well.

Thus, if the land was devised for life with contingent remainders over, it is clear that the devisees could not make a good title; yet, on the other hand, the charge must be raised at once, and therefore a power of sale was implied in the executor. *Robinson* v. *Lowater*, 5 D. M. & G. 275.

Where a testator directed his debts to be paid by his executors, and charged them on his real estate, a power of sale by implication was not given to an administrator. *In re Clay and Tetley*, 16 Ch. D. 3.

Lord Romilly appears to have been of opinion that a charge of debts on land, where the land was beneficially devised, gave the executors an implied power of sale. See *Wrigley* v. *Sykes*, 21 B. 337; *Bolton* v. *Stannard*, 4 Jur. N. S. 576; but these cases may be supported on other grounds.

For the opinions of the text-writers on this subject, see Sugd. V. & P. 13th ed. 545; Pow. 121—122; Williams on Real Assets, ch. vi. p. 77; Davidson's Conv. vol. 2, part ii., 468, n.; Dart, V. & P. 697 *seq.*; Lewin on Trusts, 515 *seq.*; Hayes and Jarman's Conc. Prec. 491; Farwell on Powers, 79; Carson's Real Property Statutes, 413; Godefroi on Trustees, 387.

d. A charge upon land of specific debts or of a single legacy did not enable the devisee, though he might also be executor, to make a title. *Doran* v. *Wiltshire*, 3 Sw. 699; *In re Rebbeck*: *Bennett* v. *Rebbeck*, 42 W. R. 473; 71 L. T. 74. Charge of specific debts or single legacy.

e. Whether under a charge of legacies only, the devisee could sell or mortgage without the concurrence of the legatees, is a question of some difficulty. In *Horn* v. *Horn*, 2 S. & St. 448, it was held he could not, and in *Johnson* v. *Kennett*, 3 M. & K. 624, Lord Lyndhurst lays down that where legacies alone are charged, the purchasers of the real estate are bound to see to the application of the purchase-money (p. 630). But the point did not arise in that case, and Lord Lyndhurst's reasoning was not approved by Lord St. Leonards in *Stroughill* Charge of legacies only.

v. *Anstey*, 1 D. M. & G. 635, who puts it upon intention only; and Lord Cranworth, in *Colyer* v. *Finch*, 5 H. L. 905, 922, places a charge of legacies upon the same footing as a charge of debts.

The views expressed in *Stroughill* v. *Anstey* and *Colyer* v. *Finch*, seem to have received statutory approval by sect. 18 of Lord St. Leonards' Act, which declares that the Act is not to affect the power of a devisee subject to debts or legacies to sell "as he may by law now do" (see also Mr. Waley's note to Davidson, vol. 2, part ii., Mortgages, p. 474; *Re Wilson*; *Pennington* v. *Payne*, 34 W. R. 512).

7. Mode of exercising power of or trust for sale.

By the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 13, a trustee in whom a trust for sale or a power of sale is vested by an instrument coming into operation after December 31, 1881, may sell or concur with any person in selling, subject to prior charges or not, and either by public auction or private contract and subject to such conditions as he thinks fit.

Sect. 14 provides that a sale made by a trustee shall not be impeached by a beneficiary on the ground that the conditions were depreciatory unless it appears that the consideration for the sale was thereby rendered inadequate, and after conveyance a sale is not to be impeached against the purchaser on the ground that the conditions were depreciatory, unless the purchaser was acting in collusion with the trustee, and a purchaser cannot make any objection to the title on the ground aforesaid.

Concurring in selling with other owners.

Trustees with a power of sale could always join with the owner of another property in selling both properties if such a mode of sale was beneficial; but the purchase-money must be apportioned before the completion of the purchase. *Cavendish* v. *Cavendish*, 10 Ch. 319; *Morris* v. *Debenham*, 2 Ch. D. 540; *In re Cooper and Allen*, 4 Ch. D. 802, where *Rede* v. *Oakes*, 4 D. J. & S. 505, is explained.

8. Duration of powers of or trusts for sale.

A power of selling for a particular purpose only, such as payment of debts, is of course at an end if the purpose is satisfied. *Carlyon* v. *Truscott*, 20 Eq. 348.

When power of sale at an end.

In the ordinary case of a power of sale given to trustees without any express limit of time, so that it is necessary to find some limit to save the power from invalidity on the ground of

perpetuity, the power is spent when the settlement is at an end, that is to say, when all the interests have vested absolutely in possession. *Lantsbery* v. *Collier*, 2 K. & J. 718; *Woolley* v. *Jenkins*, 23 B. 53, affirmed 3 Jur. N. S. 321; *Peters* v. *Lewes & East Grinstead Ry. Co.*, 18 Ch. D. 429.

Limitations created under special power.

For the purpose of determining whether the interests have become absolutely vested, limitations created under a special power of appointment are to be considered as if they had been inserted in the original instrument. *In re Brown's Settlement*, 10 Eq. 349.

Existence of jointure.

The fact that a jointure secured by a term remains charged, and that the widow has power to charge a sum of money on the estate, will not keep the power of sale alive. *Woolley* v. *Jenkins*, 32 B. 53; *Wheale* v. *Hall*, 17 Ves. 86.

Vesting of one moiety.

If the property is devised in moieties, the fact, that the trusts of one moiety have come to an end, will not put an end to the power of sale, if the trusts of the other moiety are subsisting, unless the power is limited to property subject to continuing trusts. *Trower* v. *Knightley*, 6 Mad. 134; *Wood* v. *White*, 4 M. & Cr. 460.

Duration of power is question of intention.

If the rule against perpetuity is not infringed, the duration of a power of sale is a question of intention.

If, therefore, the period during which the power may be exercised is expressly defined, or, upon the construction of the instrument, the conclusion is that it was intended to be exercised during a certain period, it may be exercised during that period, though the interests have vested absolutely in possession, provided an absolute owner has not taken any steps to put an end to the power. *Peters* v. *Lewes & East Grinstead Ry. Co.*, 18 Ch. D. 429; *In re Cotton's Trustees*, 19 Ch. D. 624; *In re Lord Sudeley and Baines*, (1894) 1 Ch. 334; *In re Jump; Galloway* v. *Hope*, (1903) 1 Ch. 129; see *In re Dyson and Rooke*, (1896) 2 Ch. 720.

Duration of trust for sale.

A trust for sale does not necessarily determine, when all the interests have vested absolutely in possession. Apparently the trust may be exercised at any time within the limits of perpetuity, if it has not been put an end to by any beneficiary.

In re Tweedie and Miles' Contract, 27 Ch. D. 315; *In re Douglas and Powell's Contract*, (1902) 2 Ch. 296.

Inquiries as to debts.

A purchaser of freeholds under a trust for sale for payment of debts, or under a power of sale express or implied for the same purpose, was not entitled under the old law to inquire whether any debts were subsisting unless twenty years had elapsed since the testator's death. *In re Tongueray-Williamme and London*, 20 Ch. D. 465; *In re Malgaeur and White*, 13 L. R. Ir. 382; 15 L. R. Ir. 383.

A purchaser from the executor of leaseholds is not entitled to inquire, although more than twenty years have elapsed since the testator's death. *In re Whistler*, 35 Ch. D. 561; *In re Venn and Furze's Contract*, (1894) 2 Ch. 101, explaining *In re Molyneux and White*, 13 L. R. Ir. 382; 15 L. R. Ir. 383; see *In re Verrell*, (1903) 1 Ch. 65; *In re Higgins and Stephenson's Contract*, (1906) 1 Ir. 656.

Which rule is to be applied to a sale of real estate by a personal representative since the Land Transfer Act remains to be determined.

II. Power to postpone sale.

A power to postpone the sale of the residuary estate, which is given on trust for sale, involves a power to carry on a business forming part of the residue during the period of postponement. *In re Crowther*; *Midgley* v. *Crowther*, (1895) 2 Ch. 56.

A power to postpone may be so framed as to authorise an indefinite postponement or only a postponement for a limited period. *In re Crowther*, *supra*; *In re Smith*: *Arnold* v. *Smith*, (1896) 1 Ch. 171.

III. Power to mortgage.

A power to mortgage does not authorise a sale (*a*), though it authorises a mortgage with power of sale (*b*). *Cook* v. *Dawson*, 29 B. 123 (*a*); *Bridges* v. *Longman*, 24 B. 27; *In re Clauner's Will*, 8 Eq. 569, overruling *Clark* v. *Royal Panoptiron*, 4 Dr. 26 (*b*). See, now, sect. 19 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), which confers a power of sale on mortgagees.

Under a power to raise a sum by way of mortgage, the costs of effecting the security may be raised. *Armstrong* v. *Armstrong*, 18 Eq. 541.

Costs of transfer.

And a trustee may raise the costs of transferring a mortgage,

if he has any duty to protect the estate from foreclosure or sale. *Sewell* v. *Bishopp*, 68 L. T. 323; 69 L. T. 68.

As to the validity of a mortgage by demise under a power of leasing, see *Mostyn* v. *Lancaster*, 23 Ch. D. 583.

Where trustees have power to make out of income or capital of the real and personal estate any outlay they may consider necessary for renewals of leases, improvements, repairs, and the like, they may raise money by mortgage for those purposes. *In re Bellinger*; *Durell* v. *Bellinger*, (1898) 2 Ch. 534.

And as to what words give a power to mortgage, see *In re Jones*; *Dutton* v. *Brookfield*, 59 L. J. Ch. 31; 61 L. T. 661; 38 W. R. 90; *Re Webb*; *Leetha...* v. *Patchett*, 63 L. T. 545; *Redman* v. *Rymer*, 65 L. T. 270.

IV. Power of giving receipts.

By sect. 20 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), the receipt of any trustee for any money, securities or other personal property or effects payable, transferable, or deliverable to him under any trust or power is made a sufficient discharge.

The section applies to trusts created before or after the commencement of the Act.

Receipt by agent.

Sect. 17 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), enables a trustee to appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration, or property recoverable by the trustee, by permitting the solicitor to have the custody and to produce a deed containing any such receipt as is referred to in sect. 56 of the Conveyancing Act, 1881.

The section applies only where the money or valuable consideration or property is received after the 24th December, 1888.

In cases to which the section does not apply, trustees, unless empowered to do so by the instrument under which they act, ought not to authorise a solicitor or other agent, or even one of themselves, to receive purchase-money, and the purchaser may insist upon payment either to the trustees personally, or to their account at a bank. *In re Bellamy*, 24 Ch. D. 387; *In re Flower*, 27 Ch. D. 592.

The testator may direct that an infant's receipt is to be effectual. *In re Deucker; Peters* v. *Bauchereau*, W. N. 1895, 28.

V. Executor's powers.

An executor may sell or mortgage any part of the testator's personal assets. *Earl Vane* v. *Rigden*, 5 Ch. 663; *Cruikshank* v. *Duffin*, 13 Eq. 555; *Berry* v. *Gibbons*, 8 Ch. 747; *In re Ryan and Kavanagh*, 17 L. R. Ir. 42; *In re Whistler*, 35 Ch. D. 561.

The executor's power extended to real estate used for partnership purposes. *West of England and South Wales District Bank* v. *March*, 23 Ch. D. 138; see *Boylan* v. *Fay*, 8 L. R. Ir. 374; *Devitt* v. *Kearney*, 13 L. R. Ir. 45.

And by way of compromise, a sale partly for shares in a company may be upheld. *West of England Bank* v. *March*, 23 Ch. D. 138.

An administrator *durante minore ætate* has the same power of selling personal property as an executor. *In re Cope*, 16 Ch. D. 49; *In re Thomson and M'Williams*, (1896) 1 Ir. 356; overruling *In re Robinson*, 3 L. R. Ir. 429.

An administrator cannot by mortgage raise money for the repair of leaseholds, which he is not under liability to repair. *Ricketts* v. *Lewis*, 20 Ch. D. 745.

Administration to attorney.

A person who has taken out administration as attorney to another, must distribute the assets himself and cannot safely hand them over to his principal, so long as he has not constituted himself administrator. *In re Rendell; Wood* v. *Rendell*, (1901) 1 Ch. 230.

By the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), ss. 1, 2, in case of death since the 1st January, 1898, the real estate vests in the personal representatives, and all enactments and rules of law . . . in relation to the administration of personal estate and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate apply to real estate so far as the same are applicable as if that real estate were a chattel real vesting in them, but some or one of several joint personal representatives cannot, without the authority of the Court, sell or transfer real estate.

VI. Conversion of personalty within a year.

Where there is a trust for conversion, unauthorised securities should, as a general rule, be sold within a year from the death.

Bate v. *Hooper*, 5 D. M. & G. 338; *Hughes* v. *Empson*, 22 B. 181.

Where postponement of conversion justified.

But executors, who *bond fide* postpone the sale of securities of fluctuating value, upon which there is no liability, will not be liable for a loss. *Burton* v. *Burton*, 1 M. & Cr. 80; *Marsden* v. *Kent*, 5 Ch. D. 598.

Shares, upon which there is an unlimited liability, ought to be sold within the year under a direction to convert. *Graeburn* v. *Clarkson*, 3 Ch. 605; *Southorpe* v. *Tipper*, 13 Eq. 232; *The Heirs Hiddingh* v. *De Villiers Denyssen*, 12 App. Ca. 624.

Discretionary trusts.

If there is a discretionary trust to convert, trustees *bond fide* exercising their discretion will not be liable for not selling shares upon which the liability is unlimited. *In re Nevill's Trusts*; *Brindley* v. *Partridge*, 13 Ch. D. 655.

As to wasting securities see *Wilday* v. *Sandys*, 7 Eq. 455; *Tickner* v. *Old*, 18 Eq. 422.

VII. Power to compromise.

Under 23 & 24 Vict. c. 145, s. 30, executors had power to compromise debts and also claims by persons claiming as beneficiaries. *West of England and South Wales District Bank* v. *March*, 23 Ch. D. 138; *In re Warren*; *Weedon* v. *Reading*, 32 W. R. 916; 61 L. T. 561.

That section is superseded by sect. 21 of the Trustee Act, 1893, which applies to executorships and trusts constituted or created before or since the commencement of the Act.

That section provides that an executor or administrator may pay, or allow any debt or claim on any evidence that he thinks sufficient, and gives power to an executor or administrator or to two or more trustees, or to a sole acting trustee, where a sole trustee is authorised to execute the trusts and powers, to compromise claims.

Claim of co-executor.

An executor in a proper case may compromise the claim of a co-executor. *In re Houghton*; *Hawley* v. *Blake*, (1904) 1 Ch. 622.

Executors before the Act had a fair discretion as to suing debtors, but the Act has extended their powers, and it seems, that, as long as they act in good faith, they will not be liable for not taking proceedings against debtors. *Re Owens*; *Jones* v. *Owens*, 47 L. T. 61.

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But executors cannot charge the estate with a sum of money paid to compromise an action in the Probate Division, in which the validity of the will under which their title arises is contested. *Graham* v. *M'Cashin*, (1901) 1 Ir. 404.

VIII. Investment.

The Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 1, which applies to trusts created before or after the passing of the Act, authorises trustees, unless expressly forbidden by the instrument creating the trust, to invest any trust funds in their hands, whether at the time in a state of investment or not, in the securities there mentioned (extended by the Colonial Stock Act, 1900 (63 & 64 Vict. c. 62), to colonial stock), and to vary any such investment.

The words "whether at the time in a state of investment or not" were not in the Trust Investment Act, 1889 (52 & 53 Vict. c. 32), s. 3 (repealed by the Act of 1893), and were inserted to give effect to the decision, *Hume* v. *Lopes*, (1892) A. C. 112.

The power to vary "any such investment" apparently applies only to trust funds invested in the investments enumerated in the Act. See *In re Dick; Lopes* v. *Hume-Dick*, (1891) 1 Ch. 423; *Hume* v. *Lopes*, (1892) A. C. 112.

Sect. 3 deals with redeemable stocks, and sect. 5 enlarges existing powers of investment.

The provisions of sect. 5, which enlarge the powers of investment of trustees "having power to invest" in the modes therein specified, refer only to trustees on whom such power is expressly conferred by the instrument. *In re Tattersall; Topham* v. *Armitage*, (1906) 2 Ch. 369.

The Debenture Stock Act, 1871 (34 Vict. c. 27), which authorised trustees having power to invest in the mortgages or bonds of a railway company or of any other description of company, to invest in the debenture stock of a railway company or any such other company as aforesaid, is repealed by the Act of 1893, and sect. 5 (2) re-enacts the power in identical terms, but without the preamble to the Act of 1871, which appeared to limit "any other description of company" to companies to which the Companies Clauses Act, 1863 (26 & 27 Vict.

c. 118), applied. It is not clear whether the re-enacted power extends to the so-called debenture stock of a limited company.

Power to invest in such securities as trustees think fit.

A liberal construction will be put upon a power to trustees to invest in such securities as they think fit. Such a power has been held to authorise investment in Russian railway and Egyptian bonds (*a*) and mortgage debentures of a limited company (*b*); but it does not exonerate trustees from making proper inquiries if they invest on mortgage (*c*). It is doubtful whether it would authorise investment in a security upon which there is a liability (*d*). *Lewis* v. *Nobbs*, 8 Ch. D. 591 (*a*); *In re Smith*; *Smith* v. *Thompson*, (1896) 1 Ch. 71; see *Stewart* v. *Sanderson*, 10 Eq. 26; *In re Brown*; *Brown* v. *Brown*, 29 Ch. D. 889 (*b*); *Harris* v. *Harris*, 29 B. 107; *Strellon* v. *Ashmall*, 3 Dr. 9 (*c*); *In re Brown*, *supra*; *In re Kavanagh*, 27 L. R. Ir. 495; *S. C.* sub nom. *Murphy* v. *Doyle*, 29 L. R. Ir. 333 (*d*).

Provisions of Trustee Act as to mortgages.

The Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 8, contains provisions applicable to investments on mortgage as to the valuation of the property and the proportion which the value should bear to the loan.

A power to invest on mortgage does not justify investment on a contributory mortgage. *Webb* v. *Jonas*, 39 Ch. D. 660.

Power to invest in securities.

A power to invest in securities will not authorise the purchase of shares, which are not secured upon anything, unless it appears that the expression "securities" is used as equivalent to "investments." *Harris* v. *Harris*, 29 B. 107; *In re Kavanagh*, 27 L. R. Ir. 495; *S. C.* sub nom. *Murphy* v. *Doyle*, 29 L. R. Ir. 333; *In re Rayner*; *Rayner* v. *Rayner*, (1904) 1 Ch. 176; *In re Gent and Eason's Contract*, (1905) 1 Ch. 386.

Real securities.

A power to invest on real securities does not include long leaseholds. *In re Boyd's Settled Estates*, 14 Ch. D. 627.

But sect. 5 of the Trustee Act, 1893, extends such a power to the long leaseholds mentioned in that section.

A power to invest on Government securities and on ground rents authorises the purchase of ground rents. *In re Mordan*; *Legg* v. *Mordan*, (1905) 1 Ch. 515.

Public company.

A company incorporated under the Companies Acts is a public company, but it is not, though a company incorporated by a

charter granted under a special Act specifically authorising the charter is, a company incorporated by Act of Parliament. *In re Sharp; Rickett* v. *Sharp*, 45 Ch. D. 286; *Elve* v. *Boyton*, (1891) 1 Ch. 501; *In re Smith; Davidson* v. *Myrtle*, (1896) 2 Ch. 590.

Whether company must be an English company.

A power to invest in the Government funds or real or leasehold securities or the securities of any railway or other public company is limited to securities of public companies in the United Kingdom, but a power to invest in the securities of any corporation or company, municipal, commercial, or otherwise, includes the securities of companies whether incorporated or not, and whether formed or registered in the United Kingdom or elsewhere. *In re Castlehow; Lumonby* v. *Carter*, (1903) 1 Ch. 352; *In re Stanley; Tennant* v. *Stanley*, (1906) 1 Ch. 131.

Power to deposit with a firm.

A power to invest by placing on deposit with a firm does not authorise trustees to continue the deposit after a change in the members of the firm. *In re Tucker; Tucker* v. *Tucker*, (1894) 1 Ch. 724; *Smith* v. *Patrick*, (1901) A. C. 282.

Shares in reconstructed company.

A power to retain the estate "in its present form of investment," authorises the acceptance and retention of shares in a new company, which are issued in respect of shares in an old company, whose undertaking is taken over by the new company upon a reconstruction. *In re Smith; Smith* v. *Lewis*, (1902) 2 Ch. 667; see *In re Anson*, (1907) 2 Ch. 424.

The cases upon investment will be found collected in Lewin, 326; Vaizey, 428.

Consent.

Under the common power of investing with consent a previous consent is necessary, and it must be given at the time of the investment, and cannot be given by anticipation. *Bateman* v. *Davis*, 3 Mad. 98; *Child* v. *Child*, 20 B. 50.

If the consent is to be signified by deed, the deed may be executed after the exercise of the power, if consent has been previously given. *Offen* v. *Harman*, 1 D. F. & J. 253.

IX. Powers of leasing.

Trustees holding lands on trust to raise money out of the rents or to pay the rents to a tenant for life, can let the lands from year to year or for any reasonable term. *Naylor* v. *Arnitt*, 1 R. & M. 501; *Fitzpatrick* v. *Waring*, 11 L. R. Ir. 35; not following *In re Shaw's Trusts*, 12 Eq. 124.

Where a tenant for life with powor of leasing enters into an agreement for a leaso and dies before the lease is executed the trustees may carry the agreement into effect. *Davis* v. *Harford*, 22 Ch. D. 128. See now the Settled Land Act, 1882, s. 12.

As to the construction of powers of leasing, see *Hallett to Martin*, 24 Ch. D. 624; *Re James*; *James* v. *Gregory*, 73 L. T. 1; 64 L. J. Ch. 686.

Lease by executor.

An executor can make a lease, but if impugned by a beneficiary it would lie upon the executor and lessee to show that it was made in a due course of administration. *Keating* v. *Keating*, Ll. & G. t. Sug. 133.

Lease with option to purchase.

If an executor makes a lease giving the lessee an option to purchase at a fixed price, the option to purchase cannot be exercised against the beneficiaries. *Oceanic Steam Navigation Co.* v. *Sutherberry*, 16 Ch. D. 236.

Lease of several properties.

In the absence of any special circumstances, trustees of contiguous estates held upon different trusts cannot make a lease of both estates under one demise. *Tulson* v. *Sheard*, 5 Ch. D. 10.

Power to lease not accelerated.

A power to lease after the death of a tenant for life cannot be exercised before his death, though the life estate may be surrendered. *Coxe* v. *Day*, 13 East, 118.

Covenants for renewal.

As to the effect of covenants for renewal in leases under powers, see *Gas Light and Coke Co.* v. *Towse*, 35 Ch. D. 519.

In certain cases the Court is enabled to remedy defects in leases granted under powers. 12 & 13 Vict. c. 26; 13 & 14 Vict. c. 17; *Gas Light and Coke Co.* v. *Towse*, *supra*.

X. Management, repairs, and improvements.

Large powers of management, and of laying out money in repairs and improvements are given by the Conveyancing Act, 1881, s. 42, and the Settled Land Acts, 1882 to 1890.

Money to be laid out in land to go with a settled estate held, before the Settled Land Acts, could be laid out in building or building cottages and other edifices on the estate, but not in improvements or permanent repairs, unless the repairs were of the nature of salvage. *In re Leigh's Estate*, 6 Ch. 887; *Cooke* v. *Trefusis*, 10 Ch. 364; *Re Lord De Tabley*; *Leighton* v. *Leighton*, 75 L. T. 328; *Re Hawker*; *Duff* v. *Hawker*, 76 L. T. 286.

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And a power to make out of the income or capital any outlay for the benefit of the estate was held not to carry the matter further. *Re Lord De Tabley, supra;* see *In re Bellinger; Durell* v. *Bellinger*, (1898) 2 Ch. 534.

Now, by virtue of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 21, and the Settled Land Act, 1890 (52 & 53 Vict. c. 36), s. 13, capital money arising under the Act can, on the direction of the tenant for life, be laid out in any of the modes mentioned in those sections, which include improvements, and inasmuch as land if purchased could be sold by the tenant for life and applied under the Act, money to be invested in land can be applied as capital money arising under the Act. *In re Mackenzie's Trusts*, 23 Ch. D. 750.

The Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 42, confers powers of management upon trustees where infants are beneficially interested in the land, and expenses may be paid out of income.

Duty of trustees as to leaseholds.

Where leaseholds are held by trustees on trust for a tenant for life, with limitations over, it is the duty of the trustees to see that the covenants in the leases as to repairs are performed. *In re Fowler; Fowler* v. *Odell*, 16 Ch. D. 723.

And trustees for sale ought to keep the property in a saleable condition, and to execute any repairs necessary for that purpose, and the amount may be raised out of capital, if there is no obligation on the tenant for life to repair. *In re Hotchkys; Freke* v. *Calmady*, 32 Ch. D. 408; see (1902) 1 Ch. 20; *Re Freman; Diamond* v. *Newburn*, (1898) 1 Ch. 28.

XI. Power to insure.

By sect. 18 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), trustees are empowered to insure any building or other insurable property up to three-fourths of its value, and to pay the premiums out of the income of the property insured and any other property held on the same trusts. The section applies to trusts created before and after the commencement of the Act.

XII. Power to renew leases.

By sect. 19 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), trustees of renewable leaseholds may, if they think fit, and must, if thereto required by any beneficiary, use their best endeavours to obtain renewals. Where, by the terms of the

settlement or will, the tenant for life is entitled to enjoyment without any liability to renew or contribute to the expense of renewal, the trustees cannot exercise this power without his consent. The trustees may pay the expenses of renewal out of any money in their hands held upon the same trusts, or, if they have none, may raise the expenses by mortgage. The section applies to trusts created before and after the commencement of the Act.

The section does not alter rights between tenant for life and remainderman. *In re Baring; Jeune* v. *Baring*, (1893) 1 Ch. 61.

XIII. Carrying on business.

Executors or trustees cannot carry on the testator's business without express or implied authority to do so. *Travis* v. *Milne*, 9 Ha. 142; *Kirkman* v. *Booth*, 11 B. 273; *Stainer* or *Stanier* v. *Hodgkinson*, 52 W. R. 260; 73 L. J. Ch. 179.

Where a will contains the usual trust for sale, with power to postpone the sale, the executors may carry on the business during the period of postponement. *In re Chancellor; Chancellor* v. *Brown*, 26 Ch. D. 42; *In re Crowther; Midgley* v. *Crowther*, (1895) 2 Ch. 56; *In re Smith; Arnold* v. *Smith*, (1896) 1 Ch. 171.

What capital may be employed.

A direction to carry on the testator's business only authorises the employment in the business of the capital which the testator himself employed in the business at his decease. *M'Neillie* v. *Acton*, 4 D. M. & G. 744; see *Re Dimmock; Dimmock* v. *Dimmock*, 52 L. T. 494.

Power to use business premises.

Under such a direction the executors are entitled to use the freehold or leasehold premises, where the business was carried on by the testator, and they may mortgage them for the purposes of the business. *Devitt* v. *Kearney*, 13 L. R. Ir. 45; *In re Cameron; Nixon* v. *Cameron*, 26 Ch. D. 19.

An authority to trustees to carry on the business does not authorise two out of three trustees to carry it on. *Ex parte Butcher; In re Mellor*, 13 Ch. D. 465.

Bankruptcy of executor.

If the executor becomes bankrupt, the beneficiaries have no claim against his estate for the assets of the testator properly employed in the trade, though they can prove for assets employed in excess of his authority. *Ex parte Richardson.*

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XIV. Power of maintenance.

Buck, 202; 3 Mad. 138; *Scott* v. *Izon*, 34 B. 434; *Ex parte Butcher*; *In re Mellor*, 13 Ch. D. 465.

Sect. 43 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41) provides that "where any property is held by trustees in trust for an infant, either for life or for any greater interest, and whether absolutely or contingently on his attaining the age of twenty-one years or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education or benefit the income of that property or any part thereof whether there is any other fund applicable to the same purposes or any person bound by law to provide for the infant's maintenance or education or not."

The residue of the income is to be accumulated and go to the person ultimately entitled to the property, but the trustees may apply accumulations, as if they were income of the current year.

The section applies to all instruments, if there is no contrary intention expressed.

An express trust to accumulate the income of an infant's shares is not a contrary intention. *In re Thatcher's Trusts*, 26 Ch. D. 426.

When an executor or administrator has paid the debts and legacies and has a clear residue in hand which belongs to an infant, he is a trustee for the infant within the section. *In re Smith*; *Henderson-Roe* v. *Hitchins*, 42 Ch. D. 302.

This power appears to be practically the same as that contained in Lord Cranworth's Act (23 & 24 Vict. c. 145), s. 26. It enables income to be applied for maintenance in cases, where the gift of capital and income is contingent, but not where the legacy does not carry interest. *In re Cotton*, 1 Ch. D. 232; *In re George*, 5 Ch. D. 837; *In re Judkin's Trusts*, 25 Ch. D. 743; *In re Dickson*; *Hill* v. *Grant*, 28 Ch. D. 291; 29 Ch. D. 331; *In re Holford*; *Holford* v. *Holford*, (1894) 3 Ch. 30; see *ante*, p. 187.

The power of maintenance does not extend beyond the age of twenty-one. *In re Breed's Will*, 1 Ch. D. 226.

Education.

Under a power to apply money towards the maintenance or support of infants, sums may be expended on education. *In re Breeds' Will*, 1 Ch. D. 226.

Maintenance clauses.

Directions as to maintenance may be variously expressed.

Imperative trust to apply income.

If the direction is so worded as to amount to a trust, under which the trustees are bound to apply the whole or a portion of the income to maintenance, the father is entitled to have the trust carried into effect without regard to his ability to maintain his children, and if he maintains the children at his own expense, he or his representatives are entitled to an inquiry, how much ought to have been applied in the maintenance of the children, and that amount will be recouped out of the trust estate. *Mundy* v. *Earl Howe*, 4 B. C. C. 223; *Meacher* v. *Young*, 2 M. & K. 490; *Stocken* v. *Stocken*, 4 Sim. 152; 4 M. & Cr. 95; these cases are discussed in *Ransome* v. *Burgess*, 3 Eq. 773; *Wilson* v. *Turner*, 22 Ch. D. 521.

It is said that the doctrine applies only to marriage settlements, and that it is founded on the father's contract. The point really seems to be one of construction, the question being, are the trustees bound to apply the income in maintenance?

Thus, if there is in a will a trust to apply income in maintaining infants, the father is entitled to have the income so applied without reference to his ability to maintain them. If he himself be the trustee he may apply the income in maintenance in the same way. *Hawkins* v. *Watts*, 7 Sim. 199; *Bateman* v. *Foster*, 1 Coll. 118; *Newton* v. *Curzon*, 16 L. T. 696.

Power and discretionary trust.

If there is only a power given to trustees to apply income in maintenance, or there is a discretionary trust to apply all or any part of the income, so that they are not bound to apply any, the father has no such right. *Thompson* v. *Griffin*, Cr. & P. 317, *In re Kerrison's Trust*, 12 Eq. 422 (the distinction there made between a marriage settlement and a voluntary settlement seems unsatisfactory); *In re Bryant*; *Bryant* v. *Hickley*, (1894) 1 Ch. 324. See *In re Lofthouse*, 29 Ch. D. 921.

Trustees under discretion may apply income though father able to maintain.

At the same time, if there is a discretion to apply all or any part of the income in maintenance, there seems no reason to doubt that the trustees may in their discretion apply the income in maintenance, though the father may be able to maintain the

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children; and if the father is himself the trustee and applies the income in maintenance, he cannot be called to account, though he may have been of ability to maintain the children out of his own property. *Malcomson* v. *Malcomson*, 17 L. R. Ir. 69.

If the trustees in such a case do not make any payment to the father for maintenance, he cannot afterwards claim past maintenance; and if they pay over the whole income to him without exercising any discretion, and he spends it without any regard to the question of maintenance, his estate is liable for the amount. *Wilson* v. *Turner*, 22 Ch. D. 521.

Discretion as to time and manner of application.

If there is a trust to apply the income in maintenance, the trustees having a discretion only as to the time and manner of the application, the Court will control the execution of the trust, and if there are two funds will require the trustees to apply the fund, the application of which is most for the benefit of the person to be maintained. *In re Weaver*, 21 Ch. D. 615.

Income of two funds.

If the income of two funds is applicable to maintenance and the trustees do not exercise a discretion as to which income they apply, the Court will exercise the discretion and treat that income applied in maintenance, which it would have been most beneficial for the infant to apply. *Lucas* v. *King*, 11 W. R. 818; *In re Wells; Wells* v. *Wells*, 43 Ch. D. 281.

Sums expended without authority.

A trustee who has, without authority, expended sums for the maintenance of an infant, will be allowed all such sums as the Court would have authorised if it had been applied to. *Brown* v. *Smith*, 10 Ch. D. 377.

When a guardian pays an infant's income to his co-guardian, by whom the infant is properly maintained, the guardian will be allowed such a sum as was proper to be allowed for the maintenance of the infant without vouching the details. *In re Evans; Welch* v. *Chennell*, 26 Ch. D. 58.

Accumulations of income.

It seems that accumulations of income may be applied in maintenance, in subsequent years without express authority. *Edwards* v. *Grove*, 2 D. F. & J. 210.

XV. Discretionary powers generally.

The cases above cited on the question of maintenance are authorities on the view taken by the Court of discretionary powers given to trustees. It may be convenient here to refer to the principal cases.

Where a large discretion is conferred upon trustees, the Court will not interfere with the exercise of the discretion so long as it is honestly exercised. It matters not whether the discretion is expressed in the form of a trust or of a power. *Gisborne* v. *Gisborne*, 2 App. C. 300; *Tabor* v. *Brooks*, 10 Ch. D. 273; *In re Courtier; Coles* v. *Courtier*, 34 Ch. D. 136.

Large discretion not interfered with.

Upon this principle, where there is a trust for sale with power to postpone so long as the trustees think fit, the Court will not, so long as the trustees act in good faith, compel them to sell, or if they decide to sell restrain them from so doing. *In re Norrington; Brindley* v. *Partridge*, 13 Ch. D. 654; *In re Blake; Jones* v. *Blake*, 29 Ch. D. 913; *In re Crowther; Midgley* v. *Crowther*, (1895) 2 Ch. 56; see *Thomas* v. *Williams*, 24 Ch. D. 558.

Power to postpone.

The result is, that if one of the trustees honestly refuses under existing circumstances to concur in exercising a discretionary trust or power, he cannot be made to do so, and the trust or power cannot be exercised. *Marquis Camden* v. *Murray*, 16 Ch. D. 161; *Tempest* v. *Lord Camoys*, 21 Ch. D. 571; *In re Lever; Cordwell* v. *Lever*, 76 L. T. 71; see *Re Atkins; Newman* v. *Sinclair*, 81 L. T. 421.

It is, of course, a question of construction in each case whether the trustees are intended in any particular event to exercise a trust or power which is in terms discretionary.

Thus, if legacies are payable out of the proceeds of sale of real estate and the personalty is insufficient to pay them, it may be the duty of the trustees to exercise a discretionary power to sell the real estate conferred upon them. *Nickisson* v. *Cockill*, 3 D. J. & S. 622; see 34 Ch. D. 140.

If there is a discretionary trust or a power in the nature of a trust, and the trustees decline, or one of the trustees declines, to exercise the discretion, the Court will interfere and exercise the discretion.

Power in nature of a trust.

For instance, where the testator directed his mansion-house to be kept furnished and stocked and gave his trustees power to lease the house and furniture, and one trustee objected to the house being let, the Court compelled the trustees to exercise the power of leasing. *Tempest* v. *Lord Camoys*, 21 Ch. D. 576, n.;

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where the dissentient trustee objected, not to any particular lease, but apparently to any letting whatever. See, too, 34 Ch. D. 140.

Improper exercise of discretion.

The Court will, of course, restrain an improper exercise by trustees of a discretion vested in them. *Tabor* v. *Brooks*, 10 Ch. D. 273; *Bethell* v. *Abraham*, 17 Eq. 24.

Effect of administration action on trustees' powers.

The commencement of an administration action does not put an end to the trustees' powers. For instance, after the commencement of such an action and before judgment, they could exercise a trust for or power of sale, though no doubt a prudent trustee would apply for the sanction of the Court and a prudent purchaser would not complete without notice to the parties to the action. *Cafe* v. *Bent*, 3 Ha. 245, 249; *Turner* v. *Turner*, 30 B. 414; see *Walker* v. *Smalwood*, Amb. 676.

Effect of judgment in administration action.

After judgment in an administration action it may be laid down as a general principle, that ordinary powers and discretions must be exercised subject to the approval of the Court, though the will may confer such a special discretion upon a trustee as the Court will not, even after judgment for administration, control or interfere with, if it is honestly exercised. *Bethell* v. *Abraham*, 17 Eq. 24; *In re Gadd*; *Eastwood* v. *Clark*, 23 Ch. D. 134 (new trustees); *In re Norris*; *Allen* v. *Norris*, 27 Ch. D. 333; and cases cited above. See, too, *In re Mansel*; *Rhodes* v. *Jenkin*, 54 L. J. Ch. 883.

Tenant for life under Settled Land Acts.

Judgment for administration does not, however, affect the powers conferred upon a tenant for life by the Settled Land Acts. *Cardigan* v. *Curzon-Howe*, 30 Ch. D. 531.

Payment into Court.

Payment into Court in an administration action does not put an end to the discretion of trustees over the fund (*a*). But if the trustees pay the fund into Court under the Trustee Act, their discretion is at an end, and if it is a personal discretion it cannot be exercised by the Court (*b*). *Brophy* v. *Bellamy*, 8 Ch. 798 (*a*); *In re Coe's Trust*, 4 K. & J. 199; *Re Ashburnham's Trusts*, 54 L. T. 81; *In re Mulqueen's Trusts*, 7 L. R. Ir. 127; *Re Nettlefold's Trusts*, 59 L. T 315; *In re Murphy's Trust*, (1900) 1 Ir. 145, not following *Re Landon's Trusts*, 40 L. J. Ch. 370 (*b*).

XVI. Power of advancement.

Advancement is a payment to persons, who are presumably entitled to or have a vested or contingent interest in an estate or a 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. Per Cotton, L.J., *Re Aldridge; Abram* v. *Aldridge*, 55 L. T. 554.

Such a power may be limited to minority if the will so directs, for instance, if the power applies only to a child being a minor (*Clarke* v. *Hogg*, 19 W. R. 617); but it seems it is not in an ordinary case limited to minority, though it is as a rule only applicable during the early life of the object. *Re Aldridge*, 54 L. T. 827; 55 L. T. 554.

A power to advance out of a presumptive share ceases when the share has become vested. *Molyneux* v. *Fletcher*, (1898) 1 Q. B. 648.

Whether power applies to an appointed share.

Where a fund is appointed to a child of A under a special power in the will, and the will contains a power to advance any child of A, the power of advancement applies as well to an appointed share as to a share taken in default of appointment. *McMahon* v. *Gaussen*, (1896) 1 Ir. 143; see, too, *In re Hocking; Michell* v. *Loe*, (1898) 2 Ch. 567.

A power of advancement, exercisable with the consent of the tenant for life, may be exercised after the bankruptcy of the tenant for life with his consent and that of his trustee in bankruptcy. *In re Cooper; Cooper* v. *Slight*, 27 Ch. D. 565.

A power of advancement would not justify the payment of a sum to a beneficiary merely to put into his own pocket. But it would justify the payment of a sum for the purpose of making a settlement on the family of the beneficiary, if he has no property producing income. *Roper Curzon* v. *Roper Curzon*, 11 Eq. 452.

And a similar power to apply capital for the advancement or benefit of legatees may authorise payments for their maintenance and support. *In re Breeds' Will*, 1 Ch. D. 227.

Marriage portion.

A power of advancement may justify payment of a marriage portion to a daughter. *Lloyd* v. *Cocker*, 27 B. 645.

Payment to husband.

Such a power would not justify a payment to the husband of a beneficiary without some security for the repayment of the

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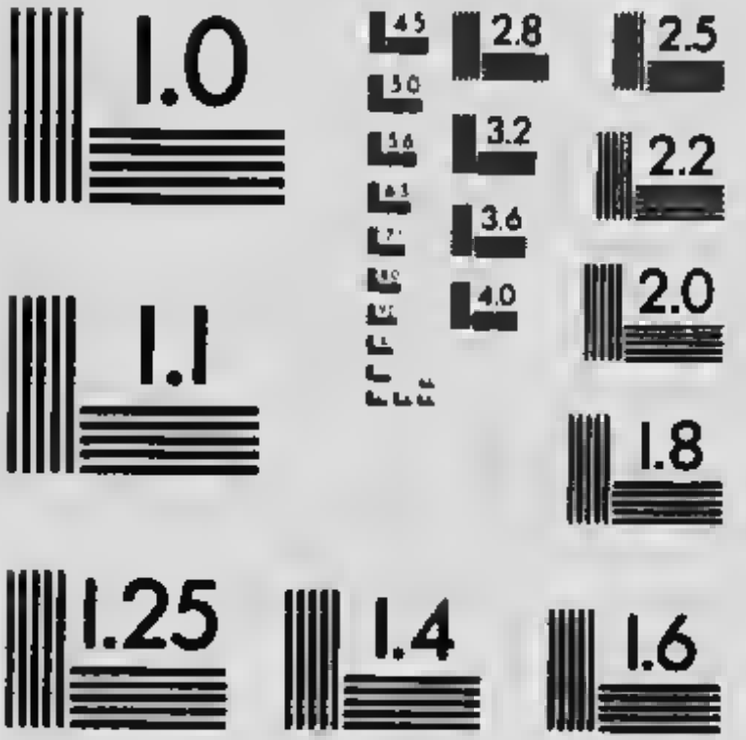

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amount. *Talbot* v. *Marshfield*, 3 Ch. 622; *In re Kershaw's Trusts*, 6 Eq. 322; *Molyneux* v. *Fletcher*, (1898) 1 Q. B. 648.

Payment of debts.

A power to apply a sum for the proferment, advancement, or otherwise for tho henefit of n legatee authorises tho payment of his debts. *Lowther* v. *Bentinck*, 19 Eq. 166; see *In re Brittlebank*; *Coates* v. *Brittlebank*, 30 W. R. 99.

XVII. Appropriation.

The Land Transfer Act, 1897 (60 & 61 Viet. c. 65), s. 4, contains certain provisions as to appropriation, but ns those provisions cannot he put in force without rules, nnd rules havo advisedly not heen made, tho section romains inoperative. It does not affect the power of appropriation whic i existed before the Act, at any rate in cases where there is a trust for conversion. *In re Beverly*; *Watson* v. *Watson*, (1901) 1 Ch. 681.

Appropriation apart from Act.

Apart from the Act, executors and trustees have power, with the consent of a legatee, though he may himself he an executor or trustee, to appropriate any part of the residuary personal estate including leaseholds, in or towards satisfaction of his legacy or share of residue. They also have power to appropriate authorised securities, or securities which they are empowered to retain, in or towards satisfaction of a settled legacy or a settled share of residue. If the appropriation is fairly and honestly made, it is binding on all persons interested in the estate. *In re Lepine*; *Dowsett* v. *Culver*, (1892) 1 Ch. 210; *In re Richardson*; *Morgan* v. *Richardson*, (1896) 1 Ch. 512; *Re Brooks*, 76 L. T. 771; *In re Nickels*; *Nickels* v. *Nickels*, (1898) 1 Ch. 630; *In re Beverly*; *Watson* v. *Watson*, (1901) 1 Ch. 681.

If the residue includes land and is given upon trust for sale, land may be appropriated in like mannor. *In re Beverly*; *Watson* v. *Watson*, (1901) 1 Ch. 681.

Power of administrator.

An administrator has a similar power of appropriation. *Elliott* v. *Kemp*, 7 M. & W. 306; *Barclay* v. *Owen*, 60 L. T. 220.

Appropriation of vested legacy without consent.

Probably in the case of an immediate vested legacy, which is to carry interest at 4 per cent. until paymont, whero the legatee is an infant or cannot be found, the executors can appropriate investments to satisfy the legacy without his consent, and they can stop interest from running hy paying the

legacy into Court under sect. 42 of the Trustee Act, 1893 (56 & 57 Vict. c. 53). *In re Hall; Foster* v. *Metcalfe*, (1903) 2 Ch. 226; *In re Salaman; De Pass* v. *Sonnenthal*, (1907) 2 Ch. 46.

Where there is a contingent legacy not carrying interest, the legatee cannot require the executors to appropriate, and they cannot without his consent appropriate authorised investments in satisfaction of the legacy. The legatee's right is to have his legacy secured. If the executors set aside a reasonable amount to secure it, and owing to depreciation of investments the sum set aside turns out insufficient to pay the legacy, the executors are not liable. *Webber* v. *Webber*, 1 S. & St. 311; *King* v. *Malcott*, 9 Ha. 692, 696; *In re Hall; Foster* v. *Metcalfe*, (1903) 2 Ch. 226.

Effect of valid appropriation.

The effect of a valid appropriation is that the legatee can look only to the appropriated sum. If it diminishes in value he must bear the loss. If it increases in value, he gets the benefit. On the other hand, he is not affected by any diminution in value of the rest of the estate, and after appropriation the executor cannot claim any indemnity against the appropriated sum for liabilities incurred by him in respect of other parts of the estate, nor can he retain any part of the appropriated sum against a debt due from the legatee. *Ex parte Chadwin*, 3 Sw. 380; *Peterson* v. *Peterson*, 3 Eq. 111; *Ballard* v. *Marsden*, 14 Ch. D. 374; *Fraser* v. *Murdoch*, 6 App. C. 855.

On the other hand, a legatee whose legacy has not been appropriated, is not entitled to share in an increase in the value of the residue before appropriation, although the executor is also a residuary legatee. *In re Campbell; Campbell* v. *Campbell*, (1893) 3 Ch. 468.

Direction to appropriate.

Where there was a direction to the trustees to select, appropriate, and set apart so much of the testator's personal estate as would produce 1,500*l.* a year for the benefit of his widow, and the trustee refused to make any selection, it was held that sufficient Consols must be set aside to answer the annuity. *Prendergast* v. *Prendergast*, 3 H. L. 195.

A direction to set apart any investments "hereby" authorised to secure an annuity, authorises the appropriation of invest-

ments named in the will only and not of investments authorised by the Trustee Act, 1893. *In re Orthwaite; Orthwaite* v. *Taylor*, (1891) 3 Ch. 494.

A direction to appropriate by investment on mortgage is satisfied by appropriating a mortgage which already forms part of the estate. *Ames* v. *Parkinson*, 7 B. 379.

Provision as to insufficiency of appropriated fund does not include breach of trust.

Where trustees are directed to set apart a sum to answer an annuity out of the income, with a declaration that if the income should from any cause or circumstance whatever prove insufficient to answer the annuity, the deficiency should be made good out of residue, insufficiency from misappropriation by one of the trustees does not entitle the annuitant to come upon the residue. *Barnett* v. *Sheffield*, 1 D. M. & G. 371.

XVIII. Indemnity.

Trustees are entitled to be indemnified out of the trust estate against all liabilities they incur in the proper execution of their trust.

Extends to damages for tort.

The indemnity extends to damages, for which they are liable owing to the wrongful act of persons properly employed by them for the purposes of the trust, and also to damages recovered against them for an injury to property done in the proper execution of their trust. *Benett* v. *Wyndham*, 4 D. F. & J. 259; *In re Raybould; Raybould* v. *Turner*, (1900) 1 Ch. 199.

The limit of the indemnity is discussed in *Walters* v. *Woodbridge*, 7 Ch. D. 504; *In re Dunn; Brinklow* v. *Singleton*, (1904) 1 Ch. 648.

Indemnity where business carried on.

If they are authorised to carry on a business, they are entitled to an indemnity out of so much of the estate as is authorised to be employed in the business, but not out of estate generally, unless the whole estate is authorised to be employed. *Ex parte Garland*, 10 Ves. 110; *Ex parte Richardson*, 3 Mad. 138; *M'Neillie* v. *Acton*, 4 D. M. & G. 744; *In re Johnson; Shearman* v. *Robinson*, 15 Ch. D. 548; *Jennings* v. *Mather*, (1902) 1 K. B. 1; *Moore* v. *M'Glynn*, (1904) 1 Ir. 334.

Effect of appropriation of legacy.

If they properly appropriate certain funds to a particular legacy, their right to indemnity against the appropriated fund for liabilities incurred, with reference to other parts of the estate, is gone. *Fraser* v. *Murdoch*, 6 App. C. 855.

Lien for

Trustees are also entitled to a lien, for money spent in pro-

serving trust property from destruction, upon the property so preserved.

Salvage money.

For instance, if, being trustees of a policy, they pay the premium out of their own money, they have a charge for the amount.

But if they have trust funds, which they ought to apply to paying the premium, and apply their own money instead, they get no lien. *Clack* v. *Holland*, 19 B. 262.

And a person, whose duty it is to expend certain rents in keeping up a policy, of which he is not a trustee, gets no lien, if the rents are insufficient and he pays the deficiency out of his own pocket. *In re Earl of Winchilsea's Policy Trusts*, 39 Ch. D. 168.

Outlay not authorised.

With regard to outlay made by trustees, which is not authorised by the trust and is not necessary for the preservation of the trust property, they are entitled to a charge on the property for the outlay to the extent to which they can shew that the value of the property has been increased by the outlay. *Vyse* v. *Foster*, 8 Ch. 309; *Rowley* v. *Ginnever*, (1897) 2 Ch. 503.

Right to personal indemnity from *cestui que trust*.

Besides the right of a trustee to be indemnified out of the trust property, he is entitled as against a beneficiary, who is absolute owner, to a personal indemnity against liabilities incurred by him as trustee. The obligation is equitable arising from the relation of the parties, and does not depend on any request or contract. *Hardoon* v. *Belilios*, (1901) A. C. 118; see *Hobbs* v. *Wayet*, 36 Ch. D. 256; *Wise* v. *Perpetual Trustee Co.*, (1903) A. C. 139.

Indemnity founded on request.

A trustee may also have a further personal right to indemnity against a person, at whose request he has accepted the office of trustee and who is himself a beneficiary. See *Fraser* v. *Murdoch*, 6 App. C. 855, 872.

Refunding by legatees.

An executor, who after he has distributed the estate among beneficiaries is called upon to pay a debt of his testator's, may make the beneficiaries refund, but without interest, if he distributed without notice of the debt. He cannot make them refund if he distributes with notice of the debt. But notice of liability, which may possibly ripen into a debt, is not notice

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of a debt for this purpose. *Jerris* v. *Wolferstan*, 18 Eq. 18; *Whittaker* v. *Kershaw*, 45 Ch. D. 320.

Indemnity clauses.

Clauses indemnifying trustees are frequently inserted in wills. Such clauses do not protect trustees against their own negligence or breach of duty. *Knox* v. *Mackinnon*, 13 App. C. 753; *Rae* v. *Meek*, 14 App. C. 558; *Wyman* v. *Paterson*, (1900) A. C. 271.

But an indemnity clause, providing that any trustee enabling his co-trustees to receive any moneys should not be liable to see to the application thereof, has been held to protect a trustee against misappropriation of the trust fund by his co-trustee. *Wilkins* v. *Hogg*, 3 Giff. 116; 10 W. R. 47; *Pass* v. *Dundas*, 29 W. R. 332.

XIX. Care of title deeds and securities

As regards the care of title deeds and securities, trustees should act as prudent business men would. Securities to bearer, money and the like should not be left in the control of one trustee only. On the other hand, there is no reason why one trustee should not have possession of title deeds, certificates of shares and similar documents which cannot be dealt with without fraud. *Lewis* v. *Nobbs*, 8 Ch. D. 591; *Field* v. *Field*, (1894) 1 Ch. 425; *In re Sisson's Settlement; Jones* v. *Trappes*, (1903) 1 Ch. 262.

Deposit of bearer securities.

Even without express authority in the will, trustees, who properly hold bearer securities, may deposit them with their bankers in order that the bankers may cut off the coupons and collect the dividends. *In re De Pothonier; Dent* v. *De Pothonier*, (1900) 2 Ch. 529.

XX. Costs.

A direction, that a solicitor trustee is to be allowed to charge for professional services, will be limited strictly to professional services unless there are words extending the direction to non-professional charges. *Harbin* v. *Darby*, 28 B. 325; *In re Ames; Ames* v. *Taylor*, 25 Ch. D. 72; *In re Chapple; Newton* v. *Chapman*, 27 Ch. D. 584; *In re Fish; Bennett* v. *Bennett*, (1893) 2 Ch. 413; *Clarkson* v. *Robinson*, (1900) 2 Ch. 722; *In re Chalinder and Herington*, (1907) 1 Ch. 58.

XXI. Power to decide questions.

A power to trustees to decide questions does not oust the jurisdiction of the Court. *Massy* v. *Rogers*, 11 L. R. Ir. 409.

Under a simple power to appoint a new trustee the appointor may appoint himself(*a*), but this does not apply to the power conferred by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 10(1), where the power is to appoint "another person" (*b*). *Montefiore* v. *Guedalla*, (1903) 2 Ch. 723(*a*); *In re Skea's' Settlement*, 42 Ch. D. 522; *In re Newen; Newen* v. *Barnes*, (1892) 2 Ch. 297; *In re Sampson; Sampson* v. *Sampson*, (1906) 1 Ch. 435(*b*).

After judgment in an administration action a power to appoint a new trustee must he exercised with the sanction of the Court, hut the judgment does not deprive the person who has the power of the right to nominate the trustee, and if his nominee is not approved he may nominate some one else. *In re Gadd; Eastwood* v. *Clark*, 23 Ch. D. 134.

CANADIAN NOTES.

Testamentary Powers.

Power to sell implies power to lease.

A power to sell given to executors implies a power to lease, where a devisee is entitled to the rents until sale. *Knapp* v. *King*, 15 N.B.R. 309.

Not to exchange.

A power to sell does not authorize an exchange. *Re Confederation Life Assn. & Clarkson*, 6 O.L.R. 606.

Power with consent.

A power to executors to sell with the consent of a named person ceases on the death of that person. *Re Ford*, 7 P.R. 451.

And where executors are given a power of sale if a devisee for life should think proper, the executors take no estate and no power until the consent is given. *Johnson* v. *Kraemer*, 8 O.R. 193.

Where a power to sell is given to a devisee for life with the consent of executors, and the executors do not prove the will, the power cannot be exercised, even where the devisee takes out letters of administration with the will annexed. *Banting* v. *Gummerson*, 24 U.C.R. 287.

Where power is personal.

A direction that no lands shall be sold without the unanimous consent of all the executors, is a personal power to the

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executors, and where one only proves the will the power does not arise. *Kerr* v. *Leishman*, 8 Gr. 435.

And a direction that legacies may be paid in land at a valuation to be fixed by the executor is personal to him, and where after such a direction the testator conveyed his land to his daughter upon trust for himself for life, and thereafter upon the trusts of his will, it was held that she could not exercise the power. *Townsend* v. *Brown*, 22 N.S.R. 423.

Where there was a power to sell with the consent of executors, and one executor died, the Court held the right of the survivors to exercise the power too doubtful to force the title on a purchaser. *Re MacNabb*, 1 O.R. 94.

Power annexed to officer.

But a power of sale to executors, *quâ* executors, can be exercised by a survivor. *Re Ford*, 7 P.R. 456; *Re Koch & Wideman*, 25 O.R. 262.

A power of sale given to executors, *quâ* executors, cannot be exercised by them if they renounce. *Travers* v. *Gustin*, 20 Gr. 106.

Limited as to time.

Executors, to whom a power of sale is given to be exercised within a given time, where there is a charge of debts, may sell thereafter, the limitation being directory only. *Scott* v. *Scott*, 6 Gr. 366.

Implied power.

An appointment of executors to apply the estate in accordance with the directions in the will gives an implied power of sale, where the proceeds of land be sold under a general direction are to be applied in a certain way. *Glover* v. *Wilson*, 17 Gr. 111.

A charge of debts upon land gives the devisee a power of sale though there is also a charge for maintenance imposed on the same land. *McMillan* v. *Wilson*, 21 Gr. 594.

Naked power.

A mere direction that executors shall sell and dispose of land, and shall have power to execute conveyances, gives them a naked power and no estate *Gregory* v. *Connolly*, 7 U.C.R. 500; *Hopkins* v. *Brown*, 10 U.C.R. 125; *Woodside* v. *Logan*, 15 Gr. 145; *Casselman* v. *Hersey*, 32 U.C.R. 333.

And, therefore, executors with such a power only cannot distrain for rent. *Nicholl* v. *Cotter*, 5 U.C.R. 564.

On a devise to named devisees with authority to executors to cause the proceeds of lands sold to be used for the support of the devisees, the executors take no estate. *McDonald* v. *McDonald*, 34 U.C.R. 369.

Power and interest.

A direction to executors or a majority of them to sell and convey, with a residuary devise to one of them who proves the will, gives that one a power coupled with an interest, and enables him to convey alone. *Wessels* v. *Carscallen*, 10 C.P. 215.

Where executors take fee.

A direction that all lands unsold at the testator's death should remain in the hands of executors until they saw fit to make sale, "with full power to act . . . divesting myself of all and singular my estate . . . to them in trust to and for the fulfilment, intent and purposes of my will," was held to give the fee to the executors and not a mere power *Patulo* v. *Boyington*, 4 C.P. 125.

An appointment of three persons "as trustees of my property to be held in trust for the benefit of my wife and children," with a direction to sell, gives the legal estate to the trustees. *Young* v. *Elliott*, 23 U.C.R. 420.

Charge for payment of debts.

A devise, as follows, "half of my lands, etc., I leave in the hands of my executors to pay my debts," gives them the fee. *Dowling* v. *Power*, 5 C.P. 480; *Moore* v. *Power*, 5 C.P. 109.

A devise of land held by the testator on mortgage, subject to a demandant's right of dower, to executors on trust to reconvey on payment of the mortgage money, gives an estate in fee to the executors, and renders them liable to an action for dower. *Low* v. *Sparks*, 14 C.P. 25.

Where lands are devised to trustees for the purposes of the will, and certain parcels are expressly charged with the payment of debts, the trustees may, nevertheless, sell any other lands for the purpose of paying debts, and the purchaser, not having any notice that debts are not all paid, may assume that the trustees are selling properly. *Duff* v. *Mewburn*, 7 Gr. 73; *Little* v. *Aikman*, 28 U.C.R. 337.

But where there is a general charge, and the testator directs that one parcel shall be sold first, and if sufficient is not produced then a second parcel, the executor cannot sell unappro-

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priated lands until he has exhausted those first directed to be sold. *Baker* v. *Mills*, 11 O.R. 253.

Power to sell authorises sale on credit.

A power to sell involves a power to sell on credit, and take a mortgage for unpaid purchase money on the land sold. *Re Graham*, 17 O.R. 570.

Power to sell for debts implies power to mortgage.

On a devise of lands to executors on trust to sell, charged with the payment of debts, they have power to mortgage, and the mortgagee, not having notice of non-payment of debts, gets a good title. *London & Can. L. & A. Co.* v. *Wallace*, 8 O.R. 539. And see *Ewart* v. *Gordon*, 13 Gr. 40; *Nowlan* v. *Logie*, 7 Gr. 90; *Edinburgh Life Assce. Co.* v. *Allen*, 18 Gr. 425.

Statutory Powers.

Statutory powers of trustees to sell or mortgage.

The powers of trustees and executors as to selling and mortgaging are now enlarged and defined by statute.

Where by a will coming into operation after 18th September, 1865, a testator charges his real estate with the payment of his debts or any legacy or specific sum of money, and devises it to trustees for the whole of his estate therein, and does not make provision for raising such debts or legacies, the devisees may sell or mortgage the land for that purpose, notwithstanding the trusts declared. R.S.O. s. 129, s. 16; R.S.B.C. c. 187, s. 6, effective from and after 21st March, 1881.

Where a testatrix directed her executor to pay her debts and devised the land to him, his executors and administrators, (which the Court held to mean heirs and assigns) for his own use during his life, and after his decease to be divided between her children, it was held that under the above section the devisee could mortgage the land for payment of debts. *Mercer* v. *Neff*, 29 O.R. 680.

The powers under the above section extend to any person in whom the estate devised is for the time being vested by survivorship, descent or devise, or any person appointed under the will or by the High Court to succeed to the trusteeship. R.S.O. c. 129, s. 17; R.S.B.C. c. 187, s. 7.

If a testator creates such a charge, and does not devise the land charged in such terms that his whole estate becomes

vested in any trustees, the executors for the time being have the like power, and the power devolves upon and becomes vested in the person in whom the executorship is for the time being vested. R.S.O. c. 129, s. 18; R.S.B.C. c. 187, s. 8.

Where a testator charged his land and affecting to dispose of the residue, specifically devised a part thereof only, and died intestate as to the remainder, it was held that the case fell within this section as the land was undoubtedly charged, and was not devised to trustees, and that the executors could sell the undisposed of lands. *Yost* v. *Adams*, 8 O.R. 411; 13 A.R. 129.

Purchasers or mortgagees are not bound to inquire whether the powers have been duly and correctly exercised. R.S.O. c. 129, s. 19; R.S.B.C. c. 187, s. 10.

The foregoing sections are not to extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate or interest charged with debts or legacies, nor are they to affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do R.S.O. c. 129, s. 20; R.S.B.C. c. 187, s. 9.

Where a testatrix devised lands to her son charged with a legacy in favour of her daughter and provided that in case of the death of either the son or daughter without issue the whole of the property should go to the survivor, and in case of the death of both without issue then to the testatrix's brothers and sisters, it was held that notwithstanding the last preceding section, the executors could sell under the combined effect of the Devolution of Estates Act (Ontario), and section 18, above, or under either of them. Section 20 applies only to the case of a devise of the whole interest of the testator to the same person or persons, either as joint tenants or tenants in common, and not to several persons successively. *Re Ross & Davies*, 7 O.L.R. 433.

Where there is in any will any direction, express or implied, to sell, dispose of, appoint, mortgage, incumber or lease any real estate, and no person is appointed to carry out the direction, the executor may do so. R.S.O. c. 129, s. 21.

An administrator with the will annexed may exercise the powers given in the preceding section where power is given to an executor. *Ibid.* s. 22.

And where there is no person appointed by the will to exercise such powers an administrator with the will annexed may exercise them. *Ibid.* s. 23.

In Manitoba substantially the same enactments have been passed. R.S.M. c. 170, ss. 15 *et seq.*

Carrying on Business.

Carrying on business.

In the absence of a direction by the testator the Court cannot make an order for executors to carry on the business of the testator. *Re Brain*, 9 O.L.R. 1.

Power to executors to carry on, with the testator's surviving partners, the business of a partnership of which he was a member, does not authorize them to put more capital into the business. *Smith* v. *Smith*, 13 Gr. 81.

Investment.

Investment.

Executors in Ontario must invest the moneys of the estate in Ontario, even where the testator, having foreign securities, and having appointed a foreign executor who has proved with the others, directs that his executors shall be guided, as to his foreign securities, by the judgment of his foreign executors. *Burritt* v. *Burritt*, 27 Gr. 143.

Executors who are directed to invest in public securities cannot invest in municipal debentures. *Ewart* v. *Gordon*, 13 Gr. 40.

For statutes regulating the investments of trustees see R.S.O. c. 130; R.S.B.C. c. 187, s. 11; R.S.M. c. 170, ss. 26 *et seq.*; R.S.N.S. c. 151, ss. 3 *et seq.*, and 1 Edw. VII. c. 48.

Powers of Leasing.

Leasing.

A devise to executors on trust to lease, but not to sell, and out of the rents to pay annuities, does not authorize a sale to pay the annuities. *Crawford* v. *Lundy*, 23 Gr. 244.

A direction to distribute and divide land amongst children on the youngest attaining twenty-one, does not authorize a lease for the presumptive period with an option to the lessee to purchase at its expiry, and an agreement by the executors to pay for improvements made by the tenant if he does not purchase. Per Blake, C., that the lease was not authorized. Per Esten, V.C., that it was. *Dalton* v. *McBride*, 7 Gr. 288.

Waste.

Under a direction that the timber, on land devised on trust to rent and pay the surplus rents to a widow *durante viduitate* for herself and the testator's children, remainder to the children, should not be used except for specific purposes, the executors are responsible for the care of the timber. *Stewart* v. *Fletcher*, 18 Gr. 21.

On a devise to a trustee on trust to cultivate, demise, let and manage for the testator's daughters without impeachment of waste, it was held that the trustee was not exonerated from liability for waste, but was empowered to do such acts as he could do if he were a tenant not accountable for waste; that he was not bound to operate a mill on the property, and, if he did not get a tenant for it, that he was not accountable for its unproductiveness; nor was he responsible for selling uncut grass at auction instead of making hay of it. *Dixon* v. *Seaman*, R.E.D. 190.

Maintenance.

Maintenance minors.

Unless the testator specifies the time for its duration, a gift for maintenance imports maintenance during minority only. *Bigelow* v. *Bigelow*, 19 Gr., at page 555; *Macdonald* v. *McLennan*, 8 O.R. 176; *Cook* v. *Noble*, 12 O.R. 81; *Ryan* v. *Cooley*, 15 A.R. 379.

And that is so, though the devise is to the children's mother (the widow) for their and her support during her life, or while she remains a widow, and at her death to the children during their minority, and the mother marries again. *Henry* v. *Gillecce*, 31 C.P. 243.

A charge for maintenance includes medical and nursing attendances, funeral expenses, and solicitor's charges respecting these expenses. *Howe* v. *Carlaw*, 15 O.R. 697.

May extend beyond death.

Where a provision is made for maintenance during a defined period, then, notwithstanding the death of the beneficiary, it will be carried on and paid to his representatives in order to avoid an intestacy. *Dawson* v. *Fraser*, 18 O.R. 496.

Conditional upon residence with named persons.

A charge of maintenance in favour of minors upon land, "so long as they or either of them remain at home" with the devisees of the land, is not forfeited by their not continuing to reside on the land, in consequence of cruel treatment. *Swainson* v. *Bentley*, 4 O.R. 572.

But a devise to sons, with a direction to them to keep the testator's daughters in a suitable manner, and a direction that as long as the daughters kept house for their brothers they should have control of poultry, etc., does not entitle the daughters to be maintained elsewhere than at the sons' houses if they are willing to keep them there. *Re O'Shea*, 6 O.L.R. 315.

Child *en ventre*.

Where a testator provided a stated sum for the support of each of his children (naming them) and a posthumous child was born to him, the Court ordered an equivalent amount to be paid for his support. *Aldwell* v. *Aldwell*, 21 Gr. 627.

Unconditional provision though excessive.

Where the income of personalty was left for the maintenance and education of children unconditionally, and land was devised to two sons, the rents to be used for their education and maintenance, it was held that they were entitled to have part of the income of the personalty applied for their education and maintenance, although the rents were more than sufficient for that purpose, the disposition of the income not being conditional upon its being needed. *Denison* v. *Denison*, 17 Gr. 219; 18 Gr. 41.

An absolute trust for maintenance of the children of A., entitles A. to receive the income for that purpose during his liability to maintain his children, notwithstanding his ability to maintain them without the gift. *Schofield* v. *Vassie*, 1 N.B. Eq. 637.

Interest of contingent gift may be applied.

Where a residue of personalty was bequeathed by a father to his two sons, to be divided between them at twenty-one, the share of a child dying meanwhile to go to the survivor, it

was held that the interest of the fund should be applied for maintenance during minority. *Spark* v. *Perrin*, 17 Gr. 519.

Where capital applied.

Part of a residuary estate being bequeathed to two infant children, at twenty-one, or such previous time as the executors might see fit, the interest thereon to be applied during their minority for maintenance and education, the share of either one dying under twenty-one to go to the survivor, with no gift over, resort was had to the principal for maintenance, the interest proving insufficient, and the legatees having no other means of support. *Re McDougall*, 14 Gr. 609.

Tender of maintenance, refusal.

Where property was charged with the supply of products of the land and personal services to be rendered by the devisees in favour of others, the value of the products may be recovered though a tender of the products was refused, but a refusal to accept services when offered was held to give no right to compensation. *Murray* v. *Black*, 21 O.R. 372.

Property given for maintenance mortgaged.

Under special circumstances property devised to the testator's widow to support herself, and his children during minority, allowed to be mortgaged to raise money for improvements. *Re Bender*, 8 P.R. 399.

Maintenance of widow, ceases on marriage.

A provision for the support of a widow ceases upon her marrying again. As to whether, if she again becomes a widow, she could again claim support, *quære*. *Cook* v. *Noble*, 12 O.R. 81.

When maintenance is charged on land.

A gift of real and personal property to A., on condition that he maintain B., gives B. a charge on the whole property so given. *Cool* v. *Cool*, 3 N.B. Eq. 11.

A provision for support out of "what property I possess" gives a charge upon equitable estates of the testator. *Campbell* v. *Campbell*, 6 Gr. 600.

Such a charge does not give the beneficiary an estate in the land. *Gilchrist* v. *Ramsay*, 27 U.C.R. 500.

Where it gives a power of sale.

A power to executors to "draw upon any of my property" to maintain the testator's widow, gives them power either to sell or mortgage land for that purpose. *Re Crawford*, 4 O.L.R. 313.

Where land was devised to a widow for life charged with maintenance of minors, with a contingent remainder to a son

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to take effect upon events which did not happen before his death, it was held that maintenance and arrears of maintenance could not be charged on the fee. *Perry* v. *Walker*, 12 Gr. 370.

Limited charge.

Maintenance from a residue directed to be divided amongst several children is a charge in favour of each on his own share only. *Gibson* v. *Annis*, 11 Gr. 481.

Land charged though devise fails.

Land charged with maintenance and devised to a witness to the will is charged in the hands of the heir-at-law, who is bound to recoup the devisee for sums paid by him during occupation under the void devise. *Munsie* v. *Lindsay*, 11 O.R. 520.

Subrogation of person furnishing maintenance.

Where a stepson maintained the testator's widow, who had a charge for maintenance on land devised for that purpose, it was held that on administration he was entitled to be subrogated to the rights of the widow and to have a first charge on the land for sums expended. *Re Howey*, 21 Gr. 485.

Discretionary Powers.

Discretionary powers.

Where executors are given discretionary powers, either of conversion of maintenance, the Court, in the absence of improper conduct will not interfere with or control the exercise of their discretion. *Foreman* v. *McGill*, 19 Gr. 210; *Cowan* v. *Besserer*, 5 O.R. 624; *Re Parker*, 20 Gr. 389; *Rowsell* v. *Winstanley*, 7 Gr. 141; *Re Curry*, 23 Gr. 277.

Where a legacy was given to A., with such other provision as the executors should deem proper, and a devise was made to B., "except in so far as any reservation shall be made by my executors in favour of" A., it was held that the executors had properly exercised their power by conveying to A. a life estate in part of the land devised to B. *McKenzie* v. *Grant*, 13 U.C.R. 180.

Where the purpose of the power or trust becomes impracticable, the Court will act. *Atty.-Gen.* v. *Power*, 35 N.S.R. 526; 35 S.C.R. 182.

Refunding.

By R.S.O. c. 129, s. 34, all creditors are placed on an equal footing, and an executor cannot prefer one to another, therefore, where a creditor was paid in full, and a deficiency of assets occurred, the executors being insolvent, the Court ordered the creditor who had been paid in full to refund the excess over his proportionate share, at the instance of other creditors. *Chamberlen* v. *Clark*, 1 O.R. 135; 9 A.R. 273.

Where an executor by mistake made over-payments of interest on a legacy, it was held that he was entitled to a refund of the excessive payments without interest. *Barber* v. *Clark*, 20 O.R. 522; 18 A.R. 435.

But where a residue was distributed, under an administration by the Court, in the absence of legatees entitled thereto, who could not be found, the recipients were ordered to refund with interest from the date of the proceedings taken to compel the re-fund. *Uffner* v. *Lewis, Boys' Home* v. *Lewis*, 5 O.L.R. 684.

CHAPTER XXXVIII.

ADMINISTRATIVE POWERS OF THE COURT.

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Jurisdiction of Court.

THE question of the jurisdiction of the Court to authorise things to be done in the administration of an estate, which are not authorised by the instrument, under which the estate passes, has been much discussed in recent cases.

Whether strictly limited by the instrument.

It has sometimes been thought that the Court can authorise nothing, which upon a proper construction of the instrument, could not have been done by the trustees. *Re Crawshay*, 60 L. T. 357; *In re Morrison; Morrison* v. *Morrison*, (1901) 1 Ch. 701.

Jurisdiction (1) as regards infants; (2) as regards trustees.

But this view, having regard to recent authority, is too narrow. The Court has a twofold jurisdiction. As regards infants, it has certain original powers derived from the prerogative of the Crown as *parens patriæ*. It also exercises a jurisdiction over trustees. In what follows, jurisdiction specially conferred on the Court by statute is left out of consideration.

I. Jurisdiction over infants.

First, as regards infants: "The King is an universal guardian to infants, and ought, in the Court of Chancery, to take care of their fortunes. . . . For allegiance and protection are reciprocal." 2 Fonb. on Equity, 225; *In re Spence*, 2 Ph. 247; *Reg.* v. *Gyngall*, (1893) 2 Q.B. 232, 239.

In theory this jurisdiction may be unlimited, but by a long course of practice the Court has imposed certain limits upon its exercise, though those limits are by no means easy to define.

Real estate of infant cannot be sold.

It appears to be settled that the Court will not dispose of an infant's real estate, either by way of sale(*a*) or lease(*b*), or mortgage(c), merely because it may be for the infant's benefit to do so. *Brookfield* v. *Bradley*, Jac. 634; *Calvert* v. *Godfrey*,

6 B. 97; *Garmstone* v. *Gaunt*, 1 Coll. 577; *Daly* v. *Daly*, 2 J. & Lat. 752, 758; *In re Staines; Staines* v. *Staines*, 33 Ch. D. 172 (*a*); *Russel* v. *Russel*, 1 Moll. 525 (*b*); *Harbroe* v. *Combes*, 43 L. J. Ch. 336 (*c*).

The ground of this rule is not that a sale would alter the devolution of the property, as the rights of the heir could have been preserved by the order. *A.-G.* v. *Marquis of Ailesbury*, 12 App. C. 672.

Power to charge maintenance on real estate.

The Court has made an order charging the costs of past maintenance of an infant upon real estate belonging to him in fee simple in possession, on the ground that judgment could have been obtained against the infant, which would have bound his real estate. But the case has been doubted, and such an order cannot be made for future maintenance or where the infant's interest is subject to a prior life interest. *In re Howarth*, 8 Ch. 415; *In re Hamilton*, 31 Ch. D. 291; *Cadman* v. *Cadman*, 33 Ch. D. 397.

Power to raise money for necessary repairs.

Where an infant is absolutely entitled to real estate, the Court may allow money to be raised by mortgage of the estate for repairs or improvements which are absolutely necessary. *Glover* v. *Barlow*, 21 Ch. D. 788, n.; *In re Jackson; Jackson* v. *Talbot*, 21 Ch. D. 786.

Purchase of land.

With regard to the investment of an infant's personalty in the purchase of land there is less difficulty. It would seem that such an investment will be made merely on the ground of benefit to the infant, but, as a matter of practice and not of law, the purchase will be carried out so as to preserve the right of the legal personal representatives, if the infant dies before attaining his majority. *Witter* v. *Witter*, 3 P. W. 99; *Ware* v. *Polhill*, 11 Ves. 257, 278. See, too, per Jessel, M.R., in *Wallace* v. *Greenwood*, 16 Ch. D. 362, 366. In *Pierson* v. *Shore*, 1 Atk. 479, the new lease was held to have been taken under the power conferred on the trustee to make purchases for the benefit of the infant. In *Inwood* v. *Twyne*, Amb. 417, the infant attained majority and confirmed the purchase.

Sale of chattels.

As regards personalty, probably an infant's leaseholds and specific chattels, such as valuable pictures, plate, and the like, are in the same position as land. They cannot be sold merely

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because it would be for the infant's benefit to sell them. See *Ex parte Dikes*, 8 Ves. 79 (a case of a lunatic's leasehold); *D'Eyncourt* v. *Gregory*, 3 Ch. D. 635.

Reversionary interests in personalty.

It has been said that the Court has no power to sell an infant's reversionary interest in personalty. But there appears to be no authority in point, and in *Nunn* v. *Fabian*, 6 Ch. 850, the Court did not favour the view, that such an interest could not be sold. See, too, *In re Wells; Boyer* v. *Maclean*, (1903) 1 Ch. 848.

Power to charge infant's reversion.

And the Court will create a charge upon an infant's contingent interest in a legacy or share of residue to secure payments to be made for the maintenance of the infant out of money, in which he has only a contingent interest, if the repayment of the money can be thereby satisfactorily secured. *Re Arbuckle*, 14 W. R. 535; *De Witte* v. *Palin*, 14 Eq. 251; *In re Colgan*, 19 Ch. D. 305.

Scheme to give up large contingency for smaller certainty.

It is a somewhat different question whether the Court can authorise a scheme under which infants give up a large contingency for a smaller certainty.

Suppose a fund is given to the children of A living at the death of B, who is alive. There are four children of A, one of whom is an infant. A is dead. The three adult children desire to divide the estate at once on the basis that each child shall take a fourth, not subject to defeasance by death before B. The arrangement is for the benefit of the infant. Has the Court power to sanction it on his behalf? Knight Bruce, V.-C., in two cases thought that such an arrangement could not be sanctioned, but this view has not been followed in a recent case. *Peto* v. *Gardner*, 2 Y. & C. C. 312; *Day* v. *Day*, 9 Jur. 785; *In re Wells; Boyer* v. *Maclean*, (1903) 1 Ch. 848.

It would not be safe to assume, that the earlier authorities are not to be followed.

Power as to compromises.

The Court has large powers of sanctioning compromises on behalf of infants. *Brooke* v. *Lord Mostyn*, 2 D. J. & S. 415.

In that case Turner, L.J., limits the power to compromise to equitable interests and bases it upon the jurisdiction, which the Court exercises over trustees. If, however, the jurisdiction of

the Court over infants is derived from the prerogative of the Crown, there is no reason for limiting it to equitable interests.

Maintenance allowed on contingent shares where the chances are all equal.

Where a fund is given on trust for a class of children who attain twenty-one, with a direction, that the income is to be accumulated and go with the capital, then inasmuch as the chances of the infants are all equal, maintenance will be allowed for them out of the income, if the persons entitled in the event of no infant attaining twenty-one consent. It is not material that the class may be increased by the birth of other children. *Errat* v. *Barlow*, 14 Ves. 202; 4 Mad. 278; *Haley* v. *Bannister*, 4 Mad. 275; *In re Breeds' Will*, 1 Ch. D. 226.

And this principle has been extended to the case, where the fund and accumulations are given to one member of a family, if he attains twenty-one, with a gift over, if he does not, to other members of the same family in the same terms. Maintenance will be allowed for all the members of the family. *Cavendish* v. *Mercer*, 5 Ves. 195, n.; *Greenwell* v. *Greenwell*, 5 Ves. 194.

II. Jurisdiction over trustees.

The Court also has a jurisdiction arising out of its power of controlling trustees. Although, as a general rule, it has no larger power in administering an estate than the trustees would have had, there are certain special cases in which, in order to give effect to the prevailing intention of a testator or settlor, a departure from subordinate directions, which in the events that have happened are in conflict with his main intention, may be authorised.

Allowance of maintenance to give effect to paramount intention.

Testators not unfrequently devise an estate with provisions for accumulating the rents during a minority without any or a very insufficient provision for the maintenance and education of the person, who if he attains twenty-one, will come into possession of a large income.

In such cases the Court considers, whether there is not a paramount intention, that the infant, when he attains twenty-one, should come into full enjoyment of the estate, which he will not do, unless a proper allowance is made for his maintenance, and for keeping up the establishment. If such a paramount intention exists, subordinate directions for accumulation must give way to it.

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Therefore when an accumulation is directed for a certain period and the accumulations are to be invested in land which is strictly settled, an allowance may be made to the tenant for life in order to enable him to educate his children, who will inherit the estate after him. *Harclock* v. *Harclock*: *In re Allan*, 17 Ch. D. 807, considered in *In re Smeed*; *Archer* v. *Pratt*, 54 L. T. 929; *In re Collins*; *Collins* v. *Collins*, 32 Ch. D. 229.

The Irish Courts have refused to follow the principle of *Havelock* v. *Havelock*. *Shaw* v. *M'Mahon*, 8 Ir. Eq. 584; *Kemmis* v. *Kemmis*, 15 L. R. Ir. 90.

In like manner an allowance may be made for the education of an infant tenant for life or tenant in tail in possession and the maintenance of a proper establishment. *Griggs* v. *Gibson*, 14 W. R. 538; *In re Walker*; *Walker* v. *Duncombe*, (1901) 1 Ch. 879.

If the tenant for life has attained twenty-one, and there is no mansion house to keep up and nothing to show that he was intended to reside on the estate, an allowance made during minority cannot be continued, while a trust for accumulation subsists. *In re Alford*; *Hunt* v. *Parry*, 32 Ch. D. 383.

Again, where the rents of land are directed to be applied in paying debts, an allowance may be made out of the rents to the tenant for life to enable him to live, if the creditors do not object. *Revel* v. *Watkinson*, 1 Ves. Sen. 93; *Bennett* (or *Benett*) v. *Wyndham*, 23 B. 521; 4 D. F. & J. 259.

Improvements and repairs.

Where there is no power given to trustees to lay out money in improvements or repairs, and the Settled Land Acts do not apply, the Court will allow money to be laid out in repairs and improvements and charged upon the property or paid out of personalty held upon the same trusts as the realty only (1) if the case is one of salvage, or (2) if it is one in which, if the Settled Land Acts applied, the expenditure could be allowed under those Acts. *In re De Teissier's Settled Estates*; *De Teissier* v. *De Teissier*, (1893) 1 Ch. 153; *In re Montagu*; *Derbishire* v. *Montagu*, (1897) 2 Ch. 8; *In re Hurst*; *Hurst* v. *Hurst*, 29 L. R. Ir. 219; *In re Willis*; *Willis* v. *Willis*, (1902) 1 Ch. 15; *In re Legh's Settled Estate*, (1902) 2 Ch. 274; *Neill* v. *Neill*, (1904) 1 Ir. 513; *Hibbert* v. *Cooke*, 1 S. & St.

552; *Frith* v. *Cameron*, 12 Eq. 169, were considered in *In re Montagu; Derbishire* v. *Montagu*, (1897) 2 Ch. 8. *Conway* v. *Fenton*, 40 Ch. D. 512, was a case, in which probably the expenditure would, since the Settled Land Act, 1890, be allowed. See, too, *In re Household; Household* v. *Household*, 27 Ch. D. 553.

Breach of trust not authorised because beneficial.

The Court does not authorise a departure from the trusts of an instrument merely because such a departure would be for the advantage of the persons interested.

For instance, where property is directed to be sold at a certain time, it does not authorise an earlier sale (*a*) on the ground that it would be beneficial, nor does it authorise an unauthorised investment to be made (*b*) merely on that ground. *Blacklow* v. *Laws*, 2 Ha. 40; *Johnstone* v. *Baker*, 8 B. 233 (*a*); *In re Tollemache*, (1903) 1 Ch. 955 (*b*).

Temporary arrangements allowed to carry out the principal intention.

But difficulties constantly arise in the administration of estates which are not provided for. An estate is directed to be sold. It turns out that it is unsaleable except at a heavy sacrifice, but the market is likely to improve. There is no power to carry on the testator's business, yet it cannot be realised at once without serious loss. Again, a business is directed to be sold for cash, but the most beneficial mode of sale is found to be its conversion into a company under a scheme by which the executors are to take shares and debentures. In all these cases, if sufficient cause is shown, the Court may authorise the sale to be postponed, the business to be carried on, or the executors to accept for the business, and hold for a limited time shares and debentures in a company. *In re Neu*, (1901) 2 Ch. 534. See *In re Tollemache*, (1903) 1 Ch. 457, where a number of cases are mentioned in which the Court has exercised this jurisdiction.

In all these cases the Court to meet a particular emergency authorises a temporary departure from the trusts with a view to carry them out more effectually.

CHAPTER XXXIX.

ABSOLUTE INTERESTS IN PERSONALTY.

I.—Bequests of Personalty with Words of Limitation.

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Bequest to A and his executors or representatives.

1. It is clear that a bequest to A and his executors, or to A and his representatives, gives A the absolute interest, the additional words being merely words of limitation. *Lugar* v. *Harman*, 1 Cox, 250; *Taylor* v. *Beverley*, 1 Coll. 108; *Appleton* v. *Rowley*, 8 Eq. 139.

Bequest to A for life and then to his executors.

So, too, a gift to A for life, and then to his executors or administrators, or to his personal representatives, gives A the absolute interest. *A.-G.* v. *Malkin*, 2 Ph. 64; *Saberton* v. *Skeels*, 1 R. & M. 587; *Alger* v. *Parrott*, L. R. 3 Eq. 328; *Acern* v. *Lloyd*, 5 Eq. 383; *Wing* v. *Wing*, 24 W. R. 878.

It is immaterial that the life interest is determinable. *Webb* v. *Sadler*, 14 Eq. 533; 8 Ch. 419.

In what case the executors take beneficially.

If, however, the gift is to A for life, and then to his executors or administrators for their own use and benefit, they will take beneficially. *Sanders* v. *Franks*, 2 Mad. 147; *Wallis* v. *Taylor*, 8 Sim. 241.

But the intention that the executors are to take beneficially must be unmistakably plain. *Stocks* v. *Dodsley*, 1 Kee. 325.

A gift to A for life with power to appoint by will and in default of appointment to his executors and administrators, gives an absolute interest and entitles the donee to immediate payment, and it is apparently not necessary that the power should be released. *Derall* v. *Dickens*, 9 Jur. 550; *Page* v. *Soper*, 11 Ha. 321.

Bequest to A and his heirs.

2. A bequest of personalty to a man and his heirs would no doubt pass the absolute interest.

So, too, a bequest to A and the heirs of his body, or to A and the heirs of his body in equal proportions, gives A an absolute interest in personalty. *Lercuthorpe* v. *Ashbie*, Rolle's Ab. 831, pl. 1; *Seale* v. *Seale*, 1 P. W. 290; *In re Barker's Trusts*, 52 L. J. Ch. 565.

Bequest to A and the heirs of his body.

It seems that in wills before the Wills Act, if the gift is to A for life, and if he die without issue over, an absolute interest will not be given to A by implication, though if the property had been real estate, A would have taken an estate tail. *Proctor* v. *Upton*, cit. 5 D. M. & G. 199, n.; *In re Banks' Trust; Ex parte Horill*, 2 K. & J. 387; see *A.-G.* v. *Bayley*, 2 B. C. C. 553; *Chandless* v. *Price*, 3 Ves. 98; *Bolens* v. *Lord Galway*, 2 Ed. 297.

Bequest to A for life and if he dies without issue over before the Wills Act.

On the other hand, a gift to A for life and then to the heirs of his body, and if he die without issue over, gives A an absolute interest. *Butterfield* v. *Butterfield*, 1 Ves. Sen. 133; *Threbridge* v. *Kilburne*, 2 Ves. Sen. 233; *Williams* v. *Lewis*, 3 Dr. 669; 6 H. L. 1013; see, too, *Elton* v. *Eason*, 19 Ves. 73; *Garth* v. *Baldwin*, 2 Ves. Sen. 646; *Tothill* v. *Pitt*, 1 Mad. 488; *S. C.* sub nom. *Earl of Chatham* v. *Tothill*, 7 B. P. C. 453; *Bronnicker* v. *Bagot*, 19 Ves. 574; 1 Mer. 271.

Bequest to A for life and then to the heirs of his body followed by a gift over.

If, in wills before the Wills Act, the gift over upon failure of issue can be limited to failure of issue at the death of the tenant for life, a prior gift to A and the heirs of his body gives A an interest defeasible upon failure of issue at his death. *Read* v. *Snell*, 2 Atk. 642; *Hodgeson* v. *Bussey*, 2 Atk. 89; *Paine* v. *Stratton*, 2 Atk. 647; 3 B. P. C. 257; Fearne, C. R. 494.

In these cases the testator has shown a clear meaning, that the property should go in a course of devolution, till there is an exhaustion of heirs of the body; and, as this intention cannot be carried into effect, the Court gives an absolute interest in personalty. See *Ex parte Wyneh*, 5 D. M. & G. 188.

But if such an intention is not manifested, it seems that the Courts will be unwilling to apply the rules of tenure to personal estate, and it must be collected from the general language of the will, whether the words heirs and heirs of the body are intended to be words of limitation or purchase.

In what cases heirs of the body will be words of limitation in bequests since the Wills Act.

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A gift to A for life and to her heirs after her is an absolute gift. *Atkinson* v. *L'Estrange*, 15 L. R. Ir. 340.

And, if the bequest is to A for life, and after her decease to her heirs as she shall give it by will, and if she die without a will to her right heirs for ever, the term right heirs is equivalent to executors and administrators. *Powell* v. *Boggis*, 35 B. 535.

So if the intention is to create a succession of estates, as in a gift to A for life and after his decease to the heirs male of his body, and so in succession, A takes an absolute interest. *Britton* v. *Twining*, 3 Mer. 176; see *Cleary's Trusts*, 16 Ir. Ch. 438; *Sparling* v. *Parker*, 29 B. 450.

Words of distribution superadded make the word heirs a word of purchase.

But if there is anything to show that the heirs were to take by purchase; if, for instance, they are to take as tenants in common, the life estate will not be enlarged, whether there is a gift over in default of issue or not. *Bult* v. *Comberbach*, 25 B. 540; *Jacobs* v. *Amyott*, 4 B. C. C. 542; *Jeaffreson's Trust*, L. R. 2 Eq. 276; see, too, *In re Russell*, 53 L. J. Ch. 400; revd. 52 L. T. 559.

So, too, in a gift to A for life with a direction that he was to have no power over the property beyond its legal vestment for conveyance, &c., and after his decease to his heirs, A took only a life interest in the personalty, though he took the realty in fee. *Herrick* v. *Franklin*, 6 Eq. 593; see *Comfort* v. *Brown*, 10 Ch. D. 146.

Whether the same construction will be adopted as regards realty and personalty where they are given together.

The better opinion seems now to be, that the Court will not shrink from giving a different construction to the words heirs and heirs of the body as regards realty and personalty, though given together in the same clause. *Herrick* v. *Franklin*, *supra*.

3. The word issue is less "mysteriously inflexible" than the words heirs of the body, and therefore in a gift of personalty to A and his issue it may be a word of limitation or of purchase, in which latter case the same question arises as in gifts to A and his children, whether A and the issue take jointly or whether the issue take subject to a life interest in A.

Bequests to a person and his issue.

a. Primâ facie it seems a gift of personalty to A and his issue, as it would give A an estate tail in realty, gives him an absolute interest in personalty. This seems clear, when there

is a gift over in default of issue, for the limitation over shows, that the gift is meant to extend to all the issue, and all the issue might not be capable of taking jointly with the parent. *Lyon* v. *Michell*, 1 Mad. 467; *Beaver* v. *Nowell*, 25 B. 551; *Re Andrews' Will*, 27 B. 608; *Donn* v. *Penny*, 1 Mer. 20; 19 Ves. 514; *Gibbs* v. *Tait*, 8 Sim. 132.

And apparently the same rule will hold good even where there is no gift over. *Harvey* v. *Towell*, 7 Ha. 231; *Samuel* v. *Samuel*, 9 Jur. 222; *Prentice* v. *Brooke*, 5 L. R. Ir. 435; but *quære*.

The case is stronger in favour of this construction, if it is a gift of realty and personalty together, or if personalty is directed to go in the same way as realty. *Parkin* v. *Knight*, 15 Sim. 83; *Tate* v. *Clarke*, 1 B. 100.

b. If, however, there is any evidence, that the testator did not use the word as a word of limitation, by the use of expressions implying, either that the parent and issue take concurrently: *Clay* v. *Pennington*, 7 Sim. 370; *Law* v. *Thorpe*, 27 L. J. Ch. 619; or that the issue take after the parent's death as purchasers; *Lampley* v. *Blower*, 3 Atk. 396; *Parsons* v. *Coke*, 4 Dr. 296; or that they are to take by substitution, by directing, for instance, that the issue are to take *per stirpes*: *Butler* v. *Ommaney*, 4 Russ. 70; *Pearson* v. *Stephen*, 5 Bl. N. S. 203; *Dick* v. *Lacy*, 8 B. 214; *Re Stenhope's Trusts*, 27 B. 201; the issue will take by purchase.

In what cases issue will be a word of purchase.

c. If the gift of personalty is to A for life and then to his issue, or to his issue in tail male, whether there is a gift over in default of issue or not, A takes only an estate for life. *Knight* v. *Ellis*, 2 B. C. C. 569; *Ex parte Wynch*, 5 D. M. & G. 188; *Goldney* v. *Crabb*, 19 B. 338; *Foster* v. *Wybrants*, I. R. 11 Eq. 40; *Sheridan* v. *O'Reilly*, (1900) 1 Ir. 386; *In re Cullen's Estate*, (1907) 1 Ir. 73.

Bequests to A for life and then to his issue.

And the same rule applies with regard to the personalty, where real and personal property are given together, unless there is something to show that the personalty was to go in the same manner as the realty.

"Except in a case where the personalty is either quite subordinate in value or a mere adjunct of the realty, as, for

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example, a leasehold garden held togother with a frechold house, it is very difficult to givo any sound logical reason for the proposition, that an intention that tbe two kinds of property should go together ought to carry the whole in accordance with the rules applicable to realty rather than those which would apply to a bequest of personalty alone." Per Lord Hatherley, *Jackson* v. *Calvert*, 1 J. & H. 235.

But, though only a life estato may be given to the ancestor, if tho issue aro to take successively according to seniority, and not conjointly, issue will be treated as a word of limitation. *Jordan* v. *Lowe*, 6 B. 350.

II.—Gifts of the Income of Property Indefinitely.

A gift of the income of property to a person, without limitation as to time, is a gift of the capital, where no other disposition of the capital is made.

Gift of income without more is a gift of *corpus*.

This is tho case, though the gift may be to the separate use, or through the medium of a trust. *Elton* v. *Shepherd*, 1 B. C. C. 532; *Phillips* v. *Chamberlayne*, 4 Ves. 51; *Rawlings* v. *Jennings*, 13 Ves. 39; *Boosey* v. *Gardner*, 18 B. 471; *Haig* v. *Swiney*, 1 S. & St. 487; *Humphrey* v. *Humphrey*, 1 Sim. N. S. 536; *Watkins* v. *Weston*, 32 B. 238; 3 D. J. & S. 434; *Penny* v. *Pippin*, 15 W. R. 306; *In re Tandy*; *Tandy* v. *Tandy*, 34 W. R. 748; *Davidson* v. *Kimpton*, 18 Ch. D. 213; *Re Coward*: *Coward* v. *Larkman*, 56 L. T. 278; 57 L. T. 285; 60 L. T. 1; *In re Morgan*; *Morgan* v. *Morgan*, (1893) 3 Ch. 222; see *In re L'Herminier*; *Mounsey* v. *Buston*, (1894) 1 Ch. 675.

A gift of the dividends of stock for the first six months in each year to A and for tho second six months to B makes A and B tenants in common of the capital. *Tredennick* v. *Tredennick*, (1900) 1 Ir. 354.

A fund given on trust for A until B conveys certain property as directed by the will, and then to divide tho fund equally between A and B, becomes tbe absolute property of A on B dying an infant. *Lowther* v. *Cavendish*, 1 Ed. 99; 3 B. P. C. 186.

Income during widowhood.

A gift of income during widowhood is a gift for life or during widowhood; but a gift of income to a legatee so long as she

should continue single and unmarried has been held to be an absolute interest, if the legatee did not marry. *Rishton* v. *Cobb*, 5 M. & Cr. 145; see 25 Ch. D. 689; *In re Howard*; *Taylor* v. *Howard*, (1901) 1 Ch. 412.

In the same way a gift of the income of property, with a power superadded of disposing of it by will, is an absolute interest. *Southouse* v. *Bate*, 16 B. 132; *Weale* v. *Ollive*, 32 B. 421.

The fact that legacies are given at the decease of the person, to whom the income is given indefinitely, will only cut down the absolute interest to the extent of the legacies. *Jennings* v. *Baily*, 17 B. 118.

Upon similar principles, a gift of income to A for life, and then to B indefinitely, gives B the absolute interest. *Clough* v. *Wynne*, 2 Mad. 188.

But a gift of income to B and C and the survivor of them gives them only life interests. *Blann* v. *Bell*, 2 D. M. & G. 775; see *In re Tandy*; *Tandy* v. *Tandy*, 34 W. R. 748. Contrary intention.

III.—Property and Power.

1. A devise of lands to be at the discretion of A, or of personal property to be at the disposal of A, or to be disposed of as A thinks fit without any direct gift to A, gives A the absolute property. *Whiskon and Clayton's Case*, 1 Leon. 156; *Nowlan* v. *Walsh*, 4 Do G. & S. 584; *In re Maxwell's Will*, 24 B. 246; *Kellett* v. *Kellett*, L. R. 3 H. L. 160. 1. Property to be at disposal of A.

The same construction has been adopted when a fund was to be at the disposal of A by will. *Robinson* v. *Dusgate*, 2 Vern. 181, a doubtful case unless there was a gift to the wife in the first instance. Disposal by will.

Of course, a mere power to dispose of property among a particular class gives no property to the donee of the power. *Birch* v. *Wade*, 3 V. & B. 198; *Blakeney* v. *Blakeney*, 6 Sim. 52. Power to dispose among a class.

2. Where there is an absolute gift a superadded power to dispose of the property by will or at the donee's death does not cut down the absolute gift. And this is the case, though there may 2. Absolute interest with power superadded.

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be a gift over in default of the donee disposing of the property. *Maskelyne* v. *Maskelyne*, Amb. 750; *Hales* v. *Margerum*, 3 Ves. 299; *Bull* v. *Kingston*, 1 Mer. 314; *Hixon* v. *Oliver*, 13 Ves. 108; *Comber* v. *Graham*, 1 R. & M. 450; *Southouse* v. *Bate*, 16 B. 133; *In re Mortlock's Trust*, 3 K. & J. 456; *Weale* v. *Ollive*, 32 B. 421.

And even a superadded power to dispose of the property among a particular class will not cut down the absolute interest previously given. *Brook* v. *Brook*, 3 Sm. & G. 280; *Howarth* v. *Dewell*, 29 B. 18.

3. Absolute interest with explanatory words added.

3. Sometimes a testator gives an absolute interest and then adds words expanding the conception of an absolute interest, but omitting some of its incidents; for instance, by a devise of lands in fee with the intention that the devisee may enjoy the same for life and by will dispose of the same, or by a bequest to a legatee to be enjoyed during her life and disposed of as she shall think fit at her death. In such cases the absolute interest remains. *Doe* d. *Herbert* v. *Thomas*, 3 A. & E. 123; *In re Davids' Trusts*, Jo. 495.

4. Particular interest with superadded power.

4. "Where there is a particular limited interest and this sort of power, liberty or authority, though the latter, without a particular partial limited interest pointed out, might have amounted to an absolute gift, yet where both occur the gift is held to be of the limited interest and the other to be but a power and not an interest." *Nannock* v. *Horton*, 7 Ves. 391, 398.

Thus if the gift is to A for life, with a superadded power to dispose of the whole for his own benefit, A takes only a life interest if he does not exercise the power. *Archibald* v. *Wright*, 9 Sim. 161; *Bradley* v. *Westcott*, 13 Ves. 445; *Reith* v. *Seymour*, 4 Russ. 263; *Scott* v. *Josselyn*, 26 B. 174; *Pennock* v. *Pennock*, 13 Eq. 144; *In re Stringer's Estate*; *Shaw* v. *Jones-Ford*, 6 Ch. D. 1; *In re Thomson's Estate*; *Herring* v. *Barrow*, 14 Ch. D. 263; *In re Pounder*; *Williams* v. *Pounder*, 56 L. J. Ch. 113; 56 L. T. 104; *In re Richards*; *Uglow* v. *Richards*, (1902) 1 Ch. 76.

And when the tenant for life has power to go to the principal only if the income is insufficient, she is entitled only to so much of the capital as will afford a suitable maintenance. *Re*

Pedrotti's Will, 27 B. 583; see *Re Fox; Fox* v. *Fox*, 62 L. T. 762.

In some cases upon the context where a life interest only has been given in the first instance, with a power of disposition added, it has been held that the legatee took an absolute interest though he did not exercise the power. *Hoy* v. *Master*, 6 Sim. 568; *Reid* v. *Carleton*, (1905) 1 Ir. 147.

5. Gifts for life with power to appoint and in default to executors.

5. A gift to A for life with remainder as A shall by deed or will (*a*), or by will only (*b*), appoint, with a limitation in default of appointment to his executors and administrators, is an absolute gift, and the fund may be paid over to the legatee without an appointment. *Holloway* v. *Clarkson*, 2 Ha. 521; *Cambridge* v. *Rous*, 25 B. 574 (*a*); *Devall* v. *Dickens*, 9 Jur. 550; *Page* v. *Soper*, 11 Ha. 321; *In re Onslow; Plowden* v. *Gayford*, 39 Ch. D. 622; *In re Davenport; Turner* v. *King*, (1895) 1 Ch. 361 (*b*).

Life tenant with power to appoint absolutely entitled to a share subject to the power.

Where a father is tenant for life, with power to appoint to his children, who take absolutely in equal shares in default of appointment, and a child dies intestate so that the father becomes entitled to his share in default of appointment, the father on surrendering his life interest and releasing his power so far as that child's share is concerned, is entitled to payment of the share. *Smith* v. *Houblon*, 26 B. 482; *In re Radcliffe; Radcliffe* v. *Bewes*, (1892) 1 Ch. 227, not following *Cunynghame* v. *Thurlow*, 1 R. & M. 436, n.

IV.—Effect of Subsequent Restrictions upon Absolute Interests.

Absolute gift remains if subsequent restrictions fail.

"If you find an absolute gift to a legatee in the first instance and trusts are engrafted or imposed on that absolute interest which fail either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed, to the exclusion of the residuary legatee or next of kin as the case may be." *Hancock* v. *Watson*, (1902) A. C. 14, 22.

Rule applies to appointed fund.

The rule applies to the case of an appointment under a power to a legatee absolutely, followed by restrictions or limitations, which are in excess of the power or void for perpetuity. The

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absolute gift remains. *Stephen* v. *Gadsden*, 20 B. 463; *Gerrard* v. *Butler*, 20 B. 541; *Churchill* v. *Churchill*, 5 Eq. 44; *Webb* v. *Sadler*, 14 Eq. 533; 8 Ch. 419; *Cooke* v. *Cooke*, 38 Ch. D. 202.

Absolute gift—direction to pay income for life.

If, therefore, there is an absolute gift, a subsequent direction to pay the income to the legatee for life may not cut the absolute interest down to a life interest, more especially, if the direction as to income can be explained as inserted for the benefit of the legatee or for her protection, if she is a married woman. *Billing* v. *Billing*, 5 Sim. 232; *Gurney* v. *Goggs*, 25 B. 334.

Absolute interest settled.

Again, if the absolute interest is settled upon trust for the legatee for life with remainder to her children and there are no children, or no children who can take either because they do not attain the age appointed for vesting or because the gift to them is too remote, the previous absolute interest remains. *Whittell* v. *Dudin*, 2 J. & W. 279; *Hulme* v. *Hulme*, 9 Sim. 644; *Ring* v. *Hardwick*, 2 B. 352; *Mayer* v. *Townsend*, 2 B. 443; *Campbell* v. *Brownrigg*, 1 Ph. 301; *Dawson* v. *Bourne*, 16 B. 29; *Lyddon* v. *Ellison*, 19 B. 565; *Norman* v. *Kynaston*, 3 D. F. & J. 29; *Watkins* v. *Weston*, 3 D. J. & S. 434.

The same principle applies, if the absolute interest is settled for life with remainder to children, and there are gifts over in certain events, which do not happen, and there are no children to take—the absolute gift remains. *Winckworth* v. *Winckworth* 8 B. 576; *Findon* v. *Findon*, 1 De G. & J. 380.

It also applies, even if the event, upon which the gift over is to take effect, happens, but there is no one to take under it. For instance, if the absolute interest is settled upon the legatee for life with remainder to her children, and if there are no children to her surviving brothers and sisters, and there are no children and no brothers or sisters survive her, the absolute gift remains. *Eaton* v. *Barker*, 2 Coll. 124; *Re Corbett's Trusts*, Jo. 591; *Kellett* v. *Kellett*, L. R. 3 H. L. 160, 169, per Cairns, L.C.; *Olphert* v. *Olphert*, (1903) 1 Ir. 326.

The case is clearer still in favour of the absolute interest if the direction to settle itself only applies in a certain event which does not happen. *Bradford* v. *Young*, 29 Ch. D. 617.

When there is an absolute gift in the first instance.

The difficulty in all these cases consists in determining whether there is an absolute gift in the first instance, which is

cut down by subsequent provisions, or whether the only gift is contained in these provisions.

The simplest case is, where there is an absolute gift followed by a proviso cutting it down in certain respects. *Campbell* v. *Browerigg*, 1 Ph. 301; *Whittell* v. *Dudin*, 2 J. & W. 279; *Winckworth* v. *Winckworth*, 8 B. 576; *Mayer* v. *Townsend*, 3 B. 443; *M'Tear* v. *M'Dowell*, 11 Ir. Ch. 338; *Welply* v. *Cormick*, 16 Ir. Ch. 74; *Kellett* v. *Kellett*, L. R. 3 H. L. 160; *Cooke* v. *Cooke*, 38 Ch. D. 202; *Re Boyd*; *Neild* v. *Boyd*, 63 L. T. 92.

Another simple case is an absolute gift by will, followed by a codicil imposing restrictions. *Norman* v. *Kynaston*, 3 D. F. & J. 29.

On the other hand, though there may be a gift to a legatee, it may be in one continuous sentence with the restrictions (*a*), or the only gift may be through the settlement (*b*); so that an absolute interest cannot be spelt out of the will. *Lassence* v. *Tierney*, 1 Mac. & G. 551; *Rucker* v. *Schofield*, 1 H. & M. 36; *Waters* v. *Waters*, 26 L. J. Ch. 624 (*a*); *Seawin* v. *Watson*, 10 B. 200; *Whitehead* v. *Bennett*, 22 L. J. Ch. 1020; *Harris* v. *Newton*, 46 L. J. Ch. 268 (*b*).

Again, the testator may use language showing that a gift at first sight absolute was not intended to be so, but that all the legatee was intended to take was the restricted gift. *Gompertz* v. *Gompertz*, 2 Ph. 107; *Re Richards*; *Williams* v. *Gorvin*, 50 L. T. 22.

V.—Gifts Beneficial or in Trust.

Words to create a trust.

The proper words to create a trust are upon or in trust. But no particular words are necessary. Thus, a gift for a purpose, or to the intent that, or upon condition, may create a trust. *Corporation of Gloucester* v. *Wood*, 3 Ha. 131; 1 H. L. 272; *Aston* v. *Wood*, 6 Eq. 419; *Bird* v. *Harris*, 9 Eq. 204; *Merchant Taylors' Co.* v. *A.-G.*, 6 Ch. 512; *A.-G.* v. *Wax Chandlers' Co.*, L. R. 6 H. L. 1.

1. Declaration of motive.

1. Expressions amounting to no more than a declaration of the motive of the testator in making a gift, as, for instance, that

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it is made to enable the donee to support his or her children, will not raise a trust. *Benson* v. *Whittam*, 5 Sim. 22; *Thorp* v. *Owen*, 2 Ha. 607; *Biddles* v. *Biddles*, 16 Sim. 1; *Byne* v. *Blackburn*, 26 B. 41; *Mackett* v. *Mackett*, 14 Eq. 49; *Farr* v. *Hennis*, 44 L. T. 202; *Ryan* v. *Keogh*, I. R. 4 Eq. 357; *Richardson* v. *Murphy*, (1903) 1 Ir. 227.

2. Gift of residue to executors when beneficial.

2. Whether a gift of residue to executors without words of benefit superadded is a gift to them for their own benefit, or whether they take as trustees for the next of kin, is a question of the construction of the will, and is not affected by the Executors Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 40). *Williams* v. *Arkle*, L. R. 7 H. L. 606.

It is in favour of the executor's beneficial title if the gift is to an executor by name and not as executor, or if the executors are in the gift described as relatives. *Hillersdon* v. *Grove*, 21 B. 518; *In re Henshaw*, 34 L. J. Ch. 98; *Williams* v. *Arkle*, *supra*; see, too, *Caruth* v. *Parker*, 11 L. R. Ir. 19.

The same is the case if the gift is of a legacy together with the residue of the estate. *Parsons* v. *Saffery*, 9 Pr. 578.

On the other hand, the fact that prior legacies have been given to them, or that the bequest is to them as joint tenants, is against their right to the beneficial interest, though not alone conclusive. *Gibbs* v. *Rumsey*, 2 V. & B. 294; *Re Henshaw*, *supra*; *Saltmarsh* v. *Barrett*, 3 D. F. & J. 279; see *Buckle* v. *Bristow*, 13 W. R. 68.

And a direction that the executors are to retain their costs would, it seems, show that they were not to take beneficially. *Saltmarsh* v. *Barrett*, *supra*.

But a reimbursement clause, where there are continuing trusts, will not have this effect. *Romans* v. *Mitchell*, 15 W. R. 552.

3. Gift to A to dispose of as he thinks fit.

3. A gift to a person who is not an executor or trustee "for a school or any other purpose he pleases," or to be distributed as he thinks fit, is a beneficial gift. *Morris* v. *Larkin*, (1902) 1 Ir. 103; *O'Brien* v. *Condon*, (1905) 1 Ir. 51.

4. Gifts of residue to executors to

4. Residuary gifts are sometimes made to executors or trustees followed by words authorising them to dispose of the

property as they think fit; the question then arises whether they are intended to take beneficially or not.

dispose of as they please.

As a general rule, where legacies have been given to the executors, and the residue is given to them jointly with a direction or authority that they are to apply the same as they think fit, the executors take a trust (*a*), and the same is the case if the gift is to the executor "to enable him to carry into effect the purposes of the will" (*b*). *Yeap Cheah Neo* v. *Ong Cheng Neo*, L. R. 6 P. C. 381; *Fenton* v. *Nevin*, 31 L. R. Ir. 478; *Balfe* v. *Halpenny*, (1904) 1 Ir. 186 (*a*); *Barrs* v. *Fenkes*, 2 H. & M. 61 (*b*). *Gibbs* v. *Ramsey*, 2 V. & B. 294, has not been approved in *Ellis* v. *Selby*, 1 M. & Cr. 286; *Buckle* v. *Bristow*, 10 Jur. N. S. 1095; *Yeap Cheah Neo* v. *Ong Cheng Neo*, *supra*; *Fenton* v. *Nevin*, *supra*.

5. Gift subject to trusts.

5. If the gift is to a person subject to the performance of certain trusts, the donee *primâ facie* takes beneficially subject to these trusts, and this construction is assisted, if the donee is a person whom the testator may be expected to provide for and he is not an executor or trustee. *King* v. *Denison*, 1 V. & B. 261; *Smith* d. *Denison* v. *King*, 16 East, 283; *Cary* v. *Cary*, 2 Sch. & L. 173; see 2 H. & M. p. 66; *Fenton* v. *Hawkins*, 9 W. R. 300; *Clarke* v. *Hilton*, L. R. 2 Eq. 810.

If there is a gift intended to be beneficial to the legatee, and an obligation is then imposed on the legatee, which does not exhaust the subject-matter of the gift, the effect is the same as if it were a gift subject to the obligation. *Wood* v. *Cox*, 2 M. & Cr. 684; *Shelley* v. *Shelley*, 6 Eq. 540; *Irvine* v. *Sullivan*, 8 Eq. 673.

Gift to trustees subject to trusts.

The case is more difficult, if there is a gift to several persons as joint tenants subject to trusts and those persons are also executors or trustees of the will. In such a case the donees *primâ facie* do not take beneficially, though there may be expressions in the will sufficient to give them the beneficial interest subject to the performance of the trusts. *Dawson* v. *Clarke*, 15 Ves. 409; 18 Ves. 247; *Saltmarsh* v. *Barrett*, 3 D. F. & J. 279.

Gift upon trust.

If the gift is upon trust, *primâ facie* the donee can take nothing beneficially, though the trusts declared may not

exhaust the property. *Wych* v. *Packington*, 3 B. P. C. 44; *Hobart* v. *Countess of Suffolk*, 2 Vern. 644; *Countess of Bristol* v. *Hungerford*, *ib.* 645; *Southouse* v. *Bate*, 2 V. & B. 396; *Watson* v. *Hayes*, 5 M. & Cr. 125; *Mullen* v. *Bowman*, 1 Coll. 197; *Andrew* v. *Andrew*, 1 Coll. 686; *Love* v. *Gaze*, 8 B. 472; *Ellcock* v. *Mapp*, 3 H. L. 492; *In re West*; *George* v. *Grose*, (1900) 1 Ch. 84.

When trustee takes beneficially.

But the question is one of construction upon the whole will, and where the donee in trust is a wife or relative, whom the testator may be supposed to have intended to provide for, and there are other circumstances to assist the construction, the proper conclusion may be that the donee is to take subject only to the partial trusts declared. *Cunningham* v. *Mellish*, Prec. Ch. 31; Eq. Ab. 273, pl. 8; 2 Vern. 247; *Hughes* v. *Evans*, 13 Sim. 496; *Williams* v. *Roberts*, 4 Jur. N. S. 18; 27 L. J. Ch. 177; *Croome* v. *Croome*, 59 L. T. 582; 61 L. T. 814; *Morrison* v. *M'Ferran*, (1901) 1 Ir. 360.

Words indicating an intention that the donee is to take beneficially, such as for his own use and benefit, or absolutely (*a*), are of course of great weight in rebutting a trust; but a separate use added to a gift to a woman (*b*) does not necessarily prevent her from taking as trustee. *Wood* v. *Cox*, 2 M. & Cr. 684; *Irvine* v. *Sullivan*, 8 Eq. 673 (*a*); *Stubbs* v. *Sargon*, 3 M. & Cr. 507; *In re Haly's Trusts*, 23 L. R. Ir. 130 (*b*).

6. Trust inferred from precatory words.

6. If the testator does not use language clearly imposing a trust, it must be ascertained, from a consideration of the whole will, whether an imperative obligation was intended to be imposed or not.

There is a long list of cases in which words of confidence, request, desire, and the like, following a gift, have been construed as imposing a trust on the legatee. "In some of the older cases obligations were inferred from language, which in modern times would be thought insufficient to justify such an inference" (per Lindley, M.R., *In re Williams*, (1897) 2 Ch. 12, p. 18); and the modern cases appear to show that such words will *primâ facie* not create a trust.

Thus, a gift followed by such expressions as in "full confidence," or in "full trust and confidence," or "well knowing," or the expression of a desire, or request, or wish that the legatee will dispose of the property in accordance with the testator's wishes, or even in a certain specified manner, will not now impose a trust on the donee. *Stead* v. *Mellor*, 5 Ch. D. 225; *In re Hutchinson and Tenant*, 8 Ch. D. 541; *In re Adams and Kensington Vestry*, 27 Ch. D. 394; *In re Diggles; Gregory* v. *Edmondson*, 39 Ch. D. 253; *Clancarty* v. *Clancarty*, 31 L. R. Ir. 530; *In re Hamilton; Treacy* v. *Hamilton*, (1895) 2 Ch. 370; *In re Williams; Williams* v. *Williams*, (1897) 2 Ch. 12; *Hill* v. *Hill*, (1897) 1 Q. B. 483; *Sullivan* v. *Sullivan*, (1903) 1 Ir. 193; *In re Oldfield; Oldfield* v. *Oldfield*, (1904) 1 Ch. 549. *Briggs* v. *Penny*, 3 De G. & S. 525; 3 Mac. & G. 546, is criticised in *Stead* v. *Mellor*, *supra*. *Curnick* v. *Tucker*, 17 Eq. 320; *Le Marchant* v. *Le Marchant*, 18 Eq. 414, were not approved in *In re Hutchinson and Tenant*, *supra*.

Such cases as *Ware* v. *Mallard*, 21 L. J. Ch. 355; 16 Jur. 492; *Gully* v. *Cregoe*, 24 B. 185; *Shorelton* v. *Shorelton*, 32 B. 143, are not easily reconcilable with *Webb* v. *Woods*, 2 Sim. N. S. 267; and their authority is still further diminished by the more recent cases.

In the older cases the following words have been held sufficient to create a trust:

Words of confidence.

a. Words of confidence, such as "trusting": *Baker* v. *Mosley*, 12 Jur. 740; *Irvine* v. *Sullivan*, 8 Eq. 673; "confiding": *Griffiths* v. *Evans*, 5 B. 241; "not doubting": *Parsons* v. *Baker*, 18 Ves. 476; "firm conviction": *Barnes* v. *Grant*, 2 Jur. N. S. 1127; 26 L. J. Ch. 92; "full belief": *Fordham* v. *Speight*, 23 W. R. 782.

Words of request.

b. Words of request and entreaty, such as "entreat": *Prevost* v. *Clarke*, 2 Mad. 458; "require and entreat": *Taylor* v. *George*, 2 V. & B. 378; "wish and request": *Foley* v. *Parry*, 5 Sim. 138; 2 M. & K. 138; "dying request": *Pierson* v. *Garnet*, 2 B. C. C. 38, 226; "request": *Eade* v. *Eade*, 5 Mad. 118; "beg": *Corbet* v. *Corbet*, I. R. 7 Eq. 456; "dying wish": *Godfrey* v. *Godfrey*, 11 W. R. 554; "last will": *Hinxman* v. *Poynder*, 5 Sim. 546; "wish and desire":

Liddard v. *Liddard*, 28 B. 266; see *Teasdale* v. *Braithwaite*, 5 Ch. D. 630; "desire": *Harding* v. *Glyn*, 1 Atk. 469.

Words of advice.

c. Even words of advice and recommendation, such as "advise": *Parker* v. *Bolton*, 5 L. J. Ch. 98; "recommend": *Tibbets* v. *Tibbets*, 19 Ves. 656; Jac. 317; *Horwood* v. *West*, 1 S. & St. 387; *Ford* v. *Fowler*, 3 B. 146; *Malim* v. *Keighley*, 2 Ves. Jun. 333, 529.

Where a precatory trust was established in favour of children, it was held that the trustee could attach a separate use to the shares of females. *Willis* v. *Kymer*, 7 Ch. D. 181.

Trust not created by precatory words if property or objects uncertain.

But though words of doubtful meaning may impose a trust, it is clear that they will not do so, if the language used leaves it uncertain, either what the legatee is to do, or what property is to be applied in doing it, or in whose favour the application is to be made.

Uncertainty as to what is to be done,

a. Therefore mere expressions of a desire that the donee will be kind to: *Baggins* v. *Yates*, 9 Mod. 122; 8 Vin. Ab. 72, pl. 27; remember: *Bardswell* v. *Bardswell*, 9 Sim. 219; consider: *Sale* v. *Moore*, 1 Sim. 534; deal justly by: *Pope* v. *Pope*, 10 Sim. 1; educate and provide for: *Macnab* v. *Whitbread*, 17 B. 299; *Winch* v. *Bratton*, 14 Sim. 379; *Fox* v. *Fox*, 27, B. 301; *Morris* v. *Morris*, 19 L. R. Ir. 37; take care of: *In re Moore; Moore* v. *Roche*, 55 L. J. Ch. 418; 54 L. T. 231; 34 W. R. 343; or do justice to: *Ellis* v. *Ellis*, 23 W. R. 382, a certain class of persons, will raise no trust.

as to property;

b. Though some property may be mentioned out of which the trust is to be performed, this is not enough, if it is not clear what the property is; as if the donee is requested to give "whatever she can transfer": *Flint* v. *Hughes*, 6 B. 342; or the bulk: *Palmer* v. *Simmonds*, 2 Dr. 221; or "when no longer required by her": *Mussoorie Bank* v. *Raynor*, 7 App. C. 321, P. C.; or if the precatory words apply not only to the property given by the testator, but to all the property of the legatee: *Eade* v. *Eade*, 5 Mad. 118; *Lechmere* v. *Lavie*, 2 M. & K. 197; *Parnall* v. *Parnall*, 9 Ch. D. 96, see *Knight* v. *Boughton*, 3 B. 148; 11 Cl. & F. 513; or only to so much as the legatee does not dispose of. *Bland* v. *Bland*, 2 Cox, 349; *Wilson* v. *Major*, 11 Ves. 205; *Pushman* v. *Filliter*, 3 Ves. 7;

Cowman v. *Harrison*, 10 Ha. 234; *Green* v. *Marsden*, 1 Dr. 646; see *In re Pounder*, 56 L. J. Ch. 113.

c. If the donee has a wide discretion as to the objects to be benefited, so that it is uncertain whom the testator meant, the Court will infer that precatory words were not intended to create an imperative trust. *Bernard* v. *Minshull*, Jo. 276, 287. as to objects.

Thus, where there is absolute power of disposal with a confidence expressed that the donee will dispose of the property according to the testator's wishes, where none are expressed, there is no trust. *Reid* v. *Atkinson*, I. R. 5 Eq. 162, 373; *Crough* v. *Murphy*, I. R. 7 Eq. 182.

Though words are used, such as "family," "relations," or "heir," to which the Court would give a meaning in a direct gift, no trust will be implied if it is uncertain what the testator meant by them. *Hurland* v. *Trigg*, 1 B. C. C. 142; *Wright* v. *Atkyns*, 17 Ves. 255; 1 V. & B. 313; 19 Ves. 299; T. & R. 143; Sug. Prop. 388; *Williams* v. *Williams*, 1 Sim. N. S. 358; *Green* v. *Marsden*, 1 Dr. 646; *Meredith* v. *Heneage*, 1 Sim. 542; *Reeves* v. *Baker*, 18 B. 372; *Greene* v. *Greene*, I. R. 3 Eq. 90, 629.

No trust will be implied from precatory words:

a. Where the donee may at his discretion apply the property to other purposes. *Lefroy* v. *Flood*, 4 Ir. Ch. 1; *Curtis* v. *Rippon*, 5 Mad. 434; *House* v. *House*, 23 W. R. 22; *Ex parte Payne*, 2 Y. & C. Ex. 636. Precatory words may be explained so as not to raise a trust.

b. Or where there is an express direction that the donee's absolute interest is not to be curtailed. *Huskisson* v. *Bridge*, 15 Jur. 738; *Eaton* v. *Watts*, 4 Eq. 151.

c. Where the precatory words are stated not to be obligatory. *Young* v. *Martin*, 2 Y. & C. C. 582; *Shepherd* v. *Nottidge*, 2 J. & H. 766; *In re Bond*; *Cole* v. *Hawes*, 4 Ch. D. 238.

d. Or where the donee is to take free and unfettered. *Meredith* v. *Heneage*, 1 Sim. 542; 10 Pr. 306; *Hoy* v. *Master*, 6 Sim. 568; *White* v. *Briggs*, 15 Sim. 33.

7. The decisions upon gifts to a parent for the benefit of himself and his children run into fine distinctions. 7. Gift to parent for benefit of himself and children.

It may be that the parent takes absolutely, or that he takes subject to some obligation to the children, or that he and the

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children take concurrent interest, or that the parent takes for life with remainder to the children (see *ante*, p. 395), or that he is a mere trustee for the children and takes nothing beneficially.

Gift to be at disposal of parent.

A gift to the testator's widow to be at her disposal in any way she may think best for the benefit of herself and family imposes no trust upon the widow. The widow is to be the judge of what she is to have and what the children are to have, and that is a trust which the Court will not execute. *Lambe* v. *Eames*, 6 Ch. 597, where *Crockett* v. *Crockett*, 2 Ph. 553, is considered; *M'Alinden* v. *M'Alinden*, I. R. 11 Eq. 219; *Morrin* v. *Morrin*, 19 L. R. Ir. 37; see *Webb* v. *Woods*, 2 Sim. N. S. 267.

When parent takes as trustee with discretionary powers.

On the other hand, the gift may be so expressed as to impose on the parent some trust for the benefit of the children, though he may have a discretion as to the interest which the children are to take. *Raikes* v. *Ward*, 1 Ha. 445; *Conolly* v. *Farrell*, 8 B. 317; *Woods* v. *Woods*, 1 M. & Cr. 401; *Godfrey* v. *Godfrey*, 2 N. R. 16; 11 W. R. 551; *Hart* v. *Tribe*, 32 B. 279; 1 D. J. & S. 418; *Bibby* v. *Thompson*, 32 B. 646; *In re Haly's Trusts*, 23 L. R. Ir. 130; *In re O'Donnagan and Ryan*, (1905) 1 Ir. 280.

Or the parent may take for life with power to appoint to the children. *Evans* v. *Evans*, 12 W. R. 508; *Talbot* v. *O'Sullivan*, 6 L. R. Ir. 302; see *In re Rae*, 1 L. R. Ir. 174.

When parent trustee only.

Again, the parent may take merely as a trustee for his children. If, for instance, the gift is to the parent to be disposed of among the children, or to be appropriated for the children, or similar expressions. *Blakeney* v. *Blakeney*, 6 Sim. 52; *Wetherell* v. *Wilson*, 1 Kee. 80; *Pilcher* v. *Randall*, 9 W. R. 251; *In re Roper's Trusts*, 11 Ch. D. 272; 40 L. T. 97; *In re Haly's Trusts*, 23 L. R. Ir. 130.

Gift for maintenance.

When the gift is to the parent for the maintenance of the children, if the maintenance of the children can be looked upon as the motive of the gift, the parent takes absolutely. *Brown* v. *Casamajor*, 4 Ves. 498; *Hammond* v. *Neame*, 1 Sw. 35 (a strong case); *Bond* v. *Dickinson*, 33 L. T. 221; see *Briggs* v. *Sharp*, 20 Eq. 317, and cases cited *supra*.

Gift subject to obligation to maintain.

Again, the gift may be so expressed as to entitle the parent to the gift subject to the obligation of maintaining the children so far as they require it.

This is the case if the gift is to the testator's widow for her use and benefit and for the maintenance of his children, or to her subject to the obligation of maintaining the children.

In such cases the Court will not interfere with the parent's discretion so long as it is honestly exercised. But it will, if necessary, administer the trust and direct an inquiry to bring out the facts.

If the will does not impose a limit, maintenance may be allowed to a child requiring it who has attained twenty-one, and also to a married daughter. *Costabadie* v. *Costabadie*, 6 Ha. 410; *Longmore* v. *Elcum*, 2 Y. & C. C. 363; *Conolly* v. *Farrell*, 8 B. 347; *Carr* v. *Living*, 28 B. 654; 33 B. 474; *Scott* v. *Key*, 35 B. 291; *Berry* v. *Briant*, 2 Dr. & S. 1; *In re Booth: Booth* v. *Booth*, (1894) 2 Ch. 282; *In re G.*, (1895) 1 Ch. 719; see *Camden* v. *Benson*, 4 L. J. N. S. 256; and *Bowden* v. *Laing*, 14 Sim. 113, where a married daughter was held not entitled to maintenance.

A mother living in adultery though she supports her children, will not be considered as properly performing the obligation cast upon her by the will, and the Court will in such a case administer the fund. *Castle* v. *Castle*, 1 De G. & J. 532; *In re G.*, *supra*.

Gifts to the parent to be applied for the maintenance of his children.

Where the interest upon legacies given to children is directed to be paid to their parents, and applied by them for their maintenance, the parents take subject to no account. *Hammond* v. *Neame*, 1 Sw. 35; *Berkeley* v. *Swinburne*, 6 Sim. 613; *Hadow* v. *Hadow*, 9 Sim. 438; *Browne* v. *Paull*, 1 Sim. N. S. 92.

And a gift to the parent for the benefit or maintenance of himself and his children may be paid to the parent. *Cooper* v. *Thornton*, 3 B. C. C. 96, 186; *Robinson* v. *Tickell*, 8 Ves. 142; *Re Robertson's Trust*, 6 W. R. 405.

VI.—Legacies given to Benefit a Legatee in a particular way.

Legacy to a legatee to be applied in a particular way for the benefit of the legatee.

1. A legacy given to a person for a particular purpose for the benefit of the legatee, as to bind him apprentice (*a*); to purchase a house (*b*); to establish a business (*c*); to purchase a commission (*d*); to pay off a mortgage (*e*); to carry on mines which the testator sells (*f*), is good though the purpose fails or becomes incapable of execution. *Barlow* v. *Grant*, 1 Vern. 255; *Nevill* v. *Nevill*, 2 Vern. 431; *Barton* v. *Cooke*, 5 Ves. 462 (*a*); *Knox* v. *Hotham*, 15 Sim. 82; *Dowling* v. *Dowling*, (1902) 1 Ir. 79 (*b*); *Gough* v. *Bult*, 16 Sim. 45 (*c*); *Leche* v. *Lord Kilmorey*, T. & R. 207; *Cope* v. *Wilmot*, 1 Coll. 396; *Palmer* v. *Flower*, 13 Eq. 250 (*d*); *Lockhart* v. *Hardy*, 9 B. 379; *Adams* v. *Lopdell*, 25 L. R. Ir. 311 (*e*); *Parsons* v. *Coke*, 6 W. R. 715 (*f*).

A gift of a sum sufficient to pay the estate duty payable by A imposes no obligation on A to apply the money in paying the duty. *Earl of Mexborough* v. *Sarile*, 88 L. T. 131.

Under a trust to lay out 5,000*l.* in planting trees on a settled estate, the 5,000*l.* was held to belong to the owners of the estate. *In re Bowes; Earl Strathmore* v. *Vane*, (1896) 1 Ch. 507.

And the interest of a fund directed to be set aside to pay the rent of leaseholds settled by the will, which had to be sold, was held payable to the person who would have been tenant for life of the leaseholds. *Earl of Lonsdale* v. *Countess of Berchtoldt*, 3 K. & J. 185.

The legacy will not be cut down to the amount actually required for the named purpose, unless the surplus, after satisfying that purpose, is expressly given over. *In re Lee's Trusts*, I. R. 10 Eq. 157.

Distinction where the purpose is not merely the benefit of the legatee.

2. If the purpose for which the money is given is not merely the benefit of the legatee, but also the gratification of some wish of the testator, the question is, which is the primary object? *Re Skinner's Trust*, 1 J. & H. 102.

VII.—Discretionary Trusts.

Discretion if too wide is void.

1. A gift to trustees upon trust to dispose of the same as they think fit is too uncertain to be carried out by the Court, and is therefore void. *Fowler* v. *Garlike*, 1 R. & M. 232; *Ellis* v. *Selby*, 1 M. & Cr. 294; *Buckle* v. *Bristow*, 10 Jur. N. S. 1095; *Yeap Cheah Neo* v. *Ong Cheng Neo*, L. R. 6 P. C. 381; *Fenton* v. *Nevin*, 31 L. R. Ir. 478.

Wide discretion given for benefit of an individual.

2. If a discretion is given to trustees to apply a fund for the benefit of an individual, and the mode of application is so wide as to lead to the inference, that the primary object was to benefit the individual, he may be entitled to the fund, though the trustees do not exercise their discretion, or the individual to be benefited dies before they can do so. This may be the case, even if there is a gift over of so much as is not applied. *Gough* v. *Bult*, 16 Sim. 45; *Gude* v. *Worthington*, 3 De G. & S. 389; *In re Johnston: Mills* v. *Johnston*, (1894) 3 Ch. 204.

And a discretion to trustees may amount to a gift, for instance, a direction that if a daughter follows the paths of virtue and obedience to the wishes of his wife and executors they may give her, by instalments when they think proper, 200*l*. *Maud* v. *Maud*, 27 B. 615.

And a discretion to maintain a person may be so expressed as to be in effect obligatory. *Foley* v. *Parry*, 2 M. & K. 138; *Kilvington* v. *Gray*, 10 Sim. 293; *Batt* v. *Anns*, 11 L. J. Ch. 52.

Discretion equivalent to power of advancement.

3. In some cases upon informal wills a power given to trustees to apply a sum for a legatee in a particular way has been held equivalent to a power of advancement, under which a legatee cannot claim anything not wanted for the purpose. *Lewis* v. *Lewis*, 1 Cox, 162; *Robinson* v. *Cleator*, 15 Ves. 526; *Cooper* v. *Mantell*, 22 B. 231; *In re Ward's Trusts*, 7 Ch. 726.

Intention to secure the personal benefit of a legatee.

4. Testators sometimes desire that a fund shall be applied only for the personal benefit of the legatee, so that it cannot be alienated by him or taken by his creditors. This object can be attained by means of a discretionary trust. If the trust is properly penned, the legatee will be entitled only to so much as the trustees in their discretion think fit to apply for the purpose mentioned by the testator. If the trustees refuse to exercise

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their discretion, or do not exercise it fairly, the Court will inquire how much ought to be applied.

Thus a trust to apply the whole or any part of the income or capital of a fund for the maintenance of A does not entitle him to more than is required for the purpose, and if the fund is reversionary, and A dies before it falls into possession, his legal personal representatives are not entitled to anything. *In re Sanderson's Trust*, 3 K. & J. 497; *Re Stanger; Moorsom* v. *Tate*, 64 L. T. 693; 60 L. J. Ch. 326; 39 W. R. 455.

Protected life interests.

5. Questions of a similar kind arise upon protected life interests, where income payable to a tenant for life is given to trustees upon a discretionary trust in the event of alienation by or bankruptcy of the tenant for life.

Income to be applied for benefit of one object.

a. If there is a trust to apply the income of property for the maintenance and support of one person, and the trustees have only a discretion as to the mode of application, but cannot deprive the beneficiary of any part of the income, the income passes to his alienee or trustee in bankruptcy. *Green* v. *Spicer*, 1 R. & M. 395; *Younghusband* v. *Gisborne*, 1 Coll. 400.

Discretion to apply income for one or more persons.

b. Where, under a similar trust, the trustees have a discretion to accumulate the whole or part of the income for the benefit of persons other than the original beneficiary, the income does not pass to his alienee or trustee in bankruptcy. *Snowden* v. *Dales*, 6 Sim. 524; *Twopeny* v. *Peyton*, 10 Sim. 487; *Re Bullock; Good* v. *Lickorish*, 60 L. J. Ch. 341; 64 L. T. 736; 39 W. R. 472.

But in such a case, if the trustees pay or deliver money or goods to the beneficiary, or appropriate money or goods to be paid or delivered to him, the money or goods pass to his alienee. *In re Coleman; Henry* v. *Strong*, 39 Ch. D. 443; *Re Neil; Hemming* v. *Neil*, 62 L. T. 649; see *In re Ashby; Ex parte Wreford*, (1892) 1 Q. B. 872.

Income to be applied for benefit of a class.

c. Where there is a trust for the benefit of a class, no member of which can be excluded from the benefits of the trust, so much of the income as is properly applicable for the benefit of any member goes to his alienee. Thus, where there is a trust for the maintenance and support of A, his wife and children, and A alienates his interest, either before the trust arises or during its continuance, A's alienee will be entitled to

so much of the income as is not required for the maintenance and support of A's wife and children. *Page* v. *Way*, 3 B. 20; *Kearsley* v. *Woodcock*, 3 Ha. 185; *Wallace* v. *Anderson*, 16 B. 533. *Godden* v. *Crowhurst* (10 Sim. 642) went too far in giving nothing to the assignee in bankruptcy; *Rippon* v. *Norton* (2 B. 63) is wrong; see *In re Coleman*, 39 Ch. D. 443, p. 448.

Power of selection among members of a class.

d. But where a trust for the benefit of a class is exclusive, so that the trustees are not bound to employ any part of the income for the benefit of any one member, so much only of the income goes to the alience of a member as the trustees pay or appropriate for payment to him. *In re Coleman, supra.* A trust for the maintenance of A, his wife and children, or any of them, is an exclusive trust within this rule. *Lord* v. *Bunn*, 2 Y. & C. C. 98; *Holmes* v. *Penney*, 3 K. & J. 90; *Re Neil; Hemming* v. *Neil*, 62 L. T. 649.

Duration of discretion.

6. Where trustees have a discretionary power enabling them to defeat a previous vested gift, the discretion may be exercised after the alienation or bankruptcy of the beneficiary, although, if it is not exercised, an absolute interest in the property would pass to the alienee. *Coe's Trust*, 4 K. & J. 199; *Chambers* v. *Smith*, 3 App. C. 795.

Time from which discretionary trust takes effect.

7. Where a discretionary trust arises upon alienation, the discretionary trust does not affect income which has become due before alienation, or is in the hands of the trustees ready for application before that time. *In re Sampson; Sampson* v. *Sampson*, (1896) 1 Ch. 630.

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Absolute Gifts.

Personal representatives.

A gift to A., but if he die before receiving his share, the same to be paid to his legal personal representatives, gives A. an absolute vested gift. *Kerr* v. *Smith*, 27 O.R. 409.

To A. and his heirs.

A bequest to A. "to have and to hold to him, his heirs and assigns forever," is an absolute gift. *Mealey* v. *Aikins*, 27 Gr. 563.

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So is a gift to the testator's wife and the heirs of the body of the testator. *Fuller* v. *Anderson*, 20 O.R. 424.

To wife and heirs of testator's body for life.

A gift of a sum of money for life is an absolute gift. *Re Chapman*, 4 O.L.R. 130.

Gift of money for life.

But such a gift may be restricted to the life of the donee, if it appears from the will that the life tenant is to receive the income only, although the terms of the gift are absolute. *Fort* v. *Fort*, 15 S.C.R. 699.

A gift to a widow of money *durante viduitate*, with a gift over if she marries again, is a gift for her life only. *Re Daly*, 37 N.B.R. 483

Gift of income.

A gift of the income of a fund, unqualified, is a gift of the fund itself. *Morrow* v. *Jenkins*, 6 O.R. 693.

But this gives way to a contrary intention. Thus, a gift of the "proceeds" (held to mean income) of an invested fund to A., with a direction that his children shall share the capital at A.'s death, gives a life interest only to A. *Chubbock* v. *Murray*, 30 N.S.R. 23. And see *Rogers* v. *Lowthian*, 27 Gr. 559.

And a gift of the income only of a fund for life, of course, gives but a life interest. *Re Hanmer*, 9 O.L.R. 348.

Absolute gift coupled with life estate in land.

An absolute gift of personalty is not cut down by being coupled with a devise to the legatee for life of land on which the chattels are to be kept. *McCrary* v. *McCrary*, 22 U.C.R. 520.

Nor, in the case of a widow remaining unmarried, by a provision that if she marry again the property is to be sold for the benefit of children. *Re Mumby*, 8 O.L.R. 283.

For life with power of disposal and gift over of residue.

A gift to A. for life, with power to dispose of the whole or any part of the property bequeathed, and at the death of A., the residue, if any, to go to other legatees, gives an absolute right of user and disposal. But undisposed of property passes, at the death of A., to the estate of the testator for distribution under his will. Conversion into money and depositing the same in a bank to the credit of the life tenant is not an exercise of the power. *Green* v. *Carley*, 20 Gr. 234; *Re Tuck*, 10 O.L.R. 309.

And a gift of personalty to a wife "for her own use during her life," with a gift over of "any money or securities which may remain at her death," gives her absolute power to dispose of and use the principal. *Re McDonald*, 35 N.S.R. 500.

The same, no gift over.

Where there is a gift for life, with power of disposal, and no gift over, the gift is absolute. *Re Bethune*, 7 O.L.R. 417.

Indefinite gift, power of disposal, no gift over.

An absolute gift to a wife of all real and personal property, "with full power to dispose of part or the whole as she and the children may think wisest," is an absolute gift, and the children take nothing. *Re McDougall*, 8 O.L.R. 640. See also *McIsaac* v. *Beaton*, 38 N.S.R. 60; 37 S.C.R. 143.

So a bequest of the "full and absolute control of all my personal property . . . and to use and possess the said personal property according to her discretion," gives an absolute right of user and disposal; and the legatee's estate is not liable for not converting, nor for debts due to the testator not collected, nor for chattels not forthcoming at her death. *McLaren* v. *Coombs*, 16 Gr. 602.

Gift of control for life, with gift over.

But a gift to a wife of "the whole control of my real and personal estate as long as she lives," with a gift over of the land, farm stock and implements, is a gift for life only. *Re Turnbull*, 11 O.L.R. 334.

Future gift, power to bequeath.

Where there is a direction to pay at a certain date, with a power to the legatee to dispose of the gift by will in case he should not live to receive it, the gift is absolute. *Becher* v. *Miller*, 25 Gr. 528.

Absolute gift, remainder over.

Though, on an absolute gift to A., with a remainder over to B., the gift to A. is absolute, yet, if it appears, in the gift to A., that he was intended to take for life only, the remainder over is good, and A. takes a life interest only. *Osterhout* v. *Osterhout*, 7 O.L.R. 402; 8 O.L.R. 685.

Use of chattels.

A bequest of the use of chattels for life gives a life interest only. *Dickson* v. *Street*, 1 U.C.R. 180.

Possession of chattels.

Where chattels are bequeathed for life and there is no other way of having the use of them but by possession, the life tenant is entitled to possession. *Sed aliter*, with regard to mortgages, promissory notes and money, the legatee having

a life interest therein being entitled to receive the income only. *Thorpe* v. *Shillington*, 15 Gr. 85.

Goodwill and hotel licence.

A devise of a hotel for life held to pass an absolute title to the good will and licence, the latter being for a year only, and personal is in any event the property of the person licensed. *Taylor* v. *Macfarlane*, 4 O.L.R. 239.

Executors Trustees of Undisposed of Property.

Executors take undisposed of personalty on trust.

Undisposed of personalty is held by executors on trust for the next of kin, unless the will shews that the executors are to take beneficially. *Thorpe* v. *Shillington*, 15 Gr. 85. See R.S.B.C. c. 73, s. 51.

Where property is bequeathed to executors upon trusts which fail for uncertainty, they do not take the property beneficially. *Davidson* v. *Boomer*, 15 Gr. 1; *Re Wilson*, 30 O.R. 553.

Nor where they take upon trusts which do not exhaust the estate, though the gift upon trust is coupled with a power to apply and dispose of the whole estate as to them in their uncontrolled and absolute discretion shall seem fit. *Re Brown*, 8 M.L.R. 391.

Contingent will not taking effect.

Where executors proved a contingent will, which, in the events which happened, never took effect, they were held to be trustees for the persons entitled on an intestacy. *Henning* v. *Maclean*, 4 O.L.R. 660; 33 S.C.R. 305.

Executors taking beneficially.

A testator gave full power to his executors to dispose of a residue as they should deem best, and they were to inquire as to the financial and social standing of his relatives, and make such disposition of the estate as they should think best to such relatives. It was held that there was no trust in favour of the relatives, that the executors had a power which they might exercise in their own behalf and therefore that they took beneficially. *Higginson* v. *Kerr*, 30 O.R. 62.

And where there was a devise to five persons who were appointed executors, some of the next of kin of the testator, "share and share alike, upon trust that they or the survivors of them . . . shall out of the said real and personal estate, suitably and well support" the testator's wife, who

was very old and imbecile at the date of the will, and died before the testator, it was held that they took beneficially as the devise would have been subject merely to the charge for support of the wife had she survived. *Ballard* v. *Stover*, 14 O.R. 153.

Where property is given beneficially to a person it does not cut down his interest, if he is appointed executor. *Lyon* v. *Bloat*, 16 Gr. 369.

A legacy given to an executor, as such, is forfeited if he renounce probate. Inequality in the legacies given to different executors does not necessarily rebut the ordinary presumption that the legacies are given in that character. *Paton* v. *Hickson*, 25 Gr. 102.

Precatory Trusts.

The cases in Ontario are not numerous enough to evolve from them any general rule as to the effect of precatory words. Perhaps it is not possible to say of any words, short of expressions obligatory in themselves, whether they are merely precatory or have the force of an obligation in the absence of their context. Thus, "I wish and desire" in an unqualified bequest or devise is equivalent to "it is my will." *Moross* v. *McAlister*, 26 U.C.R. 368. But the same words when applied to property already disposed of by the will, may or may not have an obligatory force. Precatory words:

Thus, where there was an absolute gift to a daughter, followed by the direction, "I wish and desire that my daughter shall make a competent provision for my niece Mrs. Baby," it was held that there was a trust in favour of Mrs. Baby. *Baby* v. *Miller*, 1 E. & A. 218. Ontario.

While, in a recent case, where after an absolute gift by apt words of limitation, the testator proceeded, "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," it was held that there was no trust in favour of the children. *Bank of Montreal* v. *Bower*, 18 O.R. 226.

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These cases, however, may be reconciled. In the former case, there was a mere charge on the property bequeathed, the ownership of which was not otherwise affected; while in the latter case there was an attempt to cut down an absolute and unqualified gift to a mere life interest.

The general rule in the latter class is stated by Boyd, C., as follows: "If the entire interest in the subject of the gift is given with super-added words expressing the nature of the gift, or the 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." *Bank of Montreal* v. *Bower*, 18 O.R., at p. 231.

Finlay v. *Fellows*, 14 Gr. 66, where an exactly similar direction was held to create a trust, must be taken as overruled by *Bank of Montreal* v. *Bower*.

Where a remainder-man devised his estate to the tenant for life, "to be disposed of as she may deem most fit and proper for the best interests of my brothers and sisters," a conveyance to one sister was upheld without determining whether a trust or power was created. *Pettypiece* v. *Turley*, 13 O.L.R. 1.

Nova Scotia.

The same result obtains in Nova Scotia.

A devise to a wife of "the property . . . to be by her disposed of amongst my children as she may judge most beneficial to herself and them," is a devise in fee simple to the wife, and is not cut down by the reference to the children. *McIsaac* v. *Beaton*, 38 N.S.R. 60; 37 S.C.R. 143.

So, also, a gift to a wife of all the property "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," is not a gift upon trust, but is absolute. *Sinclair* v. *Malay*, 40 N.S.R. 181.

New Brunswick.

In New Brunswick it has been held that a gift of all a testator's property to his widow, with a request to her to pay R. a sum of money at her death or on sale of the property, created a precatory trust in favour of R. *Reneham* v. *Malone*, 1 N.B. Eq. 500. This case would seem rather to be one of a

devise subject to a charge, than a case of trust, as the ownership of the property was not affected by the request to pay except to the extent of the charge.

On a devise to a wife absolutely, "to enable her to maintain a house for herself and my two sons," with a devise over on trust for the sons if she married again, followed by a devise of the residue to trustees in trust for the sons, it was held that the wife took absolutely, the words attached to the devise merely expressing the motive for the gift, and the testator shewing that he understood the nature of a trust by the subsequent devise on trust for his sons. *Leonard* v. *Leonard*, 1 N.B. Eq. 576.

Discretionary Trusts.

Where there is an absolute discretion given to executors to pay or withhold a legacy, and in lieu thereof pay a nominal sum, and they pay the nominal sum, and also a portion of the legacy, they still may exercise their discretion to withhold the remainder. *Bain* v. *Mearns*, 25 Gr. 450. Discretion will not be controlled.

A discretionary power to make advances to children, to whom limited interests only were given by the will, exercised by making conveyances to them in fee simple of valuable property, was held to be well exercised, there being no fraud or improper motive in its exercise. *Hospital for Sick Children* v. *Chute*, 3 O.L.R. 590.

A discretion to apply the interest on a legacy, payable *in futuro*, to the maintenance of the legatee, will not be controlled by the Court in the absence of improper conduct. *Foreman* v. *McGill*, 19 Gr. 210.

A devisee for life, with power of sale, and with an absolute discretion to apply any portion of the proceeds of sale to the maintenance of minor children, cannot be called upon, by devisees in remainder of unsold lands, to give an account of the sums expended for maintenance. *Cowan* v. *Besserer*, 5 O.R. 624.

On a devise to A. of the whole estate of the testator, on condition that B. should be paid $50 a month and have the use of a house with the proviso that if A. should "in his own

absolute judgment" be of opinion that B. could be best cared for in a home for infirm persons, "he should have the right and authority to place her there," and that the charges should be in lieu of the monthly payments and use of the house, it was held that A. had an absolute discretion as to placing B. in a home, and that on her refusal he took the house free from any condition, and was absolved from making the monthly payments. *Leduc* v. *Booth*, 5 O.L.R. 68.

Where purpose impracticable.

But where executors had an absolute discretion as to applying income for a particular purpose, and a further discretion to apply it for the benefit of a number of charities, and in the course of many years the executors were unable to carry out the particular purpose, the Court regarding it as impracticable ordered the income to be devoted to the charities or others of a like kind. *Atty.-Gen.* v. *Power*, 35 N.S.R. 526; 35 S.C.R. 182.

Imperative trust

A bequest of income to a son, with a provision that in case of sickness such portion of the principal should be advanced to him as the executors should think necessary, constitutes a trust as to the principal immediately upon sickness occurring, the executors having a discretion as to the amount to be applied only, and the son having died without any principal having been applied, the Court ordered a distribution amongst his next of kin free from claims of creditors of such sum as the executors should determine. *Re Evans*, 3 O.L.R. 401.

Gifts to Parents and Children.

Gifts for benefit of parent and children.

Where the income arising from a fund is given to a mother for the maintenance of herself and children, the mother, being under no legal obligation to maintain the children, is treated as a trustee for them. Therefore, where the rents of land were devised to the testator's wife for the support of herself and the children, and subject thereto, portions of the land were specifically devised to be conveyed on the death of the mother, it was held that the lands specifically devised were subject to a charge for any deficiency in the amounts derived from other properties. *Collingwood* v. *Collingwood*, 21 Gr. 102. And see *Barclay* v. *Zavitz*, 8 O.R. 663.

On a gift to trustees, upon trust to pay the income to a married woman for the use of herself and her children, it was held that she took equally with them, her share varying according to the number of the children. *Crawford* v. *Calcutt*, 13 Gr. 71.

So, also, a gift of personalty to the testator's wife "for the benefit of herself and children jointly," gives a joint interest during the minorities of the children, and they are entitled to be maintained out of the general income of the fund. *Rose* v. *Edsall*, 19 Gr. 544.

But on a devise to a father during his life, for the support and maintenance of himself and his children, there is no trust for the children, but they are, as against the father's creditors, entitled to a share of the income (the whole being divided equally amongst father and children) to be set apart for their maintenance if he is otherwise unable to maintain them. *Allen* v. *Furness*, 20 A.R. 34. See *Cameron* v. *Adams*, 25 O.R. 229.

CHAPTER XL.

GIFTS OF ANNUITIES.

I.—Characteristics of Annuities.

Annuity and rent-charge distinguished.

An annuity charged upon lands devised in fee is a legal rent-charge, even though it may be given to a person, his executors and administrators. *Ramsay* v. *Thorngate*, 16 Sim. 575; see *Martin* v. *Haynes*, 29 L. R. Ir. 416.

A gift of a rent-charge without more charges all the testator's lands. *Ex parte McDowal*, 5 Jur. N. S. 553.

Annuity charged on land.

A direction that an annuity is to be a charge on certain land, following a gift of the annuity, does not make the annuity a rent-charge payable only out of the land (*a*). But if the annuity is called a rent-charge, or express powers of distress and entry are given, or there are other similar indications of intention, the annuity may be converted into a rent-charge (*b*). *In re Trenchard; Trenchard* v. *Trenchard*, (1905) 1 Ch. 82 (*a*); *Lomax* v. *Lomax*, 12 B. 290; *Shipperdson* v. *Tower*, 1 Y. & C. C. 441; *Ion* v. *Ashton*, 28 B. 379; *Sinnett* v. *Herbert*, L. R. 7 Eq. 201, 206; *Patching* v. *Barnett*, 51 L. J. Ch. 74; *Power* v. *Buckley*, 19 L. R. Ir. 544; *Greer* v. *Waring*, (1897) 1 Ir. 427 (*b*).

If an annuity is charged on land, a right to distrain is attached to it by statute 4 Geo. II. c. 28, s. 5. *Buttery* v. *Robinson*, 3 Bing. 392; *Sollory* v. *Leaver*, 9 Eq. 22; *Kelsey* v. *Kelsey*, 17 Eq. 496; and see the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 44.

Right to receiver.

In *Sollory* v. *Leaver* (9 Eq. 22), it was held that an annuitant whose annuity was charged on land was not entitled to a receiver, as he could distrain. But since the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8), the Court has discretion to appoint a receiver whenever it is just or convenient.

Back rents.

But an annuitant cannot claim against a devisee in possession an account of back rents accrued before a receiver was appointed. *Garfitt* v. *Allen*, 37 Ch. D. 48; see *In re Marquis of Anglesea: Paget* v. *Marquis of Anglesea*, 47 Eq. 283.

Charge on reversion.

An annuity may be given so as to be a charge only upon a reversion, though it is to commence from the testator's death. *Jackson* v. *Hamilton*, 9 Ir. Eq. 430; 3 J. & Lat. 702; *Pettinger* v. *Ambler*, 34 B. 542; *In re Williams*, 64 L. J. Ch. 349.

Rent-charge does not abate if some of the land taken by title paramount.

If a rent-charge is given charged upon certain land devised by the will, and it turns out that part of the land did not belong to the testator, the devisee of the rest must bear the whole rent-charge. The rent-charge does not abate in proportion to the diminished value of the land. *Roche* v. *Jordan*, (1896) 1 Ir. 494, not following *Jackson* v. *Hamilton*, 9 Ir. Eq. 430; 3 J. & Lat. 702.

But if A, upon a grant of land to B, reserves to himself a rent-charge, and B is evicted from part of the land, the rent-charge will be apportioned. *Hartley* v. *Maddocks*, (1899) 2 Ch. 199.

Security for annuity.

Where property is given subject to an annuity, the annuitant is not entitled to have the property sold and secured, as long as the annuity is properly paid. *Re Potter*; *Potter* v. *Potter*, 50 L. T. 8; *In re Parry*; *Scott* v. *Leak*, 42 Ch. D. 570.

An annuitant, whose annuity is charged upon the income of residuary estate, is entitled to have a sufficient sum set aside per cent. Consols to secure the annuity, and subject to that the residue will be distributed. *Harbin* v. *Masterman*, (1896) 1 Ch. 351.

Right to administer.

An annuitant whose annuity is charged upon freeholds and residue is entitled to have the estate administered in order to ascertain the residue. *Wollaston* v. *Wollaston*, 7 Ch. D. 58.

A rent-charge, though charged upon realty and personalty, will be looked upon as issuing out of the realty alone. *Butt's Case*, 7 Rep. 23a; Co. Litt. 147a; *Richardson* v. *Nixon*, 7 Ir. Eq. 620; *Sollory* v. *Leaver*, 9 Eq. 22.

Rent may be declared out of seisin of devisee, and is not a use upon a use.

There cannot be at law a use upon a use. The statute executes the first use and the subsequent uses create trusts or equitable estates only. But annuities and rent-charges are an exception

to the rule. If there is a devise unto and to the use of A and his heirs to the use that B may receive a rent, B has a legal rent-charge. *Cromwell's Case*, 2 Rep. 69a; *Gilbertson* v. *Richards*, 4 H. & N. 277, 296; *Hanly* v. *Carroll*, (1906) 1 Ir. 166.

The rule in *Shelley's Case* applies to rent-charges.

The rule in *Shelley's Case* and the other technical rules of construction apply to the limitations of a rent-charge. *Drue* v. *Barry*, I. R. 7 Eq. 413; 8 *ib.* 260.

A rent-charge is entailable, but if an estate tail is created in a rent-charge, and no remainder in fee is limited, the tenant in tail cannot create more than a base fee. Co. Litt. 298a, note 2; *Chaplin* v. *Chaplin*, 3 P. W. 229.

Annuity to A and his heirs.

An annuity, given out of personal assets, if given with words of inheritance, will devolve like real estate.

Annuities are not within the *Statute de Donis*.

Such an annuity, however, not being within the *Statute de Donis*, cannot be entailed. A devise, therefore, of a personal annuity to A and the heirs of his body, gives A a fee simple conditional. *Earl of Stafford* v. *Buckley*, 2 Ves. Sen. 170; *Turner* v. *Turner*, Amb. 776; 1 B. C. C. 316.

Annuity given to a man and his heirs remains personalty except for purposes of devolution.

But an annuity, though given with words of inheritance, is, for all other purposes than descent, personalty. *Earl of Stafford* v. *Buckley*, 2 Ves. Sen. 170; *Lady Holderness* v. *Lord Carmarthen*, 1 B. C. C. 377; *Aubin* v. *Daly*, 4 B. & Ald. 59; *Radburn* v. *Jervis*, 3 B. 450.

And an annuity charged upon real and personal estate, but given without words of limitation appropriate to realty, is personal estate. *Taylor* v. *Martindale*, 12 Sim. 158; *Parsons* v. *Parsons*, 8 Eq. 260; *Joynt* v. *Richards*, 11 L. R. Ir. 278; see *Martin* v. *Haynes*, 29 L. R. Ir. 416.

Direction to lay out sum in purchase of annuity.

A direction to lay out a specified sum in the purchase of an annuity for the life of A vests that sum in the annuitant, whether the annuity is in possession or reversion. *Yates* v. *Compton*, 2 P. W. 308; *Barnes* v. *Rowley*, 3 Ves. 305; *Bayley* v. *Bishop*, 9 Ves. 6; *Palmer* v. *Crauford*, 3 Sw. 482; see *Smith* v. *King*, 1 Russ. 363.

Direction to purchase annuity of certain amount.

So if there is a direction to purchase a Government annuity of a given amount, the annuitant is entitled to the amount required to purchase the annuity as from the testator's death, though he may die before the time when the annuity was to be

purchased, or within a year from the testator's death. *Dawson* v. *Hearn*, 1 R. & M. 606; *Ford* v. *Batley*, 17 B. 303; *In re Robbins: Robbins* v. *Legge*, (1907) 2 Ch. 8; see *In re Mabbett: Pitman* v. *Holborrow*, (1891) 1 Ch. 707.

If the annuitant was a married woman with a restraint on anticipation, the purchase-money nevertheless belongs to her estate. *In re Ross: Ashton* v. *Ross*, (1900) 1 Ch. 162.

What provisions insufficient to deprive annuitant of fund.

The annuitant is entitled to the fund though there may be a direction that he is not to be allowed to accept the value of the annuity (*a*); though the trustees are empowered to apply the annuity for the benefit of the annuitant if incapacitated (*b*); though there is a restraint upon anticipation where the annuitant is not a married woman (*c*). *Stokes* v. *Cheek*, 28 B. 620 (*a*); *Re Browne's Will*, 27 B. 324 (*b*); *Woodmeston* v. *Walker*, 2 R. & M. 197 (*c*); see *Messeena* v. *Carr*, 9 Eq. 260.

Where annuities were given charged on land, which, subject to the annuities, was devised on trust for sale, with a direction that the trustees might purchase annuities for the annuitants, the purchase-money to be a first charge on the proceeds of sale of the estates on which the annuities were charged, it was held, that the representatives of an annuitant, who died before the sale of the land was completed, were not entitled to the purchase price of the annuity. *In re Mabbett: Pitman* v. *Holborrow*, (1891) 1 Ch. 707.

Direction to buy annuity in name of annuitant.

If an annuity is to be bought in the name of the annuitant, a direction, that it is to cease on alienation, is inconsistent with the absolute ownership previously conferred, and the annuitant may take the purchase-money. *Hunt Foulston* v. *Farber*, 3 Ch. D. 285; *In re Mabbett: Pitman* v. *Holborrow*, (1891) 1 Ch. 707.

Annuity to be bought in names of trustees.

If the trustees are to buy the annuity in their own names and to pay the same to the annuitant, and there is a direction that it is to fall into residue if the annuitant assigns it, the annuitant is not entitled to the purchase-money, even though he may die before the annuity is purchased without having assigned. *Power* v. *Hayne*, 8 Eq. 362; *Hatton* v. *May*, 3 Ch. D. 148; *In re Draper*, 57 L. J. Ch. 942; 58 L. T. 942; 36 W. R. 783; *Day* v. *Day*, 1 Dr. 569, better reported 22 L. J.

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Ch. 878; 17 Jur. 586, in which the contrary was held, has not been followed.

Annuitant is not entitled to the value of his annuity.

In the case of a gift of an annuity with a direction to set apart a fund to secure it, it is clear that the annuitant is not entitled to have the annuity valued and the value paid to him. *Wright* v. *Callender*, 2 D. M. & G. 652; *Miner* v. *Baldwin*, 1 Sm. & G. 522.

Deficient estate under administration.

If, however, the testator's estate is being administered by the Court and proves insufficient to pay the legacies and annuities given, so that an abatement is necessary, a value will be put upon the annuities as from the testator's death, and the annuitant or his representatives will be entitled to the valued amount after abatement. *Wroughton* v. *Colquhoun*, 1 De G. & S. 357; *Carr* v. *Ingleby*, *ib.* 362; *Long* v. *Hughes*, *ib.* 364.

This principle applies only where the estate is being administered. *In re Nicholson's Estate*, I. R. 11 Eq. 177.

It has been applied to an annuity determinable on alienation. *In re Sinclair*; *Allen* v. *Sinclair*, (1897) 1 Ch. 921, not following *Carr* v. *Ingleby*, *supra*; *Gratrix* v. *Chambers*, 2 Giff. 321.

It has also been applied to an annuity given to a married woman with a restraint on anticipation. *In re Ross*; *Ashton* v. *Ross*, (1900) 1 Ch. 162.

If the annuity is charged upon corpus, the tenant for life of the corpus is not entitled to have the annuity valued and the amount paid out of corpus; but sufficient portions of the corpus must be sold from time to time to satisfy the annuity. *In re Grant*; *Walker* v. *Martineau*, 31 W. R. 703.

II.—The Duration of Gifts of Annuities and Annual Sums.

1. Annuities whether for life or perpetual:

Annuity created *de novo* is for life.

a. When an annuity is given to a person without more, the question arises, whether it was meant to be for life only, or perpetual; and this point, in the case of annuities created *de novo*, is unaffected by sect. 28 of the Wills Act. *Nicholls* v. *Hawkes*, 10 Ha. 342.

In the case of a deed, it has been decided, that a grant of an annuity given without words of limitation and charged upon freeholds, gives a life interest. The same rule applies if the annuity is charged on freeholds and chattels real. *Butt's Case*, 7 Rep. 23a; *In re Gillman's Estate*, I. R. 10 Eq. 92.

Whether a grant of an annuity without words of limitation charged upon a chattel interest would endure beyond the life of the annuitant, if he dies during the term, is doubtful. Cases *supra*, and *In re Finlay's Estate*, (1907) 1 Ir. 24.

Rule as to annuity given by will.

In the case of wills the gift of an annuity or annual sum to A, or A for life and then to B, or to several persons successively for life and then to their children or to a person or his descendants, or to A for life and to his sons as he may appoint, gives the beneficiaries in each case interests for their lives only. *Blewitt* v. *Roberts*, 10 Sim. 491; Cr. & Ph. 274; *Yates* v. *Maden*, 3 Mac. & G. 532; *Lett* v. *Randall*, 2 D. F. & J. 388; *Blight* v. *Hartnoll*, 19 Ch. D. 294; *In re Morgan; Morgan* v. *Morgan*, (1893) 3 Ch. 222; *Ward* v. *Ward*, (1903) 1 Ir. 211; *In re Smith's Estate*, (1905) 1 Ir. 453. *Bent* v. *Cullen*, 6 Ch. 235; *Evans* v. *Walker*, 3 Ch. D. 211, must be considered overruled.

Charge upon rents of freeholds.

Thus the fact that the annuity is charged upon freehold property, or even that it exhausts the whole of the rents and profits of the freehold property, and that the testator shows upon the face of his will that he is aware of this, will not make the annuity perpetual. *Mansergh* v. *Campbell*, 3 De G. & J. 232; *Barden* v. *Meagher*, I. R. 1 Eq. 246; *Sullivan* v. *Galbraith*, I. R. 4 Eq. 582; *Whitten* v. *Hanlon*, 16 L. R. Ir. 298; *Blight* v. *Hartnoll*, 19 Ch. D. 294.

Charge upon income of a fund.

Similarly the fact that the annuity is charged upon a fund or given out of the income of a fund or that a fund is given upon trust to pay the annuity does not make the annuity perpetual. *Wilson* v. *Maddison*, 2 Y. & C. C. 372; *In re Foster's Estate*, 23 L. R. Ir. 269; *In re Morgan; Morgan* v. *Morgan*, (1893) 3 Ch. 222.

When annuity is perpetual.

b. But if the annuity is given in such a way as to amount to a gift of the income of a particular fund without limit of time, or as a gift of so much capital as will produce the

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annual sum, or if the whole estate is distributed in the shape of annual sums, the annuity or annual sums will be perpetual. *Rawlings* v. *Jennings*, 13 Ves. 39; *Stokes* v. *Heron*, 12 Cl. & F. 161; *Kerr* v. *Middlesex Hospital*, 2 D. M. & G. 576; *Hill* v. *Rattey*, 2 J. & H. 634; *Potter* v. *Baker*, 13 B. 273; 15 B. 489; *Hicks* v. *Ross*, 14 Eq. 141; *Engelhardt* v. *Engelhardt*, 26 W. R. 853; see *Wakeham* v. *Merrick*, 37 L. J. Ch. 45.

Charge upon leaseholds.

And if the annuity is charged upon income which itself continues only for a limited time, for instance, upon the rents of a leasehold property, slight indications of intention are sufficient to show that it was to last during the currency of the lease. *Courtenay* v. *Callaghan*, 5 Ir. Ch. 154, 356.

Direction to invest to provide annuity.

A direction to invest a sum in Government securities sufficient to produce a certain annual sum for a beneficiary (*a*), or to invest sufficient to answer the following annuities (*b*), gives only life annuities. *Re Grove's Trusts*, 1 Giff. 74 (*a*); *Re Taber; Arnold* v. *Kayess*, 46 L. T. 805; 30 W. R. 883; 51 L. J. Ch. 721 (*b*); see *Banks* v. *Braithwaite*, 11 W. R. 598; 32 L. J. Ch. 35, 198.

Direction to purchase annuity.

There can be no doubt, that a direction to purchase an annuity of so much a year for A is a direction to purchase a life annuity only; but in some cases a direction to purchase such an annuity in "the British funds," or "in Government securities," has been held a gift of so much Consols as would produce the annual sum. *Kerr* v. *Middlesex Hospital*, 2 D. M. & G. 576; *Ross* v. *Boyer*, 2 J. & H. 469.

Direction for cesser or sale at a certain time.

If the annuity is directed to cease if the legatee dies without issue, or is directed not to be sold till after the death of the legatee, there is a strong argument that it was meant to be perpetual. *Hedges* v *Harpur*, 3 De G. & J. 129; *Pawson* v. *Pawson*, 19 B. 146.

Powers of appointing the annuity in fee.

Or again, if the legatee has a power of appointing the annuity in words that would authorise the appointment of a perpetual annuity, or the annuity is given over in certain events in fee, the same argument arises. *Wright* v. *Wright*, 12 Ir. Ch. 401; *Robinson* v. *Hunt*, 4 B. 450.

Limitations inconsistent with a mere life interest.

And if the annuity, being given to several persons as tenants in common, is given over in its entirety at a period when, if it were only for the life of the legatees, it might have partially determined, it will be perpetual, as it would be absurd to suppose that it is to cease upon the death of a prior annuitant and to revive again in certain events. *Monsergh* v. *Campbell*, 3 De G. & J. 237; *Barden* v. *Meagher*, I. R. 1 Eq. 246.

2. Annuities given for a period and for an object:

Annuity given for fixed period for maintenance does not determine with minority.

An annuity given to a person for a fixed period for maintenance is not determined by the attainment of majority, or by death before that period. *Savery* v. *Dyer*, Amb. 139; *Badham* v. *Mee*, 1 R. & M. 631; *Longmore* v. *Elcum*, 2 Y. & C. C. 363; *Lewes* v. *Lewes*, 16 Sim. 266; *Attwood* v. *Alford*, L. R. 2 Eq. 479; *In re Ord*; *Dickinson* v. *Dickinson*, 9 Ch. D. 667; 12 Ch. D. 22.

This, however, does not apply where the duration of the annuity is merely the duration of the legal estate; if, for instance, the annuity is given to trustees for their lives, and the life of the longest liver of them, for the support of A. *Ryan* v. *Keogh*, I. R. 4 Eq. 357.

Annuity to parent during minority of child for maintenance of child.

A gift of an annuity to a parent until his child attains twenty-one for the maintenance and education of the child, does not determine by the death of the parent. *In re Yates*; *Yates* v. *Wyatt*, (1901) 2 Ch. 438.

Annuity for maintenance and education.

The gift of an annual sum for maintenance and education is not to be limited to minority, but creates a life interest. *Soames* v. *Martin*, 10 Sim. 287; *Lewes* v. *Lewes*, 16 Sim. 266; *Wilkins* v. *Jodrell*, 13 Ch. D. 564; *Williams* v. *Papworth*, (1900) A. C. 563; see *Frewen* v. *Hamilton*, 47 L. J. Ch. 391; *In re Booth*; *Booth* v. *Booth*, (1894) 2 Ch. 282.

In *Gardner* v. *Barker* (18 Jur. 508), an annuity for maintenance and education was limited to minority. See *Foley* v. *Parry*, 2 M. & K. 138.

Annuity to trustee for his trouble.

A gift of an annuity to a trustee, so long as he should continue to execute the office of trustee under the will, or for his trouble, ceases with the active trusts, not necessarily with a judgment for administration. *Baker* v. *Martin*, 8 Sim. 25; *Hull* v. *Christian*, 17 Eq. 546; *M'Dermot* v. *O'Conor*, I. R. 10

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Eq. 352; *Clay* v. *Coles*, W. N. 1880, 145; *Henrion* v. *Bonham*, Dru. t. Sug. 476; see *In re Muffett*; *Jones* v. *Mason*, 56 L. J. Ch. 600; 56 L. T. 685.

Gift to a person during the minority of an infant.

It is clear that a gift of rents and profits to a parent during the minority of a child, where no benefit is intended for the child, will go to the representatives of the parent if he dies during the minority. *Smith* v. *Havens*, Cro. Eliz. 252; *Laxton* v. *Eedle*, 19 B. 321.

On the other hand, if the child dies during his minority the parent will, nevertheless, be entitled to the rents and profits till the time when the child, if living, would have attained twenty-one, if the object of the gift is payment of debts. *Carter* v. *Church*, 1 Ch. Ca. 113; *Boraston's Case*, 3 Rep. 19a.

And it would seem that the construction would be the same if the object of the term is the benefit of the person, to whom the rents and profits are given during the minority. *Coates* v. *Needham*, 2 Vern. 65. See 1 Jarm. 544.

On the other hand, if the term is created for the benefit of the child, or if the object of it is merely to postpone the interest of the child till he should have performed some condition, which could not be performed after his death, the term will determine with his life. See *Manfield* v. *Dugard*, 1 Eq. Abr. 194, pl. 4, where the report is very unsatisfactory; *Lomax* v. *Holmeden*, 3 P. W. 176; and see *Castle* v. *Fate*, 7 B. 296; *Goodright* d. *Revell* v. *Parker*, 1 M. & S. 692.

III.—Annuities charged on Corpus or Income.

Whether annuities are payable out of income or corpus.

It is often a question of some difficulty whether an annuity is payable out of corpus or only out of income.

1. Rent-charges.

1. An ordinary rent-charge is a charge upon corpus, and the Court has jurisdiction to raise arrears by a sale of the land, though there may be express power of distress and entry (*a*). This is the case though the words by which the rent-charge is created do not expressly charge the corpus, but direct the rent-charge to issue out of rents and profits (*b*). *Capit* v. *Jackson*, 13 Pr. 721; *White* v. *James*, 26 B. 191; *Hall* v. *Hurt*, 2

J. & H. 76; *Scottish Widows' Fund* v. *Craig*, 20 Ch. D. 208; *Horton* v. *Hall*, 17 Eq. 437; *In re Tucker; Tucker* v. *Tucker*, (1893) 2 Ch. 323 (*a*); *Hambro* v. *Hambro*, (1894) 2 Ch. 564 (*b*). *Kelsey* v. *Kelsey*, 17 Eq. 495, was not a case of a rent-charge proper, and the only question there was who should pay the costs, as the annuity was not in arrear at the hearing.

But an order for sale of the inheritance will not be made if the rent-charge is secured by a term with power to raise it out of rents or by sale or mortgage of the term. *Blackburne* v. *Hope-Edwardes*, (1901) 1 Ch. 419.

If the estate out of which the rent-charge issues is settled, the Court will not raise arrears by a sale if there is any possibility that they may be met in any other way. *Graves* v. *Hicks*, 11 Sim. 536, 551; *Philips* v. *Philips*, 8 B. 193; *Taylor* v. *Taylor*, 17 Eq. 324, as explained in *Horton* v. *Hall*, *ib.* 437.

2. Annuity by way of jointure in settlement.

2. In the case of marriage settlements the nature of the document assists the construction, and a jointure to the wife given out of rents and profits has in several cases been held to be a charge upon corpus. *In re Tyndall's Estate*, 7 Ir. Ch. 181; *Carter* v. *Selfe*, I. R. 1 Eq. 97; *In re West's Estate*, 1898, 1 Ir. 75.

3. Annuity given in general terms may be made a charge by express words.

3. Where the annuity is not a rent-charge, but is given in general terms, a charge upon particular property or upon the residue may be created; for instance, if the property or residue is given subject to and chargeable or charged with the annuity (*a*), or by a direction that the annuity is to be secured out of the property (*b*), or by a gift of the property, and not merely of the income on trust to pay the annuity (*c*). *Stamper* v. *Pickering*, 9 Sim. 177; *Gordon* v. *Bonden*, 6 Mad. 342; *Picard* v. *Mitchell*, 14 B. 103; *Byam* v. *Sutton*, 19 B. 556 (*a*); *Howarth* v. *Rothwell*, 30 B. 516 (*b*); *Hickman* v. *Upsall*, 2 Giff. 124 (*c*).

Where two annuities were expressly charged upon certain property, the charge was not cut down by a direction that if the rents should be insufficient to pay both annuities one should abate in favour of the other. *Pearson* v. *Helliwell*, 18 Eq. 411.

Where trustees, in whom a term is vested to raise money to pay debts and legacies, are also directed to raise an annual sum, the inference is that they are to raise it by means of the term,

and that it is a charge upon corpus. *Torre* v. *Browne*, 5 Ir. L. 555.

4. No express charge. Annuity and residue.

4. An annuity may be given without words creating an express charge.

If the annuity is given in general terms and there is then a gift of residue, the annuity is charged upon the corpus. *Wroughton* v. *Colquhoun*, 1 De G. & S. 357; *Croly* v. *Weld*, 3 D. M. & G. 993.

5. Gift of annuity, direction to set aside fund, gift of residue.

5. If there is a clear gift of an annuity followed by a direction to set aside a fund to secure it, which on the death of the annuitant is to fall into residue, or is dealt with as part of the residue, and the estate is insufficient to provide the fund, the annuity is payable out of the corpus of the estate. The direction to set aside a fund is only a means to an end, and the question is one between annuity and residue. *Bright* v. *Larcher*, 3 De G. & J. 148; *Davies* v. *Wattier*, 1 S. & St. 463; *Miner* v. *Baldwin*, 1 Sm. & G. 522; *Haynes* v. *Haynes*, 3 D. M. & G. 590; *Upton* v. *Vanner*, 1 Dr. & S. 594; *Ingleman* v. *Worthington*, 1 Jur. N. S. 1062; *In re Mason*; *Mason* v. *Robinson*, 8 Ch. D. 411; *Carmichael* v. *Gee*, 5 App. C. 588, affirming *Gee* v. *Mahood*, 11 Ch. D. 891; *Re Taylor*; *Illsley* v. *Randall*, 50 L. T. 717.

If the annuity fund is treated as part of the residue, it is not material that the residue is given to one class of persons and the annuity fund to another, or that it is distinguished as a separate and postponed part of the residue. *Wright* v. *Callender*, 2 D. M. & G. 652; *Carmichael* v. *Gee*, *supra*.

6. No independent gift of an annuity, direction to set aside fund and residuary gift.

6. Even if there is no independent gift of an annuity, but only a direction to set aside a fund sufficient to produce by the income thereof an annuity or annual sum which is then given to an annuitant, and there is a residuary gift, or the fund is directed to fall into residue on the annuitant's death or is dealt with as part of the residue, the same result follows, the annuity is charged on the corpus of the estate. *May* v. *Bennett*, 1 Russ. 370; *Wright* v. *Callender*, 2 D. M. & G. 651; *Mills* v. *Drewitt*, 20 B. 632; *Ingleman* v. *Worthington*, 1 Jur. N. S. 1062; *Anderson* v. *Anderson*, 33 B. 223; *Percy* v. *Percy*, 35 B. 295.

7. On the other hand, if there is a direction to set aside a fund sufficient to produce an annual income of a stated amount and to pay such income to an annuitant for life, and the only gift of the annuity is through that direction, and the fund is not left or directed to fall into residue on the annuitant's death, but is then specifically disposed of, then if the testator's estate is insufficient to provide a fund sufficient to produce the income required, the annuitant is only entitled to the actual income produced during his life. It is a case of tenant for life and remainderman. *Baker* v. *Baker*, 6 H. L. 616; *A.-G.* v. *Poulden*, 3 Ha. 555; *Turbottom* v. *Earle*, 11 W. R. 680; *Michell* v. *Wilton*, 20 Eq. 269.

7. Case of tenant for life of fund and remainderman.

8. Again, the testator may give specific property upon trust out of the income thereof to pay an annual sum or an annuity to a person for life.

8. Trust to pay annuity out of income of particular property or of residuary estate.

It has been said that "an unlimited indefinite charge upon rents and profits is a charge upon corpus" (*a*), but the cases show that such an abstract proposition is of little value. The question is one of the construction of each particular will (*b*). *Phillips* v. *Gutteridge*, 3 D. J. & S. 332 (*a*); *Miller* v. *Huddlestone*, 3 Mac. & G. 513; *Forbes* v. *Richardson*, 11 Ha. 354, 357, 358; *Birch* v. *Sherratt*, 2 Ch. 644, 647, per Cairns, L.J.; *In re Boden*; *Boden* v. *Boden*, (1907) 1 Ch. 152; *In re Bigge*; *Granville* v. *Moore*, (1907) 1 Ch. 714 (*b*).

In such a case, if after the death of the annuitant the property is left or directed to fall into residue and is dealt with as part of the residuary estate, the annuity is payable out of corpus. *Magill* v. *Murphy*, 1 L. R. Ir. 496.

On the other hand, if the property is given over to other persons after the death of the annuitant, the annuity is payable out of income only. *Foster* v. *Smith*, 1 Ph. 269; *Earle* v. *Bellingham*, 24 B. 445; *Addecott* v. *Addecott*, 29 B. 450; *Sheppard* v. *Sheppard*, 32 B. 194; *In re Matthews' Estate*, 7 L. R. Ir. 269.

If the testator shows that he considered the rents and profits would be amply sufficient to pay the annuity—for instance, by directing large sums to be raised out of the surplus rents—this affords a strong argument that the corpus was not intended to

be charged. *Heneage* v. *Lord Andover*, 3 Y. & J. 360; *Forbes* v. *Richardson*, 11 Ha. 354.

The fact that the surplus rents are disposed of after payment of the annuity affords an argument against a charge upon corpus, though not a conclusive one. See *Carter* v. *Sall*, I. R. 1 Eq. 97; *Bell* v. *Bell*, I. R. 6 Eq. 239, where *Stelfox* v. *Sugden*, Jo. 234, is discussed.

9. Annuity out of income of residuary estate.

9. The testator may give the whole of his residuary estate upon trust out of the income to pay an annuity or annual sum to a person for life.

If the annuity is given in this way, and there is then nothing more than a gift of residue after the annuitant's death, the annuity is a charge on corpus. Per Wood, V.-C., *Stelfox* v. *Sugden*, Jo. 234, 240, 241; see, too, per Fry, J., in *Wormald* v. *Muzeen*, 17 Ch. D. 167.

If the surplus income is expressly given in such a way as to show that the annuity is only to be paid out of each year's income, so that arrears of one year could not be paid out of the income of subsequent years, the annuity is not a charge on corpus. *Stelfox* v. *Sugden*, Jo. 234, explained in *Bell* v. *Bell*, I. R. 6 Eq. 239.

And even if the surplus income is given simply without any words limiting the annuity to the income of each year, the proper inference may be that as the testator contemplated a surplus he did not contemplate or intend a charge upon corpus. *Sheppard* v. *Sheppard*, 32 B. 194; *Wormald* v. *Muzeen*, 29 W. R. 795; reversing *S. C.*, 17 Ch. D. 167, where the construction was probably assisted by the gift over of the "said trust estates," *i.e.*, the entire undiminished trust estates, though it was a gift not at the death of the annuitant, but at the death of the tenant for life. *In re Bigge; Granville* v. *Moore*, (1907) 1 Ch. 714.

10. Effect of gift over in charging corpus.

10. Where an annuity is given out of the income of particular property or of the residue, the property or residue may be given over in such a way as to show that the annuity is intended to be charged on corpus.

Gift over subject to annuity.

If the case is the simple one of a direction to pay an annuity out of rents and profits or income to A for his life, and the property is disposed of "subject to the annuity," the corpus is

charged. *Phillips* v. *Gutteridge*, 3 D. J. & S. 332; *Birch* v. *Sherratt*, 2 Ch. 641, 649; *Carter* v. *Salt*, I. R. 1 Eq. 97; *In re Moore's Estate*, 19 L. R. Ir. 365. See, too, *Perkins* v. *Cooke*, 2 J. & H. 393.

The same construction has been adopted where the surplus income was given to a tenant for life, and after the death of the tenant for life the property was given "subject to" or "subject and without prejudice to" the annuity, though the words "subject to the annuity" might have been intended to provide only for the event of the annuitant surviving the tenant for life. *Ex parte Wilkinson*, 3 De G. & S. 633; *Playfair* v. *Cooper*, 17 B. 187; *Bell* v. *Bell*, I. R. 6 Eq. 239; *In re Pepper's Trusts*, 13 L. R. Ir. 108.

The same result will follow if the property is given over in words which import that it is only to go over after the annuity is fully paid. This effect has been given to such words as "after the performance of all the before-mentioned trusts" (*a*), or after payment of the annuity and subject thereto (*b*). *Phillips* v. *Gutteridge*, 3 D. J. & S. 332 (*a*); *Birch* v. *Sherratt*, 2 Ch. 644; see too *Haynes* v. *Haynes*, 3 D. M. & G. 590 (*b*).

A gift over "subject to the said provisions" or "to the trusts aforesaid" does not make the annuity payable out of corpus. It merely means subject to the trust to pay the annuity out of income accruing during the life of the annuitant. *Hindle* v. *Taylor*, 20 B. 109; *In re Boden*; *Boden* v. *Boden*, (1907) 1 Ch. 132; *In re Bigge*; *Granville* v. *Moore*, (1907), 1 Ch. 714.

11. Continuing charge on income.

11. An annuitant whose annuity is payable out of rents and profits is entitled, if there is nothing to limit the annuity to the rents and profits of each year, to have arrears of one year made up out of the rents and profits of subsequent years, at any rate during his life, and the annuity may be so given as to make arrears a charge upon rents and profits after the annuitant's death. *Philips* v. *Philips*, 8 B. 192; *Booth* v. *Colton*, 5 Ch. 684.

If the surplus rents after payment of the annuity are to be accumulated and settled in favour of other persons, the annuitant is not entitled to come on the accumulated fund for arrears. *Barbon* v. *Richards*, 14 Sim. 537.

IV.—Statutes of Limitation.

Rent-charge and annuity charged on realty and personalty.

Only six years' arrears of an annuity charged on real estate or on real and personal estate can be recovered, and the annuity itself is barred by non-payment for twelve years. 3 & 4 Will. IV. c. 27, ss. 2, 42; 37 & 38 Vict. c. 57, ss. 1, 9; *James* v. *Salter*, 3 Bing. N. C. 544; *Francis* v. *Grocer*, 5 Ha. 39; *Irish Land Commission* v. *Grant*, 10 App. C. 14; *Dower* v. *Dower*, 15 L. R. Ir. 264; *In re Nugent's Trusts*, 49 L. R. Ir. 440.

Express trust.

It would seem that since the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 10, an express trust to pay the annuity would make no difference. That section provides that no action shall be brought to recover any sum of money or legacy charged upon land and secured by an express trust except within the time within which the same would be recoverable if there were no trust. However, in *Hughes* v. *Coles*, 27 Ch. D. 234, it was held that, though after twelve years the right to all arrears was barred, future payments of the annuity were not affected.

An annuity charged on personalty is a legacy within sect. 40 of the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27). It is not within sect. 42 of that Act. But whether the effect of sect. 40 is to bar the annuity altogether after the lapse of twelve years, or only to bar each accruing payment, has not yet been decided. *Re Ashwell's Trust*, Jo. 112; *Roch* v. *Callan*, 6 Ha. 531.

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An annuity given to the owner of a mansion house and grounds, so long as he should remain the owner and actual occupant, for the purpose of enabling him to keep up, decorate and beautify the property, does not cease on the expropriation of a part of the grounds. *Re Mocklem & Niagara Falls Park Comrs.*, 14 A.R. 20. Chap. XL. Duration.

An annuity of $50 was given to a widow, to be increased to $100 if she bore a child to the testator, as long as both lived and she remained a widow. By another clause the testator directed, "and pay stopped when of age, $100," referring to the child. Held, that the widow was entitled to $100 until the child attained twenty-one, if she remained a widow, but if the child died before twenty-one or she married, then to $50 for life. *Boteman* v. *Bateman*, 17 Gr. 227. Conditional

An annuity for life with a direction that on death it shall be equally divided amongst the children of the annuitant (during the lives of others) provided they are not spendthrifts, etc., is payable to the personal representative of the annuitant on death upon trust for those entitled, and is a vested interest in the children subject to be divested on their becoming spendthrifts, etc. *Woodhill* v. *Thomas*, 18 O.R. 277.

An annuity to the widow of the testator's son, as long as she *Durante viduitate.*

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remained unmarried, is not invalid as being in restraint of marriage. *Cowan* v. *Allen*, 26 S.C.R. 292.

Payable out of corpus.

Where a fund is directed to be invested to produce an annuity, and the income is insufficient, the deficiency may be made up out of capital. *Anderson* v. *Dougall*, 15 Gr. 405.

The rule is the same where the income of the fund is bequeathed to another "after payment of the annuity." *Jones* v. *Jones*, 27 Gr. 317.

And where the testator directed a fund to be provided to keep up yearly payments to his sisters, and directed that if there should not be enough in any year then to divide equally between them as much as should be available, and make up the deficiency when there were funds to do it with, and disposed of specific sums to other legatees after sufficient had been invested to provide annuities, it was held that on a deficiency in income to pay the annuities the arrears should be made up out of the proceeds of sales of the corpus. *Re McKenzie*, 4 O.L.R. 707.

An annuity of $10,000 was bequeathed to a widow in lieu of dower, and annuities were given to daughters, all payable out of the general estate, and specific devises and bequests of scheduled property were made to the daughters on the death of the widow, and it was held that as the income of the estate was not sufficient to pay the daughters' annuities in addition to the widow's, they were entitled to resort to capital, provided that sufficient was always maintained to pay the widow's annuity. *Almon* v. *Lewin*, 5 S.C.R. 514.

A direction to executors to put out as much of the estate as will bring in $200 at interest, "said amount of $200 to be paid to my wife each and every year of her life," with a direction that the "said principal" be equally divided between two other legatees at her death, indicates an intention that at least $200 a year is to be paid to the widow, and not merely the income of the estate, which was less than $200, and therefore that capital might be resorted to for the deficiency. *Kimball* v. *Cooney*, 27 A.R. 456.

A bequest of an annuity, with a fund set apart to secure it, and a direction to dispose of the residue after payment of the annuity, gives the right to resort to the residue for any deficiency after the income of the segregated fund is exhausted. *Merritt* v. *Wright*, 21 N.B.R. 135.

But where the annuity is distinctly made payable out of income alone, the corpus cannot be resorted to. Thus a direction to convert, and hold the proceeds "in trust out of the income thereof to pay" an annuity to a widow with a disposition of the "residue of such income" to children, and an ultimate disposition of capital, does not entitle the annuitant to resort to corpus on a deficiency in income. *Machray* v. *Higgins*, 8 M.L.R. 29.

Interest on arrears of an annuity not allowed after the death of the annuitant as against an assignee in insolvency. *Snarr* v. *Badenach*, 10 O.R. 131. **Interest.**

An annuity, not payable out of corpus, and a pecuniary legacy abate ratably. *Wilson* v. *Dalton*, 22 Gr. 160. **Abatement.**

On a devise of lands to trustees upon trust to pay an annuity, and to permit two parcels to be occupied by two children **Apportionments.**

respectively, and to apportion the contributions which the two parcels should make to the annuity, the act of apportioning is an administrative and not a judicial one, does not require notice to the occupants, and will not be controlled by the Court. *Roche* v. *Roche*, 22 N.S.R. 211.

CHAPTER XLI.

ESTATES FOR LIFE.

I.—Creation of Life Estates.

Devise without words of limitation.

1. In wills before the Wills Act a devise to a person without words of limitation gave a life estate only, but now by sect. 28 of the Wills Act such a devise is to be construed to pass the fee simple or other the whole interest which the testator had power to dispose of by will, unless a contrary intention appears by the will.

Successive life estates not enlarged.

If a life interest is devised to A, followed by a devise to his first and other sons successively for life, with remainder to the first and other sons of such first son for ever, the life interest to the first and other sons of A is not enlarged. *Kershaw* v. *Kershaw*, 3 E. & B. 845; *Forsbrook* v. *Forsbrook*, 3 Ch. 93.

And the same construction may be adopted where the interests of the sons of A are not expressly stated to be for life.

Thus, under a devise to A for life with remainder to his first and every other son successively, not expressly for life, and in default of such issue over, each son takes only for life. *Foster* v. *Lord Romney*, 11 East, 594; *Bevan* v. *White*, 7 Ir. Eq. 473; *Palmer* v. *Palmer*, 18 L. R. Ir. 192.

Effect of gift at the death of first taker.

2. A gift without words of limitation may be cut down to a life interest, if the same property is disposed of at the death of the first taker. *In re Russell*, 53 L. J. Ch. 400; revd. 52 L. T. 559; *In re Houghton*; *Houghton* v. *Houghton*, 53 L. J. Ch. 1018; see *In re Percy*; *Percy* v. *Percy*, 24 Ch. D. 616.

And words indicating that the property is to be enjoyed

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by some one else after the death of the first taker may have the same effect. *Gracenor* v. *Watkins*, L. R. 6 C. P. 500.

Similarly, where the testator's whole property is given to a person absolutely, followed by a gift of the residue at his decease, the first gift may be cut down to a life interest. *Sherratt* v. *Bentley*, 2 M. & K. 149; *Hare* v. *Westropp*, 9 W. R. 689; *Re Brook's Will*, 2 Dr. & Sm. 362; *In re Bagshaw's Trusts*, 24 W. R. 875; 25 W. R. 659; 46 L. J. Ch. 567; *In bonis Lupton*, (1905) P. 321.

Gift of what remains.

If what is given at the death of the legatee is what then remains, or the then balance or the like, the question is, does the testator intend to leave the absolute gift and to give over only what the absolute owner does not dispose of, in which case the absolute gift remains and the gift over is void (*Perry* v. *Merritt*, 18 Eq. 152; *Lloyd* v. *Tweedy*, (1898) 1 Ir. 5; *In re Jones*; *Richards* v. *Jones*, (1898) 1 Ch. 438); or does he intend to cut down the absolute gift to a life interest.

If the true construction is, that what in the first instance appeared to be an absolute interest is cut down to a life interest, then the use of such expressions as "whatever remains" will not prevent the intention from taking effect, and the legatee will take either for life simply or for life with a power of disposition, if there is anything in the will to support that construction. When an absolute interest is varied by a codicil, it is more easy to construe the variation as intended to give a life interest only. *Constable* v. *Bull*, 3 De G. & S. 411; *Re Adams' Trusts*, 14 W. R. 18; *Bibbens* v. *Potter*, 10 Ch. D. 753; *Re Sheldon and Kemble*, 53 L. T. 527; *In re Pounder*; *Williams* v. *Pounder*, 56 L. J. Ch. 113; 56 L. T. 104; *In re Holden*; *Holden* v. *Smith*, 57 L. J. Ch. 648; 59 L. T. 358; *In re Sanford*; *Sanford* v. *Sanford*, (1901) 1 Ch. 939; see also *Re Rowland*; *Jones* v. *Rowland*, 86 L. T. 78.

Devise to A for his life and that of his heir.

A devise to A for his life and the life of his heir gives him an estate during his own life and that of his heir. *In re Amos*; *Carrier* v. *Price*, (1891) 3 Ch. 159.

II.—Gifts to Several for their Lives.

Devise to A and B for their lives.

1. A devise to A and B for their lives is equivalent to a devise to them and the survivor of them.

So a devise to A during the life of B and C continues during the joint lives of B and C, and the life of the survivor of them.

But a devise to A for a term, if B and C so long live, determines by the death of B or C. *Brudnell's Case*, 5 Rep. 9; *Day* v. *Day*, Kay, 703.

In the same way a gift of an annuity to two persons for their lives is a gift to them and to the survivor of them, though the annuitants may be husband and wife. *Moffat* v. *Burnie*, 18 B. 211; *Neighbour* v. *Thurlow*, 28 B. 33; *Alder* v. *Lawless*, 32 B. 72; see *Day* v. *Day*, Kay, 703.

And the same construction has been put upon a gift to two during their joint lives followed by a gift over after the death of both. *Townley* v. *Bolton*, 1 M. & K. 148; see *Smith* v. *Oakes*, 14 Sim. 122.

Gift of annuity for lives of A and B.

2. A direction to purchase an annuity for the lives of A and B to be equally divided between them gives them an annuity only during the joint lives. *Grant* v. *Wimbolt*, 2 W. R. 151; 23 L. J. Ch. 282; *In re Drakeley's Estate*, 19 B. 395.

But a gift to A and B of the sum of 30*l.* each yearly, so long as they shall live, gives each a separate annuity of 30*l.* *Lill* v. *Lill*, 23 B. 446.

And a gift of income to three for their respective lives, and subject thereto for their respective children, is a gift of a third to each for his life. *Sutcliffe* v. *Howard*, 38 L. J. Ch. 472.

Gift of income to two as tenants in common for a definite period.

3. Under a gift of an annuity to A and B as tenants in common during their joint lives and the life of the survivor, if A dies his legal personal representatives are entitled to half the annuity during the life of the survivor. *Jones* v. *Randall*, 1 J. & W. 100; *Eales* v. *Cardigan*, 9 Sim. 384; *Bryan* v. *Twigg*, 3 Eq. 433; 3 Ch. 183; *Chatfield* v. *Berchtoldt*, 18 W. R. 387.

If the annuity is to be paid to several as tenants in common but not limited for their lives, and the duration of the annuity is defined by a gift over at the death of the survivor, the same result follows, and the representatives of a deceased annuitant take his share while the annuity lasts. *Bignold* v. *Giles*, 4 Dr. 343.

Cases in which the survivor takes the whole income.

4. But, even in cases where the duration of the annuity is clearly defined, there may be words to show that the survivor was to take the whole. Thus, if the gift is to several as tenants in common "for their lives or the life of the survivor for their or her absolute use," or "for their lives and the life of the survivor during their and her natural life," the additional words show that the survivor was to take the whole. *Hatton* v. *Finch*, 4 B. 186; *Cranswick* v. *Pearson*, 31 B. 624; affd. 9 L. T. 275; and in *Doe* d. *Borwell* v. *Abey*, 1 M. & S. 428, the gift over "from and after their respective deceases and the decease of the survivor" indicated that the representatives of annuitants were not to take anything after their respective deaths.

Duration of annuity inferred from gift over.

5. If the annuity is given to several for their lives as tenants in common with a gift over of the annuity as a whole after the death of the survivor, the effect may be to give the whole annuity to the survivor during his life, as the limitation for life shows, that the representatives of a deceased annuitant were not intended to take after his death.

Thus, under a gift of an annuity to A and B to be equally divided between them for their lives with a gift over after the death of both, or after the death of the survivor, the survivor takes the whole for life. *Armstrong* v. *Eldridge*, 3 B. C. C. 215; *Tuckerman* v. *Jefferies*, 3 Bac. Ab. ed. Gw. 681; 11 Mod. 108; *McDermott* v. *Wallace*, 5 B. 142; *Draycott* v. *Wood*, 8 L. T. 304; *Re Telfair; Garrioch* v. *Barclay*, 86 L. T. 496; *Jennings* v. *Hanna*, (1904) 1 Ir. 540.

This construction has been applied to the case of a gift of the income of a fund to A and B during their lives in equal shares, followed by a gift after the death of A and B to their children, in cases where there was no gift to the children till after the death of the survivor of A and B. *Armstrong* v.

Eldridge, 3 B. C. C. 215; *Pearce* v. *Edmeades*, 3 Y. & C. Ex. 246; *Alt* v. *Gregory*, 8 D. M. & G. 221; *Begley* v. *Cook*, 3 Dr. 662; *Minton* v. *Minton*, 9 W. R. 586; *Re Buller; Buller* v. *Giberne*, 74 L. T. 406; see *Round* v. *Pickett*, 47 L. J. Ch. 631; *Kelsey* v. *Ellis*, 38 L. T. 471.

III.—Provisions determining Life Interests.

A direction that a life interest is not to be alienated, if there is no provision to determine or give over the life interest, is ineffectual. *Brandon* v. *Robinson*, 18 Ves. 429; *Graves* v. *Dolphin*, 1 Sim. 66; *Rochford* v. *Hackman*, 9 Ha. 475, 480. Direction not to alienate.

But a proviso for cesser of a life interest upon bankruptcy or alienation, whether followed by a gift over or not, and though the life interest is limited to the tenant for life and his assigns, is valid. *Dommett* v. *Bedford*, 6 T. R. 684; *Joel* v. *Mills*, 3 K. & J. 458; *Craven* v. *Brady*, 4 Ch. 296; *Re Kelly's Settlement; West* v. *Turner*, 59 L. T. 494. Proviso for cesser.

And a life interest may be given over upon bankruptcy or alienation. *Rochford* v. *Hackman*, 9 Ha. 475; *Brooke* v. *Pearson*, 5 Jur. N. S. 781; *Knight* v. *Browne*, 7 Jur. N. S. 894; 30 L. J. Ch. 649; *Hurst* v. *Hurst*, 21 Ch. D. 278. Gift over on bankruptcy.

A direction that the receipt of an annuitant is to be the only discharge the executor is bound to accept, and that he may require the attendance of the annuitant to receive the annuity, does not prevent alienation. *Arden* v. *Goodacre*, 11 C. B. 883.

A gift over upon the bankruptcy of the tenant for life does not determine a power vested in him of appointing the property to his children, unless there are directions inconsistent with the continuance of the power, such as a direction to distribute the property at once among the children in the event of bankruptcy. *Wickham* v. *Wing*, 2 H. & M. 436; *Haswell* v. *Haswell*, 28 B. 26; 2 D. F. & J. 456; *Re Kelly's Settlement; West* v. *Turner*, 59 L. T. 494; see *Potts* v. *Britton*, 11 Eq. 433; *In re Stone's Estate*, I. R. 3 Eq. 621.

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Words of limitation before statute.

Before the enactmenta presently referred to, words of limitation were necessary in a will to pass the fee. But the intention to pass the fee might appear from other clear expressions in the will.

Thus, a devise to J. D. "for his children" passed a life estate only. *Hamilton* v. *Dennis*, 12 Gr. 325.

After devises in tail to children, and a residuary devise of all property "not herein mentioned," there followed a devise of lands specifically to J. K. and J. S., without words of inheritance. Held, that J. K. and J. S. took estates for life only, and that the reversion passed to the residuary devisees. *Doe dem. Ford* v. *Bell*, 6 U.C.R. 527.

A devise of all the lands that might belong to the testator at the time of his death did not indicate an intention to pass the fee. Nor did a devise to J., provided that if he died before the testator, then to B., give J. more than a life estate on his surviving the testator. *Doe dem. Paddock* v. *Green*, 7 N.B.R. 314.

Estate.

A reference to "estate" might have indicated that the fee passed; but it must clearly have referred to the testator's interest in the land, and have been directly connected with the devise in question. So, on a devise to a widow of the income of "all my real estate" during her life, and after her death the same lands to go to children to be divided equally amongst them, it was held that even if the word "estate," as used in the devise to the widow, were auffieient to indicate an intention to pass the fee, the word had no relation to the devise to the children, and that they took life estates only. *Doe dem. Whitney* v. *Stanton*, 7 N.B.R. 632.

Charge on devisee.

But a charge imposed upon a devisee of land gave him the fee, no words of limitation being used. *Chisholm* v. *Macdonnell*, 7 N.B.R. 137.

Statutes.

In Ontario after 6th March, 1834, on a devise of lands, "it shall be considered that the devisor intended to devise all such estate as she was seised of in the same land, whether in fee simple or otherwise, unless it appears 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." R.S.O. c. 128, s. 4.

And by the Wills Act, "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." R.S.O. c. 128, s. 30.

In British Columbia the same enactment except the words in brackets, is in force. R.S.B.C. c. 193, s. 25.

In Manitoba, on and after 30th May, 1882; in New Brunswick, on and after 1st January, 1839; and in Nova Scotia, on and after 30th October, 1840, the same enactment, except the words in brackets came into force.

Since these enactments, restrictive words are necessary in order to cut down an indefinite devise to a life estate.

"Live on land."

"My wife shall be allowed to live on the said property during the term of her natural life," gives a life estate. *Fulton* v. *Cummings*, 34 U.C.R. 331.

A similar devise to a daughter as long as she remained unmarried gives an estate during the residence on the land unmarried. *Judge* v. *Splann*, 22 O.R. 409.

A devise to A. in fee, subject to the condition that daughters should "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," give a life estate to the daughters. *Bartels* v. *Bartels*, 42 U.C.R. 22.

"Lien for a home."

A devise in fee, with a direction that the testator's daughters and their mother should have "a lien on said lands for a home during their natural lives" gives a life estate to the daughters. *Scouler* v. *Scouler*, 8 C.P. 9.

Life in a lot.

A devise to a widow of "her life in the said lot" gives her a life estate. *Smith* v. *Smith*, 18 O.R. 205.

Revenues and income.

A devise to children, "reserving to my wife, as long as she remains my widow, the revenues and incomes therefrom." gives an estate to the widow *durante viduitate*. *King* v. *Murray*, 22 N.B.R. 382.

Will and disposal

A devise to a wife "to be at her will and disposal during her natural life," with a devise over, gives a life estate only to the wife. *Doe dem. Keller* v. *Collins*, 7 U.C.R. 519.

But a devise to a wife for life, with a general power of disposal by will, gives a fee simple. *Re Bethune*, 7 O.L.R. 417.

Remainder over.

Semble, that a devise to H. for her own use, with power to sell or dispose of the same as she may see fit, followed by a devise that after her death "the remainder of my estate, if any, be equally divided between, etc.," gives A. a life estate only. *Roman Catholic Episcopal Corpn.* v. *O'Connor*, 14 O.L.R. 666.

A vested remainder in fee, after a life estate with power of sale in the life tenant, is not affected if the power is not exercised. *Doe dem. Savoy* v. *McEachern*, 26 N.B.R. 391.

Power to appoint to sons.

As to whether a devise for life, with a power of appointment amongst sons of the devisee creates a power or a trust, *quære*. *McMaster* v. *Morrison*, 14 Gr. 138; *Pettypiece* v. *Turley*, 13 O.L.R. 1.

Remainder to children.

A devise to D. for life, "and to her children, if any, at her death, if no children," then over, gives a life estate to D. with remainder to children. *Grant* v. *Fuller*, 33 S.C.R. 34; *Young* v. *Denike*, 2 O.L.R. 723; *Sweet* v. *Platt*, 12 O.R. 229.

A devise to A. "and his heirs and executors forever," proviso, "that he neither mortgage nor sell the place, but that it

shall be to his children after his decease," was said to indicate an intention that A. should not have such an interest as would enable him to defeat his children, and therefore that he took an estate for life only, remainder to his children. *Dickson* v. *Dickson*, 6 O.R. 278. *Sed quære*, an estate in fee having been given by technical words.

A devise to a widow for life, followed by a devise of "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 wife. After the decease of my wife . . to my nephew and his heirs," gives a life estate to the widow; the estate not being enlarged by the expression "everything real and personal," because the remainder was clearly given to the nephew. *Clow* v. *Clow*, 4 O.R. 355.

Direction to divide.

A devise to a widow for life, remainder to two sons "during the full term of their natural lives . . . and if either . . . should die not leaving heirs the issue of his own body, his surviving brother shall inherit his share . . and after the decease of both of my said sons" sale and division of the proceeds amongst their heirs "then surviving." Held, a life estate for the joint lives of the two sons, remainder in fee to the persons answering the description of the heirs of the two sons at the death of the survivor of them. *Haight* v. *Dangerfield*, 5 O.L.R. 274.

Remainder in fee tail.

A devise to a husband and wife "and to their children and children's children forever . . . " provided that the husband and wife should not be at liberty to convey, "as it is my will that the same may be entailed for the benefit of their children," gives a life estate to the husband and wife. The explanation that the "children" were to have a fee tail indicates that the words "children and children's children" are not words of limitation of the estate of the husband and wife *Peterborough R. E. Co.* v. *Patterson*, 15 A.R. 751.

A devise to A. for life and at his decease to the "second male heir of him and his present wife and his heirs male forever, and in default of a second male heir to the eldest

surviving female heir or child and her male heirs forever" gives A. an estate for life, remainder to a daughter (there being only one son) in fee tail male. *Re Brown & Slater*, 5 O.L.R. 386.

A devise to S. H. G. of "the use of my farm . . . also to his lawful children, and in case of his death without children, then to . . . daughters and their heirs forever." gives S. H. G. a life estate only. S. H. G. having the use, it was held that the children (of whom the only one at the date of the will was *en ventre*) could not share with him; nor could that child exclude after-born children who might be alive at the death of S. H. G. In order, therefore, to give both S. H. G. and all his children an interest, it was held that S. H. G. took a life estate, remainder to his children living at his death; and in default of such children, then over. *Gourley* v. *Gilbert*, 12 N.B.R. 80.

A devise to G. for life and if he marries to his wife for life, and on the death of both to his children and their heirs, gives G. a life estate, remainder to his wife for life, remainder in fee to children. *Re Sharon & Stuart*, 12 O.L.R. 605.

A devise of all real and personal property to the testator's widow, followed by a declaration that "my wish and desire is that she divide" in certain proportions amongst the testator's children, held to give a life estate to the widow, in order to prevent a complete exclusion of the widow who was evidently intended to be benefited. *Wilson* v. *Graham*, 12 O.R. 469.

Similarly, a devise to A. generally, with a restraint on alienation and against waste, followed by a disposition amongst his children after his death, according to the discretion of the executors of the testator, gives A. a life estate only. *McPhail* v. *McIntosh*, 14 O.R. 312.

So, also, a devise on trust for sale, and to invest the proceeds for maintenance of the devisee and her children, and till sale to take the rents and profits for the life of the devisee, gives an estate for life only with a power of sale. *Re O'Sullivan*, 5 N.S.R. 549.

What remains.

A devise of the "possession, use and occupation" of land and all the rents and profits of all the estate to a widow "for the support of herself and children," with a proviso that if the rents and profits are not sufficient resort may be had to principal, and a direction that what remains at the death of the widow shall go to the children, gives a life estate to the widow. *Knapp* v. *King*, 15 N.B.R. 309.

Revert back.

Where, after a direction to convert, the testator bequeathed a portion of the proceeds to M. S., with the proviso that M. S.'s interest should not be transferable or transferred to any other person, but might be inherited by her children, and in case M. S. died without legitimate issue then, that her interest should "revert back" to other legatees, it was held that M S. took a life estate only. *Jeffrey* v. *Scott*, 27 Gr. 314.

CHAPTER XLII.

ESTATES PUR AUTRE VIE.

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Creation of estates *pur autre vie.*

AN estate *pur autre vie* in land may be created by a grant to a person during the life of another or during several lives. It may also arise by an assignment by a tenant for life of his life interest. If the duration of the estate is defined, it is not necessary that it should be granted to the grantee with words of limitation.

Estate *pur autre vie* not estate of inheritance; not subject to dower or curtesy;

Such an estate is not an estate of inheritance, inasmuch as it is limited to a life or lives.

It was therefore not subject to dower or curtesy. *Low* v. *Burron*, 3 P. W. 262; *In re Mitchell; Moore* v. *Moore*, (1892) 2 Ch. 87.

is a freehold estate;

But though not an estate of inheritance, it is a freehold estate, and it is in many respects governed by the analogy of freehold estates of inheritance. *Allen* v. *Allen*, 2 Dr. & War. 307; *In re Barber's Settled Estates*, 18 Ch. D. 624.

can be given for life with remainders.

For instance, it can be limited for life with remainder over, or to a person with an executory gift over, and the remainder or executory gift over cannot be destroyed. *In re Barber's Settled Estates*, 18 Ch. D. 624.

Immediate tenant only has an estate.

But the immediate tenant of the freehold is the only person who has any estate. The remainders are not estates at all, but mere expectancies. If, therefore, there was a life interest, with contingent remainders, and an ultimate limitation to the life tenant in fee, there was no merger of the life interest and the ultimate limitation in fee and the intermediate contingent remainders were not destroyed, nor did the contingent remainder fail by failure of the life interest before the contingency happened. *Pickersgill* v. *Grey*, 30 B. 352; *Ferguson* v. *Ferguson*, 17 L. R. Ir. 552.

Construction of limitations of estates *pur autre vie.*

Limitations of estates *pur autre vie* in land receive the same construction as similar limitations of freehold estates of inheritance. *In re Mahon's Estate*, 1 Ir. C. L. 567; *In re Whitsett's Estate*, 1 Ir. C. L. 632.

Devise before Wills Act.

On this ground it was held before the Wills Act, that a devise of an estate *pur autre vie* already existing, if words of limitation were not added, passed an estate for life only. *Doe* d. *Jeff* v. *Robinson*, 8 B. & C. 296; a case disapproved by Hayes, Principles (1829, p. 137) but approved by Lord St. Leonards in *Crozier* v. *Crozier*, 3 Dr. & War. 373, 382.

But words of limitation are not now required in a will to pass the testator's whole interest in an existing estate *pur autre vie.*

Words of limitation not necessary in a deed.

And even in a deed the grantor's whole interest will pass without words of limitation, if it can be gathered from the deed, that that was the intention. *M'Clintock* v. *Irvine*, 10 Ir. Ch. 485; *Brennan* v. *Boyne*, 16 Ir. Ch. 87; *Cubbin* v. *Doyle*, 3 L. R. Ir. 265.

Powers of owner of estate *pur autre vie.*

The grantee of the estate, whether it was granted to him without words of limitation, or to him and his heirs, or to him his executors and administrators, could always dispose of the whole interest during his life, and he could make an estate, which would devolve to heirs, devolve to legal personal representatives, and *vice versâ.*

Case of power to appoint estate *pur autre vie.*

The donee of a power of appointment over an estate *pur autre vie* has not necessarily the same right to alter the devolution of the estate. That must depend on the language of the power. *Whitehead* v. *Morton*, 19 L. R. Ir. 435, 447.

Estate *pur autre vie* not entailable.

The estate was not within the Statute *De Donis* and could not be entailed. If it was limited to a man and the heirs of his body, the grantee could by a disposition in his lifetime destroy the title of the heirs of the body and of subsequent remainderman.

Destruction of title of issue and remainderman:

To do this it was only necessary that he should deal with the estate in such a way as to vest a new or different interest in himself or another.

by surrender and grant of new lease;

For instance, a surrender and acceptance of a new lease by the owner of the estate *pur autre vie* is sufficient, though the

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persons in whom the legal title is vested do not concur in the surrender. *Norton* v. *Frecker*, 1 Atk. 524; *Baker* v. *Bayley*, 2 Vern. 225; *Grey* v. *Manwood*, 2 Eden, 339; *Blake* v. *Blake*, 1 Cox, 366; 3 P. W. 102; *Blake* v. *Luxton*, Coop. 178; *In re M'Neale*, 7 Ir. Ch. 388; *Batty* v. *Humphreys*, I. R. 9 Eq. 352.

The existence of prior incumbrances is not material. *Blake* v. *Luxton*, Coop. 178; *Allen* v. *Allen*, 2 Dr. & War. 307, 330.

by a mortgage;

A mortgage, though only by demise, if the equity of redemption is reserved to the mortgagor, his heirs and assigns, also destroys the interest of the issue in tail and remaindermen. *Walsh* v. *Studdert*, I. R. 5 C. L. 478; 7 *ib.* 482.

by grant of the reversion.

No doubt acceptance by the person who owns the *quasi* estate tail of a grant of the fee from the owner of the reversion would bar the issue in tail and remainderman. And in Ireland a fee farm grant under the Renewable Leasehold Conversion Act (12 & 13 Vict. c. 105) has the same effect. *Morris* v. *Morris*, I. R. 7 C. L. 295; *Batteste* v. *Maunsell*, I. R. 10 Eq. 97; *Blackhall* v. *Gibson*, 2 L. R. Ir. 49.

Consent of tenant for life required to bar estate tail in remainder.

But the *quasi* tenant in tail of the estate subject to a prior life interest could not, without the consent of the owner of the prior life interest, destroy remainders limited to take effect after the determination of the estate tail. *Wastneys* v. *Chappell*, 3 B. P. C. Toml. 50; *Slade* v. *Pattison*, 5 L. J. Ch. 51; *Edwards* v. *Champion*, 3 D. M. & G. 202.

Before the Fines and Recoveries Act (3 & 4 Will. 4, c. 74) the consent of the prior tenant for life was required, whether his title arose under the instrument creating the estate in *quasi* tail or outside that instrument. *Edwards* v. *Champion*, *supra*.

Whether by analogy to that Act the consent of a prior tenant for life, whose estate does not arise under the instrument creating the *quasi* estate tail, is unnecessary has not been settled by authority. As the Act does not apply there seems no ground to suppose that the old law can be altered by analogy to it.

Possibly the *quasi* tenant in tail in remainder could without the consent of the prior tenant for life destroy the title of the heirs of his body so as to create a *quasi* base fee. See *Edwards* v. *Champion*, 3 D. M. & G. 202, 215; *In re Barber's Settled Estates*, 18 Ch. D. 624, 628.

No particular form of consent by the tenant for life is necessary. His concurrence in the deed of disposition, though he may not be a conveying party, is sufficient. *Norton* v. *Frecker*, 1 Atk. 524; West, 203; *Allen* v. *Allen*, 2 Dr. & War. 307, 335.

Mode in which consent must be given.

It is probably not necessary, that the consent should be given by deed, if there is other sufficient evidence, that it was given.

An estate *pur autre vie*, not being an estate of inheritance, was not within the Statutes of Wills (32 Hen. 8, c. 1; 34 & 35 Hen. 8, c. 5), and could not under these Statutes be disposed of by will.

Estate *pur autre vie* not devisable before Statute of Frauds.

It was first made devisable by the Statute of Frauds (29 Car. 2, c. 3), s. 12, which enacted that any estate *pur autre vie* shall be devisable . . . ; and if no devise be made, shall be chargeable in the hands of the heir if it shall come to him by reason of a special occupancy as assets by descent, as in case of lands in fee simple; and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant and shall be assets in their hands.

Statute of Frauds, s. 12.

The Statute of Frauds did not apply to an estate *pur autre vie* in copyholds limited to a man without words of limitation, though it did apply to such an estate in a rent-charge. *Zouch* v. *Forse*, 7 East, 186; *Bearpark* v. *Hutchinson*, 7 Bing. 178.

Estate *pur autre vie* in copyholds, in rent-charge.

Whether these decisions are reconcileable on principle is a matter of antiquarian interest only. The ground of the decision in *Zouch* v. *Forse* was that sect. 12 of the Statute of Frauds was intended to remedy the unsatisfactory condition of the law with regard to general occupancy, and therefore did not apply to an estate *pur autre vie* in copyholds of which there could be no general occupant. But neither could there be a general occupant of an estate *pur autre vie* in a rent-charge.

The Wills Act repeals sect. 12 of the Statute of Frauds, and by sect. 3 re-enacts its provisions as to the devisability of estates *pur autre vie* in ampler terms, so that there can be no doubt, that an estate *pur autre vie* in copyholds, as well as such an estate in a rent-charge, whether created with or without words of limitation, is devisable.

Effect of s. 3 of Wills Act.

Whether estate in *quasi* tail devisable.

Whether the grantee of an estate *pur autre vie* to himself and the heirs of his body with remainders over can devise the estate by his will so as to defeat the title of the heirs of his body and the remaindermen is in England not covered by authority.

Law in Ireland.

In Ireland it has been decided that he cannot. *Hopkins* v. *Ramage* (1826), Batty, 365, following dicta of Lord Redesdale in *Campbell* v. *Sandys* (1803), 1 Sch. & L. 295, and Lord Manners in *Dillon* v. *Dillon*, 1 Ba. & Be. 77, 95. Lord St. Leonards, sitting in Ireland, agreed with these authorities. *Allen* v. *Allen*, 2 Dr. & War. 307, 326.

Views of English judges.

In England Sir Thomas Plumer, in *Blake* v. *Luxton*, (1815), Coop. 178, 184, expressed an opinion in accordance with the Irish authorities; on the other hand, Lord Kenyon, in *Doe* d. *Blake* v. *Luxton*, 6 T. R. 289, 292, inclined to the view that the tenant in *quasi* tail may dispose of the absolute interest by will following an earlier opinion to the same effect of Northington, C., in *Grey* v. *Mannock*, 2 Ed. 339. See also *Cresswell* v. *Hawkins*, 3 Jur. N. S. 407.

Lord Manners, in *Dillon* v. *Dillon* (1809), 1 Ba. & Be. 77, 95, puts it on the ground that, as the *quasi* tenant in tail died without issue, her estate was spent and she had nothing to devise, a reason which would equally invalidate a grant in the grantee's lifetime. Moreover, the point was not argued.

Arguments for and against devisability of *quasi* estate tail.

The words of the Statute of Frauds, sect. 12, were general: "any estate *pur autre vie* shall be devisable." It is true the section went on to deal only with the case of an estate *pur autre vie* coming to the heir by reason of special occupancy. It did not in terms deal with an heir of the body taking as special occupant. This affords ground for an argument that the section did not make an estate *pur autre vie* given to a man and the heirs of his body devisable. On the other hand, it may be said that heirs include heirs of the body, and that it is not satisfactory to seek by construction to limit words perfectly general in themselves, especially as the words, if unlimited, effect the desirable object of enabling a person by will to dispose of that which before was his absolute property so far as disposition *inter vivos* was concerned.

Mr. Jarman, vol. i., p. 61, was of opinion that sect. 3 of the Wills Act settles the point against the devisability of such an estate, as the opening words of the section make devisable real estate which if not devised would devolve upon the heir, whereas such an estate *pur autre vie* would devolve upon the heir of the body. It is not clear that the opening words have this limiting effect. The section goes on: "and the power hereby given shall extend," among other things to estates *pur autre vie*, so that it seems that the latter part of the section is intended to extend the opening words, and not the opening words to limit the latter part. The section extends to an estate *pur autre vie* in copyholds limited to a person without words of limitation, though such an estate did not under the old law devolve on the heir or executor of the owner. *Zouch* v. *Forse*, 7 East, 186.

Devolution of estate *pur autre vie* under old law.

Under the old law, if the grantee died living the *cestui que vie*, then if the estate was limited to the grantee and his heirs, or to the grantee, his executors or administrators, the heirs or the executors or administrators, as the case may be, took as special occupants.

This was the case, whether the estate was freehold or copyhold, or whether it was a corporeal or an incorporeal hereditament. *Doe* v. *Martin*, 2 W. Bl. 1150; *Hassell* v. *Gawthwaite*, Willes, 505; *Ripley* v. *Waterworth*, 7 Ves. 425, 440; *Northen* v. *Carnegie*, 4 Dr. 587, 591.

Equitable estate subject of special occupancy.

There could also be a special occupant of an equitable estate. *Reynolds* v. *Wright*, 2 D. F. & J. 590.

Whether heir took by descent or as special occupant.

It was sometimes said that the heir took by descent and not as special occupant. See *Holden* v. *Smallbrooke*, Vaughan, 201; *Philpotts* v. *James*, 3 Doug. 426; *Doe* v. *Martin*, 2 W. Bl. 1150; *Pierson* v. *Shore*, 1 Atk. 479; Burton's Comp. 241.

But it is now well settled that the right view is that the heir takes as special occupant. *Chaplin* v. *Chaplin*, 3 P. W. 368; *Doe* d. *Blake* v. *Luxton*, 6 T. R. 289, 291; *Ripley* v. *Waterworth*, 7 Ves. 425; *Northen* v. *Carnegie*, 4 Dr. 587; *In re Barber's Settled Estates*, 18 Ch. D. 624; *In re Michell*; *Moore* v. *Moore*,

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(1892) 2 Ch. 87, 96; *In re Inman*: *Inman* v. *Inman*, (1903) 1 Ch. 241.

General occupancy.

If the estate was limited without words of limitation, then, if it was an estate in freehold land, it passed to the first occupier, who was called the general occupant.

There could not be a general occupant of a copyhold estate (*a*), or of an incorporeal hereditament such as a rent-charge (*b*); in such cases therefore the estate came to an end by the death of the grantee. *Smartle* v. *Penhallow*, 6 Mad. 63, 68; *Zouch* v. *Forse*, 7 East, 186 (*a*); *Holden* v. *Smallbrooke*, Vaughan, 199; Salk. 188 (*b*).

Nature of interest of heir as special occupant.

The heir, where he took as special occupant, took for his own benefit and without liability for the debts of the ancestor.

Executor as special occupant.

The executor, if he took as special occupant, took the property not for his own benefit, but as part of the personal estate and for the benefit of the persons entitled thereto. *Ripley* v. *Waterworth*, 7 Ves. 425.

S. 12 of Statute of Frauds.

S. 6 of Wills Act.

This was altered as regards the heir by sect. 12 of the Statute of Frauds, which was amended by 14 Geo. 2, c. 20, s. 9. These sections were repealed by the Wills Act, which by sect. 6 enacts, that, if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this Act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

Special occupant found in last

In order to ascertain the special occupant, the latest limitation of the estate is to be looked at. *Croker* v. *Brady*, 4 I. R.

Ir. 658; *In re Michell*; *Moore* v. *Moore*, (1892) 2 Ch. 87; *Earl of Mountcashell* v. *More Smyth*, (1896) A. C. 158, 164. Limitation of estate.

This applies both to legal and to equitable estates. *Reynolds* v. *Wright*, 2 D. F. & J. 590.

If the limitation is to a person, his heirs, executors, or administrators, whether in a deed or will, the heirs and not the personal representatives take as special occupants. *Atkinson* v. *Baker*, 3 T. R. 229; *Carpenter* v. *Dunsmore*, 3 E. & B. 918; *Whitehead* v. *Morton*, 19 L. R. Ir. 435, 446. Limitation to heirs, executors and administrators.

If there is an agreement to grant a lease *pur autre vie* to A, no words of limitation being expressed, the words of limitation cannot be supplied, and on A's death intestate his legal personal representatives take as special occupants. *M'Dermott* v. *Balfe*, I. R. 2 Eq. 440; *Cornwall* v. *Sourin*, 17 L. R. Ir. 595. Agreement to grant lease *pur autre vie*.

If the estate is vested in trustees the words of limitation used in the grant to the trustees do not govern the devolution of the equitable interest. *Earl of Mountcashell* v. *More Smyth*, (1896) A. C. 158. Estate of trustees does not affect estate of beneficiary.

In the case of a resulting trust it would seem that the resulting estate ought to go to the legal personal representatives and not to the heir. *Northen* v. *Carnegie*, 4 Dr. 587, which contains an interesting disquisition on the general law, appears to be wrong so far as the decision goes. There A, being entitled to an estate *pur autre vie* limited to him and his heirs in an incorporeal hereditament, conveyed it to trustees, their executors and administrators, upon trusts which did not take effect as to one-third. The settlor died, and it was held that the resulting estate went to his co-heiresses-at-law. It is not stated in the report whether his legal personal representatives were parties or not. Case of resulting trust.

If the special occupant named does not exist, for instance, where a devisee to him and his heirs is illegitimate and dies intestate without issue, then by virtue of the section the legal personal representative takes. *Plunket* v. *Reilly*, 2 Ir. Ch. 585; *Reynolds* v. *Wright*, 2 D. F. & J. 590. Non-existence of named special occupant.

If in the last disposition of the estate words of limitation are not found, the estate goes to the executor or administrator. Absence of words of limitation in

last disposition.

This is settled both in England and Ireland, where the last disposition is by deed. *Earl of Mountcashell* v. *More Smyth*, (1896) A. C. 158.

Case of a deed.

Case of a will in England.

The same rule applies in England, where the last disposition is by will, and no distinction can there be drawn between the case where the estate is originally limited to a man and his heirs, and the case where it is originally limited without words of limitation. *In re Sheppard: Sheppard* v. *Manning*, (1897) 2 Ch. 67; *In re Inman: Inman* v. *Inman*, (1903) 1 Ch. 241; see also *Doe* d. *Lewis* v. *Lewis*, 9 M. & W. 662.

In a will, however, even if the word "heirs" is not used in the limitation of the estate, there may be sufficient evidence of intention to show that the heirs were intended to take as special occupants. Upon this ground the case of *Doe* d. *Philpotts* v. *James*, 3 Doug. 425, may possibly be supported. See per Romer, J., in *In re Sheppard*, (1897) 2 Ch. 67; see also *In re Inman: Inman* v. *Inman*, (1903) 1 Ch. 241, 247.

Case of a will in Ireland.

In Ireland a distinction is made between an estate originally limited to a man and his heirs, and an estate originally limited to a man without words of limitation. In the former case, if the estate is given by will to a devisee without words of limitation, whether the estate be specifically described or included in general words, it passes on the death of the devisee intestate, not to his executor or administrator, but to his heir-at-law.

This view disregards the statute, but is well settled in the Irish Courts, though whether the House of Lords would uphold it may be doubted. *Wall* v. *Byrne*, 2 J. & L. 118; *Blake* v. *Jones*, 1 H. & Br. 227, n.; *In re King: King* v. *King*, (1859) 1 Ir. 30.

Interval between death and grant of letters of administration.

It has been said that there may still be room for a general occupant in the interval between the death intestate of a tenant *pur autre vie* and the grant of letters of administration, in cases where there is no special occupant. The freehold, it is said, cannot be in abeyance, and as there is no one in whom it can vest it must go to a general occupant. 1 Preston Conv. 44.

Probably the Court would have no difficulty in deciding that the title of the administrator when constituted relates

back, and that the general occupant, if he takes at all, takes as trustee for the administrator when constituted. See *In re Inman*; *Inman* v. *Inman*, (1903) 1 Ch. 241; *In Louis Pryse*, (1904) P. 301.

Wills Act does not make estate *pur autre vie* passing to executor personalty for all purposes.

Sect. 6 of the Wills Act directs an estate *pur autre vie* of a freehold nature coming to the executor or administrator to go and be applied and distributed in the same manner as personal estate, but it does not make it personal estate. If such an estate belongs to a person domiciled abroad it is governed by English law and not by the law of the domicile. *Chatfield* v. *Berchtoldt*, 7 Ch. 192.

CHAPTER XLIII.

RIGHTS BETWEEN TENANT FOR LIFE AND REMAINDERMAN.

I.—Waste.

Chap. XLIII. Various restrictions may be imposed on a life estate.

It may be with or without impeachment of waste, and in the case of a married woman it may be for her separate use with or without power of anticipation during the coverture. Separate use and restraint upon anticipation apply to absolute as well as to life interests, and will be found dealt with in the chapter on Conditions.

A. Creation of Estates with and without Impeachment of Waste.

A tenant for life cannot commit waste, unless expressly made unimpeachable for waste.

Impeachment of waste.

A tenant for life without impeachment of waste, voluntary waste excepted, is only excused for permissive waste. *Garth* v. *Cotton*, 1 Ves. Sen. 524, 546; 1 Dick. 183.

But the exception of voluntary waste may be so qualified as to entitle the tenant for life to cut timber. *Vincent* v. *Spicer*, 22 B. 380; see *Wickham* v. *Wickham*, 19 Ves. 419.

Tenant for life "with full and absolute power over all my property" has large powers of management, but is not unimpeachable for waste. *Pardoe* v. *Pardoe*, 82 L. T. 547.

Tenant for life unimpeachable for waste may in effect be deprived of the right to cut timber, if a large discretion to cut timber is vested in trustees. *Kekewich* v. *Marker*, 3 Mac. & G. 311.

Tenants in dower and by curtesy are impeachable for waste. *Ap Rice's Case*, 3 Leon. 121; Co. Litt. 53a.

Tenants in dower and by curtesy.

Tenant in fee subject to an executory devise over may commit legal but not equitable waste. *Turner* v. *Wright*, Do. 742; 2 D. F. & J. 234.

Tenant in fee subject to gift over.

He may be restrained from cutting timber by express words. *Blake* v. *Peters*, 1 D. J. & S. 345.

Tenant in tail after possibility of issue extinct is in the position of tenant for life dispunishable for waste. *Lewis Bowles' Case*, 11 Rep. 79b; *Williams* v. *Williams*, 15 Ves. 419; 12 East, 209.

Tenant in tail after possibility of issue extinct.

Tenant in tail restrained by statute from disentailing is dispunishable for legal waste, but will be restrained from equitable waste. *A.-G.* v. *Duke of Marlborough*, 3 Mad. 498.

Tenant in tail by Act of Parliament.

B. Rights as regards Timber, &c.

1. *Tenant for Life without Impeachment of Waste.*

Tenant for life without impeachment of waste may commit legal but not equitable waste.

Legal and equitable waste.

Thus, he may cut down the timber on the estate, not being ornamental timber, and it becomes his property from the moment of severance. *Wolf* v. *Hill*, 2 Sw. 149, n.; *Doran* v. *Wiltshire*, 3 Sw. 699; *Gordon* v. *Woodford*, 27 B. 603.

He may cut trees, which have become timber, though they have not attained maturity, or though cutting them will deprive saplings of shelter. *Smythe* v. *Smythe*, 2 Sw. 252; *Potts* v. *Potts*, 3 L. J. Ch. O. S. 176.

But though he is entitled to the timber when cut down, he is not entitled to it till then, and if he has a power of sale he cannot sell and appropriate the value of the timber. *Wolf* v. *Hill*, 2 Sw. 149, n.; *Doran* v. *Wiltshire*, 3 Sw. 699.

Timber and the materials of houses blown down during the possession of a tenant for life without impeachment of waste belong to him. *Lewis Bowles' Case*, 11 Rep. 79b; Tudor, L. C. 86; *Pyne* v. *Dor*, 1 T. R. 55; *Wolf* v. *Hill*, 2 Sw. 149, n.; *Williams* v. *Williams*, 15 Ves. 419; 12 East, 209.

Windfalls.

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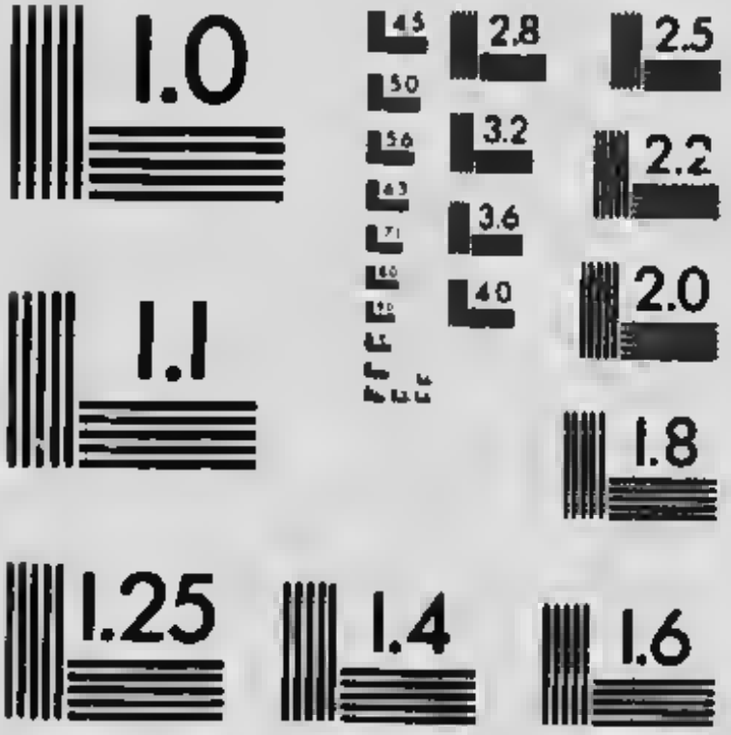

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Unripe timber.

But tenant for life without impeachment of waste may not cut young trees and saplings before they are fit for timber. *O'Brien* v. *O'Brien*, Amb. 106; *Strathmore* v. *Bowes*, 2 B. C. C. 88; *Chamberlayne* v. *Dummer*, 1 B. C. C. 166; 3 B. C. C. 548; see *Aston* v. *Aston*, 1 Ves. Sen. 264; *Potts* v. *Potts*, 3 L. J. Ch. O. S. 176.

Wanton destruction.

The Court will in all cases restrain wanton destruction, such as cutting down fruit trees, or pulling down a mansion-house or buildings. *Vane* v. *Lord Barnard*, 2 Vern. 738; Pr. Ch. 454; Gilb. Eq. 127; *Anon.*, 2 Eq. Ab. 757, pl. 2; *Kaye* v. *Banks*, 2 Dick. 431; *Aston* v. *Aston*, 1 Ves. Sen. 264.

But if the tenant for life pulls down a mansion-house, and rebuilds it with the same materials, there can be no account against him. *Morris* v. *Morris*, 3 De G. & J. 323.

Equitable waste.

By sect. 25 (3) of the Judicature Act, 1873, tenant for life without impeachment has no legal right to commit equitable waste.

Equitable waste is cutting down trees which have been planted or left for ornament or shelter, even though planted by the tenant for life himself. That they have been so planted or left must be shown by direct evidence or by reasonable inference from surrounding circumstances. *Packington's Case*, 3 Atk. 216; *Coffin* v. *Coffin*, Jac. 70; *Ford* v. *Tynte*, 2 D. J. & S. 127; *Weld-Blundell* v. *Wolseley*, (1903) 2 Ch. 664.

Effect of pulling down mansion-house.

Where a mansion-house has been pulled down, and the estate devoted to game, the timber, though formerly ornamental, will not be protected. *Micklethwait* v. *Micklethwait*, 1 De G. & J. 504.

But in such a case the ornamental timber may be protected if the estate is intended to be let on building leases. *Wellesley* v. *Wellesley*, 6 Sim. 497; *Morris* v. *Morris*, 15 Sim. 505.

And where the tenant for life restores a decayed mansion-house, he may cut down ornamental timber about it. *Newdigate* v. *Newdigate*, 1 Sim. 131; 2 Cl. & F. 601; 8 Bli. N. S. 734.

A tenant for life unimpeachable for waste, who cut down ornamental timber, which the Court would have directed to be cut if application had been made to it, was held entitled to the proceeds. *Baker* v. *Schright*, 13 Ch. D. 179.

2. *Tenant for Life Impeachable for Waste.*

Rights of tenant for life impeachable for waste as regards trees not timber.

Tenant for life impeachable for waste has a general property in trees no timber; he may cut them down and take the proceeds, and if blown down by a storm or severed by a stranger they belong to him. *Countess of Cumberland's Case*, Moor. 812; *Channon* v. *Patch*, 5 B. & C. 897; *Berriman* v. *Peacock*, 8 Bing. 384; *Bateman* v. *Hotchkin*, 31 B. 486; *Pidgely* v. *Rawling*, 2 Coll. 275; *Earl Cowley* v. *Wellesley*, 35 B. 635; L. R. 1 Eq. 656; *Honywood* v. *Honywood*, 18 Eq. 306, 307.

Timber for repairs.

He may cut timber for repairs actually about to be done, but he may not sell the timber in order to spend the money in repairs, and if the timber proves unsuitable for the repairs, he may not sell it and take the proceeds. *Malevercr* v. *Spinke*, Dyer, 35b; *Gower* v. *Eyre*, G. Coop. 156; *Simmons* v. *Norton*, 7 Bing. 640.

But he may sell the timber cut in order to buy other timber in a more convenient situation. *Wither* v. *Dean and Chapter of Winchester*, 3 Mer. 421, 426; *Sowerby* v. *Fryer*, 8 Eq. 417.

Timber for fences.

He may not cut timber to inclose lands allotted or exchanged under Inclosure Acts. *Lee* v. *Alston*, 1 B. C. C. 194.

Periodical cuttings.

Tenant for life impeachable for waste is entitled to the periodical cuttings of coppices and plantations of timberlike trees, which have never been allowed to grow into timber, but have always been cut as underwood. *Bateman* v. *Hotchkin*, 31 B. 486; *Bagot* v. *Bagot*, 32 B. 509, 517.

Timber estates.

In the case of an estate in a district, in which it is the custom to cut timber periodically, when grown in woods, so as to continue a succession of timber and to preserve the woods, the tenant for life is entitled to the proceeds of the periodical

cuttings. *Dashwood* v. *Magniac*, (1891) 3 Ch. 306; see *Ozenden* v. *Compton*, 2 Ves. Jun. 69, p. 71.

Settlement on trust for sale.

Where an estate was settled upon trust for sale and to pay the income of the proceeds of sale to a tenant for life, and larch plantations on the estate were blown down by a storm, it was held that the proceeds must be invested, but the tenant for life was held entitled to have his income made up out of the investments to the sum he had received on an average of years. *In re Harrison's Trusts: Harrison* v. *Harrison*, 28 Ch. D. 220.

3. *Property in Timber Cut, &c.*

Property in proceeds of legal waste.

In the case of legal waste, timber wrongfully cut, whether by tenant for life or a stranger, or its proceeds vest in the first owner of a vested estate of inheritance, whether there are intermediate life estates unimpeachable for waste, or intermediate contingent remainders or not. *Whitfield* v. *Bewit*, 2 P. W. 240; *Lee* v. *Alston*, 3 B. C. C. 38; 1 Ves. Jun. 82; *Bewick* v. *Whitfield*, 3 P. W. 267; *Gent* v. *Harrison*, Joh. 517; *Dare* v. *Hopkins*, 2 Cox, 110; *Pigott* v. *Bullock*, 1 Ves. Jun. 478.

Statute of Limitations.

The owner of the first estate of inheritance can immediately sue to recover the timber or its proceeds, and the Statute of Limitations runs against him from the date of the cutting. *Seagram* v. *Knight*, L. R. 2 Ch. 628; *Higginbotham* v. *Hawkins*, 7 Ch. 676.

Timber blown down.

Timber blown down by a storm during the possession of a tenant for life impeachable for waste follows the same rule, that is to say, it belongs to the owner of the first vested estate of inheritance, and is not invested. *Uredall* v. *Uredall*, 2 Roll. Ab. 119; *Pigott* v. *Bullock*, 1 Ves. Jun. 484; *Lewis Bowles' Case*, 11 Rep. 79b; Tudor, L. C. 86; *Whitfield* v. *Bewit*, 2 P. W. 240; *Bewick* v. *Whitfield*, 3 P. W. 267; *Duke of Newcastle* v. *Vane*, cited 2 P. W. 241.

Collusion between tenant for life and remainderman.

If the person having a vested estate of inheritance commits the waste, or if the tenant for life and remainderman in fee collude to commit waste, equity will interfere at the instance

of an intermediate tenant for life, or of trustees to preserve contingent remainders, and will preserve the proceeds of the waste for the benefit of persons, who become entitled under subsequent intermediate limitations. *Williams* v. *Duke of Bolton*, 1 Cox, 72; 3 P. W. 261, n.; *Powlett* v. *Duchess of Bolton*, 3 Ves. 374; *Garth* v. *Cotton*, 1 Ves. Sen. 524; 1 Dick. 183; *Perrot* v. *Perrot*, 3 Atk. 94; *Davies* v. *Leo*, 6 Ves. 784; *Birch-Wolfe* v. *Birch*, 9 Eq. 683.

In such a case, however, if as much is laid out upon the estate as is taken from it by waste, equity will not interfere. *Birch-Wolfe* v. *Birch*, 9 Eq. 683.

Proceeds of equitable waste.

The law appears to be unsettled as to the property in the proceeds of equitable waste.

There is authority for saying, that they follow the analogy of legal waste and vest in the owner of the first estate of inheritance in existence at the time when the waste is committed.

It would follow that a tenant for life in remainder cannot sue for an account of the proceeds, and it has been so held in *Bolt* v. *Lord Somerville*, 2 Eq. Ab. 759; *Ormond* v. *Kynnersley*, 7 L. J. Ch. O. S. 150; 8 *ib.* 67; 15 B. 10, n.

It would also follow that the statute runs against the remainderman from the time when the waste was committed. *Simpson* v. *Simpson*, 3 L. R. Ir. 308.

The better opinion, however, appears to be that the proceeds of equitable waste must be invested and treated as part of the estate. During the life of the tenant for life who committed the waste the proceeds must be invested and the income will be accumulated, but a subsequent tenant for life will take the income. This was done in *Lushington* v. *Boldero*, G. Coop. 216; 6 Mad. 149; 13 B. 418; 15 B. 1; see *Honywood* v. *Honywood*, 18 Eq. 306.

The same view is also supported by the cases, in which tenant for life in remainder has been held entitled to sue for an injunction to restrain equitable waste. *Perrot* v. *Perrot*, 3 Atk. 94 (apparently a case of legal waste); *Davies* v. *Leo*, 6 Ves. 784, 786; *Morris* v. *Morris*, 15 Sim. 505.

It is also supported by the decision of Lord Cottenham that

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the statute does not begin to run against the remainderman until his title accrues in possession. *Duke of Leeds* v. *Earl of Amherst*, 2 Ph. 117; see *Harcourt* v. *White*, 28 B. 303; *Birch-Wolfe* v. *Birch*, 9 Eq. 683.

Power under Settled Land Act to cut timber.

Sect. 35 of the Settled Land Act, 1882, provides that where a tenant for life is impeachable for waste in respect of timber and there is timber ripe and fit for cutting, he may, with the consent of the trustees of the settlement or under an order of the Court, cut the timber. Three-fourths of the proceeds are capital and the rest income.

Timber cut by Court.

In cases not within this section, where timber is cut by a trustee or by the Court because it is decaying or to make room for other trees, the proceeds are invested and the interest paid to the tenant for life. *Wickham* v. *Wickham*, G. Coop. 288; 19 Ves. 419; *Tooker* v. *Annesley*, 5 Sim. 235; *Waldo* v. *Waldo*, 7 Sim. 261; 12 Sim. 107; *Tollemache* v. *Tollemache*, 1 Ha. 456; *Ferrand* v. *Wilson*, 4 Ha. 381; *Lord Loval* v. *Duchess of Leeds*, 2 Dr. & Sm. 75; *Earl Cowley* v. *Wellesley*, L. R. 1 Eq. 656; *Honywood* v. *Honywood*, 18 Eq. 306.

The capital will belong to the first tenant for life without impeachment of waste who comes into possession or to the first owner of an estate of inheritance. *Gent* v. *Harrison*, Joh. 517; *Waldo* v. *Waldo*, 12 Sim. 107; *Phillips* v. *Barlow*, 14 Sim. 263; *Jodrell* v. *Jodrell*, 7 Eq. 461; *Lowndes* v. *Norton*, 6 Ch. D. 139.

C. Rights as regards Mines.

Tenant for life impeachable for waste is entitled to the profits of open mines and quarries. It is not necessary that the mines should have been opened by the settlor or testator himself. He may also open a new pit, if it is for the more profitable working of an old mine. Co. Litt. 54b; *Spencer* v. *Scurr*, 31 B. 331; *Bagot* v. *Bagot*, 32 B. 509; *Earl Cowley* v. *Wellesley*, 35 B. 635; *Miller* v. *Miller*, 13 Eq. 263; *In re Maynard's Settled Estate*, (1899) 2 Ch. 347; *Greville-Nugent* v. *Mackenzie*, (1900) A. C. 273; *In re Chaylor*, (1900) 2 Ch. 804; see *Elias* v. *Snowdon Slate Quarries*, 4 App. C. 454.

He is also entitled to the profits of mines opened under powers conferred by the testator or agreed to be leased by him, though the leases are not actually granted or the mines opened at the testator's death. *Daly* v. *Beckett*, 24 B. 114; *Earl Cowley* v. *Wellesley*, 35 B. 635; *In re Kemeys-Tynte*; *Kemeys-Tynte* v. *Kemeys-Tynte*, (1892) 2 Ch. 211.

He cannot work an abandoned mine. *Clavering* v. *Clavering*, 2 P. W. 388; *Viner* v. *Vaughan*, 2 B. 466.

The question as to what is an open mine, where there are several seams of coal served by one inclined plane, some of which have not been worked, was considered in *Chaylor* v. *Trotter*, 87 L. T. 33.

The Settled Land Act, 1882, authorises the granting of mining leases by tenants for life, and provides (sect. 11) for the disposal of the rents. See *In re Chaytor*, (1900) 2 Ch. 804.

Except in the cases above mentioned, a tenant for life impeachable for waste is not entitled to the profits of mines not opened till after the testator's death. *Campbell* v. *Wardlaw*, 8 App. C. 641.

Compensation for minerals got by trespasser.

Where minerals are got by a trespasser during the lives of successive tenants for life unimpeachable for waste, and compensation is paid, the compensation is divisible between the estates of the tenants for life in proportion to the minerals got during each life. *In re Barrington*; *Gamlen* v. *Lyon*, 33 Ch. D. 523.

Minerals taken by railway company.

Where minerals are taken by a railway company under compulsory powers the number of years in which the minerals taken could have been worked out must be ascertained, the proceeds must be divided by this number, and the resulting amount paid annually to the tenant for life. *In re Robinson's Settlement*, (1891) 3 Ch. 129; *In re Fullerton's Will*, (1906) 2 Ch. 138.

D. Permissive Waste.

Tenant for life not liable for permissive waste.

1. A tenant for life, whether legal or equitable, of freeholds or leaseholds, is not liable to the remainderman for permissive waste. *Powys* v. *Blagrave*, 4 D. M. & G. 448; *Warren* v.

Rudall, 1 J. & H. 1; *Barnes* v. *Dowling*, 44 L. T. 809; *In re Holchkys*; *Freke* v. *Calmady*, 32 Ch. D. 408; *In re Cartwright*; *Avis* v. *Newman*, 41 Ch. D. 532; *In re Parry and Hopkin*, (1906) 1 Ch. 160.

2. If the will directs the tenant for life to repair, his estate is liable upon the implied contract arising from the fact that he takes possession. *Woodhouse* v. *Walker*, 5 Q. B. D. 404; *Re Williames*; *Ambrey* v. *Williames*, 52 L. T. 41; 54 L. T. 105; *Blackmore* v. *White*, (1899) 1 Q. B. 293; *Dingle* v. *Coppen*, (1899) 1 Ch. 726.

Measure of damages.

The amount recoverable is the sum reasonably necessary to put the premises in the state of repair in which the tenant for life ought to have left them. *Woodhouse* v. *Walker*, 5 Q. B. D. 404, p. 408; *Re Bradbrook*, 56 L. T. 106; see *Conquest* v. *Ebbetts*, (1896) A. C. 490; *Joyner* v. *Weeks*, (1891) 2 Q. B. 31.

A tenant for life, bound to keep the property in tenantable condition, will not be liable for the depreciation of the land, if he deals with it in the same way in which the testator had dealt with it. *Dingle* v. *Coppen*, *supra*.

Liability to insure and rebuild.

3. If an obligation is imposed on the tenant for life to repair he is also bound to insure and to rebuild in case of fire. *In re Skingley*, 3 Mac. & G. 221; *Gregg* v. *Coates*, 23 B. 33; *Pinfold* v. *Shillingford*, 46 L. J. Ch. 491; 25 W. R. 425.

He is not bound to pay a sum for which the testator was at his death liable for repairs. *Harris* v. *Poyner*, 1 Dr. 174; *Pinfold* v. *Shillingford*, *supra*; see *Hickling* v. *Boger*, 3 Mac. & G. 635.

But a direction to keep the property in good and tenantable repair may make the tenant for life liable for dilapidations existing at the testator's death. *Re Bradbrook*, 56 L. T. 106.

II.—Ordinary Outgoings.

Tenant for life must bear ordinary outgoings.

The tenant for life must pay the ordinary outgoings incident to the property, of which he is tenant for life, such as rates, taxes, and the like.

Compensation under Licensing Act.

Deductions from the rent made by the tenant of a public-house in respect of contributions to the compensation fund under

the Licensing Act, 1904 (4 Edw. 7, c. 3), s. 3, cannot be recouped out of capital. *In re Smith; Smith* v. *Dodsworth*, (1906) 1 Ch. 799.

Tenant's valuation.

If a tenant is entitled at the end of his term to be paid for his property at a valuation, the tenant for life must pay the amount and recover it, if possible, from the incoming tenant. *Mansel* v. *Norton*, 22 Ch. D. 769.

Improvements under orders of sanitary authorities.

In the case of a tenant for life of freeholds, where local authorities under the statutory powers conferred upon them require works to be done, which are in the nature of permanent improvements, then apart from the rights of the tenant for life under the Settled Land Acts, and subject to any special direction in the will, it is a question of construction of the statute conferring the power, whether the expenses ought to be borne by the tenant for life or whether they can be charged upon the inheritance.

Equitable estates—trustees liable.

If the estates are equitable and the persons liable under the statute to pay the expenses are the trustees, they must be borne by capital. *In re Barney; Harrison* v. *Barney*, (1894) 3 Ch. 562; *In re Farnham's Trusts*, (1904) 2 Ch. 561.

Expenses made a charge.

If the expenses are made a charge upon the estate in favour of the local authority, as by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 257, or the Private Streets Works Act, 1892 (55 & 56 Vict. c. 57), s. 13, and the tenant for life pays them, he is entitled to the benefit of the charge, though the Act may authorise the tenant for life to raise the money in a particular way. *In re Smith's Settled Estates*, (1901) 1 Ch. 689; *In re Pizzi; Scrivener* v. *Aldridge*, (1907) 1 Ch. 67.

And the proceeds of sale of land taken under the Lands Clauses Acts have been applied in repaying the expenses of rebuilding condemned buildings on the property. *Ex parte Davis*, 3 De G. & J. 144.

Liability of tenant for life of leaseholds.

The tenant for life of leaseholds must, as between himself and the estate, pay the rent and perform the covenants to repair and insure, if any, and the other covenants contained in the lease under which the property is held. He is not liable for repairs necessary at the commencement of his interest, or in respect of breaches of covenant committed

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before the testator's death. *Marsh* v. *Wells*, 1 S. & St. 87; *In re Fowler*; *Fowler* v. *Odell*, 16 Ch. D. 723; *In re Courtier*, *Coles* v. *Courtier*, 34 Ch. D. 136; *In re Redding*; *Thompson* v. *Redding*, (1897) 1 Ch. 876; *Brereton* v. *Day*, (1895) 1 Ir. 519; *Kingham* v. *Kingham*, (1897) 1 Ir. 170, 174; *In re Betty*; *Betty* v. *A.-G.*, (1899) 1 Ch. 821; *In re Ojers*; *Cooper* v. *Ojers*, (1899) 2 Ch. 54; *Re Smith*; *Bull* v. *Smith*, 84 L. T. 835; *In re Waldron*, (1904) 1 Ir. 2[illegible]; not following *In re Baring*; *Baring* v. *Baring*, (1893) 1 Ch. 61; *In re Tomlinson*; *Tomlinson* v. *Tomlinson*, (1898) 2 Ch. 232.

The general rule is not altered by the fact that the tenant for life is in receipt, not of the rack rent, but of an improved ground rent only. *In re Copland's Settlement*; *Johns* v. *Carden*, (1900) 1 Ch. 326.

Expenses under orders of local authorities.

As regards the expenses incurred under the requirements of local authorities above referred to, it may be that under the terms of the lease these must also be borne by the lessee, and in that case it would seem *primâ facie* that they must be borne by the tenant for life. See *In re Crawley*; *Acton* v. *Crawley*, 28 Ch. D. 431.

Effect of Settled Land Acts.

But the works may be improvements within the meaning of the Settled Land Acts, and in that case the tenant for life may be entitled to have the expenditure provided out of capital, though the income is only payable to him after payment of all incidental expenses and outgoings. *Clarke* v. *Thornton*, 35 Ch. D. 307; *In re Lord Stamford's Settled Estates*, 43 Ch. D. 84; *In re Thomas*; *Weatherall* v. *Thomas*, (1900) 1 Ch. 319.

Works done without scheme.

If, however, the works are executed without a scheme, and it is necessary to apply to the Court to sanction the outlay under sect. 15 of the Settled Land Act, 1890, the Court has a discretion, and will not, if the will throws the expenses on income, allow them to be provided out of capital. *In re Partington*; *Reigh* v. *Kane*, (1902) 1 Ch. 711.

If there is no question as between lessor and lessee, and the outlay cannot be recovered by the lessor from the lessee or by the lessee from the lessor, so that as between them the burden must lie where it falls, it would seem that the incidence

of the burden as between tenant for life and remainderman depends on the construction of the statute under which the outlay is made, and the cases above cited as to tenant for life of freeholds would apply. See, too, *In re Lever: Cudlipp* v. *Lever*, (1897) 1 Ch. 32.

Where a leasehold, which the testator had assigned, came back to the estate after his death under a compromise with the assignee, it was held that the liabilities under the lease were payable out of corpus. *Allen* v. *Embleton*, 4 Dr. 226.

Costs of making tenants repair.

Where leaseholds are settled in the usual way on trust for sale and the trustees incur expenses in compelling the tenants to repair, these expenses are not "outgoings," but must be raised out of capital. *Re M'Carr: Carr* v. *Commercial Union Assurance Co.*, 95 L. T. 74.

As to the meaning of outgoings with reference to the requirements of local authorities, see also *In re Boor: Boor* v. *Hopkins*, 40 Ch. D. 572; *Tubbs* v. *Wynne*, (1897) 1 Q. B. 74.

III.—Emblements.

Emblements defined.

Emblements are corn, roots, flax, hemp, and other annual profits. Co. Litt. 55; *Latham* v. *Atwood*, Cro. Car. 515; *Evans* v. *Roberts*, 5 B. & C. 832; see *Graves* v. *Weld*, 5 B. & Ald. 120.

Right of executor of tenant for life to emblements.

The executor of a tenant for life whose estate determines by death is entitled to emblements, that is to say, the produce of the soil which is the result of his sowing. *Sir Henry Knivet's Case*, 5 Rep. 85; *Oland's Case*, 5 Rep. 116.

Divorce is an act of law, and does not disentitle a husband, who holds during coverture. *Oland's Case*, *supra*.

He is not entitled when his estate determines by his own act, as by the marriage of a tenant for life during widowhood. *Oland's Case*, *supra*; Co. Litt. 55b. *Davies* v. *Eyton*, 4 Moo. & P. 826; 7 Bing. 154.

Nor is he entitled where the crops are not sown by him. *Grantham* v. *Hawley*, Hob. 135; *Anon.*, Cro. Eliz. 61, 464; *Spencer's Case*, Winch, 51.

IV.—Fixtures.

Tenant for life cannot sever fixtures.

Whatever is fixed to the freehold of land becomes part of the freehold or inheritance, and cannot be severed by a tenant for life.

Trade and ornamental fixtures.

But the tenant for life or his legal personal representatives after his death, may remove trade (*a*) and ornamental (*b*) fixtures put up by him. *Lawton* v. *Lawton*, 3 Atk. 13; *Lord Dudley* v. *Lord Warde*, Amb. 113; *Ward* v. *Countess of Dudley*, 57 L. T. 20 (*a*); *Leigh* v. *Taylor*, (1902) A. C. 157 (*b*).

Any injury caused by the removal must be borne by the tenant for life or his estate. *In re De Falbe*; *Ward* v. *Taylor*, (1901) 1 Ch. 523, 542.

V.—Improvements by Tenant for Life.

Tenant for life improves at his own risk.

Apart from the Settled Land Acts, a tenant for life who makes permanent improvements, which increase the value of the inheritance, such as repairs necessitated by dry rot, building farm buildings and cottages, draining marshes and the like, does so at his own risk, and is not entitled to a charge for his expenditure. *Hibbert* v. *Cooke*, 1 S. & St. 552; *Bostock* v. *Blakeney*, 2 B. C. C. 653; *Nairn* v. *Marjoribanks*, 3 Russ. 582; *Dixon* v. *Peacock*, 3 Dr. 288; *Caldecott* v. *Brown*, 2 Ha. 144; *Dunne* v. *Dunne*, 7 D. M. & G. 207; *Dent* v. *Dent*, 30 B. 363; *In re Barrington's Settlement*, 1 J. & H. 142; *In re Ormrod's Settled Estate*, (1892) 2 Ch. 318; see *In re Montagu*; *Derbishire* v. *Montagu*, (1897) 2 Ch. 8.

Salvage.

But he will be allowed expenditure (including the costs of legal proceedings) made to preserve the property of which he is tenant for life from injury, destruction or forfeiture. *Dent* v. *Dent*, 30 B. 363, 369 (the Aroa Mine); *In re Earl De La Warr's Estate*, 16 Ch. D. 587; *In re Ormrod's Settled Estate*, (1892) 2 Ch. 318; *Hamilton* v. *Tighe*, (1898) 1 Ir. 123.

On this principle, he may complete a mansion-house upon the estate left unfinished by the testater, and charge the inheritance

with the cost. *Hibbert* v. *Cooke*, 1 S. & St. 552; *Deal* v. *Deal*, 30 B. 363.

And if he completes houses commenced by a testator on a building estate he may be entitled to the expenditure, if but for the outlay the buildings would have been lost to the estate. *Ferguson* v. *Ferguson*, 17 L. R. Ir. 567; *Gilliland* v. *Crawford*, 1. R. 4 Eq. 35.

A tenant for life, who purchases land under a statutory right of pre-emption, which he can only exercise as trustee for the persons entitled under the settlement, and then makes improvements upon it, may be allowed, in his capacity of trustee and not of tenant for life, the amount by which the value of the land has been increased. *Roche* v. *Gunneer*, (1897) 2 Ch. 503.

VI.—Charges and Incumbrances.

A. Rent-charges.

Rent-charges.

The tenant for life must keep down rent-charges upon the estate, and he is personally liable to pay them, though the rents and profits may be insufficient. *Thomas* v. *Sylvester*, L. R. 8 Q. B. 368; *Christie* v. *Barker*, 53 L. J. Q. B. 537; *Searle* v. *Cooke*, 43 Ch. D. 519; *Swift* v. *Kelly*, 24 L. R. Ir. 107, 478; *Oliam* v. *Thompson*, 31 L. R. Ir. 394; *Pertree* v. *Townsend*, (1896) 2 Q. B. 129; *In re Herbage Rents, Greenwich; Charity Commissioners* v. *Green*, (1896) 2 Ch. 811.

Annuity in nature of a debt.

If the testator has entered into a covenant to pay an annuity or rent-charge, which is also charged on the land, and the annuity or rent-charge is in the nature of a debt of the testator, for instance, if the annuity is granted in consideration of a loan or as the purchase-money of the estate, each accruing payment must, as between tenant for life and remainderman, be apportioned in proportion to the value of the life interest and remainder at the testator's death. *Bulwer* v. *Astley*, 1 Ph. 422; *Yates* v. *Yates*, 28 B. 637; *Yonge* v. *Furse*, 20 B. 380; *In re Muffett; Jones* v. *Mason*, 39 Ch. D. 534; *In re Dawson; Arathoon* v. *Dawson*, (1906) 2 Ch. 211.

Another mode of apportioning the liability in such a case is

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that the tenant for life should pay the annuity as it accrues, in which case he will be entitled to a charge on the estate for the amount, but not to interest during his life on such charge. *In re Harrison; Torrison* v. *Harrison*, 43 Ch. D. 55; *In re Bacon; Grissel* v. *Leathes*, 62 L. J. Ch. 445; *In re Henry; Gordon* v. *Gordon*, (1907) 1 Ch. 30.

B. Interest on Mortgages.

Interest on mortgages.

The tenant for life must keep down the interest on incumbrances upon the estate, falling due while he is in possession, to the extent of the income he receives. If several estates are included in one devise or settlement, he must out of the aggregate rents keep down the aggregate interest. Surplus rents of later years must be applied in making up a deficit of earlier years. He is not bound to keep down arrears of interest accrued before his possession. *Dixon* v. *Peacock*, 3 Dr. 288; *Caulfield* v. *Maguire*, 2 J. & Lat. 141; *Whitbread* v. *Smith*, 3 D. M. & G. 741; *Making* v. *Making*, 1 D. F. & J. 358; *Sharshaw* v. *Gibbs*, Kay, 333; *Tracy* v. *Lady Hereford*, 2 B. C. C. 128; *Kirwan* v. *Kennedy*, I. R. 4 Eq. 499; *Frewen* v. *Law Life Assurance Society*, (1895) 2 Ch. 511; *In re Baron Kensington; Earl of Longford* v. *Baron Kensington*, (1902) 1 Ch. 203; *Honywood* v. *Honywood*, (1902) 1 Ch. 347.

If arrears of interest are paid off by sale of one of the properties, future income remains liable to recoup the capital applied in paying such arrears. *Honywood* v. *Honywood*, (1902) 1 Ch. 347.

Back rents.

The tenant for life is not personally liable to the mortgagee for the interest, and if he receives rents without keeping down the interest he cannot be sued by the mortgagee for back rents. *In re Morley; Morley* v. *Saunders*, 8 Eq. 594.

Liability to remainderman.

If the tenant for life does not keep down the interest to the extent of the rents and profits he receives, his estate may be sued by the remainderman for what the latter has to pay, owing to the tenant for life's default. *Baldwin* v. *Baldwin*, 4 Ir. Ch. 501; 6 Ir. Ch. 156, where Lord Romilly's dictum in *Kensington* v. *Bouverie*, 19 B. 39, is explained.

Subsequent rents liable to make up arrears.

If the remainderman has to pay interest on incumbrances, which accrued during the life tenancy, and rents accrued during the life tenancy are afterwards recovered, it seems that in equity such rents, so far as required to recoup the remainderman, will be considered as belonging to the reversion. The right is not a mere lien, but the rents belong to the remainderman and he will take any accumulations produced by their investment. *Waring* v. *Coventry*, 2 M. & K. 406; *Kirwan* v. *Kennedy*, I. R. 3 Eq. 472; *Coote* v. *O'Reilly*, 1 J. & Lat. 455; *Howlin* v. *Sheppard*, I. R. 6 Eq. 38, 497, 532; see *Dillon* v. *Dillon*, 4 Ir. Ch. 102; *In re Fitzgerald's Estate*, I. R. 1 Eq. 453.

Tenant for life paying in excess of rents.

If the tenant for life pays interest on incumbrances in excess of the income received, he is not entitled to a charge for the excess, nor can he recover it from the remainderman. *Kensington* v. *Bouverie*, 7 H. L. 557.

C. Redemption of Incumbrances.

Right to redeem.

The tenant for life may redeem incumbrances in priority to the remainderman. He cannot himself be redeemed, nor can he foreclose. *Ratald* v. *Russell*, Yon. 19; *Raffety* v. *King*, 1 Kee. 618; *Aynsley* v. *Reed*, 1 Dick. 249; *Wicks* v. *Scrivens*, 1 J. & H. 215; *Prout* v. *Cock*, (1896) 2 Ch. 508.

Tenant for life paying off incumbrances.

If he pays off an incumbrance on the estate, he is presumed to do so for his own benefit, and the presumption is not rebutted by the mere fact that the remaindermen are children of the tenant for life. *Jones* v. *Morgan*, 1 B. C. C. 206; *Shrewsbury* v. *Shrewsbury*, 1 Ves. Jun. 227; *Redington* v. *Redington*, 1 Ba. & Be. 131; *Burrell* v. *Earl of Egremont*, 7 B. 205; *Morley* v. *Morley*, 5 D. M. & G. 610; *Lindsay* v. *Earl of Wicklow*, I. R. 7 Eq. 192; *In re Harvey: Harvey* v. *Hobday*, (1896) 1 Ch. 137; *Lord Gifford* v. *Lord Fitzhardinge*, (1899) 2 Ch. 32.

When a mortgage is paid off by instalments by successive tenants for life, each tenant for life is entitled to a charge for the instalments paid, and if the estate turns out insufficient

to repay the whole, the tenants for life must abate rateably. *In re Nepean's Settled Estates*, (1900) 1 Ir. 298.

D. Estate Duty.

Tenant for life must keep down interest on instalments of estate duty.

If the tenant for life charges the inheritance under the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 9 (5), with instalments of estate duty payable by him, he must pay the interest on the unpaid portions. *In re Earl Howe's Settled Estates; Earl Howe* v. *Kingscote*, (1903) 2 Ch. 69.

Estate duty in respect of jointure.

For the purpose of ascertaining the estate duty payable by a jointress, the jointress is to be treated as tenant for life of a sum equal to the value of the jointure, capitalised at the number of years' purchase at which the estate as a whole was capitalised for the purpose of duty, and she is to be charged with estate duty on that sum, but she is entitled to throw the duty so charged upon the corpus of the estate upon the terms of paying interest to the tenant for life at the rate actually paid to the Crown until payment of the duty, and thereafter at the rate at which the duty could be raised by mortgage of the estate. *In re Parker Jervis; Salt* v. *Locker*, (1898) 2 Ch. 643; *In re Duke of St. Albans; Loder* v. *Duke of St. Albans*, (1900) 2 Ch. 873; see *De Quetteville* v. *De Quetteville*, 92 L. T. 758; 93 L. T. 579.

VII.—Powers of Leasing.

Leasing powers.

Large powers of leasing are conferred upon tenants for life by the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), and the Settled Land Act, 1882 (45 & 46 Vict. c. 38).

Unlimited power.

Where express power of leasing is given without limit of time, it is a question of construction upon the whole instrument, whether the power authorises leases beyond the life of the tenant for life. *Vivian* v. *Jegon*, L. R. 3 H. L. 285.

Contract for a lease.

Under the Settled Land Act, 1882, s. 31 (2), a contract by a tenant for life for a lease binds the remainderman.

Independently of the Act, a contract for a lease by a tenant

for life with power of leasing, if the lease contracted for was within the power, bound the remainderman. *Shannon* v. *Bradstreet*, 1 Sch. & L. 52; see *Morgan* v. *Milman*, 3 D. M. & G. 24.

Covenant to renew lease.

And a covenant by a tenant for life to renew a lease at the expiration of an existing lease, though the covenant to renew is not authorised by the power, will bind the tenant for life if, when the time for renewal arrives, the renewed lease is within the power. *Harnett* v. *Yielding*, 2 Sch. & L. 549; *Doe* d. *Bromley* v. *Bettison*, 12 East, 305; *Doucell* v. *Doe*, 1 Y. & C. C. 345; 7 Jur. 117; *Gas Light and Coke Co.* v. *Towse*, 35 Ch. D. 519.

VIII.—Fiduciary Position of Tenant for Life.

In some respects the tenant for life is in a fiduciary position as regards the estate.

Purchase of incumbrances.

If he pays off an incumbrance, he can charge the inheritance only with the amount paid. *Hill* v. *Browne*, Dru. t. S. 426.

A sum received by a tenant for life for withdrawing opposition to a bill must be invested for the benefit of the estate. *Owen* v. *Williams*, Amb. 734; *Pole* v. *Pole*, 2 De G. & S. 420; *Re Duke of Marlborough's Estate*, 13 Jur. 738; *Earl of Shrewsbury* v. *North Staffordshire Ry.*, L. R. 1 Eq. 593, 608; see *Vem* v. *Edwards*, 3 K. & J. 564; 1 De G. & J. 598.

Duty as regards renewable leaseholds.

There is no duty imposed upon either legal or equitable tenants for life of renewable leaseholds to renew. *Nightingale* v. *Lawson*, 1 B. C. C. 443; *White* v. *White*, 4 Ves. 32; 9 Ves. 561; *Stone* v. *Theed*, 2 B. C. C. 248; *Montford* v. *Cadogan*, 19 Ves. 633; *Capel* v. *Wood*, 4 Russ. 500; *O'Ferrall* v. *O'Ferrall*, Ll. & G. t. P. 79; *Lawrence* v. *Maggs*, 1 Ed. 453; see *Trench* v. *St. George*, 1 Dr. & Wal. 417.

If the tenant for life does renew, he will be taken to renew for the benefit of the estate, though he may be himself the settlor. *Coppin* v. *Fernyhough*, 2 B. C. C. 291; *Bowles* v. *Stewart*, 1 Sch. & L. 209; *Giddings* v. *Giddings*, 3 Russ. 241; *Hill* v. *Mill*, 12 Ir. Eq. 107; *Mill* v. *Hill*, 3 H. L. 828; see *In re Biss*; *Biss* v. *Biss*, (1903) 2 Ch. 40; *Egan* v. *Stack*, (1906) 1 Ir. 320.

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It makes no difference that a particular renewal is directed to enure for the benefit of the trust. *Tanner* v. *Elworthy*, 4 B. 487.

Purchase of reversion.

A purchase of the reversion by the tenant for life of leaseholds renewable by contract or custom enures for the benefit of the estate. *Phillips* v. *Phillips*, 29 Ch. D. 673.

If there is no trust to renew he is entitled to a charge for the purchase-money.

If the fee is conveyed on the trusts of the will, the first tenant in tail who would have been absolutely entitled to the leaseholds is entitled to an interest equivalent to the residue of the term which would have been left at the death of the tenant for life. *Isaac* v. *Wall*, 6 Ch. D. 706.

If the fee is conveyed to the tenant for life, the first tenant in tail is absolutely entitled. *Isaac* v. *Wall*, 6 Ch. D. 706.

Tenant for life may purchase estate.

The tenant for life may purchase the estate, if sold under a power, though the power is exercisable with his consent. *Dicconson* v. *Talbot*, 6 Ch. 32; *Howard* v. *Ducane*, T. & R. 81; see *Griffith* v. *Owen*, (1907) 1 Ch. 195.

Purchase of reversion.

And he may purchase for himself the reversion subject to a lease not renewable of which he is tenant for life. *Randall* v. *Russell*, 3 Mer. 190; *Longton* v. *Wilsby*, 76 L. T. 770; *Bevan* v. *Webb*, (1905) 1 Ch. 620.

Policy moneys.

If the will contains no trust to insure and a policy is effected by the tenant for life, the policy moneys belong to him. *Seymour* v. *Vernon*, 16 Jur. 189; *Warwicker* v. *Bretnall*, 23 Ch. D. 188; *Gaussen* v. *Whatman*, 93 L. T. 110.

As to the effect of the resumption by a tenant for life of a holding under sect. 21 of the Land Law (Ireland) Act, 1881, see *Martin* v. *Martin*, (1898) 1 Ir. 112.

IX.—Estoppel against Tenant for Life.

Estoppel where testator had no title or an imperfect title.

If tenant for life under a will enters into possession of land devised by a specific description, to which the testator had either no title or an imperfect title, and the tenant for life acquires a title by possession against the true owner, the tenant for life cannot claim the land as against the remainderman.

Hackshaw v. *Hackshaw*, 11 Ha. 230; *Austen* v. *Nelms*, 1 H. & N. 225; *Board* v. *Board*, L. R. 9 Q. B. 48; *Dalton* v. *Fitzgerald*, (1897) 1 Ch. 440; 2 Ch. 86.

A distinction has been made between these cases and a case where a testator, having a good title to land, makes a devise which does not include it or is invalid, and the tenant for life enters thinking that it passes by the will. In such a case there is no estoppel. *Paine* v. *Jones*, 18 Eq. 320; *In re Stringer's Estate*, 6 Ch. D. 1; *In re Anderson; Pegler* v. *Gillatt*, (1905) 2 Ch. 70.

In *Scott* v. *Nixon*, 3 Dr. & War. 388; *Kernaghan* v. *McNally*, 12 Ir. Ch. 89, the point was whether beneficiaries entering upon land in the belief that it passed to them under a residuary devise, when in fact it did not, acquire the legal estate for themselves or for their trustee under the will. The two decisions appear to be inconsistent.

X.—Fines on Admission.—Renewals.

Fines on admission to copyholds.

Fines on admission of trustees to copyholds must be borne by tenant for life and remainderman according to their respective interests. *Carter* v. *Sebright*, 26 B. 374; *Re Bullock's Estates*; *Lofthouse* v. *Haggard*, 91 L. T. 650.

Liability for fines apportioned.

The same is the case with fines for the renewal of leaseholds. If no directions are given how the fine is to be paid, it will be apportioned between tenant for life and remainderman according to their enjoyment.

Effect of direction to renew.

A direction to renew "out of rents and profits" or to renew "out of rents and profits or by mortgage" will not alone throw the fines upon the tenant for life. *Allan* v. *Backhouse*, 2 V. & B. 85, on appeal, Law Mag. vol. 25, p. 112; *Greenwood* v. *Evans*, 4 B. 44; *Jones* v. *Jones*, 5 Ha. 440; *Reeves* v. *Creswick*, 3 Y. & C. Ex. 715; Lewin on Trusts, 408; *Ainslie* v. *Harcourt*, 28 B. 313; see *In re Marquess of Bute*; *Marquess of Bute* v. *Ryder*, 27 Ch. D. 196.

But the will may throw the expense of renewals upon the tenant for life, for instance, by imposing the duty of renewal upon him personally by name (*a*); by a trust to renew out of

rents and profits, and a gift of the rents and profits to him subject to the trust (*b*); or of the surplus rents and profits only (*c*); or by a direction to pay fines out of the annual rents (*d*). *Blake* v. *Peters*, 1 D. J. & S. 345 (*a*); *Lord Montford* v. *Lord Cadogan*, 17 Ves. 485; 19 Ves. 635; 2 Mer. 3; *Earl of Shaftesbury* v. *Duke of Marlborough*, 2 M. & K. 111 (*b*); *Stone* v. *Theed*, 2 B. C. C. 247; 5 Ha. 451, n. (*c*); *Solley* v. *Wood*, 20 B. 482 (*d*).

Fines raised by mortgage.

If the fines are to be raised out of the rents and profits or by mortgage, the tenant for life is bound to keep down the interest on the whole sum, if raised by mortgage, and not merely upon that portion of it which is ultimately paid by him. *Greenwood* v. *Evans*, 4 B. 44; *Playters* v. *Abbott*, 2 M. & K. 97; *Reeves* v. *Creswick*, 3 Y. & C. Ex. 715; *Ainslie* v. *Harcourt*, 28 B. 313; *Jones* v. *Jones*, 5 Ha. 440.

Apportionment of costs of renewal.

In the absence of any direction how the cost of renewal is to be borne, the rules are:—

a. If the tenant for life gets no advantage from the renewal, the sum to be paid by the remainderman is the sum actually paid with compound interest at 4 per cent. down to the death of the tenant for life and simple interest afterwards. *Nightingale* v. *Lawson*, 1 B. C. C. 440; *White* v. *White*, 9 Ves. 557; *Giddings* v. *Giddings*, 3 Russ. 260.

b. If the tenant for life lives to enjoy the benefit of the renewal, the remainderman has to pay a sum bearing the same proportion to the whole sum paid as the benefit he gets from the renewal bears to the whole of the renewed lease with interest as before; cases *supra*.

c. In the case of renewable leaseholds for lives the same principles apply, the value of the lives being calculated at the time of the renewal according to the tables framed for the purpose, the chance that the new life may fail during the subsistence of the other *cestuis que vie* being apparently thrown upon the remainderman. *Jones* v. *Jones*, 5 Ha. 440; *Harris* v. *Harris*, 32 B. 333; *Bradford* v. *Brownjohn*, 3 Ch. 711.

Title to fund for renewal when renewal impossible.

If the testator has directed the creation of a fund for renewal out of the rents, and the power of renewal is subsequently destroyed, the remainderman will be entitled to the

fund for renewal, or to the purchase-money, if the leaseholds are sold, as soon as renewal becomes impossible, if the object of the testator was to keep the leaseholds perpetually renewed at any cost. *In re Wood's Estate*, 10 Eq. 572; *Hollier* v. *Burne*, 16 Eq. 163; *Maddy* v. *Hale*, 3 Ch. D. 327; see *In re Lord Rancleigh's Will*, 26 Ch. D. 591.

The fund must be invested in ordinary securities, and the tenant for life takes the dividends. *In re Barber's Settled Estates*, 18 Ch. D. 624.

If renewal becomes impossible through the act of the testator, the trust is at an end. *Pinfold* v. *Shillingford*, 46 L. J. Ch. 491; 25 W. R. 425.

If only a reasonable sum is to be applied in renewals, the tenant for life will be entitled to the whole fund. *Morris* v. *Hodges*, 27 B. 625; *In re Money's Trusts*, 2 Dr. & Sm. 94; 10 W. R. 399; see *Haygard* v. *Pile*, 5 Ch. 214.

XI.—Right to Possession.

Court may let equitable tenant for life into possession.

An equitable tenant for life is not entitled as of right to possession, but the Court has a judicial discretion as to giving him possession, and having regard to the large powers conferred upon tenants for life by the Settled Land Acts, an equitable tenant for life, and a person having the powers of a tenant for life, will be let into possession upon proper undertakings for the protection of the estate. *In re Bentley*, 54 L. J. Ch. 782; *In re Wythes*; *West* v. *Wythes*, (1893) 2 Ch. 369; *In re Bagot's Settlement*; *Bagot* v. *Kittoe*, (1894) 1 Ch. 177; *In re Richardson*; *Richardson* v. *Richardson*, (1900) 2 Ch. 778; *In re Money Kyrle's Settlement*, (1900) 2 Ch. 839.

Inventory of chattels.

As a general rule a tenant for life of chattels is bound to sign an inventory, but not to give security. *Foley* v. *Burnell*, 1 B. C. C. 279; *Conduitt* v. *Soane*, 1 Coll. 285.

XII.—Title Deeds.

Legal tenant for life entitled to title deeds.

The right of possession of the title deeds follows the legal estate; therefore legal tenant for life is entitled to the title

deeds. *Garner* v. *Hannyngton*, 22 B. 627, 639; *Allwood* v. *Heywood*, 1 H. & C. 745; *Leathes* v. *Leathes*, 5 Ch. D. 221.

But if there is any probability that he will make a wrongful use of them, as for instance by taking them out of the jurisdiction, or if they are required for the purposes of an action, they may be secured in Court. *Jenner* v. *Morris*, L. R. 1 Ch. 603; *Stanford* v. *Roberts*, 6 Ch. 310.

The remainderman is entitled to have the title deeds produced for the purposes of a sale or otherwise, where there is no dispute about his title. *Davies* v. *Earl of Dysart*, 20 B. 405; *Pennell* v. *Earl of Dysart*, 27 B. 542.

Equitable tenant may have possession of title deeds.

And possession of the title deeds will also be given to an equitable tenant for life upon an undertaking not to part with them and to produce them to the trustees on all reasonable occasions. *In re Burnaby's Settled Estate*, 42 Ch. D. 621; *In re Wythes*; *West* v. *Wythes*, (1893) 2 Ch. 369.

XIII.—Capital and Income.

Trees blown down before the death.

1. Trees blown down and severed from the soil before the testator's death belong to his estate. The question whether the tree is severed or not is one of fact. *In re Ainslie*; *Swinburn* v. *Ainslie*, 30 Ch. D. 485.

Fines and casual profits.

2. Fines payable on the renewal of leases, subject to which an estate is devised, fines on admission to copyholds, casual profits and damages for breach of covenants in a lease belong to the tenant for life. *Earl Cowley* v. *Wellesley*, 35 B. 635; L. R. 1 Eq. 656; *Brigstocke* v. *Brigstocke*, 8 Ch. D. 357; *In re Medows*; *Norie* v. *Bennett*, (1898) 1 Ch. 309; *Noble* v. *Cass*, 2 Sim. 343.

Money paid on surrender of lease.

3. Money paid to the legal tenant for life as the consideration for accepting the surrender of a lease belongs to him at common law. *In re Hanbke's Settled Estates*; *Fitzroy* v. *Hanbke*, (1902) 1 Ch. 941.

Dividends.

4. Dividends declared before though not payable till after the death of the tenant for life belong to his estate. *Wright* v. *Tuckett*, 1 J. & H. 266.

The cases upon dividends and profits as between the estate and the specific legatee (*ante*, p. 184) are also authorities as between tenant for life and remainderman.

Fund for protection of property.

5. A fund created for the protection of property given for life is capital. *Varlo* v. *Faden*, 1 D. F. & J. 211.

Losses of business.

6. As between successive tenants for life of a business, it has been held that losses incurred during the life of one tenant for life must be made good out of profits earned during the life of the next tenant for life, and not out of capital. *Upton* v. *Brown*, 26 Ch. D. 588; see, too, *Gow* v. *Foster*, 26 Ch. D. 672; *Re Millechamp*, 52 L. T. 758.

Securities sold or bought cum dividend.

7. Where a sale is made between two dividend days so that more is realised owing to the accrued dividend, the tenant for life cannot claim any part of the purchase-money on account of dividend (*a*); and where a purchase is made of a security, upon which some dividend has accrued due, so that the dividend may be said to some extent to be paid for out of capital, the tenant for life cannot be required to make an allowance to capital (*b*). *Scholefield* v. *Redfern*, 2 Dr. & Sm. 173; *Freman* v. *Whitbread*, L. R. 1 Eq. 266; *Bulkeley* v. *Stephens*, (1896) 2 Ch. 241 (*a*); *In re Clarke*; *Barker* v. *Perowne*, 18 Ch. D. 160 (*b*).

Under special circumstances, however, an allowance may be made to the tenant for life, for instance, if the securities are at his death to be transferred to the remainderman, in which case his estate would get the apportioned dividend, and the trustees sell them without the concurrence of his executors. *Bulkeley* v. *Stephens*, *supra*. See, too, *Lord Londesborough* v. *Somerville*, 19 B. 295; *Bulkeley* v. *Stephens*, 3 N. R. 105.

And when the Court authorises a change of investment, it may provide that the tenant for life shall not sell ex and buy cum dividend. *Re Ingram's Trust*, 11 W. R. 980.

If interest on bonds is cumulative but is payable only out of profits, the tenant for life cannot have any allowance for arrears of interest if during his life there have been no profits available to pay them. *In re Taylor's Trusts*; *Matheson* v. *Taylor*, (1905) 1 Ch. 734.

Dividends on shares.

8. As regards dividends on shares the tenant for life is entitled only to dividends and bonuses declared by the company. But he is entitled to dividends and bonuses so declared, though the accumulated profits of past years are applied in paying them. If the company goes into liquidation so that no further dividend can be declared, and the assets are more than sufficient to repay the amount credited on the shares, the excess, though arising from funds representing accumulated profits, is nevertheless capital. *Bouch* v. *Sproule*, 12 App. C. 385; *In re Alsbury; Sugden* v. *Alsbury*, 45 Ch. D. 237; *In re Armitage; Armitage* v. *Garnett*, (1893) 3 Ch. 337. *Plumbe* v. *Neild*, 29 L. J. Ch. 618; *Hollis* v. *Allan*, 14 W. R. 980; *Nicholson* v. *Nicholson*, 30 L. J. Ch. 617, so far as they decide that dividend paid out of profits accumulated before the tenant for life's interest commenced does not belong to him, are overruled.

Accumulated profits of trading companies.

9. Where a company has no power to increase its capital but has accumulated profits, which it uses in fact for capital purposes, and afterwards distributes them among its proprietors, the sums distributed are capital. *Brander* v. *Brander*, 4 Ves. 800; *Irving* v. *Houston*, 4 Paton, Sc. App. 521; *Paris* v. *Paris*, 10 Ves. 185; *Clayton* v. *Gresham*, 10 Ves. 288; *Wills* v. *Sleere*, 13 Ves. 363; *Ex parte Hodgens; Re Hodgens*, 11 Ir. Eq. 99; *Ward* v. *Combe*, 7 Sim. 634; *Bouch* v. *Sproule*, 12 App. C. 385.

But where an extra dividend is paid by such a company out of the half-year's profits, the dividend is income. *Barclay* v. *Wainewright*, 14 Ves. 66; *Price* v. *Anderson*, 15 Sim. 473; *Preston* v. *Melville*, 16 Sim. 163.

Dividends and bonuses.

10. Where a company has power either to distribute its profits as dividend or to convert them into capital, and the company validly exercises this power, tenant for life and remainderman of shares in the company are bound by such exercise, and what is paid by the company as dividend goes to the tenant for life, and what is appropriated as capital enures for the benefit of the remainderman. *In re Barton's Will*, 5 Eq. 238; *Dale* v. *Hayes*, 19 W. R. 299; *In re Hopkins' Trusts*, 18 Eq. 696; *In re Bouch; Sproule* v. *Bouch*, 29 Ch. D.

635; *S. C. Bouch* v. *Sproule*, 12 App. C. 385; *In re Ashbury*; *Sugden* v. *Ashbury*, 45 Ch. D. 237; *In re Maham*; *Maham* v. *Hitchens*, (1894) 3 Ch. 578, *In re Piercy*; *Whitehaun* v. *Piercy*, 1907) 1 Ch. 289.

But if the capitalisation of profits is invalid the tenant for life is entitled to them. *In re Piercy*; *Whitehaun* v. *Piercy*, *supra*.

Capitalisation of accumulated profits.

It is a common transaction for companies to declare a dividend out of accumulated profits and at the same time to allot new shares to each shareholder equal in nominal amount to the dividend he is entitled to, the intention being to keep the dividend in the company's coffers. It is not easy to determine whether the transaction amounts to a capitalisation of the dividend. If the issue of new capital and the payment of the dividend are independent transactions, the dividend is not capitalised. *Bouch* v. *Sproule*, *supra*; *In re Northage*; *Ellis* v. *Barfield*, 60 L. J. Ch. 488; 64 L. T. 625; *In re Maham*; *Maham* v. *Hitchens*, (1894) 3 Ch. 578.

Allotment of new shares.

New shares allotted in respect of old shares are capital, and if they are sold for more than they cost the excess is capital. If they are paid for out of dividends, the tenant for life is entitled to a charge upon them for the amount so paid. *Rowley* v. *Unwin*, 2 K. & J. 138; *In re Northage*; *Ellis* v. *Barfield*, 60 L. J. Ch. 488; 64 L. T. 625; *In re Maham*; *Maham* v. *Hitchens*, (1894) 3 Ch. 578; *Re Bromley*; *Sanders* v. *Bromley*, 55 L. T. 145.

XIV.—Residue given to Persons in Succession.

A. Where there is a trust to convert.

Residue given on trust to sell must be treated as sold.

Where a residue is given upon trust for sale and investment, and the income is then given to a tenant for life, the tenant for life is, in the absence of proper directions, only entitled—at any rate, so far as personalty is concerned—to such income as the estate would produce when converted and invested in accordance with the directions of the will.

Reversion must be converted.

And he is entitled to have reversionary property converted, though the reversion is dependent on his own life (*a*); unless

the testator shows that he does not intend the reversion to be dealt with as part of his estate until it falls into possession (*b*). *Wilkinson* v. *Duncan*, 23 B. 469; *Johnson* v. *Routh*, 27 L. J. Ch. 305; 3 Jur. N. S. 1041; *Countess of Harrington* v. *Atherton*, 2 D. J. & S. 352; *Rowlls* v. *Bebb*, (1900) 2 Ch. 107 (*a*); *In re Flower*; *Matheson* v. *Goodwyn*, 63 L. T. 201 (*b*).

Direction as to property not producing income.

A direction, that no property not actually producing income is to be treated as producing income, would prevent the tenant for life from claiming income in respect of a reversion, but it would not deprive him of the right to have a debt, part of which is recovered, apportioned between capital and income. *In re Hubbuck*; *Hart* v. *Stone*, (1896) 1 Ch. 754.

Exception of certain property.

The fact that certain property is excepted from the trust for conversion will not entitle the tenant for life to the profits earned by the excepted property, if it is excepted for the purpose of special directions for its management. *Arnold* v. *Evans*, 2 Ir. Ch. 601.

Interim rents of land devised on trust for sale.

In some old cases before the doctrine affirmed in *Brown* v. *Gellatly* was established, where land was devised on trust for sale without any power to postpone the sale, and owing to the difficulty of selling at a fair price, or for some other sufficient reason, the land was not sold, the tenant for life has been allowed the rents and profits of the unsold land as from the testator's death (*a*). And these authorities have been followed by Mr. Justice Kekewich (*b*). It remains to be considered whether any distinction can be drawn in this respect between real and personal estate, and whether the tenant for life ought not to be allowed interest as from the death at the rate of 3 per cent. upon the value of the land at the death (*c*). *Casamajor* v. *Strode*, 19 Ves. 390, n.; *Vickers* v. *Scott*, 3 M. & K. 500; *Fitzgerald* v. *Jervoise*, 5 Mad. 25; *Viger* v. *Harwood*, 12 Sim. 172 (*a*); *Hope* v. *D'Hédouville*, (1893) 2 Ch. 361; *In re Searle*; *Searle* v. *Baker*, (1900) 2 Ch. 829; *In re Earl of Darnley*; *Clifton* v. *Darnley*, (1907) 1 Ch. 159 (*b*); *Wentworth* v. *Wentworth*, (1900) A. C. 163; see, too, *Yates* v. *Yates*, 28 B. 637 (*c*).

Long Annuities.

Where the trust was to convert such portion of the estate as should not be invested in the public funds and the income of the residue was given to a tenant for life, it was held that Long

Annuities, being public funds, need not be converted, and that the tenant for life was entitled to enjoy them in specie *Howard* v. *Kay*, 27 L. J. Ch. 148; *Willey* v. *Sandys*, 7 Eq. 455; see *Tickner* v. *Old*, 18 Eq. 422.

Powers of management do not alter rights.

Power conferred upon trustees to postpone a sale or to retain securities unconverted will not alter the rights of tenant for life and remainderman. *In re Carter*, 44 W. R. 140; *In re Chaytor*; *Chaytor* v. *Horn*, (1905) 1 Ch. 233, where *Bulkeley* v. *Stephens*, 3 N. R. 105, was not followed.

Gifts of unconverted residue.

But if in such a case what is given to the tenant for life is the income of the converted and unconverted property or the income of the securities representing the estate, he will be entitled to the income of securities retained. *Wreg* v. *Smith*, 14 Sim. 202; *In re Thomas*; *Wood* v. *Thomas*, (1891) 3 Ch. 483.

Direction to apply income of unconverted estate.

Again, the testator may expressly direct the income of any part of the estate remaining unconverted to be applied in the same way as the income of the converted estate. In such a case the tenant for life will be entitled, if the testator's capital is left in a business, to the interest and profits made by the capital, and if the testator's business is carried on to the profits of the business (*a*). On the other hand, if in the exercise of their discretion, the trustees retain a reversion, the tenant for life will not be entitled to any income in respect of the reversion (*b*). *Morley* v. *Mendham*, 2 Jur. N. S. 998; *Johnston* v. *Moore*, 27 L. J. Ch. 453; *Lean* v. *Lean*, 32 L. T. 305; 23 W. R. 484; *Waters* v. *Waters*, 32 L. T. 306, n.; *In re Chancellor*; *Chancellor* v. *Brown*, 26 Ch. D. 42; *In re Crowther*; *Midgley* v. *Crowther*, (1895) 2 Ch. 56 (*a*); *Mackie* v. *Mackie*, 5 Ha. 70; *Rowlls* v. *Bebb*, (1900) 2 Ch. 107 (*b*).

B. Where there is no trust to convert.

Rule in *Howe* v. *Lord Dartmouth*.

In such a case the rule is, that when a residue of personalty is given *en masse* to several persons successively, wasting property, and property invested in a manner not authorised by the will must be converted, unless it appears from the will that specific enjoyment by the tenant for life was intended. *Howe* v. *Lord Dartmouth*, 7 Ves. 137; *Johnson* v. *Johnson*, 2 Coll. 441; *Meyer* v. *Simonsen*, 5 De G. & S. 723; *Blann* v. *Bell*, 2 D. M. & G. 775; *Thornton* v. *Ellis*, 15 B. 193;

Macdonald v. *Irvine*, 8 Ch. D. 101; *Lyons* v. *Harris*, (1907) 1 Ir. 32; see *Wightwick* v. *Lord*, 6 H. L. 217.

Does not apply to a deed.

The rule does not apply to a settlement by deed. *In re Van Straubenzee*; *Boustead* v. *Cooper*, (1901) 2 Ch. 779.

Does not apply to realty.

The rule is limited to personalty, and the tenant for life is not entitled to any allowance, if real estate forming part of a residue devised for life is unproductive. *Yates* v. *Yates*, 28 B. 637.

The fact that the residuary gift includes real estate, the devise of which is specific, does not entitle the tenant for life to specific enjoyment of the residuary personalty. *Howe* v. *Lord Dartmouth*, *supra*.

Extent of rule.

The rule in *Howe* v. *Lord Dartmouth* "must be applied unless upon the fair construction of the will you find a sufficient indication of intention that it is not to be applied, the burden in every case being upon the person who says the rule of the Court of Chancery ought not to be applied in the particular case," per James, L.J., *Macdonald* v. *Irvine*, 8 Ch. D. p. 124.

The rule gives way more readily to an indication of contrary intention in the case of an absolute gift followed by an executory gift over. *In re Bland*; *Miller* v. *Bland*, (1899) 2 Ch. 336.

The cases are numerous in which the question has been discussed whether a sufficient intention has been shown to take the case out of the rule. Probably they are not all consistent with each other. It is proposed shortly to summarise them here.

Rule excluded by language of residuary gift.

1. An intention to give the tenant for life enjoyment in specie may be gathered from the language of the residuary gift.

Where the gift is residuary, a mere enumeration of particulars in the residuary gift will not alone entitle the tenant for life to enjoyment in specie, more especially if it is plain that some of the enumerated particulars, such as debts, cannot be intended to remain outstanding. *Sutherland* v. *Cooke*, 1 Coll. 498.

Gift specific.

If the true construction is that the gift is not residuary, but a specific gift of the enumerated things, the tenant for life is

entitled to specific enjoyment. For this purpose there is no distinction between leaseholds and a business. *Bethune* v. *Kennedy*, 1 M. & Cr. 114; *Vaughan* v. *Buck*, 1 Ph. 75; *Lord* v. *Godfrey*, 4 Mad. 455; *Vincent* v. *Newcombe*, You. 599; *Hubbard* v. *Young*, 10 B. 203; *Boys* v. *Boys*, 28 B. 436; *Stainer* v. *Hodgkinson*, 52 W. R. 260.

If the gift to the tenant for life is of property in every shape and in whatever manner it is situated, and the property "so left" is given to the remainderman, the tenant for life is entitled to specific enjoyment *Collins* v. *Collins*, 2 M. & K. 703; see *Pickering* v. *Pickering*, 4 M. & Cr. 289; *Harvey* v. *Harvey*, 5 B. 134.

And if the testator distinguishes between the enumerated things and the residue by such words as "firstly" and "secondly," the tenant for life may be entitled to specific enjoyment of the former. *Oakes* v. *Strachey*, 13 Sim. 414; see *Hood* v. *Clapham*, 19 B. 90.

Effect of word "rents" as regards leaseholds.

2. Upon the question whether a gift of the "rents" and income of the residue to the tenant for life is sufficient to entitle him to specific enjoyment of leaseholds, the better opinion appears to be that if the gift is of residuary real and personal estate, the word "rents" is satisfied by being referred to the real estate. *In re Game; Game* v. *Game*, (1897) 1 Ch. 881; approving dicta in *Harris* v. *Poyner*, 1 Dr. 174, 179; *Craig* v. *Wheeler*, 29 L. J. Ch. 374, 376, and not following dicta in *Crowe* v. *Crisford*, 17 B. 507; *Wearing* v. *Wearing*, 23 B. 99; *Vachell* v. *Roberts*, 32 B. 140; see, too, *Pickup* v. *Atkinson*, 4 Ha. 624; *Marshall* v. *Bremner*, 2 Sm. & G. 237; *Booth* v. *Coulton*, 7 Jur. N. S. 207.

It seems immaterial whether the testator had or had not real estate at the date of his will or death, as after-acquired real estate would pass.

Under the old law, if the testator had no freeholds at the date of his will, as after-acquired freeholds could not pass, it was necessary to refer the word "rents" to leaseholds, and accordingly the tenant for life was entitled to specific enjoyment of them. It seems the same result would follow in a modern

will, if the residuary gift is so limited as to exclude freeholds. *Gaudenough* v. *Tremamondo*, 2 B. 512.

Effect of gift over.

3. An intention to give specific enjoyment may be inferred from the gift over after the death of the tenant for life.

Thus, a gift of a specific part of the residue at the death of the tenant for life entitles the tenant for life to enjoyment of that part in specie. *House* v. *Way*, 12 Jur. 958; 18 L. J. Ch. 22; *Holgate* v. *Jennings*, 24 B. 623; *Harris* v. *Poyner*, 1 Dr. 174; *Collins* v. *Collins*, 2 M. & K. 703; *D'Aglie* v. *Fryer*, 12 Sim. 1.

Powers conferred on trustees.

4. Specific enjoyment may be inferred from directions given to trustees.

Thus, an express trust to convert at the death of the tenant for life (*a*), or not to convert for a given time (*b*), or without the consent of the parties (*c*), entitles the tenant for life to specific enjoyment in the meantime. *Alcock* v. *Sloper*, 2 M. & K. 699; *Hunt* v. *Scott*, 1 De G. & S. 219; *Harvey* v. *Harvey*, 5 B. 134; *Bethune* v. *Kennedy*, 1 M. & Cr. 114; *Daniel* v. *Warren*, 2 Y. & C. C. 290; *Rowe* v. *Rowe*, 29 B. 276 (*a*); *Green* v. *Britten*, 1 D. J. & S. 649 (*b*); *Hinves* v. *Hinves*, 3 Ha. 609 (*c*). *Mills* v. *Mills*, 7 Sim. 501, seems not in accord with other authorities.

Power of sale.

And a discretionary power of sale given to the trustees or the tenant for life is inconsistent with an immediate sale, and entitles the tenant for life to enjoyment in specie. *Barlow* v. *Mount*, 2 De G. & S. 383; *Bowden* v. *Bowden*, 17 Sim. 65; *Simpson* v. *Lester*, 4 Jur. N. S. 1269; *Skirving* v. *Williams*, 24 B. 275; *In re Leonard*; *Theobald* v. *King*, 29 W. R. 234; *In re Pitcairn*; *Brandreth* v. *Colvin*, (1896) 2 Ch. 199; *Re Beatham*; *Pearce* v. *Bentham*, 94 L. T. 307; see *Jebb* v. *Tugwell*, 20 B. 84; *Re Llewellyn's Trust*, 29 B. 171.

A direction to sell certain parts of the personal estate without any similar direction as to the residue, is not of much weight as showing that the residue is not to be converted. *Cafe* v. *Bent*, 5 Ha. 34.

And a trust by sale of the residue or so much as is necessary to pay debts and legacies, has been held not to entitle the

tenant for life to enjoy what remains in specie. *Sutherland* v. *Cooke*, 1 Coll. 498; see *Johnson* v. *Johnson*, 2 Coll. 441.

Power to repair leaseholds, &c.

Again, if power is given to repair and renew (*a*), or demise (*b*), or discharge incumbrances upon (*c*), leaseholds, this is inconsistent with an immediate sale, and the tenant for life may enjoy the leaseholds in specie. *Crowe* v. *Cristord*, 17 B. 507; *Thursby* v. *Thursby*, 19 Eq. 395 (*a*); *Hind* v. *Selby*, 22 B. 373 (*b*); *In re Sewell's Estate*, 11 Eq. 80 (*c*).

Power to retain.

If there is a power to retain specifically named investments, the tenant for life is entitled to the income of those in specie. *Brown* v. *Gellatly*, L. R. 2 Ch. 751.

A general power to retain any part of the estate, as invested at the testator's death, gives the tenant for life the income of unauthorised securities which are retained, whether they are wasting or not. *Gray* v. *Siggers*, 15 Ch. D. 75; *In re Sheldon*: *Nixon* v. *Sheldon*, 39 Ch. D. 50; *In re Bates*; *Hodgson* v. *Bates*, (1907) 1 Ch. 22; *In re Wilson*; *Moore* v. *Wilson*, (1907) 1 Ch. 394; not following *Porter* v. *Baddeley*, 5 Ch. D. 542.

Power given for benefit of estate.

A power to sell ships "for the benefit of my estate" was held not to give the tenant for life the earnings in specie. *Brown* v. *Gellatly*, *supra*.

It has been said that a power to vary securities is in favour of the view that the testator intended conversion. *Morgan* v. *Morgan*, 14 B. 72, 85.

Debts must be got in.

Where the tenant for life is entitled to the enjoyment in specie of the property of the testator as existing at his death, the debts must nevertheless be got in. *Holgate* v. *Jennings*, 24 B. 623.

C. Where there is no right to specific enjoyment, the following rules apply as between tenant for life and remainderman:—

What residue is.

1. The residue is what remains after taking such portion of the capital as, together with the income of such portion for one year, whatever that income may be, is required to pay the testator's debts and legacies. *Allhusen* v. *Whittell*, 4 Eq. 294; *Lambert* v. *Lambert*, 16 Eq. 320; *Marshall* v. *Crowther*, 2 Ch. D. 199; *Aikin* v. *Butler*, Seton on Decrees, p. 1680.

Property properly invested.

2. The tenant for life is entitled from the testator's death to the income of so much of the property as is invested on authorised securities. *Angerstein* v. *Martin*, T. & R. 232; *Hewitt* v. *Morris*, *ib.* 241; *Brown* v. *Gellatly*, L. R. 2 Ch. 751; reversing *Stott* v. *Hollingworth*, 3 Mad. 161; *Taylor* v. *Hibbert*, 1 J. & W. 308, so far as *contra*.

Unauthorised securities.

3. With regard to unauthorised securities, the tenant for life is entitled from the testator's death to the income which would be produced by the money upon unauthorised security, if invested on authorised security at the end of a year from the testator's death. *Dimes* v. *Scott*, 4 Russ. 195; *Taylor* v. *Clark*, 1 Ha. 161; *Brown* v. *Gellatly*, L. R. 2 Ch. 751.

In some cases the investment in authorised securities has been treated as made at the testator's death. *Hume* v. *Richardson*, 4 D. F. & J. 29; 31 L. J. Ch. 713.

It may be that a retained security stands above par and pays less than 3 per cent. upon its value, so that the amount paid to the tenant for life might have to be paid partly out of capital. It has not been decided whether the rule applies in such a case.

Again, the residue may include securities which produce less than the interest on their value, while others produce more. Must the residue be dealt with as an aggregate fund, or must each security be dealt with separately? Perhaps the answer is that the payments to the tenant for life are provisional only, and that the account must be readjusted when the securities are realised, and that in the meantime security must be taken for any over-payment to the tenant for life. See *Wentworth* v. *Wentworth*, (1900) A. C. 163, p. 172.

Property which cannot be converted.

4. With regard to property which cannot be converted within the year or which is retained under a power to retain, the tenant for life is entitled from the testator's death to interest upon the then value of such property. *Gibson* v. *Bott*, 7 Ves. 89: see 1 Y. & C. C. 320, n.; *Meyer* v. *Simonsen*, 5 De G. & S. 723; *Brown* v. *Gellatly*, L. R. 2 Ch. 751: *Farley* v. *Hyder*, 42 L. J. Ch. 626; *In re Eaton*; *Daines* v. *Eaton*, 70 L. T. 761.

If this arrangement is provisional only, it would seem that

the surplus income should be invested and accumulated. However, it has been held that the tenant for life is entitled to the income of the investments of surplus income. *In re Woods; Gabellini* v. *Woods*, (1904) 2 Ch. 4.

Where a fund is without authority employed in a business in which large profits are earned, the tenant for life is entitled to interest on the fund and on the profits exceeding the interest allowed, which must be treated as capital. *In re Hill: Hill* v. *Hill*, 50 L. J. Ch. 551.

Personalty to be laid out in land.

5. Where personalty is directed to be laid out in land the tenant for life is entitled to the income from the testator's death. *Macpherson* v. *Macpherson*, 1 Macq. 243; 1 Pat. 103.

Where the income is to be accumulated and laid out with the principal, one year is allowed for accumulation. *Sitwell* v. *Barnard*, 6 Ves. 520.

Reversionary property must be sold.

6. Reversionary property must be sold under trusts for conversion, and if the testator gives his trustees a discretion as to the period of conversion, interest will be allowed upon the value of the reversion at the end of a year from the death. *Wilkinson* v. *Duncan*, 23 B. 469; *Johnson* v. *Routh*, 3 Jur. N. S. 1041; 27 L. J. Ch. 305; *Countess of Harrington* v. *Atherton*, 2 D. J. & S. 352.

Income of fund to pay contingent or vested legacies.

7. The tenant for life is entitled to the income of a fund set apart to pay contingent legacies, or to answer reversionary annuities, and also to so much of the income of a fund set aside to answer an annuity payable at the discretion of trustees as is not wanted for the annuity. *Crawley* v. *Crawley*, 7 Sim. 427; *Fullerton* v. *Martin*, 1 Dr. & Sm. 31; *Cranley* v. *Dixon*, 23 B. 512; *Allhusen* v. *Whittell*, 4 Eq. 295; *In re Whitehead; Peacock* v. *Lucas*, (189- 1 Ch. 678.

But where a tenant for life of a residue with power to appoint appointed it for life and the residue included a fund set aside to answer legacies under the will of the first testator, which were vested but had not become payable, it was held that the appointor must be held to be entitled to a terminable annuity equal to the income of the fund, and that that income must be invested and the income of the investment only paid to

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the tenant for life under the appointment. *In re Whitehead, supra.*

Apportionment of recovered assets.

8. With regard to a reversion falling in before it is sold and to assets recovered after the testator's death, it is now settled, after some fluctuation of opinion, that the tenant for life is entitled to the difference between the sum received and the sum which, invested at the testator's death at the rate allowed, and calculated with yearly rests, would have amounted to that sum. *Cox* v. *Cox*, 8 Eq. 343; *Ackroyd* v. *Ackroyd*, 18 Eq. 313; *Bearan* v. *Bearan*, 24 Ch. D. 649, n.; *In re Earl of Chesterfield's Trusts*, 24 Ch. D. 643; *In re Hobson*; *Walker* v. *Appach*, 55 L. J. Ch. 422; 53 L. T. 627; 34 W. R. 70; *In re Godden*; *Teague* v. *Fox*, (1893) 1 Ch. 292; *In re Duke of Cleveland's Estate*; *Hay* v. *Wolvey*, (1895) 2 Ch. 542. *In re Grabowski's Settlement*, 6 Eq. 12, is no longer law.

Insufficient mortgage.

9. If money is properly advanced on mortgage and the security turns out to be insufficient, and the trustees enter into possession, the tenant for life is entitled to receive the rents for so much as is equivalent to the interest due until the time of sale. When the property is sold, if the tenant for life has not received his full interest, the proceeds of sale must be apportioned in the proportion, which the amount, which the tenant for life ought to have received for interest, bears to the amount, which ought to have been received on account of capital. The tenant for life is not bound to bring into account rents received after the date when it was known that there would be a deficiency. *In re Hubbuck*; *Hart* v. *Stone*, (1896) 1 Ch. 754; *In re Moore*; *Moore* v. *Johnson*, 54 L. J. Ch. 432; *In re Alston*; *Alston* v. *Houston*, (1901) 2 Ch. 584; *In re Auckehill's Estate*, 27 L. R. Ir. 331; *Stewart* v. *Kingsale*, (1902) 1 Ir. 496; *In re Atkinson*; *Barbers' Co.* v. *Grose-Smith*, (1904) 2 Ch. 160; overruling *In re Foster*; *Lloyd* v. *Carr*, 45 Ch. D. 629, and *In re Phillimore*; *Phillimore* v. *Herbert*, (1903) 1 Ch. 942; see, too, *In re Lewis*; *Davies* v. *Harrison*, (1907) 2 Ch. 296.

In making the computation, interest cannot be allowed to the tenant for life upon the arrears of income. *In re Moore*; *Moore* v. *Johnson*, 54 L. J. Ch. 432.

Breach of trust.

10. When an authorised investment is sold and the proceeds

invested upon an unauthorised investment, the case is different. The accounts must then be reopened from the first, though the tenant for life may not have been a party to the unauthorised investment. The proper course is to add to the capital received in respect of the unauthorised investment the income paid to the tenant for life. This is the sum to be apportioned. Then ascertain what capital there ought to be and what income the tenant for life ought to have received; the sum to be apportioned will be apportioned in the proportion which this capital bears to this income. But if the tenant for life has been overpaid, he cannot be made to refund. Possibly overpayment ought to be deducted from income subsequently accruing, if any. *In re Bird; Dodd* v. *Evans*, (1901) 1 Ch. 916.

Recurring loss.

11. Where there is a recurring loss, for instance, from a leasehold property, which cannot be sold, the tenant for life is chargeable with the difference between the amount of such loss and the sum, which, invested at the testator's death and calculated with yearly rests, would have amounted to the sum lost. *In re Hengler: Fowde* v. *Hengler*, (1893) 1 Ch. 586.

Rate of interest.

12. The rate of interest allowed in calculations between tenant for life and remainderman used to be 4 per cent., but now it is 3 per cent. *In re Goodenough: Marland* v. *Williams*, (1895) 2 Ch. 537; *In re Duke of Cleveland's Estate; Hay* v. *Wolmer*, *ib.* 542; *Rowlls* v. *Bebb*, (1900) 2 Ch. 207; *Re Woods; Gabellini* v. *Woods*, (1904) 2 Ch. 4; see *In re Davis; Davis* v. *Davis*, (1902) 2 Ch. 314.

Where part of the estate consisted of life policies subject to a mortgage, and the premiums and interest on the mortgage were paid out of income, the tenant for life, when the policies fell in, was held entitled to be repaid the premiums and interest paid, with interest thereon at 4 per cent., as the money was not trust money, but the tenant for life's own money, with which he might have earned more than 3 per cent., and the balance was apportioned in the usual way. *In re Morley; Morley* v. *Haig*, (1895) 2 Ch. 739.

XV.—Special Equities between Tenant for Life and Remainderman.

Apportionment on sale of reversion.

1. Where land subject to a beneficial lease is taken under the Lands Clauses Consolidation Act, 1845, sect. 74, or sold under the Settled Land Act, 1882, sect. 31, the tenant for life is entitled during the continuance of the term to so much of the income of the purchase-moneys as equals the rent under the lease. The rest of the income must be accumulated until the date when the lease would have expired, and from that date the tenant for life is entitled to the whole income, including the income of accumulations. *In re Wootton's Estate*, L. R. 1 Eq. 589; *In re Mette's Estate*, 7 Eq. 72; *In re Wilkes' Estate*, 16 Ch D. 597; *Cottrell* v. *Cottrell*, 28 Ch. D. 628; *In re Barrington*; *Gamlen* v. *Lyon*, 33 Ch. D. 523.

Apportionment on sale of leaseholds.

Where a leasehold interest is disposed of under one or other of these Acts, the tenant for life is entitled to an annuity of such an amount, that the payment of it would exhaust the purchase-money in the number of years which the leaseholds had to run. *In re Phillips' Trusts*, 6 Eq. 250; *Askew* v. *Woodhead*, 14 Ch. D. 27; Seton, 2448.

Sum charged on freeholds and leaseholds.

2. Where a sum was charged on freeholds and leaseholds devised for life with remainders, with a discretion to trustees as to the mode of raising the charge, and they did not raise it until the value of the leaseholds had depreciated, the sum was apportioned between the value of the freeholds and leaseholds at the end of two years from the testator's death; the amount apportioned to the leaseholds was divided by the number of years the lease had then to run, and multiplied by the number of years during which the tenant for life had been in possession, and the amount so arrived at was borne by the tenant for life as regards the past, and as regards the future, he was charged with an annuity for his life equal to the sum obtained by dividing the amount apportioned to the leaseholds by the number of years the lease had to run. *Blake* v. *O'Reilly* (1895) 1 Ir. 479; see *Marker* v. *Kekewich*, 8 Ha. 291.

Trust for payment of debts out of income.

3. If a testator creates a trust for payment of mortgage or other debts out of the annual income of his estate, and the debts are, in fact, paid out of corpus, there is no equity to compel the tenant for life out of annual income to make good what has been so paid, and if a fund has been accumulated out of income to pay mortgage debts as directed by the will and the mortgagees are paid by sales of the mortgaged estates under order of the Court or out of court, the tenant for life is entitled to the accumulated fund. *Tewart* v. *Lawson*, 18 Eq. 490; *Norton* v. *Johnstone*, 30 Ch. D. 649, *In re Green; Baldock* v. *Green*, 40 Ch. D. 610.

The will may, of course, be so framed as to require the execution of the trusts for payment of debts so far as to preserve the rights of the beneficiaries, although the debts are otherwise paid. *Biggar* v. *Eastwood*, 19 L. R. Ir. 49.

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Waste:—Clearing land for cultivation.

In Ontario it is held that a tenant for life may cut down timber on wild land, for the purpose of bringing the land into cultivation. *Drake* v. *Wigle*, 24 C.P. 405.

In *Saunders* v. *Breakie*, 5 O.R. 603, it was held by Ferguson, J., that if the tenant for life should sell the timber it would be waste, though he might lawfully destroy as much as should be necessary in the course of clearing for cultivation.

But this view was not concurred in by a Divisional Court, where tenant for years was held to be entitled to the property in stones gathered on the land, in the course of husbandry, in order to render it capable of cultivation, and sold by him. *Lewis* v. *Godson*, 15 O.R. 252.

Cutting trees and shrubs, removing buildings and cutting paths, so as to convert the land into a pleasure ground, is waste. *Monro* v. *Toronto R. Co.*, 9 O.L.R. 299.

Tapping maple trees.

As between landlord and tenant, the latter being under covenant not to cut timber, it has been held to be a question for a jury as to whether tapping maple trees for sugar-making had the effect of shortening the lives of or destroying the trees. *Campbell* v. *Shields*, 44 U.C.R. 449. But if the owner of the inheritance had been accustomed to tap the trees, a tenant for life succeeding him would, it is submitted, have the same right.

Without impeachment.

A devise to a wife of land for life, with a provision that the land "shall be under the control of my said wife," does not render her dispunishable for waste. *Clow* v. *Clow*, 4 O.R. 355.

Repairs.

A tenant for life has been allowed to cut timber and exchange it for suitable material with which to effect repairs, the law of England not being strictly applied. *Hixon* v. *Reaveley*, 9 O.L.R. 6.

Permissive waste.

Tenant for life is not liable for permissive waste. *Patterson* v. *Central Can. L. & S. Co.*, 29 O.R. 134; *Monro* v. *Toronto R. Co.*, 9 O.L.R. 299. *Holmes* v. *Wolfe*, 26 Gr. 228, to the contrary, must be considered as overruled.

But tenant for years is liable. *Morris* v. *Cairncross*, 14 O.L.R. 54.

The spread of noxious weeds, either from natural causes, or by pasturing cattle, is bad husbandry, not waste, notwithstanding a statutory enactment against allowing the spread of noxious weeds. *Patterson* v. *Central Can. L. & S. Co.*, 29 O.R. 134.

Outgoings, taxes.

Tenant for life must pay taxes on the whole estate, although some parts of it may be unproductive. *Biscoe* v. *Van Bearle*, 6 Gr. 438; *Re Denison*, 24 O.R. 197.

And where land is converted, the taxes which were chargeable on the land before conversion and for which the tenant for life was liable, become, if not paid by the tenant for life, a charge upon the income, after conversion. *Gray* v. *Hatch*, 18 Gr. 72.

Incumbrances.

Where a mortgaged estate comes to a tenant for life, he must keep down the interest; and a dowress must pay one-third of the interest in such a case. *Reid* v. *Reid*, 29 Gr. 372.

The remainderman should pay the principal. *Reid* v. *Reid*, 29 Gr. 372.

If tenant for life pays the principal, the presumption is that he pays it for his own benefit, and he may hold it as a charge on the land. *Macklem* v. *Cummings*, 7 Gr. 318; *Carrick* v. *Smith*, 34 U.C.R., at p. 394.

Where land came to a tenant for life with power of appointment, and the life tenant paid the incumbrance out of her own

moneys and afterwards appointed the land, there being no evidence as to whether she intended to acquire a charge for the principal, an enquiry was directed as to whether the land was of greater value than the incumbrance, in which case it would be declared that the life tenant had a charge for the amount, but if otherwise, that the land came to the appointee discharged of the incumbrance. *Macklem* v. *Cummings*, 7 Gr. 318.

Where the owner of a mortgaged estate granted the land to A., reserving to himself a life estate, it was held that A., on paying off the mortgage had no right to take an assignment of it and hold it against the tenant for life. *Leitch* v. *Leitch*, 2 O.L.R. 233.

Annuity.

Where an annuity is secured by a mortgage on land, and the owner devises the land to A. for life, remainder to B. in fee, the annual payments made by the tenant for life are to be treated as partly interest and partly principal and apportioned between the tenant for life and remainderman, and for those which represent principal the tenant for life has a lien on the inheritance. *Whitesell* v. *Reece*, 5 O.L.R. 352.

Capital and Income.

New shares allotted to holders of old shares are capital, and if sold at a profit, the profit is capital, and a tenant for life is entitled to interest thereon only. *Re Smith*, 8 P.R. 384.

A bequest for life of "dividends, interest and annual produce" of shares of the capital stock of a bank does not include new shares allotted to existing shareholders out of accumulated profits. *Wiggins* v. *Scovill*, 15 N.B.R. 31.

And an executrix entitled to the dividends of shares for her life, who takes up a new allotment made to holders of shares at the time of the allotment, with her own money, is not entitled to hold them as her own, but is entitled to the dividends only, with a lien for the amount advanced. *Re Sinclair*, 2 O.L.R. 349.

Renewal of lease.

A widow (executrix) entitled to the use of the testator's property during her life, which was given in remainder to his

children, took possession of and carried on the business of brickmaking upon land leased to the testator. She renewed the lease, which expired shortly after his death and leased other land for the same purpose and largely extended the business, putting in other assets of the estate, and large profits were made. On her death it was held that the business was carried on for the benefit of the estate; that she was entitled to the profits for her own use during her life, but whatever part of the profits she put back into the business became the property of the estate, and ultimately divisible amongst the remaindermen. *Wakefield* v. *Wakefield*, 32 O.R. 36.

CHAPTER XLIV.

CONDITIONS PRECEDENT—VESTING.

CONDITIONS DISTINGUISHED

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1. 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.

Condition and trust.

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. *Young* v. *Grove*, 4 C. B. 668; *Wright* v. *Wilkin*, 9 W.R. 161; 10 W. R. 403; see *A.-G.* v. *Wax Chandlers*, L. R. 6 H. L. 1; *A.-G.* v. *Merchant Taylors*, 6 Ch. 512; and see *Bird* v. *Harris*, 9 Eq. 204; *Foot* v. *Cunningham*, I. R. 11 Eq. 306; *Re Cowley; Souch* v. *Cowley*, 53 L. T. 494; *Re Oliver; Newbald* v. *Beckitt*, 62 L.T. 533.

Condition and personal liability.

2. If a gift is made to a person and he is required to make certain payments, it may be that if he accepts the gift he is personally liable to make the payments irrespective of the value of the property given to him. *Doe* d. *Willey* v. *Holmes*, 8 T. R. 1; *Pickwell* v. *Spencer*, L. R. 7 Ex. 105; *In re M'Mahon; M'Mahon* v. *M'Mahon*, (1901) 1 Ir. 489.

Condition and limitation.

3. In some cases a condition apparently precedent has been read as forming part of the original limitation. Thus, a devise to M and the heirs of her body, on condition that she marry and have issue male by S, was held to give an estate in special tale to M. *Page* v. *Hayward*, 2 Salk. 570; see *Pelham Clinton* v. *Duke of Newcastle*, (1902) 1 Ch. 34, 38; (1903) A. C. 111.

Similarly, an estate to arise upon a condition which cuts down a previous estate will, if possible, be construed as a

remainder by looking upon the condition as forming part of the limitation of the previous estate. Thus, a devise to A for life if she should not marry again, but if she should, to B, will be construed as a devise to A for life or till marriage. *Luxford* v. *Checke*, 3 Lev. 125; *Lady Ann Fry's Case*, 1 Ventr. 203; *Gordon* v. *Adolphus*, 3 B. P. C. 306.

Devise for life subject to a proviso.

So, too, if the gift for life is made "subject to the proviso hereinafter contained," the proviso is incorporated into the original limitation. *Webb* v. *Grace*, 2 Ph. 701.

And a bequest to A for life, if she should so long remain unmarried, will be construed in the same way. *Heath* v. *Lewis*, 3 D. M. & G. 954; *In re Moore; Trafford* v. *Maconochie*, 39 Ch. D. 116.

On the other hand, if the condition is so penned that it cannot be connected with the previous limitation for life, it must take effect as a condition. *Sheffield* v. *Lord Orrery*, 3 Atk. 282; see *Allen* v. *Jackson*, 1 Ch. D. 399.

In such a case, however, it may appear that the original estate was only meant to last till the condition takes effect, if, for instance, the rents are directed to be paid to a woman, which could only be done till her marriage, the estate not being given to her separate use. *Meeds* v. *Wood*, 19 B. 215.

Estate of trustees to preserve.

Upon the same principle, the ordinary limitation to trustees to preserve contingent remainders is a vested remainder, the prior estate being looked upon as lasting till forfeiture by the prior taker. *Smith* d. *Dormer* v. *Parkhurst*, 18 Viner, fol. 413; 7 Mod. 366; 3 Atk. 135; 4 B. P. C. 353; Fearne, C. R. 333.

Characteristics of Conditions Precedent.

General test of condition precedent.

Whether a condition is subsequent or precedent must depend on the language in which it is framed, and very little help can be derived from decided cases on the point. It may, however, be noticed, that when the condition requires something to be done, which will take time, the argument is in favour of construing it as a condition subsequent. *Popham* v. *Bampfield*, 1 Vern. 79; 1 Eq. Ab. 108, pl. 2; *Peyton* v. *Bury*, 2 P. W. 626; *Duddy* v. *Gresham*, 2 L. R. Ir. 443.

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On the other hand, a condition which involves anything in the nature of consideration is in general a condition precedent. *Acherley* v. *Vernon*, Willes, 153; *In re Weilstead*, 25 B. 612; *Fitzgerald* v. *Ryan*, (1899) 2 Ir. 637; *Re Enson*; *Grain* v. *Grain*, 93 L. T. 104.

Court prefers condition subsequent.

If the language of the will leaves it in doubt whether a condition is intended to be precedent or subsequent, the Court prefers the latter. *In Re Greenwood*; *Goodhart* v. *Woodhead*, (1903) 1 Ch. 749.

Condition to take a name.

Primâ facie a condition requiring a devisee to take a particular name is not intended to take effect until the devisee has come into possession of the benefit conferred upon him, and is therefore subsequent. *In re Greenwood*; *Goodhart* v. *Woodhead*, (1903) 1 Ch. 749.

Benefit to be claimed within a given time.

It would seem that *primâ facie* a condition requiring a beneficiary to claim the benefit within a given time would be precedent, but it may be so penned as to be subsequent. *Tulk* v. *Houldditch*, 1 V. & B. 248; *Priestley* v. *Holgate*, 3 K. & J. 286; *Murphy* v. *Broder*, I. R. 9 C. L. 123; *Horrigan* v. *Horrigan*, (1904) 1 Ir. 29, 271.

Condition precedent, whether impossible, impolitic, or illegal, must be fulfilled in the case of realty.

If a devise be made to take effect only on performance of some particular duty by the devisee, or upon some particular event, there is no gift unless the condition is fulfilled. And it makes no difference that the event is impossible in itself, as to go to Rome in three days, or impolitic, or illegal. See Co. Litt. 206 b; Shep. Touchstone, p. 132; *Egerton* v. *Earl Brownlow*, 4 H. L. 1; *Priestley* v. *Holgate*, 3 K. & J. 286; *Caldwell* v. *Cresswell*, 6 Ch. 278.

In personalty condition precedent involving a physical impossibility is invalid.

But as regards personalty, a gift made upon a condition precedent involving a physical impossibility, such as to drink up the ocean, takes effect, notwithstanding the condition. See 1 Swin., Part IV., sect. 6, p. 257; Co. Litt. 206 b.

But if the condition precedent, though in fact impossible at the date of the will, or becoming impossible by subsequent events, involves no physical impossibility, the gift will not take effect. *Lowther* v. *Cavendish*, 1 Ed. 99, 116; 3 B. P. C. 186; *Robinson* v. *Wheelwright*, 21 B. 214; 6 D. M. & G. 535.

Condition discharged by testator.

As regards personalty, a condition precedent, which becomes impossible by the act of the testator, is discharged; for instance, a gift of rents of leaseholds to A, if she should choose to reside at Battens, when the testator sells Battens, or a gift to A, if he repays the debt he owes me, when the testator afterwards accepts a composition and releases the debt. *Darley* v. *Langworthy*, 3 B. P. C. 359; *Gath* v. *Barton*, 1 B. 478; *Walker* v. *Walker*, 2 D. F. & J. 255.

Condition precedent *contra bonos mores*.

It is said, that as regards personalty a condition precedent, which is *contra bonos mores*, for instance, a gift to A, if she should live apart from her husband, may be rejected, leaving the gift absolute, and there is some not very satisfactory authority in support of the proposition. *Brown* v. *Peck*, 1 Ed. 140; *Wren* v. *Bradley*, 2 De G. & S. 49. See 39 Ch. D. 116; *In re Hope Johnstone*; *Hope Johnstone* v. *Hope Johnstone*, (1904) 1 Ch. 470.

On the other hand, a gift to A if living with his wife, and if not, half to him and half to her, is valid. *Shewell* v. *Dwarris*, Jo. 172.

Condition precedent as to marriage.

A gift to A, if he does not marry under a certain age, or if he marries B, does not vest unless the condition is performed and the consent of the testator to a marriage under that age, or to a marriage with C, does not alter the case. *Yonge* v. *Furse*, 8 D. M. & G. 756; *Davis* v. *Angel*, 4 D. F. & J. 524. See *Smith* v. *Cowdery*, 2 S. & St. 358.

Marriage with consent.

With regard to a condition precedent requiring marriage with consent, it seems that the consent may be disregarded if there is no gift over. *Reeves* v. *Herne*, 5 Vin. Ab. 343, pl. 41; *Reynish* v. *Martin*, 3 Atk. 330; see *Clarke* v. *Parker*, 19 Ves. 1.

But the consent only, and not the marriage, can be dispensed with; the legacy, therefore, will not vest till marriage. *Garbut* v. *Hilton*, 1 Atk. 381; *Gray* v. *Gray*, 23 L. R. Ir. 400.

On the other hand, if there is a gift over, marriage without consent will not vest the legacy. *Harry* v. *Aston*, Com. 726; *Malcolm* v. *O'Callaghan*, 2 Mad. 349; revd. on other grounds, Coop. t. Brougham, 73; *Gardiner* v. *Slater*, 25 B. 509.

And, if the consent required is to a marriage under a

certain age, the condition must be complied with. *Stackpole* v. *Beaumont*, 3 Ves. 89; see *Gray* v. *Gray*, 23 L. R. Ir. 399.

And the condition must also be complied with, if the legatee is provided for as well in the case of marriage without as in the case of marriage with consent. *Creagh* v. *Wilson*, 2 Vern. 572; *Gillett* v. *Wray*, 1 P. W. 284; *Holmes* v. *Lysaght*, 2 B. P. C. 261; *In re Nourse*; *Hampton* v. *Nourse*, (1899) 1 Ch. 63.

Consent of the testator to a marriage in his lifetime satisfies a condition requiring consent.

Where the condition is marriage with consent, whether precedent or subsequent, the consent of the testator to a marriage in his lifetime satisfies the condition. *Clarke* v. *Berkeley*, 2 Vern. 720; *Parnell* v. *Lyon*, 1 V. & B. 479; *Wheeler* v. *Warner*, 1 S. & St. 304; *Tweedale* v. *Tweedale*, 7 Ch. D. 633; see *Violett* v. *Brookman*, 5 W. R. 342.

And the condition does not apply to a subsequent marriage. *Hutcheson* v. *Hammond*, 3 B. C. C. 128; *Crommelin* v. *Crommelin*, 3 Ves. 227.

Consent of testator to a marriage to take place after his death.

But in such a case the consent of a testator to a marriage to take place after his death does not obviate the necessity for the consent of the persons named in the will. *Lowry* v. *Pattison*, I. R. 8 Eq. 372.

Condition of marriage with consent is satisfied by a second marriage with consent.

It seems, that where there is a gift upon marriage with consent, the legatee has her whole life to perform the condition and the legacy is not forfeited by a first marriage without consent. *Randall* v. *Payne*, 1 B. C. C. 55; *Beaumont* v. *Squire*, 17 Q. B. 905; *Kiersey* v. *Flaharan*, (1905) 1 Ir. 45. *Clifford* v. *Beaumont*, 4 Russ. 325, was decided on the ground, that the gift was only upon a marriage with consent, which had not in fact been obtained. See, too, *Duddy* v. *Gresham*, 2 L. R. Ir. 443.

But if other provision is made for the legatee in the event of marriage without consent, the condition must be limited to a first marriage. *Lowe* v. *Manners*, 5 B. & Ald. 917.

Condition requiring the consent of several persons, how performed.

In the case of a condition requiring the consent of several persons, if the consent required is that of executors or trustees, the consent of those who renounce or do not act is not necessary. *Worthington* v. *Evans*, 1 S. & St. 165; *Boyce* v. *Corbally*, Ll. & G. t. Plunkett, 102; *Evens* v. *Addison*, 4

Jur. N. S. 1034; *White* v. *M'Dermot*, I. R. 7 C. L. 1; see *Clarke* v. *Parker*, 19 Ves. 1.

But if there is only a single executor who renounces, his consent must, it seems, be obtained. *Graydon* v. *Hicks*, 2 Atk. 16; but the case is doubtful.

And a condition requiring the consent of several persons is performed by obtaining the consent of the survivors. *Ewing* v. *Anderson*, 7 W. R. 23; *Dawson* v. *Oliver Massey*, 2 Ch. D. 753.

If the consent of guardians is required, guardians must be appointed if there are none. *In re Brown's Trusts*, 18 Ch. D. 61.

Testator's consent.

If the testator imposes his own consent to a marriage as a condition, this will, if possible upon the construction of the will, be limited to a marriage before his death. *Booth* v. *Meyer*, 38 L. T. 125; *Curran* v. *Corbett*, (1897) 1 Ir. 343.

Where the testator does not prescribe any formalities, it is enough if the consent is substantially given. *Daley* v. *Desbouverie*, 2 Atk. 261; *In re Smith*; *Keeling* v. *Smith*, 44 Ch. D. 654.

Withdrawal of consent.

If consent has once been given, it may be withdrawn, if good reason exists for withdrawing it, but it cannot be capriciously withdrawn. *In re Brown*; *Ingalt* v. *Brown*, (1904) 1 Ch. 120.

Vesting of Real Estate.

Court leans in favour of vesting.

It has sometimes been said, that the Court leans in favour of early vesting; see per Best, C.J., *Duffield* v. *Duffield*, 3 Bl. N. S. p. 331. According to the modern doctrine, however, the Court has no leaning. It construes the will fairly, and gives effect to the intention expressed without any preconception as to what the testator ought to have or has intended, subject only to this, that it may be bound by rules established by the early authorities, though it might not now adopt such rules, if the matter were at large.

Devise "when" or "if" is contingent.

A devise to A and his heirs "if" or "when" he attains twenty-one or on attaining twenty-one is contingent: Fearne, Post. Works, 191; *Grant's Case*, Cro. Eliz. 122; 10 Rep. 50 a;

Love v. *Love*, 7 L. R. Ir. 306; *In re Francis*; *Francis* v. *Francis*, (1905) 2 Ch. 295.

"A devise in remainder to a class of children if they attain twenty-one is a contingent remainder. It is also a contingent remainder if it be a devise to a class of children equally at the age of twenty-one. And so also it is a contingent remainder if it be a devise in remainder to children who shall attain the age of twenty-one." Per Stuart, V.-C., in *Browne* v. *Browne*, 3 Sm. & C. 587; *Alexander* v. *Alexander*, 16 C. B. 59; see *Jull* v. *Jacobs*, 3 Ch. D. 703.

Condition requiring the attainment of a certain age may sometimes be subsequent.

Cases, however, where the condition as to attaining a certain age forms part of the original devise, must be distinguished from those cases, where the condition is contained in a separate direction; thus, where there is a trust for A and to be conveyed when he attains twenty-three, or an immediate devise followed by a clause directing that the devisee "is not to be of age to receive this" till he attains a certain age, or that it is to become his property on attaining twenty-five, the devisee has taken a vested interest subject to be divested. *Peard* v. *Kekewich*, 15 B. 166; *Snow* v. *Poulden*, 1 Kee. 186; *Attwater* v. *Attwater*, 18 B. 330.

So, too, a devise to A, provided she lives to attain twenty-one, has been held vested subject to be divested. *Simmonds* v. *Cock*, 29 B. 455, where the devise was after a life estate.

Effect of words "from and after" death of A.

A devise to A for life and "from and after" his death to B if he attains twenty-one gives B a contingent estate, though slight circumstances may be sufficient to show that his estate was to be vested. *Andrew* v. *Andrew*, 1 Ch. D. 410; *In re Jobson*; *Jobson* v. *Richardson*, 44 Ch. D. 154.

Express direction as to vesting.

When there is an express direction as to the time of vesting, nothing can vest before the appointed time; though on the other hand the question of vesting is not affected by a direction merely referring to the time of possession. *Russell* v. *Buchanan*, 2 Cr. & M. 561; 7 Sim. 628; *Montgomerie* v. *Woodley*, 5 Ves. 522; *Shrimpton* v. *Shrimpton*, 31 B. 425.

Cases in which a devise to A at or when or if he attain 21 is vested.

A devise to A at or when or if he attain twenty-one will be vested:—

1. If an estate is given prior to the attainment of twenty-

one by the ultimate devisee to some third person either for the benefit of the devisee himself, or for the benefit of some other persons to endure during the minority. *Goodtitle* d. *Haycard* v. *Whitby*, 1 Burr. 228; *Re Mottram*, 10 Jur. N. S. 915; *Boraston's Case*, 3 Rep. 19a; *Manfield* v. *Dugard*, 1 Eq. Ab. 195, pl. 4.

Prior devise till A attain 21.

In this case the estate given to the devisee on attaining twenty-one is in fact a vested interest subject to a term.

2. If there is a gift over upon death under twenty-one, the gift over shows that the first devisee is to take whatever interest the person claiming under the devise over is not entitled to, that is to say, the immediate interest. *Bromfield* v. *Crowder*, 1 B. & P. N. R. 313; see 14 East, 604; *Doe* d. *Roake* v. *Newell*, 1 Man. & S. 327; 5 Dow, 202; *Edwards* v *Hammond*, 3 Lev. 132; *Doe* d. *Hunt* v. *Moore*, 14 East, 601; *Phipps* v. *Ackers*, 3 Cl. & Fin. 691; 9 *ib.* 583; *Whitter* v. *Bromridge*, L. R. 2 Eq. 736; see *L'Estrange* v. *L'Estrange*, 25 L. R. Ir. 399.

Gift over upon death under 21.

This principle was applied to a devise to A for life and then to B if living at A's death, and if B should die before A without leaving issue surviving over. *Finch* v. *Lane*, 10 Eq. 501.

But it has not been applied to a devise to A for life and then to B if she should survive A, but not otherwise, and if she should die before A over, or to a similar devise after A's death to the children of B if he leave any heirs surviving, and if none over. *Doe* d. *Planner* v. *Scudamore*, 2 B. & P. 289; *Price* v. *Hall*, 5 Eq. 399.

And the gift over can have no effect where there is an express direction as to the time of vesting. *Russell* v. *Buchanan*, 2 Cr. & Mee. 561; 7 Sim. 628.

3. There is an important distinction between a devise to definite persons or to a class, at twenty-one, and a devise to such of a class as attain twenty-one, or to those who attain twenty-one. In the latter case "the finding or not finding the legatee depends on his attaining a particular qualification, and till the contingency happens, there is no one to whom the doctrine laid down in *Phipps* v. *Ackers* can apply." Such a

Devise to a contingent class and to a class upon a contingency.

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devise, therefore, will not be vested by a gift over. *Duffield* v. *Duffield*, 3 Bl. N. S. 260; *Stephen* v. *Stephen*, Ca. t. Talb. 228; *Festing* v. *Allen*, 12 M. & W. 279; *Holmes* v. *Prescott*, 10 Jur. N. S. 507; 33 L. J. Ch. 264; 11 L. T. N. S. 38; 12 W. R. 636; 3 N. R. 559; *Rhodes* v. *Whitehead*, 2 Dr. & Sm. 532; 13 W. R. 800; *Price* v. *Hall*, 5 Eq. 399; *Eddels' Trusts*, 11 Eq. 559; *Patching* v. *Barnett*, 28 W. R. 886; 51 L. J. Ch. 74. *Riley* v. *Garnett*, 3 De G. & S. 629; *Browne* v. *Browne*, 3 Sm. & G. 568, are overruled upon this point.

But a devise to A for life, and if he leave a son born or to be born in due time after his decease, who should live to attain twenty-one, then to such son in fee if he attain twenty-one, with a gift over if A die without leaving a son who should attain twenty-one, has been held to give an infant son of A a vested estate subject to be divested, because a son born within nine months of A's death could not then have attained twenty-one. *Muskett* v. *Eaton*, 1 Ch. D. 435; see, too, *Doe* v. *Hopkinson*, 5 Q. B. 223; *Sulley* v. *Barber*, 59 L. T. 824.

An estate to commence in certain events fails unless the events happen.

4. An estate limited to commence in certain specified events will fail altogether unless those exact events happen. Thus a gift, "if A should die, living my wife, without leaving a widow or any child, after his death and my wife's" to B, will fail if A survives the testator's wife, though he may die without leaving a widow or child. *Holmes* v. *Cradock*, 3 Ves. 317; *Sheldon* v. *Smith*, 6 Dow, 22; *Dicken* v. *Clarke*, 2 Y. & C. Ex. 572.

So if a testator recites that he will be entitled to property in certain events, and disposes of it, if those events happen, the property passes only if those events happen, though in fact, he may be entitled to the property in other events as well. *Archbold* v. *Austin Gourlay*, 5 L. R. Ir. 214.

Again, under a gift to children of the testator living at his wife's death, and the issue of those then dead, when the wife died before the testator and there was a son then living who also died before the testator, children of the son could not take as he was not dead at the wife's death. *Re Kinnear*; *Kinnear* v. *Burnett*, 90 L. T. 537.

Contingency not to be enlarged.

On the other hand, a contingency is not to be enlarged though it may appear to be inadequately penned; for instance,

a power of raising different sums according to the number of children a man may have will not be construed as meaning the number of children capable of taking. *Knapp* v. *Knapp*, 12 Eq. 238; *In re Verschoyle's Trusts*, 3 L. R. Ir. 13; see *Rye* v. *Rye*, 1 L. R. Ir. 413.

Where the contingency imports no more than the determination of prior interests the estate is vested.

In the case of successive limitations "where there is a limitation over which, though expressed in the form of a contingent limitation, is in fact dependent on a condition essential to the determination of the interests previously limited, 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 previously limited." *Maddison* v. *Chapman*, 4 K. & J. 709; 3 De G. & J. 536; *Webb* v. *Hearing*, Cro. Jac. 415; *Pearsall* v. *Simpson*, 15 Ves. 29; *Franks* v. *Price*, 3 B. 182; 5 Bing. N. C. 37; 6 Sc. 710; *Chelton* v. *Martin*, 24 W. R. 671; *Edgeworth* v. *Edgeworth*, L. R. 4 H. L. 35; see *post*, p. 578.

Thus, if the devise is to A for life, remainder to B for life and on the decease of B, if A be dead, to C in fee, C takes a vested remainder whether B survives A or not. Cases, *supra*; see, too, *Key* v. *Key*, 4 D. M. & G. 73; *In re Betty Smith's Trusts*, L. R. 1 Eq. 79; *In re Martin*: *Smith* v. *Martin*, 54 L. J. Ch. 1071; 54 L. T. 34.

So a devise in remainder to a person for his life, if he shall be living when the prior limitations determine, is not contingent, nor will subsequent remainders be contingent upon the survivorship of the tenant for life. *Leadbeater* v. *Cross*, 2 Q. B. D. 18.

And where the testator had power to appoint a fund, in which as to half his widow had a life interest and as to the other half an interest determinable on marriage, and he appointed it after his wife's death, those words were held equivalent to "subject to the wife's interest," so that on her marriage the appointment took effect at once as to half. *In re Shuckburgh's Settlement*; *Robertson* v. *Shuckburgh*, (1901) 2 Ch. 794.

Limits of the doctrine.

But to admit this construction, the limitation over must involve no incident but what is essential to the determination

of the estates previously limited. *Maddison* v. *Chapman*, 1 K. & J. 709; 3 De G. & J. 536.

Devise on a general failure of issue of a reversion dependent on failure of certain lines of issue.

5. If the property devised is a reversion which comes into possession only after the failure of issue of some person, a devise of such reversion after failure of the issue in question is in effect an immediate devise of the reversion. And the result is the same if the event upon which the reversion is expressed to be devised is larger than and includes the event upon which it comes into possession, if in effect the two events are the same, and the intention is merely to devise the reversion. If, for instance, the reversion falls into possession on failure of issue by a particular wife of the testator and the testator devises it upon a general failure of issue. A second marriage would revoke the will. *Jones* v. *Morgan*, Fearne, C. R. App. 577; 3 B. P. C. 322; *Lytton* v. *Lytton*, 4 B. C. C. 441; see *Baukes* v. *Holmes*, 1 Russ. 394, n.; not approved, *ib.* 406; *Lewis* v. *Templer*, 33 B. 625.

But a mere devise of a reversion upon a failure of a larger class of issue than that upon which it is limited, will not operate as an immediate devise of the reversion. *Lady Lansborough* v. *Fox*, Ca. t. Talb. 262.

Devise in default of issue.

6. It is well settled that a limitation in default or for want "of such issue," following a limitation in tail, is to be construed as a remainder to take effect upon the determination of the prior estate tail. It is not defeated by the birth of issue capable of taking under the prior limitation. *Ashley* v. *Ashley*, 6 Sim. 356.

And this construction may be applied where after a gift to A for life with remainder to his first and other sons in tail, there is a gift over in default of such sons, if there is any context to assist the construction. *Doe* v. *Dacre*, 1 B. & P. 250; 8 T. R. 112; *Hennessey* v. *Bray*, 33 B. 96.

Estates to arise upon the determination of a prior life estate by marriage or bankruptcy take effect as vested remainders.

7. It is also settled, that when there is a gift to a person for life, if she so long remains unmarried, or for life until bankruptcy, followed by a gift over in the event of marriage or bankruptcy, the remainder is not contingent, but vested so as to take effect either upon the death or marriage or bankruptcy, as the case may be, of the tenant for life. *Luxford* v. *Cheeke*, 3

Lev. 125; *Lady Ann Fry's Case*, 1 Vent. 199; *Gordon* v. *Adolphus*, 3 B. P. C. 306; *Foster* v. *Lord Romney*, 11 East, 594; *Meeds* v. *Wood*, 19 B. 215; *Browne* v. *Hammond*, Jo. 210; *Walpole* v. *Lasbett*, 7 L. T. N. S. 526; 1 N. R. 180; *Etches* v. *Etches*, 3 Dr. 441; *Underhill* v. *Roden*, 2 Ch. D. 494; *In re Cane*; *Raff* v. *Sivers*, 60 L. J. Ch. 36; 63 L. T. 746; *O'Donoghue* v. *O'Donoghue*, (1906) 1 Ir. 482.

Gift till marriage followed by gift after death.

Similarly, where there is a gift for life or until marriage, followed by a gift over on death, the gift over takes effect on the marriage of the tenant for life. *Stanford* v. *Stanford*, 34 Ch. D. 362; *In re Dear*; *Helby* v. *Dear*, 58 L. J. Ch. 659; 61 L. T. 432; 38 W. R. 31; *In re Akeroyd's Settlement*; *Roberts* v. *Akeroyd*, (1893) 3 Ch. 363. *Re Wyatt*; *Gowan* v. *Wyatt*, 60 L. T. 920, must be considered overruled.

Gift over to class living at death of tenant for life.

The fact that the gift over is to a class described as living at the death of the tenant for life does not prevent the application of the rule. In such a case, upon the marriage of the tenant for life, the gift takes effect, and the class then living are entitled. *Bainbridge* v. *Cream*, 16 B. 25; *Stanford* v. *Stanford*, 34 Ch. D. 362.

Tenant for life also beneficiary under gift over.

The fact that the testator gives to the person upon whose marriage the fund is given over a life interest in part does not prevent the application of the rule. *Scarborough* v. *Scarborough*, 57 L. T. 851. See, too, *Eaton* v. *Hewitt*, 2 Dr. & Sm. 184; *Wardroper* v. *Cutfield*, 33 L. J. Ch. 605; 12 W. R. 458; 10 L. T. 19, where, however, the contingency of marriage was held not to apply to the limitations under which the question arose.

Pile v. *Salter*.

In *Pile* v. *Salter*, 5 Sim. 411, the testator gave his property to his widow so long as she should remain a widow, but upon her marrying again he gave her one-third of all his property, and gave the other two-thirds to his nieces. The widow died unmarried, and it was held there was an intestacy. The case has been disapproved (see *Underhill* v. *Roden*, 2 Ch. D. 494; *Scarborough* v. *Scarborough*, 58 L. T. 851); but it is obviously a long way from *Luxford* v. *Cheeke* and the other authorities of that class.

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Limits of doctrine.

The doctrine does not apply where a life interest is given in the first instance, which is then cut down by a gift over in the event of marriage. *Sheffield* v. *Lord Orrery*, 3 Atk. 282.

And if the true construction is that there is an absolute gift to A, followed by a gift over if she marries, the gift over only takes effect in that event. *M'Culloch* v. *M'Culloch*, 3 Giff. 606.

Nor does the doctrine apply to a case where a residue is given to the testator's widow for life or until marriage, and an annuity is given to her if she marries again, and legacies are directed to be paid on her death. In such a case the legacies are not raisable on A's marriage. *In re Tredwell*; *Jeffray* v. *Tredwell*, (1891) 2 Ch. 640.

Doe v. *Freeman.*

8. Upon principles resembling those above stated, a devise to a wife provided she should remain a widow, but in case she marries again to A when he attains twenty-three, was held to give the widow who married again an interest till A attained twenty-three. *Doe* v. *Freeman*, 1 T. R. 389; 2 Chitty, 198; *Re Cabburn*; *Gaye* v. *Rutland*, 46 L. T. 848.

Whether a contingency runs through a whole series of limitations.

9. When a particular estate is limited upon a contingency, and the subsequent estates are limited as remainders upon it, the contingency *primâ facie* applies to the whole series of limitations. *Davis* v. *Norton*, 2 P. W. 360; *Doe* d. *Watson* v. *Shippard*, Dougl. 75; *Tolderey* v. *Colt*, 1 Y. & C. Ex. 240, 627; 1 M. & W. 250.

Similarly, when an interest is given to a person, and then in a certain event a different interest is given with limitations over, the contingency applies to all the subsequent limitations. *Gray* v. *Golding*, 6 Jur. N. S. 474; *Cattley* v. *Vincent*, 15 B. 198; *Findon* v. *Findon*, 24 B. 83; *Lett* v. *Randall*, 10 Sim. 112; *Paylor* v. *Pegg*, 24 B. 105.

Cases where the subsequent limitations are independent gifts.

On the other hand, if the subsequent limitations, or any of them, can be looked upon as independent gifts, they will not be liable to the contingency of preceding gifts. *Lethieullier* v. *Tracy*, 3 Atk. 774; Amb. 204; *Boosey* v. *Gardener*, 5 D. M. & G. 122; *Doutty* v. *Laver*, 14 Jur. 188; *Partridge* v. *Foster*, 35 B. 545; *In re Blight*; *Blight* v. *Hartnoll*, 13 Ch. D. 858.

In the same way, if a particular gift is expressed to be made contingent from motives applicable to that gift only, subsequent gifts will not be contingent. *Norton* v. *Whittaker*, 1 T. R. 346.

Subsequent gifts subject to prior contingent gifts.

And if subsequent gifts can be read as given, subject to the prior limitations, they will not be liable to the contingencies of prior gifts. *Sheffield* v. *Earl of Coventry*, 2 D. M. & G. 551; see *Pearson* v. *Rutter*, 3 D. M. & G. 398; 6 H. L. 61; *Hole* v. *Davies*, 34 B. 345.

Where the ultimate limitation sums up the prior contingencies.

In the same way, when there has been a gift in one event to one set of issue in fee, and upon another event to another set of issue in tail, a gift over in default of such issue may be construed as referring to a failure of all the prior limitations, and not merely as a remainder dependent upon the limitations to the second class of issue taking effect. *Doe* d. *Lees* v. *Ford*, 2 E. & B. 970.

Whether an ultimate limitation applies to the whole of property which has been given in two independent lines.

As to whether in a devise of Whitacre to A and his issue, and then to B and his issue, and of Blackacre to B and his issue, and then to A and his issue, and in default of issue of A and B over, the ultimate gift includes both estates. See *Gordon* v. *Gordon*, L. R. 5 H. L. 254; see, too, *Adshead* v. *Willetts*, 29 B. 358.

Vesting of Charges on Land.

Legacies charged on land do not vest before they are payable.

The v[illegible] charged upon real estate is governed by rul[illegible] common law.

"If a sum of money be given to a person charged upon real estate, and that person, being an infant, is not to have the legacy immediately, but it is given at twenty-one or payable at twenty-one, if the child does not attain twenty-one the legacy is not raisable." *Parker* v. *Hodgson*, 1 Dr. & Sm. 568; see *Brown* v. *Wooler*, 2 Y. & C. C. 134.

In such a case the gift of interest in the meantime will not vest the legacy. *Gawler* v. *Standerwick*, 2 Cox, 15; see *Markin* v. *Phillipson*, 3 M. & K. 257.

Distinction between postponement of

If the payment is postponed for purposes not referable to the person of the legatee, but only for the convenience of the estate,

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payment for the purposes of the estate and of the legatee.

as, for instance, in the case of a life tenancy, the legacies vest before the time of payment. *Evans* v. *Scott*, 1 H. L. 57; *King* v. *Withers*, Ca. t. Talb. 116; *Haverty* v. *Curtis*, (1895) 1 Ir. 23; see *In re Brabazon*, 13 Ir. Eq. 156; *In re Neary's Estate*, 7 L. R. Ir. 311.

It makes no difference whether the legacies subject to a life interest are made payable at twenty-one or not, though it seems that they will not in any case vest before them. *Remnant* v. *Hood*, 2 D. F. & J. 396; *Davies* v. *Huguenin*, 1 H. & M. 730; *Haverty* v. *Curtis*, (1895) 1 Ir. 23.

Legacy payable upon an event which may never happen is contingent.

And a legacy charged upon land and directed to be paid upon an event which may or may not happen, for instance, when the testator's eldest son should come into possession of a settled estate, will fail if the event does not happen. *Taylor* v. *Lambert*, 2 Ch. D. 177.

Legacy charged upon real and personal estate follows proportionally the rules applicable to realty and personalty.

If a legacy is charged upon real and personal estate, the personal estate is the primary fund for payment, and, so far as the personal estate extends, the vesting is governed by the rules applicable to personal estate, but, so far as the legacy is payable out of realty, the rules with regard to legacies charged upon land apply. *Duke of Chandos* v. *Talbot*, 2 P. W. 601, 612; *Prowse* v. *Abingdon*, 1 Atk. 481; *In re Hudsons*, Dru. t. Sugd. 6.

In the case of a power, if the donee is authorised to fix the times at which portions are to vest, he can direct a portion to vest at once, and it will in that case be raisable though the child dies under twenty-one. *Henty* v. *Wrey*, 21 Ch. D. 332, where the subject of the vesting of portions is fully discussed.

Vesting of Bequests of Personalty.

Vesting of personalty is governed by the civil law.

The vesting of bequests of personalty, including chattels real, is governed by rules derived from the civil law. These rules also apply to realty directed to be converted. *In re Hudsons*, Dru. t. Sugd. 6; *In re Hart's Trusts*, 3 De G. & J. 195.

I. When there is an express direction as to the period of vesting:—

Meaning of "vest."

It has been said that the word "vest," being derived from "vestire," naturally refers to vesting in possession, and not to vesting in interest. *Young* v. *Robertson*, 4 Macq. 314. This is, however, contrary to the whole current of English authority, according to which the word "vest" has always been held to refer *primâ facie* to vesting in interest or transmissibility, and not vesting in possession or indefeasibility.

Direction as to vesting is imperative.

Thus, when there is a direction that the gifts are to be vested at a certain period, the legatee will take no interest till then.

Gift over upon death before the time of vesting will not alter the meaning of the word "vest."

Where the interests of legatees are to be vested at twenty-one, a gift over upon death under twenty-one, or upon death before the time of vesting, will not affect the natural meaning of the word. *Glanvill* v. *Glanvill*, 2 Mer. 38; *Comport* v. *Austen*, 12 Sim. 218; *Griffith* v. *Blunt*, 4 B. 248; *Rowland* v. *Tawney*, 26 B. 67; *Re Thatcher's Trust*, *ib.* 365: *Wakefield* v. *Dyott*, 7 W. R. 31; 4 Jur. N. S. 1098; *Selby* v. *Whittaker*, 6 Ch. D. 239; see *Creeth* v. *Wilson*, 9 L. R. Ir. 216.

When "vested" means "payable."

In many cases, however, "vested" has been used as equivalent to "indefeasible" or "payable."

Gift over upon death without issue before the time of vesting.

Thus, if the shares of members of a class are directed to be vested at a certain time, and there is a gift over to the other members of the class of the shares of those dying before that time without issue, vested will mean payable. *Taylor* v. *Frobisher*, 5 De G. & S. 191.

Shares treated as vested before the time appointed.

So, too, if legatees are treated as taking vested shares before the time fixed for vesting, vested must mean payable.

This will be the case, if a time is appointed for vesting, and maintenance is given, if any child entitled on the death of the tenant for life to a vested or presumptive share should be under the age appointed for vesting, where the word presumptive refers to the possibility of accruer. *Berkeley* v. *Swinburne*, 16 Sim. 275; *Baxter's Trust*, 4 N. R. 131; 10 Jur. N. S. 485.

Similarly, if in the event of any child dying before the time of vesting, leaving children, there is a gift of the share such

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child would have had if living to his issue, the direction as to vesting will be referred to payment. *In re Edmondson's Estate*, 5 Eq. 389; *Poole* v. *Bott*, 11 Ha. 33.

Vested and paid used interchangeably.

Or, again, it may appear that the testator has used the terms vested and paid interchangeably. *In re Edmondson's Estate, supra*; *Williams* v. *Haythorne*, 6 Ch. 782; *Re Parr's Trust*, 41 L. J. Ch. 170; *Darley* v. *Percival*, (1900) 1 Ir. 145.

Direction to pay legacies at a certain time.

And when there is a direction to pay legacies at the death of the tenant for life, a subsequent direction as to vesting at twenty-one will be referred to indefeasible vesting or possession. *Barnet* v. *Barnet*, 29 B. 239; *Simpson* v. *Peach*, 16 Eq. 209.

Gift to children who survive the parent with a direction as to vesting.

When there is a gift to children who survive their parent, a direction as to vesting will not make the gift vest in any who do not survive their parent. *In re Payne*, 25 B. 556; *Williams* v. *Haythorne*, 6 Ch. 782; see *Draycott* v. *Wood*, 5 W. R. 158.

If, however, the proviso as to vesting is intended to introduce a new gift, evidenced by the fact, for instance, that it applies to prior legatees who die leaving issue, and not merely to such of them as survive the tenant for life, it will override the previous contingency of surviving the tenants for life. *Williams* v. *Russell*, 10 Jur. N. S. 168.

Beneficial interest.

A direction that legatees are to be beneficially interested at a certain period refers only to vesting in possession. *M'Lachlan* v. *Taitl*, 28 B. 407; 2 D. F. & J. 449.

II. Where there is no direction as to vesting:—

Gift to a class who attain 21, and to a class at 21.

1. It is important to distinguish a gift to a contingent class and a gift to a class upon a contingency; thus, a gift to children who attain twenty-one, or to such children as attain twenty-one, is a gift to a contingent class, and will only vest in those who attain twenty-one, though there may be a gift of interest or other circumstances, which in a gift to a class upon a contingency, as, for instance, at twenty-one, might have the effect of vesting the bequest. *Bull* v. *Pritchard*, 1 Russ. 213; *Bree* v. *Perfect*, 1 Coll. 128; *Leake* v. *Robinson*, 2 Mer. 363; *Stead* v. *Platt*, 18 B. 50; *Lloyd* v. *Lloyd*, 3 K. & J. 20; *Thomas* v. *Wilberforce*, 31 B. 299; *Williams* v. *Haythorne*, 6 Ch. 782; *Dewar* v. *Brooke*, 14 Ch. D. 529; *Wilson* v. *Knox*, 13 L. R. Ir.

349; see *Re Bulley's Estate*, 11 Jur. N. S. 791, 847; *Gotch* v. *Foster*, 5 Eq. 311.

Contingency not imported into the gift to a single child.

If the gift is to children who attain twenty-one, and, if but one child, to such child, the contingency of attaining twenty-one will not be imported into the gift to a single child, unless it is apparent from the gift over, for instance, by a gift over "if no child shall live to attain a vested interest," or otherwise that no child was intended to take a vested interest at birth. *Walker* v. *Mower*, 16 B. 365; *Johnson* v. *Foulds*, 5 Eq. 268; *Re Fletcher*; *Doré* v. *Fletcher*, 53 L. T. 813.

Direction as to payment will not postpone vesting when ere is a clear gift.

2. Where there is a clear gift, an additional direction to pay, when the legatee attains a given age, will not postpone the vesting, the gift being considered *debitum in presenti, solvendum in futuro.*

Thus, a gift to A, payable at twenty-one, is vested, and it makes no difference whether the gift precedes or follows the direction for payment, provided a clear immediate gift can be found in the will. *In re Bartholomew*, 1 Mac. & G. 354; *Shrimpton* v. *Shrimpton*, 31 B. 425; *Maher* v. *Maher*, 1 L. R. Ir. 22.

Where the only gift is in the direction to pay, nothing vests till then.

The difficulty in these cases is to decide whether there is a substantive gift and a direction to pay, or whether the only gift is in the direction to pay. See *Bentinck* v. *Duke of Portland*, 4 L. J. Ch. 13; *Shum* v. *Hobbs*, 3 Dr. 93; *Chaffers* v. *Abell*, 3 Jur. 577; *Farmer* v. *Francis*, 2 S. & St. 505; *Williams* v. *Clark*, 4 De G. & S. 472; *Merry* v. *Hill*, 8 Eq. 619.

Direction to accumulate interest till 21 will not affect a gift already vested.

When there is a clear gift, a direction to accumulate the interest and to pay the principal and accumulations at twenty-one will not affect the vesting. *Stretch* v. *Watkins*, 1 Mad. 253; *Blease* v. *Burgh*, 2 B. 226; *Breedon* v. *Tugman*, 3 M. & K. 289.

In doubtful cases the contingency may be reflected back and *vice versâ*.

In doubtful cases the construction may be assisted by reference to other limitations; thus, where there was a gift for the children of a tenant for life, to be paid upon their attaining twenty-five, and if but one child, the whole to become the property of such only child upon his attaining twenty-five, and be transmissible to his heirs, executors, or administrators, none of the children took vested interests

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before twenty-five, the gift, in the event of there being an only child, being clearly contingent. *Judd* v. *Judd*, 3 Sim. 525; see *Hunter* v. *Judd*, 4 Sim. 455; *Merry* v. *Hill*, 8 Eq. 619.

Similarly, if the interest of an only child is clearly vested, this may show that a gift to all the children at twenty-one was meant to be vested too. *King* v. *Isaacson*, 1 Sm. & G. 371.

Paid may mean vested.

And it may appear from the context that the words "to be paid" were meant to refer to vesting and not to payment. *Martineau* v. *Rogers*, 8 D. M. & G. 328.

Gift to be paid at a time which may never come in the legatee's life is contingent.

3. The time when the legacy is to be paid must, however, be certain; that is to say, it must be certain that the time will come if the legatee lives long enough. No doubt it is uncertain whether a legatee will ever attain a given age, but since he must attain it if he lives, this latter contingency is disregarded.

"When the time annexed to the payment is merely eventual, and may or may not come, and the person dies before the contingency happens, I can find no instance in this Court where it has been held that the legacy at all events should be paid." It becomes, in fact, a legacy upon condition, for *dies incertus conditionem in testamento facit*. Thus, a legacy to A to be paid upon marriage is contingent. *Atkins* v. *Hiccocks*, 1 Atk. 500; *Ellis* v. *Ellis*, 1 Sch. & L. 1; *Morgan* v. *Morgan*, 4 De G. & S. 164; *In re Cantillon's Minors*, 16 Ir. Ch. 301; *Corr* v. *Corr*, I. R. 7 Eq. 397; *Taylor* v. *Lambert*, 2 Ch. D. 177.

Gift upon marriage construed as a gift at 21, or upon marriage under 21.

It may be noticed, however, that a legacy given upon marriage may be held upon the context to be given at twenty-one, or upon marriage under twenty-one, as where there was a gift to parents for life, and then to their children if then of age or married, and if any were infants at the death of their parents, then to them at twenty-one if sons, or on marriage if daughters. *Lang* v. *Pugh*, 1 Y. & C. C. 719; see *West* v. *West*, 4 Giff. 198.

4. When the only gift is to be found in the direction to pay or divide:—

Direction to pay after a

a. If the postponement of division or payment is merely on

account of the position of the property, if, for instance, there is a prior gift for life, or a bequest to trustees to pay debts, and a direction to pay upon the decease of the legatee for life, or after payment of the debts, the gift in remainder vests at once. *Bennett's Trust*, 3 K. & J. 280; *Strother* v. *Dutton*, 1 De G. & J. 675. *Beck* v. *Burn*, 7 B. 492, which appears inconsistent with this rule, went upon the construction of the particular will there in question, and was criticised in *Parker* v. *Sowerby*, 17 Jur. 752; *Adams* v. *Roberts*, 25 B. 658.

Life interest vests at once.

b. But where the payment is deferred for reasons personal to the legatee, the gift will not vest till the appointed time.

Thus, a gift to a person at, or if, or as and when he shall attain, or upon attaining, or from and after attaining twenty-one, will not vest till the age is attained. *Hanson* v. *Graham*, 6 Ves. 239; *Locke* v. *Lamb*, 4 Eq. 372.

Direction to pay at 21 will not vest till then.

Probably a gift of personalty to A till B attains twenty-one, and then to B, will not give B a vested interest unless there is something to show that A is to take in trust for B. *Lane* v. *Goudge*, 9 Ves. 225; *Sullivan* v. *Edgell*, 23 W. R. 722.

Gift to A till B attains 21, then to B.

c. If there is a direction to pay a sum of money to a legatee at the end of a certain time, for instance ten years from the testator's death, though the only gift is in the direction to pay, it would seem upon principle that the gift is not contingent upon the legatee being alive at the end of the ten years. A gift to a person upon the happening of some contingency gives the legatee a transmissible interest; if the contingency happens his estate is entitled, though he is then dead. Why should a gift at the end of ten years fail if the legatee is not alive at the end of that time? There is, however, authority to show that it does so fail. *Smell* v. *Dee*, 2 Salk. 415. In *Bruce* v. *Charlton*, 13 Sim. 65, the point did not arise, but the Vice-Chancellor lays down the law in accordance with *Smell* v. *Dee*, which was also followed in *Re Eve*; *Belton* v. *Thompson*, 93 L. T. 235; see, too, *Re Cartledge*, 29 B. 583. *Bromley* v. *Wright*, 7 Ha. 334, 339, is an authority the other way.

Direction to pay at the end of a certain period, whether contingent.

5. Vesting of residuary and severed gifts:—

If the subject-matter of the gift is residue (*a*), or if it is at once separated from the rest of the estate and vested in trustees

Residuary and severed gifts more easily vested.

for the benefit of the legatee (*b*), these are circumstances which assist the Court in arriving at the conclusion that the gift is vested. *Booth* v. *Booth*, 4 Ves. 399; *Pearman* v. *Pearman*, 33 B. 394 (*a*); *Lore* v. *L'Estrange*, 5 B. P. C. 59; *Saunders* v. *Vautier*, Cr. & Ph. 240; *Branstrom* v. *Wilkinson*, 7 Ves. 420; *Greet* v. *Greet*, 5 B. 123; *Lister* v. *Bradley*, 1 Ha. 10; *Ingram* v. *Suckling*, 7 W. R. 386; *Pearson* v. *Dolman*, 3 Eq. 315; *In re Bevan's Trusts*, 34 Ch. D. 716; *Brennan* v. *Brennan*, (1894) 1 Ir. 69; *In re Wrey; Stuart* v. *Wrey*, 30 Ch. D. 507 (*b*).

Gift of interest in meantime.

6. The effect of a gift of the interest in the meantime upon vesting:—

a. If the interest upon a legacy or share of residue is given to the legatee in the meantime till the time of payment arrives the gift is vested. *Hanson* v. *Graham*, 6 Ves. 239; *In re Hart's Trusts*, 3 De G. & J. 195; *Hardcastle* v. *Hardcastle*, 1 H. & M. 405; *Bell* v. *Cade*, 2 J. & H. 122; *Perrott* v. *Davies*, 38 L. T. 52; *Bolding* v. *Strugnell*, 24 W. R. 339; 45 L. J. Ch. 208; *In re Gossling; Gossling* v. *Elcock*, (1903) 1 Ch. 448.

This rule applies in the case of deeds. *Mostyn* v. *Brunton*, 17 Ir. Ch. 153.

The rule applies though the interest may be given subject to charges or annuities. *Lane* v. *Goudge*, 9 Ves. 225; *Jones* v. *Mackilwain*, 1 Russ. 220; *Potts* v. *Atherton*, 28 L. J. Ch. 486.

It applies though the interest may be expressed to be given for maintenance. *In re Hart's Trusts*, 3 De G. & J. 195; *In re Bunn; Isaacson* v. *Webster*, 16 Ch. D. 47; *Scotney* v. *Lomer*, 29 Ch. D. 535; 31 Ch. D. 380; *Brennan* v. *Brennan*, (1894) 1 Ir. 69.

It applies though the time when the principal is given is marriage, or a later age than twenty-one. *In re Peek's Trusts*, 16 Eq. 221; *In re Bunn; Isaacson* v. *Webster*, 16 Ch. D. 47; *In re Wrey; Stuart* v. *Wrey*, 30 Ch. D. 507; *Scotney* v. *Lomer*, 29 Ch. D. 535; 31 Ch. D. 380; see *Pearson* v. *Dolman*, 3 Eq. 315. *Batsford* v. *Kebbel*, 3 Ves. 363, would probably not now be followed. It may be distinguished from the cases above cited on the ground that the legacy was not separated and given to trustees.

Discretion to apply all or part of interest.

b. The effect is the same if trustees have power to apply the whole or such part as they think fit of the income of a share in maintenance. *Fox* v. *Fox*, 19 Eq. 286; approved in *In re Turney; Turney* v. *Turney*, (1899) 2 Ch. 739; *Re Williams; Williams* v. *Williams*, (1907) 1 Ch. 180; see, too, *Eccles* v. *Birkett*, 4 De G. & S. 105. In *In re Wintle; Tucker* v. *Wintle*, (1896) 2 Ch. 711, North, J., arrived at a contrary conclusion. See also *Wilson* v. *Knox*, 13 L. R. Ir. 349; *Russell* v. *Russell*, (1903) 1 Ir. 168.

Other cases of discretion.

A discretion either to apply the interest to maintenance or to accumulate it (*a*); or to apply the whole or part of the interest, not exceeding a fixed sum, to maintenance (*b*); or the gift of a fixed sum for maintenance, though it may be equivalent to the interest of the legacy (*c*); or the gift of a sum for maintenance out of the personal estate not exceeding the income of the legacies (*d*); or a discretion to apply the income for the benefit of the legatees to the exclusion of any one or more of them (*e*); will have no effect upon vesting. *Vaudry* v. *Geddes*, 1 R. & M. 203 (*a*); *Merry* v. *Hill*, 8 Eq. 619 (*b*); *Boughton* v. *Boughton*, 1 H. L. 406; *Watson* v. *Hayes*, 5 M. & Cr. 125; *Livesey* v. *Livesey*, 3 Russ. 287 (*c*); *Wynch* v. *Wynch*, 1 Cox, 433; *Rudge* v. *Winnall*, 12 B. 357 (*d*); *In re Barnshaw's Trusts*, 15 W. R. 378 (*e*).

Effect of a gift of interest for a portion of the period before vesting.

c. Where interest is given only for a portion of the period before the time fixed for payment, if, for instance, legacies are given at twenty-six, with interest for maintenance during minority, it is doubtful whether the gift will be vested; probably it will not without more. See the remarks in *Pearson* v. *Dolman*, 3 Eq. 315. In *Davies* v. *Fisher*, 5 B. 201; *Harrison* v. *Grimwood*, 12 B. 192; *Tatham* v. *Vernon*, 29 B. 604, there were other circumstances. And see *Hunter's Trusts*, L. R. 1 Eq. 295.

It may be noticed that "minority" properly means the period before the attainment of twenty-one; though, if there is an intention expressed to that effect, it may mean the whole period during which the testator has kept the legatee out of the property. *Milroy* v. *Milroy*, 14 Sim. 48; *Maddison* v.

Chapman, 4 K. & J. 709; 3 De G. & J. 536; *Fraser* v. *Fraser*, 1 N. R. 430.

Gift of interest itself contingent.

d. Where the interest is not given in the meantime, but is itself given at the same time as the principal, the gift does not vest. *Knight* v. *Knight*, 2 S. & St. 490; *Locke* v. *Lamb*, 4 Eq. 372.

Distinction between gift of interest upon a legacy to an individual and upon an aggregate fund given to a class.

e. A distinction must be drawn between the gift of a sum to each member of a class at twenty-one, with a gift of the interest upon the several shares in the meantime, and the gift of an aggregate fund to a class as they respectively attain twenty-one, with a direction that the whole interest is to be applied for their maintenance in the meantime; in the latter case, as the fund is to be kept together, and the whole interest applied for maintenance, nothing will vest before twenty-one. *Pulsford* v. *Hunter*, 3 B. C. C. 416; *Barker* v. *Lea*, T. & R. 413; *Butcher* v. *Leach*, 5 B. 392; *In re Ashmore's Trusts*, 9 Eq. 99; *Spencer* v. *Wilson*, 16 Eq. 501; *In re Grimshaw's Trusts*, 11 Ch. D. 406; *In re Parker*; *Barker* v. *Barker*, 16 Ch. D. 44; *In re Morris*; *Salter* v. *A.-G.*, 33 W. R. 895; *Re Martin*; *Take* v. *Gilbert*, 57 L. T. 471; *In re Merrin*; *Merrin* v. *Crossman*, (1891) 3 Ch. 197; see *In re Byrne*, 23 L. R. Ir. 260; *In re Bevan's Trusts*, 34 Ch. D. 716.

Arguments in favour of vesting.

7. An argument in favour of vesting has sometimes been based upon a power to make advances. *Vivian* v. *Mills*, 1 B. 315; *Harrison* v. *Grimwood*, 12 B. 192; *Porcis* v. *Burdett*, 9 Ves. 428; *Walker* v. *Simpson*, 1 K. & J. 713; see *Malden* v. *Maine*, 2 Jur. N. S. 206.

8. Effect of a gift over upon vesting:—

a. Clear gift to children who attain 21.

a. If the gift is to children who attain twenty-one, a gift over has no effect upon vesting. *In re Edwards*; *Jones* v. *Jones*, (1906) 1 Ch. 570.

b. Gift over on death under 21.

b. Where the gift is to a class at twenty-one, a gift over upon the death of members under twenty-one cannot, it seems, have any effect upon vesting. See, per Leach, V.-C., *Bland* v. *Williams*, 3 M. & K. 411.

c. Gift to other members of class.

c. A gift over of the interests of members of the class dying under twenty-one to other members of the class vests the shares. The gift over would be superfluous if the interests

are contingent on attaining twenty-one. *In re Edmondson's Estate*, 5 Eq. 389; see *Wetherell* v. *Wetherell*, 1 D. J. & S. 134; *In re Gunning's Estate*, 13 L. R. Ir. 203.

d. Gift over on death under 21, coupled with other event.

d. A gift over upon death of members of the class under twenty-one and without issue vests the gift. The gift over shows that the members were to take, except in the event of death under twenty-one and without issue. *Harrison* v. *Grimwood*, 12 B. 192; *Markin* v. *Phillipson*, 3 M. & K. 257; *Bland* v. *Williams*, *ib.* 411; *In re Thomson's Trusts*, 11 Eq. 146.

A gift over upon death without issue simply would not, it seems, vest the gift. *Barker* v. *Lee*, T. & R. 413.

e. Gift over if parent dies without issue.

e. Where the gift is to A for life with remainder to her children at twenty-one, and if A dies without leaving issue or without issue over, the gift over has no effect upon vesting. *Walker* v. *Mocer*, 16 B. 365; *In re Wrangham's Trusts*, 1 Dr. & Sm. 358; *Chadwick* v. *Greenall*, 3 Giff. 221; *Kidman* v. *Kidman*, 40 L. J. Ch. 359; see *Ingram* v. *Suckling*, 7 W. R. 386.

f. Gift to children living at parents' death at 21.

f. If the gift is to children living at A's death at twenty-one, with a gift over if A die without leaving issue, the gift over has been held to vest the gift in children living at A's death whether they attain twenty-one or not. If it were contingent, if a child survived A, the gift over could not take effect, nor could the child take if it died under twenty-one. *Bree* v. *Prefect*, 1 Coll. 128, followed in *In re Beran's Trusts*, 34 Ch. D. 716, but doubted in *In re Edwards*; *Jones* v. *Jones*, (1906) 1 Ch. 570.

9. Vesting upon context generally:—

Reference to share.

In some cases, where the gift was to a class upon their attaining a certain age, a reference to "the share" of a member of the class dying before that age has been held to show that the members of the class took vested interests at birth. *In re Turney*; *Turney* v. *Turney*, (1899) 2 Ch. 739; see *Vivian* v. *Mills*, 1 B. 315.

General context.

There are other cases in the books, in which gifts have been held to be vested upon the language of the whole will, but as they establish no principle it seems unnecessary to cite them at length. See *Davies* v. *Fisher*, 5 B. 201; *Harrison* v. *Grimwood*,

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12 B. 192; *Ingram* v. *Suckling*, 7 W. R. 386; *Bradley* v. *Barlow*, 5 Ha. 589; *Bird* v. *Maybury*, 33 B. 351; *Pearman* v. *Pearman*, 33 B. 394; *Pearson* v. *Dolman*, 3 Eq. 315; *Perrott* v. *Davies*, 38 L. T. 52.

Gift to a class when the youngest attains 21.

10. When the gift is to a class when the youngest attains twenty-one, all who attain twenty-one will take vested interests, whether they survive the time of distribution or not. But a member of the class dying under twenty-one takes nothing. *Leeming* v. *Sherratt*, 2 Ha. 14; *Parker* v. *Sowerby*, 1 Dr. 488; 17 Jur. 752; see 4 D. M. & G. 321; *Smith's Will*, 20 B. 197; *Lloyd* v. *Lloyd*, 3 K. & J. 20; see *Sansbury* v. *Read*, 12 Ves. 75; *Ford* v. *Raclins*, 1 S. & St. 329; *In re Hunter's Trusts*, L. R. 1 Eq. 295.

Possibly if the income of the share of each child is given to him until the time of distribution, this may have the effect of vesting the share. *Re Grove's Trusts*, 3 Giff. 575.

If the income is to be applied in maintenance till the youngest child attains twenty-one, and the capital is then to be divided, namely, one-fifth to each of five children by name, they take vested interests at birth. *Cooper* v. *Cooper*, 29 B. 229; see *Re Lyman's Trust*, 2 L. T. N. S. 662.

And if there is a clear gift to the class, a direction that it is to be divided when the youngest attains twenty-one will not postpone the vesting. *Knox* v. *Wells*, 2 H. & M. 674.

III. Gifts to children contingent upon surviving their parents:—

Gifts to children who survive their parents.

In the case of marriage settlements, the nature of the instrument raises a presumption that the issue of the marriage were to be provided for at the time when their portions are wanted, namely, twenty-one.

General canon of construction.

If, therefore, the interests of children are made contingent upon surviving their parents and there are other provisions of the settlement which are inconsistent with this contingency, the Court takes hold of these provisions in order to give the children vested interests at the time when their portions are needed.

This is a well-settled canon of construction which has been affirmed in the House of Lords. At the same time, in con-

sidering the old cases, it must be borne in mind that the Courts at the present day are disinclined to do violence to the language of instruments in order to give effect to an assumed intention imputed to an ideal settler or testator. *Wakefield* v. *Maffet*, 10 App. C. 422; *Leader* v. *Duffey*, 13 App. C. 294.

Where remoter issue are provided for the ground for applying the canon is much weakened In the earlier cases not much regard was paid to this point, but considerable weight would no doubt be attached to it at the present day. See *Joyce* v. *Savage*, 10 Ch. 555, and the observations on that case in *In re Leader's Estate*, 17 L. R. Ir. 279, 307.

Voluntary settlements and wills.

The canon applies to voluntary settlements and also to wills where the testator is providing for his children or grandchildren or for persons to whom he has placed himself *in loco parentis*. *Scallow* v. *Binns*, 1 K. & J. 417, 424; *Farrer* v. *Barker*, 9 Ha. 737; *Jackson* v. *Dorer*, 2 H. & M. 209; *In re Knowles*; *Nottage* v. *Buxton*, 21 Ch. D. 806; *In re Hamlet*; *Stephen* v. *Cunningham*, 39 Ch. D. 426.

1. Clear words of contingency uncontrolled.

1. If the words of contingency are clear and there is nothing inconsistent with them in other parts of the instrument, they must have effect. *Wingrave* v. *Palgrave*, 1 P. W. 401; *Hotchkin* v. *Humfrey*, 2 Mad. 65; *Bickefield* v. *Record*, 2 Sim. 354; *Farrer* v. *Barker*, 9 Ha. 737.

2. If any children survive to such children.

2. If the gift is if any children are living at the death of the parent then to such children, only children surviving the parent can take. *Skipper* v. *King*, 12 B. 29; *Whatford* v. *Moore*, 3 M. & Cr. 270; *Bythesea* v. *Bythesea*, 23 L. J. Ch. 1004; *Sheffield* v. *Kennett*, 27 B. 207; 4 De G. & J. 593; *In re Watson's Trusts*, 10 Eq. 36.

3. "Such" omitted or inaccurately used

3. On the other hand, if the word "such" does not appear in the material limitations under which children who die before their parents claim to share, or if the word "such" is used inaccurately throughout, the contingency may be disregarded. *Woodcock* v. *Duke of Dorset*, 3 B. C. C. 569, as stated 3 V. & B. 86, 87; *King* v. *Hake*, 9 Ves. 438; *Hovgrave* v. *Cartier*, 3 V. & B. 79; *Scallow* v. *Binns*, 1 K. & J. 417; *Baillie* v. *Jackson*,

I Sm. & G. 175 (a doubtful case); *Currie* v. *Larkins*, 4 D. J. & S. 245; *Cobden* v. *Bagwell*, 19 L. R. Ir. 150.

For other cases of ungrammatical use of the word "such," see *Rye* v. *Rye*, 1 L. R. Ir. 413; *In re Verschoyle's Trusts*, 3 L. R. Ir. 43; *Showorthy* v. *Sancroft*, 12 W. R. 635; *Douglass* v. *Waddell*, 17 L. R. Ir. 384; *In re Hutchinson*; *Alexander* v. *Jol* , 55 L. J. Ch. 574.

4. Contingency not extended to gifts in default of appointment.

4. If a power in favour of children is made contingent upon there being children living at the death of the parent, the contingency will not, unless the language clearly requires it, be carried on to gifts in default of appointment. *Duffield* v. *M'Master*, (1906) 1 Ir. 333; see *Mostyn* v. *Mostyn*, 1 Coll. 161.

5. Effect of gift over in controlling contingency.

5. Where the original limitation is clearly only in favour of children who survive both parents, but there is a gift over intended to provide for the failure of prior limitations but so framed as to lead to the inference that prior limitations were not contemplated as failing if a child attained twenty-one in its parents' lifetime, though it might predecease the parents, the contingency in the original gift requiring children to survive both parents may be rejected. *Perfect* v. *Lord Curzon*, 5 Mad. 442; *Torres* v. *Franco*, 1 R. & M. 649; *Swallow* v. *Binns*, 1 K. & J. 417; *Dixon* v. *Barkshire*, 34 B. 537; *In re Knowles*: *Nottage* v. *Buxton*, 21 Ch. D. 806.

6. Contingency controlled by general intention.

6. There may be other circumstances which may enable the Court in cases where the original limitation is to children who survive their parents to arrive at the conclusion that this was not the intention, and to give children who die before their parents vested interests.

This has been done, for instance, where there was power to pay over their shares to "such" children by way of advancement in the parents' lifetime (*a*); where the shares of "such" children are to be considered as vested and transmissible interests at twenty-one or marriage, "though such respective times happen before" the parents' decease (*b*); where the shares are referred to as payable in the parents' lifetime, and are directed not to be paid till their deaths, with a direction that the shares are to be vested at twenty-one or marriage (*c*); where there is a direction that children who attain twenty-one or die under that age

leaving issue are to take vested interests (*d*). *Poris* v. *Bardett*, 9 Ves. 428; *Walker* v. *Simpson*, 1 K. & J. 713; see *Bakefield* v. *Record*, 2 Sim. 354 (*a*); *Dalton* v. *Hill*, 10 W. R. 396 (*b*); *Jackson* v. *Dorer*, 2 H. & M. 209 (*c*); *Williams* v. *Russell*, 10 Jur. N. S. 168, with which compare *Williams* v. *Hathorne*, 6 Ch. 782 (a case not within the rule) (*d*).

7. Covenant to pay.

7. A covenant to pay a sum of money if there shall be a child of the marriage living at the death of the parents is less easily controlled by ambiguous expressions. *Fitzgerald* v. *Field*, 1 Russ. 430.

Gift to contingent class and to class upon a contingency.

IV. Gift to class upon a contingency and gift to contingent class:—

The general rule is, that if there is a gift to a class upon a contingency, the contingency is not to be imported into the constitution of the class, even though the contingency is the existence of a member of the class at a particular time.

Therefore, if, in the event of any children of A being alive at his death, there is a gift to the children of A and there is a child of A living at his death, all his children take whether living at his death or not. *Hope* v. *Lord Clifden*, 6 Ves. 499; *Boulton* v. *Beard*, 3 D. M. & G. 608; *M'Lachlan* v. *Tuitt*, 28 B. 407; 2 D. F. & J. 449; *Blusson* v. *Blusson*, 2 D. J. & S. 665; *Re Gratwicke*, 35 B. 315; *Re Orlebar's Settlement*, 20 Eq. 711; *Goddard's Trusts*, I. R. 5 Eq. 14; *Hickling* v. *Fair*, (1899) A. C. 15; *Cobden* v. *Bagwell*, 19 L. R. Ir. 150. See *Taylor* v. *Graham*, 3 App. C. 1287.

This construction is, however, difficult, if not impossible, if there is a gift over if A dies without children living at his death. *Winn* v. *Fenwick*, 11 B. 438; *Wilson* v. *Mount*, 2 W. R. 448; 19 B. 292; *Stevens* v. *Pyle*, 30 B. 284.

There may also be indications of intention which show that only members of the class living when the event happens are to take. *Selby* v. *Whittaker*, 6 Ch. D. 239.

V. Reflecting contingency backwards and forwards:—

Gift to class vested; gift to single member of class contingent.

If there is a gift in remainder to children, followed by a provision that if there is only one child living at the death of the tenant for life that child is to take, it has been held

in some cases that the contingency attaching to a single child must be reflected back into the constitution of the original class. *Smith* v. *Vaughan*, 8 Vin. Ab. 381, tit. Devise (Z. c) pl. 32; *Spencer* v. *Bullock*, 2 Ves. Jun. 687; *Madden* v. *Ikin*, 2 Dr. & S. 207; *Lewis* v. *Templer*, 33 B. 625; *Cooper* v. *Macdonald*, 16 Eq. 258; see, however, *Templeman* v. *Warrington*, 13 Sim. 267; *Kimberley* v. *Teer*, 4 D. & War. 139, where this doctrine was rejected.

Gift to class contingent; gift to single member of class vested.

On the other hand, where the gift was to children at twenty-one, and, if there should be but one child, then to that child, the contingency of attaining twenty-one attaching to the original class was not reflected forward to the gift to a single child. *Walker* v. *Mower*, 16 B. 365.

VI. Gifts to persons living when prior interests determine:—

Gift to A if alive.

A gift after life interests to A "if alive" means if he is living when the prior interests determine. *In re Dundalk & Enniskillen Railway Co.; Ex parte Roebuck*, (1898) 1 Ir. 219; compare *Hodgson* v. *Smithson*, 8 D. M. & G. 604.

To what the word "then" refers.

When there is a gift after prior interests to persons "then living," the word then refers most naturally to the last antecedent; thus, in the case of a gift to A for life, remainder to B for life, remainder to a class "then living," the word then refers to B's death, whether he dies before A or not. *Archer* v. *Jegon*, 8 Sim. 446; *Wollaston's Settlement*, 27 B. 642; *Powis* v. *Matthews*, 11 W. R. 662; *Olney* v. *Bates*, 3 Dr. 319; *Heasman* v. *Pearse*, 7 Ch. 660; *Re Milne*; *Grant* v. *Heysham*, 56 L. T. 852; 57 L. T. 828; *Palmer* v. *Orpen*, (1894) 1 Ir. 32.

On the other hand, if the object of the testator is not to limit successive interests, but to provide for personal enjoyment by the legatees by substituting for persons dying before the time of enjoyment a class of persons then living, the word then refers most naturally to the time of enjoyment. *Harvey* v. *Harvey*, 3 Jur. 949; *Hetherington* v. *Oakman*, 2 Y. & C. C. 299; *Gill* v. *Barrett*, 29 B. 373; see, too, *Heasman* v. *Pearse*, 7 Ch. 275.

It may be noticed that in a gift to several persons nominatim and their children then living, the contingency of being then living will not be applied to the parents as well as the children.

unless there is something to show that parents and children were to form one homogeneous class. *Burrell* v. *Baskerfield*, 11 B. 255; *Cormack* v. *Copous*, 17 B. 397; *Turner* v. *Hudson*, 10 B. 222.

In a marriage settlement where lands were limited, after a life interest, to "all and every or any one or more child or children, or any grandchild or grandchildren or other issue then in being of the said intended marriage," as the settlor should appoint, it was held that the words "then in being" only referred to the grandchildren. *Leader* v. *Duffey*, 17 L. R. Ir. 279; 13 App. C. 294.

Construction of the words "then living."

For cases in which the words "then living" may be construed as referring to the *stirpes*, see *Cooper* v. *Macdonald*, 16 Eq. 258; and see Survivors.

VII. Vesting of interests under powers of appointment:—

From what time persons taking under a power take vested interests.

Where there is a gift to certain persons as A shall appoint, or a power to appoint certain property, and a gift in default of appointment, the persons to take in default of appointment take vested interests at the testator's death, subject to be divested by the exercise of the power. *Doe* d. *Willis* v. *Martin*, 4 T. R. 39; Fearne, C. R. 225; *In re Ware*; *Cumberlege* v. *Cumberlege-Ware*, 45 Ch. D. 269.

Thus, a gift to children as A shall by will appoint vests in all the children, but an appointment of the whole in favour of an only surviving child is good. *Woodcock* v. *Renneck*, 4 B. 190; 1 Ph. 72.

If, however, the power is exercised in favour of the same persons as would have taken in default of appointment, a question arises whether the appointees are to be considered as taking under the original will or under the power.

It seems clear, that where the will authorises an appointment among persons, who would not all take in default of appointment, the appointees take under the exercise of the power. *Lee* v. *Olding*, 25 L. J. Ch. 580; 2 Jur. N. S. 850; *Vizard's Trusts*, L. R. 1 Ch 588; *Sweetapple* v. *Horlock*, 48 L. J. Ch. 660; 11 Ch. D. 745; *In re Maddy's Estate*; *Maddy* v. *Maddy*, (1901) 2 Ch. 820.

Even if the power is merely distributive, so that the persons to take under the appointment and in default are the same, they take, nevertheless, under the exercise of the power, and not under the instrument creating it. *De Serre* v. *Clarke*, 18 Eq. 587.

Where a person on his marriage covenants to settle a share to which he is entitled in default of appointment, and the donee of the power subsequently appoints to him, the covenant is not void under sect. 91 of the Bankruptcy Act, 1869, as relating to property in which the bankrupt had no interest at the date of his marriage. *Re Andrews' Trusts*, 7 Ch. D. 635.

CANADIAN NOTES.

Conditions Precedent.

What is condition?

A devise in fee to A., but B. to have full possession and control until A. settles permanently on the land, is not a devise on condition to A., and, A. having died intestate before so settling, his heir at law was entitled to the land. *Doe dem. Murray* v. *Murray*, 15 N.B.R. 361.

Valid conditions.

A legacy to A. and B., by a will which provides that they should "work on the farm until their legacies became due," is a gift on condition, and the legacy is forfeited if they do not work. *Oliver* v. *Davidson*, 11 S.C.R. 166.

Distributive condition.

A devise to A. and B. as joint tenants "in case of their coming to Canada and claiming the same," is a devise on condition, but distributive, so that if one devisee comes to Canada he becomes entitled to one moiety. *Doe dem. McGillis* v. *McGillivray*, 9 U.C. R. 9.

Contingent will.

A devise, on condition of the testator's obtaining land by another will, construed. *Re Sproule*, 17 O.R. 334.

Conduct of legatee.

In a devise of a remainder to a son after a life estate given to a widow, on condition that he abstain from intoxicants and card playing, that he be obedient to his mother, and that he be known as an industrious man ten years after his mother's death, with a devise over if the conditions were not fulfiled, the conditions are partly precedent and partly subsequent. The first two are precedent during the life estate, and the third subsequent. Taking intoxicants for medicinal purposes would not be a breach. *Jordan* v. *Dunn*, 15 A.R. 744.

A condition that before receiving a legacy the legatee shall prove to the executors that he was not engaged in liquor traffic or in any form of gambling or games of chance is valid, but does not apply to playing games for diversion or amusement. And although there is no gift over for breach of the condition it is not *in terrorem*. A condition for the vesting of a legacy payable by instalments required that the legatee should appear before the executors before receiving any part thereof. Held, to be satisfied by one appearance. *Re Quay*, 14 O.L.R. 471.

Devise to A., "but he is to be known as a sober and industrious man. If after five years it appears to my executors that A. does not remain sober," then the executors had a power of sale for charitable purposes. Held a valid condition. *Re Fox*, 8 O.R. 489.

A condition that the legatee continue a steady boy and remain in some respectable family until he attain twenty-one, is broken by his enlisting in a foreign army, the latter part of the condition forbidding residence other than in a family. *Pew* v. *Lefferty*, 16 Gr. 408.

A condition that a daughter should reside with her mother, and on the mother's death, with other named persons, is good. *Davis* v. *McCaffrey*, 21 Gr. 554.

But a condition that A. shall not live with his father at any time before coming of age, at which time land devised to trustees was to be conveyed to him, the father having done nothing to forfeit his right to have his son reside with him, is void. *Clarke* v. *Darraugh*, 5 O.R. 140.

A devise to A. for life, remainder in fee to B., condition that if A. deposit £100 for B. "after three months after my decease," he should have the fee. Held, that "after" could not be read "within," and that A. might perform the condition by paying the £100 within a reasonable time after the expiry of three months from the testator's death. *Hyland* v. *Throckmorton*, 29 U.C.R. 560.

Condition becoming impossible.

A bequest upon condition precedent does not take effect if the condition becomes impossible before the vesting; in this case the formation of a partnership between legatees, one of whom died in the lifetime of the testator; and though made to a child is not within section 36 of the Wills Act, R.S.O. c. 128, by which a gift to a child which does not terminate with his death does not lapse if the child die in the testator's lifetime leaving issue. *McCallum* v. *Riddell*, 23 O.R. 537.

A testator released his daughter from a debt to him "on condition of her in no way making any claim for any cause whatsoever against my estate or causing any dispute in regard to the same or the management thereof by my executor," and

appointed an executor. By a codicil he revoked the appointment of his executor and appointed his daughter sole executrix. Held, that the condition had become impossible and the gift absolute. *Townshend* v. *Brown*, 22 N.S.R. 423.

Evidence of performance.

A devise on condition that trustees should convey to the separate use of a son's wife in case he married with their approbation, the trusts not to arise until the trustees should declare the same by deed, does not take effect until such deed is in fact executed, though the marriage is apparently approved by one trustee and was not disapproved of by the other. *Foster* v. *Patterson*, 15 Gr. 426.

Vesting of Realty.

The word "vested" is to be taken as vested in interest unless the contrary is plainly shewn. Where a testator directed that if the devisee should die without issue before the devise vested it should go to survivors, and the Court was of opinion that the estate vested on the testator's death, it was held that although the devisee died without issue before the estate came to his possession he took a vested interest. *Stinson* v. *Stinson*, 21 Gr. 116.

Direction to convey at future date.

Where there is no devise except by a direction to convey from and after a stated event (*e.g.*, the death of a tenant for life) the vesting is postponed until that event happens. *Williams* v. *Thurston*, 21 N.S.R. 363.

And the rule is the same although the contingent devise is followed by the expression "which I hereby devise to him and his heirs," the latter words merely indicating the quantity of the estate to be taken if the contingency happens. *Merchants' Bank* v. *Keefer*, 13 S.C.R. 515.

It seems that where there is a devise to one at a future time, without any gift over, and without in the meantime making any disposition of the intermediate estate or interest, the estate does not vest until the time arrives. In *Bigelow* v. *Bigelow*, 19 Gr., at p. 554, Strong, V.C., says, "It never has been expressly decided that a devise to A. when he shall attain twenty-one standing isolated, without any gift over, or any

disposition of an intermediate estate or interest, would confer a mere contingent interest, but on principle, and from what is to be found stated by text writers of authority, it must be assumed that that would be the proper conclusion." But in a previous case (not cited in *Bigelow* v. *Bigelow*) Robinson, C.J., laid this down in express terms. A testator made specific devises of certain lands not in question, to possess and enjoy till his son should arrive at twenty-one, "at which time it is my will that the whole of my lands be divided into four equal parts, one part of which I do give to five children." The learned Judge said, referring to land not included in the specific devise, "I apprehend that in strictness nothing vested in the five children on the death of the testator, for there is no previous estate given to any one which would fill up the interval before their estate could become an estate in possession. There is nothing but a direction that at a future day the lands are to be divided into equal portions, and a separate portion granted to each child. It is not a case in which the enjoyment of the estate only is deferred, but one in which time is of the essence of the gift." *McLellan* v. *Meggatt*, 7 U.C.R., at p. 558.

To children on attaining twenty-one.

When there is a devise to children on each attaining twenty-one, with no gift over, they take vested interests on attaining twenty-one, that being a condition precedent to the vesting. *Murphy* v. *Murphy*, 20 Gr. 575.

Similarly, when a devise was made to executors on trust to sell and invest the proceeds for the benefit of the wife and children until all the children came of age, and then two-thirds were to be divided between the wife and some of the children, it was held that a share of the corpus vested in each child as he attained twenty-one, and no child who did not attain that age was entitled, the enjoyment of the shares being postponed meantime in order to give maintenance. *Kinsey* v. *Douglas*, 22 O.R. 553.

Where after a life estate, a testator directed all his property to be divided amongst all his children on the youngest attaining twenty-one, and provided that if a child should marry and leave children the share of that child should be divided amongst her children; and a daughter attained

twenty-one and died leaving a husband, but no children, before the youngest child came of age, it was held that her share was vested on attaining twenty-one, and her husband took an interest in her share. *Re Stainsby*, 14 O.L.R. 468

Where there is a gift to expected issue, with a devise over if issue be not alive at a certain time after the testator's death, the devise over takes effect if the issue do not survive that date. *Wilson* v. *Beatty*, 2 A.R. 417.

Where devise and direction to convey distinct.

But where the gift and the direction to convey are distinct, the gift is vested. Thus a devise to trustees "for and on behalf of" sons then living, and any other sons that might be born to the testator, to be conveyed to them on their coming of age, without any disposition of the intermediate rents and profits, gives a vested estate to the sons. *Dobbie* v. *McPherson*, 19 Gr. 262.

Where prior estate given.

And where the devise is to take effect upon the devisee's coming of age, it is vested if the estate is given meantime to another, and if the intermediate rents are to be applied for the ultimate devisee after the death of the particular tenant. *Marcon* v. *Alling*, 5 Gr. 562.

And a devise to A. for life, followed by a devise to B. when he is of the age of twenty-three, gives B. a vested remainder, and though he dies under twenty-three the estate passes to his devisee. *Holtby* v. *Wilkinson*, 28 Gr. 550.

Semble, that the same rule applies where the prior estate is given to the testator's widow *durante viduitate*. *McCoppin* v. *McGuire*, 34 U.C.R. 157. And see *Gairdner* v. *Gairdner*, 1 O.R. 184; *Re Cooke & Driffil*, 8 O.R. 530.

Where intermediate rent applied to maintenance.

A devise upon attaining a certain age is vested, if the intermediate rents and profits are applied to maintenance of the devisee, although there is no gift over. *Bigelow* v. *Bigelow*, 19 Gr. 549.

In remainder to a class.

And a devise to trustees on trust for twenty years, to pay the income to the testator's widow and children in certain shares, and at the end of that time to sell and divide the proceeds amongst the same children, gives them a vested interest. And the same, as to other property, which the trustees were to

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sell at their discretion, and pay the income of the proceeds to the widow for life and on her death to divide the corpus amongst the children. *Kirby* v. *Bangs*, 27 A.R. 17.

A devise to a widow for her support and the bringing up of the testator's children, and at her death the whole of the real and personal property to be equally divided between the testator's children, gives the latter a vested interest. *Town* v. *Borden*, 1 O.R. 327.

Where there is a devise in remainder to those of a class who are surviving at the death of the life tenant, their interests are contingent and only those who survive take under the devise. *Keating* v. *Cassels*, 24 U.C.R. 314; *Baird* v. *Baird*, 26 Gr. 367, explained in *Town* v. *Borden*, 1 O.R. 327.

Devise to a class attaining twenty-one.

Where there is a devise to a class, viz., those children who arrive at twenty-one or marry, and a devise over if all the children die under age and unmarried, the devise is contingent. *McIntosh* v. *Elliott*, 1 Gr. 440.

To class surviving life tenant.

Similarly, where there is a trust of realty and personalty for accumulation during a life, and a gift of the accumulated fund to such of a class (children) as shall be living at the death of the life tenant, and the issue of such as die leaving issue, the interests of each member of the class are contingent. *Re Goodhue*, 19 Gr. 366.

Devise over on marriage.

On a devise to C., an unmarried daughter, so long as she remained unmarried, and upon her marriage the land to be divided between her and her four sisters, but if she died unmarried then amongst the four sisters, with a provision that if any of the sisters died before C.'s marriage her share should go to her children, and on death without children, the share to go to the surviving sisters, it was held that all the daughters took vested interests on the marriage of C. *Munro* v. *Smart*, 4 A.R. 449.

Vesting liable to be partially divested.

A devise to A. for the life of B., remainder to the children of B., gives a vested remainder to the children of B. in existence at the testator's death, subject to be partially divested to let in other children born during B.'s life. *Latta* v. *Lowry*, 11 O.R. 517.

So, also, on a devise to A. for life, remainder to his sons then existing, and in case any others are born to them, all equally. *Re Chandler,* 18 O.R. 105.

A devise to trustees on trust for four children until they or the survivors attain twenty-one, then to be divided, but if any should die leaving issue, the issue to take the share which the parents would have taken, gives a vested interest liable to be divested in favour of issue on death before the division leaving issue. *Ryan* v. *Cooley,* 15 O.R. 379.

Where there was a devise to two daughters to be divided between them at twenty-one, with a provision for maintenance meanwhile, and a condition that if either should die or become a Roman Catholic then over, it was held that they took vested estates liable to be divested on death or becoming Roman Catholics before twenty-one. *Griffith* v. *Griffith,* 29 Gr. 145.

A provision for divesting if a devisee does not survive, is not rendered ineffective because the devise over is void by the Mortmain Act.

Devise over in mortmain.

Therefore, where there was a devise to A. for life, remainder to B., but if B. died without issue before A. then one-half was devised to a church, and the other half as A. should think fit. B. died in the lifetime of A. and it was held that one moiety was divested as to the devise to the church which was void, and there being no residuary devise, there was an intestacy as to this moiety. *Re Archer,* 14 O.L.R. 374.

A devise to A. at twenty-one, with a devise over in case of death "before receiving the share," gives a vested interest subject to be divested if A. dies before attaining twenty-one and entitles him to the net rents and profits. *Re Dennis,* 5 O.L.R. 46.

A devise to a wife for life, and to be equally divided between two brothers at her death, but "in case of their dying before my wife it shall be equally divided between the heirs

of my brothers," gives a vested interest to the two brothers, and on the death of one of them, before the widow, his share was not divested, but passed under his will. The double event of both dying before the widow would have been necessary to divest. *Re Metcalfe*, 32 O.R. 103.

Vesting of charges on land.

Vesting of legacies charged on land.

A legacy charged on a vested remainder expectant on a life estate is vested, and does not lapse on the death of the legatee in the lifetime of the tenant for life. *Pollard* v. *Hodgson*, 22 Gr. 287.

When a legacy is charged on land, and the gift and direction to pay at a future time are distinct, the legacy is vested. *Re Stevens*, 14 O.R. 707.

Vesting of Personalty.

Contingent legatee may stay waste.

Where there is a gift to any child living at the death of a life tenant, it is contingent and not vested, but a living child has such an interest as will entitle him to ask for the protection of the estate from waste before the contingency happens. *Duggan* v. *Duggan*, 17 S.C.R. 343.

Gift involved in direction as to enjoyment.

Where the words of gift and the condition of enjoyment are blended, the gift is contingent. *Re Bank of Montreal & Imp. Stat.*, 26 Gr. 420.

Payments postponed.

But where the gift is in a mere direction to pay, but the payment is postponed merely to let in some prior interest, the gift is vested. *Webster* v. *Leys*, 28 Gr. 475.

Gift after a certain event.

Where there was a devise to trustees on trust to sell and "after the sale . . . I bequeath the proceeds" to A., the gift was held to be a gift of personalty and to be contingent upon A.'s surviving the sale. *Bolton* v. *Bailey*, 26 Gr. 361.

Where limited to representatives.

But where on a similar bequest (except that a life estate in the land was first given to another) it was provided that

if the legatee died before receiving his legacy it should go to his legal personal representatives, the legacy was held to be vested. *Kerr* v. *Smith*, 27 O.R. 409.

Gift vests at period of distribution.

Where executors were directed that, after payment of debts, etc., and providing for annuities, they should "with all convenient speed divide the residue amongst certain persons," it was held that their legacies vested at the time when the distribution was to have been made, and that the executors could not postpone it, and therefore that the share of one of the residuary legatees who died after a partial distribution passed to his representatives. *Jarvis* v. *Crawford*, 21 Gr. 1.

Gift of income, power to appoint.

A bequest of the yearly proceeds or interest of a fund, with the provision that should the legatee die "the inheritance shall be in the person of" the legatee, with a power to "name any of her brothers or sisters who shall enjoy it after her," is a vested absolute legacy, not affected by the power to give to brothers and sisters. *Fulton* v. *Fulton*, 24 Gr. 422.

Postponed gift—power to bequeath.

And where the intermediate income of a postponed gift was given to the legatee, provided that if he died before the time for payment arrived, the legacy should go to whom he should appoint by will, the legacy was held to be vested though he died without making a will. *Dwyer* v. *Mapother*, 26 N.S.R. 294.

Gift carrying income.

Where the gift is postponed, it is vested if it carries the intermediate income with it. Thus, a gift of a specific sum, on deposit in a bank, with the accumulated interest, to A. when he becomes of age, is vested at the testator's death, although there is a provision that if the legatee should not survive certain persons "his next heir shall become inheritor." *Fulton* v. *Fulton*, 24 Gr. 422.

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Accumulation till youngest child attains majority.

Where there was a direction to convert, hold, invest and accumulate until the youngest child attained twenty-one, and then to divide the accumulated and unapplied income amongst children and issue of children who should die before distribution, the gift was held to be vested. *Butler* v. *Butler*, 29 N.S.R. 145.

And a provision, in the last case, that, if any child died before receiving his share, the same should go to the survivors, was held to be repugnant to the nature of the gift and void. *Ibid.*

Legacies given without qualification, with a direction to pay at twenty-one, and a direction that the intermediate income is to be paid to their mother to assist in supporting and educating them, are vested. *Re Sproule*, 17 O.R. 334.

When shares were to be paid to children at thirty years of age, the following indications were held to point to vesting in interest before that date: References in the will to "property or moneys given to them in this my will" in the clause postponing payment; payment of interest to legatees on their shares before payment of the legacies,—the absence of gifts over on dying under thirty; the right given by the will to any son to purchase the daughters' shares. *Re Livingston*, 14 O.L.R. 161.

A direction to accumulate the income of real and personal estate, and that both form one fund, until the death or marriage of the testator's widow and the youngest child attained majority, when the executors were to hold on trust for the children as tenants in common; with the provision that, if any child died under twenty-one without issue, the share he would have taken was to go to the survivors, but if with issue, to be divided amongst issue at twenty-one, and in default of

attaining twenty-one then over, or as bequeathed by any such child, was held to vest the interest of the children of the testator on the death of the widow and the youngest child attaining twenty-one—after a great difference of opinion. *Re Charles*, 10 A.R. 281, reversing 1 O.R. 362. See also 23 Gr. 610.

Separate disposition of capital and income

When the gift is contingent upon attaining a certain age and the income is dealt with separately, and is to be distributed upon other events happening than attaining the given age, the fact that the income is given to the same person who take the capital does not make the gift a vested one. *Anderson* v. *Bell*, 29 Gr. 452.

Words of gift distinct from direction to pay.

Where the words of gift and direction to pay are distinct, the gift is vested, the payment merely being postponed. Thus, where there is a gift to certain children of money on deposit, "said money to be divided between each of my said children share and share alike when they attain the age of twenty-one years," the interest is vested at the death of the testator. *Re Baillie*, 3 B.C.R. 350.

Separation of legacy.

A direction to set apart the legacy is evidence of an intention to vest, particularly when the accumulated income is to be paid to the legatee at the time fixed for payment. And as this constitutes an absolute gift, a direction to pay some years after the legatee comes of age is repugnant to the gift and void, and the legatee is entitled at twenty-one. *Butler* v. *Butler*, 29 N.S.R. 145.

Payment at majority of vested legacy.

Where an absolute vested interest is given, the payment only being postponed beyond the majority of the legatee, he is entitled to payment at majority. *Goff* v. *Strohm*, 28 O.R. 573. See the last case.

And where vested legacies were directed to be paid at certain ages, "or as soon thereafter as they [the executors] shall

deem it advisable to do so," it was held that the executors had no authority to refuse payment after the time fixed. *Lewis* v. *Moore*, 24 A.R. 393.

And where the money is in Court the Court will, in such a case, order the moneys to be paid out to the legatee. *Re Wartmen*, 22 O.R. 601.

CHAPTER XLV.

PERPETUITY AND ACCUMULATION.

A TESTATOR cannot give directions which will make his property useless to anyone for a term of years; for instance, he cannot direct the windows and doors in every room in his house to be blocked up for twenty years. *Brown* v. *Burdett*, 21 Ch. D. 667.

Property cannot be made useless.

But subject to this restriction he has a large power of tying up his property only limited by the law as to perpetuity and accumulation.

A limitation by way of executory devise is void as too remote, if it is not to take effect until after the determination of one or more lives in being and upon the expiration of twenty-one years afterwards, as a term in gross and without reference to the infancy of any person who is to take under such limitation, or of any other person, allowance for gestation being made only in those cases where it actually exists. *Thellusson* v. *Woodford*, 4 Ves. 227; 11 Ves. 112; *Cadell* v. *Palmer*, 1 Cl. & F. 372.

Rule against remoteness stated.

For the purposes of the rule a child *en ventre* at the commencement or end of the period and afterwards born alive is to be deemed to be a life in being, and this is the case though the result may be injurious to the child. *Long* v. *Blackall*, 7 T. R. 100; *Blackburn* v. *Stables*, 2 V. & B. 367; *In re Wilmer's Trusts*; *Moore* v. *Wingfield*, (1903) 2 Ch. 411; see *Doe* v. *Lancashire*, 5 T. R. 49.

Child *en ventre* at beginning or end of period.

A direction tying up property during the lives of all persons living at the testator's death and for twenty-one years after, though not void for perpetuity, is void for uncertainty, as it would be impossible to say when the period ended. *In re Moore*; *Prior* v. *Moore*, (1901) 1 Ch. 936.

Direction tying up property during lives of persons living at testator's death.

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The fact that an executory interest is given to an ascertained person, so that he and the present owner of the estate can together make a good title within the limits of perpetuity, does not make the executory interest valid, if the event, upon which it is to take effect, is too remote.

Thus, a covenant in a conveyance of land to reconvey in certain events not limited in time or an unlimited right of re-entry or an unlimited option in a lease for more than twenty-one years to buy the fee is void for remoteness, so that the covenant cannot be specifically enforced. *London & South Western Railway* v. *Gomm*, 20 Ch. D. 562; *Dunn* v. *Flood*, 25 Ch. D. 629; 28 Ch. D. 586; *Mackenzie* v. *Childers*, 43 Ch. D. at p. 279, overruling *Birmingham Canal Company* v. *Cartwright*, 11 Ch. D. 421; *Woodall* v. *Clifton*, (1905) 2 Ch. 257; *Worthing Corporation* v. *Heather*, (1906) 2 Ch. 532. See *In re Adams*, 24 Ch. D. 199; 27 Ch. D. 394.

This applies though the option is given in favour of a charity. *Worthing Corporation* v. *Heather*, (1906) 2 Ch. 532.

But in the case of a covenant damages can be recovered for its breach. *Worthing Corporation* v. *Heather*, *supra*.

In the same way a proviso that a rent-charge may be redeemed at any time upon payment of a certain sum is void. *In re Tyrrell's Estate*, (1907) 1 Ir. 292, not approving *Seitzer & Co.* v. *Rochford*, (1906) 1 Ir. 399.

How far the rule applies to charities.

Property cannot be given to a charity on an event which is too remote. *Company of Pewterers* v. *Governors of Christ's Hospital*, 1 Vern. 161; *Commissioners of Charitable Donations* v. *De Clifford*, 1 D. & War. 245; *Chamberlayne* v. *Brockett*, 8 Ch. 211.

But property which has been given to one charity can be given over to another on a remote event. *Christ's Hospital* v. *Grainger*, 16 Sim. 83; 1 Mac. & G. 460; *In re Tyler*; *Tyler* v. *Tyler*, (1891) 3 Ch. 252.

And property can be given to a charity for a limited, though uncertain, period, which may endure beyond the limits of perpetuity, the undisposed-of interest forming part of the testator's estate. *Walsh* v. *Secretary of State for India* 10

H. L. 367; *In re Randell; Randell* v. *Dixon*, 38 Ch. D. 213; *In re Blunt's Trusts; Wigan* v. *Clinch*, (1904) 2 Ch. 767. Chap. XLV.

But where property has been given absolutely to a charity, a testator cannot add a proviso for cesser on an event which may be too remote. *In re Bowen; Lloyd Phillips* v. *Davis*, (1893) 2 Ch. 491.

To what rules legal remainders are subject.

It has been decided (after much conflict of opinion) that legal remainders are subject to the rule against perpetuities. *In re Frost; Frost* v. *Frost*, 43 Ch. D. 246; *In re Ashforth; Sibley* v. *Ashforth*, (1905) 1 Ch. 535.

Contingent remainder after vested estate cannot be void for perpetuity.

It appears, however, to be clear that no question of remoteness can arise with regard to a contingent remainder limited after a vested estate. Such a remainder is necessarily brought within the limits of perpetuity, since, if it is not ready to take effect at the expiration of the vested estate, it fails altogether, except in so far as it is saved by the Contingent Remainders Act, 1877 (40 & 41 Vict. c. 33). On the other hand, if it is then ready to take effect, it is valid. See *Ecces* v. *Challis*, 7 H. L. 531, explained in *Hancock* v. *Watson*, (1902) A. C. 14.

Legal remainder to unborn son of unborn person void.

Legal remainders are also controlled by an analogous doctrine, that an estate cannot be limited in remainder after an estate to an unborn person, to any child of that person, whether such estate is expressly limited to take effect within the limits of perpetuity or not; so that, for instance, in a limitation to A. an unmarried person, for life, remainder to his first son for life, remainder to the first son of the first son of A. born in A's life, or within twenty-one years afterwards, in fee, the ultimate remainder in fee would be bad, though clearly within the limits of perpetuity. 2 Rep. 51 a; 10 Rep. 96 b; *Hopping* v. *Davey*, 2 D. M. & G. 145; *Whitby* v. *Mitchell*, 42 Ch. D. 494; 44 Ch. D. 85; see an article by Mr. Cyprian Williams in the Law Quarterly for July, 1898.

This doctrine does not apply to personalty. *In re Bowles; Amadroz* v. *Bowles*, (1902) 2 Ch. 650.

Common law condition.

The rule against perpetuity has been held to apply to common law conditions. *In re Hollis' Hospital and Hague*, (1899) 2 Ch. 540. But the decision is open to criticism. See *Seitzer & Co.* v.

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Rochford, (1906) 1 Ir. 399; *A.-G.* v. *Cummins*, (1906) 1 Ir. 406; *Cooper* v. *Stuart*, 14 App. C. 286.

The rule is to be applied to the state of things existing at the testator's death.

In applying the rule against perpetuities, the state of things existing at the testator's death, and not at the date of the will, is to be looked at *Vanderplank* v. *King*, 3 Ha. 17; *Cattlin* v. *Brown*, 11 Ha. 382; *Peard* v. *Kekewich*, 15 B. 166.

Possible not actual events are to be considered.

But possible and not actual events are to be considered, and, therefore, if at the testator's death a gift might possibly not have vested within the proper time it will not be good, because, as a matter of fact, it did so vest. *Lord Dungannon* v. *Smith*, 12 Cl. & F. 546; see *In re Roberts*; *Repington* v. *Roberts-Gawen*, 19 Ch. D. 520; *Abbiss* v. *Burney*: *In re Finch*, 17 Ch. D. 211; *In re Harvey*; *Perk* v. *Sarory*, 39 Ch. D. 289; *In re Wood*; *Tullett* v. *Colville*, (1894) 2 Ch. 310; 3 Ch. 381.

Confirmation of voidable settlement.

Where an infant makes a settlement, which is afterwards confirmed, the date of the settlement, and not of the confirmation, must be taken for the purpose of ascertaining whether the limitations infringe the rule against perpetuity. *Cooke* v. *Cooke*, 38 Ch. D. 202.

That a woman past child-bearing may have children is a possible event within the rule.

The fact that a woman is past the age of child-bearing at the date of the will or death is not to be considered, and the chance of such a woman having children is a possible event for the purposes of determining whether a gift is void for perpetuity or not. *Jee* v. *Audley*, 1 Cox, 324; *In re Sayer's Trusts*, 6 Eq. 319; *In re Dawson*; *Johnston* v. *Hill*, 39 Ch. D. 155; *In re Hocking*; *Michell* v. *Loe*, (1898) 2 Ch. 567: not following *Cooper* v. *Laroche*, 17 Ch. D. 368.

Gift for life of animal good.

A gift for the maintenance of the testator's dogs and horses during their lives is not void for perpetuity. *In re Dean*; *Cooper-Dean* v. *Stevens*, 41 Ch. D. 552.

Gift tending to tie up property for an indefinite time is void.

Any gift not being charitable, the object of which is to tie up property for an indefinite time, is void; as, for instance, a devise of land to the trustees of the Penzance Library, to hold to them and their successors for ever, for the maintenance and support of the library. *Carne* v. *Long*, 2 D. F. & J. 75; *Thomson* v. *Shakespear*, 1 D. F. & J. 399; *Yeap Cheah Neo* v. *Ong Cheng Neo*, L. R. 6 P. C. 381; *In re Clark's Trust*,

1 Ch. D. 497; *Re Dutton*, 4 Ex. D. 54; *Hoare* v. *Hoare*, 56 L. T. 147.

Gift to repair tomb.

A gift of a sum upon trust to apply the dividends in repairing the testator's vault, not in a church, not being charitable, is void, as it creates a perpetuity. *Lloyd* v. *Lloyd*, 2 Sim. N. S. 255; *In re Rigley's Trusts*, 36 L. J. Ch. 147; *Toole* v. *Hamilton*, (1901) 1 Ir. 385.

But a gift to a charitable society on condition that the society first undertakes to keep the testator's vault in a cemetery in repair, is a good gift. *Roche* v. *M'Dermott*, (1901) 1 Ir. 394.

A restriction upon alienation beyond lives in being and twenty-one years after, is bad, and the case of a married woman is no exception to the rule. *Armitage* v. *Coutts*, 35 B. 1; *In re Teague's Settlement*, 10 Eq. 564; *In re Cunynghame's Settlement*, 11 Eq. 324; *In re Michael's Trusts*, 46 L. J. Ch. 651; *In re Ridley*; *Buckton* v. *Hay*, 11 Ch. D. 645.

Direction to convey freeholds at end of long lease.

Where a lease for fifty-four years was bequeathed for life with remainders, followed by a direction upon the expiration of the lease to convey freeholds of the testator upon the same trust, it was held that the direction was not void for perpetuity. *Wood* v. *Drew*, 33 B. 610.

Whether limitations subsequent to an estate tail can be too remote.

No questions with regard to remoteness can arise on limitations subsequent to an estate tail, provided the subsequent limitations must take effect, either during the existence of the estate tail or at the moment of its determination. *Cole* v. *Sewell*, 4 D. & War. 1; 2 H. L. 186; *Doe* d. *Winter* v. *Perratt*, 9 Cl. & F. 606; *Heasman* v. *Pearse*, 7 Ch. 275.

The test is that they must be barrable as long as they subsist.

The foundation of this rule is, that if the subsequent limitations are such, that they must take effect during the existence of the estate tail, or at the moment of its determination, or not at all, they are always barrable, and therefore do not tend to restrain the free disposal of property.

And the converse follows, that, if the subsequent limitations are not always barrable, they will be subject to the rules of remoteness. The rule is sometimes laid down absolutely, that no limitations after estates tail are too remote, but it can only

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be accepted with the qualification above laid down. Otherwise, by means of limitations of equitable remainders which do not fail by failure of the prior estates, and are not barrable after the estate tail has determined, property might possibly be tied up for an almost indefinite time.

The trusts of a term precedent to an estate tail may be void for remoteness.

Where interests are precedent to estates tail, they are, of course, not barrable, and the ordinary rules of perpetuity apply. Therefore, where a term precedent to estates tail is limited to trustees, upon trusts which are too remote, the trusts are void. *Case* v. *Drosier*, 2 Kee. 764; 5 M. & Cr. 246; *Cochrane* v. *Cochrane*, 11 L. R. Ir. 361.

And where the term is precedent this will be the case, even though the event in which the trusts are to be executed would become impossible if the subsequent estates tail were barred. *Sykes* v. *Sykes*, 13 Eq. 56.

Concurrent terms.

Similarly, powers not strictly precedent to, but concurrent with, an estate tail—for instance, powers to accumulate during the minorities of any persons entitled under the limitations of the will, whether the accumulations are expressly carried over or not, or to enter and manage the property—are void. *Marshall* v. *Holloway*, 2 Sw. 432; *Lord Southampton* v. *Marquis of Hertford*, 2 V. & B. 54; *Browne* v. *Stoughton*, 14 Sim. 369; *Turvin* v. *Newcome*, 3 K. & J. 16; *Floyer* v. *Bankes*, 8 Eq. 115.

Trust for accumulation to pay debts is good.

But a trust for accumulation for the purpose of paying off debts or incumbrances upon the estate of the testator is valid. *Lord Southampton* v. *Marquis of Hertford*, 2 V. & B. 54, 65; *Bateman* v. *Hotchkin*, 10 B. 426; *Briggs* v. *Earl of Oxford*, 1 D. M. & G. 363.

A direction to accumulate till a fund reaches a certain sum.

And a direction to accumulate a fund till it reaches a certain amount, and then to apply it for the benefit of certain named persons for their lives, and the life of the survivor, is not void for perpetuity, if the fund, whether it has reached the amount directed or not, is to be divided at the death of the survivor. *Oddie* v. *Brown*, 4 De G. & J. 179.

Power of sale and leasing.

No doubt powers of sale and leasing would be void if the testator clearly shows that he intended them to subsist, or to arise beyond the limits of perpetuity; see *Ware* v. *Polhill*,

11 Ves. 257; *Hale* v. *Pew*, 25 B. 335; *Goodier* v. *Johnson*, 18 Ch. D. 441, 446; *In re Appleby*; *Walker* v. *Lever*, (1903) 1 Ch. 565.

But powers of sale, whether collateral or subsequent, though given in general terms in a settlement containing limitations for life, with remainders in fee or in tail, with an ultimate remainder in fee, are good, because the power is spent as soon as the object of the settlement is at an end by the absolute interest vesting in possession. *Biddle* v. *Perkins*, 4 Sim. 135; *Nelson* v. *Callow*, 15 Sim. 353; *Waring* v. *Coventry*, 1 M. & K. 249; *Lantsbery* v. *Collier*, 2 K. & J. 709; *Taite* v. *Swinstead*, 26 B. 525; *In re Lord Sudeley and Baines & Co.*, (1894) 1 Ch. 334; *In re Dyson and Forke*, (1896) 2 Ch. 720.

Trusts for sale may be void.

A trust for sale, if it arises on a remote event, is void, but the invalidity of the trust for sale will not destroy the rights of the persons to take the proceeds, if they are ascertained within the proper limits. *In re Daveron*; *Bowen* v. *Churchill*, (1893) 3 Ch. 421; *Goodier* v. *Edmunds*, (1893) 3 Ch. 455; *In re Wood*; *Tullett* v. *Colville*, (1894) 2 Ch. 310; 3 Ch. 381; *In re Appleby*; *Walker* v. *Lever*, (1903) 1 Ch. 565.

Discretionary trust for maintenance.

A discretionary trust for maintenance, if it exceeds the limits of perpetuity, is void; for instance, a trust to maintain unborn children until the youngest attains twenty-three. *In re Blew*; *Blew* v. *Gunner*, (1906) 1 Ch. 624, where *Gooding* v. *Read*, 4 D. M. & G. 510, is explained, and *In re Wise*; *Jackson* v. *Parrott*, (1896) 1 Ch. 281, not followed.

Gift to persons who must be living at the testator's death and at the time of vesting cannot be too remote.

The vesting of property may be postponed for any length of time, provided it must ultimately vest, if at all, in persons born at the death of the testator, and living at the time of vesting, since in such a case it must vest absolutely within lives in being. *Lachlan* v. *Reynolds*, 9 Ha. 796.

But the gift is void for perpetuity, though it must vest in persons born within lives in being at the testator's death, and living when the event happens, if it may not so vest within lives in being and twenty-one years afterwards. *Jee* v. *Audley*, 1 Cox, 324; see *Garland* v. *Brown*, 10 L. T. N. S. 292; *In re Hargreaves*; *Midgley* v. *Tatley*, 43 Ch. D. 401; overruling

Avern v. *Lloyd*, 5 Eq. 383; see, too, *Stuart* v. *Cockerell*, 7 Eq. 363.

Gift for life to unborn children of a tenant for life is good.

A limitation for life to the unborn children of a tenant for life, or to the descendants of two tenants for life, is good. *Avern* v. *Lloyd*, 5 Eq. 383; *Stuart* v. *Cockerell*, 7 Eq. 363; see 5 Ch. 713; *Hampton* v. *Holman*, 5 Ch. D. 183; *In re Roberts*; *Repington* v. *Roberts-Gawen*, 19 Ch. D. 520; overruling *Hayes* v. *Hayes*, 4 Russ. 311.

Cross limitations between unborn tenants for life.

There appears to be no doubt that cross limitations for life between unborn tenants for life would be valid, and, moreover, that limitations for life to successive generations to come into being within the bounds of perpetuity are also valid. *Ashley* v. *Ashley*, 6 Sim. 358; *Cadell* v. *Palmer*, 1 Cl. & F. 372; see, however, *Stuart* v. *Cockerell*, 7 Eq. 363, p. 370.

Limitation to unborn persons for life as joint tenants.

Possibly a gift to unborn persons for their lives as joint tenants may be valid so as to carry the whole to the survivors for the time being. See *Gooch* v. *Gooch*, 3 D. M. & G. 366, 383, 384, explained in *In re Ashforth*; *Sibley* v. *Ashforth*, (1905) 1 Ch. 535, 541.

Limitation for life to survivor of unborn tenants for life.

But an express limitation to the survivors of several unborn tenants for life for their lives is invalid. *Whitby* v. *Von Luedecke*, (1906) 1 Ch. 783.

Substitution of issue of unborn tenants for life.

And a substitution of the issue of one of several unborn tenants for life who dies leaving issue during the life of the longest lives of the tenants for life is also invalid. *Gooch* v. *Gooch*, 3 D. M. & G. 366.

As a gift to an unborn person for life is good, it follows that the life interest may be limited to endure till the happening of some event during the life, such as marriage, though the event may possibly happen beyond the limits of perpetuity and that a remainder may be given upon the determination of the life interest. *Wainwright* v. *Miller*, (1897) 2 Ch. 255; *In re Gage*; *Hill* v. *Gage*, (1898) 1 Ch. 498.

Remainders after life interests of unborn persons.

After life interests to unborn persons, the absolute interest can be given to persons either living at the death of the testator or ascertained within the limits of perpetuity. *Evans* v. *Walker*, 3 Ch. D. 211; *In re Roberts*; *Repington* v. *Roberts-Gawen*, 19 Ch. D. 520.

But the absolute interest cannot be limited to a person who may not be ascertained within lives in being and twenty-one years afterwards. For instance, after life interests to unborn children, a limitation to the eldest grandchild living at the determination of the life estates, or a limitation to the survivor of the tenants for life, would be void. *Gooch* v. *Gooch*, 3 D. M. & G. 366; *Garland* v. *Brown*, 10 L. T. N. S. 292; *In re Ashforth*; *Sibley* v. *Ashforth*, (1905) 1 Ch. 535.

Absolute interest to survivor of unborn persons void.

Limitations following as remainders upon limitations void for perpetuity are themselves void, whether within the line of perpetuity or not. *Robinson* v. *Hardcastle*, 2 B. C. C. 22; 2 T. R. 241, 380, 781; *Routledge* v. *Dorril*, 2 Ves. Jun. 357; *Brudenell* v. *Elwes*, 1 East, 442; *Beard* v. *Westcott*, 5 Taunt. 393; 5 B. & Ald. 801; T. & R. 25; *Monypenny* v. *Dering*, 2 D. M. & G. 145.

Limitations dependent on void limitations are themselves void.

But, where a power of appointment is given to arise upon an event beyond the limits of perpetuity, a gift in default of appointment is valid. *In re Abbott*; *Peacock* v. *Frigout*, (1893) 1 Ch. 54.

Gift in default of appointment.

In the former class of cases the remaindermen are only intended to take, if there is no one to take under the prior limitations. In the latter the gift in default of appointment is intended to take effect, unless displaced by a valid exercise of the power.

An alternative limitation following limitations void for perpetuity may be valid; for instance, if there is a devise to A for life, with remainder to his unborn son for life, with remainder to the unborn son of such unborn son in tail, with a gift over in default of issue of the body of A, or in case of his not leaving any at his decease, the gift over in the event of A leaving no issue at his decease is valid. *Monypenny* v. *Dering*, 2 D. M. & G. 145.

Alternative contingent limitation.

On this principle where property was settled on tenants for life, with power to appoint life interests to their husbands with remainders, and the power was not exercised, it was held that the possibility of an appointment to a husband not born at the testator's death did not invalidate the remainders, which

Power to appoint to husband.

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took effect as alternate independent limitations. *In re Bowles: Page* v. *Page*, (1905) 1 Ch. 371.

Splitting compound event.

Where property is given over on a compound event, *i.e.*, an event involving several contingencies, the gift over cannot be split up into as many gifts over as there are possible events, so as to sustain the gift over whenever the actual event falls within the limits of perpetuity. For instance, if there is a gift to A for life, remainder to his children who attain twenty-five, and if no children attain twenty-five over, and A never has a child, the gift over cannot be read as if it were "if A shall die without having had a child or if all his children die under twenty-five." *Proctor* v. *Bishop of Bath and Wells*, 2 H. Bl. 358; *Jee* v. *Audley*, 1 Cox, 324; *Lord Dungannon* v. *Smith*, 12 Cl. & F. 546; *Burley* v. *Evelyn*, 16 Sim. 290; *Monypenny* v. *Dering*, 2 D. M. & G. 145; *Re Thatcher's Trusts*, 26 B. 365; *In re Harvey; Peck* v. *Savory*, 39 Ch. D. 289; *In re Bence; Smith* v. *Bence*, (1891) 3 Ch. 242, doubting *Watson* v. *Young*, 28 Ch. D. 436; *Hancock* v. *Watson*, (1902) A. C. 14; where *Evers* v. *Challis*, 7 H. L. 531, is explained.

But if the testator has himself separated the gift so as to make it take effect on the happening of any of several events, and the event which happens is not too remote, the gift over is good. *Longhead* v. *Phelps*, 2 W. Bl. 704; *Miles* v. *Harford*, 12 Ch. D. 691.

Gift to a class to be ascertained beyond the limits of perpetuity is void

Where there is a gift to a class, any members of which may have to be ascertained beyond the limits of perpetuity—for instance, to the children of a living person who shall attain twenty-five—the whole gift is void. *Leake* v. *Robinson*, 2 Mer. 363; *Boughton* v. *Boughton*, 1 H. L. 406; *Merlin* v. *Blagrave*, 25 B. 125; *Stuart* v. *Cockerell*, 7 Eq. 363; 5 Ch. 713; *Patching* v. *Barnett*, 49 L. J. Ch. 665; 51 *ib.* 74; *Blight* v. *Hartnoll*, 19 Ch. D. 294.

Similarly where there is a gift after the death of an unborn tenant for life to the children and grandchildren of a living person, the gift is void for remoteness, the children and grandchildren being intended to form one class. *Stuart* v. *Cockerell*, 7 Eq. 363; 5 Ch. 713.

But if the remoter issue are to take substitutionally, the gift

to the original class will be good, though the substitutional gifts may be void for remoteness. *Baldwin* v. *Rogers*, 3 D. M. & G. 649; *Packer* v. *Scott*, 33 B. 511; *Goodier* v. *Johnson*, 18 Ch. D. 441.

Whether a gift to an individual and a remote class is void.

The rule against perpetuity applies, where the gift is to a remote class and a named person as tenants in common, the shares not being ascertainable within the proper limits. *Porter* v. *Fox*, 6 Sim. 485; *In re Merrin*; *Merrin* v. *Crossman*, (1891) 3 Ch. 197.

Perhaps, however, it would not apply to a similar gift in joint tenancy. 1 Jarman, 229.

If by the application of the rules for ascertaining the class, the class must be finally ascertained within the limits of perpetuity, the gift is good. *Picken* v. *Matthews*, 10 Ch. D. 264; see *Re Whittem*; *King* v. *Whitten*, 62 L. T. 391.

Distinction between gift of a fund to a class and gift of a sum to each member of a class.

Where particular sums are given to each of the members of a class, the gift is good as to those members who are within the limits of perpetuity. *Storrs* v. *Benbow*, 2 M. & K. 46; 3 D. M. & G. 390; *Wilkinson* v. *Duncan*, 30 B. 111.

Cases where it is possible to sever valid and remote shares.

This principle has been extended to cases where, though the gift is in terms to a class, the effect of it is to give definite sums ascertained at the determination of lives in being, to each of several classes, some of which are within and some without the line of perpetuity; for instance, if the gift is to A for life, remainder to A's children for life, and the share of each child to go to his children, since the share of each of A's children is ascertained at A's death, the effect is to give a definite sum to each group of A's grandchildren, and the gift is good as regards those grandchildren whose parents were born in the testator's lifetime. *Griffith* v. *Pownall*, 13 Sim. 393; *Cattlin* v. *Brown*, 11 Ha. 372; *Knapping* v. *Tomlinson*, 12 W. R. 784; 10 Jur. N. S. 626.

And the principle is the same, where the gift is to A for life, then to B's children living at A's death, who should attain twenty-one, the share of each daughter to be settled on her for life, remainder to her children. In such a case the direction to settle is good with regard to a child of B. *in esse* at the testator's

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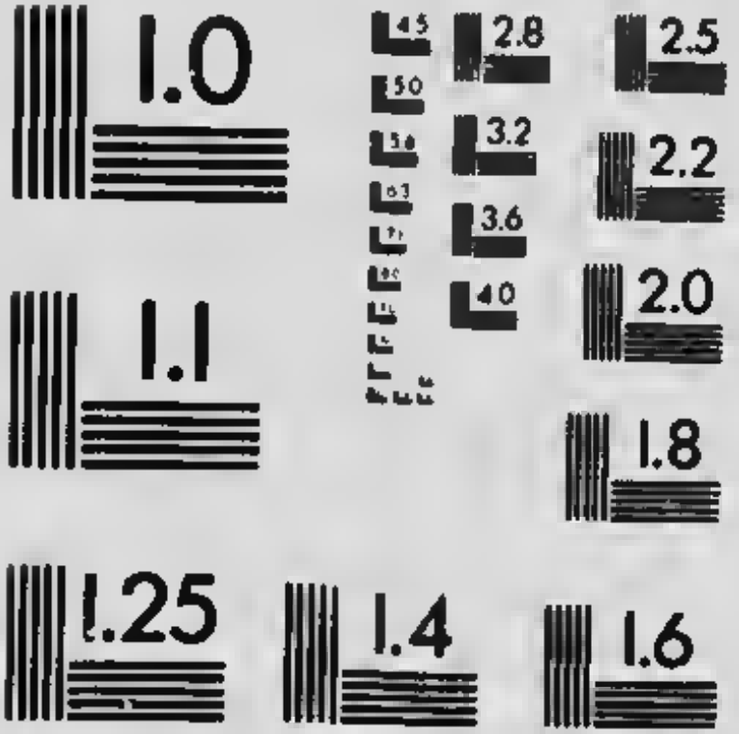

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death. *Wilson* v. *Wilson*, 4 Jur. N. S. 1076; 28 L. J. Ch. 95; *In re Russell; Dorrell* v. *Dorrell*, (1895) 2 Ch. 698.

And, apparently, if the gift were directly to the grandchildren instead of through the direction to settle, the construction would be the same. *Greenwood* v. *Roberts*, 15 B. 92, which at first sight appears to decide the contrary, is explained by the M.R., in *Webster* v. *Boddington*, 26 B. 128, to have been decided on a different principle. Whether the principle was rightly applied, *quære*.

But if the share given to grandchildren is contingent upon events, which may happen beyond the limits of perpetuity, and the share may never become vested, in which event the shares taken by the other *stirpes* would be increased, then the shares of each *stirps* would not be ascertainable within the proper limits, and the whole will fail; for instance, if the gift is to A for life, then to the children of A, and the children of such children who attain twenty-one, the children to take a parent's share. *Webster* v. *Boddington*, 26 B. 128; *Seaman* v. *Wood*, 22 B. 591; *Smith* v. *Smith*, 5 Ch. 342; *Hale* v. *Hale*, 3 Ch. D. 643; *Bentinck* v. *Duke of Portland*, 7 Ch. D. 693; *Pearks* v. *Moseley*, 5 App. C. 714; see *Salmon* v. *Salmon*, 29 B. 27; *Re Whitten; King* v. *Whitten*, 62 L. T. 391; *In re Bence; Smith* v. *Bence*, (1891) 3 Ch. 242.

Restraint upon anticipation.

Where there is a direction that female members of a class are to be subject to a restraint upon anticipation, and the direction is so expressed as not to deal with the separate shares, it appears not to be clear, whether the direction can be split so as to be valid as regards members of the class born in the testator's lifetime. *Armitage* v. *Coates*, 35 B. 1; *In re Ridley; Buckton* v. *Hay*, 11 Ch. D. 645; *In re Michael's Trusts*, 46 L. J. Ch. 651, are against, while *Herbert* v. *Webster*, 15 Ch. D. 610; *In re Ferneley's Trusts*, (1902) 1 Ch. 543; *Re Milward; Steedman* v. *Hobday*, 87 L. T. 476; *In re Game; Game* v. *Tennent*, (1907) 1 Ch. 276, are in favour of splitting.

Gift to a person satisfying a particular description is void unless

Where there is a gift to a person by some particular description, the gift will be void, unless it is clear that there must be some person answering the description within the limits of perpetuity. Thus, a trust to convey to such person as for the

time being would take by descent as heir male of the body of the testator's grandson, when some such person should attain the age of twenty-one, is void. *Lord Dungannon* v. *Smith*, 12 Cl. & F. 546; *Ibbetson* v. *Ibbetson*, 10 Sim. 495; 5 M. & Cr. 26; *Wainman* v. *Field*, Kay. 507; *Patching* v. *Barnett*, 51 L. J. Ch. 74.

there must be some such person within the limits of perpetuity.

How far the words, "as far as the rules of law and equity permit," would restrain the gift to such persons as satisfy the description within the limits of perpetuity, seems not clearly settled.

Effect of the words "as far as the rules of law and equity permit."

Where there was a gift (after life interests to the testator's wife, Lady Vere, and her son, Lord Vere) to the person who should from time to time be Lord Vere, it being the testator's will that the goods should be held with the title of the family, as far as the rules of law and equity permit, and the testator left a son, Lord Vere, and two sons of the son living at his death, the gift was held to vest absolutely in the first grandson who became Lord Vere. *Tollemache* v. *Earl of Coventry*, 2 Cl. & F. 611; 8 Bl. N. S. 547. See 12 Cl. & F. 555, n.; *In re Viscount Exmouth*; *Viscount Exmouth* v. *Praed*, 23 Ch. D. 158. See, too, per Lord St. Leonards, in *Ker* v. *Lord Dungannon*, 1 D. & War. 536; and see *Mackworth* v. *Hinxman*, 2 Kee. 658.

Tollemache v. *The Earl of Coventry.*

It seems, a trust of chattels for the person or persons who should, for the time being, be in actual possession of certain settled estates, to the end that such chattels may go along with the same estates, "so far as the rules of law or equity will permit," but so that they shall not vest in any person becoming entitled to the estates for an estate of inheritance, unless he attain twenty-one, would be good, though in the absence of those words it would be bad. *Harrington* v. *Harrington*, L. R. 5 H. L. 87.

On the effect of the words "as far as the law allows," see *Pownall* v. *Graham*, 33 B. 242.

Where personalty is given upon the trusts of real estate, which has been settled upon living persons for life, remainder to their sons in tail, and there is a direction that the personalty

Direction that personalty is not to vest in a tenant in tail dying under 21.

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is not to vest in any tenant in tail who dies under twenty-one, the clause is not void for remoteness, but refers only to tenants in tail by purchase, since none but tenants in tail by purchase can be said to take personalty under the will, personalty not being descendible. *Christie* v. *Gosling*, L. R. 1 H. L. 279; *Martelli* v. *Holloway*, L. R. 5 H. L. 532.

In such a case, in the event of a tenant in tail by purchase dying under twenty-one, leaving issue, the realty and personalty would become severed, since the realty would go to the issue, and the personalty to the next tenant in tail by purchase. But if the disposition of the personal estate contains or involves any trust for a tenant in tail who takes real estate by descent, the term tenant in tail could not be limited to tenants in tail by purchase. See per Lord Westbury, 1 D. J. & S. 1; *Ibbetson* v. *Ibbetson*, 10 Sim. 495; 5 M. & Cr. 26; *Ferrand* v. *Wilson*, 4 Ha. 344.

As regards appointments under powers:—

Power exercised within the limits of perpetuity good.

A power, though authorising an appointment which would be void for perpetuity, is valid if the appointment is kept within the proper limits. *Slark* v. *Dakyns*, 10 Ch. 35.

General powers.

Where the power is a general power to appoint by deed or will, the appointee need only be capable of taking under the instrument exercising the power.

The same principle applies to a general power to appoint by will. *Rous* v. *Jackson*, 29 Ch. D. 521; *In re Flower; Edmonds* v. *Edmonds*, 55 L. J. Ch. 200; 53 L. T. 717; 34 W. R. 149; *Stuart* v. *Babington*, 27 L. R. Ir. 551; not following *In re Powell's Trusts*, 39 L. J. Ch. 188.

Special powers.

In the case of powers of appointment to particular classes of persons, the person to whom the appointment is made must be capable of taking under the instrument creating the power. *In re Powell's Trusts*, *supra*.

The question whether an appointment is valid is determined by the state of things existing when the appointment takes effect. *Wilkinson* v. *Duncan*, 30 B. 111; *Von Brockdorff* v. *Malcolm*, 30 Ch. D. 172; *In re Hallinan's Trusts*, (1904) 1 Ir. 452; *In re Thompson; Thompson* v. *Thompson*, (1906) 2 Ch. 199.

Thus, an appointment under a special power will be good if at the time when the appointment takes effect the persons to take under it are objects of the power. *In re Coulman; Munby* v. *Ross*, 30 Ch. D. 186.

Where a marriage settlement gives a power to appoint to children of the marriage, an appointment to a son for life, with remainder to such persons as he should by will appoint, is void as to the remainder. *Wollaston* v. *King*, 8 Eq. 165; *In re Brown and Sibly*, 3 Ch. D. 156; *Hodgson* v. *Halford*, 11 Ch. D. 959; *Hutchinson* v. *Tottenham*, (1898) 1 Ir. 403; (1899) 1 Ir. 344; *Tredennick* v. *Tredennick*, (1900) 1 Ir. 354.

So a power in a settlement to appoint to children cannot be exercised by an appointment to take effect upon the marriage of an unmarried child. *Morgan* v. *Gronow*, 16 Eq. 1.

Invalid restrictions rejected.

When a power is well executed, but a restraint upon anticipation is imposed upon the enjoyment, which is void for remoteness, the restraint will be rejected. *Fry* v. *Capper*, Kay, 163; *In re Teague's Settlement*, 10 Eq. 564; *In re Cunynghame's Settlement*, 11 Eq. 324; *Shute* v. *Hogge*, 58 L. T. 546; see *ante*, p. 601.

And when there is an absolute gift, subsequent qualifications of the gift which are void for remoteness will be rejected. *Carver* v. *Bowles*, 2 R. & M. 306; *Ring* v. *Harde*[illegible], 2 B. 352; *Cooke* v. *Cooke*, 38 Ch. D. 202; *Re Boyd; Nield* v. *Boyd*, 63 L. T. 92; *Douglass* v. *Waddell*, 17 L. R. Ir. 384.

The Cy Pres Doctrine.

[illegible]ny cases limitations of real estate, in themselves void for perpetuity, have been made good by the application of the so-called doctrine of *cy près*.

Cy près doctrine is a rule of construction.

This doctrine is a rule of construction, and applies not merely to executory trusts. *Monypenny* v. *Dering*, 16 M. & W. 418; 2 D. M. & G. 145; *Parfitt* v. *Hember*, 4 Eq. 443; *Hampton* v. *Holman*, 5 Ch. D. 183.

It also applies to the execution of a power by will. *Line* v. *Hall*, 43 L. J. Ch. 107.

Parent will take an estate tail where the

1. Where a testator has devised lands in a manner transgressing the limits of perpetuity, and the Court can, by giving

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effect will be to give the property in the course marked out by the testator.

estates tail to any of the devisees, carry the property in the precise course marked out by the testator, supposing the estates left to themselves, it will do so. *Humberston* v. *Humberston*, 1 P. W. 330; *Monypenny* v. *Dering*, 16 M. & W. 418; 2 D. M. & G. 145; *Parfitt* v. *Hember*, 4 Eq. 443.

Thus, a limitation to an unborn person for life, remainder to his children successively, in tail, will give the unborn person an estate tail; cases *supra*.

Doctrine applied to some members of a class and to part of the property devised.

And the doctrine may be applied to some of a class, and not to others; as well as to a portion of the property included in a devise, and not to the rest. *Vanderplank* v. *King*, 3 Ha. 1; *Line* v. *Hall*, 22 W. R. 124; 43 L. J. Ch. 107.

The doctrine applies though the children meant to take jointly in tail.

2. And where, by giving an estate tail to the parent, all the objects intended to be benefited by the testator would be included this construction will be adopted, although the children were meant to take jointly in tail as purchasers. *Pitt* v. *Jackson*, 2 B. C. C. 51, cit. 2 Ves. Jun. 349; *Vanderplank* v. *King*, 3 Ha. 1; *Williams* v. *Teale*, 6 *ib.* 239.

Limits of the doctrine.

3. The doctrine will, however, not be applied where the result would be to carry the estate to persons not intended to be benefited by the testator, or to exclude persons intended to be benefited. *Monypenny* v. *Dering*, 16 M. & W. 418; 7 Ha. 568; 2 D. M. & G. 145; *Hampton* v. *Holman*, 5 Ch. D. 533; *In re Rising; Rising* v. *Rising*, (1904) 1 Ch. 533; *In re Mortimer; Gray* v. *Gray*, (1905) 2 Ch. 502.

Whether it applies where the intention is to create life estates for ever.

4. The *cy près* doctrine does not apply where the only intention is to create a limited or unlimited succession of life estates. *Seaward* v. *Willock*, 5 East, 198; *In re Richardson; Parry* v. *Holmes*, (1904) 1 Ch. 332.

Nor will it apply where successive terms of years, determinable on the death of the devisee, are given. *Somerville* v. *Lethbridge*, 6 T. R. 213; *Beard* v. *Westcott*, 5 B. & Ald. 81; T & R. 25.

On the other hand, it is clear that, where an estate tail is given by force of the limitation itself, words indicating that the successive interests are to be for life will be rejected, whether the estate tail is given by direct words (*a*) or by the effect of a gift over in default of issue (*b*). *Doe* d. *Elton* v.

Stenlake, 12 East, 515; *Reece* v. *Steel*, 2 Sim. 233; *Hugo* v. *Williams*, 14 Eq. 225; *Forsbrook* v. *Forsbrook*, 3 Ch. 93 (*a*); *Mortimer* v. *West*, 2 Sim. 274; *Woollen* v. *Andrews*, 2 Bing. 126; *Brooke* v. *Turner*, 2 Bing. N. C. 422; *Parfitt* v. *Hember*, 4 Eq. 443 (*b*).

It does not apply where the children take in fee.

5. The *cy près* construction does not apply where the estates are limited to children of unborn persons in fee. *Bristow* v. *Warde*, 2 Ves. Jun. 336; *Hale* v. *Pew*, 25 B. 335.

It does not apply to personalty.

The doctrine does not apply to personalty nor to a mixed fund. *Routledge* v. *Dorril*, 2 Ves. Jun. 365; *Boughton* v. *James*, 1 Coll. 44; 1 H. L. 406.

Where a parent having power to appoint to sons in tail appoints to them for life with remainders in tail, and puts them to their election between benefits given by the will and their rights in default of appointment, the doctrine of *cy près* has no application. *In re Denneby's Estate*, 17 Ir. Ch. 97.

Accumulation.

What amounts to direction to accumulate.

A direction that surplus income during a given period, and all accumulations thereof, are to go in augmentation of capital amounts to a direction to invest the income and the resulting income of the investment of income. *Wentworth* v. *Wentworth*, (1900) A. C. 163. See *In re Cox*: *Cox* v. *Edwards*, W. N. 1900, 89.

Trust for accumulation beyond the limits of perpetuity is void *in toto*.

A trust for accumulation beyond the limits of perpetuity is entirely void *ab initio*, whether before or since the Thellusson Act, and whether it be for a purpose exempted from the operation of the Act or not, unless it be for the payment of debts. *Curtis* v. *Lukin*, 5 B. 147; *Scarisbrick* v. *Skelmersdale*, 17 Sim. 187; *Smith* v. *Cuninghame*, 13 L. R. Ir. 480.

The Thellusson Act.

And by the Accumulations Act, 1800 (39 & 40 Geo. III. c. 98), commonly called the Thellusson Act, accumulation by will is restrained for any longer term than twenty-one years from the death of the testator, or during the minority or respective minorities of any person or persons who shall be living or *en ventre sa mère* at the death of the testator, or during the minority or respective minorities only of any person

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or persons who, under the trusts of the will, would for the time being, if of full age, be entitled to the rents and profits or the interest directed to be accumulated.

By sect. 2 provisions for the payment of the debts of the devisor or other person or persons, and provisions for raising portions of the children of the devisor, or of any person taking any interest under the will, and directions touching the produce of timber or wood, are excepted from the Act.

The Accumulations Act, 1892.

By the Accumulations Act, 1892 (55 & 56 Vict. c. 58), which applies to the will made before the Act of a testator who dies after the Act: *In re Baroness Llanover; Herbert* v. *Freshfield*, (1903) 2 Ch. 330; accumulation by will for the purchase of land only is restricted to the minority or respective minorities of any person or persons who under the trusts of the will would for the time being, if of full age, be entitled to receive the rents, issues, profits, or income so directed to be accumulated.

Direction to purchase real estate.

A direction to accumulate to purchase real estate is in effect a direction to purchase land only. *In re Clutterbuck; Fellowes* v. *Fellowes*, (1901) 2 Ch. 285, where *In re Danson; Bell* v. *Danson*, 13 R. 633, is explained.

A direction that the rents of leaseholds shall be capitalised for twenty-one years and become capital moneys of a settlement thereby made of realty, and subject to the powers of the Settled Land Acts, is not a direction to invest in land only within the Act, inasmuch as capital moneys may be applied otherwise than in the purchase of land. *In re Danson; Bell* v. *Danson*, 13 R. 633.

If the direction is to accumulate to pay off incumbrances or to purchase land, the direction so far as it relates to the purchase of land must be treated as struck out of the will. *In re Baroness Llanover; Herbert* v. *Freshfield*, (1903) 2 Ch. 330; *In re Baroness Llanover; Herbert* v. *Ram*, (1907) 1 Ch. 635.

The statute applies if property is so given as to involve accumulation.

An express direction to accumulate is not necessary to bring the property within the statute; it is enough if the property is given in such a manner that accumulation becomes necessary. *Tench* v. *Cheese*, 6 D. M. & G. 453; *Macdonald* v. *Bryce*, 2 Kee. 276; the decree in *Countess of Bective* v. *Hodgson*, 10 H. L. 656; *Wade Gery* v. *Handley*, 1 Ch. D. 653; 3 Ch. D. 374.

But when the property is directed to be applied to certain purposes at once, but is accumulated owing to the neglect of trustees, or from some other reason, the statute does not apply. *Lambe* v. *Stoughton*, 12 Sim. 304; where the direction to accumulate was merely subsidiary to the general trusts. See *Phipps* v. *Kelynge*, 2 V. & B. 57.

Accumulation by trustees of money to be laid out at once is not within the statute.

A direction to keep up policies effected by the testator in his lifetime, on the lives of his children, the policies to be settled in case of marriage on their wives and children, is not a trust for accumulation within the statute. *Bassil* v. *Lester*, 9 Ha. 177; *In re Vaughan: Halford* v. *Close*, W. N. 1883, 89.

Direction to keep up policies is not within the statute.

Nor is a trust out of the rents of leaseholds having more than twenty-one years to run to effect and keep up policies to secure the capital lost by not selling the leaseholds. *In re Gardiner: Gardiner* v. *Smith*, (1901) 1 Ch. 697.

Trust to replace value of leaseholds at end of term.

A trust to repair is not within the Act. *Vine* v. *Raleigh*, (1891) 2 Ch. 13; *In re Mason: Mason* v. *Mason*, (1891) 3 Ch. 467.

Repairs and improvements.

Nor is a trust to improve, provided the improvements be such as would properly be defrayed out of income. Cases *supra*.

A testator may direct accumulation during any one, but not more of the periods allowed by the statute. *Wilson* v. *Wilson*, 1 Sim. N. S. 288; *Jagger* v. *Jagger*, 25 Ch. D. 729.

Testator may select any one period permitted by the statute for accumulation.

The period of twenty-one years is to be calculated from the death of the testator, exclusive of the day of his death, and must be a period immediately following his death. *Webb* v. *Webb*, 2 B. 493; *Gorst* v. *Lowndes*, 11 Sim. 434; *Shaw* v. *Rhodes*, 1 M. & Cr. 154; *A.-G.* v. *Poulden*, 3 Ha. 555.

Period of 21 years runs from the death.

The words of the statute permitting accumulation during the minority of any person who, under the trusts of the will, would, if of full age, be entitled to the rents and profits, do not permit accumulation during the period before the birth of such person. *Haley* v. *Bannister*, 4 Mad. 275; *Ellis* v. *Maxwell*, 3 B. 596.

Period of the minority of any person.

But they authorise an accumulation during the minority of a person not born at the date of the death. *In re Cattell: Cattell*

v. *Cottell*, (1907) 1 Ch. 567, not approving dicta in *Haley* v. *Bannister*, 4 Mad. 275; *Jagger* v. *Jagger*, 25 Ch. D. 729.

Accumulation under deed.

Where a fund is settled by deed on trust to accumulate during the joint lives of A and B, the accumulation is valid only during so much of the joint lives as expires during the settlor's life. *In re Lady Rosslyn's Trust*, 16 Sim. 391; *Jagger* v. *Jagger*, 25 Ch. D. 729.

Where policies on several lives were settled, with a direction to accumulate the moneys received therefrom until all the policies should have fallen in, it was held that the accumulation was valid only for the period commencing when the first policy fell in and ending with the settlor's death. *Re Errington*; *Errington-Turbutt* v. *Errington*, 76 L. T. 616.

Accumulation directed for periods longer than the statute allows is void only for the excess.

Accumulation directed within the limits of perpetuity, but beyond the limits of the statute, is void only beyond such limits. *Longdon* v. *Simson*, 12 Ves. 295; *Griffiths* v. *Vere*, 9 Ves. 127.

Where there is a direction to accumulate income with a discretionary power to apply any part of the income towards the maintenance of infants, the power of maintenance continues after the period for accumulation limited by the Thellusson Act has expired. *Pride* v. *Fooks*, 2 B. 430.

Accumulation for payment of debts is excepted from the statute.

An accumulation for the purpose of paying debts, whether of the testator or other persons, is excepted from the Act, and is good, whether the debts be existing or future debts. *Varlo* v. *Faden*, 27 B. 255; 1 D. F. & J. 211; and see *Barrington* v. *Liddell*, 2 D. M. & G. 505; *In re Mason*; *Mason* v. *Mason*, (1891) 3 Ch. 467.

But the payment of debts must be *bonâ fide* and the primary object of the accumulation, and therefore if debts are only directed to be paid upon certain contingencies, and incidentally, the case is not within the exception. *Mathews* v. *Keble*, 4 Eq. 467; 3 Ch. 691.

If accumulation of income is directed to pay debts, a direction to continue the accumulation in order to recoup corpus, if the debts should be paid out of corpus, is void. *Tewart* v. *Lawson*, 18 Eq. 490; *In re Heathcote*; *Heathcote* v. *Trench*, (1904) 1 Ch. 826.

The second exception is of portions for the children of the testator, or person taking any interest under the will.

What are portions within the exception.

The children must be children either of the testator or of a person taking an interest under the will, and therefore if the accumulations are given to a class of children, some of whose parents take nothing under the will, the exception does not apply. *Eyre* v. *Marsden*, 2 Kee. 564.

But the interest taken by the parent under the will need not be an interest in the fund to be accumulated. *Bart* v. *Sturt*, 10 Ha. 423; *Barrington* v. *Liddell*, 2 D. M. & G. 480, 500.

And any interest, however small, given to the parent is sufficient. *Beerington* v. *Liddell*, 2 D. M. & G. 480, 505; *Evans* v. *Hellier* 5 Cl. & F. 126.

As to what are portions within the exception:—

A fund to be accumulated and given to children living at the time of distribution is not a portion.

A fund to be accumulated and given to such children as may be living at the time, when the accumulations are to cease, is not within the exception. *Bart* v. *Sturt*, 10 Ha. 415; *Drewett* v. *Pollard*, 27 B. 196.

Nor are accumulations to be added to capital given to a child or to the members of a family. *Edwards* v. *Tuck*, 3 D. M. & G. 40; *Morgan* v. *Morgan*, 4 De G. & S. 175; 20 L. J. Ch. 441; *Wildes* v. *Davies*, 1 Sm. & G. 475; *Bourne* v. *Buckton*, 2 Sim. N. S. 91; *Jones* v. *Maggs*, 9 Ha. 605; *Mathews* v. *Keble*, 4 Eq. 467; 3 Ch. 691; *Re Walker*; *Walker* v. *Walker*, 54 L. T. 792.

Nor is a fund directed to be accumulated and given to a parent for life with remainder to her children. *Watt* v. *Wood*, 2 Dr. & Sm. 56. *Middleton* v. *Losh*, 1 Sm. & G. 61, seems irreconcilable with the other decisions, unless it can be supported on the ground that the provision was called a portion; see 10 Ha. 426.

And where a fund directed to be given to children consists of a capital sum of personalty and the accumulations thereof, to which the rents of realty are added, the aggregate fund cannot be separated so as to make the gift of the accumulated rents good as a portion. *Re Walker*; *Walker* v. *Walker*, 54 L. T. 792.

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Accumulation to pay portions charged by another instrument.

But a direction to accumulate a sum to pay portions charged by another instrument is within the exception. *Halford* v. *Stains*, 16 Sim. 488; *Barrington* v. *Liddell*, 2 D. M. & G. 480, 498.

Portions given by the will itself.

And the exception extends also to portions created by the will itself. *Beech* v. *Lord St. Vincent*, 3 De G. & S. 678; 3 Jur. N. S. 762; *In re Stephens: Kilby* v. *Betts*, (1904) 1 Ch. 322.

And when an accumulation is directed to raise portions for children if there are any, and if not for some other purpose, the case is within the exception only in the former event. *Re Chalmer's Trust*, 1 J. & H. 639.

Legatee having a vested right may stop accumulation when he attains 21.

Where there is an absolute vested gift made payable at a future event, with direction to accumulate the income in the meantime and pay it with the principal, the Court will not enforce the trust for accumulation, in which no person has any interest but the legatee. *Saunders* v. *Vautier*, 4 B. 115; Cr. & Ph. 240; *Gosling* v. *Gosling*, Johns. 265; *Coventry* v. *Coventry*, 2 Dr. & S. 470; *In re Couturier: Couturier* v. *Shea*, (1907) 1 Ch. 470.

Case of charities.

The same principle applies to a charity whether corporate or unincorporate. *Wharton* v. *Masterman*, (1895) A. C. 186.

But where the accumulation is invalid, not because it is an attempted fetter upon an absolute interest, but merely because it is struck at by the Thellusson Act, *i.e.*, where other persons than the legatee have an interest in the accumulations, then, so far as the accumulation extends beyond the statutory period, the income is undisposed of. *Talbot* v. *Jevers*, 20 Eq. 255; *Weatherall* v. *Thornburgh*, 8 Ch. D. 261; *Re Parry: Powell* v. *Parry*, 60 L. T. 489; *In re Travis: Frost* v. *Greatorex*, (1900) 2 Ch. 541.

The same result follows, though there is no express trust to accumulate, if a residue is given after the death of annuitants. *Re Hiscoe; Hiscoe* v. *Waite*, 48 L. T. 510.

Destination of excessive accumulation.

When property is given absolutely in the first place, and a direction is afterwards added to accumulate, the accumulations, so far as they are void by the statute, go to the person to whom

the absolute interest is given. *Tickey* v. *Tickey*, 3 M. & K. 560; *Combe* v. *Hughes*, 31 B. 127; 2 D. J. & S. 657.

And where an estate is devised subject to a trust for accumulation which is void, the trust sinks for the benefit of the persons for the time being entitled to the estate. *Evans* v. *Hellier*, 1 M. & Cr. 135; 5 Cl. & F. 111; *Re Chabot's Trust*, 1 J. & H. 639.

But the effect of the statute is not to accelerate any gifts in the will. *Green* v. *Gascoigne*, 4 D. J. & S. 565.

Accumulations released by the statute pass to the heir or next of kin, as the case may be, or to the residuary legatee if there is one.

Therefore accumulations released by the statute, if the fund to be accumulated is not a residue, in the case of personalty fall into the residue. *Ellis* v. *Maxwell*, 3 B. 587; *A.-G.* v. *Poulden*, 3 Ha. 555; *Jones* v. *Maggs*, 9 Ha. 605; *Re Parry*; *Powell* v. *Parry*, 69 L. T. 489.

In the case of realty the residuary devisee or heir is entitled according as the will is governed by the Wills Act or not. *Smith* v. *Lomas*, 32 L. J. Ch. 578; *Nettleton* v. *Stephens*, 3 De G. & S. 366.

Accumulations of land.

If the fund to be accumulated is residuary, the void accumulations go to the heir or next of kin, according to the nature of the property, and if the fund is mixed, to the heir and next of kin proportionately. *Green* v. *Gascoigne*, 4 D. J. & S. 565; *Halford* v. *Stains*, 16 Sim. 488; *Eyre* v. *Marsden*, 2 Kee. 564; 4 M. & Cr. 231; *Wilkes* v. *Davies*, 1 Sm. & G. 475; *Ralph* v. *Carrick*, 5 Ch. D. 984; 11 Ch. D. 873; see *Elborne* v. *Goode*, 14 Sim. 165.

Income of accumulation after 21 years is capital.

The income accruing after the end of the statutory period upon the fund and upon the accumulations is capital of the residue, as between tenant for life and remainderman. *Crawley* v. *Crawley*, 7 Sim. 427; *O'Neill* v. *Lucas*, 2 Kee. 313, 316; *In re Pope*; *Sharp* v. *Marshall*, (1901) 1 Ch. 64, not following *In re Phillips*; *Phillips* v. *Levy*, 49 L. J. Ch. 198; 28 W. R. 40.

Where there is a gift to A when she marries, with all accumulations of interest in the meantime, and A dies unmarried, the tenant for life of the residue is entitled to the accumulations which have been made during her life, and within the period allowed for accumulation.

After the period allowed for accumulation, and until the

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legacy is payable or fails, the income of so much as was accumulated during the life of a tenant for life of the residue, belongs to him or his estate, and the income of the rest belongs to the remainderman. *Morgan* v. *Morgan*, 20 L. J. Ch. 109, 441; not so well reported in 4 De G. & S. 164; 15 Jur. 319.

A legacy with accumulations of interest was given to the eldest daughter of A to be paid at twenty-one, and if there should be no daughter of A, to the eldest daughter of B, payable in like manner. The testatrix died in 1819. A never had a daughter, and died in 1851. B had a daughter born in 1821, who died in 1827. It was held that the legal personal representatives of B's daughter were entitled to the legacy and accumulations down to 1827, with interest thereon at 4 per cent. until payment, and that the residuary legatee took all the rest of the accumulations. *Bryan* v. *Collins*, 16 B. 14.

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A devise was made to N. M. in fee simple, with a direction that the land should be sold, but not during N. M.'s lifetime, "and not after his death until his youngest child then living is of the full age of twenty-one years, and it is to be sold within three years after N. M.'s youngest child is of the full age of twenty-one years provided N. M. is dead," the proceeds to be divided between N. M.'s children living at the time of the sale. Held, that the gift to the children was void for remoteness, for by possibility the sale might not take place until after the expiration of twenty-one years from the death of N.M. *Meyers* v. *Hamilton P. & L. Co.*, 19 O.R. 358.

A devise to the first great-grandson in the masculine line, with a direction meanwhile that a son should occupy the land, or if he did not occupy then a grandson, was held void for remoteness, and there being no intention to give any other estate the testator died intestate. *Ferguson* v. *Ferguson*, 2 S.C.R. 497.

Thellusson Act.

The Thellusson Act, having been passed in England after the introduction of English law into Upper Canada, was not in force in Ontario until introduced by special enactment. R.S.O. c. 111; R.S.O. c. 332. And it was thereby made retrospective.

Before the Act an accumulation directed to be made for more than twenty-one years from the testator's death was upheld. *Harrison* v. *Spencer*, 15 O.R. 692.

A bequest of personalty to a foreign state for school purposes, with a direction to accumulate the interest until the whole amount reached a certain sum, was upheld, the Court holding that it was for the Courts of the foreign state to determine whether the direction should be carried out. *Parkhurst* v. *Roy*, 27 Gr. 361; 7 A.R. 614.

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After the Thellusson Act was introduced into Ontario, a direction by a testator to accumulate lands, money and mortgages for sixty years from his death and then to divide the accumulated fund amongst certain persons, was held to be void. *Baker* v. *Stuart*, 28 O.R. 439.

A direction to accumulate for twenty-three years after the testator's death was held void only as to the excess, and the interest of the presumptive beneficiary being only contingent, he was not entitled to stop accumulations and claim present payment. *Harrison* v. *Harrison*, 7 O.L.R. 297.

CHAPTER XLVI.

CONDITIONS SUBSEQUENT.

Conditions subsequent, impossible, impolitic, or illegal, are ineffectual whether there is a gift over or not.

In the case of conditions subsequent, if the condition is impossible, impolitic, or illegal, the gift remains, though there may be a gift over upon non-performance of the condition. *Thomas* v. *Howell*, 1 Salk. 170; *Egerton* v. *Earl Brownlow*, 4 H. L. 1; *Wilkinson* v. *Wilkinson*, 12 Eq. 604; *Graydon* v. *Hicks*, 2 Atk. 16; *Jones* v. *Suffolk*, 1 B. C. C. 528; *Collett* v. *Collett*, 35 B. 312; *Sutcliffe* v. *Richardson*, 13 Eq. 606; *Yates* v. *University of London*, L. R. 7 H. L. 438; and see *Wedgwood* v. *Denton*, 12 Eq. 290.

Condition becoming impossible through act of God.

The same is the case if it becomes impossible through the act of God. For instance, if the person, whose consent to a marriage is required, dies before the marriage, or if the devisee dies before the time when the condition ought to be performed. *Collett* v. *Collett*, 35 B. 312; *In re Greenwood; Goodhart* v. *Woodhead*, (1903) 1 Ch. 749. See *Croskery* v. *Ritchie*, (1901) 1 Ir. 437.

If the legatee is allowed a certain time to perform the condition and becomes lunatic before the end of the time, the condition is discharged, though there may have been a time before the lunacy when he might have performed it. *In re Bird; Bird* v. *Cross*, 8 R. 326.

The fact that in such cases there is a gift over if the condition is not performed is not material. The gift over does not take effect. *Graydon* v. *Hicks*, 2 Atk. 16; *Collett* v. *Collett*, 35 B. 312.

Condition must be clear.

A condition must be so framed that it may be capable of ascertainment at any moment, whether it has or has not taken effect. Thus, where a bequest of chattels to the owner of a title was followed by a direction that no person was to take an

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absolute interest till the expiration of twenty-one years after the death of all persons living at the testator's death and afterwards attaining the title, the direction was held void for uncertainty. *In re Viscount Exmouth; Viscount Exmouth* v. *Praed*, 23 Ch. D. 158.

Condition requiring consent of several persons becomes impossible by death of some.

A condition subsequent requiring the consent of several persons becomes impossible and is discharged by the death of all, or even of one of them, though in the latter case it would seem the condition is satisfied by the consent of the survivors. *Peyton* v. *Bury*, 2 P. W. 625; *Grant* v. *Dyer*, 2 Dow, 73; *Jones* v. *Suffolk*, 1 B. C. C. 528; *Aislabie* v. *Rice*, 3 Mad. 256; see *Dawson* v. *Oliver Massey*, 2 Ch. D. 753.

Consent of guardians.

Where the consent of guardians is required and the testator appoints no guardians, an application should be made to the Court for the appointment of guardians, and the consent of a guardian appointed by the infant would not be sufficient. *In re Brown's Will*, 18 Ch. D. 61.

So where the consent of parents or guardians is required and the parents are dead, guardians must be appointed to give their consent. *Ib.*

Condition not performed through ignorance takes effect,

A condition subsequent not performed owing to the ignorance of the legatee of its existence, nevertheless works a forfeiture, where the property is given over, whether in the case of personalty or of realty. *Frances' Case*, 8 Rep. 89 b; *Porter* v. *Fry*, 1 Vent. 197; *Carter* v. *Carter*, 3 K. & J. 617; *Hodges' Trusts*, 16 Eq. 92; *Astley* v. *Earl of Essex*, 18 Eq. 290.

unless the devisee is heir.

But this does not apply where the devisee is the heir, who has a title independent of the will. *Doe* d. *Kenrick* v. *Lord Beauclerk*, 11 East, 667; *Doe* d. *Taylor* v. *Crisp*, 8 Ad. & E. 778; *Murphy* v. *Broder*, I. R. 9 C. L. 123.

Condition forfeiting a legacy if not claimed.

So when there is a clause forfeiting a legacy, if not claimed within a given time, the forfeiture takes effect, if the legacy is not claimed, though the legatee received no notice of the legacy or of the death of the testator, and though the forfeiture is in favour of the executor. *Burgess* v. *Robinson*, 3 Mer. 7: *Tulk* v. *Houldsworth*, 1 V. & B. 248; *Powell* v. *Rawle*, 18 Eq. 243; *In re Lewis; Lewis* v. *Lewis*, (1904) 2 Ch. 656.

It has been held that the filing of a bill for the administration

of the estate before the time appointed is equivalent to a claim by the legatees, though they may not be parties to the suit. *Tollner* v. *Marriott*, 4 Sim. 19.

What amounts to a claim.

But when the gift was to persons, who should within a year establish their title as next of kin, an order made shortly after the testator's death on originating summons directing inquiries as to the persons entitled was held not to let in next of kin who made no claim within the year. *In re Hartley; Stedman* v. *Dunster*, 34 Ch. D. 742.

In the case of realty a valid condition subsequent is effectual even where there is no gift over. *Cooke* v. *Turner*, 15 M. & W. 727; 14 Sim. 493; 15 Sim. 611; 16 Sim. 482; and see *Evanturel* v. *Evanturel*, L. R. 6 P. C. 1.

A condition is effectual without a gift over in the case of realty.

In *Cooke* v. *Turner*, there was a gift over, but the case seems to have been decided at common law independently of the gift over.

And a condition subsequent may operate to destroy a contingent, as well as to divest a vested estate. *Egerton* v. *Earl Brownlow*, 4 H. L. 1.

With regard to personalty, a condition subsequent is effectual without a gift over, except as far as the rules of the civil law has been adopted with regard to certain classes of conditions, see *post*, p. 626. *In re Dickson's Trust*, 1 Sim. N. S. 37; *Craven* v. *Brady*, 4 Eq. 209; 4 Ch. 296.

Personalty follows the rule as modified by the doctrine of *in terrorem*.

As to what conditions are valid, it has been said that nothing can be made the subject of a condition in a will, which could not be made the subject of a contract or wager in life. See per the Lord Chief Baron, *Egerton* v. *Earl Brownlow*, 4 H. L. 1, p. 150. In that case a condition defeating an estate if Lord Alford, the tenant for life, should die without having acquired the title of Duke or Marquis of Bridgwater was held void.

Test of validity of a condition.

A gift over in the event of a change of religion by the legatee is valid. *Hodgson* v. *Halford*, 11 Ch. D. 959.

Change of religion.

Conditions requiring the separation of husband and wife are invalid, for instance, conditions decreasing an annuity if the annuitant again lives with her husband, or increasing a legacy to a husband in the event of a separation from his wife. *Bean*

Separation of husband and wife.

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v. *Griffiths*, 1 Jur. N. S. 1045; *Cartwright* v. *Cartwright*, 3 D. M. & G. 982; *Wilkinson* v. *Wilkinson*, 12 Eq. 604.

A limitation to endure during the separation of husband and wife is wholly void. *In re Moore; Trafford* v. *Macnachie*, 39 Ch. D. 116.

But a limitation in favour of a wife so long as she continues to live with her husband is valid, and a disposition providing for the event of the limitation coming to an end by the separation of the spouses is also valid. *In re Hope Johnstone; Hope Johnstone* v. *Hope Johnstone*, (1904) 1 Ch. 470; see *H.* v. *W.*, 3 K. & J. 382.

Condition not to dispute a will.

A condition not to dispute a will is valid in law, if the will is unsuccessfully disputed, though it will not avail to make an invalid disposition good. *Cooke* v. *Turner*, 15 M. & W. 727; *Evanturel* v. *Evanturel*, L. R. 6 P. C. 1; *Stevenson* v. *Abingdon*, 11 W. R. 935; see *Warbrick* v. *Varley*, 30 B. 347; *Hope* v. *International Financial Society*, 4 Ch. D. 327; *Phillips* v. *Phillips*, W. N. 1877, 260; *Massy* v. *Rogers*, 11 L. R. Ir. 409.

On the other hand, a condition not to institute legal proceedings touching the estate and effects devised, is too general, and is bad. *Rhodes* v. *Muswell Hill Land Co.*, 29 B. 561.

A clause forfeiting an annuity, if the annuitant should interfere or attempt to interfere in the management of the testator's estate, is good, and takes effect if the annuitant brings an action against the trustees without reasonable cause. *Adams* v. *Adams*, 45 Ch. D. 426; (1892) 1 Ch. 369.

A condition, that trustees shall not pay over the shares of legatees without taking from them bonds, that they will not intermarry or illegally cohabit with certain persons, will not be enforced. *Poole* v. *Bott*, 11 Ha. 33.

Computation of time.

As to the rules for computing time, within which a condition is required to be performed, see *Lester* v. *Garland*, 15 Ves. 248; *Miller* v. *Wheatley*, 28 L. R. Ir. 144; *Goldsmiths' Co.* v. *West Metro. Rly. Co.*, (1904) 1 K. B. 1.

Conditions in Restraint of Marriage.

A condition in restraint of marriage applies only to a lawful marriage. *In re M'Laughlin*, 1 L. R. Ir. 42.

Condition subsequent in restraint of marriage is good in realty.

A condition subsequent in restraint of marriage, where the estates are for life or in fee, is, it seems, valid as regards realty. *Jones* v. *Jones*, 1 Q. B. D. 279; *Bellairs* v. *Bellairs*, 18 Eq. 510.

But not as regards an estate tail.

But such a condition is void, if imposed upon a tenant in tail, as repugnant to the estate. *Earl of Arundel's Case*, 3 Dyer, 342 b.

Condition in restraint of marriage is void in personalty.

It is clear that, in the case of personalty, a condition subsequent in general restraint of marriage is void, whether the condition forfeits or only reduces the gift. *Morley* v. *Rennoldson*, 2 Ha. 570; (1895) 1 Ch. 449; *Re Bellamy*; *Pickard* v. *Holroyd*, 48 L. T. 212.

And a condition in restraint of marriage may be so restrictive as to be equivalent to a general restraint; for instance, if it prohibits marriage with any person not seised of an estate in fee of the clear yearly income of 500*l.* a year. *Reilly* v. *Monck*, 3 Ridg. P. C. 205.

Mixed fund.

The same rule applies to a mixed fund arising from the proceeds of sale of realty and pure personalty. *Lloyd* v. *Lloyd*, 2 Sim. N. S. 255; *Bellairs* v. *Bellairs*, 18 Eq. 510.

It would seem that the rule applies to real and personal estate given together. *Daddy* v. *Gresham*, 2 L. R. Ir. 443.

Legacy out of proceeds of sale of land.

And it seems, that a legacy out of the proceeds of land directed by the testator to be converted would follow the same rule. See *In re Hart's Trusts*, 3 De G. & J. 195; *Bellairs* v. *Bellairs*, *supra*.

Limitation ti marriage is good.

On the other hand, a limitation to a person till marriage is good, the intention being to provide for the person while he remains unmarried, and not to prevent him from marrying. *Potter* v. *Richards*, 24 L. J. Ch. 488; *Heath* v. *Lewis*, 3 D. M. & G. 954; *In re King's Trusts*, 29 L. R. Ir. 401.

In such a case, if the legatee marries in the testator's lifetime, even with his consent, the gift does not take effect. *Bullock* v. *Bennett*, 7 D. M. & G. 283; *Andrew* v. *Andrew*, 1 Coll. 690; *In re King's Trusts*, 29 L. R. Ir. 401; see *Rishton* v. *Cobb*, 5 M. & Cr. 145, considered in *In re Boddington*, *Boddington* v. *Clairat*, 25 Ch. D. 685.

But there may be enough to show that the marriage

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contemplated is a marriage after the testator's death, as in *Cooper* v. *Cooper*, 6 Ir. Ch. 217, where there was a gift to a lady till marriage, and the testator then married the lady and republished his will by a codicil.

Conditions in partial restraint of marriage are good though they may be ineffectual.

Conditions in partial restraint of marriage are valid, both with regard to realty and personalty, though with regard to the latter the further question arises, whether they are *in terrorem* or not.

Thus, conditions restraining a widow or widower, whether of the person making the will or of a stranger, from marrying again: *Evans* v. *Rosser*, 2 H. & M. 190; *Newton* v. *Marsh*, 2 J. & H. 356; *Allen* v. *Jackson*, 1 Ch. D. 399; or requiring a marriage with consent: *Sutton* v. *Jeeke*, 2 Ch. Rep. 95; *Aston* v. *Aston*, 2 Vern. 452; *Dashwood* v. *Lord Bulkeley*, 10 Ves. 230; *Lloyd* v. *Branton*, 3 Mer. 108; *In re Whiting's Settlement*; *Whiting* v. *De Rutzen*, (1905) 1 Ch. 96; or restraining marriage before a certain age: *Stackpole* v. *Beaumont*, 3 Ves. 89, are good as conditions, though they may be ineffectual if there is no gift over, on the principle hereafter mentioned.

So conditions against marriage with a Scotchman (*a*), or in a manner not in accordance with the rules of the Quakers (*b*), or with a Papist (*c*), or a person not being a Jew (*d*), or not being a Protestant and of Protestant parents (*e*), or a domestic servant (*f*), or if the legatee marries beneath her (*g*), are valid. *Perrin* v. *Lyon*, 9 East, 170 (*a*); *Haughton* v. *Haughton*, 1 Moll. 611 (*b*); *Duggan* v. *Kelly*, 10 Ir. Eq. 295, 473 (*c*); *Hodgson* v. *Halford*, 11 Ch. D. 959 (*d*); *In re Knox*, 23 L. R. Ir. 542 (*e*); *Jenner* v. *Turner*, 16 Ch. D. 188 (*f*); *Greene* v. *Kirkwood*, (1895) 1 Ir. 130 (*g*).

And a condition determining her life interest if the testator's widow should marry a person of ample fortune to maintain her in comfort and affluence is valid. *Re Moore's Trusts*, 96 L. T. 44.

In the case of real estate such conditions are effectual even if there is no gift over. *Haughton* v. *Haughton*, 1 Moll. 611.

Doctrine of *in terrorem*.

In the case of personalty, and possibly in the case of realty and personalty given together (*Duddy* v. *Gresham*, 2 L. R. Ir. 443), certain conditions subsequent, though good in law, are,

in accordance with the rule of the Civil Law, held to be void, and *in terrorem* merely, if there is no gift over.

Of this nature are the conditions in partial restraint of marriage already mentioned. *Marples* v. *Bainbridge*, 1 Mad. 590; *Reynish* v. *Martin*, 3 Atk. 330; *Wheeler* v. *Bingham*, 1 Wils. 135; 3 Atk. 364; *W.* v. *B.*, 11 B. 621.

And the same rule applies to a condition not to contest the will. *Powell* v. *Morgan*, 2 Vern. 90.

But if there is a gift over, these conditions are effectual, the gift over being considered sufficient evidence, that they were not meant to be *in terrorem* merely. *Cleaver* v. *Spurling*, 2 P. W. 526; *Tricker* v. *Kingsbury*, 7 W. R. 652; *Charlton* v. *Coombes*, 11 W. R. 1038; *Craven* v. *Brady*, 1 Eq. 209; 4 Ch. 296.

Residuary gift and direction that legacy to fall into residue.

Though a residuary gift is not, a direction that on breach of the condition the legacy is to fall into residuo is, a gift over. *Wheeler* v. *Bingham*, 3 Atk. 364; *Lloyd* v. *Branton*, 3 Mer. 108.

Miscellaneous Conditions.

Apportionment of condition.

Where a testator directs that if a certain sum should be applied in favour of A, A should apply a sum of different amount in favour of B, the condition will be compulsory on A only if the whole of the sum in question is applied in his favour, and the condition will not be apportioned. *Caldwell* v. *Cresswell*, 6 Ch. 279; *Fazakerley* v. *Ford*, 4 Sim. 390.

Condition requiring release.

A condition requiring a release within a given time, with a gift over, if the release is not given within the time, must be literally complied with. *Simpson* v. *Vickers*, 14 Ves. 341, 348.

But if there is no gift over a release given within a reasonable time will satisfy the condition. *Simpson* v. *Vickers*, 14 Ves. 341; *Taylor* v. *Topham*, 1 B. C. C. 168; *Paine* v. *Hyde*, 4 B. 468; *Hollinrake* v. *Lister*, 1 Russ. 506; see *Scarlett* v. *Lord Abinger*, 34 B. 338; *Ledward* v. *Hussels*, 2 K. & J. 370.

A legacy given on condition of conveying real estate to a

third person gives a legatee, who has conveyed, no lien upon the land for the legacy. *Barker* v. *Barker*, 10 Eq. 438.

Ceasing to carry on business.

A condition of forfeiture, if legatees cease to carry on the testator's business, takes effect if they sell it to a company, although they become managing directors and in substance sole shareholders of the company. *In re Sax*; *Barned* v. *Sax*, 62 L. J. Ch. 688; 68 L. T. 849; 41 W. R. 584; 3 R. 638.

Condition must be clear.

"Where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the Court can see from the beginning precisely and distinctly upon the happening of what event it was that the preceding vested estate was to determine." *Clavering* v. *Ellison*, 7 H. L. 707, p. 725.

Conditions as to residence and education.

Upon this principle conditions requiring a beneficiary to "live and reside" in a mansion-house (*a*), and requiring children to be educated in England and in the Protestant religion (*b*) have been held too uncertain to be effective. *Fillingham* v. *Bromley*, T. & R. 530 (*a*); *Clavering* v. *Ellison*, 7 H. L. 707 (*b*).

But such conditions if penned with sufficient particularity can be made effectual.

"Reside and dwell."

A condition requiring a person to "reside and dwell" in a mansion-house has been held good against a person who declared her intention not to live there at all. *Dunne* v. *Dunne*, 7 D. M. & G. 207.

What residence implies.

A condition of residence imports personal presence, but it may be satisfied by keeping up an establishment at the house and visiting it occasionally without passing the night there. *Walcot* v. *Botfield*, Kay, 534; *Tagore* v. *Tagore*, 1 Ind. App. 387; *In re Moir*; *Warner* v. *Moir*, 25 Ch. D. 605; *see Wynne* v. *Fletcher*, 24 B. 430; *In re Wright*; *Mott* v. *Issott*, (1907) 1 Ch. 231.

Condition inapplicable to infant.

A condition defeating an estate if the taker refuses or neglects to do something—for instance, to reside in a mansion-house—does not apply to an infant who cannot be said to refuse or neglect to reside. *Parry* v. *Roberts*, 19 W. R. 1000; *Bean* v. *Mahon-Hagan*, 27 L. R. Ir. 399; 31 *ib.* 342; *Partridge* v. *Partridge*, (1894) 1 Ch. 351.

Effect of s. 51 of Settled Land Act.

The effect of sect. 51 of the Settled Land Act, 1882, upon conditions of residence is, that the tenant for life may sell and enjoy the income of the proceeds notwithstanding the condition, but if he does not sell he must perform the condition. *In re Paget's Settled Estates*, 30 Ch. D. 161; *In re Haynes: Kemp* v. *Haynes*, 37 Ch. D. 306; see *In re Edwards' Settlement*, (1897) 2 Ch. 412; *In re Fitzgerald: Brereton* v. *Day*, (1902) 1 Ir. 162; *In re Trenchard: Trenchard* v. *Trenchard*, (1902) 1 Ch. 378; *In re Richardson*, (1904) 2 Ch. 777.

Name and arms clause.

With regard to name and arms clauses, a name can be assumed by any one, even by an infant, without any licence or authority, and therefore such assumption is sufficient, unless the testator requires some other formality. *Doe* d. *Luscombe* v. *Yates*, 5 B. & Ad. 544; *Davies* v. *Lowndes*, 1 Bing. N. C. 618; *Beron* v. *Mahon-Hogan*, 27 L. R. Ir. 399; 31 *ib.* 342.

And, unless the name is to be assumed as a surname, it is sufficient if the devisee has the name, whether as a christian name or a surname. *Bennett* v. *Bennett*, 2 Dr. & S. 266.

If a surname is to be assumed, it may be assumed after, but not before, the beneficiary's own surname; but if it is to be assumed "alone or together" with the beneficiary's family name, it may be assumed before or after the family name. *D'Eyncourt* v. *Gregory*, 1 Ch. D. 411; *In re Eversley: Mildmay* v. *Mildmay*, (1900) 1 Ch. 96.

As to the occasions on which the name is to be used see *Re Drax's Will: Baroness Dunsany* v. *Sturbridge*, 94 L. T. 611.

It appears not to be settled, whether a person can assume arms without a grant from the Heralds' College. See Davidson, Prec., vol. 3, p. 361, n.; *Beron* v. *Mahon-Hogan*, 27 L. R. Ir. 399, 411; 31 *ib.* 342, 356.

"Lawfully" to assume arms.

But if he is "lawfully" to assume a coat of arms, he can only do so by a grant from the Heralds' College, by royal licence, or by Act of Parliament. *In re Croxon: Croxon* v. *Ferrers*, (1904) 1 Ch. 252.

Where the condition requires the beneficiary to use his best endeavours to obtain a grant of arms, the condition is not broken if he obtains a grant from the Heralds' College, though

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the arms granted are not the identical arms of the testator. *Austen* v. *Collins*, 54 L. T. 903.

Entering on a calling.

For a provision requiring a beneficiary to enter on a calling, see *Gabrey* v. *Barden*, (1899) 1 Ir. 508.

And for a condition requiring a charity to obtain from the public an amount equal to the legacy left by the testator, see *In re Glubb*; *Bamfield* v. *Rogers*, (1900) 1 Ch. 354.

A condition that a legatee is not to associate, correspond or visit with the testator's wife's nephews or nieces is void for uncertainty. *Jeffreys* v. *Jeffreys*, 84 L. T. 417.

Repugnant Conditions.

Conditions repugnant to the estate previously given are void. *In re Dugdale*; *Dugdale* v. *Dugdale*, 38 Ch. D. 176; *Corbett* v. *Corbett*, 13 P. D. 136; 14 P. D. 7.

Restraints upon alienation.

Thus, conditions in general restraint of alienation are bad, if absolute interests have been given in the first place.

Unlimited restraint.

1. Where there is a devise in fee, followed by an absolute restraint upon alienation, the restraint is void for repugnancy. Co. Litt. 222 b; *Hood* v. *Oglander*, 34 B. 513.

Limited restraint on alienation.

But a condition that the feoffee shall not alien "to such a one, naming his name, or to any of his heires, or of the issues of such a one, &c., or the like," is said to be good. Co. Litt. 223 a.

Upon this principle, conditions not to sell, except to a sister or sisters or their children, and not to sell out of the family, have been held valid. *Doe* d. *Gill* v. *Pearson*, 6 East, 173; *Re Macleay*, 20 Eq. 186; see *Ludlow* v. *Bunbury*, 35 B. 36; *Billing* v. *Welch*, I. R. 6 C. L. 88; see the principle discussed in *In re Rosher*; *Rosher* v. *Rosher*, 26 Ch. D. 801.

But a condition not to sell except to one person is bad, since a person might be selected who would be certain not to purchase. *Muschamp* v. *Bluett*, Bridg. 137; *Attwater* v. *Attwater*, 18 B. 330.

And conditions that, if the devisee in fee should wish to sell in the lifetime of the testator's wife, she should have the option of purchasing at a price, which was about one-fifth of the value of the estate, and that upon any sale the devisee is to pay a

legacy out of the proceeds, have been held to be bad. *In re Rosher*; *Rosher* v. *Rosher*, 26 Ch. D. 801; *In re Elliot*; *Kelly* v. *Elliot*, (1896) 2 Ch. 353; *Crofts* v. *Beamish*, (1905) 2 Ir. 349.

Alienation limited in time.

In re Rosher also decides that a restraint upon alienation is bad though limited in point of time. Upon this question, see, too, *Renaud* v. *Tourangeau*, L. R. 2 P. C. 4; *Large's Case*, 2 Leon. 82; 3 Leon. 182; 2 Jarm. 860; *Churchill* v. *Marks*, 1 Coll. 445; *Kiallmark* v. *Kiallmark*, 26 L. J. Ch. 1; *In re Dugdale*; *Dugdale* v. *Dugdale*, 38 Ch. D. 176; *Corbett* v. *Corbett*, 13 P. D. 136; 14 P. D. 7.

Alienation by particular form of conveyance.

In the same way, conditions restraining alienation by any particular form of conveyance, as by charge or mortgage, are bad. *Willis* v. *Hiscox*, 4 M. & Cr. 201; *Ware* v. *Cann*, 10 B. & Cr. 433.

Thus, a gift over of so much land as an absolute owner charges or incumbers would be bad. *Willis* v. *Hiscox*, *supra*.

The effect of the Settled Land Act, 1882, s. 51, upon conditions in restraint of alienation must also be borne in mind. *In re Ames*; *Ames* v. *Ames*, (1893) 2 Ch. 479; *Re Sudbury and Pointon Estates*; *Vernon* v. *Vernon*, 68 L. T. 707. See p. 629.

Direction not to raise rents.

Directions that the rents upon property devised are not to be raised have been held invalid. *A.-G.* v. *Catherine Hall*, Jac. 381; *A.-G.* v. *Greenhill*, 33 B. 193.

Gift over of personalty on alienation.

These rules apply to personalty, so that if an absolute interest is given (*a*), or even a life interest with a power of disposition by deed or will (*b*), a gift over if the legatee disposes of his interest is void. *Bradley* v. *Peixoto*, 3 Ves. 324; *In re Jones's Will*, 23 L. T. 211; *Metcalfe* v. *Metcalfe*, 43 Ch. D. 633; *In re Bourke's Trusts*, 27 L. R. Ir. 573 (*a*); *Re Wolstenholme*; *Marshall* v. *Aizlewood*, 43 L. T. 752 (*b*).

Gift over on alienation before time of distribution.

It is, however, clear that absolute interests in personalty, whether vested or contingent, may be given over upon alienation before the time of possession. *Kearsley* v. *Woodcock*, 3 Ha. 185; *Re Payne*, 25 B. 556; *Pearson* v. *Dolman*, 3 Eq. 315; *In re Porter*; *Coulson* v. *Capper*, (1892) 3 Ch. 481.

Defeasance on bankruptcy.

2. A condition giving over an estate in fee on bankruptcy of the devisee is void. *In re Machu*, 21 Ch. D. 838; *In re Dugdale; Dugdale* v. *Dugdale*, 38 Ch. D. 176.

Gift over if legatee dies intestate.

3. A gift over, if a devisee or legatee, to whom an absolute interest is given, does not dispose of his interest or dies intestate, or dies before selling his interest, is void both as regards realty and personalty. *Gulliver* v. *Vaux*, 8 D. M. & G. 167, n.; *Holmes* v. *Godson*, 8 D. M. & G. 152; *Barton* v. *Barton*, 3 K. & J. 512; *Lightbourne* v. *Gill*, 3 B. P. C. 250; *Re Mortlock's Trusts*, 3 K. & J. 456; *Re Valden*, 1 D. M. & G. 53; *Watkins* v. *Williams*, 3 Mac. & G. 622; *Henderson* v. *Cross*, 29 B. 216; *Perry* v. *Merritt*, 18 Eq. 152; *In re Wilcocks's Settlement*, 1 Ch. D. 229; *In re Jenkins' Trusts*, 23 L. R. Ir. 162; *Skeffoe* v. *Fitzgerald*, 23 L. R. Ir. 310, 466; *Parnell* v. *Boyd*, (1896) 2 Ir. 571; *In re Dixon; Dixon* v. *Charlesworth*, (1903) 2 Ch. 458; *In re Hanbury, Hanbury* v. *Foster*, (1904) 1 Ch. 415.

So a direction, following a devise to tenants in common in fee, that if no distribution should be made during the lives of the tenants in common the property should devolve to their children is invalid. *Shaw* v. *Ford*, 7 Ch. D. 669.

Such conditional gifts over are good according to Scotch law. *Barstow* v. *Pattison*, L. R. 1 H. L. Sc. 392.

After a devise to A and his heirs, a gift over if A shall die without leaving lawful issue to his next heir-at-law is void. *In re Parry and Daggs*, 31 Ch. D. 130; see *Gulliver* v. *Vaux*, 8 D. M. & G. 167, n.

It has been held, that a gift over if the legatee does not dispose of his interest, does not become valid by his death in the testator's lifetime. *Hughes* v. *Ellis*, 20 B. 193; *Greated* v. *Greated*, 26 B. 621. These cases were followed in *In re Jenkins' Trusts*, 23 L. R. Ir. 162; but they were doubted in *In re Stringer*, 6 Ch. D. 1, and disapproved, if not directly overruled, in *In re Lowman; Devenish* v. *Pester*, (1895) 2 Ch. 348.

Gift over if previous gift is void.

4. A gift over in the event of a previous gift being void at law or in equity is good. *De Themmines* v. *De Bonneval*, 5 Russ. 288; *In re Crawshay; Crawshay* v. *Crawshay*, 43 Ch. D. 615.

Condition not to bar entail.

5. A tenant in tail cannot by condition subsequent be prevented from barring his estate tail. *Dawkins* v. *Lord Penrhyn*, 4 App. C. 51; see *Millbank* v. *Vane*, (1893) 3 Ch. 79.

Condition determining an estate tail in part.

A condition intended to determine an estate tail in part only, for instance, a clause directing that the interests of tenants in tail shall cease as concerns the rights and interests of the person making default, but not farther or otherwise, is void. *Seymour* v. *Vernon*, 10 Jur. N. S. 487; 12 W. R. 729.

Estate tail to cease as if the tenant in tail were dead.

A condition in certain events determining estates tail, as if the tenant in tail were dead, will be made good by supplying the words dead without issue. *Astley* v. *Earl of Essex*, 18 Eq. 290.

Absolute interest directed to cease as if the donee were dead.

But, if an absolute interest has been given, such a condition will be ineffectual, since the legatee's interest would not determine with his death, and, therefore, the interest directed to cease is not the exact interest previously given. *Bird* v. *Johnson*, 18 Jur. 976; *Cutt's Trusts*, 2 H. & M. 46; 33 L. J. Ch. 495; *Musgrave* v. *Brooke*, 26 Ch. D. 792. See *In re Cornwallis: Cornwallis* v. *Wykeham-Martin*, 32 Ch. D. 388.

Conditions postponing enjoyment beyond 21.

6. So, too, when vested interests have once been given, restrictions postponing the enjoyment of the property beyond the age of twenty-one are void, unless the property is otherwise disposed of in the meantime. *Saunders* v. *Vautier*, Cr. & Ph. 240; *Rocke* v. *Rocke*, 9 B. 66; *Re Young's Settlement*, 18 B. 199; *Gosling* v. *Gosling*, Johns. 265; *Wharton* v. *Masterman*, (1895) A. C. 186; *In re Couturier: Couturier* v. *Shea*, (1907) 1 Ch. 470.

Embracing religious life.

7. A provision cutting down legacies, if the legatees should embrace a religious life, has been held to be repugnant and void. *In re Thompson; Griffith* v. *Thompson*, 44 W. R. 582.

Forfeiture on Alienation, Bankruptcy, &c.

Meaning of the term alienation.

Where property is given over upon alienation the term includes only voluntary alienation, and not a hostile bankruptcy. *Lear* v. *Leggett*, 1 R. & M. 690; *Pym* v. *Lockyer*, 12 Sim. 394; *Graham* v. *Lee*, 23 B. 388; *Re Kelly's Settlement;*

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West v. *Turner*, 59 L. T. 494; *Re Harvey: Ex parte Pixley* v. *Harvey*, 60 L. T. 710; 37 W. R. 620; see *Cooper* v. *Wyatt*, 5 Mad. 482.

But the presentation of a petition by the legatee under the Insolvent Debtors Act, or under the arrangement clauses of the Bankruptcy Act, 1869, is a voluntary alienation. *Shee* v. *Hale*, 13 Ves. 404; *Brandon* v. *Aston*, 2 Y. & C. C. 21; *Churchill* v. *Marks*, 1 Coll. 441; *Martin* v. *Margham*, 14 Sim. 230; *Rochford* v. *Hackman*, 9 Ha. 475; *In re Amherst's Trusts*, 13 Eq. 464; see *Ex parte Dawes; In re Moon*, 17 Q. B. D. 275.

The presentation by the debtor of a petition under the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), is not by itself an alienation, but if followed by adjudication it is. *Ex parte Dawes; In re Moon*, 17 Q. B. D. 275; *In re Colgrave; Mynors* v. *Colgrave*, (1903) 2 Ch. 705; see *In re Riggs; Ex parte Lovell*, (1901) 2 K. B. 16.

Warrant of attorney.

The execution of a warrant of attorney for a debt is not a charging within the meaning of a forfeiture clause. *Croft* v. *Lumley*, 6 H. L. 672; *Arison* v. *Holmes*, 1 J. & H. 530.

Mortgage.

Possibly a mortgage is not in itself an alienation. *Josef* v. *Mulder*, (1903) A. C. 190.

Assignment on trust for assignor.

An assignment to trustees upon trust for the assignor is not a disposition by him within such a forfeiture clause. *Lockwood* v. *Sikes*, 51 L. T. 562; *In re Tancred's Settlement; Somerville* v. *Tancred*, (1903) 1 Ch. 715.

Income accrued due.

Gifts over upon alienation are directed against disposing of the property by way of anticipation; they do not, unless the language is very clearly expressed, apply to dispositions of income already accrued due. *In re Stulz's Trusts*, 4 D. M. & G. 404; *Sutton, Carden & Co.* v. *Goodrich*, 80 L. T. 765; see *In re Sampson; Sampson* v. *Sampson*, (1896) 1 Ch. 630; *Durran* v. *Durran*, 91 L. T. 187, 819.

Garnishee order.

A garnishee order, therefore, which only affects income actually accrued due, does not work a forfeiture. *In re Greenwood; Sutcliffe* v. *Gledhill*, (1901) 1 Ch. 887.

"Do or suffer."

If the property is given over if the legatee should "do or suffer," or "do or permit," anything whereby the property

would be vested in another, this includes a hostile bankruptcy. *Roffey* v. *Bent*, 3 Eq. 759; *Ex parte Eyston*; *In re Throckmorton*, 7 Ch. D. 145.

Under similar words the issue of a writ of sequestration against the legatee has been held to work a forfeiture. *Dixon* v. *Rowe*, 35 L. T. 549.

"Payable to or vested in."

A gift over, if the legatee does or suffers something whereby the property would "become payable to or vested in" another, includes a receiving order in bankruptcy (*a*) but not a Scotch sequestration (*b*), nor an adjudication in bankruptcy in New Zealand of a domiciled Englishman (*c*). *In re Sartoris's Estate*; *Sartoris* v. *Sartoris*, (1892) 1 Ch. 11; see *Ex parte Dawes*; *In re Moon*, 17 Q. B. D. 275 (*a*); *Re James*; *Clutterbuck* v. *James*, 62 L. T. 454 (*b*); *In re Hayward*; *Hayward* v. *Hayward*, (1897) 1 Ch. 905 (*c*). See also *In re Brewer's Settlement*; *Morton* v. *Blackmore*, (1896) 2 Ch. 503.

Gift over on charging takes effect though incumbrancer afterwards disclaims.

A gift over upon incumbering takes effect, if the legatee executes a charge, which is accepted by the incumbrancer, though upon hearing of the forfeiture clause he disclaims the charge. *Hurst* v. *Hurst*, 21 Ch. D. 278; *In re Baker*; *Baker* v. *Baker*, (1904) 1 Ch. 157.

A clause forfeiting an annuity on an attempt to sell it takes effect if the annuitant petitions for the benefit of the Insolvent Debtors Act. *Martin* v. *Maryham*, 14 Sim. 230.

If legatee deprived or liable to be deprived.

A gift over if the legatee does or suffers anything whereby he would be deprived or liable to be deprived of the enjoyment of the property, takes effect upon presentation of a bankruptcy petition. *In re Loftus-Otway*; *Otway* v. *Otway*, (1895) 2 Ch. 235.

Attempt to charge.

A gift over if the legatee should attempt to assign or charge his legacy takes effect, if the legatee executes a settlement purporting to assign it, although the assignment is by law inoperative (*a*); but it does not take effect on his executing a document purporting to be an equitable assignment if he had no intention to create a charge by the document (*b*). *In re Porter*; *Coulson* v. *Capper*, (1892) 3 Ch. 481; see *In re Tancred's Settlement*; *Somerville* v. *Tancred*, (1903) 1 Ch. 715 (*a*); *In re Sheward*; *Sheward* v. *Brown*, (1893)

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3 Ch. 502 (*b*); see *Re Spearman*; *Spearman* v. *Lowndes*, 82 L. T. 302.

A settlement of property, to which the settlor will be entitled under A's will, will not include a life interest given by A, but subject to forfeiture on attempted alienation. *In re Crawshay*; *Walker* v. *Crawshay*, (1891) 3 Ch. 176.

Anticipation.

A gift over, on anticipating a life interest given without power of anticipation does not take effect on the execution of a mortgage during coverture. *In re Wormald*; *Frank* v. *Mazeen*, 43 Ch. D. 630.

Taking in execution.

A gift over, if the life interest of the beneficiary "should be taken in execution by any process of law," applies to equitable execution. *Blackman* v. *Fysh*, (1892) 3 Ch. 209.

Deed of inspectorship.

The execution of a deed of inspectorship is not within a gift over in the event of the legatee taking the benefit of any Act for the relief of insolvent debtors. *Montefiore* v. *Guthrie*, 5 Eq. 35.

As to the meaning of alienation, see *Arison* v. *Holmes*, 1 J. & H. 530, p. 540.

Legal disability.

The expression legal disability means a disability arising from act of law and does not include a disability arising from the act of the legatee. *In re Carew*; *Carew* v. *Carew*, (1896) 2 Ch. 311.

Meaning of insolvency.

Insolvency has no technical meaning, but means inability to pay debts. *Freeman* v. *Bowen*, 35 B. 17; *Re Muggeridge*, Joh. 625; 29 L. J. Ch. 288; see *De Tastet* v. *Le Tavernier*, 1 Kee. 161; *Billson* v. *Crofts*, 15 Eq. 314; *Nixon* v. *Verry*, 29 Ch. D. 196.

A declaration of insolvency in S. Australia is insolvency within the meaning of a gift over upon insolvency. *Agheid's Trusts*, 16 Eq. 585; see *In re Levy's Trusts*, 30 Ch. D. 119; *In re Broughton*; *Peat* v. *Broughton*, 57 L. T. 8.

Marriage.

A gift over of a life interest given to the testator's widow in the event of her doing anything, whereby she would be deprived of the right to receive the rents, took effect under the old law upon the marriage of the widow without making any settlement. *Craven* v. *Brady*, 4 Eq. 209; 4 Ch. 296.

Power of attorney.

The execution of an irrevocable power of attorney to receive an annuity is within a clause of forfeiture in the event of assignment or disposition by way of anticipation. *Oldham* v. *Oldham*, 3 Eq. 404.

Gift over upon bankruptcy includes a subsisting bankruptcy.

Where the property is given over upon bankruptcy, the gift over *primâ facie* includes a bankruptcy which takes place after the date of the will and is subsisting at the testator's death, notwithstanding strong words of futurity. *Yarnold* v. *Moorhouse*, 1 R. & M. 361; *Metcalfe* v. *Metcalfe*, (1891) 3 Ch. 1.

And it has been held to include a bankruptcy, which took place before the date of the will, and was subsisting at the death. *Manning* v. *Chambers*, 1 De G. & S. 282; *Seymour* v. *Lucas*, 1 Dr. & Sm. 177; *Trappes* v. *Meredith* (No. 2), 10 Eq. 604; 7 Ch. 248; see *West* v. *Williams*, (1899) 1 Ch. 132.

But the same construction will not be applied to a gift over on marriage without consent, though it is coupled with bankruptcy and alienation. *In re Chapman; Perkins* v. *Chapman*, (1904) 1 Ch. 431, affirmed *Chapman* v. *Perkins*, (1905) A. C. 106.

A bankruptcy annulled before the time of distribution will not work a forfeiture.

Since the object of the gift over is merely to preserve the property from going to strangers, if the bankruptcy is annulled before any payment accrues due, the forfeiture does not take effect. *White* v. *Chittu*, L. R. 1 Eq. 372; *Lloyd* v. *Lloyd*, L. R. 2 Eq. 722; *Trappes* v. *Meredith*, 9 Eq. 229; *In re Parnham's Trusts*, 46 L. J. Ch. 80; 13 Eq. 413; *Samuel* v. *Samuel*, 12 Ch. D. 152; see *Robins* v. *Rose*, 43 L. J. Ch. 334; *Robertson* v. *Richardson*, 30 Ch. D. 623; *Re Broughton; Peat* v. *Broughton*, 57 L. T. 8; *In re Loftus-Otway; Otway* v. *Otway*, (1895) 2 Ch. 235.

In the case of an immediate gift, it appears the forfeiture will not take effect where the bankruptcy is annulled within a year from the testator's death if there is no right to any payment till then. *Lloyd* v. *Lloyd*, L. R. 2 Eq. 722; *Ancona* v. *Waddell*, 10 Ch. D. 157.

This principle would not apply if one of the terms of the annulment is, that the dividends accruing up to that time should be paid to the assignee. *In re Parnham's Trusts*, 13 Eq. 413.

These principles have no application where the freedom from bankruptcy is a condition precedent to the vesting. *Cox* v. *Faublanque*, 6 Eq. 482; see *Samuel* v. *Samuel*, *supra*.

Bankruptcy during prior life estate.

Similarly, if the life interest given over on bankruptcy is subject to a prior life interest, the gift over takes effect on a bankruptcy during the life of the prior tenant for life. *Sharp* v. *Casserat*, 20 B. 470; *Muggeridge' Trusts*, Johns. 625.

And a gift over upon bankruptcy will carry over an accrued share directed to go in the same manner as the original share, though not accruing till after bankruptcy. *Dorsett* v. *Dorsett*, 30 B. 250.

Date from which forfeiture takes effect.

In the case of forfeiture by bankruptcy, the forfeiture takes effect as from the act of bankruptcy, and not as from the adjudication. *Montefiore* v. *Guedalla*, (1901) 1 Ch. 435.

Penal servitude.

A proviso for cesser if the beneficiary "should by his own act or by operation of law be deprived of the absolute personal enjoyment" of his interest does not take effect by the beneficiary being convicted of felony and sentenced to penal servitude. *Re Dash*, *Darley* v. *King*, 57 L. T. 219.

Separate Use.

Separate estate.

Under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 2, every woman married since the Act may hold as her separate property, and dispose of as if she were a *feme sole*, all real and personal property belonging to her at the time of her marriage or acquired or devolving upon her after marriage.

And by sect. 5, every woman married before the Act may hold and dispose of in manner aforesaid, as her separate property, all real and personal property, the title to which accrues after the commencement of the Act.

Where a married woman is entitled before the commencement of the Act to a reversionary interest in property which falls into possession after the commencement of the Act, or to land which is sold under an overriding power after the commencement of the Act, her title does not accrue after the commencement of the Act (*a*); but a mere *spes successionis* before the commencement

of the Act as one of the next of kin of a living person, under a gift in favour of next of kin, is not a title at all (*b*). *Reid* v. *Reid*, 31 Ch. D. 402; *In re Bacon*; *Tovey* v. *Turner*, (1907) 1 Ch. 475 (*a*); *In re Parsons*; *Stockh* .. *Parsons*, 45 Ch. D. 51, not following *In re Beaupré's Trusts*, 21 L. R. Ir. 397 (*b*).

In the cases above mentioned a married woman may take and dispose of the legal estate in land, without deed acknowledged, if it is vested in her in her own right or as mortgagee, but not if it is vested in her as trustee, unless she is a bare trustee within the meaning of sect. 16 of the Trustee Act, 1893 (56 & 57 Vict. c. 53). *In re Drummond and Davie's Contract*, (1891) 1 Ch. 524; *In re Harkness and Allsopp*, (1896) 2 Ch. 358; *In re Brooke and Fremlin*, (1898) 1 Ch. 647; *In re Hoe-gate and Osborn*, (1902) 1 Ch. 451; *In re West and Hardy*, (1904) 1 Ch. 145.

The Act does not affect the husband's right, on his wife's death, to her undisposed-of personalty, nor destroy his tenancy by the curtesy in her undisposed-of real estate. *In re Lambert's Estate*; *Stanton* v. *Lambert*, 39 Ch. D. 626; *Surman* v. *Wharton*, (1891) 1 Q. B. 491; *Hope* v. *Hope*, (1892) 2 Ch. 336.

Separate use.

Before the Married Women's Property Act, 1882, it was settled that the corpus as well as the income of real or personal estate might be given to the separate use of a married woman. *Taylor* v. *Meads*, 4 D. J. & S. 607; *Cooper* v. *Macdonald*, 7 Ch. D. 288.

If she disposed of land settled to her separate use, her disposition defeated the husband's title by the curtesy. *Cooper* v. *Macdonald*, *supra*.

The separate use may of course be so framed as to apply to income or to the rents and profits only, and not to the corpus (*a*), or it may be limited to a particular coverture (*b*). *Crosby* v. *Church*, 3 B. 485; *Hanchett* v. *Briscoe*, 22 B. 496; *Troutbeck* v. *Boughey*, L. R. 2 Eq. 534 (*a*); *Shute* v. *Hoyge*, 58 L. T. 546 (*b*).

Separate use before the Married Women's Property Act, 1882.

In cases not within the Married Women's Property Act, 1882, the effect of the separate use as regards the capital is to give the married women a power of disposition.

If the married woman does not exercise her power of disposition the separate use is exhausted, and upon her death the husband's rights revive.

Effect of separate use on curtesy.

Therefore, in the case of land given to the separate use of a married woman who dies without making a disposition, the husband is entitled to an estate by the curtesy. *Roberts* v. *Dixwell*, 1 Atk. 607; *Follett* v. *Tyrer*, 14 Sim. 125; *Appleton* v. *Rowley*, 8 Eq. 139; *Cooper* v. *Macdonald*, 7 Ch. D. 288; overruling *Hearle* v. *Greenbank*, 3 Atk. 675, 715, 716; 1 Ves. Sen. 298, and *Moore* v. *Webster*, 3 Eq. 267.

The case of *Bennett* v. *Davis*, 2 P. W. 316, is sometimes cited as an authority, that an express declaration, that curtesy is not to attach to lands given to the separate use of a married woman, would be effectual, where no disposition is made of the lands. The question did not arise in the case, as both husband and wife were alive.

Chattels real to separate use.

Chattels real belonging to the wife to her separate use vest in the husband, *jure mariti*, if she dies without disposing of them. *Archer* v. *Lavender*, I. R. 9 Eq. 220.

Chattels in possession.

And it seems chattels in possession belonging to the wife to her separate use, and not disposed of, belong to the husband without the necessity of taking out administration to the wife. *Molony* v. *Kennedy*, 10 Sim. 254; *Bird* v. *Peagram*, 13 C. B. 639.

In cases not within the Married Women's Property Act, 1882, the marital right will be held to be excluded only by a clear indication of intention to exclude it.

What words create a separate use.

The word "separate" is sufficient for this purpose, whether the legatee is married or not. *Archer* v. *Rorke*, 7 Ir. Eq. 478.

On the other hand, such words as "own use," "absolute use," or to pay to "her own proper hands," are not enough, whether the legatee is married or single, or whether trustees are interposed or not. *Rycroft* v. *Christy*, 3 B. 238; *Tyler* v. *Lake*, 2 R. & M. 183; *Blacklow* v. *Laws*, 2 Ha. 49; *Taylor* v. *Stainton*, 2 Jur. N. S. 634; *Wills* v. *Sayer*, 4 Mad. 409; *Roberts* v. *Spicer*, 5 Mad. 491; *Beales* v. *Spencer*, 2 Y. & C. C. 651.

But if the legatee is married at the time and the legacy is directed to be at her own disposal, a separate use is created. *Kirk* v. *Paulin*, 7 Vin. Ab. 95, pl. 43; *Prichard* v. *Ames*, T. & R. 222; *Bland* v. *Daces*, 17 Ch. D. 794. Disposal.

Directions that the receipt of a legatee, "notwithstanding coverture," and that her "sole and separate receipt" should be a good discharge, have been held to create a separate use. *Cooper* v. *Wells*, 11 Jur. N. S. 923; *In re Molyneux's Estate*, I. R. 6 Eq. 411. Separate receipt.

The same has been held where the legatee was married, and her receipt was declared to be a sufficient discharge. *Lee* v. *Prideaux*, 3 B. C. C. 381; *Re Lorimer*, 12 B. 521.

And where a legacy was given, if husband and wife should not be living together, half to the husband and half to the wife absolutely, the wife took to her separate use. *Sherrell* v. *Dearris*, Johns. 172.

So, too, a direction that the devisee is to receive the rents herself, whether married or single, creates a separate use. *Goulder* v. *Camm*, 1 D. F. & J. 146.

Probably a gift for the maintenance and support of a woman referred to by the testator as married would create a separate use. *Darley* v. *Darley*, 3 Atk. 399; *Cape* v. *Cape*, 2 Y. & C. Ex. 513; see *Wardle* v. *Claxton*, 9 Sim. 524. Maintenance.

And a power given to trustees to apply income for the maintenance and support of a widow authorises payment of the income to her separate use. *Austin* v. *Austin*, 4 Ch. D. 233; see *In re Peacock's Trusts*, 10 Ch. D. 490.

The word "sole" may in some cases be sufficient to create a separate use, but *primâ facie* it has no such technical meaning, and the burden of proof is upon those who assert it has. *Lewis* v. *Mathews*, L. R. 2 Eq. 177; *Massey* v. *Rowen*, I. R. 1 Eq. 110; L. R. 4 H. L. 288. Effect of the word "sole" in creating a separate use.

In a marriage settlement, where the whole object is to secure to the wife a separate estate, the word may have the force of separate. *Ex parte Ray*, 1 Mad. 199.

But in a will where no such intention can be presumed, further indication is necessary.

T.W.

Chap. XLVI.

a. A gift to "A, the wife of B, for her sole use," creates a separate use. *Inglefield* v. *Coghlan*, 2 Coll. 247; *Farrer* v. *Smith*, W. N. 1877, 21; *In re Amies' Estate*; *Milner* v. *Milner*, W. N. 1880, 16; *Bland* v. *Dowes*, 17 Ch. D. 794.

b. The same has been held where, though the legatee was not in the gift to her referred to as married, it appeared from other parts of the will that she was a married woman. *Green* v. *Britten*, 1 D. J. & S. 649; *Hartford* v. *Power*, 1. R. 2 Eq. 204.

But this is not the case if the legatee be the testator's own wife, so that she must be discovert when the will takes effect. *Gilbert* v. *Lewis*, 1 D. J. & S. 38; *Green* v. *Marsden*, 1 Dr. 646.

c. If the legatee is unmarried at the time, but the testator shews that he contemplates her marriage, and expressly wishes to guard against the claims of a future husband, the same effect will follow. *Ex parte Killick*, 3 M. D. & De G. 480; *In re Tarsey's Trust*, L. R. 1 Eq. 561; see *Baker* v. *Ker*, 11 L. R. Ir. 3.

d. So, too, if a trust is created confined to the particular gift, and no other motive for it is discernible. *Adamson* v. *Armitage*, 19 Ves. 416.

But the mere interposition of trustees will not give the word the force of separate, if the trust is created for the general purposes of the will, and not confined to the particular gift. *Massey* v. *Rowen*, L. R. 4 H. L. 288.

Restraint upon Anticipation.

Restraint upon anticipation.

A married woman may be restrained from anticipating the rents and profits of real estate and the income of personalty given to her separate use; a restraint upon anticipation may also be imposed upon corpus.

A married woman cannot get rid of the restraint by admission or estoppel or in any other way by her own act. *Lady Bateman* v. *Faber*, (1898) 1 Ch. 144.

A restraint upon anticipation imposed by the will of an English testator binds a legatee domiciled in a country where

such a restraint is not recognised. *Pullon* v. *Brooking*, 25 B. 218.

The restraint can only be imposed upon property belonging to the separate use, whether by virtue of the Married Women's Property Act or otherwise. *Baggett* v. *Meux*, 1 Coll. 138; *Stogdon* v. *Lee*, (1891) 1 Q. B. 661; *In re Lumley: Ex parte Hood Barrs*, (1896) 2 Ch. 690.

A restraint upon anticipation is not inconsistent with the life estate being given without impeachment of waste. *In re Lumley*, *supra*.

If property is given to a married woman for her separate use for life with power to appoint it by deed or will, with a direction that an appointment by deed shall not take effect till after her death, this direction does not amount to a restraint on anticipation. *Alexander* v. *Young*, 6 Ha. 393.

A restraint upon anticipation, applicable to the rents of real estate devised to a married woman in tail, does not prevent her from enlarging the estate tail to a fee with her husband's consent. *Cooper* v. *Macdonald*, 7 Ch. D. 289.

The case would probably be the same if the restraint upon anticipation were expressly applied to the corpus. *Cooper* v. *Macdonald*, *supra*.

A married woman entitled to real estate for life to her separate use without power of anticipation, with a testamentary power of disposition, may release her power under the Act for the abolition of fines and recoveries. *Heath* v. *Wickham*, 5 L. R. Ir. 285.

Restraint applied to corpus of property producing income.

In the case of a restraint upon anticipation applied to the corpus of real estate, the effect appears to be to restrain the married woman from disposing either of the income of the corpus during coverture except by will. *Baggett* v. *Meux*, 1 Coll. 138; 1 Ph. 627.

Restraint upon anticipation of fund of personalty.

In the case of a fund of personalty given to a married woman with a restraint upon anticipation, a distinction has been drawn between a fund invested so as to produce income, and a gift of a share of proceeds of sale or cash not producing income, the restraint upon anticipation being held effectual in the former case, and ineffectual in the latter. See *In re Ellis' Trusts*, 17

Eq. 409; *In re Croughton's Trusts*, 8 Ch. D. 460; *In re Benton; Smith* v. *Smith*, 19 Ch. D. 277; *In re Clarke's Trusts*, 21 Ch. D. 748; *In re Taber; Arnold* v. *Kayes*, 46 L. T. 805; 51 L. J. Ch. 721; 30 W. R. 883; *In re Coombes; Coombes* v. *Parfitt*, W. N. 1883, 169; see, too, *Re Succi*, 4 N. R. 321; 10 Jur. N. S. 876; *Re Gaskell's Trusts*, 11 Jur. N. S. 780; *Re Sykes' Trusts*, 2 J. & H. 415.

This distinction is now overruled. The true test is, does the testator intend the fund to be paid to the married woman, or does he intend her to enjoy it only in the shape of income. *In re Boen: O'Halloran* v. *King*, 27 Ch. D. 411.

Direction to pay.

a. Where a fund is given immediately to a legatee with a direction to pay it to her, the direction to pay overrides a restraint on anticipation. *In re Grey's Settlements; Meason* v. *Greenwood*, 34 Ch. D. 85, 712 (as to the 1,500*l.*, which was not, however, before the Court); *In re Ferron; Hotchkin* v. *Major*, 45 W. R. 232; *Russell* v. *Lawder*, (1904) 1 Ir. 328.

Fund to be held by trustees.

b. But where a fund is given on trust for a legatee, a restraint on anticipation will be effectual; and the fact that the fund is given after a life interest or a period of accumulation, does not of itself show that the restraint on anticipation was meant to cease when the fund fell into possession. *In re Grey's Settlements, supra; In re Tippetts and Newbould's Contract*, 37 Ch. D. 444; *Re Holmes: Hallows* v. *Holmes*, 67 L. T. 335; see *In re Currey; Gibson* v. *Way*, 32 Ch. D. 361.

In the case of a reversionary interest, the restraint may be intended to apply only until it falls into possession. *In re Boen; O'Halloran* v. *King*, 27 Ch. D. 411; *Re Milward; Steadman* v. *Hobday*, 87 L. T. 476.

Where there was a direction to accumulate the income of a fund and the rents of realty during the life of an annuitant and after her death to stand possessed of the fund and realty with the accumulations in trust for a married woman, whom the testator restrained from anticipation during the annuitant's life, it was held that the restraint was effectual, and the married woman could not stop the accumulations. *In re Spencer; Thomas* v. *Spencer*, 30 Ch. D. 183.

Determines with coverture.

The restraint upon anticipation attaches only to the separate estate, and therefore determines with coverture. *Barton* v. *Briscoe*, Jac. 603; *Jones* v. *Salter*, 2 R. & M. 208; *Woolmerston* v. *Walker*, 2 R. & M. 197; see *In re Wheeler: Briggs* v. *Ryan*, (1899) 2 Ch. 717.

If nothing is done with the property in the meantime it revives on future coverture. *Tullett* v. *Armstrong*, 1 B. 1; 4 M. & Cr. 390; *Scarborough* v. *Borman*, 1 B. 34; 4 M. & Cr. 378; *Re Gaffee*, 1 Mac. & G. 541; see *Hamilton* v. *Hamilton*, (1892) 1 Ch. 396.

The restraint may be confined to marriage with a particular husband by name. *Morris* v. *Morris*, 4 Dr. 34; *Hawkes* v. *Hubback*, 11 Eq. 5; see *In re Molyneux's Estate*, I. R. 6 Eq. 411.

A sale or conversion of the property destroys the separate use. *Wright* v. *Wright*, 2 J. & H. 647.

What will create a restraint upon anticipation.

Difficulties have sometimes arisen as to what words are necessary to create a restraint on anticipation.

A direction that there is to be no sale or mortgage of the estate devised or the rents arising from it during the life of the devisee, amounts to a restraint on anticipation. *Baggett* v. *Meux*, 1 Coll. 138; 1 Ph. 627; *Gaubler* v. *Cumin*, 1 D. F. & J. 146; *Steedman* v. *Poole*, 6 Ha. 193; see, however, *Re Hutchings to Burt*, 59 L. T. 490.

The same has been held of a direction that the receipts of the devisee alone, after the payment of the rents devised shall have become due, should be sufficient discharges. *Field* v. *Evans*, 15 Sim. 375; *Baker* v. *Bradley*, 7 D. M. & G. 597; *White* v. *Herrick*, 21 W. R. 454; *In re Smith: Chapman* v. *Wood*, 51 L. T. 501.

But a direction to pay to the legatee personally, or on her receipt alone, will not restrain anticipation. *Re Ross's Trust*, 1 Sim. N. S. 196; *Wagstaff* v. *Smith*, 9 Ves. 520, 524; *Acton* v. *White*, 1 S. & St. 429.

When the legatee has a power to appoint the accruing rents, but not by way of anticipation, and in default of appointment there is a gift to her for her separate use, the restraint upon anticipation applies only to the exercise of the power. *Barrymore* v. *Ellis*, 8 Sim. 1; *Medley* v. *Horton*, 14 Sim. 222.

But if the gift in default of appointment is followed by a receipt clause applied to the same rents as those she has power to appoint, the restraint upon anticipation will extend to the whole gift. *Moore* v. *Moore*, 1 Coll. 54; *Brown* v. *Bamford*, 1 Ph. 620.

Restraint ceases as regards income due.

A restraint upon anticipation does not affect income which has accrued due though not paid. *Hood Barrs* v. *Heriot*, (1896) A. C. 174; overruling *Cox* v. *Bennett*, (1891) 1 Ch. 617; *Hood Barrs* v. *Cathcart*, (1894) 2 Q. B. 559; *Pillers* v. *Edwards*, 71 L. T. 788, so far as *contra*.

A judgment against a married woman restrained from anticipation can therefore be enforced against income due at the date of the judgment, but not against income afterwards becoming due. *In re Lumley*, (1896) 2 Ch. 690; *Whiteley* v. *Edwards*, (1896) 2 Q. B. 48; *Bolitho & Co.* v. *Gidley*, (1905) A. C. 98.

Apportioned part not assignable.

But a married woman restrained from anticipation cannot assign an apportioned part of the income accruing at the date of the assignment. She can only assign what has actually become payable according to the instrument under which it is payable. *In re Brettle; Jollands* v. *Burdett*, 2 D. J. & S. 79.

Costs out of property subject to restraint.

Sect. 2 of the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), provides that in any action or proceeding instituted by a woman or by a next friend on her behalf, the Court may order payment of the costs of the opposite party out of property subject to a restraint upon anticipation.

The section applies to an appeal or an application for judgment or a new trial by a married woman who is plaintiff in the action (*a*), but not to an appeal by a married woman who is defendant in the action (*b*). *Drexel* v. *Ellis*, (1905) 1 K. B. 574 (*a*); *Hood Barrs* v. *Cathcart*, (1894) 3 Ch. 376; *Hood Barrs* v. *Heriot*, (1897) A. C. 177 (*b*). See, too, *Crickett* v. *Crickett*, (1902) P. 177.

The order is not a matter of course, but the onus lies on the married woman to show why the order should not be made. The mere fact that the husband is a co-plaintiff is not a reason for refusing an order. *Pawley* v. *Pawley*, (1905) 1 Ch. 593; *Marchioness of Huntly* v. *Gaskell*, (1905) 2 Ch. 656.

CANADIAN NOTES.

To pay legacies.

A devise to A. on condition that he pay certain legacies within a certain time is a condition subsequent. *Lundy* v. *Maloney*, 11 C.P. 143.

To pay debts of another.

A devise subject to a condition that the devisee pay the debts of another person than the testator renders the land subject to such debts unconditionally. *Botsford* v. *Botsford*, 11 N.B.R. 458.

As security only.

A devise to A. "for which he is to pay . . . for use and benefit of B." certain moneys, and on default the executors to sell for the benefit of B. or convey to B., is a devise on condition for the purpose of securing B. only, and the executors having conveyed to B., A. was held entitled to redeem. *Carson* v. *Carson*, 6 Gr. 368.

Becoming impossible.

If a condition subsequent, as to maintain A., becomes impossible by reason of A.'s death, the gift is absolute. *Graham* v. *Bolton*, 9 O.R. 481.

A devise on condition that the devisee pay off a certain mortgage, is a condition subsequent, and the testator paying off the mortgage in his lifetime, the devise is absolute. *McKinnon* v. *Lundy*, 21 A.R. 560. The judgment was reversed on another point in the Supreme Court of Canada, 24 S.C.R. 650.

Legacy during ownership of estate, expropriation.

A bequest to enable A. to keep up a mansion house and grounds as long as he remains the owner and actual occupant, is not forfeited if part of the land is expropriated under statutory authority. *Re Macklem & Commissioners of N. F. Park*, 14 A.R. 20.

Occupation.

And the condition as to occupation, made by the same bequest, is fulfilled by occupation by a servant, caretaker, or farmer working the land in partnership with the legatee. *Macklem* v. *Macklem*, 19 O.R. 482.

Request for performance.

A devise of land to be divided between children of a first wife, provided that they should assist the second wife (widow) of the testator in managing property devised to her, gives a vested estate to the children of the first wife, subject to be divested on breach of the condition as to assisting, but a re-

quest for assistance must first be shewn before failure to assist becomes a breach. *Doe dem. Myers* v. *Babineau*, 11 N.B.R. 89.

Condition broken, estate does not cease.

Where a condition subsequent is broken, the estate given on the condition does not terminate until the party next entitled does some act to avoid it. *Leech* v. *Leech*, 16 Gr. 572.

When performance required.

Liberty to occupy land, provided that the licensee supports the testator's widow, requires performance of the condition to support only in case of occupying; and there is no breach if no occupation. *Dougherty* v. *Carson*, 7 Gr. 31.

For occupation not broken by temporary absence.

A devise to A., with the right to B. "to have her own free will to stay on the premises. . . . and for her to have a quiet home and maintenance as long as she may think good to hold to the same privilege," is on condition, and does not become absolute by B.'s not continuously residing on the land. *Hesp* v. *Bell*, 16 Gr. 412.

When condition unnecessary.

A condition that A. shall divide other property than that devised to him equally between himself and his brothers and sisters, is not broken, where A. for a time received all the rents, and the brothers and sisters were found to be equally entitled with A. without any act of his, and sold their shares. *Macdonald* v. *Macdoncll*, 2 E. & A. 341.

To live on land devised.

A condition annexed to a devise in fee, that if the devisee will not come to live on the land the rents should be given to another, is void. *Hamilton* v. *McKellar*, 26 Gr. 110; and see *Ferguson* v. *Ferguson*, 1 A.R. 452.

So is a condition that the devisee shall reside on the land during his natural life, though there is a devise over in case he does not come to reside on the land within a fixed time after the testator's death. *Re Ross*, 7 O.L.R. 493.

To occupy and maintain others.

But a condition that devisees shall remain on the land and maintain their mother and sisters is good, and is broken by their selling the land without providing maintenance. *McIsaac* v. *McLeod*, 7 N.S.R. 232.

To bear testator's name.

A devise to a daughter in tail male "provided she continues to bear my name through life" does not prevent the tenant in tail from barring the entail and conveying to a purchaser in fee. *Re Brown & Slater*, 5 O.L.R. 386.

Condition or trust to devise.

It has been held that it is a good condition annexed to a devise in fee, that a wife make a will in favour of two children named by the testator, there being a provision that, if she should fail to make such a will, the estate was devised to the two children instead of to the wife. *Re Turner*, 4 O.L.R. 578. Though this case was treated as a devise on condition, it would seem rather to be a case of a devise upon trust.

As to marrying.

A bequest to a widow absolutely, "however, with the observation that should she marry again then she shall receive one-third part, and the residue shall be equally divided between children," is a gift of two-thirds on condition of not marrying again, and is valid. *Re Deller*, 6 O.L.R. 711. And see *Doe dem. Livingstone* v. *Corrie*, 5 N.B.R. 450.

So, a bequest of an annuity to a son's widow as long as she remains unmarried is valid. *Cowan* v. *Allen*, 26 S.C.R. 292.

In terrorem.

Where there is a gift to a child provided he marries with the consent of executors, but there is no gift over for non-compliance, the condition is *in terrorem* only, and the gift absolute on marrying. *Re Hamilton*, 1 O.L.R. 10.

A condition precedent to the vesting of a legacy in favour of good morals is not *in terrorem* because there is no gift over. *Re Quay*, 14 O.L.R. 471.

Against public policy.

A bequest to a society for the promotion of agriculture, for the purpose of providing prizes, contained a condition that no freemason, orangeman or oddfellow should be qualified to receive a prize. *Quære*, as the validity of this condition. *Kinsey* v. *Kinsey*, 26 O.R. 99.

Religion.

A devise over if a devisee embraced the doctrines of the Church of Rome, and at any time after his majority acknowledged himself in connection with that Church, is a double condition, and is not broken by the devisee's belief in, and practice of the duties of, that Church, if he did not, in fact, after his majority, acknowledge his connection with the Church. *Laurence* v. *McQuarrie*, 26 N.S.R. 164.

A condition annexed to a legacy that the marriage of the legatee shall be according to the rites of any Church recognized by the law of the province, and that the legatee shall be

educated according to the teachings of such Church is valid. *Renaud* v. *Lamothe*, 32 S.C.R. 357.

Time for happening of event.

On a devise to the widow for life, remainder in fee to the son of the testator, condition that "if my son shall die and she shall marry," then over, the death of the son must occur before the marriage of the widow in order to divest the remainder. *Snell* v. *Davis*, 23 Gr. 132.

Repugnant conditions:—Condition requiring disposal.

A condition annexed to a devise in fee simple as to disposing of the land is repugnant and void. Thus, a gift of real and personal property to a wife, "her heirs, executors and administrators, for her own use and benefit," condition that in the event of her not having disposed of the property during her lifetime or by her will, so much as remains "in respect of which she shall have died intestate" to be paid to others, is an absolute gift, the condition being repugnant and an attempt to control the devolution of the land on an intestacy. *Bowman* v. *Oram*, 26 N.S.R. 318.

As to dying intestate, and without issue.

After a devise in fee simple, a devise over if the devisee die intestate is void. *Farrell* v. *Farrell*, 20 U.C.R. 652; *Kerr* v. *Leishman*, 8 Gr. 435.

A condition that if A., to whom lands are devised in fee simple, shall die intestate and without issue, the land shall go to other persons named is void. The condition as to intestacy standing alone, would be void; and the condition as to dying without issue being coupled with it and not severable therefrom is also void. *Re Babcock*, 9 Gr. 427.

Partial restraint.

The result of the cases in Ontario is that a partial restraint on alienation contained in a devise in fee simple is valid, but a total restraint is invalid. The cases range themselves in three classes, viz., (1) restrictions as to the time during which alienation may or may not take place; but a total restriction is not valid merely because limited as to time. (2) Restrictions as to the mode of alienation. (3) Restrictions as to persons to whom the land may or may not be conveyed.

The following restrictions have been held to be partial and valid:—

Not to sell during the devisee's life, but with liberty to

grant to the devisee's children; a mortgage not being forbidden. *Smith* v. *Faught*, 45 U.C.R. 484.

Not to dispose of the same only by will and testament. *Re Winstanley*, 6 O.R. 315.

Not to alien or incumber until one of two devisees should attain forty years of age. *Re Weller*, 16 O.R. 318.

Not to sell or mortgage during the devisees' lifetime, but with power to each to devise to children. *Re Northcote*, 18 O.R. 107.

Not to be sold during the devisee's lifetime, and not after his death till his youngest child is twenty-one years of age. *Myers* v. *Hamilton P. & L. Co.*, 19 O.R. 358.

Not during his lifetime to mortgage or sell. *Re Porter*, 13 O.L.R. 399.

None of the devisees to have the privilege of mortgaging or selling, but if one or more parcels had to be sold on account of mismanagement, the executor to see that it should remain in the Martin estate. *Re Martin & Dagneau*, 11 O.L.R. 349.

Not to be at the devisee's disposal at any time till the end of twenty-five years from the testator's decease. *Chisholm* v. *London & W. Trust Co.*, 28 O.R. 347. The same will came before the Supreme Court of Canada in *Blackburn* v. *McCallum*, 33 S.C.R. 65, where it was held that the restraint was general and void, apart from the time limit, and did not become valid on account of the limitation as to time.

All the cases as to time must, since *Blackburn* v. *McCallum*, be subject to the decision in that case, viz., that if the restraint is complete it will not be valid merely because limited as to time. In other words, limitation as to time is not partial restraint.

Devise to A., "and his heirs and executors forever" condition neither to mortgage nor sell the land, "but that it shall remain to his children after his decease." This was treated as a limitation of the estate rather than as a condition against alienation; and it was held that A. took an estate for life, remainder to his children surviving him for their lives, remainder to A. in fee. *Dickson* v. *Dickson*, 6 O.R. 278.

Without power to charge or alien except by will. *Re Bell*, 30 O.R. 318.

Not to sell "to any one except to persons of the name of O'Sullivan in my own family." *O'Sullivan* v. *Phelan*, 17 O.R. 730. This judgment was afterwards set aside for want of parties. 14 P.R. 278(*n*).

Not to sell or dispose of it to any person except to one or more of the children or grandchildren of the testator. *Rogerson* v. *Campbell*, 10 O.L.R. 748.

Not to be assigned to any person, except a son of his, for twenty years. *Pennyman* v. *McGrogan*, 18 C.P. 132.

In *Earls* v. *McAlpine*, 6 A.R. 145, a condition not to sell or transfer without the written consent of the testator's wife was held to be valid. See the next case.

The following have been held to be total and void:—

Total restraint.

A condition that the devisee should not sell, mortgage, trade or dispose of, or encumber the land without first obtaining the consent of the testator's sister, was held to be total and unlimited as to time and void. *McRae* v. *McRae*, 30 O.R. 54.

That the devisee will never make away with it by any means, but will keep it for his heirs. *Re Watson & Woods*, 14 O.R. 45.

That the land shall not be disposed of by the devisees by sale, mortgage or otherwise, except by will to their lawful heirs. *Heddlestone* v. *Heddlestone*, 15 O.R. 380.

That none of the devisees shall either sell or mortgage the lands devised. *Re Shanacy & Quinlan*, 28 O.R. 372.

After a devise in fee simple, a condition that the land should be held only during the life of the devisee and then to become the property of their heirs, with a restriction on any alienation. *Re Casner*, 6 O.R. 282.

Have no power to make sale or mortgage . . . but to go to their heirs and successors. *Re Thomas & Shannon*, 30 O.R. 49.

Devise to three sons as joint tenants, condition not to sell any part except to each other and so descend to their heirs to the third generation. *Gallinger* v. *Farlinger*, 6 C.P. 512.

CHAPTER XLVII.

LIMITATIONS BY WAY OF REMAINDER—DIVESTING.

I.—What Cannot be Given Over.

In some things nothing less than an absolute interest can be given.

Remainder in chattels.

There can be no remainder in the strict sense of the word of chattels. At law a grant of chattels for life vests the whole legal interest in the tenant for life.

This rule, however, does not apply to gifts by will. It has long been settled, that under a gift by will of a term to A for life, and after his death to B, or to the children of A, the legal interest passes by way of executory devise to the person entitled under the will on the death of the tenant for life. *Manning's Case*, 8 Rep. 94 b; *Lampet's Case*, 10 Rep. 46 b; *Stevenson* v. *Mayor of Liverpool*, L. R. 10 Q. B. 81.

In some cases the nature of the property is such as not to allow of successive limitations; thus:—

Consumable articles cannot be given over.

Things *quæ ipso usu consumuntur* cannot be given over, unless they form part of a stock-in-trade. *Randall* v. *Russell*, 3 Mer. 190; *Andrew* v. *Andrew*, 1 Coll. 690; *Groves* v. *Wright*, 2 K. & J. 347; *Bryant* v. *Easterson*, 7 W. R. 298; 5 Jur. N. S. 166; *Phillips* v. *Beal*, 32 B. 25; *Cockayne* v. *Harrison*, 13 Eq. 432; see *Re Hall's Will*, 19 Jur. 974; *Re Colyer*, 55 L. T. 344; *Connolly* v. *Connolly*, 56 L. T. 304; *Myers* v. *Washbrook*, (1901) 1 Q. B. 360.

Even in the case of stock-in-trade, if the tenant for life is not to be liable for depreciation, he takes absolutely. *Breton* v. *Mockett*, 9 Ch. D. 95.

But a gift of so much of the testator's wine as the legatee can consume in the house is effectual, and does not make the

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legatee absolute owner of the wine. *Re Colyer*, *Millikin* v. *Snelling*, 55 L. T. 344.

There can be no remainder after an absolute interest.

Absolute interests can of course not be limited over by way of remainder; thus a devise, if A dies without heirs, after a prior devise to A in fee, is void. *Tilbury* v. *Tarbut*, 3 Atk. 617; 1 Ves. Sen. 88.

And in the same way absolute interests in personalty cannot be given to several persons in succession. *Byng* v. *Lord Strafford*, 5 B. 558; see *In re Percy*; *Percy* v. *Percy*, 24 Ch. D. 616.

Gift of personalty after absolute gift which lapses.

But if personalty is given to A and the heirs of his body with remainder to B and the heirs of his body, and A dies before the testator, B takes, though he could have taken nothing if A had survived. *In re Loeman*; *Devenish* v. *Pester*, (1895) 2 Ch. 348; overruling dicta in *Harris* v. *Davis*, 1 Coll. 416; *Hughes* v. *Ellis*, 20 B. 193; and *Greated* v. *Greated*, 26 B. 621, so far as *contra*.

It would seem that a gift of consumable articles to A for life, remainder to B, would not lapse by A's death in the testator's lifetime, notwithstanding *Andrew* v. *Andrew*, 1 Coll. 690.

Gift over of so much as a legatee does not dispose of is void.

There can be no gift over of so much as a legatee does not dispose of, where an absolute interest has been given to the legatee. *Watkins* v. *Williams*, 3 Mac. & G. 622; *Henderson* v. *Cross*, 29 B. 216; *Bower* v. *Goslett*, 27 L. J. Ch. 249; 6 W. R. 8; *In re Jones*; *Richards* v. *Jones*, (1898) 1 Ch. 438; *In re Walker*; *Lloyd* v. *Tweedy*, (1898) 1 Ir. 5.

Such a limitation is, however, valid in a settlement. *Turner* v. *Coulfield*, 7 L. R. Ir. 347.

Nor can there be a gift over of what remains after payment of the debts of a legatee, to whom an absolute interest is given. *Perry* v. *Merritt*, 18 Eq. 152.

Life interest, with power to appoint.

The case is, of course, different if the true construction is that the legatee takes a life interest only (see *ante*, p. 514), and if a fund is given to a person expressly for life, with a power of disposing of it during life or by will, a gift of it after the death of the donee of the power is good, so far as the power is not exercised. *Surman* v. *Surman*, 5 Mad. 123; *Pennock* v. *Pennock*, 13 Eq. 144; *In re Thomson's Estate*; *Herring* v.

Barrow, 13 Ch. D. 144; 14 *ib.* 263; *In re Stringer's Estate*; *Shaw* v. *Jones-Ford*, 6 Ch. D. 1; *Moore* v. *Efolliott*, 11 L. R. Ir. 206; *In re Willatts*; *Willatts* v. *Artley*, (1905) 2 Ch. 135; see *Re Brook's Will*, 2 Dr. & S. 362; *Comeskey* v. *Bowring-Hanbury*, (1905) A. C. 84.

II.—Limitations Distinguished.

Limitations (excluding immediate limitations of particular estates) fall most naturally into limitations disposing of property in which partial or contingent interests have been previously given, and limitations varying and re-arranging previous dispositions.

Legal remainders and executory interests.

A legal remainder of freehold must be supported by a previous estate of freehold, otherwise it can only be supported as an executory devise.

And as no limitation can be a remainder following upon an estate less than an estate for life, so no limitation can be a remainder following upon a determinable fee, or any greater estate. Fearne, C. R. 225; *Seymour's Case*, 10 Rep. 95 b.

And a limitation following upon an executory limitation must itself be executory and cannot be a remainder. Fearne, C. R. 503.

Where an estate can take effect as a remainder, it will never be construed an executory devise or springing use. *Carwardine* v. *Carwardine*, 1 Ed. 27; *Goodtitle* v. *Billington*, Dougl. 725; Fearne, C. R. 386; *Doe* d. *Scott* v. *Roach*, 5 M. & S. 482; Smith, Ex. Div. 71.

The death of the testator is the time to ascertain whether a limitation is a contingent remainder or an executory devise. Thus, under a devise to A for life, and then to the first and other sons of B in tail, if A dies in the lifetime of the testator, and B has no sons living at the testator's death, the devise to the sons of B will take effect as an executory limitation. *Hopkins* v. *Hopkins*, Ca. t. Talb. 44.

Where there is a gift to A for life, with remainder to such of her children as before or after her death attain twenty-one, the devise must be construed as executory, as, in the case of

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children under twenty-one at the death of A, it could not take effect as a remainder. *In re Lechmere & Lloyd*, 18 Ch. D. 524; *Miles* v. *Jarvis*, 24 Ch. D. 633; *Dean* v. *Dean*, (1891) 3 Ch. 150; overruling on this point *Brackenbury* v. *Gibbons*, 2 Ch. D. 417; *In re Wrightson; Battie-Wrightson* v. *Thomas*, (1904) 2 Ch. 95; see, too, *Symes* v. *Symes*, (1896) 1 Ch. 272.

And the same principle has been applied to a devise in remainder to children who should attain twenty-one, where there was a maintenance clause to take effect after the death of the tenant for life as regards any minors' then presumptive shares. *In re Bourne; Rymer* v. *Harpley*, 56 L. J. Ch. 566; 56 L. T. 388; 35 W. R. 359.

Incidents of remainders.

Contingent remainders can no longer fail by forfeiture, surrender, or merger, but, except in cases within the Contingent Remainders Act, 1877 (40 & 41 Vict. c. 33), they will fail by the failure of the particular estate of freehold, before the remainder is ready to come into possession. *Rhodes* v. *Whitehead*, 2 Dr. & Sm. 532; *Price* v. *Hall*, 5 Eq. 399; *Percival* v. *Percival*, 9 Eq. 386; *Brackenbury* v. *Gibbons*, 2 Ch. D. 417.

Copyholds.

Contingent remainders of copyholds are liable to fail in the same way by failure of the particular estate before they have vested. *Lane* v. *Pannel*, 1 Roll. Rep. 238, 317, 438; Fearne, C. R. 310, 320.

Equitable remainder in land.

If the legal estate is devised to trustees, or is outstanding, for instance in a mortgagee, the remainder is not a remainder in the strict sense of the word, and the rules as to contingent remainders do not apply. *Hopkins* v. *Hopkins*, 1 Atk. 581; *In re Eddel's Trusts*, 11 Eq. 559; *Berry* v. *Berry*, 7 Ch. D. 657; *Astley* v. *Micklethwait*, 15 Ch. D. 59. See Dunning, Conc. Prec. 218, n.

Reconveyance of legal estate.

The fact that after the death of the testator and after the passing of the Contingent Remainders Act, 1877, the mortgagee reconveyed the legal estate to the uses of the will was held not to render the remainders liable to destruction by the termination of the life estate before they vested. *Re Freme; Freme* v. *Logan*, (1891) 3 Ch. 167.

Personalty.

The rule does not of course apply to personalty.

The Contingent Remainders Act, 1877 (40 & 41 Vict. c. 33), is set out, *ante*, p. 312.

40 & 41 Vict. c. 33.

An estate may, according to the events that happen, be either a remainder or an executory devise. For instance, if after life estates there is a devise to children in fee, and if they die under twenty-one over, the devise over, if there are children to take who die under twenty-one, would be an executory devise; yet the implied devise over, in case there were no children to take at all, would be a contingent remainder. *Doe* d. *Evers* v. *Challis*, 18 Q. B. 224; 7 H. L. 531; *Brookman* v. *Smith*, L. R. 6 Ex. 291, p. 305; see *In re Bence: Smith* v. *Bence*, (1891) 3 Ch. 242.

An estate may be a remainder or an executory devise, according to the events.

A remainder must be distinguished from an immediate vested estate, subject to a term: thus, where an estate of freehold is limited after a term, it is either a vested estate or an executory devise. For instance, a devise to A for a term of eighty years, if he shall so long live, and after his death to B, gives B strictly speaking an executory interest, since A may live longer than eighty years, and the freehold would therefore be in suspense during the remainder of A's life. It has, however, been held that B takes a vested interest, "for the mere possibility that a life in being may endure for eighty years to come does not amount to a degree of uncertainty sufficient to constitute a contingency." Fearne, C. R. 21; *Napper* v. *Sanders*, Hutt. 118; cit. 3 Atk. 781; *Lord Derby's Case*, cit. Lit. Rep. 370.

Remainder distinguished from an immediate vested estate subject to a term.

This applies, however, only "where the life cannot exceed the term, and the term must determine with the life." It does not apply, for instance, where the term is only for sixty years. *Beverley* v. *Beverley*, 2 Vern. 131.

In the same way a devise, after payment of debts, is not a remainder but an immediate vested interest. *Barnardiston* v. *Carter*, 1 P. W. 505; 3 B. P. C. 64; *Bagshaw* v. *Spencer*, 1 Ves. Sen. 142; see 1 Coll. Jur. 378; and see *ib.* 214; and *Hathorn* v. *Foster*, 9 T. L. R. 497; 10 T. L. R. 64.

Devise after payment of debts is vested.

Again, dispositions by way of remainder may be intended to take effect only after the determination of prior partial interests, or they may be alternative contingent remainders

Remainders and alternative contingent limitations.

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intended to provide for the case of prior contingent limitations not taking effect. In the former case, if any of the intermediate limitations are void, the remainders fail with them; in the latter, the limitations are good if the events upon which they are to take effect happen. *Brudenell* v. *Elwes*, 1 East, 442; *Crompe* v. *Barrow*, 4 Ves. 681.

Thus, in a devise to A for life, then to his first son for life, and after his decease to the first and other sons of such first son successively in tail, and in default of issue of A, or in case of his not having any at his decease over, if A has a son and grandson, the devise over in default of issue of A is a disposition by way of remainder of something not previously disposed of; while the devise in case of his not having any issue at his decease, is an alternative contingent limitation, disposing of something previously disposed of, in the event of that disposition failing in a particular way. *Montgomery* v. *Dering*, 2 D. M. & G. 145; *Doe* d. *Evers* v. *Challis*, 18 Q. B. 224; 7 H. L. 531; *Percival* v. *Percival*, 9 Eq. 386.

And the same limitation may, according to the events that happen, be a disposition to take effect after the failure of prior limitations, or a substitutional limitation intended to meet the case of prior limitations never taking effect at all. For instance, a limitation in default, or for want of persons to take under prior limitations for life or in tail, takes effect either in default of persons to take the prior estates, or after the determination of their estates. *Goodright* v. *Jones*, 4 Man. & S. 88; *Lewis* d. *Ormond* v. *Waters*, 6 East, 336; see *Doe* v. *Deere*, 1 B. & P. 250; 8 T. R. 112.

III.—Divesting.

A gift which is given over in certain events is divested if those events happen.

A vested interest, which is given over in certain events, is divested if these events happen, though the gift over may be void, or though the legatee to take under the gift over dies before the testator. *Doe* d. *Blomfield* v. *Eyre*, 5 C. B. 713; *Robinson* v. *Wood*, 6 W. R. 728; 27 L. J. Ch. 726; *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388; *Hurst* v. *Hurst*, 21 Ch. D. 278; *Donohoe* v. *Mooney*, 27 L. R. Ir. 26. In *Jackson* v. *Noble*, 2

Kee. 500, the question was, whether the event upon which the gift over was to take effect had happened, and it was held it had not, the period during which it was to take effect being limited to the lives of the persons to take under the gift over.

But if the contingency of there being a person to take living at the time can be looked upon as part of the event, upon which the gift over is to take effect, the original gift will remain, if there is no such person. *Crozier* v. *Crozier*, 15 Eq. 282; *Monck* v. *Croker*, (1899) 1 Ir. 56.

Upon this principle, under a gift to the testator's two sons and daughter in equal shares, with a gift over of the daughter's share, if she should die without issue, to the survivors or survivor of the sons, it was held that the daughter, having survived the sons, took absolutely. *Jones* v. *Davies*, 28 W. R. 455; *Re Deacon's Trusts*; *Deacon* v. *Deacon*, 95 L. T. 701; see *Eaton* v. *Barker*, 2 Coll. 124.

Substitutional gifts to survivors.

In the case of a substitutional gift to several persons, or to such of them as may survive the tenant for life, if none survive the tenant for life the original gift remains, whether the gift is vested or contingent. *Sturgess* v. *Pearson*, 4 Mad. 411; *Wagstaff* v. [illegible] 746; *Masters* v. *Scales*, 13 B. 60; *Penny* v. [illegible] *ilways*, (1900) A. C. 628.

[illegible] rence that the gift to the original class [illegible]ing ne—for instance, upon the death of the tenant for life without issue. *In re Sanders' Trusts*, 1 Eq. 675, not following *Willis* v. *Plaskett*, 4 B. 208.

It is indifferent whether the gift is in the simple form, "to several or the survivors," or whether there is an express gift over, in the event of any members of a class dying before the tenant for life, to the survivors; in such a case, if none survive the tenant for life, the original gift remains. *Harrison* v. *Foreman*, 5 Ves. 207; *Littlejohns* v. *Household*, 21 B. 29; *Page* v. *May*, 24 B. 323; *Cambridge* v. *Rous*, 25 B. 409; *Marriott* v. *Abell*, 7 Eq. 478; *In re Pickworth*; *Snaith* v. *Parkinson*, (1899) 1 Ch. 642.

Distinction between a gift over in

A distinction must be drawn between a gift over of the whole of a prior interest in certain events, and a gift over of

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certain events of the whole and of a partial interest.

a portion of the prior interest in certain events. In the latter case the prior interest is divested only so far as is necessary to give effect to the gift over.

Thus, if there is a devise in fee, followed by a gift over to another person for life, if the devisee dies without issue, the devisee in that event, nevertheless, takes the fee, subject only to the life interest. *Gatenby* v. *Morgan*, 1 Q. B. D. 685.

IV.—The Construction of Gifts Over.

Gifts over on two different events to different persons where both events happen.

When property is given over in one event to one person, and in another event to another, and both events occur simultaneously the original gift is not divested. *Ormerod* v. *Riley*, 12 Jur. N. S. 112. See *Drennan* v. *Andrew*, 36 L. J. Ch. 1.

The exact event must happen in order that a gift over may take effect.

When there is a gift over upon a certain contingency, it will not take effect, unless the exact contingency happens. Thus, if there is a gift to A with a gift over if he dies in the testator's lifetime, and A dies simultaneously with the testator, the gift over does not take effect. *Wing* v. *Angrave*, 8 H. L. 183; *Elliott* v. *Smith*, 22 Ch. D. 236.

There are here two distinct and independent events, in which the gift to A will lapse, death in the testator's lifetime and death simultaneously with the testator, one of which the testator has contemplated and the other not. No doubt it may be said that the gift over might be read as equivalent to "if A does not survive me to B"; but this would be making a will for the testator, since the event that has happened does not include the event contemplated, and it cannot be said that, if the gift over was to have effect, if A died in the testator's lifetime, *à fortiori* it was to have effect, if A died simultaneously with the testator. The most that can be affirmed is that if the testator could be consulted, he would probably say that the gift over was to have effect equally in either event.

Rule in *Jones* v. *Westcomb*.

There is, however, a class of cases where, though the exact event upon which the gift over is to take effect does not happen, the gift over must *à fortiori* have been intended to take effect in the event that happens.

For instance, if there is a gift to a child of which the testator

supposed his wife to be enceinte with a gift over if the child dies under twenty-one, or a gift to a class of children with a gift over if they all die under twenty-one, and the wife is not enceinte, or there never are any children of the class, the gift over nevertheless takes effect. *Jones* v. *Westcomb*, Prec. Ch. 316; 1 Eq. C. Ab. 245, pl. 10; *Gulliver* v. *Wickett*, 1 Wils. 105; *Statham* v. *Bell*, Cowp. 40; *Meadows* v. *Parry*, 1 V. & B. 124; *Mackinnon* v. *Sewell*, 2 M. & K. 214.

Under this head comes a gift to a woman, if she survives her husband, and if not as she shall by will appoint. The woman is absolutely entitled if she never marries. *Brock* v. *Bradley*, 33 B. 670.

And a gift over of the shares of three named beneficiaries, if they should die under twenty-one and unmarried, was held to take effect as regards one of them who died before the date of the will an infant and unmarried. *In re Sheppard's Trust*, 1 K. & J. 269; see *Barnes* v. *Jennings*, L. R. 2 Eq. 448 (a voluntary settlement).

Gift if condition not performed.

Again, if there is a gift to a legatee with a gift over if the legatee neglects to perform a condition, the gift over takes effect, if the legatee never comes into existence or dies before the testator, or if the gift to the legatee is itself void, so that the legatee is never able to perform the condition. *Scatterwood* v. *Edge*, 1 Salk. 229; Fearne, C. R. 237; *Evelyn* v. *Ward*, 1 Ves. 420; *Re Green's Estate*, 1 Dr. & S. 68; *Warren* v. *Rudall*, 9 H. L. 420.

Gifts in default of appointment.

The same principle is illustrated by gifts in default of appointment under powers.

Thus, a gift in default of appointment takes effect though the donee of the power predeceases the testator. *Edwards* v. *Salaway*, 2 De G. & S. 248; 2 Ph. 625, not following *Baker* v. *Hanbury*, 3 Russ. 340; *Nichols* v. *Haviland*, 1 K. & J. 504; *Kellett* v. *Kellett*, I. R. 5 Eq. 298; see *Hardwick* v. *Thurston*, 4 Russ. 380.

And such a gift is good though the power is one which cannot be exercised. For instance, if A, having power to appoint to his issue, appoints to a son for life, with remainder as such son by will appoints, or with remainder to such

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children as he appoints, or with remainder to a class of persons not being objects of the original power, as he appoints with a gift in default of appointment, the power given to the son cannot be exercised, but yet the gift in default takes effect. *Webb* v. *Sadler*, 8 Ch. 419; *Williamson* v. *Farwell*, 35 Ch. D. 128; *In re Abbott*; *Peacock* v. *Frigout*, (1893) 1 Ch. 54.

Gifts over in default of appointment.

Where there is a power to appoint and a gift in default of appointment, subsequent gifts over are to be read *primâ facie* as affecting only the gift in default of appointment, and not an appointment made under the power. *Re Simmons*; *Dennison* v. *Orman*, 87 L. T. 594.

Court considers what the contingency contemplated is.

There is another class of cases in which, though the contingency is penned in such a way as not in terms to include the event which happens, yet the Court will consider what was the contingency really contemplated by the testator, and will give effect to the will if that contingency happens. For instance, if there is a gift if all but one of the testator's children die under twenty-one, or a gift if there should be not more than two children and there are no children, the gift takes effect. *Murray* v. *Jones*, 3 V. & B. 313; *Wilkinson* v. *Thornhill*, 61 L. T. 362.

On this principle, a gift if the testator's wife should die within twelve months of his decease took effect, though she died before him, the contingency contemplated being the wife not being alive at the expiration of twelve months. *Davies* v. *Davies*, 30 W. R. 918.

Construction of gifts over upon death of the legatee under a given age.

If there is a gift to a person with a gift over in the event of his death in a particular manner, as, for instance, to A, and if he dies under twenty-one to B:—

Case where the legatee dies before the testator under the given age.

1. If A dies under twenty-one, in the lifetime of the testator, the gift over takes effect. *Darrel* v. *Molesworth*, 2 Vern. 378; *Willing* v. *Baine*, 2 Eq. Ab. 545, pl. 32; 3 P. W. 115; *Kellett* v. *Kellett*, I. R. 5 Eq. 298. In this case the failure of the prior gift is due not to lapse merely, since if A had survived the testator the gift to him would not have been indefeasible until he had attained twenty-one.

So if there is a gift to A for life and then to his issue, with a gift over if he dies without issue, the gift over takes effect if A dies before the testator without issue. *Rackham* v. *De la Mare*, 2 D. J. & S. 74; see *Bastin* v. *Watts*, 3 B. 97.

Where the legatee dies over the given age before the testator.

2. If A dies over twenty-one in the testator's lifetime, the gift over does not take effect. *Williams* v. *Chitty*, 3 Ves. 544; *Doe* v. *Brabant*, 3 B. C. C. 93; 4 T. R. 706; *Humberstone* v. *Stanton*, 1 V. & B. 385; *M'Carthy* v. *M'Carthy*, 3 L. R. Ir. 317.

In this case, since A, if he had survived, would have taken an indefeasible interest, the failure of the gift to him is due to lapse only, which the testator cannot be supposed to have contemplated, and the event, on which alone there is a bequest to the claimant has not occurred.

Where the prior gift is to a class, the following rules may be laid down; suppose a gift to children as a class, followed by a gift over, if they die under twenty-one:—

Gift to class with gift over if all die under 21, where the class never comes into existence.

1. If the contemplated class never comes into existence, the gift over takes effect on the principle already stated, *ante*: *Jones* v. *Westcomb*, 1 Eq. Ab. 245, pl. 10; *Mackinnon* v. *Sewell*, 2 M. & K. 202. In these cases the condition is more than fulfilled, since the events that have happened include the condition upon which the property is given over.

If all die under 21 before the testator.

2. If members of the class come into existence, but die under twenty-one in the testator's lifetime. In this case, too, it seems the gift over will take effect, and the same arguments would apply as to the previous case, with the additional argument that the condition is in fact literally fulfilled. It is not by reason of lapse that the gift over takes effect, since if the legatees in question had survived the testator, the gift over would still have held good in the events that have happened. See *Brookman* v. *Smith*, L. R. 6 Ex. p. 303; *Mackinnon* v. *Peach*, 2 Kee. 555; but see *Greated* v. *Greated*, 26 B. 621.

If all die before the testator, but not under 21.

3. If members of the class come into existence, survive twenty-one, and die in the testator's lifetime the gift over will not take effect. *Tarbuck* v. *Tarbuck*, 4 L. J. Ch. 129; *Brookman* v. *Smith*, L. R. 6 Ex. 291; *ib.* 7 Ex. 271; or, to

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state the rule more generally, if all conditions are fulfilled which would entitle those taking under the prior gift to indefeasible interests, supposing they had survived the testator, if, in other words, the failure of the prior gift is due to lapse and lapse only, the gift over does not take effect.

V.—Gifts Over upon Death Treated as a Contingent Event.

Gift over in case of the legatee's death.

1. If there is an immediate gift to A, and a gift over in case of his death, or any similar expression implying the death to be a contingent event, the gift over will take effect only in the event of A's death before the testator. *Lord Bindon* v. *Earl of Suffolk*, 1 P. W. 96; *Turner* v. *Moor*, 6 Ves. 556; *Cambridge* v. *Rous*, 8 Ves. 12; *Crigan* v. *Baines*, 7 Sim. 40; *Taylor* v. *Stainton*, 2 Jur. N. S. 634; *Ingham* v. *Ingham*, I. R. 11 Eq. 101; *In re Neary's Estate*, 7 L. R. Ir. 311; *Elliott* v. *Smith*, 22 Ch. D. 236; *In re Bourke's Trusts*, 27 L. R. Ir. 573; see *Watson* v. *Watson*, 7 P. D. 10.

This rule applies though the gift over may be to persons "then living," or to survivors. *Trotter* v. *Williams*, Prec. Ch. 78; *King* v. *Taylor*, 5 Ves. 806.

So, too, a gift to several, with a gift over in case of the death of either in the lifetime of the others or other, was confined to death before the testator, the death of one before the other being a certain and not a contingent event. *Howard* v. *Howard*, 21 B. 550.

It makes no difference that the gift in case of A's death is to his children. *Slade* v. *Milner*, 4 Mad. 144; *Schenck* v. *Agnew*, 4 K. & J. 405.

And this construction has been adopted where the gift over was "in case of his decease or at his decease." *Arthur* v. *Hughes*, 4 B. 506.

Gift over *at* the legatee's death.

But, as a rule, when there is a gift to A indefinitely, followed by a gift *at* his decease, A will take only a life interest. *Constable* v. *Bull*, 3 De G. & S. 411; *Waters* v. *Waters*, 26 L. J. Ch. 624; *Adams' Trust*, 14 W. R. 18; *Joslin*

v. *Hammond*, 3 M. & K. 110; *Reid* v. *Reid*, 25 B. 469; *Bibbens* v. *Potter*, 10 Ch. D. 733; *Re Houghton*; *Houghton* v. *Brown*, 50 L. T. 529; *Re Russell*, 52 L. T. 559.

General intention that the gift was to take effect after A's death.

2. A gift over "in case of the death of A" has been construed as equivalent to "after his death" in the following cases:—

a. Where the gift is only of a life interest, and the remainder would otherwise be undisposed of. *Smart* v. *Clark*, 3 Russ. 365; *Tilson* v. *Jones*, 1 R. & M. 553; *Ingham* v. *Ingham*, I. R. 11 Eq. 101.

b. Where the testator has given the absolute interest in another legacy in express terms, or has shown an intention to provide in all events for the person to take "in case of the death of A," or has expressly provided for the death of the legatee in his lifetime with regard to another legacy to the same legatee, there is ground for arguing, that the gift over in case of the death of A was to take effect upon his death at any time. *Billings* v. *Sandom*, 1 B. C. C. 393; *Nordan* v. *Nelligan*, 1 B. C. C. 489; *Douglas* v. *Chalmer*, 2 Ves. Jun. 501.

c. So a direction in the event of A's death to *continue* her annuity for the benefit of her children will not be construed as providing only against lapse. *Wilkins* v. *Jodrell*, 13 Ch. D. 564.

Gift over in case of the legatee's death after a life interest.

3. If the gift is after a life estate, or a time is appointed for payment, the words "in case of death" refer to death at any time before the vesting in possession, whether before or after the testator. *Hervey* v. *M'Laughlin*, 1 Pr. 264; *Johnson* v. *Antrobus*, 21 B. 556; *Bolitho* v. *Hillyar*, 34 B. 180; *Hodgson* v. *Smithson*, 21 B. 356; 8 D. M. & G. 604; *Penny* v. *Commissioner of Railways*, (1900) A. C. 628; and see *James* v. *Baker*, 8 Jur. 750.

It appears, that a gift, after a life interest, to executors for their trouble, with a gift over, in case of death, would *prima facie* mean death before the testator. *Green* v. *Barrow*, 10 Ha. 459.

Life interest and time of payment.

4. If there is a life interest and also a time of payment, the gift over may refer to the latter. *In re Croflon's Trust*, 7 L. R. Ir. 279; see *Bouverie* v. *Bouverie*, 2 Ph. 348.

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Gift over of realty in case of the death of the devisee.

5. In the case of realty, a devise to A simply in a will before the Wills Act, and in case of his death over, would perhaps be construed as to A for life, and after his death over. *Bowen* v. *Scowcroft*, 2 Y. & C. Ex. 640; see, however, *Wright* v. *Stephens*, 4 B. & Ald. 574.

On the other hand, if the devise gives A the fee, a gift over, in case of A's death, will be held to refer to his death before the testator. *Rogers* v. *Rogers*, 7 W. R. 541.

VI.—Gifts Over upon Death coupled with a Contingency.

Conveyancing Act, 1882, s. 10.

Sect. 10 of the Conveyancing Act, 1882 (45 & 46 Vict. c. 39), enacts that "where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period or time or not that executory limitation shall be or become void and incapable of taking effect if, and as soon as, there is living any issue, who has attained the age of twenty-one years, of the class on default or failure whereof the limitation over was to take effect."

The section applies where the executory limitation is contained in an instrument coming into operation after the 31st December, 1882. It will be noticed that the section is limited to land. See, too, *In re Booth; Pickard* v. *Booth*, (1900) 1 Ch. 768.

In cases where the Act does not apply, the following rules are deducible from the cases:—

Gift over upon death without issue is not confined to death before the testator.

If there is an immediate gift to A, and if he dies leaving issue or without issue over, the gift over takes effect upon the death of A with or without issue, as the case may be, at any time, whether before or after the testator. *Farthing* v. *Allen*, 2 Mad. 310; 2 Jarm. 1596; *Smith* v. *Stewart*, 4 De G. & S. 253; *Cotton* v. *Cotton*, 23 L. J. Ch. 489; *Bowers* v. *Bowers*, 8 Eq. 283; 5 Ch. 244; *Else* v. *Else*, 13 Eq. 196; *Varley* v. *Winn*, 2 K. & J. 705; *Woodroofe* v. *Woodroofe*, (1894) 1 Ir. 299; *Duffill* v. *Duffill*, (1903) A. C. 491.

The fourth rule in *Edwards* v.

Similarly, if the gift is future, as to A for life and then to B, and if B dies leaving issue or without issue over, the gift over

will take effect upon the death of B at any time with or without issue as the case may be, whether before or after the tenant for life. *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388; *Ingram* v. *Soutten*, *ib.* 408, overruling the so-called fourth rule in *Edwards* v. *Edwards*, 15 B. 357; *In re Schnadhorst*: *Schnadhorst* v. *Schnadhorst*, (1902) 2 Ch. 234.

Edwards is overruled.

And similarly, a direction to settle a legacy upon marriage is *primâ facie* not restricted to marriage in the lifetime of a tenant for life. *Witham* v. *Witham*, 3 D. F. & J. 758.

In some cases, however, where there was a legacy to A or to A at twenty-one, with a direction to settle it on marriage, it has been held on the construction of the will, that the direction to settle only applied to a marriage before the time of payment or before the legatee attained twenty-one. *Money* v. *Money*, 50 L. J. Ch. 623; *Fullarny* v. *Huskisson*, 3 Y. & C. 80; *In re Dowling's Trusts*, 14 Eq. 463.

Direction to settle limited to time of payment.

In cases of gifts over in default of issue, there may be circumstances in the will limiting the defeasibility to some earlier time than the death of the legatee without issue. Some of the cases decided on the authority of *Edwards* v. *Edwards* are probably not reconcilable with the rule laid down in *Ingram* v. *Soutten*. See *Allen's Estate*, 3 Dr. 380.

In what cases the period of defeasibility will be limited.

The following rules seem, however, to be admitted in *O'Mahoney* v. *Burdett*, *supra*.

1. Possibly, where there is a gift over, if any members of a class die without issue, to the survivors, the gift over must take effect, if at all, before the time, when the survivors are to be ascertained.

Gift over to survivors.

Thus, if the gift is immediate, the gift over may be limited to the happening of the event in the testator's lifetime. *In re Smaling*; *Johnson* v. *Smaling*, 26 W. R. 231; see *Apsey* v. *Apsey*, 36 L. T. 941; a case apparently inconsistent with *Bowers* v. *Bowers*, 5 Ch. 244.

If the gift is, after a life interest, to several, and if any die without issue to the survivors, the gift over may in the same way be limited to death without issue before the tenant for life. See *Clark* v. *Henry*, 11 Eq. 222; 6 Ch. 588; *Besant* v. *Cox*, 6 Ch. D. 604; *M'Cormick* v. *Simpson*, (1907) A. C. 494.

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Where the donees to take upon death without issue of a prior legatee are contemplated as taking through the medium of a trust which determines at a certain time.

2. If the fund is vested in trustees who are directed to distribute it at a certain time, so that the trusts then determine, and the legatees, who are to take upon the death of prior legatees without issue, are contemplated as taking through the medium of the same trustees, there is *primâ facie* reason for restricting the death without issue to death without issue before the time of distribution. *Galland* v. *Leonard*, 1 Sw. 161; *Wheable* v. *Withers*, 16 Sim. 505; *Edwards* v. *Edwards*, 15 B. 357; *Beckton* v. *Barton*, 27 B. 99; *Dean* v. *Handley*, 2 H. & M. 635; see *Smith* v. *Colman*, 25 B. 217; *In re Hayward*; *Creery* v. *Lingwood*, 19 Ch. D. 470; *In re Luddy*; *Peard* v. *Morton*, 25 Ch. D. 394; *Lewin* v. *Killey*, 13 App. C. 783, P. C.

But words directing payment or distribution at a certain time will not confine the contingency to that time, if the persons to take upon the death without issue of a prior legatee are not treated as taking through the medium of the same payment or distribution. *Gosling* v. *Townshend*, 17 B. 245; 2 W. R. 23.

When all the dispositions of the testator have reference to the time of distribution.

3. And if there are no trustees, but payment or division is directed at the death of the tenant for life, and all the subsequent dispositions are made with reference to the same payment or division, the death without issue will be confined to such death before the time of distribution. *Olivant* v. *Wright*, 1 Ch. D. 346; *Re Thompson to Curzon*, 52 L. T. 498; see *Re Austice*, 23 B. 135; *Pearman* v. *Pearman*, 33 B. 394.

So, if there is a life tenancy and then a gift to a class to be paid when they respectively attain twenty-one, and if any die without issue to the survivors, to be paid at the same time as the original share, death without issue may be limited to such death under twenty-one. *Re Johnson's Trusts*, 10 L. T. 455; *Re Hayne's Trusts*, 18 L. T. 16.

Similarly, if the gift is to A if living at the death of the tenant for life, and if not, to his children, and if he dies without children ever, the ultimate gift over is confined to the lifetime of the tenant for life. *Andrews* v. *Lord*, 8 W. R. 405; 6 Jur. N. S. 865; see *Wood* v. *Wood*, 35 B. 587; *In re Hill's Trusts*, 12 Eq. 302.

When the legatee is to have the absolute control at a certain time.

4. When there is a direction that a legatee is to have the absolute control of her legacy at a particular time, a subsequent gift over will be limited to take effect before that time. *Clark* v. *Henry*, 11 Eq. 222; 6 Ch. 588.

When gifts over subsequent to the gift over upon death without issue are expressly limited within a certain time.

5. If there is a gift over upon death without issue before a given time of all the legatees, whose shares have previously been given over upon death leaving issue indefinitely, or if the gift to the persons, who are to take upon death of the prior legatees without issue, is again given over upon the death of such persons before a certain time, there is a strong argument for restraining the prior gifts over to death of the prior legatees without issue before the same time. *Re Hayes' Will*, 9 Jur. N. S. 1068; *Re Sarjeant*, 11 W. R. 203; *Da Costa* v. *Keir*, 3 Russ. 360; see *Doe* d. *Lifford* v. *Sparrow*, 13 East, 359; *Lloyd* v. *Davies*, 15 C. B. 76.

Gift over in every event.

6. If there is a gift to A, his heirs, executors, administrators, and assigns, with a double gift over, as well if he dies with as if he dies without issue, it may be contended that in order to give effect to the large words of ownership, the gift over must be referred to death before the testator. This view is supported by *Gee* v. *Mayor, &c. of Manchester*, 17 Q. B. 737; but Knight-Bruce, V.-C., refused so to limit the gift: see 14 Jur. 825; 19 L. J. Ch. 151; and the direction that the share was to "return" to the sons and daughter certainly made that construction difficult. The doctrine has also been criticised by Lord Hatherley in *Bowers* v. *Bowers*, 5 Ch. 244. The cases usually cited in support of the same view depend on special circumstances, such as a trust to divide at once or the like. *Clayton* v. *Lowe*, 5 B. & A. 636; *Doe* d. *Lifford* v. *Sparrow*, 13 East, 359; *Woodburne* v. *Woodburne*, 23 L. J. Ch. 336; *Slaney* v. *Slaney*, 33 B. 631.

If the gift is merely in general words without any express indication that it is intended to be absolute, the fact that the contingencies upon which the property is given over in effect reduce the interest to a life interest, will not have the effect of confining the happening of the contingencies to the period of distribution. *Gosling* v. *Townshend*, 2 W. R. 23; *Cooper* v. *Cooper*, 1 K. & J. 658; *Bowers* v. *Bowers*, 8 Eq. 283; 5 Ch. 244.

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7. Even if the gift over is upon a single contingency, as upon death without issue, it may be limited to death without issue before a particular time, if the intention is clear to give indefeasible interests at that time. *Brotherton* v. *Bury*, 18 B. 65; *Ware* v. *Watson*, 7 D. M. & G. 248; *Re Anstice*, 23 B. 135; *Clark* v. *Henry*, 11 Eq. 222; 6 Ch. 588; perhaps *Barker* v. *Cocks*, 6 B. 92, and *Davenport* v. *Bishopp*, 2 Y. & C. C. 463, come under this head.

Gift over upon death leaving children after a contingent gift.

8. If the gift is contingent, as to A at twenty-one, there is some reason for restricting a gift over upon death coupled with a contingency to such death under twenty-one.

This construction has been adopted where there was a gift to the testator's nieces if they should attain twenty-one, with a gift in case a niece should die leaving children to her children, as otherwise the children of a niece dying under twenty-one would have taken nothing. *Home* v. *Pillans*, 2 M. & K. 15; see L. R. 7 H. L. p. 397, and (1901) 2 Ch. 341; (1902) 2 Ch. 241; *Randfield* v. *Randfield*, 8 H. L. 225.

The gift over upon death without issue cannot, however, be restricted to the time of vesting, where there is an express gift over upon death merely before the time of vesting. *Martineau* v. *Rogers*, 8 D. M. & G. 328; see, too, *Smith* v. *Spencer*, 6 D. M. & G. 631.

Gift over of share legatee would have taken.

9. If what is given over is the share the legatee would have taken, this confines the gift over to the testator's lifetime. *In re Hayward*; *Creery* v. *Lingwood*, 19 Ch. D. 470.

Ultimate gift over upon death without issue restricted by prior gift.

10. Where there is a gift to two persons, and if either dies under twenty-one without issue to the survivor, and if both die without issue over, the defeasibility may be restricted to the age of twenty-one if there is a direction to convey at twenty-one, or any other indication of intention that the interest was to become indefeasible at twenty-one. *Kirkpatrick* v. *Kilpatrick*, 13 Ves. 476; *Wheable* v. *Withers*, 16 Sim. 504; *Thackeray* v. *Hampson*, 2 S. & St. 214; see *Else* v. *Else*, 13 Eq. 196.

Gift over upon marriage without consent confined to marriage under 21.

11. When there is a gift at twenty-one, or upon marriage with consent, a gift over upon marriage without consent has been confined to the age of twenty-one. *Deshody* v. *Boyville*,

2 P. W. 547; *Knapp* v. *Noyes*, Amb. 662; *Osborn* v. *Brown*, 5 Ves. 527; *West* v. *West*, 4 Giff. 198; *Duggan* v. *Kelly*, 10 Ir. Eq. 473.

12. It may be noticed that where there is a gift to several, and in case of the death of any to the survivors, and if they die without children over, the gift, in case of death, will not be extended to mean death at any time, nor will the gift upon death without children be confined to such death in the lifetime of the testator. *Clarke* v. *Lubbock*, 1 Y. & C. C. 192; *Child* v. *Giblett*, 3 M. & K. 71.

VII.—Accrued Shares.

Effect of gifts over on accrued shares.

Clauses in a will disposing of the shares of devisees or legatees dying before a given period or event do not, in the absence of a distinct evidence of intention, extend to shares which have once accrued under those clauses so as to pass them a second time. *Ex parte West*, 1 B. C. C. 575; 1 P. W. 275, n.; *Rudge* v. *Barker*, Ca. t. Talbot, 124; *Melsom* v. *Giles*, L. R. 5 C. P. 614; 6 C. P. 532; 6 H. L. 24.

Accrued shares will not pass under the word "share" or "portion." *Cambridge* v. *Rous*, 25 B. 416; *Bright* v. *Rowe*, 3 M. & K. 316; *Burdon* v. *Burdon*, 16 Ir. Ch. 415.

If there is a gift to several to be paid at twenty-one, with a direction that, if any die under twenty-one, the share is to survive to the others, and two die under twenty-one before the testator, the original share of the one who dies last goes to the survivors, but not the accrued share coming to him on the death of the one who died first. *Rickett* v. *Guillemard*, 12 Sim. 88.

Accrued shares will go with original shares if there is an intention expressed that they should do so.

Accrued shares directed to go as original shares.

1. If, for instance, accrued shares are directed to go in the same manner as original shares. *Cursham* v. *Newland*, 2 B. 145; *Milsom* v. *Awdry*, 5 Ves. 465; *Eyre* v. *Marsden*, 4 My. & Cr. 231; *Melsom* v. *Giles*, L. R. 6 H. L. 24.

Consolidation of original and accrued shares.

2. And when original and accrued shares have once been consolidated by a direction, for instance, that they are to go in the same manner, "there is no occasion to carry on any

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separate account of the original share from the accrued share," and both will pass under the word "share." *Re Hutchinson*, 5 De G. & S. 681.

Words applicable to accrued shares.

3. If "his or her share or shares" are spoken of, where only one original share has been previously given, so that the words cannot be satisfied *reddendo singula singulis*, as might be the case if the words were "his, her, or their share or shares," accrued shares will be carried over. *Wilmott* v. *Fleavitt*, 13 W. R. 856; *In re Chaston; Chaston* v. *Scago*, 18 Ch. D. 218.

And, apparently, "share and shares and interest" would carry accrued shares. *Douglas* v. *Andrews*, 14 B. 317.

Where the fund is treated as an aggregate fund.

4. Accrued shares will pass, where the testator, though he speaks of individual shares, yet shows that he looks on the fund as existing at the time of distribution as an aggregate and previously undivided fund by speaking of it, for instance, as the trust fund. *Worlidge* v. *Churchill*, 3 B. C. C. 465; *Leeming* v. *Sherratt*, 2 Ha. 14; *Sillick* v. *Booth*, 1 Y. & C. C. 121, 739; *Barker* v. *Lea*, T. & R. 413; *In re Allan; Doe* v. *Cassaigne*, (1903) 1 Ch. 276; see *In re Hunter's Trusts*, L. R. 1 Eq. 295.

So, where the whole fund is given to a class, with benefit of survivorship, the words of survivorship apply to the whole, accrued as well as original shares. *In re Crawhall's Trust*, 8 D. M. & G. 480; 2 Jur. N. S. 892.

Gift over of the whole fund.

5. And a gift over of the whole is convincing evidence of the same intention. In such a case "share must have been meant to include every interest accruing as well as original, for otherwise the estate would go away from the issue piecemeal; whereas, it is obvious, nothing was intended to go over, but that all should go over at once on failure of the issue of all the children, as if all but one had died without issue who was intended to take all." *Doe* d. *Clift* v. *Birkhead*, 4 Ex. 110; *Douglas* v. *Andrews*, 14 B. 347; *Dalton* v. *Crowdy*, 33 B. 272; *Longley* v. *Langley*, 6 L. R. Ir. 277; see *Sutton* v. *Sutton*, 30 L. R. Ir. 251.

Where the gift is residuary.

6. And if the bequest is of residue, the presumption against intestacy will assist the Court in passing accrued with original shares. *Goodman* v. *Goodman*, 1 De G. & S. 695.

7. Accrued shares are similarly not liable to the same restrictions as original shares in the absence of a clearly expressed intention so to restrict them. *Gibbons* v. *Langdon*, 6 Sim. 260; *Ware* v. *Watson*, 7 D. M. & G. 248; and, on the other hand, *Trickey* v. *Trickey*, 3 M. & K. 560; *Jarman's Trusts*, L. R. 1 Eq. 71; *Fitzgerald* v. *Fitzgerald*, I. R. 7 Eq. 436. Accrued shares prima facie not subject to the restrictions of original shares.

8. An appointment under a power by a tenant for life of his share may operate as well upon his accrued as his original share. *Re Denton*; *Bannerman* v. *Toosey*, 63 L. T. 105. Appointment of share.

9. As to the repeated operation of cross limitations, see *Atkinson* v. *Jones*, Joh. 246. Repeated operation of gifts over.

CANADIAN NOTES.

A testator devised his land to trustees for the support of his widow *durante viduitate*, and his daughter till she attained twenty-one. In case the daughter survived the mother the trustees were to convey to her, but in no case was she to control the property until after the widow had died or married. And he further provided that even after such event the trustees were to manage the property till they saw fit to give over the management to the daughter; and in the event of the daughter dying without issue, the land was to be sold after the death or marriage of the widow and the proceeds divided amongst brothers and sisters of the testator. But if she lived the land to be preserved for her and her heirs. The daughter arrived at twenty-one. Held, that she took a fee simple absolute on the death of the widow, and that the dying without issue meant dying without issue in the lifetime of the widow; and that the devise over therefore could not take effect. *Carradice* v. *Scott*, 22 Gr. 426. Devise over on death in lifetime of life tenant.

On a devise to a widow till a daughter attained twenty-one, and then to the daughter in fee simple, with the provision that if the daughter died under twenty-one the land should go to the widow, it was held that the executory devise over to the widow, in case the daughter died under twenty-one was effective, and on the death of the widow intestate before the daughter, the interest so given descended to the daughter, Devise over on death under twenty-one.

and passed to her representatives, although she died under twenty-one. *Re Bowey*, 21 O.R. 361.

Devise over can take effect only when actual event occurs.

In a somewhat similar case, viz., on a devise to A. with a devise over to B. in case A. died under twenty-one, it was held that the devise over could only take effect if the death of A. occurred during the lifetime of B., and B. having died before A., who died under twenty-one, the estate was absolute in A. and passed to his heirs-at-law. *Parkes* v. *Trusts Corpn. of Ontario*, 26 O.R. 494.

A provision, on a devise in fee, that if the devisee die without issue, and leave a widow, she shall have a charge on the land, which is in that event to go to other devisees on a like condition, does not mean death without issue in the testator's lifetime. *Cowan* v. *Allen*, 26 S.C.R. 292.

So also, where the devise over is upon death without issue or unmarried. *Fraser* v. *Fraser*, 26 S.C.R. 316.

A devise to A. M., with a proviso that if A. M. should embrace the doctrines of the Church of Rome and at any time after his majority acknowledge himself in connection with that Church, the property devised should go to another, makes a double condition, and the devise over is not effective unless both events happen. *Laurence* v. *McQuarrie*, 26 N.S.R. 164.

Die before receiving.

Where legacies were given to children at a future date, and there was a provision that "in case any of my children die before any or all of them have received or become entitled to their several shares or portions, without lawful issue, and before such child shall have attained the age of thirty years, then I give such share" to survivors. Held, that a child attaining thirty years of age become absolutely entitled to a vested interest, though the time for payment had not arrived, viz., the death of a life tenant. *Re Clark*, 18 N.S.R. 96.

On a devise to A. when he arrives at twenty-one, with a devise over if he died "before receiving the share," it was held that he took a vested interest subject to being divested if he died under twenty-one. *Re Dennis*, 5 O.L.R. 46.

And," "or."

On a devise to A. in fee with a devise over if he should die before the testator's "brother and sister," the sister died in the testator's lifetime. Held, that "and" could not be

read "or," and that A. took a fee simple absolute. *Lillie* v. *Willis*, 31 O.R. 198.

And see *Doe dem. Forsyth* v. *Quackenbush*, 10 U.C.R. 148; *Forsyth* v. *Galt*, 21 C.P. 408; 22 C.P. 115.

Double event.

A devise was made to two sons to be divided between them when the eldest should attain twenty-five; and it was provided that if any of his sons should die under age and without issue, his share should go over. Held, that the devise over would take effect only on the happening of both events, viz., death under twenty-five and without issue, and as a son dying under twenty-five left issue, the estate was absolute, and the devise over did not take effect. *Cook* v. *Noble*, 5 O.R. 43.

Death at the same time.

And where a testator disposed of his property in a particular way in case he and his wife died at the same time, it was held that the will did not become effective upon their both dying within a few days of each other. *Henning* v. *Maclean*, 4 O.L.R. 660; 33 S.C.R. 305.

No presumption of survivorship on death in same calamity.

Where two or more persons perish in the same calamity, there being no proof of the order in which they die, there is no presumption of survivorship. Where several persons were lost at sea, in the absence of proof otherwise, the Court treated them as having died at the same moment and therefore no one of them could transmit any rights to any other of them. Therefore where a mother (illegitimate) and her children were all lost at sea in the same catastrophe, it was held that her children could take nothing under a bequest of their grandfather to such children as should be living at the mother's death; nor could a bequest over to take effect on the mother's dying without leaving issue, take effect, because though she had children, it could not be proved that she survived them; nor could the mother's will take effect as an appointment of a fund which she was empowered to appoint in case she had no issue. *Hartshore* v. *Wilkins*, 6 N.S.R. 276.

In this last case it was therefore held that the original testator died intestate as to the fund in question, and that the intestacy must be taken as of the time of his death. *Hartshore* v. *Wilkins*, 7 N.S.R. 128.

CHAPTER XLVIII.

SUBSTITUTION.

I.—What is a Substitutional Gift.

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Gift substitutional or alternative.

The simplest form of substitutional gift, introduced by the word "or," as, for instance, to class A *or* class B, generally involves the relation of smaller to larger class, or of ancestor to descendant.

Whether a gift to A or B is substitutional or alternative.

A simple gift to A or B may be substitutional or alternative, and it must be determined from the whole will which was intended. *Carey* v. *Carey*, 6 Ir. Ch. 255; *Longmore* v. *Broom*, 7 Ves. 128; *Miller* v. *Chapman*, 24 L. J. Ch. 409; *Maude* v. *Maude*, 22 Beav. 370; *In bonis Bradford*, 72 L. T. 267; *In re Delmar Charitable Trust*, (1897) 2 Ch. 163.

Children or representatives of tenant for life.

The substituted legatees may be intended to take, only if none of the original class come into existence, so that, if any come into existence, they take, whether they are living at the time of distribution or not; as, for instance, where the gift was to two daughters for their lives, and after their deaths to their respective children or legal representatives. *In re Roberts; Percival* v. *Roberts*, (1903) 2 Ch. 200.

Gift to A or B, as C may appoint, is not substitutional.

A gift to A or B, or to A or his children, as C may appoint, is not substitutional, and in default of appointment it goes among all the appointees equally. *Penny* v. *Turner*, 2 Ph. 493; *White's Trusts*, Joh. 656.

A gift of 100*l.* apiece to each of the children, grandchildren, or other descendants of A, includes all the descendants. *Solly* v. *Solly*, 5 Jur. N. S. 36.

Contingency of surviving the time of distribution applied to

When the contingency of surviving the time of distribution is applied both to the original and substituted class; if, for instance, the gift is to parents or their children living at the

decease of the tenant for life, the gift will nevertheless be construed as substitutional. *Congreve* v. *Palmer*, 16 B. 435; *Atkinson* v. *Bartram*, 28 B. 219; *In re Cleland's Trusts*, 7 L. R. Ir. 74.

original and substituted legatees.

In such a case, however, if there is anything to show that the original and substituted class are to take co-ordinately, "or" will be read "and." *Richardson* v. *Spragg*, 1 P. W. 433, where the gift was to such of the testatrix's daughters, or daughters' children, as should be living at her son's death, "without considering any superiority or eldership whatever." See *Shand* v. *Kidd*, 19 B. 310.

"Or" changed into "and."

And where the direction was to pay a sum of money after the death of a tenant for life, "to all and every the testatrix's nephews and nieces, to wit, A or her children, B or her children," &c., to be equally divided between them, "or" was read "and"; the words under the videlicet being only an expanded description of the persons to take. *Eccard* v. *Brooke*, 2 Cox, 213.

So, too, where the gift is to such of several persons as should be living at the testatrix's decease, or the issue of such of them as should be married, "or" will be read "and." *Horridge* v. *Ferguson*, Jac. 583.

Upon the same principle, a gift to children living at the time of distribution, or *their* issue, will be construed as a gift to children then living, and the issue of those then dead, including issue of these dead at the date of the will, but not, it would seem, of those who were dead before the testator was born. *King* v. *Cleaveland*, 4 De G. & J. 477; *Philps' Will*, 7 Eq. 151; *Burt* v. *Hellyar*, 14 Eq. 160; *Wingfield* v. *Wingfield*, 9 Ch. D. 658; *Keay* v. *Boulton*, 25 Ch. D. 212.

Gifts to persons "then" living, or their issue.

A substitutional gift, substituting one set of legatees for others dying before the time of distribution, must be distinguished from an executory gift over intended to take effect at any time. Thus, a gift to children living at a particular time, with a gift over, if any *such* children die leaving issue to their issue, is an executory limitation to take effect at any time. *La Roche* v. *Davies*, 3 Y. & C. Ex. 612, n.; *Ex parte Hunter*, 3 Y. & C. Ex. 610; *Howes* v. *Herring*, 1 M'Cl. & Y. 295.

Substitution distinguished from gift over to take place at any time.

On the other hand, if the gift is to children living at the time of distribution, with a gift to their issue if any such children die before becoming entitled, the gift to the issue will be construed as substitutional, since children living at the time of distribution could not die without becoming entitled. *Joyes* v. *Savage*, 10 Ch. 555; see *Giles* v. *Giles*, 8 Sim. 360.

II.—Legatees Dying before Testator after Date of Will

1. Original legatee a named person.

a. Direct gift.

If there is a direct gift to a named person or his children and the named person dies in the testator's lifetime leaving children, the children take. *Gittings* v. *McDermott*, 2 M. & K. 69.

b. Gift after life interest.

The result is the same if there is a life interest and the named person dies before the testator, leaving children. *In re Porter's Trust*, 4 K. & J. 188.

It makes no difference that the gift is not in the simple form to A or his children after a life interest, but that there is a gift to A with a direction that in case of his death or in case of his death before or in the lifetime of the tenant for life, or in case of his death leaving issue, the legacy is to go to his children. *Le Jeune* v. *Le Jeune*, 2 Kee. 701; *Ive* v. *King*, 16 B. 46; *Ashling* v. *Knowles*, 3 Dr. 593; *Hobgen* v. *Neale*, 11 Eq. 48.

2. Original gift to a class.

Cases where the original gift is not to a named person, but to a class followed by a substitutional gift, involve, in some respects, different considerations.

a. Gift to children or their issue.

For instance, if there is a life interest and then a gift to children or their issue, and a child dies before the testator, leaving issue, it seems the issue do not take, as the child did not become a member of the original class. *Re Ibbetson*: *Ibbetson* v. *Ibbetson*, 88 L. T. 461.

On the other hand, though the gift is in form substitutional, if what is given to the issue is an original share, issue of a child who dies before the testator may take if, for instance, the gift is to a class living at the death of the tenant for life or the issue of any then dead. *Attwood* v. *Alford*, 2 Eq. 479.

b. Direction that issue to take parents' share.

If the case is not the simple one of a gift to a class or their issue, but there are directions that the issue of a member dying are to take his share, the language of the direction affords a key to the construction.

The broad distinction appears to be, that, if what is given to the issue is "the share" of a member of the class, the substitution does not operate as regards a person, who died before the testator, and therefore never took a share. On the other hand, if what is given to the issue is the share a member of the class would have taken if he had lived, the substitution operates as regards a person who dies in the testator's lifetime after the date of the will.

Thus, if the gift to the class is after a life interest with a direction that the children of those dead should stand in the place of their parent or should take their parent's share, children of a parent who dies in the testator's lifetime do not come in, as he never had a place or share. *Thornhill* v. *Thornhill*, 4 Mad. 377; *In re Hannam*; *Haddelsey* v. *Hannam*, (1897) 2 Ch. 39. These cases are in accordance with the opinion expressed by Lord Romilly in *Ire* v. *King*, 16 B. 46, 53; *King* v. *Cleaveland*, 26 B. 26, 31.

Case where the original class is confined to persons living at the testator's death.

Again, if the original gift is to a class living at the testator's death, or at some other time, and the substitutional gift is expressly confined to the children of such persons, the substitution can have no effect with regard to those who never become members of the original class. See *Sherygold* v. *Boone*, 13 Ves. 370; *Smith* v. *Farr*, 3 Y. & C. Ex. 328.

c. Direction that issue to take share parent would have taken.

On the other hand, where the gift was immediate, and there was a direction that if any members of the class should die before their shares were payable leaving issue, the issue should take the share their parent would have been entitled to if living, the issue of a member of the class dying before the testator took his share. *Cort* v. *Winder*, 1 Coll. 320, where, however, the Vice-Chancellor seems to have thought that the language of the gift over referred to death before the testator; and see *In re Potter's Trust*, 8 Eq. 52, as to the nephew who died after the date of the will.

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The same construction was followed when the gift was to the testator's children living at the death of his widow with a proviso that if any of his children who should die in the lifetime of his widow should have left issue, such issue should be entitled to the share their parent would have been entitled to if living. *Smith* v. *Smith*, 8 Sim. 353, where the head-note is inaccurate. The case is explained in *In re Hannam*; *Haddelsey* v. *Hannam*, (1897) 2 Ch. 39, 43.

There may be other evidence of intention to shew that the substitution was to take effect upon the share of a member of the class dying before the testator. See *Jones* v. *Freeman*, 12 W. R. 369; 3 N. R. 415, where the original gift was apparently held to be a gift to persons named; and *Habergham* v. *Ridehalgh*, 9 Eq. 395, which was in substance a case of tenant for life and remainderman.

III.—Legatees Dead at the Date of the Will.

Where the original gift is to named persons.

1. When there is a gift to several persons nominatim, with a substitution of their issue in the event of their death, the fact, that one of the persons so named is dead at the date of the will, will not prevent his issue from taking. *Hannam* v. *Simms*, 2 De G. & J. 151; *Ive* v. *King*, 16 B. 46; *Hobgen* v. *Neale*, 11 Eq. 48; see *Barnes* v. *Jennings*, L. R. 2 Eq. 448.

Where the original gift is to a class.

2. If, however, the original gift is to a class, with a substitutional gift to issue, the question is whether the issue take a share which has been given to a parent, who is contemplated as capable of taking under the will, or whether they take a share, which has not been previously given to their parent. In the former case issue of parents dead at the date of the will will not take, in the latter they will.

Gift to parents then living, and the issue of those then dead.

a. If the gift is to parents and issue in one continuous sentence—as, for instance, to children then living and the issue of those then dead—the issue of parents deceased at the date of the will take. A direction that the issue are to take only the share their parent would have taken if living does not alter this construction. *Tytherleigh* v. *Harbin*, 6 Sim. 329;

Rust v. *Baker*, 8 Sim. 443; *Etches* v. *Etches*, 3 Dr. 447; *In re Philps' Will*, 7 Eq. 151; *Heasman* v. *Pearse*, 7 Ch. 275. *Waugh* v. *Waugh*, 2 M. & K. 11, may not be easy to reconcile with these authorities.

It seems the issue of a parent who died before the testator was born would not take. *Wingfield* v. *Wingfield*, 9 Ch. D. 658.

Issue to take their parent's share.

In some cases a direction that the issue are to take their parent's share, which implies a parent capable of taking under the will, has also been held not to exclude issue of a parent dead at the date of the will. But these cases are of doubtful authority. *Bubb* v. *Beckwith*, 2 B. 308; *Coulthurst* v. *Carter*, 15 B. 421; *Re Foulding's Trust*, 26 B. 263.

Effect of the word "said."

If the gift is to "my children then living, and the children of such of my *said* children as shall be then dead," the testator by using the term "said" children shows that he is contemplating a class of children living at the date of the will, and capable of taking under it, and therefore children of those dead at the date of the will will not be admitted. *Re Thompson's Trust*, 2 W. R. 218; 5 D. M. & G. 280; see *Peel* v. *Catlow*, 9 Sim. 372; *Smith* v. *Pepper*, 27 B. 86; *Hall* v. *Woolley*, 39 L. J. Ch. 106.

On the other hand, if the gift is to the brothers and sisters living at a particular time, and the children of such of the said brothers and sisters as should have died, and the testator has only one brother or one sister living at the date of the will, he cannot be referring to a class existing at the date of the will, and children of brothers and sisters dead at the date of the will will be admitted. *Re Jordan's Trust*, 2 N. R. 57; *Giles* v. *Giles*, 8 Sim. 360; see *Jarvis* v. *Pond*, 9 Sim. 549.

Gift to my daughters and their children.

If the children are expressed to be the children of parents, who are beneficiaries under the will; if, for instance, the bequest is to "my daughters and their children," the children of a daughter dead at the date of the will take nothing. *Parker* v. *Tootal*, 11 H. L. 143; see *Crook* v. *Whitley*, 26 L. J. Ch. 350; but see *Clay* v. *Pennington*, 7 Sim. 370.

When the gift is substitutional in the simplest form.

b. When the gift is clearly substitutional, as in the case of a gift to a class or their issue, issue of members of the original class dead at the date of the will will not take. *Congreve* v.

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Palmer, 16 B. 435; *In re Webster's Estate*; *Widgen* v. *Mello*, 23 Ch. D. 737. The principle seems to have been admitted in *In re Sibley's Trusts*, 5 Ch. D. 494.

Where such of the original legatees as are alive at the date of the will do not satisfy the words of gift.

If there is anything to assist the construction, issue of members of the class dead at the date of the will may be let in. Thus, if none of the members of the original class are alive at the date of the will, or if the original class is brothers and sisters, and the testator has only one brother living at the date of the will, children of those then dead will come in. *Gosling* v. *Thompson*, 11 Eq. 366, n.; see *Barnaby* v. *Tassell*, 11 Eq. 363; *Jarvis* v. *Pond*, 9 Sim. 549; *In re Sibley's Trusts*, 5 Ch. D. 494; *Walsh* v. *Blayney*, 21 L. R. Ir. 140.

Gift to the substituted legatees in an independent sentence.

c. Where the gift to the issue is in an independent clause, the question is, whether the intention is to add fresh members to or substitute them for the original class.

Direction that the *legacy* of a parent should go to his children.

If the gift is to children living at the testator's death, with a direction that, if any should happen to die in his lifetime, the "legacy" intended for such child should be for his issue, the word "legacy" shows that the testator meant to substitute only issue of parents who at the date of the will were capable of taking. *Christopherson* v. *Naylor*, 1 Mer. 320; *Hunter* v. *Cheshire*, 8 Ch. 751; *Re Offiler*; *Offiler* v. *Offiler*, 83 L. T. 758. It may be doubted whether *Phillips* v. *Phillips*, 13 W. R. 170; 10 Jur. N. S. 1173; and *Parsons* v. *Gulliford*, 10 Jur. N. S. 231, can stand with these authorities.

Issue to stand in the place of their parents.

The same rule applies, if there is a direction, that issue of parents dying are to stand in the place of their parents, or to take their parents' share. *Butler* v. *Ommaney*, 4 Russ. 71; *Gray* v. *Garman*, 2 Ha. 268; *Atkinson* v. *Atkinson*, 1 R. 6 Eq. 184; *Re Hotchkiss's Trusts*, 8 Eq. 643; *Habergham* v. *Ridehalgh*, 9 Eq. 395; *Kelsey* v. *Ellis*, 38 L. T. 471; *In re Barker*; *Asquith* v. *Saville*, 47 L. T. 38; *In re Musther*; *Groves* v. *Musther*, 43 Ch. D. 569; *In re Brown*; *Brown* v. *Brown*, 58 L. J. Ch. 429; 37 W. R. 472, not following *In re Smith's Trusts*, 5 Ch. D. 497, n.

The inference from the use of the words "legacy or share of the parent" cannot be drawn where what is given to the issue is not the parent's share, but the share the parent would have

taken if living. *Loring* v. *Thomas*, 1 Dr. & Sm. 497: *In re Potter's Trust*, 8 Eq. 52.

Where life interests are given to children, with a direction that upon the death of a child before or after the testator the corpus, the income whereof was or would have been payable to the child, is to go to his children, it is still more difficult to suppose that the testator intended to benefit children of a child dead at the date of the will. *In re Chinery; Chinery* v. *Hill*, 39 Ch. D. 614; *In re Wood: Tullett* v. *Colville*, (1894) 3 Ch. 381.

Where the gift was to such of the children of the testator's sisters as should survive the tenant for life, followed by a direction that in case any of such children should be dead at the testator's decease leaving issue, such issue should take the share of their deceased parent, the issue of a child dead at the date of the will was not included. *West* v. *Orr*, 8 Ch. D. 60; see *Giles* v. *Giles*, 8 Sim. 360.

Substitution if any members of original class shall die.

If the original gift is to a class followed by a direction that if any members of the class *shall* predecease the testator leaving children, such children are to take the share their parent would have taken if living, the word "shall" *primâ facie* has a future sense, and applies to members of the original class who die after the date of the will. *In re Gorringe; Gorringe* v. *Gorringe*, (1907) A. C. 225.

But there may be sufficient in the will to show that the words "shall die" are not used in a strictly future sense; for instance, if the direction is that if any children shall die leaving children who shall attain twenty-one, such last-mentioned children are to take the share their deceased parent would have taken if living, where the attainment of twenty-one cannot have been intended to be treated as a strictly future event. *Loring* v. *Thomas*, 1 Dr. & S. 497; *In re Chapman's Will*, 32 B. 382; *Adams* v. *Adams*, 14 Eq. 246; *In re Lucas' Will*, 17 Ch. D. 788; *In re Parsons; Blaker* v. *Parsons*, 8 R. 430; *In re Woolrich; Harris* v. *Harris*, 48 L. J. Ch. 321; 11 Ch. D. 663 (a doubtful case).

IV.—The Effect of Substitutional Gifts.

1. Original legatee a named person.

a. Direct gift.

1. In the case of a direct gift to a named person or his issue, if the named person survives the testator he takes absolutely. The substitution has no further operation. *Montagu* v. *Nucella*, 1 Russ. 165; *Chipchase* v. *Simpson*, 16 Sim. 485; *Salisbury* v. *Petty*, 3 Ha. 86; *Whitcher* v. *Penley*, 9 B. 477.

b. Gift after life interest.

If there is a life interest and then a gift to a named person or his children, the substitution takes effect if the named person dies leaving children after the testator but before the tenant for life. *Girdlestone* v. *Doe*, 2 Sim. 225; *Jacobs* v. *Jacobs*, 16 B. 557; *In re Craven*, 23 B. 333; *Salisbury* v. *Petty*, 3 Ha. 86; *Bolitho* v. *Hillyar*, 34 B. 180.

If the named person dies without children after the testator but before the tenant for life, he takes absolutely. *Smither* v. *Willock*, 9 Ves. 233; *Hervey* v. *M'Laughlin*, 1 Pr. 251; *Salisbury* v. *Petty*, 3 Ha. 86.

If the named person survives the tenant for life, he takes absolutely. The substitution ceases to operate. *Penley* v. *Penley*, 12 B. 547; *Sparks* v. *Restal*, 24 B. 218; *Blundell* v. *Chapman*, 33 B. 648.

2. Original legatees a class.

2. In the case of gifts to a class, for instance, to children or their issue after a life interest, if a child dies after the testator but before the tenant for life leaving issue, the issue take. *Timins* v. *Stackhouse*, 27 B. 434; *Fiulason* v. *Tatlock*, 9 Eq. 258.

Where the gift is not in this simple form but there is a direction that the issue of a deceased child are to take his share, the direction operates as regards the share of a member of the class who survives the testator but dies before the tenant for life. *Ire* v. *King*, 16 B. 46; *Re Gilbert; Daniel* v. *Matthews*, 54 L. T. 752; *Re Miles; Miles* v. *Miles*, 61 L. T. 359.

There may, however, in such a case be a context which limits the defeasance to the testator's death. *In re Dawes' Trusts*, 4 Ch. D. 210.

3. Substituted class need not be living at

3. In the ordinary case of a substitutional gift to a person or his issue or to a class, such as children or their issue, after

a life interest, it is not necessary that the issue in order to take should be living at the death of the tenant for life. *Masters* v. *Scales*, 13 B. 60; *Ire* v. *King*, 16 B. 46; *Smith* v. *Palmer*, 7 Ha. 229; *Lanphier* v. *Buck*, 2 Dr. & Sm. 484; *Re Turner*, 2 Dr. & Sm. 501; *In re Bennett's Trusts*, 3 K. & J. 280; *In re Merrick's Trusts*, 1 Eq. 551; *Hobgen* v. *Neale*, 11 Eq. 48; *In re Battersby's Trusts*, (1896) 1 Ir. 600; *Re Flower*; *Matheson* v. *Goodwyn*, 62 L. T. 677. The order in *Pearson* v. *Stephen*, 5 Bl. N. S. 203, is considered in *Lanphier* v. *Buck*, 34 L. J. Ch. 650, 659, and *Re Flower*.

Time of distribution.

4. But the issue, in order to take by substitution for their parent, must not predecease the parent. *Timins* v. *Starkhouse*, 27 B. 434; *Lanphier* v. *Buck*, 2 Dr. & Sm. 484; *Re Turner*, 2 Dr. & Sm. 501; *In re Bennett's Trusts*, 3 K. & J. 280; *Crause* v. *Cooper*, 1 J. & H. 207; *Harry* v. *Harry*, 10 Eq. 346.

4. Substituted issue must survive their parent.

The issue need not survive their parent if the gift to them though in form substitutional is in substance an independent gift; for instance, if the gift is to children then living or the issue of those then dead. *Lanphier* v. *Buck*, 2 Dr. & Sm. 484; *In re Woolley*; *Wormald* v. *Woolley*, (1903) 2 Ch. 206, explaining *In re Merrick's Trusts*, 1 Eq. 551.

Case of original gift to issue.

5. If there is a gift to children or their issue and there are children and children of those children living at the time of distribution, grandchildren cannot take in competition with their own parents. *Murgitson* v. *Hall*, 10 Jur. N. S. 89; *In re Cleland's Trusts*, 7 L. R. Ir. 74; *Re Lund's Settlement*; *Stanfield* v. *Keene*, 89 L. T. 806.

5. Substituted children do not take with their own parent.

6. In the case of a gift to several named persons or their children, if some of the named persons die before the time of distribution leaving children, and others survive that time, those who survive and the children of those who are dead take shares. *Price* v. *Lorkley*, 6 B. 180.

6. Living parents and children of deceased parents may take together.

The same is ordinarily the case where the original gift is to be divided among a class—for instance, children or their issue. *Doody* v. *Higgins*, 9 Ha. App. 32; *Finlason* v. *Tatlock*, 9 Eq. 258; *Neilson* v. *Monro*, 27 W. R. 936; *In re Sibley's Trusts*, 5 Ch. D. 494.

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When the two classes are exclusive.

On the other hand, if the gift is simply to children or grandchildren living at the time of distribution, without words denoting division, equality, or the creation of a tenancy in common, the result may be that the two classes are mutually exclusive, so that children of a deceased child cannot take if there are any children living. *In re Coley: Gibson* v. *Gibson*, (1901) 1 Ch. 40; see *Anson* v. *Harris*, 19 B. 210; *Holland* v. *Wood*, 11 Eq. 91.

V.—Whether Contingency of Original applies to Substituted Class.

Whether contingency of original applies to substituted class.

The cases hitherto discussed have been cases of simple substitution, such gifts as to several or their children, or to a class or their children, where no contingency was in terms introduced into the constitution of the original class. A very common form of gift is, however, a gift to a class living at the time of distribution and the issue of those then dead. In such cases the parents can only take if they are living at the time of distribution, and the question arises whether this contingency must be imported into the gift to the issue. It is now settled that it must not unless there is something more in the context. *Martin* v. *Holgate*, L. R. 1 H. L. 175, approving *Lyon* v. *Coward*, 15 Sim. 287; *Re Wildman's Trusts*, 1 J. & H. 299; *Barker* v. *Barker*, 5 De G. & S. 753; *Harcourt* v. *Harcourt*, 26 L. J. Ch. 536; *Etches* v. *Etches*, 3 Dr. 447; *In re Pell's Trust*, 3 D. F. & J. 291; *In re Orton's Trust*, 3 Eq. 375, and overruling, except in so far as they can be supported by a special context, *Bennett* v. *Merriman*, 6 B. 360; *Macgregor* v. *Macgregor*, 2 Coll. 192; *Penny* v. *Clarke*, 1 D. F. & J. 425; *Kirkman's Trust*, 3 De G. & J. 558.

The same rule applies if the gift to the issue is made by a separate clause providing that if any of the parents are then dead, leaving issue, the issue shall take the parents' share. *Martin* v. *Holgate*, L. R. 1 H. L. 175.

In these cases the gift to the issue is an original or independent gift. It is not therefore necessary that issue, in order to take, should survive their own parent (*a*), even though the gift

is to parents then living and the issue of those then dead leaving issue(*b*). *Harcourt* v. *Harcourt*, 26 L. J. Ch. 536; *Lanphier* v. *Buck*, 2 Dr. & Sm. 490; *In re Woolley*; *Wormald* v. *Woolley*, (1903) 2 Ch. 206. *Humfrey* v. *Humfrey*, 2 Dr. & Sm. 49, is not consistent with these authorities(a). *In re Smith's Trusts*, 7 Ch. D. 665(*b*).

Upon a similar principle, under a gift in certain events to a class and the issue of such of them as shall then be dead members of the class dying without issue before the events happen take a share. *Etches* v. *Etches*, 4 Dr. 441; *In re Wood*; *Moore* v. *Bailey*, 29 W. R. 171; see *Chandler* v. *Denton*, 1 De G. & J. 675.

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Gift, when legatee dead at date of will

On a gift to daughters living at a certain time, but in case the death of any of them then to their children, the children of a daughter dead at the time of making the will do not take. *Taylor* v. *Ridout*, 9 Gr. 356; *Re Williams*, 5 O.L.R. 345; *Re Fleming*, 7 O.L.R. 65.

Where death referred to as contingent it means death before testator.

A devise to A. absolutely, but if he die then to B., means if A. die in the lifetime of the testator, in which event B. is substituted. *Re Walker & Drew*, 22 O.R. 332.

After a gift of real and personal estate to the testator's widow for life, he disposed of his whole estate, to be divided between the children of two brothers and two sisters or their heirs. It was held that all the children took *per capita* in the first place, but if any of them died during the life of the tenant for life, their heirs, by which was meant issue, took in their place by substitution and not by descent. *Re Gardner*, 3 O.L.R. 343, and see *Harrison* v. *Spencer*, 15 O.R. 692.

To A. and B. or their heirs is substitutional.

A bequest to A. 'to have and to hold to him, his heirs and assigns forever,'' is an absolute gift, and lapses if A. dies in the testator's lifetime. *Mealey* v. *Aitkins*, 27 Gr. 563. But a gift, after the death of a tenant for life of personalty, to A. ''or his heirs, exeeutors or assigns,'' is substitutional, and the next of kin take on the death of the legatee during the life of the testator. *Re Wrigley*, 32 O.R. 108.

On a devise to A. in fee, with a devise over if he should die before the testator's "brother and sister," both events must occur before the gift over can take effect, "and" not being equivalent to "or." *Lillie* v. *Willis*, 31 O.R. 198.

See *Doe dem. Forsyth* v. *Quackenbush*, 10 U.C.R. 148; *Forsyth* v. *Galt*, 21 C.P. 408; 22 C.P. 115.

CHAPTER XLIX.

SURVIVORSHIP AND SURVIVORS.

I.—SURVIVOR AS A WORD OF LIMITATION.

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Survivor used as a word of limitation of an estate.

THE word survivor may be either a word of limitation of an estate, denoting the interest certain persons are to take, or it may denote a class of persons.

For instance, in a devise to A, B and C as tenants in common for life, with benefit of survivorship, the word survivorship refers to the extent of the estate and not to the class of persons, and upon the death of one the remaining tenants in common take the whole estate. *Haddelsey* v. *Adams*, 22 B. 266; *Taaffe* v. *Conmee*, 10 H. L. 64; see, however, *Wiley* v. *Chanteperdrix*, (1894) 1 Ir. 209.

The word cannot be a word of limitation, where absolute interests are given. *Maberley* v. *Strode*, 3 Ves. 450: *Foley* v. *Gallagher*, 2 L. R. Ir. 389.

II.—GIFTS TO SURVIVORS.

Survivors denoting persons to take.

The word survivors is more usually employed to denote a class of persons who are to take, and in such cases it must have its natural meaning, which is to outlive; that is to say, to be alive at and after the happening of a particular event or the death of a particular person, which event or person the other is to survive. *Gee* v. *Liddell*, L. R. 2 Eq. 341; *see Re Clark's Estate*, 3 D. J. & S. 111, where "survive" was held to mean merely "live after."

A single survivor takes under a gift to survivors.

A divesting clause in favour of survivors operates in favour of a single survivor. *Hearn* v. *Baker*, 2 K. & J. 283; *Bowyer* v. *Currall*, 2 W. R. 328; *Bowyer* v. *Douglass*, W. N. 1876, 279.

The principal difficulty with reference to survivorship clauses is to ascertain to what point of time the survivorship refers :—

Simple gift to several or the survivors refers to the time of division.

I. In simple cases, where the gift is to several or the survivors, or to several and the survivors or the survivors of them, or to a class described as surviving, such as surviving children, or to several or a class with benefit of survivorship, or with benefit of survivorship between them, the rule is now well settled, that survivorship is to be referred to the time, when the property or fund is divisible, and those then living will take the whole. As to the similarity in effect of these different expressions, see *Wiley* v. *Chanteperdrix*, (1894) 1 Ir. 209.

"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 legacy." *Cripps* v. *Woolcott*, 4 Mad. 11.

This is the case, whether the only gift is in the direction to divide, as in *Cripps* v. *Woolcott*, or whether there is already a prior complete gift independent of that direction. *Hearn* v. *Baker*, 2 K. & J. 383.

The same rule applies to realty as to personalty. *In re Greyson*, 2 D. J. & S. 424; *In re Belfast Town Council; Ex parte Sayers*, 12 L. R. Ir. 169.

Direct gift to several or survivors.

Therefore a direct gift to several, or to the survivors, goes to those who survive the testator. *Stringer* v. *Phelps*, 1 Ed. Ca. Ab. 292.

If there is an immediate gift to several with benefit of survivorship, payable at twenty-one, survivorship may be referred to that age, so that the share of one dying under twenty-one goes to the survivors. *Forrester* v. *Smith*, 2 Ir. Ch. 70.

Gift after life interest.

If there is a life interest those who survive the tenant for life take the whole. *Pope* v. *Whitcombe*, 3 Russ. 124; *Blewitt* v. *Roberts*, 10 Sim. 491; Cr. & P. 274; *Nunthorp* v. *Reed*, 3 D. M. & G. 18; *M'Donald* v. *Bryer*, 16 B. 581; *In re Crawhall's*

Trust, 8 D. M. & G. 480; *Taylor* v. *Beverley*, 1 Coll. 108; *Heavy* v. *Baker*, 2 K. & J. 383; *In re Pritchard's Trusts*, 3 Dr. 163; *Naylor* v. *Robson*, 34 B. 571.

The result is the same if the expression used is, if any die to the survivors, when the death referred to must be death before the tenant for life. *Whitton* v. *Field*, 9 B. 368.

Death of tenant for life before testator.

If the tenant for life dies before the testator, those who survive the testator take the whole. *Sparrell* v. *Sparrell*, 11 Ha. 54.

Gift to class when youngest attains 21, with benefit of survivorship.

On the same principle, if there is a gift to a class, when the youngest attains twenty-one, with benefit of survivorship, those living when the youngest attains twenty-one are entitled. *Worley* v. *Richardson*, 8 D. M. & G. 126.

If there is a gift to a tenant for life with remainder to his children who attain twenty-one, and if there are none to a class of survivors, the survivors are ascertained at the death of the tenant for life, or when his last child dies under twenty-one, whichever last happens. *Carver* v. *Burgess*, 7 D. M. & G. 96.

Several life tenancies.

If there are several life tenancies, the survivors are ascertained at the death of the last surviving tenant for life. *In Fox's Will*, 35 B. 163; *Howard* v. *Collins*, 5 Eq. 349.

Gift after life interest to survivors to be paid at 21.

If the gift is, after a life interest, to survivors to be paid at twenty-one, or some similar direction as to attaining a given age, the question is whether the survivorship refers to the death of the tenant for life or to the attainment of the given age. *Primâ facie*, it refers to the former. *Pope* v. *Whitcombe*, 3 Russ. 124; *Haffam* v. *Hobbard*, 16 B. 579; *Turing* v. *Turing*, 15 Sim. 139; *Lill* v. *Lill*, 23 B. 446; *Shaw* v. *Shaw*, 25 L. R. Ir. 30.

But the words of survivorship may be so connected with the direction for payment at twenty-one as to show, that by survivors are meant those who attain twenty-one. For instance, if after a life interest the gift is to a class with benefit of survivorship upon their attaining twenty-one or to be paid upon their attaining twenty-one with benefit of survivorship among them. *Knight* v. *Knight*, 25 B. 111; *Bayley* v. *Bristol*,

2 Dr. & S. 1; *Tribe* v. *Newland*, 5 De G. & S. 236; see *Crozier* v. *Fisher*, 4 Russ. 399; *Daniel* v. *Gosset*, 19 B. 478.

Effect of gift over.

In such cases a gift over, if all the beneficiaries die before the tenant for life, affords strong reason to suppose that survivorship refers to the death of the tenant for life (*a*); on the other hand, if the gift over is upon death of all before the given age, there is equally strong reason to suppose that survivorship refers to the age (*b*). *Daniel* v. *Gosset*, 19 B. 478; *Fisher* v. *Moore*, 1 Jur. N. S. 1011 (*a*); *Salisbury* v. *Lamb*, 1 Ed. 465; Amb. 383; *Bourerie* v. *Bourerie*, 2 Ph. 349; *Ally* v. *Mos*, 34 L. T. 312 (*b*).

Contrary intention.

There may be sufficient in the will to show, that in these cases survivorship does not refer to the time of division, but to some other time.

For instance, if the gift is, after a life interest, to surviving brothers or *their* issue, surviving may mean living at the testator's death (*a*); and after a gift to two tenants for life a gift to the surviving children of the second tenant for life may mean his children living at his death (*b*). *Shailer* v. *Groves*, 2 Jur. 1548 (*a*); *Drakeford* v. *Drakeford*, 33 B. 43 (*b*).

And in a similar case a gift to surviving children or their heirs and assigns shows, that the children were intended to take before the death of the tenant for life. *Re Hopkins' Trust*, 2 H. & M. 411; *In re Stannard*; *Stannard* v. *Burt*, 32 L. J. Ch. 355.

There may be other circumstances sufficient to take the case out of the ordinary rule. See *Rogers* v. *Towsie*, 9 Jur. 575; *Blackmore* v. *Snee*, 1 De G. & J. 455; *Evans* v. *Evans*, 25 B. 81.

Early cases not consistent with present rule.

Probably some of the earlier authorities, where survivorship in the case of future gifts was referred to the testator's death, are not in accordance with the views which now prevail. See *Rose* d. *Vere* v. *Hill*, 3 Burr. 1881; *Wilson* v. *Bayly*, 3 B. P. C. 195; *Roebuck* v. *Dean*, 2 Ves. Jun. 265; *Maberley* v. *Strode*, 3 Ves. 450; *Brown* v. *Bigg*, 7 Ves. 279; *Edwards* v. *Symons*, 6 Taunt. 213; *Doe* d. *Long* v. *Trigg*, 8 B. & Cr. 231.

Case where gift to survivors is if

2. If the gift is not simply to several or the survivors after a life interest, but to several, and if any die before the tenant

any die before the tenant for life.

for life to the survivors, the case is different. It is then a question of construction, whether survivorship is intended between the legatees or whether it refers to the time of distribution. Not much assistance can be got from the cases. If the gift is to the survivor of them, this indicates survivorship between the legatees (*a*); if it is to the survivor, his executors, administrators, and assigns, this indicates that the survivor was to take, though he might not survive the time of distribution (*b*); or again, if the gift is if any of the legatees die before the tenant for life to his children, and if none to the survivors, as the children are to be ascertained at the death of the legatee dying, so are the survivors (*c*). *Scurfield* v. *Howes*, 3 B. C. C. 90 (*a*); *White* v. *Baker*, 2 D. F. & J. 55 (*b*); *Ire* v. *King*, 16 B. 46, 57 (*c*).

On the other hand, if the gift is, after the death of a tenant for life, to seven persons, to be divided share and share alike, the share of each, who shall happen to die, to be equally divided among the survivors (*a*), or to two legatees, and if either of them shall be then dead, to the survivor (*b*), the time of division or the death of the tenant for life seems to be the leading idea in the testator's mind, and those then living take. *Cambridge* v. *Rous*, 25 B. 409 (*a*); *In re Pickworth*; *Smith* v. *Parkinson*, (1899) 1 Ch. 642 (*b*); see *Paul* v. *Benson*, 3 Atk. 78; *Littlejohns* v. *Household*, 21 B. 29; *Marriott* v. *Abell*, 7 Eq. 478; *In re Hill to Chapman*, 33 W. R. 570; 54 L. J. Ch. 595.

In *Bright* v. *Rowe*, 3 M. & K. 316, where the portion of any child, who should die before it should become payable, was given to the survivors and the share became payable on the father's death, it was held that on the death of a child before the father, his share went to those then living.

Gift to survivors upon death without issue before time of distribution.

3. If the gift to survivors is not simply upon death before the time of distribution, but upon death before that time without issue or under a given age, the case is more complicated. The question is, does the survivorship refer to the time of distribution, or does it refer to the death without issue or under age, as the case may be.

The former is no doubt the more convenient construction. If the other is adopted and the class is numerous there may

be difficulties as to accrued shares, and the property may be divisible in small fractions.

The determination of the question must depend upon the collocation of the words.

The fact, that the gift to the survivors is the gift of the whole fund and not merely of the share of the person dying, supports the view, that the fund is to be divisible once for all among a class ascertained at the time of distribution. *Watson* v. *England*, 15 Sim. 1.

In *Crowder* v. *Stone*, 3 Russ. 217, there was a life interest and then a gift to five beneficiaries, with a gift over, in case of the death of any of them without issue before their shares should become payable, to the survivors; and it was held that the survivors were to be ascertained when the death without issue happened. In *Young* v. *Robertson*, 4 Macq. 314; 8 Jur. N. S. 825 (a Scotch case), upon similar words, "survivors" was held to mean those living at the time of distribution. See, too, *Esser* v. *Clement*, 30 B. 525.

If there is a gift if any die leaving issue before the time of payment to the issue, and if not to the survivors, there is ground for saying, that, as the issue must be ascertained at the death of the parent, so must the survivors be. *Wilmott* v. *Fleuitt*, 13 W. R. 856; 11 Jur. N. S. 820.

Gift to survivors not limited to any period.

4. If the gift to survivors is not limited to the period of a life tenancy, but is to take effect upon the happening of some event, the survivors must be ascertained whenever the event happens.

Thus, if there is a direct gift to several persons and a gift over if any die under twenty-one to the survivors, survivors means those living when a child dies under twenty-one. *Ex parte West*, 1 B. C. C. 575; *Rickett* v. *Guillonard*, 12 Sim. 88.

And it would seem that an immediate gift to several with benefit of survivorship if any die without issue, could not be limited to death without issue in the testator's lifetime, unless there is an assisting context. See *Doe* d. *Lifford* v. *Sparrow*, 13 East, 359; *Bowers* v. *Bowers*, 5 Ch. 244.

If the gift to survivors is upon death without issue, and there

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is a life interest, though the gift over is not in terms limited to death without issue before the tenant for life, there may be circumstances, such as an intention, that the legatees are to have control of their shares at the time of distribution, which show, that this is the true construction. *Jenour* v. *Jenour*, 10 Ves. 562; *Clark* v. *Henry*, 6 Ch. 588; *Besant* v. *Cox*, 6 Ch. D. 604.

III.—When Survivors means Others.

Gift to several, and if any die without issue to the survivors.

1. If there is an absolute gift to several persons with a gift to the survivors, if any die without issue, "survivors" must be construed in its ordinary sense. *Crowder* v. *Stone*, 3 Russ. 217; *Ranelagh* v. *Ranelagh*, 2 M. & K. 441; *Steal* v. *Platt*, 18 B. 50; *Greenwood* v. *Percy*, 26 B. 572.

Gifts to be paid at 21, with a gift over if all die under 21.

2. Where there is a gift over to take place only in case the event, on which the property is limited to the first legatees, among whom there is to be survivorship, fails to happen in respect of all the legatees, "survivor" will be construed "other," so as not to cause an intestacy. For instance, if the bequests are to A, B, and C, payable at twenty-one, and if either die under twenty-one, his share to the survivors, and if two die under twenty-one, the whole to the survivor, and if all die under twenty-one, then over; the share of one dying under twenty-one would go to one who had predeceased him but attained twenty-one and to the survivor equally. *Wilmot* v. *Wilmot*, 8 Ves. 10; *In re Jackson's Trust*, 14 Ir. Ch. 472; followed in *In re Connellan's Trust*, 16 Ir. Ch. 524, though there was no gift over, but *quære*.

Survivorship between tenants in tail referred to the stirpes.

3. Where there is a devise to sons and the heirs of their bodies, and, if any die without issue, to the survivors and the heirs of their bodies, and if all die without issue over, survivorship will be referred to the stirpes and not to the first takers, and the share of a son dying without issue will go among the issue of a son previously deceased and the surviving sons. *Doe* v. *Wainewright*, 5 T. R. 427; *Smith* v. *Osborn*, 6 H. L. 376.

In such cases the testator has expressed his intention of

benefiting the line of issue, and the survivorship contemplated is one between the respective stirpes and not between the first takers merely, and this, coupled with the gift over, which can only take effect if all the sons die without issue, is sufficient to enlarge the meaning of the word survivor.

In such a case there may be enough in the will to show that survivors means others, even without a gift over if all die without issue. *Williams* v. *James*, 20 W. R. 1010; see *Tufnell* v. *Borrell*, 20 Eq. 194.

Gifts for life, remainder to issue, in default to surviving tenants for life.

4. If there are devises to several for their lives with remainder to their issue, and if any die without issue, to the surviving tenants for life for their lives, with remainder to their issue, with an ultimate gift over if all the tenants for life die without issue, then if a tenant for life dies leaving issue and another tenant for life afterwards dies without issue and there are issue of the first tenant for life living at the death of the second, such issue will take. It is not material to decide whether survivors means others simply or whether it means tenants for life surviving in person or in issue taking an interest under the will. *Cole* v. *Sewell*, 4 D. & War. 1; 2 H. L. 186; *In re Tharp's Estate*, 1 D. J. & S. 453; *In re Roe's Estate*, 43 L. J. Ch. 347; *Askew* v. *Askew*, 57 L. J. Ch. 629.

The same rule applies as regards personalty, if life interests are given with remainder to the issue of each tenant for life, with a gift over on the death of any tenant for life without issue to the surviving tenants for life for their lives, and then to their issue or to the surviving tenants for life in like manner as their original shares were given, with an ultimate gift over on failure of issue of all the tenants for life. *Loce* v. *Land*, 1 Jur. 337; *Holland* v. *Alsop*, 29 B. 498; *In re Keep's Will*, 32 B. 122; *In re Tharp's Estate*, 1 D. J. & S. 453; *Harry* v. *Morgan*, 3 Eq. 152; *Badger* v. *Gregory*, 8 Eq. 78; *Waite* v. *Littlewood*, 8 Ch. 70; *In re Palmer's Trusts*, 19 Eq. 320; *Wake* v. *Varah*, 2 Ch. D. 348.

It matters not whether the words used are "survivors" or "such as survive." *In re Tharp's Estate*, 1 D. J. & S. 453.

Whether survivors means

Upon the question whether in such case survivors means surviving in person or in issue taking an interest under the will, so

surviving in person or in stock.

that the issue of the first tenant for life, who dies, cannot take, if they all die before the death of the second tenant for life, the cases are conflicting. See *Lucena* v. *Lucena*, 7 Ch. D. 255, 270; *O'Brien* v. *O'Brien*, (1896) 2 Ir. 459; *In re Bilham*; *Buchanan* v. *Hill*, (1901) 2 Ch. 169; *In re Friend's Settlement*; *Cole* v. *Allcot*, (1906) 1 Ch. 47.

In similar cases, however, if some of the shares are settled and some are given absolutely, survivors will be construed as others and not as surviving in person or stock. *Lucena* v. *Lucena*, 7 Ch. D. 255.

Whether gift over essential.

In these cases the gift over shows that the fund is to go over as a whole, and only if there is a failure of issue of all the tenants for life; yet if survivors were read strictly, if a tenant for life died leaving issue, and the last tenant for life died without issue, the gift over could not take effect, as there has not been a total failure of issue; at the same time the issue of the tenant for life, who died first, could not take, so there would be an intestacy. If there is no gift over survivors must be strictly construed, unless there is some other evidence of intention to give it a different meaning. *In re Horner's Estate*; *Pomfret* v. *Graham*, 19 Ch. D. 186; *In re Benn*; *Benn* v. *Benn*, 29 Ch. D. 839; *Harrison* v. *Harrison*, (1901) 2 Ch. 136; *Garland* v. *Smyth*, (1904) 1 Ir. 35.

Not material whether shares settled expressly or by reference.

It can make no difference whether the shares given over to the surviving tenants for life are settled by express limitations or are only settled by reference to the limitations of the original shares; for instance, by a direction that they are to be held in the same manner as the original shares. *Melson* v. *Audry*, 5 Ves. 465; *Beckwith* v. *Beckwith*, 46 L. J. Ch. 97; 25 W. R. 282; 36 L. T. 128; *Harrison* v. *Harrison*, (1901) 2 Ch. 136; *Inderwick* v. *Tatchill*, (1901) 2 Ch. 738; (1903) A. C. 120, overruling the so-called third rule in *In re Bowman*; *Whytehead* v. *Boulton*, 41 Ch. D. 525.

The cases of *Hodge* v. *Foot*, 34 B. 349; *In re Arnold's Trusts*, 10 Eq. 252; *In re Walker's Estate*; *Church* v. *Tyacke*, 12 Ch. D. 205, see 19 Ch. D. 186, are not consistent with the later authorities.

There may, of course, be circumstances to show that survivors

is not used in a strict sense. *Harkins* v. *Hammerton*, 16 Sim. 410; *In re Beck's Trusts*, 16 W. R. 189.

Eyre v. *Marsden*.

In *Eyre* v. *Marsden*, 4 M. & Cr. 231, the construction was assisted by the fact that there was a gift to grandchildren living at the testator's death, with a postponement of payment and a direction that in case any of the grandchildren should die before their shares should be payable leaving issue, the issue should take the share the parent would have taken if then living. There was then a gift over, in case any of the grandchildren should die without leaving issue before becoming entitled to receive their shares, to surviving grandchildren, to be paid at the same time and in the same manner as the original shares. The issue of a grandchild, who did not survive, came in under the earlier clause, as they were to take the share their parent would have taken if living. See per Wood, V.-C., in *Re Corbett's Trusts*, Jo. p. 597.

No settlement of shares given over.

5. If there is no settlement of the shares of tenants for life dying without issue, survivors must be construed strictly.

For instance, as regards realty, if there are devises to nieces for life with remainder to their issue in tail, with a gift if any of the nieces die without issue to the surviving nieces, not for life but in tail or in fee, surviving cannot be read other, even though there is a gift over, if all the tenants for life die without issue. *Lee* v. *Stone*, 1 Ex. 674; *Twist* v. *Herbert*, 28 L. T. 480; *Haden* v. *Taylor*, 45 L. J. Ch. 569; *King* v. *Frost*, 15 App. C. 548; see *Cooper* v. *Macdonald*, 16 Eq. 258.

The same applies in the case of similar limitations of personalty to the surviving tenants for life absolutely, whether there is (*a*) or is not (*b*) a gift over in default of issue of all the tenants for life. *Browne* v. *Rainsford*, I. R. 1 Eq. 384 (*a*); *Leming* v. *Sherratt*, 2 Ha. 14; *Re Corbett's Trusts* (the residue), Jo. 591 (*b*).

Nor can survivors be read others where the gift over is not to the surviving tenants for life, but to the children of the surviving tenants for life. *In re Dunbery's Trusts*, 9 L. R. Ir. 349; *Re Rabbins*; *Gill* v. *Worrall*, 79 L. T. 313.

Some shares settled, others not.

6. In some cases the question has arisen whether, if the shares of daughters are settled and the shares of sons not, and

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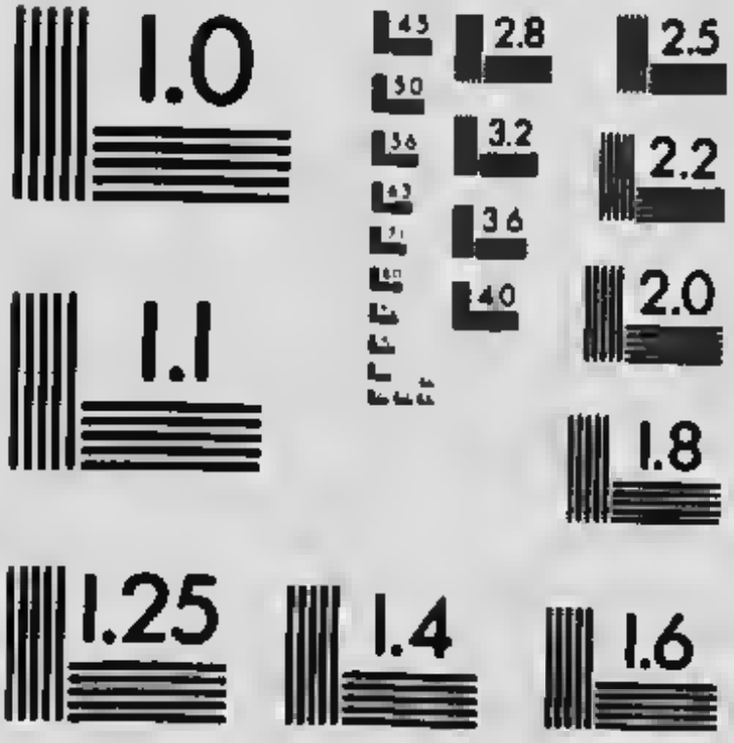

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the daughters' shares in default of children are given to the surviving sons and daughters, the daughters' accruing shares being settled as before, surviving can be read other. It can be so read if there is an ultimate gift over on a total failure of issue (*a*), but otherwise not (*b*). *Lucena* v. *Lucena*, 7 Ch. D. 255 (*a*); *De Garagnol* v. *Liardet*, 32 B. 608; *In Ustieke*, 35 B. 338; see *Jackson* v. *Sparks*, 38 L. J. Ch. 75 (*b*).

Whether last survivor takes absolutely.

7. It was at one time supposed, that, when there were gifts to several for life, with remainder to their children, and if any died without children to the surviving tenants for life absolutely, the last tenant for life dying without children took his share absolutely as the longest liver, though he did not survive the event. But this construction is now overruled, and the share of the last survivor dying without children goes over and either falls into residue or lapses. *Nevill* v. *Boddam*, 28 B. 554; *In re Mortimer; Griffiths* v. *Mortimer*, 52 L. T. 383; 54 L. J. Ch. 414; *Askew* v. *Askew*, 58 L. T. 472; 57 L. J. Ch. 629; 36 W. R. 620; *King* v. *Frost*, 15 App. C. 548; *Ranelagh* v. *Ranelagh*, 41 W. R. 549; 3 R. 315; *Olphert* v. *Olphert*, (1903) 1 Ir. 326; overruling *Madan* v. *Taylor*, 45 L. J. Ch. 569; *Davidson* v. *Kimpton*, 18 Ch. D. 213; *In re Roper; Morrell* v. *Gissing*, 41 Ch. D. 409; *In re Hutchins*, 19 L. R. Ir. 215.

"Others" not read survivors.

8. Under a gift in default of children of a daughter to the others or other of his children by name, equally between them if more than one, the word others will not be read as survivors. *In re Hagen's Trusts*, 45 L. J. Ch. 665; see *In re Chaston*; *Chaston* v. *Seago*, 18 Ch. D. 218.

Nor under a gift to a son by name and the survivors of the testator's daughters is it necessary that the son should survive in order to take. *In re Bates*, 11 W. R. 768.

CANADIAN NOTES.

Survivors of tenant for life.

A testator devised lands to his wife for life, and thereafter to the children of a brother, naming them, or the survivor or survivors of them. Held, that the word survivor related to the death of the tenant for life, and not the death of the testator. *Peebles* v. *Kyle*, 4 Gr. 334; *Smith* v. *Coleman*, 22 Gr. 507; *Keating* v. *Cassels*, 24 U.C.R. 314.

On a devise to trustees, on trust to pay the income to a widow for life, and what remained to children at her death, with a provision that in the event of the death of any of the children without leaving lawful issue, his, her or their share or shares should revert to the residuary estate and be divided amongst the survivors, it was held that the survivors were those who should outlive the widow, and not the testator. *Re Finlayson*, 5 B.C.R. 517.

A gift upon trust for support and maintenance of a widow and children until the youngest attained twenty-one, when it was to be divided in the proportion of two-thirds to the children and one-third to the widow, and at the death of the widow the one-third to be divided between the surviving children. Held, that those surviving at the death of the widow took the one-third. *Re Soules*, 30 O.R. 140.

Survivors *inter se.*

A bequest of an annuity to J. and the surplus of the income to G. W. and S. R. D., "and at his decease to divide share and share alike all moneys in the hands of the executors between G. W. and S. R. D., or the survivor of them." S. R. D. died first, then G. W., and during J.'s lifetime, the Court held that G. W., being the survivor of himself and S. R. D., took the whole surplus. *Allan* v. *Thompson*, 21 Gr. 279.

Where a testator devised land to his two sons or the survivor of them, when they attained twenty-five, with the provision that if they died under twenty-five without lawful issue their share should go to the survivors of the testator's children liv-

ing at that time, and one son died under twenty-five without issue, and the other attained twenty-five, it was held that he took the whole fund, the period of survivorship referring not to the death of the testator, but to that of the two sons. *Re McIntosh*, 13 Gr. 309.

A devise to two sons for life, and "if either should die not leaving heirs, the issue of his own body, his surviving brother shall inherit his share, for the time being, and after the decease of both sons, the land shall be sold and the proceeds equally divided and given unto their respective lawful heirs then surviving them." Held, that the persons who should be found surviving both sons at the death of the survivor of them took a fee simple in remainder after the death of the two sons. *Haight* v. *Dangerfield*, 5 O.L.R. 274.

Where estate tail created.

A devise was made to R. and J. of different parcels with the provision that should either die without issue, "their shares" should be equally divided amongst the surviving children of the testator. It was held that each son took an estate tail. No other question was mooted. *Little* v. *Billings*, 29 Gr. 353.

In *Ashbridge* v. *Ashbridge*, 22 O.R. 146, a devise in general terms of a farm to two sons to be equally divided between them, was followed by a provision that in case either of the sons should die without lawful issue of their bodies, then his share should go to the "remaining -vor." One son died leaving issue, and afterwards the ot tied without issue. It was held, that the first son took an estate in fee simple, and that the surviving son on his death left no survivor, and was not within the words of the will, and therefore took in fee simple also. In this case there was one parcel, and the share of the one dying without issue was dealt with. Under the circumstances, a decision could have been supported that there was an intention to benefit the line of issue with the whole land devised, and that the share of one who died without issue should go to the line continued by issue.

This case was not followed in *Nason* v. *Armstrong*, 22 O.R. 542, affirmed 21 A.R. 133, reversed on another point, 25 S.C.R. 263. In this case the devise was of separate parcels to two

daughters, with the provision that if either of them died without lawful issue, the part and portion of the deceased should revert to the surviving daughter, and in case of both dying without issue then a division was directed by the executors and other living persons. The Court preferred to follow *Little* v. *Billings* rather than *Ashbridge* v. *Ashbridge*, in so far as the question of survivorship was concerned; but held that as failure of issue required a division by living persons the testator must have intended a failure at the death of the devisees.

Devisee not within survivorship clause.

A testator devised land to trustees, for and on behalf of his two sons W. and J., "and any other son or sons to be hereafter lawfully begotten," and provided that "if the two boys now presently existing were those only left by me, and in case of the death of either without leaving issue, his right and title shall fall and belong to the surviving boy exclusively." A third son was born, who died after the testator but before the period of distribution. Held, that his share passed to all his brothers and sisters, as his heirs-at-law, and was not within the ... ...se as to survivorship. *Dobbie* v. *McPherson*, 19 Gr. 262.

Accrued share.

Where a testator gave legacies to each of three grandchildren to be paid to them at majority, and provided that "in case of the death of any one of my said grand-children the bequests and legacies to them shall be divided among and go to the survivor or survivors of them," it was held that an accrued share which went to survivors on the death of one of them passed to the survivor on the death of a second one, the words "bequests" and "legacies," in the plural, signifying more than the original legacy. *Clifton* v. *Crawford*, 27 A.R. 315.

Special construction.

A testator set apart a sum to be invested for his two daughters, and left the residue to his two sons, and provided that, in case of the death of either or both of the daughters without issue, her or their share should become part of the residue and be divided equally among the survivors and the issue of any child who should then be deceased. On the death of one

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daughter without issue, it was held that her share was divisible amongst all the surviving children, and not between the sons only as entitled to the residue. *Re Mackinlay*, 38 N.S.R. 254.

On a bequest to a son for the benefit of his mother for her life, and himself and any more issue she might have, with a proviso that "in the event of the death of the mother or her son leaving more issue, the principal to be equally divided among them; and in case of the death of the mother and her said son leaving no issue," then over, it was held that the reference to issue was to issue of the mother and not the son, and that if any issue, including the son, survived the mother, the gifts become absolute in them and the gift over did not take effect. *Kerrison* v. *Kaye*, 2 N.B. Eq. 455.

CHAPTER L.

THE CONSTRUCTION OF GIFTS OVER.

I.—Gift Over where Legatee Dies before Testator.

I. Gift over on death under certain conditions takes effect if the death happens in the testator's lifetime under those conditions.

As a general rule, where there is a gift to a legatee, followed by a gift over if the legatee dies under certain conditions—for instance, under twenty-one or without issue—the gift over takes effect if the event happens in the lifetime of the testator; but there may be an intention expressed in the will which takes the case out of the general rule. The fact that what is given over is the legacy or share of the legatee dying does not take the case out of the rule.

Thus, if there is a gift to A, and if he dies under twenty-one (*a*), or without issue (*b*), or leaving issue (*c*) over, and A dies in the testator's lifetime a minor, or without issue, or leaving issue, as the case may be, the gift over takes effect. *Ledsome* v. *Hickman*, 2 Vern. 611; *Perkins* v. *Micklethwaite*, 1 P. W. 274; *Northey* v. *Strange*, 1 P. W. 340; *Watling* v. *Baine*, 3 P. W. 113 (*a*); *Mackinnon* v. *Peach*, 2 Keen, 555; *Varley* v. *Winn*, 2 K. & J. 700; *Rackham* v. *De la Mare*, 2 D. J. & S. 74 (*b*); *Rheeder* v. *Owen*, 3 B. C. C. 240 (*c*).

Gift over if legacy not claimed.

The same rule applies where there is a gift over, if the legatee does not claim his legacy within a given time and he dies before the testator. *Re Green's Estate*, 1 Dr. & Sm. 68.

Death before payment.

In like manner a gift over, if a legatee dies before payment, takes effect if he dies in the testator's lifetime. *Darrel* v. *Molesworth*, 2 Vern. 378; *Bretton* v. *Lethulier*, 2 Vern. 653; *Collier* v. *Johnson*, 8 Sim. 356, n.

If the gift to A is to be paid or become vested at twenty-one, with a gift over if he dies before payment (*a*) or before attaining a vested interest (*b*), and A dies before the testator having

attained twenty-one, the gift over nevertheless takes effect, for the gift cannot be payable or become vested in the testator's lifetime. *Walker* v. *Main*, 1 J. & W. 1 (the share of Mary Main, who had attained twenty-one); *In re Gaitskell's Trusts*, 15 Eq. 386. The cases of *Miller* v. *Warren*, 2 Vern. 207; *Rider* v. *Wager*, 2 P. W. 328; *Smith* v. *Oliver*, 11 B. 494, cannot now be considered good law; see *Re Green's Estate*, 1 Dr. & Sm. 68, 73.

Deferred legacy.

The rule is the same if the legacy is not given until after the death of a tenant for life. *Walker* v. *Main*, 1 J. & W. 1 (due and payable); *Humphreys* v. *Howes*, 1 R. & M. 639; *Ive* v. *King*, 16 B. 46; *Willetts* v. *Willetts*, 7 Ha. 38.

In the case of a deferred legacy, however, the rule has not been applied where the gift over was in favour of the executors or administrators of the legatee himself as part of his estate. *Bone* v. *Cook*, 13 Pr. 332; M'Clel. 168.

A gift of the legacy of a child dying before the legacy shall have vested in him in favour of his issue may be sufficient, where the child dies before the testator, to carry to his issue not only his original share but also an accruing share which he would have taken under a gift to surviving children if he had been alive at the time of survivorship. *Willetts* v. *Willetts*, 7 Ha. 38.

Conditions of gift over must be fulfilled.

The gift over cannot take effect if, though the legatee dies before the testator, the circumstances of his death do not satisfy the language of the gift over; for instance, if there is a gift over if the legatee dies under twenty-one leaving children, and the legatee dies before the testator leaving children, but having attained twenty-one, or a gift to a son on his completing his apprenticeship with a gift over if he dies before he accomplishes it, and he dies before the testator after completing it. *Doe* v. *Braban*, 3 B. C. C. 393; 4 T. R. 706; 1 V. & B. 389; *Humberstone* v. *Stainton*, 1 V. & B. 385.

II.—Gift Over upon Death before Legacy Payable.

1. Immediate gift, no time of payment appointed.

If there is an immediate legacy, no time for payment being appointed, and there is a gift over if the legatee dies before his legacy is payable, it would seem that the gift over should take effect, if the legatee survives the testator but dies before the expiration of a year from his death, that being the date when, in the ordinary course, the legacy is payable. There appears to be no authority in which the exact point has been decided.

In former editions of this book, following Jarman, vol. ii., p. 1623, it was laid down that in such a case the gift over did not take effect if the legatee survived the testater. The case of *Cort* v. *Winder*, 1 Coll. 320, contains some observations which seem to support this view; but the point did not then arise, as the legatees died before the testator. *Collins* v. *Macpherson*, 2 Sim. 87, where the gift over was held not to operate upon the interest of a legatee who died three months after the testator, was a peculiar case, and the construction was arrived at upon "taking the whole will together." See also *Whitman* v. *Aitken*, 2 Eq. 414.

2. Immediate gift, time of payment named.

2. Immediate gift, time of payment appointed.

In such a case the legacy goes over if the legatee dies before the time of payment. *Jenkins* v. *Jenkins*, Belt's Supp. 1st ed. 250, 2nd ed. 261; *Rammell* v. *Gillow*, 9 Jur. 704.

3. Postponed gift, no time of payment named.

3. Gift after a life interest, no time for payment appointed.

In this case the gift over takes effect if the legatee dies before the tenant for life. *Crowder* v. *Stone*, 3 Russ. 217; *Cresswick* v. *Gaskell*, 16 B. 577.

4. Postponed gift payable at 21.

4. Gift after a life interest, where the gift is payable at twenty-one.

If there is a gift to a legatee payable at twenty-one after a life interest, and there is a gift over if the legatee dies before his legacy is payable, there is a question whether payable refers to the age of the legatee or to the death of the tenant for life, or to the compound event, so that the gift over takes effect unless the legatee attains twenty-one and survives the tenant for life.

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General canon of construction.

In the case of marriage settlements, where the nature of the instrument leads to the presumption that the intention is to provide for the issue of the marriage at the time when they want their portions, namely, at twenty-one or marriage, a rule of construction has been established that under a gift over upon the death of any of the issue of the marriage before their shares are payable, the expression payable is to be referred to the time when the provision is wanted, namely, twenty-one or marriage, unless the language is so clear as to make that construction impossible. This rule applies to voluntary settlements and also to wills so far as they provide for children or remoter issue of the testator, or for persons to whom he has placed himself *in loco parentis*. See *ante*, p. 591.

Payable referred to, time named for payment.

The simplest case is when the portions are to be paid at twenty-one in the case of males, and at twenty-one or marriage in the case of females, and no other time of payment is mentioned or contemplated, with a gift over if any die before their portions are payable. In such a case the gift over may be referred to the time when the portion is expressly directed to be paid. *Emperor* v. *Rolfe*, 1 Ves. sen. 208; *Powis* v. *Burdett*, 9 Ves. 428; *Hollifox* v. *Wilson*, 16 Ves. 168 (will); *Mocatta* v. *Lindo*, 9 Sim. 56; *Jones* v. *Jones*, 13 Sim. 501; *Haydon* v. *Rose*, 10 Eq. 224; *Partridge* v. *Baylis*, 17 Ch. D. 835.

Payment postponed till after parents' death.

The case is more difficult where the portions are made payable at twenty-one, but there is a provision that if any children attain that age in their parents' lifetime, then the portions are to be paid after their deaths. The same construction has, however, been adopted in such cases. *Cholmondeley* v. *Meyrick*, 1 Ed. 77; 3 B. C. C. 254, n.; *Schenck* v. *Legh*, 9 Ves. 300; *In re Williams*, 12 B. 317; *Fry* v. *Lord Sherborne*, 3 Sim. 243; *Carrie* v. *Larkins*, 4 D. J. & S. 245.

The rule has also been applied, though the only time of payment mentioned was a time after the death of the parents. *Jeffreys* v. *Reynous*, 6 B. P. C. 398; *Willis* v. *Willis*, 3 Ves. 51; *Hope* v. *Lord Cliffden*, 6 Ves. 499; *Butterworth* v. *Harvey*, 9 B. 130.

Entitled in possession and

It has also been applied where the gift over was upon death before "becoming entitled in possession" (*a*), "entitled to pay-

ment" (*b*), "entitled to the receipt" (*c*), upon death "before they have received or become possessed" (*d*), and "before their estates . . . . shall be received" (*e*). *Re Yates' Trs.* 21 L. J. Ch. 281 (*a*); *In re Williams*, 12 B. 317 (*b*); *Harrod* v. *James*, 28 B. 523 (*c*); *Rammell* v. *Gillow*, 9 Jur. 701 (*d*); *West* v. *Miller*, 6 Eq. 59 (*e*). Similar expressions.

If the gift over is if any die without issue before their shares are payable, it becomes more difficult to refer payable to the age of twenty-one or marriage, since a daughter could not have issue unless she were married, *i.e.*, after her share had become payable. *Day* v. *Radcliffe*, 3 Ch. D. 654, which is not easily reconcilable with *Mendham* v. *Williams*, 3 Eq. 396. Gift over upon death without issue before share payable.

One reason given for the rule is that, if the gift over operates on the share of a child dying over twenty-one in its parents' lifetime, the child might die and leave issue who would be unprovided for. But the rule applies where the gift over is if any child should die before his share should be payable unmarried and without leaving issue, though this reason would not then apply. *Wakefield* v. *Maffet*, 10 App. C. 422. How far rule applied where remoter issue provided for.

If, however, remoter issue are provided for in the event of a child dying before his share is payable, the reasons for applying the rule are very much weakened, and the Court will be unwilling to give the words any but their natural meaning. *In re Willmott's Trusts*, 7 Eq. 532; *Joyes* v. *Savage*, 10 Ch. 555 (where the gift over was upon death before they should "become entitled to and actually receive"); *Chell* v. *Chell*, 23 W. R. 252; see, however, the comments on *Joyes* v. *Savage* in *In re Leader's Estate*, 17 L. R. Ir. 279, 307.

And the instrument may clearly show that the gift over refers to the death of the tenant for life, if, for instance, there is a gift in remainder to children not contingent upon their attaining twenty-one or to be paid at twenty-one, with a provision that if the money becomes payable before they attain twenty-one the interest is to be applied for their maintenance with a gift over if any die before their shares are payable, payable clearly refers to the death of the tenant for life. *Bright* v. *Rowe*, 3 M. & K. 316. Clear words must have effect.

III. Vesting *prima facie* refers to vesting in interest.

III.—Gift over upon Death before Vesting.

A gift over upon the death of the legatees before attaining a vested interest refers *prima facie* to death before vesting in interest.

This is the case whether the gift be immediate or in remainder. *Parkin* v. *Hodgkinson*, 15 Sim. 293; *Re Arnold's Estate*, 33 B. 163; *Richardson* v. *Power*, 19 C. B. N. S. 780; S.C. *Re Arnold's Estate*, 33 B. 163.

When the gift over is to persons living at the time of distribution.

If, however, the gift over be to persons living at the time of distribution, there is a strong argument, that the word vested was used as equivalent to vested in possession. *Young* v. *Robertson*, 4 Macq. 314; 8 Jur. N. S. 825; *Greenhalgh* v. *Bates*, 2 P. & D. 47.

So, if the legacies would be vested in interest at the testator's death, and the gift over is, if any of the legatees die during the testator's life or after his decease, without attaining vested interests, vested must mean vested in possession. *King* v. *Cullen*, 2 De G. & S. 252.

"Vested" used as equivalent to "paid."

And, in the same way, the testator may show that he used "vested" in the gift over, as equivalent to "paid," if the gift over is, if any die before their share should be vested as aforesaid, when only directions as to payments have been previously given. *Sillick* v. *Booth*, 1 Y. & C. C. 121, 126.

If the testator expressly provides for the death of the legatees in his lifetime, a gift over upon death before vesting refers to vesting in possession. *In re Morris*, 5 W. R. 423.

IV. Meaning of entitled.

IV.—Gift Over upon Death before Entitled.

The word "entitled" has no settled legal meaning. Without explanatory context possession appears not to be part of its connotation. Its primary meaning is entitled in interest. What a man is entitled to is often used in contrast to what he has got. However, with a context the word may mean entitled in possession; it may also mean entitled to a vested as opposed to a contingent interest.

When it means entitled in interest.

In several cases where there has been a gift by will after a life interest or at a future date to a named person or to a class not capable of increase after the testator's death, a gift over upon death, before becoming entitled, has been held not to operate upon the interest of a legatee who survived the testator. *Commissioners for Charitable Donations* v. *Cotter*, 1 Dr. & War. 498; *Henderson* v. *Kentish*, 2 De G. & S. 192; *Re Crosland*; *Craig* v. *Midgley*, 54 L. T. 238.

When it means entitled to vested interest.

If the interest of the named persons is contingent upon the [illegible]nts for life dying without issue, the gift over may refer to the vesting of the title, *i.e.*, to death before the tenant for life. *Turner* v. *Cassel*, 34 B. 593.

When it means entitled in possession.

If there is a gift to a tenant for life with remainder to his children, a gift over if any die before becoming entitled must refer to title in possession, as members of the class may be born after the testator's death. *In re Noyce*; *Brown* v. *Rigg*, 31 Ch. D. 75; *In re Maunder*; *Maunder* v. *Maunder*, (1903) 1 Ch. 451.

And in a settlement so framed that children become entitled at birth, entitled in such a gift [illegible]r must mean entitled in possession. *Jopp* v. *Wood*, 2 D. J. & S. 323; see *Beale* v. *Connolly*, I. R. 8 Eq. 412.

V.—Gifts Over upon Death before actually Receiving the Legacy.

V. Gift to persons living at the testator's death, with a gift over upon death before payment.

1. When it is clear that the testator refers only to legatees living at his death and there is a gift over if any die before their shares are payable or before receiving their shares, the gift over cannot refer to death in the lifetime of the testator. Kindersley, V.-C., in such a case, held that the gift over was good with regard to the shares of those who died within a year after the testator's death; but, apparently, the Court would inquire at what time the money might have been paid. *In re Arrowsmith's Trusts*, 22 L. J. Ch. 775; 6 Jur. N. S. 1231; on appl., 2 D. F. & J. 474; *In re Chaston*; *Chaston* v. *Seago*, 18 Ch. D. 218.

2. In the same way under an immediate bequest with a gift over upon death "before me or before the division or final

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division of my estate," the gift over takes effect upon the shares of legatees dying within a year from the testator's death. *In re Collison; Collison* v. *Barber*, 12 Ch. D. 834; *In re Wilkins; Spencer* v. *Duckworth*, 18 Ch. D. 634. See *In re Potts; Hooley* v. *Fountain*, W. N. 1884, 106.

Death before receipt.

3. Where the bequest is after a life interest, with a gift over on death before the legatee receives his legacy, the gift over does not take effect if the legatee survives the tenant for life. *Re Dodgson's Trust*, 1 Drew. 440; *Whiting* v. *Force*, 2 B. 571; *Wilks* v. *Bannister*, 30 Ch. D. 512.

Although there can be no justification, except that of avoiding inconvenience, for construing "received" or "paid" as equivalent to "receivable" or "payable," yet there is more plausibility in saying that receipt by a trustee, where the cestui que trust is absolutely entitled, may be treated as equivalent to receipt by the cestui que trust himself. See *Minors* v. *Battison*, 1 App. C. 428.

Actual payment or receipt.

4. Where, however, the gift over is in the event of death before the legacy is actually paid or received, or other words are used which import the transfer of property from the executor or trustee to the legatee, the cases are in appearance difficult to reconcile. The distinction between the effect of such gifts over in the case of a residue and in the case of a pecuniary legacy does not appear to have been adverted to; but it will be found to justify most if not all of the decisions.

a. Where a share of residue is given to a legatee, with a gift over, if the legatee dies before actual receipt of his share, it cannot be ascertained at any given time, whether the gift over will take effect or not. There is no ground for treating a gift of residue as limited to the residue capable of realisation within a year from the testator's death; assets may fall into it many years after that time; and an increase of the divisible residue after the legatee's death would, if the gift over is strictly construed, bring it into operation. Such a divesting clause, therefore, is void for uncertainty. *Hutcheon* v. *Mannington*, 1 Ves. Jun. 366; 4 B. C. C. 491; *Martin* v. *Martin*, L. R. 2 Eq. 404; *Minors* v. *Battison*, 1 App. C. 428; *Bubb* v. *Padwick*, 13 Ch. D. 517.

b. But the objection does not apply if, as in *Johnson* v. *Crook*, 12 Ch. D. 639, the gift is immediate and the gift over is only of so much as the legatee has not received at his death. Here, the question whether the gift over comes into effect is answered at the legatee's death. If his death must happen within the period fixed by the rule against perpetuities, there can be no objection on that score to the gift over, although the improbability of the testator intending such a bifurcation of his residue may afford a reason for construing the words in another sense. See, too, *In re Goulder*; *Goulder* v. *Goulder*, 74 L. J. Ch. 552.

c. Nor is there any objection to the gift over where, as in *Whitman* v. *Aitken*, L. R. 2 Eq. 414, the original gift is a pecuniary legacy, incapable of augmentation.

But the improbability of any testator intending a construction which would make the interests of beneficiaries depend upon chance, has induced the Courts to give some other construction even to words naturally indicating an actual receipt by the legatee. See *Law* v. *Thompson*, 4 Russ. 92.

Death before sale completed.

5. If there is a gift upon trust for sale and division among certain legatees, a gift over if any die before the sale is completed is valid. *Faulkener* v. *Hollingworth*, cit. 8 Ves. 559; *Elwin* v. *Elwin*, 8 Ves. 547; see *Bernard* v. *Montague*, 1 Mer. 433; see 11 Ves. 508.

Death before execution of trusts.

6. A gift over upon death before the execution of all or any of the trusts of the will is void. *Roberts* v. *Voute*, 49 L. J. Ch. 744.

Where there was a direction to convert and to hold the proceeds of conversion upon trust for the testator's children, a gift over of the share of any child who should die "during the continuance of the trusts hereinbefore declared" was held to refer to death during the continuance of certain trusts specially declared of one item of the testator's property and not to death before the complete conversion of the residue. *Re Teale*: *Teale* v. *Teale*, 53 L. T. 936; 34 W. R. 248.

VI.—Gifts Over upon Death Unmarried and without Issue.

Unmarried.

1. In a gift over upon death unmarried, without any explanatory context, unmarried means never having been married. *Dalrymple* v. *Hall*, 16 Ch. D. 715; see *Blundell* v. *De Falbe*, 57 L. J. Ch. 576; 58 L. T. 621 (marriage settlement).

Gift over upon death unmarried and without issue when vested interests are given upon marriage.

2. Where vested interests are given at twenty-one or marriage, a gift over upon death unmarried and without issue will mean never having been married. *Heywood* v. *Heywood*, 29 B. 9; *Pratt* v. *Mathew*, 8 D. M. & G. 522; *Gonne* v. *Cooke*, 15 W. R. 576.

3. And, perhaps, the same construction would be adopted, where the gift is to A simply and if he dies unmarried and without issue over; the argument in favour of the construction being that A's interest would then be indefeasible upon his marriage. See *Heywood* v. *Heywood*, *supra*; *In re Saunders' Trusts*, 3 K. & J. 152; *Radford* v. *Willis*, 7 Ch. 7; *Long* v. *Lane*, 17 L. R. Ir. 11; *Roberts* v. *Bishop of Kilmore*, (1902) 1 Ir. 333.

The case of *Doe* d. *Baldwin* v. *Rawding*, 2 B. & Ald. 441, is not opposed to this view, since the donee there left a husband surviving her, so that upon no construction of unmarried could the gift over take effect. The point did not arise in *Bell* v. *Phyn*, 7 Ves. 450.

4. Of course, if the legatee were married at the date of the will this construction would be impossible.

Unmarried may refer to a second marriage.

In *Crosthwaite* v. *De ...*, 5 Eq. 245, a gift over of a fund in case the legatee should marry or die unmarried, where the legatee was married at the date of the will and of the testator's death, but her husband was believed to be dead, was held to refer to a second marriage. See, too, *Lepine* v. *Bean*, 10 Eq. 160; *Smith* v. *Charles*, 13 W. R. 224.

Gift over upon death unmarried and without issue after a prior gift to

5. If the gift is to A for life, remainder to his children, and if A dies unmarried and without issue over, unmarried will be read as equivalent to not having a wife at his death. To read it as never having been married would increase the chance of

intestacy, since in that case, if A married and had no children, the gift over would not take effect; and, again, the word unmarried would be mere surplusage. *Doe* d. *Everett* v. *Cooke*, 7 East, 269; *In re Sanders' Trusts*, L. R. 1. Eq. 675; *In re Chant*; *Chant* v. *Lemon*, (1900) 2 Ch. 345; see *Re King*; *Salisbury* v. *Ridley*, 62 L. T. 789.

the legatee for life, and then to his children.

VII.—"And" changed into "or" in Gifts Over.

1. If there is a devise to A in fee and if he dies under twenty-one and without issue over, "and" will not be read "or." To do so would have the effect of divesting a prior devise in events other than those mentioned. *Malcolm* v. *Malcolm*, 21 B. 225; *Coates* v. *Hart*, 32 B. 349; 3 D. J. & S. 504.

Devise to A in fee, and if he dies under 21 and without issue over.

And, similarly, a gift to A for life, and then to her children, and if she dies under twenty-one and without children over, will not be construed as if it were under twenty-one or without children. *Key* v. *Key*, 1 Jur. N. S. 372.

2. If the devise is to A in tail and if he dies under twenty-one and without issue over, "and" will not be read "or." *Grey* v. *Pearson*, 6 H. L. 61, and *Doe* d. *Usher* v. *Jessop*, 12 East, 288; overruling *Brownsword* v. *Edwards*, 2 Ves. Sen. 243, so far as it is an authority on this point. In this case there is reason for contending that the devise over ought to be read as equivalent to "if he dies under twenty-one or at any time without issue," since the estate would take effect as a remainder after an estate tail; but this would deprive the issue of any benefit, if the devisee died under twenty-one leaving issue, unless the devise were read under twenty-one without issue, or at any time without issue, involving a very considerable alteration of the words of the will.

Devise to A in tail, and if he dies under 21 and without issue over.

This latter construction, however, would perhaps be adopted if the original devise in tail were made contingent upon the devisee attaining twenty-one or having issue. *Brownsword* v. *Edwards*, 2 Ves. Sen. 243.

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Gift over upon two events, one of which includes the other.

3. A different question arises where the gift over is upon two events, one of which includes the other, as "if A dies unmarried and without children."

If the gift is to A for life and then to his children absolutely, so that if A marries but has no children there would be an intestacy, there are two possible constructions:—

Unmarried if possible will mean not married at the death.

a. If possible, unmarried will be held to mean unmarried at the time of death, and it is then unnecessary to change "and" into "or." *Doe* d. *Baldwin* v. *Rawding*, 2 B. & Ald. 441; *Doe* d. *Everett* v. *Cooke*, 7 East, 269; *In re Saunders' Trusts*, L. R. 1 Eq. 675; see *ante*, p. 700.

The same is the case, if unmarried means "not married by consent." *Dillon* v. *Harris*, 4 Bl. N. S. 321.

If unmarried must mean never married, "and" will be changed into "or."

b. If, however, it is clear that unmarried must mean never having been married, it seems doubtful whether "and" will not be changed into "or." According to the earlier cases, there is no doubt, that the change would be made. *Wilson* v. *Bayly*, 3 B. P. C. 195; *Hepworth* v. *Taylor*, 1 Cox, 112; *Maberley* v. *Strode*, 3 Ves. 450; *Bell* v. *Phyn*, 7 Ves. 453; see *Long* v. *Lane*, 17 L. R. Ir. 11.

These cases are, however, of doubtful authority, since the term "unmarried" would probably now in all similar cases be held equivalent to "not married at the death."

The question in *Grey* v. *Pearson*, 6 H. L. 61, was so different that it can hardly be said to have any bearing upon this point.

Gift over after absolute interest.

If the gift is to A absolutely, and if he dies unmarried and without issue him surviving, unmarried will be read as equivalent to without leaving a widow, and "and" will not be changed into "or." *Carolin* v. *Carolin*, 17 L. R. Ir. 25, n.

Gift over after an absolute interest, if the legatee dies before marriage and without issue.

And if the gift is to A absolutely, and if he dies before marriage and without children over, "and" will not be read "or," as to do so would be to increase the defeasibility of interests already completely disposed of in all events. *Sevcombe* v. *Edwards*, 28 B. 440; *Steen* v. *Steen*, I. R. 6 C. L. 8.

Where land was devised to A absolutely, with a gift over

if A died "unmarried and without legal issue," and A was given a power to jointure a widow in a limited sum, it was held that, in order that the power might not be otiose, "unmarried" must be construed "never having been married," and "and" must be changed into "or." *Long* v. *Lane*, 17 L. R. Ir. 11.

"And" will not be changed into "or" where the gift over is upon death in the testator's lifetime, and before receiving any benefit. *In re Kirkbride's Trusts*, L. R. 2 Eq. 100.

Gift over upon two independent events.

4. Where the two events upon which the gift over is made to depend are independent of each other, there can be no reason for changing "and" into "or." *Day* v. *Day*, Kay, 703; *Reed* v. *Braithwaite*, 11 Eq. 514; see *Barker* v. *Young*, 33 B. 353.

VIII.—Change of "or" into "and" in Gifts Over.

Gift over upon death under age or without lawful issue.

1. If there is a devise to A in fee if she dies leaving lawful issue, but if she dies under age or without lawful issue over, "or" will be read "and." *Johnson* v. *Simcock*, 6 H. & N. 6; 7 H. & N. 344.

2. If the devise is to A in fee, and if he dies under twenty-one or without issue over, "or" will be read "and," to favour the issue of A. *Fairfield* v. *Morgan*, 2 B. & P. N. R. 38; *Denn* d. *Wilkins* v. *Kemeys*, 9 East, 366; *Eastman* v. *Bak-*, 1 Taunt. 174; *Morris* v. *Morris*, 17 B. 198.

And this construction has been adopted in the case of personalty where, after an absolute interest, whether contingent upon attaining twenty-one or not, the gift over was upon death under twenty-one or without issue or upon death before the age of twenty-one or day of marriage. The testator cannot have intended the property to go over if the legatee should die under twenty-one leaving issue. *Mytton* v. *Beadle*, 6 Sim. 457; *In re Clegg's Estate*, 14 Ir. Ch. 70; *In re Cantillon's Minors*, 16 Ir. Ch. 301; *Wright* v. *Marson*, W. N. 1895, 148.

3. If the devise is to A for life, remainder to his children in tail, and if A dies under twenty-one or without children

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over, it is doubtful whether "or" would be read "and." According to the earlier authorities the change would be made. *Hasker* v. *Sutton*, 1 Bing. 501; 9 J. B. Moo. 2; but see *Cooke* v. *Mirehouse*, 34 B. 27.

Gift over upon failure of issue or some other event.

4. And where, after a prior absolute gift, the gift over is upon failure of issue or some other event, such as not making a will, "or" will be read "and," though the gift over may thereby become void. *Incorporated Society* v. *Richards*, 1 D. & War. 258; *Greated* v. *Greated*, 26 B. 621; *Green* v. *Harvey*, 1 Ha. 428; *Stretton* v. *Fitzgerald*, 23 L. R. Ir. 310, 466.

Devise to A in tail, and if he dies under 21 or without issue over.

5. If the devise is to A in tail, and if he dies under twenty-one or without issue over, "or" will not be construed "and"; though, on the other hand, it seems that if the devisee died under twenty-one leaving issue, the gift over would not be held to have taken effect, so that the devise would, in fact, be construed as equivalent to "if A dies under twenty-one without issue or without issue at any time." *Mortimer* v. *Hartley*, 6 Ex. 47; 3 De G. & S. 316; *Soulle* v. *Gerard*, Cro. Eliz. 525; *Woodward* v. *Glasbrook*, 2 Vern. 388; and Lord St. Leonards' judgment in *Gregg* v. *Pearson*, 6 H. L. 61. The devise over in this case takes effect as a remainder after an estate tail.

Gift over in case of death of the devisee or failure of his issue.

6. If the devise over after an estate tail to A is in case of the death of A, or want of his issue, "or" must be read "and" in order to preserve the prior estate. *Monkhouse* v. *Monkhouse*, 3 Sim. 119.

"Or" read "and" in the gift over when the gift is vested in one or other of the two events.

7. "Or" will be read "and" when a gift is given upon either of two events, as upon attaining twenty-one or marriage, and there is gift over upon death under twenty-one or unmarried, the gift over being otherwise inconsistent with the prior gift. *Grant* v. *Dyer*, 2 Dow. 87; *Malcolm* v. *O'Callaghan*, Coop. t. Brougham, 73; *Thompson* v. *Tealon*, 22 L. J. Ch. 243; *Thackeray* v. *Hampson*, 2 S. & St. 214; *Grimshawe* v. *Pickup*, 9 Sim. 591; *Collett* v. *Collett*, 35 B. 312.

Gift over upon death before the tenant for life or under 2[illegible]

8. In some cases, where there has been a gift contingent upon attaining twenty-one, subject to a life interest, and a gift over upon death before the tenant for life or under twenty-one, "or" has been read "and." *Miles* v. *Dyer*, 5 Sim. 435; 8 Sim. 330; *Bentley* v. *Meech*, 25 B. 197.

And if a gift over upon death under age or without leaving a husband is afterwards referred to as "in case of death under age as aforesaid," "or" will be read "and." *Weddell* v. *Mundy*, 6 Ves. 341.

IX.—Gift Over upon Death without Children.

"Children" read "issue" in a gift over upon death without children.

In many cases where an estate in fee is given, followed by a gift over in the event of the devisee dying without children, the word children has been construed as synonymous with issue. *Doe* d. *Smith* v. *Webber*, 1 B. & Ald. 713; *Doe* d. *Simpson* v. *Simpson*, 5 Sc. 770; 4 Bing. N. C. 333; *Doe* d. *Blesard* v. *Simpson*, 3 M. & Gr. 929; *Bacon* v. *Cosby*, 4 De G. & S. 261; *Parker* v. *Birks*, 1 K. & J. 155; *Richards* v. *Davies*, 13 C. B. N. S. 69, 861; see *Mathews* v. *Gardiner*, 17 B. 254.

And the same construction would perhaps be put upon a similar gift over after an absolute bequest of personalty. *In re Synge's Trust*, 3 Ir. Ch. 379; see *Stone* v. *Maule*, 2 Sim. 490.

X.—Gifts Over upon Death without leaving or having Issue.

Leaving construed as equivalent to having had.

The word leaving in a gift over upon death without leaving issue *primâ facie* means leaving issue living at the death, but the word leaving will in some cases be so construed as not to destroy prior vested interests.

A for life, then children, gift over on death of A without leaving children.

1. If there is a gift to A for life with a gift after his death to his children to be paid or vested at twenty-one, or to the children without more, so that they take vested interests at birth, a gift over, if A dies without leaving children, will be construed so as not to divest the vested interests of the children. *Marshall* v. *Hill*, 2 Man. & S. 608; *Maitland* v. *Chalie*, 6 Mad. 243; *Casamajor* v. *Strode*, 8 Jur. 14; *In re Thompson's Trusts*, 5 De G. & S. 667; *Kennedy* v. *Sidgwick*, 3 K. & J. 540; *White* v. *Hill*, 4 Eq. 265; *Treharne* v. *Layton*, L. R. 10 Q. B. 459; see *Ex parte Hooper*, 1 Dr. 264; *Re Bogle*; *Bogle* v. *Forstoun*, 78 L. T. 457.

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The rule applies though the gift to the children may be liable to be divested by a power of appointment given to the parent. *Barkworth* v. *Barkworth*, 75 L. J. Ch. 754.

The construction is not altered by the fact that it appears on the face of the will that A has a child living. *In re Cobbold*: *Cobbold* v. *Lawton*, (1903) 2 Ch. 299.

The same construction was adopted where the gift was to children who attain twenty-one, and the gift over was if the tenant for life should die without leaving "issue," but it must have been on the ground that issue meant such issue, *i.e.*, children who attain twenty-one. *In re Brown's Trust*, 16 Eq. 239.

Death without leaving children surviving.

2. This construction cannot be adopted where the gift over is on the death of the tenant for life without leaving any children at his death, or without leaving any children him surviving. *Young* v. *Turner*, 1 B. & S. 550; *In re Hamlet*: *Stephen* v. *Cunningham*, 38 Ch. D. 183; 39 Ch. D. 426.

And it does not apply where the subject-matter of the gift is an annuity, and the testator contemplates personal enjoyment by the legatees in remainder. *In re Hemingway*: *James* v. *Dawson*, 45 Ch. D. 453.

Not applied to vest contingent interests.

3. The Court, however, will not depart from the ordinary meaning of the word leaving, in order to vest interests, which were not vested before.

When the gift is, for instance, if the tenant for life leave children, to all such children, with a gift over in the event of his death without leaving children, the word leaving must have its ordinary meaning. In these cases the condition of surviving the tenant for life is part of the original gift, and there is no question of divesting a prior gift. *Sheffield* v. *Kennett*, 27 B. 207; 4 De G. & J. 593; *Bythesea* v. *Bythesea*, 17 Jur. 645; 23 L. J. Ch. 1004; *Young* v. *Turner*, 1 B. & S. 550; see *In re Watson's Trust*, 10 Eq. 36, and the comments therein upon *Bryden* v. *Willett*, 7 Eq. 472; *Jeyes* v. *Savage*, 10 Ch. 555; and see *Hedges* v. *Harpur*, 3 De G. & J. 129; *In re Tookey's Trust*, 1 Dr. 264.

Gift over after absolute interest.

4. And where there is a gift to A absolutely and a gift over on his death without leaving children, the word "leaving" will

be construed strictly. *In re Ball; Slattery* v. *Ball*, 36 Ch. D. 508; 40 Ch. D. 11, overruling *White* v. *Hight*, 12 Ch. D. 751; *Armstrong* v. *Armstrong*, 21 L. R. Ir. 115; see *Clay* v. *Coles*, 57 L. T. 682.

Without having any child.

5. It seems the words "without having any child" may be construed as equivalent to "without having had any child." *Weakley* d. *Knight* v. *Rugg*, 7 T. R. 322; *Wall* v. *Tomlinson*, 16 Ves. 413; *Jeffreys* v. *Conner*, 28 B. 328.

Without any children.

6. But the words "without any children" mean without children at the death. *Thicknesse* v. *Liege*, 3 B. P. C. 365; *Jeffreys* v. *Conner, supra; In re Booth; Pickard* v. *Booth*, (1900) 1 Ch. 768; see *In re Hambleton; Hambleton* v. *Hambleton*, W. N. 1884, 157.

CANADIAN NOTES.

See cases cited in notes to Chapter XLVII.

CHAPTER LI.

GIFTS OVER UPON DEATH WITHOUT ISSUE.

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Gift over upon death of the devisee without issue before a given time.

WHEN there is a gift over upon the death of A. without issue before a given time the gift over takes effect upon the failure of issue of A, not necessarily at his death, but at any time during the given period, whether the will is before or since the Wills Act. *Crowder* v. *Stone*, 3 Russ. 217; *Jarman* v. *Vye*, L. R. 2 Eq. 784.

Gift over upon death without issue to persons then living.

It is not quite clear, whether a devise upon failure of issue to such of certain named legatees as should be "then living," which would in a will before the Act have been held to take effect upon failure of issue of the ancestor at his death, or at any time during the lives of the surviving legatees, would now be held to take effect only upon failure of issue of the ancestor at his death. See *Murray* v. *Addenbrook*, 4 Russ. 407; *Greenwood* v. *Verdon*, 1 K. & J. 74.

Effect of the 29th sect. of the Wills Act upon gifts in default of issue.

By sect. 29 of the Wills Act, 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." See *In re Chinnery's Estate*, 1 L. R. Ir. 296. Chap. LI.

The words dying without male issue will, under this section, be restricted to male issue living at the death of the ancester. *Upton* v. *Hardman*, I. R. 9 Eq. 157; *In re Edwards*; *Edwards* v. *Edwards*, (1894) 3 Ch. 644. Death without issue male.

This section does not apply: — In what cases the section does not apply.

1. Where the words used are heirs of the body and not issue. *Harris* v. *Davis*, 1 Coll. 416; *Re Sollery*, 11 Ir. Ch. 236; *Dawson* v. *Small*, 9 Ch. 651.

2. Where the failure of issue would not before the Act have been construed to import an indefinite failure of issue. *Morris* v. *Morris*, 17 B. 198.

3. Apparently it would not apply, where there is a gift of personalty to A and the heirs of his body, followed by a gift over in default of his issue. At any rate, it does not where realty and personalty are given together in tail. *Green* v. *Green*, 3 De G. & S. 480; see *Greenway* v. *Greenway*, 2 H. & J. 137; *Green* v. *Giles*, 5 Ir. Ch. 25.

Referential Construction of Gifts Over upon Death without Issue.

The construction of gifts over in default of issue is not affected by the Wills Act, where those words are construed to mean default of issue to take under the preceding limitations. It becomes necessary, therefore, to consider in what cases the referential construction has been adopted.

A. Where the words are for default of *such* issue, they naturally refer to the issue before mentioned.

1. This is clearly the case where the prior limitations are in tail. *Doe* d. *Phipps* v. *Lord Mulgrave*, 5 T. R. 320. Gift over in default of *such* issue, after limitations in tail.

2. So where the prior limitations are to children and their heirs, a gift over in default of such issue means in default of such children. *Doe* d. *Comberbach* v. *Perryn*, 3 T. R. 484; *Rex* v. *Marquess of Stafford*, 7 East, 521. After limitations in fee.

But if there is anything to shew that the children were intended to take estates tail, the words in default of such issue

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may be referred to the word heirs so as to cut down the estates to estates tail. Thus, where the limitation was to the first and other sons and their heirs, a gift over in default of such issue was referred to the word heirs, the intention being that the sons were to take in succession. *Lewis* d. *Ormond* v. *Waters*, 6 East, 336.

In *Biddulph* v. *Lees*, E. B. & E. 289, the intention to give estates tail was apparent from the shifting clause.

After limitations for life.

3. And even though the limitation be to children simply, so that they would only take for life, a gift over in default of such issue will be construed referentially. *Hay* v. *Earl of Coventry*, 3 T. R. 83; *Dean* d. *Breddon* v. *Page*, 3 T. R. 87, n.; 11 East, 603, n.; *Ashley* v. *Ashley*, 6 Sim. 358; *Bridger* v. *Ramsay*, 16 Ha. 320; *Re Arnold's Estate*, 33 B. 163.

After limitations giving a first son a life interest only and the other sons estates tail.

4. On the other hand, where there is a limitation to a first son without more, followed by limitations in default of such issue to the other sons in tail, the Court will lay hold of small circumstances to give the first son also an estate tail.

Thus, in *Evans* d. *Brooke* v. *Astley*, 3 Burr. 1569, there was the circumstance that the testator referred to the earlier limitations as including the "parent and his descendants."

In *Clements* v. *Paske*, 3 Doug. 314, the limitation to the first son was referred by the word "likewise" to other limitations in fee.

And see *Doe* d. *Harris* v. *Taylor*, 10 Q. B. 718, which may perhaps be supported on the ground that the words "the elder of such sons and the heirs of his body to take before the younger," applied to the first son as well as to the others. See, however, *Barnacle* v. *Nightingale*, 14 Sim. 456; and see *Galley* v. *Barrington*, 2 Bing. 387; *In re Denny's Estate*, I. R. 8 Eq. 427.

Inaccurate use of the word "such."

5. The *primâ facie* meaning of the word "such" is to refer the word with which it is coupled to earlier words, so that the latter word is only a compendious statement of the earlier limitations; it may, however, have the converse effect if there is anything upon the will to show that the testator used the earlier word in the sense of the latter; and the word "such" may be rejected, if the term with which it is coupled and that

to which it refers are so inconsistent with each other that the testator cannot have meant the one as a mere compendious reference to the other.

Thus, a devise to A and his heirs, and in default of such issue over would, perhaps, in a will cut down A's estate to an estate tail. See *Idle* v. *Cook*, 1 P. W. 70.

And in *Parker* v. *Tootal*, 11 H. L. 143, where the devise was to Thomas for life, remainder to the first son of the said Thomas in tail male lawfully begotten, severally and successively; and for want of such lawful issue either of Thomas or of James, over, the word such was practically rejected and Thomas took an estate tail in remainder after the estate tail of his first son. See also *Charlton* v. *Craven*, 3 D. & Ry. 808; 2 B. & C. 524.

Gift over in default of issue simply.

B. When there is a devise to A for life, followed by particular limitations in favour of some of his issue, with an ultimate limitation on failure of the issue of A, the question arises whether the intention was to benefit all the issue, notwithstanding the incomplete enumeration of them under the special limitation, in which case, in wills before the Wills Act, the gift over in default of issue will give A an estate tail, or whether the issue intended to be benefited are sufficiently indicated by the special limitations, in which case the failure of issue will be construed to mean such issue as before mentioned.

When the prior limitations are to the ancestor for life with remainder to his children in fee or in tail.

1. If the devise is to A for life, then to his children, so that they take vested estates in fee or tail, and in default of issue of A over, issue means the issue before-mentioned, and A's estate will not be enlarged. *Foster* v. *Hayes*, 2 E. & B. 27; 4 E. & B. 717; *Towns* v. *Wentworth*, 11 Moo. P. C. 526; *Smyth* v. *Power*, I. R. 10 Eq. 192; see *Bowen* v. *Lewis*, 9 App. C. 890.

When the prior limitations include sons only.

And this is the case, though the children included under the prior limitations may be sons only and not daughters, and though the prior estates may be in tail male. *Turke* v. *Frenchman*, 2 Dyer, 171; 1 And. 8; *Baker* v. *Tucker*, 11 Ir. Eq. 104; 3 H. L. 106; *Grattan* v. *Langdale*, 11 L. R. Ir. 473.

Quære, whether it makes any difference in the construction of the gift over in default of issue, that the ancestor has

children living at the date of the devise. See *Doe* d. *Todd* v. *Tuesbury*, 8 M. & W. 514, commented on in 4 E. & B. 730.

Where the prior limitations include less than the whole number of sons.

2. If, however, the prior limitations include less than the whole number of sons the referential construction will not be adopted. *Langley* v. *Baldwin*, 1 Eq. Ab. 185, pl. 29, cit. 1 P. W. 759; *A.-G.* v. *Sutton*, 1 P. W. 753; 3 B. P. C. 75; *Stanley* v. *Leonard*, Amh. 355; 1 Ed. 87; *Key* v. *Key*, 4 D. M. & G. 73.

The referential construction is more readily adopted where the limitations are to some of the issue at twenty-one, and there is a gift over in default of issue who attain twenty-one. *Sanders* v. *Ashford*, 28 B. 609.

Where the limitations to issue are contingent.

3. When the limitations to issue are contingent upon attaining a certain age, it seems the referential construction would not be adopted. *Doe* d. *Rew* v. *Lucraft*, 1 M. & Sc. 573; 8 Bing. 386; *Franks* v. *Price*, 6 Sc. 710; 5 Bing. N. C. 37; 3 B. 182.

Where the children take for life only in wills before the Wills Act.

4. In wills before the Wills Act, where the devise to children is without words of limitation so that they only take estates for life, the referential construction will not be adopted, but the parent will take an estate tail in remainder after the life estates. *Parr* v. *Swindells*, 4 Russ. 283. *Bennett* v. *Lowe*, 5 M. & Pay. 485; 7 Bing. 535, is not inconsistent with this rule, since the gift over was not upon an indefinite failure of issue; and *Wight* v. *Leigh*, 15 Ves. 564, which conflicts with the latter branch of this rule, would probably not now be followed.

C. Similar rules apply to personalty.

Referential construction of gifts over upon death without issue in the case of personalty.

1. Thus, in a bequest to A for life and then to his children and if A dies without issue over, the gift over refers to the failure of the objects of the prior gift. *Doe* d. *Lyde* v. *Lyde*, 1 T. R. 593; *Salkeld* v. *Vernon*, 1 Ed. 64; *Bryan* v. *Mansion*, 5 De G. & S. 737; *Robinson* v. *Hunt*, 4 B. 450; *In re Wyndham's Trusts*, L. R. 1 Eq. 290.

"If there be no child there can be no other issue, and if there be a child, the child will take the whole, and there will be nothing to limit over." Per Turner, L. J., *Pride* v. *Fooks*, 3 De G. & J. 252.

Where family plate was settled on A for life, with remainder

to B his first son for life, with remainder to B's first son absolutely, and in the event of B's first son dying under twenty-one and without issue to the second and other sons of B in the same way, and in default of sons of B similar limitations in favour of the second and other sons of A absolutely, with an ultimate limitation if there should be no son of A or B who should attain twenty-one or die under that age leaving issue, the ultimate gift over took effect, though B attained twenty-one. *Cardigan* v. *Curzon Howe*, 9 Eq. 358.

Gift to children contingent, gift over in default of issue.

2. Upon the question whether this construction can be adopted where the limitation to the children is not vested, so that there may be issue who would not take under it, see *Pride* v. *Fooks*, 3 De G. & J. 252.

Limitation to some members of a class, gift over on failure of whole class.

3. "Provision is made for certain members of a class answering a particular description, and then a gift over is made upon failure of the class. If it be clear that the whole of the class were not to take, the gift over, though made to depend upon the failure of the whole class, will be construed to take place upon the failure of that description of the class who were to take." *Ellicombe* v. *Gompertz*, 3 M. & Cr. 127, 151.

In most of the cases in which this construction has been adopted the gift over would, upon any other construction, have been void for remoteness; and in many of them the class some members of which are benefited under the earlier limitations is the same class as that mentioned in the gift over; for instance, children in each case or issue in each case. The referential construction is therefore more easily adopted than where the earlier limitations are in favour of children and the gift over is in default of issue.

Thus, where there was a succession of limitations to sons and grandsons of the testator's son Isaac carefully limited so as not to infringe the rule against perpetuity, followed by a general gift over after the decease of all the sons and grandsons of the son Isaac, the gift over was restricted to the sons and grandsons before mentioned. *Ellicombe* v. *Gompertz*, 3 M. & Cr. 127.

And when provision was made for a daughter for life and then for her children, with a proviso that if any child should die under twenty-one and leave children who should survive the

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daughter and attain twenty-one they should take their parent's share, followed by a general gift over if there should be no child or none who should attain twenty-one, or leave issue who should attain that age, issue in the gift over was limited to children who should survive the daughter and attain twenty-one. *Trickey* v. *Trickey*, 3 M. & K. 560.

And where, under a power in a marriage settlement to appoint to issue, the wife appointed by will to a daughter for life, then to her children born in the lifetime of the testatrix, with a gift over if the daughter should die without leaving any children, children in the gift over was held to mean children born in the lifetime of the testatrix. *Hutchinson* v. *Tottenham*, (1898) 1 Ir. 403; (1899) 1 Ir. 344.

And where there was a limitation to such issue as A should by will appoint, and in case A should die without issue over, the gift over was limited to the death of A without issue at his death. *Target* v. *Gaunt*, 1 P. W. 132; *Stockley* v. *Marbey*, 1 Ves. Jun. 143; 3 B. C. C. 82; *Leeming* v. *Sherratt*, 2 Ha. 14; *Hanan* v. *Dreic*, 10 Ir. Eq. 333; *Eastwood* v. *Avison*, L. R. 4 Ex. 141.

The same rule was also applied where there was a gift to A for life, then to such children she may happen to leave at her decease, and in case she should die without issue, for such persons as she should appoint. *In re Merceron's Trusts*; *Davis* v. *Merceron*, 4 Ch. D. 182.

The referential construction may be assisted by other limitations. *Malcolm* v. *Taylor*, 2 R. & M. 416.

Gift over upon death without leaving issue living at death.

4. If when the earlier gifts are in favour of parents and their children the gift over is not merely upon the death of the parents without issue, but upon such death without leaving issue living at their death, or even without leaving children then living, the referential construction will not be adopted. *Andre* v. *Ward*, 1 Russ. 260; *Greene* v. *Ward*, 1 Russ. 262; *Walker* v. *Mower*, 16 B. 365; *Westwood* v. *Southey*, 2 Sim. N. S. 192; *In re Wrangham's Trust*, 1 Dr. & S. 358; *In re Biron*, 1 L. R. Ir. 258; *In re Edwards*; *Jones* v. *Jones*, (1906) 1 Ch. 570 disapproving *Kidman* v. *Kidman*, 40 L. J. Ch. 359.

5. The referential construction was not adopted in a will before the Wills Act where the bequest was in joint tenancy to A and her children, with a gift over in default of issue of A. In that case the whole was already disposed of, whether children were born or not, and there was no reason for attempting to make the gift over valid in order to divest absolute interests. *Fisher* v. *Webster*, 14 Eq. 283.

Bequest in joint tenancy to a parent and children, followed by a gift over on death without issue.

DEATH WITHOUT ISSUE BEFORE THE WILLS ACT.

Such words as "dying without issue," or "without leaving," or "having issue," in devises before the Wills Act, were construed to mean an indefinite failure of issue. *Lee's Case*, 1 Leon. 285, pl. 387; *Cole* v. *Goble*, 13 C. B. 445.

But with regard to personalty, death without *leaving* issue was held to mean leaving issue at the death. And where real and personal estate were devised by the same words, death without leaving issue imported an indefinite failure of issue as regards the realty, but a failure of issue at the death as regards the personalty. *Forth* v. *Chapman*, 1 P. W. 663; *Atkinson* v. *Hutchinson*, 3 P. W. 258; *Bamford* v. *Chadwick*, 2 W. R. 530.

Cases before the Wills Act in which gifts over on failure of issue will not import an indefinite failure.

Many cases are reported in the books in which the question was whether failure of issue could by construction be limited to failure at the death of the ancestor. But as the law has been altered by the Wills Act, these cases are omitted as obsolete.

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Before the Wills Act gives estate tail.

Before the Wills Act, where an estate was devised in general terms, or in terms to give a fee simple, to a devisee, with a devise over if the devisee die without issue, he took by implication an estate in fee tail, the failure of issue not being limited or restricted to a definite point of time.

Thus, on a devise to A. and his heirs, but if he should "die leaving no legitimate issue," then over, A. took an estate tail. *O'Reilly* v. *Corrie*, 11 U.C.R. 577; and see *Travers* v. *Gustin*, 20 Gr. 106; *Heron* v. *Walsh*, 3 Gr. 606.

And the rule was the same where there were several devises and the devises over were to the surviving devisees. *Little* v. *Billings*, 27 Gr. 352. *Ashbridge* v. *Ashbridge*, 22 O.R. 146, to the contrary is overruled. See *Nason* v. *Armstrong*, 22 O.R. 542; affirmed 21 A.R. 183, and on this point 25 S.C.R. 263.

Although issue to take share and share alike.

The rule also applied though there was a direction that the issue, if any, were to take "share and share alike." Thus, on a devise to two daughters to hold during their lives, and after the death of either of them her share to be equally divided between her children share and share alike, and "in case either or both shall die without leaving legal issue." then over, the daughters took estates tail. *Sisson* v. *Ellis*, 19 U.C.R. 559.

Or though the first devise over is for life.

And so, also, though the first devise over was a life estate. Thus, on a devise to a son, his heirs and assigns forever, "if he should die without leaving lawful heirs," then to the devisee's widow *durante viduitate*, and on her marriage, sale and division of the proceeds amongst such of the other children of the testator or their heirs as should then be living, it was held that the son took an estate tail, notwithstanding the devise to his widow for her life. *Dale* v. *McQuinn*, 15 Gr. 101.

Failure of issue at definite time.

But where, from the words of the will, the devise over is to take effect on the failure of issue at or before a given time, the failure of issue is referred to that time, and the devisee will then take a fee simple with an executory devise over if he die without leaving issue at that time.

As, for instance, where there is coupled with the words as to failure of issue, a reference to the death of the prior devisee. Thus, on a devise to a son, F., with a provision that at the death of my son, "having no issue," the property is to be divided equally amongst survivors (in several devises in the same terms), the division directed could take place at no other time than the death of the son, and the failure of issue must be referred to the same time, and therefore he took a fee simple with an executory devise over if he died without issue at the time of his death. *Crawford* v. *Boddy*, 25 O.R. 635; 22 A.R. 307; 26 S.C.R. 345.

And so, also, where the devise was to a son, J., his heirs and assigns, but if the son should die without leaving any issue surviving him, then to another son, T., "to have and to hold the same at the death of the said J.," it was held that J. took a fee simple with an executory devise over. *Gray* v. *Richford*, 2 S.C.R. 431.

A devise to A. in fee, but if he "die childless," then over, gives A. a fee simple with an executory devise over on dying without leaving any child surviving him. *Re Thomas & Shannon*, 30 O.R. 49.

Where there was a devise to two sons as tenants in common, their heirs and assigns, but "if either of my sons should die without legitimate issue his share shall revert to and become vested in the other son united with him in the aforesaid devise," the restricted construction was adopted and the failure of issue referred to the death. *Vantassell* v. *Frederick*, 27 O.R. 646; 24 A.R. 131.

Similarly, where there is a devise over on failure of issue, and the executors appointed by the will are given powers which are personal and discretionary with them, it is evident

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that the testator, when referring to failure of issue, means failure in the lifetime of his executors, and therefore at the death of the prior devisee. *Re Chisholm*, 17 Gr. 403; *Chisholm* v. *Emery*, 18 Gr. 467. See also *Nason* v. *Armstrong*, 22 O.R. 5 2; 21 A.R. 183; 25 S.C.R. 263.

And where the devise over on death without issue was upon the condition that the devisee over should come and take possession within six months from the prior devisee's death, the restricted construction was adopted. *McMillan* v. *McMillan*, 27 A.R. 209.

The rule is the same, though there is a prior life estate. Thus, after a devise to a widow for life, the testator devised the land to his son in fee simple, "should [he] die leaving no children," then over, "should any of my children be disposed to sell . . . the property bequeathed to them, I desire they give the preference to one of the family." It was held that notwithstanding the prior life estate, and the subsequent provision as to selling, the son took a fee simple, with an executory devise over on death without children. *Vanluven* v. *Allison*, 2 O.L.R. 198.

In a very badly drawn will where there was a direction to sell and pay legacies if a devisee in fee simple should "die without heirs," it was held that he took a fee simple with an executory devise over if he died without issue at the time of his death. *Bateman* v. *Bateman*, 17 Gr. 227.

"Die without issue" may be equivalent to "die without children," as where the issue are elsewhere called children, and there is a reference to the prior devisee as the father or parent of the issue. *Stinson* v. *Stinson*, 21 Gr. 116.

Wills Act.

By the Wills Act, "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

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 as aforesaid 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." R.S.O. c. 128, s. 32; R.S.B.C. c. 193, s. 26; R.S.M. c. 174, s. 27, R.S.N.B. c. 160, s. 23; R.S.N.S. c. 399, s. 29.

Failure of issue is restricted to death of devisee.

Since the passing of this enactment, the failure of issue, if indefinite in terms, will be referred to the death of the devisee, if there is no intention to the contrary shewn in the manner set out in the enactment.

The rule applies though the prior devisee's interest is charged with the payment of onerous sums, the contrary intention required by the Act not being shewn thus. *Cowan* v. *Allen*, 26 S.C.R. 292.

In *Martin* v. *Chandler*, 26 O.R. 81, the facts were peculiar, and it was held that the first devisee took an estate for life. *Sed quære.*

Cases not affected by the statute.

But the purpose of the statute is to correct errors supposed to have arisen from the use of the word "issue," and it was not intended to apply to cases in which the word "heirs" is used.

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Thus on a devise to J. L. B. "to him and his heirs forever," but in the event of J. L. B. "dying without leaving any lawful heirs by him begotten," then over, it was held that the enactment did not apply, and that J. L. B. took an estate tail. *Re Brown & Campbell*, 29 O.R. 402.

The statute applies, also, only to cases where there is a prior estate by implication, and not by direct limitation. *Re Fraser & Bell*, 21 O.R. 455.

There must also be a devise over, to make the statute applicable. So, where there was a devise to a daughter, with the provision that "in the event of her dying without issue all her interest in my estate shall lapse," and there was no devise over, the devise was held to mean without a child being born; and on the birth of a child the estate became absolute. *Re Johnston & Smith*, 12 O.L.R. 262.

Nova Scotia estates tail abolished.

In Nova Scotia estates tail are abolished, and all estates which would have been adjudged estates in fee tail are to be adjudged estates in fee simple. Since this statute, where there is a devise without words of limitation, with a devise over on failure of issue, such failure not limited to the lifetime of the prior devisee, the prior devisee takes a fee simple, and the devise over is void for remoteness. *Ernst* v. *Zwicker*, 27 S.C.R. 594.

But it is apprehended that, if the devise over should be on failure of issue at the death of the prior devisee, the devise over on failure of issue would be a good executory devise.

Devise over to one who may be heir.

Where there is a devise to A. and his heirs, but if he die without heirs then over to one who is capable of being his heir, the estate given to A. is cut down to an estate tail. *Tyrwhitt* v. *Dewson*, 28 Gr. 112.

But on a devise to B., "after the decease of A. if he die

without heirs," where B. is not capable of being heir to A., the latter takes a fee simple, and the devise over is too remote. *Iler* v. *Elliott*, 32 U.C.R. 434.

The words "die without issue," when used in connection with gifts of personalty, refer to failure of issue at the period of distribution or the death of the legatee. *Heron* v. *Walsh*, 3 Gr. 606; *Gould* v. *Stokes*, 26 Gr. 122; *Travers* v. *Gustin*, 20 Gr. 106; *Re McDonald*, 6 O.L.R. 478.

CHAPTER LII.

SHIFTING CLAUSES.

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WHERE estates are given by will, and there is a clause shifting the lands, if the devisee comes into possession of estates previously settled, the estates go over if the event happens *Cope* v. *Earl de la Warr*, 8 Ch. 982.

Life estate coming into possession in event upon which the shifting clause is to take effect.

And the shifting clause will operate upon the life interest of a tenant for life, though his interest is such, that if he comes into possession of the settled estates, his life interest under the will must at the same time come into possession; so that, in effect, the gift of the life interest is nugatory. *Lambarde* v. *Peach*, 4 Dr. 553; on app. sub nom. *Turton* v. *Lambarde*, 1 D. F. & J. 495.

Possession of settled estates *primâ facie* refers to possession under the settlement.

When estates devised by will are directed to shift on the devisee coming into possession of settled estates, the presumption is that the testator means a possession under the settlement; and, therefore, if the devisee comes into possession of the settled estates not under the settlement, but under an entirely new title, for instance, under the will of a tenant in tail, who had barred the entail, the shifting clause will not take effect. *Taylor* v. *Earl of Harewood*, 3 Ha. 372; *Wandesforde* v. *Carrick*, I. R. 5 Eq. 486.

A fortiori, where the shifting clause is to take effect on the devisee becoming entitled to other estates under any existing or future will or settlement and he becomes entitled by descent from his father, though the latter took under a will, the devised estates will not shift. *Walmesley* v. *Gerard*, 29 B. 321.

Meaning of "entitled."

The term entitled would in such a clause mean entitled in possession. *Chorley* v. *Loveband*, 33 B. 189; *Umbers* v. *Jaggard*, 9 Eq. 200; see *Grylls Trusts*, 6 Eq. 589; *In re Finch Abbiss* v. *Burney*, 17 Ch. D. 223.

A person may be entitled in possession within the meaning of a name and arms clause, though the testator's widow may be entitled to occupy the mansion-house rent free and though the charges may swallow up all the rents and profits. *Re Varley; Thornton* v. *Varley*, 68 L. T. 665.

Possession need not be beneficial.

A shifting clause which affects "any person for the time being entitled to the possession or to the receipt of the rents and profits" of devised hereditaments does not apply to an infant, where by a clause in the will possession is given to trustees during his minority. *Leslie* v. *Earl of Rothes*, (1894) 2 Ch. 499.

If the devisee takes the settled estates not under the settlement existing at the date of the will, but under a resettlement, which can be looked upon as a continuation of the old title, the devisee taking the same interest under the resettlement as he would have taken under the old settlement, except so far as his interest has been diminished for his own benefit, the shifting clause takes effect. *Harrison* v. *Round*, 2 D. M. & G. 190; see *In re Croker's Estate*, I. R. 2 Eq. 58; *Wright* v. *Marshall*, 51 L. T. 781.

Whether a devisee taking settled estates under a resettlement is within a shifting clause.

If the devisee takes under the resettlement a diminished interest in the settled estates or the estates themselves are diminished in quantity, the shifting clause has no effect. *Fazakerley* v. *Ford*, 4 Sim. 390; 1 A. & E. 897; *Gardiner* v. *Jellicoe*, 12 C. B. N. S. 568; *Meyrick* v. *Laws*, 9 Ch. 237.

On the other hand, if the testator expressly gives directions to have a portion of the settled estates settled to other uses, the devolution of the settled estates to the devisee diminished by that portion will not prevent the operation of the shifting clause. *Micklethwait* v. *Micklethwait*, 4 C. B. N. S. 790; see *Stacpoole* v. *Stacpoole*, 2 Con. & Law. 489, 501.

The shifting clause will not, in the absence of a clear intention, take effect, where the devisee has only an interest in remainder in the settled estates. *Monypenny* v. *Dering*, 2 D. M. & G. 145; *Curzon* v. *Curzon*, 1 Giff. 248; *Bagot* v. *Legge*, 34 L. J. Ch. 156; 12 W. R. 1097.

Operation of a shifting clause where a devisee has only remainder in settled estates.

As to the repeated operation of a shifting clause, see *Doe* d. *Lumley* v. *Earl of Scarborough*, 3 A. & E. 2, 897; *Monypenny* v. *Dering*, 2 D. M. & G. 145.

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It seems a shifting clause would not avoid jointures and portions properly charged upon the estates previous to their shifting. *Holmesdale* v. *West*, 12 Eq. 280.

In what case estates directed to shift to the next remainderman will go to the trustees to preserve.

Where an estate devised by will is directed upon the devolution of settled estates to the devisee to go over to the next remainderman, as if the tenant for life were dead, the estate will shift to trustees to preserve contingent remainders where there are contingent remainders to unborn sons of the tenant for life whose life estate has ceased; though, strictly speaking, if the tenant for life were dead, the estate of the trustees to preserve would also be at an end. *Doe* v. *Hoveage*, 4 T. R. 13; see the opinion of Fearne, C. R., App. No. 6; *Stanley* v. *Stanley*, 16 Ves. 491; *Morrice* v. *Langham*, 11 Sim. 260; 12 Sim. 615; and see 11 Cl. & F. 667; *Lambarde* v. *Peach*, 4 Dr. 553; on app. sub nom. *Turton* v. *Lambarde*, 1 D. F. & J. 495; see *Lord Kenlis* v. *Earl of Beetive*, 34 B. 587.

Who is entitled to the intermediate rents.

As to whether the heir or remainderman is entitled to the rents during the period between the shifting of the estate to the trustees and the birth of issue to take, it seems that a direction that the rents may be applied for the maintenance of a remainderman, even during the lifetime of a tenant for life, would be sufficient to show that the rents were not to go to the heir. *Turton* v. *Lambarde*, 1 D. F. & J. 495 (judgment of Turner, L.J.); *D'Eyncourt* v. *Gregory*, 34 B. 36.

On the other hand, in the absence of some such intention, they would go to the heir. *Stanley* v. *Stanley*, 16 Ves. 491; and see per Kindersley, V.-C., *Lambarde* v. *Peach*, 4 Dr. 553.

Estate directed to shift as if the devisee were dead without issue.

When the devised estate is directed to go over, as if the person becoming entitled to the settled estates were dead without issue, the next remainderman takes on the event happening. *Morrice* v. *Langham*, 8 M. & W. 194.

In such case trustees to preserve will not take.

And in such a case, if the next limitations in remainder are contingent, the estates will not go to trustees to preserve contingent remainders during the life of the person from whom the estate is shifted, since their estate would in any event be inadequate to support contingent remainders limited upon a failure of issue of such person after his death. *Carr* v. *Earl of Errol*, 6 East. 58.

When the devised estates are directed to go to the next remainderman, as if the person taking the benefit upon the occurrer of which the estate is to shift were dead without issue, the construction will not be influenced by the fact that the younger children of the person from whom the estates shift may happen to take no benefit under the settlement. *Doe* d. *Lumley* v. *Earl of Scarborough*, 3 Ad. & E. 1.

Issue limited to issue capable of taking under the limitation of the devised estate preceding the next remainder.

But where estates were devised to several sons successively in tail male, with remainder to the children of the sons in tail general, with remainder over, and the estates were directed to go over upon the acquisition of settled estates (which could not go to any female issue of the testator's sons), as if the person taking the settled estates were dead without issue, the words "without issue" were confined to issue capable of taking under the limitations of the devised estate preceding the n remainder. *Gardiner* v. *Jellicoe*, 12 C. B. N. S. 568; 11 H. L. 323.

CHAPTER LIII.

GIFTS BY REFERENCE.

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Chattels given to a person to go as heirlooms.

A BEQUEST of chattels to a person and his heirs or successors to go according to the limitations of real estate or as heirlooms vests absolutely in the person named, whether such words as "so far as the rules of law and equity permit," or "to be enjoyed and go with the title," are added or not. The Court, in fact, refuses to treat such a bequest as executory. *Rowland* v. *Morgan*, 6 Ha. 463; 2 Ph. 764; *In re Johnston; Cockerell* v. *Earl of Essex*, 26 Ch. D. 538.

The cases of *Gower* v. *Grosvenor*, Barn. 54; 5 Mad. 337, and *Trafford* v. *Trafford*, 3 Atk. 347, so far as they express a contrary opinion, are overruled.

Chattels to go with a title.

In the same way, a gift of chattels to such persons as should from time to time be the holders of a title, so far as the rules of law permit, vests absolutely in the first holder of the title after the testator's death, though he may have been born at the testator's death, and could, therefore, have been cut down to a life interest. *Tollemache* v. *Coventry*, 2 Cl. & F. 611; 8 Bl. N. S. 547; *In re Viscount Exmouth; Exmouth* v. *Praed*, 23 Ch. D. 158; *In re Hill; Hill* v. *Hill*, (1902) 1 Ch. 807.

Chattels to go as heirlooms with realty.

A gift of personalty as heirlooms to the persons for the time being entitled to real estate, so far as the rules of law and equity permit, vests absolutely not in a tenant for life of the real estate, but in the first tenant in tail at birth, whether he comes into possession or not. *Trafford* v. *Trafford*, 3 Atk. 347; *Vaughan* v. *Burslem*, 3 B. C. C. 101; *Foley* v. *Burnell*, 1 B. C. C. 274; 4 B. P. C. 319; *Carr* v. *Lord Errol*, 14 Ves. 478; *Lord Scarsdale* v. *Curzon*, 1 J. & H. 40; *In re Johnson's Trust*, L. R. 2 Eq. 716; *In re Fothergill's Estate; Price-Fothergill* v. *Price*, (1903) 1 Ch. 149; see *Miller* v. *Stanley*, 12 W. R. 780.

There seems no reason to doubt that the chattels will vest in a tenant in tail if he is within the description, though his estate

is liable to be divested by the birth of issue to take under prior limitations and he dies before his estate becomes indefeasibly vested, if, in fact, it does become so vested. *Hogg* v. *Jones*, 32 B. 45, is discussed in *In re Cresswell*; *Parkin* v. *Cresswell*, 24 Ch. D. 192.

Direction against vesting under 21.

A direction, that the personalty is not to vest in a tenant in tail dying under twenty-one, will be construed as referring to a tenant in tail by purchase under the will, and will prevent the personalty from vesting in a tenant in tail by purchase dying an infant. *Christie* v. *Gosling*, L. R. 1 H. L. 279; *Harrington* v. *Harrington*, L. R. 5 H. L. 87.

Direction as to possession.

If the direction is that a tenant in tail in possession, who dies under twenty-one, shall not be entitled to the personalty, but that the personalty shall belong only to such person as shall first attain twenty-one and become entitled to an estate tail in possession in the real estate, the words "in possession" will not be strictly construed; but if a first tenant in tail in remainder dies under twenty-one, the personalty will vest in the next tenant in tail in remainder who attains twenty-one. *Foley* v. *Burnell*, 1 B. C. C. 274; 4 B. P. C. 319; *Martelli* v. *Holloway*, L. R. 5 H. L. 532.

Reference to actual possession.

If the gift of the chattels is to the person actually seised at the death of tenants for life, or to the person seised of the actual freehold, which is defined as freehold in possession, or there are other clear words referring to actual possession, a tenant in tail who dies before coming into possession is excluded. *Potts* v. *Potts*, 3 J. & Lat. 353; 9 Ir. Eq. 577; 1 H. L. 671; *Lord Scarsdale* v. *Curzon*, 1 J. & H. 40; *In re Angerstein*; *Angerstein* v. *Angerstein*, (1895) 2 Ch. 883; *In re Fothergill's Estate*; *Price-Fothergill* v. *Price*, (1903) 1 Ch. 149; see *Cox* v. *Sutton*, 25 L. J. Ch. 845.

In such a case, if the tenant for life and the first tenant in tail bar the entail, but the first tenant in tail dies before the tenant for life, the chattels go to the person who would have come into possession if the estate tail had not been barred. *Hogg* v. *Jones*, 32 B. 45.

Where chattels were settled to go along with real estate, and the testator directed that in a certain event the personal estate

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should go over as if the tenant in tail were dead without issue, it was held that the condition of defeasance applied to a tenant in tail who had barred the entail. *In re Cornwallis; Cornwallis* v. *Wykeham-Martin*, 32 Ch. D. 388.

Proviso divesting estate must not be uncertain.

A declaration that no person in existence at the testator's death or born in due time afterwards should have more than a life interest in the chattels, and so that no person should acquire an absolute interest till the expiration of twenty-one years after the decease of all persons in existence at the testator's death and afterwards attaining the title, was held to be void for uncertainty. *In re Viscount Exmouth; Exmouth* v. *Praed*, 23 Ch. D. 158.

Where chattels are given to the person or persons in actual possession of land, to go as far as the rules of law and equity permit, but so as not to vest in any person becoming entitled to an estate of inheritance who dies under twenty-one, and the first tenant in tail in possession dies under twenty-one, it seems doubtful whether the chattels are carried on to the next owner within the limits of perpetuity, or whether there would be a lapse. See the opinion of Lord Cairns in favour of an intestacy, and of Lord Westbury in favour of the transmission of the property within the limits of perpetuity, in *Harrington* v. *Harrington*, L. R. 3 Ch. 564; *ib.* 5 H. L. 87; *In re Dayrell; Hastie* v. *Dayrell*, (1904) 2 Ch. 496.

Possession under a deed not executed.

A gift of chattels to the person entitled under a deed of entail to the possession of a house, where the deed referred to had never been executed, was held to pass to the person in fact in possession of the house. *In re Marquess of Bute; Marquess of Bute* v. *Ryder*, 27 Ch. D. 197.

Bequests "in the same manner" as prior bequests.

When a bequest has been made to several persons as tenants in common for life with remainder to their children and there is a subsequent gift to the same persons *in the same manner* as the prior bequest, the second bequest will be subject to the same limitations for life and remainders over. *Milsom* v. *Awdry*, 5 Ves. 465; *Eames* v. *Austee*, 33 B. 264; *Smith* v. *Greenhill*, 14 W. R. 912; *Giles* v. *Melsom*, L. R. 6 H. L. 24.

In *Sweeting* v. *Prideaux*, 2 Ch. D. 413, a subsequent gift for the life of the legatee only "in the same manner in every respect and subject to the same control" as the prior gift, was

held, on the language of the will, to import the limitation in remainder of the prior gift to the children of the legatee. See *Auldjo* v. *Wallace*, 31 B. 193; *Re Smith; Bashford* v. *Chaplin*, 45 L. T. 247.

If, however, the original gift is directed to fall into the residue in default of children and the residue is then given to the same persons "in the same manner," these words will be referred, if possible, to a tenancy in common or separate use. *Shanley* v. *Baker*, 4 Ves. 731.

And where the original gifts are absolute, subject to executory gifts over, a subsequent gift to be held "in the same manner" as the prior gift will not import the executory gifts over, if the words can be referred to a tenancy in common. *Lumley* v. *Robbins*, 10 Ha. 621; and see *Hare* v. *Hare*, 24 W. R. 575.

A gift to A, subject to the conditions in the will named, includes conditions comprised in a codicil. *Stretton* v. *Fitzgerald*, 22 L. R. Ir. 310, 466.

Gift by reference may import all the limitations of a prior gift.

The referential words may, however, be strong enough to import all the limitations and restrictions of the preceding gift. *Ross* v. *Ross*, 2 Coll. 269; *Re Colshead*, 2 De G. & J. 690; *Re Shirley's Trusts*, 32 B. 394; *Ord* v. *Ord*, L. R. 2 Eq. 393; *Re Lindo; Askin* v. *Ferguson*, 59 L. T. 402.

When there is a gift to a class of persons living at a particular time, and a subsequent gift to the same class without the restriction of being alive at the particular time "in the same manner" as the prior gift, this will not cut down the class to take the second gift. *Yardley* v. *Yardley*, 26 B. 38; *Pigott* v. *Wilder*, 26 B. 90; *Re Wilder's Trusts*, 27 B. 418.

But there may be words which will have this effect. *Swift* v. *Swift*, 11 W. R. 334; 32 L. J. Ch. 479.

Devise to uses of settlement.

A specific devise of land to the uses of a settlement which contains an ultimate limitation to the testator and his heirs will not, if the ultimate limitation takes effect, pass the land to the heir. *Jacob* v. *Jacob*, 78 L. T. 451, 825; see 82 L. T. 270.

Where personalty was directed to be laid out in land to be settled to such of the uses and subject to such of the powers by a settlement limited and declared as should be subsisting at the testator's death, it was held that the purchased realty

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would not be subject to charges for jointures and portions actually created at the death under the powers in the settlement. *Re Berners; Berners* v. *Calvert*, 67 L. T. 849; 41 W. R. 188; 3 R. 153; see *In re Walpole's Marriage Settlement; Thomson* v. *Walpole*, (1903) 1 Ch. 928.

An appointment under a special power to the uses of a settlement or such of them as are capable of taking effect may be so construed as to exclude uses which cannot take effect as regards the appointed property because they are not within the power or are otherwise invalid. *In re Finch and Chew*, (1903) 2 Ch. 486.

Property given by reference is held under a separate settlement.

As a general rule, where a fund is directed to be held upon trusts similar to or the same as the trusts declared by another instrument, the effect is that the fund is to be considered as held under a separate settlement, but the language may be such as to show that the fund is to be an accretion to the settled fund and to become part of it. *Re North; Meates* v. *Bishop*, 76 L. T. 186; *Eustace* v. *Robinson*, 7 L. R. Ir. 83.

Reduplication of charges.

When property is given upon the same trusts as other property which is subject to a power to raise a definite sum, the property so given by reference is not subject to an additional charge of the same amount. *Hindle* v. *Taylor*, 5 D. M. & G. 577, 599; *Boyd* v. *Boyd*, 9 L. T. N. S. 166; 2 N. R. 486; *Baskett* v. *Lodge*, 23 B. 138; *Trew* v. *Perpetual Trustee Company*, (1895) A. C. 264; see *Sambourne* v. *Barry*, I. R. 11 Eq. 140.

But if the power is to raise a charge not exceeding a certain proportion of the value of the property, the power to charge is increased in proportion by the value of the added property. *Cooper* v. *Macdonald*, 16 Eq. 258.

Gift to persons "before named."

It may be noticed that a bequest to persons "before named" may refer to persons before mentioned, and will not without more be confined to persons expressly mentioned by name. *In re Holmes*, 1 Dr. 321; *Bromley* v. *Wright*, 7 Ha. 334; *Seale-Hayne* v. *Jodrell*, (1891) A. C. 304.

A gift "amongst my relations hereafter named" where none are subsequently named is void for uncertainty. *Crampton* v. *Wise*, 58 L. T. 718.

CHAPTER LIV.

EXECUTORY TRUSTS.

Executory trusts defined.

EVERY trust which requires a future conveyance or settlement is so far executory; but the mere fact that the testator contemplates a future settlement will not justify the Court in putting upon the words of a testator any other than their legal meaning.

When the testator, though contemplating the execution of a future instrument, declares the trusts upon which the property is to be held by reference to another instrument, those trusts are looked upon as incorporated into the will and must have their ordinary legal meaning. *Christie* v. *Gosling*, L. R. 1 H. L. 279; see *Viscount Holmesdale* v. *West*, L. R. 3 Eq. 474.

If the testator himself declares the trusts to be inserted in the contemplated settlement, the question then is "whether he has been his own conveyancer," in which case the trusts declared by him must be literally followed, or whether the trusts declared by him are merely the headings of a future settlement, in which case they will be so carried out as to effectuate his intention. See *Egerton* v. *Earl Brownlow*, 4 H. L. 1, 210; *Austen* v. *Taylor*, 1 Ed. 361; Amb. 376; *Boswell* v. *Dillon*, Dru. t. Sug. 291; *In re Nelley's Trusts*, 26 W. R. 88; *In re Parrott*; *Walter* v. *Parrott*, 33 Ch. D. 274.

Thus, a direction to purchase lands to be held on the trusts declared with respect to other lands must be obeyed by literally adopting those trusts. *Austen* v. *Taylor*, 1 Ed. 361; Amb. 376.

Distinction between marriage articles and wills.

In marriage articles the purpose of the instrument is itself sufficient to indicate the settler's intention, that the property is to go in strict settlement, but in a will an intention, that words are not to have their strict meaning, must appear from the instrument itself. Therefore, though the trust is executory, a

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direction to settle property on A and the heirs of his body: *Seale* v. *Seale*, 1 P. W. 291; *Samuel* v. *Samuel*, 14 L. J. Ch. 222; 9 Jur. 222; or a devise in trust for A, with a direction to make a proper entail to the male heir by him, will not cut down A to less than an estate tail. *Blackburn* v. *Stables*, 2 V. & B. 367; *Sweetapple* v. *Bindon*, 2 Vern. 536; *Harrison* v. *Naylor*, 2 Cox, 247; *Rondall* v. *Daniell*, 24 B. 193; *Marshall* v. *Bousfield*, 2 Mad. 166; and see *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 599; *Lowry* v. *Lowry*, 13 L. R. Ir. 317.

How far the rule in *Shelley's Case* applies to executory trusts.

If, however, an intention is manifested not to use words in their strict legal sense, the trust will be executed so as to effect the general intention.

Such an intention is sufficiently indicated, if the limitation is to A for life, remainder to his heirs: *Meure* v. *Meure*, 2 Atk. 165; *Papillon* v. *Voice*, 2 P. W. 471; *Stonor* v. *Curwen*, 5 Sim. 264; *Hadwen* v. *Hadwen*, 23 B. 551; *Bastard* v. *Proby*, 2 Cox, 6; *Rochfort* v. *Fitzmaurice*, 2 D. & War. 1; *Trevor* v. *Trevor*, 1 H. L. 239; by a direction, that the first taker should be unimpoachable for waste: *Papillon* v. *Voice*, 2 P. W. 471; Fearne, C. R. 115; by a direction, that he shall not have power to bar the entail: *Leonard* v. *Earl of Sussex*, 2 Vern. 526; Fearne, C. R. 115; or that the property shall go over, if the first taker dies without issue: *Shelton* v. *Watson*, 16 Sim. 543; *Thompson* v. *Fisher*, 10 Eq. 207; by the insertion of a general limitation to preserve contingent remainders not limited to a life: *Venables* v. *Morris*, 7 T. R. 342, 438; *Doe* d. *Compere* v. *Hicks*, 7 T. R. 433; by a direction that a settlement shall be made as counsel shall advise and that issue are to take in succession, and according to priority. *White* v. *Carter*, 2 Ed. 366.

And the same result, it seems, will follow, if the general scope of the limitations shows that they were not to be literally adhered to. *Parker* v. *Bolton*, 5 L. J. Ch. 98; *Duncan* v. *Bluett*, I. R. 4 Eq. 469.

Direction to make a strict entail.

As to the effect of a direction to make a strict entail, see *Graves* v. *Hicks*, 11 Sim. 536; *Sealey* v. *Stavell*, I. R. 2 Eq. 326.

Direction to settle property to go with a title.

An executory trust to settle property upon such trusts as would correspond with the limitations of a barony granted by

letters patent to several persons in succession and the heirs male of their bodies respectively, will be limited so as to give them only estates for life, the title being inalienable. *Sackville-West* v. *Viscount Holmesdale*, L. R. 3 Eq. 474; *ib.* 4 H. L. 543; *Lord Dorchester* v. *Earl of Effingham*, Sir G. Coop. 319; 10 Sim. 587, n.; 3 B. 180, n.; *Woolmore* v. *Burrows*, 1 Sim. 512; *Baukes* v. *Baroness Le Despencer*, 10 Sim. 576.

The words "as far as the rules of law permit" will not make a trust executory.

It is clear that where chattels are directed to go as heirlooms with real estate "as far as the rules of law and equity permit," these words will not make the trust executory, or enable the Court to mould the limitations of the personalty. *Christie* v. *Gosling*, L. R. 1 H. L. 279; *In re Johnston*; *Cockerell* v. *Earl of Essex*, 26 Ch. D. 538; *In re Hill*; *Hill* v. *Hill*, (1902) 1 Ch. 807.

Effect of such words where the trust is executory.

But, if such a trust is executory, the Court will mould it, so as to prevent the absolute vesting of chattels in a tenant in tail dying before coming into possession. See *Lady Lincoln* v. *Duke of Newcastle*, 12 Ves. 226, and see per Lord Chelmsford in *Christie* v. *Gosling*, L. R. 1 H. L. 290; *Sackville-West* v. *Viscount Holmesdale*, L. R. 4 H. L. 543; see *Montagu* v. *Lord Inchiquin*, 23 W. R. 592.

If there are shifting clauses as to the realty, which would be void for remoteness as to the personalty, they will be moulded so as to carry out the intention. *Miles* v. *Harford*, 12 Ch. D. 691.

The Court will carry out in strict settlement an executory trust of family jewels directed to go as heirlooms to a succession of eldest sons "as far as the rules of law and equity will permit," though unconnected with limitations of real estate, and will insert provisoes against vesting in any person who does not become entitled to possession and attain twenty-one. *Shelley* v. *Shelley*, 6 Eq. 540.

Simple direction to settle on A.

A simple direction to settle property on beneficiaries when they come of age, without reference to marriage, probably imports no more than a trust for the beneficiaries, and they may receive the property; and the same construction has been adopted, where the direction was that the shares of daughters were to be settled on themselves at their marriage. *Laing*

v. *Laing*, 10 Sim. 315; *Kennerley* v. *Kennerley*, 10 Ha. 160; *Munt* v. *Glynes*, 41 L. J. Ch. 639; *Mayrath* v. *Morehead*, 12 Eq. 491.

If an absolute interest is given at twenty-one or marriage, with a direction that in case of marriage the share should be so settled that the legatee may enjoy the income for life for her separate use, the fund will be settled for life with restraint on anticipation, but subject thereto will belong to the legatee absolutely. *Dowd* v. *Dowd*, (1898) 1 Ir. 244.

Direction to settle strictly.

If the direction is to make a *strict* settlement, but no intention is shown to benefit children, the property will be settled upon the legatee in such a way as to exclude her husband and children. *Loch* v. *Bagley*, 4 Eq. 122; see *In re Jordan's Trusts*, (1903) 1 Ir. 118.

But a direction to settle a legacy upon the legatee by her settlement or upon marriage has been held to import the usual trusts of a marriage settlement, including trusts for children. *Duckett* v. *Thompson*, 11 L. R. Ir. 424; *Re Spicer*; *Spicer* v. *Spicer*, 84 L. T. 195; see also *Earl of Mountrashel* v. *Smyth*, (1895) 1 Ir. 346; *Wright* v. *Wright*, (1904) 1 Ir. 360.

Intention to benefit children.

If an intention is shown that the children of the legatee are to be benefited, the settlement will contain a power of appointment in the legatee with limitations in default of appointment in favour of children who, being males, attain twenty-one, or, being females, attain twenty-one or marry, as tenants in common. *Young* v. *Macintosh*, 13 Sim. 445; *Stanley* v. *Jackman*, 23 B. 450; *Taggart* v. *Taggart*, 1 Sch. & L. 84; *Cogan* v. *Duffield*, 2 Ch. D. 44; *Harris* v. *Loftus*, No. 2, (1903) 1 Ir. 203; *Herring-Cooper* v. *Herring-Cooper*, (1905) 1 Ir. 465; see *Oliver* v. *Oliver*, 10 Ch. D. 765; *Eustace* v. *Robinson*, 7 L. R. Ir. 83; *In re Gowan*; *Gowan* v. *Gowan*, 17 Ch. D. 778.

But a power of appointment will not be given, where an intention is shown, that the children are to take equally. *In re Parrott*; *Walter* v. *Parrott*, 33 Ch. D. 274.

Intention to benefit husband.

Where there is an intention to benefit a husband or wife, the husband and wife will take a joint power of appointment. *In re Gowan*; *Gowan* v. *Gowan*, 17 Ch. D. 778.

If the trustees have a discretion as to the form of settlement, a power may be inserted enabling the legatee to appoint a life interest to a husband. *Charlton* v. *Rendall*, 11 Ha. 296.

Where a testater directed 10,000*l.* to be settled upon a married daughter; "at her death 8,000*l.* of the above sum to be divided equally amongst her children, and the remaining 2,000*l.* to be given to her husband, if living," it was held that the gift must be confined to her then husband and her children by him. *In re Parrott*; *Walter* v. *Parrott*, 33 Ch. D. 274.

But where the testator, by a gift over if the legatee died "without leaving any issue her surviving" showed that he contemplated children by any marriage taking, it was held that a gift of a life interest to the legatee's husband included a second husband. *Nash* v. *Allen*, 42 Ch. D. 54.

Ultimate trusts.

Under a direction to settle for the benefit of the legatee and her issue to the exclusion of a husband, the ultimate trusts will be for the appointees of the legatee by will and in default of appointment for her absolutely. *Stanley* v. *Jackman*, 23 B. 450.

A covenant in executory marriage articles to settle real estate on issue will be carried out by successive limitations to the first and other sons, and so on. *Dod* v. *Dod*, Amb. 274; *Hart* v. *Middlehurst*, 3 Atk. 373; *Phillips* v. *James*, 13 W. R. 934; *In re Grier*, I. R. 6 Eq. 386.

In what cases tenants for life will be unimpeachable for waste.

In the execution of executory trusts by the Court the question arises whether the tenants for life are to be dispunishable for waste or not.

I. Where the executory trust is in such a form as would give the first taker an estate of inheritance, but the general object of the trust can only be effected by cutting down that estate to an estate for life, the life estates are made unimpeachable for waste. *Leonard* v. *Earl of Sussex*, 2 Vern. 526; *White* v. *Briggs*, 15 Sim. 17; 2 Ph. 583.

And, therefore, where estates are directed to go to the support of a title granted to a man and the heirs of the body, the estate of the first taker being cut down to a life estate in execution of the trust, will be dispunishable for waste. *Wool-*

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more v. *Barrows*, 1 Sim. 512; *Bankes* v. *Baroness Le Despencer*, 10 Sim. 576; 11 Sim. 508; *Sackville-West* v. *Viscount Holmesdale*, L. R. 4 H. L. 543.

A direction that the trust is to be executed in strict settlement without more, *i.e.*, where no estate for life is expressly given, implies that the estates for life are to be dispunishable for waste. See *Davenport* v. *Davenport*, 1 H. & M. 775.

And, upon the same principle, if the trust is to be executed in strict settlement, powers which would diminish the estate will not be inserted under a direction to insert the usual powers. *Higginson* v. *Barneby*, 2 S. & St. 516; see *Sackville-West* v. *Viscount Holmesdale*, *supra*.

2. But if the testator has expressly, or by reference to other trusts, directed a life estate to be given, the power to commit waste will not be added to the life estate. *Davenport* v. *Davenport*, 1 H. & M. 775.

And if life estates are directed by the testator to be given, the words "in strict settlement" will not make the life estates dispunishable for waste. *Stanley* v. *Coulthurst*, 10 Eq. 259.

A direction to settle without power of anticipation is inconsistent with a power to commit waste. *Clive* v. *Clive*, 7 Ch. 433.

Restraint upon anticipation.

Property to be settled to the separate use of a married woman will be settled with a restraint upon anticipation. *Turner* v. *Sargent*, 17 B. 515; *Stanley* v. *Jackman*, 23 B. 450; *Re Dunnill's Will*, I. R. 6 Eq. 322; see *Symonds* v. *Wilkes*, 11 Jur. N. S. 659; *In re Parrott*; *Walter* v. *Parrott*, 33 Ch. D. 274.

Real estate directed to be settled will be settled as realty. *Turner* v. *Sargent*, 17 B. 515.

What powers will be inserted in a settlement executed by the Court.

A simple direction to settle will, it seems, authorise the insertion of powers of management, such as powers of leasing, and sale and exchange. *Turner* v. *Sargent*, 17 B. 515; *Wise* v. *Piper*, 13 Ch. D. 848.

And where "usual powers" are expressly authorised, powers of leasing, of sale and exchange, and, if necessary, of partition and of leasing mines and of granting building leases, will be inserted, but not powers to confer personal privileges upon par-

ticular persons, nor a covenant to settle after-acquired property. *Peake* v. *Penlington*, 2 V. & B. 311; *Hill* v. *Hill*, 6 Sim. 136; *In re Maddy's Estate*; *Maddy* v. *Maddy*, (1901) 2 Ch. 820; see *Duke of Bedford* v. *Marquis of Abercorn*, 1 M. & Cr. 312, p. 334; *Higginson* v. *Barnaby*, 2 S. & St. 516; *In re Grier*, I. R. 6 Eq. 386.

Hotchpot clauses will, as a rule, be inserted. *Miller* v. *Gulson*, 13 L. R. Ir. 408; see *Lees* v. *Lees*, I. R. 5 Eq. 549.

Where certain powers are given to tenants for life if qualified, and if not qualified, to trustees for them, general words will not authorise powers of sale and exchange. *Brewster* v. *Angell*, 1 J. & W. 625; *Horne* v. *Barton*, Jac. 437.

And where certain powers are given, general words will, as a rule, authorise only powers of a like nature; they will not, for instance, authorise the insertion of a power to grant building leases when a power to lease is expressly given. *Pearse* v. *Baron*, Jac. 158.

The general words may, however, be so placed as to show that their generality is not to be controlled. *Lindon* v. *Fleetwood*, 6 Sim. 152.

CHAPTER LV.

IMPLICATION.

Implication of Estates Tail.

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Gift over upon an indefinite failure of issue.

If there is a devise to A simply, or to A for life, followed by a gift over in default of issue, if these words import an indefinite failure of issue, A takes an estate tail. *Machell* v. *Weeding*, 8 Sim. 4; *Daintry* v. *Daintry*, 6 T. R. 307; *In re Banks' Trusts*, 2 K. & J. 387.

The Court will not constructively limit the failure of issue, so as to prevent the implication of an estate tail.

And in wills before the Wills Act, if the limitation is to A simply, or to A for life, with a gift over in default of issue, A will take an estate tail, though there are words which might constructively limit the failure of issue within a definite period, since this is the only construction which will carry anything to the issue. *Wyld* v. *Lewis*, 1 Atk. 432; *Simmons* v. *Simmons*, 8 Sim. 22 (where the devise was in effect [illegible], and if she dies without issue over, the power to [illegible] being merely discretionary); *Bull* v. *Thomas*, [illegible] X. 109.

Whether an estate tail will be implied from a gift over in default of issue of a person who takes nothing under the will.

As to whether an estate tail will be implied in a person, from a gift over in default of his issue simply, where no interest is given to him by the will, see *Parker* v. *Tootal*, 11 H. L. 143; *Walter* v. *Drew*, Com. Rep. 373.

And where, in a devise to A for life, remainder to his children either for life or in tail, an estate tail is implied in A from a gift over in default of issue, the estate tail so implied will be in remainder, to take effect after the prior estates expressly limited. *Doe* d. *Bean* v. *Hulley*, 8 T. R. 5; *Doe* d. *Gallini* v. *Gallini*, 5 B. & Ad. 621; 3 Ad. & E. 340; *Forsbrook* v. *Forsbrook*, L. R. 3 Ch. 93; *Andrew* v. *Andrew*, 1 Ch. D. 410.

Where in a will after the Wills Act lands were devised to

A "during his life and to his eldest son and his heirs in tail male; and in default of issue" over, an estate in tail male was implied in A subsequent to the estate in tail male in his eldest son. *Neville* v. *Thacker*, 23 L. R. Ir. 344.

As between father and son, an estate tail will be implied in the father.

And where an estate tail is to be implied either in an ancestor or his issue, it will be implied in the ancestor, so as to take in the whole line of issue. *Atkinson* v. *Barton*, 10 H. L. 213; *Forsbrook* v. *Forsbrook*, *supra*.

Implication of Life Estates.

I.—*As regards Real Estate.*

Devise to the heir-at-law after the death of A, gives A a life estate.

If there is a devise of realty to the heir-at-law after the death of A, A will take an estate for life by implication. It is evident, that the heir, who would take in case of intestacy, is not meant to take immediately, and the only way of carrying out the testator's intention is to give A a life estate. "A must have the thing devised or none else can have it." *Gardner* v. *Sheldon*, Vaughan, 259; Tudor, L. C. 625.

But a devise to a stranger, after the death of A gives A no estate by implication, since the heir-at-law may have been intended to take in the meantime. *Aspinall* v. *Petvin*, 1 S. & St. 544.

Person to take on the death of A must be heir at date of devise.

In order that A may take a life estate, the person to whom the lands are given after the death of A must be the heir-at-law at the time of the devise, and not at the time when the devise takes effect. *Aspinall* v. *Petvin*, *supra*.

Devise at the death of A to one of several co-heiresses.

A devise to one of several co-heiresses after the death of A does not give A a life estate. *In re Willatts; Willatts* v. *Artley*, (1905) 1 Ch. 378 (rev. on a different point (1905) 2 Ch. 135), not following dictum in *Hutton* v. *Simpson*, 2 Vern. 723.

Devise at the death of A to the heir and others.

The rule does not apply, where the devise is to the heir and others after the death of A. *Ralph* v. *Carrick*, 11 Ch. D. 873.

Whether an express devise to A will prevent him from taking by implication.

The express gift of certain lands to A does not in itself prevent him from taking other lands by implication. See 13 Hen. VII. f. 17; Brook, Devise, pl. 52, cited in *Gardner* v. *Sheldon*, Vaughan, 259; Tudor, L. C. 4th ed. 388, 392.

Therefore, where lands are devised to A for life, and after

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the death of A the lands previously devised, together with other lands, are devised to B, A will or will not take an estate for life by implication in the other lands, according as B is the heir or a stranger. *Aspinall* v. *Petvin*, 1 S. & St. 544; *King* v. *Ringstead*, 9 B. & C. 218; *Attwater* v. *Attwater*, 18 B. 330.

Distributive construction where lands, in some of which A takes a life estate, are given at his death to the heir.

But words which taken in their grammatical sense are joint and apply to the two classes of property, will be construed distributively if the intention of the testator is manifest that the lands not expressly devised for life are to go to the devisees at once. *Cook* v. *Gerard*, 1 Saund. 183, cit. 9 B. & C. 225; *Simpson* v. *Hornsby*, 2 Veru. 723; Prec. Ch. 439, 452; *Doe* v. *Brazier*, 5 B. & Ald. 64; see *Rhodes* v. *Rhodes*, 7 App. C. 192, where a devise after the death of A was held under a peculiar will to vest immediately.

The mere fact, that provision has already been made for A, will be an argument against giving a life estate by implication, and therefore in favour of a distributive construction. See *Stevens* v. *Hale*, 2 Dr. & Sm. 22; *James* v. *Shannon*, I. R. 2 Eq. 118.

No implication where possession postponed till A's death.

Of course, if the devise after the death of A can be construed as merely postponing the vesting in possession till the death of A, no argument in favour of implication can arise. *Barnet* v. *Barnet*, 29 B. 239.

Effect of a residuary devise.

And in the same way, if there is a residuary devise, so that nothing is undisposed of, there can be no implication. *Horton* v. *Horton*, Cro. Jac. 74.

II.—*As regards Personal Estate.*

Bequest of personalty to the next of kin after A's death.

By analogy to the rule with regard to real property, it appears, that, if personal property be given to the next of kin after the death of A, A will take a life interest by implication, if there is no residuary bequest. *Stevens* v. *Hale*, 2 Dr. & Sm. 22; *Cock* v. *Cock*, 21 W. R. 807; *Blackwell* v. *Bull*, 1 Kee. 176. In *Horton* v. *Horton*, Cro. Jac. 74, there was in effect a residuary bequest according to the then state of the law.

A life interest will not be implied in A, where the persons to take on his death are not the next of kin or are the next of

kin along with other persons or are only some of the next of kin. *Ralph* v. *Carrick*, 11 Ch. D. 873; *Woodhouse* v. *Spurgeon*, 49 L. T. 97; *Green* v. *Flood*, 15 L. R. Ir. 450; *In re Springfield*; *Chamberlin* v. *Springfield*, (1894) 3 Ch. 603.

In order to imply a life interest in A, there must be something more than a mere gift after his death. Some of the earlier cases, in which a life interest has been implied, would probably not now be followed. See *Roe* v. *Summerset*, 5 Burr. 2608; *Bird* v. *Hunsdon*, 2 Sw. 342; *Humphreys* v. *Humphreys*, 4 Eq. 475.

Implication in marriage settlement.

In the case of marriage settlements settling property on the wife during coverture and providing for her death during the husband's life, with limitations after the death of the survivor, but containing no provision for the event of the wife surviving the husband, a life interest has in that event been implied in the wife. *Tunstall* v. *Trappes*, 3 Sim. 312; *Allin* v. *Crawshay*, 9 Ha. 382.

Intention to give life interest.

So in wills after a life interest to A, with a life interest in certain events to B, followed by a gift over after the death of A and B, a life interest has been implied in B, though the events did not happen. *In re Betty Smith's Trusts*, L. R. 1 Eq. 79; *In re Blake's Trust*, 3 Eq. 799; see *Isaacson* v. *Van Goor*, 42 L. J. Ch. 193; 21 W. R. 156.

Life interest implied in donee of special power.

And a life interest may be implied from a power of disposition among certain persons where there is an intention shown that the donee of the power should take some interest. *Acheson* v. *Fair*, 3 D. & War. 512; *In re Willatts*; *Willatts* v. *Artley*, (1905) 1 Ch. 378; 2 Ch. 135.

Where the testator's widow was directed to carry on the testator's business and after his death he directed his property to be divided among his children, the widow took a life interest in the property upon the general intention to keep the family together. *Blackwell* v. *Bull*, 1 Kee. 176; see *Cockshott* v. *Cockshott*, 2 Coll. 432.

Effect of a residuary bequest.

A residuary bequest or a gift in default of appointment, where the bequest after the life of A is made under a power, affords an argument against the implication of a life interest. *Cranley* v. *Dixon*, 23 B. 512; *Henderson* v. *Constable*, 5 B. 297.

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No implication arises in favour of A, where the gift is if A dies under 21 to B.

There is no implication in favour of A, where the gift is if A dies under twenty-one or unmarried, since in such a case an absolute interest and not a life estate would have to be implied. *James* v. *Shannon*, I. R. 2 Eq. 118; *Harris* v. *Du Pasquier*, 20 W. R. 668.

Implication of Absolute Interests.

Gift to A till 21, with a gift over if he dies under 21.

1. If there is a gift to A till twenty-one with a gift over if he dies under twenty-one, A will take by implication the fee or an absolute interest in personalty, defeasible upon death under twenty-one. *Tomkins* v. *Tomkins*, cited 1 Burr. 234; *Taylor* v. *Pegg*, 24 B. 105; *Gardiner* v. *Stevens*, 30 L. J. Ch. 199; *In re Harrison's Estate*, 5 Ch. 408; see *Savage* v. *Tyers*, 7 Ch. 356.

The argument in favour of implication is strengthened, if the residuary legatees or devisees are different from those, who would take under the gift over, so that without implication the property would go to different persons, according as A died under or over twenty-one. *Cropton* v. *Davies*, L. R. 4 C. P. 159.

Gift till 21.

2. A simple gift to trustees in trust for A till he attains twenty-one will not give A the absolute interest. *In re Hedley's Trusts*, 25 W. R. 529; see *M'Cutcheon* v. *Allen*, 5 L. R. Ir. 268.

But very slight indications of intention have been held sufficient to give the absolute interest, though possibly some of the earlier decisions may be difficult to support.

In some cases the Court has found a direct gift to the legatee, with a superadded direction that it was to be in trust till he should come of age. *Atkinson* v. *Paice*, 1 B. C. C. 91; *Hale* v. *Beck*, 2 Ed. 229; see *Tunaley* v. *Roch*, 3 Dr. 720.

In others an absolute interest has been implied from a direction, that the trust is to cease at twenty-one, or from a reference to the trustees as trustees for the legatees. *Peat* v. *Powell*, Amb. 387; 1 Ed. 479; *Wilks* v. *Williams*, 2 J. & H. 125.

Or, again, an absolute interest has been given because the trustees are directed to apply not only the interest but the produce till the legatees attain twenty-one. *Newland* v. *Sheppard*, 2 P. W. 194.

Effect of a gift to A till 21, for the benefit of himself and another.

3. But the implication will be rebutted, if there are circumstances tending to show that the person to take till twenty-one is not to take an absolute interest if he survives twenty-one; if, for instance, the gift is to the wife for her and her son's support till the son attains twenty-one, and if he dies under twenty-one, to the wife for life, and then over. In this case the son did not take the whole interest till twenty-one, and it could therefore hardly be implied that he was to take the whole after that age to the exclusion of his mother. *Fitzhenry* v. *Bonner*, 2 Dr. 36.

No implication in favour of children arises in a gift to A absolutely, and if he dies without children over.

4. No implication in favour of children arises upon an absolute gift of personalty to A and if he dies without children over, or upon a gift to several as tenants in common and if any die without issue their shares to those then living or their children. *Addison* v. *Busk*, 14 B. 459; 2 D. M. & G. 810, sub nom. *Lee* v. *Busk*; *Cooper* v. *Pitcher*, 4 Ha. 485; 16 L. J. Ch. 24; *Dowling* v. *Dowling*, L. R. 1 Eq. 442; *ib.* 1 Ch. 612.

But where there was a gift of a share of residue to A. followed by an accruer clause on his death before the testator "without leaving any children lawfully to inherit," a gift to children was implied. *M'Clean* v. *Simpson*, 19 L. R. Ir. 528.

Gift to A for life, and if he dies without children over.

5. Nor does any implication in favour of children arise if the gift is to A for life and if he dies without children over. *Greene* v. *Ward*, 1 Russ. 262; *Ranelagh* v. *Ranelagh*, 12 B. 200; *Sparks* v. *Restal*, 24 B. 218; *Neighbour* v. *Thurloe*, 28 B. 33; *Re Hayton's Trusts*, 4 N. R. 54; *Seymour* v. *Kilbee*, 3 L. R. Ir. 33; *In re Rawlins' Trusts*, 45 Ch. D. 299; *S. C. Sealé* v. *Rawlins*, (1892) A. C. 342. *Ex parte Rogers*, 2 Mad. 449, probably went too far.

So, in the case of real estate, a gift over in default of issue of A following limitations to A for life with remainder to his first son for life, with remainder to the first son of the first son in tail, with remainder to every other son of A successively for like interests, will not give the second and other sons of the first son of A estates by purchase. *Monypenny* v. *Dering*, 7 Ha. 568.

6. But though after a gift to A for life the mere gift over in default of children will not be sufficient to give the children any

interest by implication, there may be circumstances to fortify the argument based upon the gift over, so as to give the children an interest. For instance, where the gift over was not merely on the death of the tenant for life without issue but also upon his leaving issue and such issue dying under twenty-one, the latter gift over was a strong indication of an intention that the issue were to take. *Kinsella* v. *Caffray*, 11 Ir. Ch. 151. *Champ* v. *Champ*, 30 L. R. Ir. 72.

Gift to A to dispose of among a certain class at his death.

7. Possibly where there is a gift to A to dispose of among a certain class by deed or will, a life interest would be implied in A. *Acheson* v. *Fair*, 3 D. & War. 527. See *Williams* v. *Roberts*, 27 L. J. Ch. 177; 4 Jur. N. S. 18.

Bare power to appoint to A.

8. A bare power to appoint a sum of money to a particular person will not give that person any interest, if the power is not exercised. *Bull* v. *Vardy*, 1 Ves. Jun. 270; see *Tweedale* v. *Tweedale*, 7 Ch. D. 633.

Wide discretion not exercised.

If a wide discretion is given to trustees to apply a fund in the maintenance of a son or in augmentation of the shares of the other children, there is no implied gift if the trustees refuse to exercise their discretion. *Re Eddowes*, 1 Dr. & Sm. 395.

Life interest with power to appoint.

Where there is a life interest with a power to the life tenant to appoint to his children but no gift to the children, and no gift over in default of appointment, the children will take nothing in default of appointment (*a*), unless an intention can be gathered that the power is in the nature of a trust which the donee is bound to exercise (*b*). *Healy* v. *Donnery*, 3 Ir. C. L. 213; *In re Weekes' Settlement*, (1897) 1 Ch. 289; *Carberry* v. *McCarthy*, 7 L. R. Ir. 328; *In re Hall; Sheil* v. *Clark*, (1899) 1 Ir. 308 (*a*); *Witts* v. *Boddington*, 3 B. C. C. 95; *Forbes* v. *Ball*, 3 Mer. 437; *Birch* v. *Wade*, 3 V. & B. 198; *Re White's Trusts*, Joh. 656; *Salusbury* v. *Denton*, 3 K. & J. 529; *In re Patterson; Dunlop* v. *Greer*, (1899) 1 Ir. 321; see *Ahearne* v. *Aherne*, 9 L. R. Ir. 144 (*b*).

If the gift can be construed as a gift to the children with a power of selection in the tenant for life which is not exercised, the gift to the children will take effect. This construction has been adopted in several cases where the provision was for such

children as the tenant for life or as trustees should appoint. *Brown* v. *Higgs*, 4 Ves. 708; 5 Ves. 495; 8 Ves. 561; *Burrough* v. *Philcox*, 5 M. & Cr. 73; *Re Caplin's Will*, 2 Dr. & Sm. 527; *Re White's Trusts*, Joh. 656; *Carthew* v. *Enraght*, 20 W. R. 743; *In re Brierley; Brierley* v. *Brierley*, 43 W. R. 56.

A gift over in default of objects of the power is a strong indication that the property was not to go over if there were any objects of the power. *Butler* v. *Gray*, 5 Ch. 26.

If there is a gift over in default of appointment there can be no implication in favour of the objects of the power. *Pattison* v. *Pattison*, 19 B. 638; *Richardson* v. *Harrison*, 16 Q. B. D. 85, disapproving *In re Jeffery's Trusts*, 14 Eq. 136; *Re Sprague; Miley* v. *Cape*, 43 L. T. 236; *In re Lyons and Carroll's Contract*, (1896) 1 Ir. 383.

Implication of Cross-Remainders.

Cross-remainders implied in devise to several in tail, with gift over in default of issue to take under preceding limitations.

1. If there is a devise of lands to two or more as tenants in common and the heirs of their bodies respectively, followed by a gift over in default of such issue, the gift over takes effect only in default of all such issue as would take under the antecedent limitations, and therefore cross-remainders are implied between the tenants in tail. *Doe* d. *Gorges* v. *Webb*, 1 Taunt. 234; *Powell* v. *Howells*, L. R. 3 Q. B. 655; *Hannaford* v. *Hannaford*, L. R. 7 Q. B. 116; see *Askew* v. *Askew*, 57 L. J. Ch. 629; 58 L. T. 472; 36 W. R. 620.

Where the gift over is limited as a remainder or reversion.

And if the gift over is limited not expressly in default of issue, but as a remainder, the same result follows. *Doe* d. *Burden* v. *Burville*, 2 East, 47, n.

The word reversion would probably now be held to have the same force, notwithstanding *Pery* v. *White*, Cowp. 777.

The arguments against the implication of cross-remainders founded upon the number of the devisees and such words as severally or respectively, or the fact that *the whole* is not expressly given over, cannot now be considered as having any weight.

Gift over in default of issue living at deaths of ancestors.

2. The result will be the same if the gift over is in default of issue to take under the preceding limitations, living at the death of their parents. *Maden* v. *Taylor*, 45 L. J. Ch. 569.

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Whether the limitation of cross-remainders in certain events prevents the implication of cross-remainders.

3. It has been said that, if cross-remainders are provided between certain objects in certain events, the implication of cross-remainders between those objects in different events does not arise; so that, for instance, if cross-remainders are provided between the children of separate families among themselves, cross-remainders would not be implied between the children of one family and those of the other. *Cache's Case* (Dyer, 330), however, which is usually cited on this point, is no authority for any such proposition. All that case decides is, that cross-remainders cannot be implied in the face of an express limitation over in a certain event with which such an implication would be inconsistent. See the remarks by Turner, L.J., in *Atkinson* v. *Barton*, 3 D. F. & J. 339. And the decision in *Rabbeth* v. *Squire*, 19 B. 77; 4 De G. & J. 406, was based on totally different grounds. The true rule is laid down by Turner, L.J.: "Cross-remainders are to be implied or not according to the intention. The circumstance of remainders having been created between the parties in particular events is a circumstance to be weighed in determining the intention, but is not decisive upon it." *Atkinson* v. *Barton*, 3 D. F. & J. 330 (reversed on appeal, but on different grounds, 10 H. L. 313; see, too, *Vanderplank* v. *King*, 3 Ha. 1; *Re Ridge's Trusts*, 7 Ch. 665; *In re Hudson: Hudson* v. *Hudson*, 20 Ch. D. 406 (where the rules deducible from the cases are stated); *Re Rabbins: Gill* v. *Worrall*, 79 L. T. 313.

Cross-remainders implied between persons taking different interests.

4. Cross-remainders will be implied even though, as the result of legal rules and not of the testator's intention, the class of persons between whom they are implied take different interests; if, for instance, some are tenants in tail, others only tenants for life, with remainders to their children in tail. *Vanderplank* v. *King*, 3 Ha. 1.

Cross-remainders implied between tenants for life.

5. Cross-remainders will be implied in a devise to the children of A, which carries to them only a life estate, with a gift over for want of such issue of A. *Ashley* v. *Ashley*, 6 Sim. 358.

Cross-remainders implied between the

6. And where realty or personalty is given to several persons as tenants in common for life with remainders to their issue, followed by a gift over if all should die without leaving issue,

cross-limitations between the first takers and their families will be implied. *Re Ridge's Trusts*, 7 Ch. 665; *Re Clark*, 11 W. R. 871; see, too, *Coates* v. *Hart*, 3 D. J. & S. 504.

families where the limitations are for life, with remainder to children.

7. But cross-limitations will not be implied so as to divest vested interests. The implication arises from the presumption against intestacy, but where there are vested interests there can be no intestacy. See *Rabbeth* v. *Squire*, 19 B. 70; 1 De G. & J. 406; *Re Clark*, 11 W. R. 871; *Sutton* v. *Sutton*, 30 L. R. Ir. 251.

Cross-limitations will not be implied so as to divest vested interests.

Upon the same principle, when the testator has disposed of his whole interest in realty or personalty, if for instance, absolute vested interests have been given to several as tenants in common, with a gift over upon the death of all in certain events, cross-limitations cannot be implied between them, as there can be no intestacy, and cross-limitations would divest vested interests. *Skey* v. *Barnes*, 3 Mer. 334; *Bromhead* v. *Hunt*, 2 J. & W. 459; *Baxter* v. *Losh*, 14 B. 612; *Beaver* v. *Nowell*, 25 B. 551.

Gift over of contingent interests, if all the legatees die before the time of vesting.

8. If, however, the interests are not vested, but contingent with a gift over upon the death of all before the interests vest, the argument against an intestacy applies, and no argument can be raised against cross-limitations on the ground that they would divest vested gifts, and therefore in all probability cross-limitations would be implied. *Mackell* v. *Winter*, 3 Ves. 236, 536; *Scott* v. *Bargeman*, 2 P. W. 68; 2 Eq. Ab. 542; *Graves* v. *Waters*, 10 Ir. Eq. 234.

There are no grounds for supposing *Scott* v. *Bargeman* to be overruled. The point in *Beauman* v. *Scott*, 2 Ba. & Be. 406, was totally different. It was whether benefit of survivorship would be implied between tenants in common taking vested interests, and the incidental remarks of Lord Manners cannot be considered as overruling a case expressly approved by Lord St. Leonards in *Vize* v. *Stoney*, 1 Dr. & War. 348, and followed in *Graves* v. *Waters*.

As to the circumstances under which cross-remainders apply to an accruer clause, see *Sutton* v. *Sutton*, 30 L. R. Ir. 251.

Implication by Recital.

A recital that a person is entitled under another instrument.

1. A recital, that a person is entitled under another instrument, when he is not in fact entitled, does not in general amount to a gift by the instrument which contains the recital. *Wright* v. *Wyvell*, 2 Vent. 56; *Dashwood* v. *Peyton*, 18 Ves. 27; *Harris* v. *Harris*, 1. R. 3 Eq. 610; *Circuitt* v. *Perry*, 23 B. 275; *Re Bagot; Paton* v. *Ormerod*, (1893) 3 Ch. 348; *Harvey* v. *Curtis*, (1895) 1 Ir. 23; not following *Hall* v. *Leitch*, 9 Eq. 376; see *Trevor* v. *Trevor*, 5 Russ. 24.

Recital in the will of a gift by the will.

2. It has been said, that a recital in the will itself of a gift as made by the will, when in fact it contains no such gift, is "conclusive evidence of an intention to give by the will," and amounts to a gift. See *Adams* v. *Adams*, 1 Ha. 540; and per Lord Brougham, "If a man says 'I have in the first part of my will given such an estate to A,' A shall have that estate though the gift is not contained in the first part of the will." 3 Cl. & F. p. 572.

There appears to be no decision in support of this doctrine. It must be a question of construction in each case whether the mention of the supposed gift itself amounts to a gift or not.

Erroneous recital by codicil.

3. A reference by codicil to something as given by the will, which is not in fact given, when there is something else given, to which the codicil is an incorrect reference, or an inaccurate recital of a gift by will, for instance, a recital of what was a life interest as if it were an estate tail, will not affect the will or amount to a gift. *Skerratt* v. *Oakley*, 7 T. R. 492; *Smith* v. *Fitzgerald*, 3 V. & B. 2; *Cosby* v. *Millington*, 38 L. J. C. P. 373; *Re Arnold's Estate*, 33 B. 163; *Mackenzie* v. *Bradbury*, 35 B. 617; *Nugent* v. *Nugent*, I. R. 8 Eq. 78.

Still less can a gift be implied from a recital, when the effect of such implication would be to cut down a prior express gift, as from a recital of a gift to B for life with remainder to his children, when the prior gift was to the children immediately. *Re Smith*, 2 J. & H. 594.

A devise of land subject to the widow's dower does not give the widow a right to dower, which she had not before. *Adams* v. *Adams*, 1 Ha. 537.

Codicil may explain will.

4. A codicil may, however, be referred to in order to show the view the testator himself took of the language used in his will. *Darley* v. *Martin*, 13 C. B. 683; *Grover* v. *Raper*, 5 W. R. 134; *In re Venn; Lindon* v. *Ingram*, (1904) 2 Ch. 52.

Gift in addition to supposed gift.

5. A simple gift to a legatee of A, in addition to B, would no doubt pass both A and B. This is not a case of implication at all.

Thus, a gift by a testatrix to a legatee of 300*l.*, "in addition to the sums owing to her from my late husband's estate," where the testatrix was her husband's executrix and residuary legatee, was held to be a gift of two sums of 500*l.*, for which the husband had given the legatee promissory notes without consideration, as well as of the 300*l.* *In re Rowe; Pike* v. *Hamlyn*, (1898) 1 Ch. 153.

But a gift by codicil of A, in addition to B, which the testator goes on to say he has already given by his will, when he has not in fact given it, stands on a different footing. The words "in addition to" are not intended to operate by way of gift, as the testator thinks that he has already given B. The point appears not to have arisen in this simple form.

In *Farrer* v. *St. Catharine's Coll.*, 16 Eq. 19, the testator by codicil confirmed a supposed gift by will and gave a sum in addition, and it was held the College took both.

In *Jordan* v. *Fortescue*, 10 B. 259, a gift by a third codicil of "500*l.* in addition to 1,500*l.* before bequeathed," where 500*l.* had been given by the will and 500*l.* by a first codicil, was held to be a gift of 2,000*l.* in all. This was a strong case, as the reference to the 1,500*l.* might very well have been considered a mere mistaken reference to the sums already given.

In *Morgan* v. *Middlemass*, 35 B. 278, a testator gave his wife 500*l.*, and by a codicil gave her a "further sum not exceeding 300*l.*, making altogether a legacy of 1,000*l.* given to her by my will and the codicil," and it was held that there was a miscalculation only, and that the widow could take only the 500*l.* and 300*l.*

The result appears to be, that a gift in addition to a gift supposed to have been already given will not amount to a

gift of the sums supposed to have been given, unless there is a context to assist the gift.

Legatee's income estimated and sum given to make it up to a stated amount. Estimate erroneous.

6. Sometimes a testator estimates the property or income of a legatee at a certain figure, and then makes a gift to the legatee making up the property or income in a stated amount, and it turns out that the estimate is mistaken. The question then arises whether the legatee is entitled only to the amount actually given or is entitled to such an amount as will make up the property or income of the legatee to the sum which the testator thought he would have. It is a question of construction, and must depend upon the question whether a gift of the larger sum can be spelt out from the will. This has been done where the testator expressed an intention that the legatee should have at least the stated amount. *Milner* v. *Milner*, 1 Ves. Sen. 106; *Trevor* v. *Trevor*, 5 Russ. 24; *Ouseley* v. *Anstruther*, 10 B. 453, 459 (a case of some difficulty).

Gift made upon a mistake of facts.

7. A gift made upon a mistaken supposition of fact cannot be cut down or altered to suit the supposed facts. *Westcott* v. *Culiford*, 3 Ha. 265; *Ives* v. *Dodgson*, 9 Eq. 401; *In re Segelcke; Ziegler* v. *Nicol*, (1906) 2 Ch. 301.

CANADIAN NOTES.

Cross remainder.

On a devise to a widow for life, and then to several children, their heirs and assigns, and in case of failure of issue to A., and in case of failure of issue of A., then over, the children take as tenants in common, with cross remainders amongst themselves. *Heron* v. *Walsh*, 3 Gr. 606.

Life estate by implication.

A devise to a son, after the death of the testator's widow, gives an estate for life to the widow by implication, though the son is only one of several heirs-at-law of the testator. *Re Colliton & Landergan*, 15 O.R. 471. *Sed quære.*

See *Doe dem. Smith* v. *Meyers*, 2 O.S. 301; *Miles* v. *Coy*, 12 N.B.R. 174.

CHAPTER LVI.

REVOCATION.

Revocation before the Wills Act.

Prior to the Wills Act, a devise was revoked, if the testator afterwards made a conveyance of the land for any purpose (except a mortgage), though the conveyance was only of the legal estate. *Lord Lincoln's Case*, Show. P. C. 154; 1 Eq. Ab. 411, pl. 1; 4 Jarm. 4th ed. 147; 5th ed. 128.

Partition was no exception to the general rule, where a conveyance was made to a trustee to divide, though, if the partition was effected by a mere release to uses, there was no revocation. *Grant* v. *Bridger*, L. R. 3 Eq. 347.

And a devise of land contracted to be purchased was revoked, if the testator took a conveyance of the land to dower uses. *Rawlins* v. *Burgis*, 2 V. & B. 382; *Plowden* v. *Hyde*, 2 D. M. & G. 684; *Jacob* v. *Jacob*, 78 L. T. 451, 825; 82 L. T. 270.

Effect of s. 23 of Wills Act.

Now, by sect. 23 of the Wills Act, it is provided 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.

The section does not apply to cases of ademption.

This section applies to cases, in which a gift would have been formerly revoked by alteration of estate, but not to cases of ademption. *Moor* v. *Raisbeck*, 12 Sim. 123; *Ford* v. *De Pontes*, 30 B. 572.

Effect of s. 19 of Wills Act.

Sect. 19 of the Wills Act provides that no will shall be revoked by any presumption of an intention on the ground of an alteration of circumstances.

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Therefore, where a will disposed of a fund, which the testator afterwards disposed of by a deed in such a way that the latter disposition was void as to one-fifth, that fifth passed under the will. *In re Wells*; *Hardisty* v. *Wells*, 42 Ch. D. 646.

Gift by codicil for purpose which fails leaves will unaffected.

Where there is a gift of the residuary personalty by will, and a specific gift by a first codicil followed by a subsequent codicil giving all the personalty for a purpose which fails, the residuary gift in the will and the specific gift in the first codicil, which are not in terms revoked, take effect. *In re Fleetwood*; *Sidgreaves* v. *Beever*, 15 Ch. D. 594, 608.

But if there is a devise by will to A absolutely, and by a codicil the same land is devised to A for life with remainder to B and the remainder fails, the devise by the will is nevertheless revoked. *Baker* v. *Story*, 23 W. R. 147.

Dependent relative revocation.

The cases on the doctrine of dependent relative revocation as affecting probate have been discussed *ante*, p. 42.

The same doctrine applies in a Court of Construction, the only difference being, that the intention to revoke a former gift, only if a subsequent gift is effectually made, must appear on the face of the instrument. No external evidence to prove the dependency of the two gifts is admissible.

Thus, if a legacy is given by will to A, and by a codicil the legacy to A is revoked, and the same legacy is given to B, who predeceases the testator, or for other reasons is incapable of taking, the legacy to A is nevertheless revoked. There is in such a case nothing to show, that the legacy to A was only to be revoked, if the legacy to B was effectually made, or in other words, no case of dependent relative revocation is made out. *French's Case*, Rolle's Ab. Devise, O. 4; *Tupper* v. *Tupper*, 1 K. & J. 665; *Nevill* v. *Boddam*, 28 B. 554; *Quinn* v. *Butler*, 6 Eq. 225; *Baker* v. *Story*, 23 W. R. 147; *In re Carey*; *Mitchell* v. *Ewing*, (1901) 1 Ir. 81.

Incapacity of beneficiary.

It has been said, that the doctrine of dependent relative revocation has no application, where the second disposition fails not from the infirmity of the instrument, but from the incapacity of the beneficiary. 1 Jarm. 156, 3rd ed.; 1 Wms. Exors. 10th ed. 113.

But this is a mere distinction of fact and not of principle.

It may even be doubted whether it rests on the cases in fact. See *Quinn* v. *Butler*, 6 Eq. 225. The true theory seems to be, that the doctrine of dependent relative revocation applies equally, where the second legatee is incapacitated from taking, provided the case can be brought within the doctrine, or in other words, provided it can be shown that the original legacy was intended to be revoked only in the event of the second taking effect. The mere fact that a legacy is revoked and a different legacy to a different legatee substituted, affords no argument either in the Court of Probate or in a Court of Construction that the capacity of the second legatee to take was the condition of the revocation of the earlier legacy.

Onions v. *Tyrer*, 1 P. W. 343; 2 Vern. 742, upon which the distinction was founded, was a peculiar case, which cannot occur at the present day. There was a will validly executed devising real estate. The testator, being minded to change his trustees, made another will, by which he revoked all former wills and devised the real estate to new trustees, but to the same uses as in the old will. The second will was sufficiently executed so far as the clause of revocation went, but not so as to devise the real estate. The question was whether the first will was revoked. It was held that it was not. The second will was obviously intended to operate as a whole, and not as a revocation clause merely.

The cases upon revocation are so special, that they are of little use as general authorities, and hardly admit of a satisfactory classification. The following points may, however, be noticed:—

It must be reasonably clear that a bequest is meant to be revoked.

1. To cut down a previous gift, it must be reasonably clear, that it was meant to be cut down. The rule is not that the words of revocation must be as clear as the words of original gift. See *Randfield* v. *Randfield*, 8 H. L. 225; *Wallace* v. *Seymour*, 20 W. R. 634; *Beamish* v. *Beamish*, 1 L. R. Ir. 501.

Where a testatrix gave a watch and sum of money to A, and by codicil, after reciting the gift of the watch, revoked the said legacy and declared that her will should be read as if A's name had not been inserted therein, it was held that the legacy of money was not revoked. *Re Percival*; *Boote* v. *Dutton*, 59 L. T. 21.

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If property is given to A for life with remainder for her children, and by a codicil all gifts in favour of A are revoked, the remainder to the children remains. *Alt* v. *Gregory*, 8 D. M. & G. 221; *Green* v. *Tribe*, 27 W. R. 39; 47 L. J. Ch. 783; *In re Whitehorne*; *Whitehorne* v. *Best*, (1906) 2 Ch. 121.

But if the original gift is to A, followed by a direction to settle it, and the gift "to or in favour" of A is revoked, the whole gift may be revoked. *Tabor* v. *Prentice*, 32 W. R. 872.

Where property is given to A for life with remainders over and the gift to A only is revoked, but the property is given absolutely to B, the whole original gift is revoked. *Murray* v. *Johnstone*, 3 D. & War. 143; *Fry* v. *Fry*, 9 Jur. 894; see *Wells* v. *Wells*, 2 W. R. 6; 17 Jur. 1020; *Hargreaves* v. *Pennington*, 12 W. R. 1047.

So, where there is a gift to A with executory limitations over, and the trusts of the will as regards the gift to A are revoked, the gifts over are revoked as well. *Boulcott* v. *Boulcott*, 2 Dr. 25; see also *Sanford* v. *Sanford*, 1 De G. & S. 67.

Where an estate was devised by the will for life with remainder, and by a codicil the testator directed the estate to be sold, but no directions were given as to the proceeds of sale, it was held that such proceeds must be held on the same trusts as the land. *Re Chifferiel*; *Chifferiel* v. *Watson*, 73 L. T. 53.

A revocation of all devises and bequests in favour of A revokes a special power of appointment by will given to A. *In re Brough*; *Currey* v. *Brough*, 38 Ch. D. 456.

Where, under a special power to appoint to her children, a testatrix appointed to them and, upon the death of one of them, she, by codicil, appointed his share to his children, which was void, it was held that the appointment by the will was not revoked by the limited appointment by the codicil. *Duguid* v. *Fraser*, 31 Ch. D. 449.

Gifts will not be considered revoked further than is necessary.

2. The dispositions of the will will not be disturbed more than is necessary to give effect to a revocation by codicil.

Where there was a gift to a daughter for life and then to her children, and by codicil the testator expressed a wish that his daughter should not marry, and in case of her marriage or death gave the property over, it was held that the gift over was

intended to take effect upon marriage or death, whichever first happened, and that as the gift over on marriage was invalid and the daughter had married and left children, the gift over could not take effect and the children took. *Morley* v. *Rennoldson*, (1895) 1 Ch. 449.

Where annuities were given to certain persons and then to their children, and by codicil smaller annuities were substituted for the annuities given to those persons, there being no reference to the children, it was held that the smaller annuities were substituted as regards the children as well. *In re Freme's Contract*, (1895) 2 Ch. 778.

Where a legacy is charged on real and personal estate and the charge on the personal estate is revoked by a codicil, the charge on the realty remains. *Kermode* v. *Macdonald*, 3 Ch. 585; *Leese* v. *Knight*, 12 W. R. 1097.

Where a legacy is charged on two funds, one of which is afterwards by a codicil given free from the charge, the charge remains on the other fund and does not abate in the proportion of the two funds. *Tatlock* v. *Jenkins*, Kay, 654.

So, too, when land is given subject to a charge to A, and the devise is afterwards revoked, the charge remains. *Beckett* v. *Harden*, 4 Man. & S. 1; see *Grice* v. *Funnell*, 1 Sm. & G. 130.

Personalty given on trusts of realty which are revoked.

Where personalty is directed to go upon the same trusts as realty, and the trusts of the realty are afterwards revoked or altered, then, if an intention can be gathered from the will and codicil to keep the two classes of property united, the limitations of the personalty will follow the altered limitations of the realty. *Lord Carrington* v. *Payne*, 5 Ves. 404; *In re Towry's Settled Estate*; *Dallas* v. *Towry*, 41 Ch. D. 64; see *Re Gibson*, 2 J. & H. 656.

But if no such intention appears, the original gift of the personalty remains. *Lord Beauclerk* v. *Mead*, 2 Atk. 167; *Dorley* v. *Langworthy*, 3 B. P. C. 359; *Agnew* v. *Pope*, 1 De G. & J. 49; *Martineau* v. *Briggs*, 23 W. R. 889; *Bridges* v. *Strachan*, 26 W. R. 691.

The same principle applies, if a legacy is given to a person, to be ascertained by reference to trusts, which are subsequently altered. *In re Towry's Settled Estate*, *supra*.

But if the gift is of money to be laid out in repairing certain premises and the surplus is given to the same persons, to whom the premises are devised, and this latter devise is revoked, the gift of personalty also fails. *Whiteway* v. *Fisher*, 9 W. R. 433.

Gift by codicil "instead of" gift by will.

3. Where there is a gift by will, and the testator by a codicil makes a disposition in favour of the legatee which is expressed to be "instead of" the disposition by the will, the effect may be to substitute the disposition by the codicil entirely for the will, so as in effect to revoke the gift by the will or to leave the gift by the will unaffected, except so far as it is inconsistent with the codicil. *Doe* v. *Marchant*, 6 Man. & G. 813; *In re Wilcock*; *Kay* v. *Deehirst*, (1898) 1 Ch. 95.

If a codicil is made for the purpose of making a particular alteration in a devise by will, but the way in which it is done is by revoking the whole devise and repeating it in the codicil, with a material omission, which has nothing to do with the particular alteration, and was probably not intended, the omission cannot be supplied. *Holder* v. *Howell*, 8 Ves. 97.

Erroneous recital will not revoke a gift.

4. A gift by will is not revoked by an erroneous recital of it by a codicil. *Vaughan* v. *Foukes*, 1 Kee. 58; *Re Smith*, 2 J. & H. 594; *Mann* v. *Fuller*, Kay, 624; *Van Grutten* v. *Foxwell*, (1897) A. C. 658.

But an erroneous recital of a gift does not prevent the revocation of the gift, if the subsequent dispositions are inconsistent with it. *Re Maryitson*; *Haggard* v. *Haggard*, 30 W. R. 920; 31 *ib.* 257.

Revocation made upon erroneous assumption of fact.

5. It has been said, that a revocation grounded on the assumption of a fact, which turns out to be false, does not take effect, "being, it is considered, conditional and dependent on a contingency which fails." 1 Jarm. 147.

Probably the proposition is too broadly stated. There is little or no authority directly in point. The true view may be, that a revocation grounded on an assumption of fact, which is false, takes effect unless, as a matter of construction, the truth of the fact is the condition of the revocation; or, in other words, unless the revocation is contingent upon the fact being true. See *Thomas* v. *Howell*, 18 Eq. 198.

In *Campbell* v. *French*, 3 Ves. 321, the testator revoked legacies to his sister's grandchildren, "they being all dead," when in fact they were not dead. Lord Loughborough said: "There is no revocation, the cause being false." Possibly the true construction of that will was, that the revocation was contingent on the death.

In *Doe* d. *Evans* v. *Evans*, 10 A. & E. 228, the other case usually cited in this connection, there was a devise to A for life, remainder to his first and other sons in tail, remainder to his first and other daughters in tail, remainder to the right heirs of the testatrix. A codicil recited, that A had died without issue, and devised the land to other uses. A had not died without issue. He had left a posthumous daughter. It was held, that the devise by the will was not revoked. It is to be noted, that there was no express revocation, and the Court refused to imply it.

Barclay v. *Maskelyne*, Jo. 121, was a peculiar case. There was a gift by will of a house and furniture to A. A codicil revoked the gift of the house, which was described as given to B, "he being lately deceased," and gave the house and furniture to C. B was in fact dead. A was alive. The gift in the will was held not revoked. There the revoked gift was a gift, which was not to be found in the will at all.

It is, however, clear, that a revocation made, because the testator is "advised" as to some matter, though the advice is mistaken, or because he states, that he is ignorant as to some fact, takes effect. *A.-G.* v. *Lloyd*, 3 Atk. 552; 1 Ves. Sen. 32; *A.-G.* v. *Ward*, 3 Ves. 327.

Inconsistency.

When two clauses in a will are absolutely irreconcilable the later one is to be preferred. *Crone* v. *Odell*, 1 Ba. & B. 449; 3 Dow, 61; *Ulrich* v. *Lichfield*, 2 Atk. 372; *Morrall* v. *Sutton*, 1 Ph. 533; *Paice* v. *Archbishop of Canterbury*, 14 Ves. 366.

The later of two inconsistent gifts takes effect.

But where the testator, using a printed form of will, made two residuary gifts, it was held that the first, which was in his

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writing, prevailed. *Re Spencer; Hart* v. *Manston*, 54 L. T. 597; 34 W. R. 527.

If possible the Court will reconcile two dispositions apparently inconsistent. See *Kerr* v. *Baroness Clinton*, 8 Eq. 462; *In re Bywater; Bywater* v. *Clarke*, 18 Ch. D. 17.

Gift of the same property to two persons.

Thus, if the same property is given to two persons in fee in two different parts of the will, they will take as joint tenants. *Paramour* v. *Yardley*, Plow. 451; *Bennett's Case*, Cro. Eliz. 9; see *Sherratt* v. *Bentley*, 2 M. & K. 149, 162.

This does not, however, apply as between will and codicil. *Re Hough's Estate*, 15 Jur. 913; 20 L. J. Ch. 422; *Evans* v. *Evans*, 17 Sim. 107.

So, too, if land is given to one person without and to another person with words of limitation, the latter will take a fee in remainder. *Gravenor* v. *Watkins*, L. R. 6 C. P. 500.

Similarly, where immediate interests in fee and in tail or in fee and for life are given in the same lands, the devise of the fee will be construed as a remainder, whether the devise of the particular estate precedes the devise of the fee or not. *Wallop* v. *Derby*, Yelv. 209; see *Conquest* v. *Conquest*, 16 W. R. 153.

Gift of the testator's whole estate, and of a residue in the same will.

In cases, where the whole personalty is given to a person absolutely, and then there is a gift of the residue at her decease, the earlier gift has been held to be for life only. *Sherratt* v. *Bentley*, 2 M. & K. 149; *Re Brook's Will*, 13 W. R. 573; *Hare* v. *Westropp*, 9 W. R. 689.

And the same construction has been adopted, where there were no words referring to the death of the first legatee, but the gift was to her children. *In re Bagshaw's Trusts*, 24 W. R. 875; 25 W. R. 659; 46 L. J. Ch. 567.

Residue and residuary legatee.

Where there is a gift of the remainder of the testator's property in words constituting a good residuary gift to A, followed by the appointment of B as residuary legatee, the two provisions are not inconsistent. Annuity funds and lapsed legacies fall into the first residue, and B will take if the gift to A lapses. *Davis* v. *Bennet*, 30 B. 326; *Kelvington* v. *Parker*, 21 W. R. 121; *Bristow* v. *Masefield*, 31 W. R. 88; *In re Isaac: Harrison* v. *Isaac*, (1905) 1 Ch. 427.

If the will shows that the residuary legatee cannot have been

appointed merely for the purposes of providing against a lapse of the first residuary gift, if, for instance, A and B are both appointed residuary legatees, it may be that lapsed legacies will fall into the second residue. *Re Jessop*, 11 Ir. Ch. 424.

But a residuary gift by codicil revokes a residuary gift by will. *Earl of Hardwicke* v. *Douglas*, 7 C. & F. 795.

Gift of all the testator's property, followed by gifts of portions of it.

Similarly, where a gift of all the testator's property is followed by gifts of specific portions of it or *vice versâ*, both gifts may take effect. *Cuthbert* v. *Lempriere*, 3 Mau. & S. 158; *Doe* d. *Snape* v. *Nevile*, 11 Q. B. 466; *Blamire* v. *Geldart*, 16 Ves. 314; *In re Arrowsmith's Trusts*, 8 W. R. 555; 2 D. F. & J. 474; *Robertson* v. *Powell*, 3 N. R. 433.

Where, however, all the testator's personal property was given to the widow for life, subsequent legacies were held to be not payable till after her death. *Burdett* v. *Young*, 9 Mod. 93; 5 B. P. C. 54.

As between will and codicil the argument is in favor of revocation.

As between a will and codicil, however, the argument is much stronger in favour of revocation. At any rate, where a testator by his will distinguishes between specific legacies and residue and by a codicil gives all his personal property, the codicil revokes the specific legacies as well as the residuary gift. *Kermode* v. *Macdonald*, L. R. 1 Eq. 457; 3 Ch. 584.

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Conflicting clauses.

Where an earlier and a later clause in a will are quite inconsistent with each other, the later one prevails to the extent necessary to give full effect to it. *McMillan* v. *McMillan*, 27 A.R. 209.

Acceleration of future gift.

Where a present and future interest are given in a fund, and the gift of the present interest is revoked by a codicil, the future interest is accelerated. *Lewin* v. *Lewin*, 2 N.B. Eq. 477.

But a future interest dependent upon the enjoyment of a present gift is revoked if the present gift is revoked. *Edwards* v. *Findlay*, 25 O.R. 489.

CHAPTER LVII.

ALTERING WORDS—UNCERTAINTY.

Changing Words.

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THE Court will change a word, when it appears from the context of the will, that the word was incorrectly employed by the testator in place of some other word.

Several cases in which "or" has been changed into "and," and *vice versâ*, have already been mentioned in the discussion of the construction of gifts over. It remains to mention some cases, in which a similar change has been made in direct gifts.

"Or" will not be changed into "and" in a condition precedent.

When there is a gift to a person upon one or other of two events, "or" will not be read "and," as the result would be to make the conditions cumulative instead of alternative. *Hawksworth* v. *Hawksworth*, 27 B. 1.

"Nor" may mean "or not."

And it seems in a condition precedent to vesting "nor" will mean "or not," if the result is to vest the gift in either of two events. *Mackenzie* v. *King*, 12 Jur. 787; 17 L. J. Ch. 448.

"And" changed into "or" upon the context.

On the other hand, in some cases on the context of the will, "and" has been read "or," so as to vest a gift in alternative in lieu of cumulative events. *Hawes* v. *Hawes*, 1 Ves. Sen. 13; *Jackson* v. *Jackson*, 1 Ves. Sen. 216; *Stapleton* v. *Stapleton*, 2 Sim. N. S. 212, with which compare *Malmesbury* v. *Malmesbury*, 31 B. 407; *Maynard* v. *Wright*, 26 B. 285.

Fourth" changed into "Fifth."

Upon the same principle the Court has changed the word fourth into fifth, where it was clear upon the construction of the whole will, that the testator intended to refer to the fifth and not to the fourth schedule. *Hart* v. *Tulk*, 2 D. M. & G. 300.

See *Surtees* v. *Hopkinson*, 4 Eq. 98; *Smith* v. *Crabtree*, 6 Ch. D. 591; *In re Northen's Estate*; *Salt* v. *Pym*, 28 Ch. D. 153; *In re Dayrell*: *Hastie* v. *Dayrell*, (1904) 2 Ch. 496.

SUPPLYING WORDS.

With regard to supplying words in a will, the rule seems to be, that, where the will as it stands is clearly inconsistent, so that the choice lies between rejecting some portion of it or supplying some word, while at the same time the latter course will make the will consistent, the Court will be justified in making the necessary addition. See *Hope* v. *Potter*, 3 K. & J. 206; *In re Morony*, 1 L. R. Ir. 483; *Phillips* v. *Rail*, 54 W. R. 517.

Limitation to the second and other sons supplied.

Thus, in a devise to A for life, remainder "to the first son of A severally and successively in tail male," the devise will be construed as to the first and other sons of A. *Parker* v. *Tootal*, 11 H. L. 143. See *Newburgh* v. *Newburgh*, Lord St. Leonards' Law of Property, 367.

Under a bequest in trust for the testator's widow for her life in trust for his children, followed by powers of maintenance and advancement after the widow's death, with an ultimate gift over after her death in default of children attaining vested interests, the Court supplied the words "and after her death" after the words "for her life." *Greenwood* v. *Greenwood*, 5 Ch. D. 954.

Limitation to daughters supplied in a marriage settlement.

So, too, where there was a limitation in a settlement to the children of the marriage who being a son or sons should attain twenty-one years, and if there should be but one such child, the whole to be in trust for such one child, his *or her* executors and administrators, and there were powers of applying the presumptive share of every such child for his *or her* maintenance until his *or her* share should become vested, the Court held daughters to be included in the gifts. *In re Daniel's Settlement Trusts*, 1 Ch. D. 375.

So, where property was given upon trust for all the children of A "who being a son or sons shall live to attain twenty-one years or being a daughter or daughters shall marry under that

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age," it was held, that the gift to daughters vested on their attaining twenty-one. *Re Hunt; Davies* v. *Hetherington*, 62 L. T. 753.

In a somewhat similar case, where there were limitations to daughters for life with remainder to their children, and the limitation to the children of one daughter was omitted, it was supplied upon the general intention of the will. *In re Redfern; Redfern* v. *Bryning*, 6 Ch. D. 133; see *Re Smith; Bashford* v. *Chaplin*, 45 L. T. 246; *Mellor* v. *Daintree*, 33 Ch. D. 198.

The words "without issue" supplied, so as not to divest a prior estate tail.

So when there is a gift to A in tail, and if he die over, the words "without issue" will be supplied in the gift over to satisfy the implied contingency. *Anon.*, 1 And. 33.

And in a similar case, where there were devises to several in tail and the interest of one of the tenants in tail was given over to mother, "if he died living Alice," the words "without issue" were supplied, there being a gift over of the whole upon death of all the tenants in tail without issue. *Spalding* v. *Spalding*, Cro. Car. 185.

Abbott v. *Middleton.*

The extreme limit to which the Court will go in supplying words in such cases is probably marked by *Abbott* v. *Middleton*, 7 H. L. 68. The gift there was of personalty to the testator's wife for life and then to his son for life with remainder to the son's children and "in case of my son dying before his mother" over. The son died, leaving a child, and the House of Lords held (diss. Lords Cranworth and Wensleydale) that the words "without children" must be supplied in the gift over, so as to leave the child of A in possession of the property.

However, if the testator expressly distinguishes death in the lifetime of a tenant for life from death without issue, if, for instance, the gift over is either in the event of death before the tenant in tail or in the event of death without issue at any time, the gift over must be literally construed. *Eastwood* v. *Lockwood*, L. R. 3 Eq. 487.

Where a testator bequeathed the remainder of his property "and any other property of which I may die possessed, and I nominate my son my executor," it was held that the residue was undisposed of. *Driver* v. *Dri[illegible]* 3 L. J. Ch. 279.

Uncertainty.

If it is impossible to ascertain the subject-matter or the objects of a gift, it will be void for uncertainty. See *Asten* v. *Asten*, (1894) 3 Ch. 260.

A bequest of indefinite amount is void.

Thus, a gift of some of my linen, not saying how much, or of a handsome gratuity, is void. *Peck* v. *Halsey*, 2 P. W. 387; *Jubber* v. *Jubber*, 9 Sim. 503; see *Jones* d. *Henry* v. *Hancock*, 4 Dow. 145.

If, though the gift is of an uncertain amount, the testator supplies a measure of the bequest, the Court will ascertain how much ought to be expended on this principle, a direction to the testator's son who was a voluntary legatee to take care and provide for his daughter (*a*); a gift of reasonable remuneration to an executor for his trouble (*b*); a gift to each of the testator's daughters of a house and garden, which house is to be built at the expense of my executors (*c*); and a gift of portions to be determined by the testator's wife and executors (*d*), have been held effectual. *Broad* v. *Berow*, 1 Russ. 511, n.; compare *Abraham* v. *Alman*, *ib.* 509 (*a*); *Jackson* v. *Hamilton*, 3 J. & Lat. 702; see *Buckley* v. *Buckley*, 19 L. R. Ir. 544 (*b*); *Edwardes* v. *Jones*, 35 B. 474 (*c*); *In re Conn: Conn* v. *Burns*, (1898) 1 Ir. 337 (*d*); see also *Magistrates of Dundee* v. *Morris*, 3 Macq. 134; 6 W. R. 556.

Gift of a sum not exceeding a certain amount.

A gift of 50*l.* or 100*l.*, or a sum not exceeding a certain amount, will be construed in favour of the legatee as a gift of the larger sum. *Seale* v. *Seale*, 1 P. W. 290; *Thompson* v. *Thompson*, 1 Coll. 395; *Cope* v. *Wilmot*, 1 Coll. 396, n.; *Gough* v. *Bult*, 16 Sim. 45.

Gift of the rest of a fund when the rest cannot be ascertained.

Upon similar principles, the gift of the rest of a fund, if the rest cannot be ascertained, is void; as in a devise of such houses as she shall select to A and the others to B, where A dies before the testator. *Boyce* v. *Boyce*, 16 Sim. 476; *Jerningham* v. *Herbert*, 4 Russ. 388.

Uncertainty of objects.

The objects of the gift may also be uncertain. Thus a gift to the son of A who has several sons is void. *Dowset* v. *Sweet*, Amb. 175.

Gift to one of a class.

In like manner a gift to one of a class, as to one of the sons of A, is void for uncertainty, though at the testator's death there may be only one member of the class living. *Steade* v. *Russel*, 2 Vern. 621, 624; *In bonis Baylis*, 2 Sw. & T. 613; *In bonis Blackwell*, 2 P. D. 72.

A gift to any female niece of A is in the same case. *Smithwick* v. *Hayden*, 19 L. R. Ir. 490.

The same is the case with a gift to the children of the deceased son (named Bamber) of my father's sister, where the sister was married to Bamber and had three sons living at the date of the will, and there was nothing to show which son was meant. *In re Stephenson: Donaldson* v. *Bamber*, (1897) 1 Ch. 75.

A child may mean first-born child.

When the testator devised his freehold estate to one child of Thomas Davies, one child of Samuel Beddoes, one child of Anne Davies, and one child of Margaret Davies, with a gift over if Thomas, Anne, and Margaret should never have any children; and Samuel only had a child, a daughter, at the date of the will, it was held that there was enough to show that the living child of Samuel was intended, and that the first-born child of each of the others would take. *Powell* v. *Davies*, 1 B. 582.

And a devise to a son of my nephew may mean the first-born son. *Blackburn* v. *Stables*, 2 V. & B. 367; *Ashburner* v. *Wilson*, 17 Sim. 204; see *Russell* v. *Russell*, 12 Ir. Ch. 377.

And a gift to one of my cousin's daughters that shall marry a Norton may be good, if it means the daughter who first marries a Norton. *Bate* v. *Amherst*, Ca. t. T. Raymond, 82.

For cases, in which the objects of the gift were held to be so uncertain that the gift failed, see *Buckley* v. *Buckley*, 19 L. R. Ir. 544; *Smithwick* v. *Hayden*, 19 L. R. Ir. 490.

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Supplying words.

Words evidently omitted and certain in their import may be read into a will.

Thus, a testator bequeathed to his "executors hereinafter named in trust to dispose thereof, etc." No property was mentioned, but it was held that the words "my property" might be read into the will. *Colvin* v. *Colvin*, 27 O.R. 142.

So, where a will read, "it is my will that as to all my estate both real and personal my wife Elizabeth and I hereby appoint my wife Elizabeth to be executrix of this my will," it was held that the whole estate passed to the wife. *May* v. *Logie*, 23 A.R. 785; 27 S.C.R. 443.

So, in a bequest of personalty, with a direction that "out of this . . . she shall $100 to my brother," the word "pay" before $100 was implied. *Re Holden*, 5 O.L.R. 156.

Uncertain words.

But the expression, "having already given to my son lot number one," does not constitute a devise. *Doe dem. Smith* v. *Meyers*, 2 O.S. 301.

Blank cannot be filled up.

A gift of an unnamed sum—a blank being left in the will—is void. *Brewster* v. *Foreign Mission Board*, 2 N.B. Eq. 172.

Uncertainty in object.

A gift to home missions, or to any such good and benevolent Christian objects as the executors should consider to be the most deserving, is not a charitable gift, and fails for uncertainty. *Brewster* v. *Foreign Mission Board*, 2 N.B. Eq. 172.

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Uncertainty in subject.

Where a testator devised "the 18 acres deeded to me by Henry Buckner," and it was shewn that this land had been sold by the testator before making his will, and that he had a parcel of 21 acres bought from Henry Buck which he spoke of as 18 acres, the devise failed for uncertainty. *Buckner* v. *Buckner*, 6 C.P. 314.

CHAPTER LVIII.

SATISFACTION—ADEMPTION—HOTCHPOT.

I.—Satisfaction.

A. Cases of Double Portions.

Satisfaction of portions by legacies.

When a father or a person *in loco parentis* has covenanted to pay a portion to a child and afterwards gives a legacy of the same or a larger amount to that child, the legacy is *prima facie* a satisfaction of the portion, and, if the legacy is of smaller amount, it is a satisfaction *pro tanto*. The rule does not apply in the case of a mother. *Warren* v. *Warren*, 1 B. C. [illegible]; 1 Cox, 41; *In re Ashton; Ingram* v. *Papillon*, (1895) [illegible] 574; revd. on a different point, (1898) 1 Ch. 142.

The doctrine is not limited to cases of covenant by [illegible] creating a personal liability; it applies also, where [illegible] charges property of his own with payment of portions to [illegible] children, and afterwards by will or otherwise provides portions [illegible] for them. *Dawson* v. *Duke of Cleveland*, West. t. Hard. 106; *In re Battersby*, 19 L. R. Ir. 359.

Satisfaction and ademption distinguished.

On the other hand, when there is a gift by will to a child, and the testator afterwards in his lifetime gives the child a sum of money, the bequest is adeemed *pro tanto*.

The difference between the two cases is, that in the former case the portion, which the testator has covenanted to pay, can only be satisfied by the bequest with the consent of the objects of the covenant; in the latter case the gift by will is revocable and the testator may substitute for it any form of gift he pleases.

Again, in the former case the question, whether the gift by will was intended to be a satisfaction of the covenant, is a question of testamentary intention; in the latter the question

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is as to the effect of an act subsequent to the will, and not as to any intention manifested by the will itself.

Lastly, in cases of satisfaction, election must always arise; in cases of ademption it never can.

It follows, that the presumption that a gift by will is intended to be a satisfaction of a prior covenant to pay a portion, is more easily rebutted, than the similar presumption in the case of ademption.

The fact that the objects of the gift by will are not the same as the objects of the covenant, is a stronger argument against satisfaction than against ademption, as the testator cannot be supposed to have wished to do by his will what it was out of his power to do, though, on the other hand, the argument is inconclusive, since the bequest by will may be intended as a satisfaction with regard to some of the objects of the covenant, leaving such of them as take nothing under the will to their rights under the covenant. See *In re Tussaud's Estate*, 9 Ch. D. 363.

Covenant to settle for life satisfied by absolute bequest.

Thus, a covenant to settle a certain share upon a son for life and then upon trusts for the benefit of his wife and children, is satisfied as regards the son by a bequest to him absolutely. *McCarogher* v. *Whieldon*, 3 Eq. 536; *In re Blundell; Blundell* v. *Blundell*, (1906) 2 Ch. 222; see *Bennett* v. *Houldsworth*, 6 Ch. D. 671.

Covenant to settle in remainder satisfied by immediate bequest.

So, too, a direct bequest to grandchildren is, as regards the grandchildren, a satisfaction of a covenant to settle a sum upon a daughter and her husband for their lives and the life of the survivor, remainder to their children as they should appoint, and in default of appointment to the children equally. *Campbell* v. *Campbell*, L. R. 1 Eq. 383.

Persons not directly benefited by will.

But there is no satisfaction as regards persons not benefited by the will, though they may take a derivative interest under the settlement in property given by the will to another person interested under the settlement, for instance, by virtue of a covenant to settle after-acquired property. *In re Blundell; Blundell* v. *Blundell*, (1906) 2 Ch. 222.

The fact that the will directs certain sums advanced to the legatee before the date of the will to be brought into hotchpot

does not rebut the presumption that a legacy to the legatee is a satisfaction of her interest under the settlement. *In re Blundell; Blundell* v. *Blundell*, (1906) 2 Ch. 222.

Legacies in lieu of claims under the settlement.

The fact, that legacies to the testator's widow are declared to be in lieu of her claim under the settlement, will not rebut the presumption against double portions in the case of legacies to children without any such declaration. *Ackworth* v. *Ackworth*, cited 3 Ves. 527; 1 B. C. C. 307, n.; *Moulson* v. *Moulson*, 1 B. C. C. 83; see, too, *Finch* v. *Finch*, 1 Ves. Jun. 534, where the legacy was expressed to be for a portion.

Satisfaction rebutted by the difference between the subject-matter of the covenant and bequest.

The presumption of satisfaction may be rebutted by the difference in the thing given by the will and covenanted to be settled.

a. Thus, a devise of land is no satisfaction of a covenant to pay money, unless the lands are expressly estimated by the testator in money. *Goodfellow* v. *Burchett*, 2 Vern. 298; *Bengough* v. *Walker*, 15 Ves. 507; see *In re Lawes; Lawes* v. *Lawes*, 20 Ch. D. 81; *In re Vickers; Vickers* v. *Vickers*, 37 Ch. D. 525.

Portion satisfied by gift of residue.

But the fact that the gift by will is of a share of residue will not prevent the gift being a satisfaction of a portion. *Lady Thynne* v. *Earl of Glengall*, 2 H. L. 131.

Contingent legacy and vested portion.

b. A contingent legacy is no satisfaction of a vested portion. *Bellasis* v. *Uthecait*, 1 Atk. 426; *Hanbury* v. *Hanbury*, 2 B. C. C. 352; *Pierce* v. *Locke*, 3 Ir. Ch. 205, 215.

Differences between the covenant and the will insufficient to rebut satisfaction.

The presumption of satisfaction will not be rebutted by slight differences between the covenant and the will; as, for instance, differences in the mode of payment, the covenant being to pay on the widow's death, the will within three months of her death (*a*); or by the fact that the covenant provides for children dying before their portions are payable, and the will does not (*b*); or that the covenant gives a power to husband and wife jointly, while the will does not (*c*); or that the covenant provides for children by a particular marriage, while the will extends to all children (*d*); or that the will imposes a restraint upon anticipation or gives a remainder to children in fee instead of in tail (*e*); or that the will gives the wife the first life estate, whereas the covenant gives it to the husband (*f*); or that the

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husband's life interest is by the will made determinable on bankruptcy or alienation which by the covenant it is not (*g*); or by the omission from the will of a life interest to the husband who took the second life interest under the covenant (*h*). *Sparkes* v. *Cator*, 3 Ves. 530; *Copley* v. *Copley*, 1 P. W. 146 (*a*); *Hinchcliffe* v. *Hinchcliffe*, 3 Ves. 516 (*b*); *Lady Thynne* v. *Earl of Glengall*, 2 H. L. 131; *Russell* v. *St. Aubyn*, 2 Ch. D. 398; *Romaine* v. *Onslow*, 24 W. R. 899 (*c*); *Lady Thynne* v. *Earl of Glengall*, *supra*; *Russell* v. *St. Aubyn*, *supra* (*d*); *Weall* v. *Rice*, 2 R. & M. 251 (*e*); *Russell* v. *St. Aubyn*, *supra*; *Romaine* v. *Onslow*, 24 W. R. 899 (*f*); *Russell* v. *St. Aubyn*, *supra* (*g*); *Mayd* v. *Field*, 3 Ch. D. 587 (*h*).

What amount of difference is sufficient to rebut satisfaction.

But a legacy to a daughter for life for her separate use and after her decease, in case her husband should be living, for such persons exclusive of her husband as she should appoint, and in case he should die in her lifetime to her appointees, is not a satisfaction of a covenant to settle on trust to pay a part to the daughter for pin-money and the rest to the husband for life, and if the daughter survive him to her for life, remainder to the children of the marriage as she shall appoint. *Lord Chichester* v. *Coventry*, L. R. 2 H. L. 71; see *Lewis* v. *Lewis*, L. R. 11 Eq. 110, 340; *Re Vernon*; *Garland* v. *Shaw*, 95 L. T. 48.

Nor is a legacy to a daughter for life to her separate use without power of anticipation with remainder to her children, a satisfaction of a covenant to settle upon such trusts as the daughter should with the consent of trustees appoint, and subject thereto for the daughter and her husband successively for life, remainder for the children and in default of children for the husband absolutely. *In re Tassan & s Estate*, 9 Ch. D. 363.

Direction to pay debts.

It seems that a direction in the will to pay debts, or debts and legacies, would not alone rebut the presumption of satisfaction, though great stress has been laid upon it, and, coupled with other circumstances, it will have that effect. *Lord Chichester* v. *Coventry*, L. R. 2 H. L. 71; *Paget* v. *Grenfell*, 6 Eq. 7; *Bennett* v. *Houldsworth*, 6 Ch. D. 671.

And where a testator on the marriage of his second son covenanted to pay him 2,000*l.* a year for life and to charge the annuity on his real estate, and then by will, after giving legacies

to the second son which, when invested, would produce more than the annuity, devised his real estate in strict settlement "subject to the charges and incumbrances thereon," it was held that the presumption of satisfaction was not rebutted, although at the testator's death the estates were subject to one mortgage only in addition to the annuity. *Montagu* v. *Earl of Sandwich*, 32 Ch. D. 525; see *Lethbridge* v. *Thurlow*, 15 B. 334.

Covenant in the nature of a debt.

If the portion covenanted to be paid is in the nature of a debt due to the husband or the trustees of the settlement, the presumption of satisfaction is more easily rebutted.

Thus, in *Hall* v. *Hill*, 1 D. & War. 94, a legacy to the daughter was held to be no satisfaction of a bond to the husband on the marriage of the daughter. See, too, *Lord Chichester* v. *Coventry*, *supra*.

No satisfaction where portions come from different sources,

No case of satisfaction arises where the property subsequently given is not the property of the person liable under the covenant.

For instance, an appointment by A of a jointure under a power given by the will of B is not a satisfaction of a covenant by A to leave an annuity. *Bannatyne* v. *Ferguson*, (1896) 1 Ir. 149; *see Lord Walpole* v. *Lord Conway*, Barn. Ch. 153, 156; *See W. Darie's Case*, 5 Vin. Ab. 292, pl. 38.

nor as between a share of settled fund and subsequent advance.

Conversely, when a father has vested property in trustees upon trust for his children, a subsequent settlement upon a child cannot be taken to be a satisfaction of the share of that child under the earlier settlement, unless there is evidence that it was intended to be so taken. *Douglas* v. *Willes*, 7 Ha. 318, p. 328; *Samuel* v. *Ward*, 22 B. 347; *Noblett* v. *Litchfield*, 7 Jr. Ch. 575.

Whether share satisfied enures for benefit of other children.

There may, however, be an intention expressed, that the property settled by the father is to be taken in satisfaction of the child's interest under the earlier settlement. In such a case the further question arises, does the satisfaction enure for the benefit of the other children, entitled under the earlier settlement, or is the father to be considered as the purchaser of the satisfied child's share under the earlier settlement?

In the absence of any intention expressed or to be gathered from the surrounding circumstances, the satisfaction enures for the benefit of the other children entitled under the first settle-

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ment. *Folkes* v. *Western*, 9 Ves. 456; *Brownlow* v. *Earl of Meath*, 2 D. & Wal. 674; 2 Ir. Eq. 393; *Lee* v. *Head*, 1 K & J. 620; *Earl of Bradford* v. *Earl of Romney*, 31 L. J. Ch. 497.

But there may be circumstances sufficient to show that the father intended to become the purchaser of the share of the child who is satisfied. *Noel* v. *Lady Walsingham*, 2 S. & St. 99; *Ford* v. *Tynte*, 2 H. & M. 324.

B. *Cases of Breach of Trust by Parent.*

Parent receiving trust money belonging to child.

There are cases, in which, where a father became indebted to his children because he had received trust funds, to which they were entitled, and afterwards made a settlement on the marriage of a child of a sum larger than the child's share of the trust fund, the settlement has been deemed to satisfy the debt (*a*). The presumption of satisfaction may, however, be rebutted by the facts of the case (*b*). *Wood* v. *Bryant*, 2 Atk. 521; *Seal* v. *Bradford*, 1 Ves. Sen. 500; *Chave* v. *Farrant*, 18 Ves. 8; *Plunkett* v. *Lewis*, 3 Ha. 316; *Bensusan* v. *Nelemia* 20 L. J. Ch. 536 (*a*); *Creighton* v. *Creighton*, (1896) 1 Ch. 870 (*b*); see also *Drewe* v. *Bidgood*, 2 S. & St. 424; *Hayes* v. *Garvey*, 8 Ir. Eq. 90.

C. *Satisfaction of Debts.*

Legacy of equal or greater amount is a satisfaction of a debt.

The doctrine of satisfaction also applies to a legacy to a creditor. In such a case the legacy, if of equal or greater amount, is *primâ facie* considered a satisfaction of the debt. *Talbot* v. *Shrewsbury*, Prec. Ch. 394; *Fowler* v. *Fowler*, 3 P. W. 353; *Atkinson* v. *Littlewood*, 18 Eq. 595.

The general rule has, however, been so often disapproved of, and has been held to be excluded by such slight indications of intention, that it is of small practical importance.

1. As to what debts may be satisfied by legacies:—

The debt must exist at the date of the will.

a. The debt to be satisfied must be a debt existing at the date of the will. *Cranmer's Case*, 2 Salk. 508; *Thomas* v. *Bennett*, 2 P. W. 343; *Plunkett* v. *Lewis*, 3 Ha. 330.

If the testator afterwards pays the debt, the legacy is gone. *In re Fletcher*; *Gillings* v. *Fletcher*, 38 Ch. D. 373.

b. The testator must have been certain at the date of the will, that a debt was due and to whom it was due, and therefore a mere liability on a current account, or on a negotiable instrument, such as a bill of exchange, will not be satisfied by a legacy. *Rawlins* v. *Powel*, 1 P. W. 297; *Cuer* v. *Eustabrooke*, 3 Ves. 561; *Buckley* v. *Buckley*, 19 L. R. Ir. 544. The debt must be certain.

But the fact that the debt is liable to decrease makes no difference. *Edmunds* v. *Low*, 3 K. & J. 318.

2. As to what legacies will not be considered to satisfy debts:—

a. A legacy of smaller amount is no satisfaction of a debt. *Cranmer's Case*, 2 Salk. 508; *Atkinson* v. *Webb*, 2 Vern. 478; Prec. Ch. 236; *Eastwood* v. *Vinke*, 2 P. W. 614; *Gee* v. *Liddell*, 35 B. 621; see *Richardson* v. *Elphinstone*, 2 Ves. Jun. 463; *Reade* v. *Reade*, 9 L. R. Ir. 409; *Coates* v. *Coates*, (1898) 1 Ir. 258. Legacy of smaller amount is no satisfaction of a debt.

b. Nor is a gift of residue. *Barrett* v. *Beckford*, 1 Ves. Sen. 519; *In re Keogh's Estate*, 23 L. R. Ir. 257. Gift of residue,

c. Nor is a gift of a contingent legacy. *Talson* v. *Collins*, 4 Ves. 482; *Mathews* v. *Mathews*, 2 Ves. Sen. 635. of a contingent legacy.

3. Satisfaction is also rebutted by the difference in the nature of the legacy and the debt.

a. As where the debt is by bond and the testator devises land. *Eastwood* v. *Vinke*, 2 P. W. 614; *Richardson* v. *Elphinstone*, 2 Ves. Jun. 463; *Coates* v. *Coates*, (1898) 1 Ir. 258. Debt by bond is not satisfied by a devise of land.

b. If the legacy is less advantageous than the debt; if, for instance, the legacy is payable in six months, or no time is fixed for its payment, so that it would not in the ordinary course be payable till the end of a year, and the debt is payable at an earlier date: *Hagues* v. *Mico*, 1 B. C. C. 129; *Dereze* v. *Pontet*, 1 Cox, 188; *Adams* v. *Lavender*, M'Cl. & Y. 41; *In re Harlock*: *Culham* v. *Smith*, (1895) 1 Ch. 516; or the legacy is payable half-yearly, the debt quarterly: *Atkinson* v *Webb*, 2 Vern. 478; Prec. Ch. 236; if the debt is secured, the legacy not: *Wood* v. *—ood*, 7 B. 183; or the debt is a first charge, the legacy not: Debt not satisfied when the legacy is less advantageous.

Hales v. *Darell*, 3 B. 325; if the debt is to the separate use, the legacy not: *Bartlett* v. *Gillard*, 3 Russ. 149; *Rowe* v. *Rowe*, 2 De G. & S. 294; *Fourdrin* v. *Gowdey*, 3 M. & K. 409; but see *Atkinson* v. *Littlewood*, 18 Eq. 595.

And an annuity given by will, and therefore not payable till a year after the testator's death, is not a satisfaction of a covenant to pay an annuity by half-yearly payments. *In re Dowse*: *Dowse* v. *Glass*, 50 L. J. Ch. 285.

Sum due from trustee.

c. Sums held on trust for a tenant for life are not satisfied by legacies of those amounts to the tenants for life absolutely. *Fairer* v. *Park*, 3 Ch. D. 309.

Legacy in lieu of dower.

d. If the legacy is expressed to be given in satisfaction of dower, the debt is not satisfied. *Pinchin* v. *Simms*, 30 B. 119; *Glover* v. *Harteup*, 34 B. 74.

Debt due to one set of trustees, legacy to another.

e. The fact that the debt is due to one set of trustees, and the legacy is given to another, is a circumstance to be considered, but apparently not alone decisive. *Pinchin* v. *Simms*, 30 B. 119; *Smith* v. *Smith*, 3 Giff. 121; and see *Atkinson* v. *Littlewood*, 18 Eq. 595.

Direction to pay debts and legacies.

4. The presumption will be rebutted by a direction to pay "debts and legacies." *Chancey's Case*, 1 P. W. 408; *Lethbridge* v. *Thurloe*, 15 B. 334; *Richardson* v. *Greese*, 3 Atk. 65; *Field* v. *Moston*, 2 Dick. 543; *Jefferies* v. *Michell*, 20 B. 15; *Hassell* v. *Hawkins*, 2 Dr. 469.

But not if the direction is in the will, and a debtor, whose debt is incurred subsequent to the will, receives a legacy by a codicil. *Gaynon* v. *Wood*, 1 P. W. 409, n.

Covenant to pay sum to wife after husband's death satisfied by legacy.

A covenant entered into on marriage to pay the intended wife a sum of money within six months after the husband's death, has been held satisfied by a legacy of that amount payable within three months after the husband's death, though there was a direction in the will to pay debts and legacies. *Watlen* v. *Smith*, 4 Mad. 325; criticised in *Cole* v. *Willard*, 25 B. 508.

Direction to pay debts.

5. A direction to pay "debts" only rebuts the presumption of satisfaction. *Horlock* v. *Wiggins*: *Wiggins* v. *Horlock*, 39 Ch. D. 142; *In re Huish*: *Bradshaw* v. *Huish*, 43 Ch. D. 260, not following *Edmonds* v. *Low*, 3 K. & J. 318.

6. Where the document creating the debt and the will are nearly contemporaneous, the presumption of satisfaction is much more easily rebutted. *Horlock* v. *Wiggins*, 39 Ch. D. 142. Debt and will contemporaneous.

II.—Ademption.

A. *Ademption of Portions.*

Ademption is based upon the presumption that a father or person *in loco parentis* does not intend to provide double portions for his children. If, therefore, he gives a child a legacy or a share of residue by will, and subsequently provides a portion for the child, the gift by will is adeemed either wholly or in part according as the subsequent gift is equal to or exceeds, or is less than the portion provided by the will. *Pym* v. *Lockyer*, 5 M. & Cr. 29; *Montefiore* v. *Guedalla*, 1 D. F. & J. 93; *In re Lucas; Lucas* v. *Lucas*, (1891) 2 Ch. 482. Principle of ademption.

Where there is an absolute and a settled gift, a subsequent settlement adeems the settled gift first. *Montefiore* v. *Guedalla*, 1 D. F. & J. 93; *In re Furness; Furness* v. *Stallhardt*, (1901) 2 Ch. 346.

The doctrine has been applied where a father made an appointment by will under a special power and subsequently by deed appointed to one of the appointees under the will. *Montague* v. *Montague*, 15 B. 565; see *In re Ashton; Ingram* v. *Papillon*, (1897) 2 Ch. 574; (1898) 1 Ch. 142. Appointed funds.

The doctrine is only applied, as well in the case of a legacy as of a share of residue, against a child in favour of other children and not in favour of a widow or stranger. *Meinertzagen* v. *Walters*, 7 Ch. 670; *In re Heather; Pumfrey* v. *Fryer*, (1906) 2 Ch. 230. Doctrine not applied in favour of strangers.

The doctrine does not apply to a devise of land. *Durys* v. *Bourher*, 3 Y. & C. Ex. 397. Devise of land.

Inasmuch as ademption arises from acts subsequent to the will, the will itself throws no light upon the intention of the subsequent act. Ademption not question of construction.

Therefore, where the subsequent portion is given through the medium of a covenant to pay a sum of money, the fact that the

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will directs the testator's debts to be paid out of his residuary estate, is of no importance upon the question of ademption. *Cooper* v. *Macdonald*, 16 Eq. 258.

What is a portion.

A legacy or share of residue given to a child by will is presumed to be a portion. The principal contest in the cases has therefore been as to whether the subsequent gift was in the nature of a portion or not.

The question is one of fact to be considered upon all the circumstances of the case. *Kirk* v. *Eddowes*, 3 Ha. 509; *In re Lacon*; *Lacon* v. *Lacon*, (1891) 2 Ch. 482; *In re Scott*; *Langton* v. *Scott*, (1903) 1 Ch. 1.

Portion need not be given on marriage.

The simplest case of a portion is a gift upon marriage, but it is not necessary that the gift should be made on marriage or any other special occasion. *Leighton* v. *Leighton*, 18 Eq. 458.

A settlement causes ademption.

A settlement made upon a legatee adeems a gift by will, though the trusts of the will and settlement are different.

Thus, an absolute gift by will is adeemed by a settlement of property to be held on the usual trusts of a marriage settlement. *Lord Durham* v. *Wharton*, 3 Cl. & F. 146; *Stevenson* v. *Masson*, 17 Eq. 78; *Edgworth* v. *Johnston*, 1 I. R. 11 Eq. 326.

And a sum given to a daughter's husband in consideration of his making a settlement upon her or for the purposes of the marriage—for instance, to furnish a house—is an ademption of a legacy to the daughter. *Lord Durham* v. *Wharton*, 3 Cl. & F. 146; *Nevin* v. *Drysdale*, 4 Eq. 517.

Legacy for life with remainder adeemed by gift.

Conversely, a legacy to a child for life with remainder to her children will be adeemed by a gift to the child absolutely (*a*); and also by a settlement containing the usual trusts of a marriage settlement, even though the settlor may reserve to himself an ultimate interest in default of issue of the marriage (*b*). *Kirk* v. *Eddowes*, 3 Ha. 509 (*a*); *Cooper* v. *Macdonald*, 16 Eq. 258 (*b*).

The fact that the settlement directs that the settled sum is to be taken in satisfaction of a sum which would not otherwise have been satisfied does not prevent the settled sum from adeeming gifts made by the will of the settlor. *Earl of Durham* v. *Wharton*, 3 Cl. & F. 146.

A legacy of 10,000*l.* by a person *in loco parentis*, followed by a gift over to a charity, if the legatee should have no children, is adeemed both as regards the legatee and the charity by a transfer of 10,000*l.* Consols to the legatee in the testator's lifetime. *Torkington* v. *Parell*, 2 Coll. 262.

Gift over adeemed as well.

An annuity may or may not be a portion. If it is in the nature of a permanent provision for a child it will be (*a*). On the other hand, if it is only a temporary provision in the nature of maintenance, it will not (*b*). *Kirwallright* v. *Kirwallright*, 8 Ves. 51; *Dawson* v. *Dawson*, 1 Eq. 504 (*a*); *Edwards* v. *Freeman*, 2 P. W. 436; *Watson* v. *Watson*, 33 B. 574; *Hatfield* v. *Minet*, 8 Ch. D. 136 (*b*).

Annuity may be a portion.

In order to adeem a gift by will, the property afterwards given must be of the same kind as that given by will.

Therefore a legacy is not adeemed by a gift of a share of stock-in-trade. *Holmes* v. *Holmes*, 1 H. C. C. 555; *In re Jaques*; *Hudson* v. *Brailsby*, (1903) 1 Ch. 267.

Properly given must be of the same kind as that given by will.

But a legacy or share of residue may be adeemed by a settlement of Consols and of stock of a railway company (*a*), or by a share in a business which is to be taken as so much money (*b*). *Watson* v. *Watson*, 33 B. 574; *Leighton* v. *Leighton*, 18 Eq. 459 (*a*); *In re Lowes*; *Low* v. *Lowes*, 20 Ch. D. 81; *In re Vickers*; *Vickers* v. *Vickers*, 37 Ch. D. 525, see *In re Jaques*; *Hudson* v. *Brailsby*, (1903) 1 Ch. 267 (*b*).

Dissimilarity between properly willed and given.

A legacy has been held not adeemed by a contingent portion, such as a bond conditioned for payment of a sum, if the legatee should marry in the testator's life with his consent or survive him. *Spinks* v. *Robins*, 2 Atk. 491; see *Crompton* v. *Sale*, 2 P. W. 553.

Contingent portion.

Payments to a daughter on marriage of 600*l.* or 300*l.* (*a*), or 1,000*l.* stock (*b*), or to her husband of 400*l.* for furnishing (*c*), have been held to adeem legacies to the daughter; on the other hand, small occasional sums and a small allowance of 60*l.* a year (*d*), and 100*l.* for an outfit, and a gift of 400*l.* to the husband of a daughter (*e*), have been held not to adeem a legacy to a daughter. *Schofield* v. *Heap*, 27 B. 93 (*a*); *Watson* v. *Watson*, 33 B. 574 (*b*); *Nevin* v. *Drysdale*, 1 Eq. 517 (*c*);

What payments will and will not adeem.

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Schofield v. *Heap*, *supra*; *Watson* v. *Watson*, *supra* (*d*); *Ravenscroft* v. *Jones*, 32 B. 669; 1 D. J. & S. 224 (*e*).

Difference in beneficiaries.

There is no ademption if the persons taking the gift by will and the portion are different.

Therefore, a gift to a daughter's husband on the marriage, though expressed to be a portion, will not adeem a gift by will to the daughter absolutely, or to her for life, with remainder to her children. *Ravenscroft* v. *Jones*, 32 B. 669; 1 D. J. & S. 224; *Cooper* v. *Macdonald*, 16 Eq. 258.

And if there is a substitutional gift to the issue of a child dying before the testator, the gift to the issue is not adeemed by a loan made to a parent who predeceased the testator. *Re* v. *Rogers*, 39 L. J. Ch. 791.

How property valued.

For the purpose of ademption the property afterwards given is to be valued as at the time of gift less estate duty, if any, and an annuity is to be valued as at the same time. *Watson* v. *Watson*, 33 B. 574; *Kirendbright* v. *Kirendbright*, 8 Ves. 51; see *Hatfield* v. *Minet*, 8 Ch. D. 136; *In re Beddington*; *Michalis* v. *Samuel*, (1900) 1 Ch. 771.

Effect of codicil on adeemed legacy.

A codicil republishing the will does not alone revive an adeemed legacy, but it is a fact which cannot be left out of consideration. *Powys* v. *Mansfield*, 3 M. & Cr. 359, 370; *Ravenscroft* v. *Jones*, 4 D. J. & S. 224; *In re Scott*: *Langton* v. *Scott*, (1903) 1 Ch. 1, 14.

Advances made before the date of the will.

An advance made before the date of the will, will not operate as an ademption in the absence of a special agreement that it shall. *Upton* v. *Prince*, Ca. t. Talb. 71; *In re Peacock's Estate*, 14 Eq. 236; *Taylor* v. *Cartwright*, 41 L. J. Ch. 529.

B. *Advancement under Statute of Distributions.*

Advancement by portion under Statute of Distributions.

The question of "advancement by portion" also arises under the Statute of Distributions (22 & 23 Car. II. c. 10), s. 5, as regards children of the intestate. *In re Gist*: *Gist* v. *Timbrill*, (1906) 2 Ch. 280.

When Act applies.

That section does not apply where there is an intestacy as to the beneficial interest in a part of the testator's property. But it applies to cases where there is a will, which is wholly inopera-

tive. *Horte* v. *Meredith*, 13 L. R. Ir. 341; *In re Ford: Ford* v. *Ford*, (1902) 1 Ch. 218; (1902) 2 Ch. 665; *In re Roby: Hewlett* v. *Newington*, (1907) 2 Ch. 84.

Effect of Executors Act, 1830.

It probably does not apply where an executor becomes a trustee of residue undisposed of for the next of kin by virtue of the Executors Act, 1830 (11 Geo. IV. & 1 Will. IV. c. 40), s. 1. *In re Roby: Hewlett* v. *Newington*, (1907) 2 Ch. 84.

What are advances.

Under the Statute of Distributions it has been held, that the premium stamp and expenses upon a son being articled to a solicitor, the price of a commission and outfit, the admission fee at an Inn of Court, and the price of plant and machinery for starting a business, are, but that the fee of a special pleader, the price of outfit and passage money for an officer going to India, and contributions to a clergyman's housekeeping expenses are not advances. *Boyd* v. *Boyd*, 4 Eq. 305; *Taylor* v. *Taylor*, 20 Eq. 155.

Payment of a son's debts is not necessarily an advance, but may be regarded as temporary assistance. *In re Scott: Langton* v. *Scott*, (1903) 1 Ch. 1, approving *Taylor* v. *Taylor*, 20 Eq. 155, and disapproving *Boyd* v. *Boyd*, 4 Eq. 305, and *In re Blockley: Blockley* v. *Blockley*, 29 Ch. D. 250.

Rights of the heir.

The heir-at-law is entitled, notwithstanding any land which he shall have by descent or otherwise from the intestate, to an equal part in the distribution.

The heir is therefore not bound to account for freehold or copyhold land, or money charged on land, or an estate *pur autre vie* given him by the intestate. *Edwards* v. *Freeman*, 2 P. W. 140; *Chantrell* v. *Chantrell*, 37 L. T. 220; *Lyons* v. *Lyons*, (1903) 1 Ir. 156.

C. *Ademption of Legacy given for a Purpose.*

Legacies given for a purpose are adeemed if the testator satisfies the purpose.

Where a legacy appears on the face of the will to be given for a particular purpose, whether to a stranger or not, and the testator afterwards in his lifetime provides a sum of money for that purpose, the legacy is wholly or partially adeemed according as the sum so provided is greater than or equal to or less than the legacy. *Debeze* v. *Mann*, 2 B. C. C. 165, 519; *Monk* v. *Monck*, 1 Ba. & Be. 298; *Powys* v. *Mansfield*, 3 M. & Cr. 359;

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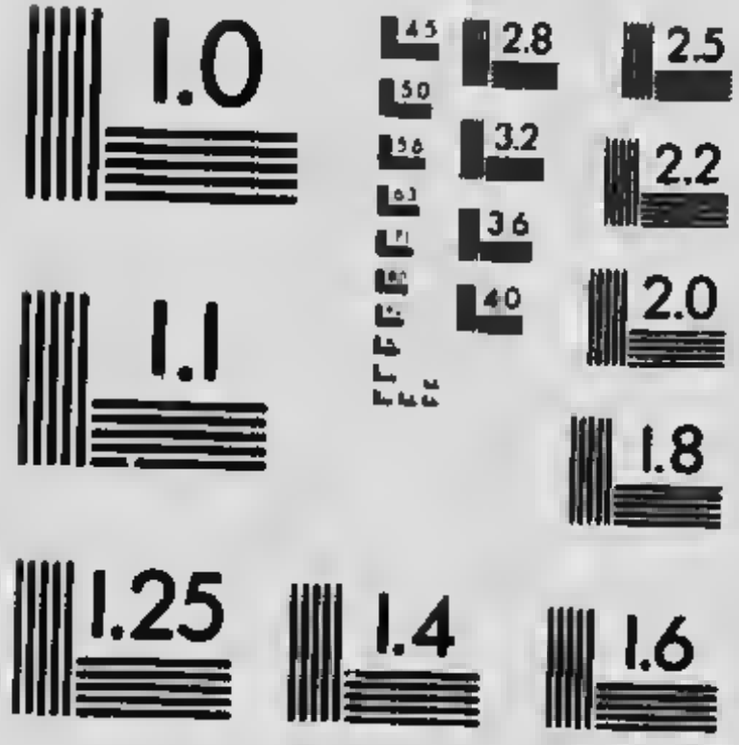

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In re Pollock; *Pollock* v. *Worrall*, 28 Ch. D. 552; *Griffith* v. *Bourke*, 21 L. R. Ir. 92; *In re Corbett*; *Corbett* v. *Lord Cobham*, (1903) 2 Ch. 326.

Legacy in fulfilment of moral obligation.

The same principle applies where the legacy is stated to be given in fulfilment of a moral obligation recognised by the testator. *In re Pollock*, *supra*.

It also applies though the legacy is not stated to be given for a particular purpose, but is by law presumed to be so given; for instance, in satisfaction of a debt. *In re Fletcher*; *Gillings* v. *Fletcher*, 38 Ch. D. 373.

Legacy for several purposes.

A legacy, stated to be given for several purposes, is not adeemed by a subsequent gift to satisfy one of those purposes only. *Roome* v. *Roome*, 3 Atk. 181.

Legacy given for benefit of infant.

A legacy given for the sole use and benefit of an infant is not given for a particular purpose within the rule. *In re Smythies*; *Wegman* v. *Smythies*, (1903) 1 Ch. 259.

A legacy of 200*l.* to the testator's wife to be paid within ten days after his decease is not adeemed by a gift of 200*l.* shortly before the death, made in order that the wife might have the immediate control of money. *Pankhurst* v. *Howell*, 6 Ch. 136.

III.—Hotchpot Clauses.

Questions arising on hotchpot clauses.

In many cases the instrument contains a direction that advances made by the testator are to be brought into hotchpot. Numerous questions have arisen on such clauses.

Share in intestacy or under will not advance in lifetime.

A direction that, if a parent should during his life advance or pay any sum for the benefit of his children, the sums are to be brought into account, does not include a share taken under the father's intestacy nor benefits given by his will. *Twisden* v. *Twisden*, 9 Ves. 413; *Cooper* v. *Cooper*, 8 Ch. 813.

The proposition supported by *Leake* v. *Leake*, 10 Ves. 476; *Golding* v. *Haverfield*, 13 Pr. 593; M'Cl. 345; *Fazakerley* v. *Gillibrand*, 6 Sim. 591, that a gift by will is an advancement in the life of the testator is no longer law.

Intention to include gift by will.

But the direction may be so framed as to include gifts by will, for instance, if the reference is to gifts made by a father "in his lifetime or by his will" or "in his life or at his death,"

er if the event provided for is if the father should have bestowed or given portions to his children on their marriage, "or otherwise provided for them." *Papillon* v. *Papillon*, 11 Sim. 642; *Rickman* v. *Morgan*, 1 B. C. C. 63; 2 B. C. C. 393; *Leake* v. *Leake*, 10 Ves. 477.

And a direction that if parents should in their lifetime "settle, give, or advance" unto, for or upon their children, has been held to include a gift by will. *Onslow* v. *Michell*, 18 Ves. 490; see *Golding* v. *Haverfield*, 13 Pr. 593; M'Cl. 345.

Words applicable to money.

The word advance primarily refers to advance of money. It is not appropriate to real or leasehold property, and, unless there is some further indication of intention to include them, a leasehold house given to a son and real estate devised to children need not be brought into account. *Douglas* v. *Willes*, 7 Ha. 318; *Cooper* v. *Cooper*, 8 Ch. 813; *In re Jaques*: *Hodgson* v. *Braisby*, (1903) 1 Ch. 267.

What is not an advance by the father.

Benefits coming to the children under a post-nuptial settlement of the mother's property, or under a deed of family arrangement, to which father and mother are parties, are not *primâ facie* advances by the father. *Douglas* v. *Willes*, 7 Ha. 318; *Cooper* v. *Cooper*, 8 Ch. 813.

What are advances.

A sum paid by the testator under a guarantee of the son's account is an advance to him; but purchase-money payable by a son to his father, which does not become due till after the testator's death, is not. If the testator proves for a debt in the son's bankruptcy so much as remains unpaid must nevertheless be brought into account. *Auster* v. *Powell*, 1 D. J. & S. 93; *In re Whitehouse*; *Whitehouse* v. *Edwards*, 37 Ch. D. 683; see *Silverside* v. *Silverside*, 25 B. 340.

Gift by way of marriage.

1,000*l.* given to a husband on his marriage with the testator's daughter in exchange for his snuff-box, was held not given by way of marriage or advancement. *M'Clure* v. *Evans*, 29 B. 422.

Direction to make up income.

Where the income of a legatee was directed to be made up to a certain amount, the legatee to certify her income from all sources, it was held that the legatee was not bound to bring into account an annuity given by a subsequent testator with a direction, that it was not to be taken into account, but was to

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be a clear beneficial addition. *In re Hedges' Trust Estate*, 18 Eq. 419.

How income ascertained.

As to how the income is to be ascertained in such a case, see *Lady Bateman* v. *Faber*, 48 W. R. 165.

A direction to deduct a sum from the share of a legatee as an equivalent for an estate given to him fails if the estate is not purchased. *Nugee* v. *Chapman*, 29 B. 288.

Statute-barred debts.

Under a direction to deduct advances made to a legatee by her brothers or sisters, debts owing from the legatee to her brothers and sisters may be deducted though barred by the statute. *Poole* v. *Poole*, 7 Ch. 17.

Debt discharged.

On the other hand, a declaration that a legatee indebted to the testator is to accept the debt as part of his share, does not apply to a debt discharged by a composition deed. *Golds* v. *Greenfield*, 2 Sm. & G. 476.

Where the testator directed certain debts and interests to be deducted from the share of a beneficiary, who had given bonds to secure the debts, it was held, that the whole of the debts and interest must be deducted, though the total amount exceeded the penalty of the bonds. *Mathews* v. *Keble*, 3 Ch. 691.

Where the testator directed his sons to pay or account for debts owing to him before they should receive their shares, and the share of a son was settled by a codicil, it was held that a debt due from the son was to be brought into account for the purpose of division, but not for the purpose of increasing the amount to be settled. *White* v. *Turner*, 25 B. 505.

When hotch-pot clause ceases to operate.

Where the residue was given to the testator's children by a first and second wife to vest at twenty-one, with a direction that if the children by the first wife should become entitled to another fund they should bring it into hotchpot, it was held that the hotchpot clause ceased to operate when the eldest child attained twenty-one. *Stares* v. *Penton*, 4 Eq. 40.

Lapsed share.

Where the testator directed his children, who were his residuary legatees, to bring advances into hotchpot, and a share given to one of the children was revoked and lapsed, it was held that the hotchpot clause applied to the lapsed share, and that the son, whose share was revoked, could not claim as next of

kin, without bringing advances into hotchpot, but not so as to increase the widow's share. *Stewart* v. *Stewart*, 15 Ch. D. 539.

Direction as to child does not affect issue.

Under a clause directing a child to bring advances into hotchpot, an advance to a child cannot be brought against the issue of the child, who take the share in remainder or by substitution. *Silverside* v. *Silverside*, 25 B. 340; *Hewitt* v. *Jardine*, 14 Eq. 58; *In re Gist*; *Gist* v. *Timbrill*, (1906) 2 Ch. 280.

But where the issue are to take only the share the parent would have taken, an advance which the parent would have to bring into account must be brought into account against the issue. *In re Scott*; *Langton* v. *Scott*, (1903) 1 Ch. 1.

Direction to bring rent into account.

Under a direction to bring into account money due for rent or otherwise, the rent of land, to which a beneficiary has acquired a good title against the testator under the Real Property Limitation Acts, 1833 and 1874, cannot be brought into account. *In re Jolly*; *Gathercole* v. *Norfolk*, (1900) 2 Ch. 616.

A direction to deduct advances from shares of residue does not affect a residuary legatee's right to a general legacy given by the will. *Smith* v. *Crabtree*, 6 Ch. D. 591.

Direction as to appointed shares.

Under the ordinary hotchpot clause with reference to appointed shares, life and reversionary interests must be brought into account. *Rucker* v. *Scholefield*, 1 H. & M. 36; *Eales* v. *Drake*, 1 Ch. D. 217.

Where an estate was to be divisible equally if below and unequally if above a certain amount, it was held that a sum which the testator covenanted to settle on a daughter and which she had to bring into hotchpot, must be brought into account in ascertaining the value of the estate. *Fox* v. *Fox*, 11 Eq. 142.

Effect of direction that settled sum be taken as part of share.

Where the testator gave his residue to his son and daughter equally, and directed any sum which he had agreed to give on the marriage of a child should be taken in satisfaction of the share, and he covenanted to settle 10,000*l.* on the son's marriage with ultimate reversion to himself on failure of issue, which happened, it was held that the son's estate was entitled to the settled 10,000*l.*, subject to his widow's life estate under the settlement, that the daughter must receive 10,000*l.*, and that the

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residue of the estate was divisible equally between the son and daughter. *Wheeler* v. *Humphreys*, (1898) A. C. 506.

Several funds and one hotchpot clause.

As a general rule, where several funds are settled by one instrument and there is a hotchpot clause, an appointee of one fund cannot claim an unappointed share of the other funds without bringing the fund appointed to him into hotchpot, unless there is a clear indication of intention that the funds are to be treated as separate. *In re Marquis of Bristol*; *Earl Grey* v. *Grey*, (1897) 1 Ch. 916; *Hutchinson* v. *Tottenham*, (1898) 1 Ir. 403; (1899) 1 Ir. 311.

And where a fund is settled by a will with a hotchpot clause, and then other funds are settled by the same will upon the same trusts by reference, there is to be *primâ facie* one hotchpot clause applicable to the three funds, and not a separate hotchpot clause applicable to each fund. *Re Perkins*; *Perkins* v. *Bagot*, 67 L. T. 743.

On the other hand, where by a will funds are directed to be held upon the same or similar trusts as funds settled by a settlement, a separate hotchpot clause must be applied to the fund settled by reference. *Montague* v. *Montague*, 15 B. 565; *Re North*; *Meates* v. *Bishop*, 76 L. T. 186.

Incorrect statement as to advance to be accounted for.

Where a testator recites that a certain amount has been lent or advanced by him to a legatee and directs that amount to be accounted for against the legacy and the amount mentioned has not in fact been lent or advanced, the legatee is nevertheless bound by the recital and must bring that amount into account. *Southampton* v. *Going*, 24 W. R. 917; *In re Wood*; *Ward* v. *Wood*, 32 Ch. D. 517; see *Burrowes* v. *Lord Clonbrock*, 27 L. R. Ir. 538.

On the other hand, where there is a similar recital and the testator directs that the amount mentioned or so much thereof as shall be owing shall be brought into account, the intention is that the legatee shall only account for the amount actually owing or advanced. *In re Taylor's Estate*; *Tomlin* v. *Underhay*, 22 Ch. D. 495; *In re Kelsey*; *Woolley* v. *Kelsey*, (1905) 2 Ch. 465, where *In re Aird's Estate*; *Aird* v. *Quick*, 12 Ch. D. 291, was not followed.

Entries subsequent to date of will.

Entries made subsequent to the date of the will cannot be incorporated into it, and made binding on the legatee, though they are admissible as evidence that advances were made by the testator. *Smith* v. *Condor*, 9 Ch. D. 170; *Whateley* v. *Spooner*, 3 K. & J. 542; see *Re Coyle*; *Coyle* v. *Coyle*, 56 L. T. 510.

Where advances are directed to be brought into account evidence is not admissible to show that the testator, some time after an advance, had written off a portion of the advance as a gift. *Smith* v. *Condor*, 9 Ch. D. 170.

Where a testator directed advances appearing in a specified book to be taken into account, and subsequently destroyed the book, it was held that no advances, whether made before or after the will, were to be taken into account. *Re Coyle*, *supra*.

Interest on advances.

According to some of the cases, where there is a direct gift and advances made by the testator are directed to be deducted from a legatee's share, interest at 4 per cent. on such advances must be computed from the testator's death. *Andrews* v. *George*, 3 Sim. 393; *Hilton* v. *Hilton*, 14 Eq. 468; *Field* v. *Seward*, 5 Ch. D. 538; *In re Dury*; *Hollingsworth* v. *Dury*, W. N. (1907) 210, rev.; *In re Whiteford*; *Inglis* v. *Whiteford*, (1903) 1 Ch. 889; see *Poole* v. *Poole*, 7 Ch. 17.

The Court of Appeal has recently laid down another mode of working out the rights, where the residue subject to an annuity was given to six children, and the shares were settled and there was a direction to bring advances into hotchpot. For the purpose of ascertaining the share of each child the advances were added to the residue, and when the share was ascertained the income was divided in proportion to the value of the shares, the income of each child being charged with one-sixth of the annuity. *In re Hargreaves*; *Hargreaves* v. *Hargreaves*, 88 L. T. 100.

If the testator directs the advances to be deducted with interest at 5 per cent., interest at that rate will be computed down to the testator's death and at 3 per cent. from that date. *Stewart* v. *Stewart*, 15 Ch. D. 539.

If the time of distribution is postponed advances carry interest only from the time of distribution. *In re Rees*; *Rees* v. *George*,

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17 Ch. D. 701; *In re Dallmeyer*; *Dallmeyer* v. *Dallmeyer*, (1896) 1 Ch. 372; *In re Lambert*: *Middleton* v. *Moore*, (1897) 2 Ch. 169.

Where a testator had advanced a son 2,000*l.* at interest and gave his residue to his widow for life with remainder to his children, a direction that advances to the children were to be taken in part satisfaction of their shares was held not to operate till the widow's death, so that the son was compelled to pay his interest on the 2,000*l.* to the widow. *Limpus* v. *Arnold*, 15 Q. B. D. 300.

In the case of appointments under powers hotchpot clauses will not be implied.

Appointment "as and for her share."

Thus, an appointment in favour of an object "as and for her share" does not exclude that object from sharing in the unappointed part, though the sum left unappointed is such as would give all the objects equal shares. *Wilson* v. *Piggott*, 2 Ves. Jun. 351; *Wombwell* v. *Hanrott*, 14 B. 143; *Walmesley* v. *Vaughan*, 1 De G. & J. 111.

Share in lieu of claims.

And it seems a direction that the appointed share is in lieu of all claims and demands of the donee to or for her original share in the trust fund will not exclude her from the unappointed part. *Foster* v. *Cautley*, 6 D. M. & G. 55.

On the other hand, an appointment to one object, coupled with a declaration that the donee of the power wishes the fund equally divided, may amount to an appointment of the rest of the fund to the other objects. *Fortescue* v. *Gregor*, 5 Ves. 553.

And a direction for accruer, which can only have a meaning on the supposition that the fund has been appointed in favour of other objects, may also amount to an appointment. *Foster* v. *Cautley*, 6 D. M. & G. 55.

In the case of a deed, if the appointee is a party and a share is appointed to him in lieu of his share in the fund the appointee cannot share in the unappointed part. *Clune* v. *Appjohn*, 17 Ir. Ch. 25; *Armstrong* v. *Lynn*, I. R. 9 Eq. 186.

Under a gift to several persons as A shall appoint with a gift in default of appointment to them equally, a direction to bring advances made by the testator into hotchpot applies only

to the unappointed portion of the fund. *Brocklehurst* v. *Flint*, 16 B. 100.

A sum raised for an object of the power under an advancement clause, where the donee of the power exercises it fully, is taken out of the appointed fund, and is not to be brought into hotchpot. *In re Fox; Wodehouse* v. *Fox*, (1904) 1 Ch. 480.

CANADIAN NOTES.

Legacy in lieu of dower not satisfaction of covenant in separation deed.

A testator, having covenanted in a separation deed to pay his wife $200 a year during her lifetime, in lieu of maintenance, alimony and dower, by his will, subsequently made, gave her $400 a year in lieu of dower. Held, that as the legacy was given in lieu of dower it was not intended to be a satisfaction of the covenant. *Carscallen* v. *Wallbridge*, 32 O.R. 114.

Gift of equivalent amount not satisfaction of debt.

A testator, being under a bond to pay an annual sum of £12 10s. to his mother, devised land to his brother on condition that he should pay £12 10s. to his mother, and it was held not to be a satisfaction of the bond. *Cole* v. *Cole*, 5 O.S. 744.

Hotchpot clause in will.

Where a testator devised a parcel of land to three granddaughters as tenants in common, and to one of them another parcel in severalty, and directed that the several parcel should be valued by his executors and its value deducted from the devisees' one-third portion of the land devised in common, it was held that the tenant in severalty was not bound to account to the other devisees for rents of the land held in severalty, but that the rents of that parcel should be deducted from her one-third share of the rents of the land held in common. *Phillips* v. *Yarwood*, 21 Gr. 622.

Discretion to executors to advance not controllable.

Absolute discretion to make advances to children to whom limited interests only are given is well exercised by conveyances in fee of valuable property, there being no fraud or improper motive in making the advances. *Hospital for Sick Children* v. *Chute*, 3 O.L.R. 590.

Statutory advancement, Ontario.

In Ontario, a child of an intestate may be advanced by a gift of either real or personal property, provided that it has

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been so expressed by the intestate in writing, or so acknowledged by the child in writing. R.S.O. c. 127, s. 60.

And the value of the advancement is that which has been acknowledged by the child by instrument in writing, otherwise the value is to be estimated according to the value of the property when given. *Ibid.*, s. 62.

The effect of this was to supersede the Statute of Distribution as to advancement, and to require a child to bring into hotchpot an advancement only where it is evidenced by writing. *Filman* v. *Filman*, 15 Gr. 643.

The Statute of Distribution has been re-printed in the Revised Statutes, c. 335, with the proviso, "subject to the provisions of the Devolution of Estates Act." What the effect of this is has not been determined, but presumably the provincial enactment controls the Statute of Distribution and still requires an advancement to be evidenced by writing.

Where child advanced, grandchildren bound.

Grandchildren take on an intestacy by representation of their parent, and not in their own right, and if he has been advanced, they are chargeable with the amount of the advancement and excluded to that extent. *Re Lewis*, 29 O.R. 609.

Manitoba.

In Manitoba "if any child of an intestate shall have been portioned, or otherwise provided for, by an advance in money or in any other way, by the intestate in his lifetime, to an amount equal to the distributive share of the other children, he shall be excepted in the distribution of the estate; but if any child of an intestate shall have been only in part so portioned or provided for, he shall have so much of the estate as will make his share equal to the share of each of the rest. R.S.M. c. 48, s. 7.

New Brunswick.

In New Brunswick, upon an intestacy as to land, "children advanced by settlement or portions not equal to the other shares, shall have so much of the surplusage as shall make the estate of all equal." R.S.N.B. c. 161, s. 1, *ad fin.*

As to personalty, "any child receiving an advancement of real estate in the lifetime of the intestate in excess of his share of the real estate shall have the value of such excess taken into account in the distribution of the personalty."

In Nova Scotia, a gift or grant made to a child or grandchild is deemed to be an advancement, if it is so expressed in writing in the grant; or if so charged in writing by the intestate, or if so acknowledged in writing by the child or grandchild; or if proved to have been so made in a Court of justice. R.S.N.S. c. 140, s. 13.

Children or grandchildren may be advanced, and the advancement is to be taken as made towards the child or grandchild's share of the estate. *Ibid.*, s. 8.

If the advancement exceeds the share, he does not refund; but if it is less, he takes enough to make up his share. *Ibid.*, ss. 9, 10, 11.

If the child or grandchild dies before the intestate leaving issue, the advancement is to be taken into consideration in the distribution. *Ibid.*, s. 12.

In Nova Scotia, where a testator invested moneys in certain Government securities in his own name for his daughters, because he had reached the amount to which an individual could invest in his own name, and subsequently spoke of these investments as his daughters' money, it was held that they were advancements, and that the circumstances under which he had made the investments did not rebut the presumption of advancement. *Jones* v. *Kinnear*, 16 N.S.R. 1.

In British Columbia the Statute of Distribution prevails. R.S.B.C. c. 93, s. 53.

CHAPTER LIX.

INTERESTS UNDISPOSED OF.

LAPSE.

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PORTIONS of a testator's property may be undisposed of, either because the disposition attempted by him has failed, or because no disposition has been attempted.

Doctrine of lapse.

A devise or legacy lapses by the death of the devisee or legatee before the testator, or even before the date of the will. *Elliott* v. *Davenport*, 1 P. W. 83; 2 Vern. 581; *Maybank* v. *Brooks*, 1 B. C. C. 84.

Confirmation by codicil.

Confirmation by codicil of a will containing a legacy to a legatee, her executors and administrators, where the legatee has died since the date of the will, does not prevent a lapse or give the legacy to the executors of the legatee. *Hutcheson* v. *Hammond*, 3 B. C. C. 127; *Maybank* v. *Brooks*, 1 B. C. C. 84.

Gift to tenants in common by name.

Where the gift is to several named persons as tenants in common, the shares of any who die before the testator lapse. *Page* v. *Page*, 2 P. W. 289; *Peat* v. *Chapman*, 1 Ves. Sen. 542.

Direction preventing lapse.

If there is a gift to four persons followed by a gift over, if only one survives, to that one, there is no lapse, though three out of the four survive the testator. *In re Radcliffe; Young* v. *Beale*, 51 W.R. 409.

Where there was a gift of a residue to a class and A. followed by a direction that "the same shall be vested legacies at the time of my decease," it was held, that these words meant that the residue was to be divided between those legatees who survived the testator. *In re Featherstone's Trusts*, 22 Ch. D. 111; see, too, *Clark* v. *Phillips*, 17 Jur. 886.

Person dead at date of will.

Possibly, if one of the named persons is shown on the face of the will to be dead at the date of the will, the fund would

be divisible among the others. *Clark* v. *Clemantas*, 33 L. J. Ch. 171.

So a devise by A to the uses of B's will can only take effect in favour of those devisees of B who survive A. *Calsbu* v. *Chere*, 7 Ha. 245.

Power of appointment.

The doctrine of lapse applies to a power of appointment exercised by will, and the appointee must survive the donee of the power in order to take. *Duke of Marlborough* v. *Lord Godolphin*, 2 Ves. Sen. 61; *Freeland* v. *Pearson*, L. R. 3 Eq. 658; *In re Susanna's Trusts*, 17 L. J. Ch. 65.

An appointment by will in accordance with a covenant is subject to the ordinary rule as to lapse. *Re Brookman's Trust*, 5 Ch. 182; see *Norris* v. *Wolfenstan*, 18 Eq. 18.

Power to appoint, death of some of the objects.

Where a testator by his will creates a power to appoint a class, it has been said that the death of any member of the class in the testator's lifetime destroys the power *pro tanto*. *Reade* v. *Reade*, 5 Ves. 744.

But the death of any members of the class after the testator's death in the lifetime of the donee of the power does not affect the power, which may be exercised as to the whole in favour of the survivors. There is no distinction for this purpose between a power to appoint to a class and a power to appoint to named individuals, with a gift to them nominatim in default of appointment. *Bogle* v. *Bishop of Peterborough*, 1 Ves. Jun. 299; *Ricketts* v. *Laffan*, 4 Y. & C. Ex. 519; *Peake* v. *Hasfunt*, 34 B. 125; *In re Ware*; *Cumberlege* v. *Cumberlege-Ware*, 45 Ch. D. 269.

Gift to debtor.

A gift to a debtor of his debt, though the debt be given to him, his executors and administrators, with a direction to hand over the securities to him, is in effect a legacy, and lapses by the death of the debtor in the testator's lifetime. It is immaterial whether the debt is given or forgiven. *Taplis* v. *Baker*, 2 Cox, 118; *Elliott* v. *Davenport*, 1 P. W. 83; 2 Vern. 521; *Maitland* v. *Adair*, 3 Ves. 231; *Izon* v. *Butler*, 2 Pr. 34.

Possibly a general direction to hand over the security to be cancelled might release the debt, whether the debtor survives the testator or not. *Sibthorp* v. *Moxom*, 3 Atk. 580; 1 Ves. Sen. 49; see *South* v. *Williams*, 12 Sim. 566.

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Legacy to a creditor.

A gift to a creditor of the amount of his debt, if the debt is barred by the statute or has been discharged by a composition deed, is mere bounty. It is a legacy, and has no priority over other legacies. *Coppin* v. *Coppin*, 2 P. W. 291, 296; *Turner* v. *Martin*, 7 D. M. & G. 429.

It would seem, that in an ordinary case such a gift would be subject to lapse, like any other gift. It has been lately suggested, that, if upon the construction of the will it appears that the testator clearly intended not to give a mere bounty to the legatee, but to discharge what he regarded as a moral obligation, whether it were legally binding or not, and if that obligation still exists at the testator's death, there is no necessary failure of the testator's object merely because the legatee dies in the testator's lifetime; and therefore death in such a case does not cause a lapse. This doctrine is novel, and may possibly be too widely stated, if it is intended to apply to anything but debts. *Stevens* v. *King*, (1904) 2 Ch. 30.

The cases go no further than this, that the testator may express his intention that a direction to pay certain debts, which have been released or discharged, is to include the debts owing to persons who predecease him.

For instance, he may direct to be handed over to the official manager in a bankruptcy, which occurred twenty-nine years before the date of the will, so much money as will make up a dividend of 20*s.* in the pound on debts proved in the bankruptcy (*a*), or he may direct a fund to be divided between such of the creditors of Lockey & Gamon as are contained in a schedule according to the amount of their debts where the schedule contained debts due to firms and to the executors of different persons (*b*), or upon the construction of the will it may be that the estates of deceased creditors are intended to be benefited (*c*). *In re Sowerby's Trust*, 2 K. & J. 630; *Turner* v. *Martin*, 7 D. M. & G. 429 (*a*); *Williamson* v. *Naylor*, 3 Y. & C. Ex. 208 (*b*); *Philips* v. *Philips*, 3 Ha. 281 (*c*).

Effect of a declaration against lapse.

A declaration, that a legacy shall not lapse, is not sufficient to prevent lapse, unless it is clear that it is to go to the estate of the legatee in the event of his death. *Pickering* v. *Stamford*,

3 Ves. 493; *Johnson* v. *Johnson*, 4 B. 318; *Underwood* v. *Wing*, 4 D. M. & G. 633; see *Wilder's Trusts*, 27 B. 418.

But a gift to A and his executors or administrators with a direction that the legacy is not to lapse has been held sufficient. *Sibley* v. *Cook*, 2 Atk. 572.

On the other hand, in the case of a gift in similar terms, a direction that the legacy was to vest from the date of the will was held insufficient to prevent lapse. *Browne* v. *Hope*, 14 Eq. 343.

Where a testator gave his residue to A and B and in case of their decease to their executors, and A predeceased the testator, having given her residue to him, it was held that the moiety given to A lapsed. *In re Vallez's Trusts*, 40 Ch. D. 159.

Interests of persons to take in default of appointment.

The interest of persons taking in default of appointment does not fail by the death of the donee of the power before the testator. *Hardwick* v. *Thurston*, 4 Russ. 380; *Edwards* v. *Salaway*, 2 Ph. 625; *Nichols* v. *Haviland*, 1 K. & J. 504; *Kellett* v. *Kellett*, I. R. 5 Eq. 298.

Interests of persons in remainder not affected by lapse of the life interest.

The interests of those taking in remainder do not fail by the death of the tenant for life before the testator. But if an absolute interest is given and the testator then proceeds to settle the share, the question is whether what is settled is a share to which the legatee has become entitled by surviving the testator *(a)*, or whether the settlement is of the share which the legatee would have taken if he or she had survived *(b)*. In the former case the gift fails if the legatee dies before the testator, in the latter case it does not. *Stewart* v. *Jones*, 3 De G. & J. 532; *In re Roberts: Tarleton* v. *Bradna*, 27 Ch. D. 316; 30 Ch. D. 234 *(a)*; *In re Speakman: Unsworth* v. *Speakman*, 4 Ch. D. 620; *In re Pinhorne: Moreton* v. *Hughes*, (1894) 2 Ch. 276; *In re Powell: Campbell* v. *Campbell*, (1900) 2 Ch. 525; *In re Whitmore: Walters* v. *Harrison*, (1902) 2 Ch. 66 *(b)*.

Absolute interest settled.

Whether a gift to A or his executors will lapse.

It is clear that a gift to A or his executors for the benefit of his estate, after a life interest, or where the payment is postponed, will fail by the death of A before the testator: *Bone* v. *Cook*, McCel. 168; 13 Pr. 332; *Corbyn* v. *French*, 4 Ves. 418; *Tidwell* v. *Ariel*, 3 Mad. 403, where heirs was read as executors and administrators. *Leach* v. *Leach*, 35 B. 185.

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This rule, however, does not apply where the gift is to A or his heirs after a life interest, where heirs means next of kin, who take beneficially and not as mere representatives. *In re Porter's Trusts*, 4 K. & J. 188.

But it would seem a direct gift to A or his executors, if executors is construed in its literal sense, would not lapse by A's death before the testator. See *Maxwell* v. *Maxwell*, I. R. 2 Eq. 478; see, however, *Aspinall* v. *Duckworth*, 35 B. 307; and *ante*, pp. 347, 692.

Charges will not fail by the death of the devisee subject to the charge.

If there is a gift to A charged with a sum payable to B, the legacy to B does not lapse by the death of A before the testator. *Wigg* v. *Wigg*, 1 Atk. 382; *Hills* v. *Wirley*, 2 Atk. 605; *Oke* v. *Heath*, 1 Ves. Sen. 134.

But the legacy would fail if the gift to A is adeemed or revoked. *Cowper* v. *Mantell*, 22 B. 223.

And where land was devised to a creditor on condition that he should release his debt, and the testator declared that the debt should not be paid out of residue, the debt was held charged on the land, though the creditor predeceased the testator. *In re Kirk; Kirk* v. *Kirk*, 21 Ch. D. 431.

Effects of sects. 32 and 33 of the Wills Act on the doctrine of lapse.

Now, by sect. 32 of the Wills Act, a devise of an estate tail will not lapse if there are at the death of the testator any issue inheritable under the entail.

And, by sect. 33, a gift of real or personal property to a child, or other issue of the testator, will not lapse if any issue of the devisee or legatee survive the testator.

The section applies to a gift to a child dead at the date of the will. *Wisden* v. *Wisden*, 2 Sm. & G. 396.

The issue surviving the testator need not be living at the death of the devisee or legatee. *In bonis Parker*, 1 Sw. & Tr. 523.

In such a case the property bequeathed belongs to the legatee, as if he had survived the testator, and passes by his will. *Johnson* v. *Johnson*, 3 Ha. 157; *In bonis Parker*, 1 Sw. & Tr. 523; *Re Mason's Will*, 34 B. 494.

Estate duty.

And estate duty is payable on the death of both father and son. *In re Scott*, (1901) 1 Q. B. 229; see *Lord Advocate* v. *Bogie*, (1894) A. C. 83.

If the devisee dies intestate, her husband is entitled to an estate by the curtesy. *Eager* v. *Furnivall*, 17 Ch. D. 115; *In re Derbyshire; Webb* v. *Derbyshire*, 75 L. J. Ch. 95.

If the legatee devises to the testator, there is a lapse, and the heir-at-law and next of kin of the legatee are entitled. *In re Hensler; Jones* v. *Hensler*, 19 Ch. D. 612.

Covenant to settle.

Property preserved from lapse by this section is not within a covenant to settle property coming to the legatee during coverture. *Pearce* v. *Graham*, 11 W. R. 415; 32 L. J. Ch. 359.

Where the testator directed a daughter's share to be settled if she survived him, and she predeceased him leaving issue, it was held that the direction to settle applied to her share. *In re Hone's Trusts*, 22 Ch. D. 663.

S. 33 applies to general not to special powers.

Sect. 33 applies to gifts under general powers of appointment, though there is a gift over in default of appointment. *Eccles* v. *Cheyne*, 2 K. & J. 676.

It does not apply to special powers, nor to cases where before the Act there would have been no lapse; as, for instance, gifts to a class, even though in the events that happen the class is reduced to one person. *Griffiths* v. *Gale*, 12 Sim. 354; *Freeland* v. *Pearson*, L. R. 3 Eq. 658; *Olney* v. *Bates*, 3 Dr. 319; *Browne* v. *Hammond*, Johns. 210; *Holyland* v. *Lewin*, 26 Ch. D. 266; *In re Sir E. Harvey's Estate; Harvey* v. *Gillow*, (1893) 1 Ch. 567.

Nor does it apply where A exercises a power of charging in favour of a child, conferred on him by the will of B, and then dies in B's lifetime. *Griggs* v. *Gibson*, 14 W. R. 538.

These sections apply to the interest of a person dying before the date of the will, but after the Act came into operation, but not to a person dying before the Act came into operation. *Winter* v. *Winter*, 5 Ha. 306; *Mower* v. *Orr*, 7 Ha. 473; *Wild* v. *Reynolds*, 5 N. of C. 1.

Doctrine of lapse in the case of gifts to a class.

In the case of gifts to a class as tenants in common, the shares of members of the class dying before the testator do not lapse but go to the other members of the class.

A gift to the children of A as tenants in common, to be

vested at twenty-one, is in effect a gift to the children who attain twenty-one. *Re Colley's Trusts*, L. R. 1 Eq. 496.

A direction, that the shares of any members of the class, who die before the testator, leaving issue, shall not lapse, will not have the effect of causing the shares of those, who die before the testator without issue to lapse. *Aspinall* v. *Duckworth*, 35 B. 307.

Gift to a class incapable of increase.

It is immaterial, that the class may be so determined as to be incapable of increase; as, for instance, if the class is "my nephew and nieces living at the time of my husband's decease," as tenants in common. *Dimond* v. *Bostock*, 10 Ch. 358; *Lee* v. *Pain*, 4 Ha. 201, 250; *Leigh* v. *Leigh*, 17 B. 605.

No person incapable at the testator's death of taking is a member of the class.

And no person incapacitated from taking at the death of the testator is looked upon as a member of the class, so that, for instance, the share of a member of the class incapacitated from taking because he witnessed the will, goes to the other members. *Young* v. *Davies*, 2 Dr. & Sm. 167; *Fell* v. *Biddulph*, L. R. 10 C. P. 701; *In re Colman and Jarrom*, 4 Ch. D. 165.

Appointment to object not capable of taking.

This doctrine does not apply to cases, where property is appointed under a power to objects and non-objects. In such cases, the objects of the power only take the shares they would have taken, if the whole appointment had been valid and the rest goes as in default. *Harvey* v. *Stracey*, 1 Dr. 137; *In re Earncombe's Trusts*, 9 Ch. D. 652.

But where by will under a power property is appointed to objects of the power, and by a codicil, which does not purport to revoke the will, part of the same property is appointed to non-objects, the original appointment takes effect over the whole property. *Duguid* v. *Fraser*, 31 Ch. D. 449; *In re Wells' Trusts*; *Hardisty* v. *Wells*, 42 Ch. D. 646.

Revocation of the share of a member of the class.

When there is a gift to a class, the revocation of the gift to one of the members of the class does not cause a lapse, but the whole goes to the other members of the class. *Shaw* v. *MacMahon*, 4 D. & War. 431; *M'Kay* v. *M'Kay*, (1900) 1 Ir. 213.

And a gift of residue to several persons and to A if living, or to several persons and to such of the children of A as are living at the date of the will, does not lapse as to the share of

A or the children of A, if A is dead or there are no children living at the date of the will. *Re Hornby*, 7 W. R. 729; *In re Spiller; Spiller* v. *Madge*, 18 Ch. D. 614; see *Sanders* v. *Ashford*, 28 B. 609.

Gift of aliquot shares to named persons.

A gift of aliquot shares to several named persons as tenants in common is not a gift to a class, and the shares of any dying before the testator lapse. *Cresswell* v. *Cheslyn*, 2 Ed. 123; *Ramsay* v. *Shelmerdine*, L. R. 1 Eq. 129.

Nor is a gift to a class of persons "before mentioned," the persons having been previously named, a gift to a class. *Re Gibson*, 2 J. & H. 656.

A gift to "the five daughters" of A, or to "my nine children," or to "my said three sisters," is not a gift to a class. *In re Smith's Trusts*, 9 Ch. D. 117; *In re Stansfield*, 15 Ch. D. 84; *Orford* v. *Orford*, (1903) 1 Ir. 124.

The result is the same if the gift is to a class, the members of which are then named. *Bain* v. *Lescher*, 11 Sim. 397.

And a gift to my wife's brother and sister and my brothers and sister equally, when the testator had at the date of the will three brothers and one sister, was held a *designatio personarum*, and the shares of two brothers who died before the testator lapsed. *Haccergal* v. *Harrison*, 7 B. 49.

Whether a gift to named executors is subject to lapse.

A gift to "my executors herein-named" has been held a gift to a class, the gift being attached to the office, and therefore passing wholly to those who survive to perform the office. *Knight* v. *Gould*, 2 M. & K. 295; see, too, *Parsons* v. *Saffery*, 9 Pr. 578; *In re Maxwell; Eivers* v. *Curry*, (1906) 1 Ir. 386.

But this is not the case if the gift, though the donees happen to be executors, is not given to them in respect of their office. *Barber* v. *Barber*, 3 M. & Cr. 688; *Hoare* v. *Osborne*, 12 W. R. 397.

What is a gift to a class.

Primâ 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. *Kingsbury* v. *Walter*, (1901) A. C. 187, 192.

Class may include named individuals.

It may be none the less a class, because some of the individuals of the class are named.

Thus a gift to "my children, including W," is a gift to a class. *Shaw* v. *MacMahon*, 4 D. & War. 431.

So are gifts to four named daughters and all after-born daughters, and to five named children and such after-born children as shall attain twenty-one or marry. *Re Stanhope's Trusts*, 27 B. 201; *In re Jackson: Shiers* v. *Ashworth*, 25 Ch. D. 162.

Composite class.

There may also be a composite class, as, for instance, the children of A and the children of B.

Gift to A and children of B is not a gift to a class unless there is a context.

On the other hand, a gift to A and the children of B is *primâ facie* not a gift to a class. *Re Ann Wood's Will*, 31 B. 323; *In re Chaplin's Trusts*, 33 L. J. Ch. 183; *In re Allen: Wilson* v. *Atter*, 44 L. T. 240; *In re Venn: Lindon* v. *Ingram*, (1904) 2 Ch. 52; *Clark* v. *Phillips*, 17 Jur. 886.

There may, however, be a context, which will show that the testator intended a gift in such a form to be a gift to a class.

This is the case, if A is shown to stand in the same relation to the testator as the children of B. *Aspinall* v. *Duckworth*, 35 B. 307.

It is also the case, where the gift is to A and the children of my sister B who attain twenty-one, where A was a niece, who had nearly attained twenty-one. *Kingsbury* v. *Walter*, (1901) A. C. 187.

But the gift will not be a gift to a class if some condition is attached to the children of B which does not attach to A. For instance, if the gift is to the children of B living at the death of the tenant for life and A. *Drakeford* v. *Drakeford*, 33 B. 43. *M'Kay* v. *M'Kay*, (1900) 1 Ir. 213, is not consistent with this principle.

Resulting Trusts.

Devise subject to a charge which fails.

When an estate is devised subject to a charge, and the purpose for which the charge is created fails, the charge sinks for the benefit of the devisee. *A.-G.* v. *Milner*, 3 Atk. 112; *Jackson* v. *Hurlock*, Amb. 487; 2 Ed. 263; *King* v. *Denison*, 1 V. & B. 261; *Tucker* v. *Kayess*, 4 K. & J. 339; *Heptinstall* v. *Gott*, 2 J. & H. 449.

Where the devise is clearly subject to a charge, it makes no

difference that the money to be raised by the charge is given to purposes such as a charity, which, if valid, would in all events give it away from the devisee. *Baker* v. *Hall*, 12 Ves. 497; *Cooke* v. *Stationers' Company*, 3 M. & K. 262.

Whether the devisee takes subject to, or what remains after satisfying charge.

But, where there is no express charge, it must depend upon the general intention, whether the particular gift is a charge, or whether the devisee was intended to take only what remains after deducting the particular gift.

Direction to pay a certain sum.

1. Thus, if the lands are not expressly charged, but the devisee is directed to pay a certain sum, there has been held to be a resulting trust. *Arnold* v. *Chapman*, 1 Ves. Sen. 108; *Bland* v. *Wilkins*, cit. 1 B. C. C. 61.

Direction to raise a sum which is disposed of in all events.

2. If a sum is directed to be raised, and a full disposition is made of it, for instance, to a charity, in such a way that the disposition, if valid, must in all events give the money away from the devisee of the land, who is to take only from and after the raising the money, there is a resulting trust for the heir upon failure of the particular disposition. *Tregonwell* v. *Sydenham*, 3 Dew, 194.

But if the money to be raised is given for purposes which, though valid, may not take effect, the mere fact, that the land is not given till after raising the money, will not take the money from the devisee, if those purposes fail. *In re Cooper's Trusts*, 23 L. J. Ch. 25; 4 D. M. & G. 757.

And where land was devised for life and in tail after the expiration or other sooner determination of a term of ninety-nine years limited to trustees, of which no trusts were declared, actual enjoyment by the devisee being intended, the devises were held to be subject to the term. *Sidney* v. *Shelley*, 19 Ves. 352.

Distinction between a charge created by the will and by a prior instrument.

Where a testator has by a previous instrument a power to charge real estates and exercises the power by will, the above rules have no application. In such a case, if the disposition made by the will fails, the charge is nevertheless raisable. *Simmons* v. *Pitt*, 8 Ch. 978.

Direction that legacy to sink into residue of personalty.

Where a testator, after charging his real estate with payment of legacies in aid of his personalty, declares that a legacy shall in certain contingencies sink into the residue of his personal

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estate, this merely amounts to a direction, that it shall sink into the fund, out of which it has been provided, and not that it shall be raisable out of the real for the benefit of the personal estate. *Johnson* v. *Webster*, 4 D. M. & G. 474; *Re Duke of Somerset*; *Thynne* v. *Seymour*, 55 L. T. 753.

Acceleration.

Acceleration.

In the case of a devise to a person for life with remainder in fee, where the tenant for life is incapable of taking or is not *in rerum naturâ*, the remainder is valid and will be accelerated. Year Book, 9 Hen. VI. fo. 24 b; Perkins, sects. 566, 567.

The same rule applies in the case of personalty. *Jull* v. *Jacobs*, 3 Ch. D. 703; see *In re Clark*; *Clark* v. *Randall*, 31 Ch. D. 72.

Revocation or forfeiture.

The rule applies if the life estate is revoked by the testator or determined by a forfeiture clause. *Lainson* v. *Lainson*, 18 B. 1; 5 D. M. & G. 754; *Earestaff* v. *Austin*, 19 B. 591; *Craven* v. *Brady*, 4 Eq. 209; 4 Ch. 296; *In re Love*; *Green* v. *Tribe*, 47 L. J. Ch. 783; see *Stephenson* v. *Stephenson*, 52 L. T. 576; *In re Whitehorne*: *Whitehorne* v. *Best*, (1906) 2 Ch. 121.

Acceleration altering class to take.

The result of an acceleration may be to alter the members of the class whose interest is accelerated. *Re Johnson*; *Danily* v. *Johnson*, 68 L. T. 20.

No acceleration while class not in existence.

There can be no acceleration so long as the persons to take in remainder are not in existence, for instance, if the gift is to A for life and then to her children and A has no children. *In re Townsend's Estate*; *Townsend* v. *Townsend*, 34 Ch. D. 357; see also *Re Vernon*: *Garland* v. *Shaw*, 95 L. T. 48.

Powers of sale and charging.

Powers of sale will be accelerated, but not powers to charge. *Truell* v. *Tysson*, 21 B. 437.

Whether there is any distinction as regards acceleration between appointments and devises.

There is no distinction as regards acceleration between appointments and devises: *Craven* v. *Brady*, *supra*; though if the object of an appointment, which is void, is to benefit the persons, who would take in default of appointment, and a remainder is well appointed, the remainder will not be accelerated. *Crozier* v. *Crozier*, 3 D. & War. 353.

WHO ARE ENTITLED TO INTERESTS UNDISPOSED OF.

Intestates' Estates Act.

By the Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29), the real and personal estate of a man who dies intestate after the 1st September, 1890, leaving a widow but no issue, if it does not exceed 500*l.*, belongs to the widow. A contingent reversionary interest is for this purpose to be valued at the testator's death. *In re Heath; Heath* v. *Widgeon*, (1907) 2 Ch. 270.

If the estate exceeds 500*l.* the widow is entitled to 500*l.*, for which she is to have a charge on the real and personal estate with interest at 4 per cent. from the death. The provision made by the Act is to be in addition to her rights in the residue of the property after paying the 500*l.*

The widow's 500*l.* is paramount to her dower. *Re Charrière; Duret* v. *Charrière*, 74 L. T. 650; 44 W. R. 539.

The Act does not apply to cases of partial intestacy. *In re Twigg's Estate; Twigg* v. *Black*, (1892) 1 Ch. 579.

Land in the Colonies.

Where the husband had land in Victoria, which descends as personalty, and by the Intestates' Estates Act, 1896, of that Colony the widow, if her husband's estate exceeds 1,000*l.*, is entitled to a charge of 1,000*l.* on it, and the land was sold and the proceeds remitted to Ireland, the widow took first 1,000*l.* out of the proceeds, the balance was then added to the Irish personalty, the mixed fund was applied in paying debts, and out of the balance the widow took 500*l.* under the Intestates' Estates Act, 1890. *Rea* v. *Rea*, (1902) 1 Ir. 451.

Dower barred by provision made by settlement.

The widow may be barred of her right to dower and also of her right under the Statute of Distributions to her share of personalty undisposed of, if she accepts a provision made, for instance, by marriage settlement in lieu of her right under an intestacy. The right to dower may be barred by a provision out of personal property, and the right under the statute may be barred by a provision out of realty. It is a question of construction of the instrument making the provision, how far it is to extend.

Provision by settlement may bar claim

A provision by marriage settlement made before the Intestates' Estates Act, 1890, in discharge of all claims on the estate

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under Act of 1890.

and effects of her husband bars her right to the 500*l.* under that Act. *Hogan* v. *Hogan*, (1901) 1 Ir. 168.

Many of the cases as to dower were before the Dower Act, when the husband could only dispose of his land subject to his wife's dower unless it was barred. Different considerations apply now that the wife's dower only attaches to land of which the husband dies intestate. See *Willis* v. *Willis*, 34 B. 340.

The expression "thirds" has no definite meaning. It may refer to the widow's right against real estate undisposed of or to her share under the statute, even though the share is a half and not a third. If the provision accepted is to be in lieu of dower and thirds at common law, this tends to show that provision under the statute is not intended to be barred, though even then there may be other words, which deprive the words "at common law" of this effect. *Druce* v. *Denison*, 6 Ves. 385; *Colleton* v. *Garth*, 5 Sim. 19; *Slatter* v. *Slatter*, 1 Y. & C. Ex. 28; *Thompson* v. *Watts*, 2 J. & H. 291; *Gurly* v. *Gurly*, 8 Cl. & F. 743; *In re Burgess' Trusts*, 11 Ir. Ch. 164; *Coyne* v. *Duigan*, (1894) 1 Ir. 138.

With regard to dower, it is not necessary that the provision accepted should be expressed to be in lieu of dower; if it is called a jointure it is enough; and, even if not called a jointure, it may be gathered from the whole instrument, that the provision was intended to be in lieu of dower; for instance, if it is recited as made for providing a competent jointure, and provision by way of maintenance. *Killen* v. *Campbell*, 10 Ir. Eq. 461; *Pennefather* v. *Pennefather*, I. R. 6 Eq. 171; *Dyke* v. *Rendall*, 2 D. M. & G. 209.

And the provision accepted in lieu of dower may be a mere agreement to make a settlement, which is never carried out; the land is, nevertheless, released from dower. *Simpson* v. *Gutteridge*, 1 Mad. 609; *Cooper* v. *Cooper*, 6 Ir. Ch. 217; *Pennefather* v. *Pennefather*, I. R. 6 Eq. 171.

But a mere annuity settled by the husband on the wife and the ordinary provisions of a marriage settlement do not bar the wife's dower. *Cody* v. *Cody*, 5 L. R. Ir. 620; *O'Rorke* v. *O'Rorke*, 17 L. R. Ir. 153; *Lemon* v. *Marsh*, (1899) 1 Ir. 416.

As regards provision for a wife by marriage settlement, where she is an infant at the time of the marriage, see *Drury* v. *Drury*, or *Earl of Buckingham* v. *Drury*, 4 B. C. C. 505, n.; 3 B. P. C. 492, ed. Tomл., *Carruthers* v. *Carruthers*, 4 B. C. C. 499; *Seaton* v. *Seaton*, 13 App. C. 61, p. 67.

Provision where wife an infant at time of marriage.

Under the Dower Act (3 & 4 Will. IV. c. 105), s. 9, where a husband devises any land, out of which his widow would be entitled to dower, if the same were not so devised, or any estate or interest therein to or for the benefit of the widow, such widow is not to be entitled to dower out of or in any land of her husband, unless a contrary intention is declared by the will.

Effect of Dower Act, s. 9.

Under this section a life interest given to the widow in the proceeds of sale of land devised on trust for sale bars her right to dower. *Rowland* v. *Cuthbertson*, 8 Eq. 466; *In re Thomas: Thomas* v. *Howell*, 34 Ch. D. 166.

And a devise within the section bars the widow's dower out of land of which the husband was tenant in tail. *Cooper* v. *Cooper*, 6 Ir. Ch. 217.

Provisions made by the will itself in satisfaction of the rights of a widow or of rights as heir-at-law or next of kin stand on a different footing.

Effect of provision by will in lieu of rights under intestacy.

Directions in the will, excluding the heir-at-law from any interest in the testator's property, do not prevent him from taking real estate, which is not disposed of. It seems to be immaterial in such a case, whether the testator attempts to dispose of the real estate or not. *Norcott* v. *Gordon*, 14 Sim. 258; *Fitch* v. *Weber*, 6 Ha. 145.

On the other hand, if there is a gift to one of the next of kin in satisfaction of his share under the statute, it makes a difference, whether the will makes a complete disposition or not. If it does, the gift in satisfaction may be considered to be given for the purposes of the dispositions of the will, and not as intended to deprive the next of kin of any interest, in what may in the event turn out to be undisposed of (*a*). But if there is an intestacy on the face of the will, the gift in satisfaction must have been intended to enure for the benefit of the other next of kin (*b*). *Sympson* v. *Hutton*, 11 Vin. 185, pl. 16; 3 Ves. 335; *Pickering* v. *Stamford*, 2 Ves. Jun. 272, 581; 3 Ves. 332, 492;

see *Naismith* v. *Boyes*, (1899) A. C. 495 (*a*); *Lett* v. *Randall*, 3 Sm. & G. 83 (*b*).

There are, however, some authorities not consistent with the proposition supported by *Lett* v. *Randall*. See *Johnson* v. *Johnson*, 4 B. 318; *Turcrnor* v. *Grindley*, 32 L. T. 424.

Next of kin excluded.

Upon similar principles, a direction, that one of the next of kin shall take no share in the testator's property will not prevent him from taking his share under the Statute of Distributions. *Johnson* v. *Johnson*, 4 B. 318; *Sykes* v. *Sykes*, 4 Eq. 200; 3 Ch. 301; see *Ramsay* v. *Shelmerdine*, L. R. 1 Eq. 129; *Gould* v. *Gould*, 32 B. 391; *Re Holmes: Holmes* v. *Holmes*, 63 L. T. 383.

A limitation to the next of kin of a married woman, as if she had died unmarried, will not exclude the husband's title as administrator if there are no next of kin. *Hankins* v. *Hankins*, 7 Sim. 173.

Gift to child of certain property and no more.

On the other hand, a gift to a child of "ten shillings and no more," has been held to bar the child's right as next of kin, where no disposition was attempted to be made by the will. *Beeton* v. *Vachell*, 5 B. P. C. 51; 11 Vin. Ab. 185, pl. 16.

But such a clause would probably now be construed as putting the child to his election. *Re Holmes*, *supra*.

And a clause excluding some of the next of kin may be so framed as in effect to amount to a gift to the others. *Bund* v. *Green*, 12 Ch. D. 819; see *In re Taylor: Taylor* v. *Ley*, 52 L. T. 839.

Escheat.

If the testator dies without an heir, lands undisposed of by him, in which he has the legal estate, pass by escheat to the lord, of whom they are held, if he can be ascertained, or if not to the Crown, but they are assets for the payment of the debts of the deceased. *Evans* v. *Brown*, 5 B. 114; *Viscount Downe* v. *Morris*, 3 Ha. 394; *Rogers* v. *Maude*, 1 Y. & C. C. 4; *Thruxton* v. *A.-G.*, 1 Vern. 340; Co. Litt. 18 b; *May* v. *Street*, Cro. Eliz. 120; *In re Hyatt; Boucles* v. *Hyatt*, 38 Ch. D. 609, p. 620.

Intestates' Estates Act, 1884.

The Intestates' Estates Act, 1884 (47 & 48 Vict. c. 71), enacts that after the 14th August, 1884, "where a person dies without an heir and intestate in respect of any real estate,

consisting of any estate or interest, whether legal or equitable in any incorporeal hereditament, or of any equitable estate or interest in any corporeal hereditament, whether devised or not to trustees by the will of such person, the law of escheat shall apply in the same manner, as if the estate or interest above-mentioned were a legal estate in corporeal hereditaments."

Effect of Act on rent-charge.

Before the Act, if the owner of a rent-charge died without heirs, the rent-charge merged in the land. Co. Litt. 299 b, n. 261.

Is the effect of the Act to keep the rent-charge alive for the benefit of the lord of the manor?

Land devised to trustees.

Under the Act, where land is devised to trustees on trust for sale and to pay debts, but the residue is not disposed of, the residue, in default of an heir, goes to the Crown and not to the trustees. *In re Wood; A.-G.* v. *Anderson*, (1896) 2 Ch. 596.

Equitable estates on failure of heirs.

In cases not affected by this Act, if a testator who dies intestate and without an heir has an equitable estate in land, the person in whom the legal estate is vested, whether as trustee or mortgagee, is entitled to the lands. *Burgess* v. *Wheate*, 1 Ed. 177; *A.-G.* v. *Sands*, 2 Freem 129; Hardres, 488; *Beale* v. *Symonds*, 16 B. 406; *Cox* v. *Parker*, 22 B. 168.

The trustee takes where there is no heir.

The trustee is beneficially entitled, though the land may be devised on trust for sale. *Walker* v. *Denne*, 2 Ves. Jun. 170; *Taylor* v. *Haygarth*, 14 Sim. 8; *Cox* v. *Parker*, 22 B. 168.

Where lands held by trustees for the testator are devised to other trustees, the latter are entitled upon failure of the trusts, if there is no heir of the testator. *Onslow* v. *Wallis*, 1 Mac. & G. 506.

But the original trustees will be entitled, if the latter trustees are bare trustees having no active duties to perform. *In re Lashmar; Moody* v. *Penfold*, (1891) 1 Ch. 258.

In the case of copyholds the heir of a trustee who has not been admitted is entitled as against the lord. *Gallard* v. *Hawkins*, 27 Ch. D. 298.

The Crown takes in default of next of kin.

In the case of chattels real and personal, the Crown and not the trustee is entitled on failure of next of kin. *Crudock* v.

Owen, 2 Sm. & G. 241; *Powell* v. *Merritt*, 1 *ib.* 381; *Read* v. *Stedman*, 26 B. 495; *Johnstone* v. *Hamilton*, 11 Jur. N. S. 777.

Land sold under Settled Land Acts.

The proceeds of sale of land sold under the Settled Land Acts and in the hands of trustees, where the land was devised for life only and the testator's heir cannot be found, are *bona vacantia*. *In re Bond*; *Paines* v. *A.-G.*, (1901) 1 Ch. 15.

Bona vacantia.

Bona vacantia include the property in this country of a foreigner domiciled in his own country. *In re Barrett's Trusts*, (1902) 1 Ch. 847.

If next of kin afterwards establish a title, the Crown cannot be charged with interest on what it has received while in possession of the property, except where it administers to the estate of the deceased person. *In re Gosman*, 17 Ch. D. 771.

Chattel interest in land undisposed of goes to heir as personalty.

Land which is undisposed of for a chattel interest passes to the heir, but the heir takes the interest as personalty. *Leet* v. *Needham*, 2 Vern. 138; *Sewell* v. *Denny*, 10 B. 315; *Burley* v. *Eveleyn*, 16 Sim. 290; *Whitehead* v. *Bennett*, 18 Jur. 140.

Residue undisposed of.

Effect of Lord St. Leonards' Act.

Since the Executors Act, 1830 (11 Geo. IV. & 1 Will. IV. c. 40), which controls the wills of testators dying after September 1, 1830, the executors take the residue undisposed of for the benefit of the next of kin, unless a contrary intention is expressed in the will, parol evidence not being admissible. *Juler* v. *Juler*, 29 B. 34; *Love* v. *Gaze*, 8 B. 472; *In re Lacy*, (1899) 2 Ch. 149.

Contrary intention within the Act.

Such contrary intention does not sufficiently appear by the mere fact that the testator shows that he conceived himself to have disposed of the residue. *Travers* v. *Travers*, 14 Eq. 275.

But if the testator appoints three of his children executors without expressly giving them any beneficial interest, and gives reasons why he has not provided by his will for his other children, the executors will take the residue beneficially. *Harrison* v. *Harrison*, 2 H. & M. 237; see *Fuge* v. *Fuge*, 27 L. R. Ir. 59.

Where a testator, after making several legacies, gave to each of his executors 50*l.*, and added, "I will the executors shall

apply the overplus, if any, as they think fit," it was held, that they took the residue as trustees for the next of kin. *Fenton* v. *Nevin*, 31 L. R. Ir. 478.

The Act only applies where the will contains no gift of the residue.

The Act applies only where the executor would otherwise have taken the undisposed of residue; it does not therefore apply where there is an express devise of the residue, whether on trusts which do not exhaust the whole or otherwise. *Saltmarsh* v. *Barrett*, 22 B. 474; 3 D. F. & J. 279; *Yeap Cheah Neo* v. *Ong Cheng Neo*, L. R. 6 P. C. 381; *Williams* v. *Arkle*, L. R. 7 H. L. 606; *In re Roby*; *Howlett* v. *Newington*, (1907) 2 Ch. 84.

Where there are no next of kin the Act does not apply.

If there are no next of kin, the Act does not apply, and the executors will take the residue undisposed of, unless a contrary intention is indicated, in which case it will go to the Crown. *Middleton* v. *Spicer*, 1 B. C. C. 201; *Johnstone* v. *Hamilton*, 11 Jur. N. S. 777; *Taylor* v. *Haygarth*, 14 Sim. 8; *In re Knowles*; *Roose* v. *Chalk*, 28 W. R. 975.

The title of executors in cases under the old law.

It becomes, therefore, necessary to consider in what cases executors would have been held excluded from the residue undisposed of under the old law.

1. They take only such residue as the testator did not intend to dispose of.

They do not take lapsed or void legacies.

a. They do not take legacies which have lapsed or are void. *Bennett* v. *Batchelor*, 3 B. C. C. 28; *A.-G.* v. *Tomkins*, Amb. 216.

Nor residue given on trust.

b. Nor do they take, where the whole is expressly given to them on trusts, which are void: *Dacre* v. *Patrickson*, 1 Dr. & Sm. 182; *Johnstone* v. *Hamilton*, 11 Jur. N. S. 777; or not exhaustive: *Dawson* v. *Clarke*, 18 Ves. 247; *Ellcock* v. *Mapp*, 2 Ph. 793; 3 H. L. 492; or not declared: *Milnes* v. *Slater*, 8 Ves. 295; *Taylor* v. *Haygarth*, 14 Sim. 8; *Cradock* v. *Owen*, 2 Sm. & G. 241; *Read* v. *Stedman*, 26 B. 495; *Vezey* v. *Jamson*, 1 S. & St. 69; *Chester* v. *Chester*, 12 Eq. 444.

The fact, however, that the executors are made trustees for some particular and limited purpose does not affect their title to the residue. *Batteley* v. *Windle*, 2 B. C. C. 31; *Griffiths* v. *Hamilton*, 12 Ves. 299; *Pratt* v. *Sladden*, 14 Ves. 193.

Executors not entitled to

2. And even when the property is not given to the executors

the residue when they are treated as trustees.

upon trust, if they are appointed to carry out the will, or are treated as undertaking a duty and not receiving a benefit, they take as trustees. *Andrewin* v. *Poilblanc*, 3 Atk. 299; *Braddon* v. *Farrand*, 4 Russ. 87; *Girard* v. *Hanbury*, 3 Mer. 150; *Lord North* v. *Purdon*, 2 Ves. Sen. 495; *Dillon* v. *Reilly*, 9 L. R. Ir. 57.

Cases where the testator intends to dispose of all his property by his will.

3. And a presumption against the executor's title is raised, if the testator shows an intention to dispose of the residue, though he may not actually do so: *Bishop of Cloyne* v. *Young*, 2 Ves. Sen. 91; *Lord North* v. *Purdon*, 2 Ves. Sen. 495; *Davers* v. *Dewes*, 3 P. W. 40; *Mordaunt* v. *Hussey*, 4 Ves. 117; *Mence* v. *Mence*, 18 Ves. 348; or if he expresses an intention to dispose of part only of his property by his will: *Urquhart* v. *King*, 7 Ves. 225; or if the property is directed to go according to law: *Cranley* v. *Hale*, 14 Ves. 307.

4. The executor takes as trustee for the next of kin:—

A legacy to a sole executor converts him into a trustee.

a. If there is a legacy to a sole executor, whether general or specific, or whether in possession or reversion, or whether expressed to be for his trouble or not, or whether for life or not, if there is no gift of the remainder. *Nourse* v. *Finch*, 1 Ves. Jun. 344; 2 Ves. Jun. 78; *Southcot* v. *Watson*, 3 Atk. 226; *Seley* v. *Wood*, 10 Ves. 71; *Oldman* v. *Slater*, 3 Sim. 84; *Rachfield* v. *Careless*, 2 P. W. 158; *King* v. *Denison*, 1 V. & B. 260; *Zouch* v. *Lambert*, 4 B. C. C. 326; *Dick* v. *Lambert*, 4 Ves. 725.

It makes no difference that the executrix is the testator's wife or relation, or that legacies are given to the next of kin. *Randall* v. *Bookey*, 2 Vern. 425; *Dick* v. *Lambert*, 4 Ves. 725; *Farrington* v. *Knightley*, 1 P. W. 543; and see note, *ib.*

What legacies will not convert an executor into a trustee.

It seems doubtful whether a contingent reversionary interest would raise a presumption against the executor's title. *Lynn* v. *Beaver*, T. & R. 63.

A legacy to an executor's wife will not convert him into a trustee for the next of kin. *Wilson* v. *Ieat*, 2 Ves. Sen. 166; *Fruer* v. *Bouquet*, 21 B. 33.

In these cases the presumption against the executor's title arises from the difficulty of supposing that the testator would have given him something, if he meant him to have all

Therefore, if the express legacy can be accounted for on other grounds, no presumption arises. If, for instance, the legacy is an exception out of a larger gift: *Griffith* v. *Rogers*, 1 Eq. Ab. 245, pl. 8; *Jones* v. *Westcomb*, Prec. Ch. 316; and this includes the case of a gift to the executor for life, if there is a gift of the remainder: *Granville* v. *Beaufort*, 1 P. W. 114; or if the legacy is to an executrix, a married woman, for her separate use. *Newstead* v. *Johnson*, 2 Atk. 45; 9 Mod. 242.

Equal legacies to several executors.

b. Equal legacies to several executors will also raise a presumption against their title to the residue. *Ommaney* v. *Butcher*, T. & R. 260; *In re Hudson's Trusts*, 31 W. R. 778; 52 L.J. Ch. 789.

And this presumption, it seems, is not rebutted by the fact that unequal bounty is shown them as regards real estate. *Mackleston* v. *Brown*, 6 Ves. 52. p. 64.

Nor by the fact that specific legacies of unequal value are given to two out of three executors. *In re Glukman; A.-G.* v. *Jefferys*, (1907) 1 Ch. 171.

Legacies to some executors and not to others.

But legacies to some executors and not to others, or unequal legacies to all, raise no presumption against them, since the intention may be to favour some more than others. *Griffiths* v. *Hamilton*, 12 Ves. 299; *Pratt* v. *Sladden*, 14 Ves. 193; *Bowker* v. *Hunter*, 1 B. C. C. 328; *Rawlings* v. *Jennings*, 13 Ves. 39; *Dawson* v. *Thorne*, 3 Russ. 235; *In re Knowles: Roose* v. *Chalk*, 28 W. R. 975.

Legacy to one of several executors for his trouble.

If, however, a legacy be given to one of several executors expressly for his trouble, they all take as trustees. *White* v. *Evans*, 4 Ves. 21; *Milnes* v. *Slater*, 8 Ves. 295.

Executors appointed for particular reasons.

5. If it is clear that the executors are appointed not from personal motives, but merely from convenience or because they occupy a particular position, they take as trustees. *Urquhart* v. *King*, 7 Ves. 224; *De Mazar* v. *Pybus*, 4 Ves. 644; *Sadler* v. *Turner*, 8 Ves. 616.

CANADIAN NOTES.

Chap. LIX.

Before the Wills Act.

A testator bequeathed personalty to his two sisters and their children, all to share alike if living. One sister died in his lifetime. Held, that her legacy lapsed. *Bradley* v. *Wilson*, 13 Gr. 642.

The addition of words of limitation to a bequest did not prevent a lapse. *Mealey* v. *Aitkins*, 27 Gr. 563.

A devise of a residue "to be equally divided amongst my five sons above mentioned," the sons having been previously named as individual legatees, is not a devise to a class, and one son dying in the testator's lifetime, his share went to the heirs-at-law of the testator. *McIntosh* v. *Ontario Bank*, 19 Gr. 155.

In a New Brunswick case, where there was a gift to the "heirs of E. P.," naming them, and allotting specific shares to each by name, and two of them died in the testator's lifetime, it was held that the shares allotted to them did not lapse, but passed to their representatives. *Re Price*, N.B. Eq. Cas. 429. It is difficult to see how this case can be supported. If taken as a gift to a class those living at the testator's death should have taken all. If as a gift to individuals there was nothing to prevent a lapse.

Where the devise to a prior devisee lapsed the devises over also lapsed it being clear that the testator intended the survival of the prior devisee to be an essential part of his scheme of disposition. *Riddell* v. *McIntosh*, 9 O.R. 606.

A devise to charitable uses having been held void, the residuary disposition being, "all the rest . . . not hereinbefore mentioned or disposed of," the lapsed devise passed to the heirs. *Lewis* v. *Patterson*, 13 Gr. 223.

Wills Act.

By the Wills Act, "unless a contrary intention appears by the will, such real estate or interest therein 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." R.S.O. c. 128, s. 27; R.S.B.C. c. 193, s. 22; R.S.M. c. 174, s. 23; R.S.N.B. c. 160, s. 19; R.S.N.S. c. 139, s. 25.

A devise which fails on account of the Mortmain Act falls into the residue. *Re Smith*, 7 O.L.R. 619.

Lapse devise falls into residue though there is a wrong enumeration.

A lapsed devise will fall into the residue although there is a wrong enumeration of what the residue consists of. Thus, a testator devised and bequeathed "all" his real and personal property to A. To his sister he devised certain lands. And he bequeathed all the rest and residue of his "estate," "consisting of money, promissory notes, vehicles and implements" to his brother. The sister died before the testator and the devise to her lapsed. It was held that as the devise to her was excepted from the general devise to A., on her death it must fall into the residue under the statute, notwithstanding the wrong enumeration. *Re Farrell*, 12 O.L.R. 580.

Where lapsed bequest is part of a residue.

Where bequests which are part of a residue fail to take effect on account of their being void they do not accrue to the other legatees who have specific portions of the residue, but are undisposed of and pass to those entitled on intestacy. *Purcell* v. *Bergin*, 20 A.R. 535.

Particular and general residue.

Where a testator directed a conversion of his real estate, and directed legacies to be paid thereout, some of which were void, and then directed that the balance be invested for the benefit of two legatees, and after some further dispositions, made a general residuary disposition, it was held that the void legacies went to the legatees of the particular residue, and did not go to augment the general residue of the estate. *McMylor* v. *Lynch*, 24 O.R. 632.

When gift is to joint tenants.

A devise and bequest of real and personal property to two persons constitutes them tenants in common of the realty and joint tenants of the personalty. Consequently, on the death

of one of them before the testator, there is a lapse as to one-half of the realty, but none as to the personalty which goes to the survivor. *Re Gamble*, 13 O.L.R. 299.

Estate tail does not lapse if issue in tail survive.

By the Wills Act, "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." R.S.O. c. 128, s. 35; R.S.B.C. c. 193, s. 29; R.S.M. c. 174, s. 30; R.S.N.B. c. 160, s. 26; R.S.N.S. c. 139, s. 31.

Gift to child or other issue does not lapse if issue survive.

"Where any person, being a child or other issue of the testator, to whom any real 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." R.S.O. c. 128, s. 36; R.S.B.C. c. 193, s. 30; R.S.M. c. 174, s. 31; R.S.N.B. c. 160, s. 27; R.S.N.S. c. 139, s. 32.

Statute not retrospective.

A will made and re-published before this Act is not affected thereby, though the testator died thereafter. *Zumstein* v. *Hedrick*, 8 O.R. 338.

Child means legitimate child.

The expression "child or other issue" means legitimate child or issue, and therefore, on an illegitimate devisee or legatee dying in the testator's lifetime, though leaving issue, the gift lapses. *Hargraft* v. *Keegan*, 10 O.R. 272.

Husband and issue of deceased child.

After this Act a testatrix directed her estate to be divided into four equal parts, and gave one to each of her four children. One daughter died in her lifetime leaving a husband and two children who survived the testatrix. Held, that one-fourth share of the estate passed to the husband and children of the deceased daughter. *Re Hunt*, 5 O.L.R. 197.

Where there is a devise to a class the statute does not apply. Thus, where there was a devise to the testator's children at Barnstable "to be divided among them in equal shares," and one died leaving issue who survived the testator, his issue were excluded. *Re Clark*, 8 O.L.R. 599; *Re Sinclair*, 2 O.L.R. 349. Statute does not apply to class.

And the rule is the same, although one of the class is mentioned by name. Thus, where a residue was given to "all my children except J. . . . her share or a double share shall go to M.," and M. died before the testator leaving issue, who survived him, they were excluded. *Re Moir*, 14 O.L.R. 541.

Nor does the statute apply to a similar devise where a child was dead at the making of the will, but left issue who survived the testator. *Re Williams*, 5 O.L.R. 345. Child dead when will made.

Nor to a gift to a child, on a condition which becomes impossible by reason of the death. The gift was on condition that the son should form a partnership with a named person, and the son having died in the testator's lifetime the condition could not be performed. *McCallum* v. *Riddell*, 23 O.R. 537. On condition becoming impossible.

As to the title of executors to property undisposed of, see notes to Chapter XXXIX. Right of executors.

CHAPTER LX.

ADMINISTRATION.

I.—Payment of Debts, &c.

A. *Funeral Expenses.*

Chap. LX.

Funeral expenses.

The executor, if he has received assets, is personally liable for the proper funeral expenses of his testator, though he may not have ordered the funeral. Those expenses are payable out of the assets before any others. *Tugwell* v. *Heyman*, 3 Camp. 297; *Rogers* v. *Price*, 3 Y. & J. 28; *Corner* v. *Shaw*, 3 M. & W. 350; *Magennis* v. *Dempsey*, I. R. 3 C. L. 327.

In case of necessity, a stranger may order the funeral and pay for it out of the assets, without rendering himself liable as executor *de son tort*, and he may recover the expenses from the estate. Vin. Ab. Executor, B. a, 24; *Green* v. *Salmon*, 8 A. & E. 348.

As against creditors the funeral expenses must not be more than is reasonable, having regard to the position of the deceased. *Hancock* v. *Podmore*, 1 B. & Ad. 260.

Funeral expenses of married woman.

In the case of a married woman, the husband is liable for her funeral expenses, but where the funeral expenses are made a charge by her will, or she has an estate of her own which does not go to the husband, he may be recouped the funeral expenses. *Willsher* v. *Dobie*, 2 K. & J. 647; *In re M'Myn*: *Lightbown* v. *M'Myn*, 33 Ch. D. 575.

B. *Costs of Administration.*

Costs of administration.

After funeral expenses come the costs of administration, and these costs have priority over any other costs directed to be paid out of the estate, for instance, costs of a suit in the Probate

Division. *In re Mayhew; Rowles* v. *Mayhew*, 5 Ch. D. 596; *Gilhooly* v. *Plunkett*, 9 L. R. Ir. 324; *In re Price; Williams* v. *Jenkins*, 31 Ch. D. 485.

Since the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), costs ordered by the Probate Division to be paid out of the estate are payable out of the real estate if the personalty is insufficient. *In re Vickerstaff; Vickerstaff* v. *Chadwick*, (1906) 1 Ch. 762, where *In re Shaw; Bridges* v. *Shaw*, (1894) 3 Ch. 615, is considered.

Testators often give directions how costs of administration are to be borne.

Testamentary expenses include costs of action.

In cases not affected by the Land Transfer Act, a direction to pay testamentary expenses included the costs of an administration action, except in so far as they had been increased by the administration of the real estate. *Morrell* v. *Fisher*, 4 D. G. & S. 422; *Miles* v. *Harrison*, 9 Ch. 316; *Harbe* v. *Harbe*, 20 Eq. 471; *Penny* v. *Penny*, 11 Ch. D. 449; *In Young; Young* v. *Dolman*, 44 L. T. 499; *Patching* v. *Barnett*, 51 L. J. Ch. 74; (1907) 2 Ch. 154, n.; *In re Middleton; Thompson* v. *Harris*, 19 Ch. D. 552; *In re Copland; Mitchell* v. *Bain*, 44 W. R. 94; see *In re Roper; Taylor* v. *Bland*, 45 Ch. D. 126.

And this rule has not been affected by that Act. *In re Betts; Dougaty* v. *Walker*, (1907) 2 Ch. 149.

Executorship expenses.

The term "executorship expenses" has the same meaning as testamentary expenses. *Sharp* v. *Lash*, 10 Ch. D. 468.

Testamentary expenses also include estate duty payable in respect of the personal estate and of a fund in possession appointed under a general power (*a*), but not estate duty payable in respect of the real estate (*b*), nor settlement estate duty (*c*), nor estate duty upon a fund appointed under a general power subject to a prior life interest (*d*). *In re Clemow; Yeo* v. *Clemow*, (1900) 2 Ch. 182; *In re Treasure; Wild* v. *Stanham*, (1900) 2 Ch. 648; *In re Fearnsides; Baines* v. *Chadwick*, (1903) 1 Ch. 250 (*a*); *In re Sharman; Wright* v. *Sharman*, (1901) 2 Ch. 280 (*b*); *In re King; Travers* v. *Kelly*, (1904) 1 Ch. 368 (*c*); *In re Dixon; Penfold* v. *Dixon*, (1902) 1 Ch. 248 (*d*). See, too, pp. 194 *et seq.*

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Direction to pay testamentary expenses of another.

A direction to pay the testamentary expenses of a person, who afterwards dies intestate, may include the costs of procuring administration to her estate. *In re Clemow; Yeo* v. *Clemow*, (1900) 2 Ch. 182.

Funeral and other expenses.

Costs of an administration suit have been held to be included under "funeral and other expenses" and "legal expenses." *Webb* v. *De Beauvoisin*, 31 B. 573; *Coventry* v. *Coventry*, 2 Dr. & Sm. 470.

But the words "debts and costs of proving the will" do not include costs of a suit. *Stringer* v. *Harper*, 26 B. 585; see *Alsop* v. *Bell*, 24 B. 451.

Costs of special case.

Browne v. *Groombridge*, 4 Mad. 495, and *Gilbertson* v. *Gilbertson*, 34 B. 354, where the costs of a special case were held not included in testamentary expenses, and *In re Biel's Estate*, 16 Eq. 577, may be considered overruled. See, too, *Brown* v. *Bardett*, 53 L. J. Ch. 56.

The plaintiff's costs of an unsuccessful action impeaching the will are not testamentary expenses. *In re Prince; Godwin* v. *Prince*, (1898) 2 Ch. 225.

A fund charged with payment of testamentary expenses need not be retained by the executors for more than a year if no action is apprehended. *In re Cope's Trusts*, 36 L. T. 837.

Charges of executing the will have been held not to include fines on admission to copyholds specifically devised. *Cole* v. *Jealous*, 5 Ha. 51.

Personal estate liable for costs.

If no particular fund is appointed by the testator, costs of administration are payable out of the personal estate, except in so far as they have been increased by administration of the realty, which in that case must bear the added costs, and the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), has made no alteration in this respect. *Ripley* v. *Moysey*, 1 Kee. 578; *Pickford* v. *Brown*, 2 K. & J. 426; *Jackson* v. *Pease*, 19 Eq. 96; *In re Middleton; Thompson* v. *Harris*, 19 Ch. D. 552; *In re Towry's Settled Estate; Dallas* v. *Towry*, 41 Ch. D. 64, 87; *In re Jones; Elgood* v. *Kinderley*, (1902) 1 Ch. 92; see *In re Price; Williams* v. *Jenkins*, 31 Ch. D. 485.

What costs are included.

The costs of administration include the costs of getting in any part of the real and personal estate which is in a foreign

country, and the payment of all duties necessary for that purpose. *Peter* v. *Stirling*, 10 Ch. D. 279; *Re Maurice: Braun* v. *Maurice*, 75 L. T. 415.

Mixed residue bears costs rateably.

Where the residue is composed of the proceeds of sale of realty directed to be converted and of personalty, given together as a mixed fund, costs of administration are payable out of the mixed fund rateably, and a lapsed share will not be applied before shares well disposed of. This is the case though the personalty may not be exonerated for the purpose of paying debts. *Lockeratt* v. *Pridhoni*, 48 L. J. Ch. 636.

Unappointed fund not first liable.

In the case of a fund subject to a power, the costs of administration will be borne rateably by appointed and unappointed shares. *Warren* v. *Postlethwaite*, 2 Coll. 108, 116; *Trollope* v. *Routledge*, 1 De G. & S. 662; *Moore* v. *Dixon*, 15 Ch. D. 566; *In re Chisholm: Goddard* v. *Brodie*, (1902) 1 Ch. 457.

Probate and estate duty.

Probate Duty and the old Estate Duty were payable out of the residuary personalty. *In re Bourne: Martin* v. *Martin*, (1893) 1 Ch. 188.

The heir could not be made liable to pay the Probate Duty. *Shepheard* v. *Beetham*, 6 Ch. D. 597.

C. *Debts and their Priority.*

Debts.

After payment of the funeral and testamentary expenses, the debts must be paid.

Sect. 40 of Bankruptcy Act.

Under sect. 40 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), which binds the Crown so far as the priorities of debts are concerned (see sect. 150), all debts are to be paid *pari passu*.

The effect of the section is to abolish pre-existing priorities given by statute, except so far as they are saved by the Act.

Sect. 10 of Judicature Act.

Sect. 10 of the Judicature Act, 1875 (38 & 39 Vict. c. 77), imports the Bankruptcy Rules as to payment of debts into the administration in the Chancery Division of the estate of a person, whose estate may prove to be insufficient for the payment in full of his debts and liabilities. *In re Lemy: Turn* v. *Emmerson*, (1895) 1 Ch. 652; *In re Whitaker: Whitaker* v. *Palmer*, (1901) 1 Ch. 9; *M'Causland* v. *O'Callaghan*, (1904)

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I Ir. 376; see, too, *In re Leinster Contract Corporation*, (1903) I Ir. 517. *In re Mayo*, 29 Ch. D. 545; *Smith* v. *Morgan*, 5 C. P. D. 337; *In re Williams*: *Jones* v. *Williams*, 36 Ch. D. 573, are therefore no longer law.

What is an insufficient estate.

For the purpose of ascertaining whether an estate is insufficient to pay debts and liabilities of the deceased, the costs of administration must be brought into account, and also any interest payable on the debts, either according to the contract between the parties or under the Bankruptcy Rules. *In re Long*: *Tarn* v. *Emmerson*, (1895) 1 Ch. 652; *In re Whitaker*: *Whitaker* v. *Palmer*, (1904) 1 Ch. 290, not following *In re Healey*, 75 L. T. 307.

Debts made preferential by statute.

There are, however, certain debts to which priority is given by statute.

1. By the Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), which applies to the administration in Chancery of the estate of a person, who dies insolvent after the 31st December, 1888 (*In re Heywood*: *Parkington* v. *Heywood*, (1897) 2 Ch. 593), priority is given to—

Rates.

(*a*) Parochial and other local rates due and having become due within twelve months before the death, and all assessed taxes, land tax, and income tax assessed on the deceased up to the 5th April before his death, not exceeding one year's assessment;

Wages of servants.

(*b*) Wages and salaries of clerks and servants for services rendered during four months next before the death, not exceeding 50*l.* (*Ex parte Fox*, 17 Q. B. D. 4);

Wages of labourers.

(*c*) Wages of labourers and workmen not exceeding 25*l.* for time or piecework in respect of services rendered during two months next before the death, with a provision for the case of wages payable in a lump sum at the end of the year of hiring.

The secretary of a company may be a clerk or servant within sub-section (*b*), but a secretary who only occasionally attends at the office and employs a clerk to attend regularly is not within these words. *Cairney* v. *Back*, (1906) 2 K. B. 746.

Debts due by officers of Friendly and

2. 4 & 5 Will. IV. c. 40, s. 12; 6 & 7 Will. IV. c. 32, s. 4, both now repealed, gave priority to debts owing to Friendly and

Building Societies by their officers: *Moore* v. *Marriott*, 7 Ch. D. 513; and the privilege is preserved as regards Friendly Societies by the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25), s. 35. Building Societies.

3. In the case of a person dying, while subject to military law, a priority is given to certain debts by the Regimental Debts Act, 1893 (56 Vict. c. 5), s. 2. Regimental debts.

4. The guardians have no preference against the estate of a deceased pauper for expenses of maintenance under sect. 16 of the Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103). *Lever* v. *Betham & Sons*, (1895) 1 Q. B. 59. Guardians of poor.

5. By the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 3, a claim for money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him or otherwise is postponed to the claims of other creditors. *In re Long; Tarn* v. *Emmerson*, (1895) 1 Ch. 652. Claim of wife for money lent to husband.

An order in lunacy directing certain debts to be paid in priority to others ceases to operate after the debtor's death. *In re Seager Hunt; Silicate Paint Co.* v. *Hunt*, (1906) 2 Ch. 295. Priority given in lunacy ceases to operate after death.

It may still be necessary to refer to the old rules as to priorities of debts for purposes of an executor's retainer. They were as follows:— Old rules as to priority of debts.

I. Debts due to the Crown by record or specialty. Crown debts by record or specialty.

Whoever receives money, knowing or having reason to believe that it is money of the Crown, becomes a debtor to the Crown. *Rex* v. *Wrangham*, 1 Cr. & J. 408; *Rex* v. *Ward*, 2 Ex. 301, n.; *Reg.* v. *Adams*, 2 Ex. 293; *In re West London Commercial Bank*, 38 Ch. D. 364. What makes a Crown debtor.

An Education Board, having a discretionary power independent of the Government to expend money entrusted to it, is not in the position of the Crown in respect of such money. *Fox* v. *Government of Newfoundland*, (1898) A. C. 667.

A surety who has paid a Crown debt is entitled to the Crown's priority. *In re Lord Churchill; Manisty* v. *Churchill*, 39 Ch. D. 174. Surety paying Crown debt.

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Debts made preferential by statute.

II. Debts to which priority is given by statute.

Debts due by officers of Savings Bank.

To those already enumerated (*ante*, p. 804) must be added debts owing to a Savings Bank in respect of sums received by its officers by virtue of their office; see the Trustee Savings Banks Act, 1863, and the Savings Banks Act, 1891 (26 & 27 Vict. c. 87, s. 14; 54 & 55 Vict. c. 21, s. 13). *Ex parte Riddell: Re Batson*, 3 Mont. D. & D. 80; *Ex parte Fleet; In re Jardine*, 4 De G. & S. 52; *In re Williams: Jones* v. *Williams*, 36 Ch. D. 573.

Registered judgments.

III. Judgments against the deceased, when the judgment has been registered under the Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38), s. 3. *Kemp* v. *Waddington*, L. R. 1 Q. B. 355.

Surety paying judgment debt.

A surety who has paid the judgment debt without taking an assignment is in the same position as the judgment creditor. *In re M'Myn: Lightburn* v. *M'Myn*, 33 Ch. D. 575.

What judgments have priority.

The judgment must be the judgment of a Court of Record, and by the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 18, all decrees of Courts of Equity and all rules of Courts of common law and all orders in lunacy, whereby any money or any costs, charges, or expenses shall be payable, are to have the effect of judgments.

The order must be for payment of a definite sum of money to a particular person; therefore an order for an account and payment of what may be found due (*a*), a chief clerk's certificate finding a sum due (*b*), and an order to pay into Court (*c*), give no priority. *Chadwick* v. *Holt*, 8 D. M. & G. 584 (*a*); *Earl of Mansfield* v. *Ogle*, 4 De G. & J. 38 (*b*); *Wand* v. *Docker*, 5 Jur. N. S. 1287 (*c*).

Judgments against the legal personal representative.

IV. Judgments against the legal personal representative for debts of the deceased, whether the judgment is registered or not. *Jennings* v. *Rigby*, 33 B. 198; *In re Williams' Estate: Williams* v. *Williams*, 15 Eq. 270.

Such a judgment has no priority, unless it is actually signed before the date of a judgment for administration of the estate. *Parker* v. *Bingham*, 33 B. 535; *In re Stubbs' Estate: Hanson* v. *Stubbs*, 8 Ch. D. 154.

Order to pay call.

An order against the legal personal representative to pay a call out of the assets of the deceased in due course of administration is not a judgment which will give priority. *In re Hubback: International Marine Agency Homœopathic Company* v. *Hawes*, 29 Ch. D. 934.

Judgments *inter se*.

Inter se judgments against the executor have priority according to order of date. *Abbis* v. *Winter*, 3 Sw. 578, n.; *Morrice* v. *Bank of England*, 3 Sw. 573; Ca. t. Talb. 212; *Dolloud* v. *Johnson*, 2 Sm. & G. 301.

V. Statutes and recognizances.

Recognizances.

Statutes are obsolete. A familiar kind of recognizance is the ordinary recognizance of a receiver and manager appointed by the Court, which does not create a Crown debt. See *Seagram* v. *Tuck*, 18 Ch. D. 296.

Debts by specialty and simple contract.

VI. Debts by specialty (including arrears of rent (*a*)) and simple contract, including judgments against the deceased not registered (*b*); see the Administration of Estates Act, 1869 (32 & 33 Vict. c. 46). *In re Hastings: Shirreff* v. *Hastings*, 6 Ch. D. 610 (*a*); *Van Ghelaive* v. *Nerincks*, 21 Ch. D. 189 (*b*).

Incumbent's dilapidations.

Formerly a debt due from an incumbent's estate for dilapidations was postponed to simple contract debts, but it now ranks with them under the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43). *In re Monk: Wagman* v. *Monk*, 35 Ch. D. 583.

Debt due to Crown.

A simple contract debt due to the Crown is not entitled to priority over a specialty debt. The result is that the assets must be apportioned between specialty and simple contract debts, and the Crown will be paid in priority out of the portion available for simple contract debts. *In re Bentinck: Bentinck* v. *Bentinck*, (1897) 1 Ch. 673; see *New South Wales Taxation Commissioner* v. *Palmer*, (1907) A. C. 179.

Money lent to husband.

VII. Money of a wife lent to her husband for the purposes of his business. *In re Leng: Turn* v. *Emmerson*, (1895) 1 Ch. 652.

Voluntary debts.

VIII. Voluntary bonds and covenants. *Jones* v. *Powell*, 1 Eq. Ca. Ab. 84; see *Blount* v. *Doughty*, 3 Atk. 483; *Dawson* v. *Kearton*, 3 Sm. & G. 186.

The holder of a promissory note or similar instrument given

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without consideration has no claim upon the estate. *In re Whitaker*, 42 Ch. D. 119.

A voluntary bond assigned for value is entitled to the same priority, as if it had originally been given for value. *Payne* v. *Mortimer*, 4 De G. & J. 447.

Interest.

IX. Interest on debts not carrying interest payable under Ord. LV., r. 62. *Garrard* v. *Lord Dinorben*, 5 Ha. 213.

D. *Release of Debt.*

The question frequently arises whether a debt has been released or not. There is no distinction between law and equity in this matter. If the debt has not been released at law, it has not been released in equity. Mere verbal declarations by a testator outside his will, or entries in his books, that he has forgiven a debt, or that it is not to be enforced, are not sufficient to release it. *Aston* v. *Pye*, 5 Ves. 350, n.; *Byrn* v. *Godfrey*, 4 Ves. 6; *Reeves* v. *Brymer*, 6 Ves. 516; *Cross* v. *Sprigg*, 6 Ha. 552; see 2 Mac. & G. 113; *Peace* v. *Hains*, 11 Ha. 151.

But if the security is handed to the debtor with the intention of forgiving the debt, the debt is gone (*a*), and there may be other circumstances short of an actual release which have the same effect (*b*). *Richards* v. *Syms*, 2 Eq. Ca. Ab. 617; *Taylor* v. *Manners*, 1 Ch. 48 (*a*); see, too, *Eden* v. *Smyth*, 5 Ves. 341; *Gilbert* v. *Wetherell*, 2 S. & St. 254; *Flower* v. *Marten*, 2 M. & Cr. 459; *Yeomans* v. *Williams*, 1 Eq. 184 b.

E. *Creditor made Executor.*

Creditor appointed executor.

If a debtor appoints his creditor his executor, and the executor receives assets sufficient to pay the debt, it must be taken to have been paid. *Wankford* v. *Wankford*, 1 Salk. 299; see Co. Litt. 264 b, and Harg. and Butler's Notes.

But if the debt is due to two trustees, one of whom is appointed executor, no such presumption arises. *In re Carew*, 4 Ir. Ch. 112, overruling *Richards* v. *Wisling*, 2 Ir. Ch. 1; see *Binns* v. *Nicholls*, 2 Eq. 256.

F. *Debtor made Executor.*

Debtor appointed executor.

At law the appointment of a debtor executor, or one of several executors, extinguishes the right of action and amounts to a gift of the debt to the executor, though the debt remains assets for payment of creditors (*a*). In equity the debt remains owing both for the benefit of legatees and next of kin (*b*), and the executor is deemed to have the money in his hands as executor (*c*). *Sir John Needham's Case*, 8 Co. 135 a; *Wankford* v. *Wankford*, 1 Salk. 299 (*a*); *Carey* v. *Goodinge*, 3 B. C. C. 111; *Barry* v. *Usher*, 11 Ves. 87, 90 (*b*); *In re Bourne*; *Darcy* v. *Bourne*, (1906) 1 Ch. 697 (*c*).

As to the admissibility of evidence to rebut this equity, see the chapter on Evidence.

The right of action is released at law, though the executor dies before he proves the will, provided he does not renounce. *Wankford* v. *Wankford*, 1 Salk. 299; *In re Applebee*; *Lerwon* v. *Beales*, (1891) 3 Ch. 422.

Letters of administration granted to the debtor only suspend the remedy at law. *Sir John Needham's Case*, 8 Co. 135 a.

G. *Executor's Right to Prefer.*

Right to prefer.

The legal personal representative may prefer a creditor over other creditors of the same class, and this right has not been affected by the Administration of Estates Act, 1869 (32 & 33 Vict. c. 46), and that Act, by placing specialty and simple contract creditors on the same footing, enables the executor to pay a simple contract in preference to a specialty debt, where the estate is insolvent. *Re Orsmond*; *Drury* v. *Orsmond*, 58 L. T. 24; *In re Samson*; *Robbins* v. *Alexander*, (1906) 2 Ch. 584, overruling *In re Hankey*; *Cunliffe Smith* v. *Hankey*, (1899) 1 Ch. 541.

Statute-barred debts.

In exercise of this right, the executor may pay a statute-barred debt, unless it has been judicially declared to be barred (*a*); and he may pay a debt that does not carry interest before a debt that does (*b*). *Stahlschmidt* v. *Lett*, 1 Sm. & G.

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415; *Lewis* v. *Rumney*, 4 Eq. 451; *Midgley* v. *Midgley*, (1893) 3 Ch. 282; see *In re Wenham; Hunt* v. *Wenham*, (1892) 3 Ch. 59 (*a*); *Turner* v. *Turner*, 1 J. & W. 44; *Robinson* v. *Cumming*, 2 Atk. 409, 411; *In re Stevens; Cooke* v. *Stevens*, (1898) 1 Ch. 162, 174 (*b*).

He cannot pay a debt, which is not enforceable, because the Statute of Frauds has not been complied with. *In re Rownson; Field* v. *White*, 29 Ch. D. 358.

When right to prefer ceases.

The right to prefer continues, both at law and in equity, until judgment for the administration of the estate, and a receiver will not be appointed merely to interfere with the right. *European Assurance Society* v. *Radcliffe*, 7 Ch. D. 733; *Philips* v. *Jones*, 28 Sol. J. 360; *In re Barrett; Whitaker* v. *Barrett*, 43 Ch. D. 71; *In re Wells; Molony* v. *Brooke*, 45 Ch. D. 569; *In re Stevens; Cooke* v. *Stevens*, (1898) 1 Ch. 162, 173.

An order for an account does not bar the right. *In re Barrett; Whitaker* v. *Barrett*, 43 Ch. D. 70.

The rule at common law by which the commencement of an action by another creditor put an end to the right to prefer is now superseded by the rule in equity above stated. *Vibart* v. *Coles*, 24 Q. B. D. 364.

II. *Executor's Right of Retainer.*

Foundation of right of retainer.

The legal personal representative could be sued by creditors, who would, on recovering judgment, get priority over other creditors of the same degree. But he could not sue himself and so acquire priority. To remedy this disability the law allows the legal personal representative to retain his debt out of legal assets as against creditors of equal degree with himself.

Trustees have no such right. *Anon.*, 2 Ch. Ca. 54; *Bain* v. *Sadler*, 12 Eq. 570.

The right is a personal privilege of the legal personal representative, which he cannot in that capacity be ordered to exercise.

Therefore, if the legal personal representative of a deceased trustee declines to act in the trusts, he cannot be ordered to retain for the benefit of the trust estate a debt owing by the trustee to that estate. *In re Ridley*; *Ridley* v. *Ridley*, (1904) 2 Ch. 774; *In re Benett*: *Ward* v. *Benett*, (1906) 1 Ch. 216.

Again, if A is the executor of two estates, of which one is indebted to the other, the executor cannot be ordered to retain out of the debtor estate what is owing to the creditor estate. *In re Benett*: *Ward* v. *Benett*, (1906) 1 Ch. 216, overruling *Poe* v. *Garrett*, 28 B. 16; and not approving *In re Owen*: *Poe* v. *Shortt*, 23 L. R. Ir. 328.

It was suggested in *In re Benett* that the case may be different if both estates are being administered by the Court.

If a trustee to whom a debt is owing in that capacity is appointed legal personal representative of the debtor, he may, of course, be compelled by his beneficiaries to enforce his right of retainer. *Davies* v. *Parry*, (1899) 1 Ch. 602, 607; *In re Benett*, *supra*.

The right extends to the executor of a sole executor. *Thomson* v. *Grant*, 1 Russ. 540, n.; *In re Owen*: *Poe* v. *Shortt*, 23 L. R. Ir. 328.

As between several legal personal representatives, the right must be exercised rateably in proportion to their debts. *Chapman* v. *Turner*, 11 Vin. Ab. 72; 9 Mod. 268.

Right of administrator *durante minore ætate*.

If there is an administrator *durante minore ætate*, or to the use of another, for instance, a lunatic, the administrator may retain not only his own debt, but also the debt of the infant or lunatic. *Roskelley* v. *Godolphin*, Sir T. Raym. 484: *Franks* v. *Cooper*, 4 Ves. 763.

An officer of a bank, who is administrator, has no right to retain a debt due to the bank. *Re Richards*; *Lawson* v. *Harvey*, 85 L. T. 273.

Retainer limited to legal assets.

The right extends only to legal assets, *i.e.*, such assets as come to the legal personal representatives *virtute officii*. Legal assets include the equity of redemption in a sum of money charged on land and in a term of years. *Hawkins* v. *Lawse*, 1

Leon. 154; *Cook* v. *Gregson*, 3 Dr. 547; *Hanley* v. *M'Dermott*, I. R. 9 Eq. 35; not following *Creditors of Sir Charles Cox*, 3 P. W. 341, and *Hartwell* v. *Chitters*, Amb. 308; see, too, a note in *Lovegrove* v. *Cooper*, 2 Sm. & G. 271, 273.

Retainer as against real estate.

The legal personal representatives had no right of retainer against real estate, which was made equitable assets by the Administration of Estates Act, 1833 (3 & 4 Will. IV. c. 104). *Walters* v. *Walters*, 18 Ch. D. 182.

Effect of Land Transfer Act.

The Land Transfer Act, 1897 (60 & 61 Vict. c. 65), under which the real estate vests in the personal representative, does not give a right of retainer against the real estate. *In re Williams*; *Hobler* v. *Williams*, (1904) 1 Ch. 52.

Estate of married woman.

Property belonging to a married woman for her separate use, including earnings made her separate estate by the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), was equitable assets. *In re Poole's Estate*; *Thompson* v. *Bennett*, 6 Ch. D. 739.

But now, by the Married Women's Property Acts, 1882 and 1893 (45 & 46 Vict. c. 75; 56 & 57 Vict. c. 63), a married woman's property appears to be made legal assets.

Right must be asserted.

The right of retainer must be asserted; it does not act automatically; but it need not be asserted until something is done to interfere with the right, for instance, it may be exercised after an order to administer the estate in bankruptcy as regards assets in the executor's possession at that time. *In re Rhoades*, (1899) 2 Q. B. 347.

Right, if asserted in lifetime, may be exercised after death.

If the legal personal representative asserts the right in his lifetime, but dies before exercising it, his legal personal representative may assert it after his death. *In re Compton*; *Norton* v. *Compton*, 30 Ch. D. 15; see *Burge* v. *Brutton*, 2 Ha. 373.

To what assets it is limited.

The right is limited to such legal assets as come into the possession or under the control of the legal personal representative, or are paid into Court during his life. *In re Compton*; *Norton* v. *Compton*, 30 Ch. D. 15, not following *Wilson* v. *Coxwell*, 23 Ch. D. 764; *Taaffe* v. *Taaffe*, (1902) 1 Ir. 148.

He cannot retain against a fund in Court to the credit of an

old administration action, which would not be paid out to him, but would be paid either to beneficiaries or to the credit of an action to administer the estate of the debtor. *Pulman* v. *Meadows*, (1901) 1 Ch. 233.

Retainer in specie.

If the assets are less than the debt the assets may be retained in specie. *In re Gilbert*, (1898) 1 Q. B. 282.

Effect of s. 10 of Judicature Act.

Sect. 10 of the Judicature Act, 1875 (38 & 39 Vict. c. 77), has not destroyed the right of retainer. *Lee* v. *Nuttall*, 12 Ch. D. 61; *In re May*; *Crawford* v. *May*, 45 Ch. D. 499; see, too, *In re Leng*; *Tarn* v. *Emmerson*, (1895) 1 Ch. 652.

Retainer allowed only against creditors of equal degree.

The right of retainer could not be exercised against creditors of higher degree of whose debts the executor had notice. For instance, a simple contract debt could not be retained as against a specialty debt, and it has been held that in this respect the Administration of Estates Act, 1869 (32 & 33 Vict. c. 46), made no difference. *Talbot* v. *Frere*, 9 Ch. D. 568; *Wilson* v. *Coxwell*, 23 Ch. D. 764; *Re Jones*; *Calcer* v. *Laxton*, 31 Ch. D. 440; *Hanley* v. *M'Dermott*, I. R. 9 Eq. 35.

The Act of 1869 refers to priority of *payment*; it is probable, therefore, that the authorities above cited are not affected by *In re Samson*; *Robbins* v. *Alexander*, (1906) 2 Ch. 584, which related only to the right to pay one creditor in preference to another.

Effect of Married Women's Property Act, s. 3, on retainer.

Sect. 3 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), which postpones a sum lent by a wife to her husband for the purposes of his business to debts of other creditors, does not affect her right of retainer. *In re May*; *Crawford* v. *May*, 45 Ch. D. 499; *In re Ambler*; *Woodhead* v. *Ambler*, (1905) 1 Ch. 697.

Retainer against debt of higher degree of which executor has not notice.

But though an executor cannot retain against a creditor of higher degree, of whose debt he has notice, it has been held that if he retains his debt without notice of a debt of higher degree, the retainer cannot be questioned. *In re Fludyer*; *Wingfield* v. *Erskine*, (1898) 2 Ch. 562.

In re Fludyer was decided on the authority of *Harman* v. *Harman*, 2 Show. 492; Comb. 35, which is not a satisfactory case; but the same view is supported by *Britton* v. *Batthurst*, 3

Leo. 115; *Davis* v. *Monkhouse*, Fitzg. 76; *Hawkins* v. *Day*, Amb. 160, App. E. An article on the subject by Mr. Jenks in the Law Quar. Rev. (Ap. 1907), p. 171, "A Note on Retainer," should be consulted. *Greenwood* v. *Bradnish*, Prec. Ch. 354; 2 Eq. Ab. 461, only decided that there was no equity in that particular case to restrain an action at law.

Probably sect. 10, above referred to, which imports into the administration of estates the bankruptcy rule that all debts are payable *pari passu*, has not affected the rule so as, for instance, to enable a simple contract debt to be retained against a specialty creditor.

What debts may be retained.

The right extends to legal debts requiring a complicated account, and also to equitable debts only ascertainable after a similar account. *In re Morris' Estate; Morris* v. *Morris*, 10 Ch. 68.

Debt vested in trustee.

It has been extended to a debt vested in a trustee for the legal personal representative. "It would be a vain thing for her to pay the 100*l.* to her own trustee with the one hand and to take it back from him with the other." *Cockroft* v. *Black*, 2 P. W. 298; *Loane* v. *Casey*, 2 W. Bl. 965; *Loomes* v. *Stotherd*, 1 S. & St. 458.

But there is no right of retainer, if the legal personal representative is not in substance the person to receive the debt. For instance, a sum due to the trustees of a marriage settlement for a breach of trust by the deceased cannot be retained by a legal personal representative, who is only tenant for life under the settlement. *In re Dunning; Hatherley* v. *Dunning*, 54 L. J. Ch. 900; *In re Hayward; Tweedie* v. *Hayward*, (1901) 1 Ch. 221.

Debt owing to executor jointly with others, to one of several executors, to executor as trustee.

The right extends to a debt owing to the legal personal representative jointly with others (*a*); to a debt owing to one of several representatives (*b*); and to a debt owing to the legal personal representative as also legal personal representative of another estate, or as trustee or one of several trustees, though he becomes trustee only by virtue of his office of legal personal representative (*c*). *Crowder* v. *Stewart*, 16 Ch. D. 368; *In re Hubback; International Marine Hydropathic Company* v. *Hawes*, 29 Ch. D. 934 (*a*); *Kent* v. *Pickering*, 2 Kee. 1; *In re Morris'*

Estate; *Morris* v. *Morris*, 10 Ch. 68; *In re Hubback*: *supra* (*b*); *Thompson* v. *Cooper*, 1 Coll. 85; *Wyatt* v. *Grant*, 24 L. J. Ch. 6; *Plumer* v. *Marchant*, 3 Burr. 1380; *Ferguson* v. *Gibson*, 14 Eq. 379; *Sander* v. *Heathfield*, 19 Eq. 21; *Re Faithfull*, 57 L. T. 14; *In re Hubback*, *supra* (*c*).

Debt paid by surety, claim for damages.

It extends to a debt paid by the legal personal representative after the death, and even after judgment for administration, as surety for the deceased (*a*); to an unmatured liability on a contract of suretyship, on which there has been no actual payment (*b*); to a sum paid by the legal personal representative under an indemnity from the deceased (*c*); and to a claim for damages for breach of a pecuniary contract, for which there is a certain standard (*d*). *Boyd* v. *Brooks*, 34 B. 7; *Lee* v. *Nuttall*, 12 Ch. D. 61, 64; see *Ferguson* v. *Gibson*, 14 Eq. 379 (*a*); *Re Orme*; *Evans* v. *Maxwell*, 50 L. T. 51; *In re Owen*: *Poe* v. *Shortt*, 23 L. R. Ir. 328 (*b*); *Wildes* v. *Dudlow*, 19 Eq. 198 (*c*); *Loane* v. *Casey*, 2 W. Bl. 965; *In re Compton*: *Norton* v. *Compton*, 30 Ch. D. 15; *In re Allen*: *Adcock* v. *Evans*, (1896) 2 Ch. 345 (*d*).

Debt barred by statute.

It extends to a statute-barred debt, provided it has not been judicially decided to be barred (*a*), but not to debts, which are not enforceable against the estate, because the Statute of Frauds has not been complied with (*b*). *Stahlschmidt* v. *Lett*, 1 Sm. & G. 415; *Hall* v. *Walker*, 4 K. & J. 166; *Midgley* v. *Midgley*, (1893) 3 Ch. 282 (*a*); *In re Rowenson*: *Field* v. *White*, 29 Ch. D. 358 (*b*).

Retainer in respect of annuity.

A legal personal representative, who is entitled to an annuity under a covenant by the deceased, may, if the estate is insolvent, retain arrears of the annuity due down to the time when any money claimed to be retained is dealt with, but not future payments. *In re Beeman*: *Fowler* v. *James*, (1896) 1 Ch. 48.

Whether executor can buy up debt.

It appears not to have been decided whether a legal personal representative can buy up a debt due by the testator and then retain it. He cannot retain a debt, to which he becomes entitled as legatee of a creditor, after the debt has been proved in an administration action. *Jones* v. *Evans*, 2 Ch. D. 420; see *Hepworth* v. *Heslop*, 6 Ha. 561.

Retainer not

The right of retainer is not destroyed by a bond given by an

Lost by administration bond.

administrator in the old form to apply the assets in a due course of administration rateably and proportionately, and according to the priority required by law, and not unduly preferring his own debt. *Davies* v. *Parry*, (1899) 1 Ch. 602; *In re Betham*; *Richardes* v. *Yates*, (1901) 2 Ch. 52; see the new form, W. N. 1899, 262.

Judgments in creditor's action.

Nor by judgment for administration in a creditor's action. *Spicer* v. *James*, 2 M. & K. 387; *Thompson* v. *Cooper*, 1 Coll. 81; *Sharman* v. *Rudd*, 27 L. J. Ch. 811; *Nunn* v. *Barlow*, 1 S. & St. 588; *Davies* v. *Parry*, (1899) 1 Ch. 602; see *Player* v. *Fuxhall*, 1 Russ. 538.

Proof of debt.

Nor by proving the debt in such an action, or even part payment in the action, before the creditor became legal personal representative. *Nunn* v. *Barlow*, 1 S. & St. 588; *In re Harrison*; *Latimer* v. *Harrison*, 32 Ch. D. 395; *Davies* v. *Parry*, (1899) 1 Ch. 602.

Payment into Court.

The right is not lost by payment into Court by the legal personal representative, or by a third person ordered to make such payment in his presence (*a*); or by payment by the legal personal representative to a receiver appointed in a creditor's administration action (*b*). *Stahlschmidt* v. *Lett*, 1 Sm. & G. 415; *Chissum* v. *Deeves*, 5 Russ. 29; *Tipping* v. *Power*, 1 Ha. 405; *Richmond* v. *White*, 12 Ch. D. 361; *In re Compton*, 30 Ch. D. 15; *Hanley* v. *M'Dermott*, I. R. 9 Eq. 35 (*a*); *In re Harrison*; *Latimer* v. *Harrison*, 32 Ch. D. 395 (*b*).

The right has priority over the costs of the action. *Chissum* v. *Deeves*; *Tipping* v. *Power*, *supra*.

Payment to officer of Court in ignorance.

Payment to an officer of the Court in ignorance of the right of retainer will not destroy the right. *Ex parte James*, 9 Ch. 609; *Ex parte Simmonds*, 16 Q. B. D. 308; *In re Rhodes*, (1899) 2 Q. B. 347.

Assets got in by receiver.

After the appointment of a receiver, the legal personal representative has no claim against assets got in by the receiver. *In re Jones*; *Calver* v. *Laxton*, 31 Ch. D. 440; *In re Harrison*; *Latimer* v. *Harrison*, 32 Ch. D. 395; *Tuaffe* v. *Tuaffe*, (1902) 1 Ir. 148; see *In re Birt*; *Birt* v. *Buel*, 22 Ch. D. 604.

But a receiver will not be appointed merely to destroy the right of retainer. *In re Wells*; *Molony* v. *Brooke*, 45 Ch. D. 569.

The legal personal representative cannot retain against a creditor who has obtained judgment against him for a debt of the testator. *In re Marvin*; *Crocker* v. *Marvin*, (1905) 2 Ch. 490.

Administration in bankruptcy.

The existence of a right of retainer is not alone sufficient ground for a transfer of the administration of an insolvent estate into bankruptcy; nor, on the other hand, will such a right prevent the exercise of the judicial discretion to make a transfer. *In re York*; *Atkinson* v. *Powell*, 36 Ch. D. 233; *In re Baker*; *Nichols* v. *Baker*, 44 Ch. D. 262.

Payment out of Court.

A fund will not be paid out of Court to a legal personal representative to enable him to exercise a right of retainer, at any rate, after an inquiry as to the persons entitled has been ordered in his presence. *Trevor* v. *Hutchins*, (1896) 1 Ch. 844.

Right of proof after retainer.

If the legal personal representative, by exercising the right of retainer, has paid himself in part, he will not be allowed to prove against assets, which cannot be retained, until the other creditors have been paid a dividend equal to the dividend he received by means of the retainer. *Bain* v. *Sadler*, 12 Eq. 570.

I. *Retainer by Heir or Devisee.*

Retainer by heir or devisee.

A creditor by specialty, in which the heirs were bound, had prior to the Administration of Estates Act, 1833 (3 & 4 Will. IV. c. 104), a right of action against the heir and devisee of the debtor; and, therefore, upon principles precisely similar to those, upon which the legal personal representative was allowed to retain, the heir or devisee, if himself a creditor by specialty, could retain his debt against the land. *Loomes* v. *Stotherd*, 1 S. & S. 458.

This right was not affected by the Administration of Estates Act, 1833 (3 & 4 Will. IV. c. 104), nor, it seems, by Hinde-Palmer's Act (32 & 33 Vict. c. 46). *In re Illidge*; *Davidson* v. *Illidge*, 27 Ch. D. 478.

The right does not extend to simple contract debts. *Bain* v. *Sadler*, 12 Eq. 570; *In re Illidge*; *Davidson* v. *Illidge*, 27 Ch. D. 478; where *Hall* v. *Macdonald*, 14 Sm. 1; *Ferguson* v. *Gibson*, 14 Eq. 379, are discussed.

T.W.

A devisee on trust to sell and pay debts had no right of retainer. *Bain* v. *Sadler*, *supra*.

J. *Retainer of Debt owing to Estate by Beneficiary.*

Trustees may retain debt due to estate out of share of debtor.

Where a person is entitled to benefits under a deed and has at the same time undertaken obligations under the deed which he fails to perform, the trustees may retain the benefits as a security for the performance of the obligations. *Ex parte Mitford*, 1 B. C. C. 398; *Priddy* v. *Rose*, 3 Mer. 86; *Smith* v. *Smith*, 1 Y. & C. Ex. 338; *Burridge* v. *Row*, 1 Y. & C. C. 183, on appeal 13 L. J. Ch. 173; 8 Jur. 299; *Core* v. *Core*, 3 L. R. Ir. 135; *In re Weston*; *Davies* v. *Tugart*, (1900) 2 Ch. 164; see also *Hughes* v. *Williams*, 3 Mac. & G. 683, 690.

Voluntary settlement.

The equity applies though the deed may be a voluntary settlement. *In re Weston*; *Davies* v. *Tugart*, (1900) 2 Ch. 164.

Derivative interest may be retained.

The equity holds good against a derivative interest which the debtor acquires from a person interested under the deed. *Burridge* v. *Row*, 1 Y. & C. C. 183; on appeal 13 L. J. Ch. 173; 8 Jur. 299.

Ultimate trust for debtor.

It also holds good against property held by the trustees in trust for the debtor under an ultimate limitation in the settlement. *In re Weston*; *Davies* v. *Tugart*, (1900) 2 Ch. 164; see *Hallett* v. *Hallett*, 13 Ch. D. 232.

Legal interest in land cannot be retained.

It does not hold good against a legal interest in land taken by the debtor under the deed. The Court of Chancery had no control over such an interest. There seems to be no precise decision on the point. The analogy, however, of a trustee becoming indebted to the trust appears to apply. See *Egbert* v. *Butler*, 21 B. 500; *Fox* v. *Buckley*, 3 Ch. D. 508; where *Woodyatt* v. *Gresley*, 8 Sim. 180, was considered.

Purchaser for value bound.

It holds good against a purchaser for value of the debtor's interest. The purchaser derives his title from the deed, and therefore takes with notice of the equities arising under it. *Priddy* v. *Rose*, 3 Mer. 86.

Extent of right to retain interest under a will.

A similar equity arises in the case of wills, where a person who takes a benefit under a will, is indebted to the testator. In such a case the executors may retain the benefit given by the

will in satisfaction of the debt owing. The right of retainer extends to a share of proceeds of sale of realty given to the executors on trust for sale and to a specific gift of money. *Willis* v. *Greenhill*, 29 B. 376; *In re Akerman*; *Akerman* v. *Akerman*, (1891) 3 Ch. 212; *In re Taylor*; *Taylor* v. *Wade*, (1894) 1 Ch. 671.

It extends to interests whether in possession or reversion. *In re Watson*; *Turner* v. *Watson*, (1896) 1 Ch. 925.

It does not extend to a specific devise of land or a specific gift of leaseholds or chattels or to a share of the proceeds of sale of land directed by the will to be sold, but which descends to the heir by reason of lapse. *Ex parte Bagg*, De G. 613; *Harvey* v. *Palmer*, 4 De G. & S. 425; *In re Akerman*; *Akerman* v. *Akerman*, (1891) 3 Ch. 212; *Re Milnes*; *Milnes* v. *Sherwin*, 53 L. T. 531.

The equity prevails against an interest, which the debtor acquires from a person interested under the will. *Stammers* v. *Elliott*, 3 Ch. 195.

Retainer of husband's debt out of wife's legacy.

In the case of a husband, entitled under the old law to his wife's legacy, the husband's debt to the testator could be retained out of so much of the legacy as was payable to the husband after satisfying the wife's equity to a settlement (*a*), but the right of [illegible] if the wife assigned the legacy under the power [illegible] Married Women's Reversionary Interest [illegible] 21 Vict. c. 57) (*b*). *McMahon* v. *Burchell*, 5 Ha. 325; *In re Beiant*; *Poulter* v. *Shackel*, 39 Ch. D. 471 (*a*); *In re Batchelor*; *Sloper* v. *Oliver*, 16 Eq. 481 (*b*).

Limit of the right.

The right applies against beneficiaries under the will. It does not apply against a debtor of the testator, who after his death, establishes a right to damages against his estate; so as to enable the executors to retain the damages in satisfaction of the debt if it is barred by statute. *Dingle* v. *Coppen*, (1899) 1 Ch. 726.

What debts may be retained.

The debt may arise under a contract of sureityship entered into by the testator, ripening into a debt after his death. *In re Whitehouse*; *Whitehouse* v. *Edwards*, 37 Ch. D. 683; *In re Palmer*; *Palmer* v. *Clarke*, 13 R. 220; *In re Watson*; *Turner* v. *Watson*, (1896) 1 Ch. 925.

It would seem to follow from these cases that a legacy can be retained against a debt which was not owing to the testator, but has become due to the executor as such since the testator's death. But the retainer would be subject to any rights to the legacy created between the testator's death and the time when the debt accrued due. *Smee* v. *Baines*, 29 B. 661, was a peculiar case, depending on the view taken by the Court of the facts.

If a debt is owing to the estate of A and that estate belongs to B and there is a clear residue of A's estate without including the debt, if the debtor is a beneficiary under B's will, the debt may be retained out of his share. *Bousfield* v. *Lawford*, 1 D. J. & S. 459.

But where A is indebted to B's estate, which is indebted to C's estate, in which A is interested, A's interest in C's estate cannot be retained to satisfy his debt to B's estate in order to enable B's estate to pay its debt to C's estate. *Arison* v. *Holmes*, 1 J. & H. 530.

Statute-barred debt.

A debt may be retained, though barred by the statute. *Courtenay* v. *Williams*, 2 Ha. 539, affd. 15 L. J. Ch. 204; *Coates* v. *Coates*, 33 B. 249; *Gee* v. *Liddell* (No. 2), 35 B. 629; *In re Cordwell's Estate*; *White* v. *Cordwell*, 20 Eq. 644.

But there must be a debt, for which the legatee could be sued but for the statute. *In re Wheeler*: *Hankinson* v. *Hayler*, (1904) 2 Ch. 66.

Costs.

Costs ordered to be paid to the executors by a legatee in proceedings relating to probate of the will may be retained in the same way. *In re Knapman's Estate*; *Knapman* v. *Wreford*, 18 Ch. D. 300.

Right prevails against assignee for value.

The right is exercisable against an assignee for value of the benefit given by the will. *Willes* v. *Greenhill*, 29 B. 376; *Barnett* v. *Sheffield*, 1 D. M. & G. 371; *In re Batchelor*; *Sloper* v. *Oliver*, 16 Eq. 481, 484; *In re Orpen*; *Beswick* v. *Orpen*, 16 Ch. D. 202; *In re Knapman's Estate*; *Knapman* v. *Wreford*, 18 Ch. D. 300; *In re Palmer*; *Palmer* v. *Clarke*, 13 R. 220.

Bankruptcy of debtor.

If the debtor becomes bankrupt in the testator's lifetime, the right of retainer is gone, except as to so much as can be recovered in the bankruptcy (*a*). The same is the case if the testator in his lifetime becomes bound by a composition deed (*b*).

Cherry v. *Boultbee*, 2 Kee. 319; 4 M. & Cr. 442, overruling *Ex parte Man*, Mont. & Mac. 240; *Bell* v. *Bell*, 17 Sim. 127; *Golds* v. *Greenfield*, 2 Sm. & G. 479; *In re Hodgson: Hodgson* v. *Fox*, 9 Ch. D. 673; *In re Rees: Rees* v. *Rees*, 60 L. T. 260 (*a*); *In re Orpen: Resnick* v. *Orpen*, 16 Ch. D. 202 (*b*).

The executor's right is to pay himself out of the fund, he must therefore be entitled to receive the debt. But, if the debtor becomes bankrupt in the testator's lifetime, the executor is not at the death entitled to payment of the whole debt, he cannot therefore pay himself.

In the same way, if the debt arises only in the bankruptcy, so that the executor can only prove, he cannot retain the entire debt. Upon this principle, where a son had an option under the will of buying a house of the testator at a price, and exercised the option and then became bankrupt, and his trustee in bankruptcy disclaimed the contract and the house was afterwards sold at a lower price, it was held that the difference in price could not be retained against the son's share. Besides being a claim for damages, it only arose in and by virtue of the bankruptcy, and could only be the subject-matter of a proof under sect. 55 (7) of the Bankruptcy Act. *In re Palmer: Palmer* v. *Clarke*, 13 R. 220.

Bankruptcy after testator's death.

If the debtor becomes bankrupt after the testator's death, the debt may be retained with interest at 4 per cent. The trustee in bankruptcy is in no better position than the debtor. *Jeffs* v. *Wood*, 2 P. W. 129; *Ranking* v. *Barnard*, 5 Mad. 32; *In re Watson: Turner* v. *Watson*, (1896) 1 Ch. 925.

It has been said, that if the debt cannot be proved in the bankruptcy, there is no right to retain. For instance, where a testator deposited 2,400*l.* as security for a son's banking account and the son became bankrupt after the testator's death, and the amount due to the bank was 8,858*l.*, for which the bank proved in the bankruptcy without deducting the 2,400*l.*, it was held, that the executors had no right to retain. They could not prove for the 2,400*l.*, since, being sureties, they could not prove in competition with the bank, the principal creditors. *In re Binns; Lee* v. *Binns*, (1896) 2 Ch. 584.

It may be doubted, whether the impossibility of proof is

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material. At the death the debter had 2,400*l.* belenging te the testator. That sum the executer was entitled to retain eut of his share. How could the subsequent bankruptcy er any rule of bankruptcy destroy that right. *In re Binns* may be open te reconsideration.

It has been suggested that, whore the debtor becemes bankrupt after the testater's death and is discharged, the right ef retainer is gone. See *In re Watson: Turner* v. *Watson*, (1896) 1 Ch. 925, 933.

If the executor's right is in the nature of an equitable lien, there seems ne reason, why the debter's discharge should destroy the lieu. In *In re Palmer; Palmer* v. *Clarke*, 13 R. 220. the bankrupt's discharge was not held te destroy the right of retainer.

Effect of proof in bankruptcy.

If an executor or a receiver with authority to get in the debt proves in the bankruptcy, his right to retain the debt is gone. *Stammers* v. *Elliott*, 3 Ch. 195; *Armstrong* v. *Armstrong*, 12 Eq. 614.

Preef by a trusteo has been held net te have this effect. *Ex parte Dicken*, Buck, 115.

K. *Set-off.*

Set-off implies liability on both sides.

To raise a set-off there must he liability on both sides. Therefore a sum charged on land fer which the landowner is net personally liable cannot be set eff against a sum due to the landewner by the person entitled to the charge. *Mongpenny* v. *Bristow*, 2 R. & M. 117; see also *In re Morley: Morley* v. *Saunders*, 8 Eq. 594.

Set-off of debt due to executor against legacy.

There can be ne right ef retainer or set-off in the case of cross demands existing in different rights. Fer instance, the executer cannet retain a legacy to satisfy a debt owing te the executor personally. *M'Mahon* v. *Burdett*, 2 Ph. 127; *Freeman* v. *Lomas*, 9 Ha. 109; *Middleton* v. *Pollock; Ex parte Nugee*, 20 Eq. 29.

Debt owing by executor personally and debt owing

Where money is owing by a person in his private capacity, it cannot be set off against a debt owing to him as executor. It makes no difference, that the executor is also entitled te the

residue and that the estate is sufficient to pay the debts. *Bishop* v. *Church*, 3 Atk. 691; *Mellicott* v. *Bowes*, 1 Ves. Sen. 207, 9 Ha. 113; *Freeman* v. *Lomas*, 9 Ha. 109; *Middleton* v. *Pollock*; *Ex parte Nugee*, 20 Eq. 29; *Ex parte Mosier*; *In re Willis Percival & Co.*, 12 Ch. D. 491; *Phillips* v. *Howell*, (1901) 2 Ch. 773; see *Jones* v. *Mossop*, 3 Ha. 568; *Bailey* v. *Finch*, L. R. 7 Q. B. 34.

to him as executor.

A debt which is owing by or to the testator or intestate in his lifetime cannot be set off against a debt, which does not become payable till after his death, and is therefore payable to or by the executor or administrator. *Rees* v. *Watts*, 11 Ex. 410; *Newell* v. *National Provincial Bank of England*, 1 C. P. D. 496; *Shipman* v. *Thompson*, Willes, 103; *Lombardo* v. *Older*, 17 B. 542; *Hallett* v. *Hallett*, 13 Ch. D. 232; see *Thomas* v. *Howell*, 18 Eq. 198.

Debt owing by or to testator in his lifetime and debt becoming due after his death.

It was at one time thought, that there was an exception to the rule in the case of mortgagees, who received policy monies after the testator's death more than sufficient to satisfy the mortgage debt. In some cases they were held entitled to set off the surplus against a debt due to them by the testator outside the mortgage, but it is now well settled that they cannot do so. *Talbot* v. *Frere*, 9 Ch. D. 568; *In re Gregson*; *Christison* v. *Bolam*, 36 Ch. D. 223; not following *Spalding* v. *Thompson*, 26 B. 637; *In re Hasilfoot's Estate*, 13 Eq. 327; *Ex parte National Bank*, 14 Eq. 507.

Case of mortgage.

It seems a debt due to a trustee personally cannot be set off against a share of the trust fund belonging to the debtor. *Stammers* v. *Elliott*, 3 Ch. 195 (the 150*l*.).

Debt to trustee personally and debtor's share of fund.

But a sum owing by an administrator to one of the next of kin as part of his share in the intestate's estate can be set off against a debt owing by the next of kin to the administrator personally. *Taylor* v. *Taylor*, 20 Eq. 155; *In re Jones*; *Christmas* v. *Jones*, (1897) 2 Ch. 190.

After judgment in an administration action no fresh right of set-off can be created against the estate being administered. For instance, a debtor to the estate cannot buy a claim against the estate and set it off against his debt. *Middleton* v. *Pollock*, 20 Eq. 29.

Judgment in administration action stops set-off.

L. *Specific Directions as to Debts.*

Charge of debts includes debts subsisting at the death.

Testators frequently give directions with reference to debts.

A direction to pay debts includes all the legal debts of the testator subsisting at his death, but not debts barred by statute. *Burke* v. *Jones*, 2 V. & B. 275; *Maxwell* v. *Maxwell*, L. R. 4 H. L. 506; see *Hankins* v. *Hankins*, 13 Ch. D. 470.

It includes a sum lent to the testator during infancy and applied by him for necessaries. *Marlow* v. *Pitfield*, 1 P. W. 559.

Trust to pay debts.

A trust for payment of debts out of personalty will not prevent the statute from continuing to run. *Scott* v. *Jones*, 4 Cl. & F. 382; *In re Hepburn*, 14 Q. B. D. 394.

But a similar trust to pay them out of real estate will keep them alive against the realty for twelve years. *In re Stephens; Warburton* v. *Stephens*, 43 Ch. D. 39.

Possibly a direction to pay specific debts barred by statute would revive them. See *Clinton* v. *Brophy*, 10 Ir. Eq. 139; *In re Bermingham*, 1 R. 4 Eq. 187; *In re Warnock's Estate*, I. R. 11 Eq. 212.

Damages accrued after the death.

A charge of debts will include damages accrued after the testator's death on an equitable liability to indemnify and damages recovered in respect of a covenant broken after the testator's death. *Wilson* v. *Leonard*, 3 B. 373; *Morse* v. *Tucker*, 5 Ha. 79; see *In re Bagot*, (1903) 1 Ir. 374, n.

Debts due at a particular time.

And though there may be words limiting the debts to a particular class of debts, such as debts due at a particular period of the testator's life, the Court will, if possible, adopt the wider construction, so as to include all the debts. *Bridgman* v. *Dove*, 3 Atk. 201; *Dormay* v. *Borradaile*, 10 B. 263; *Bermingham* v. *Burke*, 2 J. & Lat. 699.

Direction to pay debts of another.

A direction to pay the debts of another person includes the debts subsisting at his death, but not debts barred by statute. *O'Connor* v. *Huslam*, 5 H. L. 170; see, too, *Martin* v. *Smyth*, 3 L. R. Ir. 417; 5 *ib.* 266.

M. *Partnership Debts.*

A creditor of a partnership, of which one partner is dead, has concurrent remedies against the estate of the deceased partner and the surviving partners, and it makes no difference which remedy he pursues first. He may have the estate of the deceased administered in order that the separate estate may be applied in paying the separate debts and then in paying the joint debts. It is not necessary to show that the partnership is insolvent. *Wilkinson* v. *Henderson*, 1 M. & K. 582; *In re Hodgson: Beckett* v. *Ramsdale*, 31 Ch. D. 177; *In re Doetsch: Mattheson* v. *Ludwig*, (1896) 2 Ch. 836.

N. *Creditors by Subrogation.*

In some cases, persons, who are not directly creditors of the testator, may acquire rights against the estate.

Debts incurred by the executor, for instance, in carrying on the business of the testator, are the executor's debts, and the creditors, to whom these debts are owing, have no direct remedy against the testator's estate. They cannot prove against the estate or take the testator's assets in execution. *Labouchere* v. *Tupper*, 11 Moo. P. C. 198; *Owen* v. *Delamere*, 15 Eq. 134; *Abbott* v. *Parfitt*, L. R. 6 Q. B. 346; *Fairland* v. *Perry*, 3 P. & D. 217; *Farhall* v. *Farhall*, 7 Ch. 123; *Hall* v. *Fennell*, I. R. 9 Eq. 406, 615; *In re Morgan: Pillgrem* v. *Pillgrem*, 18 Ch. D. 93; *Lord Talbot de Malahide* v. *Moran*, 8 L. R. Ir. 307. Debts incurred by executors.

If any part of the estate is by the will authorised to be applied for the purpose of carrying on the business, the executor is entitled to be indemnified out of that part, and the creditors are entitled to the benefit of that indemnity. Creditor's right against the estate.

The creditors are entitled to come upon the estate only to the extent to which it is authorised to be used in the business. If it is not so authorised to be used, the creditors have no rights against the estate, though the executor may himself be entitled to an indemnity. *Strickland* v. *Symons*, 26 Ch. D. 245.

Executor's right is subject to equities.

The right to indemnity is the executor's right; it is therefore subject to any equities between him and the estate. For instance, if upon taking the accounts he is indebted to the estate, his right, and therefore the right of his creditors to indemnity, is diminished by the amount of his indebtedness. *In re Johnson; Shearman* v. *Robinson*, 15 Ch. D. 548; *Strickland* v. *Symons*, 22 Ch. D. 666; 26 Ch. D. 245; *In re Evans; Evans* v. *Evans*, 34 Ch. D. 597; *Ecclesiastical Commissioners* v. *Pinney*, (1900) 2 Ch. 736; see *Re Kidd; Kidd* v. *Kidd*, 70 L. T. 648; 42 W. R. 571; *Re Shorey; Smith* v. *Shorey*, 79 L. T. 349; *M'Aloon* v. *M'Aloon*, (1900) 1 Ir. 367.

If only one of several trustees is a defaulter, and the accounts of the others are clear, the right of subrogation as regards the latter remains. *In re Frith; Newton* v. *Rolfe*, (1902) 1 Ch. 342.

Right as between creditors of testator and of executor.

Nothing in the will can affect the rights of the testator's creditors. As against them, therefore, the executor carrying on the business is entitled to indemnity, only if the carrying on was reasonable in order to pay the debts, or if the creditors assented to the business being carried on.

If it was not reasonable, and there was no assent, it is open to the testator's creditors to repudiate the executor's act and to treat it as a devastavit or to adopt it, in which case the executor is entitled to be indemnified against the debts he has incurred. Through the medium and to the extent of this indemnity the executor's creditors may acquire priority over the testator's creditors. The same result follows if the creditors stand by and allow the business to be carried on. *Dowse* v. *Gorton*, (1891) A. C. 190; *In re Brooke; Brooke* v. *Brooke*, (1894) 2 Ch. 600; *In re Hodges; Hodges* v. *Hodges*, (1899) 1 Ir. 480.

No distinction can for this purpose be drawn between the testator's estate at his death and assets subsequently created by the executor. *Dowse* v. *Gorton*, (1891) A. C. 190.

Rights as between creditor of executor and beneficiaries.

As between the creditors of the executor and the beneficiaries, the rights depend upon the will, and for this purpose persons dealing with the executor must be taken to know the contents of the will. If the executor has no authority to carry on the business, he has no right to an indemnity, and his creditors have no right against the estate. If the will confers authority

to carry on the business for a limited period, persons becoming creditors after that period have no claim against the estate. *Cutbush* v. *Cutbush*, 1 B. 184; *Gallagher* v. *Ferris*, 7 L. R. Ir. 489.

O.—*Foreign Creditors, &c.*

Lex fori governs priorities.

The proper order and priority of distribution of assets is always a matter for the *lex fori*, and the country where the distribution takes place always claims to itself the right to regulate the course of distribution. Per Lord Cairns, *Thorburn* v. *Steward*, L. R. 3 P. C. 478, 513; *Ex parte Melbourn*, 6 Ch. 64.

Therefore, a creditor, who has by contract obtained some priority abroad, which would not be recognised here, cannot assert such priority against a fund administered here. *Pardo* v. *Bingham*, 6 Eq. 485.

Foreign assets administered according to *lex fori*.

Foreign assets are administered among the foreign creditors according to the *lex fori*.

If such assets are remitted to England before the foreign creditors are paid, they will be administered according to the foreign law for the benefit of those creditors. *Cook* v. *Gregson*, 2 Dr. 286.

In administering assets here, whether the domicile of the deceased was English or foreign, all creditors, English and foreign, are admitted *pari passu*. *In re Kloebe*; *Kammeuther* v. *Geiselbrecht*, 28 Ch. D. 175.

Creditors must bring amounts received out of special funds into hotchpot.

It is a well settled rule, that, if a creditor takes a part of a fund, which otherwise would have been available for payment of all the creditors, he will not be allowed to come upon the remainder until the other creditors have received dividends equal to what he has received. *Cockerell* v. *Dickens*, 3 Moo. P. C. 98.

Therefore, foreign creditors, who have taken foreign assets in part payment of their debts, are only admitted to prove against English assets upon the terms of bringing what they have received into account. *Shepherd* v. *Kent*, 2 Vern. 435; *Creditors of Sir Charles Cox*, 3 P. W. 341; *Morrice* v. *Bank of England*, Ca. t. Talb. 217; *In re Kloebe*; *Kammeuther* v. *Geiselbrecht*, 28 Ch. D. 175.

And creditors, who had got payment out of legal assets in accordance with their legal rights, could come against equitable assets only upon these terms. *Haslewood* v. *Pope*, 3 P. W. 322; *Chapman* v. *Esgar*, 1 Sm. & G. 175.

And an executor, who retains part of his debt out of legal assets, can come against equitable assets for the rest only upon the same terms. *Bain* v. *Sadler*, 12 Eq. 570.

II.—The Order of Assets.

The order, in which the assets of a testator are applied in administration, is as follows:—

I. General personal estate.

I. The general personal estate, not specifically bequeathed, including personalty, over which the testator has a general power of appointment, and which passes under the residuary gift by virtue of sect. 27 of the Wills Act. *Manning* v. *Spooner*, 3 Ves. 117; *In re Hartley*, (1900) 1 Ch. 152.

Charge of debts on specific fund of personalty.

If a specific fund of personalty is charged with payment of debts and legacies, that is sufficient to make it primarily liable, if the residue is effectually disposed of. *Bourne* v. *Groombridge*, 4 Mad. 495; *Chant* v. *Yeats*, 1 J. & W. 102; *Evans* v. *Evans*, 17 Sim. 106; *Phillips* v. *Eastwood*, 1 Ll. & G. 294; *Webb* v. *De Beauvoisin*, 31 B. 573; *Vernon* v. *Earl Manvers*, (No. 2), *ib.* 623; *Longfield* v. *Bantry*, 15 L. R. Ir. 101.

Charge on specific fund—no disposition of residue.

It would seem, that if no disposition of the residuary estate is attempted, the proper inference is, that the specific fund is onerated for the benefit of the next of kin, and that it and not the residue undisposed of is the primary fund for payment of debts and legacies. See *Milnes* v. *Slater*, 8 Ves. 295; *Dacre* v. *Patrickson*, 1 Dr. & S. 186; *In re Grainger: Dawson* v. *Higgins*, (1900) 2 Ch. 775.

There are, however, several cases, in which the residue, of which no disposition was attempted has been held primarily liable. Possibly those cases depended on the construction of the particular will. *Holford* v. *Wood*, 4 Ves. 76; *Howse* v. *Chapman*, 4 Ves. 542; *Hewett* v. *Snare*, 1 De G. & S. 333; *Newbegin* v. *Bell*, 23 B. 386; *Corbet* v. *Corbet*, I. R. 8 Eq. 407; see *Re Williams: Green* v. *Burgess*, 59 L. T. 310.

If personalty is conveyed by the testator upon trust to pay his debts after his death, that is the primary fund for payment of debts. *Trott* v. *Buchanan*, 28 Ch. D. 446.

If a portion of the specific fund is undisposed of, that portion bears only its proportion of the debts, &c., rateably with the rest of the fund. *Horse* v. *Chapman*, 4 Ves. 542.

Lapsed share of residue contributes rateably.

Residue of personal estate is what remains after payment of funeral and testamentary expenses, debts and legacies, and the costs of administration, including costs of an administration action. Therefore, a share of residue, which is undisposed of, bears only its proportion of expenses, debts, legacies and costs rateably with the other shares.

This is the case whether the share is undisposed of by reason of lapse, or because the legatee is incapable of taking. *Cresswell* v. *Cheslyn*, 2 Ed. 123; as explained in *Skrymsher* v. *Northcote*, 1 Sw. 566, p. 571; *Eyre* v. *Marsden*, 4 M. & Cr. 231; *A.-G.* v. *Lord Winchelsea*, 3 B. C. C. 373; *S. C.*, *A.-G.* v. *Hurst*, 2 Cox, 364; *Trethewy* v. *Helyar*, 4 Ch. D. 53; *Fenton* v. *Wills*, 7 Ch. D. 33; *Blann* v. *Bell*, *ib.* 382; overruling *Gowan* v. *Broughton*, 19 Eq. 77, so far as *contra*.

On the same principle, if the residue is directed to be accumulated for a period longer than is allowed by the Thellusson Act, so that there is an intestacy during the period of excess, debts must be borne by the general residue and not by the income, which is undisposed of. *Eyre* v. *Marsden*, 4 M. & Cr. 231; *Oddie* v. *Brown*, 4 De G. & J. 179; *Ralph* v. *Carrick*, 5 Ch. D. 984, 998.

A share of residue, which is subject to a secret trust, is in the same position as a specific gift. *In re Maddock*; *Llewelyn* v. *Washington*, (1902) 2 Ch. 220.

II. Real estate devised for payment of debts.

II. Real estate devised or ordered to be sold for payment of debts, whether it descends to the heir or not. *Miles* v. *Slater*, 8 Ves. 295; *West* v. *Lawday*, I. R. 2 Eq. 517; *Phillips* v. *Parry*, 22 B. 279; *Stead* v. *Hardaker*, 15 Eq. 175.

III. Real estate descending to the heir.

III. Real estate, which descends either because no disposition is made of it (*a*) or by reason of lapse (*b*). It makes no difference that there is a general charge of debts. *Galton* v. *Hancock*, 2

Atk. 424; *Barber* v. *Wood*, 4 Ch. D. 885; *Wood* v. *Ordish*, 3 Sm. & G. 125 (*a*); *Williams* v. *Chitty*, 3 Ves. 545 (*b*).

An attempt has been made to draw a distinction between real estate descended by reason of lapse and real estate, of which no disposition is attempted. See *Scott* v. *Cumberland*, 18 Eq. 578, the argument; *Hurst* v. *Hurst*, 28 Ch. D. 159; but the distinction seems unfounded.

IV. Real estate charged with debts.

IV. Real estate charged with payment of debts and devised subject to the charge. *White* v. *Clarke*, 2 B. C. C. 261, n.; *Harewood* v. *Oglander*, 8 Ves. 124.

A lapsed share of real estate devised subject to a charge of debts to several as tenants in common only contributes its rateable proportion with the other shares. *Fisher* v. *Fisher*, 2 Kee. 619; *Wood* v. *Ordish*, 3 Sm. & G. 125; *Peacock* v. *Peacock*, 13 W. R. 516; 34 L. J. Ch. 315; *Ryves* v. *Ryves*, 11 Eq. 539. *Scott* v. *Cumberland*, 18 Eq. 578; *Astley* v. *Micklethwait*, 15 Ch. D. 59; so far as inconsistent with the other cases, would probably not be followed.

Implied and express charge of debts.

It has been held, that, where there was a general direction to pay debts operating as a charge upon specifically devised real estate, and certain personalty was then specifically given after payment of debts, the land charged by implication and the personalty expressly charged with debts must contribute rateably. *Re Grainger: Dawson* v. *Higgins*, 83 L. T. 209, the point did not arise on the appeal.

Pecuniary legacies are not assets.

It has become usual in the text-books to insert pecuniary legacies as the fifth class of assets. It seems illogical to do this. Pecuniary legacies are not assets of the testator. His assets are his personal estate, out of which the legacies are payable. The right of pecuniary legatees to payment out of real estate charged with payment of debts, i. the personalty is exhausted in paying debts, depends on the doctrine of marshalling; see *post*. Pecuniary legacies are therefore omitted here.

V. Real estate devised not charged with debts and specific gifts.

V. Real estate devised, not charged with debts (including residuary real estate), and specifically bequeathed personal estate rateably. *Tombs* v. *Roch*, 2 Coll. 490; *Hensman* v. *Fryer*, 3 Ch. 420 (see *Lancefield* v. *Iggulden*, 10 Ch. 136); *Jackson* v. *Pease*, 19 Eq. 96.

If as between specific legatees, who are bound to contribute to debts, some become bankrupts and are unable to pay, the others must make up the deficiency. *Casally* v. *Fawcett*, 10 B. 142; *In re Peerless: Peerless* v. *Smith*, W. N. 1901, 151.

The real estate must contribute in proportion to its value without any deduction in respect of legacies or annuities charged upon it by the will. *In re Saunders-Davies: Saunders-Davies* v. *Saunders-Davies*, 34 Ch. D. 482; *In re Barden: National Provincial Bank of England* v. *Cresswell*, (1894) 1 Ch. 693.

Direction making specific bequest liable before specific devise.

The testator may make specific bequests applicable before specific devises by directing, for instance, that his debts are to be paid out of his personalty (except leaseholds) if sufficient, and if not out of his realty. *Bateman* v. *Hotchkin*, 10 B. 426.

VI. Property appointed.

VI. Property expressly appointed by the will under a general power of appointment, whether by deed or will or by will only. *Fleming* v. *Buchanan*, 3 D. M. & G. 976; *Hawthorn* v. *Sheldon*, 3 Sm. & G. 305; *Peter* v. *Peter*, 14 B. 197; *Williams* v. *Lomas*, 16 B. 1.

A power to appoint to anyone except A is a general power for this purpose. *Edie* v. *Babington*, 3 Ir. Ch. 568.

The appointed fund is general assets, though it is appointed to a single creditor in pursuance of a covenant by the appointor. *Bayliss* v. *Lawley*, (1903) A. C. 411.

It is not property divisible among creditors under sect. 44 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). If, therefore, the testator becomes bankrupt and incurs debts after the bankruptcy, the latter debts alone are payable out of the appointed fund. *In re Guedalla: Lee* v. *Guedalla's Trustee*, (1905) 2 Ch. 331.

Execution of general power by married woman.

By sect. 4 of the Married Women's Property Act, 1882, it is enacted that "the execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act."

The effect of the Act is to make the appointed property liable to her debts (including debts existing when the Act came into operation), though she may have had no separate estate at the time, when the debts were contracted. *In re Ann: Wilson* v.

Ann, (1894) 1 Ch. 549; *In re Hughes; Bestadon* v. *Hughes*, (1898) 1 Ch. 529.

An appointment for a purpose, which fails, for instance, in satisfaction of a debt, which is paid after the death of the testatrix, makes the appointed funds assets. *In re Hodgson: Darby* v. *Hodgson*, (1899) 1 Ch. 666.

Exercise of general power by married woman.

For the decisions on this subject before the Act see *Vaughan* v. *Vanderstegen*, 2 Drew. 165, 363; *Johnson* v. *Gallagher*, 3 D. F. & J. 494; *London Chartered Bank of Australia* v. *Lemprière*, L. R. 4 P. C. 572; *Magd* v. *Field*, 3 Ch. D. 587; *In re Harvey's Estate: Godfrey* v. *Harbon*, 13 Ch. D. 216; *Hodges* v. *Hodges*, 20 Ch. D. 749; *In re Roper: Roper* v. *Doncaster*, 39 Ch. D. 482; *In re Parkin: Hill* v. *Schwarz*, (1892) 3 Ch. 510; *Ex parte Gilchrist*, 17 Q. B. D. 521.

VII. Land is governed by the *lex loci*.

VII. Land in a foreign country is governed by the *lex loci rei sitæ* and is only liable to such debts as would be cast upon it by the law of that country. *Harrison* v. *Harrison*, 8 Ch. 342; see *In re Hewit: Lawson* v. *Duncan*, (1891) 3 Ch. 568.

III.—Charge of Debts.

I. General direction to pay debts:—

General direction to pay debts charges realty.

A general direction to pay debts charges them upon real estate devised by the will. *Clifford* v. *Lewis*, 6 Mad. 33; *Ball* v. *Harris*, 8 Sim. 485; 4 M. & Cr. 264; *Shaw* v. *Borrer*, 1 Koe. 559; *Harding* v. *Grady*, 1 D. & War. 430; *Elliot* v. *Montgomery*, I. R. 7 Eq. 214.

Whether realty left to descend would be charged.

Whether real estate would be charged by such a direction, where the will only attempts to dispose of personalty seems doubtful. The remarks of Sir R. P. Arden, in *Shalleross* v. *Finden*, 3 Ves. 739, probably only contemplate a case of lapse.

Subsequent express charge of certain debts on particular estates.

A subsequent express charge of particular debts upon certain estates or upon all the real estate will not overrule the general direction. *Taylor* v. *Taylor*, 6 Sim. 246; *Forster* v. *Thompson*, 4 D. & War. 303. *Douce* v. *Lady Torrington*, 2 M. & K. 600, is overruled.

Subsequent

Nor will a subsequent express charge of all the debts upon

the personalty. *Price* v. *North*, 1 Ph. 85; *Graves* v. *Graves*, 8 Sim. 43; *Hartland* v. *Murrell*, 27 B. 204.

Charge of all debts on personalty.

But a subsequent express charge of all the debts upon particular portions of the realty would, it seems, overrule the general direction. *Palmer* v. *Graves*, 1 Kee. 545. This distinction reconciles the case with those previously cited; but *quære*, whether it is substantial.

Subsequent charge of all debts upon portion of the realty.

So, too, if certain real estate is expressly excepted out of a subsequent charge of debts upon a portion of the realty, the general direction is controlled. *Thomas* v. *Britnell*, 2 Ves. Sen. 313.

Exception of certain real estate out of a subsequent charge.

An express charge of debts on real and personal estate is not controlled by subsequent partial charges. *Wrigley* v. *Sykes*, 21 B. 337.

Express charge not controlled by partial charges.

Where a testator authorised his executors "to adjust and pay all claims made upon my estate," it was held that these words did not charge debts on the real estate. *In re Head's Trustees and Macdonald*, 45 Ch. D. 310.

2. Direction to executors to pay debts:—

a. If the executor is directed to pay the debts, they are not charged upon the real estate unless real estate is expressly devised to him. *Keeling* v. *Brown*, 5 Ves. 359; *Powell* v. *Robins*, 7 Ves. 209; *Cook* v. *Dawson*, 29 B. 123; 3 D. F. & J. 127.

Direction to executors to pay debts will not charge realty where no land is devised to them.

A direction to an executor to pay debts, followed by a devise to another person introduced by the word "then," will not charge the land. *Brydges* v. *Laude*, 3 Russ. 346, n.; 3 Ves. 550; *Wilkin* v. *Lancaster*, 3 Russ. 108.

But if the real estate is devised "subject as aforesaid," it is charged. *Dowling* v. *Hudson*, 17 B. 218.

b. If land is devised to the executors, either in trust or beneficially, it is a question of construction, whether it is charged with debts. *Primâ facie* it is so charged. *Barker* v. *Duke of Devonshire*, 3 Mer. 310; *Howell* v. *Whitaker*, 3 Russ. 343; *Dormay* v *Borradaile*, 10 B. 263; *Hartland* v. *Murrell*, 27 B. 204; *Bentley* v. *Robinson*, 10 Ir. Ch. 293; *In re Tanqueray-Willaume and Landau*, 20 Ch. D. 465; *In re De Burgh Lawson*; *De Burgh Lawson* v. *De Burgh Lawson*, 41 Ch. D. 568; *Re Stokes*: *Parsons* v. *Miller*, 67 L. T. 223.

Land devised to the executors is charged.

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Where the devise is for life or in tail.

It makes no difference apparently, that the devise is of an estate tail or of an estate for life. *Cloudsley* v. *Pelham*, 1 Vern. 411; 1 Eq. Ab. 198, pl. 2; *Harris* v. *Watkins*, Kay, 438; *Cook* v. *Dawson*, 29 B. 123; see 3 D. F. & J. 127; see *Finch* v. *Hattersley*, 3 Russ. 345, n.; *Doe* d. *Ashby* v. *Baines*, 3 C. M. & R. 23.

Devises to executors unequally.

On the other hand, if land is devised only to one of several executors or unequal interests are devised to them, or land is devised to a son absolutely, and other land is devised to the executors upon trust for the daughters, there is no charge. *Warren* v. *Davies*, 2 M. & K. 49; *Symons* v. *James*, 2 Y. & C. C. 301; *Wasse* v. *Helsington*, 3 M. & K. 495; *In re Bailey: Bailey* v. *Bailey*, 12 Ch. D. 268.

Gift after payment of debts.

A gift of real and personal estate after payment of debts charges both. *Withers* v. *Kennedy*, 2 M. & K. 607; *Moores* v. *Whittle*, 22 L. J. Ch. 207.

Gift of residue after direction to pay debts.

3. When debts are directed to be paid by the executors and there is a gift of the residue of the real and personal estate together, the debts are charged upon the entire residue. *In re Bailey*, 12 Ch. D. 268, 274. As to legacies, see *post*.

4. Charge upon income or corpus:—

Power to raise out of rents and profits to pay debts or legacies.

It would seem that a power to raise money out of the rents and profits would naturally mean out of the annual rents and profits, but the cases show that a power to raise a lump sum out of rents and profits will authorise a sale. See *Booth* v. *Blundell*, 1 Mer. 233, per Lord Eldon; *Baines* v. *Dixon*, 1 Ves. Sen. 42.

This is clear, at any rate, where the object is to pay debts or legacies. *Lingon* v. *Foley*, 2 Ch. Ca. 205; *Anon.*, 1 Vern. 104; *Berry* v. *Askham*, 2 Vern. 26; *Metcalfe* v. *Hutchinson*, 1 Ch. D. 591; *Lord Londesborough* v. *Somerville*, 19 B. 295.

Money payable within a given time.

Or, if the money is to be raised within a given time, and the annual rents would be insufficient to raise the money within that time. *Sheldon* v. *Dormer*, 2 Vern. 310; *Warburton* v. *Warburton*, *ib.* 420; *Gibson* v. *Lord Montfort*, 1 Ves. Sen. 491.

Portions.

Portions, it would seem, are on the same footing as debts, as it is to be presumed that they are to be paid within a limited

time. *Trafford* v. *Ashton*, 1 P. W. 415; *Stanhope* v. *Thacker*, Prec. Ch. 435.

Gross sum payable at once.

Similarly, if a gross sum payable out of rents and profits is payable at once, it may be raised by sale. *Allan* v. *Backhouse*, 2 V. & B. 65; Jac. 631.

Annual rents.

But a direction to pay out of annual rents and profits does not create a charge on corpus. *In re Green; Baldock* v. *Green*, 40 Ch. D. 610.

When the annual rents only are applicable.

And if the testator treats the rents and profits as applicable for some time for the purpose of raising the money, and gives the whole lands from and after raising the money, the power will be limited to the annual rents and profits. *Small* v. *Wing*, 5 B. P. C. 68; see *Harper* v. *Munday*, 7 D. M. & G. 369; *Hennage* v. *Lord Andover*, 3 Y. & J. 360; *Lord Lovat* v. *Duchess of Leeds*, 2 Dr. & Sm. 75.

IV.—Exoneration of Personalty.

Directions to exonerate personalty.

The testator may give directions by his will altering the order of assets. He may appoint a specific fund of personalty to pay debts, or he may direct realty to be applied *pari passu* with the personalty, or he may exonerate the personalty altogether.

1. When realty and personalty liable rateably.

A gift of realty and personalty together on trust to pay debts (*a*), or the fact that a mixed fund of personalty and proceeds of sale of realty is charged with payment of debts under the rule in *Greville* v. *Browne*, 7 H. L. 689, or otherwise (*b*), does not alter the primary liability of the personalty. *Boughton* v. *Boughton*, 1 H. L. 406; *Tench* v. *Cheese*, 6 D. M. & G. 453 (*a*); *Luckcraft* v. *Pridham*, 48 L. J. Ch. 636; *Wells* v. *Row*, 48 L. J. Ch. 476; *Elliott* v. *Dearsley*, 16 Ch. D. 322; *In re Ovey; Broadbent* v. *Parrow*, 31 Ch. D. 113; *In re Boards; Knight* v. *Knight*, (1895) 1 Ch. 499 (*b*).

Debts to be paid out of mixed fund.

But if realty is given upon trust for sale and blended with personalty, and there is a trust to pay debts out of the mixed fund, the realty and personalty are liable rateably. *Roberts* v. *Walker*, 1 R. & M. 752; *Stocker* v. *Harbin*, 3 B. 479; *Salt* v. *Chattaway*, *ib.* 576; *Dunk* v. *Fenner*, 2 R. & M. 557; *Fourdrin*

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v. *Gowdey*, 3 M. & K. 383; *Tatlock* v. *Jenkins*, Kay, 654; *Bedford* v. *Bedford*, 35 B. 584.

The same result follows, if the realty is directed to be converted and become part of the personal estate. *Simmons* v. *Rose*, 6 D. M. & G. 411; *Bright* v. *Larcher*, 3 De G. & J. 148.

It is not necessary, that there should be an absolute direction to convert the realty, it is enough if the testator contemplates the creation of a mixed fund of personalty and proceeds of realty out of which the legacies are to be paid. *Allan* v. *Gott*, 7 Ch. 439.

2. When personalty exonerated.

Neither a charge of debts upon land nor a devise of land on trust to pay debts exonerates the personalty from its primary liability. There must be an intention shown not only to charge the land but to exonerate the personalty. *Bootle* v. *Blundell*, 1 Mer. 193, p. 219; *White* v. *White*, 2 Vern. 43; *Walker* v. *Hardwick*, 1 M. & K. 396; *Ouseley* v. *Anstruther*, 10 B. 453; *Quennell* v. *Turner* 3 B. 240; *Hancox* v. *Abbey*, 11 Ves. 186; *Collis* v. *Robins*, 1 De G. & S. 131; *Kilford* v. *Blaney*, 29 Ch. D. 145; 31 Ch. D. 56.

And a gift of real and personal estate to executors on trust, in the first place to sell an advowson and apply the proceeds in discharge of debts and legacies and to raise the deficiency, if any, out of the real estate, where there was no further gift of the personalty, has been held not to exonerate the personalty. *Rhodes* v. *Rudge*, 1 Sim. 79.

A conveyance by the testator in his lifetime of land upon trust after his death to pay his debts does not exonerate the personalty. *French* v. *Chichester*, 2 Vern. 568; 2 B. P. C. 16; *Trott* v. *Buchanan*, 28 Ch. D. 446.

And where the land of a tenant in tail is delivered in execution under 51 & 52 Vict. c. 51, which gives the judgment creditor a charge as against the issue in tail, and the judgment is paid off out of the personalty, the personalty is not entitled to exoneration out of the land. *In re Anthony; Anthony* v. *Anthony*, (1893) 3 Ch. 498.

It seems a devise upon condition, that the devisee shall pay the testator's debts, will not exonerate the personalty. *Bridgman* v. *Dove*, 3 Atk. 201; *Meade* v. *Hide*, 2 Vern. 120; *Henry*

v. *Henry*, I. R. 6 Eq. 286; see *In re Kirk; Kirk* v. *Kirk*, 21 Ch. D. 431.

What amounts to a direction to exonerate.

A direction that the proceeds of sale of land are to be applied in "part payment" of legacies (*a*), or a charge upon the land as a primary fund (*b*), or a direction that certain debts shall be paid out of certain land exclusively and in the first instance (*c*), or that if the land devised for payment of debts is insufficient a particular part of the personalty is to be applied (*d*), is sufficient to exonerate the general personal estate. *Bunting* v. *Marriott*, 19 B. 163 (*a*); *Davies* v. *Scott*, 5 Russ. 32 (*b*); *Forrest* v. *Prescott*, 10 Eq. 545 (*c*); *Kilford* v. *Blaney*, 31 Ch. D. 56 (*d*).

The cases are numerous, in which the question of the exoneration of personalty has been considered. They are generally complicated, and depend on the construction of the particular will without laying down any principles. The following points may be noted here.

An express charge of certain debts, for instance, simple contract debts, upon the personalty will not exonerate it from its primary liability to the other debts. *Brydges* v. *Phillips*, 6 Ves. 567; *Watson* v. *Brickwood*, 9 Ves. 447.

A charge upon the realty of debts and funeral and testamentary expenses, which latter it can hardly be supposed the personalty would not be sufficient to pay, coupled with a specific gift of the personalty, is not enough to show that the realty was to be primarily liable. *Walker* v. *Jackson*, 2 Atk. 624; *Gray* v. *Minnethorpe*, 3 Vos. 103; *Hartley* v *Hurle*, 5 Ves. 540; *In re Banks; Banks* v. *Busbridge*, (1905) 1 Ch. 547; see *Coote* v. *Coote*, 3 J. & Lat. 175.

Personal estate specifically given, realty devised on trust to sell and pay debts.

The argument for exoneration of the personalty is much stronger where the personalty is specifically given and the realty is devised upon trust to pay funeral and testamentary expenses and debts, and what is beneficially given is only the residue of the proceeds of sale after paying them, and in several cases where the personalty has been held exonerated there appears to have been nothing more. *Greene* v. *Greene*, 4 Mad. 148; *Michell* v. *Michell*, 5 Mad. 69; *Blount* v. *Hopkins*, 7 Sim. 43; *Lance* v. *Aylionby*, 27 B. 65; *Gilbertson* v. *Gilbertson*, 34 B. 354; see *Kilford* v. *Blaney*, 29 Ch. D. 145; 31 Ch. D. 56.

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Where the personalty was specifically given and a particular estate was devised upon trust to pay debts, funeral and testamentary expenses, upon failure of that estate, the general personalty and the realty were held liable *pro ratâ* to make up the deficiency. *Powell* v. *Riley*, 12 Eq. 175; disapproved by Jessell, M.R.; *In re Orey; Broadbent* v. *Barrow*, 51 L. J. Ch. 665, 667.

Specific gift of personalty to an executor.

The fact, however, that the gift of all the personalty is to a person appointed executor, is a strong argument against the exoneration of the personalty. *Brummel* v. *Prothero*, 3 Ves. 111; *Aldridge* v. *Lord Wallscourt*, 1 Ba. & Be. 312.

And, when it is doubtful, whether the whole personal estate is meant to be given specifically or only as a residue, the fact that funeral and testamentary expenses are not charged on the realty as well as the debts is an argument against exoneration. *Collis* v. *Robins*, 1 De G. & S. 131; *Ousely* v. *Anstruther*, 10 B. 453; *Bootle* v. *Blundell*, 1 Mer. 193; 19 Ves. 494; see *Tower* v. *Lord Rous*, 18 Ves. 138.

Effect of charge of particular debts on realty.

A charge of a particular debt, for instance, an annuity secured by bond, on realty and specific personalty, has been held insufficient to exonerate the general personalty, though the language may be strong enough to have that effect. *Quennell* v. *Turner*, 13 B. 240; *Welby* v. *Rokeliffe*, 1 R. & M. 571; see *Bickham* v. *Cruttwell*, 3 M. & Cr. 763.

Under the old law, by which the devisee of land subject to a mortgage was entitled to have the mortgage debt paid out of the personalty, a devise of lands, including the mortgaged land on trust for sale and payment of the mortgage debt, or a declaration that the mortgage debt was to be charged upon the land, has been held to make the land primarily liable. *Hancox* v. *Abbey*, 11 Ves. 179; *Evans* v. *Cockeram*, 1 Coll. 428; see *Corballis* v. *Corballis*, 9 L. R. Ir. 309.

Where debts have been paid out of the personal estate and the real estate is bound to bear its rateable proportion, the real estate will be charged with interest upon the amount it ought to contribute. *Ashworth* v. *Munn*, 34 Ch. D. 391.

Fund to be applied in exoneration insufficient.

Where there is a direction, that the personalty is to be exempt from payment of debts, and certain land is devised for their

payment and that land proves insufficient, the debts are payable out of the other real estate of the testator in exoneration of the personalty. *Morrow* v. *Bush*, 1 Cox, 185; *Young* v. *Young*, 26 B. 522.

But if land is devised for payment of debts in exoneration of the personalty, the personalty remains liable if the land so devised is insufficient. *Colvile* v. *Middleton*, 3 B. 570.

As between land and residue, both given exempt from debts, the residue is primarily liable on failure of other funds. *Lord Brooke* v. *Earl of Warwick*, 1 H. & T. 142.

Effect of lapse of exonerated personalty.

Where the personalty is to be exonerated, the exoneration is assumed to be for the purposes of the dispositions of the will; and if the gift of the exonerated personalty fails, the exoneration, whether out of real or personal estate, does not enure for the benefit of the next of kin. *Waring* v. *Ward*, 5 Ves. 676; *Noel* v. *Lord Henley*, 7 Pr. 241; Dan. 211; *Dicre* v. *Patrickson*, 1 Dr. & S. 186; *Kilford* v. *Blaney*, 31 Ch. D. 56; overruling *Browne* v. *Groombridge*, 4 Mad. 495, so far as *contra*.

If the personalty is exonerated from debts and no disposition made of it, it is exonerated for all purposes. *Milnes* v. *Slater*, 8 Ves. 305; see 1 Dr. & S. 186.

Covenant in settlement to pay jointure charged on realty.

In connection with this subject, it is to be remembered, that a covenant in a settlement to pay a jointure, which is charged on real estate, leaves the real estate primarily liable, as the covenant is only ancillary to the security. *Lanoy* v. *Duke of Athol*, 2 Atk. 444; *Lechmere* v. *Charlton*, 15 Ves. 193; *Graves* v. *Hicks*, 6 Sim. 398; *Loosemore* v. *Knapman*, Kay, 123.

V.—Payment of Legacies.

Pecuniary legacies payable out of personalty.

Pecuniary legacies are *primâ facie* payable out of the personal estate not specifically bequeathed, and the residuary legatee can take nothing till the pecuniary legacies are paid. For this purpose a fund which is subject to a general power of appointment, and passes under a residuary bequest by virtue of sect. 27 of the Wills Act, is in the same position as the rest of the residue. *In re Hartley*, (1900) 1 Ch. 152.

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Legacy in lieu of revoked share of residue.

Legacies given in lieu of a share of residue, the gift of which is revoked and thereby becomes undisposed of, are payable out of the general residue and not out of the lapsed share (*a*), unless an intention can be gathered that they are to be paid out of the lapsed share (*b*). *Sykes* v. *Sykes*, 4 Eq. 200; 3 Ch. 301 (*a*); *In re Woods' Will*, 29 B. 236; *Walsh* v. *Walsh*, I. R. 4 Eq. 396 (*b*).

Personal estate given specifically.

The whole of the personal estate may be given in such a way as to be a specific gift, but this must be clearly expressed; and, *primâ facie*, if legacies are given, a gift of the whole personal estate is subject to the payment of the legacies. *Robertson* v. *Broadbent*, 8 App. C. 812.

Residuary realty not liable to legacies.

Residuary real estate is not applicable to satisfy pecuniary legacies, unless, by the operation of the rule in *Greville* v. *Browne* (7 H. L. 689), or by some other direction of the testator, the legacies are charged upon the realty. *Mirehouse* v. *Scaife*, 2 M. & Cr. 695; *Gibbins* v. *Eyden*, 7 Eq. 371; *Collins* v. *Lewis*, 8 Eq. 708; *Dugdale* v. *Dugdale*, 14 Eq. 234; *Tomkins* v. *Colthurst*, 1 Ch. D. 626; *Farquharson* v. *Floyer*, 3 Ch. D. 109; not following *Hensman* v. *Fryer*, 3 Ch. 420.

Liability of land charged with payment of debts.

If the personalty is exhausted in payment of debts, pecuniary legatees may, by virtue of the doctrine of marshalling, stand in the place of creditors against real estate descended or charged with payment of debts. See under Marshalling.

Legacies charged on particular fund.

Legacies may be given in such a way as to be primarily chargeable upon some particular fund. If the particular fund is primarily liable, leaving the general personal estate liable if the fund is deficient, the legacies are demonstrative.

Direction to pay particular legacies out of particular fund.

For instance, a direction to pay a particular legacy out of a particular fund may have the effect of making it payable primarily out of that fund. *Hancox* v. *Abbey*, 11 Ves. 179; *Lamphier* v. *Despard*, 2 D. & War. 59.

Charge on real estate.

Legacies may also be charged on real estate.

A direction to executors to realise such part of the testator's estate as they think right to pay legacies is to be limited to property, which the executors take as such, and does not charge the real estate. *In re Cameron; Nixon* v. *Cameron*, 26 Ch. D. 19.

Executor directed to pay legacies and devise of land to him.

It would not be safe to assume, that, where land is devised to an executor beneficially, and he is directed to pay legacies, the land is charged with the legacies. It is a question of construction in each case. The direction to pay legacies may be so connected with the devise, or there may be such other indications of intention, as to charge the land.

A devise to the executor on condition of his paying a legacy (*a*), or with a request that he will see the will performed (*b*), or words whereby the testator charges the executor with payment of legacies (*c*), have been held to charge the legacies on the land devised to the executor; though, on the other hand, a direction that legacies were to be paid by the executor, to whom a specific devise of realty was made, followed by a gift to him of the residue of the personalty after payment of debts, has been held insufficient to create a charge (*d*). *Wigg* v. *Wigg*, 1 Atk. 382 (*a*); *Alcock* v. *Sparhawk* 2 Verm. 228; 1 Eq. Ab. 198, pl. 4 (*b*); *Cross* v. *Kennington*, 9 B. 150; 10 Jur. 343; 15 L. J. Ch. 167 (where there was a devise of the residue of the realty) (*c*); *Parker* v. *Framley*, 2 S. & St. 592 (*d*); see also *Preston* v. *Preston*, 2 Jur. N. S. 1040; *Gallemore* v. *Gill*, 8 D. M. & G. 567.

Devise of residue of realty creates a charge.

It is now settled, that a devise of the "residue" of the real and personal estate charges legacies upon the real estate. *Greville* v. *Browne*, 7 H. L. 689; *In re Bailey*, 12 Ch. D. 268, 274.

The words all real and personal estate not otherwise disposed of, or all other the real and personal estate, have the same effect. *Hassel* v. *Hassel*, 2 Dick. 527; *In re Bawden; National Provincial Bank of England* v. *Cresswell*, (1894) 1 Ch. 693; *In re Smith; Smith* v. *Smith*, (1899) 1 Ch. 365.

But there must be words such as residue or remainder, or similar words. Thus, a devise of all the testator's real estate and the residue of his personalty does not charge the realty. *Wells* v. *Row*, 48 L. J. Ch. 476; *James* v. *Jones*, 9 L. R. Ir. 489.

Charge on fund subject to special power.

On the same principle, where legacies are given and the testator gives the residue of the property belonging to him, or over which he has a power of appointment, the legacies are charged on property subject to a special power of appointment

exercisable in favour of the legatees. *Gainsford* v. *Dunn*, 17 Eq. 405; see (1895) 1 Ch. 499.

It is not material, whether interests in land have been already devised by the will or not (*a*), nor whether the residuary gift follows or precedes the legacies (*b*), and the rule applies to a legacy given by a codicil as an addition to a legacy given by the will (*c*). *Beach* v. *Biles*, 4 Mad. 187; *Francis* v. *Clemow*, Kay, 435; *Wheeler* v. *Howell*, 3 K. & J. 198 (*a*); *Elliott* v. *Dearsley*, 16 Ch. D. 322 (*b*); *Re Hall: Hall* v. *Hall*, 51 L. T. 86 (*c*).

The charge extends to real estate, which is enumerated in the residuary devise. *Tharman* v. *Hillhouse*, 7 W. R. 332; 5 Jur. N. S. 563; *Bray* v. *Stevens*, 12 Ch. D. 162; see *Castle* v. *Gillett*, 16 Eq. 530.

The fact that the executors are directed to pay debts and legacies, the residuary realty and personalty being devised to other persons, does not take the case out of the rule. *In re Brooke: Brooke* v. *Rooke*, 3 Ch. D. 630.

Where the testator first deals exclusively with his personal estate and allots it out to different objects of his bounty in particular sums, these sums will not be charged on the realty by a residuary gift. *Gyett* v. *Williams*, 2 J. & H. 429.

Charge on realty in exoneration of personalty.

Legacies may also be charged on real estate in such a way as to make them payable only out of the real estate so charged in exoneration of the personalty. *Gittens* v. *Steele* 1 Sw. 24; *Jones* v. *Bruce*, 11 Sim. 221; *Roberts* v. *Roberts*, 13 Sim. 330; *Ion* v. *Ashton*, 28 B. 379; *Dickin* v. *Edwards*, 4 Ha. 273; *Bessant* v. *Noble*, 26 L. J. Ch. 236; *In re Needham; Robinson* v. *Needham*, 54 L. J. Ch. 75.

Devisee of land subject to legacy not personally liable.

A devise of land subject to the payment of a legacy does not impose on the devisee a personal liability to pay the charge; and, if he sells the land for its full value, he is not bound to account to the legatee for any part of the purchase-money. *Newman* v. *Kent*, 1 Mer. 240; 3 De G. & J. 511: *Jillard* v. *Edge*, 3 De G. & S. 502.

The will may, of course, be so expressed as to impose a personal liability on the devisee if he accepts the devise. See, *e.g. Pickwell* v. *Spencer*, L. R. 7 Ex. 105.

No doubt annuities given in general terms are payable in the same way as legacies, and a general charge on real estate would not exonerate the personalty from its primary liability. *Boughton* v. *Boughton*, 1 H. L. 406. Annuities given generally.

But where annuities were directed to be paid out of the rents and income of real and personal estate without any direction to convert the realty, the annuities were held payable out of both rateably, on the ground that the whole income was intended to be dealt with as one fund. *Falkner* v. *Grace*, 9 Ha. 282; *Howard* v. *Dryland*, 38 L. T. 24. Annuities charged on income of realty and personalty.

And an annuity charged on freehold and leasehold estates specifically devised is payable rateably out of each according to their values at the testator's death. *Fielding* v. *Preston*, 1 De G. & J. 438. Annuity charged on freehold and leaseholds.

Where a jointure was charged on mineral property and on agricultural property devised to different devisees, it was held, that the two properties must contribute to the jointure in proportion to the yearly income from each, and not in proportion to their capital values. *Ley* v. *Ley*, 6 Eq. 174.

In several cases questions have arisen, how far a charge of legacies on real estate extends. Does it extend to real estate specifically devised, or must it be limited to residuary real estate? The question is one of construction. How far charge of legacies on realty extends.

If land is specifically devised, and legacies are then given and charged on the testator's real estate, and there is residuary real estate, the natural inference is, that the charge is intended only to affect the residuary real estate. *Spong* v. *Spong*, 1 Y. & J. 300; 3 Bl. N. S. 84; 1 D. & Cl. 365; *Conron* v. *Conron*, 7 H. L. 168; *Campbell* v. *McConaghey*, I. R. 6 Eq. 20.

If there is no residuary devise, land specifically devised is charged. *Bank of Ireland* v. *McCarthy*, (1898) A. C. 181; see *Maskell* v. *Farrington*, 3 D. J. & S. 338; *Earl of Portarlington* v. *Damer*, 4 D. J. & S. 161; *Mannox* v. *Greener*, 14 Eq. 456.

If, however, legacies are charged on all the testator's real estate at the commencement of the will and specific devises are subsequently made, it may be more easy to infer, that the land specifically devised was intended to be included in the charge.

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See *Mannox* v. *Greener*, 14 Eq. 456; *Cornwall* v. *Saurin*, 17 L. R. Ir. 595; *McCarthy* v. *McCartie*, (1897) 1 Ir. 86; affd. (1898) A. C. 181.

If there is a general charge of legacies on real estate by the will, land specifically devised by a codicil may be taken out of the charge in the will. *Wheeler* v. *Clayton*, 16 B. 169; *Quain* v. *Harvey*, 5 L. R. Ir. 622.

Rent-charge has priority over legacy.

And a rent-charge or annuity issuing out of the land has priority over legacies charged upon the land. *Creed* v. *Creed*, 11 Cl. & F. 491; *In re Briggs; Briggs* v. *George*, 29 W. R. 925. See *Coore* v. *Todd*, 7 D. M. & G. 520.

When sufficiency of personalty to be ascertained.

The question has also arisen, whether, if the legacies are charged on realty if the personalty is insufficient and the personalty is sufficient at the death but becomes insufficient owing to a devastavit by the executor, the charge takes effect or not. The authorities in Ireland support the view that it does unless there is something in the will to limit the time, when it is to be ascertained, whether the charge has taken effect or not (*a*). Lord Romilly, on the other hand, took the opposite view (*b*). *In re Massy's Estate*, 14 Ir. Ch. 355; *In re Bradford's Estate*, (1895) 1 Ir. 251; *McCarthy* v. *McCartie*, (1897) 1 Ir. 86; affirmed on a different point, (1898) A. C. 181 (*a*); *Richardson* v. *Morton*, 13 Eq. 123 (*b*); see also *Hepworth* v. *Hill*, 30 B. 476. *Humble* v. *Humble*, 2 Jur. 696, and *Howard* v. *Chaffers*, 2 Dr. & S. 236, perhaps support the Irish view, though there the defaulting executors were also devisees of the land.

No right to back rents.

A legatee, who has a charge upon land, can enforce his charge by appointment of a receiver, but he has no claim upon back rents received by the devisee. *Ex parte Wilson*, 2 V. & B. 252; *Gresley* v. *Adderley*, 1 Sw. 573; *Garfitt* v. *Allen*, 37 Ch. D. 48.

Legacies charged on land do not abate if part of land required for debts.

If real estate is charged with the payment of legacies, and the real estate has to contribute to the payment of the debts, the legacies must, nevertheless, be paid in full out of the real estate. *Raikes* v. *Boulton*, 29 B. 41; *In re Saunders Davies; Saunders Davies* v. *Saunders Davies*, 34 Ch. D. 482; *In re*

Bawden; *National Provincial Bank of England* v. *Cresswell*, (1894) 1 Ch. 693.

Legacy in foreign currency.

Difficulties used formerly to arise as to the currency, in which a legacy was to be paid. For instance, if a testator domiciled in Jamaica or Ireland gave a legacy of 1,000*l.*, was the legacy to be paid in the currency of the domicile or in English currency? It was settled that the currency of the domicile must prevail. *Saunders* v. *Drake*, 2 Atk. 466; *Pierson* v. *Garnet*, 2 B. C. C. 39, 47; *Malcolm* v. *Martin*, 3 B. C. C. 50.

Such questions can no longer arise. But a somewhat similar question may still create a difficulty. Suppose a testator gives a legacy of 10,000 rupees or 20,000 francs to a legatee in England, how is the value to be ascertained? Is the legacy to be paid at the rate of exchange of the day, at the value of the rupee or franc as bullion, at the current value, or how? In *Cockerell* v. *Barber*, 16 Ves. 461, where the testator was domiciled in India, it was held, that the rupee was to be taken according to its current value, without regard to the exchange or the expense of remittance, but the decision appears to leave a good many questions open. See *Manners* v. *Pearson & Son*, (1898) 1 Ch. 581.

Abatement of pecuniary legacies.

If the funds available for payment of the pecuniary legatees are insufficient, they must abate rateably, subject to any question of priority *inter se*.

Legacy duty directed to be paid on legacies is an additional legacy. If the estate is insufficient to pay the legacies, the duty must be added to the legacy, there will then be a rateable abatement, and duty must be paid on and out of the abated amount. *Farrer* v. *St. Catharine's Coll.*, 16 Eq. 19; *In re Turnbull*; *Skipper* v. *Wade*, (1905) 1 Ch. 726; see *Wilson* v. *O'Leary*, 17 Eq. 419; *In re Wilkins*; *Wilkins* v. *Rotherham*, 27 Ch. D. 703.

And annuities for the purposes of abatement rank with general legacies. *Miller* v. *Huddlestone*, 3 Mac. & G. 513.

How the value of annuities is to be calculated.

In estimating the value of annuities for purposes of abatement, their value is to be taken at the time, when the estimate is made; thus the value of the annuity of an annuitant, who is dead, is the sum of the payments, which would have been

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made to him in respect of it; and the value of a reversionary annuity, which has come into possession, is its present value according to the Government tables at the time of abatement, *plus* any arrears due on it. *Todd* v. *Bulby*, 27 B. 353; *Potts* v. *Smith*, 8 Eq. 683; *Delves* v. *Newington*, 52 L. T. 512; *In re Metcalf*; *Metcalf* v. *Blencowe*, (1903) 2 Ch. 424.

The same rule applies, where all the annuitants are living, *Heath* v. *Nugent*, 29 B. 226; *In re Wilkins*; *Wilkins* v. *Rotherham*, 27 Ch. D. 703.

Where legacies and annuities are charged on real estate, powers of distress and entry conferred upon the annuitants do not give the annuities priority over the legatees. *Roper* v. *Roper*, 3 Ch. D. 714.

Priority of general legacies, *inter se*:—

Legacy in lieu of dower.

a. As between general legatees, a legacy given instead of dower has priority. *Blower* v. *Morret*, 2 Ves. Sen. 420; *Heath* v. *Dendy*, 1 Russ. 543; *Norcott* v. *Gordon*, 14 Sim. 258; *Bell* v. *Bell*, 6 Ir. Eq. 209; *Davies* v. *Bush*, 1 You. 341; *Stahlschmidt* v. *Lett*, 1 Sm. & G. 421.

A legacy, however, in lieu of dower, where the testator has no land, out of which the widow is dowable, or disposes of his land by his will so as to destroy her dower, has no priority. *Acey* v. *Simpson*, 5 B. 35; *Roper* v. *Roper*, 3 Ch. D. 714; *In re Greenwood*; *Greenwood* v. *Greenwood*, (1892) 2 Ch. 295.

Legacy to satisfy debt.

A legacy given to satisfy a debt has no priority, if the creditor elects to take it instead of the debt. *In re Wedmore*; *Wedmore* v. *Wedmore*, (1907) 2 Ch. 277.

Legacy to executor for his trouble.

A legacy to an executor for his trouble has no priority. *Heron* v. *Heron*, 2 Atk. 171; *A.-G.* v. *Robins*, 2 P. W. 23; *Duncan* v. *Watts*, 16 B. 204.

A legacy to the testator's wife for her immediate requirements has no priority. *Blower* v. *Morret*, 2 Ves. Sen. 420; *Cazenove* v. *Cazenove*, 61 L. T. 115; *In re Schneider's Estate*; *Oppenheim* v. *Schneider*, (1891) 3 Ch. 44. *In re Hardy*, 17 Ch. D. 798, must be considered overruled.

Time of payment

b. Legacies payable at the death of a tenant for life or at some other future period, do not abate before other legacies

Miller v. *Huddlestone*, 3 Mac. & G. 513; *Street* v. *Street*, 2 N. R. 56; *Nickson* v. *Cockill*, 3 D. J. & S. 622.

Legacies not entitled to priority.

The words "in the first place," "in the next place," or the word "afterwards," used in introducing legacies, create no priority between them. *Thrustes* v. *Forman*, 1 Cal. 160 affd. 10 Jur. 483; *Beeston* v. *Booth*, 4 Mad. 161; *Whitehaw* v. *Insole*, 7 L. T. N. S. 490; see *In re Hardy*; *Wells* v. *Barwick*, 17 Ch. D. 798.

Legacies introduced by "lastly," "finally," &c.

Annuities to become payable when all the legacies [illegible] and annuities payable immediately abate *pari passu*. *Lefroy* v. *Daly*, 9 L. R. Ir. 184.

Legacies and annuities.

But legacies given on the supposition that there will be more than enough to pay prior legacies, abate first. *A.-G.* v. *Robins*, 2 P. W. 24; *Stammers* v. *Halkley*, 12 Sim. 12.

Legacies for life applicable on the death of the legatees.

And a direction, that certain legacies given for life are to become applicable on the death of the legatees to the payment of other legacies, will give the legatees for life priority. *Brown* v. *Brown*, 1 Kee. 275.

Residuary legacy.

A legacy may be given in such a way as to be itself what may be called a residuary legacy so as not to be payable till the other legacies have been paid; for instance, if legacies are given generally and then the residue is given upon trust to pay further legacies. *Haynes* v. *Haynes*, 3 D. M. & G. 590; *In re Malone*; *Brown* v. *Malone*, (1897) 1 Ir. 571; *In re Smith*; *Smith* v. *Smith*, (1899) 1 Ch. 365.

When a particular legacy is given and the residue is then distributed in certain sums, the particular legacy has priority over all the others. *Gyett* v. *Williams*, 2 J. & H. 429; see *In re Hardy*; *Wells* v. *Barwick*, 17 Ch. D. 798.

Priority between general and residuary legatees:—

General legacies have priority over residue.

a. As a general rule, the residuary legatee is entitled to nothing, till all the particular legacies given by the will are satisfied in full.

Fund set apart to pay annuities.

Where a fund is set apart to pay annuities and is directed upon the death of the annuitants respectively to fall into the residue, if the fund is insufficient to pay the annuities, the residuary legatee is entitled to nothing till all the legacies and annuities have been paid in full. *Arnold* v. *Arnold*, 2 M. & K.

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374; *Anderson* v. *Anderson*, 33 B. 223; *In re Tootal's Estate*, 2 Ch. D. 628.

And when two legacies are directed to be paid out of a fund, which turns out too small to pay both, and one of them lapses, the other legacy gets the benefit of the lapse. *In re Tunno: Raikes* v. *Raikes*, 45 Ch. D. 66.

Direction for abatement.

b. It would seem, that a direction, that in the event of insufficiency of assets all the beneficiaries are to abate, does not entitle the residuary legatee to a fund, which is released by the death of a tenant for life. *In re Lyne's Estate; Sands* v. *Lyne*, 8 Eq. 482.

On the other hand, if annuities are directed to abate in favour of legatees or *vice versâ*, in the event of deficient assets the abatement is permanent, and a fund falling in is not applicable to increase gifts, which have abated. *Farmer* v. *Mills*, 4 Russ. 86; *Hichens* v. *Hichens*, 25 W. R. 249.

Loss of assets falls on the residue.

c. Upon similar principles, where assets have been lost after the death of the testator, the loss falls on the residuary legatee in the first instance. *Wilmot* v. *Jenkins*, 1 P. W. 401: *Baker* v. *Farmer*, L. R. 3 Ch. 537. *Dyose* v. *Dyose*, 1 P. W. 305, is overruled; see *Fonnereau* v. *Poyntz*, 1 B. C. C. 478; *Humphreys* v. *Humphreys*, 2 Cox, 186; *Baker* v. *Farmer*, *supra*.

Where assets are wasted after some legacies have been satisfied, the satisfied legatees cannot be called on to refund by the other legatees; and similarly, if assets are wasted after one of several residuary legatees has received his share, he cannot be called on to refund by the other residuary legatees. *Fenwick* v. *Clarke*, 4 D. F. & J. 240; *Peterson* v. *Peterson*, 3 Eq. 111; *In re Winslow; Frere* v. *Winslow*, 45 Ch. D. 349; *In re Lepine; Dowsett* v. *Culver*, (1892) 1 Ch. 210.

VI.—Marshalling.

A. *General Rules.*

Doctrine stated.

Lord Eldon, in *Aldrich* v. *Cooper* (8 Ves. 382, 388), says: "If a party has two funds . . . a person having an interest

in one only has a right in equity to compel the former to resort to the other if that is necessary for the satisfaction of both"; and again (391), "if a creditor has two funds the interest of the debtor shall not be regarded, but the creditor having two funds shall take to that which paying him will leave another fund for another creditor."

There must be a common debtor.

There must be a common debtor. Therefore, creditors of A, B, and C cannot compel creditors of A, B, C, and D first to take payment of their debts from D's estate before they come upon the estate of A, B, and C. *Ex parte Kendall*, 17 Ves. 514; see *In re Kelly*, 6 Ir. Ch. 394.

And where A devises Whiteacre and Blackacre to B charged with legacies, and B mortgages Blackacre to C, and Blackacre is exhausted in paying the legacies, it would seem that C has no right to marshal so as to throw the legacies on Whiteacre. *M'Carthy* v. *M'Carlie*, (1904) 1 Ir. 100.

There must be two funds belonging to same person.

The two funds must belong to the same person, or to volunteers claiming under him. *Douglas* v. *Cooksey*, I. R. 2 Eq. 311; *The Chioggia*, (1898) P. 1.

The funds need not be money funds.

The two funds need not be money funds. For instance, if a landlord distrains goods, some of which are included in a bill of sale, the bill of sale holder may throw the rent so far as possible on the goods not included in the bill of sale (*a*). Again, A has a balance at his bank on current account which belongs to B, and he has a debit on loan account which is secured. B may marshal so as to have the bank paid out of the securities (*b*). *Ex parte Stephenson*, De G. 586 (*a*); *M'Mahon* v. *Featherstonhaugh*, (1895) 1 Ir. 83; see *Mutton* v. *Peat*, (1900) 2 Ch. 79 (*b*).

But there must be two funds and not merely two different rights. For instance, if A has a charge on a fund and a right of action against C, B who has a charge on the fund only cannot compel A to resort to his right of action so as to leave the fund free for B. *The Arab*, 5 Jur. N. S. 417.

The two funds must be available for the first creditor under the same circumstances. For instance, if auctioneers hold two funds, one of which is subject to a lien for their expenses, they are not bound in favour of a person who has a charge upon that

fund to pay their expenses out of the other fund, which they could only do by way of set-off. *Webb* v. *Smith*, 30 Ch. D. 192.

Right to marshal may be destroyed by contract.

The equity may of course be destroyed by the contract of the parties. For instance, policy-holders of a Life Assurance Company, who by their contract are entitled to be paid out of limited assets after satisfying all other prior charges on such assets, cannot marshal so as to throw on the unlimited assets a creditor, who has a charge on the limited assets. Their contract gives them the surplus only. *In re International Life Assurance Co.*, 2 Ch. D. 476; *In re Mower's Trusts*, 8 Eq. 110; *In re Lauder's Estate*, 11 Ir. Ch. 346.

Judgment creditors of debtor cannot set up the equity.

The equity is not available on behalf of the debtor nor on behalf of his judgment creditors, who take only the interest he himself has. *Dolphin* v. *Aylward*, L. R. 4 H. L. 486, 500, 501; see *Stock* v. *Aylward*, 8 Ir. Ch. 429.

Volunteers may marshal.

It does, however, apply in favour of volunteers claiming by grant or devise. *Aldridge* v. *Forbes* (1839), 9 L. J. Ch. 37; 4 Jur. 20, and the cases cited below, where assets are marshalled in favour of legatees. *Aldridge* v. *Forbes* was put upon other grounds in *In re Lysaght's Estate*, (1903) 1 Ir. 235, where, however, the view taken of the doctrine of marshalling is not in accordance with the authorities. *Boazman* v. *Johnston*, 3 Sim. 377, was probably well decided, though the last paragraph of the headnote, which states that the principle of marshalling securities is not applicable as between volunteers, goes too far.

B. *Marshalling as between Secured Creditors.*

Marshalling in case of secured creditors.

The equity applies in the case of creditors, who hold securities for their debts.

Whether marshalling is result of working out equities of redemption.

It has indeed been suggested (Ashburner, Principles of Equity, p. 286), that in the case of secured creditors there is no independent equity to marshal, but that what is called marshalling is "merely the result of working out successive rights of redemption." But this view is not borne out by the authorities. It is true, that a second mortgagee may have a much better right, than a mere right to marshal securities. He may be entitled to redeem a prior mortgagee, whose mortgage includes property not included in his own security

and to hold the properties included in the two securities as one aggregate fund to pay the entire mortgage debt, so that if the property comprised in his second mortgage is an insufficient security, he would recover the deficiency out of the other property which he could not do merely by marshalling.

But the right to marshal exists collaterally with the right to redeem, and it may be exercised in cases, where there is no right to redeem or where that right has been lost.

Lord Hardwicke's statement of the rule.

Lord Hardwicke, in *Lanoy* v. *Duke of Athol*, 2 Atk. 444, 446, states the rule thus: "Suppose a person, who has two real estates, mortgages both to one person, and afterwards only one estate to a second mortgagee, who had no notice of the first, the Court, in order to relieve the second mortgagee, have directed the first to take his satisfaction out of that estate only, which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee, even though the estates descended to two different persons."

Notice of first mortgage.

Absence of notice to the second mortgagee of the first mortgage, though it strengthens the case for marshalling, is not essential to it.

First and second mortgages held by same person.

It makes no difference that the first and *second* mortgages are held by the same person. *In re Ruddy's Estate*, 11 Ir. Ch. 240.

It is also immaterial, whether the property *not* included in the *second* mortgage is mortgaged to the first mortgagee before *or* after the date *of* the second mortgage. This seems to be clear, though there is no express decision on the point. It arose in *Barnes* v. *Raester*, 1 Y. & C. C. 401, but was not decided because the Court, assuming it in favour of the second mortgagee, decided against him on other grounds.

Circumstances may negative the right.

The circumstances may be such as to destroy the right of the creditor having one fund only to marshal. For instance, where property was conveyed on trust to pay bond creditors and also certain mortgage debts, and land, which was subject to the mortgages, was settled by a voluntary settlement, the bond creditors were not allowed to throw the mortgages on the settled land, inasmuch as the intention was to clear the settled land from the mortgages so far as possible by means of the

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first-mentioned property. *Bouzmon* v. *Johnston*, 3 Sim. 377, explained in *Averall* v. *Wade*, Ll. & G. t. Sug. 252, 257.

And *In re Lander's Estate*, 14 Ir. Ch. 346, was decided upon similar grounds. There the contract of the second mortgagee was held to be, that he would not claim against the estate included in his mortgage until after the first mortgagee had been satisfied out of it.

Sureties.

The equity prevails against a surety for the mortgagor. *Tidd* v. *Lister*, 3 D. M. & G. 857, 861, 872; *South* v. *Bloxam*, 2 H. & M. 457.

Trustee in bankruptcy. Execution creditors.

It also prevails against the trustee in bankruptcy (*a*), and execution creditors of the mortgagor (*b*). *Baldwin* v. *Belcher*, 3 Dr. & War. 173; *Ex parte Hartley*, 1 Dea. 288; *Tidd* v *Lister*, 10 Ha. 140, 157; 3 D. M. & G. 857, 872; *Laurance* v. *Galsworthy*, 3 Jur. N. S. 1049; *Gibson* v. *Seagrim*, 20 B. 614 (*a*); *In re Lynch's Estate*, I. R. 1 Eq. 396; *Gray* v. *Stace*, W. N. 1893, 133 (*b*).

Volunteers.

And it prevails against volunteers claiming under the mortgagor. *Lamy* v. *Duke of Athol*, 2 Atk. 444; *Flint* v. *Howard*, (1893) 2 Ch. 54, 72.

Rule that assignee takes subject to equities does not apply.

But the equity is not within the rule, that the assignee of an equity takes subject to equities. It may be, that the equity may never arise. The first mortgagee may pay himself out of the property not included in the second mortgage, or the property included in the second mortgage may be sufficient to satisfy both mortgages. The equity is only a possibility until the time for distribution of the funds arrives.

First mortgagee may release property not included in second mortgage.

It follows from this, that the first mortgagee may, if he thinks fit, effectually release from his security the property not included in the second mortgage, and may thus destroy the second mortgagee's equity to marshal. See *Barnes* v. *Raester*, 1 Y. & C. C. 401.

Equity not applied so as to prejudice purchaser for value.

The equity cannot be applied to the prejudice of persons claiming for value under the mortgagor.

For instance, if the two properties are mortgaged to a third mortgagee, the second mortgagee cannot marshal against the third mortgagee. *Wellesley* v. *Lord Mornington*, 17 W. R. 355; *Baglioni* v. *Cavelli*, 83 L. T. 501, which would no doubt

be followed in preference to *Aldridge* v. *Forbes* (1839), 9 L. J. Ch. 37.

The equity of redemption of the property not included in the second mortgage may be mortgaged to a third mortgagee.

In that case the second mortgagee cannot marshal against the third, and it is not material whether the third mortgagee took his security with or without notice of the prior mortgages. *Barnes* v. *Raester*, 1 Y. & C. C. 401; *Bugden* v. *Bignold*, 2 Y. & C. C. 377; *Moxon* v. *Berkeley Mutual Benefit Building Society*, 59 L. J. 524; see *Flint* v. *Howard*, (1893) 2 Ch. 54, 72, 73.

Apportionment.

In these cases the right of the second mortgagee is to have the first mortgage apportioned rateably between the two properties.

Third mortgagee taking with notice of the first mortgage.

It has been said (Ashburner, Mortgages, 382) that there is authority in Ireland showing, that if the third mortgagee took with notice of the first mortgage, the second mortgagee can marshal against him, citing *In re Leader's Estate*, 11 Ir. Ch. 346; *In re Roddy's Estate*, 11 Ir. Ch. 369; *In re Roche's Estate*, 25 L. R. Ir. 271. The first two cases do not appear to have proceeded upon such a distinction, and the last went upon a different equity, which is discussed below.

Effect of special contract.

The mortgage to the third mortgagee may be so expressed as to give him only what remains of the two properties after the first and second mortgages are satisfied. In that case the right of the second mortgagee to marshal against him remains. *In re Moore's Trusts*, 8 Eq. 110.

Third mortgagee of A cannot marshal against second mortgagee of B.

On the other hand the third mortgagee of one property cannot marshal against the second mortgagee of the other. It is not material that the third mortgagee had no notice of the prior securities. *Bugden* v. *Bignold*, 2 Y. & C. C. 377.

C. *Marshalling in Administration of Estates.*

The equity was from an early date applied in the administration of the estates of deceased testators and intestates.

Marshalling in favour of simple

Under the old law, real estate was only liable to creditors by specialty, in which the heirs were bound. Such creditors could

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contract creditors.

proceed against both real and personal estate. Simple contract creditors could only get payment out of the personal estate. If a person died leaving specialty and simple contract debts, and the specialty debts were paid out of the personalty, leaving a balance insufficient to pay simple contract creditors, then to the extent of the deficiency the simple contract creditors were allowed to stand in the place of the specialty creditors and get payment out of the real estate. *Sagittary* v. *Hyde*, 1 Vern. 455; *Neave* v. *Alderton*, 1 Eq. Ca. Ab. 144; *Aldrich* v. *Cooper*, 8 Ves. 382.

The right was not lost though, at the time of payment, the personalty was sufficient to pay both specialty and simple contract debts, and only became insufficient owing to a devastavit by the executor. *Ellard* v. *Cooper*, 1 Ir. Ch. 376.

The right was limited to the amount of personalty exhausted in payment of specialty debts. Interest on that amount was not allowed as against the real estate, though the specialty debts carried interest and the personalty exhausted was an income-bearing fund. *Lighton* v. *Hayes*, 2 Moll. 523; *Craddock* v. *Piper*, 15 Sim. 301.

Simple contract creditors allowed to stand in place of secured creditor who exhausts personalty.

In the same way, if a mortgagee of the land exhausted the personalty, the simple contract creditors were entitled to stand in the place of the mortgagee against the land. *Wilson* v. *Fielding* (1718), 2 Vern. 763; *Selby* v. *Selby*, 4 Russ. 336.

And a widow, whose paraphernalia were taken to pay her husband's debts, was entitled to be recouped out of his real estate liable to pay those debts. *Tipping* v. *Tipping*, 1 P. W. 729.

So far the rule works well, and does substantial justice. A man is bound to pay his debts, and it is only reasonable that his assets should be marshalled in such a way as to provide the largest possible fund to pay them. The debtor and legatees, devisees, and heirs, who claim as volunteers, ought not to take anything until the debts are paid. The right of the creditor with one fund ought not to depend on the accident, whether the creditor having two funds takes one fund or the other.

Rule extended to legatees.

But there are developments of the doctrine which are less satisfactory. It was soon extended beyond creditors, and it

became a settled rule, that, if the personalty is exhausted by creditors, specific and pecuniary legatees may stand in the place of the creditors against land, which had descended to the heir. *Clifton* v. *Burt*, 1 P. W. 678.

The rule does not apply to land of a domiciled Englishman, situate in a country which does not recognise the rule. *Harrison* v. *Harrison*, 8 Ch. 342.

Again, if land is devised subject to a charge of debts, and the personalty is exhausted in paying debts, legatees are entitled to come upon the real estate to the extent to which the debts have exhausted the personalty. It makes no difference whether there is an express charge of debts on the realty or a charge only by inference from a general direction to pay debts, and the equity is applied as well against a specific as a residuary devisee. *Foster* v. *Cook*, 3 B. C. C. 347; *Bradford* v. *Foley*, 3 B. C. C. 351, n.; *Webster* v. *Alsop*, 3 B. C. C. 352, n.; *Paterson* v. *Scott*, 1 D. M. & G. 531; *Rickard* v. *Barrett*, 3 K. & J. 289; *Sartees* v. *Parkin*, 19 B. 406; *Re Stokes*; *Parsons* v. *Miller*, 67 L. T. 222; *In re Salt*; *Brothwood* v. *Keeling*, (1895) 2 Ch. 263; *In re Roberts' Estate*, (1902) 2 Ch. 834.

Kay, L.J., in a case which came before him unprejudiced by the citation of authorities, came to a different conclusion; but that case has met with no favour, and is not law. *In re Bate*; *Bate* v. *Bate*, 43 Ch. D. 600.

Effect of Land Transfer Act

This rule has not been altered by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65). *In re Kempster*; *Kempster* v. *Kempster*, (1906) 1 Ch. 446; see *Rickard* v. *Barrett*, 3 K. & J. 289, a case as to the effect of the Administration of Estates Act, 1833 (3 & 4 Will. IV. c. 104).

Legatees have no right against land devised not charged.

Legatees cannot come upon land devised not subject to a charge of debts. *Forrester* v. *Lord Leigh*, Amb. 171; *Scott* v. *Scott*, Amb. 383; *Clifton* v. *Burt*, 1 P. W. 678.

It would seem logically that now, since land is available to pay debts, legatees ought in a case where the personalty is exhausted in paying debts to be able to come against realty devised, though not charged with debts. There is the same argument as regards the two funds, and the fact that the two funds are not applicable in the same order of priority, ought to

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be no more material here than it was in the case of land descended, and of land devised subject to a charge. But as Lord Hathorley said (*Wellesley* v. *Lord Mornington*, 17 W. R. 355), "the whole of our law with reference to that subject will not bear very much the test of logical sequence," and the law as above stated must be taken as settled. *Collins* v. *Lewis*, 8 Eq. 708; *Dugdale* v. *Dugdale*, 14 Eq. 2[illegible]; *Tomkins* v. *Colthurst*, 1 Ch. D. 626; *Farquharson* v. *Floyd*, 3 Ch. D. 109, not following *Heusman* v. *Fryer*, 3 Ch. 420, 42[illegible]

Right of legatees against mortgaged land.

Under the old law, when the devisee of land was entitled to have a mortgage debt discharged out of the personalty, if the mortgagee came upon the personalty, legatees were entitled both as against the devisee (*a*) and against the heir (*b*) to come against the mortgaged land. *Lutkens* v. *Leigh*, Ca. t. Talb. 52; *Forrester* v. *Lord Leigh*, Amb. 171; *O'Neal* v. *Mead*, 1 P. W. 693; *Wythe* v. *Henniker*, 2 M. & K. 635, 644; *Johnson* v. *Child*, 4 Ha. 87; *Binns* v. *Nicholls*, 2 Eq. 256 (*a*); *Anon.* (1679), 2 Ch. Ca. 4; *Culpepper* v. *Aston*, 2 Ch. Ca. 115 (*b*).

If the mortgage included land with other property, the mortgage was apportioned between the two properties, and the legatees could come upon the devisee of the land to the extent of the mortgage money apportioned to the land. *Johnson* v. *Child*, 4 Ha. 87.

Vendor's lien.

The doctrine was after some discussion extended, in favour of legatees as well as creditors, to the case of a vendor's lien upon land purchased by a testator and paid for out of his personal estate after his death, whether the land went to the heir or to a devisee. *Sproule* v. *Prior*, 8 Sim. 189; *Burds* v. *Askey*, 24 B. 418; *Lord Lilford* v. *Powys Keck*, 1 Eq. 347, not following *Wythe* v. *Henniker*, 2 M. & K. 635.

Intention that mortgage should be paid out of personalty.

This application of the doctrine has ceased to be important as the devisee of land has no right to have mortgage debts discharged out of the personal estate, unless there is an intention expressed that he is to have that right. But if there is such an intention expressed, it is looked upon as intended only to exclude Locke King's Act, and not to exclude the doctrine of marshalling, and the latter doctrine therefore applies in such a case. *Porcher* v. *Wilson*, 14 W. R. 1011; *In re Smith*; *Smith*

v. *Smith*, (1899) 1 Ch. 365, not following the Irish cases *Smith* v. *Smith*, 10 Ir. Ch. 89, 461; *Barley* v. *Armstrong*, 12 Ir. Ch. 270.

Marshalling not affected by Locke King's Act.

Locke King's Act does not affect the doctrine of marshalling. Therefore, if an annuity is given charged upon land only and the land is subject to a mortgage, which exhausts it, the annuitant is entitled to stand in the shoes of the mortgagee against the personal estate *pari passu* with legatees and other annuitants. *Buckley* v. *Buckley*, 19 L. R. Ir. 544.

Legacies with and without a charge upon land.

Again, if some legacies are charged on land and some are not, and the personalty is insufficient to pay them all, those charged on the land will be thrown upon the land so as to leave the personalty free for the others. *Hanby* v. *Roberts*, Amb. 127; *S. C.* sub nom. *Hamly* v. *Fisher*, 1 Dick. 104; *Hanby* v. *Fisher*, 2 Coll. 512; *Masters* v. *Masters*, 1 P. W. 420; *Hyde* v. *Hyde*, 3 Ch. Rep. 83; *Bligh* v. *Earl of Darnley*, 2 P. W. 619.

A legacy, which never becomes an effectual charge on the land, because the legatee dies before the time of payment, cannot be taken into account. *Preese* v. *Abingdon*, 1 Atk. 482; *Pearce* v. *Loman*, 3 Ves. 135.

Anomalies of the doctrine.

The doctrine as thus developed presents some anomalies.

The personalty is exhausted in paying debts. Why should a legatee come upon real estate descended or real estate charged with payment of debts? The personalty has been applied in its proper order. It is well settled that the personal estate is applicable before land descended and that a charge of debts upon land does not exonerate the personalty from its primary liability to pay debts; why, then, should legatees, whose fund has been exhausted in its proper order, have a claim against a fund which is not applicable to pay debts till after their own?

The doctrine may have results unexpected by the testator. Suppose he directs his debts to be paid. This charges the debts upon real estate. He then gives his land to his eldest son; he makes specific gifts of personalty to his other children and also gives pecuniary legacies. The personalty is insufficient to pay the debts. The specific devisee must contribute towards the legacies to the extent to which the personalty has been applied in paying debts; the specific legatee contributes nothing at all.

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The pecuniary legatee obtains priority over the specific devisee, who is in a worse position than the specific legatee. The testator's intention appears thus to be effectually frustrated.

Again, take the case of legacies charged upon land and legacies not so charged. If the charge upon the land is only auxiliary, if the personalty is the primary fund to pay them, what equity is there in throwing them upon the land so as to leave the personalty free for the other legacies? There may or may not be some intention to that effect expressed in the will. If there is none, why should a charge be thrown upon the land, which the testator never contemplated?

D. *Marshalling in Case of Charities.*

Court did not marshal in favour of a charity.

Under the law as it was before the Mortmain and Charitable Uses Act, 1891, it was settled that the Court would not marshal assets in favour of a charity, unless the testator gave express directions to do so. For instance, the debts could not be cast on the impure personalty, so as to increase the pure personalty for the benefit of a charity. The reason was that "the assets cannot be marshalled to support a legacy contrary to law" (see *Mogg* v. *Hodges*, 1 Ves. Sen. 52), or the Court will not "do *per obliquum* what could not be done *per directum*." *A.-G.* v. *Tyndall*, Amb. 614.

Now, however, as impure personalty and even land may be given to charity, the reason for the rule has fallen away, and it seems that if the occasion were to arise assets would be marshalled in favour of a charity. They will be marshalled in Ireland, where the Mortmain Act did not apply. *Biggar* v. *Eastwood*, 19 L. R. Ir. 49.

The result of the old cases may be shortly stated here.

Charitable legacies abate.

In the absence of an intention to marshal, charitable legacies abated in the proportion of the pure to the impure personalty, the value being taken as at the testator's death. *Calvert* v. *Armitage*, 2 H. & M. 446; *Luckcraft* v. *Pridham*, 48 L. J. Ch. 636, 639.

A gift of the residue to charity, except so much as could not by law be so appropriated, does not amount to a direction to marshal. *Edwards* v. *Hall*, 11 Ha. 1, 22; see 6 D. M. & G.

74; *In re Somers Cocks*; *Wegg-Prosser* v. *Wegg-Prosser*, (1895) 2 Ch. 449. Chap. LX.

A direction that the charities are to be paid out of pure personalty gives them priority over other legatees as regards the pure personalty, but does not release the pure personalty from bearing its proportion of the debts. *Robinson* v. *Geldard*, 3 De G. & S. 499; 3 Mac. & G. 735; *Tempest* v. *Tempest*, 2 K. & J. 635; 7 D. M. & G. 470; *Beaumont* v. *Oliveira*, 6 Eq. 534; 4 Ch. 309; *Lewis* v. *Beetefour*, 38 L. T. 93; affd. W. N. 1879, 11; see *Nickisson* v. *Cockill*, 3 D. J. & S. 622. Direction to pay out of pure personalty.

But where the testator devised his real estate upon trust to pay debts and funeral and testamentary expenses, and gave his personalty on trust to pay so much of the debts, &c. as the realty was insufficient to pay, and then gave the residue to charity with a direction that it should include only such parts of his property as could be lawfully given to charity, it was held that it followed by necessary implication that the impure personalty must be applied in paying debts before the pure personalty. *Wills* v. *Bourne*, 16 Eq. 487. Implied direction to marshal.

And a direction that the pure personalty shall be reserved for the charities (*a*), or that they be paid exclusively out of pure personalty (*b*), or that the pure personalty is to be first applied in paying them (*c*), is in effect a direction to marshal. *Miles* v. *Harrison*, 9 Ch. 316 (*a*); *In re Arnold*; *Ravenscroft* v. *Workman*, 37 Ch. D. 637 (*b*); *In re Pitt*; *Lacy* v. *Stone*, 33 W. R. 653 (*c*). Direction to reserve or pay exclusively or first out of pure personalty.

And a gift to charity of so much of the testator's estate as can lawfully be given to charity may be a specific gift and liable to debts only in the order in which property specifically given is applicable. *Shepheard* v. *Beetham*, 6 Ch. D. 597. Pure personalty may be given specifically.

If the pure personalty is exonerated from debts, it must, nevertheless, bear its share of the costs of administration, if they are not otherwise provided for. *In re Fitzgerald*; *Adolph* v. *Dolman*, 26 W. R. 53.

E. *Other Cases of Marshalling.*

An equity, which in some respects resembles marshalling, arises, when a person improperly deals with property entrusted to him. Improper dealing by agent with trust fund.

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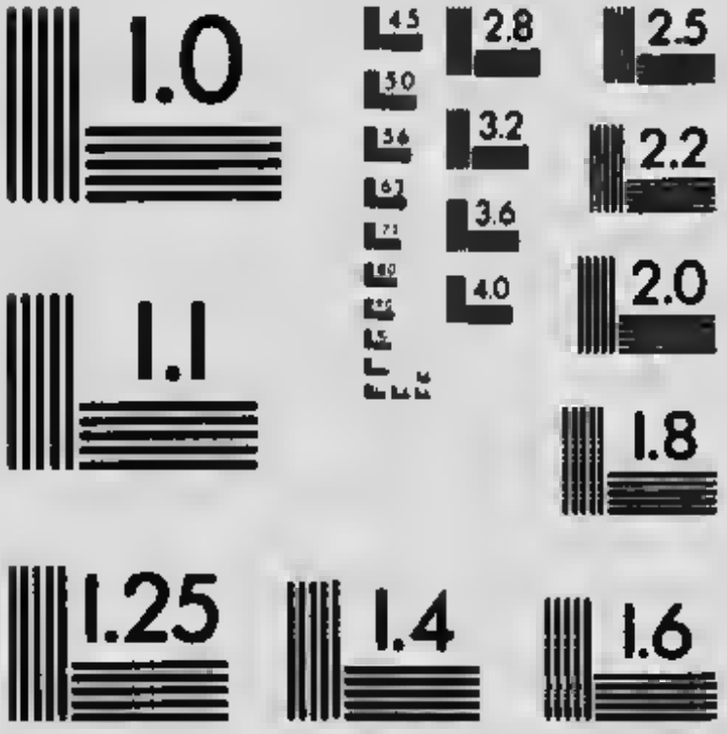

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If a person deposits property entrusted to him with his own property as security for a loan, then, as against him, and his trustee in bankruptcy, the loan will be thrown on his property in the first instance. *Ex parte Alston; In re Holland*, 4 Ch. 168; *Ex parte Salting; In re Stratton*, 25 Ch. D. 148.

Current account deemed to include trust property.

The case of a man who pays into his own banking account money entrusted to him, whether as trustee or agent or in any other fiduciary capacity, is another illustration of the same principle. So long as the account remains in credit, the credit balance must be taken to represent or include the entrusted fund, and the trustee or agent must be taken to have drawn out his own money first. *In re Hallett's Estate; Knatchbull* v. *Hallett*, 13 Ch. D. 696, overruling *Ex parte Dale & Co.*, 11 Ch. D. 772, and *Pennell* v. *Deffell*, 4 D. M. & G. 372; see *In re Hallett & Co.; Ex parte Blane*, (1894) 2 Q. B. 237.

If several persons have entrusted money to the trustee or agent and the balance is not enough to satisfy them, then as between the several claimants the rule in *Clayton's Case* applies, and the money of that claimant, whose money was first paid in must be taken to have been first paid out. *In re Hallett's Estate; Knatchbull* v. *Hallett*, 13 Ch. D. 696; *Hancock* v. *Smith*, 41 Ch. D. 456.

It was held in *In re Stenning; Wood* v. *Stenning*, (1895) 2 Ch. 433, that the defaulting agent can set up the rights of third parties, who make no claim to the balance; but this seems inconsistent with *Hancock* v. *Smith* and principle. See *Re Oatway; Hertslet* v. *Oatway*, 88 L. T. 622.

VII.—Contribution.

The right to contribution as between owners, whose property is subject to a common charge, is a different right from the right to marshal. It should also be distinguished from an equity, which has been developed principally in Ireland, and depends on the covenants entered into by a vendor on successive sales of land, which is subject to an overriding incumbrance.

Contribution when several properties subject to one mortgage.

The simplest case is where property subject to a mortgage is devised to different persons.

In that case the rule is, that the different owners must bear the charge rateably in proportion to the value of the property they take.

This is the case where land subject to a mortgage is devised partly to one and partly to another (*a*), or land and personal estate subject to a mortgage are devised to different persons (*b*). *In re Newmarch; Newmarch* v. *Storr*, 9 Ch. D. 12 (*a*); *Lipscomb* v. *Lipscomb*, 7 Eq. 501; *Trestrail* v. *Mason*, 7 Ch. D. 655 (*b*).

Devisee and heir.

If the mortgagor dies intestate as to part of the land in mortgage and devises the rest, the devisee and heir bear the charge rateably. *Eyre* v. *Green*, 2 Coll. 527.

Real and personal representatives.

If he dies wholly intestate and there is a charge on real and personal property, it must in the same way be apportioned between the real and personal representatives. *Evans* v. *Wyatt*, 31 B. 217; *Lipscomb* v. *Lipscomb*, 7 Eq. 501.

Locke King's Act has not the effect of making the land primarily liable, where land and personal estate are included in a mortgage. *Trestrail* v. *Mason*, 7 Ch. D. 655.

Debt mortgaged with other property.

A debtor, whose debt is with other property assigned by way of mortgage, has, of course, no equity to call for contribution from the other property to reduce his debt. For instance, when a policy is assigned by way of mortgage with other property, and the policy contains a suicide clause providing that the policy is to be void in case of the suicide of the assured, but if he has assigned the policy for value it is to be valid to the extent of the interest of the assignee, the office must pay the assignee the policy money to the extent of the mortgage debt, and cannot claim contribution out of the other property. *Solicitors and General Life Assurance Co.* v. *Lamb*, 2 D. J. & S. 251; *City Bank* v. *Sovereign Life Assurance Co.*, 50 L. T. 565.

Primary and secondary securities.

If a mortgagor creates a mortgage upon land, and then mortgages the same land and other property to secure the original debt and further advances, the whole amount due will be treated as one debt, and apportioned between the different properties, unless there is something to show that the land first

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mortgaged was intended to be the primary security for the original advance. *Leonino* v. *Leonino*, 10 Ch. D. 460, where *Lipscomb* v. *Lipscomb*, 7 Eq. 501, and *De Rochefort* v. *Dawes*, 12 Eq. 540, are discussed.

The mortgagor may declare, how, as between the persons entitled to the equity of redemption, the mortgage debt is to be borne. *Marquis of Bute* v. *Cunynghame*, 2 Russ. 275.

Merely describing one of two securities as a collateral security is not sufficient to make the other the primary security. *Early* v. *Early*, 16 Ch. D. 214, n.; *In re Athill*; *Athill* v. *Athill*, 16 Ch. D. 211. *Stringer* v. *Harper*, 26 B. 33, is probably not consistent with these authorities.

Specific charge and general lien.

There is no right of contribution as between property specifically charged with a debt and property, over which the mortgagee has a general lien for the same debt, arising out of the relation of the parties. *In re Dunlop*: *Dunlop* v. *Dunlop*, 21 Ch. D. 583.

Mortgagee may have right to contribution.

The devisee of land subject to a mortgage must bear the mortgage, but a testator may give the devisee a right to contribution out of other property. For instance, by directing t' debts, including mortgage debts, to be paid out of the real estate as a whole, in which case land free from any mortgage devised to one devisee must contribute to a mortgage on land devised to another devi[illegible]. *Carter* v. *Barnardiston*, 1 P. W. 505; *Middleton* v. [illegible]*on*, 15 B. 450; see *Stronge* v. *Hawkes*, 4 De G. & J. 632.

Part of mortgaged land devised to mortgagee.

A difficulty arises, when some of the land subject to a charge is devised to the incumbrancer. For instance, where a wife is entitled to a jointure charged on Whiteacre and Blackacre, and the husband devises Whiteacre to her for life, is she entitled to enjoy Whiteacre and take her jointure entirely out of Blackacre, or must Whiteacre bear its proportion of the jointure? It is a question of construction. *Primâ facie* the jointure must be apportioned, but there may be enough in the will to show, that she was intended to take it entirely out of Blackacre. *Knight* v. *Cutthorpe*, 1 Vern. 347; *Powell* v. *Grigby*, 5 Sim. 290; 3 Cl. & F. 103; *Eyre* v. *Green*, 2 Coll. 527.

In *Young* v. *Hassall*, 1 Dr. & War. 638, lands were devised to

A subject to an annuity to B. By a codicil some of the lands were devised to B. It was held that the lands devised to B must bear their proportion of the annuity.

Contribution when land devised subject to overriding liability.

The question of contribution is more complicated, when land subject to an overriding liability is granted to a number of persons.

The old law on this subject, at any rate so far as liability on judgments is concerned, is to be found in *Sir William Herbert's Case*, 3 Rep. 11 b.

Overriding liability could not be enforced against one person only.

Where land, which had become vested in a number of owners, was subject to a liability on a statute or recognizance, and the liability was sought to be enforced against the land of one owner, he could successfully resist until all the other owners were brought in. If he did not resist on this ground, but paid the charge, he could not afterwards get contribution from the others.

16 & 17 Car. 2, c. 5.

This procedure was found to cause delay, and the Act 16 & 17 Charles II. c. 5 was passed to remedy the mischief. That Act provided (sect. 1) that where any judgment statute or recognizance is extended, the same shall not be avoided or delayed by occasion that any part of the land extendable are or shall be omitted out of the extent, saving to the person whose lands are extended his remedy for contribution against such persons whose lands are omitted out of the extent. The Act (sect. 2) does not give any extent or contribution against an heir who is an infant, and (sect. 3) it extends only to statutes for the payment of money and to extents within twenty years after the statute recognizance or judgment had and obtained.

The statute does not give any right to contribution. It assumes, that such a right exists. But there is very little to be found in the books as to the nature of the right.

Owner of land subject with other land to a rent-charge.

Where the land of several owners is subject to a rent-charge, which is enforced against the land of one owner, he can obtain contribution from the other owners. *Anon.*, 1 Eq. Ca. Ab. 113 A. 1.

Owner of land subject to charge who conveys part.

If the owner of land, subject to a charge, for which he is liable, conveys part of the land, whether by voluntary grant or for good consideration, and retains the rest, then as between the land granted and retained, the latter must bear the whole charge, and the heir or devisee of the retained land is in the

same position as the grantor. This follows from *Sir William Harbert's Case*, 3 Rep. 11 b, 12 b, the reason being "because he himself is the person who was the debtor and who was bound; and therefore he is subject to execution, and it is but reasonable that he may be only charged, the same law of his heir, for the reasons before rehearsed." *In re Darby's Estate; Rendall* v. *Darby*, (1907) 2 Ch. 465; *Hales* v. *Cox*, 32 B. 118, may be inconsistent with this view as regards the share of Thomas Harding Hales bought by the settlor. The case is discussed in *Ker* v. *Ker*, I. R. 4 Eq. 15.

Grantor not liable for charge.

If, however, the charge is one, for which the grantor is not liable, and part of the property subject to the charge is granted by a voluntary deed and the rest devised, the grantee and devisee must contribute rateably to the charge. *Ker* v. *Ker*, I. R. 4 Eq. 15.

Whether it would make any difference in such a case that the grantor has by the voluntary grant covenanted against incumbrances is not clear. See *Ker* v. *Ker*, I. R. 4 Eq. 15.

Purchasers for value subject to overriding charge.

There is little authority as to the obligation, *inter se*, of a number of persons, who have acquired their lands for value subject to a general overriding charge, which was not disclosed to them by the person liable to satisfy it.

It would seem, that *inter se* such persons ought to contribute rateably; they are all purchasers for value without notice, and, so long as they remain liable to the charge as between themselves and the mortgagees, it is difficult to see, what equity there is to throw the burden upon those later in date for the benefit of those earlier in date. In Ireland it was held by Lord Chancellor Hart, in *Hartley* v. *O'Flaherty*, Beatty 61, that rateable contribution was the true rule. This decision was however reversed by Lord Chancellor Plunket, Ll. & G. t. P. 208, who held that a person taking under the first conveyance from the person liable for the charge could throw it on to the persons taking under the conveyance subsequent in order of date, and so on. The case was not put upon the effect of a covenant against incumbrances, which involves a different equity.

Contribution to expenses by joint owners.

It is well settled, that, where a joint owner lays out money in improving or repairing the joint property, the other joint owner is under no liability to contribute to the expenditure. *Leigh* v. *Dickeson*, 15 Q. B. D. 60.

Nor has the joint owner, who made the outlay, a lien for his outlay. *Kay* v. *Johnston*, 21 B. 536.

On the other hand, if the property is sold in a partition action or otherwise and the Court has to distribute the money, it will allow the cost of expenditure on the joint property to the extent to which the purchase price is thereby shown to have been increased. *In re Jones*, (1893) 2 Ch. 461, 476; *In re Cook's Mortgage; Lawledge* v. *Tyndall*, (1896) 1 Ch. 923.

And if one joint owner has been in occupation of the property though he is not liable to pay rent, an occupation rent will be fixed and set off against his share of the proceeds of sale. But the set-off is not available against a legal mortgagee of the share, and probably not against an equitable mortgagee. *Hill* v. *Hickin*, (1897) 2 Ch. 579; where *Heckles* v. *Heckles*, W. N. 1892, 188, is doubted.

And the Court may refuse to make partition of the property, except upon the terms, that the joint owner who has improved it is to have a lien for his outlay. *Swan* v. *Swan*, 8 Pr. 518, considered in *In re Leslie; Leslie* v. *French*, 23 Ch. D. 552, 564.

Some underlessees saving leasehold from forfeiture.

It was said in *Webber* v. *Smith*, 2 Vern. 103, where the lessor had re-entered for non-payment of rent and breach of covenants to repair, and thereby destroyed a hundred underleases, that some of the underlessees, on paying the rent and repairing the property and thus obtaining relief from the forfeiture, might recover contribution from the other underlessees.

It is difficult to see what right there could be to contribution. See *Johnson* v. *Wild*, 44 Ch. D. 146; *Allison* v. *Jenkins*, (1904) 1 Ir. 341, where contribution was ordered.

Possibly the underlessees paying the rent might be entitled to a charge upon the leasehold interest for the amount paid. See *Hamilton* v. *Denny*, 1 Ba. & Be. 199; *Locke* v *Evans*, 11 Ir. Eq. 52; *O'Geran* v. *M'Swiney*, I. R. 8 Eq. 500, 624.

Vendor selling property as unincumbered which is subject with other property to a charge.

There is another well known equity, which arises against a vendor, who sells property as unincumbered, when, in fact, it is subject with other property to a charge. If an owner of property subject to a mortgage disposes of part to a purchaser for value, as if it were unincumbered, the purchaser is entitled to throw the mortgage on the part retained by the owner.

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Averall v. *Wade*, Ll. & G. temp. Sug. 252; *In re Jones: Farrington* v. *Forrester*, (1893) 2 Ch. 461.

The intention to dispose of the property as unincumbered may be shown by a covenant against incumbrances or for further assurance or for quiet enjoyment, or by a declaration to that effect, or even from the mere fact that it is conveyed without mention of incumbrances. *Backhouse* v. *Middleton*, 1 Ch. Ca. 173; *Lord Cornbury* v. *Saun*, *ib.* 208, 212; *King* v. *Jones*, 5 Taunt. 418; *Stock* v. *Aylward*, 8 Ir. Ch. 429; *Tighe* v. *Dolphin*, (1906) 1 Ir. 305.

Whether a covenant against incumbrances in a voluntary settlement would have the effect of throwing an incumbrance affecting the settled land and also unsettled lands of the settlor upon the unsettled lands is uncertain. See *Ker* v. *Ker*, I. R. 4 Eq. 15, where *Hales* v. *Cox*, 32 B. 118, a very peculiar case, is considered. See also *Mallott* v. *Wilson*, (1903) 2 Ch. 494.

Equity does not apply to appointment under power.

The equity only applies where the person who conveys is the owner. It does not apply where the conveyance is in execution of a power. *Stronge* v. *Hawkes*, 4 De G. & J. 632.

Whether equity binds purchaser for value.

In Ireland it has been held, that the equity applies not only against the vendor, but against subsequent purchasers from him, and that each earlier purchaser is entitled to throw the charge upon each later purchaser, or at any rate that this is so as against each purchaser, who has notice of the earlier deed under which the equity against the original vendor arises. See *Hartley* v. *O'Flaherty*, Beatty 61; Ll. & G. temp. Plunket 208; *Hamilton* v. *Royse*, 2 Sch. & Lef. 315, 327; *Handcock* v. *Handcock*, 1 Ir. Ch. 444, 474; *Dolphin* v. *Aylward*, 15 Ir. Ch. 583; *Aicken* v. *Macklin*, 1 Dr. & Wal. 621; *In re Barker's Estate*, 3 L. R. Ir. 395 (a very strong case); *In re Roche's Estate*, 25 L. R. 271, 279.

Lord Justice Turner, however, in *Stronge* v. *Hawkes*, 4 De G. & J. 362, expressed doubts, whether notice of the deed was notice of the equity, and he evidently thought, that the Irish Courts had carried the equity much further than it was likely to be carried in England.

CANADIAN NOTES.

Debts and their Priority.

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All debts rank *pari passu*, Ontario, Manitoba.

In Ontario and Manitoba it is provided that "on the administration of the estate of a deceased person, in case of a deficiency of assets, debts due to the Crown and to the executor, or administrator of the deceased person, and debts to others, including therein respectively debts by judgment or order, and other debts of record, debts by specialty, simple contract debts, and such claims for damages as by statute 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 contained shall prejudice any lien existing during the lifetime of the debtor in any of his real or personal estate." R.S.O. c. 129, s. 34; R.S.M. c. 170, s. 39.

New Brunswick.

In New Brunswick the same enactment prevails except that debts due to the Crown are excepted. R.S.N.B. c. 118, s. 44.

Nova Scotia, preferred debts.

In Nova Scotia, after payment of the expense of medical and other attendances in the last illness of the deceased, and funeral expenses, the wages of clerks, domestic and farm servants, and rent for a time not exceeding one year before the death of the deceased, are first paid in full, and thereafter all creditors are paid in proportion to their respective claims.

Nothing is to affect any debt secured by mortgage, or by a judgment registered in the lifetime of the deceased so as to bind his real property; nor the right to rank for a deficiency if the security does not realize sufficient to pay the debt. R.S.N.S. c. 158, ss. 96, 97.

Refunding.

Inasmuch as an executor cannot prefer one creditor over another, in so far as ratable distribution is required by these enactments, if creditors are paid in full, and then a deficiency is discovered, the unpaid creditors can compel those paid in full to refund a sufficient amount to put all on an equal basis. *Chamberlen* v. *Clark*, 1 O.R. 135; 9 A.R. 273.

Retainer.

Where a devisee is indebted to the estate the executor, who in Ontario takes the land by virtue of the Devolution of

Estates Act, can impound the devise as a security for the debt due by the devisee. *Lillie* v. *Springer*, 21 O.R. 585.

It has been held in Ontario, that if an executor, who is a creditor of the deceased, allows the land to pass to a devisee, he cannot assert his right by retainer. *Re Starr*, 2 O.L.R. 762. *Sed quære*, whether the right of retainer should be extended to land. See *Re Williams*, *ante*, p. 812.

The Order of Assets.

Ontario, D. E. Act.

By the Devolution of Estates 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 shall appear from his will or any codicil thereto) be applicable ratably, according to their respective values, to the payment of his debts. R.S.O. c. 127, s. 7.

In order that this section may apply there must be both realty and personalty in the residue. Thus, where a testator bequeathed all his personal estate to his son, and devised to him a farm, and devised the remainder of his real estate to his executors upon trusts, and directed his debts to be paid out of his "estate," it was held that the debts should be paid out of personalty as far as it was sufficient. *Re Moody*, 12 O.L.R. 10.

Apart from this enactment the Devolution of Estates Act has not made any change in the order of administration of assets. *Scott* v. *Supple*, 23 O.R. 393.

In Nova Scotia and New Brunswick, where the personalty is insufficient to pay the debts, the Court may grant a licence to sell a sufficient amount of land for that purpose. See ante, p. 82*d*.

Debts Charged on Land.

See the notes to Chapter XXXVII.

Payment of Legacies.

Legacies payable out of personalty.

Personalty is the primary fund for payment of legacies, and where it is insufficient land specifically devised cannot

be resorted to. *Totten* v. *Totten*, 20 O.R. 505; *Re Piers*, 11 N.S.R. 358.

Implied charge on land.

A devise of lands after payment of legacies previously given, or subject to payment of legacies, or a bequest of legacies followed by a devise of all the residue, constitutes the legacies a charge on the lands devised. *Johnson* v. *Denman*, 18 O.R. 66; *Stewart* v. *Dick*, 10 P.R. 411; *Jones* v. *Jones*, 15 Gr. 40; *Cameron* v. *Harper*, 21 S.C.R. 273; *Confederation Life Assn.* v. *Moore*, 6 M.L.R. 102; *Manson* v. *Ross*, 1 B.C.R., Part II., 49.

A direction that the expenses of a grandson's education should be paid out of the estate, which consisted of land only when the debts were paid, constituted them a charge on the land. *Hellem* v. *Severs*, 24 Gr. 320.

Direction to devisee to pay

A devise accompanied by a direction that the devisee shall pay certain legacies constitutes them a charge on the land devised. *Robson* v. *Jardine*, 22 Gr. 420; and see *Clark* v. *Clark*, 17 Gr. 17; *Gray* v. *Richmond*, 22 O.R. 256.

A direction that a legacy shall be paid out of the annual produce of a farm devised to another, or as the executors should deem best, makes it a charge on the farm notwithstanding the concluding power to executors. *Callaghan* v. *Howell*, 29 O.R. 329.

Mixed fund.

Legacies payable out of a mixed residue are a charge on the land. *Young* v. *Purvis*, 11 O.R. 597; *Moore* v. *Mellish*, 3 O.R. 174.

In order to create a mixed fund for the payment of legacies, there must be a direction for sale of the land so as to throw the two funds together to answer the common purposes of the will.

And so, where an annuity was given to a widow in lieu of dower, and after sundry other legacies and devises were given, the testator empowered his executors to sell and convey the lands, it was held that the mere power to sell did not constitute a mixed fund, and that the annuities and other legacies were primarily payable out of personalty. *Davidson* v. *Boomer*, 18 Gr. 475.

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And where a testator gave the management of his farm to his wife for her own benefit, and after certain legacies, gave to her "all the moneys that remain after paying my former bequests," and disposed of his lands for the benefit of his children, it was held that no blended fund had been created and the wife's legacy was payable out of personalty only. *Re Bailey*, 6 O.L.R. 688.

But where a testator directed payment of his debts and funeral expenses to be made out of his personalty, and if that proved insufficient his executors were to make up the deficiency out of his land, and then gave pecuniary legacies, it was held that a mixed fund was created, and if the personalty was insufficient for payment of debts then the legacies were payable out of the proceeds of the land; but if sufficient, then out of the mixed fund. *Toomey* v. *Tracey*, 4 O.R. 98. And see *Re Gilchrist*, 23 Gr. 524.

Legacies charged on estate.

A direction that, in the event of the estate being insufficient to pay certain pecuniary legacies, they shall abate proportionately, does not charge them on the residue; the word "estate," in connection with pecuniary legacies, meaning that portion of the general estate out of which pecuniary legacies are primarily payable, viz., personalty. *Re Fairley*, 1 N.B. Eq. 91.

But where the residue of real and personal estate not required for payment of debts is disposed of in payment of legacies which are directed to be paid out of the estate, followed by an ultimate disposition of all the residue of both real and personal estate, they become a charge on the land failing personalty. *Moore* v. *Mellish*, 3 O.R. 174.

Exoneration of personalty.

Where a testator directed his debts to be paid out of his "estate," and bequeathed all his personalty to his wife, and directed his executors to sell such portions of his "property" as should be necessary to pay debts and to "give title," it was held that the personalty was exonerated and the debts chargeable primarily upon the realty. *Harrold* v. *Wallis*, 10 Gr. 197.

Legacy payable out of stock.

Where a legacy payable out of the shares of a company is reduced by a codicil, and the amount of the reduction is given

to another, it is payable out of the same shares. *Smith* v. *Seaton*, 17 Gr. 397. Chap. LX.

Abatement.

A legacy given to executors expressly as compensation for their trouble, does not in Ontario (where executors are entitled by statute to compensation) abate with other legacies which are mere bounties, on a deficiency of assets. *Anderson* v. *Dougall*, 15 Gr. 405. Legacy to executors does not abate.

An annuity given to the testator's widow in lieu of dower does not abate with other legacies. *Koch* v. *Heisey*, 26 O.R. 87. See *Becker* v. *Hammond*, 12 Gr. 485. Legacy in lieu of dower does not abate.

The onus is on those who assert that one legacy is to be preferred to another, to establish it. *Re Waddell*, 29 N.S.R. 19. Legacies payable firstly, secondly, etc.

Legacies abate proportionately, though there is a direction first to set apart one and then to pay others. *Lindsay* v. *Waldbrook*, 24 A.R. 604.

But not where the subsequently mentioned legacies are in the nature of residuary bequests. *King* v. *Yorston*, 27 O.R. 1.

A testator gave the income of his estate to his wife, and bequeathed the corpus of his estate, after her death to his two executors in the proportion of two-thirds to S. and one-third to F. By a codicil he gave legacies to other persons payable out of the share of S. After the death of S., F. wasted more than one-third of the estate, and on the widow's death, it was held that what remained belonged to the estate of S. and that the legacies payable under the codicil did not abate proportionately to the reduction of S.'s share, but should be paid in full thereout. *Re Dunn*, 7 O.L.R. 560. Demonstrative legacy.

Legacies to be paid out of the proceeds of real and personal property directed to be sold are specific and not demonstrative, and abate proportionately on a deficiency. *Blaker* v. *White*, 23 Gr. 163. Specific legacy.

An annuity, not payable out of corpus, and a pecuniary legacy abate ratably. *Wilson* v. *Dalton*, 22 Gr. 160. Annuity and legacy abate ratably.

A pecuniary legacy and a provision for maintenance abate ratably. *Cook* v. *Noble*, 12 O.R. 81. Legacy and maintenance.

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All legacies abate ratably, including appropriations of specific sums, the interest on which is to be paid to or applied for, certain children, even where no money is to be given to one, but he is to be furnished with the "necessary articles of living." *Re Waddell*, 29 N.S.R. 19.

Where legacies are valued by testator.

A testator devised certain lands to several children at a valuation named in his will. He provided for an abatement if there was a deficiency, but directed that if there was a surplus it should be divided amongst them equally. On a surplus being found, it was held that it was divisible equally, and that the valuations were no indication of the basis for abatement or division of the surplus. *Patterson* v. *Hueston*, 40 N.S.R. 4.

APPENDIX A.

1 VIC. CAP. 26.

AN ACT FOR THE AMENDMENT OF THE LAWS WITH RESPECT TO WILLS [3RD JULY, 1837].

Meaning of certain words in this Act:

"Will":

12 Car. 2, c. 24.

14 & 15 Car. 2 (I.).

"Real Estate":

"Personal Estate":

Number:

Gender.

All property may be disposed of by

THE Words and Expressions hereinafter mentioned, which in their ordinary Signification have a more confined or a different Meaning, shall in this Act, except where the Nature of the Provision or the Context of the Act shall exclude such Construction, be interpreted as follows: (that is to say,) the Word "Will" shall extend to a Testament, and to a Codicil, and to an Appointment by Will or by Writing in the Nature of a Will in exercise of a Power, and also to a Disposition by Will and Testament or Devise of the Custody and Tuition of any Child, by virtue of an Act passed in the Twelfth Year of the Reign of King *Charles* the Second, intituled *An Act for taking away the Court of Wards and Liveries, and Tenures* in capite, *and by Knight's Service, and Purveyance, and for Settling a Revenue upon His Majesty in lieu thereof*, or by virtue of an Act passed in the Parliament of *Ireland* in the Fourteenth and Fifteenth Years of the Reign of King *Charles* the Second, intituled *An Act for taking away the Court of Wards and Liveries, and Tenures* in capite *and by Knight's Service*, and to any other Testamentary Disposition; and the Words "Real Estate" shall extend to Manors, Advowsons, Messuages, Lands, Tithes Rents, and Hereditaments, whether Freehold, Customary Freehold, Tenant Right, Customary or Copyhold, or of any other Tenure, and whether corporeal, incorporeal, or personal, and to any undivided Share thereof, and to any Estate, Right, or Interest (other than a Chattel Interest) therein; and the Words "Personal Estate" shall extend to Leasehold Estates, and other Chattels Real, and also to Monies, Shares of Government and other Funds, Securities for Money (being not Real Estates), Debts, Choses in Action, Rights, Credits, Goods, and all other Property whatsoever, which by Law devolves upon the Executor or Administrator, and to any Share or Interest therein; and every Word importing the Singular Number only shall extend and be applied to Several Persons or Things as well as one Person or Thing; and every Word importing the Masculine Gender only shall extend and be applied to a Female as well as a Male.

3. It shall be lawful for every Person to devise, bequeath, or dispose of, by his Will executed in manner hereinafter required,

Appendix A.

Will, comprising Customary Freeholds and Copyholds without Surrender, and before Admittance, and also such of them as cannot now be devised;

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; and the power hereby given shall extend to all Real Estate of the Nature of Customary Freehold or Tenant Right, or Customary or Copyhold, notwithstanding that the Testator may not have surrendered the same to the Use of his Will, or notwithstanding that, being entitled as Heir, Devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a Custom to devise or surrender to the Use of a Will or otherwise, could not at Law have been disposed of by Will if this Act had not been made, or notwithstanding that the same, in consequence of there being a Custom that a Will or a Surrender to the Use of a Will should continue in force for a limited Time only, or any other special Custom, could not have been disposed of by Will according to the Power contained in this Act, if this Act had not been made;

Estates *pur autre vie*;

and also to Estates *pur autre vie*, whether there shall or shall not be any special Occupant thereof, and whether the same shall be Freehold, Customary Freehold, Tenant Right, Customary or Copyhold, or of any other Tenure, and whether the same shall be a corporeal or an incorporeal Hereditament; and also to all contingent, executory, or other future Interests in any Real or Personal Estate, whether the Testator may or may not be ascertained as the Person or one of the Persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any Disposition thereof by Deed or Will; 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 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.

Contingent Interests;

Rights of Entry; and Property acquired after Execution of the Will.

As to the Fees and Fines payable by Devisees of Customary and Copyhold Estates.

4. Provided always, that where any Real Estate of the Nature of Customary Freehold or Tenant Right, or Customary or Copyhold, might, by the Custom of the Manor of which the same is holden, have been surrendered to the Use of a Will, and the Testator shall not have surrendered the same to the Use of his Will, no person entitled or claiming to be entitled thereto by virtue of such Will shall be entitled to be admitted, except upon payment of all such Stamp Duties, Fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such Real Estate to the Use of the Will, or in respect of presenting, registering, or enrolling such Surrender, if the same Real Estate had been surrendered to the Use of the Will of such Testator: Provided also that where the Testator was entitled to have been admitted to such Real Estate, and might, if he had been admitted thereto, have surrendered the same to the Use of his Will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such Real Estate in consequence of

such Will shall be entitled to be admitted to the same Real Estate by virtue thereof, except on Payment of all such Stamp Duties, Fees, Fine, and Sums of Money as would have been lawfully due and payable in respect of the admittance of such Testator to such Real Estate, and also of all such Stamp Duties, Fees, and Sums of Money, as would have been lawfully due and payable in respect of surrendering such Real Estate to the Use of the Will, or of presenting, registering, or enrolling such Surrender, had the Testator been duly admitted to such Real Estate, and afterwards surrendered the same to the Use of his Will; all which Stamp Duties, Fees, Fine, or Sums of Money due as aforesaid shall be paid in addition to the Stamp Duties, Fees, Fine, or Sums of Money due or payable on the Admittance of such Person so entitled or claiming to be entitled to the same Real Estate as aforesaid.

Wills or Extracts of Wills of Customary Freeholds and Copyholds to be entered on the Court Rolls;

5. When any Real Estate of the Nature of Customary Freehold or Tenant Right, or Customary or Copyhold, shall be disposed of by Will, the Lord of the Manor or reputed Manor of which such Real Estate is holden, or his Steward, or the Deputy of such Steward, shall cause the Will by which such Disposition shall be made, or so much thereof as shall contain the Disposition of such Real Estate, to be entered on the Court Rolls of such Manor or reputed Manor; and when any Trusts are declared by the Will of such Real Estate, it shall not be necessary to enter the Declaration of such Trusts, but it shall be sufficient to state in the Entry on the Court Rolls that such Real Estate is subject to the Trusts declared by such Will; and when any such Real Estate could not have been disposed of by Will if this Act had not been made, the same Fine, Heriot, Dues, Duties, and Services shall be paid and rendered by the Devisee as would have been due from the Customary Heir in case of the Descent of the same Real Estate, and the Lord shall as against the Devisee of such Estate have the same Remedy for recovering and enforcing such Fine, Heriot, Dues, Duties, and Services as he is now entitled to for recovering and enforcing the same from or against the Customary Heir in case of a Descent.

and the Lord to be entitled to the same Fine, &c., when such Estates are not now devisable, as he would have been from the Heir in case of Descent.

Estates *pur autre vie.*

6. If no Disposition by Will shall be made of any Estate *pur autre vie* of a Freehold Nature, the same shall be chargeable in the Hands of the Heir, if it shall come to him by reason of special Occupancy, as Assets by Descent, as in the case of Freehold Land in Fee Simple; and in case there shall be no special Occupant of any Estate *pur autre vie*, whether Freehold or Customary Freehold, Tenant Right, Customary or Copyhold, or of any other Tenure, and whether a corporeal or incorporeal Hereditament, it shall go to the Executor or Administrator of the Party that had the Estate thereof by virtue of the Grant; and if the same shall come to the Executor or Administrator either by reason of a special Occupancy or by virtue of this Act, it shall be assets in his Hands, and shall go and be applied and distributed in the same Manner as the Personal Estate of the Testator or Intestate.

No Will of a minor valid;

7. No Will made by any Person under the Age of Twenty-one Years shall be valid.

nor of a Feme Covert, except such as might now be made.

8. Provided also that no Will made by any Married Woman shall be valid, except such a Will as might have been made by a Married Woman before the passing of this Act.

Appendix A.

Every Will shall be in Writing, and signed by the Testator and attested.

9. 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.

Appointments by Will to be executed like other Wills.

10. No appointment made by Will, in exercise of any Power, shall be valid, unless the same be executed in manner herein-before required; and every Will executed in manner herein-before 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.

Soldiers' and Mariners' Wills excepted.

11. Provided always, that any Soldier being in actual Military Service, or any Mariner or Seaman being at Sea, may dispose of his Personal Estate as he might have done before the making of this Act.

Publication not to be requisite.

13. Every Will executed in manner herein-before required shall be valid without any other Publication thereof.

Incompetency of attesting Witness not to avoid Will.

14. If any person who shall attest the Execution of a Will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a Witness to prove the Execution thereof, such Will shall not on that Account be invalid.

Gifts to an attesting Witness to be void.

15. If any Person shall attest the Execution of any Will to whom or to whose Wife or Husband any beneficial Devise, Legacy, Estate, Interest, Gift, or Appointment, of or affecting any Real or Personal Estate (other than and except Charges and Directions for the Payment of any Debt or Debts), shall be thereby given or made, such Devise, Legacy, Estate, Interest, Gift, or Appointment, shall, so far only as concerns such Person attesting the Execution of such Will, or the Wife or Husband of such Person, or any person claiming under such Person or Wife, or Husband, be utterly null and void, and such Person so attesting shall be admitted as a Witness to prove the Execution of such Will, or to prove the Validity or Invalidity thereof, notwithstanding such Devise, Legacy, Estate, Interest, Gift, or Appointment mentioned in such Will.

Creditor attesting to be admitted a Witness.

16. 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.

Executor to be admitted a Witness.

17. 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.

Will to be revoked by Marriage.

18. 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).

No Will to be revoked by Presumption.

19. No Will shall be revoked by any presumption of an Intention on the Ground of an Alteration in Circumstances.

No Will to be revoked but by another Will or Codicil, or by a Writing executed like a Will, or by Destruction.

20. No Will or Codicil, or any Part thereof, shall be revoked otherwise than as aforesaid, or by another Will or Codicil executed in manner herein-before required, or by some Writing declaring an Intention to revoke the same, and executed in the Manner in which a Will is herein-before 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.

No alteration in a Will shall have any Effect unless executed as a Will.

21. 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 herein-before is required for the Execution of the Will; but the Will, with such Alteration as Part thereof, shall be deemed to be duly executed if the Signature of the Testator and the Subscription of the Witnesses be made in the Margin or on some other Part of the Will opposite or near to such Alteration, or at the Foot or End of or opposite to a Memorandum referring to such Alteration, and written at the end or some other Part of the Will.

No Will revoked to be revived otherwise than by Re-execution or a Codicil to revive it.

22. No Will or Codicil, or any Part thereof, which shall be in any Manner revoked, shall be revived otherwise than by the Re-execution thereof, or by a Codicil executed in manner herein-before 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.

A Devise not to be rendered inoperative by any subsequent Conveyance or Act.

23. No Conveyance or other Act made or done subsequently to the Execution of a Will of or relating to any Real or Personal Estate therein comprised, except an Act by which such Will shall be revoked as aforesaid, shall prevent the Operation of the Will with respect to such Estate or Interest in such Real or Personal Estate as the Testator shall have power to dispose of by will at the Time of his Death.

A Will shall be construed to speak from the Death of the Testator.

24. Every Will shall be construed, with reference to the Real Estate and Personal Estate comprised in it, to speak and take effect as if it had been executed immediately before the Death of the Testator, unless a contrary Intention shall appear by the Will.

A Residuary Devise shall include Estates comprised in lapsed and void Devises.

25. 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.

Appendix A.

A general Devise of the Testator's Lands shall include Copyhold and Leasehold as well as Freehold Lands.

26. 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.

A general Gift shall include Estates over which the Testator has a general Power of Appointment.

27. A general Devise of the Real Estate of the Testator, or of the Real Estate of the Testator in any Place or in the occupation of any Person mentioned in his Will, or otherwise described in a general Manner, shall be construed to include any Real Estate, or any Real Estate to which such Description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an Execution of such Power, unless a contrary Intention shall appear by the Will; and in like Manner a Bequest of the Personal Estate of the Testator, or any Bequest of Personal Property described in a general Manner, shall be construed to include any Personal Estate, or any Personal Estate to which such Description shall extend (as the Case may be), which he may have power to appoint in any Manner he may think proper, and shall operate as an Execution of such Power, unless a contrary Intention shall appear by the Will.

A Devise without any Words of Limitation shall be construed to pass the Fee.

28. 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.

The Words "die without Issue," or "die without leaving Issue," shall be construed to mean die without issue living at the Death.

29. 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.

No Devise to Trustees or Executors, except for a Term or a Presentation to a Church

30. Where any Real Estate (other than or not being a Presentation to a Church) shall be devised to any Trustee or Executor, such devise shall be construed to pass the Fee Simple or other the whole Estate or interest which the Testator had power to dispose of by Will in such Real Estate, unless a definite Term of Years, absolute

or determinable, or an Estate of Freehold, shall thereby be given to him expressly or by Implication.

Devise to Trustees shall pass a Chattel Interest.

31. 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 Estates, or in the surplus Rents and Profits thereof, shall not be given to any Person for Life, or such beneficial Interest shall be given to any Person for Life, but the Purposes of the Trust may continue beyond the Life of such Person, such Devise shall be construed to vest in such Trustee the Fee Simple, or other the whole legal Estate, which the Testator had Power to dispose of by Will in such Real Estate, and not an Estate determinable when the Purposes of the Trust shall be satisfied.

Trustees under an unlimited Devise, where the Trust may endure beyond the Life of a Person beneficially entitled for Life, to take the Fee.

Devises of Estates Tail shall not lapse.

32. Where any Person to whom any Real Estate shall be devised for an Estate Tail or an Estate in quasi Entail shall die in the lifetime of the Testator leaving Issue who would be inheritable under such Entail, and any such Issue shall be living at the Time of the Death of the Testator, such Devise shall not lapse, but shall take effect as if the Death of such Person had happened immediately after the Death of the Testator, unless a contrary Intention shall appear by the Will.

Gifts to Children or other Issue who leave Issue living at the Testator's Death shall not lapse.

33. 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.

Act not to extend to Wills made before 1838 nor to Estates *pur autre vie* of Persons who die before 1838.

34. This Act shall not extend to any Will made before the First Day of January, One thousand eight hundred and thirty-eight, and every Will re-executed republished, or revived by any Codicil, shall for the Purposes of this Act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and this Act shall not extend to any Estate *pur autre vie* of any Person who shall die before the First Day of *January*, One thousand eight hundred and thirty-eight.

Act not to extend to Scotland.

35. This Act shall not extend to *Scotland*.

APPENDIX B.

BERRY *v.* GAUKROGER.

1874 B. 264. 2 July 1880.

Appendix B.

And all persoas appeariag by their counsel admitting that the testator was at the time of his death seized of or eatitled to copyhold lands and tenements parcel of the manor of Wakefield for an estate of inheritance to him and his heirs and to some of which he had been duly admitted tenant according to the custom of that manor, and that according to such custom the widow of a customary tenant of the said manor is entitled by way of freebench for her life to one third of all lands copyhold of such manor held by him as such tenant at any time during the coverture, and that such right and title to freebench cannot according to the said custom be barred or excluded by any alienation or disposition by such tenaat, This Court Doth Declare that notwithstanding such custom the deviso of the testator's estute contained ia his will is paramount to his widow's right to freebench and that Ruth Sugden the widow of John Berry the testator is not eatitled to aay freebeach ia or out of the freehold or copyhold estates of the said testator except in respect of the income thereof herein-after declared to be undisposed of.

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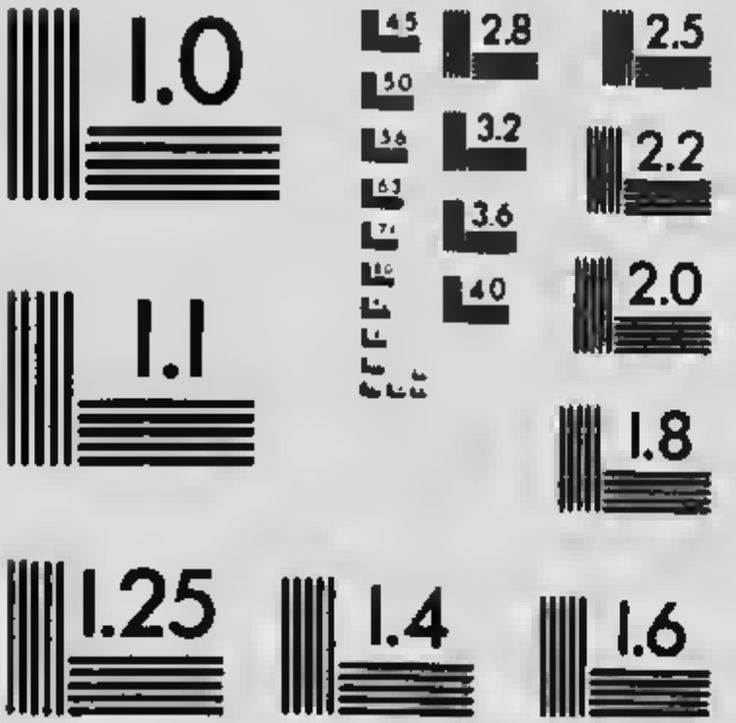

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